Tulsa Law Review

Volume 22 | Issue 3

Spring 1987

Constitutionality of Sodomy Statutes: Bowers v. Hardwick

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CONSTITUTIONALITY OF SODOMY STATUTES: *BOWERS v. HARDWICK*

I. INTRODUCTION

The Supreme Court first recognized a personal right of privacy in the 1971 landmark case of *Griswold v. Connecticut*.[1] Although the Constitution contains no explicit basis for the right of privacy, the Court interpreted the Bill of Rights and the fourteenth amendment as conferring a right of privacy.[2] As the Court extended this right from a married person's decision to use contraceptives[3] to a minor's right to an abortion,[4] debate and speculation over the limits of this nontextual right of privacy abounded. On one hand, extending the right to privacy is urged in the interest of personal liberty on the premise that persons in a democratic society should be free from government intrusion in their personal decisions.[5] On the other hand, it is argued the right of privacy should be narrowly construed, because without textual constitutional direction, the Court must exercise restraint and defer to state legislatures.[6] The Supreme Court's opinions on privacy have reflected this dichotomy of views in strong dissents and closely decided cases.[7]

1. 381 U.S. 479 (1965).

2. *Id.* To ground the decision in constitutional principles, the Court created a new "right to privacy." The majority opinion found that the penumbras and emanations of several guarantees of the Bill of Rights established this right of privacy. *See infra* notes 34-43 and accompanying text.

3. *Griswold*, 381 U.S. at 485.

4. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

5. *See* Ludd, *The Aftermath of* Doe v. Commonwealth's Attorney: *In Search of the Right to Be Let Alone*, 10 U. DAYTON L. REV. 705 (1985) (contending the Constitution protects individual choices regarding private, adult, consensual sexual behavior from government intrusion based on majority morality); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974) (because the right of privacy has been extended to heterosexual conduct, exclusion of homosexual conduct cannot be justified); Note, *The Right of Privacy: A Renewed Challenge to Laws Regulating Private Consensual Behavior*, 25 WAYNE L. REV. 1067, 1083-84 (1979) (promoting morals is insufficient justification for laws regulating private intimate behavior; private morality should be beyond the state's police power); *infra* note 103 and accompanying text.

6. *See* Note, *Doe and Dronenburg: Sodomy Statutes Are Constitutional*, 26 WM. & MARY L. REV. 645 (1985) (contending the right to privacy must be narrowly construed by likening Griswold v. Connecticut, 381 U.S. 479 (1965), to Lochner v. New York, 198 U.S. 45 (1905), but in a social rather than economic context); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 281 (1981) (the Court is not justified when it invalidates practices that are similar to practices allowed by the Framers); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (criticizing "due substance" adjudication as relying on a "perfect Constitution" to protect nontextual rights; in Monaghan's view, original intent and precedent must be examined to determine constitutional meaning); *infra* note 113 and accompanying text.

7. *See* Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting). "As an exercise of raw

Bowers v. Hardwick,[8] addressing homosexual sodomy, is the Court's latest ruling in the controversial right of privacy cases. In a five-to-four decision, the Court upheld the constitutionality of the Georgia sodomy statute and ruled that no fundamental right for homosexual sodomy exists.[9] By reflecting the view that the right of privacy must be narrowly construed, the Court denied constitutional protection to homosexuals in their sexual choices. In deferring to the Georgia legislature, the Court has left homosexuals with only one solution—repeal of sodomy statutes through the legislative process. In ruling on only homosexual conduct, the Court not only created a possible double standard for homosexuals and heterosexuals but also failed to remove the present confusion regarding the sexual freedom of heterosexuals. According to the Court, however, one area of the law is perfectly clear: the Constitution does not protect the right of homosexuals to perform consensual sodomy even in the privacy of their home.

II. STATEMENT OF THE CASE

A. *Facts*

Michael Hardwick was arrested in Atlanta, Georgia, on August 3, 1982, for violating Georgia's sodomy statute.[10] Hardwick and a consenting adult male committed the crime in the bedroom of Hardwick's home. The district attorney decided not to present the case to the grand jury unless further evidence developed. Hardwick, however, brought suit challenging the constitutionality of the Georgia statute[11] criminalizing

judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court." *Id.*; Carey v. Population Servs. Int'l, 431 U.S. 678, 718 (1977) (Rehnquist, J., dissenting). "There comes a point when endless and ill-considered extension of principles originally formulated in quite different cases produces such an indefensible result that no logic chopping can possibly make the fallacy of the result more obvious." *Id.*; *see also* Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986) (a five-to-four decision invalidating the Pennsylvania Abortion Control Act).

8. 106 S. Ct. 2841 (1986).

9. *Id.*

10. *Id.* at 2842.

11. GA. CODE ANN. § 26-2002 (Harrison 1983) provides:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.
>
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

sodomy. Hardwick claimed he was a practicing homosexual who regularly engaged in private homosexual acts. Because Hardwick admitted he would continue to engage in homosexual acts, the statute placed him in imminent danger of arrest. The district court dismissed Hardwick's suit for failure to state a legal claim.[12]

On appeal, the Court of Appeals for the Eleventh Circuit reversed and ruled that the Georgia statute violated Hardwick's fundamental rights.[13] The case was remanded for trial. To prevail, the state had to prove it had a compelling interest in criminalizing sodomy and that the statute was the most narrowly drawn means of achieving that end.[14] Before trial, the Supreme Court granted the state's petition for certiorari.[15]

B. *Issues*

The Court addressed three issues in its majority opinion: (1) whether a fundamental right of homosexuals to engage in sodomy exists, (2) the "limits of the Court's role in carrying out its constitutional mandate," and (3) whether consensual homosexual sodomy is protected when

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John and Mary Doe, a married couple, joined in Hardwick's constitutional challenge. The Does claimed their sexual activity was "chilled and deterred" by the statute and Hardwick's arrest. The district court ruled that the Does did not have standing to bring suit. The Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of their complaint for lack of standing. The Does did not appeal the appellate court decision to the Supreme Court. *Bowers*, 106 S. Ct. at 2842 n.2.

12. In dismissing Hardwick's suit, the district court relied on the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney for Richmond, 425 U.S. 901 (1976). Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986). In *Doe*, the Court summarily affirmed a district court's dismissal of a challenge to the Virginia sodomy statute. *Doe*, 425 U.S. at 901.

13. *Hardwick*, 760 F.2d at 1207-10. The Eleventh Circuit Court in *Hardwick* refused to follow *Doe*. It agreed that a summary affirmance had precedential value but believed the holding had to be narrowly construed, because the Supreme Court had not explained its reasons for affirming. The court further believed that footnotes five and seventeen in Carey v. Population Servs. Int'l, 431 U.S. 678, 688, 694 (1977), indicated that the Court viewed regulation of private consensual sexual conduct as an open question. The appellate court also cited the Court's granting of certiorari in People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), *cert. granted*, 464 U.S. 812 (1983), *cert. dismissed*, 467 U.S. 246 (1984), and later dismissal of the writ as evidence that the Court viewed the sodomy issue as unsettled. "Under these circumstances, we [believe that] the consitutional questions presented by Hardwick are still open for consideration by the Supreme Court and by this court." *Hardwick*, 760 F.2d at 1207-10.

