KeyCite Yellow Flag - Negative Treatment
Distinguished by National Gay Task Force v. Board of Educ. of City of Oklahoma City, 10th Cir.(Okla.), March 14, 1984

51 N.Y.2d 476
Court of Appeals of New York.

The PEOPLE of the State of New York, Appellant,
v.
Ronald ONOFRE, Respondent.
The PEOPLE of the State of New York,
Respondent,
v.
Conde J. PEOPLES, III, and Philip S. Goss,
Appellants.
The PEOPLE of the State of New York,
Respondent,
v.
Mary SWEAT, Appellant.

Dec. 18, 1980.

Synopsis
Defendant was convicted before the Onondaga County Court, Ormand N. Gale, J., of consensual sodomy, and he appealed. The Supreme Court, Appellate Division, 72 A.D.2d 268, 424 N.Y.S.2d 566, reversed and dismissed the indictment. Permission to appeal was granted. Two other defendants were convicted before the City Court of the City of Buffalo, Herbert R. Johnston, Jr., J., of the same offense, and they appealed. The Erie County Court, Penny M. Wolfgang, J., affirmed, and permission to appeal was granted. A fourth defendant was convicted before the City Court of the City of Buffalo, Carmelo A. Parlato, J., of consensual sodomy, and he appealed. The Erie County Court, Penny M. Wolfgang, J., affirmed, and permission to appeal was granted. The Court of Appeals, Jones, J., held that provision of Penal Law which criminalizes consensual sodomy or deviate sexual intercourse between persons not married to each other violates federal constitutional rights.

Order of Appellate Division affirmed; orders of Erie County Court reversed and informations dismissed.

Jasen, J., concurred in result in a separate opinion.

Gabrielli, J., dissented and voted to reverse in one case and affirm in the remaining cases in an opinion in which Cooke, C. J., concurred.

West Headnotes (4)

[1] **Constitutional Law**
Sodomy; sexual orientation
Constitutional Law
Other particular issues and applications
Sex Offenses
Consensual conduct

Provision of penal law criminalizing consensual sodomy or deviate sexual intercourse between persons not married to each other is violative of rights protected by United States Constitution as the statute is broad enough to reach noncommercial, cloistered personal sexual conduct between consenting adults and permits proscribed conduct between persons married to each other without sanction and, hence, violates right to privacy and equal protection. Penal Law § 130.38; U.S.C.A.Const. Amend. 14.

31 Cases that cite this headnote

[2] **Criminal Law**
Power to Define and Punish Crime

It is not the function of the penal law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values.

4 Cases that cite this headnote

[3] **Constitutional Law**
Other particular issues and applications
Sex Offenses
Sodomy and deviate sexual conduct in general

Even if object is tendered by the prosecution, i. e., societal interest in protecting and nurturing

institution of marriage and rights accorded married persons, are legitimate matters of public concern they did not suffice to uphold, against equal protection attack, distinction made in consensual sodomy statute between married and unmarrieds, absent some relationship, much less a rational relationship, between such objectives and the statutory proscription. Penal Law § 130.38; U.S.C.A.Const. Amend. 14.

18 Cases that cite this headnote

[4] **Sex Offenses**
Consensual conduct

Statute making consensual sodomy a crime could not be upheld, as against constitutional attack, on ground that it was a valid exercise of the police power to prevent harm and preserve public morality, there being no substantial prospect of harm from such sodomy nor any threat to public as opposed to private morality shown. Penal Law § 130.38; U.S.C.A.Const. Amend. 14.

12 Cases that cite this headnote

Attorneys and Law Firms

***477 ***948 **937** Richard A. Hennessy, Jr., Dist. Atty. (Gail N. Uebelhoer and John A. Cirando, Asst. Dist. Attys., of counsel), for appellant in the first above entitled action.

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William H. Gardner and Dianne Bennett, Buffalo, for appellants in the second and third above-entitled actions.

***482** Edward C. Cosgrove, Dist. Atty. (John J. DeFranks, Asst. Dist. Atty., of counsel), for respondent in the second and third above-entitled actions.

***483** OPINION OF THE COURT

JONES, Judge.

These appeals, argued together, present a common question viz., whether the provision of our State's Penal Law that makes consensual sodomy a crime is violative of rights protected by the United States Constitution. We hold that it is.

Defendant Onofre was convicted in County Court of Onondaga County of violating section 130.38 of the Penal Law (consensual sodomy) after his admission to having committed acts of deviate sexual intercourse with a 17-year-old male at defendant's ****938** home.[1] The factual admission followed the court's denial of defendant's motion to dismiss ***484** the indictment on the ground that the statute was an invasion of his constitutionality protected right of privacy and that it denied him equal protection of the laws.

Defendants Peoples and Goss were convicted in Buffalo City Court of violating the consensual sodomy statute after a jury trial at which evidence was adduced that they had engaged in an act of oral sodomy in an automobile parked on a street in the City of Buffalo in the early morning hours. Defendant Sweat was convicted of the same crime after a jury trial in the same court on proof that she had committed a similar act with a male in a truck parked on a street in a residential area of the city about 1:30 A.M. In the cases in Buffalo City Court motions by defendants for dismissals of the informations on the ground that section 130.38 of the Penal Law is

unconstitutional because it deprives them of equal protection of the law and denies their right of privacy had been denied.

