THE SUPREME COURT GIVES STATES A FREE REIN WITH SODOMY STATUTES: *BOWERS v. HARDWICK*

Courts have often struggled with the question of whether the constitutional right to privacy[1] extends to a homosexual's intimate activity.[2]

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1. The Constitution does not explicitly provide a right of privacy. D. O'BRIEN, PRIVACY, LAW AND PUBLIC POLICY 3 (1979). A constitutional right of privacy emerged instead through judicial interpretation of the Constitution and the Bill of Rights. *Id.* at 178. In 1965, the United States Supreme Court recognized a right of privacy as a fundamental personal right emanating from the Constitution. Griswold v. Connecticut, 381 U.S. 479 (1965). *See infra* notes 22-28 and accompanying text for a discussion of Griswold. Justice Douglas, in his majority opinion, maintained that judicial recognition of a right of privacy is permissible because the Constitution extends protection to an individual's privacy interest through "penumbras" or "shadows" of express guarantees. *Griswold*, 381 U.S. at 484. *See* O'BRIEN, *supra*, at 177-99 (discussion of privacy as a fundamental right). Because the Court regards these fundamental constitutional rights as penumbral, it generally protects such rights from governmental intrusion. *Id.* at 3. Douglas further asserted that the privacy rights embodied in the penumbras are peripheral rights that give life and substance to the guaranteed rights. *Griswold*, 381 U.S. at 484. *See generally* BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION (1973).

The Supreme Court has found fundamental rights in the areas relating to marriage, childbearing and family life. *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (Constitution prevents states from interfering in woman's decision of whether to bear a child); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (right of privacy protects decisions regarding family); Griswold v. Connecticut, 381 U.S. 479 (1965) (Constitution protects privacy of marital relationships). Most of the interests that the Court has found to be fundamental fall within the broad category of the right of privacy. BARNETT, *supra*, at 52-73. When the Court determines that a right is fundamental, it applies a test of strict scrutiny to the statutes in question. This test requires that the state show a compelling interest that cannot be furthered in a less burdensome way. O'BRIEN, *supra*, at 189. This two part test is so strict that few statutes are able to survive judicial scrutiny. *Id.*

The Court and other scholars make four assumptions about the concept of privacy:

1. Privacy denotes the seclusion or withdrawal of an individual from public affairs.
2. Privacy is voluntary; it is therefore, basically an aspect of individual freedom and control over personal engagements.
3. Privacy is equated with a right.
4. Privacy is valued for either its intrinsic worth or its instrumental value, but rarely are both of these values considered simultaneously.

Many states attempt to control this activity by enacting sodomy[3] statutes that criminalize adult sodomitic activity.[4] In *Bowers v. Hardwick*[5] the United States Supreme Court held that state statutes prohibiting adult sodomitic activity were valid because the Constitution does not

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Id. at 4. *See generally* G. GUNTHER, CONSTITUTIONAL LAW 501-16 (11th ed. 1985) (discussion of right of privacy).

2. *See* Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986) (Georgia sodomy statute declared unconstitutional); Baker v. Wade, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986) (Court upheld sodomy statute exclusive to homosexuals); Dronenberg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (private homosexual activity is not protected by the Constitution); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (Court held sodomy statute constitutional). *See generally* Comment, *A Setback For the Right of Privacy*, 65 KY. L.J. 748, 755-62 (1976-77) (critical discussion of Doe and how it deviates from line of Supreme Court decisions) [hereinafter Comment, *Setback*]; Comment, *Marriage, Kinship and the Purposes of a Democratic Society*, 81 MICH. L. REV. 463, 517 (1983) (discussion of the evolution of right to privacy protection) [hereinafter Comment, *Marriage*].

3. Sodomy is defined as oral or anal copulation between persons who are not husband and wife, or consenting adult members of the opposite sex. BLACK'S LAW DICTIONARY 1247 (5th ed. 1979). *See also* WEBSTER'S NEW WORLD DICTIONARY 568 (2d ed. 1979) (sodomy defined as any sexual intercourse considered abnormal, as between two male persons). *See generally* Comment, *Constitutional Protection of Private Sexual Conduct Among Consenting Adults: Another Look at Sodomy Statutes*, 62 IOWA L. REV. 568, 568 (1976) (definition of sodomy and discussion of the expansion of homosexuals' rights in light of Supreme Court decisions) [hereinafter Comment, *Constitutional Protection*].

While most sodomy statutes apply equally to both heterosexuals and homosexuals, primarily the latter suffer arrest and conviction for participating in activities proscribed by these statutes. Comment, *Setback, supra* note 2, at 478.

4. Statutes in twenty-five states make private homosexual behavior between consenting adults subject to criminal sanction. Comment, *Setback, supra* note 2, at 750. *See generally* Comment, *The Right to Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 811-875 (1984) (objective discussion of the constitutionality of sodomy statutes).

