BEHIND THE FACADE: UNDERSTANDING THE POTENTIAL EXTENSION OF THE CONSTITUTIONAL RIGHT TO PRIVACY TO HOMOSEXUAL CONDUCT

> The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal. . . . I'm not God. The currents and eddies of right and wrong, which you find such plainsailing I can't navigate, I'm no voyager.[1]

Since the days of ancient Sodom, laws have proscribed homosexual conduct.[2] American prohibitions on sodomy are as old as American history itself.[3] These laws, whether based on religion,[4] medical understanding,[5] or "natural law,"[6] reflect society's disdain for homosexuality.

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1. R. Bolt, *A Man for All Seasons*, act I at 147 (1967), *quoted in* Tennessee Valley Authority v. Hill, 98 S. Ct. 2279, 2303 (1978) by Chief Justice Burger.

2. The word "sodomy" comes from the Biblical city of Sodom, which, according to the Bible, God destroyed because of its citizens' evil practices. *Genesis* 19: 1-29. Judaic law specifically prohibited homosexual sodomy. The punishment for homosexual sodomy was death. *Leviticus* 20:13.

3. The Jamestown colony prohibited sodomy. *For the Colony in Virginia Britannia: Laws Divine, Moral, and Martial Etc.*, art. 9, at 12 (London 1612) (comp. by W. Strachery 1969) ("No man shall commit the horrible, and detestable sins of Sodomie upon pain of death; . . . .") The old English "buggery" statute of 1533, which made the "detestable and abominable Vice of Buggery" a capital crime, provided the historical roots of the Jamestown prohibition. 25 Hen. 8, ch. 6 (1533). After the Revolution, Virginia passed its own "buggery" statute, which retained the penalty of death. 1 S. SHEPARD, THE STATUTE AT LARGE OF VIRGINIA 1792 TO 1806 113 (1970). Most states followed Virginia's pattern. MUELLER, SEXUAL CONDUCT AND THE LAW 41 (2d ed. 1980).

4. The early Christian Church, relying in part on Old Testament prohibitions, believed that homosexuality was deviant and should be punished. *See Romans* 1: 26-27 ("men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men"); 1 *Corinthians* 6: 9-10 ("neither this immoral, nor idolaters, nor adulterers, nor homosexuals, nor thieves, nor the greedy, nor drunkards, nor revilers, nor robbers will inherit the kingdom of God"); *See also supra* note 2. *But see* J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 117 (1980) (the New Testament takes no demonstrable position on homosexuality).

Thomas Aquinas cataloged homosexuality as a sin against God. He reasoned that God created men and women as sexual beings only for procreation. He considered sodomy a noncreative pleasure of the flesh, and therefore in conflict with man's spiritual destiny. 43 T. AQUINAS, *Summa Theologica* 246-249 (T. Gilby ed. 1968).

5. At one time, the American Psychiatric Association labeled homosexuality as a "mental disorder" and classified it as a "sexual deviation." In general, psychiatrists believed homosexuals were ill because they failed to conform to the prevailing cultural norms. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-I) 38-39 (1952). Later, the association retained the "mental disorder," but categorized homosexuality under "personality disorders." A personality disorder is a deeply ingrained maladaptive pattern of behavior, but is

Recently, however, various groups have attempted to mobilize public support for changes in sodomy laws.[7] Although twenty-one states have decriminalized sodomy,[8] twenty-four have chosen[9] to retain their

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different from psychiatric and neurotic symptoms. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-II) (1968) DSM III.

6. 4 BLACKSTONE'S COMMENTARIES 215 (Lewis's ed. 1897) (referring to sodomy as "the infamous crime against nature, committed with either man or beast . . . the very mention of which is a disgrace to human nature.").

The young American states copied Blackstone's language in their sodomy statutes, using such language as "unnatural" or crimes against nature. *See, e.g.,* Va. Code § 18.2-361 (1982):

> Crimes against nature.—If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a Class 6 felony.

7. Homosexuals began to organize in 1961 following a riot outside a bar in New York's Greenwich Village. Police had beaten a man outside a bar frequented by homosexuals. Homosexuals adopted the term "gay," meaning celebration, for their movement. *See generally P. Simpson, From the Closet to the Courts* (1976).

8. The following states have decriminalized consensual sodomy between adult homosexuals: Alaska, 1978 Alaska Sess. Laws ch. 166 (effective Jan. 1, 1980); California, 1975 Cal. Stat., ch. 71, § 7 (effective July 1, 1976); Colorado, 1971 Colo. Sess. Laws, ch. 121, § (approved June 2, 1971); Connecticut, 1969 Conn. Pub. Acts. 828, § 214 (effective Oct. 1, 1971); Delaware, 58 Del. Laws, ch. 497, § 1 (effective Apr. 1, 1973); Hawaii, 1972 Hawaii Sess. Laws, act 9, § 1 (effective Jan. 1, 1983); Illinois, 1961 Ill. Laws, pt. 1983, § 11-2 (effective Jan. 1, 1962); Indiana, 1976 Ind. Acts. P.L. 148, § 24 (effective July 1, 1977); Iowa, Iowa Acts, ch. 1245, § 520 (effective Jan. 1, 1978); Maine, 1975 Me. Acts. ch. 499, § 5 (effective Mary. 1, 1976); Nebraska, 1977 Neb. Laws L.B. 38, § 328 (effective July 1, 1978); New Hampshire, 1978 N.H. Laws, 532: 26 (effective Nov. 1, 1973); New Jersey, 1978 N.J. Laws, ch. 95, § 2C:98-2 effective Sept. 1, 1979); New Mexico, 1975 N.M. Laws, ch. 109, § 8; North Dakota, 1977 N.D. Sess. Laws, ch. 122, § 1 (effective Mary. 19, 1977); Ohio, 1972 Ohio Laws, 134 v H 511, § 2 (effective Jan. 1, 1974); Oregon, 1971 Or. Laws, ch. 743, § 432 (167.040) (effective Jan. 1, 1972); South Dakota, 1976 S.D. Sess. Laws, ch. 158, § 22-8 (effective Apr. 1, 1977); Vermont, 1977 Vt. Acts, no. 51, § 3 (effective July 1, 1977); Washington, 1975 Wash. Laws, 1st esec. Sess., ch. 260 (effective July 1, 1976); West Virginia, 1976 W. Va. Acts, ch. 43 (effective June 11, 1976); Wyoming, 1977 Wyo. Sess. Laws, ch. 70, § 3 (effective May 27, 1977).

