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NOTES


I. INTRODUCTION

Ronald Onofre admitted to committing acts of deviate sexual intercourse in his home with a seventeen-year-old male. Onofre was convicted in the County Court of Onondaga County, New York, of violating the state’s criminal statute prohibiting consensual sodomy.\(^1\) The decision was reversed by the appellate division, and the indictment against Onofre was dismissed on the grounds that the statute interfered with his constitutionally protected right of privacy and that it denied him equal protection of the law.\(^2\) The Onondaga County District Attorney appealed to the New York Court of Appeals, where *People v. Onofre*\(^3\) was argued.

This note examines the New York Court of Appeals decision in *Onofre*. Analysis focuses on the due process and equal protection arguments utilized by the court in its invalidation of the New York statute prohibiting consensual sodomy among unmarried adults in private, noncommercial settings.\(^4\)

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1. “A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.” *N.Y. Penal Law* § 130.38 (McKinney 1975). Deviate sexual intercourse is defined as “sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.” *Id.* § 130.00(2) (McKinney 1975).


4. This note deals with the right of privacy derived by the Supreme Court of the United States from the due process and equal protection clauses of the fourteenth amendment. *U.S. Const.* amend. XIV, § 1; 51 N.Y.2d at 485, 415 N.E.2d at 939, 434 N.Y.S.2d at 949. A right of privacy has been derived from other areas of the Constitution. *U.S. Const.* amends. I, III, IV, V, IX. A right of privacy has also been derived
Onofre is unique in a number of aspects. First, the case involved unmarried heterosexual and unmarried homosexual defendants. Thus, the opinion touched upon the fundamental right of privacy and the legislation of morality through issues which generally have been treated in separate discussions. Next, the majority has illuminated a plausible interpretation of various Supreme Court decisions, ignored by some jurisdictions, which extends the fundamental right of privacy to private, consensual sexual acts between unmarried adults. Finally, the majority and dissenting opinions reflect the deep philosophical differences underlying arguments for and against the extension of a fundamental right of privacy and arguments for and against judicial deference to legislative pronouncement of morality in the area of consensual sodomy.

from the penumbras of these amendments. See Griswold v. Connecticut, 381 U.S. 479, 485 (1965).


Scholarly articles that analyze sodomy statutes in terms of homosexual and heterosexual behavior do so in separate discussions and have not addressed or envisioned the situation in Onofre, where homosexual and heterosexual behavior were addressed within the same case. See, e.g., Wilkinson & White, Constitutional Protection for Personal Lifestyles, 62 CORNELL L. REV. 563 (1977); Comment, The Constitutionality of Sodomy Statutes, 45 FORDHAM L. REV. 553 (1976).

The area of homosexual rights is vast. Discussion in this note focuses on the homosexual's right to engage in private, consensual sodomitical acts without commercial aspects and without involvement of minors. (The statutory age of consent in New York is seventeen years). N.Y. PENAL LAW § 130.05(3)(a) (McKinney 1975). It is not unreasonable to assume that such sexual relations provide a foundation for homosexual relationships and that extension of sexual freedom to the homosexual could be viewed as legitimizing the existence of homosexuals and their behavior. See infra text accompanying notes 138-40. The concept of sexual privacy, however, is only one aspect of the law in the area of homosexuality. A court's invalidation of a consensual sodomy statute may well permit the homosexual to engage in acts of sodomy within the privacy of the home, yet such judicial action does not necessarily allow the homosexual to marry a member of the same sex, to teach in a public school, or to receive government benefits. See Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 628 (1980). Simply, there is a great deal more to human relationships than sexual activities. Invalidation or repeal of a consensual sodomy statute affects the sexual aspect of intimate homosexual and heterosexual relationships. See infra note 105 and accompanying text. For a discussion of the other aspects of intimate homosexual and heterosexual relationships, and the degree to which they are subject to government interference, see generally Karst, supra note 3.

6. For a discussion of Supreme Court language lending itself to this interpretation, see infra text accompanying notes 36, 41-46.

7. For a discussion of the moral values underlying the divergent majority and minority positions in Onofre, see infra text accompanying notes 104-41.
This case note examines each of these three areas and concludes that the Supreme Court of the United States must take a definitive stance on the issue of homosexuality before the law related to the rights of all unmarried individuals engaging in acts of private, consensual sodomy can be settled.

II. Onofre

A. Facts

Onofre was heard with two companion cases. Defendants Conde Peoples, III, and Philip Goss were convicted in Buffalo City Court of violating penal law section 130.38. A jury determined from the evidence that the two had engaged in an act of oral sodomy in an automobile parked on a street in the city of Buffalo during the early morning hours. This conviction was affirmed in the County Court of Erie County. The claim that the statute was unconstitutional because it infringed on the right of privacy and was a denial of equal protection of the laws was rejected.

Defendant Mary Sweat was convicted of the same crime after a jury trial in Buffalo City Court on proof that she had committed an act of oral sodomy with a male in a truck parked on a street in a residential area of the city during the early morning hours. Her appeal to the County Court of Erie County, based on a claim similar to that of defendants Peoples and Goss, was rejected.

The New York Court of Appeals granted permission to appeal in all three cases. They were argued together in Onofre and presented the common question of whether the provision of the New York Penal Code making consensual sodomy a crime infringed upon defendants' constitutionally protected rights. The court of appeals affirmed the reversal of Onofre's conviction and reversed the convictions of defendants Peoples, Goss, and Sweat. The majority con-
cluded that because the statute was broad enough to reach the noncommercial, secluded sexual conduct of consenting adults, it violated defendants' right of privacy\(^{16}\) and right to equal protection of the laws guaranteed by the United States Constitution.\(^{17}\)

The United States Supreme Court allowed *Onofre* to stand without comment.\(^{18}\) The Court denied a petition for writ of certiorari review on May 18, 1981.\(^{19}\)

**B. Analysis**

1. **Historical Origins of the Fundamental Right of Privacy**

The New York Court of Appeals held that section 130.38 of the New York Penal Code infringes on both homosexual and heterosexual...
ual defendants' fundamental right of privacy.20 This perhaps is the most controversial and far-reaching aspect of Onofre.21 The origins of this right to privacy are found in Griswold v. Connecticut,22 in which the Supreme Court held that a Connecticut statute prohibiting all persons from using contraceptives was unconstitutional because it violated the fundamental right of privacy inherent in the marriage relationship.23 The Court stated that any statute intruding on the marital right of privacy would be strictly scrutinized and would be sustained only in the absence of alternative means of achieving a compelling state interest.24

As a result of Griswold, many jurisdictions have ruled that criminal sanctions cannot be imposed on married couples for sodomitical

20. 51 N.Y.2d at 484-85, 415 N.E.2d at 938-39, 434 N.Y.S.2d at 948-49; see supra note 4. The existence of a fundamental right determines the court's standard of review under the due process and equal protection clauses. If a fundamental right is involved, strict scrutiny is utilized under both a due process and an equal protection review of the statute. It is said that “[w]hen an equal protection decision rests on this [fundamental right] basis, it may be little more than a substantive due process decision decked out in the trappings of equal protection.” Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, 72 Mich. L. Rev. 1613, 1624 (1974) (quoting Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1132 (1969); see infra text accompanying notes 107-08 for a discussion of substantive due process. Under due process analysis involving a fundamental right, a statute will be subject to strict scrutiny: it will be upheld only if it is a necessary means toward accomplishing a compelling state interest. Roe v. Wade, 410 U.S. 113, 155 (1973). Due process analysis is concerned with the relationship between the means and ends of the statute while under equal protection analysis, attention focuses on whether the statute disadvantages one group in comparison to another. Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1132 (1969). In adding the fundamental interest theory to equal protection analysis, “a classification might be found to be invalid even though it is not invidious and even though it is reasonably related to a legitimate public purpose.” Id. Under equal protection fundamental right analysis, a court will weigh the benefit of the state's interest against the harm resulting from the impairment of the personal interest. Id. “If the state's objective is not important enough to justify impairment of the individual's interest, the classification will fall. Here the focus is on the injustice created by unwarranted state interference with a fundamental interest at least as strongly as on the injustice engendered by inequality.” Id. It should be noted that the Onofre court did not address the “suspect classification” aspect of equal protection analysis, which involves scrutiny similar to fundamental rights analysis. See infra note 85.

