THE USE OF THE STATE CONSTITUTIONAL RIGHT TO PRIVACY TO DEFEAT STATE SODOMY LAWS

INTRODUCTION

In 1978 Justice Stanley Mosk of the California Supreme Court, commenting on the United States Supreme Court's refusal to review a decision denying the right of privacy to consenting homosexuals,[1] observed that "the only hope of preserving this seemingly clear right of privacy remains with the more benign states that, some by court action and some by legislative enactment, have curbed local zealots who suspect Sodom and Gomorrah behind every keyhole."[2]

When Justice Mosk wrote these words, the United States Supreme Court had not addressed directly whether the federal constitutional right to privacy prohibited the states from criminalizing consensual adult sodomy. Consequently, the Court's refusal to address the lower court's reasoning when it summarily affirmed *Doe v. Commonwealth's Attorney*, a decision upholding Virginia's sodomy law,[3] left gay rights attorneys with hope for a future Court declaration that sodomy laws were unconstitutionally intrusive.

In 1986, however, the Supreme Court eliminated hope for national sodomy law reform when a bitterly divided Court ruled that the federal right to privacy does not prohibit the state of Georgia from criminalizing adult consensual sodomy.[4] Justice White, writing for the majority, crudely dismissed as "facetious" the respondent's claim that sodomy laws offend the principles of autonomy, liberty, and personal choice protected by the federal Constitution.[5] The disappointing result in *Bowers* dashed the expectations of lesbians and gay men who had hoped that the federal Constitution would safeguard their right of privacy. As Justice Mosk had predicted, lesbian and gay Americans must now avail themselves of the possible protection offered by the states.

This note examines ways to defeat sodomy laws on state constitutional right to privacy grounds. This approach is promising in states with either

1. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976), *reh'g denied*, 425 U.S. 985 (1976).

2. Mosk, *Contemporary Federalism*, 9 PAC. L.J. 711, 715 (1978).

3. 425 U.S. 901. A summary affirmance, while settling the matter between the parties, does not necessarily support the reasoning by which the lower court decision was reached. *See* Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring). For a discussion of the meaning of the Supreme Court's summary disposition in *Doe*, see Comment, *Doe v. Commonwealth's Attorney: A Set-Back for the Right of Privacy*, 65 KY. L.J. 748 (1977); Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 838-41 (1984) [hereinafter *Challenges to Sodomy Statutes*].

4. Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

5. *Id.* at 2846.

explicit[6] or court-inferred[7] constitutional privacy protections. While sodomy laws can be challenged under several theories,[8] challenges based on a right to privacy are particularly compelling.[9] Part I discusses the need for sodomy law reform and the possible results thereunder. This background can help create public policy arguments for reshaping precedent. Part II examines the case law of states with an explicit constitutional right to privacy. Part III offers theoretical and methodological approaches that attorneys may use to persuade state courts to invoke their own bills of rights independently of federal constitutional interpretation.

Fortunately, state constitutions can provide a potentially effective framework for lesbian and gay civil rights litigation within state courts.[10] The resulting interest in state civil rights bills can encourage the "double security" of individual rights inherent in our federalist system, while fostering a broader view of state constitutions as primary protectors of individual liberties.[11] At a minimum, state constitutions may serve as vital supplements to the federal Constitution, as the current Supreme Court cuts back on federal protection.

I
THE NEED FOR SODOMY LAW REFORM

Twenty-five states and the District of Columbia criminalize private adult consensual sodomy.[12] Of these state sodomy statutes, only six[13] specifically

6. *See infra* notes 63-74 and accompanying text.

7. *See infra* notes 75-84 and accompanying text.

8. *See infra* note 55 and accompanying text.

9. *See* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 495-98 (1977); Fine, Matsakis & Spector, *Project Report, Toward an Activist Role for State Bills of Rights,* 8 HARV. C.R.-C.L. L.REV. 271 (1973) [hereinafter *Project Report*]; Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights,* 110 GA. L. REV. 533 (1976).

10. Since going to press, two state courts have indeed struck down state sodomy laws based on state constitutional provisions. *See* Commonwealth of Kentucky v. Wasson, No. 86M859 (Fayette Dist. Oct. 31, 1986) (Court held that state sodomy law violated the right to privacy as provided in the Kentucky Constitution); State of Minnesota v. Corny, No. 3103327 (4th Jud. Dist., 1st Div. Dec. 5, 1986) (State sodomy law infringed on the right to privacy granted by the Minnesota Constitution). Judge Lewis G. Paisley of the Fayette Dist. Ct. observed that: "Judicial construction of the federal Constitution in no way limits the rights and protections of the state constitution. . . .[The] right to privacy under the Kentucky Constitution is broader than that provided by the federal Constitution." No. 86M859, slip op. at 2.

With the number of remaining state criminal sodomy laws in flux, the law in this area is changing rapidly.

11. *See, e.g.*, Collins, *Reliance on State Constitutions — Away From a Reactionary Approach,* 9 HASTINGS CONST. L.Q. 1 (1981); Linde, *First Things First: Rediscovering the States' Bill of Rights,* 9 U. BALT. L. REV. 379 (1980).

12. ALA. CODE § 13A-6-65(a)(3)(1982); ARIZ. REV. STAT. ANN. § 13-1411 (West Supp. 1985); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-3502 (West 1981); FLA. STAT. ANN. § 800.02 (West 1985); GA. CODE ANN.§ 16-6-2 (1984); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (1985); KY. REV. STAT. § 510.100 (1985); LA. REV. STAT. ANN. § 14:89 (West Supp. 1986); MD. ANN. CODE, art. 27, §§ 553-554 (1982) ; MASS. ANN. LAWS ch. 272, § 34 (Michie/Law. Co-op. 1970); MICH. COMP. LAWS § 750.158 (1968); MINN. STAT. ANN. § 609.293 (West Supp. 1984); MISS. CODE ANN. § 97-29-59 (1973); MO.

prohibit sexual activity between members of the same sex. Thus, criminalization of private adult sexual activity also threatens the civil liberties of heterosexuals.[14] Because they are enforced selectively, however, sodomy laws have a disproportionate and devastating impact on the civil liberties of lesbians and gay men.[15] Although severe statutory penalties usually are not imposed, the effect of a conviction or mere indictment under a sodomy law can result in the loss of a job or other forms of discrimination.[16] The very existence of these laws is used to justify other punitive and discriminatory actions against lesbians and gay men.[17] In addition, these laws significantly affect the manner in which heterosexuals perceive homosexuals, as well as the manner in which homosexuals perceive themselves.[18] While the status of being lesbian or gay is not unlawful,[19] these laws in effect have cast a shadow of criminality upon all lesbians and gay men.

A. State Sodomy Statutes

The specific language of criminal sodomy laws varies from state to state. Several states specify sodomy as any sex act involving the mouth or anus of one person and the sex organs of another person.[20] Other states rely on the early legal scholar Blackstone, and on early Christian theologians, in proscribing any "crime against nature,"[21] or "abominable and detestable crime against

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REV. STAT. § 566.090 (1978); MONT. CODE ANN. § 45-5-505 (1985); NEV. REV. STAT. § 201.190 (1985); N.C. GEN. STAT. § 14-177 (Michie 1981); 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. § 39-2-612 (1982); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974); UTAH CODE ANN. § 76-5-403 (1983); VA. CODE § 18.2-361 (1982).