For years, federal and state courts disagreed over the issue of whether state sodomy statutes are constitutional. *See infra* notes 40-47 (discussing Doe v. Commonwealth's Attorney; sodomy statute constitutional); *infra* notes 48-52 (discussing Baker v. Wade; sodomy statute valid); *infra* note 5 (discussing Hardwick v. Bowers; sodomy statute unconstitutional).

5. 106 S. Ct. 2841 (1986). In *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), the United States Court of Appeals for the Eleventh Circuit held that a Georgia sodomy statute infringed upon a homosexual's fundamental right to engage in private, consensual sexual activity. 760 F.2d at 1213. The Eleventh Circuit further held that such statutes are valid only if a state shows a compelling interest and proves that the regulation is narrowly tailored to further that interest. *Id. See infra* note 8 for the text of the Georgia sodomy statute.

confer a fundamental right upon homosexuals to engage in sodomy.[6]

In *Bowers* the plaintiff was a practicing homosexual who regularly engaged in private homosexual activity.[7] He was charged with violating a Georgia sodomy statute[8] when he sodomized with a consenting adult male in his own home.[9] Hardwick challenged the constitutionality of the statute,[10] claiming that it violated an individual's constitu-

6. 106 S. Ct. at 2843.

7. *Id.* at 2842.

8. GA. CODE ANN. § 16-6-2 (1984), reads, in part, as follows:

a. A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .

b. A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .

Id.

9. 106 S. Ct. at 2842. The District Attorney brought charges against Hardwick as a result of his arrest, and after a hearing in the Municipal Court of Atlanta, Hardwick was bound over to the Superior Court. Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985). The district attorney decided not to present the case to the jury unless further evidence developed. *Id.*

10. The lower courts decided two peripheral issues regarding the parties' standing to bring suit. The first issue involved a married couple, John and Mary Doe, who attempted to join Hardwick in his suit. 106 S. Ct. at 2842 n.2. The Does alleged that they desired to engage in sexual activity proscribed by the statute, but had been "chilled and deterred" by the existence of the statute and the recent arrest of Hardwick. *Id.* The district court dismissed Doe's claim, holding that they lacked standing. *Id.* The Eleventh Circuit affirmed, reasoning that a plaintiff must show that he or she has suffered an actual or threatened injury caused by the challenged conduct of the defendant. 760 F.2d at 1206-07. *See* American Civil Liberties Union v. Rabon County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983) (plaintiffs had standing to bring suit to request the dismantling of a lighted cross in state park because they had been injured due to their unwillingness to camp in the part because of the cross). Because the Does had not been arrested for the activity proscribed by the statute, the appellate court held that the Does could not rely solely on Hardwick's past arrest to give them standing to challenge the constitutionality of the statute. 760 F.2d at 1205. Because the Does suffered no threat of prosecution and presented no evidence to support that contention, the court dismissed their claim. *Id.* at 1207.

The second peripheral issue that the court of appeals discussed involved Hardwick's standing. *Id.* at 1204. Because Hardwick brought an anticipatory challenge to the statute, the court asserted that Hardwick's standing depended upon whether the threat of prosecution under the statute was real and immediate or "imaginary" and "speculative." *Id.* at 1205. The court relied on two factors to find that Hardwick had standing to bring the suit. The first factor was that the police had previously arrested Hardwick for violating the statute. *Id.* The court argued that the past enforcement of the statute against Hardwick was significant in measuring the state's intentions of prosecuting him in the future. *Id.* The second factor was that Hardwick desired to engage in the prohibited conduct regardless of its legal status. *Id.* The Eleventh Circuit held, therefore, that

tional right to privacy by prohibiting him from engaging in deviate sexual behavior[11] in the privacy of his home.[12] The Eleventh Circuit Court of Appeals reversed and remanded the case for trial.[13] The Eleventh Circuit held that the Georgia sodomy statute unconstitutionally impinged upon a fundamental right of homosexuals. The court noted that the statute was void unless the state could prove a compelling interest and narrowly tailor the statute to advance that interest.[14] The United States Supreme Court reversed the Eleventh Circuit decision and held that the Georgia statute was constitutional because the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.[15]

The Constitution does not explicitly grant a right of privacy.[16] Through a series of landmark decisions, however, the Supreme Court recognized a right of privacy as implicit in the fourteenth amendment.[17] In *Griswold v. Connecticut*[18] the Supreme Court first recognized the right of privacy as an independent constitutional right.[19] The Court invalidated a birth control statute that prohibited the use of contraceptives.[20] The Court held that an individual's right to make deci-

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Hardwick faced a real threat of prosecution that gave him standing to bring the suit. *Id.* at 1206.

11. Deviate sexual intercourse is any contact between any part of the genitals of one person, and the mouth or anus of another person. Baker v. Wade, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986). *See infra* notes 48-52 and accompanying text (discussion of *Baker*).

