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Commonwealth v. Wasson: Invalidating Kentucky's Sodomy Statute

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INTRODUCTION

By Thomas P. Lewis*

Two articles in this issue discuss Commonwealth v. Wasson, the recent and highly controversial case in which the Kentucky Supreme Court by a 4-3 vote invalidated Kentucky's sodomy law. The majority ruled that the law violates an offender's "right of privacy" and denies equal protection of the law. Section 2 of the Kentucky Constitution, which speaks to "absolute and arbitrary power," was central to both rulings.

As suggested by the titles of their articles, the authors state viewpoints and conclusions that are at polar extremes. University of Oklahoma Law Professor Shirley Wiegand and her assistant and coauthor, law student Sara Farr, applaud the reasoning and result of Wasson in Part of the Moving Stream: State Constitutional Law, Sodomy, and Beyond. Their title is drawn in part from Justice Leibson's opinion for the court's majority. After noting that since 1961, half of the fifty states that had declared sodomy to be a crime had decriminalized it, Leibson stated: "Thus our decision, rather than being the leading edge of change, is but a part of the moving stream." Wiegand and Farr find the court's result to be fully supported by the constitutional text, especially when interpreted in light of expert testimony of record in the case and relevant early constitutional precedents upon which the majority relied.

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1 Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).
2 KY. REV. STAT. § 510.010 (Michie/Bobbs-Merrill 1990).
3 Wasson, 842 S.W.2d at 491-92, 500.
4 Id. at 494-500. Section 2 of the Kentucky Constitution states: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." KY. CONST. § 2.
6 Wasson, 842 S.W.2d at 498.
7 Wiegand and Farr, supra note 5, at 456-62.
In *Rule of Men*, recent University of Kentucky College of Law graduate John Roach aims a heated blast at the *Wasson* majority's reasoning and result. Roach finds the court's reference to a "moving stream" to be quite misleading, claiming that only one other state has decriminalized sodomy with a ruling from its highest court grounded clearly on its state constitution. What state legislatures have done or may do in making policy, Roach believes, is largely irrelevant to constitutional adjudication, which finds legitimacy in constitutional text and precedent. Because the court lacked these legitimate sources according to his analysis, Roach charges the majority with engaging in a decision-making process that depends on nothing more than their "whims and personal opinions." Thus his title, implying that the decision has gutted what has become the hallowed and axiomatic description of our system as a government of laws, not of men.

The articles are freestanding submissions, not halves of a structured debate. For that reason, positions taken in one article are not directly responded to by the other, though the authors of course cover a great deal of common ground. Professor Wiegand served as co-counsel for defendant Jeffrey Wasson in the district and circuit courts, and participated in the preparation of his brief on appeal. It is understandable that in her article she would give close attention to the course of litigation and the Kentucky Supreme Court majority's responsive methodology. And since Wasson prevailed at every level of trial and appeal, it is also understandable that Wiegand would write approvingly of the building blocks of that success. One particularly important building block was the use of "expert" witnesses; another was the participation, through briefs, of an extraordinary array of supportive amici curiae. On a broader front, Wiegand and Farr give substantial attention to the potential for expansion of civil rights and liberties, a sort of new frontier beyond the settled territory of federal constitutional rights, that can be pioneered through state court interpretations of state constitutions.

Roach defined his topic more pointedly as an analysis of the *Wasson* court's use of constitutional text and precedent. Like Wiegand and Farr, he notes the potential importance of state constitutional decisions, but rather than encourage expansion in this area, he

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9 Id. at 487-88.
10 Id.
11 Id. at 483.
12 Id. at 483.
13 See Wiegand and Farr, supra note 5, at 456-57.
14 Id. at 474-75.
15 Id. at 450.
expresses the hope that the courts will not "invent" new rights.\textsuperscript{15} He does not address the details of defense counsel's strategies or the court's specific responses to them.

The parallels between the polarity of the authors in these articles and the differences between \textit{Wasson}'s majority and dissenting justices pose some interesting questions for the reader. Surprisingly, there is no open disagreement about the proper approach to constitutional interpretation, at least at the barest descriptive level. Justice Leibson, writing for the majority, purportedly embraced "original intent" of the framers as his guide to interpretation,\textsuperscript{16} and I believe it is fair to say that his opinions generally voice this approach. Wiegand and Farr note the use of this standard in the case.\textsuperscript{17} Roach and certainly the dissenting justices bear down heavily on this standard as the appropriate one.\textsuperscript{18}

Two major factors appear to account for the differences between the majority and dissenting opinions. The first polarizing factor, obviously, is the difference in the justices' conclusions about what was intended by the framers. In 1890-91, the constitutional convention essentially carried forward the 1792 constitution's bill of rights (as intervening constitutional conventions had done), and included section 2,\textsuperscript{19} which had been included in Kentucky's third constitution in 1850.\textsuperscript{20} Section 2 was pivotal in \textit{Wasson}. Focus on its language for a moment: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."\textsuperscript{21} The original purpose of this provision is not helpful; it is reasonably clear that the proponents of section 2 in the convention of 1849 were motivated by a fear of uncompensated governmental deprivation of their property in slaves.\textsuperscript{22} That problem had disappeared before 1890. Moreover, if section 2 was, at bottom, intended as anything more than a rhetorical flourish in 1849 or 1890, it certainly was not couched in fact-specific language. What does section 2 mean?

Is it relevant to contemplate what sorts of governmental regulation in other contexts the framers of 1849 and 1890 would have denounced as absolute and arbitrary power? Here we get agreement on relevance from

\begin{itemize}
\item \textsuperscript{15} Roach, \textit{supra} note 8, at 483-84.
\item \textit{Wasson}, 842 S.W.2d at 492-93.
\item Wiegand and Farr, \textit{supra} note 5, at 472.
\item \textit{Wasson}, 842 S.W.2d at 504 (Lambert, J., dissenting), 514 (Wintersheimer, J., dissenting); Roach, \textit{supra} note 8, at 494-95, 505-06.
\item KY. CONST. § 2.
\item KY. CONST. § 2.
\item \textsuperscript{22} See John D. Dyche, \textit{Section 2 of the Kentucky Constitution—Where Did it Come From and What Does it Mean?}, 18 N. KY. L. REV. 503 (1990).
\end{itemize}
the justices and Roach, but very different conclusions from their applications of the idea. Justice Leibson found an original intent of the framers in 1890 to adopt the philosophy of John Stuart Mill;\textsuperscript{23} Justice Wintersheimer, dissenting, found that conclusion to be irresponsible.\textsuperscript{24} Roach and the dissenters believe it is highly relevant, even controlling, to consider the traditions of the people at the time the Kentucky Constitution was adopted.\textsuperscript{25} On the basis of the historical record, going back even to ancient times, they believe it is evident that the framers, the populace and the judges of the time did not entertain doubts about the legitimacy of criminalizing homosexual sodomy.\textsuperscript{26}