9. The following states prohibit various forms of private consensual sodomy. "Modern definition" statutes exclude the conduct of married couples. Alabama, Ala. Code § 13A-6-64 to -65 (1982) (modern definition); Arizona, Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (1978 & Supp. 1983-84) (common law definition; "infamous crime against nature"); Arkansas, Ark. Stat. Ann. § 41-1813 (1977) (modern definition; homosexual acts only); District of Columbia, D.C. Code Ann. § 2203502 (Michie 1981) (modern definition); Florida, Fla. Stat. Ann. § 800.2 (West 1976) ("unnatural and lascivious acts"); Idaho, Idaho Code § 18-6605 (1979) (common law definition); Kansas, Dan. Stat. Ann. § 21-3505 (West Supp. 1984) (modern definition); Kentucky, Ky. Rev. Stat. § 510.100 (1975) (modern definition); Louisiana, La. Rev. Stat. Ann. § 14:89 (West 1974 & Supp. 1984) (modern definition); Maryland, Md. Ann. Code §§ 27-553, 27-554 (Michie 1982) ("sodomy" and "unnatural and perverted sex practices"); Massachusetts, Mass. Ann. Laws, ch. 272, §§ 34, 35 (West 1970) (common law definition); Michigan, Mich. Comp. Laws §§ 750.158, 750.338, 750.338a, 730.338b (2968) (common law definition); Minnesota, Minn. Stat. Ann. § 609.293-.294 (West Supp. 1984) (modern definition); Mississippi, Miss. Code Ann. § 97-29-59 (1973) (common law definition); Missouri, Mo. Ann. Stat. § 566.090 (Vernon 1979) (modern definition); Montana, Mont. Code Ann

prohibitions.

Recently, advocates of the decriminalization of sodomy urged the Supreme Court to do what representative legislatures have refused to do—change laws prohibiting homosexual conduct.[10]

In *Bowers v. Hardwick*, however, the Court refused, over a strongly worded dissent by Justice Blackmun, to invalidate sodomy laws.[11] This Note analyzes the arguments in favor of an extension of the constitutional right to privacy to homosexual conduct and examines the governing role that the Supreme Court assumes when it invalidates laws on the basis of constitutional privacy. Part I examines the nature of our constitutional government. Part II analyzes the creation of the constitutional right to privacy and its articulated limitations. Part III examines three approaches offered by Justice Blackmun to extend privacy protection to homosexual conduct. Finally, after a brief description of recent legislative action, this Note concludes that an extension of constitutional privacy protection to homosexual conduct would be unprincipled and undemocratic judicial action.

I. THE MAJORITY-RULE PRINCIPLE.

The Constitution presupposes a system of representative government based on the principle of majority rule. During the birth of the Constitution, some expressed concern over the effect of majoritarianism on minority interests.[12] They feared that political issues would be decided "not according to the rules of justice and the rights of the minor party, but by

§ 45-5-505 (1984) (deviate sexual conduct); Nevada, Nev. Rev. Stat. § 201.190 (1979) (homosexual acts only); North Carolina, N.C. Gen. Stat. § 24-177 (1981) (common law definition); Oklahoma, Okla. Stat. Ann. tit. 21, § 886 (West 1983) (common law definition); Rhode Island, R.I. Gen. Laws § 11-10-1 (1981) (common law definition); South Carolina, § C. Code Ann. § 16-15-120 (Law Coop. 1977) ("abominable crime of buggery"); Tennessee, Ten. Code Ann. § 39-2-612 (1982) (common law definition); Utah, Utah Code Ann. § 76-5-403, -406 (1978 & Supp. 1983) (modern definition); Wisconsin, Wis. Stat. Ann. § 944.17 (West 1982 & Supp. 1983-1984) (modern definition).

10. Georgia, Ga. Code Ann. § 16-6-2 (1982) (declared unconstitutional by the United States Court of Appeals for the Eleventh Circuit in Hardwick v. Bowers, 760 F.2d 1202 (1985)). New York, N.Y. Penal Law §§ 130.00, 130.38 (McKinney 1975) (criminal statute invalidated by the New York Court of Appeals in People v. Onofre, 51 N.Y.2d 476, 415 N.E.3d 936, 434 N.Y.S.2d 947 (1980), *cert. denied,* 451 U.S. 987 (1981)); Pennsylvania, 18 Pa. Cons. Stat. §§ 1301, 1324 (1973) (criminal statutes invalidated by the Pennsylvania Supreme Court in Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980)); Texas, Tex. Penal Code Ann. tit. 5, § 21.06 (Vernon 1974) (held unconstitutional by the United States District Court for the Northern District of Texas in Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982)).

11. 54 U.S.L.W. 4919 (July 24, 1986).

