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Bowers v. Hardwick: The Supreme Court Closes the Door on the Right to Privacy and Opens the Door to the Bedroom

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Bowers v. Hardwick: The Supreme Court Closes the Door on the Right to Privacy and Opens the Door to the Bedroom

I. Introduction

The judicial system has struggled to determine how far the right to privacy extends. Whether this right includes private, consensual, homosexual sodomy between adults has caused a great deal of controversy. For many years, the United States Supreme Court refused to address this issue,[1] thereby providing state legislatures free reign to decide the scope of the right to privacy. Conflicting judicial decisions have resulted:[2] in some states, homosexual sodomy is a protected right,[3] in others it carries a prison sentence.[4]

In *Bowers v. Hardwick*,[5] a 5-4 decision, the Supreme Court finally addressed this issue and concluded that there is no constitutional right to engage in private, consensual, homosexual sodomy. As a result, the states may continue to decide for themselves whether such behavior is legal. This comment will trace the historical development of the constitutional right to privacy and its expansion into various areas, including the areas of private, consensual, homosexual and heterosexual behavior. Against this backdrop, the Supreme Court's decision in *Hardwick* will be discussed.[6] Finally, the Court's holding will be analyzed and its impact on the area of the right to privacy will be examined. This article will conclude by showing why the decision is improper from a constitutional and moral perspective.[7]

II. Background

A. *History of Sodomy Statutes*

Laws regulating homosexual behavior have existed throughout history. They can be traced to Hebraic laws which specifically prohibited such behavior,[8] and which imposed the death penalty on those who engaged in such acts.[9] The term "sodomy" also stems from biblical times. It is derived from the ancient city of Sodom, where the inhabitants reputedly engaged in various sexual activities. As a result of this conduct, God destroyed the city.[10]

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1. *See infra* notes 36-51 and accompanying text.
2. *See infra* notes 52-55 and accompanying text.
3. *Id.*
4. *See* Bowers v. Hardwick, 106 S. Ct. 2841, 2847 n.1 (1986).
5. *Id.*
6. *See infra* notes 62-91 and accompanying text.
7. *See infra* notes 93-126 and accompanying text.
8. *See, e.g., Leviticus* 18:22 which states: "[T]hou shall not lie with mankind as with womankind; it is abomination."
9. *Leviticus* 20:13.
10. *Genesis* 19:1-29.

During the middle ages, sodomy was a religious offense punishable by the ecclesiastic courts.[11] The first secular legislation forbidding sodomy was passed in England during the reign of Henry VIII. At that time, sodomy was defined as, "the detestable and abominable vice of buggery committed with mankind or beast," and was punishable as a felony.[12] This definition was later changed by Blackstone, who characterized it as "so horrible a crime that it ought not to be named among Christians."[13] This negative attitude towards sodomy was subsequently incorporated into early American law through sodomy statutes[14] and state court decisions.[15]

Through the 1950s sodomy was punishable as a criminal offense in all 50 states. In 1961, Illinois became the first state to decriminalize private, consensual, sexual conduct between adults by adopting the American Law Institute's Model Penal Code.[16] By the end of the 1970s, legislators in twenty-one additional states had decriminalized such behavior.[17] Presently, 24 states and the District of Columbia provide criminal penalties, including prison sentences, for consensual sodomy performed in private.[18]

B. *History of the Right to Privacy*

There is no express constitutional right to privacy. In 1890, however, Samuel D. Warren and Louis D. Brandeis recognized the existence of such a right.[19] Subsequently, in *Olmstead v. U.S.*,[20] Brandeis' dissent introduced the right into case law. He found that an individual should be free from governmental wiretapping of his telephone, based upon

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11. *See* Harris v. State, 457 P.2d 638, 648 (Alaska 1969) (citing Goodman, *The Bedroom Should Not Be Within the Province of the Law*, 4 CAL. W.L. REV. 115 (1968)).

12. *Id.* at 649 (citing 25 Henry VIII, ch.6 (1533)).

13. *See* W. BLACKSTONE, COMMENTARIES 215-16. Blackstone stated:

> I will not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject the very mention of which is a disgrace to human nature. It will be more eligible to imitate, in this respect, the delicacy of our English law, which treats it in its very indictments as crime not fit to be named . . . .

14. *See, e.g.*, CAL. PENAL CODE § 286 (West 1970); IDAHO CODE § 18-6605 (1979); MO. REV. STAT. § 563.230 (1959) (repealed 1979) (the Missouri statute provided: "any person who shall be convicted of the detestable crime against nature, committed with mankind or beast, with the sexual organs or with the mouth, shall be punished by imprisonment in the penitentiary not less than two years."); MONT. CODE ANN. § 45-5-505 (1985).

