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Supreme Court Limits the Right to Privacy, The-- Fourteenth Amendment: Bowers v. Hardwick, 106 S. Ct. 2841 (1986)

Gary S. Caplan

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FOURTEENTH AMENDMENT—THE SUPREME COURT LIMITS THE RIGHT TO PRIVACY

Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

I. INTRODUCTION

Ever since the landmark decision of *Griswold v. Connecticut*,¹ the Supreme Court has consistently enlarged the privacy rights of individuals based on the penumbral protections of the first, third, fourth, fifth, ninth and fourteenth amendments to the United States Constitution.² Although no individual right to privacy is expressly found in the Constitution,³ the Court has repeatedly recognized an individual's right to make choices regarding intimate aspects of one's own life in the area of sexual expression.⁴

Society's moral views concerning sexual permissiveness have arguably become more liberal.⁵ Sexual permissiveness is commonly regarded as an essential freedom.⁶ The Supreme Court's trend of expanding the penumbra of individual privacy rights has been consistent with the liberalization of society's morals concerning sexual freedom. In *Bowers v. Hardwick*,⁷ however, the Supreme Court severely restricted the individual's right to privacy in holding that the Georgia sodomy statute⁸ was constitutional as applied to

¹ 381 U.S. 479 (1965)(the right to privacy encompassed an individual's right to use contraceptives). See *infra* notes 156-63 and accompanying text.

² *Griswold*, 381 U.S. at 484-86. The right to privacy identified in *Griswold* was later expanded in *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); and *Cary v. Population Services International*, 431 U.S. 678 (1977). See *infra* notes 156-75 and accompanying text.

³ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

⁴ See *supra* note 2 and accompanying text.

⁵ See, e.g., Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 873 (1975); Annotation, *Consent as Defense in Prosecution for Sodomy*, 58 A.L.R. 3D 636, 640 (1974).

⁶ See generally Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* (1973); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

⁷ 106 S. Ct. 2841 (1986).

⁸ The Georgia statute provides, in pertinent part: "A person commits the offense of

homosexuals.⁹

By narrowly interpreting the right to privacy, the *Bowers* Court reversed the prior trend of expanding individual privacy rights. The Court also undermined the legitimacy of its prior decisions which recognized the value of an individual's independence to make certain important decisions regarding sexual expression and the right to carry out those decisions.¹⁰

This Note examines the right to privacy by analyzing the Supreme Court's decision in *Bowers v. Hardwick*. In elucidating the errors in the majority's reasoning, this Note argues that the right to privacy should yield an individual right of autonomy concerning consensual sexual activities. Furthermore, the majority's focus on an incorrectly stated, narrowly drawn issue confused the rights of homosexuals concerning sexual fulfillment. Finally, this Note will suggest the implications that *Bowers* could pose in the future.

II. FACTS OF *BOWERS*

Michael Hardwick was arrested on August 3, 1982 and charged with violating the Georgia sodomy statute¹¹ by committing sodomy

sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years" GA. CODE ANN. § 16-6-2 (1984).

⁹ *Bowers*, 106 S. Ct. at 2843.

¹⁰ See *infra* notes 140-75 and accompanying text.

¹¹ See *supra* note 8. The following state statutes prohibit various forms of private consensual sodomy: ALA. CODE §§ 13A-6-64 to -65 (1982); ARIZ. REV. STAT. ANN. §§ 13-1411 to -1412 (1978 & Supp. 1983-1984); ARK. STAT. ANN. § 41-1813 (1977); D.C. CODE ANN. § 22-3502 (Michie 1981); FLA. STAT. ANN. § 800-2 (West 1976); IDAHO CODE § 18-6605 (1979); KAN. STAT. ANN. § 21-3505 (West Supp. 1984); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merril 1975); LA. REV. STAT. ANN. § 14:78 (West 1974 & Supp. 1984); MD. ANN. CODE §§ 27-553 to -554 (Michie 1982); MASS. ANN. LAWS, ch. 272, §§ 34-35 (West 1970); MICH. COMP. LAWS §§ 750.158, .338, .388a, .388b (1968); MINN. STAT. ANN. §§ 609.293 -294 (West Supp. 1984); MISS. CODE ANN. § 566.090 (Vernon 1979); MONT. CODE ANN. § 45-5-505 (1984); NEV. REV. STAT. § 201.190 (1979); N.C. GEN. STAT. § 24-177 (1981); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law Co-op. 1977); TENN. CODE ANN. § 39-2-612 (1982); UTAH CODE ANN. §§ 76-5-403, -406 (1978 & Supp. 1983); VA. CODE ANN. § 18.2-361 (1982); WIS. STAT. ANN. § 944.17 (West 1982 & Supp. 1983-1984). The following state statutes have been declared unconstitutional by the state courts: GA. CODE ANN. § 16-6-2 (1982)(declared unconstitutional by the United States Court of Appeals for the Eleventh Circuit in *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985)); N.Y. PENAL LAW §§ 130.00, .38 (McKinney 1975)(criminal statute invalidated by the New York Court of Appeals in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981); 18 PA. CONS. STAT. §§ 1301, 1324 (1973)(criminal statutes invalidated by the Pennsylvania Supreme Court in *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980)); TEX. PENAL CODE ANN. tit. 5, § 21.06 (Vernon 1974)(held unconstitutional by the United States District

in his home with another consenting male adult.¹² After a hearing, the District Attorney decided not to pursue the case to the grand jury because of a lack of evidence.¹³ Hardwick subsequently filed suit asking the court to declare the Georgia sodomy statute unconstitutional.¹⁴ Hardwick alleged that he was a practicing homosexual who regularly engaged in sexual acts, and would continue to do so in the future.¹⁵ The district court granted the state's motion to dismiss for failure to state a claim.¹⁶ The court ruled that, although Hardwick did in fact have standing to sue, the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney*¹⁷ foreclosed any constitutional challenge to the statute.¹⁸

On appeal, the United States Court of Appeals for the Eleventh Circuit held that Hardwick had standing to bring suit.¹⁹ The appellate court reversed and remanded regarding the constitutional chal-

Court for the Northern District of Texas in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982)). The following state session laws have decriminalized private, consensual sodomy between adult homosexuals: 1978 Alaska Sess. Laws, ch. 166 (effective Jan. 1, 1980); 1975 Cal. Stat., ch. 71, § 7 (effective July 1, 1976); 1971 Colo. Sess. Laws, ch. 121, § 1 (approved June 2, 1971); 1969 Conn. Pub. Acts 828, § 214 (effective Oct. 1, 1971); 58 Del. Laws, ch. 497, § 1 (effective April 1, 1973); 1972 Haw. Sess. Laws, act 9, § 1 (effective Jan. 1, 1983); 1961 Ill. Laws, pt. 1983, § 11-2 (effective Jan. 1, 1962); 1976 Ind. Acts. P.L. 148, § 24 (effective July 1, 1977); Iowa Acts ch. 1245, § 520 (effective Jan. 1, 1978); 1975 Me. Acts, ch. 499, § 5 (effective Mar. 1, 1976); 1977 Neb. Laws, L.B. 38, § 328 (effective July 1, 1978); 1973 N.H. Laws, 532:26 (effective Nov. 1, 1973); 1978 N.J. Laws, ch. 95, § 2C:98-2 (effective Sept. 1, 1979); 1975 N.M. Laws, ch. 109, § 8; 1977 N.D. Laws, ch. 122, § 1 (approved Mar. 19, 1977); 1972 Ohio Laws, 134, § 2 (effective Jan. 1, 1974); 1971 Or. Laws, ch. 743, § 432 (167.040)(effective Jan. 1, 1972); 1976 S.D. Laws, ch. 158, § 22-8 (effective Apr. 1, 1977); 1977 Vt. Laws, No. 51, § 3 (effective July 1, 1977); 1975 Wash. Laws, 1st exec. Sess., ch. 260 (effective July 1, 1976); 1976 W. Va. Acts, ch. 43 (effective June 11, 1976); 1977 Wyo. Sess. Laws, ch. 70, § 3 (effective May 27, 1977).

¹² *Bowers*, 106 S. Ct. at 2842; *Hardwick v. Bowers*, 760 F.2d 1202, 1203 (11th Cir. 1985), *reh'g denied*, 762 F.2d 1123 (11th Cir. 1985).

¹³ *Bowers*, 106 S. Ct. at 2842.

¹⁴ *Id.* Hardwick challenged the constitutionality of criminalizing consensual sodomy. The complaint named as defendants Michael Bowers, Attorney General of Georgia; Lewis Slator, District Attorney for Fulton County; and George Napper, Public Safety Commissioner of Atlanta. *Hardwick*, 760 F.2d at 1204.

¹⁵ *Bowers*, 106 S. Ct. at 2842. John and Mary Doe, a married couple, joined in the suit claiming they desired to engage in sexual activity proscribed by the statute, but felt "chilled and deterred" due to the existence of the statute, coupled with Hardwick's recent arrest. *Id.* at 2842 n.2.

¹⁶ *Id.* at 2842.

¹⁷ 403 F. Supp. 1199 (E.D. Va. 1975), *summarily aff'd*, 425 U.S. 901 (1976)(Virginia sodomy statute held constitutional).

¹⁸ *Hardwick*, 760 F.2d at 1204-10.

¹⁹ *Id.* at 1204-07. The district court previously had held that because the Does had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have standing.

lenge to the Georgia sodomy statute.²⁰ The appellate court held that the summary affirmance in *Commonwealth's Attorney* was not dispositive regarding the constitutionality of the statute because doctrinal developments subsequent to *Commonwealth's Attorney* undermined its precedential value.²¹

The court of appeals found that the Georgia statute criminalizing sodomy contravened a fundamental right to engage in private, consensual sexual activity.²² The appellate court held that an individual's right to sexual fulfillment via private, consensual acts was constitutionally protected by the right to privacy. The court stated that "[t]he Constitution prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society."²³

The court of appeals then determined that upon remand the state must prove both a compelling interest to regulate such behavior, and that the statute was narrowly drawn to serve that interest.²⁴ The Supreme Court granted certiorari to determine whether the Georgia sodomy statute violated the fundamental rights of homosexuals.²⁵

III. THE SUPREME COURT OPINIONS

A. THE MAJORITY

A sharply divided Court²⁶ reversed the court of appeals and held that the Georgia statute was constitutional and did not violate the fundamental rights of homosexuals.²⁷ Justice White stated the

²⁰ *Bowers*, 106 S. Ct. at 2843.

²¹ *Hardwick*, 760 F.2d at 1208-10. The court of appeals pointed to two decisions: *Carey v. Population Services International*, 431 U.S. 678, 688 n.5 (1977) ("[T]he court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults" (brackets in original)); and *New York v. Uplinger*, 467 U.S. 246 (1983) ("[T]he Supreme Court was prepared to address the constitutionality of state regulations like Georgia's sodomy statute but chose to address the issue when presented more directly in another case.").

²² *Bowers*, 106 S. Ct. at 2843.

²³ *Hardwick*, 760 F.2d at 1212-13.

²⁴ *Bowers*, 106 S. Ct. at 2843. The Supreme Court first enunciated this test in *Roe v. Wade*, 410 U.S. 113, 152 (1973).

²⁵ *Bowers*, 106 S. Ct. at 2843.