On appeal by defendants from the judgments of conviction the Appellate Division, Fourth Department, reversed in the case of Onofre and dismissed the indictment, concluding that section 130.38 of the Penal Law was unconstitutional and the County Court of Erie County affirmed the convictions of Peoples, Goss and Sweat, rejecting the claims of unconstitutionality. The order of the Appellate Division should be affirmed; those of County Court should be reversed and the informations dismissed.

[1] The statutes under which these defendants were charged and convicted provide as follows:

> "s 130.38 Consensual sodomy.
>
> "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.
>
> "s 130.00 Sex offenses; definitions of terms.
>
> ***949** "The following definitions are applicable to this article:
>
> "2. Deviate sexual intercourse means 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."

***485** Because the statutes are broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults and because it permits the same conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy[2] and the right to equal protection ****939** of the laws guaranteed them by the United States Constitution.

As to the right of privacy. At the outset it should be noted that the 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 what we referred to in People v. Rice, 41 N.Y.2d 1018, 1019, 395 N.Y.S.2d 626, 363 N.E.2d 1371 as "freedom of conduct". (See Whalen v. Roe, 429 U.S. 589, 598-600, 97 S.Ct. 869, 875-876, 51 L.Ed.2d 64.) The right, which has been called "the most comprehensive of ***486** rights and the right most valued by civilized men" (Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (Brandeis, J., dissenting)), "has been viewed as emanating from the first amendment's guarantee of freedom of association, NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); and of speech, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); the fourth amendment, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); the equal protection clause of the fourteenth amendment, Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the ninth amendment, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); the penumbras of the Bill of Rights, id.; and the concept of liberty guaranteed by the due process clause of the fourteenth amendment, Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)" (Lovisi v. Slayton, D.C., 363 F.Supp. 620, 624, affd., 4 Cir., 539 F.2d 349, cert. den. 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 585 supra).

****950** As recently as 1976 the Supreme Court took pains in Carey v. Population Servs. Int., 431 U.S. 678, 684-685, 97 S.Ct. 2010, 2015-16, 52 L.Ed.2d 675 to observe that "the outer limits" of the decision-making aspect of the right of privacy "have not been marked by the Court", noting however that "among the decisions that an individual may make without unjustified government interference" are personal decisions relating to marriage (Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010, supra), procreation (Skinner v. Oklahoma, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655), contraception (Eisenstadt v. Baird, 405 U.S. 438, 453-454, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349), family relationships (Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645), child rearing and education (Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070; Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042), and abortion (Roe v. Wade, 410 U.S. 113, 154, 93 S.Ct. 705, 727, 35 L.Ed.2d 147, supra.

The People are in no disagreement that a fundamental right of personal decision exists; the divergence of the parties focuses on what subjects fall within its protection, the People contending that it extends to only two aspects of sexual behavior marital intimacy (by virtue of the Supreme Court's decision in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 supra) and procreative choice (by reason of Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed. 2d 349 supra and ***487** Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, supra)). Such a stance fails however adequately to

take into account the decision in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, supra and the explication of the right of privacy contained in the court's opinion in Eisenstadt. In Stanley the court found violative of the individual's right to be free from governmental interference in making important, protected decisions a statute which made criminal the possession of obscene matter within the privacy of the defendant's home. Although the material itself was entitled to no protection ****940** against government proscription (Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498) the defendant's choice to seek sexual gratification by viewing it and the effectuation of that choice within the bastion of his home, removed from the public eye, was held to be blanketed by the constitutional right of privacy. That the right enunciated in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, supra to make decisions with respect to the consequence of sexual encounters and, necessarily, to have such encounters, was not limited to married couples was made clear by the language of the court in Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349, supra: "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 each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See Stanley v. Georgia, 394 U.S. 557, 1243, 22 L.Ed.2d 542 (1969)." In a footnote appended to the Stanley citation the court set out the following quotation from that decision (405 U.S. p. 453, n. 10, 92 S.Ct. p. 1038 n. 10):

" '(A)lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

" ' "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in ***488** material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They *****951** conferred, as against the Government, the right to be let alone the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U. S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed.2d 944 (1928) (Brandeis, J., dissenting).' "

[2] In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions such as those made by defendants before us to seek sexual gratification from what at least once was commonly regarded as "deviant" conduct,[3] so long as the decisions are voluntarily made by adults in a ****941** noncommercial, private setting. Nor is any such basis supplied by the claims advanced by the prosecution that a prohibition against consensual sodomy will prevent physical harm which might otherwise befall the participants, will uphold public morality and will protect the institution ***489** of marriage. Commendable though these objectives clearly are, there is nothing on which to base a conclusion that they are achieved by section 130.38 of the Penal Law. No showing has been made, even in references tendered in the briefs that physical injury is a common or even occasional consequence of the prohibited conduct, and there has been no demonstration either that this is a danger presently addressed by the statute or was one apprehended at the time the statutory section was enacted contemporaneously with the adoption of the new Penal Law in 1965. Indeed, the proposed comprehensive penal statute submitted to the Legislature by the Temporary Commission on Revision of the Penal Law and Criminal Code dropped all proscription against private acts of consensual sodomy.[4] 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 statement contained in the memorandum prepared by the chairman of the Temporary Commission: "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" (N.Y.Legis.Ann., 1965, pp. 51-52).

