Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

In The

Fourteenth Court of Appeals

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NOS. 14-99-00109-CR & 14-99-00111-CR

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JOHN GEDDES LAWRENCE and TYRON GARNER, Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 & 98-48531

MAJORITY OPINION

Appellants, John Geddes Lawrence and Tyron Garner, were convicted of engaging in homosexual conduct. They were each assessed a fine of two hundred dollars. On appeal, appellants challenge the constitutionality of Section 21.06 of the Texas Penal Code, contending it offends the equal protection and privacy guarantees assured by both the state and federal constitutions. For the reasons set forth below, we find no constitutional infringement.

While investigating a reported "weapons disturbance," police entered a residence where they observed appellants engaged in deviate sexual intercourse.[1] It is a Class C misdemeanor in the State of Texas for a person to engage "in deviate sexual intercourse with another individual of the same sex." TEX. PEN. CODE ANN. § 21.06 (Vernon 1994). However, because appellants subsequently entered pleas of *nolo contendere*, the facts and circumstances of the offense are not in the record. Accordingly, appellants did not challenge at trial, and do not contest on appeal, the propriety of the police conduct leading to their discovery and arrest. Thus, the narrow issue presented here is whether Section 21.06 is facially unconstitutional.

EQUAL PROTECTION

In their first point of error, appellants contend Section 21.06 violates federal and state equal protection guarantees by discriminating both in regard to sexual orientation and gender.[2]

The universal application of law to all citizens has been a tenet of English common law since at least the Magna Carta, and our whole system of law is predicated on this

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[1] "Deviate sexual intercourse" is defined in Texas as "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." TEX. PEN. CODE ANN. § 21.01 (Vernon 1994).

[2] Appellants rely upon the Fourteenth Amendment of the United States Constitution and two provisions of the Texas Constitution, namely, Article I, sections 3 and 3a:

> No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service.

TEX. CONST. art. I, § 3.

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

TEX. CONST. art. I, § 3a.

fundamental principle. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). Nevertheless, our federal constitution did not originally contain an express guarantee of equal protection. While an assurance of equal protection could be implied from the Due Process Clause of the Fifth Amendment, this rudimentary guarantee was complicated by constitutional distinctions between "free" persons and persons "held to service or labour." U.S. CONST. arts. I, § 2 & IV, § 2.[3]

Although the constitution did not establish or legalize slavery, it certainly recognized its existence within the states which tolerated it. *See The Amistad*, 40 U.S. 518, 551 (1841). This constitutional recognition of slavery undoubtedly facilitated a union of the original colonies, but it postponed until a later day a resolution of the tension between involuntary servitude and the concept of equal protection of laws implied by the Fifth Amendment.[4] Reconciling the institution of slavery with the notion of equal protection ultimately proved to be impossible. In the end, a constitutional "clarification" was obtained by the force of arms, six hundred thousand lives, and two constitutional amendments.

In 1863, while the outcome of the civil war remained very much in doubt, President Lincoln issued his Emancipation Proclamation purporting to free slaves found within the confederate states. In 1865, just months after general hostilities had ended, the Thirteenth Amendment was adopted. It declared that "neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The abolition of slavery, however, was not immediately effective in bestowing the equal protection of law upon all persons. Several centuries of slavery had instilled a deep cultural bias against people of color. Individual southern states began

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[3] These articles were subsequently amended by the Thirteenth and Fourteenth Amendments.

[4] The Due Process Clause of the Fifth Amendment "requires that every man shall have the protection of his day in court, and the benefit of the general law . . . so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." U.S. CONST. amend. V.

enacting the so-called Black Codes which were designed to repress their black citizens and very nearly resurrect the institution of slavery. *City of Memphis v. Greene*, 451 U.S. 100, 132 (1981) (White, J., concurring). In response to these events, the Republican Congress passed the Civil Rights Act of 1866 in an attempt to ensure equal rights for former slaves. *General Bldgs. Contrs. Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982). In 1868, the Fourteenth Amendment was adopted and its Equal Protection Clause enjoined the states from denying to any person the equal protection of the laws.

Thus, the central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). While the guarantees of "equal protection" and "due process of law" may overlap, the spheres of protection they offer are not coterminous. *Truax*, 257 U.S. at 332, 42 S.Ct. at 129. Rather, the right to "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law.'" *Bolling*, 347 U.S. 497, 499 (1954). It is aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. *See Truax*, 257 U.S. at 332-33, 42 S.Ct. at 129. It was not intended, however, "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 31 (1884).

