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LGBTQ Issues Through the Lens of Bowers v. Hardwick and Related Cases

June 2, 2023
2:00 pm - 3:30 pm

Presenters: John F.K. Coffey, Esq.
Andrea F. Composto, Esq.

1985 WL 667946 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Michael J. BOWERS, Attorney General of Georgia, Petitioner,
v.
Michael HARDWICK, and John and Mary Doe, Respondents.

No. 85-140.
October Term, 1985.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief of National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, Los Angeles Lawyers for Human Rights and California Lawyers for Individual Freedom, Amici Curiae, in Support of Respondents

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Edward P. Errante, Counsel of Record, Teresa Lynn Friend, Paul Freud Wotman, Bay Area Lawyers For Individual Freedom, California Lawyers for Individual Freedom.

*i QUESTION PRESENTED

Whether a State exceeds its inherent police power when it attempts to induce conformity to a particular moral view through the imposition of substantial criminal penalties upon intimate conduct between consenting adults which takes place in the seclusion of the home.

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*1 BRIEF OF NATIONAL GAY RIGHTS ADVOCATES, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, LOS ANGELES LAWYERS FOR HUMAN RIGHTS AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, Los Angeles Lawyers for Human Rights and California Lawyers for Individual Freedom file this brief *amici curiae* with the consent of the parties.

INTEREST OF THE AMICI CURIAE

National Gay Rights Advocates is a nonprofit, public interest law firm involved in litigation throughout the country to advance the civil rights of lesbians and gay men. This litigation has addressed major constitutional issues as well as procedural matters and issues of state law, including housing and employment discrimination, immigration and naturalization policies, challenges to laws which proscribe private sexual conduct of consenting adults and the rights of gay people to serve in the military.

Bay Area Lawyers For Individual Freedom (BALIF) is an organization of more than 400 gay and lesbian lawyers and legal workers that works to increase the input and representation of lesbians and gay men in the judiciary, local and state Bar organizations and other policy making bodies. BALIF also encourages and supports the appointment of lesbian and gay attorneys to the judiciary, public agencies and commissions; takes action on questions of law and the administration of justice as they affect the lesbian ***2** and gay community, including the filing of *amicus curiae* briefs; endorses candidates for office; takes positions on ballot propositions; evaluates the qualifications of candidates seeking judicial appointment; analyzes and proposes legislation; gives testimony on bills dealing with gay issues; and presents educational programs.

Los Angeles Lawyers for Human Rights (LHR) is an affiliate of the Los Angeles County Bar Association. LHR was organized in 1976 to provide a focal point from which to address human rights issues, including those which have an impact on the gay and lesbian community. LHR is made up of judges, attorneys, and law students from diverse backgrounds. LHR participated as *amicus curiae* in *New York v. Uplinger*, 104 S.Ct. 2332 (1984) and *Board of Education v. National Gay Task Force*, 105 S.Ct. 1858 (1985). Like BALIF, as an organization of attorneys, LHR recognizes and is concerned about the overall discriminatory effect of laws which criminalize the private affectional behavior and intimate association of adults, especially in such areas as employment, housing, parenting, and delivery of governmental services.

California Lawyers for Individual Freedom (CALIF) is a statewide organization of over 650 lawyers concerned with securing equal civil rights for gay men and lesbians. CALIF promotes representation of gay men and women within State Bar committees and delegations, and takes action on issues of law as they affect the rights of lesbians and gay men, including the filing of *amicus curiae* briefs.

***3 STATUTORY PROVISION INVOLVED**

The statute in question is Georgia Code section 16-6-2 (1981), which provides as follows:
(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

A second portion of the statute, not at issue in this case, criminalizes forcible sodomy. The statute at issue applies to all persons, married or single, heterosexual or homosexual.

SUMMARY OF ARGUMENT

The issue before the Court in this case is far more significant and complex than its phrasing by the State of Georgia would indicate. Properly phrased, the question is whether the State, using moral indignation as its justification, may intrude into personal relationships and invade people's homes to criminalize private consensual adult sexual conduct. *Amici* contend that where the sole objective of a statute is the regulation of private morality, the State's police power may not be employed to invade the privacy of protected spaces such as the home, absent ***4** a strong showing of harm. The Georgia statute in question is an improper exercise of the police power because it imposes criminal sanctions in order to enforce conformity to a single moral view, and in the process invades important personal rights. The traditional disapproval of homosexuality, proffered by the State as a rationale for this statute, is an impermissible goal in a pluralistic, secular society and does not justify the extreme intrusions on protected interests which the Georgia statute permits. It is simply inconsistent with "the concept of ordered liberty" and with contemporary understanding of what constitutes a civilized society to permit the State to express disapproval by allowing the entry of police into the privacy of one's bedroom to make an arrest for harmless noncommercial sexual conduct between consenting adults.

ARGUMENT

I. THE STATE HAS FAILED TO SHOW SUFFICIENT JUSTIFICATION FOR THIS EXERCISE OF THE POLICE POWER WHICH INTRUDES INTO THE PRIVACY OF THE HOME TO REGULATE INTIMATE CONDUCT BETWEEN CONSENTING ADULTS.

The Georgia statute is an exercise of the State's police power, the power of the State to regulate in the public interest. The police power "connotes the timetested conceptional limit of public encroachment upon private interests." [1] ***5** *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962). To determine if a regulation is a valid exercise of the police power, the Court is guided by the following rule:

"To justify the State in ... interposing its authority in behalf of the public, it must appear, first, that the interests of the public ... require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Id. at 594-95 (quoting *Lawton v. Steele,* 152 U.S. 133, 137 (1894)).

In evaluating whether a challenged exercise of the police power is "not unduly oppressive upon individuals," the Court's inquiry properly focuses on the nature of the individual interest which is burdened and the extent of the burden, the rationality of the connection between the legislative purpose and the means chosen to achieve that purpose, the legitimacy of the legislative

purpose and the existence of alternative means to effectuate the legitimate governmental purpose. *Zablocki v. Redhail,* 434 U.S. 374, 396 (1978) (Stewart. J., concurring). *See also Moore v. City of East Cleveland,* 431 U.S. 374 (1978). The nature and magnitude of the individual interest involved largely determines the degree to which both the legislative purpose and the means chosen to promote it are subjected to ***6** judicial scrutiny. *See City of Cleburne v. Cleburne Living Center,* -- U.S. --, 105 S.Ct. 3249, 3260-3261 (1985) (Stevens, J., concurring).

In the present case, two important individual interests are implicated: the interest in engaging in intimate conduct of one's own choosing and the interest in "residential privacy" or the maintenance of the home as "a sanctuary privileged against prying eyes ... where most intimate associations are centered." Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624, 634 (1980). The individual's interest in engaging in truly private consensual sexual conduct, that is, sexual conduct in the seclusion of the home or a similar private space, is arguably "fundamental" within the meaning of this Court's prior decisions, as respondents and several other *amici* will argue. Even if not deemed "fundamental," however, these are undeniably important interests whose role in the life of individuals is significant, if not central. The Court has found that these interests are entitled to a significant degree of protection from governmental intrusion. *See, e.g., Roberts v. United States Jaycees,* -- U.S. --, 104 S.Ct. 3244, 3249-3250 (1984); *Payton v. New York,* 445 U.S. 573, 589-590 (1980).

Previous decisions of this Court have derived from the "concept of personal liberty and restrictions upon state action" contained in the Fourteenth Amendment, a right of privacy which functions as a substantive limit on the police power of the State to control certain kinds of conduct. *Roe v. Wade,* 410 U.S. 113, 153 (1973). In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49 (1973), this Court identified personal rights which may be deemed "fundamental" or "implicit in the concept of ordered liberty." ***7** *Id.* at 65 (quoting *Palko v. Connecticut,* 302 U.S. 319, 325 (1937)). The Court noted that these include "*the personal intimacies of the home,* the family, marriage, motherhood, procreation, and child rearing." *Id.* (emphasis added).

The principle that the State must respect the home as a place of sanctuary is one of the most cherished in our system of law and one that is firmly grounded in the Constitution. As the Court stated in *Payton v. New York,* 445 U.S. 573 (1980),

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their ... houses ... shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."

Id. at 589-90 (quoting *Silverman v. United States,* 365 U.S. 505, 511 (1961)).

The interest of the individual in the sanctuary of his home predominates even when the State seeks to regulate conduct not protected by a "fundamental" privacy right. Thus, the Court in *Stanley v. Georgia,* 394 U.S. 557 (1969), found that possession of obscene matter in the home was protected, even though such material was properly subject to regulation in the public arena. The Court stated:

> Moreover, in the context of this case--a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home--that right takes on an added dimension. For also fundamental is the ***8** right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

Id. at 564.

Thus the home itself, both because of the individual's need for a place of sanctuary and because it is the locus of intimate associations, has long been considered deserving of special constitutional protection. *Stanley v. Georgia,* 394 U.S. 557 (1969); *see also,* Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624, 634 (1980); Wilkinson & White, *Constitutional*

Protection for Personal Lifestyles, 62 Cornell L.Rev. 563, 588-89 (1977); Seigel, *Privacy: Control Over Stimulus Input, Stimulus Output and Self-Regarding Conduct*, 33 Buffalo L.Rev. 35 (1984); Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 Calif. L.Rev. 1447 (1976); Note, *Roe & Paris: Does Privacy Have a Principle?* 26 Stan.L.Rev. 1161, 1185-89 (1974).

The Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59 (1973), found the State's interests in controlling the public, commercial exploitation of sexuality and in establishing a "moral tone" for downtown areas sufficient to justify prohibiting the viewing of obscene material in a theatre. When the materials are viewed in the confines of one's home, however, the individual's interests in maintaining the home as a sanctuary for self-expression and as a situs for intimate relationships increase substantially, while the State's interests are considerably, if not entirely, diminished. When the Court in *Paris Adult Theatre I* rejected the notion that consenting adults had a right to watch obscene films in a public theatre, it reiterated that although such conduct was not protected by a fundamental ***9** privacy right it was nevertheless beyond the reach of the criminal law when it took place in the home. *Id.* at 66 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

The choice to form and maintain intimate human relationships is also a fundamental element of the personal liberty guaranteed by our constitutional system, and one which is protected from unwarranted interference by the State. *Roberts v. United States Jaycees*, -- U.S. --, 104 S.Ct. 3244, 3249 (1984). The Court stated:

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.

Id. at 3250.

The protection from unjustified government intrusion is not limited to marriage and "traditional" family relationships. As the Court in *Roberts* recognized, between the poles of family relationships and business associations,

> lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.

Id. at 3251.

An objective evaluation of homosexual relationships will locate them on the spectrum of human interactions ***10** closer to intimate family relationships than to impersonal business associations. Accordingly, there must be a higher degree of justification for State interference with a homosexual relationship than with a business arrangement.

Consistent with this Court's recent opinions, *amici* contend that the State must make a stronger showing to justify legislation which has as its only purpose the control of morality, especially when that legislation reaches into the confines of the home and touches intimate relationships. The State has broader latitude to regulate conduct in public places or conduct which more directly impinges on public sensibilities. [2] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447-449 (1972). However, the protection given to conduct in the home applies even where the prohibited conduct is not subject to the kind of per se privacy protection as are decisions regarding marriage and childbearing, and even where the majority disapproves of the conduct. *Stanley v. Georgia*, 394 U.S. 557 (1969).

***11 II. NEITHER THE DESIRE FOR MORAL CONFORMITY NOR THE TRADITIONAL DISAPPROVAL OF HOMOSEXUALITY ARE SUFFICIENT TO JUSTIFY THE GEORGIA STATUTE AS A PROPER EXERCISE OF THE POLICE POWER.**

A. The Regulation Of Private Morality Does Not Justify Georgia's Intrusion Into Intimate Relationships And The Home.

Petitioner concedes that the aim of the Georgia statute is to promote traditional morality. Petitioner's Brief at 34-36. However, the promotion of traditional notions of morality does not justify imposing criminal sanctions upon private consensual adult sexual behavior.

The State, of course, may regulate sexual activity when such regulation promotes a legitimate state interest. For example, Georgia has a proper role in proscribing forcible sexual acts, in protecting minors from being sexually used by adults, in preventing public displays of sexual behavior, and in regulating the commercialization of sexual activity. To promote these valid state interests, Georgia has a broad range of criminal statutes proscribing rape, Georgia Code section 16-6-1 (1981); forcible sodomy, *id.*, section 16-6-2; statutory rape, *id.*, section 16-6-3; child molestation, *id.*, section 16-6-4; public indecency, *id.*, section 16-6-8; prostitution, *id.*, section 16-6-9; pimping, *id.*, section 16-6-11; and pandering, *id.*, section 16-6-12. Obviously, with these prohibitions in place, the Georgia statute in question has only one possible purpose--regulation of the private sexual behavior of adults.

The sexual acts proscribed by the statute at issue are subject to criminal penalties even when they take place in ***12** total seclusion. The sole purpose for reaching such private conduct, and Petitioner's admitted rationale, is the expression of the collective moral disapproval of the enumerated acts by the General Assembly of Georgia. Petitioner's Brief at 31. This, however, is an impermissible purpose.

The protection of the public morality may, in some instances, be a legitimate State purpose. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973). However, private adult consensual sexual activity takes place without public scrutiny and without intruding upon the sensibilities of the general public. There is no element of force, commercialization, or exploitation of minors. In addition, nobody, including the participants, suffers any harm which justifies state intrusion. [3] In this instance, the interests of individuals in the sanctuary of their homes and in maintaining intimate relationships outweighs the interest of the State in regulating morality. Quite simply, " [n]o harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." Model Penal Code § 107.5--Sodomy and Related Offenses. Comment (Tent. Draft No. 4, 1955).

In the absence of any intrusion on the sensibilities of the general public, or any component of force, coercion, ***13** exploitation of the young or commercialization, the sole statutory purposes to be served are the prevention of moral indignation, outrage or disgust with which one segment of society regards another, and the enforced conformity of private sexual conduct to state-prescribed norms. Whatever the validity in other societies of the use of the criminal law to enforce majority views regarding private morals, [4] such use is singularly inappropriate in a secular, pluralistic society such as ours which was founded upon a tradition of nonconformity and which has institutionalized a number of guarantees in the Bill of Rights and Civil War Amendments to protect minorities from the democratically expressed will of the majority.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

The notion of required conformity to official views on matters so personal is antithetical to the basic political traditions of our society. *Id.* at 639-642. This deeply rooted respect and protection for minority rights in personal matters has proved sufficient

to overcome the disapproval ***14** of a substantial part of the citizenry towards interracial marriage, contraception and abortion. *Loving v. Virginia*, 388 U.S. 1 (1967) ; *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

Anti-sodomy laws, as Petitioner points out, are rooted in religious teachings. Petitioner's Brief at 20-21. However, the quest for moral conformity or the extirpation of sin are inconsistent with the function of a government of limited powers in a secular society. *See* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391 (1963). Even assuming the Georgia statute represents the majority's moral views, there are more appropriate methods for inculcating moral values than the criminal law: [5]

Immorality clearly should not be viewed as a sufficient or even a principal reason for proscribing conduct as criminal. Morals belong to the home, the school, and the church; and we have many homes, many schools, many churches. Our moral universe is polycentric. The state, especially when the most coercive of sanctions is at issue, should not seek to impose a spurious unity upon it.

H. Packer, *The Limits of the Criminal Sanction* 267 (1968). *See also,* ***15** *People v. Onofre*, 51 N.Y.2d 476, 488 n.3, 415 N.E.2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980), *cert. denied* 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 490 Pa. 91, 96, 415 A.2d 47, 50 (1980).

In short, the State exceeds the proper bounds of the police power when it acts solely to impose traditional notions of propriety. "There must remain a realm of private morality and immorality which is, in brief, and crude terms, not the law's business." *Wolfenden Report--Report of the Committee on Homosexual Offenses and Prostitution* ¶ 61 (1963). This is particularly true where the only harm of the actions proscribed is repugnance to some members of society. *See* Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A. L. Rev. 581 (1967); Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980).

When the State imposes criminal sanctions solely to prohibit that which it finds repugnant, it is regulating matters of personal taste. Such matters are beyond State regulation and properly left to the discretion of the individual. For example, in *Cohen v. California*, 403 U.S. 15 (1971), Justice Harlan wrote that the right to speech cannot be curtailed merely because the State, acting as guardian of the public morality, finds a vulgarity to be offensive.

> For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id. at 25.

***16** Similarly, in an area so personal as private consensual adult sexual conduct the government exceeds its authority when it chooses only certain sexual acts as "proper" for its citizens.

As was asserted at the outset, the issue is not whether there is necessarily a "fundamental" right to engage in homosexual conduct, or indeed in any adult sexual conduct. Rather, the issue is whether the police power of the State may be employed to intrude into intimate relationships and enforce the Legislature's views as to what is proper sexual conduct when that conduct takes place in a secluded, private space such as the home. The desire for moral conformity is not a sufficient justification for the extreme intrusions which result from enforcement of the Georgia statute.

B. The Traditional Disapproval of Homosexuality Is Not A Sufficient State Interest To Justify This Exercise Of The State's Police Power.

In addition to its interest in promoting traditional notions of morality, the State of Georgia justifies its statute on the basis of the historical antipathy towards homosexuals. Petitioner's Brief at 20-23. However, the bare desire to harm an unpopular group is not a legitimate state interest. *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973). In *Moreno,* the Court considered legislation which was amended to prevent hippies and hippie communes from participating in the food stamp program. The Court stated:

> "[A] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."

***17** *Id.* at 534-35 (quoting the opinion of the District Court below, 345 F.Supp. 310, 314 n.11 (D.D.C. 1973)).

Similarly, the Court in *O'Connor v. Donaldson,* 422 U.S. 563 (1975), struck down a statute providing for incarceration of mentally ill persons, stating:

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

Id. at 575 (citations omitted).

If public animosity alone is an insufficient State interest to justify deprivation of government benefits or incarceration of the mentally ill, it follows that there must be a stronger rationale than distaste for homosexuals to justify a statute which provides for a prison term up to 20 years for private consensual adult sexual conduct.

In the context of racial prejudice, the Court in *Palmore v. Sidoti,* -- U.S. --, 104 S.Ct. 1879, 1882 (1984) stated: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." And, in *City of Cleburne v. Cleburne Living Center,* -- U.S. --, 105 S.Ct. 3249 (1985), the Court struck down the application of a municipal zoning ordinance because it "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 3260. This same principle applies to the Georgia statute. The State has no legitimate interest in a statute which, solely on the basis of public distaste or disapproval and without a ***18** showing of harm to a public interest, outlaws private consensual sexual conduct.

Finally, in relying on the traditional condemnation of homosexuality to defend its statute, Georgia ignores the fact that the statute at issue criminalizes the same sexual acts performed by heterosexuals, both married and single. Even if the bald desire to proscribe homosexual conduct were a legitimate state interest, that interest is not rationally advanced by this statute because it criminalizes both heterosexual and homosexual acts. Furthermore, with respect to acts of sodomy committed by married persons, enforcement of this statute violates the "privacy surrounding the marriage relationship" and invades "the sacred precincts of marital bedrooms." *Griswold v. Connecticut,* 381 U.S. 479, 485-86 (1965).

III. THE CRIMINAL SANCTION IS AN IMPERMISSIBLE MEANS BY WHICH TO ACCOMPLISH THE STATE'S PURPOSE OF IMPOSING MORAL CONFORMITY ON ITS CITIZENS.

In addition to focusing on the nature of the individual interests at stake and the legitimacy of the State's purpose, the Court must examine the degree to which the State utilizes permissible means to promote a legitimate goal. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 647 (1974). In this instance, even if the prevention of homosexual conduct were a legitimate state

purpose, the use of criminal sanctions is an impermissible means of effectuating that purpose. Enforcement of the statute is not only a gross intrusion upon important liberty interests, but it is an ineffective way of promoting the State's view of morality.

***19** The Georgia statute is virtually unenforceable when applied to consensual adult intimate behavior which takes place in the privacy of the home. By definition, such conduct occurs in a place where it will only rarely be discovered by the State. It involves no victim to report the "crime," and causes no harm which might bring the conduct to the attention of the authorities. In reality, the proscribed conduct can be detected only by objectionable police surveillance techniques. As a consequence, enforcement is at best erratic, and at worst arbitrary and discriminatory. *See* H. Packer, *The Limits of The Criminal Sanction* 304 (1968).

To promote its moral values, the State has available to it a wide variety of means less intrusive upon personal liberty. These include "theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other non-coercive means." *People v. Onofre*, 51 N.Y.2d 476, 488 n.3, 415 N.E.2d 936, 940 n.3, 434 N.Y.S.2d 947, 951 n.3 (1980) *cert. denied*, 451 U.S. 987 (1981). In view of the liberty interests at stake, and the unenforceability of the statute, *amici* submit that the use of the criminal sanction in an impermissible means to further the State's interest in moral conformity.

CONCLUSION

The Georgia statute infringes on the right of Michael Hardwick to determine with whom and how he will experience sexual intimacy. In effect, Georgia has said that even in the home there is no sanctuary for persons who are homosexual. Such persons may never engage in sexual ***20** relations, no matter that they take place in a totally private setting, no matter the quality or duration of the relationship involved.

Amici submit that where adult sexual conduct is purely consensual, does not impinge on other members of the public, and does not harm the persons involved, the State's interest in the promotion of traditional morality does not justify imposition of criminal sanctions. As this case demonstrates, the enforcement of such laws requires an impermissible level of government intrusion into the home, as well as into matters so basic and personal as the choice of persons with whom one will be intimate. Georgia has failed to demonstrate a reason why criminalizing such private choices predominates over the individual's interest in maintaining intimate associations in the sanctuary of the home.

For the foregoing reasons, the Georgia statute should be held to be an unconstitutional exercise of the State's police power.

Footnotes

1 The "private interest" implicated when the State exercises its police power is the interest of the individual in liberty. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: " ... nor shall any State deprive any person of life, liberty, or property, without due process of law." The Due Process Clause affords not only a procedural guarantee against the deprivation of liberty, but also protects substantive aspects of liberty against unconstitutional restrictions by the State. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

2 For example, the State has a legitimate interest in regulating sexual conduct which takes place in public. As this Court has observed, the high degree of constitutional protection given to the marital relationship does not protect "marital intercourse on a street corner" or "at high noon in Times Square." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13, 67 (1973).

3 For example, statutes which regulate private conduct by prohibiting drug use or requiring motorcyclists to wear protective helmets, have been upheld, in part, on the ground that the State has an interest in preventing its citizens from harming themselves. *See, e.g. State v. Baker*, 56 Hawaii 271, 535 P.2d 1394 (1975) (use of marijuana); *State v. Lombardi*, 104 R.I. 28, 241 A.2d 625 (1968) (helmets). However, in the case of sodomy, even this element of self-inflicted harm is absent.

4 *See, e.g.*, the debate between H.L.A. Hart and Lord Patrick Devlin on the criminalization of private sexual conduct. H.L.A. Hart, *Law, Liberty and Morality* (1963); P. Devlin, *The Enforcement of Morals* (1965); Levi, *The Collective Morality of a Maturing Society*, 30 Wash. & Lee L.Rev. 399 (1973); Note, *Roe and Paris: Does Privacy Have a Principle?* 26 Stan. L.Rev. 1161, 1167-1171 (1974).

5 Petitioner argues that by decriminalizing sodomy, the State will be seen as condoning homosexuality and therefore immorality. Petitioner's Brief at 37-38. Yet removing criminal penalties from conduct does not automatically remove long-standing social or moral

restrictions. Given the considerable social stigma attached to homosexual conduct, it is unlikely that removal of criminal penalties on private, consensual homosexual conduct will make homosexuality more attractive, or marriage less attractive. *See* H. Packer, *The Limits of the Criminal Sanction* 264-265 (1968).

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478 U.S. 186 (1986)

BOWERS, ATTORNEY GENERAL OF GEORGIA
v.
HARDWICK ET AL.

No. 85-140.

Supreme Court of United States.

Argued March 31, 1986
Decided June 30, 1986

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

187 *187 *Michael E. Hobbs,* Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were *Michael J.* ***Bowers****,* Attorney General, *pro se, Marion O. Gordon,* First Assistant Attorney General, and *Daryl A. Robinson,* Senior Assistant Attorney General.

Laurence H. Tribe argued the cause for respondent **Hardwick**. With him on the brief were *Kathleen M. Sullivan* and *Kathleen L. Wilde.*[*]

Briefs of *amici curiae* urging affirmance were filed for the State of New York et al. by *Robert Abrams,* Attorney General of New York, *Robert Hermann,* Solicitor General, *Lawrence S. Kahn, Howard L. Zwickel, Charles R. Fraser,* and *Sanford M. Cohen,* Assistant Attorneys General, and *John Van de Kamp,* Attorney General of California; for the American Jewish Congress by *Daniel D. Levenson, David Cohen,* and *Frederick Mandel;* for the American Psychological Association et al. by *Margaret Farrell Ewing, Donald N. Bersoff, Anne Simon, Nadine Taub,* and *Herbert Semmel;* for the Association of the Bar of the City of New York by *Steven A. Rosen;* for the National Organization for Women by *John S. L. Katz;* and for the Presbyterian Church (U. S. A.) et al. by *Jeffrey O. Bramlett.*

Briefs of *amici curiae* were filed for the Lesbian Rights Project et al. by *Mary C. Dunlap;* and for the National Gay Rights Advocates et al. by *Edward P Errante, Leonard Graff,* and *Jay Kohorn.*

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent **Hardwick** (hereafter respondent) was charged with violating the Georgia statute
188 criminalizing *188 sodomy[1] by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy.[2] He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on *Doe v. Commonwealth's Attorney for the City of Richmond,* 403 F. Supp. 1199 (ED Va. 1975), which this Court summarily affirmed, 425 U. S. 901 (1976).

189 *189 A divided panel of the Court of Appeals for the Eleventh Circuit reversed. 760 F. 2d 1202 (1985). The court first held that, because *Doe* was distinguishable and in any event had been undermined by later decisions, our summary affirmance in that case did not require affirmance of the District Court. Relying on our decisions in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Stanley* v. *Georgia*, 394 U. S. 557 (1969); and *Roe* v. *Wade*, 410 U. S. 113 (1973), the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

Because other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit in this case,[3] we granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment.[4]

190 *190 This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977). *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), and *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), were described as dealing with child rearing and education; *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), with family relationships; *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), with procreation; *Loving* v. *Virginia*, 388 U. S. 1 (1967), with marriage; *Griswold* v. *Connecticut*, *supra*, and *Eisenstadt* v. *Baird*, *supra*, with contraception; and *Roe* v. *Wade*, 410 U. S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey* v. *Population Services International*, *supra*, at 688-689.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the
191 rights announced in those cases bears any resemblance to the *191 claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U. S., at 688, n. 5, 694, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer, Prince,* and *Pierce* fall in this category, as do the privacy cases from *Griswold* to *Carey.*

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut,* 302 U. S. 319, 325, 326 (1937), it was said that this category includes
192 those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither *192 liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland,* 431 U. S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.,* at 503 (POWELL, J.). See also *Griswold v. Connecticut,* 381 U. S., at 506.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13
193 States when they ratified the Bill of Rights.[5] In 1868, when the Fourteenth Amendment was *193 ratified, all but 5 of the 37 States in the Union had criminal sodomy laws.[6] In fact, until 1961,[7] all 50 States outlawed
194 sodomy, and today, 24 States and the District of Columbia *194 continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U. Miami L. Rev., *supra,* at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in
195 the 1930's, which resulted in the repudiation *195 of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls for short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley v. Georgia,* 394 U. S. 557 (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Id.,* at 565.

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. *Id.,* at 568, n. 11. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed
196 right to homosexual conduct *196 while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.[8]

Accordingly, the judgment of the Court of Appeals is

Reversed.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, *ante,* at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just.
197 9.9.31. See also D. Bailey, Homosexuality *197 and the Western Christian Tradition 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous *crime against nature*" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right — *i. e.,* no substantive right under the Due Process Clause — such as that claimed by respondent **Hardwick**, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. § 16-6-2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct — certainly a sentence of long duration — would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting
198 of a home, is a *198 felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, § 16-5-24, first-degree arson, § 16-7-60, and robbery, § 16-8-40.[1]

In this case, however, respondent has not been tried, much less convicted and sentenced.[2] Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

199 *199 JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante,* at 191, than *Stanley* v. *Georgia,* 394 U. S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz* v. *United States,* 389 U. S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. § 16-6-2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that § 16-6-2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." *Ante,* at 190. But the fact that the moral judgments expressed by statutes like § 16-6-2 may be " `natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.' " *Roe* v. *Wade,* 410 U. S. 113, 117 (1973), quoting *Lochner* v. *New York,* 198 U. S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent **Hardwick's** claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its
200 citizens for making choices about the most intimate *200 aspects of their lives, it must do more than assert that the choice they have made is an " `abominable crime not fit to be named among Christians.' " *Herring* v. *State,* 119 Ga. 709, 721, 46 S. E. 876, 882 (1904).

I

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confe[r] a fundamental right upon homosexuals to engage in sodomy," *ante,* at 190, the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. *ante,* at 188, n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. § 16-6-2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of § 16-6-2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity.

201 [1] I therefore see no basis for the *201 Court's decision to treat this case as an "as applied" challenge to § 16-6-2, see *ante,* at 188, n. 2, or for Georgia's attempt, both in its brief and at oral argument, to defend § 16-6-2 solely on the grounds that it prohibits homosexual activity. Michael **Hardwick's** standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. See Tr. of Oral Arg. 4-5; cf. 760 F. 2d 1202, 1205-1206 (CA11 1985). But his claim that § 16-6-2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether § 16-6-2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. *Ante,* at 196, n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on *Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965), which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. See Brief for Respondent **Hardwick** 10-12; Tr. of Oral Arg. 33. More importantly, the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is *any* ground on which respondent may be entitled to relief. This case is before us on petitioner's motion to dismiss for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6). See App. 17. It is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to

202 examine the complaint to determine if the allegations provide for relief on any possible theory." *202 *Bramlet* v. *Wilson,* 495 F. 2d 714, 716 (CA8 1974); see *Parr* v. *Great Lakes Express Co.,* 484 F. 2d 767, 773 (CA7 1973); *Due* v. *Tallahassee Theaters, Inc.,* 333 F. 2d 630, 631 (CA5 1964); *United States* v. *Howell,* 318 F. 2d 162, 166 (CA9 1963); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, pp. 601-602 (1969); see also *Conley* v. *Gibson,* 355 U. S. 41, 45-46 (1957). Thus, even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that **Hardwick** has stated a cognizable claim that § 16-6-2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either

203 provision should be peremptorily dismissed.[2] The Court's cramped reading of the *203 issue before it makes for a short opinion, but it does little to make for a persuasive one.

II

"Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh* v. *American College of Obstetricians & Gynecologists,* 476 U. S. 747, 772 (1986). In construing the right to privacy, the Court has

204 proceeded along two somewhat distinct, *204 albeit complementary, lines. First, it has recognized a privacy

interest with reference to certain *decisions* that are properly for the individual to make. *E. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged. *E. g.*, *United States* v. *Karo*, 468 U. S. 705 (1984); *Payton* v. *New York*, 445 U. S. 573 (1980); *Rios* v. *United States*, 364 U. S. 253 (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." *Ante*, at 190-191. While it is true that these cases may be characterized by their connection to protection of the family, see *Roberts* v. *United States Jaycees*, 468 U. S. 609, 619 (1984), the Court's conclusion that they extend no further than this boundary ignores the warning in *Moore* v. *East Cleveland*, 431 U. S. 494, 501 (1977) (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the `moral fact that a person belongs to himself and not others nor to society as a whole.' " *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U. S., at 777, n. 5 (STEVENS, J., concurring), quoting Fried,
205 Correspondence, 6 Phil. & Pub. Affairs 288-289 (1977). And so we protect the decision whether to *205 marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold* v. *Connecticut*, 381 U. S., at 486. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. *Thornburgh* v. *American College of Obstetricians & Gynecologists*, *supra*, at 777, n. 6 (STEVENS, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. *Moore* v. *East Cleveland*, 431 U. S., at 500-506 (plurality opinion). The Court recognized in *Roberts*, 468 U. S., at 619, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others." *Ibid.*

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 63 (1973); see also *Carey* v. *Population Services International*, 431 U. S. 678, 685 (1977). The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. See Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 637 (1980); cf. *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Roe* v. *Wade*, 410 U. S., at 153.

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to
206 choose *206 how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to

a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is `right' and the Amish and others like them are `wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin* v. *Yoder,* 406 U. S. 205, 223-224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

B

The behavior for which **Hardwick** faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a `place,' " *Katz* v. *United States,* 389 U. S., at 361 (Harlan, J., concurring), "the essence of a Fourth Amendment violation is `not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is `the invasion of his indefensible right of personal security, personal
207 liberty and private property.' " *California* v. *Ciraolo,* 476 U. S. 207, 226 (1986) (POWELL, J., dissenting), *207 quoting *Boyd* v. *United States,* 116 U. S. 616, 630 (1886).

The Court's interpretation of the pivotal case of *Stanley* v. *Georgia,* 394 U. S. 557 (1969), is entirely unconvincing. *Stanley* held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. *Ante,* at 195. But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

> " `The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.'
>
> .....
>
> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases — the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U. S., at 564-565, quoting *Olmstead* v. *United States,* 277 U. S., at 478 (Brandeis, J., dissenting).

The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead,* a case raising *no* First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49 (1973), the Court suggested that reliance on
208 the Fourth *208 Amendment not only supported the Court's outcome in *Stanley* but actually was *necessary* to

it: "If obscene material unprotected by the First Amendment in itself carried with it a `penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the `privacy of the home,' which was hardly more than a reaffirmation that `a man's home is his castle.' " 413 U. S., at 66. "The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution," *ante,* at 195. Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for § 16-6-2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Brief for Petitioner 37. Inasmuch as this case was dismissed by the District Court on the pleading, it is not surprising that the record before us is barren of any evidence to support petitioner's claim.[3]
209 In light of the state of the record, I see *209 no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," *ante,* at 195, to which *Stanley* refused to extend its protection. 394 U. S., at 568, n. 11. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless," *ante,* at 195: drugs and weapons are inherently dangerous, see, *e. g., McLaughlin* v. *United States,* 476 U. S. 16 (1986), and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by § 16-6-2 to be physically dangerous, either to the persons engaged in it or to others.[4]

210 *210 The core of petitioner's defense of § 16-6-2, however, is that respondent and others who engage in the conduct prohibited by § 16-6-2 interfere with Georgia's exercise of the " `right of the Nation and of the States to maintain a decent society,' " *Paris Adult Theater I* v. *Slaton,* 413 U. S., at 59-60, quoting *Jacobellis* v. *Ohio,* 378 U. S. 184, 199 (1964) (Warren, C. J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in § 16-6-2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19; see *ante,* at 190, 192-194, 196.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's security. See, *e. g., Roe* v. *Wade,* 410 U. S. 113 (1973); *Loving* v. *Virginia,* 388 U. S. 1 (1967); *Brown* v. *Board of Education,* 347 U. S. 483 (1954).[5] As Justice
211 Jackson wrote so eloquently *211 for the Court in *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 641-642 (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L. J., at 627. It is

precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for § 16-6-2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. See, *e. g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 429-453 (1961); *Stone* v. *Graham*, 449 U. S. 39 (1980). Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16-6-2 represents a legitimate use of secular coercive power.[6] A State can no more
212 punish private behavior because *212 of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore* v. *Sidoti*, 466 U. S. 429, 433 (1984). No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor* v. *Donaldson*, 422 U. S. 563, 575 (1975). See also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *United States Dept. of Agriculture* v. *Moreno*, 413 U. S. 528, 534 (1973).

Nor can § 16-6-2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theatre I*, 413 U. S., at 68-69. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, Immorality and Treason, reprinted in The Law as Literature 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public
213 sensibilities and those that enforce private morality. Statutes banning *213 public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See *Paris Adult Theatre I*, 413 U. S., at 66, n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965)).[7]

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. *Diamond* v. *Charles*, 476 U. S. 54, 65-66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

IV

It took but three years for the Court to see the error in its analysis in *Minersville School District* v. *Gobitis*, 310
214 U. S. *214 586 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West*

Virginia Board of Education v. *Barnette*, 319 U. S. 624 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Like the statute that is challenged in this case,[1] the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes.[2] Sodomy was condemned as an odious and sinful type of behavior during the
215 formative period of the common law.[3] *215 That condemnation was equally damning for heterosexual and homosexual sodomy.[4] Moreover, it provided no special exemption for married couples.[5] The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature."

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy.[6] Indeed, at one point in the 20th century, Georgia's law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited between heterosexuals.[7] The history of the statutes cited by the majority as proof for the proposition that sodomy is
216 not constitutionally protected, *ante,* at 192-194, *216 and nn. 5 and 6, similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy.[8]

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

I

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.[9] Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972).

217 *217 In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

> "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain

> unusually important decisions that will affect his own, or his family's destiny. The Court has referred to such decisions as implicating `basic values,' as being `fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom — the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." *Fitzgerald v. Porter Memorial Hospital*, 523 F. 2d 716, 719-720 (CA7 1975) (footnotes omitted), cert. denied, 425 U. S. 916 (1976).

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to
218 conduct their intimate relations is a matter for them — not the *218 State — to decide.[10] The essential "liberty" that animated the development of the law in cases like *Griswold, Eisenstadt,* and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within "the sacred precincts of marital bedrooms," *Griswold*, 381 U. S., at 485, or, indeed, between unmarried heterosexual adults. *Eisenstadt*, 405 U. S., at 453. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16-6-2 of the Georgia Criminal Code.

II

If the Georgia statute cannot be enforced as it is written — if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens — the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct
219 himself in his personal and voluntary *219 associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest — something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." *Ante,* at 196. But the Georgia electorate has

expressed no such belief — instead, its representatives enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does not Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him. As JUSTICE POWELL points out, moreover, Georgia's prohibition on private, consensual sodomy has not been enforced for decades.[11] The record of nonenforcement, in this case and in the last several decades, belies the
220 Attorney General's representations *220 about the importance of the State's selective application of its generally applicable law.[12]

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter,* is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

III

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's *post hoc* explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss.[13]

I respectfully dissent.

[*] Briefs of *amici curiae* urging reversal were filed for the Catholic League for Religious and Civil Rights by *Steven Frederick McDowell;* for the Rutherford Institute et al. by *W. Charles Bundren, Guy O. Farley, Jr., George M. Weaver, William B. Hollberg, Wendell R. Bird, John W Whitehead, Thomas O. Kotouc,* and *Alfred Lindh;* and for David Robinson, Jr., *pro se.*

[1] Georgia Code Ann. § 16-6-2 (1984) provides, in pertinent part, as follows:

"(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

"(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . ."

[2] John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by § 16-6-2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and **Hardwick's** arrest. *Id.,* at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. *Id.,* at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim for lack of standing, 760 F. 2d 1202, 1206-1207 (CA11 1985), and the Does do not challenge that holding in this Court.

The only claim properly before the Court, therefore, is **Hardwick's** challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.

[3] See *Baker* v. *Wade,* 769 F. 2d 289, rehearing denied, 774 F. 2d 1285 (CA5 1985) (en banc); *Dronenburg* v. *Zech,* 239 U. S. App. D. C. 229, 741 F. 2d 1388, rehearing denied, 241 U. S. App. D. C. 262, 746 F. 2d 1579 (1984).

[4] Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in *Doe.* We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action

in *Doe*. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 14 (1976); *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 309, n. 1 (1976); *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). Cf. *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1975).

[5] Criminal sodomy laws in effect in 1791:

Connecticut: 1 Public Statute Laws of the State of Connecticut, 1808, Title LXVI, ch. 1, § 2 (rev. 1672).

Delaware: 1 Laws of the State of Delaware, 1797, ch. 22, § 5 (passed 1719).

Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784. The First Laws of the State of Georgia, pt. 1, p. 290 (1981).

Maryland had no criminal sodomy statute in 1791. Maryland's Declaration of Rights, passed in 1776, however, stated that "the inhabitants of Maryland are entitled to the common law of England," and sodomy was a crime at common law. 4 W. Swindler, Sources and Documents of United States Constitutions 372 (1975).

Massachusetts: Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785.

New Hampshire passed its first sodomy statute in 1718. Acts and Laws of New Hampshire 1680-1726, p. 141 (1978).

Sodomy was a crime at common law in New Jersey at the time of the ratification of the Bill of Rights. The State enacted its first criminal sodomy law five years later. Acts of the Twentieth General Assembly, Mar. 18, 1796, ch. DC, § 7.

