Duquesne Law Review

Volume 15 | Number 1 Article 8

1976

Constitutional Law - Right of Privacy - Sodomy Statutes - Supreme Court Summary Affirmance

Leslie Larkin Cooney

Recent Decisions

CONSTITUTIONAL LAW—RIGHT OF PRIVACY—SODOMY STATUTES—SUPREME COURT SUMMARY AFFIRMANCE—The United States Supreme Court has affirmed without opinion the decision of a three-judge district court validating a state's right to criminalize sexual acts between consenting homosexuals carried out in the privacy of the home.

Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

Two anonymous plaintiffs, John Doe and Richard Roe, filed an individual and class action[1] against the Attorney for the Commonwealth for the City of Richmond challenging the constitutionality of a Virginia statute which criminalized prescribed sexual behavior.[2] Active homosexuals, the plaintiffs sought declaratory and injunctive relief from enforcement of the statute which makes no distinction between public and private sodomitic acts and clearly proscribes certain adult consensual conduct performed in the seclusion of one's bedroom. The plaintiffs alleged the statute deprived them of their right of privacy.[3] Having neither been arrested nor threatened with arrest for the commission of homosexual acts, plaintiffs apparently based their complaint on the statute's "chilling" effect on their enjoyment of acts they believed were constitutionally pro-

1. Upon oral argument, the plaintiffs abandoned their prayer for class relief. The district court ruled the case did not fit within the compass of FED. R. CIV. P. 23 and found class relief unnecessary. Doe v. Commonwealth's Att'y, 403 F. Supp. 1199, 1200 n.1 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

2. The Virginia sodomy statute, as amended, now reads in part:

> Crimes Against Nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a . . . felony.

Va. Code Ann. § 18.2-361 (1975).

3. The plaintiffs also contended the threat of prosecution denied them fourteenth amendment due process and equal protection, first amendment free expression and association, violated the establishment clause of the first amendment, and constituted cruel and unusual punishment under the eighth amendment. Brief for Plaintiff at 10-21, Doe v. Commonwealth's Att'y, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

tected.[4] A divided three-judge district court[5] upheld the Virginia statute. The Supreme Court summarily affirmed the decision.[6]

THE DISTRICT COURT'S OPINION

The majority bottomed its analysis of the constitutional claim on a restrictive reading of Supreme Court decisions recognizing the right of privacy, and limited their scope to the incidents of marriage, the sanctity of the home and the protection of family life.[7] The court cited *Griswold v. Connecticut*[8] as the basis for the plaintiffs' challenge of the statute, and distinguished *Griswold* as guaranteeing a right of privacy only to married couples.[9] Relying heavily on Justice Harlan's dissent in *Poe v. Ullman*,[10] the court held that homosexual intimacy can be criminalized by a state even when privately prac-

4. There has been a lack of litigation on the issue of private adult consensual sexual behavior due to the problem of standing. If an act is truly private, prosecution would be rare or nonexistent. Force accompanying the conduct or public exposure of any kind invalidates a claim that the action is protected by the right of privacy. *See* Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670, 721 & nn.311 & 312 (1973) [hereinafter cited as *On Privacy*].

5. A three-judge district court was convened pursuant to 28 U.S.C. § 2281 (1970), which requires such a forum when an injunction against the enforcement of a state statute is at issue. Section 2281 has been repealed and reenacted as § 2284. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

6. 96 S. Ct. 1489 (1976). Justices Brennan, Marshall and Stevens noted probable argument but the "rule of four" applied: plenary consideration with oral argument requires the vote of four judges. Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 246-47 (1959). *See also* Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373, 396-97 (1972).

7. 403 F. Supp. at 1200. The right of privacy is not expressly found in the Constitution, but the Supreme Court has recognized certain zones in which privacy is protected. In varying contexts, the Court has posited the roots of this right in the first, fourth and fifth amendments, in the penumbras of the Bill of Rights, in the ninth amendment and in the concept of liberty found in the first section of the fourteenth amendment. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) (summarizing the opinion and concurrences in Griswold v. Connecticut).

