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Constitutional Law—Privacy and Equal Protection—Arkansas Joins Other States in a Revival of State Constitutions as Guardians of Individual Rights, Establishing New Protections for Arkansas Gays and Lesbians. *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002).

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CONSTITUTIONAL LAW—PRIVACY AND EQUAL PROTECTION—
ARKANSAS JOINS OTHER STATES IN A REVIVAL OF STATE CONSTITUTIONS
AS GUARDIANS OF INDIVIDUAL RIGHTS, ESTABLISHING NEW PROTECTIONS
FOR ARKANSAS GAYS AND LESBIANS. *Jegley v. Picado*, 349 Ark. 600, 80
S.W.3d 332 (2002).

I. INTRODUCTION

In *Jegley v. Picado*,¹ an eloquent opinion by Justice Annabelle Imber declared that civil liberties are alive and well in Arkansas.² Unprecedented in its articulation of privacy rights under the Arkansas Constitution,³ the decision also enhances the state's commitment to equal protection.⁴ With an expansive interpretation of justiciability, the *Picado* resolution provides assurances that Arkansans in legal distress will get their day in court.⁵ The Arkansas Supreme Court, holding that the Arkansas Constitution grants individual rights greater than those under the United States Constitution, may be coming into its own as a guardian of civil liberties.⁶

In *Picado*, the court took on a politically and socially sensitive issue—the constitutionality of the state statute criminalizing sexual intimacy between persons of the same sex, also known as the “sodomy law.”⁷ After three unsuccessful attempts to persuade the Arkansas General Assembly to repeal the statute,⁸ gay rights activists looked to the courts for relief from

1. 349 Ark. 600, 80 S.W.3d 332 (2002).

2. See *id.* at 632, 80 S.W.3d at 350. In asserting that due process is a living principle, the court quoted Justice Frankfurter in *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled* by *Mapp v. Ohio*, 367 U.S. 643 (1961), in which he stated that:

[i]t is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Picado, 349 Ark. at 632, 80 S.W.3d at 350.

3. See *Picado*, 349 Ark. at 632, 80 S.W.3d at 350. In *Picado*, the Arkansas Supreme Court acknowledged a fundamental right to privacy under the Arkansas Constitution, subject to strict scrutiny review. See *id.*, 80 S.W.3d at 350. For a discussion of levels of constitutional review, see *infra* Part III.B.1.b.

4. See *Picado*, 349 Ark. at 637–38, 80 S.W.3d at 353–54.

5. See *id.* at 611–22, 80 S.W.3d at 336–43; see discussions *infra* Parts IV.A, V.B.

6. See *Picado*, 349 Ark. at 611–22, 80 S.W.3d at 336–43. The court had previously “recognized protection of individual rights greater than the federal floor” only in search and seizure cases. *Id.* at 631, 80 S.W.3d at 349. See *infra* Part III.A.2 for a discussion of the Arkansas Supreme Court's use of the state constitution in the protection of civil rights.

7. See *Picado*, 349 Ark. at 632, 80 S.W.3d at 350.

8. S.B. 378, 80th Gen. Assem., Reg. Sess. (Ark. 1995); S.B. 565, 79th Gen. Assem., Reg. Sess. (Ark. 1993); S.B. 125, 78th Gen. Assem., Reg. Sess. (Ark. 1991). None of these bills survived the General Assembly's Judiciary Committee. *Picado*, 349 Ark. at 621, 80 S.W.3d at 342–43. Congressman Vic Snyder sponsored the three attempts at repeal of the sodomy law when he was an Arkansas State Senator because “it was a transparently dis-

what the *Picado* court acknowledged as a legal "Catch-22."⁹ The state refused to disavow the law, but also declined to prosecute anyone under it, thus insulating the statute from judicial review.¹⁰ Meanwhile, lesbian and gay citizens were forced to choose between celibacy and criminality.¹¹ The *Picado* plaintiffs¹² also alleged that the statute caused collateral harms including fear of prosecution and a multitude of social and legal ramifications.¹³ The Arkansas Supreme Court responded to this plight by agreeing to hear the case, holding that private, consensual, noncommercial intimacy between adults of the same sex is protected by the Arkansas Constitution,¹⁴ and acknowledging homosexuals as a separate and identifiable class entitled to constitutional protection.¹⁵

This note begins with a brief review of the facts and procedural posture of *Picado*, including a glimpse into the lives of the seven lesbian and gay Arkansans who brought the suit.¹⁶ It puts the case into national and historical context by examining the United States Supreme Court and the high courts of the states in their roles as protectors of civil liberties.¹⁷ The author then narrows this exploration with a look at the legal status of lesbians and gay men at the national and state levels, with a particular focus on Arkansas. The note ends with a walk-through of the reasoning used in *Picado*¹⁸ and a discussion of the significance of the *Picado* decision, especially the implications of its recognition of a fundamental right to privacy for all citizens and equal protection for gays and lesbians.¹⁹

II. FACTS

In 1998 Elena Picado was the mother of two children, a Spanish teacher at a Little Rock high school, and a member of Spirit Song Metro-

criminary part of our criminal code which served no purpose." Interview via email with Vic Snyder, United States Congress (Nov. 12, 2002). According to Congressman Snyder, the effort to repeal the statute included testimony by compelling witnesses such as State Senator Mike Everett, who described his experience as the father of a young, gay man. *Id.* Although the statute was not repealed, the process helped to educate state officials and the public about the discriminatory nature of the law. *Id.*

9. *Picado*, 349 Ark. at 622, 80 S.W.3d at 343.

10. *Id.*, 80 S.W.3d at 343.

11. *Id.*, 80 S.W.3d at 343.

12. See *infra* note 24 for a brief description of each of the seven plaintiffs and note 26 for a look at plaintiff Elena Picado's motivation for joining the suit.

13. Some of the collateral harms alleged by the plaintiffs are described *infra* in note 34.

14. *Picado*, 349 Ark. at 632, 80 S.W.3d at 350.

15. *Id.* at 634, 80 S.W.3d at 351.

16. See *infra* Part II.

17. See *infra* Part III.A.

18. See *infra* Part IV.

19. See *infra* Part V.

politan Community Church.²⁰ She enjoyed working with stained glass, cooking, and gardening.²¹ She lived in the country with her children, her partner, four dogs, and a guinea pig.²² As a lesbian in a long-term, physically intimate relationship with another woman, Picado was also a criminal under Arkansas law.²³

On January 28, 1998, Picado, six other Arkansas gays and lesbians,²⁴ and their attorneys announced that they were filing a lawsuit asking the court to declare Arkansas's criminal sodomy law²⁵ unconstitutional.²⁶ The plaintiffs also sought an injunction against enforcement of the statute, asserting that they had violated the statute in the past, intended to violate it in the future, and had a fear of prosecution.²⁷ They based their complaint on alleged violations of rights to privacy and equal protection under the United States Constitution and the Arkansas Constitution.²⁸ Specifically, the plain-

20. Telephone Interview with Elena Picado (Oct. 6, 2002).

21. *Id.*

22. *Id.*

23. Affidavit of Elena Picado at 1-2, *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002) (No. 01-815). Elena Picado admitted committing acts described as sodomy and made criminal under ARK. CODE ANN. § 5-14-122 (Michie Repl. 1997). Affidavit of Elena Picado at 1-2, *Picado* (No. 01-815).

24. The other plaintiffs were: Vernon Stokay, an inspector at a computer manufacturing plant from Little Rock; George Townsend, a registered nurse from Sherwood; Charlotte Downey, the owner and operator of a bait and tackle shop near Eureka Springs; Randy McCain, the pastor of the Open Door Community Church in Sherwood; Robin White, a research analyst at a Little Rock software development company; and Bryan Manire, a professional counselor in the Fayetteville public school district. Affidavits of Vernon Stokay, George Townsend, Charlotte Downey, Randy McCain, Robin White, and Bryan Manire, *Picado*, (No. 01-815).

25. ARK. CODE ANN. § 5-14-122. The statute prohibited:

any act of sexual gratification involving: (1) [t]he penetration, however slight, of the anus or mouth of . . . a person by the penis of a person of the same sex . . . ; or (2) [t]he penetration, however slight, of the vagina or anus of . . . a person by any body member of a person of the same sex

Id. The criminal penalty for a conviction was up to one year in jail and/or a fine of up to \$1000. ARK. CODE ANN. §§ 5-4-201, -401 (Michie Repl. 1997).

26. Press Release, Lambda Legal, Lambda, Arkansas Activists To Announce Challenge to State Sodomy Ban (Jan. 28, 1998), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=177> [hereinafter Press Release]. Picado's participation in the suit was motivated by fear of prosecution and her concern for gay and lesbian youth. Telephone Interview with Elena Picado, *supra* note 20. She believed the sodomy law was both a threat and a condemnation clouding the lives of Arkansas homosexuals. *Id.* "If there was a statute saying any child with black blood would be born a slave," explained Picado, "any mother would get out and destroy that law. It may be that it would not be used, but as long as it is on the law books, it could be used. 'May' is not good enough." *Id.*

27. *Bryant v. Picado*, 338 Ark. 227, 230, 996 S.W.2d 17, 18 (1999).

28. *Id.*, 996 S.W.2d at 18. The plaintiffs claimed privacy rights under the Bill of Rights and privacy and equal protection rights under the Fourteenth Amendment of the United States Constitution and article 2 of the Arkansas Constitution. *Id.*, 996 S.W.2d at 18.

tiffs argued that criminalizing their private, consensual sexual acts was a violation of their privacy rights.²⁹ They also claimed that criminalizing conduct between homosexuals that is legal between heterosexuals violated the plaintiffs' rights to equal protection.³⁰

Defendants Attorney General Winston Bryant and Sixth Judicial District Prosecuting Attorney Larry Jegley³¹ unsuccessfully moved to dismiss.³² Their primary argument was that the case was not justiciable because none of the plaintiffs had been charged with a violation of the statute and there was no realistic threat of enforcement.³³ The plaintiffs countered that the case was justiciable because the statute created a credible threat of prosecution and the unequal treatment supported by the statute caused judicially cognizable injuries by institutionalizing and condoning discrimination against lesbian and gay citizens.³⁴ Although the defendants denied any intention to prosecute under the sodomy statute, the plaintiffs argued that homosexuals had every reason to believe the state was committed to the law and would enforce it.³⁵ They pointed out that bills to repeal the law were

29. *Id.*, 996 S.W.2d at 18.

30. *Id.*, 996 S.W.2d at 18.

31. *Jegley v. Picado*, 349 Ark. 600, 609, 80 S.W.3d 332, 335 (2002). Mark Pryor replaced Winston Bryant as Attorney General of Arkansas in January 1999. *Id.*, 80 S.W.3d at 335. He was substituted for Bryant, but the circuit court subsequently agreed with Pryor's contention that he had no nexus with the enforcement of the sodomy statute and granted his motion to dismiss. *Id.*, 80 S.W.3d at 335. In June 2000 the circuit court certified *Jegley* as representative of a defendant class consisting of all state prosecuting attorneys. *Id.*, 80 S.W.3d at 335.

32. *Id.*, 80 S.W.3d at 335.

33. *Picado v. Jegley*, CV 99-7048 (6th Div. Pulaski County Cir. Ct. Mar. 23, 2001).