New York: Laws of New York, ch. 21 (passed 1787).

At the time of ratification of the Bill of Rights, North Carolina had adopted the English statute of Henry VIII outlawing sodomy. See Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina, ch. 17, p. 314 (Martin ed. 1792).

Pennsylvania: Laws of the Fourteenth General Assembly of the Commonwealth of Pennsylvania, ch. CLIV, § 2 (passed 1790).

Rhode Island passed its first sodomy law in 1662. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719, p. 142 (1977).

South Carolina: Public Laws of the State of South Carolina, p. 49 (1790).

At the time of the ratification of the Bill of Rights, Virginia had no specific statute outlawing sodomy, but had adopted the English common law. 9 Hening's Laws of Virginia, ch. 5, § 6, p. 127 (1821) (passed 1776).

[6] Criminal sodomy statutes in effect in 1868:

Alabama: Ala. Rev. Code § 3604 (1867).

Arizona (Terr.): Howell Code, ch. 10, § 48 (1865).

Arkansas: Ark. Stat., ch. 51, Art. IV, § 5 (1858).

California: 1 Cal. Gen. Laws, ¶ 1450, § 48 (1865).

Colorado (Terr.): Colo. Rev. Stat., ch. 22, §§ 45, 46 (1868).

Connecticut: Conn. Gen. Stat., Tit. 122, ch. 7, § 124 (1866).

Delaware: Del. Rev. Stat., ch. 131, § 7 (1893).

Florida: Fla. Rev. Stat., div. 5, § 2614 (passed 1868) (1892).

Georgia: Ga. Code §§ 4286, 4287, 4290 (1867).

Kingdom of Hawaii: Haw. Penal Code, ch. 13, § 11 (1869).

Illinois: Ill. Rev. Stat., div. 5, §§ 49, 50 (1845).

Kansas (Terr.): Kan. Stat., ch. 53, § 7 (1855).

Kentucky: 1 Ky. Rev. Stat., ch. 28, Art. IV, § 11 (1860).

Louisiana: La. Rev. Stat., Crimes and Offences, § 5 (1856).

Maine: Me. Rev. Stat., Tit. XII, ch. 160, § 4 (1840).

Maryland: 1 Md. Code, Art. 30, § 201 (1860).

Massachusetts: Mass. Gen. Stat., ch. 165, § 18 (1860).

Michigan: Mich. Rev. Stat., Tit. 30, ch. 158, § 16 (1846).

Minnesota: Minn. Stat., ch. 96, § 13 (1859).

Mississippi: Miss. Rev. Code, ch. 64, § LII, Art. 238 (1857).

Missouri: 1 Mo. Rev. Stat., ch. 50, Art. VIII, § 7 (1856).

Montana (Terr.): Mont. Acts, Resolutions, Memorials, Criminal Practice Acts, ch. IV, § 44 (1866).

Nebraska (Terr.): Neb. Rev. Stat., Crim. Code, ch. 4, § 47 (1866).

Nevada (Terr.): Nev. Comp. Laws, 1861-1900, Crimes and Punishments, § 45.

New Hampshire: N. H. Laws, Act. of June 19, 1812, § 5 (1815).

New Jersey: N. J. Rev. Stat., Tit. 8, ch. 1, § 9 (1847).

New York: 3 N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 5, § 20 (5th ed. 1859).

North Carolina: N. C. Rev. Code, ch. 34, § 6 (1855).

Oregon: Laws of Ore., Crimes — Against Morality, etc., ch. 7, § 655 (1874).

Pennsylvania: Act of Mar. 31, 1860, § 32, Pub. L. 392, in 1 Digest of Statute Law of Pa. 1700-1903, p. 1011 (Purdon 1905).

Rhode Island: R. I. Gen. Stat., ch. 232, § 12 (1872).

South Carolina: Act of 1712, in 2 Stat. at Large of S. C. 1682-1716, p. 493 (1837).

Tennessee: Tenn. Code, ch. 8, Art. 1, § 4843 (1858).

Texas: Tex. Rev. Stat., Tit. 10, ch. 5, Art. 342 (1887) (passed 1860).

Vermont: Acts and Laws of the State of Vt. (1779).

Virginia: Va. Code, ch. 149, § 12 (1868).

West Virginia: W. Va. Code, ch. 149, § 12 (1868).

Wisconsin (Terr.): Wis. Stat. § 14, p. 367 (1839).

[7] In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. Criminal Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill. Rev. Stat., ch. 38, ¶¶ 11-2, 11-3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962).

[8] Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

[1] Among those States that continue to make sodomy a crime, Georgia authorizes one of the longest possible sentences. See Ala. Code § 13A-6-65(a)(3) (1982) (1-year maximum); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (West Supp. 1985) (30 days); Ark. Stat. Ann. § 41-1813 (1977) (1-year maximum); D. C. Code § 22-3502 (1981) (10-year maximum); Fla. Stat. § 800.02 (1985) (60-day maximum); Ga. Code Ann. § 16-6-2 (1984) (1 to 20 years); Idaho Code § 18-6605 (1979) (5-year minimum); Kan. Stat. Ann. § 21-3505 (Supp. 1985) (6-month maximum); Ky. Rev. Stat. § 510.100 (1985) (90 days to 12 months); La. Rev. Stat. Ann. § 14:89 (West 1986) (5-year maximum); Md. Ann. Code, Art. 27, §§ 553-554 (1982) (10-year maximum); Mich. Comp. Laws § 750.158 (1968) (15-year maximum); Minn. Stat. § 609.293 (1984) (1-year maximum); Miss. Code Ann. § 97-29-59 (1973) (10-year maximum); Mo. Rev. Stat. § 566.090 (Supp. 1984) (1-year maximum); Mont. Code Ann. § 45-5-505 (1985) (10-year maximum); Nev. Rev. Stat. § 201.190 (1985) (6-year maximum); N. C. Gen. Stat. § 14-177 (1981) (10-year maximum); Okla. Stat., Tit. 21, § 886 (1981) (10-year maximum); R. I. Gen. Laws § 11-10-1 (1981) (7 to 20 years); S. C. Code § 16-15-120 (1985) (5-year maximum); Tenn. Code Ann. § 39-2-612 (1982) (5 to 15 years); Tex. Penal Code Ann. § 21.06 (1974) ($200 maximum fine); Utah Code Ann. § 76-5-403 (1978) (6-month maximum); Va. Code § 18.2-361 (1982) (5-year maximum).

[2] It was conceded at oral argument that, prior to the complaint against respondent **Hardwick**, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades. See *Thompson v. Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939). Moreover, the State has declined to present the criminal charge against **Hardwick** to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute. The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the

Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right.

[1] Until 1968, Georgia defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Crim. Code § 26-5901 (1933). In *Thompson* v. *Aldredge*, 187 Ga. 467, 200 S. E. 799 (1939), the Georgia Supreme Court held that § 26-5901 did not prohibit lesbian activity. And in *Riley* v. *Garrett*, 219 Ga. 345, 133 S. E. 2d 367 (1963), the Georgia Supreme Court held that § 26-5901 did not prohibit heterosexual cunnilingus. Georgia passed the act-specific statute currently in force "perhaps in response to the restrictive court decisions such as *Riley*," Note, The Crimes Against Nature, 16 J. Pub. L. 159, 167, n. 47 (1967).

[2] In *Robinson* v. *California*, 370 U. S. 660 (1962), the Court held that the Eighth Amendment barred convicting a defendant due to his "status" as a narcotics addict, since that condition was "apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In *Powell* v. *Texas*, 392 U. S. 514 (1968), where the Court refused to extend *Robinson* to punishment of public drunkenness by a chronic alcoholic, one of the factors relied on by JUSTICE MARSHALL, in writing the plurality opinion, was that Texas had not "attempted to regulate appellant's behavior in the privacy of his own home." *Id.*, at 532. JUSTICE WHITE wrote separately:

"Analysis of this difficult case is not advanced by preoccupation with the label `condition.' In *Robinson* the Court dealt with `a statute which makes the "status" of narcotic addiction a criminal offense . . . .' 370 U. S., at 666. By precluding criminal conviction for such a `status' the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. . . . If it were necessary to distinguish between `acts' and `conditions' for purposes of the Eighth Amendment, I would adhere to the concept of `condition' implicit in the opinion in *Robinson* . . . . The proper subject of inquiry is whether volitional acts brought about the `condition' and whether those acts are sufficiently proximate to the `condition' for it to be permissible to impose penal sanctions on the `condition.' " *Id.*, at 550-551, n. 2.

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a "disease" or disorder. See Brief for American Psychological Association and American Public Health Association as *Amici Curiae* 8-11. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality. Consequently, under JUSTICE WHITE's analysis in *Powell*, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations," *Carey* v. *Population Services International*, 431 U. S. 678, 711 (1977) (POWELL, J., concurring in part and concurring in judgment), is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy.

With respect to the Equal Protection Clause's applicability to § 16-6-2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374 (1886). The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend § 16-6-2 on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class. See, *e. g.*, *Rowland* v. *Mad River Local School District*, 470 U. S. 1009 (1985) (BRENNAN, J., dissenting from denial of certiorari); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285 (1985).

[3] Even if a court faced with a challenge to § 16-6-2 were to apply simple rational-basis scrutiny to the statute, Georgia would be required to show an actual connection between the forbidden acts and the ill effects it seeks to prevent. The connection between the acts prohibited by § 16-6-2 and the harms identified by petitioner in his brief before this Court is a subject of hot dispute, hardly amenable to dismissal under Federal Rule of Civil Procedure 12(b)(6). Compare, *e. g.*, Brief for Petitioner 36-37 and Brief for David Robinson, Jr., as *Amicus Curiae* 23-28, on the one hand, with *People* v. *Onofre*, 51 N. Y. 2d 476, 489, 415 N. E. 2d 936, 941 (1980); Brief for the Attorney General of the State of New York, joined by the Attorney General of the State of California, as *Amici Curiae* 11-14; and Brief for the American Psychological Association and American Public Health Association as *Amici Curiae* 19-27, on the other.

[4] Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points, *ante*, at 196), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity is warranted. See Tr. of Oral Arg. 21-22. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

[5] The parallel between *Loving* and this case is almost uncanny. There, too, the State relied on a religious justification for its law. Compare 388 U. S., at 3 (quoting trial court's statement that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix"), with Brief for Petitioner 20-21

(relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that "traditional Judeo-Christian values proscribe such conduct"). There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions. Compare Brief for Appellee in *Loving v. Virginia,* O. T. 1966, No. 395, pp. 28-29, with *ante,* at 192-194, and n. 6. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the conduct at issue. Compare 388 U. S., at 6, n. 5 (noting that 16 States still outlawed interracial marriage), with *ante,* at 193-194 (noting that 24 States and the District of Columbia have sodomy statutes). Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, see 388 U. S., at 7-12, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.,* at 12.

[6] The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense was, in Sir James Stephen's words, "merely ecclesiastical." 2J. Stephen, A History of the Criminal Law of England 429-430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, The History of English Law 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. 6 E. Coke, Institutes, ch. 10 (4th ed. 1797).

[7] At oral argument a suggestion appeared that, while the Fourth Amendment's special protection of the home might prevent the State from enforcing § 16-6-2 against individuals who engage in consensual sexual activity there, that protection would not make the statute invalid. See Tr. of Oral Arg. 10-11. The suggestion misses the point entirely. If the law is not invalid, then the police *can* invade the home to enforce it, provided, of course, that they obtain a determination of probable cause from a neutral magistrate. One of the reasons for the Court's holding in *Griswold v. Connecticut,* 381 U. S. 479 (1965), was precisely the possibility, and repugnance, of permitting searches to obtain evidence regarding the use of contraceptives. *Id.,* at 485-486. Permitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned by § 16-6-2 seems no less intrusive, or repugnant. Cf. *Winston v. Lee,* 470 U. S. 753 (1985); *Mary Beth G. v. City of Chicago,* 723 F. 2d 1263, 1274 (CA7 1983).

[1] See Ga. Code Ann. § 16-6-2(a) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another").

[2] The Court states that the "issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Ante,* at 190. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present "for a very long time." See nn. 3, 4, and 5, *infra.* Moreover, the reasoning the Court employs would provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

[3] See, *e. g.,* 1 W. Hawkins, Pleas of the Crown 9 (6th ed. 1787) ("All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the antient common law, and punished, according to some authors, with burning; according to others, with burying alive"); 4 W. Blackstone, Commentaries *215 (discussing "the infamous *crime against nature,* committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished").

[4] See 1 E. East, Pleas of the Crown 480 (1803) ("This offence, concerning which the least notice is the best, 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"); J. Hawley & M. McGregor, The Criminal Law 287 (3d ed. 1899) ("Sodomy is the carnal knowledge against the order of nature by two persons with each other, or of a human being with a beast. . . . The offense may be committed between a man and a woman, or between two male persons, or between a man or a woman and a beast").

[5] See J. May, The Law of Crimes § 203 (2d ed. 1893) ("Sodomy, otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast. . . . It may be committed by a man with a man, by a man with a beast, or by a woman with a beast, or by a man with a woman — his wife, in which case, if she consent, she is an accomplice").

[6] The predecessor of the current Georgia statute provided: "Sodomy is the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Code, Tit. 1, Pt. 4, § 4251 (1861). This prohibition of heterosexual sodomy was not purely hortatory. See, *e. g., Comer v. State,* 21 Ga. App. 306, 94 S. E. 314 (1917) (affirming prosecution for consensual heterosexual sodomy).

[7] See *Thompson v. Aldredge,* 187 Ga. 467, 200 S. E. 799 (1939).

[8] A review of the statutes cited by the majority discloses that, in 1791, in 1868, and today, the vast majority of sodomy statutes do not differentiate between homosexual and heterosexual sodomy.

[9] See *Loving v. Virginia,* 388 U. S. 1 (1967). Interestingly, miscegenation was once treated as a crime similar to sodomy. See Hawley & McGregor, The Criminal Law, at 287 (discussing crime of sodomy); *id.,* at 288 (discussing crime of miscegenation).

[10] Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple. See Tr. of Oral Arg. 8 (stating that application of the statute to a married couple "would be unconstitutional" because of the "right of marital privacy as identified by the Court in Griswold"). Significantly, Georgia passed the current statute three years after the Court's decision in *Griswold*.

[11] *Ante,* at 198, n. 2 (POWELL, J., concurring). See also Tr. of Oral Arg. 4-5 (argument of Georgia Attorney General) (noting, in response to question about prosecution "where the activity took place in a private residence," the "last case I can recall was back in the 1930's or 40's").

[12] It is, of course, possible to argue that a statute has a purely symbolic role. Cf. *Carey* v. *Population Services International,* 431 U. S. 678, 715, n. 3 (1977) (STEVENS, J., concurring in part and concurring in judgment) ("The fact that the State admittedly has never brought a prosecution under the statute . . . is consistent with appellants' position that the purpose of the statute is merely symbolic"). Since the Georgia Attorney General does not even defend the statute as written, however, see n. 10, *supra,* the State cannot possibly rest on the notion that the statute may be defended for its symbolic message.

[13] Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraces all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed either in the record of this case or in the text of the statute. If that is true, although the text of the statute is clear enough, its true meaning may be "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." *Marks* v. *United States,* 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part).

U.S. Supreme Court

BOWERS v. HARDWICK, 478 U.S. 186 (1986)

478 U.S. 186

BOWERS, ATTORNEY GENERAL OF GEORGIA v. HARDWICK ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-140.

Argued March 31, 1986
Decided June 30, 1986

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., post, p. 196, and POWELL, J., post, p. 197, filed concurring opinions. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, post, p. 199. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 214.

Laurence H. Tribe argued the cause for respondent Hardwick. With him on the brief were Kathleen M. Sullivan and Kathleen L. Wilde. *

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing [478 U.S. 186, 188] sodomy 1 by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. 2 He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on Doe v. Commonwealth's Attorney for the City of Richmond, 403 F. Supp. 1199 (ED Va. 1975), which this Court summarily affirmed, 425 U.S. 901 (1976). [478 U.S. 186, 189]

A divided panel of the Court of Appeals for the Eleventh Circuit reversed. …[T]he court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the

Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

….

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case.

[W]e think it evident that none of the rights announced in those cases bears any resemblance to the [478 U.S. 186, 191] claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in Carey twice asserted that the privacy right, which the Griswold line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U.S., at 688 , n. 5, 694, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. Meyer, Prince, and Pierce fall in this category, as do the privacy cases from Griswold to Carey.

…

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct

have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. 5 In 1868, when the Fourteenth Amendment was [478 U.S. 186, 193] ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. 6 In fact, until 1961, 7 all 50 States outlawed sodomy, and today, 24 States and the District of Columbia [478 U.S. 186, 194] continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U. Miami L. Rev., supra, at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

…

.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis. 8

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

I

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. 9 Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Griswold v. Connecticut, 381 U.S. 479 (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. Carey v. Population Services International, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972). [478 U.S. 186, 217]

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago: ….

II

If the Georgia statute cannot be enforced as it is written - if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens - the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary [478 U.S. 186, 219] associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest - something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." Ante, at 196. But the Georgia electorate has expressed no such belief - instead, its representatives enacted a law that presumably reflects the belief that all sodomy is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

….

III

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's post hoc explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss. 13

I respectfully dissent.

[

No. 85-140

In The

Supreme Court of the United States

October Term, 1985

MICHAEL BOWERS,
Attorney General of Georgia,

Petitioner,

v.

MICHAEL HARDWICK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE FOR LESBIAN RIGHTS PROJECT, WOMEN'S LEGAL DEFENSE FUND, EQUAL RIGHTS ADVOCATES, INC., WOMEN'S LAW PROJECT, and NATIONAL WOMEN'S LAW CENTER

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* NOTE: This brief is published in the form in which it was submitted to the United States Supreme Court. Spelling errors have been indicated, but not corrected. No other editorial changes have been made to text or footnotes.—EDS.

INTEREST AND DESCRIPTION OF AMICI CURIAE

This brief *amicus curiae* in support of respondents is submitted on behalf of the Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., Women's Law Project and National Women's Law Center.*

The Lesbian Rights Project is a public interest law firm doing impact litigation and providing no-fee legal services for lesbians and gay men who encounter discrimination on the basis of sexual orientation. Founded in 1977, the Lesbian Rights Project is the only legal organization in the country which emphasizes litigation and public education in areas of law of special concern to lesbians, including the right of a parent to child custody and visitation without reference to the parent's sexual orientation, equal access for lesbians and gay men to adoption and foster parenting, the right of non-marital partners to speak for each other in the event of incapacity or illness, and the right of non-marital partners to equal employment benefits. The Project also does legal work in the area of employment discrimination, insurance discrimination, access to public accommodations, discrimination in the military, and decriminalization of private consensual sexual behavior.

Women's Legal Defense Fund (WLDF) is a private non-profit membership organization located in Washington, D.C. It was founded in 1971 to assist women in their efforts to achieve equality under the law. WLDF is dedicated to eliminate sex discrimination and sex stereotypes, and believes that discrimination against lesbians and gay men is intricately connected to discrimination against women in our society. WLDF further believes that the right to control over one's body, which encompasses matters of reproduction and sexuality, is critical to the achievement of equality between the sexes.

Equal Rights Advocates, Inc. is a San Francisco-based, public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA, Inc. has been particularly concerned with gender equality in the workforce because economic independence is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through ERA, Inc.'s participation, both as counsel and as *amicus*, in numerous employment discrimination cases.

The Women's Law Project is a non-profit feminist law firm which seeks to advance the legal status of women through litigation, public education, and individual counseling. During the past eleven years its activities have included work in the fields of health, reproductive freedom, employment, domestic relations, housing, insurance, credit, education, and constitutional privacy. Women's Law Project has become a unique resource for the women of Philadelphia and Pennsylvania, as well as an organization recognized nationally for its expertise and commitment in the field of women's rights.

* Letters from counsel for all parties consenting to the filing of this brief are being filed with the Clerk.

The National Women's Law Center is a legal organization, located in Washington, D.C., with the purpose of protecting and advancing women's rights. The Center represents women's concerns before federal administrative agencies and courts. The Center has been involved in issues affecting the employment rights of women, and in particular has handled cases involving employment of women in nontraditional jobs.

Amici curiae assert that the continued criminalization of private consensual adult sexual behavior is of grave concern, not only to lesbians and gay men, but to all women and men who value the right of the individual to intimate self-expression and personal autonomy.

SUMMARY OF ARGUMENT

Amici curiae Lesbian Rights Project et al. contend that the right of privacy, as derived from the U.S. Constitution and Bill of Rights, readily and reasonably includes the right of an adult person of whatever sexual orientation (to wit., whether heterosexual, bisexual, gay or lesbian) to choose to engage in physically private, consenting, non-violent sexual activities with another adult person. *Amici* believe that the privacy decisions of this Court, from the earliest to the most recent, support the position that it is within the fundamental rights of the individual person to make such intimate personal choices as are not only proscribed but criminalized by the "anti-sodomy" law of the State of Georgia. *Amici* for respondents assert that the need for love is natural, and that the determination to express and receive love of a sexual nature by engaging in sexual activities with another adult of the same gender is one possible type of behavior within the range of medical and psychological normalcy.

Amici for respondents further contend that government will suffer a loss of respect if the U.S. Constitution is read to undercut the claim of the individual to a right to privacy in the circumstances at bar. Not only will the state be invited to police the sacred precincts of bedrooms, marital and non-marital alike, thus denigrating the role and relationship of law enforcement to the individual citizen, but governments such as that which adopted the "anti-sodomy" law at issue in the case at bar, will be lent the imprimatur of this Court in enacting homophobic laws and enforcing discrimination based on sexual orientation on an open, *de jure* basis. This Court and this nation should have learned to recognize the irrationality and wastefulness of such discrimination, from the lesson of this Court's own decisions, which first validated, and since have had to repair, the harms done by *de jure* discrimination against women and people of color. Responsibility, and the privacy that is designed to enforce and protect it against unwarranted governmental interference, must be held to rest with the individual for his/her private, consenting, adult sexual activities, where no violence, coercion or threat of unwanted public exposure is present.

ARGUMENT
INTRODUCTION

For tens of millions of adult persons in the United States, this case concerns the relationship between the boundaries of government and the boundaries of the human self. For this Court and this legal system, this case concerns the constitutionality not simply of one state's "anti-sodomy" law but of the exercise of state power to criminalize those tens of millions of adults in the United States.

It would be impossible accurately to determine the number of adult persons in the United States who have engaged in or are likely in the future to engage in sexual activities that would violate a law prohibiting all oral-genital and anal-genital contacts. Indeed, it is impossible precisely because of the "privacy" in which people tend to hold this type of sexual information about themselves. Law itself upholds the reasonableness of the person's expectation that his/her sexual acts, if conducted with the consent of the participants, in physical privacy, between adults will not be the subject of inquiry, intrusion or action by anyone else, including government.[1] While it is possible to imagine a government that would set about inquiring about and cataloguing sexual activities among its subjects, surely transplanting that imagined possibility to the shores and mountains and cities of the United States would chill the hearts of the vast majority of subjects of this government.[2]

In spite of the impracticability of statistical assessment of the commonness of the sexual practices criminalized by the Georgia statute here at issue, it seems reasonable to project, based on available data, that oral-genital and anal-genital modes of sexual expression are commonly engaged in by tens of

1. In the context of civil enforcement of the human person's federal constitutional right to privacy, this expectation has been upheld. *See, e.g., Shuman v. City of Philadelphia*, 470 F. Supp. 449 (E.D. Pa. 1977) (city employer's questions to police officer concerning his sex life, and specifically his relationship to a recently emancipated female with whom he was living, were held to violate his federal constitutional right to privacy); *Mindel v. U.S. Civil Service Commission*, 312 F. Supp. 485, 487 (N.D. Cal. 1970) (plaintiff public employee's right to privacy and to due process were held to have been violated where his employer, U.S. Postal Service, deprived him of his employment based upon the "immorality" of his living with a female not married to him; District Court agreed with plaintiff that "[t]he spectre of the government dashing about investigating this non-notorious and not uncommon relationship . . . is the most disturbing aspect of this case"); *cf. Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (public employer's questions to female police officer candidate concerning her lawful sex life were held to violate employee's right to freedom from discrimination under Title VII of the Civil Rights Act of 1964, as amended).

2. For example, in Nazi Germany, the Nuremberg Laws, passed in 1935, outlawed both marriage and extramarital sexual relations between Jews and non-Jews. W. Shirer, *The Nightmare Years: 1930-1940* 159 (1984). The end result of the Nazi system of inquiry into and cataloguing of sexual activities included torture and executions of those deemed to be sexually aberrant. "By 1945 there were more than a thousand concentration camps in Germany, Austria and occupied countries. Besides Jews, who constituted the vast majority of those killed, the approximately seven million people killed included . . . homosexuals. Their unspeakable agony was exacerbated by the infamous medical experiments . . . ." M. Daly, *Gyn/Ecology: The Metaethics of Radical Feminism* 300 (1978).

millions of gay, lesbian, bisexual and heterosexual adult persons in the United States.[3] Assuming as the data suggest that gay, lesbian and bisexual persons constitute a minority numbering around twenty million persons in the U.S.,[4] the overwhelming majority of persons engaging in sexual activities that would violate Georgia's law, then, are persons of heterosexual orientation.

For all of these tens of millions of persons, regardless of sexual orientation, this case involves an issue of the most vital and fundamental nature. The issue is whether a state is free, under the U.S. Constitution, to criminalize sexual activities engaged in by them as consenting adults, in physically private locations, because of the gender(s) of the partners involved and/or because of the specific parts of the body used. The potency of the criminal sanction is self-evident, and need not be belabored in this forum. What is at stake in the case at bar is nothing more or less than the capacity of states to render millions of their citizens subject to the consequences of criminality, including prosecution, trial, sentence/penalty and lifelong stigmatization and suffering that can accompany conviction for crimes.

In a very real and profound sense, this case concerns a highly essential question to be asked about the relationship between the person and his/her government. That question is: what is the proper basis for limiting the prerogatives of the latter to govern the former? This issue, which has absorbed sentient beings including hundreds of accomplished philosophers for centuries, is to be answered as it applies to the case at bar by resort to a body of legal precedent interpreting the U.S. Constitution, and to the theories of the members of this Court as to the meanings of those precedents.

Regardless of the particular positions and beliefs of the members of this Court relative to this case, there is one view that *amici* urge should be univer-

3. *See, e.g.*, A. Kinsey, *et al.*, *Sexual Behavior in the Human Female* 281 (1953) (50% of female respondents had been orally stimulated by male partners; approximately 40% of female respondents had orally stimulated their male partners); A. Kinsey, *et al.*, *Sexual Behavior in the Human Male* 371 (1948) (60% of male respondents had engaged in oral-genital contact, either heterosexual or homosexual); S. Hite, *The Hite Report: A Nationwide Study of Female Sexuality* 232 (1976) (97% of female respondents had been orally stimulated by a partner); S. Hite, *The Hite Report on Male Sexuality* 1110, 1121 (1981) (approximately 95% of male respondents had been orally stimulated by a partner; approximately 96% of all respondents had orally stimulated a female partner); C. Tarvis and S. Sadd, *The Redbook Report on Female Sexuality* 162, 163 (1977) (91% of the women had performed fellatio with their husbands; 42% of the women had engaged in anal intercourse with their husbands); L. Wolfe, *The Cosmo Report* 312 (1981) (84% of female respondents engage regularly in fellatio with male partners; 13% engage regularly in anal sex with male partners).

4. "There are some 20 million lesbians and gay men living in the United States today. These men and women represent a community that is as diverse as American society. There are gay people in every economic class, racial group, religious organization, and occupation." D. Hitchens, Foreward to H. Curry & D. Clifford, *A Legal Guide for Lesbian and Gay Couples* (2d ed. 1984). According to one past president of the American Psychiatric Association, "It is fair to conclude, conservatively, that the incidence of more or less exclusively homosexual behavior in Western culture ranges from 5 to 10 percent for adult males and from 3 to 5 percent for adult females. If bisexual behavior is included, the incidence may well be twice these figures." J. Marmor, *Homosexual Behavior: A Modern Reappraisal* 7 (1980).

sal among the decision-makers: this case must not be trivialized, whether because it arises in relation to the subject of sex, or because petitioner asserts that it concerns the right to "commit homosexual sodomy", or because the respondent Hardwick represents an oft-despised and heavily stereotyped sexual minority, or because enforcement of "anti-sodomy" laws in this country to date has been erratic and, at least relative to the frequency of sexual activities violating "anti-sodomy" laws, presumptively infrequent. None of these aspects of this case should be allowed to minimize its significance. This case is of surpassing importance, not only to the millions of people directly (if not necessarily consciously[5]) affected by the outcome, but to the respect and authority of our governmental system itself and of the Constitution upon which it stands.

I. IT IS NO COINCIDENCE THAT THE FEDERAL CONSTITUTIONAL RIGHT TO PRIVACY HAS BEEN DEVELOPED IN LARGE MEASURE IN CASES CONCERNING PERSONAL DECISIONS ABOUT SEX; SEXUAL MATTERS ARE INTEGRAL TO HUMAN PERSONALITY AND HUMAN RELATIONSHIPS.

A. The Right To Be Sexual In Consenting, Non-Violent And Physically Private Ways Constitutes One Essential Dimension Of Personal Privacy Of The Adult Human Being.

The right to privacy derived from the Bill of Rights has been developed by this Court in a deep if not an exceedingly long line of cases, many of which have concerned decision-making by persons and government about sexual matters.[6] *Amici* assert that it is no coincidence that those cases, like the case at bar, involve a sexual subject matter. Sex is very important to people and,

5. It is doubtful that the average heterosexual person expects to be prosecuted and convicted for his/her private consenting adult sexual activities, whatever this Court may hold as to the power of the state to do so. By contrast, gay, lesbian and bisexual persons have considerably more reason to fear prosecution, penalties and their civil consequences, given the differential history of "anti-sodomy" law enforcement against sexual minorities. As of 1969, only fifteen years ago, only Illinois among the 50 states had decriminalized private consenting same-gender sexual contacts. Ill. Rev. Stat. c. 38, §§ 11-2, 11-3 (1961), *discussed in* S. Kadish & M. Paulsen, *Criminal Law and Its Processes* 9 (1st ed. 1969). While "well over half the population of the [United States] now resides in locations in which one may enjoy autonomy in one's decision-making related to one's sexual relationship," *Sexual Orientation and the Law* 11-12 (R. Achtenberg, ed. 1985), a holding by this Court that Georgia is within constitutional bounds in criminalizing "sodomy" would empower the twenty-five (25) states that have decriminalized this range of sexual behaviors to re-criminalize it, to the detriment of gay, lesbian and bisexual persons who constitute the demonstrable majority of those persons against whom such laws historically have been enforced, even if such laws theoretically encompass heterosexual as well as homosexual conduct.

6. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977); *LaFleur v. Cleveland Board of Education*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Loving*

generally, people associate sexual matters with privacy.[7] The cases decided by this Court concerning the constitutional development of privacy as it relates to sexual matters typify the sorts of difficult, life-altering decisions people are required to reach every day concerning sex (e.g., methods of birth control; sterilization; choice of marital partner; pregnancy in relation to both the family and employment).

Once asked by a journalist at the turn of this century to define "mental health", Sigmund Freud is reputed to have replied: "It is to love and to work". Love is a multi-faceted human need. For most adults, at least some forms of love include a strong sexual element. Except for persons who have chosen celibacy, the human being's crucial psychological need to share sexual love requires some form of physical action for its fulfillment and expression. By no means are all forms of love "Platonic."[8] Certainly judging by the wealth of literature and philosophical work devoted to sexual matters over the centuries, personal decisions about sex compose an extremely important human activity. It would not be an overstatement to rank sexual activity and the resulting self-expression as a highly important human need.[9] Not only is sexual activity necessary to procreation; for an indeterminately large number of persons, voluntary sexual activity is a critical component of human happiness and personal fulfillment.

At the same time, involuntary sexual acts constitute a major form of serious crime, and sexual activity whether or not voluntary carries risks, varying

v. Virginia, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

7. *See* cases cited at n. 1, *supra*. Also, R. Gavison, *Privacy and the Limits of Law*, 89 Yale L.J. 421 (1980); K. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980); T. Gerety, *Redefining Privacy*, 12 Harv. C.R.-C.L. L.Rev. 233 (1977); M. Dunlap, *Toward Recognition of "A Right To Be Sexual"*, 7 Women's Rts. L.Rptr. 245 (Spring 1982).

8. Petitioner erroneously asserts that ". . . there is no validation for sodomy found in the teaching of the ancient Greek philosophers Plato or Aristotle." (Pet. Brief 20 and n.2 thereof). Although Plato's non-demonstrativeness and his view of the inappropriateness of sexual expression generally have given rise to the common understanding of a "Platonic" relationship as a non-sexual one, and although it has been said of Plato, the man, that "[o]f love between the sexes . . . he had no experience . . . nor would he have valued it highly," D. Lee, trans., Introduction to *The Republic of Plato* 46 (1974), considerable scholarship concerning Plato's milieu, attitudes and experience has defined him and his era as (at least) highly tolerant of sexual expression of love between males, in a culture persuaded of the naturalness and normalcy of homosexuality. K. Dover, *Greek Homosexuality* 12, 154 (1978). The scholars do mention that homophobia existed in ancient Greece, however, to the extent that the passive receptivity of the male in some forms of same-sex intercourse was considered womanish and therefore undesirable. Perhaps homophobia stemmed in ancient Greece and stems today in the United States in part from the fears of sexual passivity, rape, physical subjugation of the female part of the self and domination by the male that co-exist and correlate with sexism toward women. *See*, S. Brownmiller, *Against Our Will: Men, Women and Rape* 257-268 (1975). In any event, petitioner seriously misstates Greek history and classical philosophy in an avid search to find support for the categorical assertion that sexual activity between two persons of the same gender "for hundreds of years, if not thousands, has been uniformly condemned as immoral." (Pet. Brief 19).

9. *See* generally, H. Katchadourian and D. Lunde, *Fundamentals of Human Sexuality* 2 (1972); J. McCary, *McCary's Human Sexuality* 11, 137 (1978).

in intensity from displeasure and discomfort to disease[10] and unwanted parenthood. Where violence, coercion, overreaching or involuntary public exposure are at issue, the state has been held to have power to regulate sexual behavior, and personal privacy finds boundaries in these situations.[11] However, in the case at bar, respondent Hardwick was arrested in the bedroom of his own home and charged with committing an act of sodomy (Jt. App. 4); here there is no evidence of violence, coercion, overreaching, or involuntary public exposure in relation to Hardwick's sexual activity.

The homophobic argument of petitioner to the contrary notwithstanding, gay, lesbian and bisexual persons hold no monopoly on the negative side of sexual activities, either in terms of being assaultive[12] or in terms of sexually

10. Counsel for *amicus* David Robinson Jr., [sic] behalf of petitioner, argues that the phenomenon of AIDS justifies the State of Georgia in criminalizing all oral-genital and anal-genital contacts. Because AIDS appears to be caused by exchange of bodily fluids, resulting in transmission of the infecting virus to the blood stream (*see, e.g.*, J. Curran, *et al., The Epidemiology of AIDS: Current Status and Future Prospects*, 229 Science 1352-1357 (Sept. 1985)), Robinson's argument should include the position that AIDS empowers the State of Georgia to criminalize contact between penis and vagina, since it poses the likelihood of exchange of semen and vaginal fluids, not to mention blood and mucus. Logically, Robinson's position should be that the State is empowered to prevent AIDS by prohibiting all sexual activities that countenance any risk of exchanging bodily fluids, no matter what the genders of the partners. There are no known instances where AIDS has been contracted through sexual activity between women. There are 158 known cases where women have contracted AIDS through heterosexual activity. The Center for Disease Control considers lesbians at a lower risk of contracting AIDS through sexual activity than heterosexual women (Telephone interview with Chuck Fallis, Public Affairs Specialist, Public Affairs Office, Center for Disease Control, Atlanta, Ga. (Jan. 22, 1986)). Moreover, because lesbians enjoy the lowest rate of AIDS, by Robinson's hypothesis, lesbian sex ought to be the only kind that a state can permit during the pendency of the AIDS epidemic. These points underscore the utter irrationality of the Robinson hypothesis.

11. The power of states to prevent and punish violent and coercive sexual activity is expressed in sexual assault and rape laws, for example, and is in no way disputed in the case at bar. As to the matter of states' power to prevent involuntary public exposure to sexual activities, the states' authority likewise has been found to be constitutionally grounded. "Granting that society can proceed directly against the 'sexual embrace at high noon in Times Square' (*Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973)), an appeal to such extremes should not provide the pretext for withdrawing all constitutional protection from sexual conduct whenever the participants fail to hermetically seal their actions (footnote omitted)." L. Tribe, *American Constitutional Law* 948 (1978); *see also, Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211, 215 n. 13) (1975) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71-72 (1976) (regulation of locations of pornographic theatres to prevent unwanted public exposure is constitutional, if drawn to meet governmental interests without undue discrimination).

12. Petitioner argues that "[h]omosexual sodomy . . . is marked by . . . a disproportionate involvement with adolescents (footnote omitted) and . . . a possible relationship to crimes of violence." (Pet. Brief 37) These arguments are factually unsupported. To the extent petitioner seeks to implant the idea that homosexuals prey upon unconsenting youths, this position likewise is false; is based upon a notorious and unsupported stereotype. *See*, D. Warner, *Homophobia, "Manifest Homosexuals" and Political Activity: A New Approach to Gay Rights and the "Issue" of Homosexuality*, 11 Golden Gate U. L. Rev. 635; D. Hitchens & B. Price, *Trial Strategy In Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 Golden Gate U. L. Rev. 451, 452-461 (1978-1979) (discussion of pervasiveness and falsity of stereotype of "lesbian mothers" as persons who "molest children, and engage in sexual activity in front of children"). If the term "disproportionate" in petitioner's argument is supposed to suggest a contrast with the degree of heterosexual involvement in coercive, non-consensual sexual acts

transmitted diseases.[13] In this regard, the effort of petitioner and of *amicus* Robinson to use AIDS to justify failing to protect the right of privacy of homosexuals amounts to an expedient and perverse use of half-informed fears about a tragic and deadly disease to twist law around a moralistic condemnation of an entire class of human beings. In their AIDS argument, more than in any other argument they offer, petitioner and *amicus* Robinson seem to be overwhelmed by the weight of homophobia. Homophobia is a burdensome form of bigotry that has been in search of justification for centuries.[14]

This Court's decisions concerning federal constitutional privacy have firmly established that the right to privacy in the context of decision-making about a variety of sexual matters is both personal and fundamental. The case at bar cannot validly and convincingly be distinguished from those decisions by the assertion that they concern sex within marriage[15]. Nor can those cases accurately be characterized as concerning exclusively family matters.[16] Along with decisions on the subjects of marriage[17] and family life[18], the range of constitutional privacy decisions of this Court encompasses the rights of un-

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with adolescents, again, it is a false contrast; it would appear that the most common form of such coercive, non-consensual sexual acts as to minors is incest, which to date appears chiefly to be a male-adult-on-female-minor pattern. E. Press, H. Morris, R. Sondza, *An Epidemic of Incest*, 98 Newsweek 68 (11/30/81) (estimating that at least one in one hundred adult women in the United States has been sexually molested by her father); J. Herman, *Father-Daughter Incest* (1981) (projecting that when close relatives are included, one adult woman in every six in the United States has been a victim during childhood/adolescence of sexual molestation by males); K. Meiselman, *Incest* 52 (1978); J. Densen-Gerber & J. Benwad, *Incest as a Causative Factor in Anti-Social Behavior: An Exploratory Study* (1976); J. James & J. Meyereding, *Early Sexual Experience and Prostitution*, 134 American Journal of Psychology 1381-1385 (1977) (incest is responsible for the largest percentage of female teenage runaways and an even larger percentage of prostitutes). Perhaps most important, petitioner's arguments constitute a *non sequitur*; the frequency of sexual coercion and violence as to teenagers by homosexuals no more forms a proper basis for denying constitutional privacy to physically private, consenting *adult* homosexual contacts than the above-recited frequency of sexual coercion and violence as to minor females by adult heterosexual males provides a proper basis for denying constitutional privacy to physically private, consenting adult heterosexual contacts.

13. *See* note 10 and accompanying text, *supra*.