²⁶ Justice White wrote the opinion for the majority, and Justices Burger and Powell filed concurring opinions. Justice Blackmun filed a vigorous dissent, and was joined by Justices Brennan, Marshall and Stevens. Justice Stevens filed a separate dissent, in which Justices Brennan and Marshall joined.

²⁷ *Bowers*, 106 S. Ct. at 2841.

question presented as follows: “[W]hether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a very long time.”²⁸

Justice White objected to the court of appeals’ view that the line of cases beginning with *Griswold v. Connecticut*²⁹ conferred a right of privacy aimed at individual autonomy.³⁰ Justice White found the right of privacy to be applicable only to factual situations regarding family, marriage and procreation.³¹ In voicing his disregard of the individual autonomy view of the right to privacy, Justice White stated that “any claim that these cases nevertheless stand for the proposition that any kind of private conduct between consenting adults is constitutionally insulated from state proscription is unsupported.”³² Next, Justice White rejected Hardwick’s argument that there is a fundamental right to engage in homosexual sodomy.³³ Justice White noted that the fifth and fourteenth amendments had previously been interpreted to recognize substantive rights.³⁴ He denounced, however, such “substantive due process”³⁵ and reasserted that certain fundamental liberties are “implicit in the concept of ordered liberty”³⁶ and “deeply rooted in this Nation’s history and tradition.”³⁷ Because laws proscribing sodomy have “ancient

²⁸ *Id.* at 2843.

²⁹ 381 U.S. 479 (1965).

³⁰ Justice White referred to the Court’s prior cases construing the right to privacy and their factual settings: *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)(child rearing and education); *Prince v. Massachusetts*, 321 U.S. 158 (1944)(family relationships); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942)(procreation); *Loving v. Virginia*, 388 U.S. 1 (1967)(marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)(contraception); and *Roe v. Wade*, 410 U.S. 113 (1973)(abortion).

³¹ *Bowers*, 106 S. Ct. at 2844.

³² *Id.*

³³ *Id.*

³⁴ *Id.* The right to privacy has usually been anchored in the fourteenth amendment, which reads:

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

U.S. CONST. amend. XIV, § 1.

³⁵ See *infra* notes 283-95 and accompanying text.

³⁶ *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)(a state statute allowing appeal by the state in criminal cases for correction of errors of law was held consistent with due process under the fourteenth amendment).

³⁷ *Moore v. East Cleveland*, 431 U.S. 494 (1977)(opinion of Powell, J.). In *Moore*, an East Cleveland housing ordinance defining “family” was unconstitutional because it violated the due process clause of the fourteenth amendment. Although Justice White tried

roots,"³⁸ Justice White reasoned "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."³⁹ After engaging in an historical discussion of the criminal offenses of sodomy,⁴⁰ the Court declined to enlarge the right to privacy and asserted that engaging in sodomitic activities was not a fundamental right.⁴¹

Next, the majority rejected the respondent's argument based on *Stanley v. Georgia*⁴² that the Constitution protects homosexual conduct in the privacy of one's home.⁴³ While recognizing that *Stanley* gave special protection to certain conduct that would not be protected outside the home, the majority in *Bowers* found *Stanley* inapplicable because "the decision was firmly grounded in the First Amendment."⁴⁴ Justice White stated that all illegal conduct was not immunized when occurring within the home, specifying victimless crimes as an example.⁴⁵ The Court analogized homosexual conduct to other victimless crimes⁴⁶ in asserting that allowance of Hardwick's claim would mean "start[ing] down the road" to recognizing as a fundamental right these other crimes.⁴⁷

The Court then asserted that a presumption of public morality against homosexuality was sufficient to support a criminal statute.⁴⁸

to limit fundamental rights to specific cases, additional language in *Moore* points to a different theory: "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society." *Id.* at 503 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965)(Harland, J., concurring)).

³⁸ *Bowers*, 106 S. Ct. at 2844. Justice White cited Comment, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986).

³⁹ *Bowers*, 106 S. Ct. at 2844.

⁴⁰ Justice White further noted:

Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 states in the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.

Id. at 2845.

⁴¹ *Id.* at 2846. The Court reasoned that an expansive view of the determination of fundamental rights "comes nearest to illegitimacy" because it becomes "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.*

⁴² 394 U.S. 557 (1969)(obscene films, although punishable in public, are allowable in the privacy of the home).

⁴³ *Bowers*, 106 S. Ct. at 2846.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ In addition to illegal drugs, Justice White used as examples of victimless crimes, adultery, incest and other sexual crimes occurring at home. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

The Court noted that the law continually reflects notions of morality.⁴⁹ The state's notion concerning the morality of homosexual conduct, the Court asserted, should not be declared inadequate to justify the Georgia sodomy statute.⁵⁰ Finally, the Court declined to respond to Hardwick's constitutional arguments concerning Georgia's sodomy statute based on the ninth amendment, the equal protection clause or the eighth amendment because Hardwick did not raise these issues below.⁵¹

B. CHIEF JUSTICE BURGER'S CONCURRENCE

Similar to the majority's opinion, Chief Justice Burger emphasized that "there is no such thing as a fundamental right to commit homosexual sodomy."⁵² Chief Justice Burger traced the proscriptions against sodomy throughout the history of Western Civilization.⁵³ He concluded from this evidence that homosexual sodomy is not a fundamental right.⁵⁴

C. JUSTICE POWELL'S CONCURRENCE

Justice Powell also wrote a separate concurrence. While joining in the opinion of the Court, Justice Powell doubted the constitutionality of the Georgia sodomy statute under an eighth amendment analysis.⁵⁵

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at n.8. See *infra* notes 53, 197-201 and accompanying text.

⁵² *Bowers*, 106 S. Ct. at 2847 (Burger, C.J., concurring).

⁵³ *Id.* (Burger, C.J., concurring). For some proscriptions against sodomy see CODE TH. 9.7.6 (Roman law); An Act for the Punishment of the Vice of Buggery, 1533-34, 25 Hen. VIII, c. 6 (the first English criminal sodomy statute); D. BAILEY, *HOMOSEXUALITY IN THE WESTERN CHRISTIAN TRADITION* 70-81 (1975); W. BLACKSTONE, *COMMENTARIES* *215 (a description of sodomy as "a crime not fit to be named" that "the very mention of which is a disgrace to human nature"). Chief Justice Burger also discussed the common law of England and that of the American colonies. Finally, he noted that Georgia passed its initial sodomy statute in 1816 and has continued to promulgate such statutes "in one form or another" since then. *Bowers*, 106 S. Ct. at 2846 (Burger, C.J., concurring).

⁵⁴ *Bowers*, 106 S. Ct. at 2846 (Burger, C.J., concurring).

⁵⁵ *Id.* at 2847 (Powell, J., concurring). The eighth amendment prohibits cruel and unusual punishment. See U.S. CONST. amend. VIII. Two different eighth amendment arguments could possibly legitimize a homosexual's right to consensual sexual activity and challenge the Georgia statute. The first argument concerns the *status* of an individual. In *Robinson v. California*, 370 U.S. 660 (1962), the Court held that the eighth amendment barred a conviction because of the defendant's "status" as a drug addict. Narcotic addiction was "apparently an illness which may be contracted innocently or involuntarily." *Id.* at 667. In *Powell v. Texas*, 392 U.S. 514 (1968), the Court refused to include an alcoholic's public drunkenness in *Robinson's* protection. The majority distinguished the criminalization of public drunkenness from regulating behavior in the privacy of the home. *Id.* at 532. In *Bowers*, Justice Blackmun noted "Homosexual orientation

Justice Powell noted that the Georgia sodomy statute permits up to twenty years of imprisonment upon conviction of a sodomitic act.⁵⁶ Justice Powell then measured the punishment for sodomy against the sentence length for a serious felony such as aggravated battery, finding the penalties of each crime to be comparable.⁵⁷ Justice Powell suggested that "a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue."⁵⁸ Because the eighth amendment issue had not been raised below, however, Justice Powell concurred with the majority.⁵⁹

Justice Powell noted that Hardwick had not been tried, convicted or sentenced for his conduct.⁶⁰ He added that the history of non-enforcement of statutes prohibiting sodomy limited the practical effect of an eighth amendment argument.⁶¹

D. JUSTICE BLACKMUN'S DISSENT

Justice Blackmun strongly dissented.⁶² First, Justice Blackmun disagreed with the majority's "almost obsessive focus on homosexual activity" because he found that the Georgia sodomy statute prohibited sodomy regardless of sex.⁶³ Furthermore, he inferred that the legislative purpose behind Georgia's enactment of § 16-6-2 in 1968 was to broaden the applicability of the sodomy proscription to homosexuals and heterosexuals.⁶⁴ Justice Blackmun then con-

may well form part of the very fiber of an individual's personality." *Bowers*, 106 S. Ct. at 2850 n.2 (Blackmun, J., dissenting). Homosexuality, therefore, has the potential to be treated as a "status." Consequently, under the Court's analysis in *Robinson*, criminal punishment of the status of homosexuality and its concurrent sexual practices may be unconstitutional under the eighth amendment.

The second possible eighth amendment argument concerns the correlation between the length of the sentence and the crime committed. In *Weems v. United States*, 217 U.S. 349 (1910), the Supreme Court held that the eighth amendment prohibits sentences that are disproportionate to the severity of the crime. In sodomy cases, the harmfulness of the crimes is negligible compared to other more heinous crimes receiving the same or lesser penalties. See notes 55-58 and accompanying text. For a more expansive view of an eighth amendment analysis of a homosexual's right to engage in private, consensual relations, see Comment, *The Constitutionality of Sodomy Statutes*, 45 *FORDHAM L. REV.* 553, 567-72 (1976).

⁵⁶ *Bowers*, 106 S. Ct. at 2847 (Powell, J., concurring).

⁵⁷ *Id.* (Powell, J., concurring).

⁵⁸ *Id.* (Powell, J., concurring).

⁵⁹ *Id.* at 2848 (Powell, J., concurring).

⁶⁰ *Id.* (Powell, J., concurring).

⁶¹ *Id.* at n.2 (Powell, J., concurring).

⁶² *Id.* at 2848 (Blackmun, J., dissenting). Justice Blackmun immediately discredited the majority opinion.

⁶³ *Id.* at 2849 (Blackmun, J., dissenting).

⁶⁴ *Id.* (Blackmun, J., dissenting).

tended that an intrusion on one's right to privacy and individual association is independent of any sexual orientation.⁶⁵

Second, Justice Blackmun emphasized that the procedural posture of the case mandated affirmance "if there is *any* ground on which respondent may be entitled to relief."⁶⁶ Justice Blackmun remarked that the majority should have considered the constitutionality of the statute based on the eighth amendment⁶⁷ and the equal protection clause.⁶⁸ Justice Blackmun emphasized, however, that the statute abridged Hardwick's constitutional rights to privacy and freedom of intimate association.⁶⁹ Justice Blackmun asserted that the right to privacy alone was sufficient to challenge the constitutionality of § 16-6-2.⁷⁰

Justice Blackmun then traced the Court's construction of the right to privacy. He stated that the Court has recognized a right to privacy "with reference to certain *decisions*"⁷¹ an individual might make, and "with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged."⁷² Justice Blackmun concluded that *Bowers* involved both the decisional and locational aspects of the right to privacy.⁷³

⁶⁵ *Id.* (Blackmun, J., dissenting).