14. If legislation limits a fundamental right, the Court reviews the legislation using the strict scrutiny standard set out in Roe v. Wade, 410 U.S. 113, 155 (1973). The law must be the most narrowly drawn means to promote a compelling state interest. *See also* Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

15. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986).

it occurs within the privacy of the home.[16]

In a narrowly focused opinion, the Court considered only Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy.[17] The issue of the constitutionality of the statute as applied to other acts of sodomy was not discussed.[18]

The dissenting justices claimed that the issue before the Court was not the fundamental right of homosexuals to engage in sodomy.[19] The dissenters believed the case concerned " 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.' "[20]

III. DEVELOPMENT OF THE FUNDAMENTAL RIGHT OF PRIVACY

A. *Pre*-Griswold

The Supreme Court recognized certain nontextual constitutional rights in early cases involving childrearing, education,[21] and procreation.[22] In *Meyer v. Nebraska*,[23] the Court struck down a state law which prohibited teaching a foreign language to any child not yet in the eighth grade. The Court held that the statute in question unreasonably infringed the liberty guaranteed by the fourteenth amendment.[24] In *Pierce v. Society of Sisters*,[25] a state statute requiring children to attend only public schools was held unconstitutional.[26] Relying on *Meyer*, the Court

16. *Bowers*, 106 S. Ct. at 2843-46.
17. *Id.* at 2842 n.2.
18. *Id.*
19. *Id.* at 2848 (Blackmun, J., dissenting).
20. *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Brandeis' view of a "right to be let alone" first appeared in a law review article attacking intrusions by the press into the private life of individuals. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Justice Brandeis eloquently characterized this right to be let alone:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendent.

Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting).
21. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
22. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).
23. 262 U.S. 390 (1923).
24. *Id.*
25. 268 U.S. 510 (1925).
26. *Id.*

ruled that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[27] Thus, the Court established the parental right to make certain decisions relating to child-rearing and education.

Skinner v. Oklahoma[28] invalidated an Oklahoma statute which provided that a criminal offender should be sterilized if convicted two or more times of felonies "involving moral turpitude."[29] The Court recognized procreation as a "basic civil [right] of man. . . . fundamental to the very existence and survival of the race."[30] *Skinner* was decided under an equal protection analysis, but has since been cited for the proposition that procreation is protected as a fundamental right.[31]

Although the Court did not use any consistent argument or rationale for upholding the "liberty" recognized in these early cases, it established the right to make certain decisions relating to child-rearing, education, and procreation.

B. Griswold

In the landmark case of *Griswold v. Connecticut*,[32] the Supreme Court first recognized a fundamental right of privacy. Griswold, director of a Planned Parenthood Association, was convicted for violating a state law prohibiting counselling married persons in the use of contraceptives.[33] Because no specific textual constitutional language protecting marital privacy existed, the justices had to search for justification to find the law unconstitutional.[34]

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27. *Id.* at 534-35.

28. 316 U.S. 535 (1942).

29. *Id.* at 536.

30. *Id.* at 541.

31. *See* Carey v. Population Servs. Int'l., 431 U.S. 678, 685 (1977); Roe v. Wade, 410 U.S.113, 152 (1973).

32. 381 U.S. 479 (1965).

33. CONN. GEN. STAT. § 53-32 (1958 rev.) (repealed 1969) provided that any person who used contraceptives would be fined not less than fifty dollars and/or imprisoned sixty days to one year. Section 54-196 provided that any person who assisted another to commit an offense could be prosecuted and punished as if he had committed the offense himself. Thus, Griswold, and a physician who also worked for Planned Parenthood, were charged and convicted as accessories. *Griswold*, 381 U.S. at 480.

34. Earlier adjudication striking state economic laws on substantive due process grounds resulted in severe criticism of the Court. *See* Lochner v. New York, 198 U.S. 45, 65-74 (1905) (Harlan, J., dissenting); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 446 (1978) ("Many members of the bench and bar roundly criticized the economic, social, and judicial philosophy expressed by the *Lochner* majority."); Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 572 (1924) (labeling the Supeme Court justices as "arbiters" and characterizing their actions as "indefensible"). Distinguishing the Court's present decision from its earlier criticized actions, Justice Douglas' majority opinion stated, "We do not sit as a super-legislature to determine the wisdom,

The Court found that the right of married persons to use contraceptives fell within zones of privacy created by penumbras of several guarantees of the Bill of Rights.[35] To find a right of privacy, concurring Justice Goldberg relied on the ninth amendment.[36] Justice Goldberg believed the ninth amendment provided that certain rights not enumerated in the Bill of Rights were protected from government interference.[37] Justice Harlan's concurrence reflected his belief that the fourteenth amendment due process clause protected "basic values 'implicit in the concept of ordered liberty.' "[38]

Dissents by Justices Black and Stewart reflected the view that nontextual rights deserved no constitutional protection.[39] Without a constitutional provision prohibiting intrusion, the Court could not prevent the government from invading the privacy of its citizens. Justice Black stated the law was personally offensive to him,[40] and Justice Stewart viewed the law as "uncommonly silly."[41] Nonetheless, the dissenters believed the Court had no constitutional authority to strike the state regulation.

Although the constitutional basis and limits of the right of privacy remained vague, the Court struck down the Connecticut anti-contraceptive law.[42] The law violated the marital right of privacy described by Justice Douglas as:

> [A] right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble

need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold*, 381 U.S. at 482.

35. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." *Griswold*, 381 U.S. at 484 (citation omitted). As creating a right of privacy, Justice Douglas named the first, third, fourth, fifth, and ninth amendments. *See id.*

36. *Griswold*, 381 U.S. at 488-91 (Golberg, J., concurring). The ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

37. Although the ninth amendment does not apply directly to the state governments, it could be extended to the states through the fourteenth amendment's protection of fundamental rights. *Griswold*, 381 U.S. at 492-93.

38. *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

39. *Griswold*, 381 U.S. at 509, 530 (Black, Stewart, JJ., dissenting).

40. *Id.* at 507.

41. *Id.* at 527.

42. *Id.* at 485.

a purpose as any involved in our prior decisions.[43]

With its focus on marriage, *Griswold*, at the very least, established the right of married persons to use contraceptives free from government interference. With its outer limits still to be determined, the right of privacy was established in the marital relationship.