34. *Id.* The plaintiffs offered evidence of a variety of harms collateral to the criminal sodomy statute. *Id.* *Picado* described her fear of losing custody of her children, citing two Arkansas cases in which sexual orientation was used as a factor in removing children from the custody of their lesbian mothers. Affidavit of Elena *Picado* at 5, *Picado* (No. 01-815) (citing *Larson v. Larson*, 50 Ark. App. 158, 902 S.W.2d 254 (1995); *Thigpen v. Carpenter*, 21 Ark. App. 194, 199, 730 S.W.2d 510 (1987)). Manire said the Springdale School District justified the retraction of a proffered contract as a school counselor by claiming they could not employ him because of the sodomy law. Affidavit of Bryan Manire at 5, *Picado* (No. 01-815). Townsend, a registered nurse, stated that he had been exposed to numerous anti-gay comments at work and pointed out that the Arkansas State Board of Nursing had the authority to revoke his license for committing any crime, including sodomy. Affidavit of George Townsend at 7, *Picado* (No. 01-815). Stokay recalled a frightening encounter with Little Rock police officers who taunted him for being gay, and he cited documentation of other abusive behavior by Arkansas law enforcement officials. Affidavit of Vernon Stokey at 4, *Picado* (No. 01-815). McCain gave several accounts of anti-gay harassment, assault, and negative employment actions. Affidavit of Randy McCain at 7-8, *Picado* (No. 01-815). White submitted a copy of her lease into the record, noting that her landlord reserved the right to enter her home under certain circumstances and that she could be evicted if she were caught committing a crime. Affidavit of Robin White at 7, *Picado* (No. 01-815).

35. *Picado v. Jegley*, CV 99-7048 (6th Div. Pulaski County Cir. Ct. Mar. 23, 2001).

introduced in 1991, 1993, and 1995.³⁶ All died in the Arkansas General Assembly's Judiciary Committee.³⁷

In an order issued March 23, 2001, Pulaski County Circuit Judge David Bogard held that Arkansas Code Annotated section 5-14-122 violated privacy rights guaranteed by the Arkansas Constitution.³⁸ The court also held that the statute violated the Arkansas Equal Rights Amendment because it criminalized conduct based on the sex of the participants.³⁹ The State appealed the decision directly to the Arkansas Supreme Court.⁴⁰

III. BACKGROUND

Individual rights for most Americans expanded dramatically during the last half of the twentieth century.⁴¹ The trend began with United States Supreme Court decisions in the 1960s that applied certain provisions of the Fourteenth Amendment to the states.⁴² Changes in the Court—notably the retirement of Chief Justice Earl Warren and his replacement by Chief Justice Warren Burger—ended this period of sweeping change⁴³ and halted the movement toward broader application of the Federal Bill of Rights.⁴⁴ President Richard Nixon opposed the “egalitarian jurisprudence”⁴⁵ of the Warren Court, and he and President Ronald Reagan made conservative judicial appointments.⁴⁶

The second wave of this trend began when state courts began to step into the vacuum, taking on new roles as protectors of civil liberties.⁴⁷ Initially criticized by judges, legal scholars, and others as an attempt to undermine the power of the Burger Court, judicial activism quickly spread among

36. S.B. 378, 80th Gen. Assem., Reg. Sess. (Ark. 1995); S.B. 565, 79th Gen. Assem., Reg. Sess. (Ark. 1993); S.B. 125, 78th Gen. Assem., Reg. Sess. (Ark. 1991).

37. *Picado*, 349 Ark. at 621, 80 S.W.3d at 342–43.

38. *Picado v. Jegley*, CV 99-7048 (6th Div. Pulaski County Cir. Ct. Mar. 23, 2001) (granting summary judgment to plaintiffs and denying summary judgment to defendants).

39. *Id.*

40. *Picado v. Jegley*, CV 99-7048 (6th Div. Pulaski County Cir. Ct. Apr. 23, 2001) (giving notice of appeal).

41. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 540 (1986).

42. *Id.* The Warren Court fundamentally changed the law of the United States with broad reforms that nationalized civil rights guarantees. *Id.* at 545.

43. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097 (1997).

44. Brennan, *supra* note 41, at 546.

45. Nixon used the term “egalitarian jurisprudence” during his 1968 presidential campaign to express opposition to the expansion of civil liberties under the Warren Court. Michael Esler, *Part I: Equality in American Law*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 105, 126.

46. *Id.*

47. Tarr, *supra* note 43, at 1097–98.

state courts and gained widespread acceptance.⁴⁸ Legal scholars refer to this national phenomenon, well-established by the late 1990s, as the “new judicial federalism.”⁴⁹

Recognizing civil rights for gay and lesbian citizens is a prime example of how state courts have, in recent decades, found greater protections under their own constitutions than those provided by federal law.⁵⁰ The invalidation or repeal of criminal sodomy⁵¹ laws in most states is a noteworthy consequence of this trend.⁵² The United States Supreme Court has held that consenting adults have no constitutionally protected right to engage in homosexual sodomy,⁵³ and prior to 1961 all fifty states outlawed the practice.⁵⁴ By early 2002 courts in nine states had invalidated their sodomy laws.⁵⁵

This section will briefly examine the scope of the new judicial federalism and the Arkansas Supreme Court’s place in this trend prior to *Jegley v. Picado*.⁵⁶ The author will then put *Picado* in context by summarizing the United States Supreme Court’s decisions involving civil rights for lesbians and gays. The section concludes with a snapshot of sodomy laws, decisions in other states, and a brief survey of Arkansas Supreme Court cases involving homosexual sodomy.

48. *Id.*

49. *Id.*

50. ALAN S. YANG, FROM WRONGS TO RIGHTS: PUBLIC OPINION ON GAY AND LESBIAN AMERICANS MOVES TOWARD EQUALITY 6–9, 14–16, available at <http://www.nglrf.org> (last visited Mar. 24, 2003). Though beyond the scope of this note, public opinion has significant impact on legal policy affecting homosexuals, particularly in state courts, which are inherently closer to the people. *Id.* Favorable attitudes toward equal rights and opportunities for homosexual citizens have increased on several fronts including employment, housing, and family issues. *Id.*

51. One of the challenges faced by courts and legislatures discussing sodomy is how to define the crime. *Harris v. Alaska*, 457 P.2d 638 (Alaska 1969), was an early attempt by a plaintiff who was convicted of a “crime against nature” to have the law declared unconstitutional and void for vagueness. *Id.* The *Harris* court affirmed the conviction, but remanded for an amended judgment changing the crime to sodomy. *Id.* at 649. The opinion includes a discussion of the problems inherent in defining sodomy. *Id.* at 642. The author of the *Harris* opinion noted that many judicial opinions will decline to name particular acts but will assert that the “loathsome” acts committed by the defendant have always been prohibited under the statutes in question. *Id.* The results are confusing and, arguably, unconstitutionally vague. *Id.*; see also Arthur E. Brooks, Note, *Doe and Dronenburg: Sodomy Statutes Are Constitutional*, 26 WM. & MARY L. REV. 645, 647–48 (1985).

52. *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986).

53. *Id.* at 189.

54. *Id.* at 193–94. In 1961 Illinois became the first state to decriminalize private, adult, consensual sexual conduct by adopting the relevant provision of the American Law Institute’s *Model Penal Code*. *Id.*

55. *Jegley v. Picado*, 349 Ark. 600, 626, 80 S.W.3d 332, 345 (2002).

56. *Id.*, 80 S.W.3d at 346.

A. The New Judicial Federalism and the Arkansas Supreme Court

State courts vary widely in their enthusiasm for new judicial federalism.⁵⁷ Some sparked the movement in the 1970s, energizing local discussion of civil rights protections and bringing new vigor to state constitutions.⁵⁸ Over the past thirty years, the high courts of most states have participated to some degree.⁵⁹ This section will begin with a short review of the historical context of the new judicial federalism, move to a look at its current manifestations, and end with a discussion of the Arkansas Supreme Court's response to the trend.

1. *The New Judicial Federalism*

Some legal scholars see the new era of judicial federalism as a re-emergence of state constitutions as the primary guarantors of individual rights.⁶⁰ In the early days of the United States, most political leaders believed that decentralization of government power was the key to protecting political and civil liberties.⁶¹ Before the 1868 ratification of the Fourteenth Amendment, the United States Supreme Court applied the Bill of Rights only to the federal government.⁶² The Civil War convinced many citizens that the states could not be trusted to protect their civil rights.⁶³ Thus, the war created a widespread desire for the federal government to take a stronger role in protecting citizens against unconstitutional actions by the states.⁶⁴ Shortly after the war, the states ratified the Fourteenth Amendment, which guarantees that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of

57. Brennan, *supra* note 41, at 548-49.

58. *Id.*

59. Tarr, *supra* note 43, at 1098.

60. 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §§ 6-3 to -4, at 266-68 (2d ed. LEXIS 2000); Tarr, *supra* note 43, at 1098.

61. Brennan, *supra* note 41, at 537-40. State governments were closer to the people and, presumably, more responsive to the concerns of ordinary people than the distant federal government. *Id.* at 537. Therefore, citizens looked to their respective states for protection of personal liberties. *Id.*

62. *Id.*; see also *Barron v. Mayor of Baltimore*, 32 U.S. 243 (1833) (holding that the Federal Bill of Rights does not apply to the states).

63. Brennan, *supra* note 41, at 537.

64. *Id.*

law; nor deny to any person within its jurisdiction the equal protection of the laws.⁶⁵

Since that time, the Supreme Court has struggled to determine how to apply the Fourteenth Amendment and other constitutionally guaranteed civil liberties to the states.⁶⁶

United States Supreme Court oversight of personal liberties reached a high water mark under Chief Justice Warren during the 1960s,⁶⁷ when the Court made a dizzying series of decisions expanding civil rights protections.⁶⁸ The first such case was *Mapp v. Ohio*,⁶⁹ in which the Court extended the exclusionary evidence rule to state courts.⁷⁰ Subsequent cases extended federal protections against cruel and unusual punishment,⁷¹ self-incrimination,⁷² and double jeopardy.⁷³ During the same period, the Court upheld the right of counsel,⁷⁴ the right of the accused to be confronted by the witnesses against him,⁷⁵ the right to a speedy trial,⁷⁶ the right to trial by an impartial jury,⁷⁷ and the right to have compulsory subpoenas of witnesses.⁷⁸ Meanwhile, state supreme courts had essentially abdicated any role

65. U.S. CONST. amend XIV, § 1.

66. Brennan, *supra* note 41, at 537-38.

67. 3 PERLIN, *supra* note 60, § 6-3, at 266.

68. Brennan, *supra* note 41, at 541.

69. 367 U.S. 643 (1961).

70. *See id.* at 660. The rule states that evidence obtained in unconstitutional searches may not be used in criminal prosecutions. *Id.*

71. *See Robinson v. California*, 370 U.S. 660, 666-67 (1962) (striking a state statute criminalizing addiction to narcotics).

72. *See Malloy v. Hogan*, 378 U.S. 1 (1964). This case led to the famous decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), requiring police to warn suspects against self-incrimination. Brennan, *supra* note 41, at 544.

73. *See Benton v. Maryland*, 395 U.S. 784 (1969). Double jeopardy, prohibited by the Fifth Amendment, is "[t]he fact of being prosecuted twice for substantially the same offense." BLACK'S LAW DICTIONARY 506 (7th ed. 1999).

74. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding petitioner's trial and conviction without benefit of council violative of the Fourteenth Amendment).

75. *See Pointer v. Texas*, 380 U.S. 400, 406 (1965) (holding that the right of a criminal defendant to confront witnesses against him is a fundamental right).

76. *See Klopfer v. North Carolina*, 386 U.S. 213 (1967) (declaring unconstitutional a procedural device whereby the accused was discharged from custody but remained subject to future prosecution at the discretion of the prosecutor).

77. *See Parker v. Gladden*, 385 U.S. 363 (1966) (reversing a second degree murder conviction obtained subsequent to a bailiff's comment to the jury that the defendant was guilty).