12. 106 S. Ct. at 2846. The court of appeals ruled that Hardwick had no legal claim because of precedent set in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.* 425 U.S. 901 (1976), a prior Supreme Court case. In *Doe* the district court upheld the constitutionality of a state sodomy statute. *See infra* notes 44-53 and accompanying text.

13. 760 F.2d 1202, 1213 (11th Cir. 1985).

14. *Id.*

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

16. *See supra* note 1.

17. *See infra* notes 18-39 and accompanying text (discussion of cases that recognize a right to privacy). *See generally* 15 DUQ. L. REV. 123 (1976) (critical discussion of *Doe v. Commonwealth's Attorney*).

18. 381 U.S. 479 (1965). A Connecticut court convicted two directors of Planned Parenthood of violating the state contraceptive statute for giving information, instruction, and medical advice to married persons for the purpose of preventing conception. *Id.* at 480.

19. *Id.* at 485.

20. *Id.*

sions peculiar to the marital relationship is a fundamental right[21] because it involves intimate and personal matters that should not be subject to state interference.[22] As a result, states could not justify statutes infringing on the right of privacy by a mere showing of a rational basis.[23] States now have to show a compelling interest and demonstrate that the regulation is narrowly tailored to further that interest before they can regulate activity involving marriage.[24]

Six years later, the Supreme Court expanded the bounds of the right to privacy protection to include relations outside marriage. In *Eisenstadt v. Baird*[25] the Supreme Court extended the *Griswold* holding to strike down a state statute that forbade the distribution of contraceptives to single individuals.[26] The Court held that the right of privacy in personal matters should no longer be limited to the marital relationship.[27] Essential to this holding was the Court's assertion that the individual, married or single, should be free from unwarranted governmental intrusions into highly personal matters.[28]

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21. *See supra* note 1 (discussion of fundamental right).

22. 381 U.S. at 485. *See generally* Comment, *Setback, supra* note 2, at 755.

23. 381 U.S. at 485. *See generally* O'BRIEN, *supra* note 1, at 177-199 (discussion of Court's shift from rational basis test to compelling interest test for fundamental rights of privacy).

24. 381 U.S. at 485. *See, e.g.*, Carey v. Population Services, 431 U.S. 678 (1977) (state cannot prevent the sale of non-prescription contraceptives to adults by persons other than licensed pharmacists because no compelling state interest exists); Zablocki v. Redhail, 434 U.S. 374 (1978) (decisions respecting marriage, including an individual's right to get married, are among protected liberties).

25. 405 U.S. 438 (1972). In *Eisenstadt* the defendant gave a lecture on contraceptives to a group of college students, and gave one student a package of contraceptives at the end of his speech. *Id.* at 440. *See* Comment, *Setback, supra* note 2, at 757 (discussion of Supreme Court's expansion of right of privacy to decisions outside the marital relationship).

26. 405 U.S. at 453.

27. *Id. But see* Louisi v. Slayton, 539 F.2d 349 (4th Cir.), *cert. denied sub nom.* Louisi v. Zahradnick, 429 U.S. 977 (1976) (court suggested that the right of privacy is probably confined to the marital relationship); State v. Elliott, 89 N.M. 305, 551 P.2d 1352 (1976) (court held state sodomy statute constitutional and found that the right of privacy does not extend to unmarried people).

28. 405 U.S. at 453. The Court stated: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id. See generally* Note, *Constitutional Law—Right of Privacy—Doe v. Commonwealth's Attorney*, B.Y.U.L. REV. 170, 176-80 (1977) (discussion of *Doe*, and similar sodomy statutes).

Similarly, in *Roe v. Wade*[29] the Supreme Court extended the constitutional right of privacy to include decisions outside the context of marriage.[30] In *Roe* the Court invalidated an anti-abortion statute, holding that because the decision to terminate pregnancy is a personal matter of grave importance in the life of the decisionmaker, the Constitution protects such a decision under the fourteenth amendment.[31] As a result of *Eisenstadt* and *Roe*, the Supreme Court redefined the constitutional protection of the right of privacy to encompass the rights of all individuals to make certain personal decisions, regardless of their marital status.[32]

In *Stanley v. Georgia*[33] the Supreme Court extended the right of privacy in a different manner. Rather than evaluating this case exclusively by the classification of individuals to determine if a right of privacy existed,[34] the Court shifted its focus to the locality of the prohibited activity[35] and expanded the right of privacy protection to in-

29. 410 U.S. 113 (1973). In *Roe* a pregnant single woman brought a class action challenging the constitutionality of the Texas criminal abortion statute that made it a crime to obtain or perform an abortion. *Id.* at 120. The plaintiff desired to terminate her pregnancy by having a licensed physician perform an abortion. *Id.* The plaintiff alleged that she was unable to obtain an abortion because of the Texas statute. *Id.* She claimed that the statute abridged her right of privacy as protected by the first, fourth, fifth, ninth, and fourteenth amendments. *Id.*

30. 410 U.S. at 120. Although the Court restricted its holding to decisions regarding childbearing, the Roe decision had a much wider impact on subsequent right of privacy cases. *See generally* Comment, *Marriage, supra* note 2, at 520, 526, 532.

