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Lawrence M. Ross

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RIGHT OF PRIVACY—FORNICATION STATUTE HELD UNCONSTITUTIONAL—STATE V. SAUNDERS

INTRODUCTION

In the early morning hours of July 23, 1973, Charles Saunders and Bernard Busby picked up two women in Newark, New Jersey, and drove to a deserted parking lot where the four engaged in sexual activities. The women later complained to the police, and Saunders and Busby were arrested and indicted for rape, assault with intent to commit rape, and armed robbery. The women alleged that a third man also participated in the incident. At trial, they testified that the defendants forcibly seized them on the street, drove them to a deserted lot, and under the threat of a gun, physically compelled them to engage in sexual intercourse with each of the three men. Busby and Saunders admitted to the acts of sexual intercourse, but insisted that they had merely promised to give the women marijuana cigarettes in exchange for the sexual favors, and had neither coerced nor induced them in any other way. On its own initiative, the court charged the defendants with fornication as a lesser included offense.[1]

The jury returned a verdict acquitting the defendants on the counts charged in the indictment, but found them guilty of fornication. Saunders objected to the verdict, contending that the fornication statute was unconstitutional under recent decisions of the United States Supreme Court.[2] The Essex County Court, Law Division, refused to overturn the verdict,[3] relying largely on two 1971 cases, *State v. Clark*[4] and *State v. Lutz*,[5] in which the New Jersey Supreme Court had upheld the constitutionality of the fornication statute.[6] The

1. The relevant New Jersey statute provides that "[a]ny person who commits fornication is guilty of a misdemeanor, and shall be punished by a fine of not more than $50, or by imprisonment for not more than 6 months, or both." N.J. STAT. ANN. § 2A:110-1 (West 1969). The trial court, in its charge to the jury, defined the crime of fornication as "an act of illicit sexual intercourse by a man, married or single, with and unmarried woman." State v. Saunders, 75 N.J. 200, 205, 381 A.2d 333, 335 (1977).

2. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). Saunders contended that the expansion of the right of privacy from the married individual to the unmarried individual indicated that prior New Jersey cases which held the fornication statute constitutional should be re-examined. 75 N.J. at 206-07, 381 A.2d at 336.

3. State v. Saunders, 130 N.J. Super. 234, 326 A.2d 84 (Essex County Ct. Law Div. 1974).

4. 58 N.J. 72, 275 A.2d 137 (1971).

5. 57 N.J. 314, 272 A.2d 753 (1971).

6. The defendants argued that the fornication statute violated the equal protection and due process clauses of the fourteenth amendment of the United States

Appellate Division summarily affirmed,[7] but the New Jersey Supreme Court reversed. *Held:* New Jersey's fornication statute impermissibly infringes upon the right of privacy guaranteed by both the state and federal constitutions. *State v. Saunders,* 75 N.J. 200, 381 A.2d 333 (1977).

I. STANDING

At the outset, the supreme court readily disposed of the State's assertion that the defendant lacked standing to raise his constitutional defenses. The State argued that because the conduct under review involved "several other persons and occurred in a public place," no right of privacy accrued.[8] In response, the court distinguished the defendant's argument from one ordinarily employed in an "overbreadth attack." It noted that the defendant had not alleged that the "statute may be 'invalid in its application in special circumstances or fringe areas,' "[9] but had challenged the "normal application of the statute," contending that the State had "no power to prohibit" the outlawed conduct.[10]

Despite the court's ruling, it is possible to argue that the defendant's attack was hinged, in substantial part, upon the claim that the statute drew no distinction between acts committed in public and acts committed in private. The defendant did not maintain that he had a right to fornicate on a street corner in downtown Newark, but rather that the Constitution protected his fundamental personal choice to engage in the forbidden sexual activities. Any such protection, how-

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Constitution, as well as their rights of privacy under the fourth and ninth amendments. State v. Saunders, 130 N.J. Super. at 240, 326 A.2d at 87. The defendants also argued that the statute had been selectively enforced. They submitted an affidavit from Linda Blumkin, who as an LL.M. candidate had surveyed 1177 chief prosecutors on the subject of fornication and cohabitation prosecutions in their respective jurisdictions. Her results indicated that the enforcement pattern in New Jersey was haphazard, a result of widely varying prosecutorial attitudes towards the offense. *Id.* at 238-39, 326 A.2d at 86-87.

Judge Bedford, writing for the trial court, acknowledged the limited prosecutions under the fornication statute, but was of the opinion that Eisenstadt v. Baird, 405 U.S. 438 (1972), did not undermine the reasoning of the *Clark* and *Lutz* decisions.

7. State v. Saunders, 142 N.J. Super. 287, 361 A.2d 111 (Super. Ct. App. Div. 1976).

8. 75 N.J. at 208, 381 A.2d at 337. The state, which had not raised this issue prior to appeal, cited United States v. Raines, 362 U.S. 17 (1960), for the proposition that a defendant may not challenge the constitutionality of a legislative enactment unless that enactment is unconstitutional as applied to him.