13. ARK. STAT. ANN. § 13-1411 (1977); KAN. STAT. § 21-3505 (1985); KY. REV. STAT.§ 510.100 (1985); MONT. CODE ANN. § 45-5-505 (1985); NEV. REV. STAT. § 201.190 (1985); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974). *Cf.* Oklahoma v. Post, 715 P.2d 1105, (Okla. Crim. App.), *reh'g denied*, 717 P.2d 1151, *cert denied*, 107 S. Ct. 290 (1986). In this decision, handed down before Bowers v. Hardwick, the Court of Criminal Appeals of Oklahoma ruled that its state sodomy law was violative of the federal right to privacy as applied to private heterosexual activity. The Court did not address the constitutionality of criminalizing homosexual sodomy in Oklahoma. 715 P.2d at 1109-10. *See also* State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (invalidating Iowa's sodomy law for heterosexual activity; inapplicable to private adult homosexual consensual sodomy).

14. *See Challenges to Sodomy Statutes, supra* note 3, at 855-56; Note, *The Right to Privacy: A Renewal Challenge to Laws Regulating Private Consensual Behavior*, 25 WAYNE L. REV. 1067, 1070 (1979).

15. *See* Richards, *Sexual Autonomy and the Constitutional Right to Privacy*, 30 HASTINGS L.J. 957, 1006-09 (1979); Richards, *Homosexuality and the Constitutional Right to Privacy*, 8 N.Y.U. REV. L. & SOC. CHANGE 311, 315-16 (1978).

16. *See infra* notes 32-38 and accompanying text.

17. *See infra* notes 39-44 and accompanying text.

18. *See infra* notes 45-49 and accompanying text.

19. *See generally* Robinson v. California, 370 U.S. 660 (1962) (unconstitutional to make the "status" of narcotic addiction a crime).

20. *See, e.g.*, ALA. CODE § 13A-6-65(a)(3) (1982); ARK. STAT. ANN. § 41-1813 (1977).

21. *See, e.g.*, N.C. GEN. STAT. § 14-177 (Michie 1981); TENN. CODE ANN. § 39-2-612 (1982).

nature."[22] Still other states have proscribed sodomy by instituting penalties for "unnatural and lascivious acts"[23] or for "deviate sexual behavior."[24] Regardless of the language used, twenty-five states and Washington D.C. criminalize private consensual activity. In fact, two states expressly exclude consent as a defense to criminal sodomy.[25]

The criminal sanctions which attach to each law also vary. Sixteen states classify sodomy as a felony.[26] While the penalty in most states is generally imprisonment and/or a fine, the statutes of ten states[27] establish imprisonment as the only available penalty. For example, "engaging in any unnatural sex act, that is fellatio, cunnilingus or sodomy," is a felony under Rhode Island law[28] punishable by not less than seven years and not more than twenty years in prison.[29] In Arizona, consensual adult sodomy is a misdemeanor with a maximum sentence of thirty days and a five-hundred dollar fine.[30] In no state is the sole penalty a fine.

The discrepancies in the language, the selectivity of enforcement and, to a certain extent, the severity of punishment of these states' sodomy laws impinge differently upon civil liberties. As a result, different legal strategies are needed to challenge the laws.[31]

B. The Effect of Sodomy Laws

A detailed look at both the direct and indirect effects of these laws is important to understand the need for sodomy law reform. Obviously, sodomy laws directly impact those whom the state convicts under its authority. Along with the threat of a fine and imprisonment, conviction results in the stigma of a criminal record and the risk that one's homosexual activity will be disclosed publicly. Where sodomy is a felony, conviction may result in the suspension or the revocation of some professional licenses;[32] a conviction of an offense involving "moral turpitude," commonly construed by licensing agencies to in-

22. *See, e.g.*, MASS. ANN. LAWS ch. 272, § 34 (Michie/Law. Co-op. 1970); MICH. COMP. LAWS ANN. § 750.158 (West 1968).

23. *See, e.g.*, FLA. STAT. ANN. § 800.02 (West 1985).

24. *See, e.g.*, MONT. CODE ANN. § 45-5-505 (1985).

25. ALA. CODE § 13A-6-65(a)(3) (1982); KY. REV. STAT. ANN. § 510.100 (1985).

26. These states are: District of Columbia, Ga., Idaho, La., Md., Mass., Mich., Miss., Mont., Nev., N.C., Okla., R.I., S.C., Tenn., Va. For the corresponding statutory provisions, see *supra* note 12.

27. These states are: Ala., Ga., Idaho, Mass., Mich., Miss., Nev., Okla., R.I., and Tenn. For the corresponding statutory provisions, see *supra* note 12.

28. R.I. GEN. LAWS § 11-10-1 (1981).

29. *Id.*

30. ARIZ. REV. STAT. ANN. § 13-1411 (West Supp. 1985).

31. For example, a statute like Rhode Island's, with a possible seven to twenty year prison sentence, may be more vulnerable to a challenge based on the constitutional prohibition against cruel and unusual punishment, whereas a statute prohibiting a "crime against nature," such as that of North Carolina, may be subject to an attack based on its vagueness. For a list of possible bases on which to challenge sodomy laws, *see infra* note 55.

32. E. BOGGAN, M. HAFT, C. LISTER, J. RUPP, T. STODDARD, THE RIGHTS OF GAY PEOPLE 115 (1983) [hereinafter RIGHTS OF GAY PEOPLE].

clude homosexual activity,[33] may also result in the temporary or permanent loss of a license.

An individual need not be employed in a licensed profession to fear retaliation and job loss resulting from conviction under a sodomy law. Gays and lesbians have few legal protections from discrimination based on their sexual orientation. Only one state[34] and a select number of cities[35] make such discrimination illegal. As a result, in many areas of the country, if an employer learns of an employee's conviction for homosexual sodomy, the convicted individual can lose her job with little recourse.

Even without actual conviction, mere arrest for homosexual sodomy can result in discrimination. Many employers, for example, require a job applicant to reveal and explain an arrest record. In addition, many companies perform their own background investigations on potential employees. Once it is revealed that an individual has been arrested for homosexual activity, many employers refuse to hire her.[36]

Discrimination resulting from arrest and/or conviction under a sodomy law is not limited to the workplace. For example, one's chances of becoming a naturalized citizen of the United States are jeopardized by a sodomy conviction,[37] or the admission of homosexual conduct.[38]

Even without actual enforcement, the mere existence of sodomy laws has

33. *Id.* For a discussion of discrimination against gays and lesbians in licensed occupations, see also Rivera, *Queer Law: Sexual Orientation in the Mid-Eighties — Part 1*, 10 U. DAYTON L. REV. 459, 536-40 (1985); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 855-74 (1979); Levine, *Employment Discrimination Against Gay People* , 9 INTERNATIONAL REV. OF MODERN SOCIETY, 151, 157-59 (1979).

34. Wisconsin has enacted a state law which prohibits discrimination in employment, housing and public accomodations based on sexual orientation. WISC. STAT. ANN. §§ 66.432, 66.433, 111.32(13 m), 101.22(a), 111.31 and 234.29 (West Supp. 1985).

35. To date, over 40 jurisdictions, including Washington, D.C., Los Angeles, Ca., San Francisco, Ca., New York, N.Y., and Philadelphia, Pa., have enacted ordinances which prohibit discrimination based on sexual orientation or preference. Some gay rights ordinances, however, most notably in Dade Co., Fla., Wichita, Kan., St. Paul, Mn., and Eugene Ore., have been repealed.

36. *See* Larson, *Homosexual Rights: The Law in Flux and Conflict*, 9 U. BALT. L. REV.47, 64-69 (1980); Rivera, *Our Straight-Laced Judges*, *supra* note 33, at 805-74; Levine, *supra* note 33, at 153-59.

