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Sandra S. Klein

Notre Dame Law School, klein.26@nd.edu

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*YOUR RIGHT TO PRIVACY:
SELECTIVE BIBLIOGRAPHIES*

Sexual Freedom
and Your Right to Privacy:
A Selective Bibliography

Sandra S. Klein

INTRODUCTION

Like so many other privacy issues, concern over sexual freedom took on more than intellectual overtones with the advent of greater public discussion. As courts and government appeared to enter the most private domain of all, the bedroom, the public's interest in privacy issues dealing with sexual freedom increased dramatically. This bibliography should serve as a valuable tool for researchers who have an interest in this highly controversial area of social concern.

SCOPE

The bibliography which follows is intended to be used as a research tool for those scholars already well-versed in the area, as well as for those

Sandra S. Klein is Assistant Professor of Library Administration and Law Librarian, EdM, MSLIS, University of Illinois Law Library, 504 East Pennsylvania Avenue, Champaign, IL 61820.

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who are looking to find an introduction to this highly controversial and socially relevant area of concern. The time period covered is from 1980-1992. All entries are arranged alphabetically by the author's last name, and annotations are provided for those titles which are not clearly indicative of the content of the article. All of the material presented has been reviewed by the author.

OVERVIEW

The issue of sexual freedom is not new. It has, however, become a more publicly controversial issue with the advent of greater legal, scholarly, and media scrutiny. As with most other privacy concerns, the analysis of this issue begins with a review of its constitutional elements, whether explicit or implied. The literature then reflects investigators' concerns with specific court cases, as well as with religious, moral and ethical aspects of this topic; In addition, specific sexual freedom sub-category concerns such as pornography, homosexuality, and prostitution are addressed.

The first concern analysts focus on in reviewing cases involving the question of whether or not individuals do in fact have a right to sexual freedom, is whether or not references to such a right may be found in the Constitution. Lacking any such direct constitutional references, commentators often seek evidence of indirect or implied reference, either in constitutional history or by way of subsequent court interpretation.

Constitutional analysis generally seems oriented toward a review from a specific perspective. For example, Richard Mohr's article, "Mr. Justice Douglas at Sodom: Gays and Privacy," looks at cases that considered privacy issues in general, explains why the author feels that privacy should be considered a fundamental and constitutional right, and concludes that such a right should apply to homosexuals.

Similarly, in an article that is of particular contemporary interest, Harley Diamond, in "Homosexuals in the Military: They Would Rather Fight than Switch," argues that this group is clearly being discriminated against "in contravention of their constitutional right to privacy . . . (in particular) that military regulations excluding homosexuals impinge upon constitutional rights in three major areas: freedom of association or the right to be homosexual, personal autonomy or the right to participate in private consensual sex, and the right to be let alone."

In a more general constitutional sense, Kevin Fitzgerald reviews the relationship between the constitution and the actions of adults in "Constitutional Law: The Right of Privacy and its Application to Sexual Activity Between Consenting Adults."

Other articles dealing with specific issues that relate to sexual freedom are also included. For example, Ruth Colker reviews one of these more limited areas in "Pornography and Privacy: Towards the Development of a Group Based Theory for Sex Based Intrusions of Privacy." Another limited area, prostitution, is considered by Kathleen Daly in "The Social Control of Sexuality: A Case Study of the Criminalization of Prostitution in the Progressive Era." AIDS, too, is an issue that doesn't escape attention, being reviewed in this context by Kristine Gobbie in "AIDS and Government: Regulation of Sexual Behavior."

The religious viewpoint, as might be expected during a period of fundamentalist resurgence, has not been overlooked, either, as indicated by several of the referenced articles. Lynn Buzzard reviews the ways in which churches use public disciplinary procedures to ensure compliance with church doctrine in "Scarlet Letter Lawsuits: Private Affairs and Public Judgments." James Wood, alternatively, takes a broader view on the religious aspect of the sexual freedom issue in his article, "Religion, the State, and Sexual Morality," while other writers consider the role of religion in the debate as part of the larger social concern increasingly evidenced by the public as a whole.

Finally, scholars have looked at actions taken by the courts, most specifically the Supreme Court, regarding sexual freedom. Chief among such evaluations have been those oriented toward an analysis of the *Bowers* case and its implications for individual sexual freedom.

