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COMMENT

FUTURE SCOPE OF MINNESOTA’S RIGHT TO PRIVACY

INTRODUCTION

Defining the scope of decisional privacy—the right to make behavioral choices free from undue governmental interference—requires law-making which necessarily gives effect to strongly held beliefs in philosophy, politics, religion and law. Defining the scope of decisional privacy also determines whose interests will receive greater protection: those legislatively defined as society’s or those which define the individual. To what extent should the law regulate an individual’s decision on how to conduct his or her private life? Defining the scope of decisional privacy not only responds to that question but also indicates what values are animated by the privacy right.

Two theoretic bases can be identified as defining the scope of decisional privacy. The more restrictive view, denominated here as the familial context approach, defines the scope of privacy protection according to the type of behavioral choice being made. Under the familial context approach decisional privacy is of derivative value only—family, marriage and procreation choices are protected because of the traditional value accorded individual instead of state control over the creation and complexion of the family unit. The more expansive view, accords decisional privacy independent value. Referred to here as the individual autonomy basis, individual autonomy and dignity are the seminal notions on which privacy rights are based. Decisional privacy is protected in order to preserve individual liberty.

In the recent Minnesota case of State v. Gray, a defendant charged with the criminal offense of sodomy challenged the statute as an unconstitutional infringement of his right to privacy as protected by the federal and the Minnesota Constitutions. Because of the particular facts of the case, the Minnesota Supreme Court’s decision to uphold the sodomy statute is not the focus of this Comment. In-
stead, this Comment will focus on questions concerning the theoretic basis of decisional privacy raised by the court's announcement that a right to privacy exists under the Minnesota Constitution.

Gray also provides a useful context in which to examine the scope of privacy protection which will develop. Sexual behavior is a uniquely intimate and private concern. Moreover, whether private consensual sexual behavior is protected by the right to privacy depends upon which theory of privacy informs the decision. Thus, sexual behavior is also uniquely suited to an understanding of the arguments regarding a familial context or an individual autonomy basis for extending privacy protection.

Despite its announcement that a right to privacy exists within the Minnesota Constitution, the court left determination of the scope of state constitutional protection of the right to privacy to be decided in future cases. The court strongly reiterated the axiom that the Minnesota Constitution may provide greater protection to Minnesota citizens than the protection provided by the United States Constitution. This Comment will examine the possible right-to-privacy analysis which Minnesota courts may develop. The practical importance of state constitutional protection of a right to privacy can be seen in the number, variety and conviction with which privacy issues are debated. Further, advancing technology in fields such as medicine and electronics as well as the increasing complexity of social behavior creates new subjects in which right to privacy issues will surface. Finally, while commentators debate the nature and origin

5. Id.
6. Id. at 114. When discussing whether the Minnesota Constitution provided a broader scope of privacy rights than that recently determined under the federal Constitution, the court said, "[t]oday's decision is limited to a holding that any asserted Minnesota constitutional privacy right does not encompass the protection of those who traffic in commercial sexual conduct." Id. Thus, the court carefully limited its holding to find that a fundamental right to engage in sodomous acts within a sex for compensation relationship does not exist. Id. The defendant was denied standing to challenge the statute on behalf of those who practice private consensual acts of oral or anal sex. Id. at 113. The court denied standing because the rights of those individuals will not be affected by the Gray decision. Id.
7. Id. at 111.
8. The following cases illustrate the variety of contexts in which a right to privacy has been claimed: Kelley v. Johnson, 425 U.S. 238 (1976) (length of hair); Paul v. Davis, 424 U.S. 693 (1976) (disclosure of personal information); Illinois NORMEL, Inc. v. Scott, 66 Ill. App. 3d 633, 383 N.E.2d 1330 (1978) (possession of drugs); Chicago v. Wilson, 75 Ill. 2d 525, 389 N.E.2d 522 (1978) (cross-dressing); People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (Ill. 1969) (mandatory helmet use); In Re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) (nonconsensual medical treatment).
9. The committee report to the Illinois Bill of Rights Committee, submitted with the recommendation to add an explicit prohibition against invasions of privacy in its state "search and seizure" provision, warned:

It is doubtless inevitable that any person who chooses to enjoy the benefits
of the federal right to privacy, states are able to purposefully select the scope of privacy as befits their own communities.10

Recent developments in federal privacy jurisprudence indicate a restructuring of the theoretical basis for the right to privacy recognized in the federal Constitution.11 The scope of protection afforded the right to make decisions concerning personal, nonharmful behavior appears to be restricted to decisions regarding family, marriage and procreation.12 Advocates of a familial context approach to defining the scope of federal privacy protection rely on case law and on traditional notions regarding the sanctity of the family unit.13

The individual autonomy basis for the right to privacy results from the constitutional origin of the right as emanating from, among other sources, the ninth amendment protecting inalienable and inherent rights.14 The notion is that the right of privacy inures to an individual to protect his or her individual autonomy from erosion caused by governmental regulation.15 With this theoretical base, the right to privacy is rooted in the concept of individual liberty.16

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10. During the 1970s many states amended their constitutions to include a specific right to privacy either as a separate provision, or added to the clause concerning inalienable rights or search and seizure protection. See, e.g., ALASKA CONST. art. I, § 22 (separate provision added in 1972); ARIZ. CONST. art. II, § 8 (1910, amended 1987) (search and seizure clause); CAL. CONST. art. I, § 1 (right to privacy added to inalienable rights clause); HAW. CONST. art. I, § 6 (separate provision added in 1978); ILL. CONST. art. I, § 6 (invasion of privacy added to search and seizure clause in 1970); LA. CONST. art. I, § 5; MONT. CONST. art. II, §§ 10, 11 (separate provision prohibiting invasion of privacy added in 1972); S.C. CONST. art. I, § 10 (added to search and seizure clause).


14. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court held that the first, third, fourth, fifth and ninth amendments created a zone of privacy protected from undue governmental interference. Id. at 484-86. The fourteenth amendment makes the right of privacy applicable to the states. Id. at 488 (Goldberg, J., concurring).


16. Id. at 589-90.
This Comment will advocate that a concerted choice be made to conceptualize the Minnesota right of privacy as one grounded upon the traditional value accorded an individual as an autonomous actor rather than on the type of decision the individual makes. Beginning with the United States Supreme Court's decision regarding the constitutionality of Georgia's sodomy statute, and following a summary of the history of and challenges made to state sodomy statutes, this Comment will explore the privacy right analysis Minnesota may follow in future privacy cases.

I. CONSTITUTIONAL CHALLENGES TO SODOMY STATUTES

Since the 1970s, prosecution under a state's sodomy statute has typically resulted in a challenge made to the statute's constitutionality. In general, statutes which referred to the prohibited behavior as simply an act against nature were struck down for being too vague. Where the statute criminalized sodomy only between persons of the same sex and/or unmarried partners, the statute has failed on equal protection grounds. As to arguments that the statute is an impermissible infringement on an individual's right to privacy, the lower courts have been split in deciding the constitutional challenge. Until Bowers v. Hardwick, the United States Supreme


Court had declined to decide the issue and then examined only the right to privacy within the context of private sexual conduct between homosexual partners.  

Three cases are especially important to an understanding of the arguments, both for and against, the invalidation of state sodomy statutes on the grounds of unreasonable governmental infringement of an individual's right to privacy as argued in Gray. They are also important to an understanding of how the theoretical nature of the privacy right as being based on a familial context or upon individual autonomy determines the outcome of the challenge. First, Doe v. Commonwealth's Attorney found that the right of privacy did not extend to homosexual sodomy. The United States Supreme Court gave this case summary affirmance. Second, People v. Onofre held that the right of privacy did include consensual sodomy and that the statute was not reasonably related to any state interest which would legitimize the statute's infringement on that right. The United States Supreme Court declined to hear the case on appeal. Finally, Bowers v. Hardwick has become precedent for privacy challenges to state prohibition of private sexual behavior between partners of the same sex which are based on the United States Constitution.