31. 410 U.S. at 153.

32. Comment, *Setback, supra* note 2, at 757.

33. 394 U.S. 557 (1969). In *Stanley* police officers executing a valid search warrant found obscene films in Stanley's home. *Id.* at 558. He was charged with possession of obscene material. *Id.* at 559.

34. Before *Stanley* the Court's main focus was on specific classes of individuals. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (Court extended privacy protection to class consisting of unmarried adults); Griswold v. Connecticut, 381 U.S. 479 (1965) (Court extended privacy protection to class consisting of married adults). See *supra* notes 18-24 and accompanying text for a detailed discussion of these cases.

35. Justice Marshall's majority opinion in *Stanley* explained the shift in focus, emphasizing the inherent privacy of activities in individuals' homes. 394 U.S. at 565. Marshall reasoned that because the state attempted to regulate what individuals read, the Court needed to change its focus to both the location of Stanley's activities and the nature and purpose of the intrusion. *Id.*

The Supreme Court continued to focus on locality in subsequent decisions. *See, e.g.*, Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) (Court rejected privacy claims extended to adult theaters); United States v. Reidel, 402 U.S. 351 (1971) (Court rejected privacy claims to sell obscene materials in marketplace).

clude intimate activities in the home.[36] The Court invalidated a statute that prohibited the possession of obscene matter in the home.[37] According to the Court, a state cannot reach into the privacy of one's home and control the moral content of a person's thoughts.[38] The Court recognized the state interest in regulating obscenity, but found that this interest was not compelling enough to justify an invasion into an individual's home.[39]

In 1975, the Supreme Court made an unprecedented departure from the developing line of case law regarding the right of privacy. This departure marked another change in the focus of the Court's analysis. In *Doe v. Commonwealth's Attorney*[40] the Court focused on the activity of the individual challenging the statute, disregarding the classification of persons[41] and the locality of the activity as bases for a right of privacy decision.[42] In *Doe* the district court upheld a sodomy statute that prohibited individuals from engaging in sodomitic activity.[43] The Court found that the right of privacy concerned issues relating only to marriage, childbearing, and family life, which placed private homosexual activity outside the scope of protection.[44] The Court further reasoned that the statute was a proper exercise of the state's police power,[45] therefore justifying the criminalization of such activity.[46] The

36. *Id.* at 565. *See also* Payton v. New York, 445 U.S. 573 (1980) (police prohibited from making warrantless and nonconsensual entry into suspect's home to make routine felony arrest because the entry constituted invasion of privacy of home).

37. 394 U.S. at 558.

38. *Id.* at 565.

39. *Id.* at 568.

40. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976). The plaintiffs were adults seeking court protection from the effects of a sodomy statute in order to engage in private homosexual relations. *Id.* at 1205. *See generally* Comment, *Setback, supra* note 2, at 748 (discussion of *Doe* controversy and its precedential effect).

41. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). *See supra* notes 18-24 and accompanying text (discussion of *Griswold*).

42. *See* Stanley v. Georgia, 394 U.S. 557 (1969). *See supra* notes 33-39 and accompanying text (discussion of *Stanley*).

43. 403 F. Supp. at 1200.

44. *Id.* at 1203. See Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), in which the Court refused to protect private, consensual, homosexual conduct because constitutional recognition of the right of privacy has never been defined by the Court to encompass homosexual conduct.

45. The analysis of a state's police powers involves both the question of whether the power exists in a particular case and can be exercised, and whether the state has used it properly. M. FORKOSCH, CONSTITUTIONAL LAW 298-305, 298 (2d ed. 1969). When these two questions face the Court, it must consider the purpose of the legislation as

Supreme Court summarily affirmed the district court's holding.[47]

The Court of Appeals for the Fifth Circuit upheld a Texas sodomy

well. *Id.* The state's police power is justifiably utilized only if there is a reasonable relation between the end and the means. *Id.* As long as there is a substantial relation to a public end, such as public health, safety, and morals, and the means are neither oppressive nor arbitrary, the Court will generally uphold the state law or action. *Id.* at 303.