Justice Leibson rejects this last inquiry, at least in the Wasson section 2 context, as a "miscast application of original intent."\textsuperscript{27} Based principally on early judicial pronouncements of the meaning of section 2's language, Leibson believes that the original intent of the framers was to create a right of privacy in the mode of John Stuart Mill's philosophy. In Leibson's opinion, judges must pursue and actuate that generalized original intent on the basis of the world in which they live, not the world of 1890.\textsuperscript{28}

There is sound precedent for the Leibson formulation in its relating of contemporary knowledge to an original principle. Even Robert Bork agrees that \textit{Brown v. Board of Education}\textsuperscript{29} was correctly decided, despite historical evidence that the framers and ratifiers of the Fourteenth Amendment probably contemplated racially segregated schools.\textsuperscript{30} According to Bork, in light of contemporary knowledge of the actual and inherent inequality of separate, segregated school systems, desegregation became the only proper application of the principle of equal protection the framers had drafted.\textsuperscript{31} Roach challenges the Leibson formulation as applied in \textit{Wasson} by asking rhetorically: "But, if original intent is to be gauged in light of contemporaneous knowledge and understanding, what new and relevant discourses are there regarding human nature? What new authority is there?"\textsuperscript{32}

The reader might consider whether these differences of opinion are merely variations of technique in describing constitutional interpretation.

\textsuperscript{23} Commonwealth v. Wasson, 842 S.W.2d 487, 496-97 (Ky. 1992).
\textsuperscript{24} Id. at 512-13 (Wintersheimer, J., dissenting).
\textsuperscript{25} See id. at 504 (Lambert, J., dissenting); Roach, supra note 8, at 494-95.
\textsuperscript{26} See Wasson, 842 S.W.2d at 504 (Lambert, J., dissenting); Roach, supra note 8, at 484-85.
\textsuperscript{27} Id., 842 S.W.2d at 497.
\textsuperscript{28} Id. at 492-99. Mill's thoughts will be elaborated upon below; for now it suffices to summarize the applicable principle as the idea that individuals are not accountable to society for conduct that affects themselves but not others.
\textsuperscript{29} 347 U.S. 483 (1954).
\textsuperscript{31} Id. at 74-84.
\textsuperscript{32} Roach, supra note 8, at 505.
These differences, in Wasson at least, might not lead to different results in the absence of the second polarizing factor. Disagreement about the answers to one or more of a number of very closely related questions provides the context in which interpretive technique becomes a determinating factor. These questions include:

(1) What place, if any, do considerations of traditional morality have in the formulation of legislative policy to promote or protect the general welfare by disapproving given conduct, in the absence of harm—presumed or provable, threatened or actual—to others?

(2) Assuming that at least some concern for actual or threatened harm to others or to society is necessary to justify regulation of conduct, who has the burden of persuasion regarding the conduct's potential or lack thereof for harm, and by what standard of proof should relevant evidence be judged?

(3) If by traditional, even ancient, and contemporary standards (standards that obviously may not be universally accepted), given conduct has been and continues to be deemed immoral, is that judgment evidence that actual harm to society is widely perceived, and if so is that perception relevant and material evidence?

(4) Can actual or potential harm to the actor justify regulation of the actor in the absence of acceptable knowledge of direct potential harm to others?

(5) Does the constitution provide a clear answer to any of these questions?

Some types of conduct that appear to be suitable candidates for consideration in light of these questions are adultery, bigamy, prostitution, incest, and homosexual or heterosexual sodomy, with oral and anal categories. Public solicitation of sexual activity may be regarded as a separate category. Additional candidates less deeply grounded in traditional morality might include drug use, drinking, smoking, cockfighting, driving without a seat belt, nude dancing before a voluntary audience, and private, but regulated, lotteries.\(^3\)

I. STATE COURTS AND STATE CONSTITUTIONS

The opening theme of Wiegand and Farr's article prompts some general observations in advance of more specific consideration of the Wasson

\(^3\) That the constitution speaks to this subject should be of no necessary consequence. We are told absolute and arbitrary power exists nowhere in a republic. See supra note 21 and accompanying text. It may not be safe in this context to pursue this thought too far. What might we conclude if we parsed the 1891 constitution for examples of violations of its own section 2, bearing in mind that we are inquiring what it is that the people of 1891 decided we can or cannot do in 1993? If it is argued that the constitution does not speak with absolute authority because it is subject to amendment, we must note that the amendment process depends on the same majority with which section 2 is concerned. Besides, that line of thought would generally move the search by the people of a state for examples of absolute power up to the federal level of government.
opinion. Their theme is candidly stated: "A revolution is taking place among those who seek social change through litigation. Rather than continuing to look to the U.S. Constitution for protection of established rights, as well as the expansion of these rights, lawyers are searching their state constitutions for such protection and expansion." It has always been true that states may, through their constitutions or otherwise, recognize and protect greater individual interests, rights, or "privacy" than federal law would require, unless they go so far as to trammel the federally protected interests or rights of others.

If state courts respond to invitations to move more vigorously into the arena of civil rights and liberties, two points are worthy of special consideration. The first is that any change from federal doctrine can only expand upon, not detract from, federal civil rights and liberties. Expansion necessarily builds upon a substantial repository of doctrine established by the United States Supreme Court over decades of experience in the field. Some who urge greater state court intervention in this context appear to be driven by the idea that civil rights and liberties are a good thing, and one simply cannot get too much of a good thing. This general idea has broad appeal, but no actual claim to truth. A dose of caution may be the better part of wisdom. Nonetheless, there surely is room for some improvement on federal doctrine in some specific areas where parallel constitutional provisions exist and each state constitution has some provisions that differ from the U.S. Constitution and reflect special state traditions that vary from national traditions.

The second point concerning state courts' expansion of rights derived from state constitutions was alluded to early in our country's history, albeit in a somewhat different context, by Chief Justice John Marshall's famous reminder that "we must never forget, that it is a constitution we are expounding." One implication of this admonition is the evident importance of constitutional decisions. We have come to expect courts to protect individuals from the excesses of the majority, but there is an

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34 Wiegand and Farr, supra note 5, at 450.
35 See, e.g., Oregon v. Hass, 420 U.S. 714, 719 (1975) (referring approvingly to Supreme Court's "expressions that a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards"); Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 630-36 (1874) (affirming decision of Tennessee court on state law issue and noting that the Court must "receive the decision of the State Court as conclusive" on nonfederal question). See also Michigan v. Long, 463 U.S. 1032, 1038 n.4 (1983) (citing Fox Film Corp. v. Muller, 296 U.S. 207 (1935), for the proposition that Court's jurisdiction fails where state or nonfederal ground for state court decision is adequate to support the decision).
36 See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land; ... anything in the ... Laws of any State to the Contrary notwithstanding"); Cooper v. Aaron, 358 U.S. 1 (1958) (holding that state officials could not resist school desegregation plan in an attempt to nullify equal protection rights of minority students, as established in Brown v. Board of Education, 347 U.S. 483 (1954)).
unavoidable risk that courts will sometimes discharge their protective function incorrectly or improperly. The result can only be that an individual will receive too little or too much protection, the latter clearly risking infringement of majority rights. It is therefore important that a court do all it reasonably can to produce "right" results.