15. *See, e.g.*, Kelly v. People, 192 Ill. 58, 59, 61 N.E. 425, 426 (1901) (stating that sodomy is "a disgrace to human nature"); Honselman v. People, 168 Ill. 172, 175, 48 N.E. 304, 305 (1897); State v. Whitemarsh, 26 S.D. 426, 427, 128 N.W. 580, 581 (1910) (referring to the act as "so loathsome and disgusting that a discussion of it soils the pages of the court's report").

16. Criminal Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws 1985-2006 (codified as amended at ILL. ANN. STAT. ch. 38, § 11-2, 11-3 (Smith-Hund 1979 & Supp. 1983)); *see* MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962); MODEL PENAL CODE § 207.5 (Tent. Draft No. 4, 1955).

17. *See* Apasu-Gbatsu, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526-27, n.28 (1986) [hereinafter Apasu-Gbatsu, *Survey*].

18. *See id.* at 524 n.9.

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

20. 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

"the right to be let alone."[21]

In 1965, the Supreme Court recognized a constitutional right to privacy in *Griswold v. Connecticut*.[22] Appellants challenged a Connecticut statute that forbade counselling married persons on the use of contraceptives, alleging that it violated their rights under the 14th Amendment.[23] The Supreme Court found a zone of privacy, protected by the "penumbras" of the Bill of Rights, that extended to the marital relationship.[24]

Subsequently, the right of privacy was extended to the protection of the home from unwarranted governmental interference.[25] In *Stanley v. Georgia*,[26] Stanley appealed his conviction under a criminal statute that illegalized the private possession of obscene material.[27] The obscene films were inadvertently discovered during a police search for bookmaking equipment.[28] Based upon the fundamental right to be free from unwarranted governmental intrusions, the Court ruled that no justifications existed to warrant punishing the private use of obscene material in one's home.[29]

The next case in which the Court addressed the right to privacy was *Eisenstadt v. Baird*,[30] where it extended the right beyond the confines of the marriage relationship to the individuals themselves. The Court also ruled to be unconstitutional, a statute that prohibited the selling or giving away contraceptives to unmarried persons.[31] Finally, in 1973, the Supreme Court expanded the privacy right to include a woman's decision to have an abortion. In the companion cases of *Roe v. Wade*[32] and *Doe v. Bolton*,[33] the Court held that the right to privacy, although not absolute, did encompass a woman's decision whether or not to terminate her pregnancy.[34] These decisions have been reaffirmed in several recent Supreme Court decisions.[35]

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21. *Id.* at 478 (Brandeis, J., dissenting) (stating that "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.")

22. 381 U.S. 479 (1965).

23. *Id.* at 480.

24. *Id.* at 484, 500. Although the majority found that the right to privacy emanated from the first, third ,fourth, fifth and ninth amendments, the remaining justices differed as to where it was to be found. Justice Goldberg concluded that the right stemmed from the ninth amendment. Justice Harlan found it in the due process clause of the 14th amendment. Justices Black and Stewart dissented, finding that no constitutional right to privacy existed.

25. *See* Stanley v. Georgia, 394 U.S. 557 (1969); *see also* U.S. v. Orito, 413 U.S. 139 (1973) (holding that the right to possess obscene materials is limited to one's home); Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) (right to view pornography limited to one's home).

26. 394 U.S. 557 (1969).

27. *Id.* at 558-59 n.1.

28. *Id.* at 558.

29. *Id.* at 564-65.

30. 405 U.S. 438 (1972).

31. *Id.* at 453.

32. 410 U.S. 113 (1973).

33. 410 U.S. 179 (1973).

34. *Roe*, 410 U.S. at 153-54.

35. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.

