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# NOTES

## PEEPING THROUGH THE CLOSET KEYHOLE: SODOMY, HOMOSEXUALITY, AND THE AMORPHOUS RIGHT OF PRIVACY

JOHN V. HARRISON\*

“Sex is the biggest nothing of all time.”  
—Painter, Andy Warhol<sup>1</sup>

### INTRODUCTION

Laws proscribing sodomy<sup>2</sup> are laws against homosexuality.<sup>3</sup> From the time of Christ, social policy toward homosexuals<sup>4</sup> in

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<sup>1</sup> ERROL SELKIRK, *SEX FOR BEGINNERS* 14 (1988).

<sup>2</sup> For the purposes of this Note, any reference to an act of sodomy, or a statute proscribing acts of sodomy, assumes that the act in question was: (1) noncommercial; (2) consensual; (3) carried out by consenting adults; and (4) performed in the privacy of one's home. See *Powell v. State*, 510 S.E.2d 18, 23–24 (Ga. 1998).

<sup>3</sup> While it is true that many sodomy statutes allege to proscribe both heterosexual and homosexual sodomy, “it is generally assumed either that these laws, despite their wording, in fact apply only to homosexual sodomy, or that, if applied to heterosexual sodomy, they would be unconstitutional.” See RICHARD A. POSNER, *SEX AND REASON* 291 (Harvard Univ. Press 1994). In addition, sodomy is a more important practice to homosexual men than to heterosexuals because vaginal intercourse is a substitute for sodomy that is available only to heterosexuals. *Id.*

<sup>4</sup> The term “homosexual” first appeared in 1868 in correspondence between two German sex reformers who, ironically, wished to change Germany's strict sex laws. It entered the English lexicon in 1909 when it was listed in *Merriam-Webster's New International Dictionary* as “morbid sexual passion for one of the same sex.” CHARLES PANATI, *SEXY ORIGINS AND INTIMATE THINGS* 190–91 (1998).

Western culture has been strong disapproval, discrimination and ostracism, often marked by the most severe of punishments.<sup>5</sup> While in many northern European countries the modern-day plight of homosexuals is far better, the situation in English-speaking countries, especially the United States, is less favorable.<sup>6</sup> The existence of anti-sodomy legislation not only impinges on the sexual freedom of heterosexuals, and virtually eliminates freedom of sexual contact between homosexuals, but also has a direct negative effect on society's attitude toward homosexuals.<sup>7</sup> It may be true that today homosexuals enjoy increased tolerance and greater influence in the political arena, and some argue that this increased stature makes the argument against anti-homosexual sodomy statutes moot.<sup>8</sup> It would, however, be naive to believe that these advances in the status of homosexuals represent an end to blatant discrimination against them.<sup>9</sup> At one point, all fifty states had laws proscribing acts of

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<sup>5</sup> See POSNER, *supra* note 3, at 291. Even in the United States, some sodomy statutes carry maximum sentences of 10 to 20 years imprisonment. See ALA. CODE § 13A-6-63 (2000).

<sup>6</sup> POSNER, *supra* note 3, at 291. The following countries and territories have no sodomy laws, though some have laws forbidding homosexual conduct between members of the military: Albania; Antigua and Barbuda; Argentina; Aruba; Austria; Belgium; Bolivia; Brazil; Bulgaria; Cambodia; Central African Republic; Chad; Chile; China; Columbia; Congo; Costa Rica; Croatia; Cuba; Cyprus; Czech Republic; Denmark; Dominican Republic; Dutch Antilles; Ecuador; Egypt; El Salvador; Estonia; Finland; France; Germany; Gibraltar; Greece; Greenland; Guatemala; Haiti; Honduras; Hong Kong; Hungary; Iceland; Indonesia; Iraq; Ireland; Israel; Italy; Japan; Jordan; Kazakhstan; Kosovo; Liberia; Lithuania; Luxembourg; Madagascar; Martinique; Mexico; Monaco; Netherlands; New Zealand; Norway; Panama; Paraguay; Peru; Philippines; Portugal; Russia; Rwanda; Senegal; Serbia; South Africa; South Korea; Spain; Sweden; Switzerland; Taiwan; Thailand; Turkey; Ukraine; Uruguay; Venezuela; and Vietnam. The United States is part of the following group of countries that currently have sodomy laws, some carrying a penalty of death: Algeria; Angola; Armenia; Bangladesh; Barbados; Botswana; Brunei; Burma; Burundi; Cameroon; Ethiopia; Fiji; Ghana; India (punishable by life imprisonment); Iran (punishable by death); Jamaica; Kenya; Kuwait; Libya; Macedonia; Malaysia; Morocco; Mozambique; Namibia; Nepal; Nicaragua; Pakistan; Saudi Arabia (punishable by death); Singapore (punishable by life imprisonment); Somalia; Sri Lanka; Sudan (punishable by death); Syria; Tanzania; Trinidad; Tunisia; Uganda; United Arab Emirates; Yemen (punishable by death); Zaire; Zambia; and Zimbabwe. See *Homosexual Rights Around the World* (visited Sept 1, 1999) <<http://www.actwin.com/eatonohio/gay/world.htm>>.

<sup>7</sup> For a full discussion of this negative effect see *infra* Section II.

<sup>8</sup> See POSNER, *supra* note 3, at 291.

<sup>9</sup> See *Romer v. Evans*, 517 U.S. 620 (1995) (declaring unconstitutional a 1992 amendment to the Colorado State Constitution forbidding the state, its agencies, and political subdivisions from enacting, adopting, or enforcing any law whereby

consensual sodomy. Such laws have been repealed or struck down in thirty-two states.<sup>10</sup> Highlighting the fact that sodomy laws are largely laws against homosexuality,<sup>11</sup> today five states and Puerto Rico currently have laws that proscribe only same-sex acts of sodomy.<sup>12</sup>

The recent overturn of Georgia's sodomy law in *Powell v. State*,<sup>13</sup> marks an ironic turn of events that presents an opportunity to revisit the Supreme Court's decision in *Bowers*<sup>14</sup> and survey judicial handling of challenges to state sodomy laws. In addition, the Vermont Supreme Court's decision in *Baker v. State*,<sup>15</sup> allowing some form of same-sex "marriage," heightens the irony and helps to highlight the importance of repealing the country's remaining sodomy laws.

Part I of this Note will review the Supreme Court's position with respect to the constitutionality of state sodomy laws by discussing *Bowers v. Hardwick*.<sup>16</sup> The privacy and equal

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homosexual orientation, conduct, practices, or relationships would be the basis for any person to have or claim any protected status or claim of discrimination); see also *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 291, 301 (6th Cir. 1996) (holding a ballot initiative approved by 62 percent of Cincinnati voters did not disempower a group of citizens from attaining special protection at all levels of state government, but instead merely removed municipally enacted special protection from gays and lesbians). The ballot initiative stated:

The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

*Id.* at 301. Another case illustrating the blatant discrimination against homosexuals is *Boy Scouts of America v. Dale*, which found the Boy Scouts' policy of preventing homosexuals from being members of the organization was constitutionally protected by First Amendment freedom of association. See 530 U.S. 640 (2000).

<sup>10</sup> See American Civil Liberties Union, *Lesbian & Gay Rights* (visited Aug. 19, 1999) <<http://www.aclu.org/issues/gay/sodomy.html>>. Twenty-five states have legislatively repealed their sodomy laws. The bulk of these repeals took place in the 1970s, largely in response to events that took place in that decade. See AM. CIV. LIBERTIES UNION, *LESBIAN & GAY RTS. AND AIDS/HIV 2000* at 42-44 (1999).

<sup>11</sup> See POSNER, *supra* note 3.

<sup>12</sup> These states are Arkansas; Kansas; Missouri; Oklahoma; and Texas. The states that still have laws proscribing both heterosexual and homosexual sodomy are: Alabama; Arizona; Florida; Idaho; Louisiana; Michigan; Massachusetts; Minnesota; Mississippi; North Carolina; South Carolina; Utah; and Virginia.

<sup>13</sup> 510 S.E.2d 18 (Ga. 1998).

<sup>14</sup> 478 U.S. 186 (1986).

<sup>15</sup> 744 A.2d 864 (Vt. 1999).

<sup>16</sup> 478 U.S. 186 (1986).

protection issues raised in *Bowers* will be compared and contrasted with *Powell* and other state court decisions that, unlike *Bowers*, found state sodomy laws to be unconstitutional. Part II will highlight the reasons why the repeal of sodomy laws is essential despite a general feeling that they are rarely enforced and therefore harmless. This Note will also attempt to illustrate the enigmatic situation created by the conflict between the *Bowers* holding with respect to homosexual sodomy, and the Vermont Supreme Court's recent approval of an equivalent to same-sex marriage.<sup>17</sup> Part III presents prevalent arguments for maintaining sodomy laws and reveals the weaknesses inherent in these arguments. Part IV makes the argument that the current state of privacy jurisprudence is so indefinite that it is impossible to decide the constitutionality of sodomy laws under this doctrine with any degree of certainty. Instead, equal protection is the more appropriate analysis to apply when a sodomy law is challenged. Finally, Part V argues that discrimination against homosexuals in the form of state sodomy laws can only be overcome by designating homosexuals a suspect class for the purpose of equal protection analysis.

## I. BOWERS V. THE STATES

### A. *Bowers v. Hardwick*

The Supreme Court's decision in *Bowers v. Hardwick*<sup>18</sup> is a logical point to commence a discussion of judicial overturn of state sodomy laws. *Bowers*, of course, did not overturn Georgia's sodomy law.<sup>19</sup> Quite to the contrary, *Bowers* determined that there is no constitutional right to engage in homosexual sodomy.<sup>20</sup> The *Bowers* decision does, however, cogently present many of the issues raised by courts that have considered the

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<sup>17</sup> See *Baker*, 744 A.2d at 867 (holding that same-sex couples are entitled to all of the rights and benefits afforded heterosexual couples through marriage).

<sup>18</sup> 478 U.S. 186 (1986).

<sup>19</sup> The Supreme Court upheld the sodomy law after first determining there was no fundamental right to homosexual sodomy. See *id.* at 191. Georgia's sodomy law passed a rational basis test because it is acceptable to pass laws "based on notions of morality." *Id.* at 196.

<sup>20</sup> There was no fundamental right to homosexual sodomy, the Court reasoned, because the history of sodomy as an outlawed and immoral act precludes it from being a liberty "deeply rooted in this Nation's history and tradition." *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

constitutionality of state sodomy laws.<sup>21</sup> In addition, *Bowers*

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<sup>21</sup> Six years before the Supreme Court would consider the constitutionality of state sodomy laws, the New York Court of Appeals performed an analysis of the state's sodomy laws under the Federal Constitution. To date, New York is the only state to judicially decide the constitutionality of its sodomy laws under the Federal Constitution.

In *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), the court declared the New York law unconstitutional as a violation of the fundamental right to privacy and as a violation of equal protection under the U.S. Constitution. Unlike other state courts, the *Onofre* court did not consider the statute's validity under the state constitution. The facts of *Onofre* are fundamentally similar to the facts in *Bowers*. *Onofre* was convicted of violating section 130.38 of the New York Penal Law for committing an act of sodomy with another male in the privacy of his home. *See id.* at 938.

The New York Court of Appeals performed a searching review of U.S. Supreme Court decisions in order to establish the source of the right of privacy. The court concluded that the right of privacy stems from the First, Fourth, Ninth, and Fourteenth Amendments, but that the Supreme Court had yet to define the "outer limits" of the right of privacy. *See id.* at 938-39 (citing *Carey v. Population Servs. Inc.*, 431 U.S. 678, 684-85 (1977)). The government, however, asserted that by virtue of the Supreme Court's decisions, it was clear that the right of privacy extended only to marital intimacy and procreative choice. *See Onofre*, 415 N.E.2d at 939; *see also* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding a statute that makes it a criminal offense for a married couple to use contraceptives invalid as invading their right of privacy, "a right older than the Bill of Rights") *Id.* at 486. Another case, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), invalidated a Massachusetts statute forbidding the sale or distribution of contraceptive devices to unmarried persons. The state argued that the statute acted as a deterrent to fornication, a health measure, or as simply a prohibition on contraception. The Court held that the statute violated the equal protection clause of the Fourteenth Amendment and the right to privacy granted by the Constitution, which "gives an individual, married or single, [the right] to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. This was an effective prediction of the Supreme Court's position on the matter. The *Onofre* court concluded, however, that in light of the Supreme Court's prior holdings, there was no rational basis for declining to extend the right of privacy to cover an individual's private consensual choice to engage in what was once considered deviant conduct. In addition, the court observed that, not only did private acts of consensual sodomy not injure anyone else, but also no showing had been made that physical injury is a common or even occasional consequence to the participants of such acts. *See Onofre*, 415 N.E.2d at 939.

Displaying greater wisdom than the Supreme Court would show when it addressed the constitutionality of anti-sodomy laws, the New York court expressly disclaimed any view on the theological, moral, or psychological aspects of the controversy. Noting that various authorities in these disciplines can and do disagree about the propriety of consensual sodomy, the court quite correctly concluded that the government should not provide the apparatus for the enforcement of moral or theological values. *See id.* The *Onofre* court instructed that the community is free to counsel, persuade, teach, advise, and use other non-coercive means to convince members of society to adopt a particular moral position, but the government was not to act as enforcer and punisher in such matters. *See id.*

The dissenters in *Onofre* legitimately criticized the notion of a constitutional

provides a logical contrasting background against which *Powell v. State*,<sup>22</sup> the Georgia case that overturned the very same sodomy statute upheld by the *Bowers* court, can be analyzed.

Another reason for looking at *Bowers* first is because it reveals what might arguably be considered an uncharacteristic bias, and even animus, by the Supreme Court against homosexuals. Therefore, *Bowers* not only highlights the legal arguments that form the basis for judicial overturn of state

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right of privacy for being an indefinite concept, but then went on to support the idea that the government's police power includes the ability to regulate the moral conduct of its citizens in order to maintain a decent society. *See id.* at 944 (Gabrielli, J., Dissenting). Such a conclusion begs the questions: What is a decent society? Who is the final arbiter of decency and morality? Claiming that the New York Penal Code is already an expression of the society's view of decency and morality, the dissent offered no answers to these questions and declined to name a single provision of the code that stood for this proposition. *Id.*

The *Onofre* dissenters were quite accurate in foreshadowing the rationale that the Supreme Court would use in *Bowers*. First, they declared that *Eisenstadt* did not announce any fundamental sexual rights, but only stood for the narrower proposition that the "right of an individual to decide 'whether to bear or beget a child' cannot be limited to married adults." *Onofre*, 415 N.E.2d at 947 (Gabrielli, J., Dissenting) (quoting *Eisenstadt v. Baird*, 405 U.S. 438 (1972)). The dissenters also correctly foretold the *Bowers* Court's reaction to the argument that *Stanley v. Georgia*, 394 U.S. 557 (1969), stood for the proposition that consensual sexual acts in the privacy of one's home are beyond the reach of the government. *See Onofre*, 415 N.E.2d at 939 n.2.

The *Onofre* dissent supported its position much like the *Bowers* court would. Alluding to lessons learned in the *Lochner* era, the period from 1905 to 1934 during which the Court frequently substituted its judgment for that of Congress and state legislatures on the wisdom of economic regulation, *see WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION* 228 (1996), the dissenters warned that the courts cannot act as a sort of super-legislature, but needed to observe the tenets of judicial restraint by exercising only minimal scrutiny of state legislation. *See Onofre*, 415 N.E.2d at 938 (Gabrielli, J., Dissenting). In fact, the dissent declared that the majority's decision amounted to an act of judicial legislation that created a new fundamental right. *See id.* at 938. While the *Onofre* dissenters are correct in the notion that judicial restraint should be a guiding principal of appellate courts, it is equally true that the court should not shirk its responsibility of reviewing the constitutionality of its legislation for fear of executive bullying.