37. Immigration & Nationality Act § 241 (a)(4), 8 U.S.C. § 1251 (a)(4) provides for deportation of an alien convicted of a crime of moral turpitude within five years of entry into the United States. In Velez-Lozano v. Immigration and Naturalization Serv., 463 F.2d 1305 (D.C. Cir. 1972), the D.C. Circuit court held that consensual sodomy is a crime of moral turpitude for purposes of the Immigration & Nationality Act.

38. Boutilier v. Immigration and Naturalization Services, 387 U.S. 118 (1967) (language of INA barring aliens afflicted with pyschopathic personalities includes all homosexuals and other "sex perverts"); In re Longstaff, 716 F.2d 1439 (5th Cir. 1983) *cert. denied*, 104 S. Ct. 2668 (1984) (self-defined gay people can be denied naturalization based on own admission of homosexuality, without requiring medical certification). *But see* Hill v. INS, 714 F.2d 1470 (9th Cir. 1983) (INS may not automatically exclude self-defined gay aliens). *See also* Fowler and Graff, *Gay Aliens and Immigration; Resolving the Conflict Between Hill and Longstaff*, 10 U. DAYTON L. REV. 681 (1985).

been used to justify serious infringements upon the rights of gays and lesbians. For example, in *Mississippi Gay Alliance v. Goudelock*,[39] the Fifth Circuit Court of Appeals relied on the criminal sodomy law in Mississippi as a "special"[40] reason to deny the first amendment claim of a gay student group that sought publication of an advertisement in a university newspaper. The court wrote: "One may not be prosecuted for being a homosexual, but he may be prosecuted for the commission of homosexual acts . . . . The advertisement tendered by the Gay Alliance offered legal aid. Such offer is open to various interpretations, one of which is that criminal activity is contemplated, necessitating the aid of counsel."[41]

Parents have been denied custody of their children by courts which do not find actual harm to the children, but which use sodomy laws to bolster their condemnation of the same-sex relationship of the parents. In *Roe v. Roe*,[42] the Virginia Supreme Court denied a gay father joint custody of his daughter, noting that the father's relationship with his lover is "punishable as a class six sex felony which is prosecuted with considerable frequency and vigor."[43]

Indeed, some courts have come close to viewing the status of homosexuality as criminal, reasoning that to be homosexual means to engage in, or at least contemplate, criminal activity.[44] Also, heterosexual members of the public commonly rely on criminal sodomy laws to justify stereotypes of gays and lesbians, or at least mistakenly assume that the status of being homosexual is criminal.[45]

Sexuality is an especially critical element of the definition of self and community,[46] and consensual sexual activity, including sodomy, reflects a desire for intimate communication.[47] As Justice Blackmun wrote in his dissent in *Bowers v. Hardwick*, "[I]ndividuals define themselves in a significant way through their intimate sexual relationships with others . . . and . . . much of the richness of a relationship will come from the freedom an individual has to

39. 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977). *See also* National Gay Task Force v. Board of Education, 729 F.2d 1270 (10th Cir. 1984), *aff'd mem.*, 105 S. Ct. 1858 (1985) (state seeks to justify statute limiting right to discuss homosexuality by existence of state's consensual sodomy law); Gay Activist Alliance v. Bd. of Regents, 638 P.2d 1116, 1121-22 (Okla. 1981) (lower court upheld Regents' refusal to grant organization recognition because of Oklahoma's homosexual sodomy law).

40. 536 F.2d at 1075.

41. *Id.* at 1076 n. 4.

42. 228 Va. 722, 324 S.E.2d 691 (1985).

43. *Id.* at 728, 324 S.E.2d at 694.

44. For example, one court reasoned that "in order to be a homosexual, the prohibited act must have at some time been committed, or at least is presently contemplated." Gay Activists v. Lomenzo, 66 Misc. 2d 456, 320 N.Y.S.2d 994, 997 (Sup. Ct. 1971), *rev'd*, 38 A.D.2d 981, 329 N.Y.S.2d 181 (3d. Dept. 1972), *aff'd*, 31 N.Y.2d 965, 341 N.Y.S.2d 108 (1973).

45. RIGHTS OF GAY PEOPLE, *supra* note 32, at 108.

46. *See* C.A. TRIPP, THE HOMOSEXUAL MATRIX (1975); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 945 n. 17 (1978).

47. *See* Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1308 (1977).

choose the form and nature of these intensely personal bonds."[48] Sodomy laws not only criminalize sexual activity, but they also deny lesbians and gay men the opportunity to define themselves through sexual intimacy. Thus, reform of sodomy statutes is necessary "to make decently possible for homosexuals what heterosexuals have always had and of which they have difficulty in imagining the absence, namely, the realistic possibility of a personal life of dignity and self-respect without fear of irrational prejudice."[49]

C. Efforts at Sodomy Law Reform

While at one time every state criminalized sodomy,[50] twenty-five states no longer impose criminal sanctions for homosexual sodomy. Beginning with Illinois,[51] which was the first state to adopt the American Law Institute's recommendation for decriminalization of all private, voluntary and adult sexual activity,[52] twenty-three states have legislatively repealed their sodomy laws.[53] In the remaining two states, repeal has been effectuated by the courts.[54] Litigators have relied upon five theories in order to press for reform. These theories argue that the statute at issue: 1) either facially or in practice denies homosexuals their equal protection under the law; 2) violates the religion clause of the federal Constitution insofar as it attempts to dictate religious views expressed in Judeo-Christian tradition; 3) violates the prohibition against cruel and unusual punishment; 4) is unconstitutionally vague; and 5) unconstitutionally impinges on a person's right to privacy.[55] Almost every sodomy law challenge has been based on at least one of these theories.[56] However, in only two cases, *People v. Uplinger*[57] (invalidating New York's sodomy law), and *Commonwealth v. Bonnadio*[58] (invalidating Pennsylvania's sodomy law), have the states' highest courts struck down laws proscribing homosexual

48. 106 S. Ct. at 2851.

49. Richards, *Homosexuality and the Constitutional Right to Privacy, supra* note 16, at 316.

50. *Challenges to Sodomy Statutes, supra* note 3, at 817.

51. 1961 Ill. Laws, p. 1983, § 11-2 (eff. Jan. 1, 1962); ILL. ANN. STAT. ch. 38 § 12-15 (West Supp. 1986).

52. MODEL PENAL CODE, § 207.5(1) Comment (Tent. Draft No. 4, 1955).

53. These states are: Ak., Ca., Colo., Ct., Del., Ha., Ill., Ind., Iowa., Me., Neb., N.H., N.J., N.M., N.D., Ohio, Ore., S.D., Vt., Wash., W.Va., Wis., and Wy.

54. *See supra* note 10.

55. For a discussion of the various grounds to challenge state sodomy laws, see *Challenges to Sodomy Statutes, supra* note 3 and Richards, *Homosexuality and the Constitutional Right to Privacy, supra* note 15, at 311-13.

56. For a list of challenges brought against each state sodomy law, see Rivera, *Our Straight-Laced Judges, supra* note 33, at 952-55.

57. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 101 S. Ct. 2323 (1981) (New York's consensual sodomy law violates federal right to privacy and equal protection guarantees). For an in-depth discussion of this case, see Katz, *Sexual Morality and the Constitution: People v. Onofre*, 46 ALB. L. REV. 311 (1982).

58. 490 Pa. 91, 415 A.2d 47 (1980) (Pennsylvania's consensual sodomy law exceeds the proper bounds of police power and violates the equal protection guarantees of the Pennsylvania and United States Constitutions).

activity.[59]

By focusing on state constitutional privacy guarantees, this note does not intend to suggest that other constitutional grounds would be ineffective in repealing sodomy laws. However, the potential strength of state privacy guarantees makes sodomy law reform before state courts and legislatures particularly hopeful.

