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Constitutional Limitations on the Right to Privacy

NOTES

CONSTITUTIONAL LIMITATIONS ON THE RIGHT TO PRIVACY

Bowers v. Hardwick[1]

The Supreme Court in *Bowers v. Hardwick*[2] defined one parameter of the right to privacy. This amorphous concept is rooted in personal activities relating to accepted family relationships. Factors affecting marriage, procreation, and control of reproductive functions are considered so fundamental to the individual that a state's attempts to limit them are unconstitutional.[3]

Although other courts have attempted to extend the right to privacy to include intimate associations,[4] many courts were unsure of the degree of constitutional protection to be given to activities such as sodomy. The Supreme Court has halted the expansion of the right to privacy, holding that intimate associations in the act of sodomy are not afforded constitutional protection.[5]

In contrast, the Eleventh Circuit Court of Appeals in *Bowers v. Hardwick* had held that laws prohibiting adult consensual sodomy could not stand in the face of constitutional guarantees of equal protection of the law and of privacy.[6] The Supreme Court reversed the court of appeals in *Bowers*, holding that there is no fundamental right to engage in sodomy, and that laws making such conduct a crime are valid.[7]

The basis for challenging the law was the arrest of Michael Hardwick on August 3, 1982. Hardwick was charged with committing the crime of sodomy with a consenting adult of the same sex in his home.[8] Following a

1. 106 S. Ct. 2841, *reh'g denied*, 107 S. Ct. 29 (1986).
2. 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986), *reh'g denied*, 107 S. Ct. 29 (1986).
3. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraceptives); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives).
4. *See, e.g.*, People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980); Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).
5. 106 S. Ct. at 2844.
6. 760 F.2d at 1212.
7. 106 S. Ct. at 2846.
8. 760 F.2d at 1204.

hearing and a decision to dismiss the case,[9] Hardwick filed suit naming Michael Bowers, Attorney General of Georgia; Lewis Slaton, District Attorney for Fulton County; and George Napper, Public Safety Commissioner of Atlanta, as defendants. Hardwick alleged that the Georgia sodomy statute was unconstitutional.[10] John and Mary Doe, a married couple, attempted to join Hardwick in his suit. They claimed that they had been "chilled and deterred"[11] from engaging in the statute's proscribed activity.

The trial court granted all three defendants' motions to dismiss the constitutional claim for failure to state a cause of action.[12] The Does were found to lack standing because they had never been arrested in violation of the statute and had presented no evidence that the possibility of arrest was a legitimate threat.[13] Hardwick's claim was dismissed based on the Supreme Court's summary affirmance of *Doe v. Commonwealth*.[14]

Following an appeal by all three plaintiffs, the Eleventh Circuit Court of Appeals found that the Georgia sodomy statute violated fundamental constitutional rights.[15] The court noted, "The Constitution prevents the states from unduly interfering in certain individual decisions crucial to personal autonomy because those decision are essentially private and beyond the legitimate reach of civilized society."[16] While finding that the Does lacked standing,[17] the court reached the merits of the case through Hardwick's claim. The case was remanded for a showing by the state that there was a compelling interest in the regulation of this type of behavior.[18]

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9. *Id.* Following the arrest, the District Attorney's office declined to pursue the case to the grand jury without additional evidence. Hardwick filed his suit contending that he was a practicing homosexual who had in the past and would continue to engage in the acts prohibited by the sodomy statute, and as such had standing to challenge its constitutionality.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 1204, 1206-07.

14. For a discussion of the summary affirmance aspect of this case, see Note, *Hardwick v. Bowers: An Attempt to Pull the Meaning of Doe v. Commonwealth's Attorney Out of the Closet*, 39 U. MIAMI L. REV. 973 (1985). The plaintiffs in *Doe*, homosexuals who had never been arrested, attempted to invalidate a sodomy statute which they claimed violated their rights of privacy and freedom of expression. The district court found the statute constitutionally valid and the Supreme Court summarily affirmed the judgment. The decision was based on the lack of standing of the plaintiffs to bring the claim, but the Supreme Court affirmed a dismissal on the merits in the lower court instead of vacating the judgment. This case was read narrowly by the Eleventh Circuit in *Bowers,* which found that the case need not be dismissed since a different standing question was at issue. Bowers v. Hardwick, 760 F.2d 1202, 1208 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986), *reh'g denied*, 107 S. Ct. 29 (1986).

15. 760 F.2d at 1211.

16. *Id.*

17. *Id.* at 1207.

18. *Id.* at 1213. A discussion of the case at this point and a comprehensive study of related sodomy laws can be found in *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986).