C. Stanley v. Georgia

The Court addressed the right of privacy and the first amendment protection of speech and press in *Stanley v. Georgia*.[44] The appellant was convicted for possession of obscene films in his own home in violation of a Georgia statute.[45] The statute prohibited selling, lending, or possessing obscene material.[46] However, the Supreme Court invalidated the Georgia law for violating the first and fourteenth amendments.[47] Although the case for the most part was decided on first amendment grounds, the Court stressed the right of privacy, particularly in the home. Individuals possess a fundamental "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."[48] Despite these broad statements, the Court confined its holding to private possession of obscene material.[49] The power of the state to regulate obscenity "simply does not extend to mere possession by the individual in the privacy of his own home."[50]

D. Eisenstadt v. Baird

The right to use contraceptives was extended from married persons to unmarried persons in *Eisenstadt v. Baird*.[51] Baird gave a contraceptive

43. *Id.* at 486.
44. 394 U.S. 557 (1969).
45. *Id.* at 558-59.
46. *Id.* at 558 n.1.
47. *Id.* at 568.
48. *Id.* at 564-65.
49. One Justice has since noted that *Stanley* did not create a generalized right of privacy, but instead was based on an interpretation of the first amendment. Whalen v. Roe, 429 U.S. 589, 609 (1977) (Stewart, J., concurring). *But see* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) in which Chief Justice Burger stated:

> 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."

Id. at 66 (citation omitted).
50. *Stanley*, 394 U.S. at 568.
51. 405 U.S. 438 (1972).

device to a young woman at the close of his lecture on contraception.[52] Subsequently, Baird was convicted of violating Massachusetts law which prohibited dispensing contraceptives to married persons except by a physician or pharmacist.[53]

The Court used the equal protection clause of the fourteenth amendment to invalidate the statute.[54] Under equal protection analysis, the state was required to show that the classification of unmarried persons was "reasonable, not arbitrary" and rested "upon some ground of difference having a fair and substantial relation to the object of the legislation."[55] The state claimed the statute was constitutional because its object was to promote health and protect morals through the deterrence of fornication.[56] The Court rejected the state's claim and viewed the statute's purpose as prohibiting "contraception *per se*."[57] The Court concluded, "[i]f under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible."[58]

Although *Eisenstadt* was decided under equal protection analysis, the Court also addressed the unmarried person's right of privacy. "If the right of privacy means anything, it is the right of the *individual*, married

52. *Id.* at 440.

53. *Id.* at 440-41.

54. *Id.* at 454-55.

55. *Id.* at 446-47 (quoting Reed v. Reed, 404 U.S. 71, 75-76 (1971) (citations omitted)). Under equal protection analysis, a state statute will be reviewed with strict scrutiny by the Court if a fundamental interest or suspect classification is involved. Dunn v. Blumstein, 405 U.S. 330 (1972) (applying strict scrutiny standard when the fundamental right to vote is involved); Korematsu v. United States, 323 U.S. 214 (1944) (applying strict scrutiny standard when a suspect classification is involved). When statutes distinguish between males and females, this classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976) (Oklahoma statute prohibiting sale of 3.2% beer to females under the age of 18 and to males under the age of 21 invalidated because the gender-based difference was not substantially related to the state's goal of traffic safety). In other areas, the Court uses a minimal level of scrutiny and finds statutes unconstitutional only if "the classification rests on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420, 425 (1961) (Maryland statute prohibiting most commercial activities on Sunday while allowing sale of specified commodities upheld as related to the state objective of protecting public health or enhancing recreational atmosphere).

56. *Eisenstadt*, 405 U.S. at 442.

57. *Id.* at 443. The Court rejected the state's asserted purpose of protecting morals by deterring premarital sex. "It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for . . . a misdemeanor . . . ." *Id.* at 448. The Court also rejected the state's asserted purpose of promoting health. " '[T]he statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency, and Good Order' . . . . A physician was forbidden to prescribe contraceptives even when needed for the protection of health.' " *Id.* at 450 (citations omitted). Further, the statute prohibited all contraceptives, even those not potentially dangerous to health. *Id.* at 451.

58. *Id.* at 453.

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."[59] The right of privacy was thus extended, at least to unmarried persons' decisions concerning the use of contraceptives.[60]

E. Roe v. Wade

The right of privacy was dramatically expanded to include a woman's decision to have an abortion in the landmark case of *Roe v. Wade*.[61] Jane Roe, a pregnant single woman, brought suit challenging the constitutionality of Texas' criminal abortion laws.[62] Roe contended her right to an abortion was grounded in "the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras; or among those rights reserved to the people by the Ninth Amendment."[63]

The Court stated that a right of privacy does exist even though the Constitution contains no explicit textual basis for such a right.[64] This right had previously been found in the "First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment."[65] The Court's list of activities previously protected by the right of privacy included "marriage, procreation, contraception, family relationships, and childrearing and education."[66] The Court then concluded the right of privacy founded in the liberty guaranteed by the fourteenth amendment, was "broad enough to

59. *Id.*

60. Although Justice Brennan's opinion addressed the right of privacy, the concurring opinions by Justices Douglas, White, and Blackmun indicated the case should have been decided on other grounds. Justice Douglas believed the decision could be based on the first amendment—handing the contraceptive device to the woman was a visual aid to understanding his lecture. *Id.* at 459-60. Justice White's concurrence, joined by Justice Blackmun, stated the record did not indicate whether the contraceptive was given to a married or unmarried woman. The conviction, therefore, should have been overturned, because the Court could not ascertain if appellant had been wrongfully convicted. The Court, therefore, need not have addressed the question of whether a state could regulate distribution of contraceptives. *Id.* at 465. In his dissent, Chief Justice Burger agreed with the state's contention that the statute was related to the permissible state goal of protecting health. Burger further criticized the opinions of Brennan and White as invading areas left for the states to regulate. *Id.* at 466-67.

61. 410 U.S. 113 (1973).

62. *Id.* at 120.

63. *Id.* at 129 (citations omitted).

64. *Id.* at 152.

65. *Id.* (citations omitted).

66. *Id.* at 152-53 (citations omitted).

encompass a woman's decision whether or not to terminate her pregnancy."[67] The Texas statute's nearly complete ban on abortion was thus found unconstitutional.[68]

The Court found that the woman's right to choose to have an abortion was not absolute. The state could still regulate this fundamental right, but any regulation would be reviewed with strict scrutiny.[69] "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[70] The Court thus established a constitutionally protected right to an abortion that could not easily be state regulated.

F. Carey v. Population Services International *and* Planned Parenthood v. Danforth

The right of privacy in connection with decisions affecting procreation was extended to minors in *Planned Parenthood v. Danforth*[71] and *Carey v. Population Services International.*[72] In *Danforth*, the Court addressed the consent requirement in Missouri's abortion statute.[73] The Court held that Missouri "may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first twelve weeks of her

67. *Id.* at 153. Justice Rehnquist, in his dissent, criticized the Court's use of the fourteenth amendment to find a fundamental right of privacy concerning the abortion decision. "To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Id.* at 174.

68. *Id.* at 164.

69. The Court stated the state had a compelling interest in protecting the health of the mother during the second trimester of pregnancy and a compelling interest in the potential life of the fetus after viability *Id.* at 163. The state could thus regulate abortion after the first trimester with narrowly drawn regulations. The holding in the opinion has been criticized as being too legislative in nature. Justice Rehnquist, dissenting, pointed out that "to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one . . . partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." *Id.* at 174.