When the United States Supreme Court was presented with the same issues as those faced by the lower courts, the question of

22. The Court noted that John and Mary Doe were plaintiffs in the action but had been denied standing by the district court to assert their constitutional challenge to the sodomy statute as it applied to heterosexual conduct. When the court of appeals sustained the district court's decision denying standing the Does did not continue the appeal to the Supreme Court. Id. at 188 n.2. Thus, the Court examined the constitutionality of the statute as it was applied to Hardwick and not a facial challenge. Id.
24. Id. at 1203.
25. 425 U.S. 901 (1976) (without opinion). Justices Brennan, Marshall, and Stevens would have set the case for oral argument. Id. Disagreement as to whether the affirmation was on the merits or on the decision regarding standing led to different use of the case as precedent by the lower courts. See Baker v. Wade, 553 F. Supp. 1121, 1137–38 (N.D. Tex. 1982), rev'd, 769 F.2d 289 (5th Cir. 1985) (reasoning that Doe became precedent when summarily affirmed), cert. denied, 478 U.S. 1022 (1986).
27. Id. at 488–90, 434 N.Y.S.2d at 951–52, 415 N.E.2d at 940–41.
28. 451 U.S. 987 (1981) (without opinion). Thus, because of the opposite result of the cases, the summary affirmation given Doe had unclear weight and tended to support those who argued that the affirmation regarded only the standing issues. See Onofre, 51 N.Y.2d at 493, 434 N.Y.S.2d at 954, 415 N.E.2d at 943. See also supra note 25.
29. In Gray, the Minnesota Supreme Court stated that the Hardwick holding was "dispositive of and wiped out" Gray's argument that the Minnesota sodomy statute violated the federal Constitution. 413 N.W.2d at 110.
whether the Constitution protected against governmental interference with the right of privacy to conduct private consensual sexual behavior was not subjected to scrutiny. In its five to four decision in *Hardwick*, the Court held that no fundamental right to engage in homosexual sodomy exists. In dicta, however, the Court said that the notion that the line of cases regarding privacy rights "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is insupportable."  

In order for personal conduct to be protected within the scope of the right to privacy extended by the federal Constitution, that conduct must be either "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." The Court then traced the history of the criminalization of sodomy to illustrate that the practice of sodomy has traditionally met with public disfavor. Therefore, the practice of sodomy was found not to be

30. 478 U.S. at 191. One of the dissenting opinions took issue with the Court's "almost obsessive focus" on homosexual activity when the state had broadened the statute to include heterosexual activity and therefore should have addressed the subject of the statute—oral and anal sexual activity—regardless of the sexual orientation of the person challenging the statute as an intrusion on right to privacy and right of intimate expression. *Id.* at 200 (dissenting opinion by Justice Blackmun, joined by Brennan, Marshall, and Stevens). *See also supra* note 22.

As the dissenters argued in *Hardwick*, the eighth amendment, ninth amendment or the equal protection clause in the fourteenth amendment could have decided the issue differently. 478 U.S. at 201. In Justice Powell's concurring opinion, he thought that the eighth amendment prohibiting punishment of status would have been a successful challenge but declined to apply it in the case because *Hardwick* was not prosecuted under the statute and did not raise the issue below. *Id.* at 197-98. The Court has previously supplied the appropriate constitutional grounds for a challenge to the validity of a statute when absent from the petitioner's argument and, according to the dissent, is obligated to do so. *Id.* at 201-02 and cases cited therein.

31. 478 U.S. at 192. Does it hold more? Chief Justice Burger wrote "separately to underscore [his] view that in constitutional terms there is no such thing as a fundamental right to commit heterosexual sodomy." *Id.* at 196 (emphasis added). Interestingly, the argument has not been made that by criminalizing sodomy and by finding the behavior unprotected by the Constitution, homosexuals are completely denied sexual expression. That the homosexual relationship may have identical attributes of the marriage relationship which were the basis of the United States Supreme Court's protection of the marriage unit is particularly relevant: marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Douglas, J., plurality opinion). It is the state which withholds married status from homosexual partners. *See* Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 661-63 (1980).

32. 478 U.S. at 191.

33. *Id.* at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

34. 478 U.S. at 190-91 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

35. 478 U.S. at 192-95.
deeply rooted in this Nation's history and tradition." Moreover, the Court listed the previous privacy cases to find that the scope of decisional privacy protected by the Constitution has been developed only so far as to include choices concerning family, marriage or procreation. The Court could not find a relationship between homosexual activity and the three arenas in which a fundamental right to freedom from interference is constitutionally provided.

The Hardwick Court restricted the scope of the federal right to decisional privacy to a notion of familial context rather than individual autonomy. In other words, according to the Hardwick Court, protection of decisional privacy from governmental interference is based on the nature of the decision being made rather than on the value of individual liberty or autonomy. The majority was of the opinion that the established privacy right protecting family, marriage and procreation decisions does not extend to decisions regarding private consensual sexual behavior between adults—regardless of their sexual preference.

In contrast to the conclusion of the majority in Hardwick, commentators citing the same line of cases for the proposition that the right to decisional privacy is grounded on personal autonomy outnumber those that support the view that the privacy right is grounded in a

36. Id. at 194. According to the dissenting opinion of Justice Blackmun, this is the major flaw in the majority's opinion. See supra note 30. The history of nonenforcement suggests the moribund character of the law as does the fact that, while the majority cites existing statutes, 26 states have repealed them. 478 U.S. at 198. Both dissenting opinions noted the similarity of history between sodomy statutes and miscegenation statutes which were found unconstitutional in Loving v. Virginia, 388 U.S. 1 (1967). Id. at 210 n.5, 216 n.9.

37. Id. at 190. The lower courts as well as the dissenting opinions in Hardwick have used the same line of cases in support of their decision to hold state sodomy statutes unconstitutional. See id. at 204. Two interpretations of the federal privacy cases have emerged: the majority's contextual restriction of the cases and the dissent's understanding of the personal nature of the decision being made and the liberty interest in making it free of governmental restraint. Id. at 216-17 (Stevens, J., dissenting; joined by Justices Brennan and Marshall). "The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable." Id. at 217. (quoting Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 719-20 (7th Cir. 1975) (footnotes omitted), cert. denied, 425 U.S. 916 (1976)).

38. 478 U.S. at 191.

39. The Court's decision was a majority of 5-4 with the dissenting Justices emphasizing the language in previous cases which celebrate the liberty interest of autonomous individuals conducting private lives. Id. at 208. Thus, "every free citizen" has equal liberty interests whether homosexual or heterosexual in deciding how to live and how to conduct "personal and voluntary associations with his companions." Id. at 218-19.

40. Id. at 191.
familial context. 41 This difference of opinion, as well as the dissenting opinion in Hardwick, indicates the importance of examining previous cases in order to understand the changing scope of privacy protection. For example, although Eisenstadt v. Baird 42 extended privacy protection to an unmarried individual’s decision to use contraceptives, the case was not cited by the majority in Hardwick for the proposition that protection of decisional privacy was owed to the individual qua individual. 43 Instead, procreation decisions such as birth control or abortion were characterized as decisions concerning the creation of the parent/child relationship; the creation of family. 44 Thus, justification for granting privacy protection to decisions of unmarried women in choosing whether to use contraceptives is based on the familial context of the decision, not upon the autonomy of

41. See, e.g., Eichbaum, Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy, 14 HARV. C.R.–C.L. L. REV. 361 (1979); Grey, Eros, Civilization and the Burger Court, 43 LAW & CONTEMP. PROBS. 83, 98–100 (1980). Of articles published between 1965 and 1979, 38 out of 41 commentators predicted that the right of privacy would extend to private consensual sexual behavior. Id.

42. 405 U.S. 438, 452 (1972).

43. Compare Judge Merhige’s use of Eisenstadt to show that sexual matters between married couples were granted privacy and extended in Eisenstadt because it is the individual, not the couple, who are free from governmental intrusion into matters which fundamentally effect the individual. Doe, 403 F. Supp. at 1204 (dissenting opinion). Accord Lovisi v. Slayton, 363 F. Supp. 620, 625 (E.D. Va. 1973), aff’d, 539 F.2d 349 (4th Cir. 1976), cert. denied, 429 U. S. 977 (1976). In Hardwick, the majority declined to find that decisions regarding sexual behavior are ones which fundamentally affect an individual’s life, restricting Eisenstadt to decisions regarding procreation. 478 U.S. at 190. However, the exact language in Eisenstadt can be read so that procreation is just one example of decisions which fundamentally affect a person: “[m]atters so fundamentally affecting a person as the decision whether to bear or beget a child.” 405 U.S. 438, 453 (1972).

44. Again, the dissenting opinion disagrees with the restrictive scope which the majority finds within previous cases and quotes the warning against “clo[se]ng our eyes to the basic reasons why certain rights associated with the family have been accorded shelter. . . . We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life.” Hardwick, 478 U.S. at 204 (quoting Moore v. East Cleveland, 431 U.S. 494, 501 (1977)).

