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Constitutional Challenges to the Criminalization of Same-Sex Sexual Activities: State Interest in HIV-AIDS Issues

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CONSTITUTIONAL CHALLENGES TO THE CRIMINALIZATION OF SAME-SEX SEXUAL ACTIVITIES: STATE INTEREST IN HIV-AIDS ISSUES

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INTRODUCTION

As the most-litigated disease in our nation's history,[1] Human Immunodeficiency Virus-Acquired Immune Deficiency Syndrome (HIV-AIDS) frequently challenges the courts to separate reasoned arguments from arguments based on misinformation, prejudice and hysteria. A major national study recently concluded that society subjects people affected by HIV-AIDS to discrimination in employment,[2] health care,[3] insurance[4] and criminal law.[5] The stigma of HIV disease[6] has particularly

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The author of this article assisted in the preparation of the amici curiae brief submitted by the American Psychological Association et al. to the Kentucky Supreme Court in *Commonwealth v. Wasson*, No. 90-SC-558-TG, 1992 WL 235412 (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990). The views expressed in this article are those of the author alone.

1. *See* Larry O. Gostin, *AIDS Litigation Project II: A National Survey of Federal, State, & Local Cases Before the Courts and Human Rights Commissions* (1991) (available from the Department of Health and Human Services, Public Health Service, National AIDS Program Office). The AIDS Litigation Project (ALP) tallied 444 AIDS-related cases by June 1, 1989. Eighteen months later, in January, 1991, the ALP recorded 372 cases (the vast majority were not included in the earlier study). The ALP report provides expansive detail of both discrimination against persons with HIV-AIDS and ignorance of scientific evidence concerning the disease.

2. *See, e.g.*, Cain v. Hyatt, 734 F. Supp. 671 (E.D. Pa. 1990) (awarding plaintiff $157,888.18 in damages against employer who discharged plaintiff after learning he contracted AIDS).

3. *See, e.g.*, Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989) (plaintiffs brought suit against Missouri Medicaid officials who denied Medicaid coverage for the anti-viral drug AZT to AIDS patients eligible for Medicaid).

4. *See, e.g.*, William Penn Life Ins. v. Sands, 912 F.2d 1359 (11th Cir. 1990) (insurer refused to pay coverage on life insurance of deceased, who died of AIDS, and sought to rescind life insurance policy of deceased's beneficiary, who also had AIDS, although neither applicant misstated his health status at time of application).

5. *See, e.g.*, Wiggins v. State, 602 A.2d 212 (Md. App. 1989) (homosexual defendant of unknown HIV status was, under order of the trial judge, escorted to and from court by guards wearing rubber gloves).

6. Many health care professionals now view the term AIDS as arbitrary and outmoded. Of broader application are the terms HIV illness and HIV infection, which encompass the effects of HIV on those who have tested positive for antibodies to the virus, not just those who fall within the prevailing definition of AIDS. *See* Michael Closen & Scott

harsh consequences when criminal penalties are at stake. Controversial results abound in criminal prosecutions of HIV-positive defendants. One state court reinstated a conviction for attempted murder based upon the defendant's spitting and throwing of blood.[7] A federal appeals court held that the bite of an HIV positive person constituted use of a "deadly and dangerous" weapon in an assault prosecution.[8] In other cases, criminal defendants diagnosed or merely perceived as HIV-positive were subject to irrational and humiliating courtroom treatment.[9]

Constitutional challenges to criminal sodomy laws provide a valuable setting for assessing the rationality of judicial response to HIV-AIDS issues. In particular, homosexuals' legal challenges to these laws' proscriptions of private, noncommercial, consensual, same-sex sexual activities raise two of the most provocative issues of our time: preventing the spread of HIV-AIDS and protecting the right to privacy in intimate acts. Courts face difficulty in resolving these challenges when supporters and opponents of same-sex sodomy statutes raise emotionally charged HIV-AIDS issues linked to a variety of complex medical, social and psychological concerns.

The effect of these arguments on courts and on legislatures is profound. As one commentator noted: "The trend towards decriminalization of gay sex has been halted by AIDS . . . ."[10] Now that the AIDS hysteria has abated somewhat, courts may again be willing to view the sodomy issue rationally. In *Commonwealth v. Wasson*,[11] the Kentucky Supreme Court struck down the Kentucky same-sex sodomy law on state constitutional grounds. The decision provided a ringing affirmation of personal privacy rights and rejected irrational arguments based on HIV-AIDS concerns. It remains an open question whether other courts will take a similar view or will bend to popular pressures.

Part I of this Article places constitutional challenges to sodomy laws in their legal context by surveying major state and federal cases con-

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Isaacman, *HIV-AIDS and Governmental Control of Information: International Denial of Human Rights*, 4 ST. THOMAS L. REV. 107, 111-14 (1992).

7. State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (reversing trial court decision and reinstating attempted murder conviction).

8. United States v. Moore, 846 F.2d 1163 (8th Cir. 1988). For a critical view of the decision in *Moore*, *see* Carlton D. Stansbury, Comment, *Deadly and Dangerous Weapons and AIDS: The Moore Analysis is Likely to be Dangerous*, 74 IOWA L. REV. 951 (1989) (concluding that, although the court did not expressly rely on the defendant's HIV status to uphold the conviction, the issue very likely influenced the outcome).

9. *See, e.g.*, *Wiggins*, 602 A.2d at 212 (trial judge ordered guards to wear rubber gloves and ordered jury not to touch trial exhibits, even though it was unknown whether Wiggins was HIV-positive); Beason v. Harcleroad, 805 P.2d 700 (Or. App. 1991) (prosecutors discover that suspect is homosexual and fabricated a story to news media that he was gay, had AIDS and induced others to have unprotected sex while concealing illness); State v. Hudson, 1989 Tenn. Crim. App. Lexis 773 (Nov. 8, 1989) (leaving sacks marked "CAUTION, AIDS" within sight of jury is not reversible error, even though the sacks were filled with evidence from another trial).

10. Arthur Leonard, *Report from the Legal Front: Gay/Lesbian Rights*, THE NATION, July 2, 1990, at 12.

11. Commonwealth v. Wasson, No. 90-SC-558-TG, 1992 WL 235412 (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990).

fronting the issue. Part II examines how challenges to state sodomy laws frame HIV-AIDS issues. The Article also evaluates the merits of arguments based on HIV-AIDS with particular focus on state sodomy laws. In conclusion, the Article proposes a reasoned basis for the courts' responses to those arguments.

I. Criminal Proscriptions Against Consensual Same-Sex Sexual Activities

In 1986 the United States Supreme Court in *Bowers v. Hardwick*[12] held that there is no federal constitutional right to privacy in consensual, same-sex sexual activities. Thus, in the years since *Hardwick*, challengers to sodomy laws have shifted their efforts from federal to state courts. These efforts produced substantial recent success, most notably the 1992 Kentucky Supreme Court decision *Commonwealth v. Wasson*.[13] As in other areas of the law, litigants now find state courts far more receptive than federal courts to claims based upon individual constitutional liberties.[14]

To uphold the criminalization of consensual, same-sex sexual activities against constitutional challenge, the courts must find sufficient government justification for the challenged statutes.[15] In this context supporters of the same-sex sodomy statutes raise the AIDS specter by arguing that these statues effectively deter the spread of HIV-AIDS.

A. *State "Sodomy" Statutes*

In 1986 the Supreme Court upheld a Georgia sodomy law in *Hardwick*,[16] a case involving oral sex between two men in a private dwelling. Today, criminal statutes in about twenty-one states continue to forbid private, consensual, same-sex sexual activities.[17] Contrary to common

12. 478 U.S. 186, *reh'g denied*, 478 U.S. 1039 (1986).