Fundamental rights for due process purposes include at least those rights that are fundamental for equal protection purposes. Roe v. Wade, 410 U.S. 113, 152 (1973) (due process case citing equal protection cases holding that the right of privacy is fundamental). If there is no fundamental right involved, then the due process and equal protection analyses are separate inquiries at lesser levels of judicial scrutiny.

21. The Onofre majority actually decided the case on equal protection grounds. See supra note 16.
22. 381 U.S. 479 (1965).
23. Id. at 485-86.
24. Id. at 504.
sexual conduct. The current trend of case law indicates that anti-sodomy legislation no longer is applicable to married couples, regardless of whether the wording of the state statute has been changed to accord with Griswold.

Since Griswold, the Supreme Court has attempted to specify other areas of personal decisions in which the individual may choose a course of action without unjustified government interference, while also noting that "the outer limits of this aspect of privacy have not been marked by the Court . . ." The areas specified by the Supreme Court as within the sphere of protected private conduct are personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education, and abortion.

It is out of these delineated areas that the debate surfaces as to whether the right of personal privacy extends to all sexual activities between consenting adults, or whether the protected areas symbolize a narrower right of privacy that allows freedom to make personal decisions concerning the bearing of children. The divergent view-


34. The debate surfaces in recent cases. See Miller v. Rumsfeld, 647 F.2d 80 (9th Cir.) (Norris, J., dissenting), cert. denied, 102 S. Ct. 324 (1981) (commission of homosexual act is not an impermissible ground for selective service prosecution under Article 125 of the Uniform Code of Military Justice, 10 U.S.C. § 925 (1976)); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), reh'g en banc denied, 647 F.2d 80, cert. denied, 454 U.S. 855 (1981) (upholding constitutionality of Navy regulation providing for the discharge of
points can be traced to language in *Eisenstadt v. Baird.* Eisenstadt eliminated the distinction between married and unmarried couples in the area of contraception. This holding has been interpreted as extending the right of privacy to all sexual activities.

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals. 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.

A less expansive view of this language is that the right referred to in *Eisenstadt* is simply the freedom to make decisions related to the birth of a child. *Roe v. Wade* substantiated this narrow view. *Roe* held that the right of privacy is a liberty guaranteed by the fourteenth amendment concept of personal liberty, thus entitling an unmarried woman to terminate her pregnancy.

The *Onofre* majority adopted the more expansive interpretation of the language in *Eisenstadt.* The New York Court of Appeals construed the Supreme Court decision in *Roe* as an extension of the *Eisenstadt* definition of privacy. In combining the reasoning of the

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35. 405 U.S. 438 (1972). The Court in *Eisenstadt* held that because "the distribution of contraceptives to married persons cannot be prohibited, a ban on their distribution to unmarried persons would be equally impermissible." *Id* at 453.


37. 405 U.S. at 453 (emphasis in original).

38. *E.g., Neville v. State, 290 Md. 364, 374, 430 A.2d 570, 575 (1981); People v. Onofre, 51 N.Y.2d at 498, 415 A.2d at 946, 434 N.Y.S.2d at 957 (Gabrielli, J., dissenting); State v. Santos, 413 A.2d 58, 68 (R.I. 1980); see also Comment, *supra* note 5, at 574.


40. *Id* at 153. For another narrow construction of *Roe,* see State v. Santos, 413 A.2d 58, 68 (R.I. 1980).

41. 51 N.Y.2d at 488, 415 N.E.2d at 940, 434 N.Y.S.2d at 951.

42. *Id* at 486-87, 415 N.E.2d at 939, 434 N.Y.S.2d at 950.
two cases, *Onofre* defined privacy as the freedom to make choices about one's intimate affairs.\textsuperscript{43} Justice Gabrielli's dissent in *Onofre* acknowledged the fundamental right of privacy.\textsuperscript{44} In the spirit of the *Eisenstadt* language,\textsuperscript{45} however, he contended that only marital intimacy and procreative choice fall under such protection.\textsuperscript{46}

2. Due Process

The denial of certiorari by the Supreme Court\textsuperscript{47} limits the effect of the court's decision to the State of New York,\textsuperscript{48} where the fundamental right of privacy has been extended to an unmarried adult's

\textsuperscript{43} Wilkinson & White, *supra* note 5, at 590. Yet the Court in *Roe* did not summarily equate privacy with autonomy: "[I]t is not clear to us that the claim . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions." 410 U.S. at 154.

\textsuperscript{44} 51 N.Y.2d at 499, 415 N.E.2d at 946, 434 N.Y.S.2d at 957 (Gabrielli, J., dissenting).

\textsuperscript{45} See *supra* text accompanying note 37.

\textsuperscript{46} 51 N.Y.2d at 499, 415 N.E.2d at 947, 434 N.Y.S.2d at 957 (Gabrielli, J., dissenting).

\textsuperscript{47} 451 U.S. 987 (1981).

The sole significance of such a denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of sound judicial discretion . . . .

Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950) (Frankfurter, J., respecting the denial of the petition for writ of certiorari) (citation omitted).

\textsuperscript{48} The privacy discussion in *Onofre* serves as mandatory authority only in the State of New York, although *Onofre* has been noted in other jurisdictions. See Miller v. Rumsfeld, 647 F.2d 80, 84 (9th Cir.) (Norris, J., dissenting) (adopting the majority view in *Onofre* that private consensual homosexual activity is protected as an aspect of the fundamental right of privacy), cert. denied, 454 U.S. 855 (1981); Beller v. Middendorf, 632 F.2d 788, 809-10 (9th Cir. 1980) (noting the *Onofre* decision yet upholding the constitutionality of a Navy regulation providing for the discharge of those engaging in homosexual practices), reh'g en banc denied, 647 F.2d 80 (9th Cir.), cert. denied, 454 U.S. 855 (1981).

Neville v. State, 290 Md. 364, 430 A.2d 570 (1981), is particularly interesting as it appears to be directly contrary to *Onofre*. The *Neville* majority held that where each petitioner had engaged in intimate sexual activities during the daylight hours in a secluded place that was as accessible to uninvited persons as it was to petitioners, the Maryland pervaded practices statute was constitutionally applied. *Id.* at 381, 430 A.2d at 578. The majority found that MD. ANN. CODE art. 27, § 554 (1982), was not subject to an equal protection attack as married persons as well as unmarried persons could be prosecuted under the statute. *Id.* at 382, 430 A.2d at 579. The *Neville* dissent, however, adopted the view of the *Onofre* majority and found that the acts of petitioners were entitled to the constitutionally protected fundamental right of privacy. *Id.* at 391, 430 A.2d at 584 (Davidson, J., dissenting). Further, in a fashion similar to that of the *Onofre* majority, the *Neville* dissent also found that the state does not have a compelling interest in regulating private, consensual sexual activity among adults. *Id.* at 396, 430 A.2d at 586 (Davidson, J., dissenting).
personal decisions related to sexual activity within the seclusion of the home. Onofre is significant in that the majority revived an expansive view of the right of privacy that was ignored by the majority of a three-judge district court and by the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney.