II
THE STATE CONSTITUTIONAL RIGHT TO PRIVACY

The protection of an individual's privacy rights is by no means the exclusive domain of the federal courts. Ten states[60] have now accomplished through constitutional amendment what the Warren Court partially accomplished in *Griswold v. Connecticut*,[61] and thereby provide new constitutional grounds for a right to privacy. The constitutions of Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington include language which explicitly protects individual privacy. Of these states, Arizona, Florida, Louisiana, Montana, and South Carolina also criminalize sodomy.[62]

Six of the aforementioned states[63] have explicit constitutional privacy protections which are attached to prohibitions against unreasonable searches and seizures. Case law in these states indicates judicial reluctance to extend state protection to areas of personal autonomy which are associated with the federal right to privacy. For example, the privacy provision of Arizona's constitution states that: "No person shall be disturbed in his private affairs, or his home invaded without authority of law."[64] To date, Arizona state courts have not extended this protection to other areas.[65] While it is still possible to argue that this kind of privacy provision requires invalidation of sodomy laws, case law in these states is not encouraging.[66]

In contrast, the constitutions of Alaska, California, Florida, and Montana include free-standing privacy amendments which are not linked to a search and seizure prohibition. For example, Alaska's constitution provides that "[t]he right of the people to privacy is recognized and shall not be in-

59. *But cf.* cases cited *supra* note 10.

60. ALASKA CONST. art. I, § 22 (1972); ARIZ. CONST. art. II, § 8 (1910); CAL. CONST. art. I, § 1, (1972); FLA. CONST. art. I, § 23 (1981); HAWAII CONST. art. I, § 5 (1968); ILL. CONST. art. I, § 6 (1970); LA. CONST. art. I, § 5 (1974); MONT. CONST. art. II, § 10 (1972); S. C. CONST. art. I, § 10 (1971); WASH. CONST. art. I, § 7 (1889).

61. 381 U.S. 479 (1965).

62. *See supra* note 13. *See also infra* notes 75-84 and accompanying text.

63. Ariz., Hawaii, Ill., La., S.C., Wash.

64. ARIZ. CONST. art. II, § 8 (1910).

65. *See, e.g.*, State v. Bateman, 547 P.2d 6 (Ariz.) (en banc), *cert. denied*, 97 S. Ct. 170 (1976) (court rejected federal right to privacy challenge to state sodomy law).

66. For a discussion of the history of each state's constitutional privacy provision, see Note, *Toward a Right of Privacy a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631, 690-729 (1977).

fringed."[67] State courts which have interpreted these provisions, particularly in Alaska and California, have extended protection to individual civil rights well beyond the search and seizure context.[68]

In what is perhaps the most well known state constitutional privacy decision, *Ravin v. State*,[69] the Alaska Supreme Court held that the state's privacy guarantee protects the right to possess small amounts of marijuana in one's home. In *Committee to Defend Reproductive Rights v. Myers*,[70] California's highest court held that its explicit constitutional right to privacy forbids the exclusion of abortion coverage from publicly-funded medical assistance programs. This decision goes beyond an earlier United States Supreme Court decision where, when faced with the identical issue on federal privacy grounds, the Court upheld the prohibition of federally-funded abortions.[71]

While laws proscribing consensual adult sodomy have been legislatively repealed in both Alaska and California,[72] both Florida[73] and Montana,[74] states with equally strong privacy language in their constitutions, continue to criminalize sodomy; in fact, Montana's law imposes one of the harshest penalties in the nation insofar as prison time and monetary fines are concerned. Neither of these two sodomy laws has been challenged under the state constitutional right to privacy.

Numerous other states have extended privacy protection to their citizens through judicial recognition of an implicit right to privacy from other provisions within the state's constitution.[75] This approach, of course, is similar to that adopted by the Supreme Court when it recognized a federal constitutional right to privacy from the "penumbra" of explicitly guaranteed rights in the United States Constitution.[76]

In *Matter of Quinlan*,[77] the New Jersey Supreme Court held that privacy is an aspect of general "rights of personality" guaranteed by Article I, Section

67. ALASKA CONST. art. I. § 22 (1972).

68. *See infra* notes 69-70 and accompanying text.

69. 537 P.2d 494 (Alaska Sup. Ct. 1975).

70. 29 Cal.3d 252, 172 Cal. Rptr. 866, 625 P.2d 779 (1981).

71. Harris v. MacRae, 448 U.S. 297 (1980).

72. *See supra* note 53.

73. FLA. STAT. ANN. § 800.02 (West 1985). *But see* FLA. CONST. Art. I, § 23: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

74. MONT. CODES ANN. § 45-5-505 (1985). *But see* MONT. CONST. Art. II, § 10: "[t]he right of individual privacy is essential to the well-being of a free society and should not be infringed without the showing of a compelling state interest."

75. *See, e.g.*, Yoo v. Moynihan, 28 Conn. Supp. 375, 262 A.2d 814 (1969); Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Murphy v. Pocatella School District No. 25, 94 Idaho 32, 480 P.2d 878 (1971); Moe v. Secretary of Administration, 417 N.E.2d 387 (Mass Sup. Ct. 1981); Jacobs v. Benedict, 35 Ohio Misc. 91, 301 N.E.2d 723 (Ct. C.P. Hamilton Co.), *aff'd*, 39 Ohio App. 2d 141, 316 N.E.2d 898 (1973); In re B., 482 Pa. 471, 394 A.2d 419 (Pa. Sup. Ct. 1978).

76. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

77. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

1 of the New Jersey Constitution which guarantees liberty and the pursuit of happiness. The court went on to hold that under this guarantee of privacy, the government could not compel a critically ill person "to endure the unendurable, only to vegetate a few measurable months, with no realistic possibility of returning to any semblance of cognitive or sapient life."[78] Therefore, the father of the woman in an irreversible coma could remove her from life support systems.

Relying on *Quinlan*, the same court one year later used the state constitutional privacy right to strike down New Jersey's fornication statute.[79] The court wrote: "We conclude that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice. Thus, the statute infringes upon the right of privacy. Although persons may differ as to the propriety and morality of such conduct . . . such a decision is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard."[80]

To date, no state's highest court has struck down its sodomy law based on a judicially recognized state constitutional right to privacy.[81] The Supreme Court of Pennsylvania, for example, invalidated its consensual sodomy law[82] based on state and federal equal protection grounds.[83] Yet, the decision includes stirring language underscoring an individual's guarantee of personal autonomy: "With respect to regulations of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality. It is not to enforce a majority morality on persons whose conduct *does not harm* others."[84]

State court adjudication plays two roles in establishing privacy rights. First, it provides a separate body of law involving issues not squarely addressed by the United States Supreme Court. For example, the Supreme Court never has resolved whether the federal right to privacy includes personal grooming choices of students. However, the courts of Alaska,[85] Ohio,[86] Connecticut,[87] and Idaho[88] have each held that school board limits on hair length were repugnant to the state's constitutional privacy protection.[89] In another

78. *Id.* at 38, 355 A.2d at 663.

79. State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977).

80. *Id.* at 212-13, 381 A.2d at 339 (citations omitted).

81. *But cf.* cases cited *supra* note 10.

82. Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

83. *Id.* at 94 n.2, 415 A.2d at 49 n.2.

84. *Id.* at 96, 415 A.2d at 50. (emphasis added).