Finally, the *Onofre* dissenters foretold the *Bowers* Court's reliance on the "deeply rooted" test for what freedoms are covered by the right of privacy. They attempted to support their position on the fatally flawed notion that since sodomy has been historically prohibited, it is an activity that cannot be protected by the Constitution. The dissenters stepped into the same trap as the *Bowers* majority, a trap set by laws in the Nation's history that permitted slavery, prohibited interracial marriage, and treated women as chattel. Nonetheless, the dissent declared "western man has never been free to pursue his own choice of sexual gratification," and therefore, they concluded, constitutional protection for acts of consensual sodomy simply do not exist. *Id.*

<sup>22</sup> 510 S.E.2d 18 (Ga. 1998).

sodomy laws, but also provides a glimpse at the deep-seated homophobia that has kept such laws on the books for such a long time.

### 1. Judicial Restraint or Bias?

The Supreme Court made its feelings about homosexuality and sodomy known in the widely criticized case<sup>23</sup> of *Bowers v. Hardwick*, in which it considered the constitutionality of a Georgia statute<sup>24</sup> prohibiting sodomy between both heterosexual and homosexual couples.<sup>25</sup> The Court limited the scope of its decision to just homosexual sodomy, and left the Georgia statute's proscription of heterosexual sodomy for another day because the case involved prohibited sexual activity between homosexuals. One might assume that this narrowing of the issue was merely an exercise of judicial restraint, but the decision's lack of support for such narrowing may indicate that the Court had other reasons for focusing solely on the issue of homosexual sodomy.

Perhaps one of the reasons the *Bowers* decision is so highly criticized is because the majority's apparent dislike of homosexuals is only thinly veiled.<sup>26</sup> The dissent addressed this

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<sup>23</sup> See, e.g., Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, THE NAT'L L.J., Nov. 5, 1990, at 3; Tracey Rich, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773, 787 (1988) (noting the Supreme Court's oversight that sodomy statutes apply to heterosexuals); Yvonne L. Tharpes, *Bowers v. Hardwick and The Legitimization of Homophobia in America*, 30 HOW. L.J. 829 (1987); Mitchell Lloyd Pearl, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154 (1988) (finding it troubling that the Supreme Court "blatant[ly] refuse[d] to extend constitutional protection to homosexuals"); Donald A. Dripps, *Bowers v. Hardwick and the Law of Standing: Noncases Make Bad Law*, 44 EMORY L.J. 1417, 1434 (1995) (proposing that the only implication of *Bowers* is that the government may validly denounce homosexuality); Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1, 4-5 (1994) (explaining that the hostile reaction of gay organizations around the country was prompted by their view that the Supreme Court had shown its disdain for homosexuals in the *Bowers* decision).

<sup>24</sup> GA. CODE ANN. § 16-6-2 (1984).

<sup>25</sup> Acts of sodomy are not confined to gay men. While homosexuals may have no choice but to engage in acts that are considered "unnatural" when they desire sexual intimacy, many heterosexuals, who do have a choice, choose to do likewise. A survey has indicated that a majority of Americans have engaged in some form of sodomy, regardless of their sexual preference. See ROBERT T. MICHAEL ET AL., *SEX IN AMERICA* 139-41 (1994).

<sup>26</sup> See, e.g., *Sodomy Ruling: Dark Day in Court for Homosexuals*, U.S. NEWS & WORLD REPORT, July 14, 1986, at 18 (stating that the ruling in *Bowers* "allows Big



dislike head-on, stating that "[n]o 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.'"<sup>27</sup> Another example of this thinly-veiled dislike is revealed in Justice Burger's concurrence.<sup>28</sup> Finding it necessary to drive home the repugnance of homosexuality and sodomy, Justice Burger noted that homosexuality was not only condemned from the beginning of the Republic, but for thousands of years before, inferring that all things condemned by Judeo-Christian moral standards ought to be illegal.<sup>29</sup> Resorting to 19th Century rhetoric, Burger referred to sodomy as "a heinous act 'the very mention of which is a disgrace to human nature . . . .'"<sup>30</sup>

Amidst its expression of disapproval of homosexual sodomy, the Court took the stance that it was not passing on the wisdom or desirability of laws proscribing consensual acts of sodomy. Instead, the Court felt its role was to determine "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ."<sup>31</sup> Curiously, though, the Court simultaneously felt the need to suddenly limit its role in such matters by declining to extend the right of privacy any further. It would not be cynical to observe that no such need existed when faced with the heterosexual issues raised in *Eisenstadt v. Baird*, *Roe v. Wade*, and *Casey v. Population Services International*.<sup>32</sup> The timing of such self-limitation is, to say the least, suspect.

## 2. The Deep Roots of Privacy

In 1986, the Court granted certiorari in *Bowers* because the circuits were in disagreement over the constitutionality of state

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Brother to police the bedroom of millions," with the likely result that anti-homosexual bias will only increase).

<sup>27</sup> *Bowers v. Hardwick*, 478 U.S. 186, 212 (1986) (Blackmun, J., dissenting) (citing *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)).

<sup>28</sup> See *Bowers* 478 U.S. 3at 196-97.

<sup>29</sup> See *id.*

<sup>30</sup> *Id.* at 197 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*215).

<sup>31</sup> *Id.* at 190.

<sup>32</sup> See *id.* at 190-91. The Court stated that these cases, construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental right to decide whether or not to beget or bear a child had no resemblance to the "claimed constitutional right of homosexuals to engage in acts of sodomy . . . ." *Id.*

sodomy statutes. Specifically, the Eleventh Circuit's holding was in opposition to cases decided in the Ninth and D.C. Circuits that upheld state sodomy statutes.<sup>33</sup> The Court announced that the Eleventh Circuit had misread its privacy jurisprudence developed in the line of cases from *Griswold v. Connecticut* to *Eisenstadt*.<sup>34</sup> Privacy, according to the Court, pertained only to areas affecting child rearing, family relationships, procreation, marriage, contraception, and abortion.<sup>35</sup> What the Court neglected to acknowledge was that all of these privacy rights had a common denominator—*sex*: specifically heterosexual intercourse. While the Court might feel better about defining privacy rights in terms other than sex, it cannot ignore two important inferences: (1) the right of privacy, as developed by the Court, is fundamentally based on peoples' freedom in deciding the details of their sex lives; and (2) the areas the Court purports to protect with a right of privacy all involve some degree of sexual freedom. It is legitimate to inquire whether "marriage," "family," and "procreation"<sup>36</sup> are merely code words for heterosexual sex. If so, the Court's claim that there is "[n]o connection between family, marriage or procreation on the one hand and homosexual activity on the other,"<sup>37</sup> is dramatically weakened when family, marriage, and procreation are reduced to the less euphemistic, but more realistic, characterization of heterosexual sex. Once reduced to this simple term, it is difficult to deny that there is a connection between the freedoms associated with heterosexual sexual practices and the freedoms associated with homosexual sexual practices.

Because the right of privacy exists solely by judicial fiat,<sup>38</sup> the Court found it important to assert that it was not merely imposing its own moral judgment about homosexual sodomy.<sup>39</sup> Though not textually present in the Constitution, privacy rights are those "fundamental liberties that are implicit in the concept of ordered liberty."<sup>40</sup> Further flushing out the test for the

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<sup>33</sup> See *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985); see also *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

<sup>34</sup> See *Bowers*, 478 U.S. at 190–91.

<sup>35</sup> See *id.*

<sup>36</sup> *Id.* at 191.

<sup>37</sup> *Id.*

<sup>38</sup> See ROBERT H. BORK, *SLOUCHING TOWARDS GAMMORAH* 103 (1996).

<sup>39</sup> See *Bowers*, 478 U.S. at 191–92.

<sup>40</sup> *Id.* at 191 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

freedoms covered by the right of privacy, the Court turned to *Moore v. East Cleveland*,<sup>41</sup> where it established that the liberties protected by the right to privacy are "deeply rooted in this Nation's history and tradition."<sup>42</sup> The Court uses this "deeply rooted" test to disqualify homosexual sodomy from the ranks of protected privacy rights. In a paper-thin argument, the Court asserted that since sodomy has been a criminal offense since the establishment of the original thirteen states, the practice of homosexual sodomy could not be deeply rooted in the Nation's history and tradition.<sup>43</sup> The fallacy of this conclusion is arrived at with little thought. What such a statement actually proves is that animus towards, and bias against, homosexual sex are deeply rooted in the national tradition. In an attempt to bolster its "deeply rooted" argument, the *Bowers* court performed an exhaustive analysis of the prevalence of sodomy laws at the time of the original thirteen states, and at the time of the ratification of the Fourteenth Amendment in 1868.<sup>44</sup> The Court, however, ignores the fact that slavery laws, anti-miscegenation laws, and laws protecting a host of discriminatory practices were also deeply rooted in this Nation's history.<sup>45</sup>

The truth is that homosexuality *is* pervasive in the Nation's history. In fact, it is pervasive in world history.<sup>46</sup> The fact that the Court can point to a long history of laws aimed at persecuting homosexuals by criminalizing their sex practices actually proves the prevalence of homosexuality throughout the Nation's history. If homosexuality was not pervasive and embedded in American society, there would be little need to pass laws aimed at impeding practices associated with it. The Court

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<sup>41</sup> 431 U.S. 494 (1977).

<sup>42</sup> *Id.* at 503.

<sup>43</sup> See *Bowers*, 478 U.S. at 192-94.

<sup>44</sup> See *id.*

<sup>45</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding a military order excluding all persons of Japanese ancestry from the west coast); *Buck v. Bell*, 274 U.S. 200 (1927) (holding a Virginia statute that provides for the sexual sterilization of inmates of State supported institutions, found to be afflicted with a hereditary form of insanity or imbecility, to be within the power of the State under the Fourteenth Amendment); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that enforced separation of the races is not akin to inequality); *Pace v. Alabama*, 106 U.S. 583 (1883) (upholding the imposition of special penalties on interracial adultery or fornication).

<sup>46</sup> For an indication of homosexuality's deep historical roots, see generally A. L. ROWSE, *HOMOSEXUALS IN HISTORY* (1977) (naming historical figures who were purportedly homosexual).

conveniently ignored the fact that the condemnation of sodomy between heterosexual couples, married or unmarried, is likewise deeply rooted in the common law and religious tradition of this country, while declining to extend this decision to those practices. The absurdity of the Court's reasoning in this respect becomes apparent when one considers the Nation's long history of anti-miscegenation laws.<sup>47</sup> This history is brought into sharp focus by the trial court decision that formed the basis of *Loving v. Virginia*.<sup>48</sup> In 1959, a Virginia trial court declared that the state's anti-miscegenation laws were constitutional because "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."<sup>49</sup> Reading such a rationale today causes most to shiver in disbelief, yet the *Bowers* decision is remarkably similar in tenor,<sup>50</sup> and will doubtless cause similar shivers when read by generations to come. Another similarity between many anti-miscegenation cases and *Bowers* is the government's reliance on traditional Judeo-Christian values in arguing for the absurd result that *Loving v. Commonwealth*<sup>51</sup> represents. What both

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<sup>47</sup> For example, section 20—54 of the Virginia Code provided:

Intermarriage prohibited; meaning of term 'white persons.'—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.

VA.CODE ANN. § 20-54 (1960 Repl.Vol.). See generally, *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955) (discussing the court's rationale for upholding Virginia's anti-miscegenation laws and stating that more than half the states in the Union have such laws).

<sup>48</sup> 388 U.S. 1 (1967).

<sup>49</sup> *Id.* at 3. This argument is echoed in the dissents of many state decisions that have overturned state sodomy laws.

<sup>50</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 211 n.5 (1986) (Blackmun, J., dissenting) (citing the similarities between the Court's reliance on religious justification and the historical existence of similar prohibitions as a basis for law, yet noting that the Court still found that the "vital personal rights" essential to the pursuit of happiness outweighed such justifications).

<sup>51</sup> 147 S.E.2d 78 (Va. 1966) (upholding a trial court decision that Virginia's anti-miscegenation laws are valid because God intended for the races to be separate).

*Bowers* and *Loving* seem to ignore is the established principle that conformity with some religious doctrine<sup>52</sup> can never form the sole rational basis necessary for legitimate secular legislation.<sup>53</sup>

### 3. *Stanley v. Georgia* and the Classic Arguments Against the Extension of Privacy Rights

The *Bowers* Court found it necessary to close a door that it opened eighteen years earlier. In *Stanley v. Georgia*,<sup>54</sup> the Court announced that "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."<sup>55</sup> Hardwick, and many others who would eventually challenge the constitutionality of sodomy statutes, seized this holding in an attempt to broaden the Court's concept of privacy. The Court, however, declined to follow this logic and determined that *Stanley* was "firmly grounded in the First Amendment."<sup>56</sup> It

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<sup>52</sup> One of the biblical passages often cited in an effort to show the disdain of homosexual sodomy is Genesis, book 19, when God sends two male angels to Sodom to warn the inhabitants to mend their evil ways. The angels seek refuge in Lot's house and a group of male residents of Sodom arrive and demand, "Where are the men who came to you tonight? Bring them out to us that we may have [intimacies] with them." *Genesis* 19:5 (New American Bible). Lot begs with the men, "Do not do this wicked thing." *Genesis* 19:7. A few verses later, God rains sulphurous fire upon the inhabitants of Sodom. *Genesis* 19:24. There is a certain irony, however, when one considers that

[t]he Bible is replete with episodes in which the afflictions of the poor, the blind, the lame, and the diseased were regarded with disdain. Persons who occupied the status of slaves, illegitimate children, or women were objects of unequal and unfair treatment. All of these biblical minorities were stereotyped as sinful, evil, and social deviants marked for punishment.

Tharpe, *supra* note 23, at 835-36.

<sup>53</sup> See *Bowers*, 478 U.S. at 211; see also *McGowan v. Maryland*, 366 U.S. 420, 429-453 (1961) (examining the history of Sunday closing laws and upholding them as constitutional based on secular reasoning despite the laws' religious origin); *Stone v. Graham*, 449 U.S. 39, 40 (1980) (stating "a statute must have a secular legislative purpose . . . that neither advances nor inhibits religion") (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

<sup>54</sup> 394 U.S. 557, 565 (1969) (holding that whatever the justifications for state statutes regulating obscenity, they cannot reach into the privacy of one's own home).

<sup>55</sup> *Id.*

<sup>56</sup> *Bowers*, 478 U.S. at 195. The dissent in *People v. Onofre* raised this argument six years earlier, stating that *Stanley* merely proscribed "governmental interference in making important, protected decisions." *People v. Onofre*, 415 N.E.2d 936, 939 (Gabrielli, J., Dissenting) (N.Y. 1980). Apparently, however, the Tennessee Court of Appeals was not persuaded by the *Bowers* majority's interpretation of *Stanley*. In overturning the state's same-sex sodomy law, the court cited *Stanley* in support of

was in explaining away the *Stanley* holding that the Court raised the arguments most relied on by those defending sodomy laws. The Court reasoned that, if the argument in favor of allowing private acts of consensual sodomy was that people acting in the privacy of their own homes, and not injuring any third party, ought to be left alone, then other types of currently illegal conduct would also have to be permitted when carried out in the privacy of a person's home. The conduct cited by the *Bowers* court and echoed by anti-sodomy proponents since, was drug use and incest. In fact, the dissenters in the Kentucky Supreme Court decision overturning the state's same-sex sodomy law<sup>57</sup> used an almost identical argument predicting the fall of drug and incest laws as well as laws prohibiting cruelty to animals, the abuse of dead human bodies, suicide, and polygamy.<sup>58</sup> The *Bowers* dissent aptly points out that *Stanley* is as much based on the Fourth Amendment, as it is on the First Amendment.<sup>59</sup> The entire concept of privacy is firmly rooted in the Fourth Amendment's proscription of unreasonable search and seizure and peoples' right to security within their homes. In fact, the Fourth Amendment is the closest the Constitution comes to containing a textual provision for the right of privacy.<sup>60</sup> As is discussed below, several state courts have used the *Stanley* decision as a basis for expanding their privacy jurisprudence.