9. 75 N.J. at 209, 381 A.2d at 337 (quoting State v. Monteleone, 36 N.J. 93, 99, 175 A.2d 225, 233 (1961)).

10. 75 N.J. at 209, 381 A.2d at 337.

ever, should be limited to conduct that occurs in private.[11] The absence of this element of "privateness" should have deprived the defendant of any standing to question the constitutionality of the statute.[12] The United States Supreme Court has consistently maintained that "overbreadth attacks," if they are entertained at all, should be curtailed when invoked against ordinary criminal laws.[13]

II. The Development of Federal Privacy Concepts

In *Saunders,* the court duly noted that the right of privacy "is not explicitly mentioned in either the New Jersey or [the] United States Constitutions."[14] Nonetheless, it chose to rely almost exclusively on federal precedent to reach its decision, avoiding perhaps the easier route of analyzing the case under the state constitution.[15] Writing for

11. *Cf.* Lovisi v. Slayton, 539 F.2d 349, (4th Cir.), *cert. denied,* 429 U.S. 977 (1976) (Defendants had engaged in sex in the presence of a third party. The court posited that the element of seclusion was a necessary prerequisite for asserting one's privacy rights, and that the third party onlooker had destroyed the "seclusion" aspect of the sexual relations.).

12. *See, e.g.,* Carter v. State, 255 Ark. 225, 233, 500 S.W.2d 368, 373 (1973) (Defendants, who had committed an act of sodomy at a highway rest area, were denied standing to question the sodomy statute's failure to distinguish between publicly and privately committed acts.); Commonwealth v. LaBella, 364 Mass. 550, 553-54, 306 N.E.2d 813, 815-16 (1974) (Defendant, convicted of committing an "unnatural and lascivious act" in the front seat of his automobile, was not allowed to invoke a "right of privacy in the home" defense.).

13. *See, e.g.,* Broadrick v. Oklahoma, 413 U.S. 601, 610-15 (1973).

14. 75 N.J. at 210, 381 A.2d at 337.

15. New Jersey courts have not encountered the difficulties the federal courts have wrestled with in isolating the origins of the right of privacy. *See, e.g.,* Note, *On Privacy: Constitutional Protection for Personal Liberty,* 48 N.Y.U.L. Rev. 670, 671 (1973). In McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945), *aff'd,* 137 N.J. Eq. 548, 45 A.2d 842 (1946), a case decided just prior to the adoption of the present New Jersey Constitution, the court recognized the right of privacy and pinpointed its situs in the state constitution. *McGovern* involved a sheriff who was indicted for failure to fingerprint and photograph certain persons following their indictment. The sheriff desired an injunction to restrain the superintendent of the State Police from taking *his* fingerprints and photograph and forwarding copies to other criminal agencies. The court granted the injunction o the ground that the state had no right to disseminate the materials unless the sheriff was a fugitive from justice. The court called the right of privacy "one of the 'natural and inalienable rights' recognized in article 1, section 1 of the constitution of this state," and stated that it had "its origin in natural law [and] is immutable and absolute . . . ." 137 N.J. Eq. at 33, 43 A.2d at 519. Subsequent decisions in New Jersey reaffirmed the existence and importance of a right of privacy in the present state constitution. *See In re* Quinlan, 70 N.J. 10, 40, 355 A.2d 647, 663, *cert. denied,* 429 U.S. 922 (1976) (holding that the father of a young woman in a comatose condition described as "chronic persistent vegetative state" possessed the right to discontinue all life support apparatus in the face of certain imminent death for his daughter if the life support systems were removed).

the majority, Justice Pashman cited *Griswold v. Connecticut*[16] as the first instance of federal recognition of a right of privacy, and then noted that several later Supreme Court decisions, including *Roe v. Wade*[17] *and Carey v. Population Serv. Int'l*,[18] firmly established the constitutional stature of this right. He conceded that the "precise scope" of the right's protected interests never had been definitively sketched, but felt that the right should not be confined to the "private situations" isolated in previous cases.[19]

To support the court's perception of broadening privacy rights, Justice Pashman relied heavily on *Carey*, wherein the United States Supreme Court reviewed a New York statute that criminalized sales or distributions of contraceptive devices to minors under the age of sixteen years by persons other than physicians.[20] Justice Pashman inferred that the *actual* "constitutional basis for the protection of such decisions is their relationship to individual autonomy,"[21] despite the *Carey* Court's explicit statement that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[22] He concluded, therefore, that the ultimate interest protected by the right of privacy was the "freedom of personal development."[23]

This conclusion appears to have been prompted by Justice Brennan's statement in *Carey* that an individual's decision concerning contraception was "among the most private and sensitive" privileges protected by the right of privacy.[24] The *Saunders* court was mistaken, however, in inferring from Brennan's assertion that the right of privacy provided protection beyond the field of decisions involving whether or not to beget a child. Justice Brennan subsequently qualified his assertion, confirming that he intended to restrict its holding:

16. 381 U.S. 479 (1965). *Griswold* has been construed as marking the establishment of a zone of privacy emanating, as former Justice Douglas suggested, from the penumbras of several constitutional guarantees. 381 U.S. at 484.