85. Bresse v. Smith, 501 P.2d 159 (Alaska 1975).

86. Jacobs v. Benedict, 39 Ohio App. 2d 141, 316 N.E.2d 898 (Ohio Ct. App. 1973).

87. Yoo v. Moynihan, 29 Conn. Supp. 375, 262 A.2d 814 (1969).

88. Murphy v. Pocatello School District No. 25, 94 Idaho 32, 480 P.2d 878 (1971).

89. At least one court has refused to extend state privacy guarantees to protect student grooming choices. *See, e.g.,* Pendley v. Mingus Union High School District No. 4, 109 Ariz. 18, 504 P.2d 919 (1972) (en banc).

example, the Massachusetts[90] and New Jersey[91] Supreme Courts have each held that state privacy guarantees include the right of the critically ill to refuse medical treatment. This field of state court litigation has no counterpart in United States Supreme Court precedent.

The second role of state constitutional law is to provide protections explicitly rejected by the Supreme Court. As noted earlier, the Court[92] upheld the exclusion of abortion coverage from public medical insurance. Massachusetts[93] and California[94] state courts have responded by ruling that their respective state privacy guarantees prohibit the exclusion of abortion funding from their medical assistance programs.[95]

III

ARGUING A STATE CONSTITUTIONAL PRIVACY CHALLENGE

The foregoing discussion makes clear that state courts have invoked their own constitutional privacy provisions to provide protection where federal constitutional law is either unresolved or unprotective. However, whether state privacy laws will successfully restrict encroaching state laws depends to a large extent on a state court's willingness to see its role as independent from the parameters of federal reasoning. Some courts before which parties litigate state constitutional privacy claims ignore state constitutional analysis altogether and invoke federal doctrine as the sole basis of their decisions.[96] Other courts, while addressing state privacy issues, attach a state law holding to an explicit determination of a litigant's federal constitutional rights, and rely exclusively on federal constitutional precedent.[97]

A state court's reluctance to venture beyond the Supreme Court's reasoning will obviously hinder a litigant's efforts at challenging sodomy laws. The

90. Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (Mass. Sup. Ct. 1971).

91. Matter of Quinlan, 70 N.J. 10, 355 A.2d 647, *cert denied*, 429 U.S. 922 (1976).

92. Harris v. McRae, 448 U.S. 297 (1980).

93. Moe v. Secretary of Administration, 417 N.E.2d 387 (Mass. Sup. Ct. 1981).

94. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 799, 172 Cal. Rptr. 866 (1981).

95. Several states have reached similar results based on state equal protection grounds. *See, e.g.*, Planned Parenthood Assoc'n., Inc. v. Dept. of Human Resources, 63 Or. App. 41, 663 P.2d 1247 (Or. Ct. App. 1983); Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982).

96. *See, e.g., Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981). According to Professor Katz, lawyers arguing against the constitutionality of New York's sodomy statute, at issue in the case, devoted extensive portions of their briefs to demonstrating that the law was in violation of the state constitution. The New York Court of Appeals ruled exclusively on the basis of the federal Constitution. *See* Katz, *supra* note 57, at 321.

97. *See, e.g.*, State v. Prouse, 382 A.2d 1359 (Del. 1978), *aff'd*, 440 U.S. 648 (1979). At the Supreme Court level, Justice White noted that since the Delaware state court, after concluding that there was a violation of the 14th Amendment to the Constitution, summarily held that the state constitution also was "infringed," the Supreme Court had jurisdiction to review the state court decision. Delaware v. Prouse, 440 U.S. 648, 653 (1978). *See also* Linde, *supra* note 11 at 390.

Court's decision in *Bowers v. Hardwick*,[98] with its sweeping indictment of homosexual sodomy, has been used already by a state court to justify its criminalization of sodomy. In *Missouri v. Walsh*,[99] the Missouri Supreme Court cited *Bowers* in support of its ruling that the state's sodomy law did not violate the federal right to privacy. The court refused to address whether the state's implicit right to privacy prohibited Missouri's sodomy law, noting that the parties had not "addressed the distinct nature of Missouri's right to privacy apart from federal doctrines."[100] This case is one of the first sodomy challenges decided since *Bowers*, and demonstrates the reluctance of some state courts to go beyond federal reasoning.[101] It further underscores the importance of presenting well argued and persuasive *state* constitutional arguments.

A. Theoretical Underpinnings: The State Court as an Independent Decision Maker

In general, a state court has the power to construe its privacy protection independently and more expansively than the Supreme Court's construction of the federal privacy guarantee. Since the supremacy of the United States Constitution is absolute, a state constitutional provision may be deemed unconstitutional if it conflicts with federal constitutional law.[102]

However, the federal Constitution sets forth only minimum protection:[103] unless greater state constitutional protection for one litigant interferes with the constitutional rights of another,[104] a state court may legally reject the Supreme Court's reasoning and expand the limits of state constitutional protection.[105]

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98. 106 S. Ct. 2841 (1986).

99. 713 S.W.2d 508 (Mo. 1986) (en banc).

100. *Id.* at 513.

101. *But cf.* cases cited *supra* note 10.

102. Article VI of the Constitution specifically provides that "[t]his Constitution . . . shall be the supreme Law of the land . . . anything in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2.

103. McGrath, *Developments in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1335 (1982) [hereinafter *Developments*]; *Project Report*, *supra* note 9, at 184-85.

104. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

105. The Supreme Court of Alaska, in extending the right to a jury beyond the limits of federal constitutional precedent, described its view of the relationship between federal and state constitutional protections as follows:

> While we must enforce the minimum constitutional standards imposed on us by the United States Supreme Court's interpretation of the 14th Amendment, we are free and we are under a duty to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language. . . . We need not stand idly and passively waiting for constitutional direction from the highest court in the land. Instead we should be moving concurrently to develop and expand the principles embodied in our constitutional law.

Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (going beyond Duncan v. Louisiana, 391 U.S. 145 (1968)) (holding that the Fourteenth Amendment guarantees a right to jury trial). Some commentators argue that state courts are free to interpret state constitutions to

The Supreme Court itself has sanctioned the independence of state decision making. In *Cooper v. California*, the Court wrote that "a state court is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."[106] In particular, Justice Brennan has actively encouraged state court expansion of individual rights.[107] In his well known article on state constitutional rights, he wrote: "State courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State Constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[108]

This does not mean that state courts are required to improve on federal standards. However, independence from, or at least critical analysis of, analogous federal constitutional law is part of the duty of state courts when they review state constitutional challenges.[109]

Two key factors have been used by state courts to justify their role as independent decision makers. The first, based on a notion of federalism, relies on the duty of state courts and the historical importance of state constitutions in protecting individual rights. The second factor invokes the local and sometimes unique concerns of state citizenry to justify state constitutional autonomy.

B. Federalism

Notions of federalism have influenced developments in this country since its founding. Central to the concept of federalism is the existence of an independent state judiciary. Since early Americans distrusted the national government, state bills of rights were originally perceived as the main protectors of individual liberties.[110] The federal Bill of Rights did not restrict state action, but was a constraint only on the federal government.[111] Indeed, the adoption of the United States Constitution was intended to serve as a "double security" to the constitutional protections already available on the state level against state officials.[112]

This constitutional scheme was altered with the adoption of the Reconstruction Amendments, which extended the Bill of Rights to state action.[113] However, the emergence of federal constitutional protection against state offi-

provide lesser protections than required by federal constitutional precedent, as long as federal constitutional rights are still honored. *See* Collins, *supra* note 11, at 15-16.

106. Cooper v. California, 386 U.S. 58, 62 (1967). *See also* Oregon v. Hass, 420 U.S. 714, 719 (1975).

107. *See, e.g.*, United States v. Miller, 425 U.S. 435, 447 (1976) (Brennan, J., dissenting); Brennan, *supra* note 9.

108. Brennan, *supra* note 9, at 491.

109. *Project Report*, *supra* note 9, at 285.