Doe involved Virginia's sodomy statute. In Doe, a group of male homosexuals sued in federal district court for declaratory and injunctive relief. They argued that Virginia's sodomy statute was unconstitutional as applied to consensual homosexual acts performed in private by adult males. The Doe majority concluded that state legislation regulating personal conduct was constitutionally suspect only when it 'trestpass[ed] upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life.' The majority quoted dicta in a dissent from Poe v. Ullman, wherein Justice Harlan argued that private homosexuality could be criminally prosecuted. Doe acknowledged the right of sexual privacy only in the area of decisions related to home, marriage, and family: a view consistent with the traditional view of Griswold and the narrow interpretation of Eisenstadt. Doe serves as a reminder that although a right to private sexual activity may exist,

49. See supra note 20 for a discussion on the scope of due process analysis. Despite the fact that the New York Court of Appeals found that under due process section 130.38 violated constitutionally protected fundamental rights, the court's brief treatment of the settings of defendants' acts of sodomy evidenced the court's intent to rest its holding on equal protection grounds. See supra note 16, infra notes 84-104 and accompanying text.

50. 403 F. Supp. 1199 (E.D. Va. 1975) (three-judge ct.), aff'd mem., 425 U.S. 901 (1976). Onofre involved both homosexual and heterosexual behavior. Many federal courts have understood the holding in Doe to be that homosexual conduct does not enjoy special constitutional protection under the due process clause. Beller v. Middendorf, 632 F.2d 788, 809-10 (9th Cir. 1980) (citations omitted), reh'g en banc denied, 647 F.2d 80 (9th Cir.), cert. denied, 454 S. Ct. 855 (1981).

51. VA. CODE § 18.2-36 (1982). The statute states 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 . . . .

Id.

52. 403 F. Supp. at 1200.

53. Id.

54. Id. at 1201-02.


56. Id. More recently, however, at least one Justice has indicated that the constitutionally protected right to privacy may include private, consensual, sexual activities. "I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults." California v. LaRue, 409 U.S. 109, 132 n.10 (1972) (Marshall, J., dissenting).

57. See supra text accompanying notes 23-26, 38-40.
this right must be balanced against "countervailing state interests."58 The *Doe* majority did not acknowledge the possible extension of the fundamental right of privacy, evident in *Eisenstadt* and *Roe*,59 which supports the freedom of the individual to make decisions about intimate personal matters.

The extension of the fundamental right of privacy, ignored by *Doe*, was further evidenced in *Stanley v. Georgia*.60 *Stanley* is an important factor in *Onofre* because it expanded61 the scope of the fundamental right of privacy beyond notions of the family related or childbearing areas enumerated in *Roe*.62 *Stanley* established the home as a constitutionally protected zone of privacy, meaning one was permitted to view sexual materials defined as obscene by the community. This decision, in turn, allowed the *Onofre* majority to find that acts of sexual gratification within the home were constitutionally protected and that the consensual sodomy statute63 violated defendants' fundamental right of privacy.64

58. Wilkinson & White, supra note 5, at 599. This proposition is supported by the *Onofre* dissent. 51 N.Y.2d at 497, 415 N.E.2d at 945, 434 N.Y.S.2d at 956 (Gabrielli, J., dissenting).

59. See supra text accompanying notes 36, 43.

60. 394 U.S. 557 (1969) (upholding the right of an adult to possess and to view obscene materials in the privacy of the home).

The *Onofre* dissent read *Stanley* to suggest that petitioner was protected only because he exercised a constitutional right to receive information and ideas. 51 N.Y.2d at 501 n.2, 415 N.E.2d at 948 n.2, 434 N.Y.S.2d at 958-59 n.2 (Gabrielli, J., dissenting). This view is also the majority view in *Neville v. State*, 290 Md. 364, 374-75, 430 A.2d 570, 575 (1981). See supra note 48.

Yet the *Onofre* majority's emphasis on the special nature of the home suggested that it was at least as much the setting as the nature of the activity that prompted the protection. Wilkinson & White, supra note 5, at 586 n.119. This view prevailed in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), in which the Supreme Court stated that "the 'privacy of the home' . . . was hardly more than a reaffirmation that 'a man's home is his castle.'" Id. at 66 (interpreting *Stanley v. Georgia*, 394 U.S. at 564).

Thus, *Stanley* can be interpreted to stand for the proposition that the constitutionally protected right to privacy includes intimacies occurring in private that are associated with personal relationships. *Neville v. State*, 290 Md. 364, 390, 430 A.2d 570, 584 (1981) (Davidson, J., dissenting). This view is in accord with the *Onofre* majority. *But see Beller v. Middendorf*, 632 F.2d 788, 809 (9th Cir. 1980) (listing of federal cases holding that homosexual activities are not constitutionally protected), reh'g en banc denied, 647 F.2d 80 (9th Cir.), cert. denied, 454 U.S. 855 (1981).

61. See supra text accompanying notes 36, 43.

62. 410 U.S. at 153.

63. N.Y. PENAL LAW § 130.38 (McKinney 1975).

64. This apparently assumes that there is, indeed, a fundamental right of privacy that stems from the due process and equal protection clauses of the fourteenth amendment. Inherent in the *Onofre* majority's discussion of the right of privacy is the assumption that Supreme Court cases, including *Griswold*, *Eisenstadt*, and *Roe*, are proper interpretations of the "open-ended" due process and equal protection clauses of the four-
At least one authority believes that the majority in Doe “as-
teneth amendment. See J. ELY, DEMOCRACY AND DISTRUST 181 (1980) (acknowledging that constitutional provisions are “open-ended”). But cf, Berger, Ely’s “Theory of Judicial Review,” 42 OHIO ST. L.J. 87, 120-21 (1981) (Berger claims that “[i]t is . . . sheer fantasy to maintain that the founders employed ‘open-ended’ terms in order to empower judges to overrule the legislature or rewrite the Constitution by invoking values derived outside the Constitution”). Id. at 121. The Onofre dissent also assumes that the fundamental right of privacy exists, although in a more limited sense. See supra notes 37-40 and accompanying text.

This case note deals specifically with the choice between the Onofre majority and dissenting theories regarding the right of privacy. This debate is also revealed in the contrast between the Onofre and Doe majorities. It must be acknowledged, however, that other constitutional questions concerning the fourteenth amendment’s fundamental right of privacy exist. One question inquires as to the nature of judicial adjudication; the second question asks, assuming that the fundamental right of privacy is the business of the courts, whether such a right be properly interpreted from the Constitution.

Debate on the first question centers on whether Supreme Court cases prior to Onofre, proclaiming that a fundamental right of privacy can be derived from the fourteenth amendment, e.g., Griswold v. Connecticut, 381 U.S. at 481; Eisenstadt v. Baird, 405 U.S. at 443; and Roe v. Wade, 410 U.S. at 164, are examples of proper judicial adjudication. What constitutes proper adjudication, however, varies according to the particular doctrine of constitutional theory that is utilized. See generally Symposium: Judicial Review Versus Democracy, 42 OHIO ST. L.J. 1 (1981).

American constitutional theory has been marked by an ongoing effort to reconcile two fundamental propositions about constitutional law, legislation, and the judiciary in American society. The first proposition . . . the justification principle, asserts that there are occasions when judicial displacement of legislative decisions—judicial review—is justified. The second proposition is that judges cannot justifiably do whatever they want, but must respect some constraints on their behavior as judges . . . the restraint principle. Constitutional theory attempts to specify the constraints that judges must respect by deriving them from the Constitution and the nature of democracy. It seeks to constrain judges both directly, by the moral force it exerts on their work, and indirectly, by providing an agreed-upon standard against which their work can be measured.