70. *Id.* at 155 (citations omitted). In his dissent, Justice Rehnquist argued that the test for substantive due process rights should be whether the challenged law has a rational relation to a valid state purpose. He believed the "compelling state interest" test, borrowed from the equal protection analysis, would only confuse the law in this area. *Id.* at 173; *see supra* note 55 and accompanying text.

71. 428 U.S. 52 (1976).

72. 431 U.S. 678 (1977).

73. The statute barred abortion without the consent of the woman's parents if she was unmarried and under 18. *Danforth*, 428 U.S. at 58.

pregnancy."[74]

In *Carey*, the Court examined a New York statute which (1) prohibited anyone but a licensed pharmacist from distributing contraceptives to persons over sixteen, and (2) entirely prohibited the sale or distribution of contraceptives to minors under sixteen.[75] Relying on *Danforth*, the Court stated "[s]ince the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition on the distribution of contraceptives to minors is *a fortiori* foreclosed."[76] The state could still regulate the activities of a minor protected by the privacy right as long as the state could show it had a significant interest in so doing.[77]

In *Danforth* and *Carey*, the privacy right afforded minors concerned the decision to use contraceptives or terminate a pregnancy. The due process clause of the fourteenth amendment was interpreted as guaranteeing a zone of privacy in making certain kinds of personal decisions.[78] "The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."[79] Although the Court in *Carey* stressed that this privacy right was not to be automatically extended to other activities,[80] the right of privacy was nevertheless broadened to include minors' use of contraceptives and access to abortion.

IV. THE *BOWERS* DECISION

The *Bowers* decision reflects the majority's narrow view of the fundamental right of privacy established by the Court's previous decisions. The Court found that previous fundamental right of privacy cases provided no precedent for a fundamental right of homosexuals to engage in

74. *Id.* at 74.

75. *Carey*, 431 U.S. at 681.

76. *Id.* at 694.

77. "State restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.' " *Id.* at 693 (quoting *Danforth*, 428 U.S. at 75). The standard for justifying state regulation of minors, "significant state interest," is therefore lower for the state to meet than the "compelling state interest" with the regulation "narrowly drawn" standard set out in Roe v. Wade, 410 U.S. 113, 155 (1973). "The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults." *Danforth*, 428 U.S. at 74.

78. *Carey*, 431 U.S. at 684. The Court in *Danforth* did not expressly rely on the fourteenth amendment to find a right of privacy. Instead the Court quoted *Roe* for the proposition that the fourteenth amendment protected a women's decision concerning abortion. *Danforth*, 428 U.S. at 60.

79. *Carey*, 431 U.S. at 685.

80. *Id.* at 685-86.

sodomy.[81] Previous cases did not "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally [protected]."[82] The Court also refused to discover a new fundamental right covering homosexual sodomy, warning that there should be "great resistance to expand the substantive reach of [the due process clause of the fifth and fourteenth amendments]."[83] The Court further refused to extend a fundamental right of privacy for sodomy occurring within the privacy of the home. The Court pointed out illegal conduct occurring in the home is not always protected from state interference.[84]

Because no fundamental right was recognized, the Court also upheld Georgia's assertion that the sodomy statute was rationally related to its interest in morality.[85] The Court rejected the argument that the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was insufficient as a rationale to support the law.[86] The Court recognized morality as a rational basis for the Georgia statute.

In concurrence, Justice Burger reiterated "there is no such thing as a fundamental right to commit homosexual sodomy."[87] Justice Burger pointed out that states had regulated homosexual conduct throughout the history of Western Civilization. After tracing the historical roots of Georgia's sodomy statute, Burger stated, "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[88]

Justice Powell concurred that there was no fundamental right for homosexuals to engage in sodomy under the due process clause, but also raised an eighth amendment issue.[89] Because the Georgia statute provided up to a twenty-year imprisonment for a single, consensual act of sodomy, Powell believed the Georgia statute might be considered "cruel and unusual punishment."[90] Powell conceded that that issue was not before the Court, however, because Hardwick had not been tried, con-

81. Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986).
82. *Id.*
83. *Id.* at 2846.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 2847 (Burger, J., concurring).
88. *Id.*
89. *Id.* (Powell, J., concurring).
90. The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

victed, or sentenced, and because the issue had not been raised.[91]

The majority rejected every opportunity to protect the homosexual's right of privacy. With little analysis, the Court upheld Georgia's statute. While the dissenting opinions illustrate the options available to the Court for protecting homosexuals' freedom in sexual choices, every option was rejected, leaving homosexuals without constitutional protection for their lifestyle.

V. ANALYSIS

A. *Previous Decisions Provided No Precedent*

The Court held that its previous decisions provided no precedent for extending the fundamental right of privacy to homosexual sodomy.[92] Hardwick[93] relied on the Court's previous right of privacy cases as set out in *Carey v. Population Services International*.[94] Hardwick contended this line of cases stood for the proposition that the fundamental right of privacy protected consensual sexual conduct between adults in the privacy of their home.[95] The Court rejected this argument.[96] The Court

91. *Bowers*, 106 S. Ct. at 2848 (Powell, J., concurring).

92. *Id.* at 2844.

93. In his appeal, Hardwick was represented by Professor Laurence Tribe. Professor Tribe, a recognized authority on constitutional law, has been critical of the Burger Court. Professor Tribe stated:

> I perceive in recent decisions of the Supreme Court a distressing retreat from an appropriate defense of liberty and equality. . . . [T]he Burger Court has been animated by a specific substantive vision of the proper relationship between individuals and government—a vision I regard as bordering on the authoritarian, unduly beholden to the status quo, and insufficiently sensitive to human rights and needs. I believe that the course of the Burger Court . . . will eventually be marked not as the end of an era of exaggerated activism on behalf of individuals and minorities, but as a sad period of often opposite activism, cloaked in the worn-out if well-meant disguise of judicial restraint.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW v (1978).

94. 431 U.S. at 678, 685 (1977). The Court viewed previous cases as dealing with "child rearing and education," "family relationships," "procreation," "marriage," "contraception," and "abortion." *Bowers*, 106 S. Ct. at 2843.

95. *Bowers*, 106 S. Ct. at 2843.

96. The Court's opinion that prior privacy cases provided no precedent for a right of privacy in sexual conduct clashes with several lower court decisions and illustrates the confusion of lower courts in this area. Many state and federal courts have interpreted the privacy cases as establishing constitutional protection for sexual freedom. The confusion becomes more apparent when the numerous dissents and reversals are considered. 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) held New York's sodomy law unconstitutional as applied to both heterosexuals and homosexuals. The previous Supreme Court privacy decisions were viewed as offering protection for "decisions . . . to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting." *Id.* at 488, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951. Dissenting in *Onofre*, Judge Gabrielli stated previous privacy cases did not "stand for the proposition that there is a generalized right of privacy or personal autonomy implicit in the Federal Bill of Rights." *Id.* at 495, 415 N.E.2d at 944, 434 N.Y.S.2d at 955. Judge Gabrielli adopted

reasoned that prior privacy holdings protected only decisions dealing with family, marriage, and procreation.[97]

The Court appeared to limit the holdings in prior decisions to the facts of those cases by stating, "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."[98] This sentence indicates the Court viewed its prior decisions, such as *Griswold*, *Eisenstadt*, *Roe*, and *Carey*, as conferring not a general right of privacy, but a privacy right only in decisions relating to family, marriage, or procreation. In light of the very specific holdings and repeated use of the terms "family," "marriage," and "procreation" throughout previous decisions, this limitation is not surprising. The Court is indicating that previous privacy decisions do not create a "privacy principle." By using the descriptive and limiting terms "family," "marriage," and "procreation," the Court refused to extend the holdings in previous privacy cases beyond their facts.