8. 381 U.S. 479 (1965) (Connecticut statute prohibiting the distribution of contraceptives to husband and wife declared unconstitutional).

9. 403 F. Supp. at 1200-01.

10. 367 U.S. 497 (1961). In *Ullman*, a challenge to a Connecticut statute by two married women who desired medical advice on contraception was dismissed for lack of standing. Justice Harlan dissented and found the statute unconstitutional because it also forbade the *use* of contraceptives. He felt the right of privacy was not absolute, however, and took the view that tradition alone may be sufficient reason not to extend constitutional protection to certain areas. *Id.* at 546-52 (Harlan, J., dissenting).

The *Doe* majority noted that Harlan's dissent had been adopted in *Griswold*. 403 F. Supp. at 1201. *See* Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring).

ticed since under its police power the state has a right to be concerned with its inhabitants' moral welfare.[11] Eschewing a definitive statement concerning a state's burden to demonstrate a legitimate interest in the subject of the statute, the court held that *if* the state had such a burden it was met since the statute was directed toward the suppression of crime. In its view, no causal connection between the sexual activity and moral delinquency was required; it was sufficient that sodomitic conduct was likely to contribute to moral delinquency.[12] The court reasoned that the longevity of the Virginia statute and its Judeo-Christian ancestry buttressed the state's claim of a legitimate governmental interest.[13]

The majority's focus on the state's interest in morality and decency rather than the individual's interest in the intimacy of his sex life prompted the dissenting judge to argue that the majority misinterpreted the issue, the constitutional right of privacy.[14] Rather than limiting the right to the areas of marital, home, and family life, Judge Merhige concluded Supreme Court precedents dealing with the right of privacy gave every person a right to make private, intimate decisions without unwarranted governmental intrusions.[15] He criticized the majority's reliance on *Ullman*, and noted Justice Harlan's argument that the state could constitutionally forbid extramarital sexuality had been blunted by *Eisenstadt v. Baird*,[16] where the Supreme Court declined to restrict the right of privacy to the marital entity. In contrast with the majority, Merhige determined that the fourteenth amendment[17] required the state to prove a com-

11. 403 F. Supp. at 1201-02.

12. *Id.* at 1202. As an illustration, the court looked at the factual situation of Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973). In *Lovisi*, a married couple who participated in fellatio with a male third party could not assert the right of privacy since their minor daughters had carried photographs of the act to school.

13. 403 F. Supp. at 1202-03.

14. *Id.* at 1205 (Merhige, J., dissenting).

15. *Id.* at 1203, *citing* Roe v. Wade, 410 U.S. 113 (1973) (Texas statute invalidated since abortion was within protected right of privacy until point in pregnancy where the state's interest in mother and fetus became "compelling"); Doe v. Bolton, 410 U.S. 179 (1973) (companion case to *Roe* which struck down procedural directives in Georgia abortion law since compelling interests were not shown by the state); Griswold v. Connecticut, 381 U.S. 479 (1965).

16. 405 U.S. 438 (1972) (Massachusetts contraception statute allowing distribution to married but not single persons held unconstitutional).

17. Judge Merhige found a basis for attaching the right of privacy to homosexual conduct in the fourteenth amendment's liberty guarantee. He distinguished cases where conduct was forcible, nonprivate, or involved minors. 403 F. Supp. at 1204-05, *citing* Smayda v. United

pelling interest before regulating private intimate sexual behavior.[18] The dissenter also would have invalidated the statute based on its intrusion into the home, an area extended special safeguards in *Stanley v. Georgia*.[19]

The Supreme Court's Summary Affirmance

The Supreme Court chose to summarily affirm rather than fully examine the district court opinion and by so doing created a number of uncertainties, both as to the precedential value of *Doe* for future cases dealing with the right of privacy and the effect of *Doe* on past decisions delineating this right. A summary affirmance, one type of summary disposition, is the Supreme Court's method of affirming without opinion a district court appeal within its obligatory jurisdiction[20] when the Court feels the decision does not warrant plenary consideration.[21] In affirming without opinion, the Supreme Court summarily affirms cases on appeal from federal district court, and dismisses for lack of a substantial federal question appeals from state court decisions.[22]