The Supreme Court granted certiorari and on June 30, 1986, reversed the decision of the court of appeals.[19] In its analysis, the Court separated the desirability of prohibiting sodomy by consenting adults and a constitutional right to engage in such conduct. The court acknowledged prior cases providing constitutional support for Hardwick's claim in the areas of family relationships,[20] marriage,[21] contraception,[22] procreation,[23] and abortion.[24] Distinguishing these activities from the activity in this case,[25] the Court found no fundamental right to engage in homosexual sodomy.[26]

The concept of fundamental right is important in the analysis of any due process violation. The fifth and fourteenth amendments to the United States Constitution disallow actions by the government which would "deprive any person of life, liberty or property without due process of law."[27] This acts as a safeguard limiting governmental restrictions on certain freedoms. Substantive due process, distinguished from procedural due process, "may protect certain fundamental rights or void arbitrary limitations on a person's freedom of action."[28] Through incorporation of the Bill of Rights, the states are also prohibited from enacting legislation which would deny such guarantees as freedom of speech and freedom of religion.[29] Few would dispute that such personal freedoms do exist and that their protection is a vital purpose of the Constitution. Controversy arises when courts attempt to define the parameters of substantive due process beyond the vague "life, liberty, and property." These fundamental rights could be as broad as the right of an individual to be left alone if not harming another, or as narrow as the rule of the majority's morals at the moment in question.

A fundamental right flowing from the marriage relationship was articulated in *Griswold v. Connecticut*.[30] *Griswold* involved a Connecticut statute which made the use of contraceptives a criminal act. Taking into consideration past cases which broadened the specific liberties protected by the Bill

19. 106 S. Ct. at 2847.
20. Prince v. Massachusetts, 321 U.S. 158 (1944).
21. Loving v. Virginia, 388 U.S. 1 (1967).
22. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).
23. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).
24. Roe v. Wade, 410 U.S. 113 (1973).
25. The Court discussed the past cases of right to privacy claims, finding that all of these areas (family relationships, procreation, marriage, contraception and abortion) were those which could be traced to traditional ideas of the family and marriage. They represented that which had always been held sacred in our society. Conduct which has been labeled sodomy, with its past history of societal disapproval, could not fall within this narrow characterization of a "fundamental right." 106 S. Ct. at 2844.
26. *Id.*
27. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.
28. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 452 (3d ed. 1986).
29. *Id.*
30. 381 U.S. 479 (1965).

of Rights,[31] the Supreme Court found that the case concerned "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[32]

A law which dealt with the use, not the sale or manufacture, of contraceptives was seen as too great an interference with "a right of privacy older than the Bill of Rights, older than our political parties, older than our school system,"[33] — the association of two people in marriage. This governmental intrusion would not be allowed because it invaded a private and socially acceptable relationship, the act of sexual intercourse between two legally married individuals. The Supreme Court also raised the difficulty of implementing the law, stating, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[34]

The evolution of the right to privacy continued in *Stanley v. Georgia*,[35] where the appellant claimed that a Georgia statute prohibiting possession of obscene material was unconstitutional. In *Stanley*, the police found obscene films in Stanley's bedroom and he was convicted of knowingly possessing obscene material.[36] The conviction was upheld by the Supreme Court of Georgia.[37] The United States Supreme Court found that the first and fourteenth amendments would invalidate a statute making criminal the private possession of obscene materials,[38] and stated, "Also fundamental is the right

31. *Cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right to educate one's children); Martin v. City of Struthers, 319 U.S. 141 (1943) (the freedom to distribute, receive and read literature); Wieman v. Updegraff, 344 U.S. 183 (1952) (loyalty oath as a pre-condition to employment); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (freedom of association).

32. 381 U.S. at 485. The concept of "zones of privacy" had its genesis in other constitutional guarantees such as the right of association and the third amendment, which would prohibit quartering of soldiers in a house during times of peace without the owner's permission.

> The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. at 484.

33. *Id.* at 486.

34. *Id.* at 485-86.

35. 394 U.S. 557 (1969).

36. *Id.* at 558-59.

37. Stanley v. State, 224 Ga. 259, 161 S.E.2d 309 (1968), *rev'd*, 394 U.S. 557 (1969).

38. The first amendment has not been used to give blanket protection to

to be free except in very limited circumstances from unwanted governmental intrusion into one's privacy."[39]

Distinguishing the possession of obscene materials from prohibitions on the possession of narcotics, firearms or stolen goods, the Court found that appellant was "asserting the right to read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home."[40] The Court emphasized, however, that in cases involving national security, the compelling state interest would be sufficient to reach into the home despite the guarantees of the first and fourteenth amendments.[41]

The Supreme Court again used the family as a basis for the right to privacy in *Eisenstadt v. Baird*.[42] In that case, a lecturer was convicted of showing contraceptives and of giving away a package of vaginal foam to students at Boston University.[43] Massachusetts law provided for a maximum of five years in prison for anyone who gave away any device for the prevention of pregnancy.[44] An exception existed only for a physician or pharmacist who could provide contraceptives to married persons.[45] Thus, married people could only get contraceptives from a doctor or pharmacist, while single people could not obtain them at all. Both groups, however, could get contraceptives from a doctor or pharmacist to prevent disease.[46]

The Court found that the state's interest in prohibiting premarital sexual intercourse was not being furthered by these statutes.[47] For single people, the

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obscenity. There is even a question as to whether the first amendment gives any protection at all to what has been deemed to be pornography. *See generally* Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Winters v. New York, 333 U.S. 507, 510 (1947); Hannegan v. Esquire, Inc., 327 U.S. 146, 158 (1945); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1941). According to the *Stanley* Court, the state has an interest in dealing with obscenity and thus could enact laws to control its distribution. However, the Court would not allow the exercise of this interest to prohibit the private possession of it, stating:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Stanley v. State, 394 U.S. 557, 565 (1969).

