"[I]f the state has the burden of proving that it has a legitimate interest in the subject of the statute, or that the statute is rationally supportable, then Virginia has completely fulfilled this obligation."–Bryan, U.S. Senior Circuit Judge

"The judgment is affirmed."–U.S. Supreme Court

DOE v. COMMONWEALTH'S ATTORNEY

403 F.Supp. 1199 (E.D.Va.1975).

Two male homosexuals filed suit in a federal district court, attacking the constitutionality of § 18.1212 of the Virginia Code, which made it a crime, even for consenting adults acting in private, to engage in homosexual relations. As then required by jurisdictional statutes, a special three-judge district court heard the case.

BRYAN, Senior Circuit Judge....

Our decision is that on its face and in the circumstances here ... [§ 18.1212] is not unconstitutional. No judgment is made upon the wisdom or policy of the statute. It is simply that we cannot say that the statute offends the Bill of Rights or any other of the Amendments....

I

Precedents cited to us as *contra* rest exclusively on the precept that the Constitution condemns State legislation that trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life. This and only this concern has been the justification for nullification of State regulation in this area....

In Griswold v. Connecticut (1965) the Court has most recently announced its views on the question here. Striking down a State statute forbidding the use of contraceptives, the ruling was put on the right of marital privacy ... and was also put on the sanctity of the home and family....

That *Griswold* is premised on the right of privacy and that homosexual intimacy is denunciable by the State is unequivocally demonstrated by Mr. Justice Goldberg in his concurrence in his adoption of Mr. Justice Harlan's dissenting statement in Poe v. Ullman (1961):

> Adultery, *homosexuality* and the like are sexual intimacies *which the State forbids* ... but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. *It is one thing when the State exerts its power either to forbid extra-marital sexuality* ... or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of

the criminal law the details of that intimacy. (Emphasis added.)

Equally forceful is the succeeding paragraph of Justice Harlan:

> [T]he intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy is surely *a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection....* (Emphasis added.)

Justice Harlan's words are nonetheless commanding merely because they were written in dissent. To begin with ... they were authentically approved in *Griswold*. Moreover, he was not differing with the majority there on the merits of the substantive case but only as to the procedural reason of its dismissal. At all events, the Justice's exegesis is that of a jurist of widely acknowledged superior stature and weighty whatever its context.

With his standing what he had further to say in *Poe* is worthy of high regard. On the plaintiffs' effort presently to shield the practice of homosexuality from State incrimination by according it immunity when committed in private as against public exercise, the Justice said this:

> Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as *laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition,* confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. (Emphasis added.)
> ...

Many states have long had, and still have, statutes and decisional law criminalizing conduct depicted in the Virginia legislation....

II

With no authoritative judicial bar to the proscription of homosexuality– since it is obviously no portion of marriage, home or family life– the next question is whether there is any ground for barring Virginia from branding it as criminal. If a State determines that punishment therefor, even when committed in the home, 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. In short, it is an inquiry addressable only to the State's Legislature.

Furthermore, if the State has the burden of proving that it has a legitimate interest in the subject of the statute or that the statute is rationally supportable, Virginia has completely fulfilled this obligation.

Fundamentally the State action is simply directed to the suppression of crime, whether committed in public or in private....

Moreover, to sustain its action, the State is not required to show that moral delinquency actually results from homosexuality. It is enough for upholding the legislation to establish that the conduct is likely to end in a contribution to moral delinquency....

Although a questionable law is not removed from question by the lapse of any prescriptive period, the longevity of the Virginia statute does testify to the State's interest and its legitimacy. It ... has ancestry going back to Judaic and Christian law. The immediate parentage may be readily traced to the Code of Virginia of 1792. All the while the law has been kept alive, as evidenced by the periodic amendments....

In sum, we believe that the sodomy statute ... has rational basis of State interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court. Indeed, the Court has treated as free of infirmity a State law with a background similar to the Virginia enactment in suit. ...

MERHIGE, District Judge, dissenting.

... In ... the absence of any legitimate interest or rational basis to support the statute's application we must, without regard to our own proclivities and reluctance to judicially bar the state proscription of homosexuality, hold the statute as it applies to the plaintiffs to be violative of their rights under the Due Process Clause of the Fourteenth Amendment.... The Supreme Court decision in *Griswold* is ... premised on the right of privacy, but I fear my brothers have misapplied its precedent value through an apparent over-adherence to its factual circumstances.

The Supreme Court has consistently held that the Due Process Clause of the Fourteenth Amendment protects the right of individuals to make personal choices, unfettered by arbitrary and purposeless restraints, in the private matters of marriage and procreation. Roe v. Wade [1973]. See also *Griswold* (Harlan, J. concurring). I view those cases as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest.

To say, as the majority does, that the right of privacy ... is limited to matters of marital, home or family life is unwarranted under the law. Such a contention places a distinction in marital-nonmarital matters which is inconsistent with current Supreme Court opinions and is unsupportable.