The impact of *Doe* as Supreme Court precedent to be relied upon by future courts confronted with delimiting the scope of the privacy right is unclear; the Supreme Court has never specifically defined the precedential value of a summary affirmance. Summary dispositions have been recognized by the Court as decisions "on the merits"[23] which cannot be freely ignored. In *Hicks v. Miranda*,[24] the

States, 352 F.2d 251 (9th Cir. 1965) (oral copulation in men's restroom); Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973) (photographs taken of illicit act); Towler v. Peyton, 303 F. Supp. 581 (W.D. Va. 1969) (forcible sodomy with wife); Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972) (sodomy with male under eighteen).

18. 403 F. Supp. at 1205. In Judge Merhige's view the Commonwealth had not even established a rational basis for proscribing these acts.

19. 394 U.S. 557 (1969) (possession of obscene material within one's home constitutionally protected).

20. Appeals from three-judge district courts are directly to the United States Supreme Court. 28 U.S.C. § 1253 (1970).

21. *See generally* Colorado Springs Amusements, Ltd. v. Rizzo, 96 S. Ct. 3228 (1976) (Brennan, J., dissenting) (discussing the weight of summary dispositions).

22. R. Stern & E. Gressman, Supreme Court Practice 233 (4th ed. 1969). *See also* Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 Colum. L. Rev. 508, 508 n.1 (1976).

23. *See, e.g.*, Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959) (Brennan, J.) (explaining Court procedure in granting plenary consideration of appeals).

24. 422 U.S. 332 (1975). In *Hicks*, a three-judge district court declared the California

Supreme Court held that a district court was not free to disregard the summary disposition of a previous case; until informed otherwise such a decision was to be recognized as fully binding precedent.[25] The summary disposition referred to in *Hicks* was a dismissal for want of a substantial federal question. The "*Hicks* rule,"[26] however, would seem to apply to the *Doe* summary affirmance since any basis for distinguishing between a dismissal for want of a substantial federal question and a summary affirmance is purely historical.[27] There were indications from the Court prior to *Hicks* that summary affirmances were not of the same precedential value as written opinions decided after plenary consideration.[28] But in a dissent to a denial of certiorari in *Colorado Springs Amusements, Ltd. v. Rizzo*,[29] Justice Brennan observed that the pronouncements on dismissal for lack of a substantial federal question articulated in *Hicks* do apply to summary affirmances;[30] he criticized the "*Hicks* rule" for impairing adjudication of significant constitutional issues.[31]

Notwithstanding its effect upon future decisions concerning the right of privacy, the impact of *Doe's* summary affirmance on existing precedent such as *Eisenstadt* and *Stanley* is important. Chief Justice Burger, concurring in *Fusari v. Steinberg*,[32] expressed the view that a summary affirmance supports the judgment but not necessarily the reasoning of the lower court and is not to be read as

---

obscenity statute unconstitutional, disregarding the Supreme Court's summary dismissal in Miller v. California, 413 U.S. 15 (1973), which concerned the same statute. Reviewing the *Hicks* decision, the Court held that although a district court could *not* reconsider the constitutional issue in *Miller*, it could consider the constitutionality of separate issues not discussed therein.

25. 422 U.S. at 343-45.

26. Justice Brennan has referred to the principle that a summary disposition is fully binding precedent as the "*Hicks* rule." Colorado Springs Amusements, Ltd. v. Rizzo, 96 S. Ct. 3228, 3229 n.2 (1976).

27. *See* note 22 and accompanying text *supra*.

28. *See* Edelman v. Jordan, 415 U.S. 651, 671 (1974) (summary affirmances not of the same precedential value as would be an opinion of this Court treating the question on the merits); Gibson v. Berryhill, 411 U.S. 564, 576 (1973) (acknowledgment that summary dispositions are "somewhat opaque").