46. 403 F. Supp. at 1202. Justice Merhige dissented, criticizing the majority's disregard of the Supreme Court decision in *Stanley*. *Id.* at 1203. He asserted that the court should have invalidated the statute because *Stanley* extended the right of privacy to protect state intrusions into the home. 403 F. Supp. at 1205. Justice Merhige concluded that a state must show a compelling interest before regulating private, consensual, sexual behavior in the privacy of an individual's home. *Id.*

The state courts continued to grapple with the right of privacy issue. 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), Onofre was convicted of violating a New York Penal Law that makes it a crime to engage in consensual sodomy. *Id.* at 483, 415 N.E.2d at 937, 434 N.Y.S.2d at 948. He admitted to having committed acts of deviate sexual intercourse with a seventeen year old male at his home. *Id.* The Court of Appeals of New York invalidated the state sodomy statute, which prohibited deviate sexual intercourse between unmarried persons. *Id.* at 485, 415 N.E.2d at 938, 434 N.Y.S.2d at 949. The court applied the *Griswold*, *Stanley*, and *Eisenstadt* rationales and held that the right of privacy protects individual decisions to seek deviate sexual gratification, as long as the decisions are voluntarily made by adults. *Id.* at 486-90, 415 N.E.2d at 939-41, 434 N.Y.S.2d at 950-52. The court recognized the state's interest in protecting public morality, but found that the statute in question sought to regulate private morality, which the Constitution protects under the right of privacy. *Id.*

Public morality deals with the state's interest in insuring that the public as a whole maintains a moral prospective on life. Private morality is an individual's own values and ideals, wholly unrelated to the public's moral views. *See, e.g., Onofre*, 51 N.Y.2d at 489-91, 415 N.E.2d at 941, 434 N.Y.S.2d at 952. *See* Katz, *Sexual Morality and the Constitution: People v. Onofre*, 46 ALB. L. REV. 311, 312 (1982) (discussion of Onofre as victory for advocates of sexual freedom).

In People v. Uplinger, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983), *cert. granted sub nom.* New York v. Uplinger, 464 U.S. 812 (1983), *dismissed*, 467 U.S. 246 (1984), defendants challenged the constitutionality of a state sodomy statute that proscribed loitering in a public place to engage or solicit another to take part in deviate sexual intercourse. *Id.* at 937, 447 N.E.2d at 62, 460 N.Y.S.2d at 515. The court held that the state may not constitutionally prohibit sexual behavior conducted in private by consenting adults. *Id.* at 938, 447 N.E.2d at 63, 460 N.Y.S.2d at 515. The court asserted that the object of the statute was to punish conduct in anticipation of the act of consensual sodomy. *Id.* That object, the court found, was not within the state's police power. *Id.* The court therefore held the statute invalid. *Id.*

47. 425 U.S. 901 (1976). Considerable controversy existed over the precedential effect of *Doe*. The Supreme Court's opinionless affirmance left the courts with the question of whether the Supreme Court decided *Doe* on the merits, making it binding precedent, or affirmed *Doe* because the plaintiff lacked standing. *See* Comment, *supra* note 4, at 840. *See also* Hickes v. Miranda, 422 U.S. 332 (1975) (lower courts are bound by summary decisions of the Supreme Court until Court informs them that they are not).

statute in *Baker v. Wade*,[48] causing a split in the circuits.[49] In *Baker* a homosexual challenged the statute's constitutionality under the right of privacy.[50] The district court invalidated the statute and held, *inter alia*, that it violated the right to privacy by intruding into the private sex lives of fully consenting adults.[51] The Fifth Circuit reversed, holding that *Doe* was binding precedent until the Supreme Court held otherwise.[52]

But see Fusari v. Steinberg, 419 U.S. 379 (1975) (summary affirmance supports the judgment but not necessarily the reasoning of the lower court).

In Bowers v. Hardwick, 106 S. Ct. 1841 (1986), the Court did not resolve the *Doe* controversy because it wanted to give plenary consideration to the merits of the case. *Id.* at 2843.

48. 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986). In *Baker* the plaintiff, a homosexual, challenged the constitutionality of a Texas statute that proscribed engaging in deviate sexual intercourse with another person of the same sex. *Id.* at 291.

49. *Id.* at 292. *See* Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985) (Eleventh Circuit, in invalidating sodomy statute, exemplifies split in circuits). *See supra* notes 5-14 and accompanying text.

50. *Id.* at 292.

51. *Id.* at 291. The district court also held that the statute violated the right to equal protection. *Id.* at 291. The Fifth Circuit, however, reversed the lower court's holding on that issue. *Id.* at 292. The Fifth Circuit reasoned that since homosexual conduct is not a constitutionally protected liberty interest, the states need only show that the statute is rationally related to a legitimate state end. *Id.* The court concluded that the statute did not deprive the plaintiff of equal protection of the laws because the state had shown a rational basis, namely implementing morality, for the statute. *Id.* *See generally* C. COLLIN, THE FOURTEENTH AMENDMENT AND THE STATES, 110-25 (1974) (discussion of equal protection).

52. 769 F.2d at 292. *See supra* note 47 (precedential effect of Supreme Court summary affirmances). Seven judges dissented, arguing that the Supreme Court's summary affirmance in *Doe* was not a decision on the merits, and therefore not controlling. 769 F.2d at 293-99. One dissenting judge argued that Texas had blatantly encroached upon the intimate sex lives of consenting adults and that the statute was therefore invalid on its face. *Id.* at 293 (Goldberg, J., dissenting).