The dissent in *Bowers* offers a cogent response to the majority's incest and drug use arguments. First, the dissenters note that behaviors such as drug use and gun possession differ dramatically from consensual acts of sodomy in that they are not victimless because they are both inherently dangerous.<sup>61</sup> Second, the dissent points out the randomness in the majority's decision to group acts of homosexual sodomy with acts of incest and adultery, rather than with acts of heterosexual sex, or with

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the proposition that the sanctity of the home was essential to the right of privacy. See *Campbell v. Sundquist*, 926 S.W.2d 250, 262 n.10 (Tenn. Ct. App. 1996).

<sup>57</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

<sup>58</sup> See *id.* at 505.

<sup>59</sup> See *Bowers*, 478 U.S. at 207-08 (Blackmun, J., dissenting).

<sup>60</sup> See *id.* at 208. Indeed, as the Court revealed in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Constitutional right of privacy has its underpinnings in several of the first ten Amendments. The Fourth and Fifth Amendments were singled out as granting "protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'" *Id.* at 484.

<sup>61</sup> See *Bowers*, 478 U.S. at 208-09.

sodomy between married persons.<sup>62</sup> The comparison of acts of private, consensual sodomy to incest is a classic apples and oranges comparison. Incest presents a situation in which, because of the uniquely close relationship of the parties involved, true consent is impossible. Adultery presents a situation in which third parties such as spouses and children are victims subject to genuine injury.

With the refusal to include homosexual sodomy in the protections afforded by the right of privacy, the Georgia sodomy statute was found not to impinge on a fundamental right. The Court, therefore, needed only to apply rational basis review. With little discussion, the Court declared that passing a law on the basis of majoritarian morality was enough to qualify as a legitimate state interest, and glibly noted that "if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."<sup>63</sup>

#### 4. A Wavering Majority and a Strong Dissent

Filing a brief concurrence, Justice Powell agreed with the majority in terms of its stance on limiting the right of privacy to exclude homosexual sodomy. Justice Powell, however, hinted that he was not entirely comfortable with the decision by conceding that *Hardwick* may have been protected from the wrath of Georgia's sodomy statute by the Eighth Amendment's bar against cruel and unusual punishment.<sup>64</sup> Justice Powell himself later confirmed the hint. Four years after the decision, the then retired Justice admitted he "probably made a mistake" in providing the crucial swing vote in the *Bowers* case.<sup>65</sup> Justice Powell, like most of *Bowers*' critics, ultimately believed the decision to be inconsistent with *Roe v. Wade*<sup>66</sup> and concluded that "the dissent[ers] had the better of the arguments."<sup>67</sup>

Justice Powell was right. The dissent's cogent arguments have influenced many of the state court decisions overturning state sodomy statutes. Unlike the majority's odd interpretation

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<sup>62</sup> See *id.* at 209 n.4.

<sup>63</sup> *Id.* at 196.

<sup>64</sup> See *id.* at 197-98 (Powell, J., concurring).

<sup>65</sup> See Agneshwar, *supra* note 23, at 3.

<sup>66</sup> 410 U.S. 113 (1973).

<sup>67</sup> See Agneshwar, *supra* note 23, at 3.

of the issue as to whether there was a constitutional right to engage in homosexual sodomy,<sup>68</sup> the dissenters realized the case was actually about "the right most valued by civilized men . . . the right to be left alone."<sup>69</sup>

At the core of the dissent was an attack on the majority's questionable logic: if sodomy and homosexuality have been the subject of prohibition throughout history, then current prohibitions must be constitutional. Quoting Justice Holmes, the dissent thought it "revolting to have no better reason for a rule of law than . . . [one that] was laid down in the time of Henry IV."<sup>70</sup> The dissenters realized that protecting the freedom of people who challenge majoritarian notions of morality is a difficult and unpopular task for a court, but "[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 existing order."<sup>71</sup>

In disassembling perhaps the weakest part of the majority's reasoning, the dissent attacked the notion that laws based on the majority's notion of morality are implicitly constitutional. Quoting *Wisconsin v. Yoder*,<sup>72</sup> the dissent summed up the principle which should drive such judicial inquiries into matters of private sexuality: "[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."<sup>73</sup>

## B. *Powell and the States*

Seven states have judicially overturned their sodomy laws.<sup>74</sup>

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<sup>68</sup> See *Bowers*, 478 U.S. at 190.

<sup>69</sup> *Id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928)).

<sup>70</sup> *Id.* (quoting Justice Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

<sup>71</sup> *Id.* at 211 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>72</sup> 406 U.S. 205, 224 (1972).

<sup>73</sup> *Id.*

<sup>74</sup> See *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980) (overturning Pennsylvania's sodomy statute); see also *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (overturning New York's sodomy statute); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (overturning Kentucky's sodomy statute); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (overturning Tennessee's sodomy statute); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997) (overturning Montana's sodomy statute); *Williams v. State*, 722 A.2d 886 (Ga. 1998) (refusing to enforce Maryland's sodomy statute and resulting in a consent decree in which the state



With the exception of New York, all have done so under their state's constitution. Two states, Pennsylvania and New York, overturned their sodomy statutes prior to the 1986 *Bowers* decision. All of the states, in one way or another, wrestled with the expanding and contracting character of the right of privacy, often using the Supreme Court's privacy jurisprudence as a guide, but finding a more expansive right of privacy under their own state's constitution. Only two states, Pennsylvania and Kentucky, substantially addressed the equal protection issues raised by a challenge to a sodomy statute.

Because *Powell v. State*<sup>75</sup> is one of the more recent cases<sup>76</sup> marking the overturn of a state sodomy statute, and because the statute in question is the same one considered by the *Bowers* court, it is a case that helps define what may be changing legal and social attitudes with respect to laws against sodomy. Likewise, *Commonwealth v. Wasson*,<sup>77</sup> the decision overturning Kentucky's sodomy law, is particularly instructive because it too is a post-*Bowers* decision. Unlike other state courts weighing the constitutionality of their sodomy laws, *Wasson* overruled the Kentucky statute on both privacy and equal protection grounds. These two cases, *Powell* and *Wasson*, are illustrative of the state-level judicial trend toward overturning state sodomy laws. These cases warrant attention for the purpose of contrasting the position taken by the Supreme Court in *Bowers* with, what appears to be a more liberal attitude toward sodomy, privacy, and equal protection taken by the states.

When contrasted with the facts of *Bowers v. Hardwick*,<sup>78</sup> the

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agreed to repeal two sodomy laws in order to settle a law suit filed by the ACLU); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (overturning Georgia's sodomy statute).

<sup>75</sup> 510 S.E.2d 18 (Ga. 1998).

<sup>76</sup> Maryland's two sodomy laws were overturned in January 1999, two months after the *Powell* decision. This overturn came, however, in the form of a consent decree eliminating both sodomy laws. A Baltimore County Circuit Court ruling in favor of an ACLU challenge to the state's sodomy laws prompted the consent decree. See AM. CIV. LIBERTIES UNION, LESBIAN & GAY RTS. AND AIDS/HIV 2000 at 22, 40 (1999).

<sup>77</sup> 842 S.W.2d 487 (Ky. 1992).

<sup>78</sup> 478 U.S. 186 (1986). There is much lore about how exactly a police officer found himself in the bedroom of Michael Hardwick so that he could arrest and charge him with violation of the state's sodomy statute, and thus creating the basis for the case. The full story not only fills in the gaps in the Court's version of the facts, but also highlights some of the harassment to which homosexuals are subject. Hardwick was engaged in an act of oral sex with another man in his bedroom at about 3 a.m. An Atlanta police officer seeking to serve a warrant on Hardwick, was

facts of *Powell* are particularly ironic. While *Bowers* involved the private consensual sexual activity of a homosexual couple, *Powell* involved an act of questionably consensual, adulterous, oral sex between a man and his wife's seventeen-year-old niece.<sup>79</sup> As a result of this act, *Powell* was convicted of violating Georgia's infamous sodomy statute and received a five-year sentence.<sup>80</sup>

Early in its opinion, the Georgia Supreme Court dismissed *Bowers* as inapplicable to *Powell* because the court was reviewing the state's sodomy statute under the state constitution, and recognized that the Georgia Constitution grants more extensive rights in the area of privacy than the Federal Constitution.<sup>81</sup> Indeed, the court identified historically broader protections under the state constitution in the areas of free speech, self-incrimination, cruel and unusual punishment, free education, and equal protection.<sup>82</sup> The court proceeded to trace, what it referred to as, the right of privacy's "long and distinguished history in Georgia."<sup>83</sup>

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allowed into the apartment by a friend of Hardwick's who was visiting at the time. The police officer entered Hardwick's bedroom, witnessed the act, and arrested both Hardwick and his partner. While Hardwick was never prosecuted, the story of his arrest helps explain why homosexuals fear that sodomy laws are one of the tools that police may use to harass them. It is reasonable to argue that the service of a warrant for failing to appear for a low-level misdemeanor at three o'clock in the morning is the sort of vigilant policing that is reserved for use against homosexuals. What was the warrant for? A police officer had observed Hardwick exit a gay bar with an open beer can and he was charged with violating Georgia's open container law. Hardwick apparently never paid the fine. See Ann Woolner, *Though Seldom Enforced, Sex Statute Meant A Lot*, FULTON COUNTY DAILY REPORT, Nov. 30, 1998 at 1.

<sup>79</sup> See June D. Bell, *Conviction for Sodomy Draws 5 Years, Vow to Appeal*, FULTON COUNTY DAILY REPORTER, Oct. 16, 1997, at 3.

<sup>80</sup> See *id.*

<sup>81</sup> See *Powell v. State*, 510 S.E.2d 18, 21-22 (Ga. 1998).

<sup>82</sup> See *id.* at 22 n.3.

<sup>83</sup> *Id.* at 21. In fact, it was a Georgia case that marked the first time the right of privacy was ever recognized by any court of last resort in the country. See *Pavesich v. New England Life Ins.*, 50 S.E. 68 (Ga. 1905). In *Pavesich*, the Georgia court found the right of privacy to be an immutable and absolute right stemming from natural law, and endorsed a person's "right to be let alone," so long as he was not interfering with the rights of others. See *id.* at 70-71. More than seventy years later, Georgia would recognize "the right to define one's circle of intimacy." *Macon-Bibb County Water & Sewerage Auth. v. Reynolds*, 299 S.E.2d 594, 596 (Ga. Ct. App. 1983).

In sharp contrast to the "long and distinguished" history of privacy that Georgia and other states could look to in overturning their sodomy statutes, Tennessee's privacy jurisprudence was in its infancy. The Court of Appeals of Tennessee

Two years earlier, in *Christensen v. State*,<sup>84</sup> the Georgia Supreme Court upheld a challenge to the state's sodomy law.<sup>85</sup> In *Powell*, the court found it necessary to abandon the rational basis review applied in *Christensen* and adopt a strict scrutiny analysis by focusing on the right of privacy's classification as a fundamental right.<sup>86</sup> It did so by examining the valid bounds of the state's police power, and by questioning the premise that majoritarian morality is a compelling government interest.

Like the Pennsylvania Supreme Court had done eighteen

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overturned the state's "Homosexual Acts" Statute in 1996 in *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996). Unlike other states that were able to draw on a rich history of privacy jurisprudence, the Tennessee Supreme Court had first articulated such a right only four years earlier in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). Like the government of Kentucky in the *Wasson* case, the government in *Campbell* argued that the right of privacy encompassed by the Tennessee Constitution was identical in breadth to that of the Federal Constitution. Therefore, the government contended, because the federal right of privacy does not encompass homosexual sodomy, neither should Tennessee's right of privacy. Observing that in defining the right of privacy under the Tennessee Constitution, the court is not bound by the United States Supreme Court's decision in *Bowers*, the Tennessee Supreme Court was correct in allowing greater protections under the state constitution than those granted under the Federal Constitution. Like the Federal Constitution, the right of privacy is not expressly provided for in the Tennessee Constitution. The Tennessee Court of Appeals, however, did not limit its interpretation of the right of privacy to the Tennessee Constitution's Due Process Clause. See TENN. CONST. art. I, § 8. Instead, the court found that the right of privacy was reflected in several sections of the Tennessee Declaration of Rights. See *Sundquist*, 926 S.W.2d at 260. Section three guarantees freedom of worship, section seven protects against unreasonable searches and seizures, section 19 guarantees freedom of speech, and section 27 protects against the quartering of soldiers. See TENN. CONST. Interpreting the extent of the Tennessee Constitution's right of privacy to be far greater than that provided by the Federal Constitution, the Court of Appeals determined that private, consensual, noncommercial acts of sex are matters of "intimate personal concern . . . at the heart of Tennessee's . . . right to privacy." *Sundquist*, 926 S.W.2d at 262. Furthermore, the court declared the extent of this right should not be diminished for the mere fact that the adults engaging in this activity are of the same gender. See *id.* The court determined that because the right of privacy is a fundamental right, strict scrutiny analysis had to be applied to the matter of its constitutionality under the state constitution. See *id.* Because of the court's holding on the issue of privacy, there was no need for it to address the equal protection issues raised by the courts below.

<sup>84</sup> 468 S.E.2d 188 (Ga. 1996).

<sup>85</sup> See *id.* at 190.

<sup>86</sup> *Christensen* held that a statutory proscription against sodomy is a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public. The court held that the Georgia Constitution does not deny the legislature the right to prohibit such conduct; thus, a statute criminalizing sodomy does not violate the right to privacy under the Georgia Constitution. See *id.*

years earlier in *Commonwealth v. Bonadio*,<sup>87</sup> the Georgia court

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<sup>87</sup> 415 A.2d 47 (Pa. 1980). Pennsylvania was the first state to have its sodomy laws declared unconstitutional. Predating the *Bowers* decision, the court in *Bonadio* focused on the valid bounds of police power and touched upon the issue of sexual liberty without specifically addressing the right of privacy. *See id.* at 49. Unlike *Bowers*, where the act occurred in the privacy of a bedroom, the act of sodomy at issue in *Bonadio* occurred in an "adult" movie theater. Because the circumstances of the charged acts were anything but private, the court avoided the question of privacy and focused on whether Pennsylvania's sodomy statute constituted a valid exercise of police power, and whether the statute constituted an equal protection violation. The *Bonadio* court relied heavily on the American Law Institute's position on such matters, as presented in the Institute's comments to the Model Penal Code. *See id.* at 50. This reliance would be adopted by other states in overturning their sodomy statutes. *See* MODEL PENAL CODE § 207.5 (comment) (Tent. Draft No. 4, 1955). A comment to the code states: "No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." *Id.* In addition, the Code suggests that the decisive factor favoring decriminalization of laws against private homosexual relations between consenting adults is the importance that society and law ought to give to individual freedom of choice and action in matters of private morality. *See* MODEL PENAL CODE AND COMMENTARIES, PART II 362-63 (1980).