39. *Id.* at 564.
40. *Id.* at 565.
41. *Id.* at 568 n.11.
42. 405 U.S. 438 (1972).
43. *Id.* at 440.
44. MASS. GEN. LAWS ANN. ch. 272, § 21 (West 1970).
45. Eisenstadt v. Baird, 405 U.S. 438, 441 (1972).
46. *Id.* at 441-42.
47. The state had argued that the law furthered the goal of protecting health. The State Supreme Judicial Court stated that the law related to "preventing the distribution of articles designed to prevent conception which may have undesirable if not dangerous physical consequences." Commonwealth v. Baird, 355 Mass. 746,

prohibitions constituted a violation of their rights under the equal protection clause because no legitimate reason was found for the distinction between single and married people.[48] The Court found that deterring premarital sex could be a legitimate concern of the state, but the statute in question did not accomplish this end.[49] Acknowledging that the right to privacy evidenced in *Griswold*[50] had its roots in marriage, the Court stated, "Yet the marital couple is not an independent entity with mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[51] It was these individuals who must be protected by a right of privacy in "matters so fundamentally affecting a person as the decision whether to bear or beget a child."[52] The holding in *Griswold* that prohibiting the distribution of contraceptives to married individuals was unconstitutional would preclude an attempt to prohibit the same activity in single individuals.[53]

A famous privacy case, *Roe v. Wade*,[54] is generating as much controversy today as it did when the decision was rendered in 1973. *Roe* declared that the right to privacy included a woman's decision to have an abortion.[55] The Supreme Court reached this conclusion by balancing a woman's right to choose against the competing state interests in protecting a woman's health in the later trimesters of pregnancy and in protecting the life of the fetus.[56]

The due process analysis requires this comparison of competing values.[57] The state had asserted an interest in discouraging "illicit sexual conduct," protecting the life of the woman, and protecting the life of the fetus.[58] Against these interests was the woman's right to privacy concerning her own body and her own procreative decisions. The Court found that the right to privacy

> founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court

753, 247 N.E.2d 574, 578 (1969). The Supreme Court in *Eisenstadt*, found that this was not a legitimate protection of health only for single persons. Even an argument based on moral grounds would fail. The contraceptives were available to married persons with no restrictions that they be used with their spouse, or even that they be living with their spouse at the time they received the contraceptives. 405 U.S. at 442.

48. *Eisenstadt*, 405 U.S. at 447.
49. *Id.* at 448.
50. Griswold v. Connecticut, 381 U.S. 479 (1965).
51. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
52. *Id.*
53. *Id.*
54. 410 U.S. 113 (1973).
55. *Id.* at 153.
56. *Id.* at 154.
57. *Id.* at 155.
58. *Id.* at 150. The Court noted that when the right asserted was found to be a fundamental right, an attempt at limitation can only be "justified by a compelling state interest." *Id.* at 155. Even with a finding of the sufficient state interest, it would be necessary to read the legislation narrowly to protect the interest without unduly infringing upon the right.

> determined in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[59]

The Court indicated that this right had limitations; at some point the state's interests in regulating abortion would become compelling. The state's interest in discouraging sexual intercourse was discounted,[60] but the other two interests were found to become compelling at the end of the first trimester.[61] The Court compared this case with those in which states were allowed to limit an individual's privacy right by requiring vaccination.[62]

The right to privacy was being shaped through these cases. A concept which had begun as a hybrid of other constitutional guarantees was expanding in its protection of the individual from governmental interference with very private aspects of life. The above cases had persuaded several courts to extend the right to privacy. This extension was not based on the family or marriage, but on the right of the individual to be free in the choice of "intimate associations."[63]

In *People v. Onofre*,[64] the Court of Appeals of New York found that a law prohibiting consensual sodomy violated the United States Constitution. In this case two of the appellants, one male and one female, performed oral sodomy in an automobile.[65] Another appellant admitted to engaging in sodomy with a member of the same sex in his home.[66] All were convicted and subsequently claimed that the statute was unconstitutional.[67]

The defendant argued that these situations differed from other public activities which had been prohibited.[68] The court referred to the activity as

59. *Id.* at 153. The ninth amendment to the United States Constitution reserves certain rights to the people even though they might not be specifically mentioned in the Constitution. Justice Blackmun raised the ninth amendment in his *Bowers* dissent. While not elaborating on its implication, he stated that a claim by Hardwick based on the ninth amendment would not be unreasonable and that the Supreme Court should not dispose of the case while any constitutional ground existed upon which Hardwick could find relief. 106 S. Ct. at 2849-50 (Blackmun, J., dissenting).

60. Roe v. Wade, 410 U.S. 113, 148 (1973). It was argued that this purpose was not a proper one for the state to espouse since it did not distinguish in any way between married and unmarried sexual intercourse. *Id.*

61. *Id.* at 163-64.

62. *Id.* at 154.

63. *See* cases cited *supra* note 3.

64. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

65. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948.

66. *Id.* at 483, 415 N.E.2d at 937, 434 N.Y.S.2d at 948.

67. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 946.