The remaining seven dissenting judges argued that the appeal was improper because neither party appealed the lower court decision. *Id.* at 295. (Rubin, J., dissenting). The district attorney, however, intervened and became the defendant class representative after the lower court had decided the case. *Id.* at 294. These dissenters asserted that the district attorney had no standing to appeal the case. *Id.* at 295. They argued that the court had originally given the district attorney an opportunity to join the defendant class in the lower court, but that he had declined. *Id.* at 294. According to his dissent, the district attorney was an improper party to bring the appeal because he chose not to intervene until after the lower court judgment. *Id.* at 295. The dissent concluded that the district attorney did not adequately represent the interests of the state and should not have been permitted to appeal as the class representative. *Id.* at 299.

In *Bowers v. Hardwick*[53] the Supreme Court began its brief majority opinion emphasizing that the case did not require a judgment of whether laws against sodomy were wise or desirable.[54] Justice White outlined the issue in terms of whether the Constitution conferred a fundamental right upon homosexuals to engage in sodomy.[55]

Justice White argued that the Eleventh Circuit erroneously interpreted past right to privacy cases to justify the extension of this right to homosexual sodomy.[56] He stated that the rights recognized in the

53. 106 S. Ct. 2841 (1986).

54. *Id.* at 2843. Justice White delivered the Court's opinion, in which Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined.

55. *Id.* Justice White stated that the case did not raise a question about the propriety of state legislative decisions repealing laws against sodomy or of state court decisions to invalidate sodomy laws on state constitutional grounds. *Id.*

56. *Id.* Justice White criticized the Eleventh Circuit for interpreting *Griswold v. Connecticut, Eisenstadt v. Baird,* and *Roe v. Wade,* which construed the due process clause to confer a fundamental right to bear a child, to confer a right of privacy to homosexuals to engage in sodomy. *Id.* Justice White also cited three cases, Carey v. Population Services International, 431 U.S. 678 (1977), Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyers v. Nebraska, 262 U.S. 390 (1923), that recognized a fundamental right for individuals to make their own decisions with regard to child rearing and education. These decisions, as well as Prince v. Massachusetts, 321 U.S. 158 (1944) (fundamental right to make decisions regarding family relationships), Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (fundamental right to make decisions regarding procreation), and Loving v. Virginia, 388 U.S. 1 (1967) (fundamental right to make decisions regarding marriage), could not be interpreted to extend the right of privacy to homosexual sodomy. 106 S. Ct. at 2843.

In *Hardwick v. Bowers* the Eleventh Circuit recognized that the Constitution prevents states from interfering with certain personal decisions because such decisions are private and should be free from governmental intrusion. 760 F.2d at 1211. The court set forth a list of protected rights, including decisions regarding marriage, childbearing, and family life, and classified them as fundamental rights. *Id.* The court then determined that Hardwick's activity could be added to the list of fundamental rights, invalidating the Georgia sodomy statute. 760 F.2d at 1211.

The Eleventh Circuit relied heavily on the Supreme Court's recent expansion of rights protected by the right of privacy. *See supra* notes 18-39 and accompanying text. The court broadly read *Griswold* to assert that individuals have the right to make certain decisions involving personal and intimate matters. 760 F.2d at 1211. It combined the holding in *Eisenstadt* with the holding in *Stanley* to extend to unmarried individuals the protection of privacy in the home. *Id.* at 1212. The Eleventh Circuit reasoned that Hardwick's situation was similar to those in *Griswold, Eisenstadt,* and *Stanley* because he was an unmarried individual who desired to engage in sexual activity in the privacy of his home. This activity, the court stated, was of a highly personal nature and should therefore be constitutionally protected as a fundamental right. *Id. See supra* notes 33-36 and accompanying text (discussion of *Roe v. Wade*). The Eleventh Circuit concluded that the sodomy statute abridged Hardwick's fundamental right and held that the statute was void unless the state could withstand the strict scrutiny of the compel-

right to privacy cases, particularly those involving marriage, family, and procreation, did not bear any resemblance to the constitutional right of homosexuals to engage in sodomy.[57]

Justice White then quoted two definitions of "protected rights" from two prior Supreme Court cases.[58] In these two cases, the Court defined "protected rights" as "fundamental liberties that implied in the concept of ordered liberty"[59] and "those liberties that are deeply rooted in the nation's history and tradition."[60] According to the majority, neither of these definitions confer a fundamental right upon homosexuals to engage in sodomy.[61] The Court reasoned that laws criminalizing sodomy have roots in the common law.[62] In light of this fact, Justice White concluded that the right to engage in sodomy is not grounded in the nation's history, and therefore does not fall under the definition of a "protected right."[63]

Justice White further reasoned that the Supreme Court should be reluctant to make an addition to the list of protected activities included in the category of fundamental rights.[64] He feared that if the Court extended this category, the judiciary would be governing the country without express constitutional authority.[65] The Court, therefore, refused to recognize a new fundamental right for homosexual sodomy.[66]

The majority then addressed Hardwick's argument that *Stanley v. Georgia*[67] protected his conduct in the privacy of his home.[68] Justice

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ling interest test. 760 F.2d at 1213. *See supra* notes 1 (discussion of compelling interest test), 9 (discussion of the standing issue).