14. "Homophobia" was first coined by psychologist George Weinberg, author of *Society and the Healthy Homosexual* (1972), to describe an irrational fear and hatred of homosexuals and of their sexuality. T. Marotta, *The Politics of Homosexuality* 265 (1981). Such irrational repulsion can take the form of dread at being in close quarters with gay men or lesbians (Weinberg at 4-5); anxiety about being thought a homosexual; hostility towards touching between members of the same sex (eg., football players may safely pat each other on the buttocks but not walk together hand in hand, as noted in Slade, *Displaying Affection in Public*, NY Times, Dec. 17, 1984, at B14, col. 1); violent assaults against perceived homosexuals; strongly held, irrational stereotypes, such as that homosexuals are all child molesters or oversexed (reminiscent of an era, a century ago, in which the New York Times could run an article insisting that black men were prone to rape, P. Giddings, *When and Where I Enter* 92 (1984); and the conviction that homosexual men and women—by reason of sin, sociopathology or sickness—are not entitled to the full benefits of citizenship.

15. Pet. Brief 25.

16. Pet. Brief 27, 30.

17. *Griswold v. Connecticut* and *Loving v. Virginia*, cited at note 6, *supra*.

18. *Zablocki v. Redhail, Moore v. City of East Cleveland, Pierce v. Society of Sisters*, cited at note 6, *supra*.

married persons[19] and of minors[20] to have contraceptives, the right of a person to possess pornography in his home[21], and the fundamental nature of the right of a person to retain his procreative capacity where a state law would have required sterilization of him as a member of a certain group of criminal convicts (in a decision rendered prior to an explicit holding by this Court that privacy itself is guaranteed by the Constitution[22]).

To propose that constitutionally protected privacy is not available to those of every sexual orientation whose consensual, adult, physically private sexual activities are considered unorthodox by the majority of a given state's legislators, no matter how common the activites are in fact, is circular. To propose that because they are unmarried[23], constitutionally protected privacy is unavailable to those of non-heterosexual orientation for sexual choices that preclude them from marriage, particularly when it is the state that keeps the gates of marriage and excludes gay and lesbian persons from that estate[24], is viciously circular. The effort of petitioner to undermine respondents' assertion of a right to privacy that includes the right to choose to engage in physically private, consenting oral-genital and anal-genital sexual activities between adults, by characterizing this Court's privacy decisions as protecting only married persons and their families, seriously misstates the case law. Also, it invites this Court to make the scope of federal constitutional privacy depend on and vary with the marriage and domestic relations laws of the fifty states.[25] The equal protection guarantee and the fundamental nature of the right to privacy should fully deter this Court from entering upon that mistaken road.[26]

If this Court is to uphold Georgia's "anti-sodomy" law as against gay, lesbian and bisexual persons, this Court will sweep aside its own informed decisions about the nature of privacy and of the relationship between the person and government. The gist of those decisions[27] is that there is a realm of personal choice, of which sex-related choices constitute a vital part, in which the government's coercive force (and, particularly, the criminal sanction) does not belong, constitutionally speaking. That realm of personal choice is properly characterized as being enjoyed primarily by adults, with respect to inti-

19. *Eisenstadt v. Baird*, cited at note 6, *supra*.

20. *Carey v. Population Services International*, cited at note 6, *supra*.

21. *Stanley v. Georgia*, cited at note 6, *supra*.

22. *Skinner v. Oklahoma*, cited at note 6, *supra*.

23. Pet. Brief 37-39.

24. In *Baker v. Nelson*, 291 Minn. 310 (1971), *app. dismissed*, 409 U.S. 810 (1972) and in *Singer v. Hara*, 11 Wash. App. 247 (1974), the state courts held that state laws proscribing same-gender marriage are constitutional. Neither of these decisions squarely addresses the federal constitutional right to privacy in relation to these holdings.

25. Presently no state legitimates marriage between two males or two females; thus, at present no gay or lesbian marital partner could successfully claim a federal right to privacy deriving from his/her marriage in a state authorizing such marriage. However, in that the states do retain the power to define who may marry, once any state validates same-gender marriage, the federal constitutional right to privacy would vary according to state law.

26. *See* notes 24 and 25, *supra*.

27. *See* cases cited at note 6, *supra*.

mately personal matters such as whether to bear or beget a child, whether to engage in procreative sexual activity, whether to marry a person of a different racial group, whether to possess pornography in one's home, whether to secure birth control information and contraceptives, and whether to have an abortion prior to viability of the foetus. Whether to consent to engage in physically private sexual activities of a non-injurious[28], non-violent nature with another adult snugly and logically fits within that area of personal decision-making circumscribed by the privacy decisions of this Court.

B. Georgia's Definition Of "Sodomy" Criminalizes Sexual Conduct In Which Persons Of Every Sexual Orientation Engage; The Definition Assures Built-In Discrimination In Law Enforcement.

The Georgia law, by its terms, includes a wide array of prohibited acts under the rubric of "sodomy". *Amici* already have observed that millions of adult persons in the U.S. would be rendered criminals if the Georgia law were adopted and enforced nationwide. It also has been noted that the statute prohibits sexual activities that are less dangerous, in terms of the spread of at least some sexually transmitted diseases, than contact between penis and vagina.[29] Along with these deficiencies in this law, it must be observed that the law prohibits sexual activities that may be the only ones available to meet the fundamental needs for sexual fulfillment and communication of some groups of persons. For example, disabled persons may not have use or control of genitals for sexual purposes and may need to engage in anal-genital or oral-genital sexual activities to express and gratify themselves sexually.[30] Sexually dysfunctional persons may need these forms of activities as well, if they are to have any means of sexual satisfaction and expression.[31]

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28. Of course, it may be argued that some of the activities prohibited by the Georgia law can cause AIDS, venereal disease and other health hazards. However, so can genital-genital intercourse between a male and a female, as discussed in note 10, *supra*. The position that the Georgia law is based upon a need to prevent AIDS is simply unsupported by the content of the statute itself, which is overbroad (some anal-genital and some oral-genital contacts do not involve exchange of bodily fluids and do not appear to carry high risks of transmission of AIDS and venereal disease) and underinclusive (genital-genital intercouse, which does involve exchange of bodily fluids, and which carries risks of transmission of AIDS and venereal disease) is not prohibited. The constitutional deficiencies of this type of law are well-recognized. The inadequacies of the AIDS argument to justify an "anti-sodomy" law of the type and scope here at issue also have been ably addressed by the District Court in *Baker v. Wade*, 106 F.R.D. 526 (1985), 553 F. Supp. 1121 (1982), *rev'd on other grounds*, 769 F.2d 289 (1985).

29. *See* notes 10 and 28.

30. *See, e.g.*, J. Brockway, *et al.*, *Effectiveness of a Sex Education and Counseling Program for Spinal Cord Injured Patients*, 1 Sexuality and Disability 127-136 (1978) (program of rehabilitation for heterosexual persons with spinal cord injuries to learn to use oral-genital sexual techniques); J. Brockway, *et al.*, *Sexual Enhancement in Spinal Cord Injured Patients: Behavioral Group Treatment*, 3 Sexuality and Disability 84-96 (1980). *See also* J. Lessing, Sex and Disability in J. Loulan, *Lesbian Sex* 151-158 (1984).

31. *See generally*, H. Kaplan, *The New Sex Therapy: Active Treatment of Sexual Dysfunctions* (1974); and W. Masters and V. Johnson, *Human Sexual Inadequacy* (1970).

As written, the sweep of Georgia's "anti-sodomy" statute is unrestrained. Its terms beg for discriminatory enforcement, and its application to potentially millions of persons invites hypocrisy and arbitrariness in that enforcement process. As one criminal law scholar, Dean Sanford Kadish, observed almost two decades ago, after noting that the then-pervasive criminal laws prohibiting homosexual practices had little if any deterrent effect:

> . . . the use of the criminal law has been attended by grave consequences. Opportunities for enforcement are limited by the private and consensual character of the behavior . . . To obtain evidence, police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution (See Project, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement in Los Angeles County", 13 U.C.L.A. L.Rev. 643 (1966)).[32]

Because of the breadth and variety of sexual acts prohibited by it, the Georgia law also assures hypocrisy in enforcement, even if it ever were feasible to enforce it against all of those who violate its quite capacious terms. If the sexual activities engaged in by tens of millions of persons, including oral-genital and anal-genital contact between male-male, female-female and male-female partners, are representative of the sexual activities engaged in by police officers, judges, jurors, prosecutors and others involved in enforcing the Georgia law and like laws of other states, then there will be many occasions where a lawbreaker will arrest, prosecute, convict or sentence another lawbreaker for acts that s/he also has done. There can be no more hypocritical quality to law enforcement than this.

Feminist poet and philosopher Adrienne Rich has written of the danger of hypocrisy about sexuality, in moving terms, as follows: "Heterosexuality as an institution has also drowned in silence the erotic feelings between women. I myself lived half a lifetime in the lie of that denial. That silence makes us all, to some degree, into liars . . . The possibilities that exist between two people . . . are . . . the most interesting things in life. The liar is someone who keeps losing sight of these possibilities."[33] Where the enforcers of the law are as pervasively "guilty" of violating it as those punished by the enforcers under the law, the "lying" becomes a devastating and encompassing dishonesty that corrupts the law itself. Surely Georgia's "anti-sodomy" statute is the prototype of laws that are "unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals."[34]

32. S. Kadish, *The Crisis of Overcriminalization*, 374 The Annals of the American Academy of Political and Social Science 157, 159-162 (1967).

33. A. Rich, *Women and Honor: Some Notes on Lying* (5th printing, 1979).

34. T. Arnold, *Symbols of Government* 160 (1935).

C. *Government Has Important And Legitimate Interests In Recognizing The Privacy Of Adults Who Engage In Consensual Sexual Activities In Physically Private Locations.*

The limitation upon the power of states that will be represented by this Court's decision in favor of the individual's right to privacy as asserted by respondents Hardwick *et al.* does not undercut the power of the state to act to prohibit dangerous, irresponsible or coercive sexual activities, nor to protect persons from violence, nor to protect minors, nor to protect persons from crimes committed within sexual relationships (e.g., sexual assaults by familiars). Rather, a decision in favor of the decision-making power of Hardwick *et al.* as to whether to engage in private, consenting, non-violent sexual activities with others of the same or different sexes places responsibility precisely where it belongs and is most manageable—upon the shoulders of the person making the decision, affected by the decision, and living with the consequences of the decision. "*Responsibility is the great developer of men.*"[35]

A decision that places the responsibility on the individual involved removes government from the position of moral arbiter in this complex arena of human behavior. "Any 'higher law' philosophy implies a hierarchy of values"[36], and for this Court to determine that the state is in a better position than its citizens to say what types of non-harmful sex are appropriate and good lofts governmental power over the conscience and moral judgment of the individual. The government is placed in a position of being "better" than its citizens. This is particularly anomalous in a system in which the government is supposed to be its citizens, including minorities. The central argument of the Attorney General of Georgia is that all persons who engage in "sodomy" as Georgia defines it are immoral and it is that immorality that empowers the state to prohibit "sodomy". If this Court were to accept that argument, it would be passing judgment upon the lives and behaviors of millions of human beings. It also would be deciding that the state has a right to punish its citizens for physically private consenting adult sexual activities, thus diminishing the citizens' capacities for responsible individual judgment in the area of consenting adult sexual behavior.

Such a position by this Court would invite not simply discriminatory, homophobic and arbitrary law enforcement, and not simply hypocrisy behind that process. The end result would be dependence and weakness of the individual relative to the government. The individual would have been deemed less capable than the state of managing her/his own most intimate, personal decisions. If it is true that people have a way of living up or down to the expectations of those who govern them, then a decision by this Court that arrogates to the state the power to make intimate sexual choices for individuals assuredly invites people to live down to this Court's unfavorable image of

35. *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 92 (1936) (Brandeis, J., concurring) (emphasis added).

36. W. Friedman, *Legal Theory* 143 (5th ed., 1970).

the capabilities of the individual. As discussed here and in the section that follows, the policy considerations accompanying the substantive issue presented by the case at bar cut decidedly in favor of the vindication of the privacy model to place freedom and responsibility for decisions by adults about physically private, consenting sexual behavior upon the individual.

II. IF THIS COURT LIMITS CONSTITUTIONALLY PROTECTED PRIVACY AS URGED BY PETITIONER, IT WILL BE LENDING ITS UNPARALLED [SIC] AUTHORITY TO RAMPANT *DE JURE* AND *DE FACTO* DISCRIMINATION AGAINST A MINORITY GROUP, FOR NO GOOD REASON.

Throughout the United States, anti-gay violence and anti-gay bigotry are posing real and ongoing problems for lesbians, gay men and for those who are concerned with fair treatment of all minority groups.[37] At the same time, discrimination against gay men and lesbians in employment[38], domestic relations[39], public accommodations[40], and other vital realms of human existence[41] are the subjects of myriad legal challenges, with varying results. In this milieu, a determination by this Court that states are free to criminalize gay/lesbian sexual activities *per se* would reinforce the homophonic [sic] elements of both anti-gay violence and the anti-gay legal decisions that are proliferating at the present time. Criminalization of gay/lesbian sexual activities excuses and encourages already pervasive civil discriminations against these groups of persons. If this Court were to uphold Georgia's power to make criminals of Hardwick *et al.*, this Court would be lending its unparalleled leadership to the position that it is acceptable to hate those who are gay and lesbian, and even to prosecute and punish those unfortunate enough (as respondent Hardwick was) to have their entirely unobtrusive and non-public sexual activities come to the attention of criminal law authorities.

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37. It has been reported that one (1) of five (5) gay males and one (1) of ten (10) lesbians surveyed in eight (8) cities in the United States have been punched, kicked, hit or beaten because they are gay/lesbian. National Gay Task Force (in cooperation with gay and lesbian organizations in eight U.S. cities), "Anti-Gay/Lesbian Victimization: A Study" (New York: June 1984) (unpublished).

38. *See, e.g., Rowland v. Mad River School District*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, — U.S. —, 105 S.Ct. 1373 (1985); *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981); *Aumiller v. University of Delaware*, 434 F.Supp. 1273 (D.Del. 1977); *Gay Law Students v. Pacific Telephone & Telegraph Co.*, 24 C.3d 458 (1979); *Gaylord v. Tacoma School District*, 88 Wash. 2d 286 (1977), *cert. denied*, 434 U.S. 879 (1977); *see generally, Sexual Orientation and the Law* at Chapter 5, pp. 5-1 through 5-71, cited at note 5, *supra*.

39. *See generally, Sexual Orientation and The Law*, Chps. 1 & 2, pp. 1-3 through 2-58, cited at note 5, *supra*.

40. *See, e.g., Hubert v. Williams*, 133 Cal.App.3d Supp. 1 (1982) (denial of housing to disabled person and his lesbian attendant was violation of California's public accommodations law); *see generally, Sexual Orientation and the Law* at Chap. 8, pp. 8-3 to 8-20, cited at note 5, *supra*.

41. *See generally, Sexual Orientation and the Law*, Chaps. 3 (taxes), 4 (death, incapacity and illness), 6 (military and veterans), 7 (immigration), 9 (First Amendment), cited at note 5, *supra*.

At present, "[t]he presence of the criminal penalty in a state casts a shadow over other areas (eg., custody, immigration, and licensing) and contributes to the patchwork of results."[42] If this Court were to lend its imprimatur to the position that all sexually active gay, lesbian and bisexual persons may be treated as criminals *per se*, that shadow would lengthen and deepen to cover practices of anti-gay discrimination and violence of unmeasured proportions. While decriminalization hardly would render any of these other types of suffering by gay and lesbian persons *necessarily* less likely[43], the denial of any right of privacy to gay and lesbian persons represents an approval, howsoever tacit and sublimated, of all of these related forms of discrimination and violence. In this era of severe homophobic reactions, fanned by the fear of AIDS, this message from this Court would be quite likely to prove nothing short of devastating to the struggle for a measure of decency and fairness in treatment afforded to gay, lesbian and bisexual persons by neighbors, employers and others including government. Criminalization translates readily into permission to discriminate, to malign, to stigmatize and to multiply the harms already suffered by gay and lesbian persons in this culture, society and legal system.[44]

There is an interesting debate about whether being gay/lesbian is a matter of genes, of compulsion, of parenting or of personal choice. One commentator summarizes it as follows:

> Homosexual activity is sometimes explained as "compulsive activity", that is, acts which are beyond free choice. Others claim that it

42. R. Rivera, *Queer Law: Sexual Orientation Law In The Mid-Eighties, Part I*, 10 U. Dayton L.Rev. 459, 540 (Spring 1985).

43. The experience of England after passage of an act decriminalizing homosexual conduct is instructive in this regard. "The Act did not legalize homosexuality; it merely removed criminal penalties from a fairly narrow range of homosexual activities . . . [continuing to permit a wide array of criminal prosecutions of gay persons] . . . [t]he 1967 Act has not secured for homosexual men and women a rightful and equal place in society. It was not intended to." P. Hewitt, *The Abuse of Power: Civil Liberties in The United Kingdom* 221 (1982). The author of this study on the state of civil liberties in the United Kingdom concludes that "[i]n order to guarantee homosexual men and women their right to equality of treatment, the law on homosexual offenses should be placed on the same basis as the law relating to heterosexual offenses . . . Far from protecting society, the [current] law demeans both its victims and those who enforce it." *Id.* at 227. In England, unlike the United States, there is no federally protected constitutional right to privacy for anyone.

44. Formidable examples of the high price of criminalization of homosexuality *per se* include: cases upholding denials of child custody based in part on the criminalization of homosexuality, *see, e.g., L. v. D.*, 630 S.W.2d 240 (1982); *N.K.M. v. L.E.M.*, 606 S.W.2d 179 (1980); *Roe v. Roe*, 228 Va. 722 (1985); cases upholding dismissals from public employment of persons based upon criminal law convictions for same-gender sexual relations, *see, e.g., Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), *cert. granted*, 376 U.S. 904, *cert. dismissed by agreement of parties*, 379 U.S. 951 (1964); *McLaughlin v. Board of Medical Examiners*, 35 Cal.App.3d 1010 (1973); cases in which courts have proposed to limit freedoms of speech and association based upon the existence of state sodomy proscriptions, *see, e.g., Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Gay Activists Alliance v. Lomenzo*, 66 Misc.2d 456, 320 N.Y.S.2d 994 (1971), *reversed sub nom., Owles v. Lomenzo*, 38 App.Div.2d 981, 329 N.Y.S.2d 181 (1972), *aff'd.*, 31 N.Y.2d 965 (1973).

> is the outcome of a deliberate choice motivated by curiosity, opportunity, or caring for another person of the same sex. Some say that physiological factors, such as sex hormone levels, are at the root of homosexuality. Still others claim that homosexuality begins in the home . . .[45]

Perhaps unfortunately, resolution of that interesting debate would be of little help to this Court in deciding this case. If homosexuality is controlled by factors outside personal volition, then to punish gay/lesbian sex *per se* is to criminalize a status over which the person does not have control. Such status-based criminalization has been recognized as unfair by this Court in the contexts of drug addiction and alcoholism.[46] Even this legally protective analogy disfavors lesbians and gay men, in policy terms, in that, unlike drug addiction and alcoholism, homosexuality is not a disease, defect or sexual deviation, medically and psychologically speaking.[47] Assuming *arguendo* that homosexuality is chosen, to punish its adherents and practitioners is comparable to punishing the adherents and practitioners of an unpopular religious faith. Such punishment strikes a strong blow to the historical heart of the U.S. Con-

45. R. Slovenko, Foreward, *The Homosexual and Society: A Historical Perspective*, 10 U. Dayton L.Rev. 456 (Spring 1985).

46. *Robinson v. California*, 370 U.S. 660, 667 (1962) (criminal offense of "addiction to narcotics" held to violate Eighth and Fourteenth Amendments' guarantee of freedom of the person from cruel or unusual punishment, stating "[drug addiction] . . . is apparently an illness which may be contracted innocently or involuntarily"); *but see, Powell v. Texas*, 392 U.S. 514, 517 (1968) (state law punishing a person who shall "get drunk or be found in a state of intoxication in any public place" held not to violate Eighth and Fourteenth Amendments as cruel or unusual punishment, because of the distinct problems associated with public drunkenness); and *see, Perkins v. North Carolina*, 234 F.Supp. 333 (W.D.N.C. 1964) (upholding five-to-sixty year sentence for homosexual conduct, making distinction between status and acts of the homosexual). If the homosexual is as helpless to prevent himself from engaging in sex with another of the same gender as an alcoholic or drug addict is to keep from consuming the addictive substance, then *Perkins* was wrongly decided and this Court should dispose of cases involving criminal penalties for homosexuality in the same way as it disposed of cases penalizing drug addiction and alcoholism; where there is not independent basis for criminalization, as there was found to be in *Powell v. Texas* in the fact that public drunkenness posed special law enforcement difficulties, the punishment of a person for a condition or status that she/he is helpless to avert is cruel and unusual, and denies equal protection *vis a vis* heterosexuals.

47. As of 1973, the American Psychiatric Association determined that homosexuality is neither a mental illness nor a form of sexual deviation. *See* American Psychiatric Association *D.S.M. III: Diagnostic and Statistical Manual of Mental Disorders* 281-82, 380 (3d ed. 1980). See discussion of these changes in *Hill v. Immigration and Naturalization Service*, 714 F.2d 1470, 1472 and n. 3 thereof (9th Cir. 1983) ("[A]ccording to 'current and generally accepted canons of medical practice,' homosexuality *per se* is no longer considered to be a mental disorder" (footnote omitted)). Further, it is important to note that there is no such thing as a homosexual personality or character structure. The diversity within the homosexual community is as great as within the heterosexual community. Benedek, P., M.D. and Schetky, D., M.D., eds., *Emerging Issues in Child Psychiatry and the Law*, Chapter on "Lesbian Mothers/Gay Fathers" by Kirkpatrick, M., M.D. and Hitchens, D. J., J.D. Moreover, there is no evidence that homosexuals as a group are more neurotic, unhappy, or psychologically maladjusted than heterosexuals matched for living similar lives. *See* Bell, A. & Weinberg, M., *Homosexualities: A Study of Diversity Among Men and Women* (1978).

stitution and Bill of Rights.[48] In sum, the constitutional right to privacy no more can be denied to gay and lesbian persons based on the ascription of their status than it can be withheld on the basis that gay persons choose to be gay. In this regard, it should be noted that some of the situations involving exercises of privacy held protected by this Court may be said to concern ascribed statuses beyond the person's control (e.g. minority[49] and fertility[50]), while others may be said to concern statuses or situations chosen by the person claiming the protection of constitutional privacy (eg. criminal conviction[51], interest in prurient literature[52], and unmarried status[53]). Plainly, whether homosexuality is dictated by external forces or chosen by the person, (or both), cannot determine whether privacy should be afforded to the homosexual person.

CONCLUSION

There are those who would contend that this Court need neither hear nor give reasons in order to uphold the prerogative of Georgia to criminally proscribe practices that have been the subject of proscription and penalties in various cultures for centuries. Their argument, that reason need not govern the process of this Court in deciding this case, has already been made by no less a champion of the criminalization of homosexuality than Lord Patrick Devlin, to whom H.L.A. Hart's definitive response deserves to be read in its entirety.[54] The most telling passage of Hart's response, in terms of the position that this Court need only act upon a gut response of moral repugnance toward homosexuality in order to strike down the assertion of a claim of privacy by respondents Hardwick *et al.*, is as follows:

> When Sir Patrick [Devlin's] lecture was first delivered The Times greeted it with these words: "There is a moving welcome humility in the conception that society should not be asked to give its reason for refusing to tolerate what in its heart it feels intolerable." This drew from a correspondent in Cambridge the retort: "I am afraid that we are less humble than we used to be. We once burnt old women because, without giving our reasons, we felt in our hearts that witchcraft was intolerable."

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48. Historian J. R. Pole aptly has summarized the development of religious freedoms under the U.S. Constitution as follows: "The concept of equality of conscience, which began as a claim for equal treatment between warring sects thus ends by forming a perfect unity with the political equality of individuals. Whatever an individual's heritage, convictons [sic] or associations, the government's only legitimate knowledge of him or her is as the sovereign possessor of autonomous moral being." J. R. Pole, *The Pursuit of Equality in American History* 111 (1978).

49. *Carey v. Population Services International*, cited at note 6, *supra*.

50. *Roe v. Wade, Griswold v. Connecticut* and *Eisenstadt v. Baird*, cited at note 6, *supra*.

51. *Skinner v. Oklahoma*, cited at note 6, *supra*.

52. *Stanley v. Georgia*, cited at note 6, *supra*.

53. *Eisenstadt v. Baird*, cited at note 6, *supra*.

54. H.L.A. Hart, *Immorality and Treason*, 62 Listener 162-163 (July 30, 1959), reprinted in S. Kadish & M. Paulsen, *Criminal Law and Its Processes* 18 (1st ed. 1969).

> This retore [sic] is a bitter one, yet its bitterness is salutary. We are not, I suppose, likely, in England, to take again to the burning of old women for witchcraft or to punishing people for associating with those of a different race or colour, or to punishing people again for adultery. Yet if these things were viewed with intolerance, indignation and disgust, as the second of them still is in some countries, it seems that on Sir Patrick's principles no rational criticism could be opposed to the claim that they should be punished by law. We could only pray, in his words, that the limits of tolerance might shift.[55]

In a government in which this Court must be the source of ultimate illumination of the guarantees of the U.S. Constitution, the responsibilities of this Court must sometimes seem onerous beyond description. More than once this Court has had to undo *de jure* discrimination enforced by prior decisions of this Court.[56] That represents an extremely delicate process, in that the undoing, if done incautiously or callously, can undo the respect and authority of the Court itself in the process. Blessedly, in this case, this Court has ample information by which to be guided away from the course of ratification of ignorant bigotory [sic] that was taken in decision [sic] such as *Bradwell v. State, Plessy v. Ferguson* and *Korematsu v. United States.*[57] If this Court can see its way clear to uphold the fundamental right to privacy of persons including gay men, lesbians and bisexual persons to make decisions about private, consenting adult sexual activity, at this stage in our constitutional and legal

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55. *Id.*

56. Perhaps the most powerful example of this process is the matter of racial segregation, where this Court's decision of *Plessy v. Ferguson*, 163 U.S. 537 (1896), announcing "separate but equal" and holding it constitutional, took decades of hard labor including the work of this Court itself to undo, and still requires effort by this Court and the people of this country to undo. R. Kluger, *Simple Justice, passim* (1977). Likewise, the ratification of *de jure* discrimination against women based upon "natural law" inferiority of the female, in the case of *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873), has left a legacy and heritage of discrimination that this Court has been busy repairing since at least *Reed v. Reed*, 404 U.S. 71 (1971). The forcible internment of Japanese-Americans during World War II, upheld by this Court in *Korematsu v. United States*, 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943) (curfew upheld) is currently the subject of legal efforts at repair, *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). As to this example of a Supreme Court decision leading to discrimination the harm of which the courts, decades later, have been called upon and have determined it necessary to repair, the most memorable statement perhaps is that of the late Justice Earl Warren, who has written in his memoirs, ". . . I testified for a proposal which was not to intern in concentration camps *all* Japanese, but to require them to move from what was designated as the theater of operations, extending seven hundred and fifty miles inland from the Pacific Ocean. Those who did not move were to be confined to concentration camps established by the United States Government . . . I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens. Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. It was wrong to react so impulsively without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state . . . ." *The Memoirs of Chief Justice Earl Warren* 148-149 (1977) (emphasis in original).

57. *See* citations at note 56, *supra.*

progress, there will not need to be the extreme extent of agonizing and delicate undoing of rampant *de jure* discrimination and mistreatment, as to these sexual minorities, that has had to be and that continues to have to be done, by this Court and by this nation, as to women and people of color.

Respectfully submitted,

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With grateful appreciation for the contributions of Maureen C. Mason, member, State Bar of California, Carl Goodman and Mary Perdue, students, New College of California School of Law, Cevyn Godre, Kathy Alfieri, and Joyce Newstat, students, Golden Gate University Law School.

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-140

TITLE MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, Petitione
v. MICHAEL HARDWICK, AND JOHN AND MARY DOE

PLACE Washington, D. C.

DATE March 31, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA,

Petitioner

v. No. 85-140

MICHAEL HARDWICK, AND JOHN AND MARY DOE

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Monday, March 31, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MICHAEL E. HOBBS, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Petitioner.

LAURENCE TRIBE, ESQ., Cambridge, Massachusetts; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in Bowers against Hardwick.

Mr. Hobbs, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL E. HOBBS, ESQ.

ON BEHALF OF THE PETITIONER

MR. HOBBS: Thank you. Mr. Chief Justice, and may it please the Court:

This case presents the question of whether or not there is a fundamental right under the Constitution of the United States to engage in consensual private homosexual sodomy.

In 1982, Michael Hardwick was arrested and charged with the violation of Georgia's anti-sodomy statute for engaging in this conduct with a consenting adult in his home.

The case was never presented to the grand jury of Fulton County and no prosecution of Mr. Hardwick ensued.

However, in 1983, Mr. Hardwick, along with John and Mary Doe, filed a Section 1983 suit seeking injunctive relief and declaratory relief against the enforcement of

Georgia's sodomy statute.

QUESTION: Was there a reason, Mr. Hobbs, that it wasn't presented to the grand jury?

MR. HOBBS: Your Honor, the District Attorney of Fulton County, who would have handled that case --

QUESTION: That is Atlanta, isn't it?

MR. HOBBS: That is correct, Your Honor. -- indicated that it would not be presented the grand jury under further evidence developed. That is the only reason that I know that it was not presented.

QUESTION: Mr. Hobbs?

MR. HOBBS: Yes, Your Honor.

QUESTION: Is the statute enforced in Georgia?

MR. HOBBS: Yes, Your Honor, the statute is enforced in Georgia.

QUESTION: How many prosecutions have there been in the last year or five years?

MR. HOBBS: I could not tell the Court that. I can only say that in our experience the statute is most frequently enforced in situations where the conduct takes place in more public or quasi-public areas.

QUESTION: Well, I should have framed my question more specifically. In the context of the issue presented in this case where the activity took place in a private residence, has it ever been enforced?

MR. HOBBS: It had been enforced. I believe that last case I can recall was back in the 1930's or 40's in the State of Georgia. Appellate decisions.

Obviously, Your Honor, the Fourth Amendment impedes the ability of the State of Georgia to enforce the statute when the conduct takes place in the privacy of the home.

Nevertheless, it is our position that the Fourth Amendment restrictions should not have any bearing on whether or not there is a fundamental right to engage in this conduct.

QUESTION: Did you say the last prosecution was in the 30's or 40's?

MR. HOBBS: The last reported Appellate decision concerning this type of conduct in a private setting.

QUESTION: Has it ever been enforced in a marital situation?

MR. HOBBS: Not to my knowledge. Not in the State of Georgia at least.

QUESTION: But, on its face, the statute would permit such a prosecution, would it not?

MR. HOBBS: That is correct, Your Honor. The statute does not differentiate between married individuals, unmarried heterosexuals or homosexuals.

It is our position that there is no fundamental right to engage in this conduct and that the State of

Georgia should not be required to show a compelling state interest to prohibit this conduct.

There is certainly textual support for this proposition. And, contrary to the views expressed by the Eleventh Circuit Court of Appeals and the Respondent, it is suggested that there is no precedential support in the decision of this Court for the proposition that there is a fundamental right to engage in sexual relationships outside of the bonds of marriage.

This Court in the Carey decision in 1976 made it fairly explicit that its previous decisions relating to contraception and abortion were restricted to state regulations which burden an individual's choice to prevent conception or to terminate pregnancy. And, the Court concluded that it was not holding a state must show a compelling state interest every time sexual freedom is involved.

In Moore versus City of East Cleveland, Justice Powell noted the difficulty this Court has sometimes had in defining fundamental rights under the Due Process Clause of the Fourteenth Amendment and suggested, based upon numerous cases of this Court, that appropriate limits and guidelines for determining whether or not rights are truly fundamental can be found in the tradition, history, and heritage of this nation.

In that particular case, Justice Powell, writing for the plurality, concluded that the Constitution protects the family simply because the family is so rooted in the history and traditions of our nation.

Many of this Court's decisions have followed the history and traditions of our nation in making its determination as to whether or not a particular activity is entitled to constitutional protection as a fundamental right.

Thus far this Court has concluded that the right of privacy includes matters which involve marriage and family, procreation, abortion, child rearing and child education. It has never concluded, and I would suggest to the Court that there is no constitutional warrant to conclude that there should be a fundamental right to engage in homosexual sodomy or any other type of extra-marital sexual relationships.

The common thread of this Court's --

QUESTION: Let me just ask, what is your position on the application of the statute to a married couple?

MR. HOBBS: If Your Honor please --

QUESTION: Could it be constitutionally applied or not?

MR. HOBBS: I believe in light of Griswold versus Connecticut that application of the statute to a married

couple would make it very problematic for the State of Georgia to --

QUESTION: Do you think they could or could not? Do you think it would be constitutional or unconstitutional to apply it to a married couple?

MR. HOBBS: I believe that it would be unconstitutional.

QUESTION: You think it would be constitutional?

MR. HOBBS: Yes, sir.

QUESTION: And, what is the right that would be protected of the married person in that situation in your view?

MR. HOBBS: The right of marital privacy as identified by the Court in Griswold.

QUESTION: And, this conduct, though it is traditionally frowned upon as I understand your brief, you would nevertheless be constitutionally protected in the marital setting?

MR. HOBBS: Yes, Your Honor, based upon this Court's findings in Griswold versus Connecticut in which Justice Douglas stated the right of marital intimacy is older than our Bill of Right. It harkens back to the heritage of --

QUESTION: He didn't say anything about this kind of conduct.

MR. HOBBS: That is correct, Your Honor.

The Court has previously described fundamental rights, whether they be under the general heading of a right of privacy or other fundamental rights, is those which are so rooted in the conscience of our people as to be truly fundamental.

Principles of liberty and justice which lie at the base of our civil and political institutions, privileges which have long been recognized, a common law as essential to the orderly pursuit of happiness by free men.

The simple fact is that homosexual sodomy, which is what is involved in this case, has never in our heritage held a place --

QUESTION: Is the record clear as to whether the conduct was with a male or a female?

MR. HOBBS: The record, I believe, Your Honor -- The complaint indicated that Mr. Hardwick was arrested for engaging in sodomitic act with another male.

QUESTION: Of course, this isn't a review of any conviction, is it? The only reason you would want to show that is to show there was a danger of prosecution.

MR. HOBBS: That is correct, Your Honor. This is a review of a dismissal of a Section 1983 lawsuit and under that dismissal we are bound by the allegations contained in the complaint.

Our legal history and our social traditions have condemned this conduct uniformly for hundreds and hundreds of years.

As late as 1979 in the Palm versus Hughes case this Court indicated that it is neither illogical nor unjust for society to express its condemnation of irresponsible liaisons outside of the bonds of marriage.

I would submit to the Court that the Respondent and the Eleventh Circuit have posed no reason to distinguish the rationale of that decision.

Nor should the conduct be considered fundamental protected by the Constitution merely because it might take place in the home. The Eleventh Circuit and the Respondents rely heavily upon this decision in Payton versus New York and in Stanley versus Georgia. Of course, Payton was a Fourth Amendment case involving the physical intrusion of individuals of the state into a person's home.

This is not a Fourth Amendment case. The Fourth Amendment does not -- while it does provide a general right of privacy concerning the home, it does not prevent the state from enacting regulations which govern activities in the home.

QUESTION: It might well, as a practical matter, I suppose, prevent the state from enforcing its law with respect to -- Your point is that doesn't make the law

invalid.

MR. HOBBS: That is absolutely correct, Your Honor.

The Four Amendment, as this Court has held, protects two types of expectations, searches and seizures, and those expectations are not involved in the questions presented to the Court today.

Stanley versus Georgia, which is relied on most heavily by the Respondent, is also, I would submit, inapplicable to this situation, for in Stanley this Court found that there was an underlying right, a fundamental right under the First Amendment, to freedom to receive information and ideas and it was that right which was being infringed upon when Georgia attempted to prosecute Mr. Stanley for the private possession of phornographic materials.

This case does not involve any such underlying right.

In order for Stanley to be applicable, I would submit to the Court, this Court must find first that there is a fundamental right to engage in homosexual sodomy.

Moreover, Stanley has been limited to its facts by this Court and United States versus 12 200-Foot Reels of Film, wherein this Court decided that Stanley was a line of demarcation, that the Court would go thus far but

not beyond and limited Stanley strictly to the facts of that particular case.

Concededly there are certain kinds of highly personal relationships which are entitled to heightened sanctuary from the state and intrusion.

The Respondents would urge, and the Eleventh Circuit has concluded, that the relationship involved in this case is entitled to constitutional protection as a fundamental right under the right of intimate association. Only a limited number of associations and relationships have been found by this Court to be entitled to constitutional protection, those that attend marriage, the family, raising children, and cohabitation with one's relatives.

This Court has described those relationships as personal bonds which have played a critical role in the culture and traditions of the nation by cultivating and transmitting shared ideals and beliefs.

QUESTION: Mr. Hobbs, when you say "cohabitation with one's relatives," you mean living in the same house with them?

MR. HOBBS: That is correct, Your Honor.

(Laughter)

MR. HOBBS: I was referring, of course, to this Court's decision in Moore versus East Cleveland.

This description, I would submit to the Court, does not apply to the conduct which is prescribed by Georgia's sodomy statute.

Respondent and some amici in this case have argued that perhaps the definition of the family should be changed so as to be extended to homosexuals and other types of relationships which have not been recognized in our society thus far so as to accommodate the conduct which is prohibited and elevated to a constitutional status.

QUESTION: General Hobbs, can I ask you one question that is prompted by Justice Rehnquist's notion that there are difficulties of enforcement within the home and earlier you had been asked about the extent to which the statute has been enforced.

In this case, as I read the complaint, the Plaintiff expressly alleged that he did this sort of thing over and over again. And, I take it the state didn't take discovery to find out maybe they could prove that that was, in fact, true and, therefore, could have prosecuted him.

How do you reconcile that with the notion that there is a statute that the state seeks to enforce in a situation which he says exists in this case?

MR. HOBBS: Well, Your Honor, to be quite frank, I do not know what was in the mind of the District Attorney

when he decided not to prosecute this case.

QUESTION: But, what about the state representative to defended this very lawsuit?

MR. HOBBS: In terms of prosecuting Mr. Hardwick?

QUESTION: If they thought there was an important public interest in enforcing the statute, why wouldn't they take his discovery, get him to admit he committed all these acts and then prosecute him?

MR. HOBBS: Because at the time, Your Honor, we relied heavily, almost exclusively on this Court's decision in Doe versus Commonwealth's Attorney. The State of Georgia was in this case by virtue of the declaratory judgment action and it was decided that a motion to dismiss the 1983 lawsuit should be found based upon this Court's decision in Doe versus Commonwealth's Attorney.

QUESTION: I can understand why that would win the lawsuit for you, but I find it puzzling as to how that vindicates the public interest that this statute was supposed to serve to stop this kind of conduct.

MR. HOBBS: Well, I think --

QUESTION: Does the state really have an interest in stopping this kind of conduct? If not, why wouldn't they enforce the statute?

MR. HOBBS: I think that most certainly the state does have an interest in enforcing the statute and in

maintaining the statute on our books.

As I have indicated, the Fourth Amendment makes the enforcement of this statute very difficult, but the statute also --

QUESTION: It would have been very easy in this case, in this instance.

MR. HOBBS: Perhaps so.

QUESTION: Presented with a silver platter and they declined to go forward. It seems to me there is some tension between the obvious ability to convict this gentleman and the supposed interest in general enforcement.

MR. HOBBS: I would agree, Your Honor. We are, however, bound by the record as it is presented to the Court and I am wary of going beyond the record to explain other evidence.

The Respondent, as I was saying, and some amici have urged that the relationship of the family should be redefined and this is one of the interests that the State of Georgia is most concerned about. We are very concerned that there is a potential, should the Eleventh Circuit's decision be upheld, for a reshuffling of our society, for a reordering of our society.

As this Court indicated in Roe versus Wade, the right of privacy is not limited. It is not absolute, pardon me. There must be limits and it is submitted that in finding

these limits we must be wary of creating a regime in the name of a constitutional right which is little more than one of self-gratification and indulgence.

The Constitution must remain a charter of tolerance for individual liberty. We have no quarrel with that. But, it must not become an instrument for a change in the social order.

The Respondents have made a crack-in-the-door argument that if the Eleventh Circuit's decision is affirmed in this case it will not go beyond consensual private homosexual sodomy; that it is submitted that this crack-in-the-door argument is truly a Pandora's box for I believe that if the Eleventh Circuit's decision is affirmed that this Court will quite soon be confronted with questions concerning the legitimacy of statutes which prohibit polygamy, homosexual, same-sex marriage, consensual incest, prostitution, fornication, adultery, and possibly even personal possession in private of illegal drugs.