The Supreme Court also refused to equate the homosexual relationship to the relationship concerning family, marriage, or procreation.[99] In concluding that previous privacy cases protecting marriage were applicable to homosexual conduct, the Court of Appeals for the Eleventh Circuit stated "[t]he intimate association protected against state interference

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the position, generally equivalent to the Supreme Court's position in *Bowers*, that previous cases "limited the protection of the Constitution to decisions relating to the traditionally protected areas of family life, marital intimacy and procreation." *Id.* at 500-01, 415 N.E.2d at 947, 434 N.Y.S.2d at 958.

A Texas sodomy statute was ruled unconstitutional in district court but was later reinstated on appeal. Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 3337 (1986). The district court found previous privacy cases established a right of privacy that extended to "private, voluntary intimate relationships—between husband and wife, between unmarried males and females, between homosexuals." *Id.* at 1141. On appeal, however, the Court of Appeals for the Fifth Circuit considered the summary affirmance upholding Virginia's sodomy statute in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) as binding precedent. Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985). The court, therefore, held the Texas statute constitutional. *Id.* at 292-93.

See also Lovisi v. Slayton, 539 F.2d 349, 351 (4th Cir.) (en banc), *cert. denied*, 429 U.S. 977 (1976) (the right of privacy protects marital intimacies of a couple alone in their bedroom, but this protection is lost when strangers as onlookers are admitted); State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977) (New Jersey's fornication statute struck as unconstitutional infringement on the right of privacy); State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (Iowa's criminal sodomy statute unconstitutionally violated the fundamental right of privacy as applied to private consensual heterosexual sodomy). *But see* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (the rights to privacy and equal protection do not protect homosexual conduct); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976) (previous privacy cases protect marriage, home, and family life and are not a bar to state proscription of homosexuality).

97. *Bowers*, 106 S. Ct. at 2844.

98. *Id.*

99. *Id.*

does not exist in the marriage relationship alone. . . . The benefits of marriage can inure to individuals outside the traditional marital relationship. For some, the sexual activity in question here serves the same purpose as the intimacy of marriage."[100] The Supreme Court, however, saw no resemblance in homosexual conduct and the rights previously protected.[101] Furthermore, the Court stated that neither respondent nor the court of appeals had demonstrated such a connection.[102] The argument that homosexual conduct is constitutionally protected as an intimate association[103] seems doomed by the Court's failure to favorably compare the homosexual relationship to marriage or family.

In contrast, Justice Blackmun's dissent pointed out that when the issue is framed differently, precedent protecting family, marriage, and procreation decisions are applicable to homosexual relationships.[104] By viewing previous cases as protecting individual liberty in the context of family, marriage, and procreation, this precedent applies to the individual liberty at stake in the context of homosexuality. Blackmun "connected" family, marriage, and procreation to homosexual activity by showing the rights protected in previous cases related to individual liberty.[105] Blackmun believed the Court protected marriage, family, and procreation decisions because of their impact on the individual. In denying homosexuals the right to choose the form and nature of their intimate sexual relationships, Blackmun contended the Court had "refused to recognize . . . the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[106]

Justice Stevens also believed prior case law established a fundamental right of privacy protecting sexual conduct. "The essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisen-*

100. Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986).

101. *Bowers*, 106 S. Ct. at 2844.

102. *Id.*

103. For a discussion of the freedom of intimate association, *see generally* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (privacy decisions dealing with marriage, family relations, procreation, and associations outside the traditional family are part of the constitutionally protected freedom of intimate association). *Compare* Roberts v. United States Jaycees, 468 U.S. 609 (1984). The Court held that application of Minnesota law forcing Jaycees to accept women members did not infringe the male members' freedom of intimate association. *Id.* at 620-21. The Court characterized one line of past cases as protecting freedom of association as an element of personal liberty. "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id.* at 617-18.

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

105. *Id.*

106. *Id.* at 2852.

stadt, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral."[107] Nevertheless, by viewing past cases as controlled by their facts, the majority concluded these cases did not create an unlimited right of intimate association in sexual choices.[108]

B. *No New Fundamental Right*

Because precedent did not establish a fundamental right of homosexual sodomy, the Court examined its power to announce a new fundamental right. Alluding to the criticism leveled at the Court in the 1930's, the Court viewed its authority as very limited.[109] The Court stated it could only announce new fundamental rights if they were " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed' "[110] or if they were " 'deeply rooted in this Nation's history and tradition.' "[111] The Court believed sodomy fit neither of these definitions; therefore, a new fundamental right could not be created.[112]

The controversy concerning the Court's power to strike state statutes that interfere with judicially created rights has raged since *Griswold* was first announced. The majority in *Bowers* joins those commentators and jurists who narrowly view the Court's power to create rights without textual support in the Constitution.[113] In keeping with this view, the Court deferred to the Georgia legislation because the statute did not conflict with a specific provision of the Constitution.[114]

The Justices gave notice that the Court had gone about as far as it

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107. *Id.* at 2858 (Stevens, J., dissenting).

108. *Id.* at 2844.

109. *See infra* notes 113-17 and accompanying text.

110. *Bowers*, 106 S. Ct. at 2844 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

111. *Bowers*, 106 S. Ct. at 2844 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)); *see also The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 137 (1977) (criticizing Powell's "reliance on history and tradition to define and legitimate constitutional rights [as] apt to cast the Court as a defender of established collective values").

112. *Bowers*, 106 S. Ct. at 2844-46.

113. J. ELY, DEMOCRACY AND DISTRUST (1980). The interpretivist view provides that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." *Id.* at 1; *see also* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8-9 (1971) (stating "judge[s] must stick close to the text [of the Constitution] and the history, and their fair implications, and not construct new rights," and viewing *Griswold* as "an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it").

114. *Bowers*, 106 S. Ct. at 2846.

would go in naming new fundamental rights using substantive due process:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be . . . great resistance to expand the substantive reach of [the due process clause of the fifth and fourteenth amendments] particularly if it requires redefining the category of rights deemed to be fundamental.[115]

The Court could hardly make a clearer statement describing its perceived role.