The court found that the proper exercise of police power involved protecting an individual's right to be free from interference in observing his own morality, but did not involve enforcing the majority's morality on a person whose conduct, though contrary to the majority, did not harm others. *See Bonadio*, 415 A.2d at 50. Indeed, "what is considered to be 'moral' changes with the times and is dependent upon societal background." *Id.* at 50. The court did acknowledge that there is a place for morality in society, but "[s]piritual leadership, not the government, has the responsibility for striving to improve the morality of individuals." *Id.*

While the *Bonadio* court avoided an examination of the privacy issue, it explored the foundations of liberty and freedom. The court contributed to the philosophical underpinnings of the right of privacy, as they relate to consensual sodomy, in its reliance on the seminal work of philosopher John Stuart Mill in *On Liberty*. *See* JOHN STUART MILL, ON LIBERTY (1859). Mill espoused the belief that the basic concepts of liberty and freedom prohibited laws restricting the private, consensual sexual behavior of a nation's citizens. Mill's belief was that a government may only legitimately exercise its power over an individual, against his will, in order to prevent harm to others, and that protecting an individual's own physical or moral well-being is not within the realm of legitimate state power. Mill believed society should attempt to persuade and reason with a person for his own good, but it should never be able to compel or punish him. *See id.*

According to Mill, human liberty has three components: (1) liberty of conscience, allowing the individual absolute freedom in terms of opinion, thought, and feeling; (2) liberty of tastes and pursuits, allowing a person to plan his own life to suit his character so long as he doesn't hurt others; and (3) freedom to unite, allowing individuals to come together with other individuals for whatever purpose they desire, providing they do not hurt others and the unity is consensual. *See id.* at 50-51. By introducing Mill's philosophy as fundamental to the freedoms associated with the right to engage in certain consensual sexual activities, the *Bonadio* court provided a philosophical framework in which other courts could define the right of privacy as it relates to sodomy.

concluded that legislation must serve a public purpose, and the means adopted to achieve that purpose must be reasonable and not unduly oppressive.<sup>88</sup> In applying this test to determine the validity of the police power created by the Georgia anti-sodomy statute, the court concluded that a statute with the sole effect of regulating private conduct carries no public purpose.<sup>89</sup> Furthermore, the *Powell* court urged that the invasion of the right of privacy made possible by Georgia's anti-sodomy statute was both unreasonable and unduly oppressive.<sup>90</sup> Accordingly, the court found that the statute "exceeds the permissible bounds of the police power."<sup>91</sup>

Citing the Montana Supreme Court's decision in *Gryczan v. State*,<sup>92</sup> the Georgia Supreme Court declared that the mere fact

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<sup>88</sup> See *Powell*, 510 S.E.2d at 25.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> *Id.*

<sup>92</sup> 942 P.2d 112 (Mont. 1997). The Supreme Court of Montana overturned the state's same-sex sodomy statute in 1997. Montana's statute, MONT. CODE ANN. § 45-5-505 (1999), was broader than most other sodomy statutes in that it prohibited "any touching of the sexual or other intimate parts of the person of another . . . in order to knowingly or purposely arouse or gratify the sexual response or desire of either party." MONT. CODE ANN. § 45-2-101(66)(b). There seems to have been considerable pressure to remove this law from the books as there were legislative attempts to repeal the statute in 1991, 1993, and 1995. See *Gryczan*, 942 P.2d at 116. Because the court could have easily dismissed the case for lack of standing, it is obvious that the constitutionality of the state's same-sex sodomy statute was an issue the court wanted to address. See *id.* at 117-20. The court may have alluded to one of the factors that drew its interest to this case, and a cause of the attempts to repeal the law, in referring to evidence indicating there is a correlation between homosexual sodomy laws and homophobic violence, making gays the most frequent victims of hate crimes in America today. See *id.* at 120.

The court analyzed the constitutionality of the statute with respect to the right of privacy under the state constitution and identified the right to be let alone as one of the basic tenets of Montana's right of privacy. See *id.* at 121; see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928); *Bowers v. Hardwick*, 478 U.S. 186, 199 (Blackmun, J., dissenting). Unlike the Federal Constitution and many state constitutions, the Montana Constitution expressly grants a fundamental right of privacy and alludes to the need for strict scrutiny analysis should the right be violated. Montana's Constitution states: "Right of Privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10. The *Gryczan* court reasoned that all adults have an expectation of privacy with regard to their consensual sexual activities, and that this expectation precluded governmental snooping. See *Gryczan*, 942 P.2d at 122.

In addition to public health issues advanced by the government, the state also attempted to advance public morality as a compelling governmental interest. The court stated that, just because the legislature enacted a law that happens to be the

that legislation reflects the moral choice of the majority does not require the court to simply acquiesce.<sup>93</sup> Quoting Oliver Wendell Holmes' dissent in *Lochner v. New York*,<sup>94</sup> the *Powell* court noted that finding a particular opinion natural and familiar or novel and shocking should not pre-conclude the propriety of a legislative act.<sup>95</sup> This is a sentiment echoed by United States Supreme Court Justice Hugo Black more than sixty years after the *Lochner* decision. Justice Black said that it is a popular misconception that "the Constitution prohibits that which [the majority] thinks should be prohibited and permits that which they think should be permitted."<sup>96</sup> Though it rejected the notion that majoritarian morality ought to drive its decision, the *Powell* court found it necessary to distance itself personally from the decision it was rendering, stating that "if we were called to pass upon the propriety of [acts of sodomy], we would not condone [them]."<sup>97</sup>

The *Powell* dissent adopted many of the arguments of the *Bowers* majority, including the now familiar argument that an expansion of the right of privacy will inevitably lead to the legalization of drug use in one's home.<sup>98</sup> The dissent in *Powell* argued that the majority placed too much in a right of privacy not expressly articulated in the state's constitution, and accused them of acting as social engineers rather than jurists.<sup>99</sup> The dissent also made the equally standard argument that under the

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moral choice of the majority, it would not merely acquiesce to majoritarian morality without evidence of some other legitimate state interest. Instead, the court declared that the Montana Constitution does not protect morality, but it does guarantee privacy to all persons, whether they are in the majority or the minority. *See id.* at 125. Citing James Madison, the *Gryczan* court declared that it was as important to protect the minority against injustice at the hands of the majority, as it was to protect society against oppression by its rulers. *See id.* (citing THE FEDERALIST, NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961)). In fact, the court reasoned that certain rights are so fundamental that they cannot be denied to a minority "no matter how despised by society." *Gryczan*, 942 P.2d at 126.

<sup>93</sup> *See Powell*, 510 S.E.2d at 25 (citing *Gryczan*, 942 P.2d at 125).

<sup>94</sup> 198 U.S. 45, 76 (1905).

<sup>95</sup> *See Powell*, 510 S.E.2d at 26 n.6.

<sup>96</sup> *Newsmakers*, NEWSWEEK, Dec. 9, 1968, at 52.

<sup>97</sup> *Powell*, 510 S.E.2d at 25.

<sup>98</sup> *See id.* at 30 ("[T]he constitutionality of criminal laws which forbid the possession and use of certain drugs has suddenly become questionable.").

<sup>99</sup> *See id.* at 28 ("[T]he only perceptible unconstitutionality in this case is that which is evidenced by the majority's determination, acting as social engineers rather than as jurists, to elevate their notion of individual 'liberty' over the collective wisdom of the people's elected representatives. . . .") (citations omitted).

majority's reasoning, acts of incest, when committed by consenting adults, should likewise be protected by the right of privacy.<sup>100</sup> The dissenters ascribed the difference in how sodomy and incest were treated by the majority to the political correctness of improving the status of homosexuals. Finally, the dissent pointed out an anomaly created by the overturn of the state's sodomy law; while it remains a crime for a father to engage in intercourse with his adult stepdaughter, they may now lawfully perform acts of sodomy.<sup>101</sup> The *Powell* majority was not persuaded by these arguments.

Six years prior to the *Powell* decision, the Supreme Court of Kentucky affirmed two lower court decisions overturning a Kentucky statute prohibiting same-sex sodomy.<sup>102</sup> The trial court dismissed criminal charges brought under the statute as violative of an individual's right of privacy under the state constitution.<sup>103</sup> An intermediate appellate court affirmed the trial court and added to the analysis a finding that the statute also violated the state constitution's Equal Protection Clause.<sup>104</sup> In affirming the decisions of the lower courts, the Kentucky Supreme Court affirmed and adopted both the right of privacy and equal protection rationales, and limited its analysis solely to state constitutional grounds.

The facts of *Commonwealth v. Wasson*<sup>105</sup> illustrate how homosexuals are singled-out for enforcement of sodomy laws. Police conducted an undercover operation in which officers wearing microphones staked out a parking lot and attempted to engage passersby in conversation. The objective was to see if any individuals passing by would solicit one of the officers for sexual contact.<sup>106</sup> One of the officers struck up a conversation

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<sup>100</sup> See *id.* at 30.

<sup>101</sup> See *id.*

<sup>102</sup> See KY. REV. STAT. ANN. § 510.100 (Michie 1999).

<sup>103</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487, 488 (Ky. 1993).

<sup>104</sup> See *id.* at 489. Sections two and three of the Kentucky Constitution provide: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority. . . . All men, when they form a social compact, are equal . . ." KY. CONST. § 2-3.

<sup>105</sup> 842 S.W.2d 487 (Ky. 1993).

<sup>106</sup> Wasson was actually charged with a violation of KY. REV. STAT. ANN. § 506.030, which prohibits solicitation to commit any criminal offense. In this case the criminal offense was sodomy. Therefore, a finding that the sodomy law was unconstitutional undermined the solicitation offense. See *Wasson*, 842 S.W.2d at 488.

with Wasson that lasted approximately twenty-five minutes. At the end of the conversation, Wasson invited the officer to "come home" with him. The officer then prodded Wasson for details, and Wasson finally expressed a desire to engage in acts prohibited by the Kentucky sodomy statute.<sup>107</sup> No money was offered and there was no suggestion that the sexual activity would occur anywhere but in the privacy of Wasson's home.<sup>108</sup>

While the defense presented seven expert witnesses offering testimony on the sociological, psychological, and medical aspects of same-sex sexual activity, the government presented no witnesses and offered no scientific or social science data.<sup>109</sup> Instead, the government relied on the familiar position that the majority, speaking through the legislature, has the right to criminalize any sexual behavior it deems immoral.<sup>110</sup> Arguing that the Kentucky constitution gives no greater right to privacy than the Federal Constitution, the government took the position that the court was bound by the decision of the Supreme Court in *Bowers*.<sup>111</sup> The Kentucky Supreme Court refused to accept the government's argument that the Kentucky constitution paralleled the U.S. Constitution with regard to the right to engage in consensual acts of same-sex sodomy. In fact, the court made the point that "[t]he adoption of the Federal Constitution in 1791 was preceded by state constitutions . . . [and] state constitutional law documents and the writings on liberty were more the source of federal law than the child of federal law."<sup>112</sup> Just as the Supreme Court of Georgia would do in *Powell* five years later, the Kentucky court pointed to its rich history of privacy jurisprudence that predated the United States Supreme Court's discovery of a right of privacy in the Federal Constitution.<sup>113</sup>

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<sup>107</sup> See KY. REV. STAT. ANN. § 510.100 (Michie 1999).

<sup>108</sup> See *Wasson*, 842 S.W.2d at 489.

<sup>109</sup> See *id.* at 490.

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

<sup>112</sup> *Id.* at 492.

<sup>113</sup> See *id.* at 492-93. In *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. 1909), the Kentucky Supreme Court laid the foundation for the right of privacy that would be used eighty-three years later by the *Wasson* court in overturning Kentucky's same-sex sodomy statute. In a succinct and deliberate discourse on a citizen's right to privacy, the *Campbell* court announced:

Man in his natural state has a right to do whatever he chooses and has the power to do. When he becomes a member of organized society . . . he



The government also attempted to make the argument made in *Bowers* that since homosexual sodomy was outlawed at common law and by statute since 1860, its prohibition is deeply rooted in the laws of the state. The Kentucky Supreme Court however, correctly pointed out that while acts of anal sex may have been traditionally prohibited, the Kentucky statute at issue also banned acts of same-sex oral copulation and any form of deviate sexual intercourse between women. While these activities may have been historically viewed as immoral, they were never punished as criminal in Kentucky.<sup>114</sup> Accordingly, the *Wasson* majority rejected the argument that the proscriptions are historical, and therefore valid. As a result, the Kentucky Supreme Court declined to apply the United States Supreme Court's analysis of whether the liberties at issue were deeply rooted in the Nation's history and tradition.<sup>115</sup> Indeed, the *Wasson* court held that the purpose of the Due Process Clause of the Kentucky Constitution was not to protect traditional values, but to question them when they operated to discriminate against disadvantaged minorities.<sup>116</sup> The court illuminated one of the fundamental flaws in the *Bowers* Court's "deeply rooted" analysis when it said: "[I]n all probability, homosexuality is not considered a deeply rooted part of our traditions precisely because homosexuals have historically been subjected to invidious discrimination."<sup>117</sup>

The *Wasson* court declined to speculate as to whether

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surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires . . . . *Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws.*

*Id.* at 385-86 (emphasis added). The *Campbell* case was about a person's right to possess and consume alcohol in the privacy of his home. At the time it was decided, prohibition and the consumption of alcohol was every bit as incendiary of a moral issue as sodomy between consenting adults is today. See *Wasson*, 842 S.W.2d at 495. The Kentucky Supreme Court took a similar stance in *Hershberg v. City of Barbourville*, 133 S.W. 985 (Ky. 1911), declaring an ordinance that made it illegal to smoke cigarettes in the privacy of one's home, beyond the reach of state action under the Kentucky Constitution.

<sup>114</sup> See *Wasson*, 842 S.W.2d at 491.

<sup>115</sup> See *id.* at 499.

<sup>116</sup> See *id.*

<sup>117</sup> *Id.* at 499.

homosexuals ought to be treated as a suspect class under the Federal Constitution. The court, however, did hold homosexuals to be an identifiable class under the Kentucky constitution because the Kentucky Equal Protection Clause provides that *no* class of people may be discriminated against. The government argued that the level of moral indignation felt by the majority with regard to homosexual sodomy provided the requisite rational basis to treat homosexuals differently. In rejecting the government's rational basis argument, the court found that it was arbitrary to criminalize sexual behavior solely on the basis of majoritarian sexual preference.<sup>118</sup>

Taking a lead from Pennsylvania,<sup>119</sup> the *Wasson* court supported its reasoning on the writings of the 19th century English philosopher and economist John Stuart Mill. The Kentucky Supreme Court echoed Mill's philosophy when it stated simply: "The majority has no moral right to dictate how everyone else should live."<sup>120</sup> The court tempered this bold position, and modified the Mill philosophy, by conceding that the law is permitted to intervene for the purpose of stopping the self-inflicted harm that would result from drug use, or the failure to use seat belts or crash helmets. The court endorsed this type of intervention, not for the purpose of enforcing majoritarian morality, "but because the victim of such self-inflicted harm becomes a burden on society."<sup>121</sup>

## II. WHAT'S ALL THE FUSS: WHY SODOMY LAWS MUST BE REPEALED

A common reaction to attempts to repeal sodomy statutes is: "What's all the fuss?" After all, the nightly news is not filled with accounts of "sex-police" bursting into bedrooms and arresting people engaged in consensual acts of sodomy.<sup>122</sup> While this may be true, the mere existence of such laws threatens homosexuals' ability to go unharassed, increases the chances that they will be the subject of violence and discrimination,

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<sup>118</sup> See *id.* at 500.