C. *The Right of Privacy As It Extends to Private, Consensual, Homosexual Behavior: Pre-*Hardwick

1. Supreme Court Decisions

Although the Supreme Court has established the existence of a constitutional right to privacy, its boundaries remain unclear. One example is private, consensual sexual activity, in particular, homosexual sodomy. The first case in which the Supreme Court addressed the issue of private, consensual, behavior between adults was the landmark case of *Doe v. Commonwealth's Attorney for the City of Richmond*.[36] In this case, two homosexuals (appellants) challenged a Virginia sodomy statute that prohibited anal and oral sodomy between a person and any man, woman, or animal.[37] The appellants contended that the statute violated their rights of privacy, freedoms of association and expression, and denied them their assurance of due process.[38]

The three-judge Federal District Court upheld the constitutionality of the Virginia statute. The court reasoned that because homosexuality has no place in marriage, home or family life, the state can regulate such behavior in order to promote morality and decency.[39] Justice Merhige delivered a stinging dissent.[40] He contended that the majority misinterpreted the issue by focusing on morality instead of the right to privacy.[41] Despite this controversy within the deciding Federal Court, the United States Supreme Court summarily affirmed the decision without opinion.[42]

In *Carey v. Population Services International*,[43] the Court was once again called upon to address the privacy right as it relates to adult sexual relations. In *Carey*, however, the Court again failed to clarify any boundaries. Although the Court held that the fundamental decision to bear a

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Ct. 2169 (1986) (portions of a statute imposing requirements on abortions held unconstitutional); *see also* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (provisions of the ordinance imposing requirements on abortions performed in the second-trimester held invalid). *But see* Simopoulos v. Virginia, 426 U.S. 506 (1983) (requirement that second-trimesters abortions be performed in licensed clinics held constitutional).

36. 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

37. *Doe*, 403 F. Supp. at 1200.

38. *Id.*

39. Id. at 1202. *See* Note, *Bowers v. Hardwick: The Extension of the Right to Privacy to Private Consensual Homosexual Conduct*, 10 NOVA L.J. 175, 183 n.41 (1985), for a detailed discussion of the poor quality of the *Doe* court's reasoning.

40. *Id.* at 1203 (Merhige, J., dissenting). Merhige argued "that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern." The choice of a sexual partner is a decision so private and intimate, that absent evidence of harm, the state has no legitimate interest that justifies interfering with it. *Id.*

41. *Id.* at 1205 (Merhige, J., dissenting).

42. *Doe*, 425 U.S. 901 (1976) (Justices Brennan, Marshall and Stevens voted to hear the case).

43. 431 U.S. 678 (1977). *Carey* involved a constitutional challenge to a New York law that banned the distribution of contraceptives to anyone under sixteen. The challenged law only allowed pharmacists to distribute contraceptives to those over sixteen, and banned the advertising or display of contraceptives.

child is clearly within the right to privacy,[44] it refused to determine whether the constitutional right to privacy extended to private, consensual, sexual behavior.[45]

In 1984, the Court granted certiorari to hear *New York v. Uplinger*,[46] which, like *Doe*, addressed the right to engage in private, consensual, homosexual activity. The New York Court of Appeals had declared a statute that prohibited loitering, for purposes of soliciting others to engage in deviate sexual behavior, unconstitutional.[47] After accepting briefs from counsel and amici curiae, and hearing oral argument, the Court ruled in a 5-4 decision that certiorari had been "improvidently granted."[48] Once again, the Supreme Court dodged the privacy issue as it relates to homosexual rights.

Finally in 1985, the Supreme Court agreed to hear another case raising the same privacy issue. In *National Gay Task Force v. Board of Education*,[49] plaintiffs brought an action challenging an Oklahoma statute that permitted the dismissal or suspension of a teacher for engaging in "public homosexual conduct." The United States Court of Appeals for the Tenth Circuit had ruled that the statute violated the plaintiff's first amendment rights.[50] In a 4-4 decision, the Supreme Court affirmed the judgment.[51] Again, prior to *Hardwick*, the Court refused to address whether the right to privacy extended to private, consensual, homosexual behavior.

2. Lower Court Decisions

The Supreme Court's refusal to address the privacy issue has had a profound impact on state court decisions. Some states have chosen to follow the Supreme Court's summary affirmance in *Doe*,[52] thereby finding that no right exists to engage in private, consensual, homosexual conduct. These jurisdictions include the District of Columbia, the Fifth Circuit and New Mexico.[53] Conversely, other states have chosen to fol-

44. *Id.* at 688-89.

45. *Id.* at 694 n.17.

46. 467 U.S. 246 (1984).

47. N.Y. PENAL LAW § 240.35(3) (McKinney 1980).

48. *Uplinger*, 467 U.S. 248-49. The Court reasoned that the statute was related to a sodomy statute that the New York Court of Appeals had struck down in People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied sub nom.* New York v. Onofre, 451 U.S. 987 (1981). As such, a decision could not be made without a consideration of the earlier case. Additionally, the Court reasoned, due to ambiguities in the Court of Appeals' opinion, it was unclear which federal question had been presented.