Any purported justification for the consensual sodomy statute in terms of upholding *****952** public morality is belied by the position reflected in the Eisenstadt decision in which the court carefully distinguished between public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of the public arena and in the sanctum of the private home. There is a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality (see ***490**

State v. Saunders, 75 N.J. 200, 218-220, 381 A.2d 333). So here, the People have 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 with 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.

Finally, the records and the written and oral arguments of the District Attorneys as well are devoid of any support for the statement that a prohibition against consensual sodomy will promote or protect the institution of marriage, venerable and worthy as is that estate. Certainly there is no suggestion that the one is 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 outside the marital bond.

In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct. Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others. Personal feelings of distaste for the conduct sought to be proscribed by ****942** section 130.38 of the Penal Law and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked.

The assertion in the dissent that validation of the consensual sodomy statute is mandated by our recent decision ***491** in People v. Shepard, 50 N.Y.2d 640, 431 N.Y.S.2d 363, 409 N.E.2d 840 proceeds from a misconception of our holding in Shepard. In that case we upheld the constitutionality of the statutory proscription against the possession of marihuana as applied to possession by an individual in the privacy of his home, noting the existence of a legitimate controversy with respect to whether marihuana is a dangerous substance. The concurring opinion assembled the impressive evidence of the harmfulness which attends the use of marihuana. On such a record we sustained the right of the Legislature to reach the substantive conclusion that the use of marihuana was indeed harmful and accordingly to impose a criminal proscription based on that predicate. There is in the present case no basis for a counterpart to the statement in Shepard that "the Legislature, following extensive studies and hearings, has specifically found the drug to be sufficiently harmful to warrant punishing its possession in an effort to deter its use" (p. 646, 431 N.Y.S.2d 363, 409 N.E.2d 840). By critical contrast neither the People nor the dissent has cited any authority or evidence for the proposition that the practice of consensual sodomy in private is harmful either to the participants or to society in general; indeed, the dissent's appeal is only to the historical, conventional characterization *****953** which attached to the practice of sodomy.[5] It surely does not follow that, because it is constitutionally permissible to enter the privacy of an individual's home to regulate conduct justifiably found to be harmful to him, the Legislature may also intrude on such privacy to regulate individual conduct where no basis has been shown for concluding that the conduct is harmful.

[3] As to the denial of defendants' right to equal protection. Section 130.38 of the Penal Law on its face discriminates between married and unmarried persons, making criminal when done by the latter what is innocent when done by the former. With that distinction drawn, we look to see whether there is, as a minimum, "some ground of difference that rationally explains the different treatment accorded married and unmarried persons" under the statute (***492** Eisenstadt v. Baird, 405 U.S. 438, 447, 92 S.Ct. 1029, 1035, 31 L.Ed.2d 349, supra).[6] In our view, none has been demonstrated or identified by the People in any of the cases before us. In fact, the only justifications suggested are a societal interest in protecting and nurturing the institution of marriage and what are termed "rights accorded married persons". As has been indicated, however, no showing has been made as to how, or even that, the statute banning consensual sodomy between persons not married to each other preserves or fosters marriage. Nor is there any suggestion how consensual sodomy relates to rights accorded married persons; certainly it is not evident how it adversely affects any such rights. Thus, even if it be assumed that the ****943** objectives tendered by the prosecution are legitimate matters of public concern, no relationship much less rational relationship between those objectives and the proscription of section 130.38 of the Penal Law is manifested. The statute therefore must fall as violative of the right to equal protection enjoyed by persons not

married to each other.

[4] Little more need be said to dispose of the contention made by the District Attorneys that the statute is a valid exercise of the police power vested in the State, which power, it is asserted, is authorized for the prevention of harm or for the preservation of public morality. No substantial prospect of harm from consensual sodomy nor any threat to public as opposed to private morality has been shown.

Finally, we do not plow new ground in the result we reach today. Most recently, the Supreme Court of Pennsylvania, for some of the same reasons that underlie our decision, has reached a similar conclusion even in a case in which the defendants were charged with commission of deviant acts of sexual conduct with members of the audience at performances in a public theatre for which an admission ***493** fee had been charged Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47. Also consistent with the result we reach are the decisions by the Iowa Supreme Court in State v. Pilcher, 242 N.W.2d 348 (Iowa) and by the New Jersey Superior Court in State v. Ciuffini, 164 N.J.Super. 145, 395 A.2d 904, relying on the earlier case of State v. Saunders, 75 N.J. 200, 381 A.2d 333, supra in which its Supreme Court had invalidated as contrary to the constitutionally protected right of privacy a statute making fornication a criminal offense. Nor is any contrary result compelled by Doe v. Commonwealth's Attorney for City of Richmond, D.C., 403 F.Supp. 1199, affd. *****954** 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751, a civil action in which prayers for a declaratory judgment invalidating an injunction precluding prosecution under a Virginia sodomy statute, which expressly included consensual sodomy, were denied. Although the District Court in its opinion addressed the constitutionality of the statute and concluded that it was not invalid, its disposition included no declaration of constitutionality, but merely denied the relief requested and dismissed the complaint. A summary affirmance of the dismissal without declaration followed in the United States Supreme Court. In that circumstance the disposition by the Supreme Court does not necessarily signify approval of the reasoning by which the lower court resolved the case (Fusari v. Steinberg, 419 U.S. 379, 391, 95 S.Ct. 533, 540, 42 L.Ed.2d 521 (concurring opn. by BURGER, Ch. J.)). Apart from the limited precedential value of a summary affirmance (see, e. g., Edelman v. Jordan, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662, Hart & Wechsler, Federal Courts and the Federal System (1977 Supp.), at p. 112, n. 1) in Doe there was lacking any evidence of threatened prosecution of the plaintiffs under the Virginia statute a factor arguably relevant to their standing to maintain the action (cf. O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674). 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 plaintiffs. Subsequent to the decision of the Doe case a member of that court stated that the court had not yet "definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior (private consensual sexual behavior) among adults" (***494** Carey v. Population Servs. Int., 431 U.S. 678, 694, n. 17, 97 S.Ct. 2010, 2021 n. 17, 52 L.Ed.2d 675 (opn. by BRENNAN, J., concurred in by a plurality), supra).