Members of the Court also disagreed over the use of Stanley v. Georgia, 394 U.S. 557 (1969) (right to watch pornography in privacy of one’s home). In Hardwick, the Court restricts its reading of Stanley to first amendment grounds. 478 U.S. at 195. However, the dissent argues that Stanley is not about the first amendment protection of spatial privacy but is about the individual’s right to be left alone. Id. at 199. “This case is no more about a fundamental right to engage in homosexual sodomy” as the Court purports to declare . . . than Stanley . . . was about a fundamental right to watch obscene movies.” Id. Stanley was important to lower courts for its emphasis not only on individual liberty being at the core of privacy decisions, but also for the notion that majority abhorrence of a behavior does not justify its criminalization. See Baker v. Wade, 553 F. Supp. 1121, 1145 (1982), rev’d, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986); People v. Onofre, 51 N.Y.2d 476, 489 n.3, 434 N.Y.S.2d 947, 951 n.3, 415 N.E.2d 936, 940 n.3 (1980), cert. denied, 451 U.S. 987 (1981).
women, as individuals, to make value expressive choices. Should the tendency of the United States Supreme Court to restrict decisional privacy to a scope of relational rights continue, a state’s constitutional protection should become the focus of advocates for decisional privacy based on the notion of individual liberty in the realm of nonharmful behaviors. Indeed, the Hardwick Court reminded the states that state constitutional law may differ.

II. History of Sodomy Statutes and Their Enforcement

Understanding the history of the criminalization of sodomy is helpful to an understanding of traditional assumptions and public attitudes toward private sexual conduct. It has not always been a crime to perform an act of sodomy. Historically, sodomy was defined as an act of anal sex performed with a man or a beast. It was first punishable only in the ecclesiastical courts and infrequently at that. Blackstone traced the history of the criminalization of sodomy to its sources in natural law and the express laws of God. The crime of sodomy entered common law in 1533 when King Henry made it a felony punishable by hanging. Although the statute was

45. See generally Eisenstadt, 405 U.S. at 452.
47. 478 U.S. at 190.
49. 4 W. Blackstone, Commentaries *215 (1825) (referring to the “infamous crime against nature”).
50. Harris, 457 P.2d at 648-49. The word “sodomy” is believed to have come from the name of the biblical city of Sodom which was destroyed by fire for its sins. Blackstone believed this explained why those found by the clergy to have committed acts of sodomy were burned alive. Blackstone, supra note 49, at *216.
51. Blackstone’s vehemence that the act is against natural law and the laws of God expressed itself in the quote most often cited: “‘peccatum illud horrible, inter christianos non nominandum’” (that horrible crime not fit to be named among Christians). Harris, 457 P.2d at 642 n.14 (quoting Blackstone, Commentaries on the Laws of England 215 (Jones ed. 1916)). Judaic law forbade homosexual sodomy, adultery, bestiality and incest, and sex with menstruating women. Leviticus 18:11-23.
52. W. Barnett, supra note 17, at 80. This first sodomy statute in English law prohibited “[t]he abominable and detestable crime against nature, committed with mankind or beast.” Id. at 81.

Sodomy between women could not be prosecuted because sodomy at that time required penetration. V. Bullough, Homosexuality: A History 35 (1979). Because oral sex was not included in the prohibition, some have argued that it was
repealed by Queen Mary Tudor, Queen Elizabeth I reenacted the statute prohibiting sodomy, defined solely as acts of anal sex.53

Thus, examination of the history of the criminalization of sodomy, reveals not only its religious and natural law origins, but also an attitude toward the act of sodomy which is no longer generally accepted.54 Known as the "infamous crime against nature,"55 Blackstone wrote little on the subject "whose very mention . . . is a disgrace to human nature."56 It was a crime "not fit to be named" in an indictment.57 Since the late 1950s and early 1960s, open and frank discussion of sexual behavior has become more common.58 Further, sexuality and sexual behavior became not only subjects of legitimate scholarly research, but were also identified as crucial aspects of an individual's sense of self.59 Whatever one's views regard-
ing the propriety of medical, sociological and psychological discourse on human sexuality, the debate continues. Whatever one's comfort level in the face of increased public discussion of sexuality, the discussion accelerates to meet such problems as AIDS, teenage pregnancy, and overpopulation.

Before 1962, all fifty states had statutes prohibiting sodomy. The American Law Institute (ALI) proposed the decriminalization of private consensual sodomy between adults in its 1962 draft of the Model Penal Code. The definition of sodomy as a crime was viewed by the ALI commentators as an attempt to coerce private morality rather than an attempt to prevent harm to individuals or to society.

To date, only twenty-four states and the District of Columbia have retained statutes which criminalize consensual sodomy. Of those sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality."

60. 478 U.S. at 193-94.


62. As long as there is no harm to secular interests of society, private morals are the concern of spiritual authorities. State v. Lair, 62 N.J. 388, 397-98, 301 A.2d 748, 754 (1973). Accord Baker, 553 F. Supp. at 1145; People v. Onofre, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 987 (1981). Contra Buchanan v. Batchelor, 308 F. Supp. 729, 733 (N.D. Tex. 1970). See Note, Behind the Facade: Understanding the Potential Extension of the Constitutional Right to Privacy to Homosexual Conduct, 64 WASH. U.L.Q. 1233, 1244 n.74 (1986) [hereinafter Behind the Facade] (detailing the "debate that was unleashed" by the commentary of the American Law Institute which described why, absent harm, private sexual behavior is a matter of private morality not criminal enforcement). See generally Note, Doe and Dronenburg: Sodomy Statutes Are Constitutional, 26 WM. & MARY L. REV. 645 (1985) [hereinafter Doe and Dronenburg] (arguing that it is a legislative decision to use the police power to properly protect public morality by criminal statutes directed at private nonharmful behavior). But see Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 627 (1980) (the question should not be whether the government can regulate private morality, but what level of governmental interest should be demanded to justify such regulations). When examining the debate regarding government action in the realm of private/public morality, a quote by Justice Holmes is instructive: "what I have found spoil more good talks than anything else;—long arguments on special points between people who differ on the fundamental principles on which these points depend." Reprinted in THE ATLANTIC, p. 20, col. 4 (Nov. 1987). As yet, writers who support criminalization of private behavior to protect public morality have not explored the assumption that sodomy performed between consenting adults, regardless of their sexual preference, is immoral behavior.

63. The statutes are: ALASKA STAT. § 13A-6-60(2) (1982) (prohibits sodomy only between persons not married to each other); ARIZ. REV. STAT. ANN. §§ 13-1411, 1412 (Supp. 1987); ARK. STAT. ANN. § 5-14-122 (1977) (prohibits sodomy only between members of the same sex); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ANN. § 800.02 (West 1976) (provision making sodomy a misdemeanor; § 800.01 which made the "abominable and detestable crime against nature" a felony was repealed in
states, six prohibit consensual sodomy only between members of the same sex. Arkansas, Kansas, Kentucky, Missouri, Nevada and Texas decriminalized sodomy between heterosexual partners while prohibiting homosexual sodomy. Both homosexual and hetero-


64. See statutes cited supra note 63.

65. In 1982, a federal district court in Texas found that the Texas statute was unconstitutional on the grounds of equal protection and right to privacy. Baker v. Wade, 553 F. Supp. 1121, 1122 (N.D. Tex 1982), rev'd, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986). The district court's thirty-three page opinion contains an excellent discussion of the emotional and psychological impact of the discovery of one's homosexuality, and is a good example of how to demonstrate the impact of the state on an important sphere of decision-making. See infra notes 155-59 and accompanying text. The court also analyzed the major cases in other jurisdictions. Id. at 1135-40. Nevertheless, the Baker decision was reversed on the grounds that the United States Supreme Court's summary affirmance of Doe v. Commonwealth's Attorney was a decision on the merits, and thus binding precedent on the privacy right challenge. Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (Goldberg, J., dissenting).

As to the equal protection challenge, the appellate court found that homosexuals do not constitute a suspect class. Thus, the state need only show a rational relation to "implementing morality" which the United States Supreme Court had found to be a permissible state objective. Id. at 292. The dissent stated that the court was "determined to uphold the constitutionality of a Texas statute whatever obstacles bar the way, even though the majority opinion tramples every procedural rule it considers." Id. at 293. The appeal was made by a person not named as a party nor a class representative. Id. at 294. In fact, the appealing party, Danny Hill, had turned down an invitation to intervene, and when none of the named defendants sought an appeal, Hill did. Id. The Attorney General of the State of Texas initiated but then withdrew an appeal. Hill filed a motion in district court to intervene and substitute himself as a class representative. While the motions were pending in district court, Hill filed the same motions in the Fifth Circuit. Id. at 294. Interestingly, two weeks
sexual sodomy are prohibited in the Minnesota statute.66

Not until 1921 was consensual sodomy included in Minnesota’s prohibition against sodomy.67 The first criminal code, adopted in 1851, included sodomy as a crime punishable by one to five years imprisonment.68 Both the scope of the statute and the punishment for violations increased. In 1891, a prison sentence of five to twenty years was the penalty for committing the “detestable and abominable crime against nature,”69 including bestiality, necrophilia, and involuntary oral and anal intercourse.70 After the inclusion of consensual oral and anal intercourse in 1921, the statute remained unchanged until 1967 when punishment of consensual sodomy was reduced to a prison sentence of up to one year, or a fine of $1,000, or both.71 Finally, in 1977, the statute was amended to prohibit only acts of consensual sodomy.72 Forced sexual behavior and adult corruption of minors are now crimes prosecuted under other sexual misconduct statutes, as are bestiality and necrophilia.73

However, the history of Minnesota’s sodomy statute is incomplete before his oral argument before the circuit court, the district court denied Hill’s motions to intervene. Id. at 295.