Tushnet’s article is a critique of Ely’s, Democracy and Distrust, which proposes that judicial review under the Constitution’s open-ended provisions be restricted to questions of participation as opposed to questions dealing with the substantive merits of the political choice under attack. J. ELY, supra, at 181. This representation-reinforcing theory of judicial review is an example of what Tushnet refers to as the restraint principle. Tushnet, supra, at 1037. The popular characterization of the representation theory by the Supreme Court was written by Justice Stone in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1063 (1980). For another major representation-reinforcing theory, see J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) (Supreme Court should not review federalism disputes between the states and the national government; nor should it review separation of power disputes between Congress and the executive branch).

Although the Choper and Ely theories differ, both share the common ground that constitutional theory “should focus on function and process, in particular, on the broad
concern whether nonjudicial institutions fairly represent diverse interests and, in those cases in which they do not, on the special role of judicial review in securing that representation.” Richards, Moral Philosophy and the Search for Fundamental Values in Constitutional Law, 42 OHIO ST. L.J. 319, 319 (1981). Proponents of this theory would, as a result, find that the right of privacy derived by the Supreme Court from the fourteenth amendment is improper judicial adjudication, as the Court must avoid “controversial judgments about substantive issues left open by the Constitution’s text and history, and [instead safeguard] the representative character of the political process.” Tribe, supra, at 1063.

Tribe, however, in the spirit of Tushnet’s justification principle, see Tushnet, supra at 1037, contends that the representation-reinforcing theory of Ely “by itself determines almost nothing unless its presuppositions are specified, and its content supplemented by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.” Tribe, supra, at 1064. Paul Brest is of a similar opinion and questions Ely’s proposition in Democracy and Distrust “that courts are more competent to engage in representation-reinforcing judicial review, . . . than in fundamental values, which he [Ely] scorns.” Brest, The Substance of Process, 42 OHIO ST. L.J. 131, 131 (1981) (emphasis in original). Brest believes that “instances of representation-reinforcing demand value judgments not different in kind or scope from the fundamental values sort.” Id.

While Tribe and Brest embrace a theory of judicial adjudication that seems to embrace substantive rights and values similar to the right of privacy that has evolved from the fourteenth amendment and is now at issue in Onofre, a question remains as to the proper interpretation of those substantive rights and values from the Constitution. Assuming that the theory of judicial adjudication includes substantive values, the issue is simply how the Constitution should be interpreted. The opposing theories are “interpretivism” and “noninterpretivism,” each reflecting, respectively, the “longstanding debate that pervades all of law, that between ‘positivism’ and ‘natural law.’ ” J. ELY, supra, at 1. Ely sees noninterpretivism as the view “that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.” Id. Interpretivism is seen as “the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.” Id.

Paul Brest, although agreeing that the terms represent basically the same concept, describes the contending theories as “originalism” (which can be divided into the subcategories “strict originalism” and “moderate originalism”) and “nonoriginalism.” Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. REV. 204, 204-05 (1980). Professor Brest explains the reasons for his differing terminology:

Virtually all modes of constitutional decisionmaking, including those endorsed by Professor Ely, require interpretation. The differences lie in what is being interpreted, and I use the term ‘originalism’ to describe the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values.

Id. at 204 n.1. According to originalism, then, it is possible to adopt a theory of judicial adjudication that embraces substantive rights and values which at the same time disavows existence of a fundamental right of privacy derived from the due process and equal protection clauses of the fourteenth amendment. See R. BERGER, GOVERNMENT BY JUDICIARY 166-220 (1977). Berger contends that

[t]he Court, it is safe to say, has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design [of the fourteenth amendment]: to leave suffrage, segregation, and other matters to State governance. It has done this under [the] cover of the so-called ‘majestic generalities’ of the Amendment—‘due process’ and ‘equal protection’—which it found ‘conve-
sumed away” an important, emerging constitutional question.\(^65\) This question is whether, after \textit{Eisenstadt}, \textit{Roe}, and \textit{Stanley}, there exists a fundamental right to engage in private sexual practices outside of the traditional marital and childbearing context.\(^66\) The \textit{Onofre} majority addressed this question and answered it affirmatively.\(^67\) The court of appeals, relying on \textit{Eisenstadt}, \textit{Roe}, and \textit{Stanley}, adopted a trend in Supreme Court opinions protecting an individual’s right to make decisions concerning indulgence in private acts of sexual intimacy and an individual’s right to satisfy sexual

\textit{Id.} at 408. This view is to be contrasted with that of a nonoriginalist, David A.J. Richards, who argues that an examination of moral and philosophical theory can clarify the fourteenth amendment’s right of privacy. Richards, \textit{Unnatural Acts and the Constitutional Right of Privacy: A Moral Theory}, 45 \textit{Fordham L. Rev.} 1281, 1282-87 (1977).

In sum, the questions related to constitutional theory, i.e., the role of the judiciary in adjudicating constitutional issues and the nature of constitutional interpretation, reveal that the conflict between the majority and dissent in \textit{Onofre} is only one aspect of the multi-faceted debate related to the fundamental right of privacy. The preceding discussion reveals that there is not only a controversy as to which view of the right is correct, exemplified by the debate in \textit{Onofre}, but also a debate as to whether such a right exists, and if it does, a debate as to whether the courts are the appropriate forum for the application or rejection of the fundamental right of privacy.

\^65. \textit{See Wilkinson \& White, supra} note 5, at 592.

\^66. \textit{Id.}.

\^67. 51 N.Y.2d at 486, 415 N.E.2d at 939, 434 N.Y.S.2d at 950. The precedential significance of the summary affirmance of \textit{Doe} by the Supreme Court is limited, inasmuch as the Court gave no reasoning to explain exactly what it was affirming. “It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action.” Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500 (1981) (citing \textit{Washington v. Confederated Bands and Tribes}, 439 U.S. 463, 477 n.20 (1979)). It should be noted that the lower court's decision does not necessarily represent the reasoning of the Supreme Court. \textit{See Mandel v. Bradley}, 432 U.S. 173, 176 (1977); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975).

The \textit{Onofre} dissent viewed the \textit{Doe} affirmance as maintaining the state's right to intervene in decisions involving pure sexual gratification. 51 N.Y.2d at 503, 415 N.E.2d at 949, 434 N.Y.S.2d at 960 (Gabrielli, J., dissenting). The \textit{Onofre} majority, however, suggested that the disposition of the district court in \textit{Doe} included no statement regarding the constitutionality of the statute and merely denied the relief requested and dismissed the complaint. \textit{Id.} at 493, 415 N.E.2d at 943, 434 N.Y.S.2d at 954.

In \textit{Doe} there was lacking any evidence of threatened prosecution... under the Virginia statute—a factor arguably relevant to their standing to maintain the action. . . . Thus, the affirmance by the Supreme Court of the District Court's dismissal of the action may have been predicated on a lack of standing on the part of the plaintiffs.

\textit{Id.} (citation omitted). This argument has not been accepted by jurisdictions that have relied on \textit{Doe}. \textit{See supra} note 51 and accompanying text. Hence, \textit{Doe} establishes “the proposition that state efforts to prohibit private, consensual homosexual conduct are constitutionally permissible, despite \textit{Stanley v. Georgia}, \textit{Eisenstadt}, and \textit{Roe}.” Wilkinson \& White, \textit{supra} note 5, at 593.
desires through the use of material condemned as obscene by common standards. The court of appeals labeled these rights "fundamental"; such a conclusion necessarily dictated that the statute be upheld only if it was the sole means available to accomplish a compelling state purpose.