That difficult question, to the extent that it is posed by these appeals, is before us now. For the reasons given above, we conclude that the imposition of criminal sanctions such as those contained in section 130.38 of the Penal Law is proscribed by the Constitution of the United States.

Accordingly, on the appeal by the District Attorney of Onondaga County the order of the Appellate Division should be affirmed. On the appeals by defendants Peoples, Goss ****944** and Sweat the orders of the Erie County Court should be reversed, the convictions vacated and the informations dismissed.

JASEN, Judge (concurring in result).

While I cannot accept the majority's premise that the so-called "penumbral" right to privacy which first appeared in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 should be extended to encompass and protect any and all types of consensual sexual behavior in private, I nonetheless concur in result herein for I can discern no rational basis upon which the Legislature could have decided to freely allow the conduct in issue among married people and to make identical conduct criminal among those for whom that estate is undesirable or unattainable.

I hasten to add that, in my opinion, the Legislature does have the power to make moral judgments. However, that legislative power is, as all others are, limited by the supervening requirement that it be exercised with the requisite evenhandedness. Here, it was not.

GABRIELLI, Judge (dissenting).

Without making any effort to define its boundaries or limitations, a majority of my colleagues has recognized for the first time a constitutional right of personal autonomy broad enough to encompass at least the freedom to indulge in those sexual practices which have long been proscribed by our criminal law. Although the majority has attempted to associate this "fundamental right" with the recent Supreme Court decisions creating a "zone of privacy" to protect certain familial decisions, it is apparent that the connection between this case and those decisions exists only on the most superficial level and that the right of sexual choice *****955** established today is really a wholly ***495** new legal concept bearing little resemblance to the familiar principles enunciated in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 and its progeny. Because I cannot concur in the substance of the majority's conclusion and because I am concerned with the majority's failure to articulate an analytical framework for resolving future claims under this amorphous concept of personal autonomy, I am compelled to cast my vote in dissent.

I begin with the premise that none of the cases relied upon by the majority stand for the proposition that there is a generalized right of privacy or personal autonomy implicit in the Federal Bill of Rights. Nor do the cases cited in the majority opinion provide support for the idea that the courts may invoke the due process clause of the Fourteenth Amendment as a predicate for striking down penal provisions which some members of the judiciary may find distasteful or inconsistent with their own notions of fundamental fairness. Indeed, were that not the case, we could not have held as we recently did in People v. Shepard, 50 N.Y.2d 640, 431 N.Y.S.2d 363, 409 N.E.2d 840 that the statutory ban on the private possession of marihuana (see Penal Law, s 220.03) is not an unconstitutional infringement of the right of an individual to do as he pleases in his own home. To the contrary, had we concluded in Shepard as the majority seems to have concluded in this case that the freedom to choose one's own form of sensory gratification within the confines of one's own home is a constitutionally protected "fundamental" right, we could not have sustained the statute at issue in that case on the basis of mere "rationality", but would instead have been duty bound to conduct a more searching inquiry to determine whether the State's interest in the legislative ban was truly "compelling" (see, e. g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147; Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, supra).

Arguing that the People have failed to demonstrate that individuals who engage in consensual acts of sodomy are likely to suffer any serious physical side effects, the majority has attempted to distinguish the statutory prohibition at issue in Shepard from that at issue in this case by stressing that the ban which we upheld in Shepard was justified by a ***496** rational legislative finding ****945** that marihuana use can be physically harmful (p. 491, 434 N.Y.S.2d 952, 415 N.E.2d 936). This assertion, however, represents a seriously flawed understanding of the inquiry that must be pursued in identifying such rights.

In order to determine whether the freedom to engage in a particular activity is a constitutionally protected "fundamental right", we must look directly to the specific guarantees outlined in the body of the Constitution and the Bill of Rights and to the "penumbras, formed by emanations from those guarant(ees)" (Griswold v. Connecticut, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510, supra). The nature and extent of the State's interest in regulating or proscribing the activity in question are simply not relevant considerations at this stage of the inquiry. Indeed, it is only after the court makes a threshold determination as to whether a particular State regulation impinges upon a "fundamental right" that such considerations are brought into play. If it is determined, for example, that a "fundamental right" is being impaired, the regulation at issue cannot be sustained unless it is narrowly tailored to effectuate some "compelling" governmental interest, such as the State's interest in protecting the health of its citizens (see Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, supra; Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600, supra). On the other hand, once it is established that no "fundamental rights" are at issue, the court may uphold the State enactment if it is merely rationally related to some legitimate governmental purpose which falls within the State's broad police powers (e. g., *****956** People v. Shepard, 50 N.Y.2d 640, 431 N.Y.S.2d 363, 409 N.E.2d 840, supra). By suggesting that the activity proscribed in this case involves a "fundamental right" simply because it entails no significant danger to health, the majority has created a truly circular constitutional theory and has, in effect, injected an additional level of confusion into this already rather murky area of the law.