13. *Wasson*, No. 90-SC-558-TG; *see also* State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992), No. D-2393 (Tex. argued Jan. 5, 1993); Michigan Organization for Human Rights v. Kelly, No. 88-815820 (Mich. Cir. Ct. July 9, 1990). Even before *Hardwick*, courts in Pennsylvania and New York had invalidated sodomy laws on constitutional grounds. *See* Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (invalid exercise of police power and violation of equal protection); People v. Onofre, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981) (violation of equal protection and right to privacy).

14. This trend has been the subject of substantial recent commentary. *See, e.g.*, Kevin Cullen, *Scales Tip to State Courts: Rights Lawyers Avoiding Federal Route*, BOSTON GLOBE, Dec. 28, 1991, at 1; W. John Moore, *In Whose Court?*, 23 NATIONAL J. 2396 (1991). The trend is particularly notable in privacy and Fourth Amendment cases. *See, e.g.*, Moe v. Secretary of Admin., 417 N.E.2d 382 (Mass. 1981) (rejecting holding in Harris v. McRae, 448 U.S. 297 (1980), and upholding the right to public funding of abortions under the state constitutional right to privacy); People v. Scott, 593 N.E.2d 1328 (N.Y. 1992) (rejecting holding in Oliver v. United States, 466 U.S. 170 (1984) and finding a legitimate expectation of privacy in land based on the Fourth Amendment).

15. The particular level of governmental justification required depends upon the constitutional basis for challenging the statute. *See infra* notes 34-68 and accompanying text.

16. 478 U.S. 186 (1986).

17. SEXUAL ORIENTATION AND THE LAW at 9-10 (Harv. L. Rev. eds., 1989) [hereinafter SEXUAL ORIENTATION]. The study lists twenty-four statutes, three of which have since been invalidated by courts. *See infra* note 19 and accompanying text. The proscribed acts generally, but not uniformly, involve anal and/or oral sex. Some of these statutes also prohibit

belief, the states continue to invoke and enforce these criminal sodomy statutes, albeit with less frequency. In the last six years, several state challenges have been raised in connection with arrests and/or prosecutions under these statutes. The Supreme Court of Missouri upheld the state statute,[18] while the highest state court in Kentucky and lower state courts in Michigan and Texas invalidated the statutes.[19]

The underlying facts of *Commonwealth v. Wasson* illustrate the role of state sodomy statutes. During 1985 the Lexington, Kentucky police department engaged in an undercover operation designed to generate prosecutions under Kentucky's sodomy law.[20] Over a period of roughly two months undercover police officers drove to an area they believed to be frequented by homosexuals. The officers parked their cars and engaged in conversations to determine if their targets would invite them to engage in illegal sexual conduct. The police officers secretly recorded the conversations, including a conversation with Mr. Wasson.[21] After talking with an undercover officer for twenty to twenty-five minutes, Mr. Wasson invited the officer to his home.[22] Before agreeing, the officer asked about the activities involved. At the officer's prodding, Mr. Wasson mentioned acts that were criminal under the Kentucky statute.[23] The officer departed at that point.[24] Mr. Wasson was arrested and subsequently charged him with soliciting a criminal act. Both Mr. Wasson and the officer were over twenty-one years old. The state did not allege that there was any offer or exchange of money, or that any public or private sexual activities occurred. The court postponed the trials of four other people arrested under similar circumstances pending the outcome of Mr. Wasson's constitutional challenge to the Kentucky sodomy law.[25]

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certain private consensual sexual activities between persons of the opposite sex. Prosecutions for heterosexual sodomy sometimes occur in connection with other crimes, such as rape, but rarely are brought when sodomy is the only crime charged. For an example of one such case, *see, e.g.*, State v. Bateman, 540 P.2d 732 (Ariz. App. 1975), *vacated*, 547 P.2d 6 (Ariz. 1976) (reinstating conviction), *cert. denied*, 429 U.S. 864 (1976).

For ease of reference, this Article refers to all laws criminalizing consensual private sexual activities as *sodomy* laws. For an overview of the specifics of these laws, *see* SEXUAL ORIENTATION at 9-10 nn.1-6.

18. State v. Walsh, 713 S.W.2d 508 (Mo. 1986).

19. Commonwealth v. Wasson, No. 90-SC-558-TG, 1992 WL 235412 (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990); Michigan Organization for Human Rights v. Kelly, No. 88-815820 (Mich. Cir. Ct. July 9, 1990); State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992).

20. Ky. Rev. Stat. Ann. § 510.100 criminalizes "deviate sexual intercourse" between persons of the same sex. Ky. Rev. Stat. Ann. § 510.010(1) defines "deviate sexual intercourse" as "any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another."

21. *Wasson*, No 90-SC-558-TG, slip op. at 3.

22. *Id.*

23. *Id.*

24. This description of the events, presented to the court by defense counsel, was not contested by the state. Commonwealth v. Wasson, No. 90-SC-558-TG, slip op. at 3 (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990).

25. *See infra* notes 34-68 and accompanying text.

B. *The* Hardwick *Decision*

Considering the views of the current United States Supreme Court, state court challenges will rest primarily on state rather than federal constitutional grounds.[26] In *Bowers v. Hardwick* the Supreme Court rejected a federal constitutional right to privacy challenge to Georgia's sodomy law.[27] Justice Lewis Powell cast the deciding vote for the majority in a five-to-four decision. Powell later repudiated the Court's decision.[28] In *Hardwick*, the Court framed the issue as whether the constitution provides a fundamental right to engage in homosexual sodomy. With the issue so framed, the Court found no fundamental right at stake and rejected the challenge.[29] The Court sustained the law merely by finding a rational relationship between the challenged law and a legitimate governmental justification.[30] This legitimate governmental justification was the state's interest in regulating morality.[31]

Justice Blackmun wrote the dissent. Justices Brennan, Marshall and Stevens joined Justice Blackmun in rejecting the majority's characterization of the issue. The dissenters found the right involved to be " 'the most comprehensive of rights and the right most valued by civilized men', namely, 'the right to be let alone.' "[32] The dissent argued there was no distinction between the sodomy statute and other privacy invasions struck down by the Court, including the right to buy and use con-

26. *See* Juli A. Morris, Note, *Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy*, 66 IND. L.J. 609 (1991) (contending that federal due process challenges to sodomy laws are futile after *Hardwick*).

27. Bowers v. Hardwick, 478 U.S. 186, 196 (1986). Michael Hardwick was arrested in his bedroom by a police officer who was present to serve papers on Mr. Hardwick in an unrelated matter and who saw him having sex with another adult male. The charges were not pursued, but Hardwick and a married couple brought a federal action seeking a declaration that the Georgia statute, which criminalizes both homosexual and heterosexual sodomy, is unconstitutional. Finding that Hardwick, but not the married couple, had standing to challenge the statute, the Eleventh Circuit went on to hold that the statute implicated a fundamental right to privacy, and remanded for a determination of a compelling state interest. Hardwick v. Bowers, 760 F.2d 1202, 1204-07, 1211 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

Much has been written on state sodomy laws; the vast of majority of these writings are critical of *Hardwick* and support the invalidation or repeal of sodomy laws. *See, e.g.*, John C. Sims, *Moving Towards Equal Treatment of Homosexuals*, 23 PAC. L.J. 1543 (1992); Norman Vieira, *Hardwick and the Right of Privacy*, 55 U. CHI. L. REV. 1181 (1988); SEXUAL ORIENTATION, *supra* note 17, at 9-27.

28. Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling; Vote to Sustain Sodomy Law At High Court Called Mistake*, N.Y. L.J., Oct. 26, 1990 at 1, col. 3. A majority of the justices who decided the *Hardwick* decision would therefore hold that same-sex sodomy statutes violate the right to privacy under the federal constitution. But, given that Justice Powell, in addition to two of the *Hardwick* dissenters, Justice Brenna and the late Justice Marshall, are no longer on the Court, *Hardwick* is not likely to be overturned in the near future.

29. The Court held that the Constitution does not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy." *Hardwick*, 478 U.S. at 192.

30. Had the Court found that a fundamental right was at stake, then it would have had to find that the statute was supported by a *compelling* state interest—a much more difficult burden for the state to meet. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1454-65 (2d. ed. 1988).

31. *Hardwick*, 478 U.S. at 195-96.

32. *Id.* at 199 (Blackmun, J., dissenting) (citation omitted).

traceptives and the right to obtain an abortion.[33] The dissent also rejected the majority's state-interest analysis and found the state's interest in enforcing morality ambiguous at best, thus that interest could not alone sustain the statute.[34] The *Hardwick* majority did not explicitly address HIV-AIDS issues, but the dissent noted that the litigants and *amici curiae* presented those issues to the Court.[35]

C. *Post-*Hardwick *Challenges to State Sodomy Laws*

After *Hardwick*, litigants have primarily resorted to state courts in their fights against same-sex sodomy laws.[36] As *Hardwick* noted, states remain free to derive from their state constitutions higher levels of protection for individual rights than those provided by the federal Constitution.[37] In contrast to the implicit right to privacy found in the United States Constitution, some eleven state constitutions explicitly provide for such rights.[38] Courts in a number of other states have held that their state constitutions contain various implied rights to privacy.[39] Equal protection provisions—as distinct from right to privacy provisions—of both the federal and state constitutions may provide an additional basis for successful challenges to sodomy laws.[40]

1. Right to Privacy Challenges to State Sodomy Laws

While state constitutions need not recognize any right to privacy, those constitutions may provide rights above and beyond those guaran-

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33. *Id.* at 199-214.

34. Bowers v. Hardwick, 478 U.S. 186, 211-13 (1986) (Blackmun, J., dissenting). It thus appears that under Roe v. Wade, 410 U.S. 113, 153-56 (1973), the dissent would have required the state to show both a compelling state interest in the statute and the absence of less burdensome alternatives. *See* Allan Ides, Bowers v. Hardwick: *The Enigmatic Fifth Vote and the Reasonableness of Moral Certitude*, 49 WASH. & LEE L. REV. 93, 95 (1992).

35. *Hardwick*, 478 U.S. at 208.

36. *See supra* notes 18-19 and accompanying text. The Missouri Supreme Court upheld such a statute in State v. Walsh, 713 S.W.2d 508 (Mo. 1986), while the highest state court in Kentucky and lower courts in Michigan and Texas have invalidated the statutes on privacy grounds. Commonwealth v. Wasson, No. 90-SC-558-TG (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990); State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992); Michigan Org. for Human Rights v. Kelly, No. 88-815820 (Mich. Cir. Ct. July 9, 1990).

37. *Hardwick*, 478 U.S. at 190.

38. ALA. CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § l; FLA. CONST. art. I, § 12; HAW. CONST. art. I, §§ 6,7; ILL. CONST. art. I, § 6; LA. CONST. *art. I, § 5*; MISS. CONST. art. III, § 23; MONT. CONST. art. II, §§ 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, 7.

39. *See, e.g.*, Davidson v. Dill, 503 P.2d 157 (Colo. 1972) (right to privacy barred retention of non-conviction arrest records); State v. Baker, 405 A.2d 368 (N.J. 1979) (right to privacy invalidated restrictive zoning ordinance banning alternative families); Jacobs v. Benedict, 301 N.E.2d 723, 725 (Ohio Misc. 1973), *aff'd*, 316 N.E.2d 898 (Ohio Ct. App. 1973) (right to privacy invalidated school limitations on hair length); In re B., 394 A.2d 419 (Pa. 1978) (right to privacy in psychiatric records); Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation, 746 S.W.2d 203 (Tex. 1987) (right to privacy in confidential personal information violated by policy of requiring employees to take polygraph test). Implied rights to privacy do not necessarily extend to the right to engage in consensual sexual activity; as discussed herein, those issues remain to be litigated on a case-by-case basis

40. *See infra* notes 71-77 and accompanying text.

teed by the federal Constitution. Thus the notable federal right to privacy cases provide an important context for state constitutional challenges to sodomy laws in that they provide a basis for state rights to privacy and act as points of departure for creating higher levels of rights than exist at the federal level.

The Supreme Court's 1965 decision in *Griswold v. Connecticut*[41] set forth the constitutionally based "right to privacy" as a matter of substantive due process. The Court based the right on the "penumbras" of various provisions of the Bill of Rights.[42] In *Griswold* the Court invalidated a state statute prohibiting the use of contraceptives by married couples.[43] The majority found that the statute violated a "fundamental" right to privacy that is inherent in marriage and that no compelling state interest supported the violation.[44]

The *Griswold* decision provided the impetus for an initially rapid expansion of the newly articulated right to privacy. Later cases invoked the right to privacy to overturn a statute prohibiting a person's viewing of pornography in the home,[45] a statute prohibiting the distribution of contraceptives to an unmarried couple[46] and a statute prohibiting a woman from obtaining an abortion.[47] The Court in *Hardwick*, however, declined to extend the constitutional right to privacy to private, consensual, same-sex sexual activities.[48]

For this analysis the important point about *Hardwick* is its state interest discussion. For a statute to survive a right to privacy challenge the court must find a state interest that is sufficiently compelling to override the particular privacy interest.[49] How the court chooses to define the privacy interest at stake is crucial. The *Hardwick* court found no *fundamental* right at stake by casting the issue as whether there is a *right* to *engage* in homosexual sodomy[50] rather than whether there is a *right* to be left alone in the privacy of one's bedroom. The sole state interest identified by the Court, "majority sentiments about the morality of homosexuality," outweighed whatever privacy interest upon which the Georgia statute infringed.[51]

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41. 381 U.S. 479 (1965).
42. *Id.* at 484.
43. *Id.* at 485-86.
44. *Id.* at 485-86.
45. Stanley v. Georgia, 394 U.S. 557, 568 (1969).
46. Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972). This decision determined that unmarried couples have the same right to privacy, under the equal protection clause, that married couples have to use contraceptives. The court narrowly limited its consideration of privacy rights to control over matters of procreation.
47. Roe v. Wade, 410 U.S. 113, 154, 162-66 (1973).
48. Commentators across the political spectrum have criticized the Court's interpretation of its privacy cases in *Hardwick*. *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 346 (Harv. Univ. Pres., 1992) ("the majority and concurring opinions in *Hardwick* betray a lack of knowledge about the history and character of the regulation of sexuality"); TRIBE, *supra* note 30, at 1422-35.
49. For a general discussion of the state interest analysis in the context of state sodomy law, see Ides, *supra* note 34, at 95.
50. *Hardwick*, 478 U.S. at 190.
51. *Id.* at 196. Critics have questioned this analysis. Judge Posner, for example, ar-

Because it did not find a fundamental right to privacy in consensual, same-sex sexual activities among adults, the Court was able to apply a rational basis test for the challenged statute. The Court thus avoided the more serious analysis necessary to support the finding of a compelling state interest.[52] The Court's majoritarian view of the morality analysis has been rejected by most state courts[53] and commentators[54] as not being sufficient state interest to sustain sodomy laws.