12. THE FEDERALIST, No. 10, at 77 (J. Madison) (Am. Lib. Ed. 1961). Madison, for example,

the superior force of an interested and overbearing majority."[13] To protect against this danger, Madison urged adoption of the political structure contained in the proposed United States Constitution, a structure calculated to divide and disperse political power among and between various levels of government.[14] The Bill of Rights supplemented this sophisticated political protection by expressly protecting certain "rights of the minor party" against invasion by the majority.[15]

The majority-rule principle has operated as the centerpiece of American political freedom.[16] At its most fundamental level, the majority-rule principle creates a political environment where legal obligations reflect the values of a community.[17] By appealing to citizens' sense of fairness, the principle of majority rule contributes to political stability.[18] Majority rule also promotes consensus building and encourages pluralism by forcing minority factions to bind together to achieve wider public support.[19] "The majority," said Abraham Lincoln, "is the only true sovereign of a free people."[20]

Despite the political norm of majority rule and its accompanying bene-

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feared the power of political factions united by some "common impulse of passion" which would ignore the "rights" of other citizens or the "aggregate interests" of the community. *Id.*

13. *Id.*

14. *Id.*

15. The Constitution did not originally contain the Bill of Rights. *Id.* at 529-50. In responding to arguments that a bill of rights should be included in the Constitution, Alexander Hamilton called such an addition unnecessary. He argued that the establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and the lack of titles of nobility were "greater securities to liberty and republicanism." Hamilton explained that the Constitution's list of specific powers limited the authority of the federal government, and that wise legislative discretion, regulated by public opinion, would adequately restrict the exercise of those powers. THE FEDERALIST, No. 84, at 510-515 (A. Hamilton) (Am. Lib. Ed. 1961).

16. The majority-rule principle is an indispensable ingredient in the daily functioning of government. Before a "bill" originating in either house of the United States Congress can become a "law," it must first be approved by a majority vote in both houses of Congress; without such approval, the bill cannot be presented to the President for his consideration. U.S. CONST. art. I, § 7, Cl. 2.

The veto power of the executive and the requirement that a bill be approved by both houses of Congress check the capacity of one house to enact a law by a simple majority vote of that house. U.S. CONST. art. I, § 7, Cl. 2.

17. Paust, *The Concept of Norm: Toward a Better Understanding of Content, Authority, and Constitutional Choice*, 54 TEMP. L.Q. 226, 287-87 (1980). One commentator has suggested that there "exists a 'fundamental right' to have the majority rule principle as the operative norm in society." BUCHANAN, MORALITY, SEX, AND THE CONSTITUTION 9 (1983).

18. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

19. *Id.*

20. 3 SANDBURG, ABRAHAM LINCOLN 132 (1942).

fits, the Constitution defines certain spheres in which our domestic society has agreed to be ruled undemocratically.[21] For example, short of a constitutional amendment, Americans cannot, however overwhelming the majority, establish a state religion. The Constitution's first amendment, as interpreted by an unelected Supreme Court, prohibits such action. "We the People" have articulated a value judgment in the Constitution—that church and state should be separate institutions.[22]

The Bill of Rights originally operated only to limit the power of the federal government. After the Civil War, however, Congress enacted the fourteenth amendment, in part, to increase constitutional authority of states.[23] The fourteenth amendment contains a "due process" clause that[24] courts originally interpreted in general terms to mean that government cannot harm citizens unless it follows certain procedures.[25]

In *Lochner v. New York*, however, the Supreme Court discovered a substantive component in the clause.[26] The court found, implicit in the word "liberty," certain unenumerated "fundamental" rights.[27] For thirty years, the Court employed this methodology, known as substantive due process, to strike down economic and social legislation that violated "fundamental" rights.[28] Eventually, the Court expressly repudiated substantive due process and, in fact, continues to do so.[29] *"Lochnerizing"* allowed the courts to protect what it perceived as "fundamental" rights, without textual or historical support from the Constitution.

A Supreme Court that makes rather than implements, fundamental

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21. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

22. Admittedly, the Supreme Court faces far more difficult questions than this elementary hypothetical. Nonetheless, that conclusion does not invalidate the basic premise that the Constitution contains identifiable value choices which preclude legislative action.

23. *See generally* Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911).

24. U.S. CONST. amend. XIV § 1, cl. 3.

25. J. ELY, DEMOCRACY AND DISTRUST 19 (1980).

26. 198 U.S. 45 (1905).

27. *Id.* at 48.

28. During the "Lochner era" the Court invalidated economic legislation which outlawed "yellow dog" contracts, Coppage v. Kansas, 236 U.S. 1 (1915); set minimum wages for women, Adkins v. Children's Hospital, 261 U.S. 525 (1923); and which prohibited the use of second-hand, unsterilized fabrics in the manufacture of bedding material, Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

29. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) ("the doctrine that prevailed in *Lochner* . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long been discarded").

value choices cannot be squared with Madisonian government.[30] Such action is neither inherently democratic nor constitutionally approved undemocratic decisionmaking. The Constitution—its history, structure, and language—is the beginning and the end of judicial responsibility.[31] In fact, in every opinion involving a constitutional question, the Supreme Court asserts that the Constitution compels the result.[32] The framers specifically rejected the idea that the Court should be a "Council of Revision" with the authority to alter legislative policy.[33] As a result, legislative judgments should stand, unless those judgments contravene a principle "fairly discoverable" in the Constitution.[34]

II. THE CONSTRUCTION OF THE CONSTITUTIONAL PRIVACY FACADE

The Constitution does not contain an express right to privacy. It does however, proscribe certain types of potentially intrusive government action.[35] The first proposal for creating a separate "right to privacy" emerged in 1890.[36] Samuel Warren and Louis Brandeis, fearing a dra-

30. Bork, *supra* note 21, at 6. Unless judicial decisions are based on principles "generally attributable to the Constitution," unfettered decisionmaking, "which enables courts to impose unacceptable values on the people," may result. Leede, *A Critique of Illegitimate Noninterpretivism*, 8 U. DAYTON L. REV. 533, 540 (1983).

31. *Id.* at 8. ("The judge must stick close to the [Constitution's] text and the history, and their implications, and not construct new rights.") *See also* Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972) (the judicial responsibility is to determine the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text).

32. Bork, *supra* note 21, at 3-4.

33. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 435-38 (1865). During the constitutional convention, some delegates argued that the judicial branch should be a "Council of Revision," a third legislative chamber with revisionary power over all legislation it deemed "improper." In effect, the Council of Revision would have given judges not only control over constitutional questions, but also control over legislative policy. The Convention rejected this concept of judicial authority. *Id.*

34. *See* J. ELY, *supra* note 25, at 2 (1980).

35. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 929 n.3 (reference to privacy in the Bill of Rights pertains to ways in which the government can go about collecting information). Under the third amendment, the federal government cannot forcibly quarter soldiers in civilian homes in peacetime. *U.S. Const.* amend. III. The fourth amendment prohibits the federal government from conducting "unreasonable searches and seizures" against citizens' "persons, houses, papers and effects." *U.S. Const.* amend. IV. The fifth amendment prohibits compulsory confessions in criminal trials. *U.S. Const.* amend. V. Far from granting a general right to privacy, however, these amendments govern activity in limited certain spheres. BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 3 (1965).

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

matic increase in unauthorized publicity, urged courts to recognize a separate common law remedy for invasions of personal "privacy."[37] Viewing the development of "instantaneous photographs" and the newspaper enterprise as especially threatening to citizens' solitude, Warren and Brandeis urged courts to recognize a right "to be let alone."[38] Most courts, finding "privacy" adequately protected by other causes of action, balked at recognizing a separate right.

Seventy-five years later the United States Supreme Court discovered a separate, *constitutional* right to privacy.[39] The court, expressing grave fears about physical and figurative intrusions into marital solitude, held that states could not interfere with married couples' "private" use of contraceptives.[40] In 1972, the Court moved away from its concern for marriage and marital solitude, and found the right to privacy protects *individual decisions* to purchase contraceptives.[41] In 1973, the Court ruled that constitutional privacy also includes the "right to decide" to have an abortion.[42] Constitutional "privacy" therefore prevents states from prohibiting abortions, surgical procedures, performed in state-licensed hospitals and clinics, by state-licensed physicians.[43] In short, the Court's concern for "privacy" has moved from the solitude of the marital bedroom to decisions carried out in public hospitals.

Justice Blackmun, dissenting in *Bowers v. Hardwick*, argued that the constitutional right to privacy includes the right to engage in homosexual

37. *Id.* at 195. More specifically, Warren and Brandeis feared an increase in the "unauthorized circulation of portraits of private persons," a press "overstepping in every direction the obvious bounds of propriety and decency," and the publishing of "unseemly gossip" which had resulted in the "lowering of social standards and morality." *Id.*

38. *Id.* at 193. This phrase originated in COOLEY, TORTS 29 (2d ed. 1888). According to Cooley: "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley characterized the corresponding duty as, "not to inflict an injury and not, within such proximity as might render it successful, to attempt the infliction of an injury." *Id.*

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

40. *Id.*

41. Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972).

42. Roe v. Wade, 410 U.S. 113, 154 (1973).

43. After *Roe*, the Supreme Court invalidated a number of state enactments on the basis of violations of "privacy." *See, e.g.*, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 75 (1976) (striking down a parental consent requirement for abortions performed on minors). The Court also held that constitutional privacy not only prevents the states from interfering with the abortion decision, but also prohibits the spouse from "interfering" as well. 428 U.S. at 69 (states may not constitutionally require spousal consent for an abortion). In addition, the *Danforth* Court struck down a provision which prohibited a particular abortion procedure, despite extensive lower court and legislative findings that the procedure was dangerous. 428 U.S. at 95-99 (White, J., dissenting in part and concurring in part).

sodomy.[44] The Constitution, according to Justice Blackmun, prohibits states from interfering with "intimate behavior" that does not take place in public.[45]

Justice Blackmun offered three general bases for his conclusion: first, the constitutionalization of John Stuart Mill's principle of liberty;[46] second, a judicial ban on legislating "private morality;"[47] and, finally, implicit constitutional values protecting intimate relationships.[48] Adoption of these principles, however, would invade the province of legislative decisionmaking and allow the Court to impose its values on a reluctant public.

III. JUSTICE BLACKMUN'S BASES FOR EXPANDING THE RIGHT TO PRIVACY

A. The Constitutionalization of John Stuart Mill's Principle of Liberty

The dissenters in *Bowers* would have the Court constitutionalize the contemporary version of John Stuart Mill's libertarian principle of liberty. Mill proposed that governments could only regulate individual behavior that "harms others."[49] Justice Blackmun wrote that nothing justified the conclusion that homosexuality is "physically dangerous, either to the persons engaged in it or to others."[50] In short, the dissenters would have held that states cannot, consistent with the Constitution, regulate behavior unless it is harmful.

This constitutionalization of Mill's principle would transfer to the judiciary the broad responsibility of determining whether individual behavior constitutes sufficient harm to warrant legal prohibition. When the *Bowers* dissenters concluded that "private" homosexuality is not harmful, they ignored two critical questions, namely, what is a "sufficient harm" and who should decide what is harmful. The dissenters, by concluding that homosexual conduct is not harmful, either meant that ho-

44. 54 U.S.L.W. at 4924-25.

45. *Id.* at 4926-27. ("[T]he mere fact that intimate behavior may be punished when it takes place in public cannot dictate [state regulation of] intimate behavior that occurs in intimate places.")

46. *Id.* at 4925-26.

47. *Id.* at 4926.

48. *Id.* at 4924-25.

49. J.S. MILL, ON LIBERTY 13 (Lib. Arts Ed. 1956). To his basic proposition, Mill added the corollary that government should not enact purely "paternalistic" laws. Mills sought to articulate one basic principle that could "govern absolutely" the extent to which society could control individuals. *Id.*

50. 54 U.S.L.W. at 4925-26.

mosexuality is completely without social effects, or that the effects are not "harmful" enough to justify legal sanction. The former conclusion is absurd, the latter a determination only for an elected legislature.

Homosexuality clearly "affects" society. "Homosexuality," according to one commentator, is a "continuous aspect of personality or personhood that usually requires expression across the public/private spectrum."[51] As one author observed, the gay experience "provides an opportunity to question traditional lifestyles and values and create an individual lifestyle based on personal knowledge and clarified social values."[52] Legal recognition of an alternative "lifestyle," by definition, affects the character of society.