Moral issues and social issues, it is submitted to the Court, should be decided by the people of this nation. Laws which are written concerning those issues are rescinded concerning those issues should be by the representatives of those people. Otherwise, the natural order of the public debate and the formulation of consensus concerning these issues, it is submitted, would be

interrupted and misshapen.

It is the right of the nation and of the states to maintain a decent society, representing the collective moral aspirations of the people.

The Eleventh Circuit and Respondents in this case, by failing to adhere to the traditions, the history of this nation and the collective conscience of our people, would remove from this area of legitimate state concern, a most important function of government and possibily make each individual a law unto himself.

It is submitted to this Court that this is not the balance that our forefathers intended between individual liberties and legitimate state legislative prerogatives.

Thank you very much, Your Honor.

CHIEF JUSTICE BURGER: Mr. Tribe?

ORAL ARGUMENT OF LAURENCE TRIBE, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. TRIBE: Mr. Chief Justice, and may it please the Court:

This case is about the limits of governmental power. The power that the State of Georgia invoked to arrest Michael Hardwick in the bedroom of his own home is not a power to preserve public decorum. It is not a power to protect children in public or in private. It

is not a power to control commerce or to outlaw the infliction of physical harm or to forbid a breach in a state sanctioned relationship such as marriage or, indeed, to regulate the term of a state sanctioned relationship through laws against polygamy or bigamy or incest.

The power invoked here, and I think we must be clear about it, is the power to dictate in the most initimate and, indeed, I must say, embarrassing detail how every adult, married or unmarried, in every bedroom in Georgia will behave in the closest and most intimate personal association with another adult.

QUESTION: Professor Tribe, is there a limiting principle to your argument? You commented, but I don't think responded, to the suggestion that how do you draw the line between bigamy involving private homes or incest or prostitution and you move on to the place.

MR. TRIBE: Yes.

QUESTION: You emphasize the home and so would I if I were arguing this case, but what about -- Take an easier one, a motel room or the back of an automobile or toilet or wherever. What are the limiting principles?

MR. TRIBE: Justice Powell, I think there are two kinds of limiting principles. The first relates to the place.

QUESTION: To the place?

MR. TRIBE: The place where the acts occur. In Stanley versus Georgia, this Court suggested that the mere possession and enjoyment of obscenity at home is quite different from other supposedly private places.

And, in the Fourth Amendment area, the Court has faced the problem of defining what is a home. It said, for example, a mobile home may not qualify. We think that wherever that line is drawn that a private home such as this represents the repository of constitutional traditions under the Third and Fourth Amendments.

QUESTION: What about incest in the private home?

MR. TRIBE: It seems to us that the private home does not shield anything that one might do there. It seems to us that the state's power to regulate the terms of relationships, just as it regulates the terms of contracts, includes the power to punish a breach of contract in a home, it can certainly punish adultery, wherever it occurs, without --

QUESTION: So, the limiting principle is limited to sodomy. Is that a principle?

MR. TRIBE: No, not quite. I think it is somewhat broader to be candid, Justice Powell. I think it includes all physical, sexual intimacies of a kind that are not demonstrably physically harmful that are consensual and

non-commercial in the privacy of the home.

Indeed, Mr. Hobbs said that under his theory state should be able, without providing a compelling justification, to punish -- his words were "irresponsible liaison" outside the bonds of marriage. So, imagine for a moment an ordinance or a statute that says unmarried couples may hold hands and they may perhaps embrace lightly, but extended caresses or kissing with the mouth is forbidden.

Now, in their theory, even if this occurs in the home, under their theory as long as the state says the majority of our legislators disapprove of this conduct and, indeed, there is a long history of disapproving things that might lead to greater intimacies among unmarried people, we can outlaw it, not just outlaw it, but we can resist a request for more particularized explanation of why.

When Justice Stevens asked, what is the public interest after all, why is it to so great, you don't even want to prosecute him in this clear case of violation, I think you will notice that Mr. Hobbs retreated to generalities.

What we suggest is that when the state asserts the power to dictate the details of intimacies in what they call irresponsible liaison, even in the privacy of the home, that it has a burden to justify its law through

some form of tightened scrutiny.

In your concurring opinion, Justice Powell, in Kelly versus Johnson when you suggested that a regulation on the length of hair if applied across the board to all citizens, unlike that case which was just the police, would involve an important personal liberty interest, would require a balancing of state interest against personal interest, and cited the Harlan dissent in Poe v. Ullman, I think what you recognized in that case and what I would stress here is that when a state's assertion of power over liberty occurs at the intersection of intimate personal association, which this Court has recognized in a half-century of cases, and the privacy of the home in the clearest possible sense, then there must be at least heightened scrutiny rather than the unquestioning deference that the State of Georgia would request.

QUESTION: I am not sure that you have answered Justic Powell's question about incest in the privacy of the home?

MR. TRIBE: Yes. Mr. Chief Justice, as to incest, it seems to me quite apart from problems about offspring and whatever genetic evidence there might be. But, the state's power to define the terms of relationships and to limit potential exploitation surely includes the power in the employee/employer context to say that a parent consents to sex is not real. In a parent/child context

to say that a --

QUESTION: Suppose it is parent and adult child. Those are two consenting adults then perhaps.

MR. TRIBE: I doubt, Mr. Chief Justice, that the state would have to assume that just because a woman is over 21, that if her father induces her to have sex, that that has got to be consensual.

We think a state can assume that there are certain relationships in the context of which, even if both people are adults, in the context of which consent, because of the power structure of the relationship, may just be an illusion, but there is nothing about this law that limits it to cases where consent is questionable or where there is some other relationship between the parties that makes this other than completely consensual intimacy.

QUESTION: Mr. Tribe, your line of reasoning would make the Edmonds Act unconstitutional, would it not?

MR. TRIBE: The Edmonds Act --

QUESTION: The Edmonds Act forbade the -- the Moral Act forbade polygamy and the Edmonds Act forbade cohabitation by one who is already married.

MR. TRIBE: No, I think, Justice Rehnquist, that cohabitation by one already married could be punished by the state as a breach of a state sanctioned relationship. If the state can punish inducement of breach of contract

in other cases, if the state can say that when people have made a solemn bond, a bond of status as well as contract, that it cannot be broken, I would think that laws against cohabitation and bigamy, wherever practiced, at least raise a different and far more difficult question than that here, because here the state is not saying that Mr. Hardwick was violating some relationship. The complaint, indeed, said nothing about the relationship between Mr. Hardwick and the other person, male or female. It just says that because the majority of us disapprove morally, we have the power, we, the State of Georgia, have the power to punish it and make it a crime.

QUESTION: Well, Mr. Tribe, how do you propose that these other situations be analyzed, by some sort of heightened scrutiny as well, and are you suggesting that there is a more compelling state interest or what is it you are saying?

MR. TRIBE: I think, Justice O'Connor, there are two approaches, either of which would lead to the same result.

One is that the recognized power of the state to protect children and to protect relationships and to prevent harmful conduct is such that it would be pointless to require heightened scrutiny any more than this Court does of the minimum wage laws or other laws regulating

special relationships, therefore, minimum rationality would suffice.

The other approach would be to say that if it is in the privacy of the home, scrutiny should be somewhat heightened, but it seems to me that it would be very easy for the state to show compelling justification and a compelling interest.

It seems to me that in either event the holding of the Eleventh Circuit, which is that in cases of this kind where a law reaches sweepingly to all consensual intimacy in the privacy of the home, without drawing any of the lines that a legislature might draw to deal with these problems --

QUESTION: Professor Tribe, let's come back to the privacy of the home and part of the question that I asked you and I don't think I gave you an opportunity to answer, would you distinguish the home between the back of an automobile?

MR. TRIBE: Certainly, Justice Powell.

QUESTION: And, a public toilet, of course?

MR. TRIBE: Certainly. We would say that in --

QUESTION: What about a hotel room overnight?

MR. TRIBE: We think that a hotel overnight is not entitled to the same degree of protection, but, frankly, I do not know precisely where the line would be drawn.

For Fourth Amendment purposes, hotel room overnight gets full protection.

But, when this Court decided in Payton that one needs a warrant to enter a private home even with probable cause, it is not clear to me that that decision which reflected, as your concurring opinion in Rakas did, the sense that there is something special about a home, would automatically extend to a hotel room.

QUESTION: I mentioned something special about a home in Moore also against East Cleveland. You mentioned Poe against Ullman, but doesn't Justice Harlan in his dissenting opinion exclude sodomy when he was talking about the history of relationships?

MR. TRIBE: Justice Powell, I have been troubled by parts of the Harlan dissent in Moore which rather casually mentioned homosexuality, and for that matter abortion, in much the same breath.

The actual language that I think is operative at page 552 of the Harlan dissent is that he would not suggest -- He says that "adultery, homosexuality, fornication and incest are immune from criminal inquiry however privately practiced."

We are not arguing for absolute immunity. We are arguing for heightened scrutiny. The Eleventh Circuit only held that when a law of this kind is challenged because

of its intrusive invasion of personal liberty at the intersection of intimate association, on the one hand, and the privacy of the home on the other, the state must do more than appeal to the tautology that a majority of its legislators has approved.

QUESTION: Mr. Tribe, can I ask you a little more about your second limiting principle. Your first is the place. The second, as I understand it, is that if the justification is to protect some state-sanctioned relationship it may be permissible. Would it be permissible under your view for the state to prohibit conduct between -- heterosexual conduct between males and females who are not married to one another and not married to anybody else in order to discourage that kind of conduct and sort of foster the marriage institution?

MR. TRIBE: I would think, Justice Stevens, first, that if they did that, strict or substantially heightened scrutiny would be required.

Second, I think that when the state makes the argument that it is necessary to illegalize extra-marital, completely non-marital sexual relations in order to put marriage on a pedestal, that under heightened scrutiny that argument would emerge rather dubious, the cause/effect relationship extremely dubious, as in Carey and as in Griswold when the argument was we want to outlaw

contraceptives because indirectly that will make --

QUESTION: What you are saying is that it would implicate your second limiting principle, but not carry the day.

MR. TRIBE: Exactly, Justice Stevens.

QUESTION: But, you say there is a parallel between that problem and the one we have before us today.

MR. TRIBE: I would say --

QUESTION: One could argue that the reason for discouraging it is to encourage marriage.

MR. TRIBE: If that argument were made on remand, but if the Court were to agree that heightened scrutiny is appropriate, it would certainly be a legitimate argument for the state to advance, unlike the tautology it advances here, we outlaw it because we don't like it, we think it is immoral. It would be a legitimate argument, that this is a properly tailored means of encouraging marriage.

I would then submit that one would have responses along the line of Boddie v. Connecticut, the right not to be married. It would then be a more finely tuned inquiry into whether the state's intrusion into so personal and intimate and private a realm was really a rationally, reasonably tailored means of achieving that end and I frankly doubt that it could be sustained. But, at least the state would not be asking for the utterly opaque and

unquestioned deference that it seeks in a case of this kind where it says that because the majority for a long time has disapproved of this conduct, we can make it a triumph.

If history alone were the guide -- Surely, I have to conceded that the framers of the Fourteenth Amendment and perhaps Justice Harlan 25 years ago would have been prepared to assume that the kinds of sexual intimacies involved in this case would be outlawed. But, then the framers of the Fourteenth Amendment assumed that the kinds of sexual -- given the constitutional protection in Reed v. Reed and in Frantiero and in Stanton versus Stanton and in Hogan v. Mississippi University for Women also could be outlawed. The law that they assumed would apply is the law that kept Myra Bradwell from being a lawyer.

But, as this Court recognized in Loving against Virginia, where also a majority of the people of Virginia believed that interracial liaisons were inherently immoral and where for a long time a lot of people had believed that, this Court did not think that the Constitution's mission was to freeze that historical vision into place.

Justice Harlan's dissenting opinion in Poe v. Ullman recognized the evolutionary character of the definition of those intimacies that are protected.

And, it seems to me that it would hardly be a

suitable role for any court to decide its own catalogue of protected intimacies.

QUESTION: Mr. Tribe, if this evolution is taking place, as you suggest, and you may well be right, why isn't it more proper for this Court to let it be reflected in the majority rule where, you know, states have repealed these statutes.

MR. TRIBE: Justice Rehnquist, we do think that that trend is at least relevant for the question of whether this is self-evidently evil. But, this Court has never before held that when a personal right protected by the Constitution, just because those persons might be able to obtain political redress, the right no longer deserves judicial protection.

Indeed, in Justice Powell's dissent in Garcia, the suggestion was made that surely this Court would never say as to individual rights that the ability of individuals to possibly persuade a legislature to protect them is enough.

In Stanley v. Georgia, another case where Georgia wanted to impose its morality on the privacy of the home, the argument could have also been made most states have legalized private possession of pornography.

QUESTION: But, I thought your argument suggested that 25 years ago, if that is the right time that Justice Harlan wrote his dissent in Poe against Ullman, perhaps

these rights wouldn't have -- the right that you are arguing for here, the right to commit sodomy, would not have been constitutionally protected, but now they are. What has happened in 25 years? .

MR. TRIBE: I do not think that if this case had been squarely presented before Justice Harlan that he would have decided to draw the line based on which body parts come into contact. I think he would have recognized that the power of the state in a case properly presented, the power of the state to have its own catalogue of how you can touch someone else in the privacy of the home is limited.

QUESTION: Then he just wrote that part of his dissent in a fit of absent-mindedness?

MR. TRIBE: No, I don't think Justice Harlan was capable of fits of absent-mindedness. But, this Court's doctrine about advisory opinions recognizes that even the best justices are at their best when they have a genuine case or controversy before them. And, I do think that we have one here.

I want to make some comment about the suggestion implicit in some of the questions, that the absence of frequent prosecution in cases like this, apart from how strongly it suggests the State of Georgia hardly has a compelling or important interest in vindicating this law,

might also provide an avenue for avoiding a decision much as the Court found one in Poe versus Ullman.

It does not seem to me that that avenue is a plausible one here for several reasons. After all, Mr. Hartwick was arrested. Under this very arrest, he could still be prosecuted. Under this arrest, he is subject to considerable restraint. And, the state's undisputed resolve to enforce this law, at least in some instances, according to their own catalogue of where they think it is appropriate to enforce it if evidence comes to their attention. That resolve is undiminished, especially since this is a facial attack on the law.

It seems to us that the nature of the harm that Mr. Hardwick suffers from having been arrested and being told he is a criminal and might be arrested again makes it very difficult to avoid decisions.

QUESTION: You say it is a facial attack, Mr. Tribe. I had thought it was only as applied in the home.

MR. TRIBE: Well, I suppose with every facial attack, Justice Rehnquist, there is some definition of the relevant universe. There is no suggestion, for instance, that the part of this law which involves aggrevated sodomy is under attack.

The argument, however, is that this law in its sweeping definition of intimacies in the home is

unconstitutional and --

QUESTION: But, you are saying when applied in the home. I thought your response to Justice Powell was that a hotel room, back seat of a car, no.

MR. TRIBE: That is correct. We don't rely on peculiarities of the facts here, but we do say that it is only in the context of the home that the very powerful confluence of rights represented by the home and intimacy are involved.

QUESTION: Well, then it is really not a facial attack on the statute I don't think.

MR. TRIBE: If you want to call it something else, that is not a problem.

In any event, it is important, I think, to recognize that he is not identifying something about his situation relevantly different from that of a married couple that might be prosecuted and saying that the law perhaps protects them but not me, but I am invoking their rights.

The argument he makes is that regulation of sexual intimacy in the privacy of the home by a law this sweeping is subject to heightened scrutiny and there is no severability clause in this law as there wasn't in Carey or Zablocki.

This is not, for example, one of the five states that outlaws sodomy only between people of the same sex.

So, it seems to us that what is before the Court

quite clearly is the power of Georgia asserted through this statute to criminalize without explanation beyond the tautological invocation of the majority morality.

QUESTION: Professor, what provision of the Constitution do you rely on or we should rely on to strike down this statute?

MR. TRIBE: The Liberty Clause of the Fourteenth Amendment, Justice White, as given further meaning an content by a force of decisions over half a century.

We think that as to the home the Third and Fourth Amendment --

QUESTION: Which cases do you particularly rely on?

MR. TRIBE: Well, we think with respect to the home dimension we rely heavily on Stanley, where the idea that it was a First Amendment right surely will not wash because, as the Court held, and, indeed, the very case they cite, 12 200-Foot Reels, there is no right to buy the material, no right to sell it, no right to show it to consenting adults in public, only a right to enjoy it in private.

With respect to the intimacy dimension, we rely heavily on Griswold and on Eisenstadt to show that Griswold cannot be limited to married couples.

And, with respect to both, we rely on the

fundamental principle recognized in the concurring opinion in Kelly v. Johnson that important intrusions upon liberty are not to be upheld on a form of review so differential though it might be appropriate in regimented context such as the policy or military. This Court has never held it appropriate in dealing with all citizens in the privacy of their home.

QUESTION: How do you articulate this right or this process of declaring a -- you say it is a fundamental right or is it a -- how should we go about identifying some new right that should give protection?

MR. TRIBE: Well, Justice White, I think that the method that this Court used in both Griswold and in Roe of looking to tradition in terms of the protection of the place where an act occurs and of looking to a tradition in terms of recognizing autonomous personal control over intimacy is an appropriate process to employ.

It seems to us that it is easier using that process to conclude that this case implicates a fundamental right and even to conclude it in Moore v. East Cleveland, because as the tradition of family is -- In your dissenting opinion in Moore, I think it was an important point that it was not necessarily so crucial a matter for the society to ensure the right of grandmothers to choose exactly which grandchildren to live with.

Now, I think myself the majority was right in that case. But, whatever you think about Moore, the long line of opinions cannot in any principled way be cut off at the particular triangle of rights in which the State of Georgia would try to encase this Court's precedents, marriage, family, and procreation.

If the entire line of decisions is not to be repudiated root and branch, it has to stand for some generalizable principle of the kind that the majority opinion in the Jaycees case endorsed where the Court expressly rejected the idea of a methodology that would proceed by specific categories unmentioned in the Constitution like marriage and family and in favor of the more functional approach that would look to the distinctively personal aspects of life that are being regulated in settings distinguished, as the Court put it, by solace, selectivity and seclusion.

Now, if liberty means anything in our Constitution, especially given the Ninth Amendment's proposition that it is not all expressly enumerated, if liberty means anything it means that the power of government is limited in a way that requires an articulated rationale by government for an intrusion on freedom as personal as this.

It is not a characteristic of governments devoted to liberty that they proclaim the unquestioned authority

of big brother dictate every detail of intimate life in the home.

What sense would it make to say that the government cannot order its regiments in the home, if it could regiment every detail of life in the home. What sense does it make to use the apparatus of the Fourth Amendment with the controversial exclusionary rule to protect the privacy of the home if the Constitution is insensitive to the substantive privacies of the life within the home?

It seems to us that if the protections of the Third and Fourth Amendments are not to be reduced to error and empty formalisms, that they have to reflect an underlying principle, a principle not unlike that which this Court recognized in decisions like Meyer and Pierce and more recently in Moore v. East Cleveland.

Those underlying principles, I think it is important to stress, do not place on a constitutional pedestal as though receiving this Court's particular approval, the particular acts involved in a case like this. I think in that sense it is misleading to say that we are championing a fundamental right to commit a particular sexual act.

We are saying that there is a fundamental right to restrict government's intimate regulation of the privacies of association like in the home. The principle that we

champion is a principle of limited government, it is not a principle of a special catalogue of rights.

Robert Frost once said that home is the place, where when you go there they have to take you in.

I think constitutionally home is the place where when the government would tell you in intimate detail what you must do there and how to behave there, they have to give you a better reason why than simply an invocation of the majority's morality which tautologically would vindicate without any scrutiny by this Court literally every intimate regulation of everything one can do in the home.

It doesn't denigrate the special place of family and parenthood and marriage in our society to recognize the principle of limited government. On the contrary, if there is something special and unique about parental authority it is that we do not cede to big brother the same unquestioned deference that children are perhaps supposed to give to their parents.

When the government would tell people in this much detail how to conduct their intimate lives and doesn't apparently have a good enough reason to keep Mr. Hardwich in something other than a limbo in which he could be prosecuted any time until August under this extraordinarily sweeping law, when it does that, it seems to us that it

is fully respectful of history and tradition for the Eleventh Circuit to have said you owe Mr. Hardwick a better reason and you owe the people of the United States a better reason than simply unquestioned deference.

And, I think Justice Harlan, if the issue had been properly posed in Poe v. Ullman which, of course, didn't involve this, would have recognized that requirement of meaningful justification. Even if you only call it rationality review, it is rationality review with meaningful content of the kind this Court recognized in the Cleburne case.

QUESTION: Mr. Tribe, I am curious to know, you have referred to Justice White's opinion in Moore v. Cleveland. Do you think that opinion helps you or hurts you?

MR. TRIBE: Oh, it certainly hurts more than it helps. I was suggesting, however, that even that opinion -- that even in that opinion there is room for some hope.

Your opinion in Moore v. East Cleveland is considerably more helpful, because in that opinion you talk about the meaning of private property which is also involved in this case. What does it mean to say one's home is a private place if every detail of what one does there can be regulated by the state because they think

it is an irresponsible liaison.

It seems to us that the very meaning of home is denigrated if that can be done. It seems to us it is only a principle of limited government that makes it important to affirm the Eleventh Circuit's decision that heightened scrutiny is required in such a case.

QUESTION: Let me ask you one other question which is really about Justice White's opinion which seems to assume that a law that has some impact on liberty must have some utility or -- his exact line which is must have a purpose or utility.

MR. TRIBE: That is right.

QUESTION: What is your understanding of the purpose or utility of the law of the state in this case?

MR. TRIBE: My understanding is that Georgia refuses to tell us other than to say that the acts involved we say are immoral. Three times they say they are the definition of evil, although half the states have decriminalized them. They refuse to advance a purpose or utility. It is in that respect that even the form of review endorsed by Justice White's dissent in Moore which requires some meaningful explanation of how this law would function to advance the public welfare, why it wouldn't be counter-productive, why it wouldn't cause more contempt for law than respect for families. Some explanation is

required.

And, if one reverses the Eleventh Circuit's decision and allows the flat and unexplained dismissal of the district court to stand, the message of that is the state need not offer any explanation, no utility, no function. It is enough to say we passed it, that means most of us thinks it is wrong and a lot of people have thought it was wrong for a long time, therefore, ask us no further questions.

QUESTION: Well, Mr. Tribe, under your analysis what sort of explanation would be required? You suggested that if the state were to assert its desire to promote traditional families instead of homosexual relationships would not suffice in your view and yet that is an articulate -- potentially articulate reason. Perhaps the state can say its desire to deter the spread of a communicable disease or something of that sort.

MR. TRIBE: Yes.

QUESTION: Now, what suffices here?

MR. TRIBE: As to the first, if the State of Georgia were simply defending -- Might I finish the answer to this question, Mr. Chief Justice?

If the State of Georgia were defending its refusal to sanction homosexual marriage, there would be a close connection between that and the first rationale.

The connection, however, would be so weak between this sweeping law and the rationale of endorsing or helping marriage that I doubt that would work.

As to avoiding the spread of communicable diseases, the American Public Health Association, at page 27 of the amicus brief, they think that this law and laws like it would be counter-productive to that end, but you don't even reach that issue until you have some kind of meaningful inquiry.

Surely, if a narrowly tailored law could be shown necessary to protect the public health, that would be a compelling justification, but Georgia offers no such justification here.

Limited government, we think, makes the Eleventh Circuit's decision correct.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Hobbs?

ORAL ARGUMENT OF MICHAEL E. HOBBS, ESQ.

ON BEHALF OF THE PETITIONER --REBUTTAL

MR. HOBBS: The State of Georgia is not acting as big brother in this particular case. It is adhering to centuries-old tradition and the conventional morality of its people.

Certainly, it cannot invade the privacy of the

home and regulate each intimate activity which takes place there.

Each statute enacted by any state must be rationally related to a legitimate government purpose and it is submitted most respectfully to Mr. Tribe that this statute is related to the legitimate purpose of maintaining a decent and moral society. It is inherently intertwined with the state's concern with the moral soundness of its people.

Just a couple of comments. The State of Georgia in its official code does have a general severability statute and that should bear on the issue here before the Court.

In summary, the liberty that exists under our Constitution is not unrestrained. It is ordered liberty, it is not licentiousness.

If the Eleventh Circuit's decision is affirmed in this case, the State of Georgia and other states will be impeded for making those distinctions between true liberty, ordered liberty, and licentiousness.

Thank you very much, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:56 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-140 - MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, Petitioner

v. MICHAEL HARDWICK, AND JOHN AND MARY DOE

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

Comment

History, Homosexuality, and Political Values: Searching for the Hidden Determinants of *Bowers v. Hardwick*

Anne B. Goldstein†

On August 3, 1982, Michael Hardwick was arrested in his own bedroom for making love with another consenting adult and charged with sodomy.[1] Hardwick and his male lover spent ten humiliating hours in jail, but the district attorney decided not to prosecute them.[2] In response to this experience with Georgia's criminal justice system, Hardwick filed a federal civil rights challenge to the statute that made his private lovemaking a crime, alleging that it violated his "fundamental right of privacy." In considering this case, the various courts[3] analyzed the issues he raised under the modern cases establishing a constitutional right of privacy.[4] Writing for a majority of five, Justice White concluded that the constitutional right

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† Associate Professor of Law, Western New England College School of Law. The author thanks Howard I. Kalodner, Dean, Western New England College School of Law, for reading earlier drafts and for providing institutional support that aided in the completion of this article. She also thanks Gary Buseck, Mary Joe Frug, Molly Geraghty, James Gordon, Cathy Jones, Leora Harpaz, Kathleen Lachance, Michele Dill LaRose, Art Leavens, Stephanie Levin, Bruce Miller, Martha Minow, Dennis Patterson, David A.J. Richards, Barry Stern, Sam Stonefield, Kathleen Sullivan, Samuel Thorne, Donna Uhlmann, and Keith Werhan for their assistance, and, above all, Zipporah B. Wiseman, without whose encouragement and support this would never have been written.

1. GA. CODE ANN. § 16-6-2(a) (1984) provides, "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . ."

2. Hardwick and his lover were held in a cell with about twelve other men. Jail employees repeatedly joked that they would be sexually assaulted by other inmates. *See* Affidavit of Michael David Hardwick, dated Sept. 19, 1982 (not filed in court; on file with the author).

3. *See* 478 U.S. 186 (1986), *rev'g* Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

4. Justice White also rejected Hardwick's argument that his conduct was protected under the Fourth Amendment because it occurred in his own home. 478 U.S. at 195. Justice Stevens' dissent was based upon equal protection analysis, *id.* at 214–20, also considered in Justice Blackmun's dissent, *id.* at 202 n.2.

of privacy described by the Court's prior cases did not extend to "homosexual sodomy."[5] Writing for the four dissenters, Justice Blackmun argued that Hardwick's lovemaking was within that private sphere of individual liberty kept largely beyond the reach of the state.[6]

The Court's focus on "constitutional privacy" doctrine obscured two other important determinants of the opinions in *Hardwick*: the Justices' underlying political philosophies and their understandings of the act for which Hardwick was arrested.[7] The Justices disagreed about more than just the interpretation of prior cases and their application to new facts. They disagreed about the basic meaning of the terms "privacy" and "homosexuality," and, although they did not frame their dispute in these terms, they disagreed over fundamental political values.

Central to the majority's treatment of the case is its claim that "homosexual sodomy" has always been abhorred. Both Justice White's opinion and Chief Justice Burger's concurrence rely heavily on the asserted antiquity of proscriptions against "homosexual sodomy" to understand Hardwick's conduct and to analyze his constitutional claims. They cite "ancient proscriptions" to demonstrate that the framers could not have intended the Bill of Rights or the Fourteenth Amendment to protect Hardwick's "homosexual sodomy,"[8] and to support their implicit view that "homosexual sodomy" is sinful and immoral, and hence that it is now, as it always has been, properly punished by the criminal law.

Close examination of the historical accounts on which Justice White and Chief Justice Burger rely for these assertions reveals that they are certainly misleading, and in some cases inaccurate as well. Even their apparently uncontroversial assumption that lovemaking between persons of the same sex[9] has always been seen as fundamentally different from heter-

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5. *Id.* at 191. Chief Justice Burger, and Justices Powell, Rehnquist, and O'Connor, joined Justice White's majority opinion. Burger and Powell filed separate concurring opinions. Burger emphasized what he asserted were the "ancient roots" of the Georgia law. *Id.* at 196–97 (Burger, C.J., concurring). Powell suggested that the statute's maximum 20-year sentence for a single private, consensual act might be a cruel and unusual punishment under the Eighth Amendment. *Id.* at 197–98. (Powell, J., concurring).

6. *Id.* at 203 (Blackmun, J., dissenting). Justices Brennan, Stevens, and Marshall joined Blackmun's dissent.

7. Most commentary on this case either accepts the Justices' characterizations of their handiwork at face value and explores the decision's implications in those terms, or attempts to relitigate the case on a different theory from the one actually employed. *See, e.g.*, Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1986–87); Gillerman, *Dred Scott Revisited: A Comment on Bowers v. Hardwick*, 30 BOSTON B.J. 4 (Sept./Oct. 1986); Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 COLUM. HUM. RTS. L. REV. 43 (1986–87); Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986); Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 210–20 (1986) [hereinafter *Leading Cases*].

8. 478 U.S. 191–92 (White, J.); *id.* at 196–97 (Burger, C.J., concurring).

9. This Comment focuses exclusively on historical attitudes toward, and treatment of, sex between men. Because women had different social and biological roles and responsibilities, a corresponding discussion of historical attitudes toward, and treatment of, sex between women is beyond the scope of this Comment, although it merits full treatment elsewhere.

osexual lovemaking is incorrect: This distinction turns out to be more modern than either the Bill of Rights or the Fourteenth Amendment.

After carefully examining the Justices' historical claims, this Comment examines the interrelations between their differing use of "privacy," understandings of "homosexuality," and political values. The Comment will argue that the political philosophies underlying the majority and dissenting opinions in *Hardwick* inform the Justices' definitions of "privacy" and interact with their differing understandings of "homosexuality." The majority's understanding of homosexuality as immoral corresponded with its willingness to justify criminal prohibitions by reference to morality. In contrast, the dissenters' understanding of homosexuality as a normal human variation coincided with the importance they attach to preserving individual liberty.

This Comment explores the relationships between the Justices' understandings of homosexuality and their political values by comparing the *Hardwick* opinions to an earlier dispute over whether consensual lovemaking should be a crime: the celebrated Hart-Devlin debate. The Comment concludes with some thoughts on the probable effects of *Hardwick* on future constitutional litigation.

I. The Justices' Doctrinal Disagreements

Writing for the majority, Justice White announced that the constitutional right of privacy did not protect even private and consensual homosexual sodomy. White narrowly limited the Court's earlier privacy cases to their facts,[10] and refused to extend them, arguing that substantive due process rights not found in the text of the Constitution, such as the right of privacy, should not represent merely the Justices' own values.[11] Such rights must either be " 'deeply rooted in this Nation's history and tradition,' "[12] or " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.' "[13] Because Justice White believed that every state that ratified the Bill of Rights and all but five of those that ratified the Fourteenth Amendment proscribed homosexual sodomy,[14] he perceived any claim that homosexual sodomy involved a "substantive due process" right to be "facetious."[15] White concluded that recognizing a fundamental right to "homosexual sodomy" would exceed the Court's institutional limits.[16] Because Hardwick had no fundamental right to engage in homosexual sodomy,[17] the Court sought

10. 478 U.S. at 190.
11. *Id.* at 191.
12. *Id.* at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).
13. *Id.* at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).
14. *Id.* at 192-93.
15. *Id.* at 194.
16. *Id.*
17. *Id.* at 192.

merely a rational basis[18] for Georgia's statute. White's opinion held that the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable"[19] was sufficient justification for the law. Writing separately, Chief Justice Burger emphasized the "ancient roots" of proscriptions against "homosexual sodomy."[20]

In dissent, Justice Blackmun rejected the majority's framing of the issue. For Blackmun, the case involved not merely a right to perform homosexual sodomy, but "the fundamental interest all individuals have in controlling the nature of their intimate associations with others,"[21] or, even more broadly, " 'the right to be let alone.' "[22] Blackmun articulated two reasons for framing the issues expansively. First, he thought that because the statute used anatomical rather than gender-based proscriptions, it should not be tested "as applied" to homosexuals alone. Selective enforcement of Georgia's statute might confer standing on a "practicing homosexual," but no enforcement pattern could narrow the language of a statute that made both gender and marital status irrelevant.[23] Second, Justice Blackmun believed "sexual intimacy" to be " 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.' "[24] He thought it as "central a part of an individual's life"[25] as the activities already protected by the constitutional right of privacy. Although he would have applied a stricter test,[26] Blackmun argued that the Georgia law lacked even a rational basis: Georgia had not proved that private, consensual homosexual sodomy caused

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18. Under both the equal protection and due process clauses of the Fourteenth Amendment, the Court has calibrated its scrutiny of challenged laws to the interests it perceives to be involved in the case. When no interest justifying greater vigilance appears to be at stake, the Court is deferential to legislative judgments. In these cases it requires only that the law have a "rational basis": a reasonable relationship to a legitimate public purpose based on some conception of the general public good. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994–96 (1978).

The Court's least deferential review is reserved for cases in which a suspect classification, such as race, has been employed, or where a fundamental right has been impaired. Review in these cases is called "strict scrutiny." It is usually fatal. *See id.* at 1000–12.

The Court has also used an intermediate level of deference to review laws employing classifications such as gender, *see* Craig v. Boren, 429 U.S. 190 (1976), or illegitimacy, *see* Trimble v. Gordon, 430 U.S. 762 (1977).

19. 478 U.S. at 196. Reasoning that "the law is constantly based on morality," the majority was "unpersuaded" "that majority sentiments about the morality of homosexuality should be declared inadequate." *Id.*

20. *Id.* at 196–97 (Burger, C.J., concurring).

21. *Id.* at 206 (Blackmun, J., dissenting).

22. *Id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

23. 478 U.S. at 200–01 (Blackmun, J., dissenting).

24. *Id.* at 205 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

25. 478 U.S. at 204 (Blackmun, J., dissenting).

26. Blackmun would have given the Georgia statute strict scrutiny because " 'the basic reasons' " for constitutional protection of individual decisions about the family mandate protection of sexual expression per se. *Id.* at 204–06 (Blackmun, J., dissenting) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion)).

any form of tangible harm.[27] Blackmun also emphatically rejected the argument that "ancient" notions of immorality insulate sodomy statutes from review.[28]

Justice Stevens' dissent took a different approach. It argued that, because prohibitions against sodomy applied historically to married and unmarried participants, of the same and of different sexes,[29] the Court's rationale for upholding sodomy statutes must apply just as broadly. Stevens therefore considered whether Georgia could enact a neutral law prohibiting sodomy by all persons without exception,[30] and, if not, whether it could save the statute from being found unconstitutional by selectively enforcing it against homosexuals. Stevens concluded that neither course was permissible, because the "essential 'liberty' " recognized in the Court's prior privacy cases encompassed the right of both married and unmarried heterosexual couples to engage in nonreproductive sexual conduct, and because every citizen has the same subjective interest in such liberty.[31] Stevens could find no neutral and legitimate interest to support selectively enforcing a generally applicable sodomy law against homosexuals; he thought Georgia's asserted interest amounted to nothing more substantial than "habitual dislike . . . or ignorance."[32] Indeed, Stevens argued that

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27. 478 U.S. at 208-09 & n.3.

28. *Id.* at 210 (Blackmun, J. dissenting).

29. *Id.* at 214-15 & n.2 (Stevens, J., dissenting).

Because Hardwick's complaint raised no equal protection claim, Stevens was, in effect, redrafting the complaint. Had Hardwick used this theory below, Georgia might have made a better showing on it. Although ingenious arguments have stretched equal protection doctrine to fit homosexual rights, *see, e.g.*, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) [hereinafter *Suspect Classification*]; Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984), these arguments have both theoretical and practical defects.

It is difficult to characterize "homosexuality" as a condition so similar to race and sex as to be a protected category without severely narrowing the definition of homosexuality. Human sexuality appears to be polymorphous, not dimorphous. Most adults have some sexual interest in persons of their own gender, and very few have no other sexual interests at all. *See* A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 636-56 (1948). If equal protection of "homosexuals" benefited only persons with an exclusive, lifelong, sexual preference for others of their own gender, the category might be analogous to race or sex, but it would not include many of the people who violate Georgia's statute with others of the same gender.

Furthermore, the potential power of equal protection analysis may be, paradoxically, its greatest practical weakness. An argument with less potential, which would be less threatening to those who fear that striking down sodomy laws will transform society beyond recognition, is more likely to win cases. Precisely because "an equal protection analysis seeks to unify the private and the political by protecting gay personhood as a whole . . . [and] could provide a comprehensive doctrinal framework for addressing the problem of gay inequality," *Suspect Classification*, *supra*, at 1297, it would be a much larger step to strike down a sodomy law on equal protection grounds than on privacy grounds. Courts have uniformly rejected attempts to legitimize homosexual marriage, for example, a result that would probably follow if homosexuals were held to be entitled to equal protection of the laws. *See, e.g.*, Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971). *But see* Watkins v. United States Army, 847 F.2d 1329 (9th Cir.) (Army's discharge of, and refusal to reenlist, soldier for mere status as "homosexual" denies him equal protection.), *reh'g en banc granted*, 847 F.2d 1362 (9th Cir. 1988).

30. 478 U.S. at 216-18 (Stevens, J., dissenting).

31. *Id.* at 218-20.

32. *Id.* at 219.

the statute's language demonstrated that the Georgia electorate did not believe homosexual sodomy to be either more immoral or more unacceptable than heterosexual sodomy.[33] Similarly, the Georgia prosecutor's failure to prosecute Hardwick, even though Hardwick acknowledged that he intended to continue to engage in the prohibited conduct, showed that the prosecutor did not believe that homosexuals should necessarily be punished for violating the statute.[34] Stevens concluded that Georgia's failure to "provide the Court with any support for the conclusion that homosexual sodomy, *simpliciter*, is considered unacceptable conduct in that State"[35] deprived the statute of a rational basis.

II. Competing Conceptions of "Privacy" and "Homosexuality"

The doctrinal disputes among the Justices in *Hardwick* proceeded from more basic differences regarding the meanings of "privacy" and "homosexuality." This Section explores that level of disagreement.

A. *"Privacy"*

"Privacy" is an evocative word, but courts have been unable to give it precise meaning.[36] When Michael Hardwick's lawyers claimed that his arrest violated his "right to privacy," they explicitly compared his desire to be uninterrupted in sexual activity in his own bedroom to the desire of a heterosexual couple to use birth control without interference, or the desire of a woman to terminate an early pregnancy.[37] The Court therefore faced two basic and related questions: What was the nature of the "pri-

33. *Id.* (the Georgia electorate's representatives "enacted a law that presumably reflects the belief that *all sodomy* is immoral and unacceptable") (emphasis in original).

34. *Id.* at 219-20.

35. *Id.* at 220 (emphasis in original).

36. A "right of privacy" was first discerned in the Constitution in Griswold v. Connecticut. 381 U.S. 479, 485-86 (1965) (married couples' right to contraception grounded in privacy of marital relationship). Although *Griswold* cited earlier cases, it used the evocative word "privacy" to justify a new substantive due process right with only tenuous support in the text of the Constitution.

Subsequent cases have found a right of privacy in a variety of circumstances. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (right to remarry because marriage is "the foundation of the family"); Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) (right to live in extended family); Planned Parenthood v. Danforth, 428 U.S. 52, 67-72 (1976) (married woman may obtain abortion over husband's objection); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) (mandatory maternity leave rules in public schools unconstitutional because of "freedom of personal choice in matters of marriage and family life"); Eisenstadt v. Baird, 405 U.S. 438, 442-55 (1972) (right to birth control); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (possession of obscene matter in home protected from "unwanted governmental intrusions").

These many inconsistent applications have led some commentators to conclude that privacy is an irredeemably incoherent concept. *E.g.*, Olsen, *The Myth of State Intervention in the Family*, 18 J.L. Reform 835, 862 n.73 (1985); *cf.* Note, Roe *and* Paris*: Does Privacy Have A Principle?*, 26 Stan. L. Rev. 1161, 1163 (1974) (Court's treatment of privacy as "self-explanatory, unitary concept" one of its "major failings").