Despite the *Hardwick* outcome, some state courts have found state constitutional privacy rights in consensual, same-sex sexual activities, as shown by the *Wasson* decision.[55] *Wasson* traced the philosophical and historical bases of individual liberties and relied on an implied state right to privacy to strike down the statute.[56] The court rejected majoritarian morality as a basis for the statute[57] concluding that "immorality in private which does 'not operate to the detriment of others' is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution."[58]

Other courts refuse to accept the United States Supreme Court's framing of the issue as a right to engage in homosexual sodomy.[59] The state interest analysis in these cases has been and will be much more extensive than that in *Hardwick* because such decisions identify privacy interests that are more than minimally significant.[60]

Although the Court in *Hardwick* did not explicitly discuss HIV-AIDS issues, a number of briefs submitted to the Court did raise these concerns.[61] State courts considering challenges to sodomy laws have directly addressed these issues when both upholding and invalidating state statutes.[62] It is highly likely that state court challenges to same-sex

gues that the Court's state interest analysis more likely reflected unarticulated religious principles than society's views of homosexuality. POSNER, *supra* note 48, at 345-46. For a similar criticism, see Ides, *supra* note 31, at 104 ("Faith may well be a sufficient basis for regulating one's own life; it does not, however, provide an adequate basis for regulating the life of another through the iron fist of the state.").

52. *Cf.* Texas State Employees Union v. Department of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987) (the implied right of privacy in the Texas constitution "should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means").

53. *See, e.g.*, Commonwealth v. Wasson, No. 90-SC-558-TG (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990); People v. Onofre, 415 N.E. 2d 936, 940 n.3 (N.Y. 1980), *cert denied*, 451 U.S. 987 (1981); Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980); State v. Morales, 826 S.W.2d 201 (Tex. Ct. App. 1992). *But see* State v. Walsh, 713 S.W.2d 508 (Mo. 1986).

54. *See* POSNER, *supra* note 48, at 344-46; Ides, *supra* note 34, at 104.

55. Commonwealth v. Wasson, No. 90-SC-558-TG (Ky. Sept. 24, 1992), *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990).

56. *Id.* at 9-25.

57. *Wasson*, No. 90-SC-558-TG, slip op. at 31-33 (citation omitted).

58. *Id.* at 20.

59. *See supra* note 53 and accompanying text.

60. *See Wasson*, No. 90-SC-558-TG, slip op. at 31-33 (finding no rational basis for denying homosexuals equal protection of the law).

61. *See infra* notes 90-91 and accompanying text.

62. *See infra* notes 93-106 and accompanying text.

sodomy statutes will increase in frequency and that those challenges will almost certainly implicate HIV-AIDS issues with a state interest analysis.

2. Equal Protection Challenges to State Sodomy Laws

The defendant in *Hardwick* did not present an equal protection challenge to the state sodomy statute, under the Fifth and Fourteenth Amendments to the United States Constitution.[63] Thus the nation's highest court has not resolved the validity of a federal equal protection challenge to sodomy laws.[64] State courts remain free to find rights under state constitutional equal protection provisions even if the federal Constitution does not provide such rights.[65]

An equal protection challenge to a law may fall into one of three categories on a sliding scale of required governmental interests. First, courts strictly scrutinize laws based upon a suspect classification—a category that so far encompasses only race, national origin, alienage and religion. To sustain such a law, the court must find that the law is necessary to achieve a compelling state interest and that there are no less discriminatory alternatives.[66] Second, laws based on a quasi-suspect classification, such as gender and illegitimacy, must be substantially related to an important state interest.[67] Third, for other classifications not affecting fundamental interests, the court need only find a rational basis for the law that meets a legitimate state interest.[68]

Commentators argue that laws that classify on the basis of sexual orientation should be subject to strict scrutiny because of the history of

63. The Georgia statute at issue in *Hardwick* applied to both homosexual and heterosexual sodomy, thereby apparently precluding a facial challenge to the statute on the grounds that it discriminated against homosexuals. As noted *supra* in note 27, the *Hardwick* majority only considered the statute as applied to homosexual activities because the heterosexual challengers to the statute had been denied standing.

64. In the context of military service, a California federal district court applied the federal Equal Protection Clause to homosexuals. Meinhold v. Department of Defense, CV 92-6044 TJH (JRx) (C.D. Cal. Jan 29, 1993). Analyzing the asserted bases for excluding gay men and lesbians from the military, the court found the military's policy not to be rationally related to permissable governmental goals. Meinhold v. Dep't of Defense, CV 92-6044, slip op. at 3 (C.D. Cal. Jan. 29, 1993) (citing Pruitt v. Cheney, 963 F.2d 1160, 1166-67, *cert. den.*, 113 S. Ct. (1992). Commentators have long argued that equal protection analysis should apply to homosexuality. *See, e.g.*, Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (arguing that *Hardwick* left the door open for an equal protection analysis applicable to homosexuality); Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984). *Cf.* Sims, *supra* note 27, at 1562, 1565 (arguing that *Hardwick* likely forecloses successful application of federal equal protection analysis to homosexuality).

65. *See*, JAMES KUSHNER, GOVERNMENT DISCRIMINATION § 1.07 (1992).

66. *See, eg.*, City of Richmond v. J. A. Croson Company, 488 U.S. 469 (1989); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

67. Craig v. Boren, 429 U.S. 190, 197 (1976). *See, e.g.* City of Cleburne, 473 U.S. at 441 (illegitimacy-based classifications); Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981) (gender-based classifications).

68. *See generally* TRIBE, *supra* note 27, at 1440-41; SEXUAL ORIENTATION, *supra* note 17, at 15-16. The *Meinhold* court found that the military proscription against service by homosexuals failed to meet even the rational basis test. Meinhold v. Dep't of Defense, CV 92-6044 TJH (JRx) (C.C. Cal. Jan. 29, 1993).

discrimination against gay men and lesbians.[69] So far, however, the courts have subjected claims based upon sexual orientation classifications to the rational basis test.[70] The *Wasson* court found that the challenged state sodomy statute failed even that test.[71] The court rejected the argument that morality provides a rational basis for the statute in language that goes beyond equal protection analysis of earlier gay and lesbian' rights cases.[72]

> The question is whether a society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexual acts for different treatment. Is there a rational basis for declaring this one type of sexual immorality so destructive of family values as to merit criminal punishment whereas other acts of sexual immorality which were likewise forbidden by the same religious and traditional heritage of Western civilization are now decriminalized? If there is a rational basis for different treatment it has yet to be demonstrated in this case. We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.[73]

Wasson demonstrates a sound basis substantiating a state constitutional right to privacy or a federal or state constitutional right to equal

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69. *See, e.g.*, Sunstein, *supra* note 64, at 1166. The view that sexual orientation is an immutable characteristic is now generally accepted among psychiatrists and psychologists. *See generally* A. BELL, ET AL., SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN (1981). In his recent book on law and sexuality, Judge Posner engages in an extensive review of the social and empirical evidence on the issues of the origin of homosexuality and the possibilities either that a more tolerant society will produce greater numbers of homosexuals or that the young are susceptible to homosexual *conversion*. Judge Posner concludes, "When we consider how difficult—how well-nigh impossible—it appears to be to convert a homosexual into a heterosexual, despite all the personal and social advantages to being a heterosexual in this and perhaps any society, the issue of homosexual seduction, recruitment, or propaganda is placed in perspective. How *much* more difficult it must be for homosexuals to convert a heterosexual into one of themselves!" POSNER, *supra* note 48, at 298-99. It is perhaps only a matter of time before some courts begin to recognize that sexual orientation is a category worthy of a high level of constitutional protection.

Although it is beyond the scope of this article to establish that sexual orientation is a *suspect* or *quasi-suspect* classification deserving of strict or intermediate scrutiny for equal protection purposes, it is important to note that should courts adopt such scrutiny, the state same-sex sodomy statutes will be far more difficult to justify.