<sup>119</sup> See *Bonadio*, 415 A.2d at 50-51; see also *supra* note 87 and accompanying text.

<sup>120</sup> *Wasson*, 842 S.W.2d at 496.

<sup>121</sup> *Id.* at 497 (citing LORD LLOYD OF HAMPTSTEAD, INTRODUCTION TO JURISPRUDENCE 59 (4th ed. 1979)).

<sup>122</sup> See *supra* note 78.

allows homosexuals to be routinely branded as "criminals" with all of the concomitant stigma and disadvantages associated with such a classification, and illustrates societal intolerance that should not exist.<sup>123</sup>

The recent decision by the Vermont Supreme Court, *Baker v. State*,<sup>124</sup> creates an even more urgent need to uniformly overturn state sodomy laws. *Baker* clears the way for gay civil unions in the state of Vermont.<sup>125</sup> While the complicated and debatable questions about recognition of these unions by other states under the Full Faith and Credit Clause are beyond the scope of this Note, it is easy to predict the chaos that will arise when those gay men who enjoy the absolute legal equivalent of marriage cross the border into a state that has a sodomy law in effect. Suddenly, homosexuals are apparently entitled to the protection of marital privacy first extended in *Griswold v. Connecticut*.<sup>126</sup> No doubt, the battle over the cross-border recognition of these marriages will be fierce, but one thing is certain—under the current Supreme Court precedents, the equivalent of gay marriage and sodomy laws cannot co-exist.

In a way, the existence of dormant and unenforced sodomy laws may give the public a sort of moral peace-of-mind. The notion being that a state will tolerate homosexuals, so long as it is on record that the state does not condone what they do in bed. In another sense, it may be a way for society to deal with the

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<sup>123</sup> See AM. CIV. LIBERTIES UNION, LESBIAN & GAY RTS. AND AIDS/HIV 2000 at 10 (1999). One of the chief areas in which sodomy laws and the stigma they cause are used against homosexuals is in the area of child custody. "[Sodomy laws] are used as a justification for separating lesbians and gay men from their children, or, in the most recent fashion, for visitation and custody orders that force lesbians and gay men to choose between their partners and their kids." *Id.*

<sup>124</sup> 744 A.2d 864 (Vt. 1999).

<sup>125</sup> Faced with a challenge to the state's denial of a marriage license to a same-sex couple, the *Baker* court held:

[V]iewed in the light of history, logic, and experience, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law . . . . [W]e find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples.

*Id.* at 886. The court, however, stopped short of requiring the issuance of marriage licenses to same-sex couples. Instead, the court left it to the "Legislature to craft an appropriate means of addressing this constitutional mandate . . . ." *Id.*

<sup>126</sup> 381 U.S. 479 (1965) (holding the state cannot outlaw certain intimate sexual activities because those activities do not lead to procreation).

moral or religious guilt many of its members feel for engaging in sodomy themselves; looking for absolution of their own sins of the bedroom by publicly denouncing such acts through laws enacted by their legislative representatives. As therapeutic as such laws may be, the rehabilitative effect is vastly outweighed by the injustice they cause. A brief look at the history of these anachronistic laws reveals how some of the modern attitudes associated with them arose.

There are two things about sodomy to be learned from history. First, despite belief to the contrary, homosexual sodomy was not always the object of contempt. Second, once it did become the object of contempt, the resulting prejudice was both punitive and severe. The adoption of anti-sodomy law as a secular concern was largely by accident. Sodomy did not become a secular offense in England until 1533.<sup>127</sup> Until that time it was purely an ecclesiastical offense.<sup>128</sup> It was England's break with the Roman Catholic Church, not any new policy by the sovereign to criminalize or punish acts of sodomy, that caused sodomy to fall under the secular jurisdiction of the English crown.<sup>129</sup>

The Ancient Greeks considered homosexuality to be entirely ordinary,<sup>130</sup> and homosexuals were not distinguished from heterosexuals in the urban centers of Roman society. In both societies, homosexual activity was regarded "as an ordinary part of the range of human eroticism."<sup>131</sup> The culture of late medieval and early modern Italy did not separate men into categories of homosexual and heterosexual either. Rather, the polar opposition ascribed to homosexuality and heterosexuality is a product of contemporary Western culture that would have seemed foreign to Italians of the Renaissance.<sup>132</sup> Surprisingly, even the early Christian Church did not oppose homosexual behavior *per se*.<sup>133</sup> In fact, up until the twelfth century "moral

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<sup>127</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 211 n.6 (1986) (citing 25 Hen VIII, ch. 6).

<sup>128</sup> See *id.* at 211-12 n.6 (citing J. STEPHEN, A HISTORY OF THE CRIMINAL LAW IN ENGLAND 429-30 (1883)).

<sup>129</sup> See *id.* (citing C.E. COKE, INSTITUTES, ch.10 (4th ed. 1797)).

<sup>130</sup> See JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 49 (1980).

<sup>131</sup> *Id.* at 333.

<sup>132</sup> See MICHAEL ROCKE, FORBIDDEN FRIENDSHIPS 10-11 (1996). Southeast Asia and Japan were also tolerant of male homosexual activity. See also POSNER, *supra* note 3, at 68-69.

<sup>133</sup> See BOSWELL, *supra* note 130, at 333.

theology was basically indifferent to homosexuality, and legal sanctions were very rare."<sup>134</sup> It was only during the latter half of the twelfth century that literary, theological, and legal writing began to display hostility toward homosexuals, and by the latter half of the Middle Ages, homosexuality was increasingly associated with heresy.<sup>135</sup> Some of the earliest and most severe laws against homosexuals were enacted by the European conquerors of Jerusalem, where the sentence for sodomy was death by burning.<sup>136</sup> In modern times, the Nazi persecution of homosexuals along with those of Jewish faith is the most extreme manifestation of the prejudice against homosexuals.<sup>137</sup> In America, homosexuals have been subject to official harassment, denied government jobs and public benefits, and excluded from immigration and naturalization.<sup>138</sup> It was, in fact, persecution by police in New York City that was the catalyst of the modern gay rights movement. In the 1960s police routinely raided establishments frequented by gays. In 1969, a routine raid of the Stonewall Inn turned into a gay riot.<sup>139</sup>

The facts surrounding *Wasson* are particularly illustrative of the lengths government has gone to in harassing homosexuals.<sup>140</sup> These facts also reveal the weakness in the argument that sodomy laws need not be overturned because they are never enforced.<sup>141</sup> Even where sodomy statutes are not enforced

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<sup>134</sup> *Able v. United States*, 968 F. Supp. 850, 853 (E.D.N.Y. 1997) [hereinafter *Able I*].

<sup>135</sup> See BOSWELL, *supra* note 130, at 284, 334.

<sup>136</sup> See William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gay Legal Agenda*, 102 YALE L.J. 333, 370 (1992).

<sup>137</sup> See Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1755 (1996); see also *Able I*, 968 F. Supp. at 852. In fact, one of the modern symbols adopted by the gay rights movement—an inverted pink triangle—has its roots in the Nazi persecution of homosexuals. A piece of pink cloth, cut in a triangle, was used to mark homosexuals in the Nazi death camps.

<sup>138</sup> See *Able I*, 968 F. Supp. at 854.

<sup>139</sup> See *id.* at 854–55.

<sup>140</sup> See *supra* notes 26–31 and accompanying text.

<sup>141</sup> See Debbie Nathan, *Sodomy for the Masses*, THE NATION, April 19, 1999, at 16. Just because sodomy laws are difficult to enforce does not mean they are never enforced. Texas Police, responding to a false report of a gun-wielding maniac in the home of John Lawrence and Tyrone Garner, which was phoned in by a vindictive acquaintance, came upon the two men engaged in an act of sodomy. The men were charged with a misdemeanor that carried a \$500 fine. See *id.* at 20.

Sodomy laws are frequently enforced against homosexuals in Puerto Rico. As recently as 1998, Puerto Rico's Justice Department warned that it "would prosecute

against homosexuals, their mere existence is enough to wreak legal havoc for homosexual men and women.<sup>142</sup>

And the days of brutal violence against homosexuals are not over. A recent National Institute of Justice study found that homosexuals are the most frequent victims of hate crimes.<sup>143</sup> A number of recent incidents add to the austere statistics. In 1998, Matthew Shepard, a gay twenty-one year-old University of Wyoming student, was tied to a fence, beaten, and left to die in near freezing temperatures by two men aged twenty-one and twenty-two.<sup>144</sup> Six months later, Billy Jack Gaither of Sylacauga, Alabama, was brutally beaten with an ax and set on fire.<sup>145</sup> In Fort Campbell, Kentucky, Private Brian Winchell of Kansas City, Missouri was bludgeoned to death by another soldier while he lay sleeping.<sup>146</sup> In Redding, California, Gary Matson and Scott Mowder were shot to death in their bed.<sup>147</sup> What do all of these cases have in common? The perpetrator's sole motivation was a hatred of homosexuals.<sup>148</sup>

While a majority of Americans have come to believe homosexuals deserve the same rights as heterosexuals, almost half believe homosexuality is a sin or just wrong. The chilling by-product of this attitude is that some feel they are entitled or

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any person engaging in sodomy if enough evidence existed to support a prosecution." AM. CIV. LIBERTIES UNION, LESBIAN & GAY RTS. AND AIDS/HIV 2000 at 51 (1999).

<sup>142</sup> Take for instance, the case of a Mississippi gay man who was denied custody of his thirteen year-old son, even though his ex-wife's new husband was a physically abusive alcoholic. The trial court judge referred to the state's anti-sodomy laws in denying custody. See *Weigand v. Houghton*, 730 So. 2d 581, 588-91 (Miss. 1999). Another example of the remote effect of anti-sodomy laws is the case of Robin Shahar who had accepted a job with the Georgia Attorney General's office only to have the offer withdrawn. The reason for the withdrawal? Attorney General, Michael Bowers, as in *Bowers v. Hardwick*, heard that Shahar and her female lover had held a private commitment ceremony which implied that she was a felon under Georgia anti-sodomy laws. See *Shahar v. Bowers*, 114 F.3d 1097, 1101 (11th Cir.), *reh'g denied* 120 F.3d 211 (11th Cir. 1997).

<sup>143</sup> See *Able I*, 968 F. Supp. at 854.

<sup>144</sup> See *An Outburst of Hatred*, NEWSDAY, October 14, 1998, at A14.

<sup>145</sup> See *Frontline: Assault on Gay America: The Life and Death of Billy Jack Gaither* (visited Mar. 31, 2001) <<http://www.pbs.org/wgbh/pages/frontline/shows/assault/billyjack/html>>.

<sup>146</sup> See *Soldier Allegedly Confessed to Killing*, CNN.com, Sept. 1, 1999 (visited Mar. 31, 2001) <<http://www.cnn.com/US/9909/01/soldier.death.01/html>>.

<sup>147</sup> See Chuck Barney, *Frontline's Look at Homophobia: Painful, But So Important*, CONTRA COSTA TIMES, Feb. 15, 2000.

<sup>148</sup> See *id.*

expected to punish others for their sexual preferences.<sup>149</sup> Enforced, or not, sodomy laws create a climate in which atrocities against homosexuals are committed by those who feel that they have a government stamp of approval. This section began by raising the question, "What's all the fuss?" Anyone who doubts that violence against homosexuals is not a substantial enough reason for repealing sodomy laws should pose the very same question to the parents of Matthew Shepard.

### III. THE WEAK ARGUMENTS FOR LAWS AGAINST SODOMY

Judicial invalidation of state sodomy statutes has given rise to several arguments that are repeated by proponents of such statutes in opposition to almost every effort to repeal or overturn them. These arguments are either fundamentally unsound or based on a bias that state courts cannot countenance. One of the most obvious and emotional of these arguments is based on the relationship between homosexual sodomy, HIV infection, and public health. Courts in Kentucky, Montana, and Tennessee have all considered this argument and rejected it in turn.<sup>150</sup>

The *Campbell v. Sundquist* decision provides a particularly good point of departure for a discussion of these arguments. In *Sundquist*, the court enumerated five arguments raised by the government that have become the hue and cry of anti-gay groups. The allegedly compelling state interests in proscribing homosexual sodomy were: (1) the discouragement of acts that cannot lead to procreation; (2) the discouragement of citizens from choosing a lifestyle that is stigmatized and leads to a higher rate of depression, suicide, and drug and alcohol abuse; (3) the discouragement of short-lived and shallow homosexual relationships initiated for the sole purpose of sexual gratification; (4) the promotion of the moral values of the citizens of Tennessee; and (5) the prevention of the spread of infectious diseases.<sup>151</sup>

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<sup>149</sup> See *id.*

<sup>150</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487, 500-01 (Ky. 1993) (rejecting claims that AIDS is a homosexual disease); see also *Gryczan v. State*, 942 P.2d 112, 123-25 (Mont. 1997) (rejecting the state's claim that statutes such as these are necessary to protect public health by containing the spread of AIDS); *Campbell v. Sundquist*, 926 S.W.2d 250, 262-65 (Tenn. App. 1996) (rejecting the alleged state interest in preventing the spread of infectious disease while promoting moral values).

<sup>151</sup> See *Sundquist*, 926 S.W.2d at 262.

The court, in analyzing the state's Homosexual Acts statute, applied strict scrutiny, and individually rejected all five of the asserted state interests on the basis that they were either not compelling, or the statute was not narrowly drawn to advance these interests.<sup>152</sup> First, the court dismissed the government's argument that the state had a compelling interest in discouraging sexual conduct that could not result in procreation.<sup>153</sup> *Griswold v. Connecticut*<sup>154</sup> established that the state may not outlaw certain intimate sexual activities because those activities do not or cannot lead to procreation.<sup>155</sup> Second, the court plainly stated that the state's attempt to save homosexuals from a socially unpopular lifestyle is neither a valid nor compelling reason to infringe on a fundamental right. Noting there is not one identifiable "homosexual lifestyle" in which a majority of homosexuals engage, the court likewise found the statute overly broad.<sup>156</sup> Third, with regard to the asserted short life and shallowness of homosexual relationships, the court found there was simply no evidence to support such a broad statement.<sup>157</sup> Fourth, the court dealt with the government's reference to the Court's assertion in *Bowers* that if all laws based on notions of morality were to "be invalidated under the Due Process Clause, the courts will be very busy indeed."<sup>158</sup> Acknowledging that many of the laws of the state of Tennessee reflect moral choices, the court recognized once "these 'moral choices' are transformed into law, they have constitutional limits."<sup>159</sup> Finally, like the Kentucky court in *Wasson* and the Montana court in *Gryczan v. State*,<sup>160</sup> the

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<sup>152</sup> See *id.* at 262-63.

<sup>153</sup> See *id.* at 263.

<sup>154</sup> 381 U.S. 479, 485 (1965).

<sup>155</sup> See *Sundquist*, 926 S.W.2d at 263.

<sup>156</sup> *Id.*

<sup>157</sup> See *id.*

<sup>158</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

<sup>159</sup> *Sundquist*, 926 S.W.2d at 264.