⁶⁶ *Id.* (Blackmun, J., dissenting). Justice Blackmun stated that " 'a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances', for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Id.* (Blackmun, J., dissenting)(quoting *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974)). See *Parr v. Great Lakes Co.*, 484 F.2d 767, 773 (7th Cir. 1973)("a complaint should not be dismissed merely because its allegations do not support the legal theory on which the pleader intends to proceed."); *Due v. Tallahassee Theatres, Inc.*, 333 F.2d 630, 631 (5th Cir. 1964)("if the complaint alleges facts, which, under any theory of the law, would entitle the complainant to recover, the action may not be dismissed for failure to state a claim."); 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL*, § 1357, 601-02 (1969).

⁶⁷ See *supra* note 55.

⁶⁸ See *infra* notes 198-202 and accompanying text.

⁶⁹ *Bowers*, 106 S. Ct. at 2850 (Blackmun, J., dissenting).

⁷⁰ *Id.* (Blackmun, J., dissenting).

⁷¹ *Id.* (Blackmun, J., dissenting). See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973)(concerning an individual's decision to have an abortion); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)(concerning the parental decision of guiding their children's education).

⁷² *Bowers*, 106 S. Ct. at 2850, 2851 (Blackmun, J., dissenting). See *United States v. Karo*, 468 U.S. 705, 706 (1984)("The monitoring of a beeper in a private residence . . . violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence."); *Payton v. New York*, 445 U.S. 573 (1980)("The Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."); *Rios v. United States*, 364 U.S. 253 (1960)(evidence seized in an unreasonable search, absent probable cause was excluded from trial where police seized narcotics from passenger in a taxicab).

⁷³ *Bowers*, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

Justice Blackmun then focused on the rationale behind the decisional right to privacy. He stated:

We protect those [privacy] rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. [T]he concept of privacy embodies the moral fact that a person belongs to himself and not others nor to society as a whole.⁷⁴

Justice Blackmun analyzed why certain rights have been protected by the fourteenth amendment's due process clause.⁷⁵ He reasoned that behind the personal decisions concerning marriage,⁷⁶ procreation,⁷⁷ and having a family⁷⁸ were more basic individual value choices. Justice Blackmun determined that the effect of each decision on an individual's self-definition was what had really been protected.⁷⁹ Justice Blackmun further noted that many individual values and decisions are expressed through choice of intimate sexual relationships.⁸⁰

Justice Blackmun then argued that if an individual is free to choose how to conduct his life, society must accept "the fact that different individuals will make different choices."⁸¹ Justice Blackmun concluded that the majority, in refusing to further expand the right to privacy in *Bowers*, had in actuality refused to allow individual choice in intimate associations with others.⁸²

Justice Blackmun next contrasted the decisional privacy right with the locational privacy right, a right attached to the home, where "the Fourth Amendment attaches special significance."⁸³ Justice Blackmun was unconvinced by the majority's conclusion that *Stanley*

⁷⁴ *Id.* (Blackmun, J., dissenting)(quoting *Thornburgh v. American College of Obstetrics & Gynecology*, 106 S. Ct. 2169, 2187 n.5 (1984) (Stevens, J., concurring)).

⁷⁵ *Id.* (Blackmun, J., dissenting).

⁷⁶ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

⁷⁷ *Thornburgh v. American College of Obstetrics & Gynecology*, 106 S. Ct. at 2188 n.6 (Stevens, J., concurring).

⁷⁸ *Moore v. East Cleveland*, 431 U.S. 494, 500-06 (1977).

⁷⁹ *Bowers*, 106 S. Ct. at 2841 (Blackmun, J., dissenting).

⁸⁰ *Id.* (Blackmun, J., dissenting). Justice Blackmun asserted, "[T]here may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds." See Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 637 (1980).

⁸¹ *Bowers*, 106 S. Ct. at 2852 (Blackmun, J., dissenting). As an example, Justice Blackmun quoted from a case concerning formal schooling for the Amish: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong'. A way of life that is odd or even erratic *but* interferes with no rights or interests of others is not to be condemned because it is different." *Bowers*, 106 S. Ct. at 2852 (Blackmun, J., dissenting) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972)).

⁸² *Bowers*, 106 S. Ct. at 2852 (Blackmun, J., dissenting).

⁸³ *Id.* (Blackmun, J., dissenting).

*v. Georgia*⁸⁴ was entirely a first amendment case.⁸⁵ Justice Blackmun construed *Stanley* to hold that a state's "power to punish the public distribution of constitutionally unprotected, obscene material did not permit the state to punish the private possession of such material."⁸⁶ Justice Blackmun declared, moreover, that *Stanley* concerned a fourth amendment locational right to individual privacy.⁸⁷ Justice Blackmun asserted that *Stanley's* reliance on *Olmstead v. United States*,⁸⁸ a fourth amendment case, advanced *Stanley* as a fourth amendment case.⁸⁹ Justice Blackmun additionally supported his interpretation of *Stanley* with *Paris Adult Theatre I v. Slaton*.⁹⁰

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home" which was hardly more than a reaffirmation that "a man's home is his castle."⁹¹

From this conclusion in *Paris*, Justice Blackmun reasserted that an individual's right to conduct intimate sexual relations within the privacy of the home was at "the heart of the Constitution's protection of privacy."⁹² Because both the *decisional* and *locational* aspects of privacy were intertwined in *Bowers*, Justice Blackmun argued that private, consensual sexual relations provided a most compelling reason to extend constitutional protection to an individual through the right to privacy.⁹³

Having shown the magnitude of the liberty interests involved in *Bowers*, Justice Blackmun belittled the majority's justification of Georgia's infringement upon these interests. Justice Blackmun reasoned that the two main justifications supporting the Georgia sodomy statute—the protection of the state's general health and welfare and the fact that sodomy had previously been prohibited for a long period—were insufficient to warrant dismissing Hardwick's challenge for failure to state a claim.⁹⁴

⁸⁴ 394 U.S. 557 (1969).

⁸⁵ See *Bowers*, 106 S. Ct. at 2852 (Blackmun, J., dissenting).

⁸⁶ *Id.* (Blackmun, J., dissenting).

⁸⁷ *Id.* (Blackmun, J., dissenting).

⁸⁸ 227 U.S. 438 (1928).

⁸⁹ *Bowers*, 106 S. Ct. at 2852-53 (Blackmun, J., dissenting).

⁹⁰ 413 U.S. 49 (1973) (The right to privacy did not extend to a display of obscene films in commercial theaters to consenting adult audiences. The state concern of safeguarding against crime and other possible effects of obscenity was held to be a legitimate interest.)

⁹¹ *Id.* at 66.

⁹² *Bowers*, 106 S. Ct. at 2853 (Blackmun, J., dissenting).

⁹³ *Id.* (Blackmun, J., dissenting).

⁹⁴ *Id.* (Blackmun, J., dissenting).

First, Justice Blackmun declared that the state's interest in promoting "the general public health and welfare" was unsupported.⁹⁵ Justice Blackmun noted that the record below did not contain any evidence supporting the state's claim.⁹⁶ Furthermore, Justice Blackmun discredited any analogy between private consensual sexual activity and the victimless crimes that *Stanley* refused to protect.⁹⁷ Justice Blackmun reasoned that these victimless crimes—"possession in the home of drugs, firearms, or stolen goods"⁹⁸—were not actually "victimless" because "drugs and weapons are inherently dangerous, and for property to be 'stolen,' someone must have been wrongfully deprived of it."⁹⁹ Justice Blackmun distinguished sodomitic activity because "[n]othing in the record before the Court provides any justification for finding the activity by § 16-6-2 to be physically dangerous, either to the persons engaged in it or to others."¹⁰⁰

Second, Justice Blackmun disagreed with the majority that long-standing religious prohibitions are a sufficient reason to permit Georgia's interference with an individual's right to privacy.¹⁰¹ Justice Blackmun asserted that the length of time a majority holds its convictions does not bar an issue from constitutional scrutiny.¹⁰²

Justice Blackmun further reasoned that the majority's invocation of traditional Judeo-Christian prohibitions was misguided. Although certain religious groups condemn sodomitic behavior, Justice Blackmun pointed out that these proscriptions did not warrant a state's imposition of morality on its citizens.¹⁰³ Justice Blackmun stated:

⁹⁵ *Id.* (Blackmun, J., dissenting).

⁹⁶ *Id.* (Blackmun, J., dissenting).

⁹⁷ *Id.* (Blackmun, J., dissenting).

⁹⁸ *Id.* (Blackmun, J., dissenting).

⁹⁹ *Id.* (Blackmun, J., dissenting). For a case concerning the inherent danger of weapons, see *McLaughlin v. United States*, 106 S. Ct. 1677 (1986) (an unloaded hand gun was termed a dangerous weapon).

¹⁰⁰ *Bowers*, 106 S. Ct. at 2853 (Blackmun, J., dissenting). Justice Blackmun further distinguished between private, consensual sexual conduct and adultery and incest, two sexual crimes on which the majority relied. *Id.* at 2854 n.4. Adultery "is likely to injure third persons," and incest is also harmful because "the nature of familial relationships renders true consent to incestuous activity sufficiently problematical . . ." *Id.* Justice Blackmun noted that no harm had been shown to the Court regarding private, consensual sexual activity, on the other hand. *Id.* at 2854.

¹⁰¹ *Id.* (Blackmun, J., dissenting).

¹⁰² *Id.* (Blackmun, J., dissenting). See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (the right to an abortion was protected); *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation protected); *Brown v. Board of Education*, 347 U.S. 483 (1954) (school segregation held unconstitutional).

¹⁰³ *Bowers*, 106 S. Ct. at 2854 (Blackmun, J., dissenting).

A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect."¹⁰⁴

Next, Justice Blackmun rejected Georgia's justification of § 16-6-2 as a method of promoting public morality.¹⁰⁵ Justice Blackmun distinguished the protection of public sensibilities from the enforcement of private morality upon individuals.¹⁰⁶ Justice Blackmun also distinguished the regulation of public sexual activity, a legitimate state concern, from prohibitions of intimate behavior occurring in private.¹⁰⁷ The interests involved in *Bowers*, Justice Blackmun reasoned, were private in nature, and a state could not justify "invading the houses, hearts, and minds of citizens who choose to live their lives differently."¹⁰⁸

Justice Blackmun concluded his dissent with a plea that the majority reconsider its analysis, again urging that "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of non-conformity could ever do."¹⁰⁹

E. JUSTICE STEVENS' DISSENT

Justice Stevens wrote a separate dissent.¹¹⁰ He approached the case with a two-part analysis. Justice Stevens questioned whether § 16-6-2 applied to all persons. He next queried whether specific enforcement of the statute against homosexuals was constitutional. Justice Stevens first discussed the constitutionality of the Georgia

¹⁰⁴ *Id.* at 2855 (Blackmun, J., dissenting)(quoting *Palmore v. Sidoti*, 466 U.S. 429 (1984)). Justice Blackmun also noted that "mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *Id.* See *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)(State may not confine harmless mentally ill patient to "save its citizens from exposure to those whose ways are different."); U.S. Dep't. of Agric. v. *Moreno*, 413 U.S. 528, 534 (1973)("[A] bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.")(emphasis in original).