70. *See* KUSHNER, *supra* note 65, at § 5.12; Meinhold v. Dep't of Defense, CV 92-6044 TJH (JRx) (C.D. Cal. Jan. 29, 1993).

71. Commonwealth v. Wasson, No. 90-SC-558-TG, slip op. at 28-34 (Ky. Sept. 24, 1992) *aff'g* No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990). *See also* Citizens for Responsible Behavior v. Superior Ct., 2 Cal. Rptr. 2d 648, 654-56 (Ct. App. 1991) (finding homosexuals to be entitled to equal protection of the laws under the United States and California constitutions, and applying a rational basis test to strike down an initiative that would have banned anti-discrimination measures protecting homosexuals and those with HIV-AIDS).

72. Courts in New York and Pennsylvania relied upon the right of unmarried persons to equal protection of the laws to invalidate state sodomy laws that applied to all unmarried persons, including both heterosexuals and homosexuals. People v. Onofre, 415 N.E.2d 936 (N.Y. 1980), *cert denied*, 451 U.S. 987 (1981) (violation of equal protection and right to privacy); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980) (invalid exercise of police power and violation of equal protection).

73. *Wasson*, No. 90-SC-558-TG, slip op. at 32-33 (Ky. Sept. 24, 1992).

protection of the laws. At a minimum the government must prove that a law forbidding consensual, same-sex sexual activities bears a rational relationship to a legitimate governmental interest.[74] It is in this context that litigants and courts will raise HIV-AIDS policy issues with even greater frequency in the years ahead.

II. HIV-AIDS Issues as a Basis for Arguing State Interests in Same-Sex Sodomy Laws

In cases from *Hardwick* to *Wasson*, litigants and *amici curiae* barraged the courts with arguments on the impact that state sodomy laws have on transmission of HIV-AIDS. Supporters of sodomy statutes argue that the laws act both as a legal deterrent against high-risk activities and as a moral condemnation of a *life-style* fostering health risks.[75] These arguments have a surface appeal to courts. Even when not explicitly relied upon, the arguments may be implicit in decisions upholding these laws. Such arguments supporting same-sex sodomy statutes have the potential to feed into the bias that pervades the legal system in connection with HIV-AIDS issues. These arguments deserve close scrutiny from a rational viewpoint to eliminate prejudice and hysteria-based arguments.

A. *The Transmission of HIV*

Reports of the first cases of HIV-AIDS illness appeared in 1981.[76] The Human Immunodeficiency Virus (HIV), the etiologic agent of HIV-AIDS illness, can infect and destroy the body's immune system.[77] Cases of documented HIV transmission include sexual contact which involves the exchange of bodily fluids, infection with contaminated blood or blood products and perinatal infection from mother to child.[78]

Health care experts consider HIV-AIDS illness a global pandemic affecting every country in the world. The illness has a particularly devastating impact on African countries.[79] As of April, 1991, reports show 171,865 cases of AIDS in the United States.[80] Approximately fifty-nine percent of these reported cases were homosexual or bisexual men who did not use intravenous drugs.[81] Twenty-nine percent of the cases were intravenous drug users, seven percent of whom were gay or bisexual males. Six percent were heterosexuals who had sex with either an infected person or someone in a high-risk group.[82] In urban areas that have high rates of intravenous drug use, intravenous drug users account

74. TRIBE, *supra* note 30, at 1440-41.
75. *See infra* notes 90-91 and accompanying text.
76. Abe M. Macher, *HIV Disease/AIDS: Medical Background*, *in* AIDS AND THE LAW 1 (Wiley L. Publications eds., 2d ed. 1992).
77. Anthony S. Fauci, *The Human Immunodeficiency Virus: Infectivity and Mechanisms of Pathogenesis*, 239 SCIENCE 617-22 (1988).
78. *Id.* at 617; Macher, *supra* note 76, at 4-5.
79. Macher, *supra* note 76, at 4; Fauci, *supra* note 77, at 617.
80. Macher, *supra* note 76, at 5.
81. *Id.*
82. *Id.* The remainder of the cases included hemophiliacs and recipients of infected blood, blood products or tissue.

for a higher rate of new AIDS cases than do gay men.[83] The Centers for Disease Control estimates that, by the end of 1993, there would be a total of 390,000-480,000 cases of AIDS reported in the United States.[84]

B. *HIV-AIDS Issues in Challenges to Sodomy Laws*

1. Background

Since AIDS became a matter of public concern in the early 1980s, litigants have raised HIV-AIDS issues in challenges to sodomy laws. In *Baker v. Wade*,[85] a pre-*Hardwick* decision, opponents of a federal challenge to the Texas sodomy law argued "the public health and safety of all citizens of Texas will be harmed if the spread of AIDS is not stopped," and that the sodomy law was essential "to combat the AIDS menace."[86] The District Court rejected that argument and held the statute invalid.[87] The Fifth Circuit reversed, upholding the statute on grounds similar to those used in *Hardwick*.[88] While not explicit in the Fifth Circuit's opinion, HIV-AIDS issues probably had some impact on the court's decision.[89]

In *Hardwick*, the state argued in its brief on appeal that the compelling state interest in preventing the spread of HIV-AIDS favored Georgia's sodomy statute.[90] An *amicus* brief supporting the state's position argued that the statute was necessary to deter "potentially lethal behavior," that is, homosexual activities leading to the transmission of HIV.[91] Although the majority opinion did not directly address HIV-AIDS, the *Hardwick* dissent criticized the briefs submitted in favor of the law for making groundless arguments that the statute supported public policy goals.[92]

Efforts to use HIV-AIDS issues as an explicit basis for upholding sodomy laws came to fruition in *State v. Walsh*, a 1986 Missouri Supreme

83. *Id.*

84. *Id.* at 17. The recent change in the definition of AIDS means that these numbers are dramatically understated. The United States Center for Disease Control and Prevention ("CDC") has included three additional diseases the appearance of which in an HIV-positive person will result in an AIDS diagnosis, and has also added to the AIDS definition a drop in the number of CD4 cells, or T-cells, to 200 per cubic millimeter of blood. The CDC estimates that the new definition will produce an increase in the number of the country's new AIDS patients by seventy-five percent in 1993. Sheryl Stolberg, *New AIDS Definition to Increase Tally*, L.A. TIMES, Dec. 31, 1992, at 1.

85. 106 F.R.D. 526, 528-29 (N.D. Tex. 1985), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). For a fuller analysis of the *Baker* decision, *see* Charles Spiegel, *Privacy, Sodomy, AIDS & Schools: Case Studies in Equal Protection*, 1986 ANN. SURV. AM. L. 221, 241-47.

86. *Baker*, 106 F.R.D. at 528-29.

87. *Id.* at 534-35.

88. 769 F.2d 289, 292 (5th Cir. 1985). *See* Spiegel, *supra* note 85, at 246; Susan McGuigan, *The AIDS Dilemma: Public Health v. Criminal Law*, 4 J. L. & INEQUALITY 545, 567-68 (1986).

89. *See* McGuigan, *supra* note 88, at 568.

90. Brief for Petitioner at 37, Bowers v. Hardwick, 478 U.S. 186 (1985). *See* Bowers v. Hardwick, 478 U.S. 186, 290 n.3 (1985).

91. Brief for David Robinson, Jr., as Amicus Curiae at 5, Bowers v. Hardwick, 478 U.S. 186 (1985).

92. 478 U.S. at 208 & n.3 (Blackmun, J., dissenting).

Court decision.[93] The *Walsh* court upheld the state's sodomy statute by relying on the state's interests in morality and in deterring activities leading to the spread of HIV-AIDS:

> We further find that [the challenged statute] is rationally related to the State's concededly legitimate interest in protecting the public health. The State has argued that forbidding homosexual activity will inhibit the spread of [AIDS].[94]

Thus, with *Walsh*, the HIV-AIDS rational for upholding same-sex sodomy statutes became explicit.