78. *See Washington v. Texas*, 388 U.S. 14 (1967) (striking two state statutes preventing a person accused of a crime from testifying for a coparticipant).

they might have played in defining individual rights.⁷⁹ During the Warren Court years, neither citizens nor courts saw state constitutions as robust defenders of civil liberties.⁸⁰

The trend changed radically in the 1970s with the advent of the new judicial federalism.⁸¹ The United States Supreme Court began a period distinguished by a retrenchment of civil liberties.⁸² For reasons on which legal scholars disagree,⁸³ state supreme courts almost immediately began to fill the void.⁸⁴ Invigorated by the activism of the Warren Court, state judges and civil rights litigants looked to state courts as fora for constitutional interpretation.⁸⁵ During the next two decades, state courts decided more than 300 cases holding that their state constitutions granted broader rights than the federal floor.⁸⁶ A recent study of twenty-five states indicated that the expansion of rights under state constitutions has been most active in the areas of free exercise of religion, jury trial, and search and seizure.⁸⁷ State courts have issued opinions on a variety of constitutional issues, however, including civil rights for homosexual citizens.⁸⁸

79. Tarr, *supra* note 43, at 1100–01. Although states had relatively more power during the first 150 years of the United States, constitutional disputes in general were fairly rare during this period, so the impact of state supreme court decisions was actually small. *Id.*

80. 3 PERLIN, *supra* note 60, § 6-3, at 266.

81. Brennan, *supra* note 41, at 548.

82. *Id.* at 546; *see also, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (revoking the rule that a search warrant must be supported by probable cause when an officer relied on it in good faith).

83. Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 874–75 (1999). Most scholars see the new judicial federalism as largely judge-driven, but others argue that state courts are highly responsive to political pressures from social movements and interest groups. *Id.*

84. Tarr, *supra* note 43, at 1112.

85. *Id.* at 1112–13. State constitutions, as interpreted by state courts, may mandate more expansive civil rights than the minimum required by the United States Constitution. *Id.* at 1112.

86. *Id.* at 1112–13. Only ten similar cases were decided during the previous twenty years. *Id.*

87. James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1195–97 (2000). For example, seven of the eight state decisions on free exercise rejected the United States Supreme Court's decision in *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), which permitted increased governmental restriction on religious practices. Cauthen, *supra*, at 1197. In *Smith*, members of the Native American Church were discharged from employment for their sacramental use of peyote, an illegal drug. *Smith*, 494 U.S. at 874. The Court held that the State's subsequent denial of unemployment benefits was not unconstitutional. *Id.* at 882.

88. Elizabeth A. Leveno, Comment, *New Hope for the New Federalism: State Constitutional Challenges to Sodomy Statutes*, 62 U. CIN. L. REV. 1029, 1030 (1994). For an extensive discussion on the issue of state sodomy statutes, see *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

2. *The Arkansas Supreme Court*

Early in 2002 the Arkansas Supreme Court signaled its acceptance of the new judicial federalism in *Griffin v. State*.⁸⁹ In *Griffin*, the defendant was convicted of drug-related offenses using evidence obtained during a warrantless search of his home.⁹⁰ On appeal he argued that the search violated article 2, section 15 of the Arkansas Constitution.⁹¹ The court reversed and remanded the case with an order to suppress the evidence obtained by the illegal search.⁹² The *Griffin* court emphasized that its holding was based on the state constitution and asserted its “authority to impose greater restrictions on police activities in our state based upon our own state law than those the Supreme Court holds to be necessary based upon federal constitutional standards.”⁹³ In classic judicial federalism language, the court noted:

[W]e now depart from our earlier decisions wherein this court has declared that the Arkansas Constitution provides no greater protection than the Fourth Amendment to the United States Constitution. We previously noted that the wording of each document is comparable, and through the years, in construing this part of the Arkansas Constitution, we have followed the United States Supreme Court’s cases. Current interpretation of the United States Constitution in the federal courts no longer mirrors our interpretation of our own constitution.⁹⁴

Shortly after the *Griffin* decision, the court considered *State v. Sullivan*,⁹⁵ which had been remanded by the United States Supreme Court.⁹⁶ The issue on appeal was whether the court could suppress evidence seized in a search after a pretextual arrest.⁹⁷ Following *Griffin* the Arkansas Supreme

89. 347 Ark. 788, 67 S.W.3d 582 (2002).

90. *Id.*, 67 S.W.3d at 582.

91. *Id.* at 793, 67 S.W.3d at 585; see ARK. CONST. art. 2, § 15 (providing that “the right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated”).

92. *Griffin*, 347 Ark. at 791, 67 S.W.3d at 584.

93. *Id.* at 791–92, 67 S.W.3d at 584.

94. *Id.* at 804, 67 S.W.3d at 593 (Hannah, J., concurring) (internal citations omitted).

95. 348 Ark. 647, 74 S.W.3d 215 (2002).

96. *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

97. *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526 (2000), *overruled by* *Arkansas v. Sullivan*, 532 U.S. 769 (2001). The defendant was stopped for going forty miles-per-hour in a thirty-five mile-per-hour zone. *Id.* at 316, 11 S.W.3d at 526. He was unable to produce his registration and proof of insurance. *Id.*, 11 S.W.3d at 526. A rusted roofing hatchet—the defendant was a disabled former roofer—was corroding into the floor of the car. *Id.*, 11 S.W.3d at 526. The officer, who admittedly had reason to believe the defendant was involved with illegal drugs, arrested the defendant for speeding, carrying a weapon, and driving without registration and insurance. See *id.*, 11 S.W.3d at 526. A subsequent search of the vehicle turned up illegal drugs and paraphernalia. *Id.*, 11 S.W.3d at 527. The Arkansas Supreme

Court reiterated its independence and used state grounds to determine what police conduct is reasonable under the Arkansas Constitution. The holdings in *Griffin* and *Sullivan* foreshadowed the dramatic opinion to come a few weeks later in *Jegley v. Picado*.⁹⁸

B. Civil Rights and Homosexuality

The new judicial federalism has had a significant effect on the civil rights of homosexuals.⁹⁹ Achieving only limited success at the federal level,¹⁰⁰ gays and lesbians have increasingly turned to state courts and legislatures in a search for equality.¹⁰¹ One of the most popular targets of gay rights activists has been state laws prohibiting the practice of sodomy.¹⁰² Although many current laws and regulations affect their lives,¹⁰³ the attempts to regulate their sexuality by the criminalization of sodomy vividly illustrates the legal status of gay men and lesbians.

This section will examine privacy and equal protection rights in the context of two key United States Supreme Court opinions discussing homosexuality and sodomy. It will then briefly address the legal status of acts termed "sodomy" in the fifty states and the District of Columbia. Finally, the author will take a more detailed look at the treatment of sodomy by the Arkansas Supreme Court.

1. *Homosexuality and the United States Supreme Court*

The United States Supreme Court did not directly address the rights of homosexuals until the mid-1980s.¹⁰⁴ Gay rights advocates and legal scholars

Court affirmed the lower court's decision to allow suppression of this evidence, finding that the arrest was only a pretext to support the search. *Id.* at 317, 11 S.W.3d at 527.

98. 349 Ark. 600, 80 S.W.3d 332 (2002).

99. See *infra* Part III.B.2.

100. See *infra* Part III.B.1.

101. See *infra* Part III.B.2.

102. See *supra* Part III.A.2. One modern definition of sodomy is: "1. Oral or anal copulation between humans, esp. those of the same sex. 2. Oral or anal copulation between a human and an animal; bestiality.—Also termed *buggery*; *crime against nature*; *abominable and detestable crime against nature*; *unnatural offense*; [and] *unspeakable crime*." BLACK'S LAW DICTIONARY 1396–97 (7th ed. 1999).

103. Nancy K. Ota, *Queer Recount*, 64 ALB. L. REV. 889, 893–99 (2001). The Republican Unity Coalition was formed to promote diversity within the Republican Party by helping it respond constructively to issues of concern to gays and lesbians. *Id.* at 898. Ota suggests an agenda of issues that the coalition urgently needs to address: same-sex marriage, military service (the Republican Party Platform in 2000 stated that homosexuals should not be allowed to serve), adoption (President Bush supports limiting adoption to married couples), employment discrimination, funding for AIDS/HIV, sex education, and anti-sodomy laws. *Id.* at 898–99.

have criticized the Court for what they perceive as a reluctance to participate in this highly charged debate affecting the lives of millions of Americans.¹⁰⁵ When the Supreme Court has granted certiorari and entered the fray, results have been mixed.¹⁰⁶ During the past two decades, the Court decided nine cases involving the status of lesbians and gays.¹⁰⁷ Five of those decisions were favorable to homosexuals,¹⁰⁸ and four were not.¹⁰⁹ The Court's trend is toward greater involvement in homosexual rights issues than in the past and, arguably, toward greater protection.¹¹⁰ The Court has decided four relevant cases since 1996, three of them favorably to gay rights¹¹¹ and the fourth restricting gay rights by only a narrow margin.¹¹² In December 2002 the United States Supreme Court agreed to hear an appeal

104. Jeff Bleich & Kelly Klaus, *Unfinished Trilogy: The Supreme Court and Sexual Orientation*, 62 OR. ST. B. BULL. 9 (2002). The Court had not previously granted certiorari to any cases involving gay rights, although it came close with *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 901 (1976), which garnered three of the four votes necessary for the Court to hear oral arguments. Scott Patrick Johnson, *An Analysis of the U.S. Supreme Court's Decision Making in Gay Rights Cases (1985-2000)*, 27 OHIO N.U. L. REV. 197, 199 n.9 (2001).

105. Bleich & Klaus, *supra* note 104, at 9. For an extensive discussion of the treatment of homosexuality by the United States Supreme Court, including analyses of major opinions and denials of certiorari and biographical information about justices and litigants, see JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* (2001).

106. Johnson, *supra* note 104, at 197.

107. *Id.* at 198.

108. See *Bragdon v. Abbott*, 524 U.S. 624 (1998) (finding non-symptomatic HIV to be a disability under the Americans with Disabilities Act); *Onscale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (holding that Title VII of the Civil Rights Act of 1964 prohibits same-sex harassment); *Webster v. Doe*, 486 U.S. 592 (1998) (holding that national security interests do not preclude federal courts from ruling on the dismissal of a CIA employee because of his sexual orientation); *Romer v. Evans*, 517 U.S. 620 (1996) (ruling that a Colorado ballot initiative denying protections to homosexuals in state and local government violated equal protection rights); *Bd. of Educ. of Okla. City v. Nat'l Gay Task Force*, 470 U.S. 903 (1985) (leaving a lower court ruling invalidating an Oklahoma law firing teachers who advocated homosexual conduct, but not establishing a controlling precedent because the vote was split four to four).

109. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (ruling that the Boy Scouts could discharge a scoutmaster for identifying himself as gay); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (ruling that the St. Patrick's Day Parade did not have to allow participation by a group identified as homosexual); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (denying the use of the word "Olympic" to the organizers of the Gay Olympics); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding no fundamental privacy right to engage in homosexual sodomy).