66. MINN. STAT. § 609.293 (1986).
67. GEN. STAT. MINN. § 10183 (1921).
68. MINN. REV. STAT. ch. 107 § 13 (1851).
69. MINN. GEN. STAT. § 6216 (1891).
70. Id. Bestiality and attempted sexual intercourse with a dead body is still prohibited in Minnesota. MINN. STAT. § 609.294 (1986).
71. The statute defined offenders as those who “voluntarily submit to such carnal knowledge” and the carnal knowledge proscribed is “carnally knowing in any manner any animal or bird, or . . . any male or female person by the anus or by or with the mouth or attempt sexual intercourse with a dead body.” GEN. STAT. MINN. § 10183 (1921). Bestiality and necrophilia were severed from the sodomy statute in 1967. 1967 Minn. Laws, ch. 507, secs. 4–5 (codified at MINN. STAT. § 609.293–294 (1986)).
72. MINN. STAT. § 609.293 (1986) (original at 1977 Minn. Laws, ch. 130, sec. 4). There exists a discrepancy between the Advisory Committee Comments: one Comment states that no distinction is drawn between voluntary and involuntary spousal sodomy; another Comment states that subd. 5 excludes sodomous acts between spouses when both consent. MINN. STAT. ANN. Advisory Committee’s note. The language of the statute makes no such exclusion:

Subdivision 1. Definition. “Sodomy” means carnally knowing any person by the anus or by or with the mouth.

Subdivision 5. Consensual acts. Whoever, in cases not coming within the provisions of sections 609.342 or 609.344, voluntarily engages in or submits to an act of sodomy with another may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

MINN. STAT. § 609.293 (1986). Subdivisions 2–4 were repealed by 1977 Minn. Laws ch. 130, sec. 10 (effective May 20, 1977). The provisions which form the exception to subdivision five define criminal sexual misconduct and cover the repealed sections relating to nonconsensual sodomy—that committed by force and that committed with a child.

73. See MINN. STAT. §§ 609.342–345 (1986) and supra note 71.
without an understanding of its enforcement. The statute is "generally not vigorously prosecuted." Prior to 1977, most prosecution under the sodomy statute was against adult males charged with the rape of a female or with the sexual abuse of children. Again, both criminal offenses are now defined by and prosecuted under other statutes. Since the statute has been narrowed in scope to criminalize only consensual sodomy, prosecution has been against those who have performed sodomous acts in public or semi-public places. Thus, private acts of consensual sodomy are prohibited by law, but not in fact.

Minnesota's enforcement of its sodomy statute is similar to enforcement of sodomy statutes nationwide. Moreover, it is estimated that a substantial majority of sexually active Americans engage in sodomy. The discrepancy between the law proscribing a nonharmful behavior for reasons of "morality" and the frequency with which individuals choose to participate in the criminalized activity, may indicate a discrepancy between announced public morality and individualized private morality. In other words, this may be a

74. Minneapolis Star and Tribune, Oct. 4, 1983, at 1A, col. 6, quoted in Grove, Constitutionality of Minnesota's Sodomy Law, 2 Law and Inequality 521, 525-26 (1984). Hennepin County had a policy of nonenforcement of the sodomy statute, as was reported to Grove in an interview with the then Assistant to the County Attorney for Hennepin County, Sexual Assault Division in 1984. Id. at 526 and 526 n.22.

75. Grove, supra note 75, at 526.

76. Id.

77. Id.

78. Because children are deemed unable to consent, even if a person below the age of 16 voluntarily engages in a sodomous act, it is a nonconsensual act constituting either child abuse or criminal sexual conduct. See generally Karst, supra note 61, at 672 (explaining that adult authority over their children results in lost freedom of choice so that incest would not only be taboo, but also nonconsensual behavior—a behavior not within those adult consensual activities for which a privacy right may attach).

79. Grove, supra note 74, at 522.

80. See W. Masters, V. Johnson & R. Kolodny, Masters and Johnson on Sex and Human Loving 325-29 (1986) (discussing studies which indicate that at least sixty-nine percent of unmarried Americans and up to eighty-seven percent of married Americans engage in or have engaged in oral-genital sex); C. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male 371 (1948) (45.9% of American husbands who are well educated engage in acts of sodomy).

81. But see Behind the Facade, supra note 62, at 1235-37 (articulating the democratic principle of majority rule, the author assumes a majority finds private sodomous activity to be reprehensible). Thus, "majoritarian morality" is a proper democratic form and individual moral choices should be made at the ballot box. Id. at 1247. However, explicit value choices may be found in the Constitution and represent spheres in which society has consented to nonmajoritarian rule. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 3 (1971). Alexander Hamilton had feared that the enunciation of specific rights in a bill of rights would lead to the argument that if a particular right was not enunciated, it would be deemed not to exist. The Federalist No. 84 at 535 (A. Hamilton) (Am. Lib. Ed. 1961). Therefore,
law which does not reflect the public's actual beliefs.

III. LOWER COURT DECISIONS

In *Doe v. Commonwealth's Attorney*, a declaratory judgment was sought as to the unconstitutionality of the Virginia sodomy statute as well as an injunction against its enforcement. The court relied on Justice Harlan's dissenting opinion in *Poe v. Ullman* to emphasize that Supreme Court precedents involved only the right to marital privacy. Justice Harlan had written that fornication, adultery and homosexuality have always been forbidden and can claim no social protection. The court rationalized its reliance on Harlan's dissent by the fact that his dissent had been quoted in a concurring opinion in *Griswold v. Connecticut*, and by noting his stature as a jurist. Thus, the Virginia court found no "authoritative judicial bar to the proscription of homosexuality—since it is obviously no portion of marriage, home or family life."

The court then turned to the question of whether the state had a legitimate interest in proscribing the conduct. The question of whether Virginia could be barred from defining sodomy as a crime was declared by the court to be a legislative question. Because the state action "is simply directed to the suppression of crime, whether committed in public or in private," it is properly within "the reach of the police power." No demand was made for the state to show that moral delinquency results from homosexuality because the court found it impracticable to prove and because "the law is not so exact.

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The United States Supreme Court, however, has indicated that moral indignation of a possible majority was not a sufficient justification for state criminalization of certain conduct. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Stanley v. Georgia*, 394 U.S. 557 (1969).

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83. *Id.* at 1200 (plaintiffs brought the action against state prosecutors as a class of defendants).
85. 403 F. Supp. at 1201.
86. 367 U.S. at 553 (Harlan, J., dissenting).
87. 381 U.S. 479, 499 (1965) (Goldberg, J., concurring).
88. 403 F. Supp. at 1201.
89. *Id.* at 1202.
90. *Id.*
91. *Id.*
Finally, the longevity of the statute and its ancestry in Judaic and Christian law was regarded as evidence of the state's interest and the legitimacy of the statute itself. The court then concluded: "[w]e believe that the sodomy statute, so long in force in Virginia, has a rational basis of State interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court." In contrast, the New York Court of Appeals found not only that the right to privacy encompassed private consensual sexual behavior based upon decisions of the Supreme Court, but also that the law proscribing sodomy was not rationally related to the state's interest in promoting public morality, protecting the individual or protecting and promoting marriage. In Onofre, the original defendant was convicted of violating a penal statute prohibiting consensual sodomy and successfully appealed his conviction on the grounds that the statute was unconstitutional. The state's appeal, and the appeal of three other similarly situated defendants, were heard together. Unlike the United States Supreme Court, the New York court examined the constitutionality of its sodomy statute in the context of private consensual sodomy between homosexual and heterosexual partners.