Similarly, Article I, § 3 of the Texas Constitution also guarantees equality of rights to all persons. *Burroughs v. Lyles*, 181 S.W.2d 570, 574 (Tex. 1944). It was designed to prevent any person, or class of persons, from being singled out as a special subject for discriminating or hostile legislation. *Id.* Because the state and federal equal protection guarantees share a common aim and are similar in scope, Texas cases have frequently followed federal precedent when analyzing the scope and effect of Article I, § 3. *Hogan v. Hallman*, 889 S.W.2d 332, 338 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

The Texas Equal Rights Amendment, however, has no federal equivalent. *See* TEX. CONST. art. I, § 3a. When Texas voters adopted it in 1972 by a four to one margin, both the United States and Texas constitutions already provided due process and equal protection guarantees. *In the Interest of McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Thus, unless the amendment was an exercise in futility, it must have been intended to be more extensive and provide greater specific protection than either the United States or Texas due process and equal protection guarantees. *Id.*

All of the aforementioned state and federal guarantees of equal protection are tempered somewhat by the practical reality that the mere act of governing often requires discrimination between groups and classes of individuals. *Casarez v. State*, 913 S.W.2d 468, 493 (Tex. Crim. App. 1994). A state simply cannot function without classifying its citizens for various purposes and treating some differently than others. *See Sullivan v. U.I.L.*, 616 S.W.2d 170, 172 (Tex. 1981). For example, able-bodied citizens may be required to serve in the armed forces, while the infirm are not. *Casarez*, 913 S.W.2d at 493.

The conflict between the hypothetical ideal of equal protection and the practical necessity of governmental classifications has spawned a series of judicial tests for determining when classifications are and are not permissible. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The general rule gives way, however, when a statute classifies persons by race, alienage, or national origin. *Id.* These factors are so seldom relevant to the achievement of any legitimate state interest that laws separating persons according to these "suspect classifications" are subject to strict scrutiny. *Id.* Accordingly, laws directed against a "suspect class," or which infringe upon a "fundamental right," will be sustained only if they are suitably tailored to serve a compelling state interest. *Id.*; *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988).

Sexual Orientation

Relying on the Fourteenth Amendment of the United States Constitution, Article I, § 3 of the Texas Constitution, and the Texas Equal Rights Amendment, appellants contend that Section 21.06 of the Texas Penal Code unconstitutionally discriminates against homosexuals.[5] In other words, the statute improperly punishes persons on the basis of their sexual orientation.

The threshold issue we must decide is whether Section 21.06 distinguishes persons by sexual orientation. On its face, the statute makes no classification on the basis of sexual orientation; rather, the statute is expressly directed at conduct. While homosexuals may be disproportionately affected by the statute, we cannot assume homosexual conduct is limited only to those possessing a homosexual "orientation." Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct.[6] Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation.

However, a facially neutral statute may support an equal protection claim where it is motivated by discriminatory animus and its application results in a discriminatory effect. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65

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[5] There is some authority recognizing a distinction between homosexual orientation and homosexual conduct. *Meinhold v. United States Dept. of Defense*, 34 F.3d 1469, 1477 (9th Cir. 1994); *Pruitt v. Cheney*, 963 F.2d 1160, 1164 (9th Cir. 1991); *see also Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) (stating that "any attempt to criminalize the status of an individual's sexual orientation would present grave constitutional problems").

[6] In his study of human sexuality, Dr. Alfred C. Kinsey classified the "sexual orientation" of his subjects on a seven point continuum: (1) exclusively heterosexual; (2) predominantly heterosexual, only incidentally homosexual; (3) heterosexual, but more than incidentally homosexual; (4) equally heterosexual and homosexual; (5) predominantly homosexual, but more than incidentally heterosexual; (6) predominantly homosexual, but incidentally heterosexual; and (7) exclusively homosexual. Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 58 (1991). Kinsey estimated that approximately 50 per cent of the population is exclusively heterosexual; 4 per cent is exclusively homosexual. *Id.* at 64. *See also* Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65, 83-84 (1997); Odeana R. Neal, *The Limits of Legal Discourse: Learning From the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679, 705 (1996).