Under the analysis utilized by the majority, all private, consensual conduct would necessarily involve the exercise of a constitutionally protected "fundamental right" unless the conduct in question jeopardizes the physical health of the participant. In effect, the majority has held that a State statute regulating private conduct

will not pass constitutional muster if it is not designed to prevent physical harm ***497** to the individual. Such an analysis, however, can only be based upon an unnecessarily restrictive view of the scope of the State's power to regulate the conduct of its citizens. In my view, the so-called "police powers" of the State must include the right of the State to regulate the moral conduct of its citizens and "to maintain a decent society" (Jacobellis v. Ohio, 378 U.S. 184, 199, 84 S.Ct. 1676, 1684, 12 L.Ed.2d 793, quoted in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59-60, 93 S.Ct. 2628, 2635-36, 37 L.Ed.2d 446). Indeed, without mentioning specific provisions, it is apparent that our State's penal code represents, in part, an expression of our society's collective view as to what is or is not morally acceptable conduct. And, although the Legislature may not exercise this power in a manner that would impair a constitutionally protected "fundamental right", 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.

We may avoid the circularity in the majority's reasoning in cases such as this only if we utilize a two-tiered approach, taking care to ascertain at the outset whether a "fundamental right" is actually implicated without regard to the nature of the governmental interest involved in the challenged statute. If no such right is found to exist, we must refrain from interfering with the choice made by the Legislature and rest content upon the assurance that when the challenged statute is no longer palatable to the moral sensibilities of a majority of our State's citizens, it will simply be repealed.

Although our decision to sustain the statute challenged in Shepard under settled principles of judicial restraint would seem dispositive of the issue in this case, the ****946** majority has nonetheless adopted a contrary view and has placed the claim of personal autonomy asserted by defendants in the category of those ill-defined fundamental rights which are protected by the "penumbras" emanating from the Bill of Rights (Griswold v. Connecticut, supra, 381 U.S. at pp. 484-485, 85 S.Ct. at pp. 1681-1682) and by the concept of ordered liberty implicit in the due process clause of the Fourteenth Amendment (Roe v. Wade, supra, 410 U.S. at pp. 152-153, 93 S.Ct. at p. 726). I cannot agree, however, that the right of an individual to select his own form of sexual gratification should ***498** stand on any better footing than does the right of an individual to choose his own brand of intoxicant without governmental interference. Admittedly, the issue in this case is superficially distinguishable from the issue in Shepard, in that here we are concerned with a claim involving freedom of sexual expression, and it is therefore tempting to equate the "right" asserted by defendants with other well-established sexually related rights such as the right of an individual to obtain contraceptives (Griswold v. Connecticut, supra), the right of a woman to terminate an unwanted pregnancy (Roe v. Wade, supra; see Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201) and the right of a citizen to consume printed pornographic material in the privacy of his own home (Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542). But the decisions in Griswold, Roe and Stanley cannot fairly be interpreted as collectively establishing an undifferentiated right to unfettered sexual *****957** expression (see Note, Constitutionality of Sodomy Statutes, 45 Fordham L.Rev. 553, 575). Consequently, the majority's effort to justify its holding today as a mere extension of these decisions is, in the final analysis, entirely unconvincing.

The "fundamental" rights recognized in Griswold, Roe and their progeny are clearly not a product of a belief on the part of the Supreme Court that modern values and changing standards of morality should be incorporated wholesale into the due process clause of the Fourteenth Amendment. To the contrary, the language of the Supreme Court decisions makes clear that the rights which have so far been recognized as part of our due process guarantee are those rights to make certain familial decisions which have been considered sacrosanct and immune from governmental intrusion throughout the history of western civilization. The point has been aptly made by Justice HARLAN in his oft-quoted dissent in Poe v. Ullman, 367 U.S. 497, 553, 81 S.Ct. 1752, 1782, 6 L.Ed.2d 989, quoted in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, supra, at p. 499, 85 S.Ct. at p. 1689 (GOLDBERG, J., concurring): "Adultery, homosexuality and the like are sexual intimacies which this State forbids * * * but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and ***499** protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality * * * or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy". Justice DOUGLAS also made clear the nature of the "right of privacy" that was being protected when he stated in Griswold v. Connecticut, supra, at p. 486, 85 S.Ct. at 1682: "We deal with a right of privacy older than the Bill of Rights older than our political parties, older than our school system * * * It is an association that promotes a way of life".

This is not to suggest that the Federal Constitution protects only those sexually related decisions that are made within the context of the marital relationship. As the majority notes, such a conclusion was effectively foreclosed when the Supreme Court stated in Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349, supra: "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 ****947** individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (emphasis in original).