The New York Court of Appeals emphasized that the right of privacy, which encompasses sexual behavior, allows one to make independent decisions regarding private, consensual sexual conduct "undeterred by government restraint." The court found that voluntary, private sexual intimacy between adults is within the scope of

92. Id. ("It is enough for the upholding of the legislation to establish that the conduct is likely to end in a contribution to moral delinquency.").
93. Id.
94. Id. at 1203.
95. People v. Onofre, 51 N.Y.2d 476, 486-92, 434 N.Y.S.2d 947, 950-53, 415 N.E.2d 936, 939-43 (1980), cert. denied, 451 U.S. 987 (1981). Onofre also held that the statute violated equal protection because sodomy was not prohibited to partners that were married to each other. Id. at 491-92, 434 N.Y.S.2d at 953, 415 N.E.2d at 942-43.
96. Id. at 483-84, 434 N.Y.S.2d at 948, 415 N.E.2d at 937-38.
97. Id. at 483, 434 N.Y.S.2d at 948, 415 N.E.2d at 937.
98. Id. at 483-84, 434 N.Y.S.2d at 948, 415 N.E.2d at 937-38.
99. Id. at 485, 434 N.Y.S.2d at 949, 415 N.E.2d at 939. Onofre was prosecuted for engaging in homosexual sodomy at his home, the other defendants were prosecuted for performing acts of sodomy while in an automobile on separate, distinct occasions. Because its decision also rested on a denial of equal protection, the court declined to address the prosecution's contention that the acts committed by defendants Peoples, Gross, and Sweat were public instead of private because a hypothetical passerby could have observed them. Id. at 485 n.2, 434 N.Y.S.2d at 949 n.2, 415 N.E.2d at 938 n.2. Thus, the appeal consolidated the arguments of three men and a woman and covered the spectrum of heterosexual and homosexual consensual sodomy.
the privacy right as outlined by the United States Supreme Court. Accordingly, the court could find no rational basis for prohibiting "what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting."101 The court declined to make a theological, moral or psychological evaluation of consensual sodomy.102

The prosecution claimed that the statute served three legitimate state interests, and thus constituted a permissible intrusion on the right to consensual sexual conduct.103 First, the court examined the state's interest in protecting the participants from physical harm.104 The court found no evidence of present harm to participants, nor had the legislature identified any harm when the sodomy statute was enacted.105 According to legislative history, legislators feared that the public would consider a repeal of the sodomy statute to be affirmative legislative approval of sodomy.106

The second state interest advanced for criminalizing consensual sodomy was the promotion of public morality.107 Absent a commercial component, however, the court could not find that the performance of a sodomous act out of the view of the public had any effect on public morality.108 Further, the court noted that a state penal code is

100. Id. at 485, 434 N.Y.S.2d at 949, 415 N.E.2d at 939. The court defined the right at issue as follows:

[T]he right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint....

Id. Justice Brandeis characterized the decisional privacy right not only as "the most comprehensive of rights and the right most valued by civilized men" but also as "the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Thus, the dissent in Hardwick cites the Olmstead dissent for the proposition that the fundamental right being asserted is not the right to engage in a particular sex act as the majority believed, but the "right to be let alone." 478 U.S. at 199 (Blackmun, J., dissenting). Earlier cases in which privacy protection had been extended did not center on a fundamental right to watch pornography in the home or to place interstate bets from a phone booth, but on the right to be left alone. Hardwick, 478 U.S. at 199 (recalling Stanley v. Georgia, 394 U.S. 557 (1969) (pornography) and Katz v. United States, 389 U.S. 347 (1967) (telephone bets)).


102. Id. at 489 n.3, 434 N.Y.S.2d at 951 n.3, 415 N.E.2d at 940 n.3.

103. The three purported state interests were: (1) preventing physical harm to the participants; (2) upholding public morality; (3) protecting the institution of marriage.

104. Id. at 488-89, 434 N.Y.S.2d at 951, 415 N.E.2d at 941.

105. Id.


107. Id. at 488, 434 N.Y.S.2d at 951, 415 N.E.2d at 941.

108. Id. at 490, 434 N.Y.S.2d at 952, 415 N.E.2d at 941. Compare Doe v. Common-
not the proper vehicle with which to enforce moral or theological values—even those arguably held by a majority. Rather, noncoercive methods such as teaching, parental guidance, moral persuasion and counseling are appropriate to enforcement of public morality.

Finally, the state argued that the statute promoted a valid state interest in protecting the institution of marriage. Again, the court found no evidence that private consensual sodomy interferes with marriage. "[O]ne is [not] a substitute or alternative for the other nor is any empirical data submitted which demonstrates that marriage is nothing more than a refuge for persons deprived by legislative fiat of the option of consensual sodomy. . . ." In other words, if consensual sodomy between adults was legalized, the incidence of marriage would not decline; nor would the divorce rate increase. The majority dismissed the dissent's reasoning in support of the statute as an "appeal . . . to the historical, conventional characterization which attached to the practice of sodomy."

IV. CHALLENGE UNDER THE MINNESOTA CONSTITUTION

Following the precedent set by Hardwick, the Minnesota trial court restricted the Gray challenge to the state's sodomy statute to state constitutional grounds. Although Gray's challenge was based on a right to privacy argument, the facts concerning his prosecution did not lead to consideration of whether the Minnesota Constitution protects the privacy of an individual's sexual conduct against unwarranted governmental intrusion. According to the court, Gray had

109. Onofre, 51 N.Y.2d at 488 n.3, 434 N.Y.S.2d at 951 n.3, 415 N.E.2d at 940 n.3. The state had failed to show that the statute served to do anything other than to "restrict individual conduct and impose a concept of private morality chosen by the State." Id. at 490, 434 N.Y.S.2d at 952, 415 N.E.2d at 941.

110. See id. at 488 n.3, 434 N.Y.S.2d at 951 n.3, 415 N.E.2d at 940 n.3.

111. Id. at 488-89, 434 N.Y.S.2d at 951, 415 N.E.2d at 941.

112. Id. at 490, 434 N.Y.S.2d at 952, 415 N.E.2d at 941.

113. Id.

114. Id. at 491, 434 N.Y.S.2d at 952-53, 415 N.E.2d at 942.

115. 413 N.W.2d at 110.

116. The court granted Gray standing to challenge the constitutionality of the statute only as it applied to him. Id. at 112. Gray had argued standing to assert that the statute was unconstitutional on its face but that argument was denied. Id. The trial court had granted him standing for a facial attack and found that the statute was unconstitutionally overbroad. Id. He also sought standing based on the exception for third parties not able to protect their interests and that for protecting first amendment rights. Id. at 112-13. The court found that its decision would not affect the rights of others because the holding was restricted to the facts of the case. Id. at 113.
mischaracterized his conduct as private. The court found that his conduct was public because Gray had “picked up” his sexual partner in a public park, had an undetermined number of “one night stands” with him, and had compensated him for their sexual encounter. The court restricted its holding to a decision that commercial sex is not protected by the Minnesota Constitution’s right to privacy. It also found that Gray had participated in public sexual behavior and therefore could not properly raise the issue of whether private sexual conduct is protected. In other words, his argument that the sodomy statute, as applied to him, violated his right to privacy in conducting his private sexual life was inapposite. Because the court stated that others would not be affected by its decision in Gray, those who participate in private consensual sodomy are not foreclosed from asserting their privacy rights in the future. Thus, Gray was denied standing to proceed with a facial challenge to the statute. The question of whether the state constitutional right to privacy protects consensual adult sexual behavior conducted in private was not properly before the court.

Based on a comparison between the Minnesota Bill of Rights and the United States Constitution, the court held that a right of privacy similar in nature to that which exists under the United States Constitution also exists under the Minnesota Constitution. As to the contours of the privacy right, the court commented: “Whether the

117. Id. at 113. The court also found that, although Gray was not charged with prostitution, the facts would support such a charge. Id. at 113–14.

118. Id. Compare United States v. Lemons, 697 F.2d 832 (8th Cir. 1983). In Lemons, the defendant was charged with sodomy after being found engaged in a sodomous act in a park restroom in Arkansas. Id. at 833. As in Gray, the defendant challenged the statute on privacy grounds and the court also restricted standing to challenge the statute as it applied to him. Id. at 834. The court then found that the constitution did not protect public sexual acts. Id. at 836. In his dissent, Senior Circuit Judge Henley argued that “[c]onstruing appellant’s offense as ‘public oral sexual activity’ in order to uphold the constitutionality of the statute distorts the purpose of the sodomy statute and distorts the nature of the case.” Id. at 841. It was the sodomy statute which was being challenged as unconstitutional, not the statute prohibiting public sexual acts. Id. Further, Judge Henley reasoned, if the majority found that the defendant was not convicted of homosexual sex, but of public sex, then he was prosecuted under the wrong statute and might also argue that there had been a violation of his due process rights. Id. at 841 n.5. Like the majority in Lemons, the court in Gray analyzed the privacy right argument as if the challenged statute was the public lewdness or prostitution statute, neither of which Gray had challenged nor been prosecuted under. 413 N.W.2d at 113–14.