Justice Blackmun's dissent accused the majority of entirely missing the issue of the case by viewing the rights at stake so narrowly.[116] Justice Blackmun, whose dissent embodied the view that the Constitution provides for a more liberal protection of individual freedom, contended the case presented the broader question of freedom from government intrusion in private matters.[117] Under Blackmun's view, the right to use contraceptives, procure an abortion, or view obscene material in the home existed because a general right of privacy is protected by the Constitution.[118] Justice Blackmun asserted that tolerating nonconformity threatens America's values far less than denying individuals the freedom of choosing how to conduct their intimate relations.[119]

C. *Privacy in the Home*

The Court rejected Hardwick's claim that homosexual sodomy should be protected at least when it occurs in the privacy of the home.

115. *Id.* In describing the Court's role, Justice White refers to the "face-off between the Executive and the Court in the 1930's." *Id.* In 1937, President Franklin D. Roosevelt proposed to increase the number of justices on the Supreme Court. Under his "Court-packing plan," Presidential appointments would increase the maximum number of justices to fifteen. Roosevelt justified his plan by arguing that new people were needed and that the older justices were not as efficient. Actually, Roosevelt wished to change the Court's make-up, because his New Deal legislation was being struck down by the Court. Although the plan was defeated by Congress, the Supreme Court did begin exercising more judicial restraint and upholding New Deal legislation. This change in the Court was apparently due to the retirement of one conservative Justice and the switch of another from the conservative to the liberal bloc. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 34-35 (3d ed. 1986).

116. *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting).

117. *Id.*; *see also* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (Grey espouses a broader view of judicial review and sees the Court's role as the "expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution"); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 238 (1980) (protecting values and the democratic process is best accomplished by interpreting the text and original history of the Constituton as guidelines rather than as authoritative or binding).

118. *Bowers*, 106 S. Ct. at 2851-52 (Blackmun, J., dissenting).

119. *Id.* at 2856.

The Court's protection of possession of illegal obscene material in *Stanley*[120] generated the argument that even state-regulated conduct occurring within the home merited special protection.[121] The Court, however, asserted that *Stanley* was "firmly grounded in the First Amendment."[122] The Court reasoned that viewing obscene material was protected for two reasons: (1) the first amendment protects free speech and press, and (2) the conduct occurred within the privacy of the home.[123]

Using the Court's reasoning in *Stanley*, two criteria must be met in order for illegal conduct to merit special protection: (1) the illegal conduct must have some textual support for constitutional protection (for example, viewing obscene material is arguably protected by the first amendment); and simultaneously, (2) the conduct must occur in the privacy of the home. While homosexual sodomy may occur within the home, the Court refused to protect it, because no constitutional support existed for protecting the conduct.[124]

However, Justice Blackmun, in dissent, argued that the privacy of the home was the central reason *Stanley* protected otherwise illegal conduct.[125] The Court "anchored its holding in the Fourth Amendment's special protection for the individual in his home."[126] Using this broader view of *Stanley,* illegal conduct that creates no harm and occurs within the privacy of the home must be protected. This argument has never been offered to protect criminal conduct that causes harm.[127] The activities listed by the majority as illegal conduct occurring within the home can be distinguished from homosexual sodomy. Arguably, possession of drugs, firearms, and stolen goods, as well as adultery, incest, and other sexual crimes cannot be categorized as victimless.[128] On the other hand,

120. Stanley v. Georgia, 394 U.S. 557 (1969).

121. *Bowers*, 106 S. Ct. at 2846.

122. *Id.*; *see supra* note 49.

123. *Bowers*, 106 S. Ct. at 2846.

124. *Id.*

125. *Id.* at 2852-53 (Blackmun, J., dissenting).

126. *Id.* at 2852.

127. J.S. MILL, ON LIBERTY (England 1859). Mill developed the theory that government should not regulate conduct which causes no harm. *See also* Ludd, *The Aftermath of* Doe v. Commonwealth's Attorney: *In Search of the Right to Be Let Alone*, 10 U. DAYTON L. REV. 705, 706-08 (1985) (colonial Americans espoused the political theory of libertarianism which included the philosophy that, before behavior may be limited, government must demonstrate that harm will result); Comment, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605 (1970) (Mill's philosophy affects the legislative process as well as the judiciary).

128. Drugs and firearms can cause lethal harm, stolen goods evidence harm to a true owner, while adultery and incest have an adverse effect on the family.

homosexual sodomy between consenting adults causes at the most only incidental harm.

Any harm caused by private consensual sodomy between adults can only be characterized as an affront to society's morals. When consenting adults engage in sodomy, no question of force or harm to minors is involved. When sodomy occurs in the privacy of the home, society would not be required to tolerate observance of public sexual acts. Furthermore, when the character of homosexuality is considered, the likelihood that striking down sodomy statutes would endanger the traditional family is at best questionable.[129]

Here, the harm to society would have to come from the mere knowledge that people might engage in sodomy. That this knowledge might affront the morals of some or many is an inadequate justification to deny protection of privacy in sexual choices. The harm is, at most, minimal and incidental. "No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners."[130] This lack of harm results in a victimless crime that is distinguishable from other types of crimes which do not deserve constitutional protection because they cause harm. The fact that the conduct does not cause harm and occurs in the privacy of the home combine to justify constitutional protection from government interference.

D. *Morality as State's Justification*

The *Bowers* Court upheld the state's assertion that the sodomy statute was rationally related to the legitimate state objective of protecting

129. *See* Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 595-96 (1977). Professors Wilkinson and White include in their article the argument that criminalizing sodomy protects the traditional family by deterring young people from choosing homosexuality, a lifestyle not approved by society. "If society accorded more legitimacy to expressions of homosexual attraction, attachment to the opposite sex might be postponed or diverted for some time, perhaps until after the establishment of sexual patterns that would hamper development of traditional heterosexual family relationships." *Id.* at 596. *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 945 (1978) stating scientists generally agree homosexuality is determined before birth or in the first few years of life. People who have no cognizable choice as to their sexual preference are not likely to be forced into a traditional family life because of criminal sodomy statutes. *See id.; see also* MODEL PENAL CODE § 213.2 comment at 367-69 (Official Draft 1980) (explaining that homosexuality may be viewed as a sin, a disease, or a difference); MODEL PENAL CODE § 207.5 Appendix B (Tent. Draft No. 4, 1955) (listing studies and sources relating to the causes of sexual deviation).