In subjecting the statute to strict scrutiny, a new debate arises. Assuming that the right to indulge in acts of private, consensual sodomy is encompassed by a constitutionally protected fundamental right, the state must assert a compelling interest in prohibiting consensual sodomy between unmarried consenting adults in noncommercial settings, absent elements of force and involvement of minors. Yet the Onofre majority found that the state was unable to provide even a rational basis to justify its regulation of consensual sodomy. The prosecution did not present any evidence that section 130.38 prevented physical harm to unmarried adults who engaged in private, consensual acts of sodomy, or that any such harm was envisioned by the state legislature when the state's penal law was adopted. The majority further contended that there was no showing by the state that interference in matters of intimate sexual behavior out of the public view would serve to advance the cause of public morality. Nor did the prosecution reveal that section 130.38 pro-

68. 51 N.Y.2d at 487-88, 415 N.E.2d at 940, 434 N.Y.S.2d at 950-51. The court of appeals expressed no view as to any theological, moral, or psychological evaluation of consensual sodomy, nor was it unaware of the sensibilities of those who believe that consensual sodomy is evil and should be unpunished. The court, however, saw the issue in Onofre as whether the federal Constitution permits recourse to sanctions of criminal law for the achievement of that objective. Id. at 488 n.3, 415 N.E.2d at 940 n.3, 434 N.Y.S.2d at 951 n.3.

69. 51 N.Y.2d at 486, 415 N.E.2d at 939, 434 N.Y.S.2d at 950.

70. Id.; see Roe, 410 U.S. 113. This is another way of stating that the court must use strict scrutiny in its review of the statute. See supra note 20.

71. 51 N.Y.2d at 488, 415 N.E.2d at 940, 434 N.Y.S.2d at 951. Under its equal protection analysis, the court noted that infringement upon defendants' fundamental right of privacy would require that the statutory classification be necessary to the accomplishment of a compelling state interest. Id. at 492 n.6, 415 N.E.2d at 942 n.6, 434 N.Y.S.2d at 953 n.6. The court went on to state, however, that because the statute failed to satisfy the lenient rational basis standard, there existed no need to measure the statute by the strict scrutiny standard.

The court's inability to find a rational basis for the statute under equal protection analysis suggests that the aforementioned logic is applicable to the due process portion of the Onofre opinion. See infra note 93 and accompanying text. There is an argument, however, that in refusing to defer to the legislative judgment under due process analysis, the court actually was utilizing a form of heightened scrutiny. See infra text accompanying notes 93-104.

72. Id. at 491, 415 N.E.2d at 941, 434 N.Y.S.2d at 952.

73. Id. at 489, 415 N.E.2d at 942, 434 N.Y.S.2d at 951.

74. Id. at 489-90, 415 N.E.2d at 941-42, 434 N.Y.S.2d at 951-52.
tected the institution of marriage, inasmuch as it was not suggested that sodomy served as a substitute for marriage; or that empirical data existed to indicate that marriage served as a refuge for those deprived of the option of consensual sodomy outside of the marital bond. The court distinguished Onofre from another court of appeals case, People v. Shepard. In Shepard, the court of appeals held constitutional a statutory proscription of the use of marihuana in the home where there was found to be a legitimate controversy, over credible evidence, as to whether marihuana could be considered a dangerous substance. This finding justified the state legislature's right to conclude that marihuana was a dangerous substance and, accordingly, to impose a criminal proscription. In Onofre, however, the majority concluded that there was no evidence that the practice of consensual sodomy was harmful either to the participants or to society in general and found that the only argument made against the statute was an appeal to the historical, conventional characterization of sodomy.

The Onofre majority, utilizing due process analysis, found that the right of an adult to engage in private, consensual acts of sodomy was encompassed by the constitutionally protected fundamental right of privacy. The court reasoned that simply because it would be constitutionally permissible for the legislature to enter the privacy of a person's home to regulate conduct arguably harmful to that person, the legislature was not entitled to invade this privacy in an effort to regulate individual conduct where there was no evidence that the

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75. Id. at 490, 415 N.E.2d at 941, 434 N.Y.S.2d at 952.
77. Defendant Shepard was convicted of criminal possession of a controlled substance in the seventh degree. N.Y. PENAL LAW § 220.03 (McKinney 1980). Defendant was in possession of nine marihuana plants. 50 N.Y.2d at 643, 409 N.E.2d at 841, 431 N.Y.S.2d at 364. These plants contained an aggregate weight of less than nine-tenths of one ounce of marihuana. Id. at 649, 409 N.E.2d at 845, 431 N.Y.S.2d at 368 (Fuchsberg, J., dissenting). This concentrated form of marihuana, see N.Y. PENAL LAW § 220.00(5) (McKinney 1980), was not encompassed by the Marihuana Reform Act of 1977. 1977 N.Y. LAWS, ch. 360 (codified at N.Y. PENAL LAW §§ 221.00-.55 (McKinney 1980)); but see 50 N.Y.2d at 649, 409 N.E.2d at 845, 431 N.Y.S.2d at 368 (Fuchsberg, J., dissenting).
78. 50 N.Y.2d at 649, 409 N.E.2d at 845, 431 N.Y.S.2d at 368.
79. 51 N.Y.2d at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 952-53.

[It is apparent that western civilization has through the centuries abhorred [sic] sodomy, fellatio and cunnilingus. See Genesis 19:1-29; Deuteronomy 23:17, Leviticus 18:22-23, 20:16. As early as 1533 in the reign of Henry VIII, England enacted statutes prohibiting sodomy which became a part of American common law at the time of the American revolution.]

activity is harmful. The statute could not be justified as a valid exercise of police power authorized for the preservation of morality, as "[n]o substantial prospect of harm from consensual sodomy nor any threat to public—as opposed to private—morality has been shown." This view reflects a minority view of jurisdictions in the United States.

3. Equal Protection

The New York Court of Appeals also invalidated section 130.38 on the ground that it denied defendants equal protection of the law. Section 130.38 discriminates on its face against unmarried persons because it prohibits them from engaging in an activity which results in no sanctions against married persons. As a result of this unequal treatment, the court looked to whether, at a minimum, there was "some ground of difference that rationally explain[ed] the different treatment accorded married and unmarried persons . . ." under.

80. 51 N.Y.2d at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.
81. Id. at 492, 415 N.E.2d at 943, 434 N.Y.S.2d at 953.

83. The equal protection attack was not made in Doe v. Commonwealth’s Attorney, hence, the equal protection attack on consensual sodomy statutes has yet to be ruled on by the Supreme Court. See, Comment, supra note 5, at 586.
84. 51 N.Y.2d at 492, 415 N.E.2d at 943, 434 N.Y.S.2d at 953.
It was upon equal protection analysis that the court of appeals rested its holding. Although the court decided that the state demonstrated no compelling interest sufficient to justify the infringement of a fundamental right under due process, it left this holding open to question and invalidated the statute through equal protection arguments in a manner similar to the Supreme Court's holding in *Eisenstadt*. 86

If we are correct in the view earlier expressed in this opinion that section 130.38 of the Penal Law infringes on defendants' right of privacy which is a fundamental right, then, as observed in *Eisenstadt*, the statutory classification "would have to be not merely *rationally related* to a valid public purpose but necessary to the achievement of a *compelling* state interest". . . . As was so in *Eisenstadt*, however, we do not need to measure the statute by that test inasmuch as it fails to satisfy even the more lenient rational basis standard. 87

The court of appeals found that there was no evidence showing that the classification created by section 130.38 achieved state goals or was related to any articulated state justification. Section 130.38 did not protect the institution of marriage or rights accorded married persons. 88 The statute was not shown to preserve or foster marriage. 89 No evidence was advanced to reveal that consensual sodomy relates to rights accorded married persons. 90 As a result, the court concluded that there was no rational basis for permitting married persons to engage in sodomitical behavior while forbidding unmarried persons to do the same. 91 This conclusion echoed an earlier rationale that "all [of] the arguments that have ever pertained to the prohibition of 'deviate' forms of intercourse . . . have pertained irre-
spective of the marital status of the participants."