(1977). Appellants contend this discriminatory intent is evident in the evolution of Section 21.06. For most of its history, Texas has deemed deviate sexual intercourse, i.e., sodomy, to be unlawful whether performed by persons of the same or different sex.[7] In 1973, however, the Legislature repealed its prohibition of sodomy generally, except when performed by persons of the same sex. Because "homosexual sodomy" is unlawful, while "heterosexual sodomy" is not, appellants contend the statute evidences a hostility toward homosexuals, not shared by heterosexuals.

While we find this distinction may be sufficient to support an equal protection claim, neither the United States Supreme Court, the Texas Supreme Court, nor the Texas Court of Criminal Appeals has found sexual orientation to be a "suspect class."[8] Thus, the prohibition of homosexual sodomy is permissible if it is rationally related to a legitimate state interest.

The State contends the statute advances a legitimate state interest, namely, preserving public morals. One fundamental purpose of government is "to conserve the moral forces of society." *Grigsby v. Reib*, 105 Tex. 597, 607, 153 S.W. 1124, 1129 (Tex. 1913). In fact, the Legislature has outlawed behavior ranging from murder to prostitution precisely because it has deemed these activities to be immoral. Even our civil law rests on concepts of fairness

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[7] *See* Acts 1943, 48th Leg., p. 194, ch.112, § 1; Vernon's Ann. P.C. (1925) art. 524; Rev. P.C. 1911, art. 507; Rev. P.C. 1895, art. 364; and Rev.P.C.1879, art. 342.

[8] The Ninth Circuit Court of Appeals briefly held that homosexuals constitute a "suspect class," but that opinion was later withdrawn. *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *withdrawn*, 875 F.2d 699, 711 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990). No other federal court of appeals has ever applied heightened scrutiny when considering equal protection claims in the context of sexual orientation. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (all holding that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes).

See also Romer v. Evans, 517 U.S. 620, 631-32 (1996) (relying on the "rational relationship" test rather than "strict scrutiny" when assessing the constitutionality of Colorado's Second Amendment barring legislation favorable to homosexuals).

derived from a moral understanding of right and wrong. The State's power to preserve and protect morality has been the basis for upholding such diverse statutes as requiring parents to provide medical care to their children,[9] prohibiting the sale of obscene devices,[10] forbidding nude dancing where liquor is sold,[11] criminalizing child endangerment,[12] regulating the sale of liquor,[13] and punishing incest.[14] Most, if not all, of our law is "based on notions of morality." *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

Appellants claim the concept of "morality" is simply "the singling out [of] groups of people based on popular dislike or disapproval." Contending this practice was specifically condemned in *Romer v. Evans*, appellants argue that classifications based on sexual orientation can no longer be rationally justified by the State's interest in protecting morality. 517 U.S. 620 (1996). We find, however, that appellant's broad interpretation of *Romer* is not supported by the text or rationale of the Court's opinion.

In *Romer*, the Supreme Court considered the constitutionality of Colorado's universal prohibition of any statute, regulation, ordinance, or policy making homosexual orientation the basis of any claim of minority status, quota preferences, protected status, or claim of discrimination. Justice Kennedy, writing for the majority, first observed that the Fourteenth Amendment does not give Congress a general power to prohibit discrimination in public accommodations. *Id*. at 627-28. Thus, discrimination in employment, accommodations, and other commercial activities has historically been rectified by the enactment of detailed statutory schemes. *Id*. at 628. The Court cited, for illustration, several municipal codes in

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[9] *Commonwealth v. Nixon*, 2000 WL 1741296, *5 (Pa. Nov. 27, 2000).

[10] *Yorko v. State*, 690 S.W.2d 260, 265-66 (Tex. Crim. App. 1985).

[11] *El Marocco Club, Inc. v. Richardson*, 746 A.2d 1228, 1237-38 (R.I. 2000).

[12] *State v. Wilson*, 987 P.2d 1060, 1067 (Kan. 1999).

[13] *Altshuler v. Pennsylvania Liquor Control Bd.*, 729 A.2d 1272, 1277 (Pa. Commw. Ct. 1999).

[14] *Smith v. State*, 6 S.W.3d 512, 519-20 (Tenn. Crim. App. 1999).

Colorado that prohibited discrimination on the basis of age, military status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability, or sexual orientation. *Id*. at 629. To the extent these codes protected homosexuals, however, they were rendered invalid by Colorado's constitutional amendment.

In striking down the amendment, the Supreme Court declared that all citizens have the right to petition and seek legislative protection from their government. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id*. at 633. "A State cannot . . . deem a class of persons a stranger to its laws." *Id*. at 635. Thus, while no individual, class, or group is guaranteed success, all persons have the right to *seek* legislation favoring their interests.