49. 729 F.2d 1270 (10th Cir. 1984), *aff'd per curiam*, 470 U.S. 903 (1985).

50. *Id.* at 1274.

51. 470 U.S. 903 (1985). Although several other cases came before the Supreme Court, this comment addresses only those most relevant to this discussion. *See also* Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1975) (en banc), *cert. denied*, 429 U.S. 977 (1976); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970) *vacated* 401 U.S. 989 (1971); Canfield v. Oklahoma, 506 P.2d 987 (Okla. Crim. App. 1973), *dismissed for want of substantial federal question*, 414 U.S. 991 (1973); Pruett v. Texas, 463 S.W.2d 191 (1970), *dismissed for want of substantial federal question*, 402 U.S. 902 (1971).

52. *See supra* notes 36-42 and accompanying text.

53. *See* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (Navy regulation ordering mandatory discharge for homosexual conduct did not violate enlisted man's rights to

low Judge Merhige's dissent in *Doe*,[54] by finding the existence of such a right. These states include Iowa, New Jersey, New York, and Pennsylvania.[55]

III. INSTANT CASE

A. *Facts:* Hardwick v. Bowers[56]

In August 1982, Michael Hardwick was arrested for committing sodomy with a consenting male adult in the bedroom of his own home. This conduct violated a Georgia statute that criminalizes sodomy.[57] The charges were subsequently dropped, but Hardwick filed a declaratory action contending that the statute violated his constitutional right to privacy.[58] The district court dismissed, stating that the United States Supreme Court's summary affirmance in *Doe* was controlling.[59]

The Eleventh Circuit Court of Appeals reversed and remanded, holding that the district court had erred in applying *Doe* and that the Georgia statute violated Hardwick's fundamental constitutional right to sexual privacy.[60] After rehearing was denied, the defendant petitioned the United States Supreme Court. The Supreme Court, due to recent contrary decisions in the circuit courts, granted certiorari.[61]

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privacy or equal protection); Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (holding that a statute prohibiting homosexual conduct is constitutional, based upon the Supreme Court's summary affirmance in *Doe*). *But see* Apasu-Gbatsu, *Survey*, *supra* note 17, at 600 (stating that *Baker* stands as one of the best expressions of the argument favoring a broad right to privacy); State of New Mexico v. Elliott, 89 N.M. 305, 551 P.2d 1352 (1976) (ruling that a sodomy statute did not violate unmarried defendant's rights of marital privacy and privacy of the home).

54. *See supra* notes 40-42 and accompanying text.

55. *See* State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (ruling the sodomy statue was unconstitutional as applied to private consensual sexual acts between heterosexual adults because it invaded the individual's right to privacy); State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977) (sexual activities between adults are protected by the right to privacy and the state's asserted interest in protecting morality is insufficient to support the fornication statute); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied sub nom.*, New York v. Onofre, 451 U.S. 987 (1981) (right to privacy extends to private, consensual, homosexual behavior); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (no sufficient state interest justifies legislation of norms where no harm occurs).

56. 760 F.2d 1202 (11th Cir. 1985).

57. GA. CODE ANN. § 16-6-2 (1984) provides:

> A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . . A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more that 20 years.

Note that the statute is not limited to homosexual acts.

58. *Hardwick*, 760 F.2d at 1204. Hardwick was joined in the suit by John and Mary Doe, a married couple who claimed the right to engage in the sexual activity proscribed by the statute, but had been "chilled and deterred" by its prohibitions and by Hardwick's arrest. The Eleventh Circuit upheld the district court's dismissal of the Does' complaint for lack of standing. *Id.* at 1207.

59. *See supra* notes 36-42 and accompanying text.

60. *Hardwick*, 760 F.2d at 1213.

61. Bowers v Hardwick, 106 S. Ct. 2841, 2843 (1986).

B. *Reasoning*

1. Majority Opinion

Justice White's majority opinion addressed one issue: whether the Constitution confers upon homosexuals a fundamental right to engage in sodomy.[62] The Court held that it does not, for five reasons. First, the right of privacy does not extend to homosexual sodomy because sodomy has no relation to those areas which have traditionally been protected: family, marriage and procreation.[63] Second, sodomy does not fulfill either formulation required for the existence of a fundamental right. It is neither "implicit in the concept of ordered liberty," nor "deeply rooted in the nation's history and tradition."[64] Third, the Court refused to expand the due process clause of the fifth and fourteenth amendments.[65] Fourth, privacy of the home, as espoused in *Stanley*, does not extend to homosexual conduct, because *Stanley* was based on a first amendment challenge unlike the right asserted by Harwick.[66] Finally, based on notions of morality, the sodomy statute is constitutional.[67]