17. 410 U.S. 113 (1973).

18. 431 U.S. 678 (1977).

19. 75 N.J. at 211, 381 A.2d at 338 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923) (child rearing and education)).

20. N.Y. EDUC. LAW § 6811(8) (McKinney 1971).

21. 75 N.J. at 212, 381 A.2d at 339.

22. 431 U.S. at 685.

23. 75 N.J. at 213-14, 381 A.2d at 339. The court equated the freedom of personal development with a "right to intimacy" and "personal autonomy." 75 N.J. at 212, 381 A.2d at 339.

24. 431 U.S. at 685.

" 'If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as *the decision whether to bear or beget a child.*' "[25] Thus, constitutional protection for contraception decisions would appear to be derived from constitutional protection for decisions about bearing children.

An argument can be made, though, that the Supreme Court did intimate in *Carey* that the right of privacy protects a broader range of decisions. The Court initially noted that the " 'right of personal privacy, or a guarantee of certain areas or zones of privacy' " recognized in *Roe v. Wade* "includes 'the interest in independence in making certain kinds of important decisions,' "[26] and listed several "personal decisions" that had already been accorded protection from "unjustified governmental interference."[27] Indicating that the list was not definitive, the Court pointed out that the "outer limits" of the "certain kinds of important decisions" had not been delineated,[28] and that it had not conclusively responded to the "question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."[29]

It is nonetheless apparent that the Supreme Court has accepted Justice Rehnquist's assertion in *Carey* that *Doe v. Commonwealth's Attorney* did, in fact, definitively establish the "facial" constitutional validity of criminal statutes prohibiting certain consensual acts.[30]

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25. *Id.* (quoting Eisenstadt v. Baird, 405 U.S. at 453) (emphasis added).

26. 431 U.S. at 684 (quoting Roe v. Wade, 410 U.S. at 152, and Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

27. 431 U.S. at 685. *See* note 19 *supra.*

28. *Id.* at 684.

29. *Id.* at 688 n.5; *see id.* at 694 n.17. Viewed in this light, *Carey's* significance goes beyond the affirmation of potential expansion of the right of privacy. It extends the holding of *Griswold.* In *Carey,* the state argued that neither *Griswold* nor *Eisenstadt* "should be treated as reflecting upon the State's power to limit or prohibit distribution of contraceptives to any persons." 431 U.S. at 687. The two prior cases, it continued, had dealt solely with the *use of* and *equal access to* contraceptives. The state's argument was a direct attempt to categorize and thereby limit the right of privacy to the fact situations of the prior cases. The Court vigorously objected to this categorization, and noted the "fatal fallacy" in the argument: "the underlying premise of [the prior] decisions," it emphasized, was "that the Constitution protects the right of the individual . . . to be free from unwarranted governmental intrusion into . . . the *decision* whether to bear or beget a child." 431 U.S. at 687 (quoting Eisenstadt v. Baird, 405 U.S. at 453 (emphasis added)). In this regard *Carey* declared that the restrictions on the distribution of contraceptives "clearly burden[ed] the freedom to make *such decisions.*" 431 U.S. at 687 (emphasis added).

30. *See* 431 U.S. at 718 n.2. The Court's decision in *Commonwealth's Attorney* to deny the "mature individual's choice of a sexual partner" relied heavily on a narrow interpretation of *Griswold* and its progeny, reading the cases as merely denying the state the right to trespass "upon the privacy of the incidents of marriage, upon the sanctity

On May 15, 1978, the Court again refused to consider a challenge to a state's criminalization of consensual sodomy,[31] lending credence to the belief that the present members of the Court will not entertain suggestions to expand the "personal decisions" beyond those areas previously delineated. Consequently, the *Saunders* court may have misread the signals emitted by Carey.

III. New Jersey's Extention of Protection to Consensual Heterosexual Conduct

In *State v. Lutz*,[32] decided in 1971, the New Jersey Supreme Court affirmed a fornication conviction despite the defendant's argument that the statute unconstitutionally invaded the federally-protected zone of privacy. The court rejected the argument virtually without analysis, by referring the defendant to the concurring opinions of Justices Goldberg and White in *Griswold*,[33] and to the dissenting opinion of Mr. Justice Harlan in *Poe v. Ullman*,[34] all of which emphasized that the right protected was the marital right of privacy.

Shortly thereafter, in *State v. Clark*,[35] the court affirmed its holding in *Lutz*. In *Clark*, the Welfare Department had refused to give the defendant financial assistance for the support of her illegitimate child until she filed a bastardy complaint against the putative father. During the bastardy proceedings, the judge directed that charges be filed against both parents for violation of the fornication statute. The resulting conviction was reversed by the New Jersey Supreme Court, which stated that fifth amendment implications and public policy considerations precluded the conviction.[36] Although it did not need

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of the home, or upon the nurture of family life." Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). Extensive support for the proposition was drawn from the statements of Justices Douglas, Goldberg, and Harlan in *Griswold* pertaining to the sanctity of marriage, home and family. Additional support arose from dicta that hinted that homosexual intimacy was "denunciable" by the state. *See* 403 F. Supp. 1201-02. However, there has been state court resistence to Justice Rehnquist's statement. In a recent New York case, *In re* P., 92 Misc. 2d 62, 400 N.Y.S.2d 455 (1977), the court declared that it did not find *Commonwealth's Attorney* dispositive of the issues in private consensual sodomy cases, and indicated that the summary affirmance only possessed "minimal precedential value." *Id.* at 76 n.21, 400 N.Y.S.2d at 465 n.21.