57. *Id.* at 2844.

58. *Id.*

59. *Id.* This definition was set forth in Palko v. Connecticut, 302 U.S. 319, 325-326 (1937).

60. 106 S. Ct. at 2844. This definition was set forth in Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

61. 106 S. Ct. at 2844.

62. *Id.* The majority also recognized that sodomy was illegal in the thirteen original states, and that when the fourteenth amendment was ratified, 32 of the 37 states in the Union criminalized sodomy. *Id.* at 2844-45. Today, the Court stated, 24 states and the District of Columbia criminalized sodomy between consenting adults. *Id.* at 2845.

63. *Id.* at 2846.

64. *Id.* Justice White stated that the Supreme Court comes nearest to illegitimacy when it makes decisions and laws without explicit constitutional authority. *Id.*

65. *Id.*

66. *Id.*

67. *See supra* notes 33-39 and accompanying text (discussion of *Stanley*).

White distinguished *Stanley* on the grounds that it was a first amendment case and Hardwick's claim was based on the fourteenth amendment.[69] Justice White further asserted that not all activities that occur in the home today, such as possession of drugs, firearms, or stolen goods, are without criminal consequences.[70] According to the majority, to permit consenting adults to engage in sodomy would invite questions regarding the right to engage in incest, adultery, and other sex crimes committed in the privacy of the home.[71] The Court refused to do this and concluded that the right to privacy does not include the right to engage in sodomy.[72]

Justice Blackmun wrote a strong dissent, asserting that the issue in this case was not whether the Constitution conferred a fundamental right to engage in homosexual sodomy but, rather, whether civilized man has the right to be let alone.[73] He criticized the majority's conclusion that the Georgia sodomy statute is valid because the laws of many states have criminalized this conduct and still do so today.[74] He argued that upholding a law because it has been the law since ancient times is "revolting."[75] Justice Blackmun stated that Hardwick's claim should be analyzed in light of the values that underlie the constitu-

68. 106 S. Ct. at 2846. Hardwick relied on *Stanley* to argue that the Constitution protects homosexual conduct if it occurs in the privacy of the home. *Id.*

69. *Id.*

70. *Id.* Justice White recognized that some victimless crimes that occur in the privacy of the home are criminal notwithstanding *Stanley*. *Id.*

71. *Id.*

72. *Id.* Chief Justice Burger wrote a separate concurring opinion emphasizing his view that the Constitution does not confer a fundamental right to commit homosexual sodomy. *Id.* at 2847 (Burger, C.J., concurring). The Chief Justice cited old codes and rules of common law to assert that if the Court held that the Constitution protects homosexual sodomy as a fundamental right, these moral teachings would be completely cast aside. *Id.* He concluded that the Constitution does not deprive a state of the power to enact sodomy statutes. *Id.*

Justice Powell also wrote a concurring opinion. *Id.* at 2847 (Powell, J., concurring). He asserted that the eighth amendment may protect Hardwick since the Georgia sodomy statute sets the punishment for its violation at imprisonment for up to 20 years. *Id.* Justice Powell argued that this prison sentence is very long and would create a serious eighth amendment issue. *Id.* He concluded that because no state court had tried or convicted Hardwick, the issue was not before the Court. *Id.* at 2848.

73. *Id.* (Blackmun, J., dissenting). Justice Blackmun wrote the dissenting opinion in which Justices Brennan, Marshall, and Stevens joined.

74. *Id.*

75. *Id.* Justice Blackmun further stated that it is also revolting for a rule to persist from blind imitation of the past when the grounds for the law no longer exist. *Id.*

tional right to privacy.[76] The dissent began its analysis by accusing the majority of focusing solely on a homosexual's right to engage in sodomy though the Georgia statute does not differentiate according to gender.[77] The dissent also criticized the majority on procedural grounds, arguing that the majority should have considered whether the statute violated the eighth or ninth amendments, or the equal protection clause of the fourteenth amendment.[78] According to Justice Blackmun the Court had a duty to examine each complaint under all possible theories even though Hardwick did not advance those theories.[79]

Justice Blackmun accused the majority of ignoring the basic reasons why the Constitution protects certain rights associated with the family.[80] According to the dissent, the Constitution protects these rights because they form a central part of an individual's life, greatly contribute to the happiness of individuals, and promote harmony.[81] Justice Blackmun argued that, in essence, the majority refused to recognize the fundamental interest all individuals have in controlling the nature of their intimate associations with others.[82] Justice Blackmun concluded that to deprive individuals of the right to choose how to conduct their intimate relationships poses a far greater threat to values most deeply rooted in our nation's history than tolerance of non-conformity could

76. *Id.*

77. *Id.* at 2849. *See supra* note 6 (Georgia sodomy statute).