130. MODEL PENAL CODE § 207.5 comment at 277 (Tent. Draft No. 4, 1955); *see also* MODEL PENAL CODE § 213.2 comment at 369-72 (Official Draft 1980) (contending criminal penalties are not appropriate because sodomy does not harm the community's secular interests, enforcement of sodomy statutes is impractical, and criminal penalties unjustifiably infringe personal liberty).

morality.[131] Because the Court held that homosexual sodomy was not a fundamental right, the state was not required to show a compelling state interest to justify the statute. When no fundamental right is involved, the state need show only that the regulation has a rational relation to the state's asserted purpose for the regulation.[132] The Court accepted as an adequate rationale supporting the law the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[133]

Both Justices Blackmun and Stevens pointed out in their dissents that morality did not adequately justify Georgia's regulation of homosexual sodomy.[134] Justice Blackmun argued that the state's justification was possibly grounded more in religion than in morality.[135] Georgia evidenced this by relying on "traditional Judeo-Christian values."[136] Such morality may not be a legitimate justification.[137] "A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."[138] Justice Stevens compared the morality used by Georgia to justify its sodomy statute to the morality used in the past to justify laws prohibiting miscegenation, implying the majority morality may be "incorrect."[139]

131. Bowers v. Hardwick, 106 S. Ct. 2841, 2846 (1986).

132. "The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective." Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (citing Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955)). When the Court engages in a low level of scrutiny, the challenged law will likely be upheld. Hardwick contended the Court should review the statute under the compelling state interest standard. Hardwick argued that even if the Court did not use that standard, the "statute *at the very least* [should] be tested for a 'fair and substantial relation' to a legitimate governmental objective." Brief for Respondent at 6, Bowers v. Hardwick, 106 S. Ct. 2841 (1986) (No. 85-140) (quoting Zablocki v. Redhail, 434 U.S. 374, 400, 402 (1978) (Powell, J., concurring in judgment)).

133. *Bowers*, 106 S. Ct. at 2846.

134. *Id.* at 2854, 2857 (Blackmun & Stevens, J.J., dissenting).

135. *Id.* at 2854-55.

136. *Id.* at 2854.

137. A statute may be held unconstitutional when the legislative purpose is "plainly religious in nature" unless a secular legislative purpose is established. Stone v. Graham, 449 U.S. 39, 40-41 (1980) (per curiam) (Court struck down Kentucky statute requiring posting of the Ten Commandments on public classroom walls as violative of the first amendment establishment clause); *see also* Katz, *Sexual Morality and the Constitution:* People v. Onofre, 46 ALB. L. REV. 311, 353-61 (1982) (sodomy legislation may be viewed as based solely on theological grounds and, thus, unconstitutional under the establishment of religion clause of the first amendment).

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

139. *Id.* at 2857. Justice Stevens seems to be relying on the premise that society may enforce a "public" morality on its citizens. However, when married people are engaged in private conduct, isolated from the public view, such public morality is insufficient justification for government regulation. With the argument that private sexual conduct of married couples is beyond government regulation, Stevens contends the state must then justify selective application of this law to homosexuals.

E. *Procedural Questions*

Bowers was a five-four decision with Justice Powell concurring with the majority. Justice Powell's fifth vote, however, may be viewed as less solid than the other four majority justices. Powell believed that Hardwick could have attacked the constitutionality of the statute on eighth amendment grounds.[140] Because the punishment for a single act of consensual sodomy could result in up to twenty years imprisonment, enforcement could result in cruel and unusual punishment. As Justice Blackmun pointed out in his dissent, "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."[141] Because Hardwick's case was before the Court on Georgia's motion to dismiss for failure to state a claim, the Court should have determined whether any possible theory could provide relief.[142] Only one vote was needed to swing the decision. Although Justice Powell voted with the majority, his concurring opinion indicated that an eighth amendment argument[143] could have changed his vote.

F. *Future Implications*

Three significant questions arise from the *Bowers* decision: (1) how will the Court rule on sodomy statutes as applied to heterosexuals; (2) how will sodomy statutes be enforced; and (3) how will the decision affect the trend toward decriminalizing sodomy?

In *Bowers*, the Court explicitly stated that heterosexual sodomy was not at issue.[144] Since that decision, the Court has denied certiorari to decide whether Oklahoma's sodomy statute[145] is constitutional.[146] The

140. *Id.* at 2847.

141. *Id.* at 2849.

142. *Id.*

143. *Id.* Blackmun raises the novel possibility that punishing homosexuals for sodomy is unconstitutional under the eighth amendment because homosexuality might be analogous to a status such as alcoholism. *Id.* at 2850 n.2. Justices Blackmun and Stevens agree that Georgia's selective enforcement of the Georgia statute raises equal protection questions whether or not homosexuals could be classified as a suspect classification. *Id. But see* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1615 n.13 (1974) (contending an eighth amendment argument relying on homosexuality would likely fail because the necessary compulsion would be difficult to prove).

144. *Bowers*, 106 S. Ct. at 2842 n.2.

145. OKLA. STAT. tit. 21, § 886 (1981) provides: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten years."

146. Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986), *cert. denied*, 107 S. Ct. 240 (1986). Post was convicted of two counts of crime against nature, anal intercourse and oral copulation, with

Oklahoma Court of Criminal Appeals declared the sodomy statute unconstitutional as applied to consenting heterosexual adults.[147] Although the Oklahoma court cautioned that its decision did not reach the question of homosexual sodomy,[148] in light of *Bowers*, the statute would clearly be constitutional.[149]

Although denial of certiorari creates no precedent,[150] as a practical result a double standard now exists in Oklahoma for heterosexual and homosexual sodomy. Criminal sanctions cannot be invoked to punish heterosexual sodomy because the Oklahoma Court of Criminal Appeals declared the sodomy statutes unconstitutional as applied to heterosexuals. Under the Supreme Court decision in *Bowers*, however, Oklahoma's statute as applied to homosexuals is constitutional. Homosexuals may be arrested and prosecuted for consensual sodomy while heterosexuals may not. A decision from the Court is needed to eliminate this confusion and to rectify the unfair double standard existing in Oklahoma—and that could exist in other states whose courts might have taken similar action.

In reviewing a heterosexual sodomy case, the Court has three alternative courses of action. First, the Court could strike the statute as applied to heterosexuals; however, equal protection questions would arise. The Court would have to justify the differential treatment of homosexuals and heterosexuals. A strict standard of review is used to review legislation when a fundamental right or suspect classification is involved.[151] Because the *Bowers* Court determined no fundamental right to engage in homosexual sodomy exists, the strict scrutiny standard would apply only

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a consenting adult female in his home. Defendant Post met the alleged victim, a married woman, at a bar and invited her to his house. The alleged victim accompanied Post to his home, where she claimed he then sexually assaulted her. Post testified the alleged victim voluntarily performed the criminal sexual acts. After instructions that consent was not an element of the crime against nature, the jury convicted Post on two counts of that crime, but acquitted him on the related rape charge. *Id.* at 1106-07. On appeal, the Oklahoma Court of Criminal Appeals stated that previous decisions of the Supreme Court provided that the right of privacy "includes the right to select consensual adult sex partners" and "natural repugnance does not create a compelling justification for state regulation." *Id.* at 1109. The court held the Oklahoma statute unconstitutional as applied to the facts of this case. *Id.* at 1109-10.

147. *Id.* at 1109. Although the victim claimed the sodomy was forcible, the jury believed the defendant's account that the victim consented. *Id.* at 1107.

148. *Id.* at 1109.

149. The Oklahoma statute applied to "every person" while the Georgia statute applied to "a person." The similarity of the language proscribing sodomy regardless of the sex of the partners indicates the statutes would be similarly applied. *See supra* notes 11 and 145.

150. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950). "[D]enial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Id.* at 919.