2. Concurring Opinions

Justice Burger and Justice Powell each wrote concurring opinions.[68] They agreed with the majority that there is no such thing as a fundamental right to commit homosexual sodomy. According to Justice Burger, however, the question raised in this controversy is not based on personal preferences due to the long history of "moral teaching" against sodomy.[69] Instead, Justice Burger found the statute constitutionally based on the authority of state legislatures to regulate morality. Justice Powell, in a separate concurring opinion, addressed the potential of an eighth amendment challenge to the statute by focusing on the length of a prison sentence for violation of the law.

3. Dissenting Opinions

a. *Justice Blackmun*

In the first dissenting opinion, Justice Blackmun contended that the

62. *Id.*

63. *Id.* at 2843-44 (citing Griswold v. Connecticut, 381 U.S. 479 (1965), *see supra* notes 22-24 and accompanying text; Eisenstadt v. Baird, 405 U.S. 438 (1972), *see supra* notes 29-30 and accompanying text; Carey v. Population Servs. Int'l., 431 U.S. 678 (1977)). The Court cited *Carey* to support the assertion that the primary right found in *Griswold* did not extend so far as to protect any kind of private sexual conduct between consenting adults. *Id.*

64. *Id.* at 2844-46 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) and Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (Powell, J.)).

65. *Id.* at 2846 (reasoning that there should be great resistance to redefining fundamental rights).

66. *Id.* (citing Stanley v. Georgia, 394 U.S. 557 (1969)); *see supra* notes 25-29 and accompanying text.

67. *See id.*

68. *Id.* at 2847.

69. *Id.*

majority had entirely misconstrued the issue.[70] He argued that the case concerned "the right to be let alone," and not whether there was a fundamental right to engage in homosexual sodomy.[71] He supported this position by examining previous right to privacy cases. According to Justice Blackmun, these cases have followed two complementary lines: those that relate to decisions and those that relate to places.[72] Both are relevant to the instant case.

Justice Blackmun first addressed the right to privacy as it relates to decisions by focusing on the importance of personal autonomy in our society. He contended that the freedom of the individual to define himself is the very essence of liberty. Such freedom allows a person to develop their identity through sexual intimacy with others.[73] He argued that one should be free to decide with whom to share this bond.[74] The fact that society is composed of diverse groups of individuals leads to the inevitable conclusion that different lifestyles will be chosen.[75] Accordingly, Justice Blackmun argued, the majority's opinion is an interference with an individual's fundamental right to control the nature of his intimate associations with others.[76]

Justice Blackmun then addressed the right to privacy as it relates to places, in particular, the home.[77] Contrary to the majority's interpretation of *Stanley*,[78] he argued that its holding was based on both the fourth and first amendments.[79] As such, the right to privacy protects individual intimate relationships that occur in the home.[80]

The second argument that Justice Blackmun presented in support of his claim that the right to privacy extends to private, consensual, homosexual sodomy is that the Georgia statute constitutes an unjustifiable infringement on individual liberty.[81] If a statute demonstrates an actual connection between prohibiting certain conduct and promoting the general health, morality and decency, it will be upheld.[82] Since the record failed to equate private, consensual, homosexual conduct with any criminal activities, under *Stanley*, the behavior falls within the right to privacy

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

71. *See id.* (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

72. *Id.* at 2850-51 (Blackmun, J., dissenting) (citations omitted).

73. *Id.* at 2851 (Blackmun, J., dissenting) (citing Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984)).

74. *Id.* (Blackmun, J., dissenting) (citing Paris Adult Theater v. Slaton, 413 U.S. 49, 63 (1973)).

75. *Id.* (Blackmun, J., dissenting) (citing Eisenstadt v. Baird, 405 U.S. 438 (1972) and Roe v. Wade, 410 U.S. 113 (1973)); *see supra* notes 30-35 and accompanying text.

76. *Id.* at 2852 (Blackmun, J., dissenting).

77. *Id.* (Blackmun, J., dissenting).

78. *See supra* notes 25-29 and accompanying text.

79. *Hardwick*, 106 S. Ct. at 2852 (Blackmun, J., dissenting). Justice Blackmun reached the conclusion that *Stanley* was based on the fourth amendment by focusing on the *Stanley* Court's reliance on Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) which did not address a first amendment issue.