119. 413 N.W.2d at 113.

120. Id.

121. Id.

122. Id.

123. Id.

124. Id. at 111.
scope of any privacy right asserted under the Minnesota Constitution should be expanded beyond federal holdings remains to be resolved in future cases wherein the issue is properly raised." It remains to be seen whether a familial context approach will be imported from federal constitutional law to define the scope of Minnesota’s privacy right or whether an individual autonomy basis will be adopted. Other Minnesota privacy cases may prove instructive on this question.

The *Gray* court stated that having recognized a right to privacy in the Minnesota Constitution, it “must articulate the scope of protection afforded by that right.” As a first step, the court noted that the right of privacy protects only fundamental rights. This step is consistent with federal constitutional analysis. However, two points made in *Gray* could provide the basis for developing the scope of privacy rights under Minnesota constitutional law beyond the federal limit of marriage, family and procreation.

First, the Minnesota Supreme Court chose to use a different definition of “fundamental right” than that used in *Hardwick*. Rather than being rooted in tradition or inherent in the concept of ordered liberty, the *Gray* court defined a fundamental right as one which has an origin in the express or implicit terms of the constitution.

125. *Id.* at 114.
127. State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987).
128. “In this respect, we agree with the United States Supreme Court that the right of privacy protects only fundamental rights.” *Id.* (citing Roe v. Wade, 410 U.S. 113, 152 (1973)).
129. *See* 478 U.S. at 191–92. The *Hardwick* Court relied on the definition in *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937) (fundamental liberties are “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if they were sacrificed.”) and the definition in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (fundamental liberties are those which are “deeply rooted in this nation’s history and tradition.”).
130. 413 N.W.2d at 111 (citing BLACK’S LAW DICTIONARY 607 (5th ed. 1979)). Although the United States Supreme Court did not use this definition in *Hardwick*, they have used a similar definition in other cases. *See*, e.g., *Griswold v Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).
Considering the outcome of *Hardwick*, where the history of the criminalization of sodomy was equated with the history of sodomy as a behavior, the definition used by the Minnesota Supreme Court may be more expansive. Applying the *Hardwick* analysis to consensual sexual behavior, a long history of public condemnation, despite private indulgence, could also be found. Ironically, this inconsistency between public rules and private behavior may reflect the depth of the public's view of consensual sex as a private matter, rather than a reflection of the public's condemnation of sexual behavior.

Furthermore, the Minnesota Supreme Court stated that it would not be confined by the *express* terms of the state constitution in determining whether a right sought to be protected is a fundamental right. Thus, the *Gray* definition might be more expansive in that textual support for a privacy right concerning private consensual sexual behavior can be found. For example, the freedom of intimate association and the freedom of expressive association can be interpreted to include private sexual intimacy. Moreover, the *Gray* court quoted extensively from an earlier case detailing the centrality of inherent and inalienable rights, the right of personal liberty and the right to the pursuit of happiness. Minnesota Constitutional provisions are also a part of the quotation. As the *Gray* court noted, article 1, section 16 "significantly provides: 'The enumeration of rights in this constitution shall not be construed to deny or impair the enjoyment of privileges or immunities, natural, inherent or inalienable, the right of personal liberty and the right to the pursuit of happiness.'"
others retained by and inherent in the people.'" 137 Thus, language in Gray can be used to support the retention of individual autonomy as the basis for privacy protection. 138

Second, the Minnesota Supreme Court emphasized that it is not limited by federal decisions regarding the scope of privacy protection. 139 As the court has announced in the past, the Minnesota Constitution can extend more protection to its citizens than the federal Constitution currently provides. The Gray court also stated that it is their responsibility to do so: "[s]tate courts are, and should be, the first line of defense for individual liberties within the federalist system." 140 While not expanding the scope of protection beyond that afforded by the federal Constitution, the court nonetheless stated that it will not be limited by federal holdings should future cases present the proper context for expanding the scope of Minnesota Constitutional privacy protection. 141 In other words, the familial context approach set forth in Hardwick, may not operate to limit the scope of the privacy right extended to Minnesota citizens. The question remains, whether the language used by the Minnesota Supreme Court describing individual liberty as seminal to the right of privacy accurately indicates the scope of protection which the Minnesota right to privacy extends. 142

137. 413 N.W.2d 112. Similarly, Justice Blackmun, in his dissent in Hardwick found a basis in the ninth amendment for affirming the court of appeals' judgment that the Georgia sodomy statute was unconstitutional. 478 U.S. at 201-02.

138. However, the opposite development can also be supported by Gray. For example, the court concludes its opinion: "We emphasize that nothing in the court's opinion, either expressly or impliedly, expands the individual's right of privacy under the Minnesota Constitution beyond the parameters established for that right by the United States Supreme Court under our Federal Constitution." Id. at 114. Those parameters are set out at the beginning of the Gray opinion and are those wherein the activity protected concerns only family, marriage and procreation. Id. at 110.

Interestingly, after emphasizing that they were not expanding an individual's right to privacy under the Minnesota Constitution, the court concludes by stating that it remains to be resolved whether the scope of Minnesota's privacy right should be expanded. Id. at 114. However, a previous case not mentioned in Gray and perhaps deliberately omitted, stated that at the core of privacy rights is personal autonomy. Price v. Shepard, 307 Minn. 250, 257, 239 N.W.2d 905, 910 (1976). Another case, decided in 1976, cited Price in asserting that at the core of the privacy right is the concept of personal autonomy. Minnesota State Bd. of Health v. City of Brainerd, 308 Minn. 24, 35, 241 N.W.2d 624, 631 (1976). However, City of Brainerd may help sever Price from development of the scope of Minnesota privacy rights. See infra notes 173-83 and accompanying text.

139. 415 N.W.2d at 111.

140. Id. (quoting State v. Fuller, 374 N.W.2d 722, 726-27 (Minn. 1985)).

141. Id. at 114.

142. Price has subsequently been used to reiterate that the concept of personal autonomy is basic to the right of privacy. See Jarvis v. Levine, 418 N.W.2d 139, 148 (Minn. 1988). However, the Jarvis court uses this concept within the context of nonconsensual medical treatment. Id. at 145. Because Jarvis emphasized nonconsensual
V. MINNESOTA RIGHT-TO-PRIVACY ANALYSIS

In Gray, the court adopted an approach for analyzing privacy cases arising under the Minnesota Constitution. However, once the court found that Gray's conduct occurred within a commercial sexual relationship and therefore did not concern a fundamental right, the analysis was cut short. The approach used in Price v. Shepard should predict the steps the court will follow in analyzing future constitutional challenges based on an infringement of the Minnesota right to privacy.

After finding that an activity regulated by the challenged statute involves a fundamental right, the court must decide whether the statute impermissibly interferes with the exercise of that right. In discussing the limits of the privacy right, the Price court stated, "[l]ike other constitutional rights, . . . this right is not an absolute one. . . ." Indeed, the individual's privacy right is subordinate to appropriate interests of the state. However, in order for state interference to be constitutional, the state's objective must be appropriate and the means chosen to attain it must be necessary and reasonable. Although often thought of as a two-pronged test,
three steps can be identified. First, as illustrated in Onofre, the state's objective must be a legitimate goal for which the police power is invoked.\textsuperscript{150} In other words, the legislative objective must be to protect public health, safety or welfare.\textsuperscript{151} If the challenged statute does not serve any of the legitimate uses of the police power, it is unnecessary to determine what level of state interest justifies an intrusion upon the fundamental right sought to be protected.\textsuperscript{152} In Onofre, the sodomy statute was found to be motivated by objectives inappropriate for the use of the police power.\textsuperscript{153} Scrutiny of this threshold step is crucial in the area of prescribing private morality by legislation seeking to promote public morality.