A second implication Marshall's reminder has for state courts stems from the special role they perform, a role summed up as the "common law tradition." State judges are most experienced in the development of the common law. In this area, they are the designated policy makers, and they naturally become accustomed to that role. But rules of law (policy) flow from results arrived at and rationalized case by case. A chapter in a hornbook, for example, may state rules that reflect the distillation of hundreds of cases. Courts draw on any source that might contribute to reaching a sensible result in a case. While we expect a decent respect for the decisions of earlier courts in the interest of stability, we also know that the common law is in a more or less constant state of incremental change at the hands of the judges. We expect and even depend on judges to resolve disputes on the basis of their learning, experience and best judgment.

Constitutional adjudication is different. Here, results are supposed to flow from preestablished rules in the form of constitutional text as understood in light of appropriate aids to interpretation. The rules of law that emerge from constitutional adjudication are not easily modified. We commit policy making to courts in their common law role because we need them. But they are not the ultimate policy makers; their common law policy is subject to modification, in light of experience, by the legislature. In constitutional adjudication, however, the courts effectively become supreme over the legislative branch. The only source of that supremacy is the constitution. A special demand for legitimacy in decision making is therefore made of the courts, a demand that cannot be satisfied by techniques and habits carried over from the common law tradition of decision making.

II. THE WASSON CASE

The majority in Commonwealth v. Wasson,\textsuperscript{38} in an opinion by Justice Leibson, invalidated Kentucky's sodomy law as a deprivation of a constitutionally guaranteed right of privacy\textsuperscript{39} and as a denial of

\textsuperscript{38} 842 S.W.2d 487 (Ky. 1992).

\textsuperscript{39} Id. at 491.
the equal protection of the law. Both rulings drew upon the same constitutional language from the Kentucky Constitution's Bill of Rights, quoted by the court as follows:

§ 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties. 

Third: The right of seeking and pursuing their safety and happiness.

§ 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

The court's opinion presents a number of important questions of methodology and substance in constitutional adjudication. My intention is to limit comment to two issues that are not addressed at length elsewhere in this feature. These issues relate to the nature of the "right of privacy" announced by the court and the unusual state of the record in the case.

A. The Right of Privacy in Kentucky

The court recognized that there is no mention of a right of privacy in the U.S. Constitution or the Kentucky Constitution. But from a potpourri of sources, including principally a collection of early cases but also including an 1890 Harvard Law Review article entitled The Right of Privacy, the court adopted the title for the right and fleshed out its content, beginning with a quotation from Commonwealth v. Campbell:4

"Man in his natural state has the right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulation, he surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires. . . . It is not within the competency of

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4 Id. at 491-92, 500.
41 Id. at 494.
42 Id. at 492.
43 Samuel D. Warren and Louis D. Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193 (1890). The authors urged common law recognition of the tort of invasion of privacy. The burden of their article is to justify recognition of the tort, reasoning from analogy, and to delineate its initial scope.
44 117 S.W. 383 (1909).
government to invade the privacy of a citizen’s life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.”

The court noted that the Campbell case had relied on and quoted from John Stuart Mill’s On Liberty, which it set forth in part:

""The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. . . . The principle requires liberty of taste and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.""

The court felt that there was "little doubt" but that the views of Mill, "which were then held in high esteem, provided the philosophical underpinnings for the reworking and broadening of protection of individual rights that occurs throughout the 1891 Constitution." What lies behind the phrasing of this sentence is not clear. There was no significant "reworking and broadening" of the text of the bill of rights in the 1891 constitution. It might be supposed that On Liberty and other essays by Mill had some influence on what was reworked in 1891—the detailed limitations on legislative power outside of the Kentucky Bill of Rights. Be that as it may, the court has often recognized that those

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43 Wasson, 842 S.W.2d at 494-95 (quoting Campbell, 117 S.W. at 385 (invalidating an ordinance that outlawed the possession of intoxicating liquor, even for private use)) (emphasis added by Justice Leibson).
44 Id. at 496 (quoting Campbell, 117 S.W. at 386 (quoting John Stuart Mill, On Liberty (1859))). The full text of Mill’s On Liberty can be found in JOHN STUART MILL, THREE ESSAYS 5 (Oxford Univ. Press 1975) (1912).
45 Wasson, 842 S.W.2d at 497.
46 See generally Gormley & Hartman, supra note 20. The sentence in section 1 of the 1891 constitution, “Third: The right of seeking and pursuing their safety and happiness,” though not explicit in the 1850 constitution, appears in essence in the preamble: “We, the representatives of the people of the State of Kentucky, in convention assembled, to secure to all the citizens thereof the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government.” KY. CONST. of 1850, pmbl.

This section 1 language is historically popular phraseology, but the one half of the sentence potentially wars with the other: one person’s interest in “safety” may conflict with another’s interest in “happiness.” This has never been more obvious than in 1993. In any event, the language does not lend itself to concrete application.

47 Another Mill essay, Considerations on Representative Government, proposed proportional representation in the election of the legislature. See Mill, supra note 46, at 145. This idea was picked up in some state constitutions, including Kentucky’s, but in provisions dealing with the election of members to corporate boards of directors. See, e.g., KY. CONST. § 207 (requiring cumulative voting in the election of directors).
new limitations essentially responded to the legislature's egregious abuses of power in the routine day-to-day affairs of the people and the state.50

Nevertheless, it cannot be doubted that in a few cases decided within two to three decades of the ratification of the Kentucky Constitution of 1891, the court espoused Mill's philosophy as constitutional doctrine.51

Having established to their satisfaction that the people in 1891 constitutionalized Mill's philosophy, the majority said that a line must be drawn at "harmful consequences to others."52 But it then immediately added:

Modern legal philosophers who follow Mill temper this test with an enlightened paternalism, permitting the law to intervene to stop self-inflicted harm such as the result of drug taking, or failure to use seat belts or crash helmets, not to enforce majoritarian or conventional morality, but because the victim of such self-inflicted harm becomes a burden on society.53

Such a qualification of an earlier principle that had been stated in broad and abstract form would not be out of the ordinary in the context of a court's development of malleable common law. But in the context of constitutional interpretation as developed in Wasson, it has an unbalancing effect, like that of inertial force when sudden braking or an unexpected turn occurs. The court had just endorsed the idea that in 1891 the framers intended to write the views of Mill, as expressed in his quoted language, into the Kentucky Constitution.54 But apparently anticipating that Mill's views would be sticky in other cases, some yet to be decided, the court lifted the core of his philosophy ("In the part which merely concerns himself, his independence is, of right, absolute . . . .")55 back out of the constitution on the basis of a virtually boundless qualifying concept authored by "modern legal philosophers." This was not an application of the concept that an original principle should be applied in light of contemporary knowledge. Rather, it was a rewriting of the principle itself in light of someone's nonconstitutional contemporary idea. I should emphasize that I am questioning the court's approach to discerning and explicating original intent. I am not here challeng-

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50 See, e.g., Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 812 (Ky. 1991) ("Most of the delegates to the Constitutional Convention felt that the real root of Kentucky's governmental problems was the almost unlimited power of the General Assembly."); Tabler v. Wallace, 704 S.W.2d 179, 183 (Ky. 1985) ("Concern for limiting the powers of the legislature in general . . . was the primary motivating force behind enactment of the new Kentucky Constitution in 1891").