68. The court stressed that this activity was one which took place in the home, stating that there was a distinction between "public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of the public arena and in the sanctum of the private home." *Id.* at 489, 415 N.E.2d at 941, 434 N.Y.S.2d at 952. Thus other activities such as exhibitionism and conduct which might be considered sodomy when performed in a commercial setting could still be prohibited.

"noncommercial, cloistered personal sexual conduct of consenting adults,"[69] and held that, as such, it was entitled to protection despite the state's claim that the right to privacy in past cases only applied to personal decisions involving marriage.[70] Citing *Eisenstadt v. Baird*[71] and *Stanley v. Georgia*,[72] the court found that the decisions of adults regarding private sexual intimacy should be constitutionally protected under the right to privacy.[73]

The court next determined whether the state's interest would outweigh that of the individual's privacy rights if the state had shown justification for the statute.[74] The court found that the goal of furthering public morality was not sufficient when it involved an activity out of the public eye and without commercial gain. This statute would not "advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State."[75] The New York court acknowledged that many people believed sodomy to be an evil, even when consensual, but that this belief, even if held by the majority, would not justify criminal sanctions. The United States Constitution did not allow this activity to be controlled by criminal penalties.[76] Without deciding the moral questions involved in consensual sodomy, the court noted, "The community and its members are entirely free to employ theological teaching, moral suasion, parental advice, psychological and psychiatric counseling and other noncoercive means to condemn the practice."[77] These would all be acceptable alternatives to making the activity a crime.

69. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948.
70. *Id.* at 486, 415 N.E.2d at 939, 434 N.Y.S.2d at 950.
71. 405 U.S. 438 (1972).
72. 394 U.S. 557 (1969).
73. People v. Onofre, 51 N.Y.2d 476, 487-88, 415 N.E.2d 936, 939-40, 434 N.Y.S.2d 947, 950-51 (1980).
74. This same court had found a sufficient state interest in People v. Shepard, 50 N.Y.2d 640, 409 N.E.2d 840, 431 N.Y.S.2d 363 (1980). A statute prohibiting marijuana possession in a person's home was found to be constitutional. It was found to be such a harmful substance that the state's control of it in the home was warranted. *Id.* at 645, 409 N.E.2d at 842, 431 N.Y.S.2d at 365. In *Onofre*, no evidence was presented that consensual, private sodomy was harmful. The main point in the state's attempt to justify controlling the behavior was the past societal disapproval of sodomy. 51 N.Y.2d at 489, 415 N.E.2d at 941, 434 N.Y.S.2d at 951-52. The court stated that it was not to be assumed that just because it was allowed to enter the person's home to "regulate conduct justifiably found to be harmful to him, the Legislature may also intrude on such privacy to regulate individual conduct where no basis has been shown for concluding that the conduct is harmful." 51 N.Y.2d at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.
75. 51 N.Y.2d at 490, 415 N.E.2d at 941, 434 N.Y.S.2d at 952.
76. *Id.* at 488, 415 N.E.2d at 940, 434 N.Y.S.2d at 951.
77. *Id.* at 488 n.3, 415 N.E.2d at 940 n.3, 434 N.Y.S.2d at 951 n.3. The court stated that although it often has that result, the purpose of the Penal Law is not to force the theological or moral values of the majority upon the minority. This is in opposition to the established idea of the police powers of the state to regulate health and morality. *Id.*

Three years later, in 1983, the same court decided *People v. Uplinger*,[78] a case challenging a statute which prohibited loitering in a public place in order to engage in or solicit "deviate" sodomy. This case was viewed in the context of the earlier *People v. Onofre* decision. Based on *Onofre*, the court stated, "Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose."[79]

Another sodomy statute was struck down in *Commonwealth v. Bonadio*,[80] in which the Supreme Court of Pennsylvania analyzed a statute which prohibited sexual intercourse per mouth or per anus between unmarried people, and sexual intercourse with animals.[81] The court noted that the exercise of the state's police power was justified in cases of force, sexual abuse of minors, and cruelty to animals. This statute, however, did nothing to further these goals.[82]

To support its conclusion, the court quoted John Stuart Mill: "There is a sphere of action in which society as distinguished from the individual has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects others, only with their free, voluntary, and undeceived consent and participation."[83]

Two recent cases, *Baker v. Wade*[84] and *Post v. State*,[85] differed in their approach to the sodomy statutes in question. *Post*, decided in February 1986, a few months before the Supreme Court decision in *Bowers v. Hardwick*, found an Oklahoma statute to be unconstitutional under the facts of the particular case.[86] The appeal resulted from a conviction on two counts of the "Crimes Against Nature" statute.[87] The statute made criminal certain "unnatural" sex acts.[88] The court found that the right to privacy which "at first appeared to be family-based, affords protection to the decisions and actions of individuals outside the marriage union."[89] The court did not consider the issue of homosexuality in this case, but as to heterosexual behavior,

78. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983).
79. *Id.* at 937, 447 N.E.2d at 63, 460 N.Y.S.2d at 515.
80. 490 Pa. 91, 415 A.2d 47 (1980).
81. 18 PA. CONS. STAT. ANN. 3101 (Purdon 1973).
82. 490 Pa. at 92, 415 A.2d at 49.
83. *Id.* at 97, 415 A.2d at 50 (quoting John Stuart Mill, *On Liberty* (1859)).
84. 774 F.2d 1285 (5th Cir. 1985).
85. 715 P.2d 1105 (Okla. Crim. App. 1986).
86. *Id.* at 1109-10.
87. OKLA. STAT. ANN. tit. 21, § 886 (West 1981). "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten years." *Id.*
88. The sexual acts viewed as criminal included copulation per os between females, cunnilingus, and fellatio.
89. 715 P.2d at 1108.