The question of what constitutes sufficient justification for legal prohibition is a question for the legislature. To begin with, the constitutionalization of Mill's principle confuses political philosophy with constitutional principles. Legislators may vote against a mandatory motorcycle helmet law based on a personal belief that the legislation is an unjust interference with personal autonomy. The Constitution, however, does not compel the same result.[53] The Constitution[54] allows states to enact even paternalistic laws to protect the "health, safety, morals, and general welfare" of their citizens.[55] Constitutionalization of Mill's principle would call into question the validity of numerous statutes commonly thought to be within states' police power, including compulsory

51. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1890 (1985).

52. NUNGUESSER, HOMOSEXUAL ACTS, ACTORS, AND IDENTITIES viii.

53. *See, e.g.*, Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W.2d 377, *cert. denied*, 395 U.S. 709 (1969). *See also* Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355 (1969). Comment, *Society's Right to Protect an Individual from Himself*, 2 CONN. L. REV. 150 (1969). *See generally* Comment, *States' Power to Require an Individual to Protect Himself*, 26 WASH. & LEE L. REV. 112 1969).

54. The Constitution provides: "Powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The Supreme Court has acknowledged the broad powers left to the states. In GIBBONS V. OGDEN, 9 Wheat 1, 6 L.Ed. 23 (1824) Chief Justice John Marshall explained that residual state powers include "an immense mass of legislation which embraces everything within the territory of a State." *Id.* at 72.

55. Berman v. Parker, 348 U.S. 26, 32 (1954). The Court identified public safety, public health, morality, peace and quiet, and law and order as some of the more conspicuous examples of states' police power. The Court also explained that the legislature, not the judiciary is the main guardian of the public's needs. *Id.*

seat belt laws, compulsory physical and mental treatment, and prohibitions on the use of allegedly harmful substances.

More importantly, legislatures should determine whether certain behavior harms society because the question of what constitutes "harm" often involves moral judgments about empirical evidence. A conclusion that homosexual conduct justifies prohibition of criminal penalties involves especially difficult value judgments about the empirical evidence on the social effects of homosexuality. First, the exact cause and character of homosexuality is unknown. Psychiatrists do not agree whether homosexuality, properly understood, is a lifestyle, a preference, an illness, a sociopolitical movement or a biological predisposition.[56] Moreover, any medical judgment declaring the exact pathological status of homosexuality is most likely already politicized.[57]

Second, social theorists have long studied the repression of certain sexual behaviors and disagreed over its significance and effects. Freud, for example, theorized that communal life depends on sexual repression.[58]. Western societies, according to Freud, sought to divert energy from sexual activity to social uses such as work.[59] Restricting sexual gratification to heterosexual, genital, monagamous sex, although a "serious injustice" to those desiring alternate sexual gratification, also stabilized society by creating de-sexualized social ties.[60] These bonds are necessary, according to Freud, to dampen man's inherent aggressiveness towards other members of society.[61]

Other social theorists have concluded that capitalism is especially dependent on the repression of sexual excesses, such as homosexuality.[62] Max Weber located the creation of capitalism in the coming of Protes-

56. *See generally* MEYER, EGO-DYSTONIC HOMOSEXUALITY, IN COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1056 (H. Kaplan & B. Saddock, 4th ed. 1985) (a firm pathological understanding of homosexuality is marked by a fundamental lack of consensus).

57. R. BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1981) ("A furious egalitarianism [compels] psychiatric experts to negotiate the pathological status of homosexuality with homosexuals themselves.").

58. S. FREUD, CIVILIZATION AND ITS DISCONTENTS 51 (J. Strachey trans. 1961). Freud observed, for example, that the continuation of family life depended on a prohibition of incest. Freud called this prohibition "the most dramatic mutilation of man's erotic life." *Id*

59. *Id.*

60. *Id.*

61. *Id.* at 56.

62. Emile Durkheim contended that society could not be maintained unless some of humankind's strongest inclinations—"the obscure, mysterious, forbidding character of the sexual act"—were controlled. LUKE, EMILE DURKHEIM, HIS LIFE AND WORK, A HISTORICAL AND CRITICAL SURVEY 533 (1972).

tant religion and its accompanying prohibitions on certain types of sexual expression.[63] Protestantism infused work with religious significance, and strove to deflect persons' energy from erotic tendencies.[64] This sexual repression repudiated all nonprocreative "idolatry of the flesh."[65] Daniel Bell has recently described the clash between a productive economy and a polity dependent upon work on the one hand, and a consumptive economic culture stressing hedonism on the other.[66] Joseph Schumpeter has predicted difficulty in sustaining capitalism in a culture of rootless and childless apartment dwellers.[67]

Finally, the recent appearance of the disease AIDS (Acquired Immune Deficiency Syndrome), which vividly shows that homosexuality is not without social or individual costs, complicates any analysis of the effects of homosexuality.[68] AIDS is a deadly disease with no known cure.[69] The spread of the disease is epidemic, as the number of reported cases doubles every six months.[70] Anyone may contract the disease,[71] but the overwhelming majority of cases involve men who have engaged in homosexual conduct.[72] Given the high incidence of the disease among homosexuals, some commentators have proposed stricter prohibitions on sodomy as a means to control the disease.[73]

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63. M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 166-67 (T. Parsons trans. 1930).

64. *Id.*

65. *Id.* at 169.

66. D. BELL, THE CULTURAL CONTRADICTION OF CAPITALISM 71-72 (1976).

67. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY chs. XI-XIV (1950).

68. *See generally* Note, *AIDS—A New Reason to Regulate Homosexuality?*, 11 J. CONTEMP. L. 315 (1984). Note, *Preventing the Spread of AIDS by Restricting Sexual Conduct in Gay Bathhouses: A Constitutional Analysis*, GOLD. GATE U. L. REV. 301 (1985).

69. Landesman and Vieira, *Acquired Immune Deficiency Syndrome (AIDS): A Review*, 143 ARCH. INTERNAL MED. 2307 (1983). Seventy percent of patients diagnosed before January, 1983 have died. Over 72% of the victims were male homosexuals, especially those with multiple sexual partners. 33 CENTERS FOR DISEASE CONTROL, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *Morbidity and Mortality Weekly Report (MMWR) Update: Acquired Immune Deficiency Syndrome (AIDS)—United States*, No. 47 (Nov. 30, 1984).