Here, appellants do not suggest that Section 21.06 unconstitutionally encumbers their right to seek legislative protection from discriminatory practices. Hence, *Romer* provides no support for appellants' position. *Romer*, for example, does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest.[15]

Moreover, while appellants may deem the statute to be based on prejudice, rather than moral insight, our power to review the moral justification for a legislative act is extremely limited. The constitution has vested the legislature, not the judiciary, with the authority to make law. In so doing, the people have granted the legislature the exclusive right to

[15] In fact, the State of Colorado did not cite the preservation of morality as one of its legitimate interests in attempting to uphold the amendment. Rather, the state argued that it had a legitimate interest in: (1) protecting the freedom of association of its citizens, particularly those who might have personal or religious objections to homosexuality, and (2) conserving its resources to combat discrimination against other groups. *Id*. at 635.

determine issues of public morality.[16] If a court could overturn a statute because it perceived nothing wrong with the prohibited conduct, the judiciary would at once become the rule making authority for society—this the people have strictly forbidden. Accordingly, we must assume for the purposes of our analysis that the Legislature has found homosexual sodomy to be immoral.

The State also contends the legislature could have rationally concluded that "homosexual sodomy" is a different, and more reprehensible, offense than "heterosexual sodomy." This proposition is difficult to confirm because in American jurisprudence courts and legislatures have historically discussed the topic only in terms of vague euphemisms. In fact, statutes often made sodomy a criminal offense without ever defining the conduct. *See Commonwealth v. Poindexter*, 118 S.W. 943, 944 (Ky. 1909).

In its broadest common law form, the offense "consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman; or by man or woman, in any manner, with beast." *Prindle v. State*, 21 S.W.

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[16] Where a statute does not run afoul of explicit constitutional protections, its moral justification is virtually unreviewable by the judiciary. When the rational basis for an Alabama statute outlawing certain sexual devices was challenged, the United States Eleventh Circuit Court of Appeals wrote:

> However misguided the legislature of Alabama may have been in enacting the statute challenged in this case, the statute is not constitutionally irrational under rational basis scrutiny because it is rationally related to the State's legitimate power to protect its view of public morality. "The Constitution presumes that ... improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 942-943, 59 L.Ed.2d 171 (1979). This Court does not invalidate bad or foolish policies, only unconstitutional ones; we may not "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).
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> For the foregoing reasons, we hold the Alabama statute challenged in this case has a rational basis.

Williams v. Pryor, 229 F.3d 1331, 1339 (11th Cir. 2000).

360 (Tex. Crim. App. 1893). More restrictive definitions of sodomy, however, were commonly recognized. In many instances, for example, sodomy was restricted to carnal copulation between two human beings—sometimes further restricted to males (perhaps because it was difficult to "imagine that such an offense would ever be committed between a man and a woman"). *Wise v. Commonwealth*, 115 S.E. 508, 509 (Va. 1923). In any event, only homosexual conduct between *two men* was included among the early capital crimes of the Massachusetts Bay Colony.[17] Moreover, in some jurisdictions, including Texas, sodomy did not include oral sex. *Prindle*, 21 S.W. at 360; *Poindexter*, 118 S.W. at 944. Again, it is difficult to know whether this more narrow definition arose deliberately or was simply the product of legislative ignorance and/or judicial innocence. Conceivably, oral sex was "so unusual and unthinkable as perhaps not to have been even contemplated in the earlier stages of the law." *Wise*, 115 S.E. at 509.

Regardless of how these differing definitions of sodomy arose, we agree with the State's general contention that it has always been the legislature's prerogative to deem some acts more egregious than others. For example, the legislature has not chosen to make every homicide a capital offense; depending upon the circumstances, some homicides are first degree felonies,[18] some are second degree felonies,[19] some are state jail felonies,[20] and others are lawful.[21] Moreover, it is the duty of this Court to construe every statute in a manner that renders it constitutional if it is possible to do so consistent with a reasonable interpretation of its language. *Trinity River Authority v. UR Consultants, Inc. Texas*, 869 S.W.2d 367, 370 (Tex. App.—Dallas 1993), *aff'd*, 889 S.W.2d 259 (Tex. 1994). Accordingly, we find the

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[17] Bestiality, however, was a capital offense whether committed by a man or a woman. THE LAWS AND LIBERTIES OF MASSACHUSETTS, at 5 (Cambridge 1648).