31. Enslin v. Bean, 46 U.S.L.W. 3705 (U.S. May 15, 1978).
32. 57 N.J. 314, 272 A.2d 753 (1971).
33. Griswold v. Connecticut, 381 U.S. at 498-99, 505-07.
34. 367 U.S. 497, 552-53 (1961).
35. 58 N.J. 72, 275 A.2d 137 (1971).
36. *Id.* at 83, 275 A.2d at 143.

to reach the issue, the court rejected without explanation the defendant's claim that the statute "unjustifiably interferred" with their right of privacy, deeming it sufficient to refer the defendants to the analysis offered in *Lutz*.[37]

Carey's elaboration of *Griswold,* as interpreted by the New Jersey Supreme Court, thus allowed the court to retreat gracefully from the stance it had articulated in *Lutz* and *Clark*. The *Saunders* court concluded that determinations in matters of conception were only one of several fundamentally personal and private decisions shielded under the right of privacy.[38] The court may have been swayed by the argument presented by the defendant in his appellate brief: that a delineation of other equally sensitive and private decisions in the right of privacy's "cluster of constitutionally protected choices" should not be precluded by the fortuitous fact that the right of privacy first emerged in an opinion concerned with prohibitions of contraceptives.[39]

Once the *Saunders* court decided that the fornication statute "impinge[d] upon the fundamental right of privacy," it proceeded to negate the proffered compelling state interests in regulating acts of fornication.[40] The court did not deny that the State had a compelling

37. *Id.* at 82-83, 275 A.2d at 143.

38. *See* 75 N.J. at 211-12, 381 A.2d at 338-39. The decision may alternately be viewed as a return to the common law standard, which did not criminalize fornication when committed in private. 2 WHARTON, CRIMINAL LAW AND PROCEDURE § 676, at 476 (Anderson ed. 1957).

39. *See also* Brief for Defendant-Appellant at 64, State v. Saunders, 130 N.J. Super. 234, 326 A.2d 84 (Essex County Ct. Law Div. 1974):

> The right of privacy recognized in *Griswold* does not rest on any specific provision of the Constitution which in explicit terms could limit its growth beyond the marriage relationship. It is supported by such recognized constitutional rights as the freedom of association, the freedom from self-incrimination, the freedom from unreasonable searches and seizures, and the freedom from having soldiers quartered in private houses. None of these protections are limited in scope to the persons and homes of married couples; thus no basis exists in the words of the Constitution itself for limiting to married couples the constitutional right of privacy first enunciated in *Griswold*. The Court in its opinion applied the right only in that limited context, true, but such limitation was unlikely to withstand the test of time and logic.

40. 75 N.J. at 217, 381 A.2d at 341. Note that prior United States Supreme Court decisions have held that "even a burdensome regulation may be validated by a sufficiently compelling state interest." Carey v. Population Serv. Int'l, 431 U.S. at 686. Such interests as "safeguarding health, . . . maintaining medical standards, and . . . protecting potential life" have been cited as examples of interests which may, at some point, "become sufficiently compelling to sustain regulation [of a fundamental interest]." Roe v. Wade, 410 U.S. at 154. However, the Supreme Court has emphasized that the state interest must be of a compelling nature to justify the regulation of the fundamental right. "Regulations imposing a burden on [the fundamental right] may be justified only by *compelling* state interests, and must be narrowly drawn to express only those interests." 431 U.S. at 686 (emphasis added).

interest in preventing venereal disease, but it questioned whether the statute had been designed with that end in mind. The court observed that the prohibition against fornication had little deterrent value, and that a vigorous prosecution of the statute would, most likely, adversely affect the State's program to combat the disease.[41] Nor was the court convinced that the prevention of the propagation of illegitimate children was measurably advanced by the statute, especially in light of prior studies demonstrating the unsuccessful deterrent effect achieved by the restraints on contraceptives.[42] Finally, the court dismissed out of hand the State's contention that the prevention of illicit sex preserved the marriage relationship and the public morals. As the court tersely noted, public morality could be furthered only to the extent that the regulation affected public morality.[43]

Justice Schreiber, in his concurrence, departed from the majority's holding only to disapprove of the court's reliance upon recent United States Supreme Court decisions.[44] He did not agree that *Carey* signalled a departure from the view that the state could prohibit certain consensual acts, and further asserted that the summary affirmance in *Doe v. Commonwealth's Attorney* was "totally incompatible" with the majority's suggestion that a broad individual autonomy was encompassed within the federal right of privacy.[45]

Justice Schreiber suspected, however, that the statute was an attempt to regulate private morality, and as such was prohibited by article I, section 1 of the New Jersey Constitution.[46] The state constitution, he pointed out, differs from the federal in that it limits the sovereign powers of the state, which had been vested in the legislature. The "natural and unalienable rights" it grants allow for the exercise of private consensual conduct incident to the right of privacy's "freedom to think, decide and act."[47] Of course, this freedom is conditioned upon not interfering with the rights of others.