The Onofre majority stated that it utilized minimum scrutiny to examine the explanation for the different treatment accorded married and unmarried persons. The court of appeals, however, actually used a form of heightened scrutiny in its analysis of section 130.38. True minimum scrutiny would mean that the court automatically should defer to a judgment of the legislature, as did the Supreme Court in applying the minimum scrutiny standard of review to economic and social regulations. Yet the court analogized its rationale to that used by the Supreme Court in Eisenstadt and was unwilling to defer to the legislative judgment.

Eisenstadt indicated that the Supreme Court would be hesitant to increase the number of fundamental rights and suspect classes in the area of personal liberties and, hence, the Court utilized an intermediate level of scrutiny in an effort to look closely at the reasonableness of the connection between the classification and the purpose of the statute.

92. People v. Johnson, 77 Misc. 2d 889, 891, 355 N.Y.S.2d 266, 267 (Buffalo City Ct. 1974) (there is no logical or factual reason for permitting the marital status of participants to determine whether the mode of sexual conduct is legal or criminal), vacated, 97 Misc. 2d 905, 412 N.Y.S.2d 721 (Erie County Ct. 1975).

93. See supra text accompanying note 85.


A student note contends that while Gunther’s model, which includes an alternative to the traditional two tiers of the equal protection test, may offer greater protection for private consensual sodomy, later Supreme Court cases do not support the intermediate scrutiny model, most notably Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Note, supra note 20, at 1627 n.108.

More recent cases suggest, however, that Gunther’s model has taken a firm hold in the Ninth Circuit, which has interpreted recent Supreme Court decisions as favoring the utilization of an intermediate scrutiny standard of review. Hatheway v. Secretary of Army, 641 F.2d 1376 (9th Cir.), cert. denied, 102 S. Ct. 324 (1981); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), rehe’g en banc denied, 647 F.2d 80 (9th Cir.), cert. denied, 454 U.S. 855 (1981).

Recent decisions indicate that substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual in-
As in Eisenstadt, the Onofre majority refused simply to defer to the legislative judgment. Unlike Eisenstadt, however, the Onofre majority found it unnecessary to hypothesize a rational state purpose,\(^{97}\) as one already existed: the upholding of public morality.\(^{98}\) The court of appeals held:

[The prosecution] failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.\(^{99}\)

Thus, even if it were assumed that the objectives tendered by the prosecution\(^{100}\) were matters of legitimate public concern, no rational relationship was evidenced between upholding public morality and

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\(^{97}\) The Supreme Court in Eisenstadt determined for itself the legislative purposes and then concluded that the statutory means were not related to the legislative purposes. The three possible purposes of the statute prohibiting the distribution of contraceptives were deterrence of premarital sex, protection of community health through regulation of harmful articles, and limitation of the use of contraceptives. 405 U.S. at 442-43. The Court found these purposes either marginally or completely unrelated to the distinction between married and unmarried persons. \textit{Id.} at 445-49.

\(^{98}\) That the enactment of section 130.38 of the Penal Law was prompted by something other than fear for the physical safety of participants in consensual sodomy is suggested by . . . the chairman of the Temporary Commission [on Revision of the Penal Law and Criminal Code]: 'It would appear that the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premises that deletion thereof might ostensibly be construed as legislative approval of deviate conduct.'

\(^{99}\) Id. at 490, 415 N.E.2d at 941, 434 N.Y.S.2d at 951 (citation omitted).

\(^{100}\) See supra text accompanying notes 88-91.
the classifications created by section 130.38. As a result, the statute fell as it violated the right of equal protection purportedly enjoyed by persons who are unmarried.\footnote{51 N.Y.2d at 492, 415 N.E.2d at 942-43, 434 N.Y.S.2d at 953.} An argument can be made that if the court of appeals were to have used a true minimum scrutiny standard of review,\footnote{See supra text accompanying note 94.} the statute prohibiting unmarried individuals' private, consensual sodomitical activities should have been upheld.\footnote{See supra text accompanying note 94.} Such an argument can be made as there is at least slight merit to the legislature's contention that proscription of consensual sodomy among unmarried adults will help to uphold public morality.\footnote{See infra notes 138-40 and accompanying text.} At this point, the question becomes whether the regulation of morality is a matter for legitimate legislative concern.

III. Questions of Morality

Regardless of the type of analysis, be it due process or equal protection, and regardless of the level of scrutiny, be it strict, intermediate, or minimum, the Onofre majority believed that unmarried, consenting adults in private settings should not be subject to criminal sanctions for acts of sodomy.\footnote{The Court of Appeals expressed no view, however, as to any theological, moral, or psychological evaluation of consensual sodomy, nor was it unaware of the sensibilities of those who believe that consensual sodomy is evil and should be prohibited. 51 N.Y.2d at 488 n.3, 415 N.E.2d at 940 n.3, 434 N.Y.S.2d at 951 n.3.} The ultimate question posed by Onofre is whether a state may regulate consensual sodomy purely for the purpose of safeguarding the moral interest of its citizens and to what extent a legislature or court may choose and enforce a moral viewpoint.\footnote{The Supreme Court has ruled that the interstate commerce power may be used to defeat purposes that are deemed to be immoral. E.g., United States v. Orito, 413 U.S. 139 (1973) (transportation of obscene material for private use). See also, Comment, supra note 5, at 580.}

Justice Gabrielli argued in Onofre that the majority's reasoning was similar to the discredited doctrine of substantive economic due process.\footnote{See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).} His dissent claimed that the majority used its own notions of justice to override a penal statute enacted by the legislature as an expression of society's view as to what constitutes morally ac-
ceptable behavior. Therefore, the controversial issue that re-

mained was the nature of morally acceptable behavior. Although Justice Gabrielli accused the Onofre majority of implementing its own notions of morality, his traditional view of morality, also based on an interpretation of Supreme Court decisions, is open to the same attack. The Supreme Court, in determinations of funda-

mental rights and suspect classes, has drawn the criticism that it engages in substantive due process analysis. Doe v. Commonwealth’s Attorney represents this criticism.

We cannot know whether the Court believed no privacy right ex-

isted at all, or whether one existed but was far outweighed by some government interest. But we can certainly wonder what distin-

guishes a heterosexual’s privacy interest in marriage, procrea-

tion, contraception, abortion, and child-rearing—all protected by the Constitution—from a homosexual’s privacy interest in having sexual relations.

Perhaps all that we know about Doe is that it symbolizes judicial recognition of government regulation of private, consensual sexual conduct, a view purported by the Onofre dissent. While Justice Gabrielli contended that this view is of greater intrinsic merit than the majority’s notions of morality, he did not articulate why the Doe view is of greater validity than the view of the Onofre majority.