2. The *Wasson* Decision

Supporters of laws prohibiting same-sex sexual activities continue to forcefully make arguments like those relied upon by the *Walsh* court. Recently, litigants have also used these arguments to try to roll back state courts' recognition of the right to privacy. In *Commonwealth v. Wasson*,[95] the litigants squarely addressed HIV-AIDS as a justification for sodomy laws.

In *Wasson*, the trial court conducted an extensive hearing on the defendant's motion to dismiss the charges. The court heard testimony from defense experts in cultural anthropology, theology, social history, psychology and medicine.[96] The state offered no evidence. Initially, the court found the Kentucky constitution's explicit right to privacy broader than the implied federal constitutional right to privacy.[97] The court then invalidated the statute on the ground that it "clearly seeks to regulate the most profoundly private conduct and in so doing impermissably [sic] invades the privacy of the citizens of this state."[98] On appeal, the intermediate court affirmed the trial court's action striking down the statute on privacy grounds.[99] In addition, the appellate court found the law violated Kentucky's constitutional guarantee to equal protection of the laws by criminalizing certain conduct with a person of the same sex but not the same conduct with persons of the other sex.[100]

The state appealed to the Kentucky Supreme Court. In its brief on appeal the state raised the AIDS-HIV specter in stark language:

> The record before this Court contains undisputed testimony that homosexuals are more promiscuous than heterosexuals,

93. 713 S.W.2d 508 (Mo. 1986).
94. *Id.* at 512.
95. No. 86M859 (Ky. Dist. Ct. Oct. 31, 1986). The defendant was charged with soliciting sodomy in the fourth degree, and challenged the underlying sodomy statute rather than the solicitation statute. The Kentucky statute criminalizes "deviate sexual intercourse" between persons of the same sex. KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990). Section 510.010(1) defines "deviate sexual intercourse" as "any act of sexual gratification involving the sex organs of one (1) person and the mouth or anus of another." KY. REV. STAT. ANN. § 510.010 (Michie/Bobbs-Merrill 1990). This statute is typical in defining sodomy as oral or anal sex between persons of the same gender.
96. Commonwealth v. Wasson, No 90-SC-558-TG, slip op. at 3-5 (Ky. Sept. 24, 1992).
97. *Wasson*, No. 86M859, slip op. at 2-3 (Ky. Dist. Ct. Oct. 31, 1986).
98. *Id.*
99. Commonwealth v. Wasson, No. 86-XX-048 (Ky. Cir. Ct. June 8, 1990).
100. *Id.* at 13-14.

> that infectious diseases are more readily transmitted by anal sodomy than by any other form of sexual copulation, that homosexuals account for 73% of all AIDS cases in the United States, that homosexuals enjoy the company of children, and that homosexuals are more prone to engage in sex acts in public than are heterosexuals.[101]

In one stroke the state argued that homosexuals are promiscuous, are child-molesters and are responsible for the spread of HIV.[102] The state concluded that public health considerations alone justified the sodomy statute.[103]

The four-justice majority of the Kentucky Supreme Court explicitly rejected this argument. The court found that the sodomy statute did not fit the State's alleged public health goal.[104] Three justices dissented in two separate opinions strongly arguing that HIV-AIDS provided a legitimate basis for upholding the statute.[105] The dissenters adopted the standard argument of supporters of same-sex sodomy laws: 1) same-sex sexual activities account for a disproportionate percentage of the transmission of HIV; 2) sodomy laws deter such activities and 3) this provides a rational basis for upholding these laws.[106] It is important to analyze these points carefully given judicial receptiveness to this argument.

C. *HIV-AIDS as a Basis for Upholding Sodomy Statutes*

If upholding a crime of consensual, same-sex sexual activity requires only a rational basis, the lowest level of governmental justification, then the goal of promoting the public health provides supporters of sodomy statutes with a facially powerful argument.[107] The Supreme Court has long held that states may exercise their police power by passing laws designed to promote public health and safety, such as laws requiring immunizations.[108] Supporters of sodomy statutes argue that the statutes are reasonably related to the legitimate governmental goal of inhibiting the spread of HIV without being arbitrary and capricious in so

101. Brief of the State of Kentucky at 22, Commonwealth v. Wasson, No. 90-SC-558-TG, 1992 WL 235412 (Ky. Sept. 24, 1992). The 73% figure was outdated at the time this brief was submitted. *See supra* note 84 and accompanying text.

102. In rejecting the state's state interest analysis, the Kentucky Supreme Court termed the quoted passage as "simply outrageous." *Wasson*, No. 90-SC-558-TG, slip op. at 31.

103. Brief of the State of Kentucky at 22, 42-43, *Wasson*, No. 90-SC-558-TG.

104. *Wasson*, No. 90-SC-558-TG, slip op. at 32. *Accord*, State v. Morales, 826 S.W.2d 201, 205 (Tex. Ct. App. 1992).

105. *Wasson*, No. 90-SC-558-TG, slip op. at 15 (Lambert, J., dissenting); *id.* at 19 (Wintersheimer, J., dissenting).

106. *Id.* at 15-16 (Lambert, J., dissenting); *id.* at 5-6, 19, 22-23 (Wintersheimer, J., dissenting).

107. At least one court has required the government to show a compelling state interest to justify a state sodomy law. *Morales*, 826 S.W.2d at 205 (finding no compelling state interest in same-sex sodomy statute).

108. Jacobson v. Massachusetts, 197 U.S. 11 (1905) (finding that law requiring smallpox immunizations does not violate due process because threat to public health outweighs burden on individual rights). *See generally* Chris D. Nichols, Note, *AIDS—A New Reason to Regulate Homosexuality*, 11 J. CONTEMP. L. 315, 332-38 (1984) (pre-*Hardwick* discussion of state interest in regulating same-sex sexual activities).

doing.[109] Because the government has a legitimate goal in inhibiting the spread of HIV, the question becomes whether the law reasonably relates to that goal.

1. HIV-AIDS Issues in Other Contexts

The *Wasson* decision explicitly rejected public health arguments, based on HIV-AIDS, made in support of the Kentucky sodomy law. Perhaps other courts will now review those arguments in a more rational light. Courts, legislatures and regulators show some willingness to reject arguments based primarily upon HIV-AIDS hysteria in non-criminal areas of public policy. Perhaps the most significant shift in this respect has occurred with respect to access to educational facilities. In the early days of the epidemic well-publicized efforts were made to keep students with HIV disease out of the schools.[110] Irrational and ill-informed beliefs about the methods of HIV transmission formed the basis of such efforts.[111]

Some courts have come to reject efforts to prevent access to educational facilities as groundless and discriminatory. For example, in *Board of Education v. Cooperman*,[112] the New Jersey Supreme Court in 1987 rejected attempts to exclude students with HIV illness from classrooms. Two years earlier the New Jersey Commissioners of Health and Education jointly issued guidelines for admitting HIV infected children to the schools. The Commissioners based the policy upon "epidemiological studies indicating 'that AIDS is not transmitted through casual contact as would be present in the school environment.' "[113] Local school boards challenged the policy, and sought to bar such students from schools even though the boards had medical opinions concluding a ban was not medically-supportable.[114] Citing regulations granting local boards some discretion to exclude students with contagious diseases, the school boards argued they had the power to bar students from public schools on health grounds.[115] The New Jersey Supreme Court upheld the Commissioners' power to issue regulations binding on the local boards.[116] The court conceded that the local boards had some power to exclude students for health reasons.[117] The majority, however, went on to state:

> *[T]hat power must be exercised reasonably.* Like other government

109. A true reasonableness analysis is missing from the majority opinion in *Hardwick*. *See, e.g.*, Ides, *supra* note 34, at 101-05.