In his dissent, Mr. Justice Clifford did not address the issue of the defendant's lack of standing.[48] He did mention in passing that the case did not appear to be a "proper vehicle" for confronting the

41. 75 N.J. at 217-18, 381 A.2d at 341-42.
42. *Id.* at 218-19, 381 A.2d at 342. For a list of the studies upon which the court relied, see Carey v. Population Serv. Int'l, 431 U.S. at 695 n.19.
43. 75 N.J. at 219, 381 A.2d at 342.
44. *Id.* at 220, 381 A.2d at 343 (Schreiber, J., concurring).
45. *Id.* at 224, 381 A.2d at 344 (Schreiber, J., concurring).
46. N.J. CONST. art. 1, par. 1.
47. 75 N.J. at 225, 381 A.2d at 345.
48. *Id.* at 228, 381 A.2d at 346 (Clifford, J., dissenting).

constitutional issues, presumably because of the improper situs of the conduct. Nonetheless, he admitted that if the case had been a proper one for the resolution of the constitutional issue, he would have followed the concurring justice's ruling. Finally, he strongly argued that the court should have resolved the propriety of including fornication as a lesser included offense to the crime of rape by requesting that parties submit further briefs on the matter.[49]

IV. Impact on Fornication Prosecutions in New Jersey

The paucity of fornication presecutions throughout the United States,[50] as well as in New Jersey,[51] tends to show that the *Saunders* decision will not substantially alter the state policy towards such prosecutions. In the seventy years since *State v. Sharp*,[52] New Jersey had addressed the issue in its appellate courts on only three occasions.[53] The state's policy towards enforcement has been termed "limited," and New Jersey's State Division of Criminal Justice has announced that its office "has no experience in fornication."[54] Whether the rationales for nonenforcement can be attributed to the inherent difficulties in gathering evidence of the furtively performed acts,[55] or to a dramatic shift in the public attitude toward toleration of such activities,[56] it is evident that the state has no policy for the regular enforcement of this statute. By its failure to administer the law, New Jersey has in effect adopted the reforms suggested by the Advisory Committee to the Model Penal Code,[57] and by its own Criminal Law Commission,[58] both of which submit that fornication should not constitute a crime. Indeed, as the *Saunders* court remarked, its decision merely sanctioned judicially the conclusions reached in those reports.[59]

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49. *Id.* at 229, 381 A.2d at 347 (Clifford, J., dissenting).

50. *See generally* L. Blumkin, The Law of Fornication and Cohabitation—with Special Attention to Problems of Prosecutorial Discretion (May 1, 1973) (unpublished LL.M. thesis in Harvard Law School Library).

51. *See* State v. Clark, 58 N.J. at 75-76, 275 A.2d at 139.

52. 75 N.J.L. 201, 66 A. 926 (Sup. Ct. 1907), *aff'd*, 76 N.J.L. 576, 70 A. 110 (E. & A. 1908).

53. *See* State v. Clark, 58 N.J. 72, 275 A.2d 137 (1971); State v. Lutz, 57 N.J. 314, 272 A.2d 753 (1971); State v. Ruttberg, 87 N.J.L. 5, 93 A. 97 (Sup. Ct. 1915).

54. State v. Saunders, 130 N.J. Super. at 240, 326 A.2d at 87.

55. *See, e.g., id.* at 241, 326 A.2d at 87-88.

56. *Id.* at 238, 326 A.2d at 86.

57. Model Penal Code § 207.1, Comment (Tent. Draft No. 4, 1955).

58. *Commentary, Final Report of the New Jersey Criminal Law Revision Commission*, 2 N.J. Penal Code ch. 14, at 189 (1971).

59. 75 N.J. at 219 n.8, 381 A.2d at 342 n.8.

Objections have been voiced concerning the propriety of such judicial law-making.[60] It is argued that it is for the legislature to amend or dispose of such unjust laws.[61] As has been aptly stated, " '[g]overnment by, for and of the people' cannot easily be deemed intrusive when making regulations . . . for the welfare of the people."[62] But while "the principles of permissible accommodation between private right and public good, . . . based in hallowed scripture, have continued to change,"[63] those "hallowed scriptures" have remained entrenched in the statute books of most states. Repeal of these statutes has been extremely difficult; the act of repeal has been perceived as a sanctioning of that which was formerly outlawed, rather than as a recognition of individual rights.[64] Political practicality has often dictated legislative inaction.