51 For what it is worth, that philosophy strikes a chord with me, for while I do not remember specific lessons, I absorbed during my public school years Mill's idea as a central feature of government in America. This is not really remarkable, because the abstract idea surely has nearly universal appeal even today.

52 Wasson, 842 S.W.2d at 496.

53 Id. at 496-97 (citing LORD LLOYD OF HEMPSTEAD, INTRODUCTION TO JURISPRUDENCE 59 (4th ed. 1979) (1959)).

54 Id. at 497.

55 See supra note 46 and accompanying text.
ing the idea that government may have some power to protect people from themselves.

It is probably wise to leave Mill out of the Kentucky Constitution. Mill wrote to persuade; it is arguable by implication from the range of his arguments in *On Liberty* that he would regard a people’s attempt to constitutionalize his words as unsound. Moreover, reading Mill provides stark evidence of how unfree he would regard modern society. With the caveat that I am not a Mill scholar, my understanding from a review of his essay is that:

1. He would find regulation that was grounded in “constructive” rather than direct injury to society to be destructive of the principle he was advancing;

2. He would not countenance control of the use of liquor by means that made its supply unreasonably inconvenient to consumers, including the masses;

3. He felt that the prohibition of “Mormonism,” specifically polygamy in a community of Mormons, could not be justified;

4. Education was of the highest priority for Mill, but the state should recognize that priority by creating a parental duty to provide for the education of their children; state-provided education could be justified only as necessary to assist children whose parents rejected their duty, and perhaps as instruments of example.

Reading Mill may help clarify one’s thinking about the content and the limits of section 2, with a focus on its language. But if we attempt to constitutionalize his core principle, there is no apparent method for selecting which of his views explaining his meaning are appropriately included and which ones are not. Certainly the “esteem” in which his views may have been held in 1890 provides no map. If it did, and the framers indeed intended to write into the constitution the principle from Mill that was quoted in *Commonwealth v. Campbell* and repeated in *Wasson,* we would not like its implications. His lengthy essay *On
The rub is that application of the abstract Millsian idea is most often problematical. At this difficult point, the majority opinion in Wasson is surprising. For nowhere in this part of the court’s opinion does it engage in any independent analysis of real or perceived present or threatened harm, to society or to the actors, from the conduct under scrutiny. Rather, the court simply assumes that the conduct is criminalized “because it is inconsistent with the majoritarian notion of acceptable behavior.”

Technically, the court might attribute this stance to the state of the record. From the court’s description it could be surmised that there was no evidentiary or even argued theoretical basis in the record for discussing the issue of actual harm to others.

B. The Record in Wasson

Because this was a major constitutional case, it can be questioned whether the court should have decided any of the issues presented solely on the basis of the record made below. Whether it had any choice under its rules is another question. The court granted a motion for direct transfer of the case for review, bypassing the court of appeals, and it is not clear that the court had an avenue of escape from this exercise of its discretion, even if it chose to seek one. Kentucky Rule of Civil Procedure 76.20 provides that a ruling granting or denying a motion for discretionary review “will not be reconsidered,” and that a motion for reconsideration, however styled, will not be accepted for filing. If the court considers its own initiative to be bound by its own rule, and if it considers itself powerless to vacate a lower court judgment and order further proceedings having no relation to proof of guilt or innocence or to affirm a lower court’s judgment on a more limited basis than review on the merits of tendered issues, then the die was cast when review was granted.

The U.S. Supreme Court rarely hears cases that have not undergone intermediate appellate review, and occasionally withdraws a grant of review as improvidently granted leaving a lower court’s judgment undisturbed. If they do not presently exist, some techniques should be
developed to enable the Kentucky Supreme Court to stimulate minimal adequacy in the development of a record in appropriate constitutional cases.

1. The Right of Privacy

The court's adoption of Mill's philosophy, as qualified, put the harm principle in issue. When first reading Justice Lambert's dissenting opinion, and then John Roach's note, I wondered why neither focused pointedly on the majority's treatment of the issue. They essentially rested their criticism of the majority's result on their conclusion that support for regulatory legislation may be found in ancient and contemporary moral traditions, just as the U.S. Supreme Court had found in Bowers v. Hardwick. One probable explanation for their reticence is their rejection of the majority's basic premise, a right of privacy as defined by reference to Mill. On reflection, however, I wonder if an additional explanation might derive from the contextual complexity of the issue of harm, and the possible discomfort associated with extended factual discussion of it.

The issue of harm having pointedly been placed in issue by the majority, the nature of the record before the court posed a serious problem. At the outset of its opinion, the court listed and summarized some of the testimony of the numerous expert witnesses introduced by the defense. It is apparent from the use of these witnesses and the array of supportive briefs from amici curiae that a thoroughly planned and coordinated defense was mounted at the trial and appellate levels. The Commonwealth, however, "presented no witnesses and offer[ed] no scientific evidence or social data." The case originated in district court, and it is probable that the prosecutors initially treated it as simply another of the hundreds of routine cases they process. Surprised or not by the defense, the county attorney's office probably lacked the staff to respond fully to a defense effort of the magnitude it faced in Wasson. In this connection, however, Justice Wintersheimer's statement that the trial judge "refused to allow the county attorney to introduce any treatises on the subject of sodomy" must be noted.

Once a right of privacy was defined by the court, the lopsided nature of the record shaped the court's task of applying its definition. According

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67 See supra notes 52-55 and accompanying text.
70 Id. at 510.
to the court, the Commonwealth's position was simply that the General Assembly has the right to criminalize activity it deems immoral, without regard for whether the activity is harmful to the participants or to others.\footnote{Id. at 490.} Except for argument concerning AIDS, which was mentioned by the majority only in the equal protection portion of the opinion,\footnote{Id. at 501. See infra notes 85-89 and accompanying text.} one might conclude that the record was actually barren of any evidence that the conduct in question is or is not harmful to others or to the participants. The testimony of defense experts as summarized by the court early in its opinion offered no factual enlightenment on this question.\footnote{Wasson, 842 S.W.2d at 489-90. Justice Wintersheimer, dissenting, does allude to evidence of AIDS, referring to testimony by a defense witness concerning the relationship between homosexual conduct and the incidence of that disease. Id. at 516.} Briefs amicus curiae were filed in opposition to the lower court's decision, but the content of these briefs is not discussed by the court.