<sup>160</sup> The government interest asserted in *Gryczan* was protecting the public health from the spread of HIV. See *Gryczan v. State*, 942 P.2d 112, 123 (Mont. 1997). Like courts before it, the *Gryczan* court aptly pointed out that the statute in question was enacted almost ten years before the first case of AIDS was detected. In addition, the statute is limited to same-gender sexual activities, while HIV is easily spread through heterosexual activities. The statute also prohibits activities that do not spread HIV, such as touching, caressing, and kissing. Finally, the statute was applied equally to those not at risk of transmitting HIV, either because they are not infected with HIV, or because they practice safe sex. See *id.* at 124. The *Gryczan*



*Sundquist*<sup>161</sup> court agreed that preventing the spread of infectious disease was a compelling state interest but found the Act lacked the narrow tailoring required when fundamental rights were at stake.<sup>162</sup> The Act prohibited all sexual contact between people of the same gender, even if they are disease free, practice safe sex, or engage in contact that does not spread disease.<sup>163</sup> In fact, the court noted that such a statute was actually counterproductive to the goal of preventing the spread of infectious disease in that it would force some homosexuals, who are infected with sexually transmitted diseases, to forego treatment for fear of prosecution.<sup>164</sup>

Such arguments are equally refutable under a rational basis analysis. In *Wasson*, where a rational basis test was applied to Kentucky's anti-sodomy statute, the court summarized its rejection of such arguments by stating: "Simply because the majority, speaking through the general assembly, finds one type of extramarital intercourse more offensive than another, does not provide a rational basis for criminalizing the sexual preference of homosexuals."<sup>165</sup>

Instead of merely arguing there is no room for homosexual sodomy under the umbrella of privacy, some make a more

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court warned that criminalizing homosexual behavior is an ineffective deterrent and actually has a negative impact on disease prevention by causing individuals to conceal or distort important information. *See id.*

<sup>161</sup> While the court dismissed a litany of the government's proffered rational bases for its anti-sodomy statute, it gave special attention to one. The government argued that there was a legitimate government interest in controlling infectious disease and that diseases such as AIDS are more readily transmitted through acts of anal sodomy. *See Commonwealth v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1992). The court, however, revealed the fallacy of such an argument by showing: (1) the statute was not limited to acts of anal sodomy; (2) the reasoning should apply to acts of male-female anal sodomy, but the statute was limited to only same-sex acts; (3) AIDS is not only a male homosexual disease; and (3) the statute was enacted in 1974—eight years before AIDS was ever diagnosed. *Id.* at 501.

<sup>162</sup> *See Sundquist*, 926 S.W.2d at 263-65.

<sup>163</sup> *See id.* at 263. A further consideration is that heterosexual contact is now the leading mode of HIV transmission in the country. Incidence of newly reported AIDS cases is growing most rapidly among heterosexuals, increasing 500% during the period of 1985 to 1995. During the same period, newly reported cases of AIDS among male homosexuals declined by 20%. *See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; PUBLIC HEALTH SERVICE; CENTERS FOR DISEASE CONTROL AND PREVENTION; NATIONAL CENTER FOR HIV, STD, AND TB PREVENTION, HIV/AIDS SURVEILLANCE REPORT (1995) Vol. 7, No. 2.*

<sup>164</sup> *See Sundquist*, 926 S.W.2d at 263-64.

<sup>165</sup> *Wasson*, 842 S.W.2d at 502.

extreme argument for the legitimacy of anti-sodomy laws by questioning the very existence of the umbrella at all. One of the dissenting judges in *People v. Onofre* prefaced his dissent with the pronouncement that he did not believe that there was any generalized right of privacy or personal autonomy implicit in the Bill of Rights.<sup>166</sup> Focusing on the argument that the extension of the right of privacy to acts that take place in the privacy of one's home would lead to a ban on laws proscribing illegal drug use, the dissent warned of the future argument that "freedom to choose one's own form of sensory gratification within the confines of one's own home is a constitutionally protected 'fundamental' right . . ." <sup>167</sup> This argument is fundamentally flawed because, for homosexuals, sodomy is not a matter of choice, but a matter of biological necessity. There is virtually no other way that two homosexual men can respond to sexual urges without engaging in some form of sodomy. While some still believe homosexuality is a lifestyle choice, the bulk of the evidence proves otherwise.<sup>168</sup>

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<sup>166</sup> See *People v. Onofre*, 415 N.E.2d 936, 949 (N.Y. 1980) (Gabielli, J., dissenting).

<sup>167</sup> *Id.* (emphasis added).

<sup>168</sup> It had long been believed that homosexuals were the result of certain childhood influences such as overbearing mothers and missing or distant fathers. In 1981, the Kinsey institute refuted this long-held belief and concluded gender nonconformity in homosexuals occurred so early in childhood that it must be biological. See PANATI, *supra* note 4, at 129. It was not until nearly ten years later that the first empirical proof of this biological basis was discovered. Simon LeVay of the Salk Institute studied forty-one brains and found a portion of the hypothalamus of homosexual men was about half the size of that in heterosexual men. LeVay studied the interstitial nuclei of the anterior hypothalamus (INAH), a portion of the hypothalamus that differs markedly between men and women. What LeVay discovered was the INAH of homosexual men bore a striking structural resemblance to the INAH of women. Months earlier, a Dutch team of researchers discovered a similar anomaly in a small group of neurons in the hypothalamus, except that this bundle of neurons was substantially larger in homosexual men than in heterosexual men. See *id.* at 132-33. Simon LeVay, however, pointed to a potential weakness in his own study. The brains he studied all came from AIDS victims, and thus, he could not be sure that his observations were not the result of the disease or some other aspect of gay life. See William H. Henry, *Born Gay?* TIME MAGAZINE, July 26, 1993 at 37.

Another fascinating study that seemed to indicate a biological basis for homosexuality was carried out by a team of scientists from the National Cancer Institute's Laboratory of Biochemistry in 1993. In a study of the families of seventy-six gay men, the team observed that the incidence of male homosexuality in these families was much higher than in the general population. In addition, this disproportion occurred largely on the mother's side of the family. See *id.* at 36. In a separate study of gay brothers, scientists discovered patches of identical genetic material grouped around the brothers' X chromosomes. Statistically, the chance

The fact is, people do have a choice among various legal forms of sensory gratification. Alcohol of varying proofs and prescription and non-prescription drugs of varying strengths, such as Xanax, Valium, Ephedrin, and Ionamin may be legally used to alter one's mood in the privacy of one's home. The same choice between legal and illegal sexual conduct does not exist for homosexuals.

The primary defining characteristic of homosexuals is who they have sex with, and, as a result, the nature of their sexual encounters.<sup>169</sup> Therefore, what sexual practices homosexuals engage in is not merely one choice in a vast array of choices that defines them as a homosexuals, it is the *only* choice.<sup>170</sup>

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that brothers would both share this genetic information and be homosexual is too unlikely to be coincidence. *See id.* at 37. (Noting the brothers did not share any other trait such as eye color, hair color, or shoe size that might also account for the genetic similarity.) Another study of homosexual male identical twins showed that they had a 50 percent chance of also being gay. A chance far greater than that between fraternal twins or other siblings. *See id.*

The biological-behavioral distinction is important because the more homosexuality takes on the profile of a biological condition "like sickle-cell anemia or male pattern baldness, the less sense it makes to place it under restrictions designed to protect children from succumbing to its allures." POSNER, *supra* note 3, at 295. "Some legal scholars think that if gays can establish a genetic basis for sexual preference, like skin color or gender, they may persuade judges that discrimination is unconstitutional." *See* Henry, *supra* at 38. These findings may, however, be a double-edged sword in that the identification of a "gayness gene" may cause some to tinker with the genetic code in an effort at intra-uterine, sexual orientation based genocide. *Id.* at 39.

Over the years, many "cures" for homosexuality have been suggested and attempted, including testicular castration, electroshock therapy, and exposure of the glands to high doses of X-ray radiation. One of the more popular cures was lobotomy. *See* PANATI, *supra* note 4, at 195. Between 1930 and 1950, Dr. Walter J. Freeman performed a procedure in which he first stunned homosexuals with an electric shock to the head and then hammered an ice pick through the thin bone above the eye socket. A minute or two of random twisting destroyed enough of the frontal lobe to achieve the desired effect—the conversion of vibrant homosexuals into docile, sexless zombies. Freeman believed that "[l]obotomized patients ma[de] good American citizens . . . [and that] the operation has potential for controlling society's misfits—schizophrenics, homosexuals and radicals." *Id.* at 195–96. Over 19,000 of these procedures were performed. The use of this ghastly procedure is especially disturbing when one considers that in 1974, the American Psychiatric Association removed homosexuality from its manual of psychiatric disorders. *Id.* at 197.

<sup>169</sup> This is not to suggest that there are not many other factors that identify homosexuals as a group, including complex social and cultural factors. These factors arise, however, from the primary distinction between heterosexuals and homosexuals, sexual preference.

<sup>170</sup> It is important to note that "choice" is used in this context to mean a choice

Homosexuals do not have a wide range of choices in terms of sexual behavior, where some would be legal and some would not. Depending on how one defines "sex," the effect of anti-sodomy laws is to make virtually every type of homosexual sexual activity illegal. Unlike the person who wishes to use drugs for sensory gratification, the homosexual has no continuum of choices. In *People v. Sheppard*,<sup>171</sup> the New York Court of Appeals ruled that use of marijuana in the privacy of one's home was not protected by the right of privacy.<sup>172</sup> The dissent argued that the position of the majority in *Onofre* was inconsistent with this ruling. It was, however, easy for the court to distinguish the holding in *Shepard* from the position it took in *Onofre*. Citing the fact that there had been no showing that private acts of consensual sodomy were harmful to the participants, the court stated that there exists a body of evidence that marijuana use is indeed harmful and that the decision in *Shepard* was predicated on this evidence.<sup>173</sup>

Proponents of anti-sodomy legislation point out that while the government may not become involved in issues of private morality, it is a common role of the legislature to enact laws that preserve and promote public morality. As this is true, it is equally true that proponents have not made a convincing argument that demonstrates how governmental interference in the most intimate of matters advances the cause of public morality.<sup>174</sup> Foreshadowing the rationale that would form the basis of the *Romer v. Evans*<sup>175</sup> decision, the New York court in *Onofre* warned that feelings of distaste, even by a majority, are no substitute for a valid and rational basis for such extreme intrusion into the private lives of Americans.<sup>176</sup>

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between an array of same-sex practices, not a choice between homosexuality and heterosexuality. The inability to choose one's sexual orientation is discussed *supra* note 168.

<sup>171</sup> 409 N.E.2d 840 (N.Y. 1981).

<sup>172</sup> *Id.* at 366.

<sup>173</sup> See *People v. Onofre*, 415 N.E.2d 936, 938 (N.Y. 1980). *Onofre* was decided years before the AIDS epidemic began to wreak havoc on the gay community. See generally *supra* note 21.

<sup>174</sup> See *id.*

<sup>175</sup> 517 U.S. 620 (1996).

<sup>176</sup> See *Onofre*, 415 N.E.2d at 938.

## IV. THE PROBLEM WITH PRIVACY

An analysis of the cases dealing with the constitutionality of sodomy laws reveals the chameleon-like nature of the right of privacy. Some state courts define this right in direct opposition to the Supreme Court's position. Furthermore, this right has been expressed as everything from a relatively conservative impediment on police power,<sup>177</sup> to an absolute proscription on governmental involvement in the sex lives of its citizens.<sup>178</sup> It is well established that the right of privacy is a product of judicial fiat, and as a result, its definition will vary in different courts and different jurisdictions. Despite the Supreme Court's claim to the contrary, every time a court is called upon to apply this right, the court is in some sense acting as a super-legislature. As a result, privacy cannot be the proper basis for determining the constitutionality of a fundamentally important practice by a highly despised minority. Homosexuals will never have their sexual freedom fairly determined if courts charged with applying the right of privacy to the statutes that impede such freedom recast the right with every change of the judiciary and public opinion.

Faced with the prospect of having to apply strict scrutiny analysis to all future issues of homosexual discrimination, it was easy for the Supreme Court to put an end to the expansion of privacy rights at the critical moment in the gay rights movement presented by *Bowers*. Because there is no textual basis for the right of privacy in the Constitution, the Court could not be second-guessed in suddenly discovering the terminus of this right. The Court, in effect, adopted Justice Stewart's syllogism by saying, "we don't know what the right to privacy is, but we'll know it when we see it."<sup>179</sup> Such soft-edged reasoning is the perfect weapon against despised minorities in that it can effectively be used to perpetuate discrimination against them without leaving the smoking gun of a clearly erroneous judicial decision.

The nebulous jurisprudential right of privacy is, however, a

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<sup>177</sup> See *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998).

<sup>178</sup> See *id.* at 22.

<sup>179</sup> In *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J., concurring), Justice Stewart said of his ability to arrive at a definition of obscenity: "[P]erhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Id.* at 197.

double-edged sword. As was later observed by Justice Powell,<sup>180</sup> the dissenters in *Bowers* were able to use the very same privacy jurisprudence to make an even more compelling argument for extending the right of privacy to include homosexual sodomy. The dissenters identified two distinct, but complementary, lines in the development of the right of privacy.<sup>181</sup> First, there is a privacy interest that accrues with reference to certain decisions that are entirely up to an individual, without governmental or societal input,<sup>182</sup> and second, a privacy interest is innate to certain places without regard to the particular activity carried out in that place.<sup>183</sup> The *Bowers* case pivots on both of these distinct strands of the concept of constitutional privacy.<sup>184</sup> Because of the broad territory that these strands cover, it is virtually impossible for a court to draw any bright line around the boundaries of the right of privacy. What is left behind is a test that is not a test, and a right that waxes and wanes with the political environment of the times.

The Warren Court invented the right of privacy.<sup>185</sup> Under the Rehnquist Court, this right became the basis of "a judicial power to dictate moral codes of sexual conduct for the entire nation."<sup>186</sup> The *Bowers* Court acknowledged that the right of privacy has no textual support in the Constitution,<sup>187</sup> but paid considerable attention to assure us that the application of such a right is much more than the imposition of the Justices' own values on the states and the federal government.<sup>188</sup> Despite its assertion that the Court was not acting as some super-legislature in defining this right, there is little in the *Bowers* decision to support this position. Stating in the extreme his objection to the judicial fiat inherent in the right of privacy,

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<sup>180</sup> See Agneshwar, *supra* note 23, at 3.

<sup>181</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 203-04 (1986) (Blackmun, J., dissenting).

<sup>182</sup> See *id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973)); see also *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>183</sup> See, e.g., *United States v. Karo*, 468 U.S. 705, 714 (1984); *Payton v. New York*, 445 U.S. 573, 585 (1980).

<sup>184</sup> See *Bowers*, 478 U.S. at 204.

<sup>185</sup> See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 110 (1990) (discussing the development of the right of privacy by subsequent courts).

<sup>186</sup> *Id.* (explaining that the Supreme Court seemed to assert that society had little interest in such matters).

<sup>187</sup> See *Bowers*, 478 U.S. at 191.

<sup>188</sup> See *id.*; see also BORK, *supra* note 185, at 118.

Robert Bork wrote: "When constitutional law is judge-made and not rooted in the text or structure of the Constitution, it does not approach illegitimacy, it *is* illegitimate . . ."189

This illegitimacy is illustrated by the Court's reliance on *Palko v. Connecticut*,<sup>190</sup> in stating that fundamental liberties are those "implicit in the concept of ordered liberty,"<sup>191</sup> and *Moore v. East Cleveland*,<sup>192</sup> in stating that these fundamental freedoms are those that are "deeply rooted in this Nation's history and tradition."<sup>193</sup> Such rarefied statements reveal the vaporous nature of the Court's privacy jurisprudence.<sup>194</sup> In contrast to the Bill of Rights, which, at the very least, provides a starting point for the individual rights it defines, e.g., freedom of speech, freedom to bear arms, etc., the phrases relied on to define the right of privacy specify no particular freedom, "but merely assure us . . . that they, the judges, will know what freedoms are required when the time comes."<sup>195</sup> The Justices' reliance on tradition and history creates a binding authority over the Court that has no constitutional support. History may certainly highlight the wisdom and mistakes of the past, but there is no constitutional authority that requires the Court to blindly follow history when there is no good reason to continue to do so.<sup>196</sup>

Unlike the right of privacy, equal protection has a clear textual basis in the Constitution. Furthermore, while the substantive due process that gives rise to the right of privacy is often accused of subverting the majority's ability to enact legislation, the same cannot be said of equal protection, which "simply requires that the majority apply its values evenhandedly."<sup>197</sup> It is for these reasons that courts faced with

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<sup>189</sup> BORK, *supra* note 185, at 119-20.