[18] TEX. PEN. CODE ANN. § 19.02 (Vernon 1994).

[19] TEX. PEN. CODE ANN. § 19.04 (Vernon 1994).

[20] TEX. PEN. CODE ANN. § 19.05 (Vernon 1994).

[21] TEX. PEN. CODE ANN. §§ 9.32, 9.33, 9.42, & 9.43 (Vernon 1994)

legislature could have concluded that deviant sexual intercourse, when performed by members of the same sex, is an act different from or more offensive than any such conduct performed by members of the opposite sex.

Because (1) there is no fundamental right to engage in sodomy, (2) homosexuals do not constitute a "suspect class," and (3) the prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals, appellant's first contention is overruled.

Gender

Appellants also contend Section 21.06 unconstitutionally discriminates on the basis of gender. In Texas, gender is recognized as a "suspect class." *Barber v. Colorado Independent School Dist*., 901 S.W.2d 447, 452 (Tex. 1995). In light of the Texas Equal Rights Amendment, classifications by gender are subject to "strict scrutiny" and will be upheld only if the State can show such classifications have been suitably tailored to serve a compelling state interest.[22]

Appellants claim Section 21.06 discriminates on the basis of sex because criminal conduct is determined to some degree by the gender of the actors. For example, deviate sexual intercourse is not unlawful *per se* in Texas. While the physical act is not unlawful as between a man and woman, it is unlawful when performed between two men or two women. Appellants contend that because criminality under the statute is, in some respects, gender-dependent, Section 21.06 runs afoul of state and federal equal protection guarantees.

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[22] Under the Fourteenth Amendment, gender classifications are analyzed according to an intermediate "heightened scrutiny" falling somewhere between the rational relationship test and strict scrutiny. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that under the Fourteenth Amendment, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives).

The State asserts the statute applies equally to men and women, i.e., two men engaged in homosexual conduct face the same sanctions as two women. Thus, the State maintains the statute does not discriminate on the basis of gender. Appellants respond by observing that a similar rationale was expressly rejected in the context of racial discrimination. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

In *Loving*, the State of Virginia attempted to uphold its miscegenation statute in the face of an equal protection challenge by arguing that the statute did not discriminate on the basis of race because it applied equally to whites and blacks. The Supreme Court traced the origins of Virginia's miscegenation statute and concluded that "[p]enalties for miscegenation arose as an incident to slavery." *Loving*, 388 U.S. at 6. Because the clear and central purpose of the Fourteenth Amendment was "to eliminate all official state sources of invidious racial discrimination," the court determined the statute was unconstitutional. *Id*., at 10.

Here, the State of Texas employs a comparable argument, namely, Section 21.06 does not discriminate on the basis of gender because it applies equally to men and women. Appellants' contend the argument was discredited by *Loving* and should not be followed here. But while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct. In other words, we find nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender. Thus, we find appellants' reliance on *Loving* unpersuasive.[23]

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[23] *See also Boutwell v. State*, 719 S.W.2d 164 (Tex. Crim. App. 1985). There the Court of Criminal Appeals considered the applicability of the Texas Equal Rights Amendment to Section 21.10 of the Penal Code which, until its repeal in 1983, provided legal defenses to certain heterosexual acts that were specifically denied in the context of homosexual acts. Act of May 24, 1973, 63rd Leg., R.S., ch. 399, § 21.10, (continued...)

While Section 21.06 alludes to sex, not every statutory reference to gender constitutes an unlawful "gender-classification." Texas law provides, for example, that counties are authorized to increase participation by "*women-owned* businesses" in public contract awards by establishing a contract percentage goal for those businesses;[24] when jurors are sequestered overnight, separate facilities must be provided for *male* and *female* jurors;[25] employers are prohibited from permitting, requesting, or requiring *female* children to work topless;[26] the Director of the Texas Department of Transportation must report to each house of the legislature regarding the department's progress in recruiting and hiring *women*;[27] where a child is adopted by two parents, one must be *female* and the other *male*;[28] *female* patients being transported from a jail to a mental health facility must be accompanied by a *female*

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[23] (...continued)
1973 Tex. Gen. Laws 918. When Boutwell was charged with sexual abuse of several boys, he argued the statute was unconstitutional under the Texas Equal Rights Amendment because it discriminated against him on the basis of sex. *Boutwell*, 719 S.W.2d at 167. The Court of Criminal Appeals rejected the contention, stating:

> But clearly, a female defendant situated similarly to appellant—that is, a female who had engaged in deviate sexual intercourse with a child 14 years or older who was of the same sex—would likewise be denied the "promiscuity" defense under § 21.10. Thus, appellant's reasoning proceeds upon a fallacy of amphiboly: his complaint is not that he is discriminated against on the basis of "sex" in the sense of "gender;" but rather, that his "sex" *act* is entitled to protection equal to that given heterosexual conduct under the law as stated in § 21.10(b).