80. *Id.* at 2853 (Blackmun, J., dissenting).

81. *Id.* (Blackmun, J., dissenting).

82. *See id.* n.3 (Blackmun, J., dissenting).

in the home, and is therefore protected.[83] Additionally, Justice Blackmun noted, that the record is void of any evidence supporting the petitioner's assertion that acts of sodomy may seriously affect the public health and welfare by spreading communicable diseases.[84]

Justice Blackmun further argued that the record failed to support the state's position that the statute is a legitimate regulation of morality.[85] He found no substance in the majority's argument that historical religious or public intolerance of specific conduct justifies its regulation.[86] Additionally, he argued that the majority's argument was erroneous because it failed to recognize the distinction between laws that are directed towards the protection of public sensibilities and those that enforce private morality.[87]

b. *Justice Stevens*

Based upon previous right to privacy cases, Justice Stevens argued that the state cannot intrude into the privacy of the heterosexual bedroom.[88] The Georgia statute, however, is in conflict with these decisions because it prohibits all sodomy. He further argued, if the state elects to enforce the law against just homosexuals, it must justify this selective application, by either showing different liberty interests between homosexuals and heterosexuals or by showing the existence of a legitimate state interest.[89]

According to Justice Stevens, neither proposed justification for the law is valid. Since "all men are created equal," all persons have the same liberty interest in how they will conduct their personal associations, regardless of sexual preference.[90] The state may not intrude into the private conduct of homosexuals, because it can not do so with respect to heterosexuals. Additionally, Georgia failed to identify a legitimate state interest in its selective enforcement of the law because, as the majority points out, the statute has not been enforced for decades.[91] Therefore, he argued that the motion to dismiss Hardwick's claim was improvidently granted because the statute was overbroad.[92]

IV. ANALYSIS

Over the years, United States Supreme Court decisions have re-

83. *Id.* at 2853 (Blackmun, J., dissenting). These activities include "the possession in the home of drugs, firearms or stolen goods."
84. *Id.* at 2853 (Blackmun, J., dissenting).
85. *See id.* at 2854-55 (Blackmun, J., dissenting).
86. *Id.* at 2855 (Blackmun, J., dissenting).
87. *Id.* (Blackmun, J., dissenting).
88. *Id.* at 2857 (Stevens, J., dissenting) (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)).
89. *Id.* at 2857-59 (Stevens, J., dissenting).
90. *Id.* at 2858 (Stevens, J., dissenting).
91. *Id.* at 2859 (Stevens, J., dissenting).
92. *Id.* (Stevens, J., dissenting).

flected a trend of expanding the right to privacy.[93] As a result, the right to engage in certain types of conduct have been correctly placed in the hands of individuals. Thus, individuals are now able to regulate marital and non-martial decisions relating to procreation, family life and contraception, without interference from the state.[94]

In *Bowers v. Hardwick*,[95] the Supreme Court halted this trend. By concluding that no fundamental right exists to engage in homosexual behavior,[96] the Court has in effect returned power to the states to control this area of privacy. As history has demonstrated, conflicting statutes among the states have resulted.[97] In order to remedy the lack of uniformity and obvious violation of individual rights, the Supreme Court's decision in *Hardwick* must be reversed. A close examination of the case supports this conclusion.

Society is composed of diverse groups of individuals, with different expectations and different needs.[98] Despite these different needs, a basic element is common to all persons: the need to love and the need to be loved. In our society, this is usually expressed by sexual intimacy. Where heterosexuals fulfill this need by being intimate with a member of the opposite sex, homosexuals do so by being intimate with a member of the same sex. Indeed, the free expression of sexual intimacy has been deemed to be at the very essence of liberty,[99] and a key element to personal autonomy.

In denying all homosexuals the right to engage in private, consensual sodomy, the Court is denying that person the right to freely satisfy basic needs of sexual intimacy. Although one may attempt to argue that the homosexual may fulfill this need by doing so with a member of the opposite sex, such an argument is both naive and unpersuasive.

There are great differences of opinion regarding the causes of homosexuality.[100] The prevailing views range from the psychological perspective, that the homosexual has no control over his or her sexual preference, to the sociological perspective that one is a homosexual as a result of experiences throughout his or her lifetime.[101] Two additional theories, that sexual preference is genetically determined[102] and that homosexuality results from a hormonal imbalance, have received little

93. *See supra* notes 19-35 and accompanying text.

94. *See supra* notes 22-35 and accompanying text.

95. 106 S. Ct. 2841 (1986).