37. Brief for Respondent at 12, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) [*hereinafter* Respondent's Brief].

vate" activities that the Court had protected in past decisions? And what was the nature of the act for which Hardwick had been arrested? If the Court understood Hardwick's sexual act as similar to other activities protected under the "constitutional right of privacy," his challenge should have succeeded. If it saw his sexual act as dissimilar from those earlier protected activities, his claim should have failed.[38] Yet Justice White's majority opinion did not explicitly address either question. It said only, "we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right . . . asserted in this case."[39]

Justice White's conclusion can be self-evident only to those who share his implicit, unarticulated assumptions about the nature of homosexuality and "homosexual sodomy." Recognizing and evaluating the diverse ways in which the Justices conceptualized homosexuality is therefore crucial to understanding their disagreements over this case. This task does not involve an assessment of judicial attitudes toward a known, objectively existing entity. Rather, the task is to discern the paradigms each Justice used to understand the essential nature of Hardwick's activity on that August morning. Although what Hardwick had done was clear,[40] evaluating whether an arrest was a constitutionally permissible response required a more profound understanding of his activity than accurate fact-finding alone can provide.

B. *Five Conceptions of "Homosexuality"*

The majority opinion is written as if the term "homosexual" solved, rather than confused, the problem of evaluating Hardwick's actions in terms of his constitutional rights. Yet, like "privacy," "homosexuality" lacks an unambiguous,[41] uncontroversial, meaning. In the *Hardwick* opin-

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38. The litigants' briefs were argued in terms of these two basic questions. Georgia's brief characterized the "common principles of this Court's privacy decisions [as] revolv[ing] around marriage, the family, the home and decisions as to whether through procreation the ancient cycles will begin again and, if so, in what manner the new generation will be brought up." Brief for Petitioner at 25, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) [hereinafter Petitioner's Brief]. Georgia contrasted these traditional family concerns with what it called "an activity which for hundreds of years, if not thousands, has been uniformly condemned as immoral." *Id.* at 19. In response, Hardwick's brief described the right of privacy as protecting "values of intimate association," Respondent's Brief, *supra* note 37, at 9, and "individual autonomy," *id.* at 12, and characterized Hardwick's activity as "the consensual intimacies of private adult life," *id.* at 9.

39. 478 U.S. at 190-91.

40. Exactly what Hardwick did was obvious to the arresting officer and clear to the state court judge. Through a partially closed door, the officer saw Michael Hardwick in his candlelit bedroom "naked on the bed engaged in an act of sodomy [with another man] . . . [t]hat being oral sex. Each of the other had each of the other[']s penis in their mouths." Transcript at 3-4, State v. Hardwick, Atlanta Mun. Ct. proceedings on Sept. 14, 1982. Hardwick's lawyers in federal court obscured the specific facts, however, by consistently using the statutory term "sodomy" to describe them.

41. The term "homosexuality" is lexically ambiguous because it can refer either to desire or to conduct. *See, e.g.*, WEBSTER'S NEW COLLEGIATE DICTIONARY 544 (1981) (defining homosexuality as "1: the manifestation of sexual desire toward a member of one's own sex; 2: erotic activity with a member of one's own sex"). Although it may at first appear that all members of the Court focus

ions one may discern at least five very different conceptions of "homosexuality": that it is (1) immoral,[42] (2) criminally harmful, (3) a manifestation of illness, (4) an identity, and (5) a normal variation of human sexuality. The first two of these focus primary upon actions, the last three upon desire.[43]

The sources for the Justices' conceptions of homosexuality were equally various. Justice White and Chief Justice Burger relied upon what they claimed were historical conceptions of "homosexual sodomy" that they assumed informed the framers' vision of the Bill of Rights and the Fourteenth Amendment. Claiming to be uninfluenced by their personal preferences,[44] these Justices also relied on the "presumed belief of a majority of the electorate in Georgia that homosexuality is immoral."[45] By comparing "homosexual sodomy" to other crimes, and relying on other sodomy statutes in effect in 1791 and 1868,[46] Justice White also implied that homosexual sodomy is criminally harmful.[47] Similarly, Chief Justice Burger's references to "millennia of moral teaching" implied that homosexuality is immoral.[48] Justice Powell's concern that a long prison sentence for a single private, consensual act of homosexual sodomy might violate the Eighth Amendment proscription against cruel and unusual punishment[49] may reflect a belief that homosexuality is an illness, or a perception that it is no longer generally regarded as a serious crime.[50]

Justices Stevens and Blackmun, in contrast, discussed the case on the

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exclusively upon conduct, as the statute itself did, closer reading reveals that the dissenters rely analytically upon conceptions of homosexuality as a function of desire, and that the majority opinion exploits the ambiguity.

42. Chief Justice Burger's reference to "Judeo-Christian moral and ethical standards," 478 U.S. at 196 (Burger, C.J., concurring), implied that Hardwick's activity was sinful as well as immoral. However, as Justice Blackmun noted, "[t]he legitimacy of secular legislation depends . . . on whether the State can advance some justification for its law beyond its conformity to religious doctrine." *Id.* at 211 (Blackmun, J., dissenting).

43. *See supra* note 41.

44. *See* 478 U.S. at 190 (White, J.) ("case does not require a judgment on whether laws against sodomy . . . are wise or desirable"); *id.* at 197 (Burger, C.J., concurring) ("This is essentially not a question of personal preferences . . . .").

45. *Id.* at 196.

46. *Id.* at 192–94.

47. *Id.* at 195–96.

48. *Id.* at 197 (Burger, C.J., concurring).

49. *Id.* at 197–98 (Powell, J., concurring). This issue was raised by neither the parties nor the facts.

50. Although the Court normally treats noncapital sentences as a matter of legislative prerogative, it has disapproved punishing a person solely for being ill. Robinson v. California, 370 U.S. 660 (1962) (narcotics addiction). Justice Powell would also review long sentences for minor crimes. *See* Carmona v. Ward, 439 U.S. 1091 (1979) (Powell & Marshall, JJ., dissenting), *denying cert. to* 576 F.2d 405 (2nd Cir. 1978) (five-year sentence for marijuana distribution not unconstitutional).

Justice Powell did not grapple seriously with the Eighth Amendment issue. Even if a long prison sentence for "a single, private consensual act of sodomy" would be questionable, a life sentence for as few as three such acts seems constitutionally unexceptionable. *Cf.* Rummell v. Estelle, 445 U.S. 263, 274 (1980) (life sentence for recidivism, based on three small thefts, not unconstitutional). *But see* Solem v. Helm, 463 U.S. 227 (1983) (life imprisonment without parole for recidivism, based on seven minor felonies, unconstitutional). Blackmun's sketch of a possible Eighth Amendment argument is much better crafted. *See*, 478 U.S. at 202 n.2 (Blackmun, J., dissenting).

assumption that "homosexuality" is a normal human variation.[51] Justice Blackmun also linked homosexuality to personality or identity,[52] relying on the views of "mental health professionals."[53] Stevens ironically relied on the apparent values of the Georgia electorate and prosecutor.[54] Each of these conceptions, and the Justices' support for them, will be evaluated in turn.

1. *The Majority's Historical Justifications for the Ideas of Homosexuality as Immorality, Crime, and Illness*

The majority relied heavily upon history to explain and justify the result in this case. Justice White made three historical assertions: (1) "[s]odomy was . . . forbidden by the laws of the original thirteen States when they ratified the Bill of Rights;"[55] (2) "[i]n 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws;"[56] and (3) "[p]roscriptions against that conduct have ancient roots."[57] Chief Justice Burger's concurrence forcefully elaborated Justice White's third point. Yet none of these historical statements is sufficiently accurate to guide constitutional interpretation.

a. *The Framers' Intentions*

Justice White's and Chief Justice Burger's most important justification for viewing "homosexual" sodomy as immoral was that this view was shared by the framers.[58] Some commentators argue that attempts to know and follow the framers' intent are necessarily misguided, whatever the

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51. *See, e.g.*, 478 U.S. at 218–19 (Stevens, J., dissenting) ("the homosexual and the heterosexual have the same interest in deciding how he will . . . conduct himself in his personal and voluntary associations with his companions"); *see also id.* at 205 (Blackmun, J., dissenting) ("in a Nation as diverse as ours . . . there may be many 'right' ways of conducting [intimate sexual] relationships").

52. *See id.* at 202 n.2 (Blackmun, J., dissenting) (homosexuality is not "a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality.").

53. *Id.*

54. *Id.* at 219 (Stevens, J., dissenting) (statute reflects belief that all sodomy is unacceptable; prosecutor no longer enforces statute).

55. *Id.* at 192 n.5 and accompanying text.

56. *Id.* at 192–93.

57. *Id.* at 192.

58. In addition to his historical claims, White relied on the Georgia electorate's "presumed belief . . . that homosexual sodomy is immoral and unacceptable." *Id.* at 196. The factual predicate for this argument was thoroughly discredited by Justices Blackmun and Stevens in dissent. *See id.* at 200 (Blackmun, J., dissenting); *id.* at 214 n.2 (Stevens, J., dissenting). Because the Georgia law did not single out homosexual acts for proscription, it is unlikely that the electorate, or its representatives in the legislature, intended the law to be applied to homosexual conduct only. The legislative history suggests instead particular concern with heterosexual sodomy. *See id.* at 200 & n.1 (Blackmun, J., dissenting) (statute's "purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity"). Moreover, even Michael Hardwick, who had been caught violating the law and had publicly declared his intention to do so again, was not prosecuted, suggesting that Georgia officials condoned secluded and consensual homosexual lovemaking. *See id.* at 219–20 (Stevens, J., dissenting). Justice White's majoritarian argument relied, therefore, not upon facts but upon conservative political principles, as will be explored in Section III *infra*.

method.[59] Yet even if the goal of discerning historical attitudes in order to follow the framers' intent is accepted, the majority's depiction of eighteenth- and nineteenth-century views of sodomy is too flawed to guide constitutional interpretation.

In 1791, when the Bill of Rights was adopted, three states' criminal statutes singled out sexual acts between men for special condemnation.[60] Eight of the other states' statutes[61] proscribed "buggery"[62] or "sodomy"[63]

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59. Even were Justice White's and Chief Justice Burger's historical claims absolutely correct, it would be possible to argue that they cast little light on "the framers' intentions," or that the framers' intentions ought not to be of controlling weight in constitutional interpretation. *See, e.g.*, Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Sofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). *But see* R. BERGER, GOVERNMENT BY JUDICIARY 363–72 (1977).

It is also possible to argue that the issue of how to interpret the Constitution ought not to be framed in this way, because neither the originalist nor the non-originalist position is a coherent one. *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981). However, a general discussion of constitutional interpretation is beyond the scope of this Comment.

I do not agree with Justice White's and Chief Justice Burger's implicit assumptions that the framers' intentions are determinate and knowable, and that the Court's role is to discern and follow those intentions. However, I think that when the Court uses statements about the past to reach a result in a case, the truth or falsity of those statements is worth examining.

60. These states were Connecticut, Massachusetts, and New Hampshire. *See* The General Laws and Liberties of the Connecticut Colonie, 1672, *reprinted in* THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES 1639–1673, at 83 (fascimile ed. 1977) ("If any man lyeth with Man-kind, as he lieth with womankind . . . ."); An Act Against Sodomy, 1785, *reprinted in* THE FIRST LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 250–51 (fascimile ed. 1981) ("That if any man shall lay with mankind as he layeth with a woman . . . ."); An Act of the Punishment of Certain Crimes, 1791, *reprinted in* 5 LAWS OF NEW HAMPSHIRE 597 (H. Metcalf ed. 1916) ("That if any man shall carnally lie with a Man as a Man carnally lieth with a Woman . . . ."). The language of these acts is drawn from *Leviticus* 18:22 (King James) ("Thou shalt not lie with mankind, as with womankind.").

61. These states were Delaware, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, New Jersey and Virginia. *See* An Act for the advancement of Justice, and more certain administration thereto, 1719, *reprinted in* THE FIRST LAWS OF THE STATE OF DELAWARE pt. 1, at 67 (facsimile ed. 1981) ("That if any person or persons shall commit sodomy, or buggery . . ."); 2 LAWS OF THE STATE OF NEW YORK 1ST–24TH ASSEMBLIES 1777–1802, ch. 21, at 391 (Albany, 1886) ("That the detestable and abominable vice of buggery, committed with mankind or beast, shall be from henceforth adjudged felony . . . ."); 13 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, at 511 (1906) (1790 statute proscribing "sodomy or buggery"); An Act for Punishing Criminal Offenses, 1662, *reprinted in* THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647–1719, at 142 (facsimile ed. 1977) ("the Detestable and Abominable Crimes of Sodomy, or Buggery"); An Act to put in force in this Province the several statutes of the Kingdom of England or South-Britain therein particulary mentioned, 1712, *reprinted in* THE FIRST LAWS OF THE STATE OF SOUTH CAROLINA pt. 1, at 25, 49 (facsimile ed. 1981) ("the detestable and abominable Vice of Buggery committed with Mankind or Beast"); An Act for the Punishment of the Vice of Buggery, ch. 27, in A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 314 (1792) ("said vice of Buggery").

The New Jersey Constitution of 1776 provided that English statutes in force prior to the revolution would continue to be law in the state, *see* E. BROWN, BRITISH STATUTES IN AMERICAN LAW 1776–1836, at 76 (1964). New Jersey repealed all English statutes eight years after the Bill of Rights was ratified. *Id.* at 82. Virginia repealed its ordinance adopting all English statutes in 1792. *Id.* at 113, 124.

62. These statutes borrowed the term "buggery" from the first secular criminal proscription of

without reference to the gender of the participants. Finally, in one state,

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such conduct in England, 25 Hen. VIII ch. 6 (1553) (referring to "the detestable and abominable vice of buggery committed with mankind or beast"), which was reenacted by 5 Eliz. ch. 17 (1562). "Buggery" denotes acts which today seem too dissimilar to be named with a single term: anal intercourse between two men, *see* Stafford's Case, 12 Co. Rep. 36, 37, 77 Eng. Rep. 1318 (1607) (requiring "penetration and emission of seed" for the offense), or between a man and a woman, *see* R. v. Wiseman, Fortes. 91, 92–93, 92 Eng. Rep. 774, 774 (1716), (buggery with a woman "is a crime exactly of the same nature, as well as it is the same action, as if committed upon a male"), and any sexual penetration between a human being and an animal, *see* E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, 58, 59 (London 1644) ("there must be *penetratio*, that is, *res in re*, either with mankind, or with beast"). Most of the English and American treatises in use when the Bill of Rights and the Fourteenth Amendment were being written rely on these three sources. *See, e.g.*, J. BACON, A NEW ABRIDGEMENT OF THE LAW *325–26 (Philadelphia 1811) (citing Coke and *Wiseman*); 2 J. CHITTY, A PRACTICAL TREATISE ON CRIMINAL LAW *48–51 (New York 1847) (citing Coke and *Wiseman*); CONDUCTOR GENERALIS 66 (New York, 1788) (widely-used justice of the peace manual, relying on Coke); J. DAVIS, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 75 (Newbern 1774) (same); 1 E. EAST, PLEAS OF THE CROWN 480 (London 1803) (citing Coke); J. GILES, A NEW-LAW DICTIONARY (3d ed. 1736) (citing Coke); W. HENING, THE NEW VIRGINIA JUSTICE 93 (Richmond 1795) (justice of peace manual; citing Coke); W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS *814–15 (Boston 1824) (citing Coke and *Wiseman*); W. SIMPSON, THE PRACTICAL JUSTICE OF THE PEACE 58 (Charlestown 1761) (justice of peace manual; citing Coke); R. STARKE, THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE 61 (Williamsburg 1774) (same).

Coke's explication that "Buggery is . . . committed by carnall [sic] knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with bruite [sic] beast," THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 58 (London 1644), might imply that a man and woman together could not commit the crime. Although this interpretation was rejected in R. v. Wiseman, Fortes. 91, 92 Eng. Rep. 774 (1716), at least one earlier source disagrees. *See* M. DALTON, COUNTREY JUSTICE 276 (London 1630) (justice of peace manual; "haec per confusionem sexuum, sc. home ove home, feme ove feme," citing the Bible). *But see* J. GILES, *supra* (3d ed. 1736) ("carnalis copula contra Naturam & haec vel per confusionem specierum, sc. a man or woman with a brute beast, vel. sexuum, *a man with a man or a man with a woman*") (emphasis added).

63. The term "sodomy" was used less frequently than "buggery." In English and American legal sources of the seventeenth, eighteenth, and nineteenth centuries, "sodomy" had no definite meaning. It was sometimes a synonym for buggery. *See, e.g.*, R. v. Wiseman, Fortes. 91, 95, 92 Eng. Rep. 774, 776 (1716) ("Sodomy is the genus, rem veneream habere in ano with a man is only a species, and with a woman is another species, and so with a boy or girl, is another species, and with a beast another species."); J. BACON, *supra* note 62 ("Sodomy"; "Sodomy . . . is an unnatural copulation between two human creatures, or between a human and a brute creature."); J. GILES, *supra* note 62 ("Buggery, or sodomy, . . . is defined to be . . . a man or woman with a brute beast, [or] a man with a man or a man with a woman," citing Coke). Sometimes "sodomy" had narrower connotations, *see, e.g.*, Stafford's Case, 12 Co. Rep. 36, 37, 77 Eng. Rep. 1318 (1607) (restricted to human beings: "sodomy is with mankind"); R. DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW 143 § 60(a) (1887) (sodomy is anal intercourse: "sexual connection *per anum*, with mankind or beast") (emphasis in original).

no statutory proscription against sodomy may have existed in 1791,[64] and in one state the historical evidence is unclear.[65]

By 1868, when the Fourteenth Amendment was ratified, no additional states had singled out sexual acts between men for special prohibition.[66] Many states' statutes had been bowdlerized, however, and now prohibited "the crime against nature"[67] instead of "sodomy" or "buggery."[68] That phrase applied to acts of anal intercourse between men and women as well as between two men.[69] Courts in at least seven of the thirty-two

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64. This was Maryland. Justice White asserted that Maryland's inhabitants were entitled to English common law, including the "common law" crime of "sodomy," 478 U.S. at 192 n.5, but he may have been incorrect. In English jurisprudence, sodomy was considered a statutory rather than a common law crime. *See* 4 W. BLACKSTONE, COMMENTARIES *215–16. Thus, merely receiving the common law was inadequate for Maryland to have adopted the English criminal proscription against sodomy; Maryland would have had to adopt 25 Hen. VIII ch.6 (1533) (discussed *supra* note 62).

Maryland's 1776 Declaration of Rights gave its inhabitants "the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances . . . ." Declaration of Rights, 1776, *reprinted in* 3 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 372 (W. Swindler ed. 1975). The English buggery statute does not appear in the collection of English laws in force in Maryland compiled by William Kilty under a 1794 directive from the Maryland legislature. *See* A COLLECTION OF THE BRITISH STATUTES IN FORCE IN MARYLAND, ACCORDING TO THE REPORT THEREOF MADE TO THE GENERAL ASSEMBLY BY THE LATE CHANCELLOR KILTY (1870); *see also* S. SIOUSSAT, THE ENGLISH STATUTES IN MARYLAND 41 (1903) (Kilty's compilation was accepted as authority on status of English statutes in state law); Steiner, *The Adoption of English Law in Maryland*, 8 YALE L.J. 353, 359–60 (1898–99) (Kilty's compilation was " 'received and respected' by the courts 'as the repository' of English Statutes in force in Maryland," although it was never formally adopted by the legislature.) (citation omitted).

65. This is Georgia. Justice White also asserted that the English "common law" crime of "sodomy" was in effect in Georgia, 478 U.S. at 192 n.5.

Georgia adopted those "common laws of England, and such of the statute laws as were usually in force" in 1784. An Act for reviving and enforcing certain laws therein mentioned, 1784, *reprinted in* R. WATKINS, DIGEST OF THE LAWS OF GEORGIA 289 (Philadelphia 1800). In 1826, the Georgia legislature formally adopted a list of English laws in force in Georgia, compiled by William Schley. *See* W. SCHLEY, A DIGEST OF THE ENGLISH STATUTES IN FORCE IN THE STATE OF GEORGIA vii (Philadelphia 1826). This list did not include the English buggery statute. *See id.* Thus, it appears that no proscription against buggery was "in force" at the time the Bill of Rights was adopted. It should be noted, however, that in 1817 Georgia adopted a statute proscribing "sodomy and bestiality" as part of a comprehensive penal code. *See* A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 350 (Milledgeville 1822). Moreover, in Savannah, Georgia, on March 25, 1734, two Lutheran pastors reported in a German-language diary that on that day there was an "execution of judgement" against a man who was to receive "three-hundred lashes under the gallows" after being "accused and convicted of sodomy and inciting others." J. KATZ, GAY/LESBIAN ALMANAC 133 & n.67 (1983).

66. Indeed, by 1868, Connecticut had a law arguably applicable to acts between men and women as well as between two men. Conn. Gen. Stat. tit. 122, ch. 7, § 124 (1866) ("Every *person*, who shall have carnal knowledge of any man, against the order of nature, shall be punished. . . . (emphasis added). *See* 2 DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 342, 744 (New Haven, 1823) (treatise by "the late Chief Justice of the State" explains "sodomy" as "carnal knowledge committed against the order of nature by man with man or in the same unnatural manner with woman," and gives a form of indictment modeled on *R. v. Wiseman*, *supra* note 62.)

67. The phrase comes from *Blackstone's Commentaries*, where it is in turn defined by reference to the English buggery statute. *See* 4 W. BLACKSTONE, COMMENTARIES *215 ("the infamous crime against nature"); *id.* at *216 ("25 Hen. VIII ch. 6 revived and confirmed by 5 Eliz. ch. 17").

68. *E.g.*, DEL. CODE ANN. tit. 20, ch. 131, § 7 (1852); MASS. GEN. L. ch. 165, § 18 (1860); N.C. REV. CODE ch. 34, § 6 (1854); OR. ORGANIC AND GEN. LAWS, 1845–64, ch. 48, § 639; TENN. CODE, pt. 4, tit. 1, ch. 8, art. 1, § 4843 (1858).

69. *See, e.g.*, J. CHITTY, *supra* note 62, at 49 (sodomy defined as "anal intercourse between human beings."); R. DESTY, *supra* note 63, at 143, § 60(a) (1887) ("it is sexual connection *per anum*, with mankind or beast, but not with fowl." (emphasis in original) (footnotes omitted)); J.

states Justice White found to have "criminal sodomy statutes in effect in 1868,"[70] explicitly held that these statutes did not apply to oral-genital contact.[71] Some treatise writers explicitly included sodomy in marriage within the statutory proscription.[72]

Thus, the evidence does not support Justice White's conclusion that the framers could not have intended the Constitution to "extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[73] American sodomy laws in force when the Bill of Rights and the Fourteenth Amendment were ratified applied to acts performed by men with women as well as with one another. Only three of the thirteen original states singled out sex acts between men for proscription; the others prohibited "sodomy" and "buggery," terms denoting sex acts between men and women as well as between two men. Moreover, in both 1791 and 1868

MAY, THE LAW OF CRIMES 223, § 210 (1881) ("Sodomy . . . is the unnatural carnal copulation of one human being with another, or with a beast. . . . To constitute the offense between human beings, the act must be *per anum*.") (footnote omitted); W. RUSSELL, *supra* note 62, *815 ("man with man; or in the same unnatural manner with woman"); *see also* 478 U.S. at 215 n.4 (Stevens, J., dissenting) (citing sources).

Georgia's modern statutory definition of "sodomy" may mislead the uninitiated to suppose that the word has always denoted oral-genital practices as well as anal intercourse. In fact, the meaning of sodomy has varied over the ages, connoting "in various times and places everything from ordinary heterosexual intercourse in atypical position to oral sexual contact with animals." J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 93 n.2 (1981); *see also* V. BULLOUGH, SEXUAL VARIANCE IN SOCIETY AND HISTORY 380-84 (1976).

70. 478 U.S. at 193 n.6.

71. *See* People v. Boyle, 116 Cal. 658, 48 P. 800 (1897) ("infamous crime against nature" does not proscribe oral-genital conduct with child); Riley v. Garrett, 219 Ga. 345, 133 S.E.2d 367 (1963) (sodomy statute inapplicable to heterosexual cunnilingus); Commonwealth v. Poindexter, 133 Ky. 720, 118 S.W. 943 (1909) ("crime of sodomy or buggery" does not proscribe fellatio); People v. Schmitt, 275 Mich. 575, 267 N.W. 741 (1936) ("abominable and detestable crime against nature" does not proscribe fellatio); State v. Morrison, 25 N.J. Super. 534, 537, 96 A.2d 723, 725 (Essex County Ct. 1953) ("There is almost complete accord among text-writers that at common law commission of the crime required penetration per anum, and that penetration per os did not constitute the offense."); Munoz v. State, 103 Tex. Crim. 439, 440, 281 S.W. 857, 857 (1926) ("[H]owever vile and detestable [fellatio] may have been, it does not come within the definition of 'sodomy' as known to the common law and adopted by legislative enactment in our State."); Wise v. Commonwealth, 135 Va. 757, 115 S.E. 508 (1923) ("buggery" does not proscribe fellatio).

Georgia's own statute was not applied to fellatio until this century. *See* Herring v. State, 119 Ga. 709, 720, 46 S.E. 876, 882 (1904) (applying statute to fellatio for first time).

These cases and the treatise writers cited *supra* note 69 appear influenced by a 1817 case decided in England, which interpreted the 1533 English buggery statute, 25 Hen. VIII ch. 6, not to proscribe fellatio. R. v. Jacobs, Russ. & Ry. 331, 168 Eng. Rep. 830 (1817) (act of oral sex forced by defendant on boy did not constitute sodomy).

72. *See* J. MAY, THE LAW OF CRIMES § 203 (2d ed. 1893) ("Sodomy . . . may be committed . . . by a man with a woman—his wife, in which case, if she consent, she is an accomplice.").

In the 1800s, medical authorities believed that inheritable physical infirmities would result from masturbation, *see* V. BULLOUGH & B. BULLOUGH, SIN, SICKNESS AND SANITY: A HISTORY OF SEXUAL ATTITUDES 55-73, 201-09 (1977); P. CONRAD & J. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS 180-85 (1980), and defined as masturbation "every kind of sexual activity that did not lead to procreation." V. BULLOUGH & B. BULLOUGH, *supra*, at 62. It seems likely, therefore, that if any distinction had then been made between "homosexual sodomy" and sodomy in marriage, the latter would have been considered much more heinous because sodomy in marriage was believed to cause stillbirths or to make the offspring of the marriage sick, weak, and deformed.

73. 478 U.S. at 192.

statutes proscribing "sodomy," "buggery," and the "crime against nature," were interpreted to proscribe anal intercourse only—not fellatio, the act for which Hardwick was arrested.[74]

b. *"Ancient" Prohibitions and the Concept of "Homosexuality"*

The majority bolstered its inferences about the framers' intentions with the claim that "[p]roscriptions against [homosexual sodomy] have ancient roots."[75] Although literally true, the statement is misleading in two ways. First, it oversimplifies and distorts a complex historical record; second, it misuses the relatively modern concept of "homosexuality" to depict the past.

Over the course of Western history, sexual practices between men, like other sexual practices, have been tolerated as well as condemned. In class-

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74. Oral-genital practices were not punished as crimes in Britain until 1885, and probably were not in this country until a decade later.

The 1553 English buggery statute did not proscribe fellatio. *See* R. v. Jacobs, Russ, & Ry. 331, 168 Eng. Rep. 830 (1817). In 1885, the British Parliament passed a statute making "gross indecency" a misdemeanor, punishable by imprisonment for "any term not exceeding two years with or without hard labour." Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 59; *see also* V. BULLOUGH, SEXUAL VARIANCE IN SOCIETY AND HISTORY 570–72 (legislative history). This statute has been applied to, among other practices, oral-genital contact between men. Its earliest well-publicized use was in the prosecution of Oscar Wilde. *See* V. BULLOUGH, *id*, 573–75; T. HUMPHREYS, A BOOK OF TRIALS 33–43 (1953).

Perhaps the notoriety of Oscar Wilde's 1895 arrest, trial, and conviction for gross indecency affected judicial attitudes and beliefs on this side of the Atlantic. Beginning in 1897, American courts did sometimes apply proscriptions of "sodomy" or the "crime against nature" against oral-genital practices, but they acknowledged that this interpretation changed the common law. Courts in at least fourteen of the thirty-two states with "criminal sodomy statutes in effect in 1868," 478 U.S. at 193 n. 6, acknowledged that by applying the state's statute to oral-genital contact they were altering the common law meaning of sodomy; the earliest such decision was rendered in 1897. *See* Honselman v. People, 168 Ill. 172, 175, 48 N.E. 304, 305 (1897)("the legislature included in the crime against nature other forms of the offense than sodomy or buggery"; fellatio); *see also*, Woods v. State, 10 Ala. App. 96, 64 So. 508 (1914)(fellatio punished as "a crime against nature"); State v. Maida, 29 Del. (6 Boyce) 40, 96 A. 207 (1915); Ephraim v. State, 82 Fla. 93, 89 So. 344 (1921) (fellatio punished as "abominable and detestable crime against nature"); State v. Vicknair, 52 La. Ann. 1921, 28 So. 274 (1900)(1896 statutory amendment expanded common law "detestable and abominable crime against nature" to include fellatio); State v. Cyr, 135 Me. 513, 514, 198 A. 743, 743 (1938)(citing "weight of recent authority" for interpreting "crime against nature" to include fellatio); Commonwealth v. Dill, 160 Mass. 536, 537, 36 N.E. 472, 473 (1894)(1887 prohibition of "unnatural and lascivious acts" intended "to include and punish any mode of unnatural copulation not coming within the definition of sodomy as uaually understood"); State v. Hill, 179 Miss. 732, 176 So. 719 (1937)("infamous crime against nature" enlarged common law sodomy to include cunnilingus); State v. Katz, 266 Mo. 493, 181 S.W. 425 (1916) (proscription of "abominable and detestable crime against nature, committed with mankind or with beast, with the sexual organs or with the mouth" expands common law sodomy to include fellatio); *In re* Benites, 37 Nev. 145, 140 P. 436 (1914)(fellatio punished as "infamous crime against nature"); State v. Fenner, 166 N.C. 247, 80 S.E. 970 (1914)("crime against nature" of broader import than sodomy; applied to fellatio); State v. Start, 65 Or. 178, 132 P. 512 (1913)(fellatio punished as "crime against nature") (reversed on other grounds); State v. Milne, 95 R.I. 315, 187 A.2d 136 (1962)(fellatio punished as "abominable and detestable crime against nature"); Fisher v. State, 197 Tenn. 594, 277 S.W.2d 340 (1954)("penetration per os" prohibited as "crime against nature"). *See generally* Spence, *The Law of Crime Against Nature*, 32 N.C.L. REV. 312, 312–18 (1954); *cf.* Wainwright v. Stone, 414 U.S. 21 (1973)(statutory phrase "abominable and detestable crime against nature" not vague); Rose v. Locke, 423 U.S. 48 (1975)("crime against nature" forseeable proscribes cunnilingus).

75. 478 U.S. at 192.

ical Greece and Rome, sexual practices between men were not uniformly condemned,[76] and some were widely accepted;[77] under Roman rule, even marriage between men was possible until at least 342 A.D.[78] Sexual acts between men were also openly tolerated by both church and state during the early Middle Ages,[79] and among the male social elite in eighteenth-century France.[80] By ignoring ancient tolerance to focus selectively on ancient proscriptions, the majority distorted the historical record. This distortion enabled the majority to present its choice of proscription over tolerance as if it were merely fidelity to "ancient roots,"[81] and conformity with laws in force "throughout the history of Western Civilization."[82]

The majority's use of the concept of homosexuality is flawed as well. All of the Justices seem to have assumed that "homosexuality" has been an invariant reality, outside of history. In fact, however, like most ways of describing aspects of the human condition, "homosexuality" is a cultural and historical artifact. No attitude toward "homosexuals" or "homosexuality" can really be identified before the mid-nineteenth century because the concept did not exist until then. Before the late 1800s, sexuality—whether tolerated or condemned—was something a person did, not what he or she was.[83] Although both the behavior and the desires we now

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76. Chief Justice Burger's assertion that "[h]omosexual sodomy was a capital crime under Roman law," 478 U.S. at 196 (citing Theodosian and Justinian Codes), is somewhat misleading. Both the Theodosian and the Justinian Codes were enacted after the classical period, in A.D. 390 and 533, respectively, and the Theodosian Code imposed the death penalty only for forcing or selling males into prostitution. *See* J. BOSWELL, *supra* note 69, at 123-24. Thus, "[n]ot until [A.D.] 533 did any part of the [Roman] Empire see legislation flatly outlawing homosexual behavior, even though Christianity had been the state religion for more than two centuries." *Id.* at 171. Sexual acts between men were not prohibited by secular law in the west until A.D. 533, when they became punishable by death, the same penalty imposed for adultery. *Id.*

77. Among the Greeks, for example, there were many shadings and variations of acceptance and disapproval of sex between men, depending upon such factors as the city, social class, precise historical time, relative ages, and the "manliness" or "effeminacy" of the participants. *See generally* K.J. DOVER, GREEK HOMOSEXUALITY (1978). There was a prejudice against *freeborn, adult* men taking the "passive" role in any sexual relationship, either with a woman or with another man. *See, e.g.*, M. FOUCAULT, THE USE OF PLEASURE: VOLUME TWO OF THE HISTORY OF SEXUALITY 216-25 (R. Hurley trans. 1985).

78. *See* J. BOSWELL, *supra* note 69, at 59, 73.

79. *Id.* at 293-95. Then, "[b]etween 1250 and 1300, homosexual activity passed from being completely legal in most of Europe to incurring the death penalty in all but a few contemporary compilations." *Id.* at 293. Until 1300, church law paralleled secular law, condemning and punishing homosexual activity only to the extent other non-marital sexual activity—including non-coital sex within marriage—was condemned and punished. *Id.* at 269-332.

80. *See* Delon, *The Priest, The Philosopher, and Homosexuality in Enlightenment France*, 9 EIGHTEENTH CENTURY LIFE 122-23 (1985).

81. 478 U.S. at 192.

82. *Id.* at 196 (Burger, C.J., concurring).

83. *See* Gilbert, *Conceptions of Homosexuality and Sodomy in Western History*, 6 J. HOMOSEXUALITY 57, 61 (1981), *reprinted in* HISTORICAL PERSPECTIVES ON HOMOSEXUALITY (S. Licata & R. Petersen ed. 1981) (homosexuals not conceptualized as identifiable segment of society until late nineteenth century); Veyne, *Homosexuality in Ancient Rome*, in WESTERN SEXUALITY: PRACTICE AND PRECEPT IN PAST AND PRESENT TIMES 26 (P. Aries & A. Bejin ed. 1985) ("It is incorrect to say that the ancients took an indulgent view of homosexuality. The truth is that they did not see it as a separate problem . . . .").

call "homosexual" existed in earlier eras,[84] our currently common assumption that persons who make love with others of their own sex are fundamentally different from the rest of humanity is only about one hundred years old.[85]

Even the word "homosexual" is new. It was coined in the nineteenth century to express the new idea that a person's immanent and essential nature is revealed by the gender of his desired sex partner.[86] The concept emerged around the time that sexuality began to seem a proper object of medical, as distinguished from clerical or judicial, concern. Before the invention of "homosexuality," sexual touchings between men were determined to be licit or illicit according to criteria that applied equally to heterosexual practices, such as the parts of the body involved,[87] the relative status of the parties, and whether the sexual drama conformed to sex role stereotypes.[88] Although illicit sexual acts were seen as sinful, immoral, criminal, or all three, before the 1870s illicit sexual acts between men were not seen as fundamentally different from, or necessarily worse than, illicit acts between a man and a woman.[89]

Thus, by referring to "homosexual sodomy" in ancient times, in 1791,

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84. *See* Amicus Curiae Brief of the American Psychological Association and American Public Health Association, Bowers v. Hardwick at 10–11, 478 U.S. 186 (1986) (No. 85-140) [hereinafter Amicus Brief] ("[H]istorical evidence reveals that homosexuality . . . [has] been common in western societies since before the Christian era. Homosexuality has been ubiquitous, whether a particular culture admired, ignored or vilified it.") (footnotes omitted).

85. Michel Foucault gave 1870 as the "convenient date" of the concept's birth. *See* M. FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME ONE: AN INTRODUCTION 43 (R. Hurley trans. 1978).

This surprising notion that "homosexuality" is a fairly modern way of conceptualizing human behavior and interests has come to be accepted by scholars only within the past ten or fifteen years. *See* Gilbert, *supra* note 83, at 61; Rousseau, *The Pursuit of Homosexuality in the Eighteenth Century: "Utterly Confused Category" and/or Rich Repository?*, 9 EIGHTEENTH CENTURY LIFE 132, 162 n.1 (1985).

86. The nineteenth-century innovation consisted of identifying people by the gender of their sexual object choice:

> The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature.

M. FOUCAULT, *supra* note 85, at 43.

87. *See* J. BOSWELL, *supra* note 69, at 182–83; and Flandrin, *Sex in Married Life in the Early Middle Ages: the Church's teaching and behavioral reality*, in WESTERN SEXUALITY, *supra* note 83, at 120–21 (anal intercourse, fellatio, and cunnilingus all forbidden to married couples in fifteenth century Christian Europe).

88. *See* M. FOUCAULT, *supra* note 77, at 220 (in classical Greece, acceptable sexuality involved domination of "feminine" partner by "masculine" partner); M. FOUCAULT, THE CARE OF THE SELF: VOLUME THREE OF THE HISTORY OF SEXUALITY 189–90 (R. Hurley trans. 1986) (in Republican Rome, acceptable sexual partner for a male citizen was a woman or a slave); Flandrin, *supra* note 87, at 120–21 (discussing acceptable positions for intercourse, and rationales therefor, in fifteenth century Christian Europe).

89. The Georgia statute under which Hardwick was arrested reflects this tradition. It does not distinguish between heterosexual and homosexual acts, but instead prohibits particular, anatomically defined, touchings. *See supra* note 1 (quoting statute's language).

and even in 1868, White and Burger were inserting their modern understanding of "homosexuality" anachronistically into systems of values organized on other principles, obscuring the relative novelty of the distinction between "homosexuality" and "heterosexuality" with a myth about its antiquity. Moreover, their anachronistic myth distorted the meaning "homosexuality" had for its nineteenth-century inventors. Nineteenth-century medical theories about "homosexuality" seem to have developed out of contemporaneous theories about the dangers of sexual arousal and satisfaction, and the debilitating effects of masturbation.[90] The concept was introduced as a medical category,[91] and was intended to rebut the idea that sex between men could be either sinful or criminal.[92] "Homosexuality," in the nineteenth century, implied that sexual inclinations toward a person of one's own sex are beyond one's control (at least without professional treatment).[93] Using the nineteenth-century medical category of homosexuality to justify the law's treatment of sex between men as criminal thus precisely inverts the term's historical significance.

2. *The Dissenters' Justifications for the Idea of Homosexuality as Normal Variation and Identity*

In order to decide this case, the Court had to choose among inconsistent paradigms for "homosexuality." The conceptions relied on by the majority do not exhaust current thinking on this issue. Alternate conceptions adopted by the dissenters treat homosexuality as an identity and as a biologically normal variation of human sexuality.[94] The dissenters justified these views by reference to modern scientific consensus and to one tendency among contemporary values;[95] Justice Stevens, ironically but correctly,[96] also relied on the beliefs of the Georgia legislature, electorate, and

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90. *See* V. BULLOUGH & B. BULLOUGH, *supra* note 72, at 55–73, 201–09; P. CONRAD & J. SCHNEIDER, *supra* note 72, at 180–85 (1980).

91. The word was coined by a physician in 1869 to denote:

> a sexual bondage which renders [men] psychically incapable—even with the best intention—of normal erection. This urge creates in advance a direct horror of the opposite [sex], and the victim of this passion finds it impossible to suppress the feelings which individuals of his own sex exercise on him.

P. CONRAD & J. SCHNEIDER, *supra* note 72, at 183 (1980).

92. *See id.* at 182–85.

93. *See id.* at 181, 183–84; M. FOUCAULT, *supra* note 85, at 116–20.

For discussions of the various medical theories of homosexual etiology and the treatment modalities they engendered, see the bibliography appended to W. MASTERS & V. JOHNSON, HOMOSEXUALITY IN PERSPECTIVE 413–36 (1979), and for a more anecdotal perspective, see J. KATZ, GAY AMERICAN HISTORY 129–207 (1976).

94. 478 U.S. 202 n.2 (Blackmun, J., dissenting).

95. *Id.* at 202 n.2, 204–06, 210–211 (Blackmun, J., dissenting).