110. Johnson, *supra* note 104, at 227.

111. See *Bragdon*, 524 U.S. at 624; *Onscale*, 523 U.S. at 75; *Webster*, 486 U.S. at 592.

112. See *Boy Scouts of Am.*, 530 U.S. at 642. The vote was five to four, with Justices Stevens, Souter, Ginsburg, and Breyer joining in a lengthy dissent. *Id.*

of *Lawrence v. Texas*, which upheld a Texas statute prohibiting same-sex sodomy.¹¹³

a. The federal right to privacy and the criminalization of sodomy

The United States Supreme Court has found constitutional privacy rights based on two fundamental principles: the sanctity of the family and the autonomy of the individual.¹¹⁴ Family-based rights support privacy related to the nurture and education of children,¹¹⁵ marital relations,¹¹⁶ and procreation.¹¹⁷ In *Prince v. Massachusetts*, the Court defined a “private realm of family life” protected from governmental intrusion.¹¹⁸ In *Moore v. City of East Cleveland*,¹¹⁹ the Court emphasized the importance of the family as a vital economic and social unit, indicating that the family’s right to privacy is collective rather than individual.¹²⁰

The Court, however, has also recognized individual privacy guarantees as an extension of personal autonomy.¹²¹ In *Eisenstadt v. Baird*¹²² and *Carey v. Population Services International*,¹²³ the Court held that unmarried persons and minors have a protected right to use contraceptives.¹²⁴ The right to abortion affirmed in *Roe v. Wade*¹²⁵ was granted to married and unmarried women alike.¹²⁶ The *Roe* opinion stated that the Court recognized the right of personal privacy under the United States Constitution as early as the late

113. *Lawrence v. Texas*, 123 S. Ct. 661 (2002) (granting certiorari to *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. App. 2001)).

114. Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 566 (1986).

115. See *Prince v. Massachusetts*, 321 U.S. 158, 166, 169 (1944) (acknowledging a “private realm of family life,” but affirming a ruling prohibiting a family member from involving a child in “street preaching”).

116. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the marital relationship is within a “zone of privacy” protected from state interference).

117. See *Carey v. Population Servs. Int’l.*, 431 U.S. 678, 684–85 (1977) (holding that the right to decide whether to have a child is within the familial “zone of privacy”).

118. *Prince*, 321 U.S. at 166.

119. 431 U.S. 494 (1977).

120. Apasu-Gbotsu, *supra* note 114, at 579.

121. ALLAN IDES & CHRISTOPHER N. MAY, *CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS* 78 (2d ed. 2001).

122. 405 U.S. 438 (1972).

123. 431 U.S. 678 (1977).

124. See *Carey*, 431 U.S. at 682; *Eisenstadt*, 405 U.S. at 440.

125. 410 U.S. 113 (1973).

126. *Id.* at 120. Jane Roe was pregnant and unmarried when she brought an action against the District Attorney in Dallas County, Texas, seeking a declaratory judgment that the Texas criminal abortion statute was unconstitutional. *Id.* The United States Supreme Court agreed with the district court decision striking down the statute. *Id.* at 166.

nineteenth century.¹²⁷ In *Carey*, the Court began to refer to this concept as the "right of autonomy," emphasizing the individualized nature of the right.¹²⁸ The Court has discussed privacy rights in a number of contexts, notably in connection with questions about search and seizure issues.¹²⁹

In 1986 the Court discussed the fundamental right to privacy and its application to homosexual sodomy in *Bowers v. Hardwick*.¹³⁰ The case arose when police officers, investigating an unrelated crime, entered Michael Hardwick's bedroom, found him in bed with another adult male, and arrested him for sodomy.¹³¹ Although the Atlanta District Attorney declined to press charges against Hardwick,¹³² the American Civil Liberties Union challenged the Georgia law on his behalf.¹³³ Hardwick challenged the constitutionality of the Georgia sodomy statute in federal district court, which dismissed the complaint for failure to state a claim.¹³⁴ The United States Court of Appeals for the Eleventh Circuit reversed, and the United States Supreme Court granted certiorari to consider the constitutionality of the Georgia statute only as applied to homosexual sodomy.¹³⁵

The Court used *Bowers* to explore the limits it should properly set on the right to privacy, which is not explicitly protected by the United States Constitution.¹³⁶ The granting of implicit rights, according to the opinion, calls for particular caution because the citizenry must be assured that the rights are based on the Constitution rather than the values and opinions of the justices themselves.¹³⁷ Classifying previously identified privacy rights as

127. *Id.* at 152 (citing *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

128. *IDES & MAY*, *supra* note 121, at 78.

129. John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1101-03, 1131-32 (2002); *see, e.g., infra* note 314 (discussing privacy rights and the use of new technology for search and seizure).

130. 478 U.S. 186 (1986).

131. Bleich & Klaus, *supra* note 104, at 9.

132. *Bowers*, 478 U.S. at 188. A violation of the statute under which Hardwick was charged carried a penalty of up to twenty years in prison. *Id.*

133. Johnson, *supra* note 104, at 199-200.

134. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *overruled by Bowers v. Hardwick* 478 U.S. 186 (1986). The district court ruled that Hardwick had standing to bring the suit but that he had no legal claim in light of the United States Supreme Court's affirmation of a federal district court decision upholding the Virginia sodomy statute. *Id.* at 1204; *see also Doe v. Commonwealth's Attorney for City of Richmond*, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D.Va. 1975).

135. *Bowers*, 478 U.S. at 189. A heterosexual couple, John and Mary Doe, had joined the case to challenge the statute's prohibition on heterosexual sodomy, but the district court held they had sustained no injury and therefore lacked standing. *Id.* at 188.

136. *Id.* at 191-92.

137. *Id.* at 190.

dealing with family, marriage, and procreation,¹³⁸ the Court distinguished consensual, non-procreative sex acts and decided that homosexual activities did not qualify for such protection.¹³⁹ The decision was a slim five to four majority.¹⁴⁰ Justice White, who wrote for the majority in *Bowers*, grounded the opinion in historical and institutional precedent.¹⁴¹ He cited ancient prohibitions against homosexual sodomy and noted that the thirteen original states had laws prohibiting the conduct and all fifty states outlawed sodomy until 1961.¹⁴²

In a long and biting dissent, Justice Blackmun¹⁴³ vehemently attacked the historical basis for the majority opinion, agreeing with the late Justice Holmes that

[it] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁴⁴

Justice Blackmun opined that the protection of intimate relationships within the home is central to constitutional privacy guarantees.¹⁴⁵ He concluded that the *Bowers* holding “poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.”¹⁴⁶

b. The federal right to equal protection and homosexuals as a protected class

The Equal Protection Clause of the Fourteenth Amendment prohibits state governments from denying any person the equal protection of the

138. *Id.* The Court looked at cases such as *Carey v. Population Services International*, 431 U.S. 678, 685 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and *Prince v. Massachusetts*, 321 U.S. 158 (1944).

139. *Bowers*, 478 U.S. at 191.

140. *Id.* at 186. Three years after his retirement from the United States Supreme Court, Justice Lewis F. Powell confessed to an audience at the New York University Law School that he had probably been wrong to cast the critical swing vote against the plaintiff in *Bowers*. Mark A. Graber, *Judicial Recantation*, 45 SYRACUSE L. REV. 807 (1994). After the decision, Justice Powell reviewed the arguments on both sides. *Id.* On reflection, he decided that the dissent had the better arguments. *Id.*

141. *Bowers*, 478 U.S. at 192–93.

142. *Id.*

143. *Id.* at 199 (Blackmun, J., dissenting). Justices Brennan, Marshall, and Stevens joined Justice Blackmun’s dissent.

144. *Id.* (Blackmun, J., dissenting) (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

145. *Id.* at 208 (Blackmun, J., dissenting).

146. *Id.* at 214 (Blackmun, J., dissenting).

laws.¹⁴⁷ Most laws discriminate by classifying individuals according to certain behaviors or personal characteristics.¹⁴⁸ The Constitution requires that such discrimination be based on legitimate government purposes, as analyzed under a three-tier model of review.¹⁴⁹ A law selectively infringing on a fundamental right or discriminating based on race, citizenship, or national origin is subjected to strict scrutiny, the most stringent standard of review.¹⁵⁰ To survive a strict scrutiny review, a law or practice must be narrowly tailored to further a compelling government interest.¹⁵¹ The Court subjects classifications based on gender to an intermediate standard.¹⁵² To be constitutional under an intermediate level of scrutiny, a classification must serve an important government objective by using means substantially related to the objective.¹⁵³ Lowest and most deferential to legislative lawmakers, the rational basis standard requires that there be some conceivable public purpose justifying a discriminatory statute.¹⁵⁴

Ten years after *Bowers*,¹⁵⁵ the United States Supreme Court considered gay rights under the Equal Protection Clause.¹⁵⁶ In *Romer v. Evans*,¹⁵⁷ the Court ruled on the constitutionality of Amendment 2, a Colorado voter initiative prohibiting the granting of protected legal status based on sexual orientation.¹⁵⁸ Amendment 2 would have voided several state and local

147. U.S. CONST. amend XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

148. IDES & MAY, *supra* note 121, at 184. For example, speed limits and child labor laws treat individuals differently according to behavior and age. *Id.*

149. *Id.* at 185.

150. *Id.*

151. *Id.* at 206.

152. *Id.* at 234.

153. *Id.* at 236.

154. IDES & MAY, *supra* note 121, at 199–200.

155. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

156. *Romer v. Evans*, 517 U.S. 620 (1996).

157. *Id.*

158. *Id.* The amendment read:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Colorado laws and regulations banning discrimination against homosexuals in employment, housing, public accommodations, insurability, and education.¹⁵⁹ The State argued that the amendment only denied "special rights," putting gays and lesbians into the same position as other citizens.¹⁶⁰ The Court, in a six to three decision, disagreed, holding that Amendment 2 was unconstitutional as a status-based enactment unrelated to legitimate public interests.¹⁶¹

Without actually deciding the level of review required, the *Romer* Court found that Amendment 2 did not even survive the rational basis test.¹⁶² Under a rational basis review, a court asks whether the classification of persons based on sexual orientation bears a "rational relation to some legitimate end."¹⁶³ The Court acknowledged there are circumstances under which a classification may be justified, even though it results in disadvantage to a particular group.¹⁶⁴ If such a classification does not target a suspect class¹⁶⁵ or interfere with a fundamental right¹⁶⁶ and is rationally related to a legitimate public purpose, the Court will allow it.¹⁶⁷ The purpose of judicial scrutiny of discriminatory mandates is to ensure that laws creating classifications of citizens are not devised to stigmatize or otherwise harm unpopular groups.¹⁶⁸ The *Romer* Court concluded that Amendment 2 was so broad

Id. at 624.

159. *Id.* at 626. The Colorado laws and regulations in question also protected against discrimination based on a variety of other characteristics such as age, marital status, parenthood, and political affiliation. *Id.* at 629. The purpose of Amendment 2 was to prohibit the inclusion of homosexuals and bisexuals in such protection. *Id.*

160. *Id.* at 626.

161. *Id.* at 635.

162. *Romer*, 517 U.S. at 635.

163. *Id.* at 631. For other United States Supreme Court applications of the rational basis test, see *Heller v. Doe*, 509 U.S. 312, 319–20 (1993), and *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 181 (1980).

164. *Romer*, 517 U.S. at 632. The Court gave several examples including *New Orleans v. Dukes*, 427 U.S. 297 (1976) (singling out certain pushcart vendors for special treatment justified by benefits to tourism), and *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) (holding that a law favoring optometrists over opticians was justified by legitimate health concerns).

165. Craig D. Moreshead, Note, *Evans v. Romer and Amendment 2: Homosexuality and the Constitutional Dilemma*, 24 CAP. U. L. REV. 485, 486 (1995). Factors considered in the determination of the appropriate level of review for a particular group include the immutability of its defining characteristic, the history of its treatment by society, and its relative political and social strength. *Id.* Homosexuals do not comprise a suspect class. *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).

166. *Romer*, 517 U.S. at 631. Fundamental rights include those that are deeply ingrained in our national tradition and are deemed necessary to liberty and justice. Moreshead, *supra* note 165, at 486.

167. *Romer*, 517 U.S. at 631.