96. *Id.* at 2843.

97. *See supra* notes 36-42 and 52-55 and accompanying text.

98. *Hardwick*, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

99. *Id.* at 2851 (Blackmun, J., dissenting) (citing Roberts v United States Jaycees, 468 U.S. 609 (1984); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Paris Adult Theater v. Slaton, 413 U.S. 49, 63 (1973)).

100. *See* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1625 (1974) (citing D. ALTMAN, HOMOSEXUAL OPPRESSION AND LIBERATION 16 (1971)).

101. *See id.*

102. *See id.* (citing D. WEST, HOMOSEXUALITY 169 (1968)).

attention.[103] Regardless of what causes homosexuality, an individual's sexual orientation once acquired is extremely difficult to change.[104] It is also contended that homosexuality is a trait over which the individual has no control.[105] Therefore, a homosexual will only be able to fulfill the need for sexual intimacy with a member of the same sex. To deny this need is to violate the homosexual's right to personal autonomy.

An argument which is closely related to this and which also refutes Justice White's majority opinion, that the right to privacy does not extend to homosexual behavior, is the "intimate association" approach to the right to privacy.[106] This approach was espoused by Justice Brennan in *Roberts v. United States Jaycees*.[107] In *Roberts*, the Court recognized that certain personal affiliations are entitled to constitutional protection because those relationships are fundamental to individual liberty.[108]

The Court in *Roberts* concluded that because the family is such an intimate association, it is entitled to constitutional protection. In reaching this conclusion, the Court set forth specific elements which constitute an "intimate association." These include deep attachments and commitments, the special sharing of thoughts, experiences and beliefs, a high degree of selectivity in decisions relating to the relationship, and seclusion from others in critical aspects concerning the relationship.[109]

It can be argued that these factors may exist in a stable homosexual relationship.[110] Such a relationship can involve a deep attachment between two people in which intimate thoughts and experiences are shared. Moreover, it may contain a high degree of selectivity in the initiation and maintenance of that relationship, and it is practiced in seclusion. Since a homosexual couple's relationship may include these elements, under Justice Brennan's definition, it is an intimate association, and thereby entitled to constitutional protection.

The second error in the majority's argument in *Hardwick*, is its conclusion that the right to privacy in the home does not protect private, homosexual conduct.[111] In *Stanley*, the Supreme Court recognized the existence of that right, stating that the right was fundamental except in very limited circumstances.[112] These "very limited circumstances" include the possession of firearms, drugs or stolen goods.[113]

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103. *See id.* (citing W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 94-135 (1973) and C. BERG & C. ALLEN, THE PROBLEM OF HOMOSEXUALITY 41 (1958)).

104. *See id.* at 1626 (citing D. WEST, HOMOSEXUALITY at 266).

105. *See id.*

106. Bowers v. Hardwick, 106 S. Ct. 2841, 2852 (1986) (Blackmun, J., dissenting).

107. 468 U.S. 609 (1984).

108. *Id.* at 618-20.

109. *Id.* at 620.

110. *See generally* MENDOLA, THE MENDOLA REPORT: A NEW LOOK AT GAY COUPLES (1980).

111. Bowers v. Hardwick, 106 S. Ct. 2841, 2846 (1986). *But see id.* at 2852-54 (Blackmun, J., dissenting) (arguing that *Stanley* stands for the proposition that the right to privacy protects consensual, homosexual conduct in the home); *See supra* notes 76-79 and accompanying text.

112. *See supra* notes 25-29 and accompanying text.

113. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

Private, homosexual conduct cannot be equated with any of these activities. Firearms and drugs are dangerous instrumentalities; it is very likely that injury may extend beyond the individual possessing them and include innocent third parties as well. In contrast, adults who engage in private, consensual, homosexual sodomy do not harm anyone. The element of danger to third parties is virtually nonexistent.

The possession of stolen goods may not be equated with private, consensual, homosexual sodomy either. As in the case of the possession of firearms and drugs, the requisite element of harm is present because the thief has taken something from the victim. Additionally, the thief is hiding the evidence of his crime in his home which is dishonest and deceitful, and thus, harmful to society. When a homosexual engages in consensual sodomy, his actions are neither dishonest nor deceitful. Since private, consensual, homosexual sodomy does not fall within the criminal act exceptions to the right to be free in one's home, it must be protected there.