One critic of Doe contends that the Supreme Court “may have summarily limited the right of privacy in a way that suggests fiat, not articulated principle.” This fiat, the view that homosexual con-

duct is not constitutionally protected, is justified by proponents who reason that condemnation of certain sexual practices can be traced to portions of the Bible. Yet portions of the Bible indicating that

108. 51 N.Y.2d at 497, 415 N.E.2d at 945, 434 N.Y.S.2d at 956 (Gabrielli, J., dissenting).
111. Bazelon, supra note 110, at 616.
113. Bazelon, supra note 110, at 616.
114. Id.
115. Wilkinson & White, supra note 5, at 599.
116. Richards, Unnatural Acts and the Constitutional Right of Privacy: A Moral Theory, 45 FORDHAM L. REV. 1281, 1286 (1977). Richards’ article discusses whether the Supreme Court's view is fundamentally consistent with the moral theory underlying the right to privacy. Id. at 1286-1321. See supra note 64.
117. See supra note 79 and accompanying text.
homosexual practices must be equated with lack of good moral character, "like many other parts of the Holy Book, require interpretation and . . . even eminent theologians have not construed them as condemning all homosexuality."\textsuperscript{118}

The dissent in \textit{Onofre} maintained the view, however, that sodomitical practices between consenting unmarried adults could be proscribed and that the state could regulate moral behavior. Justice Gabrielli accused the majority of extending \textit{Stanley} to represent the proposition that one is entitled to do anything in one's home as long as it does not result in harm or jeopardize the well-being of others.\textsuperscript{119} The dissent reasoned that the holding in \textit{Shepard}\textsuperscript{120} should be dispositive of the issue in \textit{Onofre}: "I cannot agree . . . that the right of an individual to select his own form of sexual gratification should stand on any better footing than does the right of an individual to choose his own brand of intoxicant without governmental interference."\textsuperscript{121}

The divergence of opinions in \textit{Onofre} reflected the debate of Lord Devlin\textsuperscript{122} and H.L.A. Hart\textsuperscript{123} that stemmed from the \textit{Wolfenden Report}.\textsuperscript{124} Devlin believed that society has a general right to substitute its moral judgment for that of the individual, even at the expense of personal liberty.\textsuperscript{125} Devlin opposed the \textit{Wolfenden Report}, urging that "the suppression of vice is the law's business because a violation of the society's moral structure undermines the very basis

\textsuperscript{118}. \textit{In re} Labady, 326 F. Supp. 924, 930 (S.D.N.Y. 1971) (petition for naturalization granted to homosexual).

\textsuperscript{119}. Wilkinson & White, supra note 5, at 586. Gabrielli acknowledged that the legislature may not exercise power in a manner that would impair a fundamental right, yet he argued that "it begs the question to suggest, as the majority has, that such a right is necessarily involved whenever the State seeks to regulate conduct pursuant only to its interest in the moral well-being of its citizenry." 51 N.Y.2d at 497, 415 N.E.2d at 945, 434 N.Y.S.2d at 956 (Gabrielli, J., dissenting).

\textsuperscript{120}. 50 N.Y.2d at 640, 409 N.E.2d at 840, 431 N.Y.S.2d at 363. \textit{See supra} notes 76-77 and accompanying text.

\textsuperscript{121}. 51 N.Y.2d at 497-98, 415 N.E.2d at 946, 434 N.Y.S.2d at 956 (Gabrielli, J., dissenting).

\textsuperscript{122}. \textit{See generally} P. \textsc{Devin}, \textsc{Lord Devlin and the Enforcement of Morals} (1965).

\textsuperscript{123}. \textit{See generally} H.L.A. \textsc{Hart}, \textsc{Law, Liberty and Morality} (1963).

\textsuperscript{124}. \textit{Report of the Comm. On Homosexual Offenses and Prostitution, The Wolfenden Report} (1963). The report proposed the decriminalization of homosexuality, as the function of criminal law "is to preserve public order and decency." \textit{The Wolfenden Report}, supra, at 23. The report maintained that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality." \textit{Id.} at 48.

\textsuperscript{125}. \textit{See} Dworkin, \textsc{Lord Devlin and the Enforcement of Morals}, 75 \textsc{Yale L.J.} 986, 987 (1966).
of that society.”

Hart, in contrast, supported the Wolfenden Report, finding it “difficult to understand the assertion that conformity . . . is a value worth pursuing . . .” and he “accepted the regulation of private conduct only so far as necessary to prevent harm to others.”

The Onofre majority, like Hart, advocated personal autonomy, while the dissent, in the spirit of Devlin, held that society’s view of morality is the view with which the individual must abide. Doe also revealed this split in philosophical thought. Although the Doe majority found that homosexual behavior was not constitutionally protected, the dissent argued that every individual has the right to be free from unwarranted government intrusion into one’s decisions related to private matters of intimate concern. A number of recent cases also reflect this debate. Although they vary in their fact patterns, each case addressed the question of whether an individual has a fundamental right of privacy with respect to private, consensual acts of sodomy. The debate spurred by Devlin and Hart continues, perhaps best reflected by the contrast between Onofre and Doe.

Delineation and illumination of the differing viewpoints, however, does not resolve the question of which viewpoint is correct; nor does it provide an answer to the question of how such a viewpoint might be applied.

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127. H.L.A. HART, supra note 123, at 57.
128. Note, supra note 126, at 577.
129. Post Griswold cases cause one to speculate as to whether the courts’ refusal to extend constitutional privacy protection to nonmarried persons really stems from perceptions of rational basis or compelling state interests, or whether the refusal actually stems from perceptions of moral propriety. Eichbaum, Lovisi v. Slayton: Constitutional Privacy and Sexual Expression, 10 COLUM. HUMAN RIGHTS L. REV. 525, 533 (1978-79).
130. 403 F. Supp. at 1203 (Merhige, J., dissenting).
132. See supra notes 34, 48 for an explanation of the respective fact patterns.
133. Id.
134. The Onofre majority, willing to extend a fundamental right to private consensual acts of sodomy, and unwilling to defer to a legislative goal of upholding the public morality, claimed that it was “not plowing new grounds” in the area. 51 N.Y.2d at 492, 415 N.E.2d at 943, 434 N.Y.S.2d at 953. To support this contention, the court cited State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (no compelling state interest sufficient to justify intrusion by an Iowa statute prohibiting acts of sodomy between consenting, unmarried adults of the opposite sex); State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977) (fornica-
Were the Court actually to undertake the task of judging the rationality of sodomy legislation, selecting standards could prove most difficult, if not impossible. Indeed, it may be doubted that a purely ethical justification—where no harm to the safety or mental well-being of the actors or others is involved—can be demonstrated by the logic and proof inherent in reasonableness and rationality. 135

This quotation concludes with an example of frustrating logic: “The impossibility of showing that sodomy legislation safeguards morality would be ground enough for holding it irrational and void. On the other hand, if the moral harm produced by acts of sodomy cannot be demonstrated, neither can it be proved that sodomitical conduct causes no such harm.” 136 Such logic also reveals the futility of an attempt to resolve the philosophical conflict in Onofre.

Wilkinson and White, 137 however, suggest that a tangible compelling state interest exists to justify state regulation of purely moral interests, one not raised in Onofre: the state’s interest in the prohibition of homosexuality. 138 They contend that the state has a legitimate interest in discouraging public behavior that gives widespread offense, and that homosexual behavior as well as heterosexual behavior involves public conduct. 139 Their concession to the argument that the public would adjust to displays of homosexual behavior leads them to another compelling state justification: “The most threatening aspect of homosexuality is its potential to become a viable alternative to heterosexual intimacy.” 140

Yet even if the assumption were made that the state’s interest in the prohibition of homosexual behavior was compelling and that consensual sodomy statutes were a necessary means of discouraging such behavior, the issue of whether consensual sodomy could be pro-

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135. Comment, supra note 5, at 584.
136. Id. at 585.
137. Wilkinson & White, supra note 5.
138. Id. at 593. The term “unmarried adult” necessarily includes unmarried homosexual adults.
139. Id.
140. Id. at 595. But see In re Labady, 326 F. Supp. 924 (S.D.N.Y. 1971), in which the court reasoned that the public’s complacency with regard to private homosexual conduct, reflected in sparing enforcement of laws proscribing homosexual activity, is justification enough to hold that the law does not specifically extend to consensual sodomy in private. Id. at 928-29.
scribed between heterosexuales on purely moral justifications would remain.141 Without attempting to supply an answer to this question, the New York Court of Appeals has held that private, consensual acts of sodomy between unmarried adults is a fundamental right protected by the Constitution and that a statute excluding married persons from the prohibition violates the fourteenth amendment guarantee of equal protection under the law.