168. *Id.* at 633.

in scope and so unrelated to specific, legitimate public objectives that it could not pass the test.¹⁶⁹

In *Romer* it was Justice Scalia¹⁷⁰ who wrote an impassioned dissent, arguing that the *Romer* holding was in direct opposition to *Bowers*, which the majority opinion did not discuss.¹⁷¹ Justice Scalia asserted that sodomy is the conduct that defines the homosexual class.¹⁷² If criminalizing such conduct passes constitutional muster, he argued, how can it be unconstitutional for states to prohibit the protection of a class of people defined by their propensity to engage in the conduct?¹⁷³ Justice Scalia characterized homosexuals as belonging not to a class of citizens who could be harmed by the animosity of Colorado voters, but as individuals behaving in ways that the majority of citizens understandably finds reprehensible.¹⁷⁴ He accused the Court of participating in “culture wars”¹⁷⁵ and called the majority opinion “an act, not of judicial judgment, but of political will” with “no foundation in American constitutional law.”¹⁷⁶

2. *Homosexuality and the States*

Ancient prohibitions¹⁷⁷ on various acts characterized as sodomy found their way into the statutory or common law of all thirteen of the original states.¹⁷⁸ When the Fourteenth Amendment was ratified in 1868, sodomy was a crime in most of the existing states; by 1961 all fifty states outlawed heterosexual and homosexual sodomy.¹⁷⁹ As social mores began to change, forty-one states invalidated or repealed their laws prohibiting opposite-sex sodomy.¹⁸⁰ Prior to *Picado* thirty-five states and the District of Columbia had legalized opposite-sex and same-sex sodomy, twenty-six by legislative repeal and nine by judicial decision.¹⁸¹ Six states maintained same-sex sodomy statutes: Arkansas, Kansas, Michigan, Missouri, Oklahoma, and

169. *Id.* at 634–35.

170. *Id.* at 636 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia in his dissent. *Id.* (Scalia, J., dissenting).

171. *Id.* at 640 (Scalia, J., dissenting).

172. *Id.* at 641 (Scalia, J., dissenting).

173. *Romer*, 517 U.S. at 641–43 (Scalia, J., dissenting).

174. *Id.* at 644–45 (Scalia, J., dissenting).

175. *Id.* at 652 (Scalia, J., dissenting).

176. *Id.* at 653 (Scalia, J., dissenting).

177. See Aimee D. Dayhoff, Student Article, *Sodomy Laws: The Government's Vehicle To Impose the Majority's Social Values*, 27 WM. MITCHELL L. REV. 1863, 1865 (2001) (outlining a brief history of Judeo-Christian prohibitions on sodomy).

178. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

179. *Id.* at 193.

180. *Jegley v. Picado*, 349 Ark. 600, 626, 80 S.W.3d 332, 346 (2002); see *infra* note 182.

181. *Picado*, 349 Ark. at 625, 80 S.W.3d at 346.

Texas.¹⁸² Nine states have statutes prohibiting both same-sex and opposite-sex sodomy: Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia.¹⁸³

3. *Homosexuality and the State of Arkansas*

Until 1975 homosexual and heterosexual sodomy alike were crimes in Arkansas and punishable with terms of imprisonment in the penitentiary for up to twenty-one years.¹⁸⁴ The old statute and case law prohibited a broad range of sexual activities. Arkansas courts struggled to define the crime "called sometimes buggery, sometimes the offense against nature, and sometimes the horrible crime not fit to be named among Christians, being a carnal copulation by human beings with each other against nature, or with a beast."¹⁸⁵ In 1925 the Arkansas Supreme Court defined sodomy as consisting of "unnatural sexual relations between persons of the same sex, or with beasts, or between persons of different sex, but in an unnatural manner."¹⁸⁶

In 1973 an appellant charged with an act of same-sex fellatio committed in an automobile parked on a public road argued to the Arkansas Supreme Court that the state's sodomy statute was unconstitutional on the grounds that it was vague and broad, established a religion, and invaded his right of privacy.¹⁸⁷ The court dismissed these arguments in a short opinion, stating that sodomy is simply and clearly defined as "an unnatural sex act which is condemned" and that there is widespread agreement about what that means.¹⁸⁸ "It is the opposite of a *natural* sex act; the manner of a *natural* sex act is well known, even to the young and the uneducated."¹⁸⁹ Addressing the allegation that the prohibition on sodomy established a religion, the court held that it did not, pointing out that many criminal statutes would be "emasculated" if acts regarded as sinful by religious groups could not be

182. Statutes prohibiting same-sex sodomy as of June 2002 were: ARK. CODE ANN. § 5-14-122 (Michie Repl. 1997); KAN. STAT. ANN. § 21-3505 (1995); MICH. STAT. ANN. 750.158 (Michie 1991); MO. REV. STAT. § 566.090 (1999); OKLA. STAT tit. 21 § 886 (1983); and TEX. PENAL CODE ANN. § 21.06 (Vernon 1989).

183. See ALA. CODE §§ 13A-6-63 to -65 (1975); FLA. ST. CH. § 800.02 (2002); IDAHO CODE § 18-6605 (Matthew Bender 2002); LA. REV. STAT. ANN. § 14:89 (West 1986); MISS. CODE ANN. § 97-29-59 (1972); N.C. GEN. STAT. § 14-177 (1994); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18.2-361 (Michie 1994).

184. ARK. STAT. ANN. § 41-813 (Bobbs-Merrill 1947) (repealed 1975).

185. *Strum v. State*, 168 Ark. 1012, 1014, 272 S.W. 359, 359 (1925) (quoting 1 BISHOP ON CRIMINAL LAW 1191 (1923)); see also *Smith v. State*, 150 Ark. 265, 267, 234 S.W. 32, 32 (1921).

186. *Strum*, 168 Ark. at 1014, 272 S.W. at 359.

187. *Conner v. State*, 253 Ark. 854, 855, 490 S.W.2d 114, 115 (1973).

188. *Id.*, 490 S.W.2d at 115.

189. *Id.* at 856, 490 S.W.2d at 115.

regulated.¹⁹⁰ Finally, the court refused to consider the privacy argument since the appellant committed the illegal act in a public place.¹⁹¹

Later that year the court considered the constitutionality of the statute in greater depth in *Carter v. State*.¹⁹² There, the appellants argued that the law: (1) invaded their right to privacy under the First, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments of the United States Constitution; (2) deprived them of their constitutional rights because it was so vague and ambiguous; (3) served no legitimate state interest as applied to them; and (4) imposed cruel and unusual punishment.¹⁹³ Noting the presumption of constitutionality accorded to statutes and placing a heavy burden of proof on the appellants, the court rejected each of these arguments.¹⁹⁴ The longevity of the statute was of particular importance to the *Carter* court, observing that "if such a statute were in violation of federal constitutional principles, surely the thought would have long since occurred to the many legal scholars and jurists of this state."¹⁹⁵ The court again refused to consider the privacy issue because the act in question took place in a public, if secluded, location.¹⁹⁶ The *Carter* appellants cited numerous authorities in support of their contention that sodomy between consenting adults was no longer broadly condemned by society, thus making its legal prohibition obsolete.¹⁹⁷ Without addressing the legitimacy of the argument, the court expressly left the question to the state legislature.¹⁹⁸

The state repealed its sodomy statute in 1975¹⁹⁹ and replaced it two years later with a statute criminalizing only homosexual sodomy.²⁰⁰ In addition to authorizing criminal sanctions for certain acts between persons of the same sex, Arkansas's prohibition on sodomy has justified other legal actions

190. *Id.*, 490 S.W.2d at 115.

191. *Id.*, 490 S.W.2d at 116.

192. 255 Ark. 225, 500 S.W.2d 368 (1973).

193. *Id.* at 227, 500 S.W.2d at 370. Appellants received eight-year sentences. *Id.* at 233, 500 S.W.2d at 373.

194. *Id.* at 228, 500 S.W.2d at 370.

195. *Id.*, 500 S.W.2d at 370.

196. *Id.* at 229, 500 S.W.2d at 371. The case arose from an incident in which a police officer discovered the appellants committing same-sex sodomy in Carter's automobile, which was parked in a rest area adjacent to Interstate 70. *Id.* at 227-29, 500 S.W.2d at 370-71. The officer testified that, although it was eleven o'clock at night, the area was well-lit and there were many people around. *Id.*, 500 S.W.2d at 370-71.

197. *Id.* at 230, 500 S.W.2d at 371.

198. *Carter*, 255 Ark. at 230, 500 S.W.2d at 371.

199. Act of Apr. 8, 1975, No. 928, 1975 Ark. Acts 2463 (repealing ARK. STAT. ANN. § 41-813 (Bobbs-Merrill 1947)).

200. ARK. CODE ANN. § 5-14-122 (Michie Repl. 1997); *see supra* note 25 (setting forth the wording of the statute).

against homosexuals.²⁰¹ The Arkansas Supreme Court has allowed counsel to attempt to impeach the credibility of a witness by asking whether the witness had committed sodomy, even where the sexual behavior was unrelated to the issues in the case.²⁰² The plaintiff in *Stowe v. Bowlin*,²⁰³ whose truck was damaged when the defendant failed to replace the drain plug after changing the oil, was questioned by opposing counsel about past acts of sodomy.²⁰⁴ The supreme court upheld the line of questioning as relevant to the credibility of the plaintiff.²⁰⁵ In *Thigpen v. Carpenter*²⁰⁶ the Arkansas Court of Appeals affirmed a lower court decision in which the mother's homosexuality was a factor in removing her minor children from her custody.²⁰⁷ The *Thigpen* decision held that Arkansas courts have rightly assumed illicit sexual conduct on the part of a parent to be detrimental to children.²⁰⁸

By the dawn of 1998, activists were determined to change the legal status of lesbians and gay men in Arkansas.²⁰⁹ Their first target was the sodomy statute²¹⁰ that branded them as criminals.²¹¹ Three attempts to repeal the statute had failed,²¹² so a judicial challenge was the next logical choice.²¹³ Because no plaintiff had been recently prosecuted under the stat-

201. See *Stowe v. Bowlin*, 259 Ark. 221, 531 S.W.2d 955 (1976); *Hale v. State*, 252 Ark. 1040, 483 S.W.2d 228 (1972); *Larson v. Larson*, 50 Ark. App. 158, 902 S.W.2d 254 (1995); *Thigpen v. Carpenter*, 21 Ark. App. 194, 199, 730 S.W.2d 510 (1987).

202. *Stowe*, 259 Ark. at 225-26, 531 S.W.2d at 957-58; *Hale*, 252 Ark. at 1040, 483 S.W.2d at 228.

203. 259 Ark. at 221, 531 S.W.2d at 955.

204. *Id.* at 224-25, 531 S.W.2d at 957-58.

205. *Id.* at 226, 531 S.W.2d at 958.

206. 21 Ark. App. at 199, 730 S.W.2d at 510.

207. *Id.*, 730 S.W.2d at 510; see also *Larson v. Larson*, 50 Ark. App. 158, 902 S.W.2d 254 (1995). In *Larson*, the Arkansas Court of Appeals affirmed the lower court's decision to change primary custody of two children from their lesbian mother to their father. *Larson*, 50 Ark. App. at 162, 902 S.W.2d at 256. The majority opinion emphasized that the appellant's homosexuality was only one of several factors justifying the change in custody. *Id.*, 902 S.W.2d at 256. In a concurring opinion, however, Judge Rogers expressed her concern about the lower court's obvious disapproval of the appellant's sexual orientation. *Id.*, 902 S.W.2d at 257 (Rogers, J., concurring). Judge Rogers found the emphasis on that issue troubling and possibly indicative of an inappropriately punitive approach to a custody decision. *Id.*, 902 S.W.2d at 257 (Rogers, J., concurring).