Id. at 169; *see also Boulding v. State*, 719 S.W.2d 333 (Tex. Crim. App. 1986).

Boutwell has been severely criticized, but on grounds different than those at issue here. *McGlothlin v. State*, 848 S.W.2d 139, 138 (Tex. Crim. App. 1992); *Vernon v. State*, 841 S.W.2d 407, 410 (Tex. Crim. App. 1992).

[24] TEX. LOC. GOV'T. CODE ANN. § 381.004 (Vernon 1999).

[25] TEX. CODE CRIM. PROC. ANN. art. 35.23 (Vernon Supp. 2000).

[26] TEX. PEN. CODE ANN. § 43.251 (Vernon 1994).

[27] TEX. TRANS. CODE ANN. § 201.403 (Vernon 1999).

[28] TEX. HEALTH & SAFETY CODE ANN. § 192.008 (Vernon Supp. 2000).

attendant;[29] circumcision of a *female* under the age of 18 is unlawful;[30] etc. Whether these and many other gender-specific statutes, violate the Texas Equal Rights Amendment is not before us. We must assume, however, that the legislature enacted these provisions with full knowledge of Article I, section 3a of the Texas Constitution and perceived no conflict. The legislature, for example, has specifically admonished the governor and supreme court to ensure the full and fair representation of women when making their appointments to the Board of Directors of the State Bar of Texas, but to also make no "regard to race, creed, sex, religion, or national origin." TEX. GOV'T CODE ANN. § 81.020 (Vernon 1998).

The mere allusion to gender is not a talisman of constitutional invalidity. If a statute does not impose burdens or benefits upon a particular gender, it does not subject individuals to unequal treatment. *See Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) (holding that while California's Proposition 209 mentions race and gender, it does not logically classify persons by race and gender); *see also Hayden v. County of Nassau*, 180 F.3d 42, 48-49 (2nd Cir. 1999) (entrance exam designed to diminish cultural bias on black applicants did not constitute a "racial classification" because it did not promote one race over another). While Section 21.06 includes the word "sex," it does not elevate one gender over the other. Neither does it impose burdens on one gender not shared by the other.

Where, as here, a statute is gender-neutral on its face, appellants bear the burden of showing the statute has had an adverse effect upon one gender and that such disproportionate impact can be traced to a discriminatory purpose. *Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 819 (4th Cir. 1995); *Keevan v. Smith*, 100 F.3d

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[29] TEX. CODE CRIM. PROC. ANN. art. 46.04 (Vernon Pamph. 2000).

[30] TEX. HEALTH & SAFETY CODE ANN. § 166.001 (Vernon Supp. 2000).

The legislature has mistakenly designated two different statutes as Section 166.001 of the Health and Safety Code. Act of May 18, 1999, 76th Leg., R.S., ch. 450, § 1.02, 1999 Tex. Gen. Laws 2835 (Advance Directives Act) and Act of May 26, 1999, 76th Leg., R.S., ch. 642, § 1, 1999 Tex. Gen. Laws 3213 (Female Genital Mutilation Prohibited).

644, 650 (8th Cir. 1996). Appellants have made no attempt to establish, nor do they even contend, that Section 21.06 has had any disparate impact between men and women. Rather, appellants complain only that the statute has had a disparate impact between homosexuals and heterosexuals. While we recognize the statute may adversely affect the conduct of male and female homosexuals, this simply does not raise the specter of gender-based discrimination.

As we already have determined, the police power of a state may be legitimately exerted in the form of legislation where such statute bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928). To the extent the statute has a disproportionate impact upon homosexual conduct, the statute is supported by a legitimate state interest. The first point of error is overruled.

PRIVACY

In their second point of error, appellants contend Section 21.06 violates the right to privacy guaranteed by both the state and federal constitutions. Appellants claim the intimate nature of the conduct at issue, when engaged in by consenting adults in private, is beyond the scope of governmental interference.