96. In recent years Georgia courts have consistently disregarded participants' genders when interpreting laws regulating sexual behavior. *See, e.g.*, Owens v. Owens, 247 Ga. 139, 140, 274 S.E.2d 484, 485–86 (1981) ("both extramarital homosexual, as well as heterosexual, relations constitute adultery"); Allen v. State, 170 Ga. App. 96, 316 S.E.2d 500 (1984) (man's offer to perform anal intercourse with another man violates prohibition against performing "sexual intercourse for money").

prosecutors, as revealed by the language of the statute and the state's pattern of non-enforcement.[97]

Like the ideas of "immorality," "crime," and "illness" discussed above, each of the dissenters' ideas reflects a particular world view. The idea of "homosexuality as identity" seems to have been invented for self-description. In a development related to, and roughly contemporaneous with, the invention of "homosexuality" as a medical category, some lay people adapted the idea to understand themselves and to seek societal tolerance.[98] These self-described homosexuals did not always accept the medical assumption that their condition was an illness (or "perversion") requiring treatment, but they did agree that the gender of a person's desired sex partner revealed something essential about his nature.[99]

In the 1950s, the nineteenth-century conception of homosexuality as an illness or identity began to be challenged by a new concept: "homosexuality as normal variation." This idea combined the pre-nineteenth-century assumption that a person's sexuality should be evaluated without considering the gender of his object choice with the twentieth-century notion that sexual expression is good and sexual repression, bad.[100] The idea that homosexuality is a normal manifestation of human sexuality has gradually achieved scientific acceptance; the American Psychiatric Association formally adopted this position in 1973.[101] The idea that homosexuality

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97. 478 U.S. at 219–20 (Stevens, J., dissenting).

98. Several theories have been advanced to explain the late-19th century emergence of the idea that the "homosexual" was a distinct type of human being. Michel Foucault has theorized that sexuality was "medicalized" for the aggrandizement of doctors and to increase social control. *See* M. FOUCAULT, *supra* note 85, at 43, 47, 103–114, 123. This may explain the emergence of homosexuality as a self-ascribed identity, developed by diagnosed "homosexuals" in reaction to their stigmatization. *See* E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 12–14 (1974) (members of stigmatized group may form militant "in-group" identities); K. PLUMMER, SEXUAL STIGMA: AN INTERACTIONIST ACCOUNT 122–74 (1975) (applying Goffman's analysis to homosexuals in England).

Philippe Aries has suggested that the new concept, "homosexuality," achieved popular acceptance as social changes increased the expectations of emotional closeness in marriage, made married life more restrictive for men with sexual interest in other men, and reduced opportunities for extramarital sexual and emotional bonds between men. *See* Aries, *Love in Married Life* and *The Indissoluble Marriage*, in WESTERN SEXUALITY, *supra* note 83, at 130–57. Aries' theory may also be used to explain the 19th-century emergence of "homosexuality" as a self-ascribed identity. If a married man has many other intense emotional involvements, and spends a considerable amount of time in a sex-segregated separate sphere, engaging in sexual activity with other men may pose no logistical or emotional problems for him; he may, therefore, do so without particularly noticing it or developing a homosexual identity. But if casual liaisons are less convenient, and marriage itself more emotionally demanding, married life may be less attractive or satisfactory for a man who is sexually attracted to other men. The resulting conflict could be resolved by such a man in several ways, including by adopting (subjectively, discovering) a homosexual identity. It is not surprising that Aries' theory does not explain the phenomenon of female homosexual identity particularly well; that emerged considerably later, *see* J. LAURITSEN & D. THORSTAD, THE EARLY HOMOSEXUAL RIGHTS MOVEMENT (1864–1935) 17–19 (1974), and for somewhat different reasons, *see* Rich, *Compulsory Heterosexuality*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177–205 (A. Snitow ed. 1983).

99. *See, e.g.*, J. LAURITSEN & D. THORSTAD, *supra* note 98, at 9–45.

100. *See* Amicus Brief, *supra* note 84, at 8 (oral and anal sex are not harmful, but repression of sexual desires may cause dysfunction and pathology).

101. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF

constitutes a normal variation is consistent with the nineteenth-century idea of homosexuality as an identity only in that both recognize the central part sexuality plays in life. The idea that homosexuality is normal, however, implies a recognition that homosexuality and heterosexuality may be not be rigidly distinct, mutually exclusive, categories.[102] It is inconsistent with the nineteenth-century notion that "a homosexual" is fundamentally a different sort of person than "a heterosexual."

The various paradigms the Justices used to understand the act for which Hardwick was arrested shaped their responses to his assertion that he was protected by a constitutional right of privacy. The Justices who understood homosexuality to be immoral held it to be therefore utterly unlike the more conventional personal and family interests prior cases had protected, whereas the Justices who understood homosexuality to be normal analogized Hardwick's act to other forms of "intimate association." All of the Justices drew their conceptions of homosexuality from among paradigms current in contemporary society, although the majority's historical justification for its choice of meaning was deeply flawed.[103]

III. SUBTEXT AND TEXT: THE POLITICAL PHILOSOPHIES UNDERLYING BOWERS V. HARDWICK

The Justices' debate over the scope of constitutional "privacy" masked not only disagreement about the nature of Hardwick's activity, but also a dispute over fundamental values. Two competing political philosophies, classical conservatism and classical liberalism, respectively, underlie the Supreme Court majority and dissenting opinions.[104] The *Hardwick* majority accepted Georgia's argument that even irrational popular prejudices should be enforced in order to preserve the very existence of society, because these prejudices may embody ancient wisdom. This argument resembles the classical conservatism of Edmund Burke and FitzJames Ste-

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MENTAL DISORDERS 380 (3d ed. 1980); *see also* Amicus Brief, *supra* note 84, at 9–10 (describing history of adoption of this model).

102. "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. *See* A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE 650–51 (1948) (37% of men have at least some overt homosexual experience to the point of orgasm between adolescence and old age; 10% are more or less exclusively homosexual for at least three years between the ages of 16 and 55); Plummer, *Homosexual Categories*, in THE MAKING OF THE MODERN HOMOSEXUAL 53–75 (1981).

103. *See supra* Section II-B-1.

104. I use the terms "conservative" and "liberal" with trepidation; these concepts have been used and redefined for so long and in so many ways that they have lost much of their meaning. *See, e.g.*, H. GIRVETZ, THE EVOLUTION OF LIBERALISM 23–26 (1963) (modified version of classical liberalism has become modern conservatism).

In this Comment, "classical conservatism" designates the constellation of values expressed by Edmund Burke and FitzJames Stephen, based on the view that the preservation of society in its present form is of preeminent value. "Classical liberalism" designates the constellation of values expressed by Jeremy Bentham and John Stuart Mill, based on the primacy of individual freedom.

phen.[105] Justice Blackmun's dissent implied that an individual's right to behave as he chooses may be limited only in order to prevent him from causing harm to others, a view reminiscent of the classical liberalism of Jeremy Bentham and John Stuart Mill.[106] Disputes over similar issues in other contexts have been framed in these terms, most notably the extended written debate between Professor H.L.A. Hart[107] and Lord Patrick Devlin[108] when the Wolfenden Committee recommended in 1957 that criminal penalties for private and consensual sexual acts between men be repealed in Great Britain.[109] Thus, the Supreme Court's discussion and resolution of *Bowers v. Hardwick* was shaped by thirty years of lively public, forensic,[110] and scholarly[111] debate about whether consensual lovemaking between two persons of the same sex ought to be a crime.

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105. *Compare* E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 182-84 (C. O'Brien ed. 1969) (1st ed. 1790) (natural prejudices contain latent wisdom) *and* J.F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 157 (R. White ed. 1967) (2d ed. 1874) (fixed principles of society express accumulated wisdom of centuries) *with* 478 U.S. at 192-94 (White, J.) (emphasizing "ancient roots" of proscriptions against sodomy).

106. *Compare* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 159 (Oxford ed. 1970) (1789) (punishment for otherwise disagreeable acts inappropriate if affected person consented) *and* J.S. MILL, ON LIBERTY 93 (E. Rapaport ed. 1978) (only prevention of harm to others justifies interfering with individual's liberty) *with* 478 U.S. at 199 (Blackmun, J., dissenting) ("[T]his case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.' ") (citation omitted).

107. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963). This book was augmented by several articles, including *Immorality and Treason*, The Listener, July 30, 1959, at 162, *reprinted in* THE LAW AS LITERATURE (L. Blom-Cooper ed. 1961) and *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967).

108. Lord Devlin collected his essays in one volume, *The Enforcement of Morals*. Both writers acknowledged that Lord Devlin's arguments were conservative and Professor Hart's, liberal. *See* P. DEVLIN, THE ENFORCEMENT OF MORALS vi-vii (1965); H.L.A. HART, *supra* note 107, at 72-77; Williams, *Authoritarian Morals and the Criminal Law*, 1966 CRIM. L. REV. 132.

109. THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION ¶ 62 (American ed. 1963) [hereinafter WOLFENDEN REPORT]. The Committee also defined "consenting," *id.* at ¶ 63, "adult," *id.* at ¶¶ 65-75, and "in private," *id.* at ¶ 64, and recommended penalties for those sexual acts it thought should remain crimes, *id.* at ¶¶ 76-127.

British law was reformed as the Wolfenden Report had recommended by the Sexual Offenses Act, 1967, ch. 60.

110. Although the United States Supreme Court had never given plenary consideration to the question of whether consensual lovemaking between two adults of the same sex could be punished as a crime, several lower federal courts, and one state court, had done so. *E.g.*, Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (law proscribing "deviate sexual intercourse with another individual of the same sex" held constitutional), *cert. denied*, 478 U.S. 1022 (1986); Doe v. Commonwealth's Attorney for Richmond, 403 F. Supp. 1199 (E.D. Va. 1975) (finding rational basis for sodomy law), *aff'd mem.*, 425 U.S. 901 (1976); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980) (law prohibiting consensual sodomy held unconstitutional).

111. The debate between Professor Hart and Lord Devlin spurred a considerable secondary literature. *See, e.g.*, Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966); Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962).

In the United States, meanwhile, the Advisory Committee of the American Law Institute recommended that the Model Penal Code exclude consensual relations between adults from criminal punishment. *See* MODEL PENAL CODE § 20 comments at 276 (Tentative Draft No. 4, 1955). The recommendation was initially rejected, but ultimately prevailed. *See* MODEL PENAL CODE § 213.2 (1964). This debate was also reflected in the law reviews. *See, e.g.*, Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 441 (1964); Hart, *The Use and Abuse of the Criminal Law*, OXFORD LAW. Vol. 4, No. 1, 1961, at 7; Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

A. *The Hart-Devlin Debate*

The writings of H.L.A. Hart and Patrick Devlin provide a particularly instructive comparison with *Bowers v. Hardwick* because they consider the underlying philosophical questions raised by *Hardwick* with depth and rigor. Hart and Devlin debated the political philosophy which undergirded the Wolfenden Report's jurisprudential support for its substantive recommendations: the theory that protection of an individual from external harm was the only valid justification for criminal prohibitions; no other goal, and certainly no other moral theory, could be sufficient.[112]

Lord Devlin attacked one of the Wolfenden Report's key premises: that there is a realm of private morality that may not properly be enforced by the criminal law.[113] Devlin argued that judgments about private morality must be made every day by sentencing judges,[114] and are implicit in the mere proscription of some, although perhaps not all, crimes.[115] Claiming that the Wolfenden Committee had conceded homosexuality to be morally wrong, Lord Devlin argued against a "freedom to be immoral,"[116] because "[s]ociety is entitled by means of its laws to protect itself from dangers, whether from within or without."[117] He thought the "viewpoint of the man in the street"[118]—especially when reflecting a visceral response[119]—should be the only measure of both morality and danger to society.[120] Although Lord Devlin conceded that the state might protect individual privacy from the criminal law by restricting methods of police investigation or by lenient sentences for private behavior,[121] he argued

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The development of the constitutional doctrine of privacy brought a renewal of the debate, now framed in constitutional terms. *See, e.g.*, Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Karst, *Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Richards, *Unnatural Acts and the Constitutional Right to Privacy*, 45 FORDHAM L. REV. 1281 (1977); Note, *Suspect Classification*, *supra* note 29; *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986).

112. WOLFENDEN REPORT, *supra* note 109, ¶¶ 13, 14 & 61. This view derived from the liberalism of Bentham and Mill. *See* H.L.A. HART, *supra* note 107, at 13.

113. He was considerably more troubled by the Wolfenden Committee's rationales than by its recommendations. He conceded that homosexuality does society no tangible harm, P. DEVLIN, *Mill on Liberty in Morals*, in THE ENFORCEMENT OF MORALS, *supra* note 108, at 102, 111–12, 116, and agreed that laws penalizing consensual adult homosexuality may themselves do society more harm than good, *id.* at 117.

114. P. DEVLIN, *Morals and the Criminal Law*, in THE ENFORCEMENT OF MORALS, *supra* note 108, at 1, 4 (for example, by treating an abortionist and an unlicensed midwife differently).

115. *Id.* at 5–7.

116. *Id.* at 8; *cf.* P. DEVLIN, *supra* note 113, at 102, 121–22 (moral proscriptions are appropriate even if we are not sure proscribed conduct is evil).

117. P. DEVLIN, *supra* note 114, at 1. Lord Devlin emphasized the danger of homosexuality by comparing it to treason. *Id.* at 13–14.

118. *Id.* at 15.

119. *Id.* at 17 ("No society can do without intolerance, indignation and disgust; they are the forces behind the moral law, and indeed it can be argued that if they or something like them are not present, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice.") (footnote omitted).

120. *Id.* at 17 (If society genuinely feels that homosexuality is "a vice so abominable that its mere presence is an offence . . . I do not see how society can be denied the right to eradicate it.").

121. *Id.* at 18–19; *cf.* Bowers v. Hardwick, 478 U.S. at 197–98 (Powell, J., dissenting) (sug-

that the community needed to be able to enforce the majority's moral views in order to preserve its own existence.

Lord Devlin's arguments were explicitly and self-consciously conservative. Indeed, he argued that basing the law upon rational considerations would be undemocratic and elitist.[122] He acknowledged that his argument that the law should enforce majoritarian morality was conservative, naming James FitzJames Stephen as his intellectual ancestor.[123]

Like Lord Devlin, Professor Hart was at least as interested in the Wolfenden Committee's jurisprudential theory as in its practical recommendations.[124] His arguments therefore defended both John Stuart Mill and the Wolfenden Report, and attacked the theories of Edmund Burke and FitzJames Stephen along with those propounded by Lord Devlin himself.[125] In defending the Wolfenden Committee's jurisprudence, Hart argued that although "we should attempt to adjust the severity of punishment to the moral gravity of offences," it does not follow "that punishment merely for immorality is justified." Hart explained that although "the only justification for having a *system* of punishment is to prevent harm and only harmful conduct should be punished," nevertheless using moral judgments to decide on the quantum of punishment for harmful conduct may support social morality and prevent the law from falling into disrepute.[126] Pointing out that criminal laws affect both those persons actually punished under them and those persons "coerced into obedience by the threat of legal punishment," Hart argued that proscribing harmless sexual activities was particularly pernicious because of the "recurrent and insistent part" sexual impulses play in daily life: "[T]he suppression of sexual impulses generally is[] something which affects the development or balance of the individual's emotional life, happiness, and personality."[127] Professor Hart characterized Lord Devlin's argument that society must enforce majoritarian morality to protect itself as "a highly ambitious empirical generalization" for which Devlin had offered neither evidence nor even any "indication . . . of the kind of evidence that would support

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gesting that homosexual lovemaking may be made a crime, but not punished too severely).

122. *See* P. DEVLIN, *Democracy and Morality*, in THE ENFORCEMENT OF MORALS, *supra* note 108, at 86, 91–97 (arguing that, in a democracy, morals should be decided by the majority, just as other policy choices are).

123. P. DEVLIN, *Morals and Contemporary Social Reality*, in THE ENFORCEMENT OF MORALS, *supra* note 108, at 124, 126–28; *cf.* J.F. STEPHEN, *supra* note 105, at 152 ("[T]he feeling of hatred and the desire of vengeance [that the grosser forms of vice excite in healthily constituted minds] are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.").

124. *See, e.g.*, H.L.A. HART, *supra* note 107, at 14.

125. *See, e.g.*, *id.* at 48–52 (arguing against Devlin's "moderate thesis" and Stephen's "extreme thesis"); *id.* at 73–77 (discussing whether Burke's "evolutionary defence of tradition and custom" supports Devlin's position).

126. *Id.* at 36–37 (emphasis in original). Lord Devlin rejected Professor Hart's distinction between rationales for sentencing and for the prohibitions themselves as spurious. *See* P. DEVLIN, *supra* note 123, at 124, 129–31.

127. H.L.A. HART, *supra* note 107, at 21–22.

it."[128] Professor Hart acknowledged that it might be possible to discriminate empirically between those portions of society's moral code necessary for social existence and those that were superfluous, but noted that it would be difficult to do so.[129] Until empirical evidence demonstrating the necessity for any particular moral rule was available, Hart concluded, Lord Devlin's arguments rested entirely upon the "conservative thesis" that "the majority have the right to enforce its . . . convictions that their moral environment is a thing of value to be defended from change."[130]

One of Lord Devlin's most enduring contributions to the debate about the role of morality in the criminal law was his development of a list of existing crimes which he used to challenge the liberal argument that "private immorality should altogether and always be immune from interference by the law."[131] This list included: treason,[132] euthanasia or the killing of another at his own request, suicide, attempted suicide and suicide pacts, dueling, abortion, incest between brother and sister, gambling, drunkenness, living on the earnings of a prostitute, bestiality, conspiracy to corrupt morals, bigamy, and polygamy.[133] Some version of Lord Devlin's list has become a staple in arguments over whether private lovemaking between consenting adults should be legal,[134] and a version of it appears in *Bowers v. Hardwick*.[135]

Professor Hart responded to Devlin's list in two ways. First, he argued that " 'the actual existence of laws of any given kind is wholly irrelevant to [the] contention . . . that it would be better if laws of such a kind did

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128. Hart, *Social Solidarity*, *supra* note 107, at 3. As Professor Hart recognized:

> [I]f we *mean* by "society ceasing to exist" not "disintegration" nor "the drifting apart" of its members, but a radical change in its common morality, then the case for using the law to preserve morality must rest not on any disintegration thesis but on some variant of the claim that when groups of men have developed a common form of life rich enough to include a common morality, this is something which ought to be preserved. One very obvious form of this claim is the conservative thesis that the majority have a right in these circumstances to defend their existing moral environment from change. But this is no longer an empirical claim.

Id. at 4 (emphasis in original).

129. *Id.* at 8–13.

130. *Id.* at 2, 13.

131. P. DEVLIN, *Mill on Liberty in Morals*, *supra* note 113, at 102, 110.

132. *See supra* note 117.

133. *See* P. DEVLIN, *supra* note 108, at 14, 107, 113, 128. Although J. FitzJames Stephen had claimed that "English criminal law does recognize morality" because "a considerable number of acts which need not be specified are treated as crimes merely because they are regarded as grossly immoral," J.F. STEPHEN, *supra* note 105, at 154 (footnote omitted), I believe Lord Devlin was the first to compile a list of existing crimes to demonstrate the point.

134. *See, e.g.*, Caron, *The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy*, 15 MCGILL L.J. 9 (1969) (discussing homosexual acts by comparison with incest, euthanasia, murder consented to by the victim, attempted suicide, dueling, suicide pacts, and abortion); Hughes, *supra* note 111, at 669–72 (criticizing Devlin's use of list); Williams, *supra* note 108 (discussing Devlin's jurisprudence).

135. In the course of rejecting Hardwick's argument that, under Stanley v. Georgia, 394 U.S. 557 (1969), "homosexual contact [which] occurs in the privacy of the home" is constitutionally protected, 478 U.S. at 195–96. Justice White compared homosexual sodomy with "[v]ictimless crimes, such as the possession and use of illegal drugs[,] . . . possession in the home of drugs, firearms, or stolen goods[,] . . . adultery, incest, and other sexual crimes . . . ." 478 U.S. at 195–96.

not exist.' "[136] Second, he attempted to show that many of the crimes on Lord Devlin's list were not solely attempts to enforce morality.[137]

B. Bowers v. Hardwick *Recasts the Hart-Devlin Debate*

In many respects, *Bowers v. Hardwick* recast the Hart-Devlin debate in constitutional terms.[138] Understanding White's majoritarian justifications for seeing "homosexual sodomy" as immoral, and Blackmun's responses to it, is key to understanding the philosophical similarities between *Bowers v. Hardwick* and the Hart-Devlin debate. Like Lord Devlin, Justice White[139] and Chief Justice Burger[140] defended the criminal proscription of homosexual lovemaking by appealing to tradition and morality. Like Professor Hart, Justices Blackmun[141] and Stevens[142] would have required proof that private homosexual lovemaking was harmful before permitting the state to proscribe it. These differences reflect, respectively, the conservative position, for which the desirability of protecting society's existing form is unquestioned, and the liberal position, for which individual liberty is the primary value. Liberal values and conservative values are incommensurable. Although one can make an intelligible choice between them, this cannot be done from an Archimedean perspective.

In addition to his misleading historical claims, White relied on "the presumed belief of a majority of the Georgia electorate that homosexual sodomy is immoral and unacceptable."[143] Although careful analysis suggests that White was working within the conservative perspective, his majoritarian justification can be interpreted in both conservative and liberal ways. The conservative interpretation assumes that White agreed with Fitzjames Stephen and Lord Patrick Devlin that strongly held popular prejudices are by themselves sufficient justification for criminal proscriptions. The liberal interpretation assumes that White accepted Jeremy Bentham's principle that criminal proscriptions must be limited to curbing behavior causing harm to others. Many of the dissenters' arguments, and almost all of the scholarly commentary, have been written from within the liberal perspective, and assume White to have been asserting that homosexuality is harmful.[144] Yet White's argument fails in liberal terms, since

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136. H.L.A. HART, *supra* note 107, at 28 (quoting J. Morley) (footnote omitted).
137. *Id.* at 25–52.
138. Of course *Hardwick* was an exercise in Constitutional interpretation, whereas the Hart-Devlin debate addressed a policy question for a legislature unchecked by a written constitution. Nevertheless, when the Court interprets such "open textured" terms as "Due Process," "privacy," and "fundamental rights," it is forced to resort to what are essentially policy arguments. *See* H.L.A. HART, THE CONCEPT OF LAW 121–32 (1961).
139. *See* 478 U.S. at 191–94.
140. *See id.* at 196–97 (Burger, C.J., concurring).
141. *See id.* at 208–09 (Blackmun, J., dissenting).
142. *See id.* at 217 (Stevens, J., dissenting).
143. *Id.* at 196.
144. *See, e.g.*, Conkle, *supra* note 7, at 233–34 (Georgia's interest in enforcing morality inter-

he never attempts to identify any harm caused by consensual adult sodomy.[145]

In conservative terms, however, White's argument is coherent. When he relied on "the presumed belief of a majority of the Georgia electorate," White meant that Georgia might proscribe homosexuality solely because it was abhorred by the majority. When he compiled a list strikingly similar to Lord Devlin's by comparing "homosexual sodomy" to "[v]ictimless crimes, such as the possession and use of illegal drugs[,] . . . possession in the home of drugs, firearms, or stolen goods[,] . . . adultery, incest, and other sexual crimes,"[146] White, like Devlin, was arguing that society often legislates on the basis of morality alone, and that this is entirely proper.

Blackmun explicitly repudiated White's conservative premises at some points,[147] but at others merely implicitly assumed the primacy of liberal values. Although, as just argued, Justice White's opinion is more coherent when understood in conservative terms, Justice Blackmun sometimes interpreted it as a liberal argument. Treating White's use of his Devlin-like list as shorthand for the liberal argument that all these crimes cause harm, Blackmun retorted that private, consensual, violations of Georgia's law were obviously neither the cause nor the effect of harm to any individual.[148] Blackmun's implicit assertion that the crimes on White's list are proscribed because they harm identifiable individuals may be correct for most of the crimes. Adultery[149] and sexual crimes involving the use of actual or constructive force[150] may be distinguished from "homosexual

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preted as protecting either homosexuals or other citizens from harm); Gillerman, *supra* note 7, at 6 (criticizing equation of homosexuality with moral corruption because such equation "lacks empirical foundation"); Richards, *supra* note 7, at 859–60 (because homosexuality is not harmful, treating it differently from other nonprocreative sexuality is unjust); *Leading Cases*, *supra* note 7, at 219 (Court should have required "an independent rational basis" for Georgia's law, "something more than the moral choice of a majority").

145. Within the liberal paradigm, any defense of Georgia's law must be on the basis that "homosexual sodomy" causes some sort of harm, and therefore, since the Georgia electorate had determined homosexuality to be harmful to society, it was justified in proscribing it. *Cf.* P. DEVLIN, *supra* note 114, at 1, 9–14 (society may use the criminal law to preserve morality in order to safeguard its own existence). This argument has been convincingly refuted by Ronald Dworkin. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 242 (1978) (noting that public outrage alone does not indicate that given prohibition is necessary to society's continuation); *see also* 478 U.S. at 210–12 (Blackmun, J. dissenting) (making same point).

146. 478 U.S. at 195–96.

147. Blackmun attacked conservative premises directly when he wrote, "Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,' " 478 U.S. at 199 (Blackmun, J., dissenting) (citing Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)), and, "I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny." 478 U.S. at 210 (Blackmun, J., dissenting).

148. *Id.* at 208–09. Like Justice Blackmun, Professor Hart responded to the list from within the framework of liberal values, arguing that the state's ability to enforce some morality can give it the power to prohibit homosexual acts only if some matter of appropriate state concern is linked to the specific prohibition. Hart, *Social Solidarity*, *supra* note 107, at 9 n.21.

149. 478 U.S. at 209 n.4 (Blackmun, J., dissenting) (state may punish adultery as breach of promise to be faithful, or because it harms third parties).

150. Such crimes include rape, forcible sodomy, statutory rape, child molestation, and incest be-

sodomy" on this basis. Yet incest between adults[151] is not clearly harmful.[152]

Blackmun's own liberal assumptions prevented him from recognizing that White's use of the list was shorthand for the conservative argument that the criminal law may properly be used "to preserve order and decency."[153] Professor Hart responded to this argument by requesting empirical evidence of the necessity for any criminal prohibition based upon morality; had Blackmun done so, his rhetorical position would have been stronger. Instead, Justice Blackmun attempted to refute the majority's argument on liberal terms by seeking to distinguish homosexual love from incest between adults. He may have tried to do so in order to contain the anarchic risks implied by a rule favoring individual sexual freedom.[154] Yet he set himself a formidable task, because incest between adults seems not to cause any discernable harm to an identifiable individual.

The dissenters' most creative responses to the majority pushed beyond the Hart-Devlin debate, turning the conservative argument against itself. Instead of accepting the assertion that homosexuality is universally considered immoral, as Hart implicitly did, Stevens denied that homosexuality is abhorred even in Georgia.[155] Blackmun did not challenge this factual premise. Recalling that the values of pluralistic diversity and individual liberty form a traditional part of our society's morality, he paradoxically asserted that these liberal values should be considered paramount in constitutional interpretation, even by those who consider conserving our society in its present form a primary value.[156]

IV. Political Philosophy and Constitutional Privacy

Commentators have found it difficult to explain how Michael Hardwick's challenge to a law proscribing private lovemaking between consenting adults could have failed. One suggested that the case heralds a

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tween a child and an adult.

151. At oral argument, the Court expressed particular concern with the states' continuing ability to proscribe a sexual relationship between adults who are within prohibited degrees of consanguinity or affinity. *See* Transcript of Oral Argument at 22, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) [hereinafter Oral Argument].

152. Blackmun's argument that incest is "inherently coercive" is anomalous: If structural inequality between two people makes their lovemaking "sufficiently problematical that a blanket prohibition . . . is warranted," 478 U.S. at 209 n.4 (Blackmun, J., dissenting), all heterosexual lovemaking should also be prohibited.

153. *See* P. Devlin, *supra* note 114, at 1, 7; *cf.* 478 U.S. at 196 ("The law . . . is constantly based on notions of morality.").

154. *See infra* text accompanying note 161.

155. 478 U.S. at 219-20 (Stevens, J., dissenting).

156. 478 U.S. at 205 (Blackmun, J., dissenting) ("[I]n a Nation as diverse as ours . . . there may be many right ways of conducting [intimate sexual] relationships"); *id.* at 203 (" 'Our cases have long recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.' ") (quoting Thornburgh v. American College of Obstetrics & Gynecology, 476 U.S. 747, 772 (1986)).

"second death of substantive due process";[157] another called it "one of the most transparently unprincipled exercises of judicial power in recent years."[158] Hardwick's case could hardly have been stronger. He was arrested in his own home; the Georgia statute applied equally to homosexual and heterosexual lovers, whether married or single, and its nonenforcement was even-handed. Hardwick's complaint invoked his "right of privacy," reminding the Court that it had already vindicated the rights of married women to get abortions over their husbands' objections,[159] and of children to birth control.[160] Yet he lost.

This Comment has offered an alternative interpretation of why Hardwick lost an apparently straightforward case. It has shown how *Bowers v. Hardwick* reflects a battle between two incommensurable and incompatible systems of fundamental values: classical liberalism and classical conservatism.

Both liberal and conservative philosophies make single goals the touchstone of their analysis. Individual freedom is of paramount value for classical liberalism, and the continued existence of society in its present form is of paramount value for classical conservatism. However useful this technique may be for philosophical analysis, risks inhere in using either value as a rationale for deciding cases. These risks are most clearly perceived from the opposing perspective. The risks of the extreme liberal position are risks to conservative values. Taken to its logical limit, the liberal argument seems to risk anarchy, since a totally unfettered right to be left alone might undermine virtually all social control over individuals.[161] Similarly, the risks of the extreme conservative position are risks to liberal values. At its logical limit, the conservative argument degenerates into "mere moral conservatism,"[162] preserving even manifest injustice and tyranny from change by preventing normative criticism of traditional laws.[163]

The disagreements between the majority and dissenting Justices in *Hardwick* demonstrate the uneasy balancing of risk characteristic of judicial decisions where these polar values clash.[164] The resolution of any dis-

157. Conkle, *supra* note 7, at 215.

158. Richards, *supra* note 7, at 800.

159. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

160. Carey v. Population Services Int'l, 431 U.S. 678 (1977).

161. *See, e.g.*, Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 437–38 (1980) ("right to be let alone" would prevent tax collection and conscription); Punzo, *Morality and the Law: The Search for Privacy in Community*, 18 ST. LOUIS U.L.J. 175, 186, 191–93 (1973) (if individual may freely engage in activities that directly affect only his own life, state may not enforce laws against homosexuality, gambling, prostitution, pornography, polygamy, polyandry and drug use).

162. H.L.A. HART, *supra* note 107, at 72.

163. *See* Hart, *supra* note 111, at 12 (In a society "whose principal occupation is torturing a racial minority . . . surely the argument that certain laws are required to preserve the society is not *per se* sufficient to justify the misery they cause."); *cf.* 478 U.S. at 210 n.5 (Blackmun, J., dissenting) (discussing parallels between anti-sodomy laws and anti-miscegenation laws).

164. Blackmun's paradoxical claim that valuing individual liberty is one of our hallowed traditions was an attempt to shift the terms of this debate.

pute pitting liberty against tradition requires a balance between potential anarchy and potential tyranny. A court's assessment of the potential risk of any result must therefore depend heavily on how the facts are construed. In *Hardwick*, each Justice's calculation of the relative dangers of a liberal or a conservative decision was determined by his or her understanding of the act for which Hardwick was arrested.

If homosexuality is intrinsically immoral, as Justice White and Chief Justice Burger implicitly asserted, a liberal decision might well be the more dangerous. Depriving the state of the power to arrest and punish an adult for engaging in intrinsically immoral behavior might undermine its power to curb other traditionally disfavored but private and consensual practices, such as suicide, drug use, adultery, and incest. The risk of a liberal decision could then be discussed in terms of a need for a limiting principle,[165] an answer to the question, "Where will it end?"

If homosexuality is a normal variation, however, as the dissenters implicitly asserted, a conservative decision might easily be the more dangerous. If homosexual love is as normal as any other, a conservative decision risks government enforcement of a majority's intolerance in other sensitive areas of life as well. The relevant comparisons are then not between homosexuality and incest or suicide, but between homophobia and religious intolerance or racial animus.[166] If a state may proscribe and punish a "sensitive, key relationship of human existence" such as sexual love, few limits remain on its control of individual autonomy, and on its imposition of majority preferences upon minorities with other values.[167]

The Justices' assessment of the risk inherent in the classical liberal and conservative resolutions of this case in turn determined how they applied the doctrine of constitutional privacy to the facts of *Hardwick*. The Court's prior decisions invoking constitutional privacy may be interpreted in both liberal and conservative terms. One liberal interpretation of "privacy" is as "autonomy." This concept is fully consistent with the classical liberal view that individual liberty is a primary value.[168] In contrast, one conservative interpretation of privacy is that it guarantees no more than "seclusion" for otherwise legal activities.[169] This view is consistent with

165. *See* Oral Argument, *supra* note 151, at 18–19 (questions by Justice Powell); *id.*, 21–22 (question by Chief Justice Burger).

166. *See* 478 U.S. at 211–12 (Blackmun, J., dissenting); *id.* at 219 (Stevens, J., dissenting).

167. *See* Conkle, *supra* note 7, at 215.

168. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) ("freedom of personal choice in matters of marriage and family life"); Eisenstadt v. Baird, 405 U.S. 438 (1972) (individual's right to decide whether to bear or beget child); *see also* Henkin, *supra* note 111 (interpreting constitutional "privacy" as autonomy by reference to Enlightenment philosophy); Karst, *supra* note 111 (interpreting privacy cases as protecting autonomy); Punzo, *supra* note 161 (deriving definition of privacy as autonomy from premise that individual freedom is of paramount importance).

169. *See* Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 193 (privacy as seclusion); *cf.* Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess obscene matter in seclusion of home).

making society's unchanged continuation a primary value. Interpreting privacy as protection only for traditional relationships[170] is conservative for the same reason.[171] In *Hardwick*, the Justices in the majority neither explained which of these definitions of privacy they were invoking, nor articulated the understandings of homosexuality they held before they compared Hardwick's actions with the facts of prior cases.[172] This silence obscured the underlying determinants of their opinions.

In the Hart-Devlin debate, once both sides had articulated their positions fully, it became clear that their disagreements were over fundamentally distinct and incommensurable normative frameworks, and therefore that the debate was incapable of resolution by reasoned argument. In *Bowers v. Hardwick*, however, conservatism appears to have won along with the state of Georgia. On the basis of profoundly conservative arguments the case denied constitutional protection to a politically weak minority woefully in need of equal treatment.[173] The decision's potential for undermining the entire liberal privacy doctrine[174] is greatest if homosexuality is understood as a normal variation, because *Hardwick* then implies that a state may proscribe any intimate relationship or decision. Future litigants will therefore experience a strong temptation to limit the decision's precedential effect by distinguishing themselves from homosexuals, perhaps even on the basis that homosexuality has "always been abhorred." Seen in this way, the case is an impressive victory for conservative values. It may shift the argument about whether an activity is protected by the constitutional right of privacy from the liberal paradigm, where individual liberty is protected unless it sufficiently endangers society, to the conservative paradigm, where state restrictions are upheld so long as they are sufficiently consistent with "traditional values."

Nevertheless, scoring the winners and losers in this case is really not so simple. The probable effects of this decision are both complex and paradoxical. In some respects, conservatism lost as well. The "presumed belief

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170. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (right to remarry because marriage is foundation of family); Moore v. City of East Cleveland, 431 U.S. 494, 504 (1977) (extended family protected because it is as venerable as nuclear family); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage basic civil right because it has long been recognized as essential to happiness).

171. At least two related intermediate positions have been identified. One refers to an individual's ability to limit others' access to himself or herself. *See* Gavison, *supra* note 161 (limits on access to self). The other refers to an individual's ability to limit others' access to information about him or her. *See* Fried, *Privacy*, 77 YALE L.J. 475 (1968) (limits on access to personal information). Both are equally consistent with liberal and conservative values, and derive from Fourth Amendment cases. *See, e.g.*, Boyd v. United States, 116 U.S. 616 (1886) (limits on production of private papers).

172. *See* 478 U.S. at 190-92.

173. *See, e.g.*, Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 Civ. Lib. Rev. No. 4, 19, 21 (Jan./Feb. 1979); Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part II*, 11 U. DAYTON L. REV. 275 (1986); Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part I*, 10 U. DAYTON L. REV. 459 (1985); Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81); Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

174. *See supra* notes 166-72 and accompanying text.

of a majority of the electorate in Georgia"[175] is no more than shorthand for a circular argument: The statute was justified by reliance on popular morality. But popular morality itself was supposedly evidenced by the statute's mere existence. Seen in this way, the decision is a defeat for the conservative principle of deference to majoritarian values. Contrary to their protestations, the Justices of the *Hardwick* majority ignored the explicit language of Georgia's law and the actual conduct of its law enforcement officers in order to impose their own values[176] on the states under a cloak of historical invention.[177]

This case may have been a defeat for conservative values in another sense as well. In *A History of the Criminal Law of England*, FitzJames Stephen implied that criminal laws could be adequately justified by strong popular prejudice because a prejudiced majority might otherwise use mob violence to enforce its views.[178] These ideas were perhaps sound in Stephen's place and time, but the United States in the latter half of the twentieth century is a pluralistic mixture of cultures and values. In our country, and our century, it is not at all clear that domestic peace is advanced when a majority imposes its values on the rest of society. Justice Blackmun put it well: In a pluralistic society, attempting to compel adherence to one set of values and beliefs may well constitute a greater threat to "national cohesion"[179] than mere pluralism ever could be.

V. Conclusion

Although *Bowers v. Hardwick* appears to be an incremental step in the Court's exegesis of its privacy doctrine based on fact and history, the opinions really turn on the Justices' unstated disagreements over fundamental political values. The majority applied classical conservative principles, permitting Georgia to justify its statute by its congruence with traditional moral views. It grounded this argument in the Constitution by equating "tradition" with the views of the Founders. The dissenters challenged the majority on two levels: Blackmun accepted the factual premise that homosexuality was abhorred when the Constitution was adopted, but rejected the notion that this is constitutionally significant, and Stevens challenged this factual premise itself. As both *Hardwick* and the Hart-Devlin debate show, the dispute between classical liberalism and classical conservatism cannot be resolved by resort to a meta-ethical methodology. What is clear

175. 478 U.S. at 196.

176. Justice Blackmun intimated that the majority's decision was based upon prejudice. 478 U.S. at 211–12 (Blackmun, J., dissenting).

177. *Cf.* 478 U.S. at 192–94.

178. 2 J.F. Stephen, A History of the Criminal Law of England 82 (1883) (criminal sanctions control expression of public hatred of crime as marriage controls sexual passions); *accord* J.F. Stephen, *supra* note 105, at 124 (if criminal law did not deal with an association of seducers, "lynch law" would).

179. 478 U.S. at 214 (Blackmun, J., dissenting).

in *Hardwick*, however, as Stevens noted, is that the majority's historical claims were inaccurate. Its attempt to ground its holding in American and Western history must be judged a failure.

If the majority had understood the history of sodomy statutes, it would have found it harder to limit its consideration of the Georgia statute to its effects upon a politically weak minority.[180] An accurate assessment of the 1791 and 1868 statutes would have made the implications of the Court's method much plainer. If the framers' values are represented by these statutes, then "sodomy" between a man and a woman, even within marriage, has no more protection than sodomy between two men. By mischaracterizing history and misunderstanding "homosexuality," the majority was able to make a profound change in constitutional interpretation, from the liberal to the conservative paradigm, without acknowledging either that it had done so or the implications of this shift.

180. The Court explicitly reserved consideration of the constitutionality of the Georgia statute as applied to "acts of sodomy" between parties other than homosexuals. 478 U.S. at 188 n.2. Yet given that heterosexual sodomy, including sodomy in marriage, was also proscribed in 1791 and 1868, it is difficult to see how the majority's historical method of constitutional interpretation could produce any result other than finding heterosexual sodomy constitutionally unprotected.