Second, if the statute is a legitimate use of police power, the nature of the state's interest in meeting its objective must be determined.\textsuperscript{154} In Price, the court stated that whether that interest must be legitimate, important, or compelling depends upon the "impact of the decision on the life of the individual."\textsuperscript{155} If the impact on the individual is of major consequence, the state's interest in regulating that behavior must be a compelling one in order to justify its intrusion.\textsuperscript{156} Should Price remain a standard for decisional privacy cases, this step will prove to be the most important to the outcome of a constitutional challenge.\textsuperscript{157}

To be entitled to constitutional protection, the interest of an individual in being free from interference in making decisions regarding a nonharmful, private behavior must demonstrably outweigh the interest of the state in influencing that decision.\textsuperscript{158} Persuasive authority on the weight of an individual's interest would be similar to that needed to demonstrate the state's impact on his or her life.\textsuperscript{159}

Finally, even if the state interest is sufficient to justify intrusion on an individual's right to privacy, the means used to serve that interest

\textsuperscript{152} See Onofre, 51 N.Y.2d at 490, 434 N.Y.S.2d at 952, 415 N.E.2d at 941-42.
\textsuperscript{153} Id. at 490, 434 N.Y.S.2d at 952, 415 N.E.2d at 941.
\textsuperscript{154} 307 Minn. at 258, 239 N.W.2d at 911.
\textsuperscript{155} Id. at 257, 239 N.W.2d at 910.
\textsuperscript{156} Id.
\textsuperscript{158} Id.
\textsuperscript{159} See \textit{supra} note 65.
must be both necessary and reasonable.\textsuperscript{160} In analyzing necessity and reasonableness, the \textit{Price} court explained that when there are other means of achieving a permitted state objective, the means chosen must represent the least intrusive method available.\textsuperscript{161} Thus, in the context of private consensual sexual behavior, the existence of other statutes which prohibit public lewd behavior, prostitution, forced sexual conduct and adult corruption of minors indicates that the sodomy statute is not necessary to protect public health, safety and welfare.\textsuperscript{162} However, the level of deference given to the state's choice of means remains to be seen.

In \textit{Price}, the court concluded that electroshock therapy was one of the most intrusive forms of medical treatment.\textsuperscript{163} Consequently, the impact of the state's action in \textit{Price} was of such magnitude as to require a state interest "sufficiently important" to justify its infringement on the patient's privacy rights.\textsuperscript{164} However, because the state was immune from liability, the court refused to decide whether the treatment was necessary and reasonable.\textsuperscript{165} Little indication exists on how firm the court will be in its demand for a showing that the means of effectuating an appropriate state interest are necessary and reasonable, and thus, a permissible infringement of an individual's right to privacy.\textsuperscript{166}

In sum, previous Minnesota privacy cases indicate that the above four steps will be used to analyze future challenges to a statute on

\textsuperscript{160} Jarvis v. Levine, 418 N.W.2d 139, 144 (Minn. 1988); Price v. Sheppard, 307 Minn. 250, 262, 239 N.W.2d 905, 913 (1976).
\textsuperscript{162} Furthermore, because of the existence of more narrowly drawn criminal sexual conduct statutes, the sodomy statute as it is enforced is not necessary to meet the legislative goal. \textit{See also} United States v. Lemons, 697 F.2d 832, 841 (8th Cir. 1983) (Henley, J., dissenting).
\textsuperscript{163} 307 Minn. at 260, 239 N.W.2d at 912.
\textsuperscript{164} \textit{Id}. at 259, 239 N.W.2d at 911. The court does not state what level of interest the state has, however, the state's interest was sufficient to deprive the patient of liberty when it committed the patient. Therefore, the interest in treatment must have been sufficiently important. \textit{Id}. at 259, 239 N.W.2d at 911.
\textsuperscript{165} \textit{Id}. at 260, 239 N.W.2d at 912. The court reasoned that the state could not have known it was acting unconstitutionally because of the vagueness of the constitutional right to privacy. \textit{Id}. at 261, 239 N.W.2d at 912.
\textsuperscript{166} By simply stating that it did not reach the question of whether the electroshock treatments were necessary and reasonable the court provided almost no guidance for determining how to answer this question. \textit{Id}. at 260, 239 N.W.2d at 912. The court did, however, set forth judicial review procedures to be followed in future cases to determine the necessity and reasonableness of the prescribed treatment before the state may impose "intrusive" forms of treatment on non-consenting patients. \textit{Id}. at 262–63, 239 N.W.2d at 913. \textit{See also} Jarvis, 418 N.W.2d at 144–48 (holding that the \textit{Price} procedures for determining necessity and reasonableness must be followed before the state can administer neuroleptic drugs to an involuntarily committed mental patient without the patient's consent).
the grounds that it impermissibly interferes with an individual's right to decisional privacy as it is protected by the Minnesota Constitution.\textsuperscript{167} The analysis is effective to determine the extent of privacy protection without resort to a restriction of the scope of privacy to a familial context.

VI. FUTURE SCOPE OF MINNESOTA RIGHT TO PRIVACY

The \textit{Price} case involved a challenge to the nonconsensual administration of electroshock therapy as an infringement of decisional privacy by a state actor.\textsuperscript{168} In \textit{Price}, the Minnesota Supreme Court stated, "[a]t the core of the privacy decisions, in our judgment, is the concept of personal autonomy—the notion that the Constitution reserves to the individual, free of governmental intrusion, certain fundamental decisions about how he or she will conduct his or her life."\textsuperscript{169} Sexual decisions can be considered fundamental decisions regarding the conduct of one's life in its most intimate aspect.\textsuperscript{170} Further, the importance of sexuality to development and definition of self has become better understood and is considered fundamental to the development of human personality.\textsuperscript{171}

As the right to privacy is debated by theorists, different categories of privacy rights are being distinguished. The right to privacy encompasses spatial privacy and informational privacy.\textsuperscript{172} The right to bodily integrity, a right recognized in common law, is considered a privacy right.\textsuperscript{173} Because of the categorization of privacy rights and the recent familial context used by the United States Supreme Court to analyze decisional privacy, a theoretical categorization could follow by which the personal autonomy basis for privacy rights announced in earlier Minnesota cases is lost to decisional privacy right

\textsuperscript{168} 307 Minn. at 253, 239 N.W.2d at 908.
\textsuperscript{169} 307 Minn. at 257, 239 N.W.2d at 908.
\textsuperscript{170} Hardwick, 478 U.S. at 205 (Blackmun, J., dissenting) (quoting Paris Adult Theatres I v. Slaton, 413 U.S. 49, 63 (1973). "Only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'... It is precisely because the issue raised by this case \textit{[Hardwick] touches the heart of what makes individuals what they are} that we should be especially sensitive to the rights of those whose choices upset the majority." Id. at 211 (emphasis added).
\textsuperscript{171} Id. at 205. See generally sources cited supra note 80.
\textsuperscript{172} Id. at 203–04.
\textsuperscript{173} Minnesota State Bd. of Health v. City of Brainerd, 308 Minn. 24, 36, 241 N.W.2d 624, 631 (1976). "No right is held more sacred or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person..." Id. (quoting Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).
cases. 174

It is unclear how the precedent of Minnesota privacy cases will be used to define the scope of privacy guaranteed by the state constitution. Minnesota precedent should broaden the scope of protection from that afforded by the federal Constitution. 175 Conversely, categorization of earlier privacy cases according to the behavior involved could justify restricting the scope of Minnesota privacy protection despite the spirit of Minnesota precedent. Like the language in earlier United States Supreme Court decisions which indicated that the right to decisional privacy was protected in order to protect individual autonomy and dignity, the language in Minnesota cases which provides precedent for defining the scope of decisional privacy on a personal autonomy basis could be similarly deceptive.

The court analyzed the constitutional challenge in Price as one based on decisional privacy. 176 However, the court could distinguish Price as involving bodily integrity because it concerned nonconsensual medical treatment.177 In a later paternity suit, Minnesota ex rel. Kremin v. Graham, 178 the court addressed the right to privacy challenge as a challenge based on the right to bodily integrity. 179 The court's reason for not using Price when deciding Graham, rather than indicating that Price will not be restricted to categorization as a "bodily integrity" case, could be due to the fact that Price established standards for procedural due process which must be followed before

174. See infra note 179 and accompanying text.

175. The court in Price was careful to remark that the privacy right analysis was a newly emerging federal doctrine not yet clearly understood. 307 Minn. at 256, 239 N.W.2d at 910. Thus, the court has a choice between building on the analysis it developed in Price—individual autonomy as the “core” of privacy, or discounting it because Price was a decision too early in the development of federal doctrine which has subsequently been clarified by Hardwick as a right restricted to a familial context.

176. 307 Minn. at 258, 239 N.W.2d at 911. The court set forth its understanding of the federal privacy right as an “independent constitutional” right, denominated as such by Griswold v. Connecticut, 381 U.S. 479 (1965). 307 Minn. at 256, 239 N.W.2d at 910. “[T]he notion [is] that the Constitution reserves to the individual... certain fundamental decisions about how he or she will conduct his or her life.” 307 Minn. at 257, 239 N.W.2d at 910. The Price court further demonstrated its reliance on the concept of decisional privacy by stating: “The question in the case before us is whether the state, consistent with Dwight Price’s right of privacy, can assume the decision of whether Dwight, an involuntarily committed mental patient, will undergo psychiatric treatment.” Id. at 258, 239 N.W.2d at 911.