29. 96 S. Ct. 3228 (1976).

30. *Id.* at 3229 n.1.

31. *Id.* at 3231. Justice Brennan specifically cited the summary affirmance of *Doe* as puzzling to lower court judges. *Id.* at 3232.

32. 419 U.S. 379 (1975) (Burger, C.J., concurring) (due process challenge to termination of unemployment benefits must be considered in light of current state law).

a renunciation of principles previously announced by the Supreme Court.[33] In view of this admonition and the possible application of the "*Hicks* rule" to the *Doe* summary affirmance, the extent to which *Doe* portends further restrictions upon the right of privacy is uncertain.

The Right of Privacy

The questions raised by the summary affirmance of the district court's opinion require a closer examination of the reasoning and rationale of *Doe* which seem to limit the right of personal privacy to the specific areas of marital and family life.[34] *Griswold* spawned the zone of privacy concept but did not fully outline its parameters. The plaintiffs in *Doe* sought an extension of the right of privacy to consensual, nonpublic, sexual conduct between adults. A broad reading of *Griswold* would grant the individual a right to make certain decisions involving intimate and personal matters. By limiting *Griswold* to its factual situation and refusing to grant relief to these plaintiffs, the *Doe* court left the state free to dictate what is moral and decent without considering the possible ramifications on personal privacy.

This rejection of the broader implications of *Griswold* is especially troublesome in light of *Eisenstadt v. Baird*.[35] Decided several years after *Griswold*, *Eisenstadt* held a Massachusetts contraceptive statute which permitted dissimilar treatment of married and unmarried persons violative of the equal protection clause.[36] The Court indicated that protection afforded the right of privacy in sexual matters should no longer be limited to the marital state.[37] Although

---

33. The Chief Justice stated:

> When we summarily affirm, without an opinion . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.

Id. at 391.

34. 403 F. Supp. at 1200. Acts previously recognized as protected include abortion, Roe v. Wade, 410 U.S. 113 (1973); use of contraceptives by unmarried persons, Eisenstadt v. Baird, 405 U.S. 438 (1972); viewing obscene material within the home, Stanely v. Georgia, 394 U.S. 557 (1969); interracial marriage, Loving v. Virginia, 388 U.S. 1 (1967); and use of contraceptives by married persons, Griswold v. Connecticut, 381 U.S. 479 (1965).

35. 405 U.S. 438 (1972).

36. *Id.* at 446-55.

37. The Court stated:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and

Eisenstadt is factually distinguishable from *Doe* in that it did not involve homosexual conduct, the *Doe* court's failure to refer to *Eisenstadt* is disturbing. The Virginia statute does not criminalize homosexuality. It speaks instead of carnal acts in which members of opposite sexes, including married couples, could engage.[38] *Doe* and its summary affirmance may significantly limit the scope of *Eisenstadt* and confine its protection to the purchase of contraceptives, rather than the actual sexual intimacy of the individuals.[39]

The Supreme Court has consistently held that when a state invades a fundamental right it has the burden of proving that such an invasion serves a compelling state interest.[40] Despite Supreme Court reluctance to extend the boundaries of fundamental rights in other contexts,[41] the recognition of private, adult, consensual sexual behavior as fundamental would not require a major doctrinal change;[42] it was generally assumed the right of privacy would reach such behavior.[43] Although the majority of courts have reached results similar to *Doe*,[44] recent decisions in two state courts have inval-

---

heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453 (emphasis in original).

38. *See* note 2 *supra* for the text of the statute.

39. The Supreme Court has never decided whether the marriage entity insulates individuals from prosecutions for sodomitic acts. There is no language in the Virginia statute which would prevent its application to sexual acts of married individuals. The potential breadth of the Virginia statute crystallizes the problem attending a summary affirmance, particularly since the district court did not clarify whether it was upholding the statute only as applied or whether the statute enabled the Commonwealth to criminalize any sexual conduct it deemed deleterious to the moral fabric of its citizenry.