IV. IMPLICATIONS

The Supreme Court's denial of certiorari review to Onofre does little to clarify the extent to which unmarried adults may engage in private, sodomitical consensual sexual acts. The New York Court of Appeals has relied on a broad interpretation of Griswold and its progeny,142 which cannot be reconciled with the narrow view of the fundamental right of privacy related to marriage and childbearing that may be discerned from the same cases. The court of appeals has acknowledged that the Supreme Court has the power of final disposition of the matter.143 Until the Supreme Court acts on this aspect of the fundamental right of privacy, the court of appeals' decision in Onofre can be viewed as a sound decision which rests on equal protection analysis similar to that utilized by the Supreme Court in Eisenstadt.144

Eisenstadt, and its elimination of the distinction between married and unmarried persons, if understood to extend sexual freedom in private to consenting adults,145 necessarily extended this freedom to private homosexual acts. Onofre adopted the more expansive view of Eisenstadt and reflected society's changing attitudes toward sexual conduct.146 Onofre also exemplified the philosophy advocated by H.L.A. Hart which supports freedom of the individual.

Doe, however, was in accord with the narrow interpretation of

142. See supra text accompanying note 68.
143. See supra text accompanying note 87.
144. 405 U.S. at 438.
145. See supra text accompanying notes 35-36, 41-43.
146. Potter, Sex Offenses, 28 ME. L. REV. 65, 90 (1976).
Eisenstadt which would allow a right of personal privacy in sexual activities related to the birth of children.\(^{147}\) This suggests that the state has an interest in regulating private sexual behavior, especially in cases involving homosexual behavior. Doe, contrary to Onofre, reflected the philosophical view supported by Lord Devlin, which holds that the individual must sacrifice some liberty for the overall good of society.

Onofre and Doe represent two opposing theories on the application of moral doctrine.\(^{148}\) Although the opposing philosophies appear valid when examined separately, their existence has created a dichotomy in case law which cannot be settled until the issue of homosexuality is resolved. The compromise suggested by the concurring opinion in Onofre,\(^{149}\) that moral judgments can be made by the legislature so long as they are applied fairly,\(^{150}\) is the most equitable solution. The concurring opinion of Judge Jasen contended that a moral judgment must apply equally to all citizens.\(^{151}\) This means that in the area of consensual sodomy a choice between moral doctrines would allow a legislature to adopt either: The view advocated by Devlin, the Onofre dissent, and the Doe majority, which holds that for the good of society all adults sacrifice their privilege to engage in private, consensual sodomy; or the view of moral doctrine supported by Hart, the Onofre majority, and the Doe dissent, which favors the freedom of the individual, specifically the right of an adult to engage in private, consensual sodomy. Unfortunately, a simple resolution of the opposing philosophies is prevented by the issue of homosexuality. Homosexuality prevents the exclusive adoption of either of these views. While Griswold extended the right of privacy to the marital bedroom and Eisenstadt extended this right to unmarried persons, Doe suggested that the homosexual segment of the population sacrifice its individual liberty for the moral good of society.

The ultimate choice becomes whether a particular moral view is applied to all unmarried persons, or simply to a certain segment—the homosexual population. The broader issue is whether married persons can be treated differently from unmarried persons with re-

\(^{147}\) 403 F. Supp. at 1203 (Merhige, J., dissenting).

\(^{148}\) Compare the Doe majority, 403 F. Supp. at 1199 and the Onofre dissent, 51 N.Y.2d at 494, 415 N.E.2d at 944, 434 N.Y.S.2d at 955 (Gabrielli, J., dissenting), with the Onofre majority, id. at 476, 415 N.E.2d at 936, 434 N.Y.S.2d at 947 and the Doe dissent, 403 F. Supp. at 1203 (Merhige, J., dissenting).

\(^{149}\) 51 N.Y.2d at 494, 415 N.E.2d at 944, 434 N.Y.S.2d at 954 (Jasen, J., concurring).

\(^{150}\) Id.

\(^{151}\) Id.
spect to decisions pertaining to sodomitical acts. If sodomy were, in fact, deviate or harmful, then a fair application of moral doctrine would require that sodomy be proscribed for all citizens. If sodomy were not found to be harmful to participants, that is, adults in private settings, then fair application of a moral doctrine would require that all citizens be allowed to engage in consensual sodomy. Eisenstadt stands for the proposition that married and unmarried persons cannot be treated differently in terms of access to contraceptives. The issue, and major point of contention in this note, is whether such equal treatment is applicable to areas of sodomitical activity unrelated to the birth of a child. The Onofre court extends this equal treatment to intimate sodomitical behavior among consenting adults in private settings and will leave the discouragement of homosexual behavior to social institutions other than the New York Penal Code.

V. Conclusion

For the Supreme Court to clarify this area of the law, it must decide between the two underlying philosophies embodied in Onofre and Doe. The choice exists in both due process and equal protection analysis, under either strict or minimum scrutiny. In a due process analysis applying strict scrutiny, extension of a fundamental right of privacy to secluded acts of consensual sodomy between unmarried adults necessarily includes approval of private, consensual homosexual acts. Restriction of the fundamental right of privacy, however, infringes upon the right of unmarried adults to engage in intimate personal decisions related to private sexual activities. The Court's choice under equal protection analysis with strict scrutiny is similar. The finding that unmarried persons are deprived of a fundamental right entitles adult members of that group to indulge in private acts of consensual sodomy and necessarily includes approval of private, consensual homosexual acts. Should it be found that the classification does not interfere with a fundamental right, however, the right of an unmarried adult to engage in intimate personal decisions related to private sexual activities is severely curtailed.

Under minimum scrutiny, the options also are mutually exclusive. Using this level of scrutiny, a court will decide whether, under

152. 405 U.S. at 438. See supra text accompanying notes 34-36.
153. See supra text accompanying notes 116-29.
154. The term "unmarried" necessarily encompasses all homosexuals in the United States, as our government does not sanction homosexual marriages.
due process, it will defer to a legislative decree of the means by which it attempts to achieve morally acceptable behavior. Under equal protection, a court will decide whether to defer to a legislative classification which may only slightly further a state's goal of upholding a high standard of public morals. In deferring to the legislature, the court restricts the rights of unmarried, consenting adults to engage in specified forms of sexual gratification. Yet in finding no rational connection between state purposes and means or classifications employed, that is, not deferring, the court allows homosexual as well as heterosexual, consensual, private sexual acts. In allowing these acts, the court may not be applying a minimum scrutiny test.

The Court's options under both strict and minimum scrutiny illustrate the fallacy of the concurring opinion in Onofre, which reasons that morality may be enforced by the legislature, through the courts, so long as the legislative judgment is applied fairly and equally. The Supreme Court, in ultimately choosing one option over the other, must adopt a particular moral point of view. Yet the choice of a particular view in the area of private, consensual sexual activities among adults necessarily excludes the other point of view and necessarily infringes upon those whose beliefs and lifestyles do not conform to the Court's chosen morality. For a moral judgment to be applied fairly, the Court either must allow all individuals to engage in acts of consensual sodomy or it must declare that such acts are proscribed for all persons. The former view includes acceptance of homosexual behavior, while the latter view would rescind a right already given to some members of society.

The Court, however, must consider cautiously its role in this regard, for in invalidating a consensual sodomy statute on equal protection grounds, it leaves a state legislature with little choice but to draft a statute punishing all consensual sodomy or to allow such behavior to go unpunished. The compromise, punishment of only consensual, private homosexual acts as in Doe, is not a fair application of a moral judgment to all citizens.

Douglas Everett Schwartz

155. 51 N.Y.2d at 494, 415 N.E.2d at 944, 434 N.Y.S.2d at 954 (Jasen, J., concurring).
156. See supra notes 106-39 and accompanying text.