78. 106 S. Ct. at 2849-50.

79. *Id.*

80. *Id.* at 2851. Justice Blackmun asserted that the majority ignored the warning in Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977), that the Court should not ignore the basic reasons why the fourteenth amendment due process clause protects certain rights associated with the family. *Id.*

81. *Id.* Justice Blackmun stated that the Constitution protects decisions about marriage because marriage is an association that promotes life. *Id.* The Constitution protects decisions regarding parenthood because it dramatically alters an individual's self-definition. *Id.* Finally, Justice Blackmun stated that the Constitution protects the family because it contributes to the happiness of individuals. *Id.*

82. *Id.* at 2852-53. Justice Blackmun criticized the majority's interpretation of *Stanley v. Georgia*. *Id.* He asserted that the *Stanley* Court based its decision on the fourth amendment's protection of the individual in the home. *Id.* at 2853. Justice Blackmun found no justification for the majority's comparison of private consensual activity with the possession of drugs, firearms, or stolen goods in the home. *Id.* He stated that drugs and weapons are dangerous and that stolen property is wrongfully taken, concluding that the Georgia sodomy statute does not prohibit any activity that is physically dangerous to anyone. *Id.*

ever do.[83]

Bowers v. Hardwick is a significant decision because it ends the confusion that has surrounded the right of privacy of homosexuals.[84] The majority, however, decided the case improperly because it addressed the incorrect issue. The majority framed the issue in terms of whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy.[85] The Court should have decided whether intimate sexual activities between consenting adults are so private as to be beyond the reach of the states' control. The majority's focus was incorrect because the Georgia sodomy statute does not differentiate between homosexuals and heterosexuals.[86] The statute makes it a crime for *any person* to engage in sodomy. The Court, therefore, did not address the proper issue.

The majority mistakenly assumed that by affirming the Eleventh Circuit decision, it would have decided that homosexual sodomy was wise or desirable. Further, the Court assumed that it would have to decide that homosexuals have a fundamental right to engage in sodomy.[87] The majority need only have included one more intimate activity under the scope of the already broad definition of the fundamental right to privacy, as recognized and expanded in a long line of Supreme Court cases.[88]

The majority's decision will not simply affect homosexuals.[89] The

83. *Id.* at 2856.

84. *See supra* notes 40-52 (cases that exemplify the confusion surrounding this issue).

85. 106 S. Ct. at 2843.

86. *See supra* note 8 (Georgia sodomy statute).

87. The majority need only have found that the act of sodomy between any consenting adults is included in the right of people to control private activities in their homes.

88. *See supra* notes 16-39 and accompanying text (discussion of cases that recognize a right to privacy).

89. Homosexuals maintain that the mere existence of sodomy statutes has a significant and lasting impact upon them. R. HOOK, THE CONSTITUTIONAL RIGHT OF PRIVACY: SODOMY LAWS 2 (1981). Homosexuals assert that sodomy statutes repress their sexual identity by inhibiting persons inclined toward obtaining sexual satisfaction by sodomy from fulfilling their sexual desires. *Id.* Sodomy statutes also affect homosexuals by encouraging a form of blackmail whereby states can threaten homosexuals with prosecution or exposure. *Id.* at 3. Employers may be reluctant to hire homosexuals because of their vulnerability to blackmail. *Id.* Finally, sodomy statutes indirectly approve the existing discrimination against homosexuals in public housing and employment. *Id. See* N.Y. Times, Dec. 23, 1973, § 4, at 5, col. 1 (late city ed.).

Court's holding upholds state sodomy statutes that include both homosexuals and heterosexuals. Seventy-five to ninety percent of all sexually active adults engage in sodomous activity.[90]

Bowers constitutes a major setback for all adults who want to make their own decisions as to the intimate activities they engage in with their spouses or companions. States should not be able to enter private homes and regulate intimate activity. By permitting states to do so,[91] *Bowers* represents a dangerous and improper intrusion into the most private and personal activity of adults who are fully capable of making their own intelligent and rational sexual decisions.

Angelina Marie Massari

90. *See generally* W. MASTERS, V. JOHNSON & R. KOLODNY, MASTERS & JOHNSON ON SEX AND HUMAN LOVING (1986).

91. The states have advanced the following interests in upholding sodomy statutes:
1. to prevent veneral disease,
2. to maintain marital stability,
3. to protect the moral welfare of their citizens,
4. to discourage sexual promiscuity,
5. to prevent anti-social behavior, and
6. to maintain and increase the population.

Id. But see BARNETT, *supra* note 1, at 2 (in the near future states' interests may include population control).