¹⁰⁵ *Bowers*, 106 S. Ct. at 2855 (Blackmun, J., dissenting).

¹⁰⁶ *Id.* (Blackmun, J., dissenting).

¹⁰⁷ *Id.* (Blackmun, J., dissenting).

¹⁰⁸ *Id.* at 2856 (Blackmun, J., dissenting).

¹⁰⁹ *Id.* (Blackmun, J., dissenting). Justice Blackmun referred to *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), in which the Court recognized that an individual's values outweighed the national threat brought on by a refusal to salute the flag. *West Virginia Board of Education* overruled *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

¹¹⁰ *Bowers*, 106 S. Ct. at 2856 (Stevens, J., dissenting).

sodomy statute as applied to all citizens.¹¹¹

Justice Stevens noted that the history of the Georgia statute revealed a prohibition of heterosexual as well as homosexual sodomy.¹¹² Therefore, Justice Stevens reasoned, the statute should be scrutinized based on applicability to all persons regardless of their sexual orientation.¹¹³

Justice Stevens next noted two propositions of law to aid in the analysis. Justice Stevens first asserted that a majority's traditional view of certain conduct as immoral was insufficient to uphold a law proscribing such conduct.¹¹⁴ Second, Justice Stevens noted the protection already afforded marital intimacy, even absent procreation, under the due process clause of the fourteenth amendment.¹¹⁵

In addition, Justice Stevens stressed the underlying values supporting the right to privacy.¹¹⁶ He noted that individuals have a fundamental right to make certain life choices that implicate basic human values.¹¹⁷ This individual right often meshes with the "legally sanctioned and protected relationship" of marriage.¹¹⁸ Justice Stevens found that the combination of the two protected interests formed an even more powerful right.¹¹⁹ Justice Stevens stated, "when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the state—to decide."¹²⁰

After reviewing the Court's decisions in *Griswold v. Connecti-*

¹¹¹ *Id.* (Stevens, J., dissenting).

¹¹² *Id.* (Stevens, J., dissenting). Justice Stevens undermined the majority's issue presented in stating, "In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present 'for a very long time.'" *Id.* at n.2.

¹¹³ *Id.* at 2857 (Stevens, J., dissenting).

¹¹⁴ *Id.* (Stevens, J., dissenting). See *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation, once treated as a crime, upheld under the equal protection clause and a due process argument).

¹¹⁵ *Bowers*, 106 S. Ct. at 2857 (Stevens, J., dissenting). See *infra* notes 156-63 and accompanying text.

¹¹⁶ *Bowers*, 106 S. Ct. at 2858 (Stevens, J., dissenting).

¹¹⁷ *Id.* (Stevens, J., dissenting). Justice Stevens quoted his previous opinion in *Fitzgerald v. Porter Memorial Hosp.*, 523 F.2d 716, 719-20 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976): "The character of the Court's language . . . brings to mind . . . the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable."

¹¹⁸ *Bowers*, 106 S. Ct. at 2858 (Stevens, J., dissenting).

¹¹⁹ *Id.* (Stevens, J., dissenting).

¹²⁰ *Id.* (Stevens, J., dissenting). Justice Stevens noted that the Georgia Attorney General conceded that § 16-6-2 would be held unconstitutional if applied to a married couple. *Id.* at n.10.

cut,¹²¹ *Eisenstadt v. Baird*,¹²² and *Carey v. Population Services International*,¹²³ Justice Stevens concluded that the due process clause of the fourteenth amendment protects individuals' decisions concerning the intimacies of "nonreproductive, sexual conduct that others may consider offensive or immoral."¹²⁴ Justice Stevens noted that the prior case law clearly established that states may not prohibit private, consensual sodomy between unmarried heterosexual adults.¹²⁵ Therefore, Justice Stevens pointed out that § 16-6-2 was, as a whole, unconstitutional because of proscriptions aimed at a protected right.¹²⁶

Justice Stevens then applied the Georgia statute specifically to homosexuals. Justice Stevens concluded that since the statute was inapplicable to heterosexuals, either homosexuals "do not have the same interest in 'liberty'"¹²⁷ as others, or the state must show a compelling interest to support this criminal statute.¹²⁸ Justice Stevens stated, "the State must assume the burden of justifying a selective application of its law."¹²⁹ Justice Stevens then determined that every citizen has the same interest in liberty.¹³⁰ He further reasoned that homosexuals and heterosexuals have the same interest in conducting sexual activity.¹³¹ Justice Stevens concluded that the selective application of the Georgia sodomy statute based upon a homosexual's differing interests in liberty was clearly unacceptable.¹³²

Next, Justice Stevens found no compelling state interest justifying a selective application of § 16-6-2.¹³³ Justice Stevens pointed out that the majority erred in relying on "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."¹³⁴ Justice Stevens elaborated that based on the statute as written,¹³⁵ the Georgia electorate reflected the be-

¹²¹ 381 U.S. 479 (1965). See *infra* notes 156-63 and accompanying text.

¹²² 405 U.S. 438 (1972). See *infra* notes 164-67 and accompanying text.

¹²³ 431 U.S. 678 (1977). See *infra* notes 174-75 and accompanying text.

¹²⁴ *Bowers*, 106 S. Ct. at 2858 (Stevens, J., dissenting).

¹²⁵ *Id.* (Stevens, J., dissenting). See *infra* notes 194-95 and accompanying text.

¹²⁶ *Bowers*, 106 S. Ct. at 2858 (Stevens, J., dissenting).

¹²⁷ *Id.* (Stevens, J., dissenting).

¹²⁸ *Id.* (Stevens, J., dissenting). See *infra* notes 251-84 and accompanying text.

¹²⁹ *Id.* (Stevens, J., dissenting).

¹³⁰ *Id.* (Stevens, J., dissenting).

¹³¹ *Id.* (Stevens, J., dissenting).

¹³² *Id.* (Stevens, J., dissenting).

¹³³ *Id.* at 2859 (Stevens, J., dissenting).

¹³⁴ *Id.* (Stevens, J., dissenting) (quoting the majority's opinion, *Bowers*, 106 U.S. at 2846).

¹³⁵ See *supra* note 8.

lief that all sodomy is immoral, rather than just homosexual sodomy.¹³⁶

Finally, Justice Stevens discussed the non-enforcement of the Georgia statute.¹³⁷ Justice Stevens showed the banality of Georgia's representation of the importance of the selective application of § 16-6-2. He reasoned that the history of non-enforcement of the anti-sodomy statute points out that *no* application of the statute is, in actuality, "important."¹³⁸ Justice Stevens therefore concluded that since Georgia did not justify a selective application of § 16-6-2, Hardwick had asserted a sufficient constitutional claim to withstand a motion to dismiss.¹³⁹

IV. EVOLUTION OF THE RIGHT TO PRIVACY

The word privacy itself is notably absent from the Constitution.¹⁴⁰ The right to privacy, however, has been expressed in many different forms. Thomas Paine described the natural rights of man to include "rights . . . [of] an individual for his own comfort and happiness, which are not injurious to the natural rights of others."¹⁴¹

Mirroring Paine's idea was John Stuart Mill's "harm" principle. The government may only exercise power over an individual against his or her will if necessary to prevent harm to others:

[The] sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their member, is self-protection . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute over himself, over his own body and mind, the individual is sovereign.¹⁴²

Warren and Brandeis reiterated Mill's idea of individual autonomy absent harm to another in their seminal law review article.¹⁴³ Warren and Brandeis, although writing in the context of tort principles, recognized a common law protection against the intrusion

¹³⁶ *Bowers*, 106 S. Ct. at 2859 (Stevens, J., dissenting).

¹³⁷ *Id.* (Stevens, J., dissenting). See *infra* notes 296-300 and accompanying text.

¹³⁸ *Id.* (Stevens, J., dissenting).

¹³⁹ *Id.* (Stevens, J., dissenting).

¹⁴⁰ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

¹⁴¹ Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 825 (1984) (quoting from F. COKER, *READING IN POLITICAL PHILOSOPHY* 675 (1938)).

¹⁴² J. MILL, *ON LIBERTY* 53 (1859).

¹⁴³ Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

upon personal matters.¹⁴⁴

The discussion of privacy notions was not limited to philosophers and academics, however. The courts were paramount in the evolution of the right to privacy. The courts first expressed the right to privacy in *Union Pacific Railway v. Botsford*.¹⁴⁵ Justice Gray called "the possession and control of [one's] own person" a sacred individual right, again protected by the common law against undue interference by others.¹⁴⁶

Similarly, in *Meyer v. Nebraska*,¹⁴⁷ the Supreme Court held that a state statute prohibiting the teaching of any foreign language cannot interfere with individual rights unless a "reasonable relation" to a state interest was shown.¹⁴⁸ The Court held, in weighing the competing interests, that the legislative desire to cultivate homogeneous patriotic beliefs did not override the individual's rights.¹⁴⁹

In his famous dissent in *Olmstead v. United States*,¹⁵⁰ Justice Brandeis asserted that "the right to be let alone" is "the most comprehensive of rights and the right most valued by civilized man."¹⁵¹ The right recognized by Justice Brandeis in *Olmstead* built upon the common law right he had previously recognized in his law review article¹⁵² that began developing an individual right to autonomy.

In *Skinner v. Oklahoma*,¹⁵³ the Court, for the first time, used the due process clause to support the right to privacy.¹⁵⁴ In *Skinner*, the Court invalidated a mandatory criminal sterilization statute, holding that the state's invasion of personal liberties violated due process.¹⁵⁵

The right to privacy later received explicit constitutional recognition in *Griswold v. Connecticut*.¹⁵⁶ Justice Douglas derived constitutional authority for the right to privacy out of a penumbra of Bill of Rights protections.¹⁵⁷ Although the exact constitutional directive was lacking, Justice Douglas reasoned that the right to privacy was still a part of the Constitution.¹⁵⁸ Justice Douglas found, in the first,

¹⁴⁴ See *id.*

¹⁴⁵ 141 U.S. 250 (1891).

¹⁴⁶ *Id.* at 251.

¹⁴⁷ 262 U.S. 390 (1923).

¹⁴⁸ *Id.* at 400.

¹⁴⁹ *Id.* at 402-03.

¹⁵⁰ 277 U.S. 438, 471 (1928)(Brandeis, J., dissenting).

¹⁵¹ *Id.* at 478 (Brandeis, J., dissenting).

¹⁵² See *supra* note 143.

¹⁵³ 316 U.S. 535 (1942).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 544-45 (Stone, C.J., concurring).

¹⁵⁶ 381 U.S. 479 (1965).

¹⁵⁷ *Id.* at 484-85.

¹⁵⁸ *Id.*

third, fourth, fifth and ninth amendments, an individual "zone of privacy."¹⁵⁹ Justice Douglas, as an incorporationist, asserted that the fourteenth amendment made the Bill of Rights applicable to the states.¹⁶⁰ Rather than finding a separate right to privacy inside the fourteenth amendment, however, Justice Douglas' right to privacy sprang from rights already contained in the Bill of Rights.¹⁶¹ The Court in *Griswold* specifically held a criminal statute prohibiting the use and sale of contraceptives unconstitutional.¹⁶² *Griswold* can be broadly interpreted, however, as invalidating any legislation regulating marital privacy including the right to engage in sodomy.¹⁶³

The Court next interpreted the right to privacy in *Eisenstadt v. Baird*.¹⁶⁴ In *Eisenstadt*, the Court extended *Griswold*, allowing unmarried individuals the right to use contraceptives.¹⁶⁵ Although *Eisenstadt* was decided on equal protection grounds,¹⁶⁶ the case has often been cited for the proposition that the right to privacy encompasses unmarried persons.¹⁶⁷ Hence, *Griswold*'s protection of intimacy in the marital context has been extended to the individual. Therefore, *Eisenstadt* shows that unmarried heterosexuals are protected by the right to privacy concerning private, consensual sexual fulfillment. Under *Eisenstadt*, unwarranted governmental intrusion into an individual's private sexual affairs is unconstitutional.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See id.* at 484-85.