Nevertheless, contrary to the position taken by the majority, I cannot agree that this language foreshadows a recognition by the Supreme Court of a generalized right to complete sexual freedom for all adults, whether married or single. Instead, as is suggested by the careful wording of the quoted paragraph, I would conclude that Eisenstadt stands only for the narrower proposition that the ancient and "fundamental" right of an individual to decide "whether to bear or beget a child" cannot be limited to married adults (accord Hindes, Morality Enforcement Through The Criminal Law and the Modern Doctrine of Substantive Due Process, 126 U. of Pa.L.Rev. 344, 361-362).[1] Under this view, ***500** Eisenstadt *****958** may be regarded as a simple extension of a long line of cases protecting "freedom of personal choice in matters of marriage and family life" (Roe v. Wade, 410 U.S. 113, 169, 93 S.Ct. 705, 734, 35 L.Ed.2d 147, supra (STEWART, J., concurring; emphasis supplied); see Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (personal decisions relating to marriage); Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (decisions relating to family relationships); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (decisions relating to procreation); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (decisions relating to childbearing and education)). Indeed, even the highly controversial decision in Roe v. Wade (supra) holding the freedom of women to obtain abortions to be a constitutionally protected right may be regarded as part of the continuum of cases that bring within the ambit of the due process clause those familial decisions that historically have enjoyed immunity from governmental regulation. As the Roe court was careful to point out: "It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century" (410 U.S. 113, 129, 93 S.Ct. 705, 715, 35 L.Ed.2d 147, supra).

The majority impliedly recognizes that the Supreme Court has to date limited the protection of the Constitution ***501** to decisions relating to the traditionally protected areas of family life, marital intimacy and procreation. Yet the majority has also concluded that there exists "no rational basis * * * for excluding from the same protection decisions * * * to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct" (p. 488, 434 N.Y.S.2d 951, 415 N.E.2d 936). I must disagree, however, because my reading of the recent Supreme Court cases leads me to the conclusion that the distinction ****948** repeatedly drawn in those cases between freedom of choice in the historically insulated areas of procreation, family life and marital relationships on the one hand and the general freedom of unfettered sexual choice on the other is more than just a temporary or artificial one.[2]

*****959** The assertion that the theories espoused in Griswold, Roe and their progeny may be likened to the discredited doctrine of "substantive due process" (see, e. g., Coppage v. Kansas, 236 U.S. 1, 35 S.Ct. 240, 59 L.Ed. 441; Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937; Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed.2d 832; see, generally, Tribe, American Constitutional Law, ss 8-1 through 8-7) would not come as a surprise to any serious constitutional scholar. Many have made the observation that the modern notion of "fundamental rights" bears a striking resemblance to the Lochner doctrine under which State economic and social ***502** regulations were routinely struck down as violative of certain basic, substantive freedoms that were thought to inhere in the due process clauses of the Fifth and Fourteenth Amendments (see, e. g., Roe v. Wade, 410 U.S. 113, 167-171, 93 S.Ct. 705, 733-736, 35 L.Ed.2d 147 (STEWART, J., concurring), 171-178, 93 S.Ct. 736-739 (REHNQUIST, J., dissenting), supra; Griswold v. Connecticut, 381 U.S. 479, 514-527, 85 S.Ct. 1678, 1698-1705, 14 L.Ed.2d 510 (BLACK, J., dissenting), supra; Tribe, American Constitutional Law, s 15-2; Craven, Personhood: The Right to Be Let Alone, 1976 Duke L.J. 699, 412-713; Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 S.Ct.Rev. 159). The Lochner doctrine was ultimately rejected by the Supreme Court, in part because it had

placed the court in the position of a "superlegislature" enabling it to use the "vague contours" of the due process clause as a vehicle for striking down State legislation which it found to be inconsistent with its own contemporary views of natural law (Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93; accord Williamson v. Lee Opt. Co., 348 U.S. 483, 488, 75 S.Ct. 461, 464, 99 L.Ed. 563; Day-Brite Light. v. Missouri, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469). Indeed, inherent in the Lochner doctrine was the very real danger that a countermajoritarian institution such as the court would impose upon the elected officials of State government its ad hoc notions regarding the substantive content of the term "liberty" and would place restrictions upon the States' power to govern over and above those mandated by the specific provisions contained in the body of the Constitution and the Bill of Rights. It was out of a recognition of this danger that the rule of judicial restraint and minimal judicial scrutiny of State legislation was born (see Tribe, American Constitutional Law, s 8-7).

In the wake of Griswold and Roe, it is no longer an intellectually defensible position ****949** to suggest that the once discredited doctrine of "substantive due process" is entirely dead and buried. On the other hand, it is far from clear that those two cases heralded an unqualified return to the days when a Judge acted as "a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness" (Cardozo, Selected Writings, Nature of the Judicial Process, at p. 164, quoted in People v. Shepard, 50 N.Y.2d 640, 646, 43 N.Y.S.2d 363, 409 N.E.2d 840, supra). As the language of those decisions and their forerunners indicates, the "fundamental" rights so far recognized ***503** by the Supreme Court under the modern version of "substantive due process" have been strictly limited to those that may be traced to matters that were traditionally insulated from governmental intrusion. In my view, it is precisely this limitation that differentiates the relatively recent "fundamental right" concept from the long discarded and truly pernicious doctrine enunciated in Lochner v. New York (supra).