177. Because Price concerned an application of electroshock therapy, perhaps the lack of physical ingestion kept the court from using the bodily integrity language used in City of Brainerd and subsequent blood test cases. The expansive language of Price in which personal autonomy is said to be at the core of privacy rights could be restricted to bodily integrity cases. City of Brainerd, 308 Minn. at 35–36, 241 N.W.2d at 631 (quoting Price).

178. 318 N.W.2d 853 (Minn. 1982).

179. Graham, 318 N.W.2d at 855–56.
nonconsensual medical treatment may be administered by the state.\textsuperscript{180}

In \textit{Jarvis v. Levine},\textsuperscript{181} a 1988 privacy case with facts nearly identical to those in \textit{Price}, the court held that the procedures established in \textit{Price} apply to nonconsensual treatment with neuroleptic drugs.\textsuperscript{182} Rather than discussing the right to decisional privacy, \textit{Jarvis} restated the privacy right involved in \textit{Price} as the right to refuse medical treatment.\textsuperscript{183} Noting that the right to privacy exists under the Minnesota constitution as announced in \textit{Gray}, the \textit{Jarvis} court explained that "[t]he right begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent."\textsuperscript{184} The court further explained that although the constitutional right of privacy in Minnesota is relatively recent, the protection of bodily integrity is firmly rooted in common law.\textsuperscript{185} Hopefully, Minnesota courts will not categorize \textit{Price} and \textit{Jarvis} as privacy cases involving the right to bodily integrity or the right to refuse medical treatment. As the \textit{Jarvis} court described, denying an individual the right to refuse medical treatment deprives him or her of basic human dignity by denying an individual his or her personal autonomy.\textsuperscript{186} The court emphasized that "the final decision to accept or reject a proposed medical treatment and its attendant risks is ultimately not a medical decision, but a personal choice."\textsuperscript{187}

Clearly, Minnesota precedent indicates that decisional privacy protection is based on the protection of human dignity and individual autonomy. However, the lesson of \textit{Hardwick} is to avoid that assumption. Because constitutional privacy protection extends only to fundamental rights, and because the right to bodily integrity was identified in early common law, characterization of \textit{Price} as a bodily integrity case could sever it from the development of the scope of decisional privacy protection. The language in \textit{Price} which supports a personal autonomy basis for defining the scope of protection

\textsuperscript{180} Jarvis v. Levine, 418 N.W.2d 139, 144 (Minn. 1988).
\textsuperscript{181} Id. at 148.
\textsuperscript{182} Id. at 147.
\textsuperscript{183} Id. at 148. Although recognizing Minnesota's right to privacy as established in \textit{Gray} the court did not analyze the scope of privacy protection but instead focused on the procedural protection granted to involuntarily committed mental patients. \textit{Id.} at 148. Whether \textit{Price} and \textit{Jarvis} will be used in cases beyond the context of nonconsensual medical treatment remains to be seen. Hopefully, the court will maintain its understanding that personal autonomy exists at the core of privacy rights despite the \textit{Hardwick} restriction in the decisional privacy analysis, and also despite the restricted use of \textit{Price} in nonconsensual medical treatment cases.
\textsuperscript{184} Id. at 148
\textsuperscript{185} Id. at 148–49.
\textsuperscript{186} Id. at 148.
\textsuperscript{187} Id. (emphasis in the original).
would thereby be lost.\textsuperscript{188}

Beside the danger of over-categorization of privacy rights, the danger of state constitutional analysis mimicking that of federal constitutional analysis remains. As eloquent as the analysis in \textit{Price} is, if the court adopts a familial context approach to protecting individuals from undue governmental interference in personal decisions, constitutional protection would result only when the decision sought to be protected is one concerning family, marriage or procreation. The use of a familial context to define the scope of decisional privacy ignores the original notion that it is fundamental rights which are protected within the scope of decisional privacy.\textsuperscript{189} Once the decision sought to be protected is identified as one falling outside the context of family, marriage and procreation there is no need to determine whether the decision otherwise concerns a fundamental right. Family, marriage, and procreation thus become the limit, and the definition, of fundamental rights for decisional privacy analysis. Any other arena of behavior remains unprotected. A personal autonomy approach to privacy protection would return the focus to whether the decision sought to be protected is a decision which implicates the exercise of a fundamental right.

When applied to consensual sexual choices, the difference in the theoretic basis for decisional privacy is easily seen as outcome determinative. Although essential to procreation, sexuality is not procreation. Although essential to the creation of the traditional model of family, sexuality is not family. Although existing within the marriage union, sexuality is beyond marriage. Limiting decisions protected to those regarding procreation, family, and marriage led the \textit{Hardwick} Court to state that "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from State proscription is insupportable."\textsuperscript{190}

An individual autonomy basis for granting decisional privacy should protect decisions regarding private consensual sexual con-

\textsuperscript{188} Only fundamental rights are protected within the right to privacy under the Minnesota Constitution and the federal Constitution. 413 N.W.2d at 111. However, fundamental rights are to be discerned in federal privacy cases according to whether the behavior sought to be protected is deeply rooted in tradition or inherent in the concept of ordered liberty. \textit{Bowers v. Hardwick}, 478 U.S. 186, 191-92 (1986). Because the United States Supreme Court has stated it must be a decision regarding behaviors related to family, marriage or procreation, it is hard to distinguish between a fundamental right analysis and a determination of whether the behavior is within the scope of privacy protection. One hopes that the restrictive scope of federal privacy protection will not become a shorthand way of deciding whether a fundamental right is being asserted.

\textsuperscript{189} \textit{Jarvis}, 418 N.W.2d at 148.

duct because of the fundamental right to be left alone in spheres of decision making which are crucial to an individual’s life. Beside recognition of the nature of sexual intimacy as being fundamental to the life of an individual, constitutional text can be interpreted to protect sexual intimacy as expressive association,191 as conduct removed from inquiry under the privacy of home,192 as an integral part of the pursuit of happiness,193 and as prohibited establishment of religion.194

CONCLUSION

In the final analysis, sexual intimacy represents decision making regarding the possession and control of one’s own body; therefore, sexual intimacy is a part of one’s bodily integrity. However, private consensual sexual conduct is not the focus of this Comment. As a sphere of decision making which is intensely personal and one uncomfortable to some readers, it provides merely one concrete example of the importance of the theoretic base which is used in defining the scope of the constitutional right to privacy. The complex interaction of religion, law, and unexplored assumptions which dictate the opinions formed about the nature of the behavior in question will be the common denominator between Gray and future Minnesota decisional privacy cases involving other types of behavior.

As defined by the Hardwick court, the right of privacy is restricted to a trio of legally recognized fundamental rights of choice—those choices regarding procreation, family, and marriage. Minnesota courts need not follow the Hardwick approach. The type of choice being made should dictate not whether it is a protected choice, but to what extent the choice is protected from governmental interference. Rather than determining where the line between the state’s interest and the individual’s interest is drawn, the type of decision being made should determine whether the state’s interest must be rational, important, or compelling in order to justify its interference with the individual’s choice.

Moreover, limiting the scope of privacy rights based on the familial context of the decision, results in protection being granted only to those individuals who need to make choices regarding marriage, family, and procreation. Instead of protecting individual autonomy


194. Cf. Hardwick, 478 U.S. at 211 n.6 (Blackmun, J., dissenting) (origin of antisodomy statutes is patently theological and therefore enacting these statutes could be construed as establishment of religion).
from governmental intrusion, it is an individual's familial status which is protected. Although the sanctity of the family is a traditional value in our society, no less is the sanctity of individual liberty. Should Minnesota adopt individual autonomy as the primary reason for protecting an individual's decision about how to conduct his or her life free from governmental intrusion, more than family status would be protected. The Minnesota Constitution should be interpreted to protect the individual in a more generous fashion than that resulting from the familial context adopted by the United States Supreme Court.

Granted, an autonomy based privacy right is more difficult to apply. It calls for the use of complex analytical skills by jurists and lawyers, and provokes greater controversy over the decision made. Choosing the familial context approach of defining the universe of decisions entitled to constitutional protection avoids the hard work to be done in a society forced to make choices never anticipated. Current religion and law may inform an individual's decision making but provide lessening guidance on the use of increasingly complex medico-technological capabilities.

Perhaps more importantly, increasing understanding of human interdependence demands increasing the public interest with which private decisions are made. Privacy questions regarding drug testing in the work place, waste and pollution generation, and conservation of energy resources are unanswerable under the family context approach. The list of private decisions which affect public problems is growing. Any of them may end in a courtroom and present a challenge to the authority of a government to interfere with that choice.

Basing the right to decisional privacy on the familial context within which the choice is made creates an analysis which proves useless to deciding the privacy cases to come. The notion that personal autonomy is the basis for privacy protection as enunciated in *Price* should be retained for future cases involving decisional privacy.

*N. Nelson*