¹⁶² *Id.* at 485.

¹⁶³ Subsequent to the *Griswold* decision, a majority of courts have ruled that criminal sanctions cannot be imposed on married couples for deviant sexual conduct. *See Cotner v. Henry*, 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968); *Lovisi v. Slayton*, 363 F. Supp. 620 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976)(en banc); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated and remanded sub nom. Wade v. Buchanan*, 401 U.S. 989 (1971); *Towler v. Peyton*, 303 F. Supp. 581 (W.D. Va. 1969)(dictum); *Travers v. Paton*, 261 F. Supp. 110 (D. Conn. 1966)(dictum); *State v. Bateman*, 25 Ariz. App. 1, 540 P.2d 732 (1975), *rev'd in part and aff'd in part*, 113 Ariz. 107, 547 P.2d 6 (1976)(en banc); *State v. Lair*, 62 N.J. 388, 301 A.2d 748 (1973)(dictum); *Mentek v. State*, 71 Wis. 2d 799, 238 N.W.2d 752 (1976)(dictum); *Jones v. State*, 55 Wis.2d 742, 200 N.W.2d 587 (1972)(dictum). *But see Hughes v. State*, 14 Md. App. 497, 287 A.2d 299, *cert. denied*, 409 U.S. 1025 (1972)(dictum); *State v. Schmidt*, 273 Minn. 78, 139 N.W.2d 800 (1966)(dictum); *Pruett v. State*, 463 S.W.2d 191 (Tex. Crim. App. 1970, *appeal dismissed*, 402 U.S. 902 (1971)(dictum)). *See also Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); *Wilkinson & White, Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977).

¹⁶⁴ 405 U.S. 438 (1972).

¹⁶⁵ *Id.* at 448-49.

¹⁶⁶ *See id.* at 454-55.

¹⁶⁷ *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-53 (1973); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 944 n.12 (1978); Comment, *Choice: Personal Autonomy and the Right to Privacy*, 14 IDAHO L. REV. 447 (1978).

The landmark decision of *Roe v. Wade*¹⁶⁸ solidified the constitutional protection of the right to privacy. The Court, through Justice Blackmun, held that the right to privacy protected an unmarried woman's right to choose to terminate her pregnancy.¹⁶⁹ The Court in *Roe* reasoned that the right to privacy was based on the fourteenth amendment's concept of liberty.¹⁷⁰ *Roe* can be seen as protecting individual choice regarding an intimate decision involving self-fulfillment.

In *Planned Parenthood v. Danforth*¹⁷¹ the Court once again expanded the right to privacy. The Court held that the right to privacy extended to minors. In *Planned Parenthood*, the Court stated that "[m]inors, as well as adults, are protected by the Constitution and possess Constitutional rights."¹⁷² The Court further held that a parental consent requirement for a minor's abortion was unconstitutional.¹⁷³ This decision reiterated *Eisenstadt*'s teaching that the right to privacy was inherent in the individual.

Finally, the Court addressed similar issues in *Carey v. Population Services International*.¹⁷⁴ In *Carey*, the Court held that a New York statute prohibiting the distribution of contraceptives to minors was unconstitutional because it prevented minors from making personal decisions regarding sexual intimacy.¹⁷⁵ Thus, prior to the decision in *Bowers*, the Court had established a definite protection for an individual right of privacy.

V. ANALYSIS

The growing controversy concerning the present day fashioning of the right to privacy was not settled by *Griswold* and its progeny. Prior to *Bowers*, commentators were far from unanimous regarding whether to interpret consensual homosexual conduct as constitutionally protected by the right to privacy.¹⁷⁶ Lower courts, too, handed out inconsistent opinions in cases regarding homosexual sexual fulfillment.¹⁷⁷ *Bowers*, then, was a long-awaited decision

¹⁶⁸ 410 U.S. 113 (1973).

¹⁶⁹ *Id.* at 153.

¹⁷⁰ *Id.*

¹⁷¹ 428 U.S. 52 (1976).

¹⁷² *Id.* at 74.

¹⁷³ *Id.* at 72-75.

¹⁷⁴ 431 U.S. 678 (1977).

¹⁷⁵ *Id.* at 690-91.

¹⁷⁶ See *supra* notes 6, 141; Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977). But see Comment, *supra* note 38.

¹⁷⁷ Many lower court decisions held the right to privacy did include individual autonomy in sexual expression. See *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *State v.*

that had the potential to conclusively determine a homosexual's rights. Unfortunately, while attempting to clear up the controversy, *Bowers* only confused matters regarding private, consensual homosexual conduct.

A. THE MAJORITY'S FAULTY DECISION

Justice White framed the issue in *Bowers* as: "[W]hether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidate the laws of the many States that still make such conduct illegal and have done so for a very long time."¹⁷⁸ Justice White misconstrued the issue. First, Justice White blatantly revealed his subjective bias when he remarked that "the laws of the many States that *still make such conduct illegal and have done so for a very long time.*"¹⁷⁹ Such judicial subjectivity is unnecessary. By slanting the question presented, Justice White discredited his opinion. A biased question presented logically leads to a biased, subjective opinion. A Supreme Court opinion should strive to be objective; personal predilections should have no bearing on constitutional adjudication.

Second, Justice White framed the issue too narrowly. The Georgia statute criminalizing sodomy prohibits *all* people from engaging in so-called "unnatural" acts.¹⁸⁰ Hardwick challenged the constitutionality of the entire statute.¹⁸¹ The Court, however, with minimal explanation, found that the issue only involved homosexual sodomitic activity.¹⁸²

As a general rule of constitutional adjudication, courts construe cases and statutes as narrowly as possible.¹⁸³ Decisions are based

Saunders, 75 N.J. 200, 381 A.2d 333 (1977); *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. denied*, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980). *But see* *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1976)(en banc); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975); *Hughes v. State*, 14 Md. App. 497, 287 A.2d 299, *cert. denied*, 409 U.S. 1025 (1972); *State v. Poe*, 40 N.C. App. 385, 252 S.E.2d 843, *appeal dismissed*, 298 N.C. 303, 259 S.E.2d 304 (1979), *cert. denied*, 445 U.S. 947 (1980); *State v. Santos*, 413 A.2d 58 (R.I. 1980).

¹⁷⁸ *Bowers*, 106 S. Ct. at 2843.

¹⁷⁹ *Id.* (emphasis added).

¹⁸⁰ *See* GA. CODE ANN. § 16-6-2 (1984). The "unnatural" act of sodomy

is the carnal copulation by human beings with each other against nature, or with a beast, in which sense it includes the crime against nature. Similarly, it includes bestiality, buggery, cunnilingus, and fellatio. In its narrower sense sodomy is the carnal copulation between two human beings per anus, or by a human being in any manner with a beast.

C.J.S. *Sodomy* § 1(a) (1953)(footnotes omitted).

¹⁸¹ *Bowers*, 106 S. Ct. at 2842.

¹⁸² *See id.* at 2843.

¹⁸³ Note, *United States v. Lemons: Limiting Constitutional Review in Equal Protection Litiga-*

upon the factual situation of the case at hand, rather than upon hypothetical situations raised by a party.¹⁸⁴ When a party challenges the constitutionality of a statute by alleging an infringement of an individual right, the facts of the challenge apply to how the statute directly affects the litigant himself.¹⁸⁵ Thus, although “facial” attacks¹⁸⁶ on the constitutionality of a statute are generally not entertained by courts, there is a notable exception: where a litigant would impair the constitutional rights of third parties who have no effective way to preserve those rights themselves.¹⁸⁷

The exception applies to the Georgia statute at issue in *Bowers*. A married heterosexual couple, John and Mary Doe, were initial party plaintiffs.¹⁸⁸ They were dismissed for lack of standing,¹⁸⁹ however, because they had not sustained, nor were they in danger of sustaining, direct injury from enforcement of the statute.¹⁹⁰ Furthermore, few, if any, people are likely to challenge anti-sodomy legislation because of the probable “notoriety, embarrassment, and possible economic ruin” associated with such a challenge.¹⁹¹ A constitutional challenge to an anti-sodomy statute compels an exception to the general rule. Homosexuals should be able to assert the rights of third party heterosexuals when challenging the constitutionality of statutes prohibiting sodomy. In *Bowers*, however, Hardwick was not allowed to assert the rights of third parties. Accordingly, the *Bowers* majority should have allowed Hardwick to assert the rights of the married heterosexuals, John and Mary Doe.

If the Georgia sodomy statute had been constitutionally tested in its entirety, it could have been declared unconstitutional because of its overbreadth. A statute is overbroad if, while attempting to control or prevent certain activities, it becomes overinclusive,

tion, 17 CREIGHTON L. REV. 1287, 1291 (1984). See also *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963)(citing *United States v. Raines*, 362 U.S. 17, 22 (1960)).

¹⁸⁴ *United States v. Raines*, 362 U.S. 17, 22 (1960)(the actual fact situation of a case “frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes.”).

¹⁸⁵ See Note, *supra* note 183, at 1292.

¹⁸⁶ *Id.* A “facial” attack allows a party to challenge the constitutionality of a statute based on how it might be applied in a hypothetical situation rather than constricting a court’s analysis to a specific factual situation. *Id.*

¹⁸⁷ *Id.* at 1297. See *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). *But see Lovisi v. Slayton*, 363 F. Supp. 620, 628 (E.D. Va. 1973).

¹⁸⁸ *Bowers*, 106 S. Ct. at 2842 n.2.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Comment, *supra* note 55, at 565.

thereby criminalizing previously protected freedoms.¹⁹² A statute can be struck down because of overbreadth based on its potential adverse effect on non-litigants.¹⁹³

The Georgia sodomy statute, as written, applies evenly to heterosexuals, whether married or unmarried, and homosexuals. Based on prior Supreme Court decisions, however, the right to privacy clearly prohibits a state from interfering with a heterosexual's freedom of sexual intimacy.¹⁹⁴

Sodomy is one form of sexual intimacy. Therefore, private, consensual sodomitic practices performed by married heterosexuals are constitutionally protected by the right to privacy. Indeed, Georgia conceded that their state sodomy statute, if applied to married persons, would be an unconstitutional invasion of the right to privacy under *Griswold*.¹⁹⁵ Similarly, based on *Eisenstadt*'s extension of *Griswold* to the unmarried individual, such acts performed by unmarried heterosexuals are also constitutionally protected. If an attack were made on a state statute prohibiting sodomy by either a married or unmarried heterosexual the statute would not withstand constitutional scrutiny.