Still another explanation for the dissenters' lack of strong focus on the harm principle, which could also go some distance towards explaining the majority's willingness to go forward in the face of an inadequate record, is the possibility that the right of privacy as applied in Wasson is something different from what the majority said it is. The dissenting opinions strongly suggest to the reader that those justices believed the majority actually found homosexual conduct to be protected as a "fundamental right," not simply a liberty derived from the calculus of Mill's principle.\footnote{See id. at 514 (Wintersheimer, J., dissenting).} There is evidence in a concurring opinion by Justice Combs, joined by Chief Justice Stephens, that two members of the majority accept that conclusion.\footnote{See id. at 502-03 (Combs, J., concurring).} Adoption of this position would put the issue of harm in a different light, perhaps rendering irrelevant the types of harm that might possibly be connected to homosexual conduct. I will return to this theme in a concluding part.

2. Equal Protection

It is not clear why the court felt it necessary or desirable to address the equal protection issue at all. Resolution of the issue turned on the court's rejection of any rational basis for a distinction between homosexual and heterosexual sodomy. In light of the court's privacy ruling,\footnote{See supra notes 42-63.} however, it must follow that the legislature cannot cure the equal protection issue by criminalizing heterosexual sodomy, for that move would be independently unconstitutional. The effects of a lopsided and inadequate record were further exacerbated by the court's treatment of
defense submissions as central to the issue of equal protection. The court made major pronouncements explicitly grounded on defense testimony that it found to be “further substantiated by extensive citations to medical and social science literature and treatises supplied in Amicus Curiae briefs filed by national and state associations of psychologists and clinical social workers, various national and state public health associations, and organizations covering a broad spectrum of religious denominations.”

In this part, quoting Professor Laurence Tribe, the court concluded that homosexual conduct is “in all likelihood” the product of an immutable characteristic in its practitioners, who “form virtually a discrete and insular minority.” The court found Tribe’s view “fully supported . . . by the medical, scientific and social science data provided in the briefs filed herein by Amici Curiae.” This is a very important “finding.” But whether this was tantamount to declaring homosexuality the equivalent of race or gender, the court’s opinion did not treat it as a critical issue in its selection of an appropriate constitutional standard of review for this case. The nominal test for evaluating an equal protection claim is whether there is a rational or “reasonable” basis for distinctions made by the General Assembly, a standard that in constitutional parlance generally signifies substantial deference to legislative judgment. In recent years, however, the

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7 Wasson, 842 S.W.2d at 489. This language appears before the court’s discussion of either of the major issues in the case, but specific reliance appears in the equal protection segment of the opinion. Id. at 500.

8 Id. at 500 (quoting Laurence Tribe, American Constitutional Law 1616 (2d ed. 1988)).

9 Id.

10 We do not speculate on how the United States Supreme Court as presently constituted will decide whether the sexual preference of homosexuals is entitled to protection under the Equal Protection Clause of the Federal constitution. We need not speculate as to whether male and/or female homosexuals will be allowed status as a protected class if and when the United States Supreme Court confronts this issue. They are a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution. All are entitled to equal treatment, unless there is a substantial governmental interest, a rational basis, for different treatment. The statute before us is in violation of Kentucky constitutional protection in Section Three that “all men (persons), when they form a social compact, are equal,” and in Section Two that “absolute and arbitrary power over the lives, liberty and property of free men (persons) exist nowhere in a republic, not even in the largest majority.” We have concluded that it is “arbitrary” for the majority to criminalize sexual activity solely on the basis of majoritarian sexual preference, and that it denied “equal” treatment under the law when there is no rational basis, as this term is used and applied in our Kentucky cases. Id. at 500.

For an excellent comprehensive statement of levels of review in Kentucky, depending on isolation and analysis of the interests affected, see Chief Justice Stephens’s opinion for the court in Chapman v. Gorman, 839 S.W.2d 232 (Ky. 1992).
Kentucky Supreme Court has sometimes applied the test more rigorously.82 This potential tendency is exemplified in *Wasson*.

Quoting from earlier cases he had authored, and describing the Commonwealth’s case in *Wasson*, Justice Leibson defined “rational basis” as that term is “applied in our Kentucky cases”: “‘But these [explanations of a legislative classification] are offered only as possible reasons that could have existed, not as reasons that did in fact exist...’ The Commonwealth has tried hard to demonstrate a legitimate governmental interest justifying a distinction [between homosexual and heterosexual sodomy], but has failed.”83 After addressing and rejecting specific arguments by the Commonwealth, Leibson stated, “If there is a rational basis for different treatment it has yet to be demonstrated in this case.”84

Far from finding that the Commonwealth’s arguments “demonstrated” or proved anything “in fact,” Justice Leibson found many of them to be “simply outrageous.”85 These included arguments that “homosexuals are more promiscuous than heterosexuals, ... that homosexuals enjoy the company of children, and that homosexuals are more prone to engage in sex acts in public.”86 Surely the relevance of the Commonwealth’s first argument, unlinked to anything else, can be questioned. And there is probably virtually universal agreement that persons who fit the last two of its arguments must be dealt with on an individual basis. The only argument found by the court to have even “superficial validity” was one that “infectious diseases are more readily transmitted by anal sodomy than other forms of sexual copulation.”87 The court responded as follows:

But this statute is not limited to anal copulation, and this reasoning would apply to male-female anal intercourse the same as it applies to male-male intercourse. The growing number of females to whom AIDS has been transmitted is stark evidence that AIDS is not only a male homosexual disease. The only medical evidence in the record before us rules out any distinction between male-male and male-female anal intercourse as a method of preventing AIDS.88

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82 See, e.g., Perkins v. Northeastern Log Homes, 808 S.W.2d 809, 813-14 (Ky. 1991) (invalidating statute of repose as unconstitutional special legislation because distinction between manufacturers and builders had no reasonable justification); Tabler v. Wallace, 704 S.W.2d 179, 185 (Ky. 1985) (“The fundamental question is whether the General Assembly had a reasonable basis sufficient to justify creating a separate classification for certain persons...”).
83 *Wasson*, 842 S.W.2d at 501 (quoting *Tabler*, 704 S.W.2d at 185) (emphasis added).
84 *Id.*
85 *Id.*
86 *Id.* (quoting arguments of the Commonwealth).
87 *Id.*
88 *Id.* The content and meaning of the rational basis test applied by the majority deserves further exploration. In Delta Airlines, Inc. v. Commonwealth, 689 S.W.2d 14, 18-19 (Ky. 1985), the court stated: “The standards for classifications under the Kentucky Constitution are the same as these under
The court had earlier noted the testimony of a "sociologist and sex researcher (a co-author of the Kinsey Report on homosexual behavior)" that oral and anal sex are practiced "widely" by heterosexuals. This witness also testified that homosexuality is not a "choice" and there is no "cure" for it.