<sup>190</sup> 302 U.S. 319, 329 (1937) (affirming petitioner's death sentence because the state statute allowing the state to appeal a criminal case did not violate "fundamental principles of liberty and justice" when done to ensure a trial free from substantial legal error, and therefore did not violate the Fourteenth Amendment).

<sup>191</sup> *Id.* at 325.

<sup>192</sup> 431 U.S. 494 (1977) (holding unconstitutional a local ordinance preventing a woman from having her grandchild live with her because it violated due process protections by intruding upon family sanctity, and because the ordinance had only "a tenuous relationship to [the] alleviation of the conditions mentioned by the city").

<sup>193</sup> *Id.* at 503.

<sup>194</sup> See BORK, *supra* note 185, at 118.

<sup>195</sup> *Id.*

<sup>196</sup> See *id.* at 119.

<sup>197</sup> *Watkins v. United States Army*, 875 F.2d 699, 720 (9th Cir. 1989) [hereinafter *Watkins II*].

the issue of homosexual sodomy must abandon the amorphous right of privacy and base their analysis on equal protection.

#### V. EQUAL PROTECTION AND THE ARGUMENT FOR SUSPECT CLASSIFICATION

Rejecting privacy for fear that courts will assume the role of a super-legislature,<sup>198</sup> advocates turn to equal protection as the better constitutional theory under which to analyze the validity of anti-sodomy statutes. If it is to be conceded that the right of privacy cannot be applied such that homosexual sodomy will be uniformly recognized as a fundamental right, then it must also be conceded that a court will not apply strict scrutiny in its equal protection analysis unless it is established that homosexuals are a suspect class. Such classification would guarantee that any equal protection analysis applied to a sodomy statute would utilize strict scrutiny as the standard of review, regardless of whether homosexual sodomy is considered a fundamental right.

Though the *Bowers* majority did not entertain the question of an equal protection violation, the dissent addressed it in a long footnote.<sup>199</sup> Pointing to Georgia's desire to prosecute only homosexuals under its sodomy statute despite the statute's gender-neutral terms, the dissent noted the possibility of an equal protection violation in the form of discriminatory enforcement. The Court previously declared such discriminatory enforcement unconstitutional in *Yick Wo v. Hopkins*,<sup>200</sup> and determined that the state had an obligation to support a policy of selective application of its laws on a neutral and legitimate basis.<sup>201</sup> In a sentiment that would be echoed in *Romer v. Evans*,<sup>202</sup> the *Bowers* dissenters argued the state must articulate "something more substantial than a habitual dislike for, or ignorance about, [a] disfavored group"<sup>203</sup> as justification for

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<sup>198</sup> See *Powell v State*, 510 S.E.2d 18, 31 (Ga. 1998).

<sup>199</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 203 n.2 (1986) (Blackmun, J., dissenting).

<sup>200</sup> 118 U.S. 356, 373-74 (1886) (holding unconstitutional the exclusive enforcement against Asian laundry owners of a facially fair San Francisco ordinance prohibiting the operation of a laundry service in wooden buildings).

<sup>201</sup> See *Bowers*, 478 U.S. at 218 (Stevens, J., dissenting).

<sup>202</sup> 517 U.S. 620, 634-35 (1995) (stating that "at the very least . . . a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest").

<sup>203</sup> *Bowers*, 478 U.S. at 219.



disparate treatment. Most interesting about this reference to equal protection, is the dissent's suggestion that it would be possible to address such a claim without reaching the controversial question of whether homosexuals are a suspect class.<sup>204</sup> It is in this observation that the Court tips its hand. Avoiding the question of whether homosexuals meet the test for a suspect, or quasi-suspect class was undoubtedly a strategic decision on the part of the Court. The majority realized the degree of difficulty they would have in applying the test for suspect classification and concluding that homosexuals were not part of such a class. Instead, the Court wanted to base the question on the much more malleable, court-created right of privacy. In doing so, the Court was able to forestall the possibility of having to apply strict scrutiny analysis to all future issues of homosexual discrimination, a proposition that would undoubtedly become a political football and raise the ire of the more conservative Justices.

Several state courts have performed an equal protection analysis on their state's sodomy statute. In a concurring and dissenting opinion in *Gryczan*, Chief Justice Turnage provided an interesting perspective on the question of whether the more effective means of attacking a sodomy statute is via privacy or equal protection. Though agreeing with the court's overturn of Montana's same-sex sodomy statute, Justice Turnage felt it was unnecessary and unwise for the decision to be based on the right of privacy.<sup>205</sup> Reasoning that equal protection was a far broader constitutional right, the Chief Justice argued that the Montana same-sex sodomy statute would not pass rational basis review in an equal protection analysis.<sup>206</sup> Justice Turnage expressed concern that the privacy theory espoused by the court would invite a challenge to the state's statutes prohibiting assisted suicide, stating "there is something in the lives of people equally private and more important—the right to life or death."<sup>207</sup>

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<sup>204</sup> See *id.* at 203 n.2. The *Bonadio* court encountered this question six years earlier, and likewise exhibited a weak stomach for the possibility of declaring homosexuals a suspect class. Instead, the court assumed no fundamental right was at stake and limited its equal protection analysis to rational basis review. It found, however, that an anti-sodomy law like Georgia's could not pass rational basis review. See *Commonwealth v. Bonadio*, 415 A.2d 47, 51 (Pa. 1980).

<sup>205</sup> See *Gryczan v. State*, 942 P.2d 112, 126 (Mont. 1997).

<sup>206</sup> See *id.* at 126–27.

<sup>207</sup> *Id.* at 127.

In *Onofre*, when the New York Court of Appeals turned to the question of equal protection, the court observed that section 130.38 of the New York Penal Code was facially discriminatory. Because the statute treated married and unmarried people differently, the government was obliged to prove a rational basis for the differential treatment.<sup>208</sup> The only rationale proffered by the government was the protection and nature of the institution of marriage.<sup>209</sup> The court not only found no rational relationship between anti-sodomy laws and the protection of marriage, but it also determined there was no relationship at all.<sup>210</sup> Because the statute failed the less stringent rational basis test, the question of whether strict scrutiny was the more appropriate level of review became moot.<sup>211</sup>

In *Commonwealth v. Bonadio*<sup>212</sup> court also performed the equal protection analysis that the Supreme Court, years later, would decline to perform. The essence of the equal protection analysis by the court was simple and brief, but to the point; the state may treat different classes of people in different ways, but such classifications may not be arbitrary and must be rationally related to a legitimate state interest. Because the Pennsylvania anti-sodomy statute made certain sexual conduct between unmarried couples illegal that was otherwise legal between married couples, the state created a class based on marital status, which, under the statute, would be treated differently. The court correctly found, however, that the "marital status of voluntarily participating adults . . . bear[s] no rational relationship to whether a sexual act should be legal or criminal."<sup>213</sup>

Despite the above examples, it is difficult to prevail in a challenge to a statute when a court is merely applying rational basis review. Such a lenient standard gives a court considerable latitude, and this latitude can often be used to disguise moral opinions as judicial decisions. Designating a group a suspect class becomes necessary when that group is "saddled with disabilities, or subjected to a history of purposeful unequal

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<sup>208</sup> See *People v. Onofre*, 415 N.E.2d 936, 943 (N.Y. 1980).

<sup>209</sup> See *id.*

<sup>210</sup> See *id.*

<sup>211</sup> See *id.* n.6.

<sup>212</sup> See *Commonwealth v. Bonadio*, 415 A.2d 47, 51 (Pa. 1980) (citing *Moyer v. Phillips*, 341 A.2d 441, 443 (Pa. 1975)).

<sup>213</sup> *Id.*

treatment, or relegated to a position of political powerlessness."<sup>214</sup> For this reason, homosexuals must be granted suspect class status. Such status would protect homosexuals from discrimination in the face of anti-sodomy statutes without having to rely on a court to first determine that homosexual sodomy falls into the category of a fundamental right. It likewise holds the court to a level of analysis not easily subverted by religious or moral bias.

Suits against the military for denial of re-enlistment because a service member's homosexuality became the background against which several district courts considered the question of applying suspect or quasi-suspect classification to homosexuals.<sup>215</sup>

#### A. High Tech Gays

For a short time, at least in the Ninth Circuit, homosexuals were considered a suspect class. In *High Tech Gays v. Defense Industrial Security Clearance Office*,<sup>216</sup> a Ninth Circuit district court held "gay people are a 'quasi-suspect class' entitled to heightened scrutiny."<sup>217</sup> The issue in *High Tech* was whether the Department of Defense practice of refusing to grant homosexuals secret and top secret security clearances violated their equal protection rights.<sup>218</sup> The Department of Defense guidelines classified homosexuality as deviant sexual conduct, placing it in the same category as bestiality, necrophilia, and pedophilia.<sup>219</sup> First, the court established that *Bowers* had no bearing on the question of whether homosexuals constitute a suspect class.<sup>220</sup>

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<sup>214</sup> *Able I*, 968 F. Supp. 850, 862 (E.D.N.Y. 1997).

<sup>215</sup> See generally, *Able v. United States*, 155 F.3d 628 (2d Cir. 1998) [hereinafter *Able II*]; *Able I*, 968 F. Supp. 850 (E.D.N.Y. 1997); *High Tech Gays v. Defense Indus. Security Off.*, 895 F.2d 563 (9th Cir. 1990) [hereinafter *High Tech II*]; *Watkins II*, 875 F.2d 699 (9th Cir. 1989); *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988) [hereinafter *Watkins I*]; *High Tech Gays v. Def. Indus. Security Off.*, 668 F. Supp 1361 (N.D. Cal. 1987) [hereinafter *High Tech I*].

<sup>216</sup> 668 F. Supp 1361 (N.D. Cal. 1987).

<sup>217</sup> *Id.* at 1368.

<sup>218</sup> See *id.* at 1362-63.

<sup>219</sup> See *High Tech II*, 895 F.2d at 568.

<sup>220</sup> See *High Tech I*, 668 F. Supp at 1368-69 ("*Hardwick* does not address the level of scrutiny classifications that disadvantage[d] lesbians and gay men should receive under the equal protection clause. *Hardwick* holds only that under the due process clause lesbians and gay men have no fundamental right to engage in sodomy.") (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

Then the court relied on the factors recited by the Supreme Court in *City of Cleburne v. Cleburne Living Center, Inc.*<sup>221</sup> to determine the proper considerations in designating a suspect class.<sup>222</sup> In applying these factors to this particular case, the *High Tech* court took the position that “[l]esbians and gay men have been the object of some of the deepest prejudice and hatred in American society. Some people’s hatred for gay people is so deep that many gay people face the threat of physical violence on American streets today.”<sup>223</sup> In addition, the court declared that “[w]holly unfounded, degrading stereotypes about lesbians and gay men abound in American society.”<sup>224</sup> The court found these attitudes toward gay people represent the “prejudice and antipathy” that the Supreme Court warned of in *Cleburne*.<sup>225</sup> Furthermore, notions about homosexuality are so outmoded that they are analogous to the equally outmoded notions of the relative capabilities of the sexes, notions that lead to the application of heightened scrutiny in cases of classification based on gender.<sup>226</sup> The court further determined that the relative political weakness of homosexuals caused them to be the “discrete and insular minority” warned of in *Carolene Products Co. v. United States*.<sup>227</sup>

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<sup>221</sup> 473 U.S. 432, 442–43 (1985) (holding mental retardation is not a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation, but applying a heightened rational basis review and determining there was no rational basis for believing a home for the mentally handicapped would pose any special threat to the city’s legitimate interests).

<sup>222</sup> One of the characteristics of a suspect class is the immutability of the trait that designates the class. A debate rages over whether homosexuality is an immutable trait, with one court determining that it is not, but with mounting evidence that the “cause” of homosexuality is largely biological. See *High Tech II*, 895 F.2d at 573. The *Able* court points out that “immutability is merely one of several possible indications that a classification is likely to reflect prejudice,” and although alienage is not immutable, aliens are still considered a suspect class. *Able I*, 968 F. Supp. at 863.

<sup>223</sup> *High Tech I*, 668 F. Supp. at 1369.

<sup>224</sup> *High Tech I*, 668 F. Supp. at 1369.

<sup>225</sup> 473 U.S. at 439.

<sup>226</sup> See *High Tech I*, 668 F. Supp. at 1369.

<sup>227</sup> See 304 U.S. 144, 152–53 n.4 (1938). This footnote has been hailed as “the most celebrated footnote in constitutional law.” Justice Lewis Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) (stating footnote four of the *Carolene* decision set the stage for the Court’s future adoption of heightened levels of scrutiny when “prejudice against discrete and insular minorities” were involved).

This application of the heightened scrutiny standard was short-lived for homosexuals. In early 1990, the Court of Appeals for the Ninth Circuit reversed the *High Tech I* court, at least with respect to granting homosexuals suspect class status.<sup>228</sup> The *High Tech II* court enumerated the characteristics necessary for granting a group suspect, or quasi-suspect class, status the group must: (1) have suffered a history of discrimination; (2) display obvious, immutable or distinguishing characteristics that set them apart as a group; and (3) be a minority or otherwise politically powerless. Without authority, the *High Tech II* court took on the role of psychologist and social scientist and declared homosexuals are not a suspect class, because "[h]omosexuality is not an immutable characteristic . . . it is behavioral . . ." <sup>229</sup> This statement is inaccurate, irresponsible, and reveals a frightening bias, because the "cause" of homosexuality is unknown. But there is dramatic and compelling evidence suggesting it may be biological in nature.<sup>230</sup> The suspect class designation enjoyed by homosexuals under *High Tech I* was, therefore, eliminated by this debatable statement.

The *High Tech II* court also made the argument that legislatures throughout the country have passed anti-discrimination legislation favorable to homosexuals, and therefore, homosexuals could not be viewed as politically powerless.<sup>231</sup> The hollowness of this argument becomes especially apparent in light of the subsequent passage of Colorado's Constitutional Amendment 2<sup>232</sup> and the successful passage of an anti-homosexual statute in Cincinnati.<sup>233</sup>

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<sup>228</sup> See *High Tech II*, 895 F.2d at 563.

<sup>229</sup> *Id.* at 573 (emphasis added).

<sup>230</sup> See *supra* note 168.

<sup>231</sup> See *High Tech II*, 895 F.2d at 574.

<sup>232</sup> Amendment 2 provides:

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

COLO. CONST., art. II, § 30b.