110. *Developments*, *supra* note 103, at 1326.

111. *Project Report*, *supra* note 9, at 277; Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

112. THE FEDERALIST, No. 51, at 339 (A. Hamilton) (Modern Library ed. 1937).

113. *Project Report*, *supra* note 9, at 279.

cials was not meant to swallow up the utility of state constitutional protections.[114]

The federalist system continues to rest on a notion of "double security" that emanates from both federal and state constitutionalism. State courts have relied on this early history and notions of federalism in describing their "duty"[115] to independently analyze state constitutional claims. For example, the California Supreme Court, in a decision which expanded state rights beyond the federal minimum, emphasized the chronological and historical importance of state constitutions to justify its independent decision making power. The court wrote:

> [S]tate charters, however, were conceived as the first and at one time the only line of protection of the individual against the excesses of local officials. Thus, in determining that California citizens are entitled to greater protection under the California constitution . . . than that required by the United State Constitution, we are embarking on no revolutionary course. Rather we are simply reaffirming a basic principle of federalism — that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens.[116]

C. Unique State Concerns

The second factor which state courts have relied on for their independent constitutional analysis rests on the unique concerns of their state citizens. Unlike the Supreme Court, which interprets the Constitution for a nationwide audience, a state's highest court only has a direct impact on its own citizens. Thus, the state court has a greater opportunity to reach bolder conclusions without fear of broad-ranging national implications and without imposing on the constitutional authority of another state.[117] Additionally, because states are smaller, sometimes with a more homogeneous jurisdiction, state courts can develop principles more attuned to local circumstances.[118] In the words of Justice Brandeis, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the

114. *Id.* at 283.

115. *See, e.g., Baker*, 471 P.2d at 401-02 (Alaska 1970). The Alaska Supreme Court wrote: "The concept of federalism assumes the power and duty of independence in interpreting our own organized law. With all deference, therefore, we cannot and should not follow federal precedent blindly." *See also* Pool v. Super. Ct., 139 Ariz. 98, 677 P.2d 261 (Ariz. 1984) (going beyond Oregon v. Kennedy, 456 U.S. 667 (1982)).

116. People v. Brisendine, 12 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113-14, 119 Cal. Rptr. 315, 322 (1975).

117. *See generally Developments, supra* note 103, at 1348-51; *Project Report, supra* note 9, at 290-96.

118. *Developments, supra* note 103, at 1350.

country."[119]

State courts look to several sources to identify the unique concerns of their citizens. The most significant are distinctive state constitutional provisions which, though analogous to certain federal guarantees, indicate the state's desire to provide its citizenry with greater individual protections than they may find in the United States Constitution. For instance, in construing its explicit privacy protection, the Alaska Supreme Court stated: "Since the citizens of Alaska with their strong emphasis on individual liberty enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the Constitution, it can only be construed that the right is broader in scope than that of the Federal Constitution."[120] Courts also depend on the history of the state constitution,[121] the linguistic variation of comparable state and federal provisions,[122] the previously established state law,[123] and the distinctive attitudes of the state's citizens[124] to justify their independent reasoning.

D. Methodological Considerations: Interpreting State Constitutions to Invalidate State Sodomy Laws

Federalism and unique state concerns are factors which convince a state court to exercise its independent decision-making role. The state court litigant must, however, do more than press for the state court to exercise its independence from federal constitutional precedent. She must provide the court with a detailed and convincing analysis of the state's constitutional privacy provision in an effort to persuade the court that its state right to privacy requires the invalidation of the state's consensual sodomy statute.

An analysis of a state's constitution begins as follows: where the privacy protection is textual, the language provides the grounds to argue that the scope of the state right extends beyond the federal one and protects its citizens against state infringement of private sexual activity between consenting adults.

For example, Montana, a state which has one of the harshest sodomy laws in the nation,[125] ironically has one of the strongest free-standing individ-

119. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

120. Pavin v. State, 537 P.2d 494, 514-15 (Alaska 1975) (Boochever, J., concurring).

121. *See, e.g.*, Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982) (going beyond Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980). *See infra* note 146 and accompanying text.

122. *See, e.g.*, People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

123. *See, e.g.*, State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (Handler, J., concurring). For example, in challenging a state sodomy law, a litigant should point to any state laws prohibiting discrimination based on sexual orientation to show the concern of its citizens for the protection of homosexual activity.

124. *See, e.g.*, Breese v. Smith, 501 P.2d 159 (Alaska 1975).

125. MONT. CODE ANN. § 45-5-505 (1985) (deviate sexual conduct is a felony with the punishment not to exceed ten years and/or $50,000).

ual privacy protections in the nation, making it an excellent state in which to bring a state sodomy challenge.

Article II, § 10 of Montana's constitution, ratified in 1972, provides that, "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[126]

The strength of this statutory language, particularly in limiting infringement to a compelling state interest, shows not only the importance of privacy to the citizens of Montana, but also illustrates that Montana's privacy protection extends beyond the non-explicit federal right to privacy.[127] The litigant's task is to convince the Montana Supreme Court that the right of an individual to engage in consensual sexual activity is one that "is essential to the well-being of a free society."[128] The language of its own constitution provides sufficient legal grounds for the Montana court to go beyond the limitations encountered by the federal courts.

The written history of a state's constitutional privacy provision may also provide the basis for defining the meaning and scope of the state right to privacy. Where the privacy amendment has been adopted through public elections, a litigant should evaluate voter handbooks and publications which explain the proposal.[129] Any indication that voter approval of the amendment included concern for the protection of adult sexual activity should be presented to the court. Similarly, records of the relevant state constitutional convention, including minutes of committees involved in the drafting of the privacy provision, contemporaneous notes and secondary analysis should be reviewed for supportive construction.[130]

In Montana, the delegates to the Constitutional Convention which adopted its privacy amendment left the scope of privacy protection undefined.[131] However, the Bill of Rights Committee cited previous privacy case law in the areas of data processing, search and seizure, and family planning

126. For a discussion of the Montana Supreme Court's reliance on its constitution, see Collins, *Reliance in State Constitutions — the Montana Disaster*, 63 TEX. L. REV. 1095 (1985).

127. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (State regulation proscribing married couple's use of contraceptives invades "zone of privacy" created by several fundamental constitutional guarantees).

128. MONT. CONST. art. II, § 10.

129. People v. Privitera, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431, *cert. denied* 444 U.S. 949 (1979) (court perused California voter pamphlet for evidence of whether voters intended privacy protection to include Laetrile use when passing new privacy amendment). *See* Gerstein, *California's Constitutional Right to Privacy*: The Development of the Protection of Private Life, 9 HASTINGS CONST. L.Q. 385, 404-05 (1982). *See also* Bamberger, METHODOLOGY FOR RAISING STATE CONSTITUTIONAL ISSUES: RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 287, 310 (Practising Law Institute, 1985).

130. Bamberger, *supra* note 129, at 310.

131. Montana Constitutional Convention 1971-1972, Transcript of Proceedings 5179 (1972) [hereinafter Montana Proceedings].

while recommending passage of the amendment.[132] According to one commentator, these cases were intended to illustrate the "spectrum of areas in which there may be a legitimate expectation of privacy."[133] While the delegates did not specifically address whether the new privacy amendment protected consensual adult sexual activity,[134] the fact that they cited family planning cases, in which privacy incorporates a notion of personal autonomy well suited to sodomy law reform, strongly supports the premise that in Montana, private consensual sodomy is protected from governmental intrusion.