Yet, it would be " 'ludicrous to preclude judicial relief when a mainspring of representative government is impaired.' "[65] The judiciary cannot evade its responsibility and yield to the legislature when individual liberties are at stake. Rights guaranteed by the Bill of Rights are not to be made dependent on the outcome of elections.[66]

V. Other "Private Decisions": Some Considerations

Saunders is a significant interpretation of New Jersey and federal privacy rights and one with potentially wide-spread ramifications. The court incorporated into its holding the broad claim that "sexual activities between adults are protected by the right of privacy."[67] Such

60. *See, e.g.,* Doe v. Commonwealth's Attorney, 403 F. Supp. at 1202 ("If a State determines that punishment . . . is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so."); State v. Bateman, 113 Ariz. 107, 111, 547 P.2d 6, 10 (1976) ("We are . . . cognizant of our role as the judicial branch of government and not the legislative."); State v. Pilcher, 242 N.W.2d 348, 367 (Iowa 1976) (Reynoldson, J., dissenting) (The majority overstepped its bounds "unnecessarily [interferring] in complex moral and social areas better left to the legislature."). *See also* Comment, *Right of Privacy Protects Consensual Heterosexual Behavior, State v. Pilcher,* 1977 Wash. U.L.Q. 337, 347.

61. Cornblatt, *Sin and the Laws of New Jersey,* 14 N.J. St. B.J. 20, 24 (Fall 1970) (quoting Sills, League of New Jersey Municipalities Magazine 26-27 (April 1969)).

62. I. Berlin, Two Concepts of Liberty (1958).

63. Henkin, *Privacy and Autonomy,* 74 Colum. L. Rev. 1410, 1410 (1974).

64. *See* Brief for Appellant-Defendant at 85-89, State v. Saunders, 130 N.J. Super. 234, 326 A.2d 84 (Essex County Ct. Law Div. 1974).

65. Baker v. Carr, 369 U.S. 186, 249 (1962) (Douglas, J., concurring) (quoting Dyer v. Kazuhisa Abe, 138 F. Supp. 220, 236 (D. Haw. 1956).

66. Furman v. Georgia, 408 U.S. 238, 268-69 (1972) (Brennan, J., concurring).

67. 75 N.J. at 214, 381 A.2d at 340.

language suggests that the court may soon be willing to extend protection to other private activity, such as all private consensual sexual conduct—whether homosexual or heterosexual—so long as no one is harmed, as well as private possession and consumption of marijuana within the home.

A. *Homosexuality*

The current view of the New Jersey Supreme Court on the constitutionality of statutes that proscribe acts of sodomy was articulated in *State v. Lair*,[68] where the court reviewed a rape and sodomy conviction. The court agreed that a constitutional right of marital privacy protected even deviate sexual acts when practiced consensually and in private by a married couple, but declined to extend this protection to consensual conduct practiced by unmarried couples. The court emphasized that *Griswold* had stressed a marital privacy right.

Chief Justice Weintraub, concurring in *Lair*, expressed grave reservations as to the constitutionality of legislation prohibiting private consensual sexual acts. In an earlier opinion, he had noted that criminal prohibtions against contraceptives and abortions similarly depended upon a "spiritual supposition" of evil.[69] The blanket application of criminal sanctions on sodomy, and the nonavailability of consent as a defense, led him to conclude that society's refusal to provide legal outlets for homosexuals to pursue the "dictates of their nature" was questionable. He doubted "the existence of a public interest sufficient to justify an edict that the homosexual shall behave as a heterosexual or not at all."[70]

The inference is easily drawn from *Saunders* that the New Jersey Supreme Court has yielded to the cogent arguments of Chief Justice Weintraub, and may no longer consider *Lair* good law. In *Saunders*, it specifically distinguished *Lair* by observing that *Lair's* factual situation should have precluded discussion of the constitutionality of the sodomy statute.[71] Moreover, it cited an Iowa *sodomy* case, *State v. Pilcher*,[72] as support for its position that a *fornication* statute unconstitutionally intrudes upon an individual's privacy rights.

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68. 62 N.J. 388, 301 A.2d 748 (1973).
69. Gleitman v. Cosgrove, 49 N.J. 22, 59, 227 A.2d 689, 709 (1967).
70. 62 N.J. at 398, 301 A.2d at 754 (Weintraub, C.J., concurring).
71. 75 N.J. at 217 n.7, 381 A.2d at 341 n.7. The court noted that it had not been faced with any factual basis for finding that consent had been given for the sexual acts performed there.
72. 242 N.W.2d 348 (Iowa 1976).

In *Pilcher,* the Iowa Supreme Court interpreted *Eisenstadt* as extending protection to private consensual conduct of unmarried adults, and declared the sodomy statute unconstitutionally overbroad. In an attempt to limit the impact of its holding, however, the court expressly refrained from deciding whether the state, by means of a narrowly drawn statute, could constitutionally prohibit consensual sodomy among homosexuals.

It is nevertheless clear that by declaring the statute unconstitutional on its face, the Iowa court failed to restrict its holding to the factual situation at hand. It quoted approvingly from *Lovisi v. Slayton,*[73] a federal district court decision which denied the defendants the right to assert their privacy claims, for the proposition that the right of privacy protected decisions to engage in conduct that has no effect on others and is personal to the actor; a definition certainly broad enough to encompass homosexual rights.[74] The court also stated that the statute was not amenable to the doctrine of separability, and emphatically rejected the alternative of judicially supplying an amended legislative intent.[75] Realizing the full impact of the holding, the Iowa legislature quickly responded by enacting a new sexual abuse statute.[76] Notable in this statute is the conspicous absence of any language regulating private consensual behavior among adults.