110. The most publicized case involved Ryan White, a young AIDS patient initially denied access to public schools. *See Indiana Judge Allows AIDS Victim Back in School*, N.Y. TIMES, Apr. 11, 1986, at 14, col. 16. *See also* Gene Schultz, *AIDS: Public Health and the Criminal Law*, 7 ST. LOUIS U. PUB. L. REV. 65, n.122 (1988).

111. *See* Larry Gostin, *A Decade of a Maturing Epidemic: An Assessment and Directions for Future Public Policy*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7 (1990).

112. 523 A.2d 655 (N.J. 1987).

113. *Id.* at 657.

114. *Id.*

115. *Id.* at 659.

116. *Id.* at 660.

117. *Id.*

> actors, the school board cannot act in an arbitrary fashion, especially when a child's right to an education is at stake. *Reasonableness in the present context clearly involves appropriate deference to medical expertise* . . . . [A]ll the medical experts and medical authorities agreed that the presence of the AIDS virus in the children did not by itself pose any danger to other children or to the child the board wished to exclude.[118]

The court upheld the Commissioners' policies and found them binding on the local boards.[119]

Mandatory testing for HIV and disclosure of HIV infection provide the courts with another context for examining the rationality of public health arguments based on HIV-AIDS. In *New York State Society of Surgeons v. Axelrod*,[120] the New York Court of Appeals considered whether the New York Public Health Law must list HIV infection as a communicable and sexually transmittable disease. When the Commissioner of Health would not designate the disease as such, four New York medical societies sued to require the designation.[121] The effect of the requested designation would have been to authorize mandatory testing and contact tracing in appropriate cases.[122] The Court of Appeals rejected the medical societies' claim by finding that the Commissioner's decision was not arbitrary and capricious. Specifically, the court found that voluntary testing would foster cooperation with public health officials and maintain confidentiality.[123] The court showed a strong deference to medical and psychological evidence presented by the Commissioner concerning public health and HIV-AIDS.[124]

In civil and regulatory contexts courts have increasingly shown a sensitivity to medical evidence about HIV-AIDS in evaluating the rationality of laws, regulations and policies. Courts in these civil cases have generally not been confined by federal constitutional analysis in reaching these results. Nonetheless, in cases where the stigma of criminal conviction and the loss of liberty are at stake, courts should be at least as careful when examining the rationality of arguments based upon HIV-AIDS issues.

2. HIV-AIDS Issues in the Context of Sodomy Laws

Supporters of same-sex sodomy proscriptions invoke HIV-AIDS concerns as a legitimate basis for upholding the statutes. Because of the potential for irrational analysis in this context, courts should question and evaluate the arguments carefully.

118. *Id.* (emphasis added).

119. *Id.* at 662. For a similar result, based upon equal protection analysis, *see* District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986).

120. 572 N.E.2d 605 (N.Y. 1991).

121. *Id.* at 606.

122. *Id.* at 608.

123. *Id.* at 609.

124. *Id.* at 610.

a. *Do same-sex sodomy statutes correlate with the stated public health goals?*

Statutes criminalizing same-sex sexual activities generally outlaw all oral and anal sex between persons of the same sex.[125] At least one court went further to uphold a state sodomy statute criminalizing contact between the genitals of one person and the hand of another person of the same sex.[126] These statutes thus criminalize a broad range of sexual activities between consenting adults.

Upon close analysis such statutes bear no rational relationship to the goal of reducing the rate of transmission of HIV. The highest rate of HIV sexual transmission occurs during anal-genital or vaginal-genital contact.[127] Given this scientific fact, these statutes are both under-inclusive and over-inclusive. The statutes are under-inclusive because they do not proscribe extremely high-risk activities among heterosexuals, such as the risk of male-to-female transmission during anal or vaginal intercourse.[128] At least two courts have acknowledged the disparity between the stated public health goal and the statutes' coverage when striking down same-sex sodomy laws.[129]

When compared to the asserted public health goal, these statutes are also blatantly over-inclusive. First, some statutes criminalize hand-genital contact among persons of the same sex. Such activity does not involve an exchange of bodily fluids and therefore carries minimal risk of HIV transmission. Second, the risk of HIV transmission during anal-genital contact depends to a substantial degree upon whether a condom is used.[130] The same is true for oral-genital contact, which entails a far lower degree of risk than anal intercourse.[131] Third, lesbians as a group historically run an extremely low risk of HIV transmission.[132] In light of current transmission patterns, outlawing sex between women does not further any substantial public health goal.[133] Therefore a significant

125. *See, e.g.*, GA. CODE ANN. § 16-6-2 (Michie 1992) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.")

126. State v. Walsh, 713 S.W.2d 508 (Mo. 1986). The defendant in *Walsh* allegedly felt a police officer's genitals through the officer's pants. This activity obviously bears no relationship with the stated public health goal.

127. Nancy Meuller, *The Epidemiology of the Human Immunodeficiency Virus Infection*, 14 LAW, MED. & HEALTH CARE 250 (1986).

128. Mary E. Guinan & Ann Hardy, *Epidemiology of AIDS in Women in the United States*, 257 JAMA 2039 (1987); Meuller, *supra* note 127.

129. After acknowledging the "superficial appeal" of the state's argument based on HIV-AIDS, the *Wasson* court noted, "The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS." Commonwealth v. Wasson, No. 90-SC-558-TG, slip op. at 32 (Ky. Sept. 24, 1992). *Accord*, State v. Morales, 826 S.W.2d 201, 205 (Tex. Ct. App. 1992) ("We note that [the challenged sodomy statute] does not prohibit similar heterosexual conduct that may carry a high risk of transmitting sexual diseases").

130. *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 17 (1986). *See generally* Warren Winkelstein, Jr., et al., *Reduction in Human Immunodeficiency Virus Transmission Among Homosexual/Bisexual Men, 1982-1986*, 77 AM. J. PUB. HEALTH 685 (1987).

131. Winkelstein, *supra* note 130.

132. Mueller, *supra* note 127, at 256.

133. *Id.*

percentage of prohibited activity bears little or no relationship to the stated public health goal, while unprohibited activity involves far greater risks of HIV transmission.

In historical terms, the public health argument in support of same-sex sodomy laws is even more dubious. As one Texas court noted, legislatures enacted these laws before the onset of the AIDS epidemic and could not have intended that the statutes prevent transmission of HIV.[134] Instead of relying on sodomy laws ill-suited to preventing the spread of HIV-AIDS, some legislatures have considered and enacted laws specifically criminalizing conduct that threatens the transmission of HIV.[135] Whether such laws reflect sound public policy or not, those legislatures did not find sodomy laws an effective deterrent mechanism. The lawmakers more properly sought to enact measures relating specifically to the HIV-AIDS issue.[136]

Even assuming, contrary to the available evidence, that the sodomy statutes only proscribe activities that constitute a public health threat, the question remains whether same-sex sodomy laws actually deter the criminalized activity. The premise of the deterrence rationale is that criminal law has the inherent capacity to discourage people from acting upon their basic sexual desires. Not surprisingly, the available evidence shows otherwise.[137] Moreover, as authorities enforce sodomy laws sporadically, it is doubtful that the laws have any real deterrent effect.[138] The criminalized activity is largely undetectable and wide spread prosecution is extremely unlikely as the prohibited activity generally occurs in the privacy of the home.[139]

A careful analysis of the scientific and medical evidence shows that same-sex sodomy statutes ill-fit the stated public health goal of preventing the spread of HIV-AIDS.[140] The statutes by design do not fulfill those goals and are ineffective in deterring the proscribed activities.