70. Flaherty, *A Legal Emergency Brewing Over AIDS*, 6 NAT'L L.J. 44 (July 9, 1984).

71. Landesman and Vieira, *supra* note 69, at 2308.

72. Selik, *Haverkos and Curran, Acquired Immune Deficiency Syndrome (AIDS): Trends in the U.S., 1978-1982*, 76 AM. J. MED. 394 (1984). Men who have had homosexual contact constitute 70% of reported cases. *Id.* at 499. The high level of promiscuity among homosexuals compounds the problem. Jaffe, Choi, and Thomas et al., *National Case Control Study of Kkapsoi's Sarcoma and Pneumocystis Canini in Homosexual Males, Part I and II*, 99 ANNALS INTERNAL MED. 145 (1933) (the control group averaged 25 partners per year while bathhouse customers averaged 65 sexual partners per year).

73. *See, e.g.*, Robinson, *quoted in* Bar Ass'n for Human Rights of Greater New York, LES-

Representative legislatures, not unelected judges, should evaluate the evidence on the effects of homosexual conduct and decide whether prohibitions are justified.[74] Judicial imposition of Mill's principle would improperly redistribute the constitutional authority to determine what constitutes prohibitable conduct from the legislatures to an unelected judiciary.

B. A Judicial Ban on Legislating Morality

Another principle offered by the dissenters in *Bowers* to expand the Court's privacy protection characterizes the right to privacy as a judicial ban on states' legislating private morality. Justice Blackmun criticized the majority for failing to see a constitutional difference between "public sensibilities" and "private morality."[75]

The general assertion that the Supreme Court has, or can, prohibit states from legislating morality represents a misunderstanding of the nature of law, morality, and the relationship between the two. Law frequently reflects social norms, or "morals." Most law is moral legislation insofar as it conditions actions and thoughts in conformity with those social norms.[76] States enact laws and implement policies that proscribe,

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BIAN/GAY LAW NOTES 1 (Jan. 1986). Professor Robinson suggests that: "the only rational means of responding to this extraordinary tragedy [of AIDS] is to change our behavior. The behavior believed to have infected about three fourths of the victims is sodomy. . . ." He argues that states should be allowed to enact sodomy statutes to restrict "potentially lethal behavior" and to close bathhouses and bars where "promiscuous, extraordinarily risky sexual activity takes place." *Id. See also* Note, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645, 650 n.41 (1985). "As the incidence of AIDS increases in the homosexual community and as bisexual members of that community carry the disease to the population at large, the enforcement of sodomy statutes may become a primary alternative in the containment of this disease." *Id.*

74. The debate over the American Law Institute's proposed Model Penal Code illustrates the appropriate forum for discussing whether to prohibit homosexual conduct. The ALI opposed the criminalization of homosexual conduct because it did not involve force, adult corruption of minors, or offenses committed in public. The drafters, acknowledging Mill's principle, concluded that communities were not harmed by atypical sex practices that occurred in seclusion between consenting adults. This proposal set off a furious debate. Some argued that the "suppression of vice" is necessary because violation of society's moral structure undermines the "very basis" of that society. On the other hand, proponents of decriminalization adhering to Mill's principle, argued that regulation was unjustified because such conduct, which they perceived as "private," did not harm society. In the end, state legislatures decided to accept or reject the ALI report. MODEL PENAL CODE § 207.5 commentary at 277 (Tent. Draft No. 4, 1955).

75. 54 U.S.L.W. at 4926.

76. G. WILL, STATECRAFT AS SOULCRAFT 19-20 (1985). *See also* R. POUND, THE PHILOSOPHY OF LAW 71 (1922). Law is "a system of ordering human conduct and adjusting human relations beyond merely individual feelings or desires." *Id.*

mandate, regulate, and subsidize individual behavior that will, over time, nurture, bolster, or alter habits, dispositions, and values on a public scale.[77]

The Constitution, the dissenters in *Bowers* nonetheless argued, prohibits states from regulating "private," as opposed to public, morality. Such a distinction, however, does not exist. Morals regulate conduct, commanding individuals to engage in or refrain from certain behavior. This behavior, even if based on "personal" desires, is inherently "public."[78] The moral virtue of courage, for example although based in the personal quality of fearlessness, manifests itself in "public" behavior conditioned on this quality. Similarly, while the source of homosexuality is a "personal" desire to engage in sex with a person of the same gender, homosexuality manifests itself in the "public" behavior of expressing a desire for and engaging in sex with other persons. All private morals, therefore, are also public morals.[79] "Morals" exist only within the awareness of other members of society; they mean nothing to a person in isolation.

Dividing morality into two categories, the morality of aspiration and the morality of duty, provides a more useful model for understanding the relationship between law and morality.[80] The morality of aspiration is "the morality of the Good Life, of Excellence, or the fullest realization of human powers."[81] When a man fails to achieve all that to which he "aspires" he is merely guilty of a shortcoming, but not of wrongdoing.

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77. G. WILL, *supra* note 76, at 20.

78. KELSEN, PURE THEORY OF LAW 59-60 (1978).

> The social character of morals is sometimes called into question by pointing to those moral norms that prescribe a behavior not toward other individuals but toward oneself—such as the norms that prohibit suicide or prescribe courage or chastity. The behavior of the individual, which these norms prescribe, refers directly—it is true—only to this individual; but indirectly to other members of the community. For this behavior becomes the object of a moral norm in the consciousness of the community, only because of its consequences on the community. Even the so-called obligations toward oneself are social obligations. They would be meaningless for an individual living in isolation.

Id.

79. *Id.* The fallacy of the private/public distinction is also apparent in the context of abortion rights:

> The law can treat abortions as private transactions between women and their doctors. The law cannot, however, make the consequences—1.7 million abortions a year; a new casualness about the conceiving and disposing of life; transformed attitudes about sex, relations between sexes, and the claims of family and children—the law cannot make those "private" consequences.