the court found that the statute invaded individuals' right to privacy. The court stated, "The right to privacy as formulated by the Supreme Court includes the right to select consensual adult sex partners."[90]

Not all states confronting the issue so extended the right to privacy. *Baker v. Wade*,[91] a 1985 Texas case, found that a sodomy statute prohibiting homosexual conduct was constitutional. "We see ourselves bound by the decision of the lawmakers of Texas. . . . The Statute deprives no one of a constitutional right."[92] There had been no clear mandate that this type of behavior was constitutionally protected, and the Texas court refused to find it so. Absent constitutional protection, the court felt bound by the legislature's determination of the rational basis of the law. The court deferred to the Supreme Court for a determination of a privacy right for this type of conduct.[93]

The Supreme Court denied the existence of this right in *Bowers v. Hardwick*, decided on June 26, 1986.[94] In *Bowers* the Eleventh Circuit Court of Appeals found the sodomy statutes to be unconstitutional,[95] stating, "Some personal decisions affect an individual's life so keenly that the right to privacy prohibits state interferences even though the decision could have significant public consequences."[96] The court found adults' consensual homosexual relationships to be intimate associations which should not be regulated by the state absent a compelling interest.[97] This decision, which seemed to follow the trend of past cases to expand the right to privacy to include sexual behavior,[98] was reversed by the Supreme Court, which returned to a standard requiring that the behavior in question be a traditional value in order to be given constitutional protection.[99]

The Supreme Court granted certiorari because other courts had reached results differing from that of the Eleventh Circuit.[100] The Court narrowly defined fundamental liberties to include only those "deeply rooted in this

90. *Id.* at 1109.
91. 774 F.2d 1285 (5th Cir. 1985).
92. *Id.* at 1287.
93. *Id.*
94. 106 S. Ct. 2841 (1986).
95. Bowers v. Hardwick, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986), *reh'g denied*, 107 S. Ct. 29 (1986).
96. *Id.* at 1211.
97. *Id.* at 1213.
98. *See* State v. Pilcher, 242 N.W.2d 348 (Iowa 1976) (sodomy statute relating to heterosexual oral sex with a person other than one's spouse found to be unconstitutional); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 497 (1980) (statute prohibiting consensual sodomy with person of same sex found to be unconstitutional).
99. 106 S. Ct. at 2844.
100. *See* Baker v. Wade 774 F.2d 1285 (5th Cir. 1985); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir 1984).

nation's history and tradition,"[101] and found that homosexuality, which had been condemned widely in the past, did not fit into this category.[102] Distinguishing *Stanley*,[103] the Court found that not all conduct taking place in the home is protected from state action, and expressed concern that a decision to the contrary would open challenges on the laws of incest, adultery and other sexual crimes.[104]

Justice Blackmun, joined by Justice Brennan, Justice Marshall, and Justice Stevens dissented, saying:

> This case is no more about a "Fundamental right to engage in homosexual sodomy," as the Court purports to declare, . . . than *Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies, or *Katz v. United States* . . . was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "The most comprehensive of rights and the right most valued by civilized men," namely "the right to be let alone."[105]

Justice Blackmun wrote that if the right to privacy was to have any meaning the legislature must provide a better reason for the statute than that the prohibited activity is "an abominable crime not fit to be named among Christians."[106] He noted that the majority focused on the homosexual character of the suit while ignoring the broad language of the statute.[107] Under Georgia law, the crime of sodomy is committed when performing any sexual activity "involving the sex organs of one person and the mouth or anus of another."[108] This definition would certainly encompass heterosexual as well as homosexual behavior.

Both dissenting opinions focus on the idea that the right to privacy should be based on personal autonomy. "We protect those rights [family and marital relationships] not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."[109] The dissent states that the Court denied

101. 106 S. Ct. 2844 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)). These traditional values accepted by the majority include the marriage and family relationship, and springing from that relationship, the right to decide to bear children.

102. 106 S. Ct. at 2844. The Court noted that laws prohibiting sodomy had "ancient roots" and that until 1961 all fifty states had such laws. *Id. See* Note, *supra* note 18.

103. 394 U.S. 557 (1969).

104. 106 S. Ct. at 2846.

105. *Id.* at 2848 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

106. *Id.* at 2848 (quoting Herring v. State, 119 Ga. 709, 721, 46 S.E. 876, 882 (1904)).

107. *Id.* at 2849.