40. *E.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973); Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). *Cf.* Kelley v. Johnson, 425 U.S. 238, 247 (1976) (indicating one's right of personal appearance is not fundamental and can be regulated where a rational basis is shown); Reed v. Reed, 404 U.S. 71, 76 (1971) (classification based on sex must rest on "fair and substantial relation" between the regulation and the state's goals).

41. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (decent housing); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (welfare payments).

42. *See* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1637 (1974).

43. *Id. See also On Privacy, supra* note 4, at 720 & n.309.

44. *See, e.g.*, Dixon v. State, 256 Ind. 266, 268 N.E.2d 84 (1971) (sodomy statute upheld); Hughes v. State, 14 Md. App. 497, 287 A.2d 299 (1972) (statute forbidding unnatural sex acts constitutional); Canfield v. State, 506 P.2d 987 (Okla. Crim. App.), *dismissed for want of*

idated sodomy statutes as an invasion of privacy. In *State v. Callaway*,[45] the court reasoned that *Eisenstadt* gave the privacy right of sexual intimacy to all people whether married or not.[46] In *State v. Elliott*,[47] the court relied on *Griswold* and *Roe v. Wade*,[48] which granted constitutional protection to those seeking abortions, and extended their rationale beyond the right of marital privacy to protect unmarried individuals.[49] Arguably, the right to sexual intimacy is basic to the individual and a necessary prerequisite to effective enjoyment of other fundamental rights; therefore this right is fundamental in itself.[50]

In view of the Supreme Court's reluctance to increase the number of fundamental rights,[51] the result in *Doe* may be understandable, but the reasoning of the court from the standpoint of constitutional adjudication is troublesome. The court dismissed the constitutional challenge by pointing to the longevity of the statute, the existence of similar statutes in other states and the law's theological underpinnings[52]—three elements arguably irrelevant in assessing whether the statute conflicts with constitutional limitations on governmental power. Without addressing the close question of whether a fundamental right was involved, the *Doe* court intimated the state need not demonstrate a "legitimate interest" to justify the statute.[53]

---

federal question, 414 U.S. 991 (1973) (statute proscribing "detestable and abominable crime against nature" upheld); Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1970), *dismissed for want of federal question*, 402 U.S. 902 (1971) (sodomy conviction of minors in reform school upheld after a refusal to follow district court's nullification of statute).

45. 25 Ariz. App. 267, 542 P.2d 1147 (1975) (right of sexual privacy deemed fundamental).

46. *Id.*

47. 539 P.2d 207 (N.M. 1975) (sodomy statute held unconstitutional since it violates right of personal privacy and right to privacy in the home).

48. 410 U.S. 113 (1973).

49. 539 P.2d at 213.

50. *See* State v. Callaway, 25 Ariz. App. 267, 272, 542 P.2d 1147, 1151 (1975). In *Callaway* the sodomy statute was successfully challenged based on the right of privacy even though the defendant had been convicted of forcible sodomy. *But see* note 17 *supra*.

51. *See* cases cited note 41 *supra*.

52. 403 F. Supp. at 1202-03. The use of a Biblical quotation and Judeo-Christian law arguably should have enhanced plaintiffs' argument that the sodomy statute violated the first amendment establishment clause. *See* Jurisdictional Statement for Appellants at 9 n.4, Doe v. Commonwealth's Att'y, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) [hereinafter cited as Jurisdictional Statement].