Where a statute is broadly applicable to consensual sodomitic activities of married couples and unmarried heterosexuals:

[A] possible tactic, regardless of prosecution based on homosexual or heterosexual activity, is the bringing of an action for a declaratory judgment as to the constitutionality of the statute and for an injunction against its enforcement, having a married heterosexual [or unmarried heterosexuals] be a party, so as to avoid questions of standing to raise this argument.¹⁹⁶

The *Bowers* Court should have enabled the respondent to assert the rights of third party heterosexuals. If a third party heterosexual's rights had been considered, the Georgia statute would have been held unconstitutional because of overbreadth.

The Georgia statute could also be constitutionally attacked on equal protection grounds because it applied only to homosexuals.¹⁹⁷ Although an equal protection argument was not raised be-

¹⁹² *State v. Willis*, 218 N.W.2d 921, 923 (Iowa 1974).

¹⁹³ Note, *Commonwealth v. Bonadio: Voluntary Deviate Sexual Intercourse—A Comparative Analysis*, 43 U. PITT. L. REV. 253, 273 (1981-82).

¹⁹⁴ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *supra* notes 156-75 and accompanying text.

¹⁹⁵ *Bowers*, 106 S. Ct. at 2858 n.10.

¹⁹⁶ Annotation, *Consent as Defense in Prosecution for Sodomy*, 58 A.L.R. 3d 636, 641 (1974). See *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated and remanded on other grounds sub nom. Wade v. Buchanan*, 401 U.S. 989 (1971).

¹⁹⁷ For an extensive look at the applicability of the equal protection clause to homo-

low,¹⁹⁸ a statute that inherently discriminates against a certain group of people, such as homosexuals, violates the equal protection clause of the Constitution.¹⁹⁹ Without a sufficient compelling interest to justify the unequal application, the Georgia sodomy statute would be unconstitutional. If a statute prohibited consensual homosexual, but not heterosexual sodomitic activities, the statute would be inherently discriminatory because it would classify individuals on the basis of their sexual preference. Therefore, because both case law²⁰⁰ and a Georgia concession²⁰¹ point toward the inapplicability of § 16-6-2 to heterosexuals, the Georgia sodomy statute should have been held unconstitutional on equal protection grounds.

B. INTERPRETING THE RIGHT TO PRIVACY

The right to privacy, although often discussed, is a mysterious and amorphous area of protection. The right to privacy has not been specifically defined by the judiciary. Rather, the right has evolved on a case-by-case basis.

The issue of whether the right to privacy protects consensual, private homosexual sodomy was previously before the Court in *Doe v. Commonwealth's Attorney*.²⁰² The United States District Court for the Eastern District of Virginia held that a Virginia statute criminalizing sodomy was constitutional and did not violate an individual's right to privacy.²⁰³ The court reasoned that the state's interest in promoting morality and decency, coupled with the suppression of crime, was an action within the reach of Virginia's police power.²⁰⁴

On appeal, the Supreme Court summarily affirmed without an opinion.²⁰⁵ Absent an opinion to support the affirmance, the precedential value of *Commonwealth's Attorney* is unclear. The summary affirmance only legitimizes the outcome of the case; a summary affirmance does not necessarily mean the Supreme Court is condoning the lower court's reasoning.²⁰⁶

sexual fulfillment, see Note, *Right of Privacy—Consensual Sodomy and the Choice of a Moral Doctrine: New York's Permissive Position*, W. NEW ENG. L. REV. 75, 90-94 (1982-83).

¹⁹⁸ *Bowers*, 106 S. Ct. at 2846 n.8. *But see id.* at 2849 (Blackmun, J., dissenting) ("the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is any ground on which respondent may be entitled to relief.")

¹⁹⁹ *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²⁰⁰ *See supra* note 194.

²⁰¹ *See supra* note 195 and accompanying text.

²⁰² 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

²⁰³ *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975).

²⁰⁴ *Id.* at 1202.

²⁰⁵ 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

²⁰⁶ Comment, *supra* note 141, at 840.

Two years later, in *Carey v. Population Services International*,²⁰⁷ while reaffirming a minor's interest in privacy rights, Justice Brennan noted that the Court "has not definitely answered" the question of a state's power to regulate private, consensual homosexual relationships.²⁰⁸ Alternatively, Justice Rehnquist asserted that *Commonwealth's Attorney* had settled the question—states can regulate such behavior.²⁰⁹ Lower court decisions and commentators were similarly confused about the meaning of the summary affirmance in *Commonwealth's Attorney*.²¹⁰

Bowers answered the questions surrounding the exact view the Supreme Court would adopt regarding homosexual sodomy. The majority, in a narrowly written opinion, reviewed the right to privacy and its applications based on the precise factual patterns of the cases in which the right had previously been invoked. In this fashion, the majority interpreted *Griswold* and its progeny and announced the right to privacy was strictly based in the context of marriage, the family, and procreation.²¹¹

In support of their narrow interpretation of the right to privacy, both the majority and Chief Justice Burger, in his concurrence, repeated antiquated proscriptions against sodomy.²¹² Chief Justice Burger's entire concurrence, moreover, did little more than list the "ancient roots" of the proscriptions against sodomy.²¹³ After his historical journey, Chief Justice Burger concluded that "to hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."²¹⁴ Chief Justice Burger, in basing his entire concurrence on outdated laws, rules and teachings, failed to analyze the respondent's claim in

²⁰⁷ 431 U.S. 678 (1977).

²⁰⁸ *Id.* at 694 n.17.

²⁰⁹ *Id.* at 718 n.2.

²¹⁰ See *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6 (1976), *cert. denied*, 429 U.S. 869 (1977)(unmarried consensual sexual activity); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976)(unmarried consensual sexual activity); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977)(fornication); *State v. Ciuffini*, 164 N.J. Super. 145, 395 A.2d 904 (Super. Ct. App. Div. 1978)(consensual homosexual activity); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981)(consensual homosexual activity); *In re P.*, 92 Misc.2d 62, 400 N.Y.S.2d 455 (N.Y. Fam. Ct. 1977)(prostitution). *But see* *Berg v. Claytor*, 436 F. Supp. 76, 79 (D. D.C. 1977)(holding that discharge of Navy officer because of homosexuality not violative of constitutional right of privacy since *Doe v. Commonwealth's Attorney* had established that "an individual's right to privacy does not extend to homosexual conduct even where it occurs in private between consenting adults.").

²¹¹ *Bowers*, 106 S. Ct. at 2844.

²¹² *Id.* at 2845 n.5.

²¹³ *Id.* at 2847 (Burger, C.J., concurring).

²¹⁴ *Id.* (Burger, C.J., concurring).

a constitutional light. Although both the majority and the Chief Justice provided interesting historical perspectives, their lack of legal reasoning and analysis is apparent.

Justice Blackmun pointed to the deficiencies of both opinions in his dissent.²¹⁵ He asserted that even though moral judgments are often "natural and familiar . . . [they] ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."²¹⁶ Justice Blackmun continued:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it were laid down have vanished long since, and the rule simply persists from blind imitation of the past.²¹⁷

Although the majority considered the issue from a constitutional perspective, they failed to address the underlying question involved. The issue involved was not whether a homosexual has a fundamental right to engage in sodomy. Rather, the actual issue in *Bowers* concerned the underlying values linking the privacy cases, and how these values fit into a particular factual scheme. Justice Blackmun correctly noted that "this case is no more about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare . . . [r]ather, this case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"²¹⁸

Although the right to privacy developed in *Griswold* evolved from the context of the marital relationship, subsequent Supreme Court decisions have expanded that right.²¹⁹ The right to privacy has become analogous with the freedom of intimate association.²²⁰ The Supreme Court's previous privacy decisions themselves contradict the *Bowers* majority's notion of a narrow right to privacy.

Eisenstadt freed the right to privacy from the marital context by expanding the right to use contraceptives to the individual:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individ-

²¹⁵ *Id.* at 2848 (Blackmun, J., dissenting).

²¹⁶ *Id.* (Blackmun, J., dissenting).

²¹⁷ *Id.* (Blackmun, J., dissenting)(quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

²¹⁸ *Id.* (Blackmun, J., dissenting).

²¹⁹ See *Carey v. Population Services International*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²²⁰ See generally Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

uals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.²²¹

Eisenstadt, by broadening the right to privacy beyond the marital bedroom, "served as a foundation for the Court's later widening of the right to privacy to encompass certain areas of individual decision making."²²²

Furthermore, the marital relationship itself can be viewed simply as a form of personal association in which individuals have made a value-expressive life choice. In *Loving v. Virginia*,²²³ Chief Justice Warren, striking down Virginia's miscegenation statutes, reasoned, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."²²⁴ Chief Justice Warren saw that an individual's stake in pursuing a fulfilling relationship was what the right to privacy protected, rather than the marital relationship *per se*. The right to privacy, therefore, is not bounded by the marital relationship.

The right to privacy also extends beyond procreative matters. In its inception, the right to privacy was used to legitimize the use of contraceptives.²²⁵ The *Bowers* majority, however, mistakenly classified the right to privacy as a procreative right.²²⁶ The Court's legitimizing the sale and use of contraceptives in *Griswold* discredits the *Bowers* majority's classification of privacy as a procreative right. *Roe* further discredits the *Bowers* majority's notion of privacy as a marital, procreative right because *Roe* permitted an unmarried female to choose to terminate her pregnancy.²²⁷ Thus, *Griswold*, *Eisenstadt*, and *Roe* have extended the right to privacy to include a general right of personal autonomy regardless of marital status or procreative intention.

Additionally, the recognition of a minor's right to privacy in *Planned Parenthood v. Danforth*²²⁸ directly contradicts the notion of privacy as a familial right. The right of an unmarried minor to personal autonomy in no way resembles a familial concern. Furthermore, the fact situations contained in *Roe*, *Eisenstadt*, and *Carey* all

²²¹ *Eisenstadt*, 405 U.S. at 453.

²²² Note, *Expanding the Right of Sexual Privacy*, 27 LOY. L. REV. 1279, 1286 (1981).

²²³ 338 U.S. 1 (1967).

²²⁴ *Id.* at 12.

²²⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²²⁶ *Bowers*, 106 S. Ct. at 2844.

²²⁷ *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

²²⁸ 428 U.S. 52 (1976).

lack familial relationships. In all of these cases, the right to privacy was contained in the individual rather than the family.

The teaching of *Griswold* and its progeny, therefore, goes beyond the narrow constraints used by the majority in *Bowers*. Contrary to the familial, marital, and procreative interpretations of the right to privacy, an alternative theory also exists. The right to privacy can be interpreted as a protection of individual autonomy and "the freedom to choose lifestyles that serve value-expressive functions"²²⁹ as long as no harm to others occurs. Underlying all of the Court's previous privacy decisions is the principle that autonomous choice has constitutional value.

Judge Merhige, dissenting in *Commonwealth's Attorney*, expressed the view that the right to privacy is analogous to individual autonomy:

I view those cases as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern. . . . To say . . . the right of privacy . . . is limited to matters of marital, home, or family life is unwarranted under the law.²³⁰

The freedom to choose, to think, and to act accordingly in an intimate association has been protected by the right to privacy. The right to privacy broadly encompasses individual autonomy through sexual expression rather than just the right to purchase contraceptives or have an abortion. The broad language involved in the privacy cases implies a protection of the underlying values that necessitate the constitutionally protected relationship of marriage, and the decision of "whether or not to beget or bear a child."²³¹ Therefore, autonomy in individual decision-making regarding private consensual sexual relationships is protected by the right to privacy:

The right to privacy was recognized because it is associated with and intended to facilitate the exercise of autonomy in certain basic kinds of choices that bear upon the coherent rationality of a person's life plan. Therefore, the recognition of autonomy is the basis for and basic to the right to privacy. . . . Privacy should, then, be extended to protect the right of the individual, within or without the social institutions of marriage or family, to make basic kinds of life choices.²³²

In *Bowers*, Justice Blackmun differentiated between two compo-

²²⁹ Wilikinson & White, *supra* note 163, at 581.