108. GA. CODE ANN. § 16-6-2(a) (1984).

109. 106 S. Ct. at 2851.

each individual the right to control his "intimate associations with others."[110]

Justice Stevens, dissenting with Justice Brennan and Justice Marshall joining, stated, "[T]hat the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[111] As an example, Justice Stevens noted that statutes prohibiting miscegenation were found to be unconstitutional even though the traditions of the country found them to be immoral.[112]

The Supreme Court should have looked at the constitutional question presented by these sodomy statutes without such regard for the history of the act proscribed. Today the idea of racial equality is not one which the majority of people would find offensive or immoral. Such beliefs and ideas changed, even after decades of teachings that one race was inferior to the other. There are claims today that the belief exists among the majority that the homosexual lifestyle is offensive and immoral. Extensive historical background is presented for this proposition,[113] yet this history does not make the idea more sacred or immune from constitutional examination than did the history of racial segregation. Justice Stevens also stressed the problems in enforcing this rule. Past cases like *Eisenstadt*[114] and *Griswold*[115] would indicate that sodomy could not be prohibited in the marital relationship or even between unmarried heterosexual adults.[116] This presents the problem of the statute only being applied to homosexuals despite its broad language. The statute may not even be applied in that capacity since the Georgia prosecutor initially did not press charges against Hardwick in this case, and the prohibition against private, consensual sodomy, had not been enforced in Georgia for some time.[117]

The Missouri Supreme Court quickly accepted the *Hardwick* rationale to uphold its own sodomy statute in *State of Missouri v. Walsh*.[118] In several prior cases the Supreme Court of Missouri had managed to avoid the question of the constitutionality of its sodomy statute by asserting that the issue was not raised in a timely fashion.[119]

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110. *Id.* at 2852.

111. *Id.* at 2857 (Stevens, J., dissenting).

112. *Id. See* Loving v. Virginia, 388 U.S. 1 (1967).

113. The majority opinion in *Bowers* cites thirty-eight states with anti-sodomy laws; some of which date back to the 1700's. 106 S. Ct. at 2845.

114. 405 U.S. 438 (1972).

115. 381 U.S. 479 (1965).

116. 106 S. Ct. at 2858 (Stevens, J., dissenting).

117. *Id.* at 2859.

118. 713 S.W.2d 508 (Mo. 1986). This case was decided July 15, 1986, fifteen days after the Supreme Court decision in *Bowers v. Hardwick*.

119. *See* State of Missouri v. Wickizer, 583 S.W.2d 519 (Mo. Ct. App. 1979); State of Missouri v. Collins, 587 S.W.2d 303 (Mo. Ct. App. 1979). Referring to State v. Burton, 544 S.W.2d 60, 64 (Mo. Ct. App. 1976), the *Collins* court noted that the "issue was not raised at the earliest time consistent with good pleading and orderly procedure and is not preserved for appellate review." 587 S.W.2d at 308.

The right to privacy issue was addressed in *Caesar's Health Club v. St. Louis City*,[120] concerning a massage parlor in St. Louis County. In that case, a law prohibiting prostitution was challenged on constitutional grounds.[121] The Health Club stated that their employees gave massages which resulted in the consensual touching of a person's anus or genitals.[122] This activity was prohibited by the statute, which the appellants claimed interfered with the right to privacy of their employees and customers.[123]

The trial court and the court of appeals held the ordinance constitutional.[124] Relying on *Paris Adult Theatre I v. Slaton*,[125] the court distinguished between activity taking place in the privacy of the home and activity of a commercial nature. In *Paris*, the Supreme Court had found that a theater, a "place of public accommodation," was not protected by the right to privacy.[126] The health club in question in *Ceasar's* was, by its public and commercial nature, not one in which the right to privacy issue would emerge. The court stated that the "commercial aspect" removed the case "from the sphere of a protectable right of privacy."[127] The court left open the question of whether this activity would be protected if not involving prostitution or a public place.

The Missouri Court of Appeals defended a statute making sexual intercourse with another person of the same sex a criminal offense in *L. v. D.*,[128] a divorce case in which a homosexual mother sought custody of her two children. The Missouri Court of Appeals found that morality is a factor, especially in the case of child custody, and that the trial court had ample evidence to justify awarding the father custody.[129]

In *State of Missouri v. Walsh*,[130] the defendant was charged with attempted sexual misconduct when he touched the genitalia of a police officer through the latter's clothing. The Missouri Supreme Court relied on *Bowers* in holding that the Constitution does not confer a fundamental right to engage in sodomy. The court found that the statute existed to protect and promote public health and morals.[131] The court stated that they were not bound by the decision of *Commonwealth v. Bonadio*,[132] which applied the

120. 565 S.W.2d 783 (Mo. Ct. App. 1978).
121. *Id.* at 785.
122. *Id.*
123. *Id.* at 787.
124. *Id.* at 785, 788.
125. 413 U.S. 49 (1973).
126. *Id.* at 66.
127. Caesar's Health Club v. St. Louis City, 565 S.W.2d 783, 788 (Mo. Ct. App. 1978); *see also* Brown v. Haner, 410 F. Supp. 399 (W.D. Va. 1976).
128. 630 S.W.2d 240 (Mo. Ct. App. 1982).
129. *Id.* at 245.
130. 713 S.W.2d 508 (Mo. 1986).
131. *Id.* at 512.
132. 490 Pa. 91, 415 A.2d 47 (1980).

principles of autonomy to the right to privacy issue, and used the recent spread of acquired immuno-deficiency syndrome (AIDS) and general promiscuity of a homosexual lifestyle as a rationale for the enforcement of the statute.[133] The court reserved the issue of right to privacy under the Missouri Constitution and relied on the federal decision stating, "the application of Missouri's right of privacy to date has not paralleled the right of privacy said to inhere in the Federal Constitution."[134]

The Supreme Court has limited the concept of the constitutional right to privacy to those rights which appear to be "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition."[135] The right to engage in consensual homosexual conduct is not to be included in this list of protected activities. Despite the evolution in the right to privacy area which had expanded the constitutional protection afforded to the individual, the Court has closed the door on protecting that which is most "private" and should be an individual's "right" — a consensual, intimate association with another adult.