To suggest, as the majority does, that the concept of "fundamental rights" should be expanded to include a generalized right to sexual gratification in whatever form would be, in effect, to bring the law of *****960** "substantive due process" full circle by eliminating all of its present salutary limitations and restoring it to its former status as a vehicle for lawmaking by judicial fiat. The majority acknowledges in passing that the sexual choice the defendants now assert as a matter of constitutional right was once regarded as " 'deviant' conduct" (p. 488, 434 N.Y.S.2d 951, 415 N.E.2d 936), but it erroneously ascribes no legal significance to that fact, relegating it instead to an irrelevant phenomenon of theology and privately held moral beliefs. This rather glib refusal to take account of the historical treatment of consensual sodomy as criminally punishable conduct has left a gaping hole in the majority's analysis.

In contrast to decisions relating to family life, matrimony and procreation, decisions involving pure sexual gratification have been subject to State intervention throughout the history of western civilization (see Griswold v. Connecticut, 381 U.S. 479, 505, 85 S.Ct. 1678, 1693, 14 L.Ed.2d 510, supra (WHITE, J., concurring); Poe v. Ullman, 367 U.S. 497, 553, 81 S.Ct. 1752, 1782, 6 L.Ed.2d 989, supra (HARLAN, J., dissenting); Doe v. Commonwealth's Attorney for City of Richmond, D.C., 403 F.Supp. 1199, affd. 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751, Dawson v. Vance, D.C., 329 F.Supp. 1320, 1322, State v. Bateman, 25 Ariz.App. 1, 4, 540 P.2d 732, revd. in part 113 Ariz. 107, 547 P.2d 6 (en banc)). Scholars from Aquinas to Blackstone considered even consensual sodomy to be as heinous as the crime of rape (43 Aquinas, Summa Theologiae, pp. 246-249 (Gilby ed); 4 Blackstone's commentaries *215; see, generally, Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L.Rev. 1281, 1292-1298). Indeed, as early as 1553 ***504** during the reign of Henry VIII, England enacted statutes prohibiting sodomy which became part of the American common law at the time of the American Revolution and were later embodied in the penal codes of the various States. Thus, although some may take offense at the persistence of the proscriptions against consensual sodomy in our modern law, the fact remains that western man has never been free to pursue his own choice of sexual gratification without fear of State interference. Consequently, it simply cannot be said that such freedom is an integral part of our concept of ordered liberty as embodied in the due process clauses of the Fifth and Fourteenth Amendments.

In view of the continuous and unbroken history of antisodomy laws in the United States, the majority's decision to strike down New York's statute prohibiting consensual sodomy can only be regarded as an act of judicial legislation creating a "fundamental right" where none has heretofore existed. As such, today's decision represents a radical departure from cases such as Griswold and Roe, in which the Supreme Court merely swept aside State laws which impaired or prohibited entirely the free exercise of rights that traditionally had been recognized in western thought as being beyond the reach of government. I cannot ****950** concur in the majority's conclusion.[3] As Justice BLACK once observed, "I like my privacy as well as the next one, but I

am nevertheless compelled to admit that government has a right to invade it unless ***961** prohibited by some specific constitutional *505 provision" (Griswold v. Connecticut, 381 U.S. 479, 510, 85 S.Ct. 1678, 1695, 14 L.Ed.2d 510, supra (BLACK, J., dissenting)).[4]

Accordingly, I cast my vote to reverse the order of the Appellate Division in People v. Onofre, 424 N.Y.S.2d 566, 72 A.D.2d 268 and to affirm the respective orders of the County Court in People v. Peoples, People v. Goss and People v. Sweat.

WACHTLER, FUCHSBERG and MEYER, JJ., concur with JONES, J.

JASEN, J., concurs in result in a separate opinion.

GABRIELLI, J., dissents and votes to reverse in another opinion in which COOKE, C. J., concurs.

In People v. Onofre: Order affirmed.

WACHTLER, FUCHSBERG and MEYER, JJ., concur with JONES, J.

JASEN J., concurs in result in a separate opinion.

GABRIELLI, J., dissents and votes to affirm in another opinion in which COOKE, C. J., concurs.

In People v. Peoples and Goss and People v. Sweat: Orders reversed, convictions vacated and informations dismissed.

All Citations

51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947, 20 A.L.R.4th 987

Footnotes

1 Defendant's conviction was not predicated on a guilty plea as inadvertently recited in the opinion at the Appellate Division.

2 We are not unmindful that both District Attorneys seek to draw support from conduct by defendants which they claim either drew the admitted acts of sodomy into the classification of public, not private, conduct or which constituted a waiver of the right to assert a right of privacy. Because our disposition of these appeals rests also on a denial of equal protection rights we need not pass on the contention by the District Attorney of Erie County that the acts committed by defendants, Peoples, Goss and Sweat, occurring in vehicles parked on a street or highway at times when traffic might be expected to be light but which could have been observed by a passerby should one have happened on the vehicles and looked inside, lost any claim to being private acts. (On oral argument counsel for the defendants expressly conceded that the acts took place "in public".) The suggestion by the District Attorney of Onondaga County that because defendant Onofre presumably participated in the taking of photographs of himself while engaging in acts of sodomy and thereafter displayed such photographs to the District Attorney, he was foreclosed from asserting a right of privacy fails to distinguish between the two aspects of the right as subsequently discussed. Neither the photographing nor the display of the pictures (which was done only after charges of sodomy in the first degree and sexual abuse had been laid against him) affected the secluded nature of the conduct, which was done in defendant's own home free from any observation by the public, although, conceivably, he may thereby have lost any claim to the secrecy aspect of the right to privacy an aspect he is not now asserting. No distinction between these two aspects was observed in Lovisi v. Slayton, D.C., 363 F. Supp. 620, affd. 4 Cir., 539 F.2d 349, cert. den. 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 585), the decision which appears to have turned on defendants' failure to keep the photographs in such a way that their children would be denied access to them, which the court regarded as a breach of defendants' responsibility to ensure that the seclusion surrounding their acts was preserved (363 F. Supp. p. 627).