NOTES

DOE AND *DRONENBURG*: SODOMY STATUTES ARE CONSTITUTIONAL

In 1976 the United States Supreme Court in *Doe v. Commonwealth's Attorney for Richmond*[1] summarily affirmed a three judge district court's dismissal of a challenge to the Virginia sodomy statute. In *Doe*, anonymous homosexuals contended that the statute impinged on their constitutional rights to due process, privacy, and expression.[2] The United States District Court for the Eastern District of Virginia rejected those arguments, finding that the right to privacy extended only to marriage, family, and procreation. Because the district court reasoned that homosexuality had no connection to those traditional privacy interests, it held that the constitutional right to privacy did not extend to consensual homosexual activities.[3]

More recently, in *Dronenburg v. Zech*,[4] the United States Court of Appeals for the District of Columbia Circuit rejected a homosexual's contention that an administrative discharge from the United States Navy for homosexual conduct impinged on his rights to privacy and equal protection. Citing *Doe* and *Poe v. Ullman*,[5] the court held that the rights to privacy and equal protection do not protect homosexual conduct even though that conduct occurs in private.[6]

Since *Doe*, several federal courts either ignored or rejected *Doe* as a summary affirmance and extended the scope of constitutionally protected privacy to protect consensual homosexual relations.[7]

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1. 425 U.S. 901 (1976).
2. 403 F. Supp. 1199, 1200 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).
3. *Id.* at 1202.
4. 741 F.2d 1388 (D.C. Cir. 1984).
5. 367 U.S. 497 (1961).
6. *Id.* at 20.
7. *See, e.g.*, Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985); Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982). *Contra* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 454 U.S. 855 (1981).

Additionally, several state courts used federal or state equal protection and privacy doctrines to strike down state sodomy statutes.[8]

The underlying issue of the topic discussed in this Note is the allocation of government power in areas not addressed textually by the Constitution. Stated differently, can a court of a particular sovereign constitutionally invalidate a clear expression of that sovereign's representative unit without express constitutional support? Because sodomy statutes provide a good example of modern statutory criminal law well supported by common law history[9] and because the Constitution does not address sodomy or sexual preference expressly, this Note examines whether a court constitutionally can invalidate a state prohibition of sodomy. To resolve these issues, the Note first reviews the background of and reasons for sodomy statutes. The Virginia sodomy statute serves as an example of modern sodomy statutes, and *Doe* is discussed in relation to that statute. The Note then tests the validity of *Doe*, *Dronenburg*, and the statute by analyzing the recent challenges to state sodomy statutes.

This Note contends that legislatures should decide whether to decriminalize sodomy; the judiciary should not make the decision through substantive due process.[10] Although arguing that all sodomy should be subject to criminalization, this Note reaches three specific conclusions.[11] First, current case law prohibits criminaliza-

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8. *See, e.g.*, State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980). *Contra* State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, *cert. denied*, 298 N.C. 303, 259 S.E.2d 304 (1979), *appeal dismissed*, 445 U.S. 947 (1980); State v. Santos, 413 A.2d 58 (R.I. 1980).

9. *See infra* notes 25-37 and accompanying text.

10. This Note only briefly addresses bestiality and sodomy with children. States may continue to prohibit bestiality on the basis of the state interest in the protection of animals. *See, e.g.*, VA. CODE §§ 18.2-393 to -403 (1982). Further, the traditional moral aversion to sodomy still applies fully to bestiality.

States prohibit sodomy between adults and children on the ground that a child cannot give informed consent. The state interest in protecting children allows criminalization of this form of sodomy. *See infra* note 173 and accompanying text.

11. This Note does not address forcible or public sodomy because even the broadest constitutional interpretations do not protect these forms of conduct. *E.g.*, Baker v. Wade, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982); Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976); People v. Onofre, 51 N.Y.2d 476, 491, 415 N.E.2d 936, 941, 434 N.Y.S.2d 947, 952 (1980), *cert. denied*, 451 U.S. 987

tion of marital sodomy. Second, the courts are divided on the issue of nonmarital sodomy. Third, legislatures constitutionally may prohibit homosexual sodomy but first should weigh a number of factors before making the decision.

THE MODERN SODOMY STATUTE

In general, sodomy is the unnatural carnal knowledge of human beings with each other or with a beast.[12] More specific definitions appear in state sodomy statutes, of which Virginia's is typical:

> § 18.2-361. Crimes against nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a Class 6 felony;[13] . . . .

This statute prohibits several types of conduct. First, the statute prohibits any carnal knowledge of a brute animal, or bestiality.[14] Sodomy statutes generally define carnal knowledge as the knowledge of the body, passions, or sexual appetites of either another person or an animal.[15] Thus, the Virginia statute forbids any sexual contact between a person and any animal, including oral or genital copulation.[16] The statute also prohibits any sexual contact between male or female persons by the anus or by oral-genital contact.[17] Any coupling or sexual contact by the genitals with the

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(1981); *see also* Harris v. State, 457 P.2d 638 (Alaska 1969).

12. State v. Young, 140 Or. 228, ____, 13 P.2d 604, 607 (1932). The common law defined "sodomy" as a "crime against nature" between humans and "buggery" as a "crime against nature" between a man and a beast. The terms sodomy and buggery now are used interchangeably. Wise v. Commonwealth, 135 Va. 757, 760, 45 S.E. 508, 509 (1923).

13. VA. CODE § 18.2-361 (1982). A class 6 felony has an authorized punishment of imprisonment from one to five years or, within the discretion of the fact finder, imprisonment of not greater than one year and a $1000 fine, or both. VA. CODE § 18.2-10 (1982).

14. Bestiality is a sexual connection between a human and a "beast" of the opposite sex. State v. Poole, 59 Ariz. 44, 122 P.2d 415 (1942). Sodomy statutes define a beast as any animal other than a human. *See* Murray v. State, 236 Ind. 688, 143 N.E.2d 290 (1957) (intercourse with a chicken is intercourse with a beast even thought the chicken is not a mammal); *see also* Hudspeth v. State, 194 Ark. 576, 108 S.W.2d 1085 (1937) (intercourse with a cow violated the Arkansas sodomy statute).

15. 81 C.J.S. *Sodomy* § 2(a), at 646 (1983).

16. *See* Commonwealth v. Thomas, 3 Va. (1 Va. Cas.) 307 (1812).

17. VA. CODE § 18.2-361.

mouth or anus of another person,[18] including fellatio,[19] cunnilingus,[20] and anilingus is prohibited.[21] Consequently, penile-vaginal intercourse is the only permissible sexual activity under the Virginia statute. Finally, any person who consents to any of the prohibited sex acts also is guilty of sodomy.[22]

Four situations potentially could be prosecuted under statutes like Virginia's: first, bestiality; second, consensual sodomy between married persons; third, consensual sodomy between unmarried heterosexuals; and fourth, consensual sodomy between homosexuals.[23] This Note analyzes the latter three classes[24] and concludes that all should be subject to prohibition by the states.

History of Sodomy Statutes

Sodomy laws have existed in western civilization at least since biblical times.[25] The term "sodomy" comes from the ancient city of Sodom,[26] which, according to the Bible, God destroyed because of its citizens' evil practices.[27] Sodomy prohibitions appeared in Judaic law as part of a regulatory scheme designed to guide the Hebrew people in all aspects of life.[28] During the middle ages, sodomy

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18. In order to effect the prohibited coupling or sexual contact, penetration is required (called "res in re"). Wise v. Commonwealth, 135 Va. 757, 115 S.E. 508 (1923). Only slight penetration is necessary and ejaculation is not required. *See* Ryan v. Commonwealth, 219 Va. 439, 247 S.E.2d 698 (1978); Ashby v. Commonwealth, 208 Va. 443, 158 S.E.2d 657 (1968); Commonwealth v. Thomas, 3 Va. (1 Va. Cas.) 307, 308 (1812).

19. Fellatio is an offense committed with the male sex organ and the mouth. BLACK'S LAW DICTIONARY 743 (4th ed. 1968).

20. Cunnilingus is an offense committed with the female sex organ and the mouth. BLACK'S LAW DICTIONARY 343 (5th ed. 1979).

21. Anilingus is "erotic stimulation achieved by contact between the mouth and the anus." WEBSTER'S NEW INTERNATIONAL DICTIONARY 85 (Unabridged 3d ed. 1969).

22. VA. CODE § 18.2-361.

23. *See generally* 2 MODEL PENAL CODE § 213.2, at 363-65 (1980) (discussing the different state rationales for enforcement regarding married couples, nonmarried heterosexual couples, and homosexual couples).

24. This Note does not discuss bestiality because no one has challenged state power to prohibit bestiality recently.

25. *See* Harris v. State, 457 P.2d 638, 648 (Alaska 1969).

26. *Id.*

27. *Genesis* 19:1-29.

28. Judaic law specifically prohibited homosexual sodomy. *Leviticus* 18:22. As examples of the overall scheme of Judaic law, the following sex acts also were prohibited: adultery, *Leviticus* 18:20; bestiality/buggery, *Leviticus* 18:23; incest, *Leviticus* 18:6-16 and sex with any woman during menstruation, *Leviticus* 18:19.

was a religious offense punished by the ecclesiastic courts.[29] In England, sodomy was not an offense at common law but became punishable in the temporal courts by the statute of Henry VIII.[30] The statute was repealed during the reign of Queen Mary[31] but was reinstated upon the ascension of Elizabeth I.[32]

These English statutes influenced early American law.[33] The first laws of the Jamestown colony incorporated the English prohibition of sodomy.[34] The colonists enacted this law to prevent persons from succumbing to the "weakness of the[ir] bod[ies]."[35] The present Virginia statute is directly traceable to a statute enacted in 1792.[36] The statute has no recorded legislative history because the

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Biblical law carried heavy penalties for these crimes: adultery - death, *Leviticus* 20:10; homosexuality - death, *Leviticus* 20:13; bestiality/buggery - death for both person and the animal, *Leviticus* 20:15-16; incest - death/exile, *Leviticus* 20:11, 12, 17.

29. *Harris*, 457 P.2d at 468.

30. *Id.* at 469 (citing 25 Henry VIII, c. 6 (1533)). The statute reads in part:

> Forasmuch as there is not yet sufficient and condign punishment appointed and limited by the due course of the laws of this realm, for the detestable and abominable vice of buggery committed with mankind or beast: (2) it may therefore please the King's highness, with the assent of his lords spiritual and temporal, and the commons of this present parliament assembled, that it may be enacted by authority of the same that the same offense be from henceforth adjudged felony, and such order and form of process therein to be used against the offenders as in cases of felony at the common law; . . . .

Id.

31. *Id.* at 649 n.42 (citing 1 Mary, c. 1 (1553)).

32. *Id.* (citing Elizabeth I, 5 Eliz., c. 17 (1562)).

33. *Id.* at 649.

34. FOR THE COLONY IN VIRGINIA BRITANNIA: LAWS DIVINE, MORALL AND MARTIAL, ETC., art. 9, at 12 (London 1612) (compiled by W. Strachery, 1969) ("No man shall commit the horrible, and detestable sins of Sodomie upon pain of death; . . . .").

35. I have found either the necessity of the present State of the Colonie to require, or the infancie, and weakness of the body thereof, as yet able to digest, and doe now publish [these laws] to all persons in the Colonie, that they may as well take knowledge of the laws . . . .

Id. at 9-10.

36. 1 S. SHEPARD, THE STATUTES AT LARGE OF VIRGINIA, 1792 TO 1806, at 113 (1970) (reprinted from 1835 ed., Richmond). The Virginia legislature passed the statute on December 10, 1792, which reads as follows:

> *Be it enacted and declared by the General Assembly*, That if any do commit the detestible and abominable vice of buggery, with man or beast, he or she so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without benefit of clergy.

Id.

lawmakers considered the crime too disgusting to debate.[37]

Sodomy statutes exist in America today for several reasons. Many Americans believe that sodomy is wrong because it leads to moral delinquency.[38] States therefore enact sodomy statutes to promote morality.[39] Virginia, for instance, acted within its police power in enacting its sodomy statute; the statute appears in the Virginia Code chapter entitled "Crimes involving morals and decency."[40] Preserving health has been another reason for prohibiting sodomy.[41] States have contended, for instance, that prohibiting sodomy inhibits the spread of venereal diseases.

Courts have long recognized state authority to legislate against sodomy to protect morals or health.[42] Protecting morality and

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37. *See* J. DAVIS, A TREATISE ON CRIMINAL LAW 133 (1838). The common law treated sodomy or buggery as a crime not fit to be named. *See generally* J. MATTHEWS, DIGEST OF THE LAWS OF VIRGINIA OF A CRIMINAL NATURE 124-25 (2d ed. 1878). The unwillingness of legislators and judges to discuss factual situations in sodomy cases inhibits legal research in the field. *See Harris*, 457 P.2d at 642.

38. Doe v. Commonwealth's Attorney for Richmond, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

39. *Id.*

40. VA. CODE ch. 8, at 418 (1982).

41. *See* Baker v. Wade, 553 F. Supp. 1121, 1141-42 (N.D. Tex. 1982) (discussing the health element in general police power argument). As of November 26, 1984, there were 6,993 reported cases of Acquired Immune Deficiency syndrome (AIDS), a disease with a mortality rate exceeding 48%. Seventy-three percent of patients diagnosed before January 1983 have died. Over 72% of the victims have been male homosexuals, especially those with multiple sexual partners. The two primary methods of communication apparently are sexual relations with an infected person and blood transfusions from those persons. 33 CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MORBIDITY AND MORTALITY WEEKLY REPORT (MMWR), *Update: Acquired Immunodeficiency Syndrome (AIDS) - United States*, No. 47 (Nov. 30, 1984).

Assume that all of the states had sodomy statutes and that those statutes were enforced strictly. Assume further that all blood donations were screened effectively for the AIDS virus. Under such a model, the AIDS virus would be contained.

Problems arise, however, as one moves away from the model. Not all states have sodomy statutes. For the states that do have sodomy statutes, enforcement is difficult and expensive. Despite these practical problems, any inhibition of homosexual sodomy will lessen the incidence of AIDS.

As the incidence of AIDS increases in the homosexual community and as bisexual members of that community carry the disease to the population at large, the enforcement of sodomy statutes may become a primary alternative in the containment of this disease.

42. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954); Carter v. State, 255 Ark. 225, ____, 500 S.W.2d 368, 372 (1983), *cert. denied*, 416 U.S. 905 (1984); State v. Rhinehart, 70 Wash. 2d 649, ____, 424 P.2d 906, 909, *cert. denied*, 389 U.S. 832 (1967).

Writing for the United States Court of Appeals for the District of Columbia Circuit in

health is at the core of the police power[43] because government is no more than public order and the erosion of morality weakens that public order.[44] This exercise of power is proper, however, only if the matter sought to be regulated actually affects public morals[45] and is not protected by the constitution.[46] Holding the protection of morals to be within the police power recognizes that the states, not the federal courts, should set standards of morality.

Presently, twenty-five states and the District of Columbia impose criminal sanctions for some form of consensual sodomy;[47] four

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Dronenburg, Judge Bork stated:

> [The] theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government. When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as supect because majoritarian, but as conclusively valid for that very reason.

741 F.2d 1388, 1397 (D.C. Cir. 1984).

43. The Court in *Berman* emphasized that the scope of the police power in elastic and is determined on the facts of each case. Subject to specific constitutional limitations, however, when the legislature speaks, the public interest is declared in conclusive terms. In such cases the legislature, not the judiciary, is the main guardian of the public needs that are served by social legislation.

"Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power." Berman v. Parker, 348 U.S. 26, 32 (1954); *see also* California v. LaRue, 409 U.S. 109 (1972).

44. Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684 (1959).

45. Eccles v. Stone, 134 Fla. 113, 183 So. 628 (1938).

46. Winters v. New York, 333 U.S. 507 (1948).

47. The following states prohibit various forms of private consensual sodomy. Those applying a modern definition exclude the conduct of married couples. ALABAMA, ALA. CODE § 13A-6-64 to -65 (1982) (modern definition); ARIZONA, ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1978 & Supp. 1983-1984) (common law definition; "infamous crime against nature"); ARKANSAS, ARK. STAT. ANN. § 41-1813 (1977) (modern definition; homosexual acts only); DISTRICT OF COLUMBIA, D.C. CODE ANN. § 22-3502 (Michie 1981) (modern definition); FLORIDA, FLA. STAT. ANN. § 800.2 (West 1976) ("unnatural and lascivious act") (upheld by the United States Supreme Court in Wainwright v. Stone, 414 U.S. 21 (1973)); IDAHO, IDAHO CODE § 18-6605 (1979) (common law definition); KANSAS, KAN. STAT. ANN. § 21-3505 (West Supp. 1984) (modern definition); KENTUCKY, KY. REV. STAT. § 510.100 (1975) (modern definition, homosexuals only); LOUISIANA, LA. REV. STAT. ANN. § 14:89 (West 1974 & Supp. 1984) (modern definition); MARYLAND, MD. ANN. CODE §§ 27-553, 27-554 (Michie 1982) ("sodomy" and "unnatural and perverted sex practices"); MASSACHUSETTS, MASS. ANN. LAWS, ch. 272, §§ 34, 35 (West 1970) (common law definition); MICHIGAN, MICH. COMP. LAWS §§ 750.158, 750.338, 750.338a, 750.338b (1968) (common law definition), MINNESOTA, MINN. STAT. ANN. § 609.293 - 609.294 (West Supp. 1984) (modern definition); MISSISSIPPI, MISS. CODE. ANN. § 97-29-59 (1973) (common law definition); MISSOURI, MO. ANN. STAT. § 566.090 (Vernon 1979) (modern definition); MON-

states have had their sodomy statutes invalidated;[48] the other twenty-two states have decriminalized consensual sodomy.[49] These sodomy statutes do not prohibit homosexuality.[50] Rather, they merely prohibit certain types of deviant sexual conduct.

TANA, MONT. CODE ANN. § 45-5-505 (1984) (deviate sexual conduct); NEVADA, NEV. REV. STAT. § 201.190 (1979) (homosexual acts only); NORTH CAROLINA, N.C. GEN. STAT. § 24-177 (1981) (common law definition); OKLAHOMA, OKLA. STAT. ANN. tit. 21, § 886 (West 1983) (common law definition); RHODE ISLAND, R.I. GEN. LAWS § 11-10-1 (1981) (common law definition); SOUTH CAROLINA, S.C. CODE ANN. § 16-15-120 (Law Co-op. 1977) ("abominable crime of buggery"); TENNESSEE, TENN. CODE ANN. § 39-2-612 (1982) (common law definition); UTAH, UTAH CODE ANN. § 76-5-403, -406 (1978 & Supp. 1983) (modern definition); VIRGINIA, VA. CODE § 18.2-361 (1982) (modern definition); WISCONSIN, WIS. STAT. ANN. § 944.17 (West 1982 & Supp. 1983-1984) (modern definition).

48. The following state sodomy statutes have been declared invalid by the indicated court: GEORGIA, GA. CODE ANN. § 16-6-2 (1982)(declared unconstitutional by the United States Court of Appeals for the Eleventh Circuit in Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985)); NEW YORK, N.Y. PENAL LAW §§ 130.00, 130.38 (McKinney 1975) (criminal statute invalidated by the New York Court of Appeals in People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981)); PENNSYLVANIA, 18 PA. CONS. STAT. §§ 1301, 1324 (1973) (criminal statutes invalidated by the Pennsylvania Supreme Court in Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980)); TEXAS, TEX. PENAL CODE ANN. tit. 5, § 21.06 (Vernon 1974) (held unconstitutional by the United States District Court for the Northern District of Texas in Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982)).

49. The following states have decriminalized private, consensual sodomy between adult homosexuals: ALASKA, 1978 ALASKA SESS. LAWS, ch. 166 (effective Jan. 1, 1980); CALIFORNIA, 1975 CAL. STAT., ch. 71, § 7 (effective July 1, 1976); COLORADO, 1971 COLO. SESS. LAWS, ch. 121, § 1 (approved June 2, 1971); CONNECTICUT, 1969 CONN. PUB. ACTS 828, § 214 (effective Oct. 1, 1971); DELAWARE, 58 DEL. LAWS, ch. 497, § 1 (effective Apr. 1, 1973); HAWAII, 1972 HAWAII SESS. LAWS, act 9, § 1 (effective Jan. 1, 1983); ILLINOIS, 1961 ILL. LAWS, pt. 1983, § 11-2 (effective Jan. 1, 1962); INDIANA, 1976 IND. ACTS. P.L. 148, § 24 (effective July 1, 1977); IOWA, IOWA ACTS, ch. 1245, § 520 (effective Jan. 1, 1978); MAINE, 1975 ME. ACTS, ch. 499, § 5 (effective Mar. 1, 1976); NEBRASKA, 1977 NEB. LAWS, L.B. 38, § 328 (effective July 1, 1978); NEW HAMPSHIRE, 1973 N.H. LAWS, 532: 26, (effective Nov. 1, 1973); NEW JERSEY, 1978 N.J. LAWS, ch. 95, § 2C:98-2 (effective Sept. 1, 1979); NEW MEXICO, 1975 N.M. LAWS, ch. 109, § 8; NORTH DAKOTA, 1977 N.D. SESS. LAWS, ch. 122, § 1 (approved Mar. 19, 1977); OHIO, 1972 OHIO LAWS, 134 v H 511, § 2 (effective Jan. 1, 1974); OREGON, 1971 OR. LAWS, ch. 743, § 432 (167.040) (effective Jan. 1, 1972); SOUTH DAKOTA, 1976 S.D. SESS. LAWS, ch. 158, § 22-8 (effective Apr. 1, 1977); VERMONT, 1977 VT. ACTS, No. 51, § 3 (effective July 1, 1977); WASHINGTON, 1975 WASH. LAWS, 1st exec. Sess., ch. 260 (effective July 1, 1976); WEST VIRGINIA, 1976 W. VA. ACTS, ch. 43 (effective June 11, 1976); WYOMING, 1977 WYO. SESS. LAWS, ch. 70, § 3 (effective May 27, 1977).

50. *See* Mississippi Gay Alliance v. Goudelock, 536 F.2d 107, 1076 n.4 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *see also* Board of Educ. of Oklahoma City v. National Gay Task Force, 53 U.S.L.W. 4408 (U.S. Mar. 26, 1985)(per curiam)(judgment affirmed by an equally divided court).

Doe v. Commonwealth's Attorney for Richmond

In *Doe v. Commonwealth's Attorney for Richmond*,[51] anonymous male plaintiffs challenged the constitutionality of Virginia's sodomy statute. They alleged that, as applied to their active and regular homosexual relations, the statute violated their fifth and fourteenth amendment assurances of due process, their first amendment guarantee of freedom of expression, and their first and ninth amendment freedom of privacy.[52] The United States District Court for the Eastern District of Virginia rejected the plaintiffs' claim and found the statute constitutional.[53] The United States Supreme Court summarily affirmed the decision.[54]

The plaintiffs based their privacy argument largely on *Griswold v. Connecticut*[55] and its progeny. In *Griswold* the United States Supreme Court struck down a Connecticut statute that prohibited the use of contraceptives by married couples.[56] The Court in *Griswold* held that the use of contraceptives was protected by a right of marital privacy that surrounded the home and the family.[57] The majority in *Doe* noted that *Griswold* distinguished forbidden extramarital sexuality, such as adultery and homosexuality, from marital sexuality.[58] Therefore, *Griswold* did not invalidate state

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51. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

52. The challenged statute was the 1950 predecessor to the current Virginia statute.

> VA. CODE § 18.1-212: Crimes against nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

403 F. Supp. at 1200 (quoting VA. CODE § 18.2-212 (1950)).

53. *Id.* at 1203.

54. 425 U.S. 901 (1976). The Supreme Court affirmed the majority decision summarily, without hearing arguments or writing an opinion. Summary affirmance typically is given to cases that the Court thinks do not raise "substantial" constitutional questions. T. GREY, THE LEGAL ENFORCEMENT OF MORALITY 67 (1983). In 1973 the Supreme Court gave implicit support to sodomy statutes when it upheld Florida's sodomy statute against vagueness and retroactivity attacks. Wainwright v. Stone, 414 U.S. 21 (1973).

55. 81 U.S. 479 (1965).

56. *Id.* at 485.

57. *Id.* at 485-86.

58. 403 F. Supp. at 1201. In *Griswold*, Justice Goldberg emphasized that "the Court's holding today . . . in no way interferes with a state's proper regulation of sexual promiscuity or misconduct . . . . 'Adultery, homosexuality and the like are sexual intimacies which the state [properly may] forbid' . . . ."

regulation of certain forbidden sexual acts. It required only that the decision whether to use contraceptives be left to the married couple.[59]

The *Doe* opinion further noted that the Court has recognized adultery, homosexuality, fornication, and incest as not being immune from criminal inquiry, even if privately practiced.[60] In 1961 the Supreme Court in *Poe v. Ullman*[61] upheld the same Connecticut statute that it later rejected in *Griswold*. Dissenting in *Poe*, Justice Harlan declared that the right to privacy should embrace the decision between married persons whether to use contraceptives, but that

> I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare . . . .
>
> Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether . . . .
>
> [Regulating the intimacy of husband and wife] is surely a different thing indeed from punishing those which establish intimacies which the law has always forbidden and which can have no claim to social protection.[62]

The district court in *Doe* found that homosexual sodomy had no connection to the protected interests of family, marriage, and procreation on which the holding of *Griswold* rested.[63] For that reason, it held homosexual sodomy not protected by the right to privacy.[64]

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381 U.S. at 498-99 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 553 (Harlan J., dissenting) (1961)).

59. A substantial body of case law has developed that prohibits the application of sodomy statutes to married couples. Several courts have extended the *Griswold* right of marital privacy to protect marital sodomy despite Justice Goldberg's concurrence. *See, e.g.*, Lovisi v. Slayton, 539 F.2d 349 (4th Cir), *cert. denied*, 429 U.S. 977 (1976); Cotner v. Henry, 394 F.2d 873 (7th Cir.), *cert. denied*, 393 U.S. 847 (1968).

60. 403 F. Supp. at 1202. (quoting Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 552-53 (1961)).

61. 367 U.S. 497.

62. *Id.* at 552-53 (Harlan, J., dissenting).

63. 403 F. Supp. at 1202.

64. *Id.*

The court next applied rational basis scrutiny to the sodomy statute, finding that the legitimate state interest in the promotion of morals and decency was supported rationally by the effort to prohibit those specific types of indecent acts.[65] The court reasoned that the state's concern that private sodomy was likely to lead to moral delinquency was a sufficient evil to justify the statute.[66]

Judge Merhige dissented.[67] He believed that the Supreme Court privacy decisions created a fundamental right to privacy regarding all aspects of sexual activity, including the choice of consensual sodomy partners.[68]

Doe *as a Summary Affirmance*

Because the court summarily affirmed the district court decision, *Doe*'s precedential value is unclear. In *Hicks v. Miranda*,[69] the Supreme Court stated that the lower courts are bound by its summary decisions until the Court informs them otherwise. In 1977 the Court softened the weight of summary affirmances, saying that the Court adopts only the decision, not the judgment or reasoning, of a lower court in a summary affirmance.[70] In 1979 the Court further defined the issue, stating that summary dispositions were confined to the exact facts of a case and to the precise question posed in the jurisdictional statement.[71] Summary affirmances in short, merely leave undisturbed the lower court judgment and prevent lower courts from coming to opposite conclusions on the precise issues and facts presented and decided by that action.

Despite these limitations, however, a summary disposition is binding precedent and is a decision on the merits.[72] In *Doe* the

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65. *Id.*

66. *Id.*

67. *Id.* at 1203-05 (Merhige, J., dissenting).

68. *Id.* at 1204. Recently, in Doe v. Duling, 53 U.S.L.W. 2459-60 (E.D. Va. Mar. 26, 1985), Judge Merhige held the Virginia Fornication Statute (VA. CODE § 18.2-344 (1982)) and the Virginia Lewd and Lascivious Cohabitation Statute (VA. CODE § 18.2-345 (1982)) unconstitutional on the ground that the Constitution provides an absolute right to engage in heterosexual intercourse.

69. 422 U.S. 332, 344 (1975).

70. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

71. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182-83 (1979).

72. *Hardwick*, 760 F.2d at 1213-14 (Kravitch, J., dissenting); Lecates v. Justice of Peace Court No. 4, 637 F.2d 898 (3rd Cir. 1980). *See generally*, Annot., 45 L. ED. 2D 791 (1976 &

question was whether the Virginia sodomy statute violated due process, freedom of expression, or privacy rights. The district court held that the statute did not violate those rights and that the statute was constitutional. The Supreme Court summarily affirmed that decision. *Doe* is dispositive, therefore, on due process, privacy, and freedom of expression attacks against a statute that prohibits consensual homosexual sodomy.[73] Problems arise because some courts refuse to follow *Doe*.

Dronenburg v. Zech

In January 1981, James L. Dronenburg was administratively discharged from the United States Navy for misconduct relating to homosexual acts.[74] Dronenburg challenged the discharge in the United States District Court for the District of Columbia, but the district court granted summary judgment for the Navy.[75] Dronenburg then appealed to the United States Court of Appeals for the District of Columbia, contending that the discharge impinged on his constitutional rights to privacy and equal protection.[76]

The court first rejected Dronenburg's right to privacy argument. It emphasized that, because of the Supreme Court's summary affirmance, *Doe* was binding on the lower courts.[77] The Navy regulation, therefore, clearly was constitutional.[78] The court also engaged in an independent analysis of *Griswold* and its progeny, concluding that the right to privacy did not protect homosexual conduct.[79] Turning to equal protection, the court found no fundamental right to engage in homosexual conduct[80] and assumed that homosexuals did not constitute a suspect classification. The regulation, there-

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Supp. 1984).

73. *Hardwick*, 760 F.2d at 1213-16 (Kravitch, J., dissenting).

74. Dronenburg v. Zech, 741 F.2d 1388, 1389 (D.C. Cir. 1984). For a contested discussion of the issues, see the denial of rehearing, 746 F.2d at 1579.

75. *Id.*

76. *Id.*

77. *Id.* at 1391-92.

78. *Id.* at 1392. The Court stated: "If a statute proscribing a homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context." *Id.*

79. *Id.* at 1392-96.

80. *Id.* at 1396.

fore, was not subject to strict scrutiny. Under rational basis scrutiny, the military interest in the maintenance of discipline, good order, and morale was infringed sufficiently by homosexual relations between Dronenburg, a 27 year old instructor, and his student, a 19 year old seaman recruit, to justify Dronenburg's discharge from the service.[81]

THE CURRENT ATTACKS

In *Hardwick v. Bowers*,[82] the United States Court of Appeals for the Eleventh Circuit held the Georgia Sodomy statute[83] unconstitutional because the statute violated a fundamental right to quintessential privacy and intimate association.[84] In *Baker v. Wade*[85] the United States District Court for the Northern District of Texas held the Texas Homosexual Conduct Statute[86] unconstitutional because the statute violated both the fundamental right to privacy and the right to equal protection.[87] The New York Court of Appeals in *People v. Onofre*[88] reversed the conviction of a male defendant who had engaged in consensual deviate sexual intercourse

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81. *Id.* at 1398. The military prohibition of homosexual conduct was approved in an earlier Supreme Court case, but the analysis rested primarily on the unique needs of the military service in promoting good order and discipline. *See* Parker v. Levy, 417 U.S. 733, 743 (1974); *see also* Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir.), *cert. denied*, 452 U.S. 905 (1980). The constitutional analysis in *Dronenburg* does not depend on military necessity argument.

82. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

83. (a) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

GA. CODE ANN. § 16-6-2 (1984).

84. *Hardwick*, 760 F.2d at 1212-13.

85. 553 F. Supp. 1121 (N.D. Tex. 1982).

86. A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex.

Deviate sexual intercourse means any contact between any part of the genitals of one person and the mouth or anus of another person.

A violation of the Statute is a Class C misdemeanor, punishable only by a fine not to exceed $200.

Id. at 1124 (quoting TEX. PENAL CODE ANN. tit. 5, § 21.06 (Vernon 1974)).

87. *Id.* at 1134-45.

88. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

with a seventeen-year-old boy in his home, holding that the New York consensual sodomy statute[89] violated his rights to privacy and equal protection.[90] In *Commonwealth v. Bonadio*,[91] female defendants were arrested at a pornographic theater and charged with violating the Pennsylvania Voluntary Deviate Sexual Intercourse Statute[92] by engaging in sex with male patrons onstage for the viewing pleasure of the other patrons.[93] The Supreme Court of Pennsylvania held that the statute exceeded the valid bounds of the police power and impinged on the constitutional right to equal protection.[94] The court ruled that the states could not use their police power to enforce a majority morality on persons whose conduct did not harm others.[95]

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89. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948-49. The applicable statute provided:

> Consensual sodomy
>
> A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.
>
> Sex offenses; definitions of terms.
>
> The following definitions are applicable to this article:
>
> . . . .
>
> 2. Deviate sexual intercourse means sexual contact between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.

N.Y. PENAL LAW §§ 130.00, 130.38 (McKinney 1975).

90. *Id.* at 494, 415 N.E.2d at 943, 434 N.Y.S.2d at 954.

91. 490 Pa. 91, 415 A.2d 47 (1980).

92. *Id.* at 93-94, 415 A.2d at 48-49. The relevant portions of the statute stated: "A person who engages in deviate sexual intercourse under circumstances not covered by section 3123 of this title [related to involuntary deviate sexual intercourse] is guilty of a misdemeanor of the second degree." Act of December 6, 1972, P.L. 1482, No. 334, 1, 18 PA. CONS. STAT. § 3124 (1973).

The statute defined deviate sexual intercourse as: "Sexual intercourse per os [by the mouth] or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal." Act of December 6, 1972, P.L. 1482, No. 334 1, 18 PA. CONS. STAT. § 3101 (1973).

93. 490 Pa. at 100, 415 A.2d at 52 (Nix, J., dissenting).

94. *Id.* at 99, 415 A.2d at 51-52.

95. The court quoted John Stuart Mill:

> [The] sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of

These four cases are typical of the privacy and equal protection attacks on statutes regulating sexual behavior. The Note now analyzes these attacks in light of *Doe* and its progeny. This analysis is conducted within the marital, nonmarital, and homosexual framework outlined above. These distinctions are necessary because the case law and the relative strengths of the state and personal interests vary with each situation.

THE PRIVACY ANALYSIS

The Right to Privacy

The Supreme Court has recognized that a right of personal privacy exists under the Constitution.[96] This right is not delineated textually, but is rooted in the "penumbra" of other constitutional provisions.[97] These roots reach from the first amendment,[98] the

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> others, to do [so] would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. 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. Over himself, over his own body and mind, the individual is sovereign.

490 Pa. at 95-96, 415 A.2d at 50 (quoting J. MILL, ON LIBERTY (1859)).

Hardwick, *Baker*, and the state cases indicate a judicial momentum for the decriminalization of consensual adult sodomy. *Contra* Dronenburg v. Zech, 714 F.2d 1388 (D.C. Cir. 1984). Another example of this momentum is a recent series of federal immigration cases holding that homosexuals cannot be excluded from the United States simply because they are homosexual. *See* Hill v. Immigration and Naturalization Serv., 714 F.2d 1470 (9th Cir. 1983); Nemetz v. Immigration and Naturalization Serv., 647 F.2d 432 (4th Cir. 1981); Lesbian/Gay Freedom Day Committee, Inc. v. Immigration and Naturalization Serv., 541 F. Supp. 569 (N.D. Cal. 1982), *cert. denied*, 104 S. Ct. 2668 (1984). *But see In re* Longstaff, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984) (prohibiting naturalization of a homosexual who withheld information of his sexual preference).

The decisions primarily were based on interpretation of the Immigration and Nationality Act, 8 U.S.C. § 1182(a) (1976 & Supp. V. 1981). In the Act, Congress treated homosexuals as psychopathic personalities or sexual deviates that could be prevented from entering the country. *See* Boutilier v. Immigration and Naturalization Serv., 387 U.S. 118 (1967). Today the medical profession no longer considers homosexuals to be psychopathic personalities or sexual deviates. Some courts have reasoned, therefore, that Congress no longer intends to exclude homosexuals. Hill v. Immigration and Naturalization Serv., 714 F.2d 1470 (9th Cir. 1983).

96. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973).

97. *Id.*

fourth and fifth amendments,[99] the ninth amendment,[100] and the concept of liberty guaranteed by the fourteenth amendment.[101] Only personal rights that are "fundamental" or "implicit in the concept of ordered liberty" are included in the guarantee of personal privacy.[102] A problem exists, however, in determining which personal privacy rights are "fundamental" or "within the concept of ordered liberty."

Creation of the Right to Privacy: Modern Lochnerization

The threshold question concerning privacy is whether the Supreme Court legitimately can create substantive due process rights that are not enumerated specifically in the Constitution. The process of implying constitutional rights from other, specifically enumerated rights is termed "Lochnerization" after *Lochner v. New York*.[103] In *Lochner*, the Court used the fourteenth amendment to create a constitutional "right to contract." The Court then used the right to contract to strike down a New York labor law limiting women's work in bakeries to no more than sixty hours per week.[104] The practical effect of the decision was to replace the opinion of the people of New York as expressed through their legislature with the opinion of the Court in an area of economic theory. In his famous dissent in *Lochner*, Justice Holmes questioned whether the Court could or should impose its opinion over the desires of the people[105] and concluded that it should not.[106]

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98. *Id.* (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

99. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 8-9 (1968); Katz v. United States, 389 U.S. 347, 350 (1967); and Boyd v. United States, 116 U.S. 616 (1886)).

100. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1975)(Goldberg, J., concurring)).

101. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

102. *Id.* (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

103. 198 U.S. 45 (1905).

104. *Id.*

105. *Id.* at 75. A portion of Mr. Justice Holmes's dissent follows:

> The case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislatures

The spirit of Justice Holmes' dissent prevailed nearly thirty years later in *Nebbia v. New York*.[107] In deciding that the state had the power to fix retail prices for milk, the Court rejected the idea of judicial creation of rights not supported expressly by the Constitution's text. It held that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."[108] Reasoning that no exercise of a private right could be imagined that would not affect the public in some way, the Court stated that, in the absence of textual constitutional restrictions, a state must be free to select the economic policy that it deems to promote the public welfare.[109] Later decisions continued this theme of judicial deference to state legislatures on matters of economics.

In *Williamson v. Lee Optical*,[110] the Court upheld an Oklahoma statute that strictly regulated visual care. The Court stated that "it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[111] The Court found the statute's overbreadth to be irrelevant: "The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . The day is gone when this Court uses the

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> might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples . . . . The liberty of a citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not . . . .
>
> . . . I think the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute . . . would infringe fundamental principles as they have been understood by the traditions of our people and our law.

198 U.S. at 75-76 (Holmes, J., dissenting).

106. *Id.* at 76.

107. 291 U.S. 502 (1934).

108. *Id.* at 525.

109. *Id.* at 537.

110. 348 U.S. 483 (1955).

111. *Id.* at 488.

Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they might be unwise, improvident, or out of harmony with a particular school of thought."[112] The Court further stated that the people must resort to the polls, not the courts, for protection against legislative abuses.[113] To date, the Court has refused to interfere with economic regulation that does not conflict with enumerated constitutional rights.[114]

Griswold v. Connecticut,[115] the first major privacy decision,[116] is simply *Lochner* in another context. In *Griswold*, the Court created a constitutional right to privacy, a nontextual right, to allow it to impose its opinion regarding contraceptives on the people of Connecticut. To protect this nontextual right, the Court struck down a Connecticut anticontraceptive statute as an impermissible infringement of the right to marital privacy.[117]

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112. *Id.* at 487-88.

113. *Id.* at 488.

114. *See generally* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); New Orleans v. Dukes, 427 U.S. 297 (1976); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

115. 381 U.S. 479 (1965).

116. The *Griswold* decision can be portrayed as a logical extension of earlier case law. In 1923 the Supreme Court, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), reversed the conviction of a German language teacher who was found in violation of a Nebraska law prohibiting the teaching of foreign languages to young children. The Court viewed "liberty" in the fourteenth amendment as going beyond freedom from bodily restraint to include the rights to contract, to engage in the occupation of one's choice, to marry, to have and raise children, and to worship God in the manner of one's choice. *Id.* at 399.

Two years later a unanimous Court overturned an Oregon law that required all children to attend public school. The education and upbringing of children were to be left to parents, and parents could choose private over public schools. Pierce v. Society of Sisters, 268 U.S. 510 (1925). In 1942 the Supreme Court held that the sterilization of habitual criminals was unconstitutional because the punishment impermissibly impinged on marriage and procreation. Skinner v. Oklahoma, 316 U.S. 535 (1942). In each of these cases, there was an increasing awareness of the need to protect the individual's ability to have and to raise children. *Griswold* merely reinforced this ability to choose not to have children. Therefore, limiting *Griswold* to the choice whether to have children is reasonable; the line of cases preceding *Griswold* does not suggest an intent to create a right to sexual nonconformity.