Anti-sodomy statutes have also been attacked as violating the equal protection clause of the fourteenth amendment.[136] The fourteenth amendment provides that no state shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[137] If a law classifies individuals on the basis of race, alienage or national origin (suspect classifications), the law must pass a strict scrutiny standard of review.[138] The state must show that

133. 713 S.W.2d at 512. As the percentage of heterosexuals who have Acquired Immuno-deficiency Syndrome increases, this argument could lose its impact as a reason to deny homosexuals constitutional protection. Alternatively it could be used as a device to control the sexual patterns of the heterosexual community as well. Groups at risk for AIDS include not only homosexuals, but intravenous drug users, hemophiliacs, and those receiving blood transfusions. Castro, Hardy, & Curran, *The Acquired Immunodeficiency Syndrome: Epidemiology and Risk Factors for Transmission*, MED. CLINICS OF N. AM., Vol. 70, No. 3, May 1986, at 635. There is also evidence that AIDS can be transmitted by heterosexual contact, both male to female and female to male transmission. Redfield, Markham, Salahuddin, Wright, Sarngadharan, & Gallo, *Heterosexually Acquired HTLV-III/LAV Disease Epidemiologic Evidence for Female to Male Transmission*, J. A.M.A., Vol. 254, No. 15, Oct. 18, 1985, at 2094; Lederman, *Transmission of the Acquired Immunodeficiency Syndrome Through Heterosexual Activity*, ANNALS OF INTERNAL MED., Vol. 104, No. 1, Jan. 1986, at 115; Goldsmith, *More Heterosexual Spread of HTLV-III Virus Seen*, J. A.M.A., Vol. 253, No. 23, June 21, 1985, at 3377. *See* Note, *supra* note 18 at 626-35.

134. 713 S.W.2d at 513.

135. 106 S. Ct. at 2844.

136. *See* Baker v. Wade, 774 F.2d 1285 (5th Cir. 1985); People v. Onofre, 51 N.Y. 415, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980).

137. U.S. CONST. amend. XIV, § 1.

138. Pattberg v. Pattberg, 130 Misc. 2d 893, 497 N.Y.S.2d 251 (1985).

there is a compelling state interest and that the law in question is narrowly designed to meet that interest.[139] When the law concerns neither a fundamental right nor a suspect classification, the state need only show that it bears "some rational relation to a constitutionally permissible purpose."[140] In *Loving v. Virginia,*[141] the Supreme Court evaluated a Virginia statute which prohibited marriage between persons of different races. A Negro woman and Caucasian man were married in the District of Columbia and later moved to Virginia. Following a conviction for interracial marriage, they received a one year suspended sentence and instructions not to return to Virginia together for twenty-five years.[142] The Lovings moved and filed a motion to vacate because the statutes violated the fourteenth amendment.[143] The lower court and Supreme Court of Appeals of Virginia upheld the statutes, saying that antimiscegenation statues were constitutional.[144]

The United States Supreme Court found these statutes "violated the central meaning of the Equal Protection Clause."[145] The Court rejected the contention that the statutes treated both black and white individuals the same if they chose to inter-marry, and found that the distinction based on race was unconstitutional.[146] The Court would require "the most rigid scrutiny"[147] in criminal statutes. To be valid, they "must be shown to be necessary to the accomplishment of some permissible state objective."[148] In addition, the statute violated the due process clause in that denying the fundamental freedom of marriage "on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law."[149] This freedom to marry was central to the individual and could not be prohibited or interfered with by the state to this extent.

In *Loving*, the Court found that it was unconstitutional for the state to interfere with the marriage relationship on the basis of race.[150] While not concerning the institution of marriage, the same argument has been made

139. *Id.*

140. Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1623 (1974).

141. 388 U.S. 1 (1967).

142. *Id.* at 3.

143. *Id.*

144. *Id.*

145. *Id.* at 12 (Stewart, J., concurring). Justice Stewart found the equal protection clause would prohibit restricting the rights of a person solely because of racial considerations. *Id.* at 13 (Stewart, J., concurring).

146. *Id.* at 10-11.

147. *Id.* at 11 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

148. Loving v. Virginia, 388 U.S. 1, 11 (1967).

149. *Id.* at 12.