B. *Marijuana*

In New Jersey, private possession and consumption of marijuana is currently proscribed by the Controlled Dangerous Substances Act,[77] which in 1970 replaced the Uniform Narcotic Drug Law.[78] *State v.*

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73. 363 F. Supp. 620 (E.D. Va. 1973).
74. 242 N.W.2d at 358.
75. *Id.* at 359.
76. The new act defined sexual abuse as:

> Any sex act between persons is sexual abuse by either of the participants when the act is performed with the other participant in any of the following circumstances:
>
> 1. Such act is done by force or against the will of the other. In any case where the consent or acquiescence of the other is procured by threats of violence toward any person, the act is done against the will of the other.
>
> 2. Such other participant is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.
>
> 3. Such other participant is a child.

IOWA CODE ANN. § 709.1 (West Supp. 1978).

77. N.J. STAT. ANN. §§ 24:21-1 to 21-45 (West Supp. 1976). In particular, see § 24:21-20.
78. 1933 N.J. Laws. ch. 186 § 17.

Nugent,[79] a per curium opinion affirming the conviction of two defendants for possession of marijuana, has apparently retained its precedential value despite its having been decided under the old law. In that case, the New Jersey Supreme Court brushed aside the defendants' contentions that the convictions intruded upon constitutionally protected rights.

It is not disputed that the overwhelming majority of jurisdictions that have considered the issue are nearly unanimous in their refusal to accept a constitutional right to possess and consume marijuana.[80] But past decisions holding that the right of privacy does not prevent legislatures from proscribing private possession and use of marijuana were grounded, in part, upon a reluctance to elevate the notion of personal autonomy to the status of a fundamental right.[81] In *Saunders*, however, the court did not hesitate to declare that "[t]he right of personal autonomy *is fundamental* to a free society."[82]

Several recent decisions have found state constitutional provisions determinative of whether or not protection would be accorded to private possession and use of marijuana. The Hawaiian Supreme Court, for example, has held that the Hawaiian constitution does not raise the privacy right to the equivalent of a first amendment right.[83]

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79. 125 N.J. Super. 528, 312 A.2d 158 (1973). In *Nugent*, the defendants insisted that *Griswold* and Stanley v. Georgia, 394 U.S. 557 (1969), implied a fundamental right to possess marijuana free of governmental intrusions. They maintained that prohibition of private possession was unconstitutional because it encroached upon purely private conduct. The Court disagreed, remarking that the right to possess marijuana hardly qualified as a fundamental right protected by *Griswold*, and that *Stanley* was distinguishable since it involved a "clear First Amendment right." *Id.* at 534, 312 A.2d at 162.

80. *See, e.g.*, People v. Aguiar, 257 Cal. App.2d 597, 65 Cal. Rptr. 171 (1968); State v. Anonymous, 32 Conn. Supp. 324, 355 A.2d 729 (1976); Kreisher v. State, 319 A.2d 31 (Del. 1974); State v. O'Bryan, 96 Idaho 548, 531 P.2d 1193 (1975); People v. Alexander, 56 Mich. App. 400, 223 N.W.2d 750 (1974).

81. *See, e.g.*, State v. Renfro, 56 Haw. 501, 542 P.2d 366 (1976); State v. Baker, 56 Haw. 271, 535 P.2d 1394 (1975); State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972); Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969). Courts have also rejected such claims on the ground that private possession and use of marijuana was not fundamental to the American scheme of justice or necessary to ordered liberty. *See* Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969).

82. 75 N.J. at 220, 381 A.2d at 342 (emphasis added).

83. *See, e.g.*, State v. Baker, 56 Haw. 271, 535 P.2d 1394 (1976). In *Baker*, the Hawaiian Supreme Court reversed a lower court ruling that a statute proscribing the promotion of a detrimental drug was unconstitutional, insofar as the statute related to possession of marijuana. The court found that the statute, which prohibited commercial distribution of harmful substances, may "sweep within its ambit" the possession of marijuana for personal use as an enforcement measure. In State v. Kantner, 53 Haw. 327, 493 P.2d 306 (1972), the court affirmed the conviction of defendant for possession of marijuana. It did not find that the use of marijuana involved an issue of "fundamental liberty" or that possession of marijuana fell within the "class of interests" to which

Similarly, the inapplicability of the right to privacy provision in the Massachusetts' constitution severely handicapped the petitioner's case in *Commonwealth v. Leis.*[84] Finally, a 1975 decision in Alaska, *Ravin v. State,*[85] has held that no adequate justification existed for the state's prohibition of the possession of marijuana by adults for personal consumption in the home. Subsequent cases[86] have explained *Ravin* by observing that the decision was based substantially upon the strong right of privacy provision in the Alaska constitution.[87]