²³⁰ *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1203 (E.D. Va. 1975) (Merhige, J., dissenting).

²³¹ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

²³² Comment, *supra* note 141, at 841 (quoting Richards, *supra* note 168, at 1006-09).

nents of the right to privacy: the decisional aspect of the right²³³ (analogous to individual autonomy) and the locational aspect.²³⁴ Three years after *Griswold*, the Supreme Court acknowledged in *Stanley v. Georgia*²³⁵ that the locational component of the right to privacy was crucial. In *Stanley*, the Court held that the individual has the right to possess and view, in the privacy of his own home, obscene materials that would be punishable if in the public domain.²³⁶ While the majority in *Bowers* attempted to distinguish *Stanley* as a first amendment case,²³⁷ Justice Blackmun correctly noted the integral fourth amendment concern:

These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. The central place that *Stanley* gives Justice Brandeis' dissent in *Olmstead*, a case raising no First Amendment claim, shows that *Stanley* rested as much on the Court's understanding of the Fourth Amendment as it did on the first.²³⁸

Stanley was crucial to the development of the right to privacy, expanding its scope beyond the narrow view of privacy as a purely marital, familial, and procreative right. *Stanley* firmly established that privacy protected the sanctity of an individual's residence—"a man's home is his castle."²³⁹ The Court confirmed *Stanley*'s fourth amendment focus in *Paris Adult Theatre I*,²⁴⁰ where "the Court suggested that reliance on the Fourth Amendment not only supported the Court's outcome in *Stanley* but actually was necessary to it"²⁴¹ The Court reasoned in *Paris* that "[i]f obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the 'privacy of the home'. . . ."²⁴² Additionally, Judge Merhige remarked in *Commonwealth's Attorney*, "*Stanley* teaches that socially condemned activity, excepting that of demonstrable external effect, is . . . beyond the scope of state regulation when conducted within the

²³³ *Bowers*, 106 S. Ct. at 2850.

²³⁴ *Id.* at 2851.

²³⁵ 394 U.S. 557 (1969).

²³⁶ *Id.* at 568.

²³⁷ *Bowers*, 106 S. Ct. at 2846 ("the decision was firmly grounded in the First Amendment.").

²³⁸ *Id.* at 2852-53 (Blackmun, J., dissenting) (quoting *Stanley*, 394 U.S. at 564-65.).

²³⁹ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973).

²⁴⁰ *Id.*

²⁴¹ *Bowers*, 106 S. Ct. at 2853.

²⁴² *Paris Adult Theatre I*, 413 U.S. at 66.

privacy of the home.”²⁴³

Thus, *Stanley* proposed that the right to privacy includes intimate relationships occurring in private. When *Stanley*'s locational privacy component is linked with the component of individual autonomy, a vast privacy right is formed.²⁴⁴ The right to the private, consensual sexual behavior involved in *Bowers* hinges on both aspects of the right to privacy and, therefore, a substantial privacy right encompassing sexual lifestyle choices should be recognized in this context.

The *Bowers* majority, along with Chief Justice Burger, in his concurrence, attempted to limit the right to privacy to certain “fundamental liberties.”²⁴⁵ The *Bowers* Court proposed a test to determine whether a right was fundamental: unless a right was “implied in the concept of ordered liberty” or “deeply rooted in this Nation's history and tradition,” the Court would not deem the right fundamental.²⁴⁶ The Court concluded that the right to engage in homosexual sodomy was not fundamental because of ancient proscriptions against sodomy.²⁴⁷

The right to privacy, when viewed as the right to individual autonomy, still complies with the majority's framework of “implicit in the concept of ordered liberty” or “deeply rooted in this Nation's history.” The right to privacy, therefore, even if measured by the majority's narrow standards, is a fundamental right. Privacy in intimate personal decisions has long been considered paramount to the well-being of individuals.²⁴⁸ Although sodomy itself may not be rooted in tradition, individual autonomy is. Despite the majority's topical and narrow question presented, the application of their test rings true; the right of individual autonomy is both “implicit in the concept of ordered liberty” and “deeply rooted in this Nation's history and tradition,” and should be declared a fundamental right.

C. APPLICATION OF THE RIGHT TO PRIVACY TO HOMOSEXUAL SODOMY

A homosexual derives sexual gratification and intimacy in ways that are proscribed by anti-sodomy statutes.²⁴⁹ It follows that pri-

²⁴³ *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1205 (E.D. Va. 1975)(Merrige, J., dissenting).

²⁴⁴ *Wilkinson & White*, *supra* note 163, at 590.

²⁴⁵ *Bowers*, 106 S. Ct. at 2844, 2847.

²⁴⁶ *Id.* at 2844. See *supra* notes 36-37 and accompanying text.

²⁴⁷ *Bowers*, 106 S. Ct. at 2846.

²⁴⁸ See *supra* notes 140-55 and accompanying text.

²⁴⁹ See generally G. WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* (1970).

vate, consensual relationships between homosexuals should be constitutionally protected because sexual intimacy is a personal life choice included in the right to privacy. Furthermore, the locational privacy concerns protected by *Stanley* enhance a homosexual's constitutional guarantee of privacy. If a person can watch obscene films for self-gratification within the home, then, logically, a person should be permitted to engage in other forms of consensual sexual gratification within a private residence.

Both the decisional and locational aspects of the right to privacy support a constitutional guarantee of freedom regarding a homosexual's sexual intimacy. If individual autonomy rights constitute the basis of a constitutional right to privacy, then these same rights would compel acceptance of an individual's right to choose a sex partner. In *Bowers*, the homosexual activity involved was carried on in private, and involved an intimate life choice.²⁵⁰ The constitutional guarantee of a right to privacy in *Bowers* is extremely compelling.

D. THE BALANCING TEST

The Supreme Court in *Roe* held that a state may assert a compelling interest and prohibit a person from exercising a personal, value-expressive decision regardless of the possibility of infringing on a fundamental right.²⁵¹ If a homosexual's right to engage in private, consensual sodomy is fundamental,²⁵² the Georgia sodomy statute must be found unconstitutional unless the state of Georgia can show a compelling interest to regulate such activity.

A state may attempt to assert a variety of interests in order to outweigh a homosexual's fundamental right to personal autonomy. One possible state interest is the preservation of heterosexual marriage as an institution.²⁵³ The regularity of non-enforcement of existing fornication and adultery statutes, however, shows the hypocrisy of this argument.²⁵⁴ In his dissent in *Doe*, Judge Merhige accurately stated that "to suggest . . . that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing one's is unworthy

²⁵⁰ *Bowers*, 106 S. Ct. at 2842.

²⁵¹ *Roe v. Wade*, 410 U.S. 113, 155 (1973).

²⁵² The assumption that a homosexual *does* have a fundamental right to engage in private, consensual sodomy will be carried on throughout the analysis in order to determine the validity of possible state interests.

²⁵³ See *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting); *People v. Onofre*, 51 N.Y.2d 476, 490, 415 N.E.2d 936, 941, 434 N.Y.S.2d 947, 952 (1980), *cert. denied*, 451 U.S. 987 (1981).

²⁵⁴ See Comment, *supra* note 141, at 857.

of judicial response."²⁵⁵

A state may also attempt to assert a compelling state interest in protecting children against sexual offenses by homosexuals.²⁵⁶ However, "there is no evidence to support the belief that homosexuals generally tend to be more violent than heterosexuals, and some evidence to suggest that they are less violent."²⁵⁷

Additionally, a state may desire to protect public morals. States can and do legislate morality.²⁵⁸ A vast difference clearly exists, however, between legislating public morality and legislating private morality. *Stanley* showed that although the state could proscribe obscene material in the public domain, the same obscene material was permissible if viewed in the privacy of the home and no harm came to others.²⁵⁹ Thus, while states may regulate morality in the public domain, they should not attempt to mold individual thought by legislating private morality. A lower court expressed a similar idea: "the regulation of private morality . . . is not an appropriate exercise of the police power."²⁶⁰ Similarly, in *Commonwealth v. Bonadio*,²⁶¹ a lower court ruled that states could not use their police power to enforce a majority morality on persons whose conduct did not harm others.

Moreover, the public's concept of morality changes with time. Many personal life choices once considered unnatural are now becoming acceptable.²⁶² State legislatures should recognize the public's changing morality and update antiquated statutory prohibitions. For example, the present day availability of contraceptives makes it difficult to imagine that only twenty-one years have passed since *Griswold*: "such is the pace of constitutional litigation in this area that *Griswold v. Connecticut* already seems something of a grandfather case."²⁶³ Ultimately, decriminalization of anti-sodomy statutes will depend more upon the acceptance of changing morals than upon the recognition of a freedom for individual autonomy.²⁶⁴

In *Bowers*, Georgia asserted the legislation of private morality as

²⁵⁵ *Commonwealth's Attorney*, 403 F. Supp. at 1205 (Merhige, J., dissenting).

²⁵⁶ Comment, *supra* note 141, at 857.

²⁵⁷ Comment, *supra* note 141, at 857.

²⁵⁸ See generally P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

²⁵⁹ See *supra* notes 235-43 and accompanying text.

²⁶⁰ *State v. Saunders*, 75 N.J. 200, 220, 381 A.2d 333, 342 (1977).

²⁶¹ 490 Pa. 91, 95-96, 415 A.2d 47, 50 (1980).

²⁶² Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 *FORDHAM L. REV.* 1281, 1289-90 n.44 (1977).

²⁶³ Wilkinson & White, *supra* note 163 at 564.

²⁶⁴ Note, *The Right to Privacy: A Renewed Challenge to Laws Regulating Private, Consensual Behavior*, 25 *WAYNE L. REV.* 1067, 1083-84 (1979).

a possible compelling interest.²⁶⁵ If a state asserts private morality as a compelling interest, the state is, in effect, deciding whether or not an individual right is indeed fundamental.²⁶⁶ By determining that a majority of legislators' moral views should be thrust upon an individual regardless of personal tastes, preferences and lifestyle choices, the Georgia legislature has declared that the state's choice of morality is paramount to the individual's, regardless of the existence of a compelling interest. However, an individual's right to make value-expressive life choices in private falls within the zone of the constitutionally protected right to privacy²⁶⁷ and should not be overturned by a state's injection of private morality.