<sup>233</sup> Article XII of the City Charter of Cincinnati provides:

B. *Watkins I & II*

In *Watkins I*,<sup>234</sup> a service member with a model record, who served in the army for twenty years, was denied re-enlistment because he was a homosexual. From the beginning of his military service, Watkins freely and repeatedly admitted that he was a homosexual. Despite this, he successfully re-enlisted, received high-level security clearance, and received perfect scores in reviews by his superiors.<sup>235</sup> The Court of Appeals for the Ninth Circuit considered the question of whether the refusal of Watkin's re-enlistment constituted an equal protection violation. In doing so, the court identified several factors the Supreme Court considers in identifying a suspect class. The factors identified were: (1) whether the group has suffered a history of purposeful discrimination;<sup>236</sup> (2) whether the disadvantaged class shares an immutable characteristic that bears no relation to the group's ability to perform or contribute to society;<sup>237</sup> and (3) whether the group lacks the political power necessary to obtain redress from official discrimination.<sup>238</sup>

The court performed an extensive analysis of these factors with regard to homosexuals. First, the court recognized that "homosexuals have historically been the object of pernicious and

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No special class status may be granted based upon sexual orientation, conduct, or relationships. The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Cincinnati, Ohio, City Charter, art. XII.

<sup>234</sup> 847 F.2d 1329 (9th Cir. 1988).

<sup>235</sup> See *id.* at 1330-33.

<sup>236</sup> See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985); *San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1, 28 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973).

<sup>237</sup> See *Watkins I*, 847 F.2d at 1345-46; see also *Frontiero*, 411 U.S. at 686. The *Watkins I* court identified this factor as "a cluster of factors grouped around a central idea—whether the discrimination embodies a gross unfairness that is sufficiently inconsistent with the ideals of equal protection to term it invidious." *Watkins I*, 847 F.2d at 1345-46.

<sup>238</sup> See, e.g., *Cleburne*, 473 U.S. at 441; *Rodriguez*, 411 U.S. at 28.

sustained hostility."<sup>239</sup> In addition, homosexuals have been frequent victims of violence and discrimination in terms of jobs, schools, housing, and even churches.<sup>240</sup> The court found the intensity of such discrimination equal to that experienced by other groups already treated as suspect class.<sup>241</sup> Second, the court found that sexual orientation bears no relevance to a person's ability to perform particular tasks or contribute meaningfully to society.<sup>242</sup> The government argued that the "opprobrium directed toward [homosexuals] does not represent prejudice in the pejorative sense of the word but rather represents appropriate public disapproval of persons who engage in immoral behavior."<sup>243</sup> The government's argument was simply, "[H]omosexuals, like burglars, cannot form a suspect class because they are criminals."<sup>244</sup> The court, however, revealed the two fallacies of such a position. First, the regulation at issue in *Watkins* prevented re-enlistment of any service member exhibiting homosexual *orientation*. The court correctly pointed out that "homosexual orientation itself has never been criminalized in this country."<sup>245</sup> No more than the mere desire to burglarize has ever been criminalized. Second, the statute at issue in *Watkins* covered conduct other than sodomy, such as kissing and hand-holding.<sup>246</sup>

The court next addressed immutability.<sup>247</sup> Though the Supreme Court has often focuses on immutability,<sup>248</sup> it has never held that a suspect class must exhibit an immutable trait.<sup>249</sup>

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<sup>239</sup> *Watkins I*, 847 F.2d at 1345 (quoting *Rowland v. Mad River Loc. Sch. District*, 470 U.S. 1009, 1014 (1985)). Quoting Justice Brennan, the *Able* court realized "homosexuals have historically been the object of pernicious and sustained hostility . . . [and] members of this group are particularly powerless to pursue their rights in the public arena." *Able I*, 968 F. Supp. 850, 862-63 (E.D.N.Y. 1997) (quoting *Rowland*, 470 U.S. at 1014 (Brennan, J., dissenting from denial of writ of certiorari)).

<sup>240</sup> See *Watkins I*, 847 F.2d at 1345.

<sup>241</sup> See *id.*

<sup>242</sup> See *id.* at 1346.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> See *id.*

<sup>247</sup> See *High Tech II*, 895 F.2d at 573.

<sup>248</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 220 (1981); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>249</sup> In *Cleburne*, the Court doubted the requirement of immutability, and listed the characteristics of a suspect class without mention of immutability. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41, 442 n.10 (1985).

Though the causes of homosexuality are unknown, research indicates that an individual has little control over his or her sexual orientation, and, that once established, a person's sexual orientation is largely impervious to change.<sup>250</sup>

Regardless of the outcome of scientific research into the question of the cause of homosexuality, the *Watkins I* court urged a view of immutability that "describe[s] those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them . . ." <sup>251</sup> In an elegantly simple test, the court asked "whether *heterosexuals* feel capable of changing *their* orientation," posing a rhetorical question as an answer to the inquiry into the immutability of sexual orientation.<sup>252</sup> In other words, if a city passed an ordinance banning all sexual activity except same-sex activity, would heterosexuals be able to abstain from heterosexual activity and shift the object of their desire to members of the same sex?<sup>253</sup>

In analyzing the third characteristic of a suspect class, the *Watkins I* court focused on the fact that the social, economic, and political pressure placed on homosexuals to conceal their sexual orientation prevents many of them from advocating pro-homosexual legislation, and contributes to their "inability to make effective use of the political process."<sup>254</sup> Even when homosexuals do manage to participate in the political process, the prejudice towards them renders such participation largely ineffective.<sup>255</sup> These barriers to political participation are further evidenced by under-representation by openly gay representatives in the country's legislative bodies.<sup>256</sup> A common argument against this position is that homosexuals cannot be politically powerless because several states and municipalities

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<sup>250</sup> See *Watkins I*, 847 F.2d at 1347. The number of homosexuals in society is highly debated. Alfred C. Kinsey, in his 1948 study, *Sexual Behavior in the Human Male*, estimated that ten percent of the male population was homosexual. Others, however, have interpreted the Kinsey results as indicating that six percent of adult men and two percent of adult women are homosexual. See POSNER, *supra* note 3, at 294. As controversial as the size of the homosexual population is the so-called "born or bred" controversy. See *supra* note 168.

<sup>251</sup> *Watkins I*, 847 F.2d at 1347.

<sup>252</sup> *Id.* (emphasis added).

<sup>253</sup> See *id.*

<sup>254</sup> *Id.* at 1348.

<sup>255</sup> See *id.*

<sup>256</sup> See *id.* at 1349.



have passed laws prohibiting discrimination against homosexuals.<sup>257</sup> The fact remains, however, that the number of states and municipalities that have such statutes are disproportionately small, and that no such legislation exists on the federal level. *Watkins* was reheard *en banc*.<sup>258</sup> While the court reached the same result, compelling *Watkins*' re-enlistment, they arrived at their conclusion strictly on the basis of equitable estoppel and never reached the issue of equal protection.<sup>259</sup> In a concurring opinion, however, Judge Norris, who wrote the decision in *Watkins I*, reiterated his belief that equal protection was the proper basis for evaluating the case, and that homosexuals are entitled to suspect classification.<sup>260</sup>

### C. *Able v. United States*

Relying on the momentum created by the Supreme Court's decision in *Romer v. Evans*,<sup>261</sup> *Able v. United States*<sup>262</sup> marks the last time a federal court suggested homosexuals be designated a suspect class.<sup>263</sup> *Able* was a challenge to the military's "Don't Ask, Don't Tell" policy<sup>264</sup> by six homosexuals, who were members of the Armed Forces.<sup>265</sup> The court began its analysis by reviewing a host of regulations already in place, which deterred all types of sexual conduct between service members, including acts of sodomy.<sup>266</sup> The court reasoned that because of the expansive nature of the existing regulations, there was no need

<sup>257</sup> See, e.g., N.Y. CODE OF PROF'L RESPONSIBILITY, D.R. 1-102(6) (McKinney 1999).

<sup>258</sup> See *Watkins II*, 875 F.2d at 699.

<sup>259</sup> See *id.* at 711.

<sup>260</sup> In fact, the concurrence in *Watkins II* is almost identical to the *Watkins I* decision. Compare *Watkins II*, 875 F.2d at 711-28, with *Watkins I*, 847 F.2d at 1336-49.

<sup>261</sup> 517 U.S. 620 (1996) (striking down a Colorado state constitutional amendment prohibiting homosexuals from obtaining state and local protection against discrimination as violative of the Federal Constitution's Equal Protection Clause).

<sup>262</sup> 968 F. Supp. 850 (E.D.N.Y. 1997).

<sup>263</sup> See *id.* at 862-63.

<sup>264</sup> See 10 U.S.C. § 654(b)(1) (1994) (requiring the dismissal of any service member who "has engaged in or solicited another to engage in a homosexual act . . . [unless they can demonstrate that they do] not have a propensity or intent to engage in homosexual acts." *Id.* "Homosexual act" was further defined as "any bodily contact . . . between members of the same sex for the purpose of satisfying sexual desires" *Id.* § 654(f)(3) (emphasis added)).

<sup>265</sup> See *Able I*, 968 F. Supp. at 851.

<sup>266</sup> See *id.* at 856-57.

to add the "Don't Ask, Don't Tell" policy for the purpose of deterring homosexual conduct.<sup>267</sup> The court observed that the policy allowed the Armed Forces to dismiss someone who holds hands with or kisses someone of the same sex, even if done off base and in private, but imposed no such sanction on heterosexuals who engage in the same activities with someone of the opposite sex.<sup>268</sup> This observation by the court succinctly framed the issue as a question of equal protection. While the court professed great deference to Congress's decisions regarding the military, it warned that military regulations are not exempt from the operation of the Constitution's Equal Protection Clause.<sup>269</sup>

The government offered a number of legitimate state interests to support its basis for treating homosexuals differently than heterosexuals.<sup>270</sup> These interests arguably amounted to nothing more than pandering to the personal prejudice of heterosexual service members against homosexuals.<sup>271</sup> In response to the state's asserted interests, the *Able* court displayed a compassionate wisdom lacking in many decisions regarding the rights of homosexuals, when it stated: "A court should ask itself what it might be like to be a homosexual."<sup>272</sup>

Observing that most legislation classifies groups of people for one purpose or another, the *Able* court determined that if the "Don't Ask, Don't Tell" policy does not affect a fundamental right or classify on the basis of a suspect class, it need only apply rational basis review in its equal protection analysis.<sup>273</sup> The conclusion drawn by the *Able* court was that the "Don't Ask,

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<sup>267</sup> See *id.* at 857.

<sup>268</sup> See *id.*

<sup>269</sup> See *id.*

<sup>270</sup> See *id.* at 858. The government claimed the Act would "foster unit cohesion, promotes the privacy of heterosexuals, and reduce sexual tensions." *Id.*

<sup>271</sup> See *id.* at 859. The court extensively quoted *Philips v. Perry*, 106 F.3d 1420, 1436 (9th Cir. 1997), noting the desire to accommodate citizens' personal or religious objections to homosexuality could not be a rational basis for upholding Colorado's Amendment 2. See *Romer v. Evans*, 517 U.S. 620, 633-36 (1996); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 421, 448 (1985) (holding the stereotype-driven fears of a group of home owners was not a rational basis for rejecting a zoning permit to a home for the mentally retarded); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding the desire to protect a child from racial prejudice was not a legitimate basis for awarding custody of a child to a same-race couple over an interracial couple).

<sup>272</sup> *Able I*, 968 F. Supp. at 861.

<sup>273</sup> See *id.* (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

Don't Tell" policy failed even rational basis analysis and was therefore unconstitutional.<sup>274</sup> The court went further and argued homosexuals meet the criteria for a group warranting suspect classification because they are a discrete and insular minority faced with prejudice that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>275</sup>

On appeal, the Court of Appeals for the Second Circuit reversed the district court on finding, at least in a military setting, the legitimate interests suggested by the government did satisfy rational basis review.<sup>276</sup> The Second Circuit alluded to the chicanery in which the Supreme Court sometimes engages in a vain attempt to weld the lid back onto the can of worms opened by the Court's prior expansion of suspect classes.<sup>277</sup> In citing *Romer, Cleburne, and Palmore v. Sidoti*,<sup>278</sup> the *Able II* court addressed the question of when rational basis review is not rational basis review.<sup>279</sup> The court noted the rational basis test used in these cases differed from the "traditional" rational basis test in that the government was forced to justify its discrimination because the Court would not simply defer to just any legitimate interest espoused by the government. What the *Able II* court suggested is that there is yet a fourth standard of review applied by the Court, and that this standard hovers somewhere between rational basis and middle tier scrutiny, perhaps a "turbo-charged" rational basis review. It appears that the Court dusts off this standard of review when it is faced with a class that deserves suspect, or quasi suspect classification, but would rather not expand the ranks of the suspect classes. The Court, therefore, distorts its rational basis test and in so doing, it

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<sup>274</sup> See *Able I*, 968 F. Supp. at 864.

<sup>275</sup> *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938). In *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202 (N.D. Ca. 1983), Judge Williams stated, "homosexuals attempting to form associations to represent their political and social beliefs, free from the fatal reprisals for their sexual orientation they anticipate in jobs or other social activities, are [the type of 'discrete and insular minority' that meets the *Carolene Products* test for suspect classification]." *Id.* at 209 n.24; see also *Able I*, 968 F. Supp. at 864.

<sup>276</sup> See *Able II*, 155 F.3d at 634.

<sup>277</sup> See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (overturning a Florida court's modification of a custody award on the grounds that the child's mother was then cohabitating with a black man, whom she later married).

<sup>278</sup> See *id.*

<sup>279</sup> See *Able II*, 155 F.3d at 634.

can arrive at the proper conclusion without having to live with the long-term jurisprudential consequences of an ever expanding category of individuals entitled to heightened levels of scrutiny.

### CONCLUSION

The sexual sanctuary of the bedroom is one of the most private places in a person's life. The average person does not worry much about the possibility that what they do in this sanctuary may subject them to criminal prosecution. The reality is that the chance of such prosecution is extremely small. For homosexuals, however, the reality is different. The small chance of prosecution is significantly greater for same-sex couples than for heterosexual couples. But the specter of conviction under one of the country's sodomy laws is not the greatest evil they present.

The very existence of these laws has been, and will continue to be, used as a means of justifying discrimination and violence against homosexuals. Such discrimination and violence is given the aura of state sanction because, after all, the victims are those that commit the "heinous act, the very mention of which is a disgrace to human nature."<sup>280</sup>

The country has made some giant strides in protecting sexual liberties. *Griswold*, *Eisenstadt*, *Roe*, and state decisions overturning sodomy statutes are all proof of the progress that has been made. But the fact remains that a substantial part of the population has entered the new millenium as criminals because of the way they privately express the most basic of human instincts. The right of privacy is a good idea, but its gelatinous quality makes it a poor tool for the purpose of fairly protecting the sexual freedoms of all people equally.

The current state of affairs is one of stark contrast. For the first time in the Nation's history, some form of state sanctioned same-sex union will be allowed in at least one state. Yet, at the same time that homosexual relationships are being legitimized through one state's official recognition, other states can, and will, prosecute homosexuals for engaging in the physical intimacy that is part and parcel of such unions.

Often, people hear the term gay rights and imagine some sort of affirmative action program for homosexuals. While some

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<sup>280</sup> BLACKSTONE, *supra* note 30, at \*215.

involved in this "movement" may very well have this in mind, the bulk of the gay community has something much less dramatic in mind, equal protection under the law. For homosexuals, sexual freedom between consenting adults in the privacy of one's home is not a complex matter of Fourteenth Amendment jurisprudence, but a simple matter of equality. The United States has had a commendable history of identifying those groups that have faced adversity in a search for equality, and providing them with the extra protection of heightened scrutiny of laws that discriminate against them. At times, the identification of these groups is a slow and socially painful process, such is the case with homosexuals. Without being designated a suspect or quasi-suspect class, gay Americans will continue to suffer under laws that deprive them of basic human rights.

The moral arguments against such equality are loud and resonant. One must then ask what sort of morality creates victims who are tied to a fence and left to die in the cold of night.