The majority's conclusion, that there is no fundamental right to engage in homosexual sodomy, based on ancient proscriptions against such acts,[114] is also unpersuasive. Throughout history, certain behaviors have been considered immoral. For example, interracial marriages and abortions were disallowed based upon morality. As time has progressed, society has changed, affecting public attitudes towards these issues. Thus, in *Loving v. Virginia*,[115] the Court struck down miscegenation laws, and in *Roe v. Wade*,[116] women were given the legal option of terminating their pregnancies within certain guidelines.

Public sentiment toward homosexuality has also changed. Prior to 1960, all 50 states had laws which prohibited homosexual conduct. Currently, half of the states have abolished such laws and have decriminalized homosexual behavior.[117] This change in attitude is also reflected in the judicial system.[118] Despite the Supreme Court's summary affirmance in *Doe* which upheld the constitutionality of a Virginia sodomy statute[119] many state courts have refused to follow the decision.[120] Furthermore, it is reflected in police behavior itself. Law enforcement against homosexual conduct occurs infrequently, reflecting a more tolerant attitude towards homosexual activities.[121]

To accommodate the evolution of public sentiment, the laws must necessarily change:

> It is revolting to have no better reason for a rule of law than that so it was [sic] laid down in the time of Henry IV. It is still

114. *Hardwick*, 106 S. Ct. at 2846. *But see id.* at 2854-59 (Blackmun J., dissenting) (arguing that morality is no basis for law); *See supra* notes 80-86 and accompanying text.
115. 388 U.S. 1 (1967).
116. 410 U.S. 113 (1973); *see supra* notes 32-35 and accompanying text.
117. *See supra* notes 16-17 and accompanying text.
118. *See supra* notes 54-55 and accompanying text.
119. *See supra* notes 36-42 and accompanying text.
120. *See supra* notes 54-55 and accompanying text.
121. *See* Bowers v. Hardwick, 106 S. Ct. 2841, 2859 (Stevens, J., dissenting).

> more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[122]

Therefore, the Court's conclusion that moral attitudes, which are deeply rooted in history, provide a sufficient basis for continuing to criminalize private homosexual behavior is wrong. It fails to recognize the change in attitude towards homosexual conduct.

The Supreme Court's decision is erroneous not only because of its fallacious arguments, but also because it fails to address two important areas, health and the element of harm. Advocates of state sodomy statutes support their position, in part, with the contention that the laws prevent the spread of diseases, such as AIDS.[123] Therefore, they conclude that this constitutes a valid exercise of the police powers. Such an argument, however, must fail.

First, it does not take into consideration that healthy homosexuals also engage in such acts. Because the laws regulate them as well, they are overbroad. Second, communicable diseases may also be spread by heterosexual conduct, and yet the laws do not regulate this behavior. In this respect, they are too narrow. Third, it is likely that the laws will increase the spread of diseases rather than inhibit it. This would occur where the laws dissuade people from reporting outbreaks, due to a fear of criminal prosecution for the homosexual activity.[124] Finally, the laws may in fact contribute to the spread of diseases by discouraging stable relationships and encouraging furtive affairs.[125]

The second area that the Supreme Court fails to address concerns the element of harm. The police power may be exercised to regulate morals when it is necessary to protect individuals from harmful conduct.[126] With respect to private, consensual, homosexual behavior, this required element is missing because such conduct is not harmful. Therefore, the police power may not be properly invoked to validate the Georgia sodomy statute.

V. CONCLUSION

The United State Supreme Court's decision in *Hardwick* has effectively placed a limitation on the right to privacy, a previously expanding area. In so doing, it has not only affected this protected right, but other fundamental rights as well. Specifically, the decision interferes with an individual's right to personal autonomy and his intimate associations with others, by indirectly regulating with whom that person may be intimate. Additionally, it limits the individual's right to engage in certain harmless, private conduct in his own home. Thus, the *Hardwick* decision does not only affect the right of homosexuals to engage in private, con-

122. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
123. *See, e.g.*, Apasu-Gbatsu, *Survey*, *supra* note 17 at 623-35.
124. *See, e.g.*, State v. Saunders, 74 N.J. 200, 209-10, 381 A.2d 333, 341-42 (1977).
125. *See* Note, *supra* note 100, at 1632.
126. *See* Commonwealth v. Bonadio, 490 Pa. 91, 94, 415 A.2d 47, 50 (1980).

sensual sodomy, but in fact, affects the entire scheme of the constitutionally protected right to privacy. Therefore, in order to avoid these far reaching consequences, the Supreme Court must reverse its decision and find that the constitutional right to privacy includes private, consensual, homosexual conduct.

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