A state's most compelling interest in the area of sexual autonomy is the promotion of public health.²⁶⁸ The outbreak of the Acquired Immune Deficiency Syndrome (AIDS) virus²⁶⁹ has advanced this state interest. Georgia's interest in the prevention of AIDS, however, should not outweigh Hardwick's interest in the freedom of autonomous choice. Sodomy statutes proscribe certain kinds of sexual behavior and expression. Undoubtedly, AIDS can be transmitted through an act of sodomy; yet, the *form* of the sexual act does not transmit AIDS.²⁷⁰ Both "natural" and "unnatural" sexual activity can transmit the disease. In fact, AIDS is rapidly becoming more prevalent in the heterosexual community.²⁷¹

Certainly, homosexuals are classified as a high risk group to contract AIDS.²⁷² Evidence indicates, however, that discriminating against homosexuals by criminalizing their form of sexual expression may actually exacerbate the spread of AIDS rather than de-

²⁶⁵ *Bowers*, 106 S. Ct. at 2846.

²⁶⁶ Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1636 (1974).

²⁶⁷ See notes 219-32 and accompanying text.

²⁶⁸ Comment, *supra* note 38, at 623.

²⁶⁹ See generally Wallis, *AIDS: A Growing Threat*, TIME, Aug. 12, 1985, at 41. The AIDS virus neutralizes the body's immune system and allows bacteria or a virus to cause disease. Curan, Morgan, Hardy, Jaffe, Darrow & Dowdle, *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCI. MAG. 1352, 1354 (Sept. 1985). Typical symptoms of AIDS are fever, weight loss, diarrhea, sore throat, swollen lymph nodes, and other general discomfort. *Id.* Persons can have AIDS without suffering from the symptoms. Wallis, *supra*, at 42. These individuals are termed "carriers". *Id.* Symptomatic AIDS victims and "carriers" can transmit the disease in many ways: sexual conduct through the exchange of body fluids; through intravenous drug abuse; through blood transfusions, and by mother to child at birth. Curan, Morgan, Hardy, Jaffe, Darrow & Dowdle, *supra*, at 1354.

²⁷⁰ Comment, *supra* note 141, at 855-56.

²⁷¹ Wallis, *AIDS: A Growing Threat*, TIME, Aug. 12, 1985, at 43.

²⁷² *Id.* at 41.

crease it.²⁷³ In order to prevent a further spread of AIDS, those victims already infected must be able to come forward freely to obtain medical diagnosis and treatment. The Georgia sodomy statute deters such voluntary participation and openness. The fear of being criminally prosecuted can only deter people from seeking diagnosis and treatment, and a lack of medical care will lead to furthering the spread of the disease.

Furthermore, the threat of contracting AIDS may well itself be more of a deterrence to homosexual conduct than a criminal sanction against it.²⁷⁴ In addition, the social stigma of homosexuality, supported by legislative discrimination, detracts from the probability of stable homosexual relationships.²⁷⁵ Therefore, promiscuous relationships may develop to fulfill a homosexual's sexual needs. Promiscuous relationships increase the chances of contracting and transmitting AIDS because of the increased amount of intimate contact with different people.²⁷⁶ Perhaps an understanding and acceptance of homosexuality and its concurrent sexual activity will help limit the spread of AIDS.

The record in *Bowers*, however, did not contain any data in support of the state's claim of the prevention of AIDS as a compelling interest.²⁷⁷ Justice Blackmun reasoned:

In light of the state of the record, I see no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods" to which *Stanley* refused to extend the protection. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless"²⁷⁸

Whereas the drugs and weapons asserted by the majority as victimless are in actuality inherently dangerous,²⁷⁹ nothing in the record justifies any physical danger involved in sodomitic acts, whether to the participants or others.²⁸⁰ Because no harm has been shown, Mill's principle²⁸¹ seems to govern: an individual should be free to pursue private, consensual intimate relations without governmental interference.

²⁷³ Comment, *supra* note 141, at 856. See also Richards, *supra* note 163, at 986 n.127; Note, *supra* note 266, at 1632-33.

²⁷⁴ Comment, *AIDS—A New Reason to Regulate Homosexuality?* 11 J. CONTEMP. L. 315, 338 (1984).

²⁷⁵ Comment, *supra* note 38, at 625.

²⁷⁶ Comment, *supra* note 38, at 625.

²⁷⁷ *Bowers*, 106 S. Ct. at 2853 (Blackmun, J., dissenting).

²⁷⁸ *Id.* (Blackmun, J., dissenting).

²⁷⁹ See *supra* notes 97-100 and accompanying text.

²⁸⁰ See *supra* notes 97-100 and accompanying text.

²⁸¹ See *supra* note 142 and accompanying text.

Furthermore, the "connection between the acts prohibited by § 16-6-2 and the harms identified . . . is a subject of hot dispute"282 A threat as new and unexplored as AIDS is insufficient to support a compelling state interest to override an individual's right to privacy.

E. A SHIFT IN SUBSTANTIVE DUE PROCESS

The Supreme Court's modern right to privacy decisions have their beginnings in the discredited doctrine of substantive due process.²⁸³ The doctrine of substantive due process implies that the Court uses its own notion of justice and places this view of morality into social policy.²⁸⁴ Substantive due process was invoked to hold laws unconstitutional because the Court believed that the legislature had acted unwisely.²⁸⁵ The doctrine can be widely seen as an injection of judicial morality as a basis of the Court's decision making. The Court first used this doctrine in the economic area.²⁸⁶

Despite eventually repudiating substantive due process in the economic sphere,²⁸⁷ the Court relied on the theory in the area of personal liberties.²⁸⁸ *Griswold* has been criticized as a return to the days of substantive due process: "while eschewing the substantive due process mode of analysis, he [Justice Douglas] embraced its very language."²⁸⁹

Additionally, the *Roe* opinion was said to be a twin of the *Lochner* decision because both decisions had strands of substantive due process running through them.²⁹⁰ Perhaps all of the Warren Court pri-

²⁸² *Bowers*, 106 S. Ct. at 2853 n.3 (Blackmun, J., dissenting).

²⁸³ Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 940 (1973) ("criticism of the *Lochner* philosophy [substantive due process] has been virtually universal").

²⁸⁴ See generally GUNTHER, CONSTITUTIONAL LAW 441-585 (1985).

²⁸⁵ *Id.*

²⁸⁶ *Id.* See *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (District of Columbia law prescribing minimum wages for women violated due process); *Coppage v. Kansas*, 236 U.S. 1 (1915) ("yellow dog" contract condition that employees not belong to a union held violative of due process); *Lochner v. New York*, 198 U.S. 45 (1905) ("There is no reasonable ground for interfering with the liberty of a person or the right of free contract . . .").

²⁸⁷ See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934) ("[a] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare"); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (state minimum wage law held constitutional).

²⁸⁸ Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 940-41 (1973).

²⁸⁹ Comment, *Notes From the Underground: A Substantive Analysis of Summary Adjudication by the Burger Court: Part II*, 19 Hous. L. REV. 831, 849 (1982).

²⁹⁰ Ely, *supra* note 288, at 940.

vacy decisions can be grouped together and viewed as a "superimposition of the Court's own value choices."²⁹¹ Justice Douglas and his brethren injected their own views of liberty to override inappropriate state statutes. The Warren Court as a whole, however, "attempted to defend its decisions in terms of inferences from values the Constitution marks as special."²⁹² Critics of the autonomy notion of privacy belittle the Warren Court's interpretation because of its reliance on substantive due process. Yet, query if the opposition to the autonomy interpretation of privacy stands on firm constitutional grounds or on their own personal morality.

In *Bowers*, the majority and Chief Justice Burger, in concurrence, merely manifested their personal disdain towards homosexual conduct. The *Bowers* majority ignored and misread its own precedents. By doing so, the Court was simply favoring its own morality over the Warren Court's morality. The *Bowers* majority engaged in the exact substantive due process analysis that it purported to shy away from.

The Warren Court used a substantive due process philosophy to expand individual liberties in the area of intimate association.²⁹³ The right to privacy was continually broadened by the Warren Court based on their view of the values that emanated from the Constitution.²⁹⁴ The *Bowers* Court, however, reversed the trend and attempted to drastically limit the right to privacy. While purporting to limit "the imposition of the Justices' own choice of values on the States and the Federal Government,"²⁹⁵ the *Bowers* majority engaged in its own form of substantive due process reasoning. In fact, the *Bowers* majority's reasoning provides less constitutional support than *Griswold* or *Roe*. Interestingly, the *Bowers* majority asserted substantive due process in a new light by limiting the right to privacy and individual autonomy in the area of sexual expression. The *Bowers* majority has simply injected their own morality in an attempt to shut the door on the right to privacy.

F. REPERCUSSIONS OF *BOWERS*

The *Bowers* decision will probably have little, if any, effect on homosexual conduct. A judicial stamp of approval on a legislative act will not suddenly stop individuals from making value-expressive life choices. Sodomy statutes are rarely enforced against consenting

²⁹¹ Ely, *supra* note 288, at 940.

²⁹² Ely, *supra* note 288, at 943.

²⁹³ See *supra* note 288 and accompanying text.

²⁹⁴ See *supra* notes 156-63 and accompanying text.

²⁹⁵ *Bowers*, 106 S. Ct. at 2844.

adults engaged in private sexual activity.²⁹⁶ Three factors support a general non-enforcement of state sodomy statutes. First, police policy generally views sodomitic acts as relatively harmless and not deserving of manpower which could better be utilized to combat more serious crimes.²⁹⁷ Second, the gathering of constitutionally valid evidence in sodomy cases is practically impossible.²⁹⁸ Third, and most importantly, the infrequent enforcement of sodomy statutes implies that they do not actually reflect public morality.²⁹⁹ The *Bowers* decision will therefore have little bearing on homosexual conduct in the future. By condoning the criminalization of homosexual sodomy, the Court has approved a rule that is impossible to enforce. The real value of *Bowers*, therefore, is purely symbolic. This symbolic opinion, however, may give both "police and political leadership a dangerous tool for persecution of selected enemies."³⁰⁰ *Bowers* must be overruled, and soon.

The resignation of Chief Justice Burger and the appointment of Justice Scalia do not appear to shift the Supreme Court's view concerning homosexual sodomy and the right to privacy. A homosexual's right to engage in private, consensual sexual acts may, however, gain Supreme Court recognition if an anti-sodomy statute is challenged on alternative grounds. For example, an equal protection challenge appears particularly compelling. Moreover, Justice Powell's suggestion of eighth amendment protection³⁰¹ may provide a different avenue to advance a homosexual's right of individual autonomy concerning sexual activity.

The *Bowers* Court incorrectly interpreted the right to privacy and reversed the current trend of expanding individual rights in the area of sexual expression. It seems unlikely that the Court will shift from its present view that the right to privacy does not encompass homosexual conduct. Each individual state still burdened by anti-sodomy legislation should take the initiative to declare its own statutes unconstitutional. Unfortunately, the state legislatures have been slow to abrogate their proscriptions against sodomy. Perhaps the greatest opportunity to enhance a homosexual's right to sexual intimacy lies in an equal protection or eighth amendment challenge to the existing anti-sodomy statutes. Regardless of the process, it is

²⁹⁶ Comment, *supra* note 55, at 564-65.

²⁹⁷ Comment, *supra* note 55, at 564-65.

²⁹⁸ Comment, *supra* note 55, at 565.

²⁹⁹ Note, *supra* note 266, at 1618.

³⁰⁰ Clark, *Courting Disaster*, PLAYBOY, Dec. 1986, at 244.

³⁰¹ *Bowers*, 106 S. Ct. at 2847-48.

time to grant homosexuals the right to engage in consensual, private relations in order to achieve their values of sexual fulfillment.

GARY S. CAPLAN