In *Bowers v. Hardwick*, the Court upheld the criminality of a state sodomy statute, a decision that has been reviewed extensively in the literature, and one that serves to illustrate the potential for controversy that inheres to the sexual freedom issue. Jeffrey Soderberg, in "*Bowers v. Hardwick*: The Supreme Court Redefines Constitutional Rights: Analysis," discusses the ways in which the Court has looked at the powers of the states under the 14th Amendment. He concludes that this decision opposes general rights to individual privacy, and that it serves to detract from "the growth and development of our societal values."

Several other authors deal with *Bowers*, each taking particular analytical viewpoints. For example, Nan Faylor considers ways to respond to the decision using state laws as described in her article, "The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws." Along the same lines, A.S. Cohan reviews *Bowers* to examine "The State in the Bedroom: What Some Adults May Not do After *Hardwick v. Bowers*." A final variant on the *Bowers* analysis is taken by Norman Viera in "*Hardwick* and the Right of Privacy," in which he looks at this case and its

relationship to *Roe v. Wade* and finds that the Court is guilty of far-reaching "doctrinal deficiencies."

As this brief overview clearly indicates, sexual freedom, as a subset of the general privacy issue, is one that is itself both legally and socially complex. As an increasingly publicized concern, and as one that potentially affects individual citizens in an area considered truly personal, this issue appears to be one that will continue to be important in the privacy arena. It is also one that is sure to remain in public view so long as any of its wide-ranging aspects continue to command both legal scrutiny and public attention.

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Oberstaedt, Mark J. "Constitutional Law: First Amendment: States May Proscribe the Private Possession of Non-Obscene Child Pornography: *Osborne v. Ohio*, 110 S. Ct. 1691 (1990)." *Seton Hall Law Review*. 21:2(1991): 410-444. In the recent case of *Osborne v. Ohio* (110 S. Ct. 1691, 1990), the Court found that the "private, at-home possession of non-obscene child pornography does not advance the purposes of the first amendment and therefore, was not constitutionally protected." This case, and a historical overview of the cases preceding it, is presented in order to illustrate the various limitations on an individual's first amendment rights, especially as related to issues of obscenity and privacy. The note considers the Court's protective attitude toward minors, and its willingness to balance the harm associated with restricted first amendment rights against the compelling state interest in ameliorating danger to children, even where the acts to be proscribed are not obscene. An in-depth discussion of Justice Brennan's dissent in *Osborne* is given, and viewed supportively by the author, who considers the holding in *Osborne* to have been flawed.

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Soderberg, Jeffrey W. "Bowers v Hardwick: The Supreme Court Redefines Fundamental Rights: Analysis." *Villanova Law Review* 32:1(February 1987): 221-258. Involved here is a consideration of *Bowers v Hardwick*, and its effect on the Supreme Court's efforts to examine the scope of the 14th amendment's "generalized restrictions on the power of the states to regulate the activity of their citizenry." Applying both the Bill of Rights and general questions of liberty and due process, the court, in 1965, began "redefining fundamental liberties protected by the 14th Amendment, recognizing a constitutional right of privacy." In *Hardwick*, the Court has stepped back (in consideration of rights of intimate association), and limited fundamental personal rights of privacy. The author contends that in allowing the Georgia homosexual sodomy statute to stand, very serious damage is done to the maintenance and protection by the courts of more general rights to individual privacy. This decision opposes in a fundamental way "the growth and development of our societal values."

"Substantive Due Process Comes Home to Roost: Fundamental Rights, Griswold to Bowers." *Women's Rights Law Reporter* 10:2&3(January 1988): 177-208. Argues that the decision in the Bower's case, to allow the state of Georgia to enforce its laws against sodomy, reflects the fact that the due process clause is used to promote the political value judgments of the justices of the Supreme Court. That is, the right to engage in sodomy cannot be found in American tradition, so it is illegal. The fact that rights to obtain an abortion or to use contraceptives can be so located is not explained.

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tion of several amendments to the Constitution (including the 1st, 4th, 8th, 9th, and 14th) to the question of privacy rights accruing to homosexuals, in terms of speech, action, and locus of activity.

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