208. *Thigpen*, 21 Ark. App. at 198, 730 S.W.2d at 513. Thigpen testified that she and her lesbian partner had never engaged in physical contact in the presence of her children. *Id.*, 730 S.W.2d at 513.

209. Press Release, *supra* note 26.

210. ARK. CODE ANN. § 5-14-122 (Michie Repl. 1997).

211. Press Release, *supra* note 26.

212. See *supra* text accompanying notes 36-37.

213. Press Release, *supra* note 26.

ute, opponents of the law faced problems of justiciability.²¹⁴ Although the Arkansas Supreme Court had previously heard constitutional challenges brought by plaintiffs who had not been prosecuted under the statutes or regulations in question, such cases were rare.²¹⁵ Nevertheless, seven lesbian and gay plaintiffs filed suit, alleging that the law violated their federal and state constitutional rights to privacy and equal protection.²¹⁶ Eventually, the suit made its way to the Arkansas Supreme Court.²¹⁷

IV. REASONING

In *Picado*,²¹⁸ the Arkansas Supreme Court held that the state's sodomy statute²¹⁹ violates privacy and equal protection rights guaranteed by the Arkansas Constitution.²²⁰ The court first examined the defendants' contention that, because none of the plaintiffs had been prosecuted under the statute, there was no justiciable case or controversy.²²¹ The court then considered the nature of privacy rights implicit in the state constitution and whether the statute was violative of those rights.²²² Finally, the court asked whether constitutional equal protection guarantees prohibit the state from criminalizing same-sex sodomy absent any legal sanction against identical behavior between members of opposite sexes.²²³

214. CHRISTOPHER N. MAY & ALLEN IDES, CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM § 3 (2d ed. 2001). The term "justiciability" refers to a body of doctrines that define what issues may properly be brought before a court. *Id.* Generally, courts will only decide issues in the context of active cases or controversies. *Id.* To bring a claim against the government, a plaintiff must prove a past harm or imminent threat of future harm. *Id.* Where the state neglects to enforce a criminal statute by prosecuting those who violate it, potential challengers of the statute face a justiciability problem because of the speculative nature of the alleged harm. *Id.*

215. Among the small number of such cases in the past half century are: *Epperson v. Arkansas*, 393 U.S. 97 (1968) (challenging constitutionality of 1928 Arkansas law prohibiting the teaching of evolution in public schools); *McGruder v. Arkansas Game & Fish Commission*, 287 Ark. 343, 698 S.W.2d 299 (1985) (challenging an agency regulation on the size of black bass that could be taken from Arkansas lakes); *Bennett v. NAACP*, 236 Ark. 750, 370 S.W.2d 79 (1963) (declaring four legislative acts, one of which the court found to be aimed against the NAACP, unconstitutional).

216. *Bryant v. Picado*, 338 Ark. 227, 230, 996 S.W.2d 17, 18 (1999).

217. *Picado v. Jegley*, CV 99-7048 (6th Div. Pulaski County Cir. Ct. Mar. 23, 2001).

218. 349 Ark. 600, 80 S.W.3d 332 (2002).

219. ARK. CODE ANN. § 5-14-122 (Michie Repl. 1997).

220. *See Picado*, 349 Ark. at 638, 80 S.W.3d at 354.

221. *Id.* at 611, 80 S.W.3d at 336.

222. *Id.* at 622, 80 S.W.3d at 343.

223. *Id.* at 632, 80 S.W.3d at 350.

A. Justiciable Controversy

The threshold issue in the case was whether the matter was justiciable under Arkansas law.²²⁴ In a *de novo* review, the court looked at similar cases in state and federal courts,²²⁵ but its primary source was its previous holdings, including *Epperson*, *McGruder*, and *Bennett*.²²⁶ Acknowledging that the plaintiffs lived under the threat of prosecution and a social stigma supported by the statute, the court found the issue justiciable.²²⁷ Because the state refused to renounce the statute and reserved the right to use it, the court held that the plaintiffs were caught in an unacceptable “Catch-22.”²²⁸ Prosecutors could “effectively bar shut the courthouse doors”²²⁹ and prevent constitutional challenge by not enforcing the statute.²³⁰ Thus, the plaintiffs would continue to suffer threat of prosecution and collateral harms with no possibility of relief.²³¹

B. Privacy Right

Noting that states may guarantee broader civil rights to their citizens than those recognized under federal law,²³² the court was not constrained by

224. *Id.* at 611, 80 S.W.3d at 336.

225. *Id.* at 615–16, 80 S.W.3d at 339. For example, the court discussed *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 301 (1979) (holding that a challenge to a provision of Arizona’s farm labor statute was justiciable even though the state claimed it would not be applied), and *Doe v. Bolton*, 410 U.S. 179, 188–89 (1973) (holding that criminal prosecution is not required before a plaintiff who alleges an intention to engage in conduct both proscribed by state and constitutionally protected may seek relief). *Picado*, 349 Ark. at 615–16, 80 S.W.3d at 339.

226. See *Epperson v. Arkansas*, 393 U.S. 97 (1968); *McGruder v. Ark. Game & Fish Comm’n.*, 287 Ark. 343, 698 S.W.2d 299 (1985); *Bennett v. NAACP*, 236 Ark. 750, 370 S.W.2d 79 (1963); see also *supra* note 215.

227. *Picado*, 349 Ark. at 622, 80 S.W.3d at 343.

228. *Id.*, 80 S.W.3d at 343.

229. *Id.*, 80 S.W.3d at 343.

230. *Id.*, 80 S.W.3d at 343.

231. *Id.*, 80 S.W.3d at 343.

232. *Id.*, 80 S.W.3d at 344. The United States Supreme Court has held that the Federal Constitution has no implied right to privacy that protects conduct labeled sodomy. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Several recent state court decisions have held that statutes prohibiting consensual, noncommercial, sexual acts infringe on state privacy guarantees. See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (invalidating the state’s sex-neutral criminal sodomy law); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (affirming a lower court decision that the state sodomy statute violated the appellee’s right to privacy and infringed on state equal protection guarantees); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (striking a same-gender sodomy statute); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (holding that privacy rights under the state constitution invalidated the Tennessee Homosexual Practices Act).

the United States Supreme Court's decision in *Bowers v. Hardwick*.²³³ Examining the nature of privacy protections under the Arkansas Constitution,²³⁴ the court observed that the text does not explicitly mention privacy but that the rights of the people are not limited to those enumerated.²³⁵ Several sections of article 2 imply privacy guarantees.²³⁶ Article 2, section 2 upholds "inherent and inalienable rights" including "enjoying and defending life and liberty," "protecting . . . reputation," and pursuing happiness.²³⁷ Sections 8 and 21 guarantee due process of law,²³⁸ and section 15 recognizes the "right of the people of this State to be secure in their . . . houses."²³⁹ Section 3 mandates that rights provided by the state constitution are to be given equally to all citizens.²⁴⁰

The court then examined Arkansas statutes and rules that address the issue of privacy.²⁴¹ The court noted that the Arkansas General Assembly has acknowledged such an inherent right by passing more than eighty statutes that uphold privacy guarantees.²⁴² The Arkansas Rules of Criminal Procedure also support privacy rights explicitly and by judicial interpretation in

233. 478 U.S. at 186.

234. *Picado*, 349 Ark. at 622, 80 S.W.3d at 343.

235. *Id.* at 627–28, 80 S.W.3d at 346–47. Specifically, the Arkansas Constitution states: This enumeration of rights shall not be construed to deny or disparage others retained by the people and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void.

ARK. CONST. art. 2, § 29.

236. *Picado*, 349 Ark. at 627–28, 80 S.W.3d at 346–47.

237. ARK. CONST. art. 2, § 2. "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." *Id.*

238. ARK. CONST. art. 2, §§ 8, 21.

239. ARK. CONST. art. 2, § 15; *see supra* note 91.

240. ARK. CONST. art. 2, § 3. "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition." *Id.*

241. *Picado*, 349 Ark. at 628, 80 S.W.3d at 347.

242. *Id.* at 629, 80 S.W.3d at 348. The court listed a myriad of examples, illustrating the variety of privacy rights guaranteed by the state. *See, e.g.*, ARK. CODE ANN. § 6-18-1204(3) (LEXIS Repl. 1997) (prohibiting unwarranted invasions of privacy by student publications); ARK. CODE ANN. § 16-44-203(d) (LEXIS Repl. 1999) (protecting privacy in court-record videotapes); ARK. CODE ANN. § 23-48-808 (LEXIS Repl. 2000) (requiring reasonable safeguards protecting privacy on customer-bank communication terminals).

Rules 2.2, 8.1, 10.1, 12.1, and 16.2, which pertain to a variety of matters including investigative law enforcement, searches, arrests, and evidence.²⁴³

Finally, the court turned to case law and stated that it had recognized privacy rights in criminal and civil cases.²⁴⁴ In *Fouse v. State*,²⁴⁵ a criminal case, the court said generally that the right of citizens to privacy and security in their homes is supported by court rules and the state and federal constitutions.²⁴⁶ The court also noted that in a previous decision upholding the prior sodomy statute,²⁴⁷ the defendant invoked a right to privacy, but the court declined to decide the issue because the act in question took place in public.²⁴⁸ In the realm of civil law, the court enumerated four types of invasion-of-privacy torts recognized by Arkansas courts: appropriation, intrusion, public disclosure of private facts, and false light in the public eye.²⁴⁹

Asserting that Arkansas has “a rich and compelling tradition of protecting individual privacy,” the court, for the first time, found privacy to be a fundamental right implicit in the Arkansas Constitution.²⁵⁰ As a fundamental right, it is subject to strict scrutiny review.²⁵¹ The court articulated the familiar two-prong test for withstanding strict scrutiny: the statute must advance a compelling state interest and do so in the least restrictive way possible.²⁵² Because the defendants had not argued a compelling state interest that would justify the sodomy statute, the court concluded that Arkansas

243. ARK. R. CRIM. P. 2.2 (prohibiting law enforcement officers from falsely indicating that a person is obligated to furnish information); ARK. R. CRIM. P. 8.1 (proscribing delay in taking an arrested person before a judicial officer, which was interpreted in *Bolden v. State*, 262 Ark. 718, 723–24, 561 S.W.2d 281, 284 (1978), as intended to afford protection against invasion of liberty and privacy); ARK. R. CRIM. P. 10.1 (defining a search, in part, as an intrusion upon an individual’s privacy); ARK. R. CRIM. P. 12.1 (providing that personal searches be conducted with reasonable regard for privacy); ARK. R. CRIM. P. 16.2 (giving privacy as a factor to be considered in the determination of whether evidence will be suppressed).

244. *Picado*, 349 Ark. at 631, 80 S.W.3d at 349.

245. 337 Ark. 13, 989 S.W.2d 146 (1999).

246. *Id.* at 17, 989 S.W.2d at 150–51.

247. ARK. STAT. ANN. § 41-813 (Bobbs-Merrill 1947) (repealed 1975).

248. *Picado*, 349 Ark. at 631, 80 S.W.3d at 349 (citing *Carter v. State*, 255 Ark. 225, 229, 500 S.W.2d 368, 371 (1973)); see *supra* notes 192–98 and accompanying text.

249. *Picado*, 349 Ark. at 631, 80 S.W.3d at 349. Appropriation is the unauthorized use of one’s name or likeness by, and for the benefit of, another. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 851 (5th ed. 1984). Intrusion is an unreasonable and highly offensive invasion of the seclusion of another. *Id.* at 854. Public disclosure of private facts occurs when one creates objectionable publicity about another. *Id.* at 856. False light in the public eye is committed when one publicly creates a false impression about another, for example, by using a person’s picture to illustrate a scandalous story with which she has no connection. *Id.* at 863–64.