In some states it may be useful to compare any changes in the language of the privacy provision which have occurred during its history, or review any additions to the provision. The "compelling state interest" standard in Montana's guarantee, while originally in the text of the amendment, was struck from the provision while still in the Style and Drafting Committee.[135] When the provision was brought before the entire convention, the original drafter moved to have the compelling standard restored.[136] There was much discussion on the drafter's proposal. He argued that without this language, a court could choose to apply a mere "reasonableness" test to defeat privacy challenges. Apparently, finding this alternative unsatisfactory, the convention restored the compelling state interest standard.[137] This kind of legislative history provides a fascinating opportunity for a successful challenge to Montana's sodomy law. Clearly, the citizens of Montana have recorded their deep concern for an individual's freedom from governmental intrusion.

In contrast to states like Montana, litigants face tougher obstacles when the right to privacy is implicit, not explicit. This is the exact situation with which the federal courts have struggled, and the task of expanding the right to privacy to include the right to engage in consensual sexual activity will be no less arduous in state courts. Of particular assistance in these states is state court precedent in privacy areas, recognition of a privacy interest in other areas of state law such as tort law, and the language and history of the constitutional provisions from which the privacy right is derived.

Justice Pollock, Associate Justice of the Supreme Court of New Jersey, explained the court's approach when it rejected the federal Supreme Court's reasoning in *Harris v. McRae*[138] by ruling that New Jersey cannot restrict public medical assistance for medically necessary abortions.[139] While the New Jersey decision was based on the state constitutional guarantee of equal pro-

132. Montana Proceedings, Bill of Rights Committee Proposal on Right of Privacy 5179-86 (1972).

133. Gorman, *Rights in Collision: The Individual Rights of Privacy and the Public Right to Know*, 29 MONT. L. REV. 249, 251 (1978).

134. Montana Proceedings, *supra* note 131, at 5183-85.

135. *Id.* at 5175.

136. Gorman, *supra* note 133, at 250.

137. *Id.* at 251.

138. 448 U.S. 297 (1980).

139. Right to Choose v. Byrne, 91 N.J. 287, 450 A.2d 925 (1982).

tection, Justice Pollock's description of the court's analysis is illustrative of state court reasoning independent from that of the Supreme Court:

> In reaching a divergent result from the United States Supreme Court, we relied on several factors. First, the text and history of New Jersey's Constitution, in language more expansive than the United States Constitution, declared a right to life, liberty and the pursuit of safety and happiness that protects the right of privacy from which the right to an abortion followed. This text reflected a different history from that of the United States Constitution. Second, we explained that a pre-existing body of state law recognized a woman's right to choose whether to carry a pregnancy to full term or to undergo an abortion. Finally, we noted the high priority historically accorded to the preservation of health in this state.[140]

For all state court litigants, regardless of whether the state's privacy guarantee is textual or court-inferred, judicial precedent must be carefully analyzed and effectively presented to the court. Analysis of precedent from within the state begins with a review of any decisions which have interpreted the state constitutional right to privacy. Again, Montana is illustrative. Since the ratification of its privacy amendment in 1972, the Montana Supreme Court has ruled on state privacy challenges a number of times.[141] While almost all these cases involved search and seizure issues, and none considered questions of sexual activity or even family planning, Montana case law indicates that Montana courts recognize the importance of its state-based privacy guarantee. For example, in a 1982 case, the Montana Supreme Court described its state constitutional right to privacy as "the most elegant and the most uncompromising of the various privacy statements of the states."[142] Additionally, several Mon-

140. Pollock, *State Constitutions as Separate Sources of Fundamental Rights,* 35 RUTGERS L. REV. 707, 719 (1983).

141. *See, e.g.,* State v. Coburn, 530 P.2d 442 (Mont. 1972) (search and seizure); State v. Sawyer, 571 P.2d 1131 (Mont. 1977) (search and seizure), *overruled,* 700 P.2d 153, 155; State v. Charvat, 573 P.2d 660 (Mont. 1978) (search and seizure); State v. Brackman, 582 P.2d 1216 (Mont. 1979) (search and seizure); State Ex. Rel. Zander v. District Court, 594 P.2d 273 (Mont. 1979) (Shea, J., dissenting, arguing that the state constitutional right to privacy prohibits seizures of marijuana plants possessed and used in the home); State v. Helfrich, 600 P.2d 816 (search and seizure), *overruled,* 700 P.2d 153 (Mont. 1979); Duran v. Buttrey Foods, Inc., 616 P.2d 317 (search and seizure), *overruled,* 700 P.2d 153 (Mont. 1980); State v. Hyem, 630 P.2d 202 (search and seizure), *overruled,* 700 P.2d 153 (Mont. 1980); State v. Van Haele, 649 P.2d 1311 (search and seizure), *overruled,* 700 P.2d 153 (Mont. 1982); Montana Human Rights Division v. City of Billings, 649 P.2d 1283 (Mont. 1982) (State Division of Human Rights may review employer's records, but certain procedures must be used to protect state constitutional privacy rights of employees); Hasteller v. Behan, 639 P.2d 510 (Mont. 1982) (state and federal rights of privacy do not protect individual telephone records); State v. Carlson, 644 P.2d 408 (Mont. 1982) (search and seizure); Oberg v. Billings, 674 P.2d 494 (Mont. 1983) (Morrison, J., concurring) (decision which invalidates polygraph statute on state equal protection grounds should be based as well on state constitutional right to privacy); Missoulian v. Board of Regents, 675 P.2d 962 (Mont. 1984) (job performance evaluations of university president were matters of individual privacy protected by state constitution).

142. State v. Van Haele, 649 P.2d 1311, 1315 *overruled,* 700 P.2d 153 (Mont. 1982).

tana privacy cases stress the importance of the sanctity of the home to be free from governmental intrusion.[143] The litigant who crafts her sodomy law challenge against state infringement of private sexual activity, particularly in one's home, may find it useful to draw from this state court precedent.

Additional sources of persuasive state case law are those decisions in which state courts have extended state constitutional protection beyond the Supreme Court's interpretation of analogous federal constitutional guarantees. For example, in *Montana Human Rights Division v. City of Billings*,[144] the Montana Supreme Court held that some protections against unlimited disclosure of employer records to the state Human Rights Division were required by the state constitutional right to privacy. In reaching this conclusion, the court noted that "[t]his court has recognized that the protection it [the constitutional privacy amendment] offers is more substantial than that inferred from the Federal Constitution."[145] In bringing a state law sodomy challenge, the state court's own history of extending privacy protection beyond the parameter of federal court reasoning helps to remind the court of its role as independent guardian of individual rights.

Case law from other states may also prove persuasive. While these decisions will not be binding on another state court, they help demonstrate the desirability of expansive state privacy protection, and work to assure a state court that it is not alone in interpreting its state constitution forcefully.[146] A state court litigant bringing a sodomy law challenge must look to analogous privacy cases for support and must be prepared to explain the particular relevance of these cases.[147] For example, in *State v. Saunders*,[148] the New Jersey Supreme Court struck down its fornication statute based, in part, on state constitutional privacy grounds. The court stated:

> It is now well settled that the right to privacy guaranteed under the Fourteenth Amendment has an analogue in our State Constitu-

143. *See, e.g.*, White v. State, 661 P.2d 1272 (Mont. 1983) (Montana accords a broader equal protection than the Supreme Court on the basis of language present in the Montana state constitution not present in the federal Constitution).

144. 659 P.2d 1283 (Mont. 1982).

145. *Id.* at 1286. In two recent Supreme Court decisions, Montana's high court has reasserted its independence by interpreting its own state's equal protection guarantee more broadly than has been the case in analagous federal rulings. Pfost v. State, No. 85-07, slip op. at 11 (Dec. 31, 1985) ("Federal rights are considered minimal and a state constitution may be more demanding than the equivalent federal constitution provision"); Butte Community Union v. Lewis, No. 85-449, slip op. at 8 (Mont. Jan. 16, 1986) (" This Court need not blindly follow the United States Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution.").