117. 381 U.S. at 485. The Connecticut anticontraceptive statute was being used to prevent the Medical Director of the Planned Parenthood League of Connecticut from giving contraceptive advice to married persons. Because no home was searched for contraceptives, fourth amendment protection against unreasonable search and seizure was not infringed and the Court was forced to resort to the creation of the right to privacy. The Court further strengthened the sanctity of marriage in Loving v. Virginia, 388 U.S. 1 (1967), where it invalidated Virginia's prohibition of interracial marriage. The Court ruled that antimiscegenation statutes impinge impermissably on the right to privacy in the marital decision.

The *Lochner* constitutional right to contract is no less important than the right to use contraceptives. Further, as many constitutional penumbras support the right to contract as the right to privacy. The Court has chosen to allow the people, through their legislatures, to determine hours of employment or the cost of milk. Similarly, the Court should allow the people to decide whether they will use contraceptives, have abortions, or tolerate sodomy.[118] Economic theory is opinion and morality is social norm based on majority opinion. Both involve broad social and policy questions that are best left to the legislatures. Consequently, courts should stop their interference in the field of morality for the same reasons they stopped their interference with economics.[119]

Until the "moral" *Nebbia* is decided, the right to privacy remains the law. Uncertainty remains, however, concerning the limits of that right. Because the right to privacy is not enumerated in or necessarily implied from the Constitution, its legitimacy is questionable. The right to privacy, furthermore, has obvious natural limitations and must be construed narrowly. Although a man's home is his castle, he cannot commit murder there. Similarly, he cannot gamble, smoke marijuana, or use other illegal drugs under the protection of privacy.[120] These acts are not within the specific groups of acts protected by the privacy case law. Consensual deviant sex has no relation to family, home, or procreation and therefore should be treated as outside the realm of constitutional pri-

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Id. at 12.

118. Writing for the United States Court of Appeals for the District of Columbia Circuit in *Dronenburg*, Judge Bork stated:

> If the revolution in sexual mores . . . is in fact ever to arrive, . . . it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court.

741 F.2d 1388, 1397 (D.C. Cir. 1984).

119. [A] judge has no means of demonstrating that his moral views about forms of human [sexual] gratification are superior to the views of others. For that reason, a judge has no warrant, where the Constitution is silent, to force his morality upon a legislature that has made a different moral assessment.

Bork, *Judge Bork replies*, 1984 A.B.A. J. 132 (explaining his 1971 Indiana Law Journal article; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971)); *see also* Dronenburg, 741 F.2d at 1396-97.

120. *See* United States v. Horsley, 519 F.2d 1264 (5th Cir. 1975), *cert. denied*, 424 U.S. 944 (1976); National Org. for Reform of Marijuana Laws (NORML) v. Bell, 488 F. Supp. 123 (D.D.C. 1980).

vacy and subject to state regulation.[121]

Privacy Attacks by Heterosexuals

Whether the right to privacy protects consensual marital sodomy[122] is considered first because privacy attacks by married couples on sodomy statutes have been the most successful in recent years. On its facts, *Griswold* protects only the right of married couples to use contraceptives.[123] Later interpretations of *Griswold*, however, have expanded the right of privacy to protect individual autonomy in all matters of childbearing.[124]

Conversely, Justice Goldberg's concurrence in *Griswold* pointed out that the Court's holding did not restrict the state's regulation of sexual misconduct.[125] Because of the suspect legitimacy of the right to privacy,[126] the narrow interpretations of that right in Justice Goldberg's concurrence and *Doe* are appropriate. Sodomy, adultery, and homosexuality have no rational connection to procreation or the maintenance of family life: These sexual activities should therefore be subject to state regulation.[127] Nevertheless, the Virginia sodomy statute probably cannot be applied constitutionally to married couples. In *Lovisi v. Slayton*[128] the United States

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121. *Doe*, 403 F. Supp. at 1202.

122. Homosexual "marriage" is not a traditional form of marriage. Consequently, comments concerning the protection of marriage do not extend to homosexual marriages.

123. 381 U.S. at 485.

124. In 1973 the Supreme Court held that the right to privacy encompassed a woman's decision to have an abortion. Roe v. Wade, 410 U.S. 113, 153 (1973). The Court noted, however, that the right was not unlimited; some state regulation in areas protected by the right to privacy is appropriate when the state interests of health, medical standards, and prenatal life become dominant. *Id.* at 154-55. *Roe* thus demonstrates that the right to privacy is not all-encompassing.

The proposition that *Griswold* protected all decisions regarding childbearing was expressed most recently in 1977. Carey v. Population Serv. Int'l, 431 U.S. 678, 685 (1977).

125. 381 U.S. at 498-99 (Goldberg, J., concurring).

126. *See supra* text accompanying notes 103-21.

127. This position is defensible because *Griswold* protects decisions of childbearing and no form of sodomy can lead to conception.

128. 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976). The plaintiffs, a married couple, solicited and obtained outside partners for their sex acts, which included sodomy. The couple's teenage daughters were encouraged to watch and photograph sex acts performed by their parents with strangers. The situation became known publicly when one of the daughters distributed some of the photographs at school. The Court held that the married couple, acting alone, was protected by the right of privacy. When a third person was

Court of Appeals for the Fourth Circuit held that marital intimacies shared by couples alone in their bedrooms are protected by the right of privacy.[129]

The more difficult question is whether the constitutional right to privacy protects consensual sodomy between unmarried heterosexuals.[130] In *Eisenstadt v. Baird*[131] the United States Supreme Court held that states could not deny contraceptives to unmarried persons. The Court held that the Massachusetts law prohibiting the sale of contraceptives to unmarried persons violated the equal protection clause of the fourteenth amendment because it impermissibly differentiated between married and unmarried persons.[132] In discussing *Griswold*, the Court in dicta stated:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[133]

The question posed in interpreting this dicta is whether a general freedom "from unwarranted governmental intrusion into matters fundamentally affecting a person" exists or whether the freedom is limited to the decision "whether to bear or beget a child." The latter interpretation seems more correct.[134] In *Carey v. Population Services International*,[135] a divided Supreme Court extended the right to contraceptives to minors. The Court noted that although the outer limits of privacy were unclear,[136] the right pro-

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introduced, however, the couple waived their privacy right. *Id.* at 350-52.

129. *Id.* at 351. In an addendum to the *Lovisi* opinion, the Fourth Circuit noted the summary affirmance of *Doe* and reasoned that only heterosexual conduct was protected by the right to privacy. *Id.* at 352; *see also supra* note 63 and accompanying text.

130. The question is confined to private as opposed to public heterosexual sodomy. *See supra* note 11.

131. 405 U.S. 438 (1972).

132. *Id.* at 454-55.

133. *Id.* at 453 (emphasis in original).

134. *See infra* notes 147-49 and accompanying text.

135. 431 U.S. 678 (1977).

136. *Id.* at 684.

tected certain fundamental liberties.[137] These included marriage,[138] procreation,[139] contraception,[140] traditional family relationships,[141] and child rearing and education.[142] The Court emphasized that "the decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[143]

Carey implies that *Eisenstadt*'s constitutional protection from unwarranted governmental intrusions into fundamental personal decisions is limited to the decision to conceive and bear children.[144] In other words, *Eisenstadt* and *Carey* only require that the states not interfere with heterosexual couples' rights to procreation and contraception. They do not suggest that sodomy statutes are invalid. *Carey* footnotes did discuss briefly whether the states could regulate consensual sexual activity in general but reached no definitive answer.[145] This Supreme Court silence, coupled with the narrow construction demanded of a nontextual right, suggests that courts should hesitate to extend privacy protection to nonmarital heterosexual sodomy.[146]

Several alternative arguments remain. The first is that the right to privacy extends to all consensual sexual activity.[147] This argument is based partially on the Supreme Court decision in *Stanley v. Georgia*.[148] In *Stanley* police officers searched the defendant's

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137. *Id.* at 684-85.

138. *Id.* at 685 (citing Loving v. Virginia, 388 U.S. 11, 12 (1967)).

139. *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1972)).

140. *Id.* (citing Eisenstadt v. Baird, 438 U.S. 48, 453-54 (1972)).

141. *Id.* (citing Prince v. Massachusetts, 321 U.S. 510 (1944)).

142. *Id.* (citing Pierce v. Society of Sisters, 268 U.S. 570, 575 (1925)).

143. *Id.* at 685.

144. *Expressio unius est exclusio alterius* is a maxim of statutory interpretation meaning that the "expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 512 (5th ed. 1979). Applied to *Carey*, the specific Court expression of each area protected by the right of privacy excludes any other area from privacy protection. *See* 431 U.S. at 685.

145. 431 U.S. at 688 n.5, 694 n.17, 718 n.2 (Rehnquist, J., dissenting). Justice Rehnquist believed that the limit of privacy had been drawn short of the stipulated deviate sex acts of *Doe*. *Id.* at 718 n.2 (Rehnquist, J., dissenting).

146. For example, the Fourth Circuit has expressed doubt that the right to privacy extends to nonmarital sodomy. In the addendum to *Lovisi* the court stated "the Supreme Court necessarily confined the constitutionally protected right of privacy to heterosexual conduct, *probably even that only within the marital relationship*." 539 F.2d at 352 (emphasis added).

147. *See Doe*, 403 F. Supp. at 1203 (Merhige, J., dissenting).

148. 394 U.S. 557 (1969).

home for evidence of alleged bookmaking activities and found obscene films in the defendant's bedroom.[149] A divided Court held that the private possession of obscene material in the home was not a crime.[150] The Court reiterated the first amendment right to receive information and ideas, holding that the individual's right to read or to observe what he pleased was "fundamental to our scheme of individual liberty."[151] The Court reasoned that the Framers of the Constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[152]

The argument following from *Stanley* is that if a person may view obscene films for sexual gratification in the home, then logically a person may pursue any form of sexual gratification within the home.[153] This interpretation is incorrect. *Stanley* was a first amendment case and the "liberty" it enunciated was the liberty to receive speech, not to engage in sex acts.[154] Further, the Constitu-

149. *Id.* at 558.

150. *Id.* at 568.

151. *Id.*

152. *Id.* at 564 (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

153. The Supreme Court later limited the right to view obscenity to the home. Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). In *Paris* the Court held that a state can prohibit the display of obscene films to "consenting adults" in a theatre. *Id.* at 68-69. The Court believed that its function was not "to resolve empirical uncertainities underlying state legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself. . . . Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist . . . . [A] legislature [can] legitimately act on such a conclusion to protect the 'social interest in order and morality.'" *Id.* at 60-61 (quoting Roth v. United States, 354 U.S. 476, 485 (1957)). The Court added that nothing in its decision intimated that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accomodation. *Id.* at 66. The idea that the *Stanley* privacy right to view pornography in the home could move outside the home as a "zone of privacy" therefore was rejected. *Id.*

By analogy, a state legislature could find a connection between antisocial behavior and sodomy and legitimately act on that conclusion to protect social order and morality. A "fundamental" privacy right likewise does not protect sodomy.

154. Another question is whether the Privacy Act of 1974 codified the right to privacy. 5 U.S.C. § 552(a) (1982). Section 2(a)(4) of that Act contains the congressional finding that the "right to privacy is a personal and fundamental right protected by the Constitution of the United States." The Act primarily safeguards individuals from the misuse of federal records and grants individuals access to those records. It was not used substantively to support the constitutional right to privacy in either *Doe* or *Carey*. Thus, the Act seemingly has not

tion does not incorporate the proposition that conduct involving only consenting adults always is beyond state regulation.[155]

The breadth of the right to privacy was questioned most recently in *Whalen v. Roe*.[156] In *Whalen*, the Supreme Court held that the right could not protect the identity of patients who received certain types of drugs.[157] The Court raised the specter of *Lochner* and pointed out that "state legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part."[158] A year later the Court let stand a lower court decision that refused to extend the rights of privacy and equal protection to prohibit employment discrimination based on adultery.[159]

Privacy Attacks by Homosexuals

The third major question under the privacy analysis is whether the right to privacy protects consensual sodomy between homosexuals. This question is best approached through an analysis of the successful recent attacks on sodomy statutes by homosexuals.[160]

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codified or provided any expanded substantive constitutional right.

In his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952), Mr. Justice Jackson stated that Presidential power was at its maximum when used pursuant to an express or implied congressional authorization. *Id.* at 635. When the President acts in the absence of a congressional grant or denial, he must rely on his independent powers. *Id.* at 637. Finally, when the President acts incompatibly with the expressed or implied will of Congress, his power is at its nadir. *Id.*

By analogy, the Supreme Court's credibility when creating nontextual rights is maximized when consistent with congressional will and is minimized when inconsistent with congressional will. Despite arguments of judicial independence, the congressional failure to codify the *Griswold* right to privacy leaves the Court standing alone. Further, congressional attempts to repeal portions of the right to privacy indicate the Court's vulnerability when using substantive due process. *See, e.g.*, S.J. Res. 119, 93rd Cong., 1st Sess. (1973); S.J. Res. 130, 93rd Cong., 1st Sess. (1973) (Helms Amendment); *see also Dronenberg*, 741 F.2d at 1396.

155. 413 U.S. at 68.

156. 429 U.S. 589 (1977).

157. *Id.* at 597.

158. *Id.*

159. Hollenbaugh v. Carnegie Free Library, 578 F.2d 1374 (3d Cir. 1978), *cert. denied*, 439 U.S. 864 (1978); *see also* Johnson v. San Jacinto Jr. College, 498 F. Supp. 555 (S.D. Tex. 1980). *But see supra* note 68.

160. *See supra* text accompanying notes 82-95.

Baker v. Wade

In 1976, *Doe* held that the right to privacy did not protect certain forms of sexual conduct, including homosexual sodomy.[161] In *Baker v. Wade*[162] however, the United States District Court for the Northern District of Texas distinguished *Doe* as a summary affirmance and held that *Doe* was no longer law under the "doctrinal development" exception to summary affirmances.[163] The court cited the footnote discussion in *Carey*[164] and the denial of certiorari to *People v. Onofre*[165] as "doctrinal developments" in the right to privacy that had invalidated *Doe*.[166] The court then construed from *Stanley* that a right exists to engage in any form of sexual gratification in the home.[167] It then used the *Eisenstadt* principle of nondistinguishment between married and unmarried persons to bootstrap the original *Stanley* proposition into a general right to engage in any form of sexual gratification with anyone in the home.[168]

Baker is flawed for several reasons. First, a doctrinal development is a significant change in the Supreme Court's treatment of an issue.[169] The doctrinal development exception reasonably cannot be applied to *Doe* because the Supreme Court has not noted probable jurisdiction or considered a sodomy case since *Doe*, and neither the *Carey* footnote discussion nor the denial of certiorari to *Onofre* constitutes a "change of law."[170] For these reasons, *Doe* re-

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161. 403 F. Supp. at 1202. In 1973 the Supreme Court upheld a Florida sodomy statute against vagueness and retroactivity attacks. The Court did not address any other constitutional issues but provided implied support to sodomy statutes. Wainwright v. Stone, 414 U.S. 21 (1973). Vagueness attacks on sodomy statutes generally have failed due to incorporation of state common law definitions. 414 U.S. at 22.

162. 553 F. Supp. 1121 (N.D. Tex. 1982).

163. *Id.* at 1138. The doctrinal development exception to summary affirmances allows lower courts to give a summary affirmance less precedential weight if it is inconsistent with later doctrinal developments. Hicks v. Miranda, 422 U.S. 332, 344-45 (1975). *See generally* Annot., 45 L. Ed. 2d 791, 803-04 (1976 & Supp. 1984).

164. *See supra* note 145 and accompanying text.

165. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

166. 553 F. Supp. at 1138.

167. *Id.* at 1141.

168. *Id.*

169. *See* Annot., *supra* note 163, § 6, at 803-04.

170. *Id.*; *see also Hardwick*, 760 F.2d at 1213-16 (Kravitch, J., dissenting).

mains valid and should have controlled *Baker*.

Second, the *Stanley-Eisenstadt* bootstrapping analysis reached too far. *Stanley* was a first amendment case that, after *Paris Adult Theatre I v. Slayton*,[171] must be questioned if anyone outside the home or the family is involved. When *Eisenstadt* is added, *Stanley* could reach no further than a right of nonmarried couples to use contraceptives in their home.[172] If a broader reading is combined with *Carey*, the *Baker* bootstrapping analysis would protect the right to perform sodomy on minors in the home. That interpretation is inconsistent with recent decisions that protect children from sexual abuse and pornography.[173]

Hardwick v. Bowers

Most recently, in *Hardwick v. Bowers*,[174] the United States Court of Appeals for the Eleventh Circuit distinguished *Doe* as both a lack of standing case and a summary affirmance made inapplicable by the doctrinal developments exception. The court first stated that because *Doe* was a summary affirmance, its holding must be limited carefully.[175] Because the court believed the plaintiffs in *Doe* lacked standing, the court chose to believe that the Supreme Court affirmed the Virginia statute on the ground that the plantiffs lacked standing rather than on the ground that their constitutional claims lacked merit.[176]

The Eleventh Circuit was incorrect for several reasons. First, if the Supreme Court had decided that the plaintiffs in *Doe* lacked standing, the Court would not have had jurisdiction to decide the case and would have dismissed their appeal rather than affirm the judgment below.[177] Second, the jurisdictional statement in *Doe* mentioned the substantive constitutional issues in the case, but did

171. 413 U.S. 49; *see supra* note 153.

172. *See supra* text accompanying notes 144-52.

173. *See* New York v. Ferber, 458 U.S. 747 (1982). A unanimous Court upheld a New York ban on child pornography, even if not obscene. The Court noted that the prevention of sexual exploitation and abuse of children were important government objectives that overrode the first amendment. *Id.* at 756-57.

174. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

175. *Id.* at 1207.

176. *Id.*

177. *Id.* at 1214 (Kravitch, J., dissenting).

not mention the issue of standing. The district court in *Doe* also did not mention standing. Because lower court interpretation of a summary affirmance is limited to the jurisdictional statement and because standing was not considered in the *Doe* statement, the Eleventh Circuit was incorrect when it distinguished *Doe* as a lack of standing case.[178] Third, the decision in *Doe* was a decision on the merits that did not leave lower courts free to speculate whether the decision was based on a lack of standing.[179]

The Eleventh Circuit also held that even if *Doe* was not a standing case, it had been overruled by the doctrinal developments exception to summary affirmances.[180] The court cited footnote five in *Carey*[181] and the denial of certiorari to *Uplinger*[182] as significant subsequent developments in law that had overruled *Doe*.[183] The court was incorrect regarding *Carey* because the discussion between footnotes five and seventeen indicated not that the right to privacy protected all private sexual conduct but that the right to privacy did not extend as far as the plaintiffs in *Carey* requested.[184] The court was incorrect regarding *Uplinger* because a denial of certiorari has no precedential value, even where briefs are received and arguments are heard prior to the denial.[185]

After attempting to distinguish *Doe*, the Eleventh Circuit proceeded to the merits and held sodomy to be protected specifically by a fundamental right to "quintessential privacy" and intimate association grounded in both the ninth amendment and the notion of fundamental fairness in the due process clause of the fourteenth amendment.[186] The court combined a uniquely expansive view of *Griswold* and its progeny with *Stanley*'s first amendment right to speech in the home to create a new fundamental right to "quintes-

178. *Id.* at 1213-14.

179. *Id.* at 1213.

180. *Id.* at 1208.

181. *See supra* notes 135-51 and accompanying text.

182. *See infra* notes 198-202 and accompanying text.

183. *Hardwick*, 760 F.2d at 1208-10.

184. *Id.* at 1214-15.

185. *Id.* at 1214-16. The Eleventh circuit also cannot rely on the equally divided vote in Board of Educ. v. National Gay Task Force, 105 S. Ct. 1858 (1985), because affirmances by an equally divided vote are entitled to no precedential value. *See* Neil v. Biggers, 409 U.S. 188, 191-92 (1972); Eaton v. Price, 364 U.S. 263, 264 (1960).

186. *Hardwick*, 760 F.2d at 1210-13.

sential privacy".[187]

Again, the Eleventh Circuit was wrong for several reasons. The right to privacy has been limited to the realm of family, home, or procreation and cannot be distorted to protect deviant sexual preferences.[188] Second, the Supreme Court has not found a right to "quintessential privacy" or sexual freedom and, with *Doe* remaining the law, the Eleventh Circuit had no license to create such a right.[189]

People v. Onofre

In *People v. Onofre*[190] the New York Court of Appeals also distinguished *Doe* as a case turning on lack of standing. Because a summary affirmance confirms only the holding, not the judgment of a lower court, the court in *Onofre* decided that the Supreme Court allowed the decision to stand because the defendant did not face actual charges, not because the right to privacy did not protect consensual sodomy.[191] After dispensing with *Doe*, the court focused on the absence of physical harm in consensual sodomy relations and found no evil for the state to prevent and no public interest to protect.[192] The court also distinguished private morality from public morality. It held that the police power protected only public morality. Because, according to the court, private morality had no effect on general public morality, the police power could not reach private morality.[193]

In his dissent, Judge Gabrielli contended that the court had eliminated the long-recognized state power to regulate the moral conduct of its citizens and "to maintain a decent society."[194] He noted that the court had hoisted substantive due process, through modern Lochnerization, to its former status as a vehicle for law-

187. *Id.*

188. *See supra* notes 115-59 and accompanying text.

189. *See infra* notes 230-37.

190. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

191. *Id.* at 493, 415 N.E.2d at 943, 434 N.Y.S.2d at 953-54.

192. *Id.* at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 952-53.

193. *Id.* at 489-90, 415 N.E.2d at 941-42, 434 N.Y.S.2d at 952.

194. *Id.* at 497, 415 N.E.2d at 945, 434 N.Y.S.2d at 956 (Gabrielli, J., dissenting).

making by judicial fiat.[195] Further, Judge Gabrielli asserted that the privacy cases must be interpreted narrowly, and that the Supreme Court had not created a generalized right of complete sexual freedom.[196]

Judge Gabrielli was correct. *Doe* cannot be dismissed as a standing case for reasons discussed earlier.[197] In summarily affirming *Doe*, therefore, the Supreme Court necessarily upheld both the standing of the plaintiffs and the lower court's holding that the right to privacy does not extend to consensual homosexual relationships.

Second, the court in *Onofre* failed to recognize that private immorality is inseparable from public immorality. Consequently, applying the *Onofre* reasoning has led to absurd results. An excellent example of the natural progression of the decision was the decision of the New York Court of Appeals in *People v. Uplinger*.[198] The court struck down a New York statute[199] that prohibited loitering to solicit partners for deviant sexual conduct by reasoning that the law punished anticipatory sodomy that *Onofre* now protected.[200] The facts paint a very different picture. One female defendant was flagging down cars on a street corner while making loud and overt offers to sell sexual favors. The primary male defendant asked people on the street whether they would like to participate in deviate sex acts.[201] The heart of the holding seems to be that a right to consensual sodomy would be of little value if one could not go out on the street to solicit sex partners.[202] *Uplinger* demonstrates the

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195. *Id.* at 503, 415 N.E.2d at 949, 434 N.Y.S.2d at 959-60.

196. *Id.* at 499, 415 N.E.2d at 947, 434 N.Y.S.2d at 957.

197. *See Dronenburg*, 741 F.2d at 1392; *see also supra* notes 177-79.

198. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), *cert. denied*, 104 S. Ct. 2332 (1984).

199. N.Y. PENAL LAW § 240.35(a)(3) (McKinney 1980) prohibited loitering "in a public place for the purpose of engaging or soliciting another person to engage in deviate sexual intercourse or other sexual behavior of a deviate nature."

200. 58 N.Y.2d at 938, 447 N.E.2d at 63, 460 N.Y.S.2d at 515.

201. *Id.* at 942, 447 N.E.2d at 65, 460 N.Y.S.2d at 517-18. (Jasen, J., dissenting).

202. After initially granting certiorari in *Uplinger*, 104 S. Ct. 64 (1984), the Supreme Court decided, per curiam, that certiorari had been improvidently granted. 104 S. Ct. 2332 (1984). The Court considered that the New York Court of Appeals opinion in *Uplinger* was "fairly subject to varying interpretations," leaving the precise constitutional issues unclear. *Id.* at 2333. Further, meaningful evaluation of the *Uplinger* decision required consideration of *Onofre*, a case not challenged by the petitioners. *Id.* at 2333-34. Chief Justice Burger,

fallacy of arguing that private morality does not affect public morality.

Commonwealth v. Bonadio

The Supreme Court of Pennsylvania decided *Commonwealth v. Bonadio*[203] as a police power question. The court found no public interest and thus no justification for state interference with the on-stage sexual exploits of the defendants.[204] The court seemed to require actual physical harm before a legitimate state interest arose. The individual's pursuit of her own "morality," here public sex acts for money, was held more important than the state morality condemning that activity.[205]

The Pennsylvania court made a number of errors in reaching its decision. As noted by Justice Nix's dissent, *Bonadio* did not involve private sodomy.[206] The acts took place onstage before an audience and were conducted for commercial gain. *Paris Adult Theatre I* clarified that the *Stanley* protection of pornography does not apply outside the home.[207] The court in *Bonadio*, however, did not mention or distinguish *Paris Adult Theatre I*. The court also ignored the longstanding case law that allowed the state to legislate morality, even without physical harm. Finally, the court did not consider or distinguish *Doe*. *Bonadio* is a clear example of the dangers of judicial Lochnerization. The Pennsylvania Supreme Court overrode the Pennsylvania legislature without even considering relevant case law.

Dronenburg v. Zech

In *Dronenburg*, however, the United States Court of Appeals for the District of Columbia Circuit held that the right to privacy did

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Justice White, Justice Rehnquist, and Justice O'Connor dissented. They believed that the New York statute had been invalidated on federal constitutional grounds and that the merits of the case were properly before the Court. *Id.* at 2335 (White, J., dissenting).

203. 490 Pa. 91, 415 A.2d 47 (1980).

204. *Id.* at 99, 415 A.2d at 51-52; *see supra* notes 91-93 and accompanying text.

205. *Id.* at 96, 415 A.2d at 50. The majority morality was expressed in the Pennsylvania Deviate Sexual Intercourse Statute. *See supra* note 92.

206. 490 Pa. at 100, 415 A.2d at 52 (Nix, J., dissenting).

207. 413 U.S. 49 (1973).

not extend to homosexual conduct.[208] The court considered the *Baker* position that *Stanley* and *Eisenstadt* created a general right to engage in any form of sexual gratification in the home and concluded that the right to privacy did not extend that far and certainly did not protect a right to homosexual conduct.[209] The court considered an argument similar to the *Onofre* position that the legislature could not reach private morality and concluded that such an argument was completely frivolous.[210] The court concluded that there was no constitutional right to engage in homosexual conduct.[211]

A critique of the above cases demonstrates that *Doe* remains good law. Consequently, the right to privacy does not protect homosexual sodomy.[212] No general right of sexual freedom has emerged.[213] Although debatable interpretations of *Griswold* and its progeny protect marital sodomy and muddy the waters of nonmarital sodomy, the *Hardwick*, *Baker*, and *Onofre* attempts to protect homosexual sodomy are specious.

Equal Protection Analysis

The equal protection clause of the fourteenth amendment directs that "all persons similarly circumstanced shall be treated alike."[214] Legislatures may classify persons differently so long as the classifications do not involve a "suspect class" or infringe a "fundamental right."[215] In the absence of these exceptions, the classification need bear only some fair relationship to a legitimate state purpose.[216] "The judiciary [will] not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations. . . ."[217]

The first step in an equal protection analysis is to determine the

208. Dronenburg v. Zech, 741 F.2d 1388, 1391-92 (D.C. Cir. 1984).
209. *Id.* at 1393-96.
210. *Id.* at 1397.
211. *Id.*
212. *See id.* at 1395-96.
213. *Id.* at 1391.
214. Plyler v. Doe, 457 U.S. 202, 216 (1982).
215. *Id.* at 216-17.
216. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1975).
217. *Id.*

particular problem that a state regulation seeks to alleviate. In the case of Virginia's sodomy statute, that problem is sexual conduct that is likely to contribute to legislatively determined moral delinquency.[218] The state's concern is legitimate because it is well settled that the police power may be exercised to preserve and protect public morals.[219] The police power can be used to preserve public morality because government is public order and destroying public order weakens government.[220]

The second step in an equal protection analysis is to determine whether a suspect class has been singled out by the statute. In *Frontiero v. Richardson*,[221] the Supreme Court provided the framework for determining a suspect class. In *Frontiero*, the Court compared sex to the quintessential suspect class of race and concluded that sex was an inherently suspect classification.[222] The factors considered were whether there was historical stigmatization or overuse of the classification with an implication of inferiority,[223] whether the classification addressed a discrete and insular minority,[224] and whether the classification was based on an immutable characteristic.[225]

Traditionally, the courts have not considered homosexuals to be a suspect class.[226] The *Frontiero* analysis supports this conclusion. Homosexuals historically have been victimized by the heterosexual majority. The long history of Anglo-American sodomy statutes demonstrates that stigmization.[227] The other two factors, however, are not satisfied. Although homosexuals are a minority, they are

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218. *Doe v. Commonwealth's Attorney*, 403 F. Supp. at 1202.

219. Berman v. Parker, 348 U.S. 26, 32 (1954); *see also* State v. Rhinehart, 70 Wash. 2d 649, 424 P.2d 906, *cert. denied*, 398 U.S. 832 (1967).

220. *Cf.* Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684 (1959). New York banned the film "Lady Chatterley's Lover" because it depicted adultery as a moral act. The Supreme Court reversed because the statute impinged on the textually enumerated freedom of speech, not because the state lacked power to regulate moral conduct. *Id.*

221. 411 U.S. 677 (1973).

222. *Id.* at 688. Sex no longer is considered a suspect classification. *See* Michael M. v. Superior Court, 450 U.S. 464 (1981). *Fronterio* is used only for its suspect-class analysis.

223. 411 U.S. at 684-87.

224. *Id.* at 686 n.17; *see also* Univ. of Cal. Regents v. Bakke, 438 U.S. 265 (1978).

225. 411 U.S. at 686.

226. *See Doe*, 403 F. Supp. 1199 (E.D. Va. 1975).

227. *See supra* notes 25-37 and accompanying text.

not a "discrete or insular" minority. Homosexuals are not identified easily by an immutable characteristic, like race or sex, and society is not divided easily along heterosexual-homosexual lines. Appearance alone gives no indication of a person's sexual preference. Sexual preference also arguably is not an immutable characteristic, like race or sex. Because homosexuals fail to meet the last two factors, they are not a suspect class.

Another characteristic defining a suspect class is whether the particular group has been denied participation in the political process. Recent decisions that protect homosexual speech and association have ensured access to the media.[228] The decriminalization of consensual sodomy by twenty-two states[229] reflects the political participation and power of homosexuals. Homosexuals therefore do not need the special protection afforded suspect classes.

The third step in equal protection analysis is to determine whether unnatural sexual activity is a fundamental right.[230] Thus far, the recognized fundamental rights have been limited to voting,[231] appeal,[232] counsel,[233] travel,[234] association,[235] and privacy.[236] By the principle *expressio unis*, no fundamental right to sodomy exists.[237]

Finally, the fourth step is to determine whether the statute rationally supports a legitimate state purpose. In the absence of a suspect class or a fundamental right, rational basis scrutiny is the applicable standard of judicial review. In this instance, if any persons decline to engage in the prohibited sexual conduct because of the sodomy statute, the legitimate goal of enhancing general morality will be achieved. Although the precise effect of the statutes is not quantifiable, they may inhibit persons inclined toward homo-

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228. *See* Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977).

229. *See supra* note 49.

230. *See generally* Plyler v. Doe, 457 U.S. 202, 221-23 (1982) (education not a fundamental right).

231. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

232. *See* Griffin v. Illinois, 351 U.S. 12 (1956).

233. *See* Douglas v. California, 372 U.S. 353 (1963).

234. Shapiro v. Thompson, 394 U.S. 618 (1969).

235. NAACP v. Alabama, 357 U.S. 449 (1958).

236. Griswold v. Connecticut, 381 U.S. 479 (1965).

237. *See supra* note 144 and accompanying text; *see also Dronenburg*, 741 F.2d at 1397.

sexuality from engaging in sodomy.[238] The statutes, therefore, rationally serve the states' purpose.[239]

The courts that have invalidated state sodomy statutes on equal protection grounds have failed to apply this analysis properly. The court in *Baker* struck down the Texas sodomy statutes both because it could find no legitimate state interest behind the statute[240] and because the heterosexual-homosexual distinction was impermissible.[241] The court was incorrect, however, on both points. First, the "public distaste" for homosexual sodomy that the court found not to be a legitimate state interest[242] is a legitimate interest if it represents the expression of the general public morality. Further, most cases have held that the regulation of morals is within the police power.

Second, the heterosexual-homosexual distinction should have passed rational basis scrutiny. Because sodomy is the only form of sexual expression available to homosexuals, they necessarily are more likely to perform sodomy than heterosexuals. So long as homosexuals are more likely to engage in prohibited conduct, a statute applied only to them is rationally related to the legitimate state goal of preventing, or at least reducing, sodomy. Admittedly the Texas statute and all sodomy statutes have the effect of discriminating against homosexuals by denying them their only sexual outlet while not so denying heterosexuals. In *Washington v. Davis*,[243] however, the Supreme Court held that disproportionate impact alone is insufficient to render a statute constitutionally defective. Some discriminatory intent must exist.[244]

The court in *Onofre*, discovered a different equal protection defect, finding that the New York statute distinguished impermissi-

238. *See* R. HOOK, THE CONSTITUTIONAL RIGHT OF PRIVACY: SODOMY LAWS 2 (1981).

239. *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955). Sodomy statutes might survive even strict scrutiny as a means to inhibit the spread of Acquired Immunodeficiency syndrome. *See supra* note 41; *infra* text accompanying note 261.

240. 553 F. Supp. at 1143-44.

241. *Id.* at 1144.

242. *Id.* at 1143-44.

243. 426 U.S. 229 (1976). The Supreme Court upheld a District of Columbia police department's requirement for all applicants to pass Federal Test 21 despite the fact that a disproportionate number of blacks failed the test. Effect, by itself, is not a constitutional violation. *See also* Mobile v. Bolden, 446 U.S. 55 (1980).

244. 426 U.S. at 246.

bly between married and unmarried persons.[245] The court apparently held the view that *Griswold* protects all sexual activity between married persons[246] and that *Eisenstadt* extended that range of sexual freedom to all persons, married or unmarried. Consequently, the court believed that no distinction could be drawn between married and unmarried persons without a rational justification.[247] The Pennsylvania court in *Bonadio* engaged in similar reasoning.[248]

This married-unmarried distinction, like the "pure" heterosexual-homosexual distinction, should not make sodomy statutes defective. Because homosexual couples by definition are unmarried, and homosexuals are more likely to engage in sodomy, a statute applied only to unmarried couples rationally furthers the legitimate state interest in preventing sodomy.

Most recently, the United States Court of Appeals for the Eleventh Circuit circumvented the entire analysis by creating a fundamental right to quintessential privacy and intimate association.[249] The court then remanded the case to the United States District Court for the Northern District of Georgia for strict scrutiny of the statute.[250] The Eleventh Circuit was incorrect because the Supreme Court has never held a fundamental right to sodomy to exist and, with *Doe* remaining the law, the Eleventh Circuit did not have the power to create such a fundamental right.[251]

Baker, *Onofre*, and *Bonadio* all demonstrate that the courts which invalidate sodomy statutes do so by distorting the equal protection analysis. In the absence of a suspect class or fundamental right, they are in reality applying a strict scrutiny analysis rather than the proper rational basis scrutiny. *Hardwick* went one step further and created a new fundamental right.[252] These courts are ignoring totally the state's long-recognized ability to define and to protect morality. As a result, the decisions reached by these

245. 51 N.Y.2d at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.
246. *See* Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968).
247. 51 N.Y.2d at 491-92, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.
248. 490 Pa. at 98-99, 415 A.2d at 51.
249. *See supra* notes 186-87.
250. *Hardwick*, 760 F.2d at 1213.
251. *See supra* notes 230-37 and accompanying text.
252. *See supra* notes 186-88.

courts conflict with a proper equal protection analysis of the sodomy statutes.[253]

THE LEGISLATIVE DECISION

After determining that the states constitutionally may criminalize consensual homosexual sodomy, the question remains whether, as a matter of policy, the states should criminalize such sodomy. Several important factors argue for decriminalization. Philosophically, John Stuart Mill argues that "[t]he only purpose for which power can be rightfully exercised . . . is to prevent harm to others."[254] This argument commonly is used to prevent any criminal enforcement of private, consensual, but "immoral," acts.[255] Second, as a practical matter, the sodomy statutes virtually are unenforceable and any attempted enforcement will be expensive.[256] In addition, crimes more important than sodomy face the state police forces.[257] Third, the thought of police peeking in windows or searching bedrooms for evidence of sodomy[258] is distasteful even in the absence of a specific constitutional right to privacy. Finally, an unenforced law often is disregarded by the public. The existence of such a law encourages public disdain for other, more important laws, and may defeat the preservation of order sought by the forced imposition of morality.

Alternatively, sodomy statutes are the type of laws that, even if largely unenforceable, may serve valuable societal interests. First, some forms of consensual sodomy threaten the traditional family unit and consequently threaten society.[259] Second, no private act is a true self-regarding act.[260] All private, consensual acts necessarily affect other members of society, even if tangentially. Third, en-

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253. *See supra* text accompanying notes 214-53.

254. *See supra* note 95.

255. *See* H. HART, LAW, LIBERTY AND MORALITY (1962); *see also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 240-58 (1978). Significant support exists in the academic legal community for the decriminalization of private consensual sodomy. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-13 (1978); *see also* MODEL PENAL CODE AND COMMENTARIES § 213.2 (1980).

256. *See generally* MODEL PENAL CODE § 213.2, at 370 (1980).

257. *Id.*

258. Fourth amendment protections against unreasonable search and seizure nullify the danger of this factor.

259. *See* P. DEVLIN, THE ENFORCEMENT OF MORALS 24-25 (1968).

260. *See supra* text accompanying notes 109 & 198-202.

forcement of sodomy statutes may play a crucial role in the containment and eradication of Acquired Immunodeficiency syndrome.[261] Fourth, sodomy statutes play an important role as ancillary charges in sexual assault, rape, or child abuse cases. Sodomy statutes also provide a lesser included offense in forcible or public sodomy cases. Fifth, decriminalization of sodomy without decriminalization of other "victimless" moral crimes like drug use, bestiality, and necrophilia is logically inconsistent. Sixth, government has an obligation to provide social norms for its citizens and government should provide examples of acceptable and unacceptable conduct. Even if disobeyed by a vocal minority, these laws provide necessary moral guidance to the bulk of society.

Disregard of the law, moreover, does not prevent sodomy statutes from having an effect on homosexuals. First, laws prohibiting sodomy apparently do dissuade some persons from homosexual activity.[262] Second, the sodomy laws have a larger opportunity for enforcement against homosexuals because people are more likely to report homosexual misconduct.[263] Third, the laws indirectly support societal discouragement of homosexuality.[264] For these reasons, a state legislature rationally could continue the criminalization of homosexual sodomy.

CONCLUSION

Attempts to expand the right to privacy to protect private consensual sodomy should fail. The right to privacy is not absolute and never was intended to protect sodomy. Because the Supreme Court created the right to privacy by judicial Lochnerization, the right must be defined narrowly.[265] The equal protection attacks on sodomy statutes are inapposite because homosexuals are not a suspect class, because no fundamental right to sodomy exists, and because the sodomy statutes rationally support a legitimate state purpose. For these reasons, *Doe v. Commonwealth's Attorney* remains the proper expression of the law.

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261. *See supra* notes 41 & 239.
262. *See* HOOK, *supra* note 238, at 2.
263. *Id.* at 3 (discussing the prevalence of blackmail against homosexuals).
264. *Id*; *see also* Annot., 42 A.L.R. FED. 189 (1979 & Supp. 1983).
265. *See supra* text accompanying notes 121 & 196.

The larger issue is which branch of government should decide moral questions for our society. The state legislatures traditionally made all decisions concerning sexual morality until *Griswold*. The state legislatures should be allowed to continue to resolve these questions. Decisions regarding morality require the balancing of broad policy considerations. Legislatures are better suited for these decisions. Thus, judicial interference should be minimized.

Finally, granting that the states have the power to criminalize consensual sodomy, they should balance carefully the efficacy of a sodomy statute with the practicalities and problems of its enforcement. Twenty-two states have reacted to these factors by decriminalizing consensual sodomy.[266] Conversely, if a legislature determines that the prohibition of consensual sodomy will enhance general morality, it should be free to make that choice.

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266. *See supra* note 49.