Given the structure and content of the opinion on the right of privacy, the excerpt quoted above may provide a clue concerning the majority's desire to address the equal protection issue. The issue of AIDS could have posed a troublesome factual issue (and a difficult legal issue) under the majority's formulation of the privacy right. But in a court willing to draw a comparison between homosexual and heterosexual contributions to the AIDS epidemic, a finding of potential harm to self or others could not save the law from equal protection analysis.

C. The Issue of Harm Revisited

Consider for a moment a sodomy law, such as Kentucky's, that is strictly enforced, though the authorities make no special effort to ferret out offenders. When found, however, in a private setting and in the absence of public solicitation, an offender is arrested, charged, and if found guilty jailed, fined, or both. Suppose further that a court is satisfied that a higher incidence of specific harms, such as AIDS and some other diseases, can be linked to homosexual conduct. How should a harm principle be applied? It is difficult to find close-fit analogies, but consider liquor consumption. We know that alcohol can be personally harmful and that some individuals will become alcoholics. We know or believe that some individuals may become vicious when under the influence, and we accept that individuals who drive while under the influence pose a risk of accident. As matters stand, the person who inflicts direct harm is punishable because of the harm, not because of the drink. We do not outlaw drinking by all because of the risks of alcoholism to some. That was tried once, but it did not work. The various risks associated with alcohol consumption are, however, the subjects of educational programs and a number of mandatory warnings.

the Fourteenth Amendment to the Federal Constitution. ... A classification by the legislature should be affirmed unless it is positively shown that the classification is so arbitrary and capricious as to be hostile, oppressive and utterly devoid of rational basis." This is a tax case and the court was applying a "minimal" rational basis test. Justice Leibson in Wasson certainly applied a more rigorous test, describing it as rational basis "as this term is used and applied in our Kentucky cases." Wasson, 842 S.W.2d at 500. However, in Chapman v. Gorman, 839 S.W.2d 232 (Ky. 1992), the court upheld an antinepotism statute against constitutional challenge, stating that statutorily created classifications "must bear a rational relationship to a legitimate state end" and are invalid "when these classifications are totally unrelated to the state's purpose in their enactment, and when there is no other conceivable purpose for their continued viability." Id. at 239-40 (citations omitted).
The question I mean to raise is whether, and if so how far, it would advance analysis, constitutional or otherwise, to accept the hypothetical linkage I have posited between homosexual conduct and actual direct harm. The linkage does not say anything about an individual case, except perhaps in the most abstract terms of statistical probabilities. The same might be said of those who are arrested for DUI in the absence of an actual accident causally linked to intoxication. But the analogy is flawed, because we do not convict an individual for drinking, but for driving in a certain condition. Moreover, the analogy is again less than perfect because the potential victim of the driver has no say in his selection.

With respect to the problem of linking an individual to potential harm from generalized activity, another comparison might be found in the controversy regarding second-hand smoke in public places. Those who conclude that both the liquor and smoke comparisons are silly apples and oranges constructs might ask whether that conclusion derives from rejection of underlying facts hypothetically imposed concerning homosexual conduct/harm linkage, and/or from a decidedly different ranking of the importance of the underlying individual interests that are involved. The control of risks associated with drinking is actively pursued through rigorous enforcement of the traffic laws. Proliferating smoking bans are or will be strictly enforced. For comparison purposes, a strictly enforced sodomy law was hypothesized above. Would rejection of that hypothesis as false in fact have any bearing on the comparisons?

A different type of harm projection is the feared deterioration of society, styled “moral deterioration” by those who say that any harm is limited to those who are offended only because of their moral sensibilities. That viewpoint, however, is an oversimplification according to the views of some others, sampled below, whose claim to expert status may be equal to that of many of the sources relied upon by the Wasson majority. It can be inferred from some of these alternative views that cases such as Wasson may, ironically, become part of the problem.

Dissenting in Wasson, Justice Lambert set the stage for this line of thought when he said in closing his opinion:

[It should not be doubted that this decision will be regarded as the imprimatur of Kentucky’s highest court upon homosexual conduct . . . .

While this is not an accurate line of thought, it is a natural one. Those who wish to urge that homosexual conduct is immoral and those who oppose the portrayal of homosexuality as an acceptable alternative

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90 The sources tendered by the defense in Wasson are described by Wiegand and Farr, supra note 5, at 456-57 nn.47-51.

91 The “problem” here is that decisions such as Wasson may be viewed not merely as a move toward equal treatment of homosexuals, but rather as a condonation of homosexual behavior. See infra notes 92, 109 and accompanying text.
lifestyle will encounter the majority opinion as a powerful argument to the contrary.22

In the absence of an additional element involving the public, such as solicitation, statutes criminalizing sodomy, whether limited to homosexual conduct or expanded to include heterosexual conduct, are notoriously unenforced. This surely reflects a public attitude that predates activist efforts to change the public's perception of homosexual conduct. It is evident that this nonpunitive attitude coexists in the minds of many who nevertheless strongly disapprove of homosexual activity. The law is seen not as a prohibition to be enforced as such, but rather as a symbol of societal disapproval.

Wiegand and Farr note that sodomy laws are not enforced in some states, but describe the effect more harshly: "'unenforced sodomy laws are the chief systematic way that society as a whole tells gays they are scum.'"9 And they feel that such laws remain a "sword of Damocles" for homosexuals and provide justification for both public and private discrimination.4

The use of traditionally unenforced laws as swords of Damocles should meet another kind of constitutional objection. Private discrimination can be effectively removed only through positive laws, legislative or other. The removal of sodomy laws can assist these objectives, but their removal is also sought by some groups in aid of a larger agenda. Their goals include securing, through coordinated efforts of persuasion, the law, and mandated education, what may be termed "equal respect" for the homosexual lifestyle as well as for its practitioners.95

The resulting struggle is between those who believe it is important to discourage homosexual conduct and those who want to promote equal respect for the homosexual lifestyle. A victory in that struggle was in a real sense one of the stakes in the Wasson case. What effect, if any, open recognition of the nonenforcement of the underlying sodomy statute could have had on the majority is speculative, but it is fairly predictable on the basis of the record before the court that it would not have changed anything. Certainly, at first blush, a law whose acceptance depends on a custom of nonenforcement is an anomaly. On reflection, however, it is not an unknown phenomenon and historic examples are probably most

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22 Wasson, 842 S.W.2d at 509 (Lambert, J., dissenting).
23 Wiegand and Farr, supra note 5, at 480 (quoting Richard D. Mohr, Mr. Justice Douglas at Sodom: Gays and Privacy, 18 COLUM. HUM. RTS. L. REV. 43, 53 (1986-87)).
24 Id.
25 I borrow the term "equal respect" from DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION passim (1986). Professor Richards seeks to justify a theory of constitutional privacy as the underpinning of universal toleration and equal respect for each person's rational and moral independence. He writes as a legal scholar, not as a member of any particular group.
apt to be found in the realm of conduct traditionally deemed to be immoral.96

*Wasson* removed society’s statement of disapproval from the books. The effects of removal that concerned Justice Lambert could not have been dampened by anything the court might have been able to say in the course of its opinion, because, as he noted, those effects flow from a natural, though not accurate, line of thought.97 The line of thought is simply that the result of the case delivers the wrong message. Yet what the court did say in explaining its reasoning was naturally designed, as opinions generally are, to persuade its listeners that it was delivering the right message, and that persuasion was built largely on the viewpoints of one adversary’s witnesses and supporters.