146. *Project Report, supra* note 9, at 317. *See* People v. Onofre, 51 N.Y.2d 476, 493, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (citing sodomy law decisions in Pennsylvania, Arizona, and New Jersey state courts); *but see* State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (en banc) (Court rejected persuasive value of the Pennsylvania Supreme Court's decision to strike down its consensual sodomy law).

147. *See supra* notes 60-95 and accompanying text for an overview of state constitutional privacy case law.

148. 75 N.J. 200, 381 A.2d 333 (1977).

> tion. . . . Although the scope of this . . . right is not necessarily broader in all respects, the lack of constraints imposed by federalism permit this Court to demand stronger and more persuasive showings of a public interest in allowing the State to prohibit sexual practices than would be required by the United States Supreme Court.[149]

Unlike Montana's explicit privacy guarantee, New Jersey's right to privacy is a result of judicial construction.[150] Thus a Montana litigant, seeking to invalidate a sodomy law using an explicit state provision, can argue that its explicit privacy protection should extend at least as far as protections based solely on judicial interpretation.

Finally, the recent United States Supreme Court decision in *Bowers v. Hardwick*,[151] which upheld Georgia's sodomy law, requires a litigant to strategically evaluate how best to persuade a state court of its duty to invoke its right to privacy beyond the limits of the Due Process Clause.[152] This task will be especially critical in a state with a court-inferred privacy right similar to the federal guarantee interpreted by the Court in *Bowers*. While a state court is not bound by Supreme Court interpretation of the Constitution, the *Bowers* decision will no doubt be reviewed carefully by any state court which traditionally adopts federal reasoning when interpreting its own bill of rights.

A litigant should not hesitate to directly criticize the decision in *Bowers*. The majority opinion provides little guidance for a state court. In refusing to protect the right to private intimate sexual expression, the Court provides little detailed reasoning beyond its opinion that the "ancient roots" of sodomy laws are reason enough to uphold the validity of Georgia's criminal statute.[153] The Court dismisses the precedential relevance of the principles underlying federal constitutional privacy cases as "unsupportable" with little explanation.[154] It describes respondent's argument that the right to intimate sexual expression is included in the concept of "ordered liberty" inherent in the federal right to privacy as "at best facetious."[155] The Court unjustifiably compares private consensual homosexual sodomy to "possession in the homes of drugs, firearms or stolen goods" and not to the protected sphere of private

149. *Id.* at 216-17, 381 A.2d at 341.

150. *See supra* note 77 and accompanying text.

151. 106 S. Ct. 2841 (1986) (Georgia's sodomy law does not infringe upon the federal right to privacy. Supreme Court reversed and remanded 11th Circuit decision.)

152. The Supreme Court will not review state court decisions based on "adequate and independent" state grounds. *See* Michigan v. Long, 463 U.S. 1062 (1983). In order to insulate a state court decison," [c]itations to U.S. Supreme Court majority opinions must be made with the clear statement that the reasoning is used because it is persuasive and not because it is controlling or compelling." Bamberger, *Methodology for Raising State Constitutional Issues*, RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, 287, 312, (Practising Law Institute, 1985).

153. 106 S. Ct. at 2844.

154. *Id.*

155. *Id.* at 2846.

sexual activity of heterosexuals.[156] It answers respondent's claim that a state cannot criminalize private conduct based purely on the ground that it is "immoral" by simply saying "we do not agree."[157] As Justice Blackmun writes in dissent: "The Court's failure to comprehend the magnitude of the liberty interest at stake in this case leads it to slight the question whether petitioner, on behalf of the state, has justified Georgia's infringement of these interests."[158] The result is that "values most deeply rooted in our Nation's history" are betrayed.[159]

When reminding a state court of its duty to interpret its constitution independently, the state litigant should stress that the Supreme Court wrote that its decision in *Bowers* "[d]oes not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of . . . state court decisions invalidating those laws on state constitutional grounds."[160] Indeed, the narrow five-to-four majority of the *Bowers* ruling,[161] the well-publicized spate of criticism it received,[162] the majority of public sentiment expressed against its result,[163] and its lack of thoughtful analysis undermines the persuasiveness of the case's result. A state court should look within its borders and, relying on sound notions of federalism, should draw from the spirit and language of its own constitution to protect its citizens' right to sexual expression.

IV
CONCLUSION

Until recently, individual rights cases were brought almost exclusively before federal courts based on the United States Constitution.[164] This reflects more than the sympathetic receptiveness of the federal courts to individual liberties. A United States Supreme Court decision under the Bill of Rights offers the obvious advantage of uniform national law reform. The Supreme

156. *Id.* It should be noted that in his dissent, Justice Blackmun stated: "Notably, the Court makes no effort to explain why it has chosen to group private consensual homosexual activity with adultery and incest rather than with private consensual heterosexual activity by unmarried persons, or indeed with oral or anal sex within marriage." *Id.* at 2854 n.4 .

157. *Id.* at 2846.

158. *Id.* at 2853.

159. *Id.* at 2856.

160. *Id.* at 2843.

161. According to the Washington Post, July 1, 1986, at A1, col. 6, "Powell cast the deciding vote on the closely divided court."

162. *See* Boston Globe, July 1, 1986, at 18, col. 1; Los Angeles Times, July 2, 1986, Pt. II, at 4, col. 1; N.Y. Times, July 2, 1986, at A30, col. 1 ; Gerwitz, *The Court was 'Superficial' in the Homosexuality Case*, N.Y. Times, July 8, 1986, at A21, col. 1; Nat'l L.J., July 14, 1986, at 14, col. 1.

163. Alpern, *A Newsweek Poll: Sex Laws*, Newsweek, July 14, 1986, at 38. Forty-seven percent of respondents disapproved of the Supreme Court ruling in Hardwick; fifty-seven percent said states should not restrict private sexual practices between consenting homosexuals.

164. Linde, *supra* note 11, at 380.

Court in *Bowers v. Hardwick*[165] eliminated hope for national sodomy law reform in the near future.

Fortunately, protection of individual privacy is not limited to the Constitution. Many state constitutions provide either explicit or court-inferred privacy guarantees, and state courts present a forum in which to pursue sodomy law reform. The gay rights litigant who argues that a state sodomy law infringes upon the state's right to privacy must be prepared to convince the court of its duty to decide independently of the Supreme Court. She must carefully analyze and present the history, language and use of the state's privacy guarantee. She may need to draw from the precedent of other states' privacy decisions. She should assure the court that its independent reasoning is appropriately based upon notions of federalism and reflects the unique concerns of its citizens.

Continuing efforts to strike down state sodomy laws throughout the nation should not stop with the *Bowers* decision. Laws proscribing adult consensual private gay and lesbian sexual expression not only inhibit the right to freely express intimacy and love, but also result in other forms of discrimination against lesbians and gay men. Sodomy laws have been used to deny gay people employment, child custody, professional licenses, and American citizenship. By criminalizing homosexual activity, sodomy laws come close to criminalizing the status of being gay or lesbian.

State courts provide a hopeful alternative for the protection of civil liberties, and have the potential to exercise their independence forcefully as new guardians of individual rights. State constitutional rights to privacy provide a potential sphere of protection as lesbians and gay men press for reform. And if one state court enforces its privacy guarantee and strikes down its sodomy law, others may follow. State constitutional privacy guarantees offer an exciting and largely untapped opportunity to meet the important goal of sodomy law reform.

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165. 106 S. Ct. 2841 (1986).