151. *See supra* note 55.

if homosexuals are found to be a suspect classification.[152] An alternative standard of review was indicated in *Eisenstadt v. Baird*,[153] where the Court required a showing that the classification was "reasonable, not arbitrary" and "rest[ed] upon some ground of difference having a fair and substantial relation to the object of the legislation."[154] Less stringent than the strict scrutiny standard, the Court would be better able to justify unequal treatment using this standard.[155]

Second, the Court could be faced with the issue of heterosexual sodomy in a factual setting involving only married or, alternatively, only unmarried adults. The Court's reluctance to go beyond the facts of each case in the privacy decisions[156] could result in a narrow decision leaving unanswered questions in the heterosexual relationship not addressed by the Court. The same equal protection questions would arise as in the homosexual/heterosexual issue, requiring justification for the unequal treatment of married and unmarried heterosexuals.

Finally, the Court could uphold sodomy statutes as applied to all heterosexuals, ultimately allowing states to proscribe all sodomy. By narrowly framing the issue as a right to engage in sodomy rather than as a right to be free from government interference,[157] the Court could reason that sodomy in any form is not "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history."[158] In this instance, the marital right of privacy would be narrowed considerably. The "sacred precincts of marital bedrooms"[159] could be legally entered and searched. Enforcement would pose a particularly controversial issue if sodomy in the marital relationship could be prohibited.

152. The Court has recognized race and national origin as suspect classifications. *See* Loving v. Virginia, 388 U.S. 1 (1967); Yick Wo v. Hopkins, 118 U.S. 356 (1886). The Court, however, has not recognized homosexuality as a suspect classification. *See* National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (1984) ("We cannot find that a classification based on the choice of sexual partners is suspect . . . ."), *aff'd by an equally divided Court*, 105 S. Ct. 1858 (1985). *But see* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) (arguing that homosexuals should be viewed as a suspect classification for equal protection analysis).

153. 405 U.S. 438 (1972).

154. *Id.* at 447 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

155. Acquired immune deficiency syndrome (AIDS) has been suggested as a possible state justification for prohibiting sodomy. Because homosexuals have been classified as a high-risk group, AIDS would conceivably justify differential treatment at least under the standard set out in Eisenstadt v. Baird, 405 U.S. 438 (1972). *See Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 626-35 (1986).

156. *See supra* note 98 and accompanying text.

157. *See supra* notes 104 and 116-19 and accompanying text.

158. Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) and Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

159. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

The enforcement of sodomy statutes as applied to homosexual or heterosexual conduct in the privacy of the home presents problems. Enforcement of the statutes requires access to private bedrooms gained only through warrants based on probable cause.[160] The evidence necessary to satisfy probable cause would be difficult to ascertain. Should doctors report evidence of sodomy to police, the state would defeat its objective of protecting the health of its citizens. Surely, homosexuals would hesitate before procuring medical treatment knowing they could be reported to the police. Further, the money and manpower necessary to arrest, jail, and prosecute offenders is hard to justify because the harm to other citizens is not immediately apparent. These problems indicate that enforcement of sodomy statutes is unlikely. For example, the statute at issue in *Bowers* had not been enforced for several decades.[161]

Lack of regular enforcement allows wide police discretion in selecting the targets of arrest and prosecution.[162] Abuse of this discretion occurs most often in consensual sex offenses.[163] Even though the chance of arrest and conviction for sodomy is slight, this may offer little solace to homosexuals or heterosexuals who fear government's discriminatory enforcement of the law.[164]

As a practical matter, the *Bowers* decision stands, and advocates of homosexual rights and sexual freedom will be required to seek their solution in state legislatures.[165] Recent trends indicate that such an effort might well be successful. Only twenty-four states now have criminal sod-

160. The fourth amendment's protection against "unreasonable searches and seizures" protects citizens in their homes unless "Warrants shall issue . . . upon probable cause." U.S. CONST. amend. IV.

161. *Bowers*, 106 S. Ct. at 2848 n.2.

162. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 287 (1968).

163. *Id.* at 290-91.

164. Statutes that proscribe consensual adult sodomy in private permit "capricious selection of a very few cases for prosecution and serve primarily the interests of blackmailers." MODEL PENAL CODE § 207.5 comment 278 (Tent. Draft No. 4, 1955). The discretion police officers have in enforcing consensual sex offenses may be abused "to pay off a score, to provide a basis for extortion, to stigmatize an otherwise deviant or unpopular figure." H. PACKER, *supra* note 162, at 291. Abuse of police discretion may also occur by discriminatory nonenforcement which is difficult to establish from police record. *Project, The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV., 643, 742 (1966); *see also* Harry, *Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men*, 19 CRIMINOLOGY 546 (1981) (empirical study showing incidents of extortion of homosexual men by police and others).

165. The Court's philosophy in *Bowers* will prevail so long as the Court's composition does not change. Chief Justice Burger's recent resignation held hope that a new appointee could swing the Court's position on sodomy because Burger voted with the majority. However, the new appointee to the Court, Justice Antonin Scalia, may support the *Bowers* majority, based on the decision in Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), in which he participated. Judge Bork's opinion in *Zech* clearly stated the court's position: "Whatever thread of principle may be discerned in the

omy statutes prohibiting private sodomy between consenting adults.[166] In the Model Penal Code, the American Law Institute recommended that private homosexual conduct be decriminalized.[167] Armed with these facts and a growing sense of frustration with the court system, proponents of freedom in sexual choices may be able to convince state legislatures that criminalization of sodomy results in undue government intrusion.

VI. CONCLUSION

The Court in *Bowers* flatly refused to recognize a fundamental right to engage in homosexual sodomy. The fundamental right of privacy was applied only to decisions relating to family, marriage, or procreation. The Court also viewed its role as limited in overturning state legislation that does not offend some explicit constitutional provision. Although the issue of heterosexual sodomy was not addressed, the Court refused to resolve this issue by denying certiorari in *Post*. With the Court's refusal to constitutionally protect sexual freedom, opponents of sodomy statutes must seek their solution through legislative repeal.

Perhaps the Court's decision can best be understood as a reflection of the philosophy that adheres closely to the text and history of the Constitution. In the name of judicial restraint and deference to state legislation, the Court seriously curtailed the expansion of the right of privacy doctrine. An understanding of the Court's philosophical position, however, is not necessarily justification for its results. The Court has sacrificed individual liberty to uphold a law that prevents no harm, that allows government intrusion into the privacy of the bedroom, and that admittedly will not be enforced or will be enforced only selectively. The soundness of a philosophy that yields such a result should be questioned.

Donna L. Smith

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right-of-privacy cases . . . [c]ertainly the Supreme Court has never defined the right so broadly as to encompass homosexual conduct." *Id.* at 1391.

166. The following states have criminal statutes prohibiting private consensual sodomy: Alabama, Arizona, Arkansas, District of Columbia, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia. *See Survey*, *supra* note 155, at 524.

167. *See* MODEL PENAL CODE § 213.2 comment at 372 (Official Draft 1980).