3 We express no view as to any theological, moral or psychological evaluation of consensual sodomy. These are aspects of the issue on which informed, competent authorities and individuals may and do differ. Contrary to the view expressed by the dissent, although on occasion it does serve such ends, it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values. Thus, it has been deemed irrelevant by the United States Supreme Court that the purchase and use of contraceptives by unmarried persons would arouse moral indignation among broad segments of our community or that the viewing of pornographic materials even within the privacy of one's home would not evoke general approbation (Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349, supra; Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, supra). We are not unmindful of the sensibilities of many

persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to prohibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

4 Notable also is the fact that when the Model Penal Code was adopted by the American Law Institute a subsection which would have made consensual sodomy a misdemeanor (s 207.5, subd. (4)) was consciously omitted (ABA-ALI Model Penal Code, Proposed Official Draft, s 213.2, Status of Section, pp. 145-146; Tent. Draft No. 4, pp. 93, 276).

5 Twenty-two States have now decriminalized consensual sodomy between adults in private (Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L.J. 799, 950-951; N.J.Stat.Ann., s 2C:98-21).

6 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" (405 U.S. p. 447, 92 S.Ct. p. 1035, n. 7). 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.

1 I find additional support for my interpretation of the Eisenstadt opinion in subsequent pronouncements by the Supreme Court. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68, 93 S.Ct. 2628, 2641, 37 L.Ed.2d 446, for example, the court squarely rejected the argument that "conduct which directly involves 'consenting adults' only has, for that sole reason, a special claim to constitutional protection". In response to this contention, the court observed: "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take" (footnotes omitted).

Similarly, in Roe v. Wade, 410 U.S. 113, 154, 93 S.Ct. 705, 727, 35 L.Ed.2d 147, the Supreme Court refused to accept the contention 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". The Roe court flatly stated that "(t)he Court has refused to recognize an unlimited right of this kind in the past".

2 While the majority has placed great reliance upon the decision of the Supreme Court in Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542, as support for the proposition that the Bill of Rights encompasses a general right of privacy and personal autonomy, that decision, in my view, is not susceptible of such an expansive reading (compare Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446). In Stanley, the court struck down a State statute that penalized the private possession of printed pornographic material in the home. Although the Stanley court acknowledged that the obscene materials themselves would not ordinarily be covered by the protections of the First Amendment (see Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498), it made clear that its decision to invalidate the challenged legislation was based in large measure upon the individual's First Amendment "right to receive information and ideas, regardless of their social worth" (394 U.S. at p. 564, 89 S.Ct. at p. 1247). Indeed, in a significant passage of its opinion, the Stanley court stated: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch" (id., at p. 565, 77 S.Ct. at p. 1248). The so-called "privacy right" recognized in Stanley may thus be regarded as a simple extension of the First Amendment guarantee against governmental interference with the transmission of ideas. That the "privacy right" articulated in Stanley does not extend beyond the "right to receive information" and into the claimed right to receive "sensations", whether sexually or chemically induced, was reaffirmed in our recent decision in People v. Shepard, 50 N.Y.2d 640, 43 N.Y.S.2d 363, 409 N.E.2d 840, supra.

3 Without intending to sound a general alarm, I cannot help but wonder what the limits of the majority's new doctrine of "personal autonomy" might be. If, for example, the freedom of an individual to engage in acts of consensual sodomy is truly a "fundamental right," it would seem fairly clear that, absent a "compelling state interest", the State cannot impose a burden upon the free exercise of that right by limiting the individual's access to government jobs (cf. Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600). Moreover, if the only criterion for determining when particular conduct should be deemed to be constitutionally protected is whether the conduct affects society in a direct and tangible way, then it is difficult to perceive how a State may lawfully interfere with such consensual practices as euthanasia, marihuana smoking, prostitution and homosexual marriage. I very much regret that the majority has failed in its discussion of the "fundamental right" to personal autonomy to set forth some analytical framework for resolving difficult questions such as these.

4 Inasmuch as I conclude that there is no "fundamental right" to sexual gratification, I must also consider whether section 130.38 of the Penal Law represents an irrational classification on the basis of marital status in violation of the equal protection clause of the Fourteenth Amendment. Since marital status has never been recognized as a "suspect classification" (compare Executive Law, s 296), the legislative distinction between marrieds and unmarrieds may stand if it bears some rational relation to a legitimate governmental interest.

Unlike my colleagues in the majority, I have no trouble concluding that the legislative decision to permit married individuals to engage in conduct that is forbidden to the unmarried is rationally based. While the State may prefer that none if its citizens engage in the proscribed forms of sexual gratification, it may properly limit its statutory prohibition to those that are unmarried on the theory that the institution of marriage is so important to our society that even offensive intimacies between married individuals should be tolerated. The statute at issue in this case is thus distinguishable from the statute at issue in Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349, where the Supreme Court concluded that a ban on the sale of contraceptives to unmarrieds only had no relation to any legitimate government interest.