G. WILL, *supra* note 76, at 87. Decisions to abort fetuses thus become part of the social consciousness of the community and of its social norms.

80. *See generally* FULLER, THE MORALITY OF LAW 5 (1964).

81. *Id.* at 6.

The morality of duty, on the other hand, lays down the basic rules without which an ordered society is impossible. The morality of duty, therefore, condemns citizens for failing to respect the basic requirements of social living.[82]

Society determines when to turn moral obligations into legal obligations. The law cannot force all citizens to lead "perfect" lives,[83] but legislatures routinely use legal sanctions to "heighten" the moral aspirations of individuals.[84] When legislatures take such measures diverse political interests can battle over the point at which legal pressure should end and the challenge of personal excellence begins.[85]

In some cases, the Constitution prohibits legislatures from imposing majoritarian morality on citizens. For example, suppose a state decides to expand its road system to increase economic activity in a poverty-stricken region of the state. The state cannot force citizens to donate land, without compensation, for an interstate highway. Such forced benevolence would violate the "taking clause" of the fifth amendment.[86] The judiciary must intervene and enforce a constitutionally predetermined value judgment.[87]

A state's decision to prohibit sodomy, however, does not violate any

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82. *Id.*

83. *Id.* at 9. Fuller wrote, "There is no way to compel a man to live up to the excellence of which he is capable." As an example, Fuller states that society cannot compel citizens to live lives of reason. *Id.*

84. In the 1960s for example, Congress enacted civil rights legislation, primarily to improve the condition of black Americans. Congress also sought, however, to change the "immoral" racial attitudes of many white Americans. Congress accomplished its goals by forcing races to eat, live, and study together. Desegregation and the civil rights laws explicitly and successfully changed individuals' moral beliefs by compelling them to change their behavior. Congress improved society by integrating the races, and also heightened the moral aspirations of citizens by effectuating a change in moral attitudes. *See Selections from Hearings before Senate Commerce Committees in July and August of 1963*, in GUNTHER, CONSTITUTIONAL LAW 159-162 (11th ed. 1985).

85. FULLER, *supra* note 80, at 10; G. WILL, *supra* note 76, at 87. *See also* Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 559 (1985).

Political philosophers have long disagreed over the appropriate role of government in encouraging citizens to lead "Good" lives. Edmund Burke, for example, argued that "the principles of true politics are those of morality enlarged." 1 BURKE, CORRESPONDENCE 332 (William ed. 1944). Bertrand Russel, however, condemned a high level of government interference in moral issues. B. RUSSEL, MARRIAGE AND MORALS 291 (1929).

86. "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

87. *See* Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896). Ironically, at the same time the Supreme Court is restricting the authority of states to make certain social judgments, the Court is expanding the authority of the states concerning certain economic matters. *See, e.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 227 (1984) (The public purpose of breaking up land oligarchies

constitutional limitation on majoritarian morality. Sodomy laws, at the very least, manifest society's displeasure with homosexual conduct and reinforce social values.[88] The law provides citizens with the moral gratification of living in a state which prohibits behavior they feel is morally wrong. The Constitution is silent on the question of the social propriety of homosexuality, and therefore the Court has no mandate to intervene. No principle identifiable in the text or history of the Constitution makes homosexuals' sexual gratification more important than other citizens' moral gratification.[89]

Constitutional protection of conduct that society deems morally deficient undermines the capacity of the majority to achieve the levels of moral excellence to which it aspires.[90] The moral choices of citizens, made through their elected representatives, should make or change laws.[91] Where the Constitution is silent, unelected judges have no mandate to impose their moral preferences upon a people who have made a different moral assessment.[92]

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satisfied the "public use" requirement for governmental takings, even though the land ended up in private hands.).

88. RADZINOWICZ, SIR JAMES FITZJAMES STEPHEN AND HIS CONTRIBUTION TO THE DEVELOPMENT OF CRIMINAL LAW 229-30 (1957). "The sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax. It converts into a judgment what otherwise might be a transcient sentiment." *Id.* *See also* Buchanan, *supra* note 87, at 559 ("It is hard to condemn what the law permits").

89. Bork, *supra* note 21, at 10. Bork explains that absent a moral or ethical principle embodied in the Constitution, community judgments must stand. *Id.*

90. Buchanan, *supra* note 85, at 559.

91. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) (A judge "is not a knight errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles.") *See also* Dronenberg v. Zeck, 741 F.2d at 1397. (Bork, J.). "If the revolution in sexual mores . . . is in fact ever to arrive, . . . it must arrive through the moral choices of the people and their elected representatives, not through the ukase of [a] court." *Id.* The danger of equating the courts' perceived moral superiority with its legal power is that the "morally superior judge" will be one who imposes a set of "authoritarian ethics" on an unconsenting public. Leede, *supra* note 30, at 549.

92. Plato proposed a political system ruled by "philosopher kings." These rules, according to Plato's plan, would make wiser decisions that those made by a majority in a representative form of government. Plato contended that it is possible to device a political system that would generate a continuing procession of philosopher kings as rules. THE REPUBLIC OF PLATO 205-11 (F. Cornford ed. 1961).

Judge Learned Hand once observed: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. HAND, THE BILL OF RIGHTS 73 (1958). *See also* Bork, *Judge Bork Replies*, 1984 A.B.A. J. 132 (explaining his 1971 article, Bork, *supra* note 21).

C. *Extra-Constitutional "Traditions" as the Basis for Overturning Legislative Judgments Jurisprudence*

The *Bowers* dissenters would also have applied an elastic form of "tradition-based" jurisprudence. Justice Blackmun, relying heavily on an article written by Professor Karst, attempted to identify an individual freedom to choose the "form and nature" of "intensely personal bonds."[93] Justice Blackmun rooted this freedom in what he perceived as the nation's values.[94]

In general, tradition-based jurisprudence, unattached to constitutional guidelines, is inconsistent with Madisonian government. Tradition-based jurisprudence allows a judge to arrive at almost any conclusion that he is predisposed to make.[95] Because no finite set of indicia exists to define what are "traditions," judges decide the content of controlling traditions.[96] Moreover, if a judge can arbitrarily choose which indicia of tradition to use, or if a judge simply cannot identify controlling "traditions,"[97] his own values, and not the Constitution, guide his decisionmaking.