250. *Picado*, 349 Ark. at 632, 80 S.W.3d at 349–50.

251. *Id.*, 80 S.W.3d at 349–50.

252. *Id.*, 80 S.W.3d at 350.

Code Annotated section 5-14-122 is “unconstitutional as applied to private, consensual, noncommercial, same-sex sodomy.”²⁵³ At the same time, the court determined that the right to privacy under the Arkansas Constitution is broader than that protected by the United States Constitution as interpreted by the United States Supreme Court.²⁵⁴

C. Equal Protection

The court began its equal protection analysis by looking at relevant sections of the state and federal constitutions and judicial interpretation of those provisions.²⁵⁵ The Arkansas Equal Rights Amendment affirms that the General Assembly may not grant “to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.”²⁵⁶ Under the Federal Equal Protection Clause, a statute may not mandate dissimilar treatment for “any person.”²⁵⁷ The State argued that the court should not subject the sodomy statute to an intermediate level of review, but to the lower rational basis test used in *Romer*.²⁵⁸ The court said it did not have to decide the point because the statute could not withstand even rational basis scrutiny.²⁵⁹ Under the rational basis test, a statute that identifies a particular group for disparate treatment may not be arbitrary and capricious, but must be rationally related to legitimate government objectives.²⁶⁰ The burden of proof lies with the party who challenges the constitutionality of a statute—in this case the lesbian and gay plaintiffs.²⁶¹

In applying the rational basis test, the court noted that the defendants justified the use of broad police power to criminalize homosexual sodomy with the assertion that the prohibited acts offend public morality.²⁶² The court said that the purpose of equal protection is not to defend majoritarian morals, but to protect disenfranchised minorities who may be injured by the imposition of majority values and practices.²⁶³ The court agreed that police power is broad and may be used to enforce the peace and public morals, but noted that such power is limited to the restraint of behavior actually detri-

253. *Id.*, 80 S.W.3d at 350.

254. *Id.*, 80 S.W.3d at 350.

255. *Id.*, 80 S.W.3d at 350.

256. ARK. CONST. art. 2, § 18.

257. U.S. CONST. amend. XIV, § 1; *Picado*, 349 Ark. at 633, 80 S.W.3d at 350.

258. *Id.*, 80 S.W.3d at 351; *see also Romer v. Evans*, 517 U.S. 620, 631 (1996).

259. *Picado*, 349 Ark. at 633, 80 S.W.3d at 351.

260. *Id.* at 634, 80 S.W.3d at 351.

261. *Id.*, 80 S.W.3d at 351 (citing *Ester v. Nat'l Home Centers*, 335 Ark. 356, 364–65, 981 S.W.2d 91, 96 (1998)).

262. *Id.* at 635, 80 S.W.3d at 351–52.

263. *Id.* at 633, 80 S.W.3d at 350.

mental to the public welfare.²⁶⁴ It is not enough that the prohibited behavior is generally considered offensive or immoral.²⁶⁵ "Desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."²⁶⁶

Reiterating that the sodomy statute prohibits certain acts between persons of the same sex, while the same acts are legal for opposite-sex couples, the court asked whether a rational legislative objective justified the distinction.²⁶⁷ If the public is not harmed when opposite-sex persons engage in sodomy, the court reasoned, the prohibition of same or similar conduct between same-sex persons cannot be justified.²⁶⁸ The defendants had offered no concrete evidence that a same-sex sodomy law is rationally related to a legitimate government purpose.²⁶⁹ The plaintiffs had met their burden of proof that the statute was grounded in "illegitimate disapproval, biases and stereotypes."²⁷⁰

The court concluded that the Arkansas legislature "cannot act, under the cloak of police power or public morality, arbitrarily to invade personal liberties of the individual citizen."²⁷¹ The statute could withstand neither a strict scrutiny review of its privacy limitations,²⁷² nor a rational basis review level of scrutiny of its restrictions on equal protection.²⁷³ Thus, the court declared Arkansas Code Annotated section 5-14-122 violative of civil liberties guaranteed by the Arkansas Constitution.²⁷⁴

D. Concurrence

Justice Robert L. Brown agreed that the case was justiciable because the state had labeled the plaintiffs criminals and held the sodomy statute over their heads "like a sword of Damocles . . . ready to fall at any moment."²⁷⁵ He questioned the purpose of retaining a statute that the defendants claimed would not be enforced.²⁷⁶ The sodomy law, said Justice

264. *Id.* at 635, 80 S.W.3d at 351-52.

265. *Picado*, 349 Ark. at 635, 80 S.W.3d at 352.

266. *Id.*, 80 S.W.3d at 352 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)); see *supra* Part III.B.1.b.

267. *Picado*, 349 Ark. at 637, 80 S.W.3d at 353.

268. *Id.*, 80 S.W.3d at 353.

269. *Id.* at 636, 80 S.W.3d at 352.

270. *Id.* at 634, 80 S.W.3d at 351.

271. *Id.* at 638, 80 S.W.3d at 353.

272. *Id.* at 632, 80 S.W.3d at 350.

273. *Picado*, 349 Ark. at 638, 80 S.W.3d at 353.

274. *Id.*, 80 S.W.3d at 354.

275. *Id.* at 639, 80 S.W.3d at 354 (Brown, J., concurring).

276. *Id.*, 80 S.W.3d at 354 (Brown, J., concurring).

Brown, branded the plaintiffs “with a scarlet letter” and created a “no-lose proposition” for the defendants and a “no-win situation” for the plaintiffs.²⁷⁷

Justice Brown also agreed that the sodomy statute violated equal protection and privacy rights.²⁷⁸ More fundamentally, he found the statute inconsistent with the “bedrock principles of independence, freedom, happiness, and security” guaranteed by the Arkansas Constitution.²⁷⁹ The sanctity of home and bedroom, according to Justice Brown, is well-established in Arkansas law and tradition.²⁸⁰ Pointing to an amicus brief filed in support of the plaintiffs by local religious organizations,²⁸¹ Justice Brown emphasized that social values and attitudes change and the interpretation of constitutional provisions rightly reflects those changes.²⁸²

E. Dissent

Justice Ray Thornton, with Chief Justice Arnold joining, dissented on the grounds that the plaintiffs did not bring a justiciable case or controversy to the court.²⁸³ Pointing to the constitutional separation of powers, Justice Thornton asserted that judicial intervention in legislative activity is justified only as a last resort and only in the context of a legitimate controversy between individuals.²⁸⁴ Because none of the plaintiffs had been prosecuted or directly threatened with prosecution, Justice Thornton opined that the matter should rightly be left to the legislative process.²⁸⁵ He further noted that the plaintiffs had failed to establish a direct link between the alleged collateral harms, such as abusive police behavior, and Arkansas Code Annotated sec-

277. *Id.*, 80 S.W.3d at 354 (Brown, J., concurring).

278. *Id.* at 640, 80 S.W.3d at 355 (Brown, J., concurring).

279. *Picado*, 349 Ark. at 638, 80 S.W.3d at 354 (Brown, J., concurring).

280. *Id.* at 639, 80 S.W.3d at 354 (Brown, J., concurring).

281. Brief of Amici Curiae, National Conference for Community Justice, Right Reverend Larry E. Maze, Rabbi Eugene Levy, Reverend JoEllen Willis, Reverend Donna Roundtree, More Light Presbyterians of Central Arkansas, and University of Arkansas law professors Donald Judges, Cynthia E. Nance, Richard B. Atkinson, and Morton Gitelman in Support of Appellee Elena Picado et al., *Picado* (No. 01-815).

282. *Picado*, 349 Ark. at 641, 80 S.W.3d at 356 (Brown, J., concurring).

283. *Id.* at 642, 80 S.W.3d at 356 (Thornton, J., dissenting).

284. *Id.* at 643, 80 S.W.3d at 357 (Thornton, J., dissenting). Justice Thornton laid out the precedent conditions for declaratory relief as follows:

- (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it;
- (2) the controversy must be between persons whose interests are adverse;
- (3) the party seeking declaratory relief must have a legal interest in the controversy; in other words, a legally protectable interest; and
- (4) the issue involved in the controversy must be ripe for judicial determination.

Id. at 644, 80 S.W.3d at 357–58 (Thornton, J., dissenting).

285. *Id.* at 642, 80 S.W.3d at 356 (Thornton, J., dissenting).

tion 5-14-122.²⁸⁶ In deciding the case, according to Justice Thornton, the court had acted inappropriately as a “superlegislative body with an assumed authority to correct mistakes that the court from time to time may believe have been made by our General Assembly.”²⁸⁷

V. SIGNIFICANCE

Because *Picado* stands out for its expansion of legally recognized rights for a long-disfavored minority group, attorneys, legal scholars, and potential litigants may wrongly pigeonhole the decision as one of interest primarily to gays and lesbians. The greater significance of *Picado* is that it firmly established the Arkansas Constitution as a guardian of individual rights greater than those guaranteed under the United States Constitution.²⁸⁸ The court asserted that it has long “recognized due process as a living principle,”²⁸⁹ indicating a willingness to consider appropriate expansions of civil rights under the state constitution. The decision will undoubtedly encourage future plaintiffs to add state law claims in constitutional rights cases, hoping that the Arkansas Supreme Court will apply a broader interpretation to their rights than federal courts interpreting the United States Constitution.

This section will begin with a look at the implications of Arkansas’s participation in the new judicial federalism. It will then discuss the three major *Picado* holdings, on justiciability, privacy, and equal protection²⁹⁰ and their ramifications for the future of civil liberties in Arkansas. It will also look at how the holding on equal protection creates a new source of legal arguments for lesbians and gay men.

A. Invigorating the Arkansas Constitution

The *Picado* decision clearly established the Arkansas Supreme Court as an active participant in the new judicial federalism.²⁹¹ Arkansas citizens, advocacy groups, and attorneys can now look to the court as an earnest guardian of civil liberties. In *Griffin v. State*,²⁹² the court expressed its willingness to go beyond federal guarantees in protecting individual rights in the context of criminal search and seizure.²⁹³ The *Picado* decision indicates

286. *Id.* at 647, 80 S.W.3d at 359 (Thornton, J., dissenting).

287. *Id.*, 80 S.W.3d at 360 (Thornton, J., dissenting).

288. *Picado*, 349 Ark. at 600, 80 S.W.3d at 332.

289. *Id.* at 632, 80 S.W.3d at 350.

290. *Id.* at 622, 632, 638, 80 S.W.3d at 343, 350, 353–54.

291. *See id.* at 600, 80 S.W.3d at 332.

292. 347 Ark. 788, 67 S.W.3d 582 (2002).

293. *See id.*, 67 S.W.3d at 582.

the court's willingness to go further.²⁹⁴ The language of the opinion expresses a presumption that the court will not rely on the United States Constitution.²⁹⁵ In its discussion of privacy, the court said:

[A]lthough it is clear that no fundamental right to engage in homosexual sodomy is protected by the United States Constitution, the textual and structural differences between the Bill of Rights and our own Declaration of Rights mandate that we explore whether such a right exists under the Arkansas Constitution.²⁹⁶

Further, the *Picado* court did not defer to the clear resolution of the state legislature, but struck a statute the lawmakers had repeatedly refused to repeal.²⁹⁷ The court noted that although acts passed by the state legislature are entitled to a presumption of correctness, they will be struck down when there is "clear incompatibility between the act and the constitution."²⁹⁸ The court also was undeterred by the political risk of finding in favor of an unpopular minority group, one that has received mixed treatment at the hands of the United States Supreme Court.²⁹⁹ It used the case to restate the principle that the constitutional guarantee of equal protection serves to protect "minorities from discriminatory treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities"³⁰⁰ The *Picado* opinion left no doubt that the Arkansas Supreme Court looks to the state constitution to protect the rights of all Arkansas citizens.