134. The district court in Baker v. Wade thus rejected the argument that the Texas sodomy law was designed to inhibit the spread of HIV. Baker v. Wade, 106 F.R.D. 526, 534-35 (N.D. Tex. 1985), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). However, the *Walsh* court upheld the Missouri sodomy law on public health grounds, even though the legislative history reveals that the Missouri legislature did not consider public health issues when enacting the state sodomy laws. State v. Walsh, 713 S.W.2d 508, 511-13 (Mo. 1986) *See* Schultz, *supra* note 110, at 73 n.43 (1988).

135. Donald Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. L. REV. 351 (1990).

136. For a listing of legislatures that, as of 1990, had enacted or were considering such statutes, *see* Hermann, *supra* note 135, at 370 n.106.

137. MARTIN S. WEINBERG & COLIN J. WILLIAMS, MALE HOMOSEXUALS: THEIR PROBLEMS AND ADAPTATIONS (1974); Gilbert Geis, *Reported Consequences of Decriminalization of Consensual Adult Homosexuality in Seven States*, 1 J. HOMOSEXUALITY 419 (1976).

138. *See* Hermann, *supra* note 135, at 355.

139. *See* Schultz, *supra* note 110, at 76.

140. *Cf.* District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986) (finding no rational relationship between policy of excluding HIV-positive children from public school and goal of inhibiting spread of HIV).

b. *What likely effects do same-sex sodomy statutes have on HIV-AIDS prevention and health care concerns?*

There are powerful arguments that same-sex sodomy laws do not promote, but rather undermine, public health efforts to prevent HIV-AIDS transmission and to ensure better health care among those with HIV-AIDS illness.[141] The arguments point to the statutes' effects on education and treatment efforts, and on the psychological health of those at risk for HIV-AIDS.

There are powerful arguments that same-sex sodomy laws interfere with efforts to educate the public about safer sex practices. Such interference is an explicit goal of at least some supporters of laws.[142] This interference can occur in several ways. For example, closeted gay or bisexual men most in need of education have limited contacts within the gay community and little access to educational materials. For such people, the stigma of acknowledging their practice of illegal activities deters them from seeking out the information they may need to protect their health.[143] Another deterrence is the fear of identification and prosecution. Criminal sodomy laws could particularly deter any gay or bisexual man living in an area without an organized gay community. Such an individual would not likely come forward and seek information about HIV-AIDS.

In states with criminal prohibitions of same-sex sexual activities public health officials face a hard choice. The officials can either inform the public about safer-sex activities that are illegal or allow ignorance and the heightened risk of HIV transmission to prevail. The statutes

141. Many of these arguments were made to the Kentucky Supreme Court in *Wasson* by amici curiae American Psychological Association, et al. Brief for American Psychological Association, et al., as Amicus Curiae, Commonwealth v. Wasson, No. 90-SC-558-TG (Ky. Sept. 24, 1992).

142. A group of amici curiae argued in *Wasson* that efforts to overturn same-sex state sodomy laws are part of a "widely publicized homosexual agenda" which also includes "[u]se [of] tax dollars to fund homoerotic AIDS/sex-education in all grades." Brief of Citizens for Decency Through Law, Inc., et al., as Amici Curiae, at ii, *Wasson*, 90-SC-558-TG.

> The alleged agenda consisted of:
> 1) Legalize lesbian/gay marriages; 2) Give lesbians/gays parental and adoptive rights; 3) Classify HIV-positive/AIDS carriers as disabled; 4) Enact "hate crimes" laws to include sexual orientation; 5) Use tax dollars to fund homoerotic AIDS/sex-education in all grades; 6) Amend laws to prohibit discrimination in employment, housing, public accommodations and public services; 7) Prohibit the military from excluding anyone because of sexual preference; 8) Repeal all state sodomy laws; 9) Repeal laws controlling the age of sexual consent.

Id. (citing Concerned Women for America, *Concerned Women*, Washington, D.C., March 1991).

143. *See* UNITED STATES CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, HOW EFFECTIVE IS AIDS EDUCATION? 12 (1988) (showing substantial reductions in unprotected high-risk activities from 1985 to 1987). Recent studies have likewise reported dramatic efforts to engage in safer-sex and reduce the risk of HIV transmission in places where there have been effective public education efforts. *See, e.g.*, Maria L. Ekstrand & Thomas J. Coates, *Maintenance of Safer Sexual Behaviors and Predictors of Risky Sex: The San Francisco Men's Health Study*, 80 AM. J. PUB. HEALTH 973 (1990); Marshall H. Becker & Jill G. Joseph, *AIDS and Behavioral Change to Reduce Risk: A Review*, 78 AM. J. PUB. HEALTH 394 (1988).

appear more likely to lead to an increase rather than a decrease in rates of HIV transmission.

Besides chilling education efforts, the criminalization of same-sex sexual activities could actually foster unsafe sex.[144] Criminal law in states with same-sex sodomy statutes condemns homosexual expression of affection and sexuality and casts homosexuals as social deviants. Social stigmatization leads to prejudice and homophobia. Those gay people who are unable to cope with this prejudice may internalize it and become, in clinical terms, troubled and dysfunctional.[145] The resulting loss of self-esteem and development of self-hatred could lead to behavior that is both psychologically and physically self-destructive.[146]

Finally, prevention and treatment of HIV-AIDS depends upon continuing research and treatment. Same-sex sodomy laws deter gay men, as a high risk group, from providing information to health officials and researchers. The laws discourage homosexuals from seeking prompt and adequate testing, counseling and medical care. Thus these laws undermine the very public health goals upon which states rely in seeking to sustain the laws.

Upon careful analysis the criminalization of consensual, private, same-sex sexual activities between adults does far more harm than good. The statutes deter those at risk from seeking essential information and prevent public health educators from disseminating needed information to the public to the fullest possible extent. The psychological data show that criminalizing and stigmatizing sexual acts in which a large portion of the population engages may promote rather than deter dangerous activities while preventing education and treatment efforts.

III. Conclusion

Challenges to same-sex sodomy laws remain controversial. The Kentucky Supreme Court in *Wasson* invoked an individual's right to privacy and equal protection of the laws when overturning a sodomy statute. It is, however, unclear whether *Wasson* signals a trend or is an aberration in the age of HIV-AIDS. It does appear certain that state courts will be the primary avenue of challenge so long as the United States Supreme Court maintains its present ideological course.

As the *Wasson* and *Morales* decisions show, courts presented with challenges to same-sex sodomy laws also appear increasingly aware of and sensitive to the medical and scientific realities of HIV-AIDS. Cases that deal directly or, as with challenges to sodomy laws, indirectly with HIV-AIDS issues present several challenges to the courts. One important challenge is to allow reason to prevail in an area fraught with the

144. *See generally* John Gonsiorek, *Psychotherapeutic Issues with Gay and Lesbian Clients, in* Innovations in Clinical Practice: A Sourcebook (Peter A. Keller & Lawrence C. Ritt, eds., 1984).

145. *E.g.*, John Gonsiorek & James Rudolph, *Homosexual Identity, in* Homosexuality: Research Implications for Public Policy 161-76 (John C. Gonsiorek ed., 1991).

146. *Id.*

potential for irrational responses. Courts have increasingly managed to come forward with reasoned responses in areas such as public education, mandatory HIV testing and confidentiality.

When viewed carefully, the overwhelming weight of the evidence now available shows that same-sex sodomy statutes do not promote public health goals but rather are counter-productive. The issue needs more study to determine the extent to which state sodomy laws in fact have a detrimental effect on HIV-AIDS health care concerns. At a minimum, it is certain that the "state interest" in these laws is much more complex than the laws' supporters have acknowledged and that assertions of such interest deserve careful scrutiny by the courts.