Neither the state nor federal constitutions contain an explicit guarantee of privacy. Thus, there is no general constitutional right to privacy. However, both constitutions contain express limitations on governmental power from which "zones of privacy" may be inferred. The United States Supreme Court has found five such zones in the Bill of Rights:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of

> the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Griswold v. Connecticutt, 381 U.S. 479, 484 (1965).

Similarly, the Texas Supreme Court has found "constitutionally protected zones of privacy emanating from several sections of article I of the Texas Constitution." *City of Sherman v. Henry*, 928 S.W.2d 464, 472 (Tex. 1996). These include: section 6, concerning freedom of worship; section 8, concerning freedom of speech and press; section 9, concerning searches and seizures; section 10, concerning the rights of an accused in criminal prosecutions; section 19, concerning deprivation of life, liberty and property, and due course of law; and section 25, concerning quartering soldiers in houses. *Id.*

Appellants do not specifically identify the constitutional provision which they claim creates a zone of privacy protecting consensual sexual behavior from state interference. However, we find there are but two provisions of the federal constitution which could arguably be construed to apply here—the Fourth and Ninth Amendments.

The Fourth Amendment is not applicable because appellants do not contest, and have never contested, the entry by police into the residence where they were discovered. Thus, we must assume the police conduct was both reasonable and lawful under the Fourth Amendment.

The Ninth Amendment also offers no support. In *Bowers v. Hardwick*, the defendants were convicted of violating the Georgia sodomy statute. 478 U.S. at 190-91.

Relying upon *Griswold v. Connecticut*[31] and other decisions recognizing "reproductive rights," the defendants argued that the Ninth Amendment creates a zone of privacy regarding consensual sexual activity that encompasses homosexual sodomy. The court rejected the argument and said "the position that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Bowers*, 478 U.S. at 191.

Likewise, under the Texas Constitution, we perceive that there are but two provisions that would arguably support appellants' position—sections 9 and 19 of Article I. Again, because appellants have not challenged the search leading to their arrest, we must conclude the police did not violate section 9 of the Texas Constitution.

Although neither the Texas Supreme Court nor Texas Court of Criminal Appeals has considered whether section 19 creates a zone of privacy that would protect private homosexual behavior, the Supreme Court has held it does not protect private *heterosexual* behavior. In *City of Sherman v. Henry*, the court was confronted with a case where the city had denied a promotion to a police officer because he was having an adulterous affair with the wife of another officer. *See Henry* 928 S.W.2d at 465. The court held that Article I, section 19 does not create a right of privacy protecting adulterous conduct without state interference.

> [S]exual relations with the spouse of another is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Prohibitions against adultery have ancient roots. In the latter half of the 17th century in England, adultery was a capital offense. 4 WILLIAM BLACKSTONE, COMMENTARIES *64. The common law brought to this country by the American colonists included the crime of adultery as previously defined by the canon law of England. *United States v. Clapox*, 35 F. 575, 578 (D.Or.1888); FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW vol. 11,§§ 1719-20, p. 524 (9th ed. 1885). Adultery was still considered a crime by

[31] 381 U.S. 479 (1965).

> courts and commentators in the latter half of the 19th century when the Fourteenth Amendment was ratified. *See Clapox*, 35 F. at 578; WHARTON, *supra*. In fact, adultery is a crime today in half of the states and the District of Columbia.
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> While other states, including Texas, have recently repealed laws criminalizing adultery, the mere fact that such conduct is no longer illegal in some states does not cloak it with constitutional protection.

Id. at 470.

Similarly, we find homosexual conduct is not a right that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." In America, homosexual conduct was classified as a felony offense from the time of early colonization.[32] In fact, there was such unanimity of condemnation that sodomy was, before 1961, a criminal offense in all fifty states and the District of Columbia. *Bowers v. Hardwick*, 478 U.S. at 193. In Texas, homosexual conduct has been a criminal offense for well over a century.[33]

In addition to an American tradition of statutory proscription, homosexual conduct has historically been repudiated by many religious faiths.[34] Moreover, Western civilization has a long history of repressing homosexual behavior by state action. Under Roman law, Justinian states that a *lex Iulia* imposed severe criminal penalties against "those who indulge

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[32] *See* LAWS AND LIBERTIES 5 (Cambridge 1648) (collection of the general laws of the Massachusetts Bay Colony).

[33] *See* Tex. Penal Code art. 342 (1879); Tex. Penal Code art. 364 (1895); Tex. Penal Code art. 507 (1911); and Tex. Penal Code art. 524 (1925).