CONCLUSION

The increased tolerance for homosexuality and other deviant sexual conduct has been attributed by one commentator to the "development of our industrial civilization" to the stage where such once-disruptive activity no longer effects the same passions and emotionality.[88] The Honorable Arthur J. Sills, a former Attorney General of New Jersey, has stated a second, more practical reason for the lessened enthusiasm for continuing the designation of these acts as criminal offenses: "[They] have complicated the duties of police, prosecutor and court and have hindered the attainment of a rational and just penal system."[89] Similarly, it has been argued that the penal system would "deplete its reserve of legitimacy" if it continued to prosecute certain behavior.[90] Acceptance by the *Saunders* court of the notion of personal development may reflect a change in society's attitude

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the Hawaiian constitution accorded the "highest degree of protection." 53 Haw. at 332-33, 493 P.2d at 310.

The Hawaiian courts placed some emphasis on the fact that the wording of article I, section V, of Hawaii's constitution was, prior to the privacy amendment, identical to that of the fourth amendment in the United States Bill of Rights. *See* State v. Roy, 54 Haw. 513, 517, 510 P.2d 1066, 1068-69 (1973). From the plain wording of the amendment, the courts concluded that the right of privacy is protected only against unreasonable invasions. *See* State v. Baker, 56 Haw. at 280, 535 P.2d at 1399.

84. Commonwealth v. Leis, 355 Mass. 189, 195, 243 N.E.2d 898, 903-04 (1969). The Supreme Judicial Court of Massachusetts held that a statute proscribing the possession of any narcotic drug was constitutional as applied to defendants' who had been charged with possession and conspiracy to violate the Narcotic Drugs Law.

85. 537 P.2d 494 (Alaska 1975).

86. *See, e.g.,* State v. Anderson, 16 Wash. App. 553, 556, 558 P.2d 307, 309 (1976).

87. "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." ALASKA CONST., art. I, § 22 (1972).

88. Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law.* 28 RUTGERS L. REV. 861, 873 (1975).

89. Cornblatt, *Sin and The Laws of New Jersey,* 14 N.J. ST. B.J. 20, 24 (Fall 1970) (quoting Sills, League of New Jersey Municipalities Magazine 26-27 (April 1969)).

90. Ingber, *supra* note 88, at 880.

towards all such moral crimes, including perhaps, gambling and prostitution,[91] as well as sodomy and homosexual offenses.

The rightful exercise of power over an individual can be justified only if its objective is to prevent harm to others.[92] A system that perceives crime as predominantly a social rather than an individual harm lacks this limiting factor and inhibits individuals from growing and developing to their full potential. Acts, then, which are concerned only with "private morals or ethical sanctions," should not be punished.[93]

> In a free society, illegal acts should be limited to those which threaten the peace, safety and/or stability of the society, including those which so outrage its citizens' sense of justice or propriety that they may reasonably demand protection from being exposed to them. A free society should not attempt to impose the notions of sin held by any one segment of its population upon the entire body politic.[94]

The New Jersey Supreme Court's decision in *Saunders* extends the right of privacy to consensual sexual acts between adults and represents a step towards "toleration of the maximum individual freedom . . . consistent with the integrity of society."[95]

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91. At common law, gambling had not been an indictable offense "unless it was tainted with fraud, was accompanied by a breach of the peace, or for other social reason ran counter to public policy." Carll & Ramagosa, Inc. v. Ash, 23 N.J. 436, 438, 129 A.2d 433, 434 (1957). *See also* Cornblatt, *supra* note 89, at 21. Prostitution, in the absence of definite evils which are proper subjects of regulation, is but a woman, who in full possession of her faculties, offers her body for indiscriminate sexual activity for a fee. But, if her solicitation occurs by words or behavior in any public place, then the solicitation is offensive to public order and will affront public sensibilities or decency. Furthermore, prostitution is a proper subject of regulation if an individual procures or lives on another's prostitution, or premises are maintained as a brothel. Cornblatt, *supra* note 89, at 22. Barring any of these occurrences, though, as long as she conducts her activities in private, "[t]here [should be] limits to the degree of discouragement which the criminal law can properly exercise towards a woman who has deliberately decided to live her life in this way . . . ." REPORT OF THE COMMITTEE OF HOMOSEXUAL OFFENSES AND PROSTITUTION § 226 (1957) (The Wolfenden Report). A recent Family Court case in New York, In re P., 92 Misc. 2d 62, 400 N.Y.S.2d 455 (1977), seems to have reached a similar conclusion. The court discussed the constitutionality of the New York statute on prostitution, N.Y. PENAL LAW § 230.00 (McKinney 1969), and concluded that the provision was unconstitutional under New York's right to privacy and equal protection clauses.

92. [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He can not rightfully be compelled to do or forbear . . . because, in the opinion of others, to do so would be wise, or even right.

J. MILL, ON LIBERTY 8-9 (1946).

93. *See* Cornblatt, *supra* note 89, at 20. *See also* P. DEVLIN, THE ENFORCEMENT OF MORALS 16 (1965).

94. Cornblatt, *supra* note 89, at 20.

95. P. DEVLIN, *supra* note 93, at 16.