53. The *Doe* opinion did not recognize the privacy of the plaintiffs as fundamental. The court concluded that if Virginia had the burden of proving a legitimate interest in the subject of the statute, the Commonwealth had done so. 403 F. Supp. at 1202. Where neither a fundamental right nor a suspect classification is involved, a state generally need only show a

The court seemed to decide that no fundamental right was involved but failed to articulate that position. It ignored not only *Eisenstadt*, but also *Stanley v. Georgia*,[54] which recognized a right to be free from unwanted intrusions into the home except in very limited circumstances.[55] Despite its previous observation that regulations which invaded the home could be overturned,[56] the court ignored *Stanley*. In its view, if the state desires to promote morality and decency by criminalizing conduct, even in the home, it is not for the court to forbid the state from doing so.[57]

CONCLUSION

Justice Brandeis once called the right to be let alone the most comprehensive and valued right of civilized man.[58] Whereas *Griswold*, *Eisenstadt*, and *Stanley* gave constitutional substance to

---

rational basis for legislation. A showing of a legitimate interest will usually satisfy a rational basis standard. *See, e.g.*, Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) (New York statute regulating natural mineral springs held constitutional).

It is not entirely clear that the state could meet a rational basis standard. No evidence was introduced as to the harm of homosexual conduct upon society. 403 F. Supp. at 1205 (Merhige, J., dissenting). The American Law Institute's Model Penal Code takes the position there is no legitimate goal in criminalizing private homosexual behavior. MODEL PENAL CODE § 207.5, Comment (Tent. Draft No. 4, 1955). The Pennsylvania Joint Council on the Criminal Justice System recently reported:

> On sexual acts between consenting adults in private, since no legitimate governmental purpose is served by invading the privacy of adult individuals' sexual behavior, the General Assembly is urged to immediately enact legislation to repeal all state laws regulating private sexual behavior and prevent units of local government from enacting any such regulation.

PENNSYLVANIA STANDARDS FOR THE CRIMINAL JUSTICE SYSTEM 159 (1976).

54. 394 U.S. 557 (1969) (state conviction for possessing obscene material overturned, distinguishing between commercial distribution of obscene matter and the private enjoyment of similar material in one's own home).

55. The *Doe* plaintiffs contended the sodomy statute was void in that it invaded the privacy of the home. Jurisdictional Statement, *supra* note 52, at 7. According to *Stanley*, where acts are confined to the home, the government must at least establish a close and substantial relationship between statutory restrictions and a legitimate governmental goal. 394 U.S. at 564. The Supreme Court has limited *Stanley* and has not given an absolute right to engage in conduct which adversely affects the individual or other persons. *See, e.g.*, United States v. Orito, 413 U.S. 139 (1973) (obscene material entering stream of commerce through mode of private transportation not within the protection of the home); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (movie theatre not extended the protection granted to the home by *Stanley*).

56. 403 F. Supp. at 1200.

57. *Id.* at 1202.

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

that view, the breadth of this right has been left uncertain by the Court's summary affirmance of *Doe*. Twice since *Doe* the Supreme Court has addressed the scope of the right of privacy. While *Paul v. Davis*[59] indicated the Court will limit the right of personal privacy to the factual situations of *Griswold*, *Eisenstadt*, and *Roe*,[60] the Court in *Runyon v. McCrary*[61] reaffirmed its recognition of the home as a place where governmental intrusion is ordinarily undesirable.[62] Until the Supreme Court clarifies its views in this sensitive area by something other than a summary affirmance of a divided three-judge court, Virginia and other states with similar statutes can continue to criminalize intimate sexual activity between consenting adults, conduct previously thought to be beyond the reach of governmental regulation.

Leslie Larkin Cooney

---

59. 424 U.S. 693 (1976) (reputation not protected by the fourteenth amendment).

60. In a 5-4 decision, Justice Rehnquist held that reputation alone is not a "liberty" or "property" interest sufficient to invoke the strictures of the due process clause of the fourteenth amendment. Relying on *Roe*, the Court held that privacy rights are those which are "fundamental" or "implicit in the concept of ordered liberty." The Court found the respondent's claim of privacy in matters of reputation "far afield" of areas such as marriage, procreation, contraception, child rearing and education, and family relationships, where the state's power to regulate conduct has been limited. *Id.* at 713.

61. 96 S. Ct. 2586 (1976) (racial discrimination prohibited in private schools).

62. *Id.* at 2598.