[34] "Our society's three major religions—Judaism, Christianity, and Islam—historically have viewed homosexuality as immoral." Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 404 n.40 (1994) [citing The Jewish Torah (Leviticus 18:22, 20:13), the New Testament (Romans 1:26-28, I Timothy 1:9-10, I Corinthians 6:9-10) and the Koran (The Heights 7:80)].

in criminal intercourse with those of their own sex."[35] Blackstone states that the "infamous crime against nature, committed either with man or beast" was a grave offense among the ancient Goths and that it continued to be so under English common law at the time of his writing.[36] In his survey of the law, Montesquieu was prompted to conclude that "the crime against nature" is a "crime, which religion, morality, and civil government equally condemn."[37]

Nevertheless, appellants contend that Texas should join several of our sister states who have legalized homosexual conduct. Certainly, the modern national trend has been to decriminalize many forms of consensual sexual conduct even when such behavior is widely perceived to be destructive and immoral, e.g., seduction, fornication, adultery, bestiality, etc.[38] Our concern, however, cannot be with cultural trends and political movements because these can have no place in our decision without usurping the role of the Legislature. While the Legislature is not infallible in its moral and ethical judgments, it alone is

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[35] FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 205 (J. B. Moyle trans., 5th ed., Oxford 1913).

[36] 4 WILLIAM BLACKSTONE, COMMENTARIES *215-16.

[37] 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 231 (Dublin 1751).

[38] Despite this trend, there are still today many types of "private" conduct which courts have recognized are not protected from state interference. *See generally Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding there is no protected right to commit suicide); *Osborne v. Ohio*, 495 U.S. 103 (1990) (possession of child pornography not a protectable privacy interest even when possessed inside the home); *Bowers*, 478 U.S. at 195 (suggesting that adultery, even when committed in the home, is not a constitutionally protected behavior); *United States v. Miller*, 776 F.2d 978 (11th Cir. 1985) (holding that constitutional right of privacy does not shield a person from personal possession of pornography outside the home); *Potter v. Murray City*, 760 F.2d 1065 (10th Cir. 1985) (holding that because monogamy is inextricably woven into the fabric of our society, ban on plural marriage did not violate right of privacy); *United States v. Fogarty*, 692 F.2d 542 (8th Cir. 1982) (holding there is no fundamental right to possess marijuana); *J.B.K., Inc. v. Caron*, 600 F.2d 710 (8th Cir. 1979) (holding right of privacy does not extend to commercialized sexual activities); *Kuromiya v. United States*, 37 F.Supp.2d 717 (E.D. Penn. 1999) (holding there is no fundamental right to smoke marijuana).

constitutionally empowered to decide which evils it will restrain when enacting laws for the public good.[39]

Our role was aptly defined over a hundred years ago by Justice Noggle who, while writing for the Idaho Supreme Court, observed: "The court is not expected to make or change the law, but to construe it, and determine the power of the law and the power the legislature had to pass such a law; whether that power was wisely or unwisely exercised, can be of no consequence." *People v. Griffin*, 1 Idaho 476, 479 (1873). Because we find no constitutional "zone of privacy" shielding homosexual conduct from state interference, appellants' second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

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[39] The fact that unlawful behavior is conducted in private between consenting adults may complicate detection and prosecution, but it does not, *ipso facto*, render its statutory prohibition unconstitutional. In upholding its sodomy statute, the Supreme Court of Louisiana wrote:

> The question of whether or not a third party is harmed by a consensual and private act of oral or anal sex is a debate which has been ongoing for many years and is nothing which this court needs to address. The legislature is within constitutional authority to proscribe its commission. Any claim that private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.
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> There has never been any doubt that the legislature, in the exercise of its police power, has authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral.
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> Simply put, commission of what the legislature determines as an immoral act, even if consensual and private, is an injury against society itself.

See State v. Smith, 766 So.2d 501, 509 (La. 2000).

Judgment rendered and Majority, Consenting, and Dissenting Opinions filed March 15, 2001. (Justices Yates, Fowler, Edelman, Wittig, Frost, and Amidei join this opinion; Justice Yates also filed a concurring opinion in which Justices Hudson, Fowler, Edelman, and Frost join; Justice Fowler also filed a concurring opinion in which Justices Yates, Edelman, Frost, and Amidei join. Justice Anderson filed a dissenting opinion in which Senior Chief Justice Murphy joins.) [*]

En Banc.

Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.