B. Pushing the Justiciability Envelope

The *Picado* court evidenced a broad view toward justiciability by finding the plaintiffs' fears of prosecution and collateral harms to be judicially cognizable.³⁰¹ Similar decisions, where the court hears a challenge to a statute that enjoys widespread public support and under which nobody has been prosecuted, are rare.³⁰² The *Picado* holding affirms the court's willingness to protect disfavored minorities from oppressive legislation and acknowl-

294. See *Picado*, 349 Ark. at 600, 80 S.W.3d at 332.

295. *Id.* at 624, 80 S.W.3d at 345.

296. *Id.*, 80 S.W.3d at 345.

297. *Id.* at 621, 80 S.W.3d at 342-43.

298. *Id.* at 623, 80 S.W.3d at 344.

299. See *supra* Part III.B.1.

300. *Picado*, 349 Ark. at 633, 80 S.W.3d at 350 (quoting *Commonwealth v. Wasson*, 842 S.W.2d at 499 (Ky. 1992)).

301. See *id.* at 622, 80 S.W.3d at 343.

302. See *supra* note 215 and accompanying text (giving examples of constitutional challenges of statutes by plaintiffs who had not been prosecuted).

edges that an unenforced statute can have far-reaching and devastating effects.³⁰³ Thus, the decision opens the door for future constitutional challenges grounded in fear of prosecution, stigmatization, and other collateral harms. As societal attitudes evolve in areas of religion and morality, citizens who are resistant to change may fight back with statutes like those at issue in *Epperson*,³⁰⁴ *Bennett*,³⁰⁵ and *Picado*.³⁰⁶ While laws that affect individual rights in such dramatic ways may be rare, the ability to challenge them is of monumental importance to the groups affected.

C. Forging a New Right to Privacy

In *Picado*, the Arkansas Supreme Court held, for the first time, that Arkansans have a fundamental right to privacy under their state constitution.³⁰⁷ Further, the court held that state privacy rights are broader than guarantees under the Federal Constitution as interpreted by the United States Supreme Court.³⁰⁸ A state guarantee of privacy has significant legal ramifications for both individuals and families.³⁰⁹

In the future Arkansas courts may look to the *Picado* decision in considering a multitude of contemporary matters involving the boundaries of an individual's right to privacy. The right to abortion remains a hot political issue that was inexorably linked to privacy rights in *Roe v. Wade*.³¹⁰ *Picado* could make Arkansas state court a more favorable forum for abortion-rights proponents, especially if there is a federal curtailment of *Roe v. Wade*.

Privacy related issues faced by other state courts include the right to refuse medical treatment,³¹¹ the constitutionality of traffic check-points intended to deter drunk-driving,³¹² and the legality of police searching a suspect's garbage for evidence.³¹³ As law enforcement technology advances,

303. See *Picado*, 349 Ark. at 622, 80 S.W.3d at 343.

304. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

305. *Bennett v. NAACP*, 236 Ark. 750, 370 S.W.2d 79 (1963).

306. 349 Ark. at 622, 80 S.W.3d at 343.

307. See *id.* at 632, 80 S.W.3d at 350.

308. See *Bowers v. Hardwick*, 478 U.S. 186 (1986); see also *supra* Part III.B.1.a.

309. See *supra* Part III.B.1.a.

310. 410 U.S. 113, 152 (1973).

311. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990) (noting previous United States Supreme Court decisions protecting the right to refuse medical treatment).

312. *Sitz v. Dep't of State Police*, 429 N.W.2d 180, 185 (Mich. Ct. App. 1988) (disallowing a checkpoint program as violative of the Fourth Amendment).

313. *California v. Greenwood*, 486 U.S. 35, 37-38 (1988) (holding that it was not unconstitutional for a police officer to request that a garbage collector give her the defendant's trash); see also Stanley H. Friedelbaum, *The Quest for Privacy: State Courts and an Elusive Right*, 65 ALB. L. REV. 945 (2002).

fresh judicial challenges to search and seizure techniques will arise.³¹⁴ The war on terrorism has created numerous privacy concerns, including the possible curtailment of constitutional protections against unreasonable search and seizure, monitoring of communications, and government access to personal information.³¹⁵ A fundamental right to privacy under the Arkansas Constitution may be an important element in the resolution of these and similar issues in state courts.

D. Establishing Equal Rights Protection for Gays and Lesbians

In *Picado*, the Arkansas Supreme Court held that gays and lesbians are entitled to equal protection under the Arkansas Constitution as a separately identifiable class.³¹⁶ The decision could change or clarify the legal status of Arkansas homosexuals in several ways. Public employees, for example, now have a claim for equal protection under the Arkansas Constitution if they suffer discrimination based on sexual orientation. This right was previously established under the United States Constitution by the ruling in *Romer*.³¹⁷ Arkansas public employees who suffer adverse employment actions because they are gay or lesbian will now have recourse under both state and federal law.

While *Picado* was pending, the American Civil Liberties Union of Arkansas filed a lawsuit seeking to strike the policy of the Child Welfare Agency Review Board prohibiting qualified lesbians and gay men from serving as foster parents.³¹⁸ According to a statement by board member Robin Woodruff at the time the policy was passed, the Arkansas sodomy law was one of the rationalizations for this policy.³¹⁹ By striking the sodomy statute, the *Picado* court removed that justification. And, gays and lesbians now have a potent tool with which to fight the foster parent policy. For the first time, the Arkansas Supreme Court has identified them as a “separate

314. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001). In *Kyllo*, the United States Supreme Court decided that the use of thermal imaging to detect “waste heat” emanating from lights used in the production of marijuana was an unconstitutional intrusion on the right to privacy. See *id.*

315. Whitehead & Aden, *supra* note 129, at 1101–03, 1131–32.

316. See *Jegley v. Picado*, 349 Ark. 600, 634, 80 S.W.3d 332, 351 (2002).

317. See *Romer v. Evans*, 517 U.S. 620 (1996); see also *supra* Part III.B.1.b (discussing the *Romer* decision).

318. Press Release, American Civil Liberties Union, ACLU Challenges Arkansas Policy Banning Gay and Lesbian Foster Parents (April 6, 1999) (on file with author).

319. Robin Woodruff, Remarks at the Meeting of the Child Welfare Agency Review Board (Aug. 1998) (transcript on file with author); see also *Picado*, 349 Ark. at 600, 80 S.W.3d at 332.

and identifiable class.”³²⁰ The *Picado* court left open the question of what level of scrutiny will be applied to equal protection cases based on sexual orientation.³²¹ If it is intermediate scrutiny, the Child Welfare Agency Review Board will have to show that the policy serves important governmental objectives and is substantially related to achievement of those objectives.³²² At the very least, the policy will have to pass a rational basis review.³²³

The *Picado* decision also will likely have an impact on child custody cases. In the past sexual orientation and the sodomy law have been used against lesbian and gay parents seeking custody of their children.³²⁴ Again, *Picado* has removed both justifications—the status of sexual orientation and the practice of sodomy. The holding calls into question two existing court of appeals decisions on this issue, *Thigpen v. Carpenter*³²⁵ and *Larson v. Larson*.³²⁶ Lesbian and gay parents will undoubtedly use the *Picado* holding when seeking equal treatment in custody disputes.

State courts all over the country are dealing with constitutional issues related to the “gayby boom,” a dramatic increase in the number of children being raised by same-sex parents.³²⁷ The American Bar Association estimates that as many as ten million children may be in this situation.³²⁸ Lesbians and gays will invoke the equal protection guarantees of their state constitutions to enforce their rights and compel state legislatures to recognize the changing dynamics of what it means to be a “family” in the twenty-first

320. *Picado*, 349 Ark. at 634, 80 S.W.3d at 351. The significance of the class designation is that homosexuals as a class can now be compared to similarly situated persons in a different class, e.g. heterosexuals, for purposes of equal protection analysis. See *supra* Part III.B.1.b.

321. See *supra* Part III.B.1.b.

322. *Picado*, 349 Ark. at 633, 80 S.W.3d at 351.

323. *Id.*, 80 S.W.3d at 351.

324. See *Larson v. Larson*, 50 Ark. App. 158, 902 S.W.2d 254 (1995); *Thigpen v. Carpenter*, 21 Ark. App. 194, 199, 730 S.W.2d 510, 513 (1987); see also *supra* Part III.B.3 and notes 206–08 and accompanying text.

325. 21 Ark. App. at 194, 730 S.W.2d at 510.

326. 50 Ark. App. at 158, 902 S.W.2d at 254.

327. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFFALO L. REV. 341, 342 (2002). For example, a formidable legal dilemma arises when a lesbian couple has a child together through the use of artificial insemination and the non-biological mother attempts to establish a legal parent-child relationship. Shannon Minter, *Lesbian and Gay Parents and Their Children*, A.B.A. GEN. PRAC. SOLO & SMALL FIRM SEC. MAG., Oct./Nov. 2001, available at <http://www.abanet.org/genpractice/magazine/octnov2001/minter.html>.

328. Jacobs, *supra* note 327, at 199 n.9.

century.³²⁹ The *Picado* decision may be used to provide legal support for these nontraditional families.³³⁰

The Arkansas Supreme Court holding in *Picado* may affect gay rights in a number of other areas. No longer burdened with the label of “criminal,” gay men and lesbians as a class now enjoy at least some level of state constitutional protection. Eventually, one can expect advocates to attempt to build on *Picado* in areas like hate crimes statutes, domestic partner benefits, adoption and parental rights, and perhaps even marriage or “civil unions.”³³¹ Arkansas gays and lesbians will begin to look to the state constitution in their search for equal protection under the law.

The *Picado* holding may also help lesbians and gays who seek legislative support for equal rights. According to David Ivers, one of the attorneys for the plaintiffs, “aside from custody issues, perhaps the biggest collateral harm was that every time a bill came up at the legislature that would recognize the rights of gays and lesbians, the existence of the sodomy statute was used to defeat it.”³³² Examples include failed attempts to include gays and lesbians in existing employment discrimination laws and in a proposed hate crime bill.³³³ The statute was also used by proponents in failed attempts to support passage of laws singling out homosexuals for discrimination, such as a prohibition on gay adoption.³³⁴

The *Picado* decision has implications far beyond its specific application to gays and lesbians. Justice Imber’s long, scholarly opinion invigorated discussion of civil liberties, particularly in the areas of privacy and equal protection.³³⁵ In addition, the Arkansas Supreme Court took a stand against the use of majoritarian moral standards to oppress politically disadvantaged groups.³³⁶ Individuals, advocacy groups, and civil rights attorneys may long look to this opinion as a bellwether of expanded civil rights, not just for lesbians and gays, but for all who come into court under the laws of Arkansas.

Bonnie Johnson*

329. Interview with David Ivers, Partner, Mitchell, Blackstock, Barnes, Wagoner, Ivers & Sneddon (November 4, 2002). David Ivers, Emily Sneddon, Suzanne Goldberg, Ruth E. Harlow, Susan L. Sommer, and Gary Sullivan represented the *Picado* plaintiffs. *Id.*

330. *Id.*

331. American Civil Liberties Union, *Lesbian & Gay Rights*, at <http://www.aclu.org/issues/gay/hmg1.html> (last visited Feb. 12, 2003).

332. Interview with Ivers, *supra* note 329.

333. *Id.*

334. *Id.*

335. *See* *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002).

336. *See id.* at 633, 80 S.W.3d at 350.

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