In my view, the reliance of the majority on Mr. Justice Harlan's dissenting statement in *Poe* is misplaced. An analysis of the cases indicates that in 1965 when *Griswold*, which invalidated a statute prohibiting the use of contraceptives by married couples, was decided, at least three of the Court ... would not have been willing to attach the right of privacy to

homosexual conduct. In my view, *Griswold* applied the right of privacy to its particular factual situation. That the right of privacy is not limited to the facts of *Griswold* is demonstrated by later Supreme Court decisions. After *Griswold*, by virtue of Eisenstadt v. Baird (1972), the legal viability of a marital-nonmarital distinction in private sexual acts if not eliminated, was at the very least seriously impaired. In *Eisenstadt* the Court declined to restrict the right of privacy in sexual matters to married couples:

> Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

In significantly diminishing the importance of the marital-nonmarital distinction, the Court to a great extent vitiated any implication that the state can ... forbid extra-marital sexuality....

... *Eisenstadt* ... clearly demonstrates that the right to privacy in sexual relationships is not limited to the marital relationship. Both *Roe* and *Eisenstadt* cogently demonstrate that intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification.

This approach does not unqualifiedly sanction personal whim. If the activity in question involves more than one participant, as in the instant case, each must be capable of consenting, and each must in fact consent to the conduct for the right of privacy to attach. For example, if one of the participants in homosexual contact is a minor, or force is used to coerce one of the participants to yield, the right will not attach. Similarly, the right of privacy cannot be extended to protect conduct that takes place in publicly frequented areas....

The defendants [the State] ... made no tender of any evidence which even impliedly demonstrated that homosexuality causes society any significant harm. No effort was made by the defendants to establish either a rational basis or a compelling state interest in the proscription.... To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response....

On the basis of this record one can only conclude that the sole basis of the proscription of homosexuality was what the majority refers to as the promotion of morality and decency. As salutary a legislative goal as this may be, I can find no authority for intrusion by the state into the private dwelling of a citizen.... Whether the guarantee of personal privacy springs from the First, Fourth, Fifth, Ninth, the penumbra of the Bill of Rights, or, as I believe, in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, the Supreme Court has made it

clear that fundamental rights of such an intimate facet of an individual's life as sex, absent circumstances warranting intrusion by the state, are to be respected. My brothers, I respectfully suggest, have by today's ruling misinterpreted the issue– the issue centers not around morality or decency, but the constitutional right of privacy....

Editors' Notes

(1) In a Per Curiam decision, without opinion, the U.S. Supreme Court affirmed the judgment of the District Court (Doe v. Commonwealth's Attorney [1976]). Justices Brennan, Marshall, and Stevens, however, indicated that they would note probable jurisdiction and set the case down for oral argument.

(2) At the time this case began, federal jurisdictional statutes required that suits to enjoin enforcement of state laws be heard before special district courts, staffed by three judges. Except for a few special kinds of litigation, such as suits to reapportion states or those arising under the Civil Rights Acts of 1964 or the Voting Rights Acts of 1965, Congress in 1976 repealed this requirement. In this instance, Judge Merhige was the only active member of the bench. The other two members were retired judges called back to service to hear this case. The heavy burden of federal dockets makes this practice quite common.

(3) A "summary" affirmance as here means that the decision of the lower court stands but does not mean that the Supreme Court accepts the lower court's reasoning. In Carey v. Population Services (1977), Brennan denied that the Court had "definitively" settled the issue of state regulation of private sexual conduct. (Brennan, of course, had dissented in *Doe*; and, although he wrote the opinion of the Court in *Carey*, only four justices concurred in the section of his opinion in which this statement occurred.) Dissenting in *Carey*, Rehnquist cited *Doe* and said "the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established." Notwithstanding Rehnquist's comment, the Court granted certiorari in Bowers v. Hardwick (1986).

(4) **Query:** Is Judge Bryan's standard of "legitimate state interest" or that "the statute is rationally supportable" consistent with the standards required by the Supreme Court when state legislation impinges on such "fundamental rights" as privacy? See such cases as Skinner v. Oklahoma (1942; reprinted above, p. 868) and Akron v. Akron Center for Reproductive Health (1983; reprinted above, p. 1122).

(5) In Wainwright v. Stone (1973), two males, one convicted for "copulating per os and per anum," the other for copulating "per anum," attacked as unconstitutional the Florida statute under which they had been tried. Speaking only to the claim that the law was void for vagueness, the Supreme Court unanimously sustained the convictions. The immigration laws still forbid homosexual aliens to come into the United States. See Longstaff v. INS (1984), denying certiorari in a case where the Immigration and Naturalization Service had begun deportation proceedings against a resident alien who applied for citizenship because at the time of his entry into the United States he had not noted he was a homosexual.

(6) Despite *Doe*, *Wainwright*, and *Longstaff*, there has been a trend in American law toward repealing, amending, or interpreting statutes proscribing homosexual conduct so as to make exceptions for relations between consenting adults. Enforcement of laws punishing homosexual activity is haphazard, encouraging blackmail at least as much as adherence to particular moral standards. In July, 1975 the U.S. Civil Service Commission published a set of rules governing standards for hiring and promoting which were to apply equally to homosexuals and heterosexuals. For general discussions of the right to privacy and sexual freedom, see: Kenneth Karst, "The Freedom of Intimate Association," 89 *Yale L.J.* 624 (1980); David A.J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy," 30 *Hastings L.J.* 957 (1979); J. Harvie Wilkinson, III, and G. Edward White, "Constitutional Protection for Personal Lifestyles," 62 *Cornell L.Rev*. 563 (1977).