Even assuming that judges can identify traditions, such jurisprudence is inherently undemocratic. It is hard to square the theory of our government with the notion that yesterday's majority (assuming it was a majority) should control today's.[98]

Professor Karst, advocates extending privacy protection to certain "intimate associations."[99] He defines an intimate association as "a close and

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93. 54 U.S.L.W. at 4924.

94. 54 U.S.L.W. at 4927.

95. *See generally* Ely, *The Supreme Court, 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 39-43 (1978) [hereinafter cited as Ely, *Discovering Fundamental Values*].

96. *See* Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L. REV. 1306, 1320 (1975) ("Assuming that society does have a fundamental commitment to 'those canons of decency and fairness which express the notions of justice of English-speaking peoples; what specific conclusions follow. Certainly those same standards could and have permitted the exclusion of Negroes from juries.") *See also* Betts. v. Brady, 316 U.S. 455 (1942) (the majority and dissenting opinions reached opposite conclusions on whether American traditions required the appointment of counsel for those who could not afford it).

97. Ely, *Discovering Fundamental Values, supra* note 94, at 39 (1978) (noting the "tremendous uncertainties in ascertaining anything very concrete" about past intellectual or moral climates.").

98. *Id.* at 42.

99. Karst, *The Freedom of Association*, 89 YALE L.J. 624 (1983). Professor Tribe reaches the same result by defining tradition in such meaningless terms that it will apply to almost anything. Tribe admits that the history of homosexuality is one of "disapproval and disgrace," but circumvents the obstacle by proposing to raise the definition of tradition to a higher "level of generality." This

familiar personal relationship that is in some significant way comparable to a marriage or family relationship."[100] To determine whether an "intimate association" is entitled to constitutional protection, Karst relies on four values: society,[101] caring and commitment,[102] self-identification,[103] and intimacy.[104] These values come from a "sense of collectivity," the "shared sense that 'we' exist beyond 'you' and 'me'."[105] Karst finds these values present in a homosexual relationship and concludes that the Constitution protects the act of sodomy from criminal penalties.[106]

Simply stated, "the shared sense that 'we' exist beyond 'you' and 'me' " is a principle based on a value preference rather than on a principle identifiable in the history, language, or structure of the Constitution. Notwithstanding Karst's elaborate collection of historical references to certain values, the simple fact is that twenty-four state legislatures continue to make the value judgment that sodomy is a crime.[107] Professor Karst's conglomeration of vague values does not justify judicial nullification of those legislative judgments.

IV. The Recent Political Response to Sodomy Statutes

Illinois, in 1962, decriminalized private sexual conduct between adult homosexuals.[108] Since 1979, twenty-five states have decriminalized homosexual conduct.[109] Whether due to improved medical understanding, the sexual revolution, or political pressure from gay rights activists, legislatures have responded to political pressure. In 1980 and 1984, for example, the Democratic Party included a gay rights plank in its national

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permits, according to Tribe, "unconventional variants" to claim the same constitutional protection as "mainstream versions" of conduct. L. Tribe, American Constitutional Law § 15-13, at 944-946 (1978). Through semantic gymnastics he arrives at the bizarre conclusion that what is "traditional" includes what is "unconventional."

100. *Id.* at 630. Karst defines society as the opportunity to enjoy the company of certain people, an "expectation of access" to another person's physical presence. *Id.*

101. *Id.* at 632. "Caring and commitment," according to Karst, is the chief value. In essence, "caring and commitment" is living and being loved. *Id.*

102. *Id.* at 634. Self-identification is the formation and shaping of an individual's identity. Associations, Karst asserts, profoundly affect our personalities and senses of self. *Id.*

103. *Id.* Intimacy is the context of caring which makes the sharing of personal information significant. *Id.*

104. *Id.* at 630.

105. *Id.* at 682.

106. *See supra* note 9.

107. *See supra* note 8.

108. *Id.*

109. *See supra* note 9 accompanying text.

platform. In fact, homosexuals enjoy political dominance in certain regions of the country. At the same time, twenty-four states and the District of Columbia have chosen to retain laws which prohibit some form of sexual contact between persons of the same sex. These states, for whatever reasons, continue to prefer a society in which sodomy is prohibited. The mere reluctance of states to change, however, is not a constitutional mandate for judicial intervention.

V. CONCLUSION

Justice Blackmun's dissent in *Hardwick*, if followed, would reaffirm *Lochner* in American jurisprudence behind the facade of protecting privacy. Statutes that currently prohibit homosexual conduct reflect societal value judgments concerning the propriety of a particular form of behavior. Absent a conflicting constitutional value the majority-rule principle allows such determinations to govern. The Supreme Court's only role is to invalidate legislative acts which contravene principles embodied in that Constitution. Nullifying sodomy statutes, on the basis of a "fundamental" right to privacy, would unprincipledly and undemocratically replace centuries-old values with those of an unelected Court.[110]

Alan J. Wertjes

110. F. Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 58 (1931). Frankfurter wrote:

> The veto power of the Supreme Court over the socioeconomic legislation of the states, when exercised by a narrow conception of the due process and equal protection of the law clauses, presents undue centralization in its most destructive and least responsible form. The *most destructive*, because it stops experiment at its source, preventing an increase of social knowledge by the only scientific method available; namely the tests of trial and error. The *least responsible*, because it often turns on the fortuitous circumstances which determine a majority decision, and shelters the fallible judgment of individual justices, in matters of fact and opinion not peculiarly within the competence of the judges behind the impersonal authority of the Constitution.

Id. (emphasis added).