There are other viewpoints. Whether they would merit acceptance is not the point. In our society, the role of the judiciary is defined by its reliance, indeed its absolute dependence, on a properly functioning adversarial system. Generally one side or the other in a case must prevail, but that is determined after full consideration of points and counterpoints presented by the adversaries. I offer the few examples below only to illustrate the fact that there are sources of counterpoint regarding some of the issues upon which the majority in *Wasson* made “findings.”98

Newspaper accounts have made us familiar with the efforts in some education districts to install materials and lessons in the curriculum to indoctrinate children in proper attitudes about homosexuality. In a recent column, George Will questioned the use of the public schools as a forum for endorsing the homosexual lifestyle. Using events in a New York City school district as a backdrop, Will stated:

> The bibliography of the “Children of the Rainbow” curriculum recommends for first graders (preschoolers must make do with a gay and lesbian coloring book) books such as *Daddy’s Roommate* and *Heather Has Two Mommies* and *Gloria Goes to Gay Pride.*

> In *Gloria Goes to Gay Pride,* one of Gloria’s mothers explains the gay pride parade. “Some women love women, some men love men, and some women and men love each other. That’s why we march in the parade—so everyone can have a choice.”99


97 *Wasson,* 842 S.W.2d at 509.

98 The excerpts that follow in the text are truly random samples that came to my attention in a variety of ways. Because my point is substantially more limited than trying to prove the merits of any position, I made no focused research effort to locate samples of the most convincing statements from the best experts, whoever they may be.

99 George Will, *Let Educators Steer Children Toward Heterosexuality,* *LEXINGTON HERALD-
Stressing the word "choice," Will then insisted that any steering of children should be towards heterosexuality. Will, quoting an article written by a former associate chairman of the Harvard University Department of Psychology, noted that "there is reason to think 'that a very substantial number of people are born with the potential to live either straight or gay lives'—to 'grow in either direction.'" A related point is that while "sexual orientation must result from 'a chain of events so complex that we are unaware of having made a choice'... it is 'possible that substantial numbers of youngsters do have the capacity to "choose"... that is, through a sustained, lengthy process of considered and unconsidered behaviors.'"  

In discussing strategies gay men and lesbians might pursue to achieve legislative goals, John D'Emilio, a participant in a symposium on sex and politics, urged abandonment of a position that homosexuality is not a matter of choice. "[W]hatever our short-term goals, we need to frame arguments for them consistent with the core of historians' discovery that sex is a malleable social construct." Referring to a debate in which a claim was made that medical evidence showed a lack of choice, because sexual identity is determined long before puberty, he noted that the claim was not startling, and that it is an argument "made frequently in courts and legislatures... by many of our most committed activists and allies." But he said the argument ignores several valid points:

Secondly, at a psychological level, there is something dreadfully wrong about basing a political movement on individual and collective helplessness.... And thirdly, what if the argument is simply not true?... To argue that our identity, our sexuality, is in effect an accident of birth or of early conditioning is to embrace a sexual ideology that negates the choices we have made.... All of us have made sexual choices throughout our lives.... It is time to carve out new personal and political paths, to lay claim to the possibility of choice, to embark on new journeys of sexual definition.¹⁰⁴

¹⁰¹ Id. (quoting Pattullo, supra note 100, at 22).
¹⁰² John D'Emilio, Making and Unmaking Minorities: The Tensions Between Gay Politics and History, N.Y.U. REV. L. & SOC. CHANGE 915, 921 (1986). The author is a Columbia University Ph.D, and a professor of history at the University of North Carolina, Greensboro. His article is one of several in Symposium: Sex, Politics and the Law: Lesbians and Gay Men Take the Offensive, 14 N.Y.U. REV. L. & SOC. CHANGE 891 (1986). His article and others in the symposium warrant full reading for an understanding of some of the goals of the movement, and also for a better understanding of the very personal feelings and beliefs of some of its adherents.
¹⁰³ D'Emilio, supra note 102, at 921.
¹⁰⁴ Id. at 921-22.
In the course of a strong critique of the U.S. Supreme Court’s landmark sodomy case, *Bowers v. Hardwick*, Professor Anne Goldstein stated:

The idea that homosexuality is normal, however, implies a recognition that homosexuality and heterosexuality may not be rigidly distinct, mutually exclusive categories. . . . ‘Homosexuality’ is the exclusive preference of only a small percentage of those who, at some time in their adult lives, either experience sexual desire for, or participate in sexual acts with, persons of their own gender. . . . 37% of men have at least some overt homosexual experience . . . between adolescence and old age; 10% are more or less exclusively homosexual for at least three years between the ages of 16 and 55.

Historian Paul Johnson, whose educational credentials trace to Magdalen College, Oxford, among other institutions, and who has written several best-selling texts, wrote in 1991:

Another self-inflicted wound in the advanced nations was the spread of AIDS . . . . The origins of this fatal and seemingly incurable disease . . . remained obscure even in the early 1990s . . . . In the [western nations] . . . it was largely confined to male homosexuals and (to a much lesser extent) to drug-users. It was the product of drug abuse and, far more seriously, of the homosexual promiscuity which, often in extreme form, had followed the decriminalization of homosexuality in the 1960s and 1970s. Some male homosexuals were shown to have 300 or more sexual partners in a single year, and against this background the disease spread rapidly. First reports of its seriousness came on 31 December 1981, when 152 cases had emerged, chiefly in San Francisco, Los Angeles and New York; one was an intravenous drug-abuser; the rest were male homosexuals.
Author George Gilder, a student of anthropology, among other disciplines, is a passionate (and opinionated) spokesman for the role of monogamous marriage as the civilizing force in society, the *sine qua non* of civilization as we know it. He forcefully contends that the "sexual constitution" is more basic to our society than the U.S. Constitution itself. In Gilder’s book *Men and Marriage*, consideration of male homosexuality is a segment, not a central theme, of his work. His theme in this segment, incidentally, is that what he believes to be an increase in male homosexuality is the result, not a cause, of a weakening of the role of monogamous marriage in our society. That problem he traces to the more general sexual liberation that has occurred in recent decades. Gilder notes that many leading writers and experts assume homosexuality to be a "fixated" condition that poses no real threat and is unrelated to other social developments. Concluding that research had failed us on the issue, he acknowledges the likelihood that some homosexuals "suffer from a profound disposition, possibly physiological in origin." But he then marshals arguments to convince that an "enormous number of homosexuals have clearly been recruited from the ranks of the physically normal," stating along the way:

The most powerful tool of the homosexual culture is the myth that homosexuality is a fixed and immutable condition, like the color of one’s skin. Widely taught in sex-education programs in secondary schools and in college psychology and social-science courses and endlessly repeated in the media, the message is drummed in . . . .

Asserting that female homosexuality has "nothing whatever to do with male homosexuality," and then reciting distressing figures of promiscuity and disease among male homosexuals, Gilder adds the following statements, the last of which prompts the inclusion of a warning label (Gilder sometimes writes in a strident tone, from the

According to Kentucky Department of Health Service statistics, 65% of AIDS cases reported in Kentucky involved homosexual men, 10% involved injectable drug users, 6% involved homosexual men who also use injectable drugs, 6% involved heterosexuals, 4% involved hemophilliacs, 3% involved persons who contracted AIDS through receipt of blood products, 1% involved perinatal transmission, and 5% involved undetermined sources. *How Kentuckians Contract AIDS*, LEXINGTON HERALD-LEADER, Feb. 7, 1993, at A1.

109 Id. at 69.
110 Id.
111 Id. at 71.
112 Id. at 71-78.
113 Id. at 73. The audience that concerns Gilder is composed of “sexually confused or insecure young men who [are led] to imagine that their random lusts and social failures signify a permanent homosexual fixation.” Id.
114 Id. at 73-76.
perspective of one who believes society faces an avalanche of disinformation):

This emphatically does not mean harassing or imprisoning homosexuals. Perhaps the worst perversion occasioned by homosexuality is the police practice of entrapment. But at the same time it is crucial to affirm precarious males in their heterosexuality. Compassion for men who are already homosexual—and our recognition that some have adjusted happily—should not lead us to praise or affirm the homosexual alternative or to acquiesce in its propaganda. ... The liberal journalists, compassionate churchmen, tolerant sociologists, pliable psychologists, pandering politicians, and valuefree sex educationists who condemned the most extreme homosexual behavior as an acceptable life-style are the true sources of the AIDS epidemic.115

Until his retirement in 1987, E.L. Pattullo was director of the Center for Behavioral Studies and associate chairman of the Department of Psychology at Harvard University. In Straight Talk About Gays,116 he thoroughly analyzes the available information that leads him to be concerned about the message various types of societal actions deliver, especially to the young. His analysis is more subtle, indirect, and tentative than George Gilder's117 on some points along the way to his conclusion, but he states with assurance the importance of ensuring "that all children clearly understand the desirability of growing up to be heterosexual adults."118 Though not lengthy, his article resists an abbreviated summary. When read in its entirety, it suggests a number of counterpoints to the points made by the defense in Wasson.

Are the above sources "authoritative"? Are the sources relied on by the court more or less authoritative? Who is an "expert" on the effects, now or over the course of decades, of sexual behaviors? My suggestion is simple, and by now repetitive: if expert opinion, with stress on "opinion," is to affect the outcome in a major constitutional case, it is important for a court to be in a position to sift through opinions that are gathered on some broader basis than the strategy of one adversary in an adversarial setting.

CONCLUSION

Moral principles lie behind virtually all laws governing human conduct. Professor Laurence Tribe, responding to theories propounded by others in defense of Roe v. Wade,119 observed:

115 Id. at 75-76 (emphasis added).
116 Pattullo, supra note 100.
117 See supra notes 108-15 and accompanying text.
118 Pattullo, supra note 100, at 24.
It has also been proposed that restrictions on the woman’s decision to terminate pregnancy are unconstitutional when they reflect “merely” a moral, as opposed to an instrumental or utilitarian, justification. But all normative judgments are rooted in moral premises; surely the judgment that it is wrong to kill a two-week old infant is no less “moral” in inspiration than the judgment . . . that it is wrong to kill a two-day old fetus. Archibald Cox seems correct, therefore, when he concludes that Roe v. Wade must be wrong if it rests on the premise that a state can never interfere with individual decisions relating to sex or procreation “with only moral justification.”

Professor Tribe also concludes that a defense of Roe cannot rest on a court’s ability to balance the interests in that conflict. His ultimate conclusion in support of the case is that the result can rest only on a determination that a woman’s freedom of choice is grounded in a fundamental constitutional right of privacy, or autonomy.

Societies have had hundreds of years to experience sexual behaviors. Does the general tenacity across cultures and centuries of the idea that homosexual conduct should be discouraged have any weight as evidence that such conduct carries potential for harm to the social order? For any who are prepared to give this question a tentative yes, is use of the criminal law, even unenforced, appropriate?

We can again wonder if a principle more fundamental than Mill’s was at work in Wasson. It is difficult to determine just how evidence of risks and harms associated with homosexual conduct should fit into Mill’s principle. But in light of society’s heightened concern with risks of almost any kind, and the general eagerness to control them through regulation, it is not realistic to apply Mill’s principle without some attention to what evidence there is of harms and risks. In the absence of any comment by the court on this issue, it is natural to wonder whether Mill’s philosophy, with or without modern philosophical modification, can actually carry the load of protecting the conduct in question. It is not clear whether the court’s equal protection analysis would stand in the way of the General Assembly’s passage of a carefully structured new law. But no such maneuvering could work if actually underpinning the court’s result in Wasson is the majority’s conclusion that adults enjoy a fundamental right of privacy respecting private, consensual sexual conduct, a right similar to federal constitutional rights of privacy.

That conclusion would finesse all the questions of harm, whether supposed harm is immediate, direct, consequential, long-term or other. For to characterize an interest as a constitutional fundamental right of

121 Id. at 1350-58.
privacy or autonomy is to say that any balancing of interests, the individual's versus society's, was accomplished in principle by the people at an earlier time, and that the balance was struck in favor of individual autonomy. The problem is obvious. Who would deny a judge's or any other's personal belief that the balance ought to be struck in favor of a fundamental right of individual autonomy? Most persons I know feel that way. But the personal preferences of a majority in a particular mix of judges are not supposed to be controlling. Legitimacy can be found only in their ability to articulate a constitutional source of the preference. It is here, I believe, that objective observers would conclude that such an effort must somehow surmount the wall of centuries-long tradition, with an objectively credible explanation. That effort has not yet been confronted.

In the meantime, we are left to ponder the true meaning of the Kentucky Constitution, and perhaps more importantly, the proper scope of constitutional judicial review. The following articles mark a departure point for this consideration.