150. *Id.* at 11.

concerning same sex associations.[151] The states are, in effect, denying the right of one person to associate with another in a certain manner based solely on the sex of that person. As a result, sodomy statutes may discriminate against homosexuals. Statutes prohibiting oral and anal sexual intercourse do not "close all legal outlets for heterosexual love as they do for homosexual love."[152]

The courts have not found homosexuals to be a suspect class for equal protection purposes, thus such statutes are not required to pass strict scrutiny. In *Baker v. Wade*,[153] the Fifth Circuit Court of Appeals found that no evidence had been presented that homosexuals were a suspect or semi-suspect class and thus the standard of review for the sodomy statute was whether it was rationally related to a state goal.[154] If the class in question were found to be suspect, the laws would undergo strict scrutiny by the court and be required to meet a specific, compelling state interest.[155] On petition for rehearing in this case, the court denied the plaintiff's equal protection argument on the grounds that the statute was directed at "certain conduct not at a class of people. Though the conduct be the desire of the bisexually or homosexually inclined, there is no necessity that they engage in it. The statute affects only those who chose to act in the manner proscribed."[156] In *Bowers v. Hardwick*,[157] Justice Blackmun's dissent raises questions of an equal protection nature even though Hardwick did not raise the issue. Justice Blackmun states that the decision of the court of appeals should be affirmed if any ground exists that would give relief to the respondent.[158] In addition to the right to privacy grounds, Justice Stevens also saw merit in arguments that the statute violated the eighth amendment[159] and the equal protection clause.[160]

Two cases which found that the equal protection clause would invalidate a sodomy statute were *Commonwealth v. Bonadio*[161] and *People v. Onofre*.[162]

151. *See supra* note 133.

152. Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH L. REV. 1613, 1623 (1974).

153. 769 F.2d 289 (5th Cir. 1985), *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985).

154. *Id.* at 292.

155. Pattberg v. Pattberg, 130 Misc. 2d 893, 497 N.Y.S.2d 251 (1985).

156. Baker v. Wade, 774 F.2d 1285, 1287 (5th Cir. 1985).

157. 106 S. Ct. 2841 (1986).

158. 106 S. Ct. at 2849 (Blackmun, J., dissenting).

159. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The "homosexual orientation may well form part of the very fiber of an individual's personality." 106 S. Ct. at 2850 n.2 (Blackmun, J., dissenting) (citing Robinson v. California, 370 U.S. 660 (1962), *reh'g denied*, 371 U.S. 905 (1962), for the proposition that it was unconstitutional to convict a defendant because of his "status" as a narcotics addict).

160. 106 S. Ct. at 2858-59 (Stevens, J., dissenting).

161. 490 Pa. 91, 415 A.2d 47 (1980).

162. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).

The *Bonadio* court found that the statute which made a particular sexual behavior illegal between persons who were not husband and wife was unconstitutional. The Supreme Court of Pennsylvania stated:

> Not only does the statute in question exceed the proper bounds of the police power, but, in addition, it offends the Constitution by creating a classification based on marital status (making deviate acts criminal only when performed between unmarried persons) where such differential treatment is not supported by a sufficient state interest and thereby denies equal protection of the laws.[163]

Even without finding that a fundamental right (such as the right to privacy) was involved or that the classification was suspect, the equal protection clause would require a showing that the classification was rationally related to that which the statute was attempting to accomplish.[164] In this case, the state claimed that the justification for this statute was protecting the privacy of the marital relationship. The court discounted this, finding that the statute did not fulfill this objective.[165]

In *People v. Onofre*,[166] the Court of Appeals of New York found that the state had failed in its burden to show that there was any rational basis for treating married and unmarried people differently.[167] In Missouri, the Supreme Court struck down the equal protection argument in *State of Missouri v. Walsh*.[168] The respondent argued that an improper class distinction existed in the sodomy statutes because it prohibited men from engaging in sexual activity with other men, while not prohibiting women from doing the same. The state found that this argument was invalid by viewing the statute as prohibiting both men and women from performing these activities with members of their own sex.[169]

The court found that the statute in question did not specifically make it a crime to be a homosexual, but only to engage in the homosexual conduct.[170] Yet this still prohibited the homosexual person from activity that was not prohibited to the heterosexual, and as such was a "classification based upon sexual preference."[171]

The court denied that homosexuals constituted a group to be considered "suspect," such as race, national origin, and alienage, discounting the idea

163. 490 Pa. at 98, 415 A.2d at 51.
164. *Id.*
165. *Id.*
166. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980).
167. *Id.* at 482, 415 N.E.2d at 942, 434 N.Y.S.2d at 953.
168. 713 S.W.2d 508 (Mo. 1986).
169. *Id.* at 510.
170. *Id.*
171. *Id.*

that the homosexual orientation is beyond the individual's control.[172] Even if that were the case, the court found that by prohibiting the conduct, not the characteristic, the statute was valid.[173] "It cannot be said in the usual circumstance that refraining from certain conduct is beyond control. Beyond prohibiting the specific conduct, the statute imposes no other burden."[174]

Responding to the claim that this legislation of private consensual conduct was beyond the scope of the legitimate state interest, the court defended the state's interest in promoting morality. The court, quoting *Dronenburg v. Zech*,[175] stated,

> [Respondent's] theory would, in fact, destroy the basis for much of the most valued legislation our society has. It would, for example, render legislation about civil rights, worker safety, the preservation of the environment, and much more unconstitutional. In each of these areas, legislative majorities have made moral choices contrary to the desires of minorities.[176]

The court equates legislation concerning worker safety with legislation which polices individuals' bedrooms. Both of these may indeed have as their basis a moral fiber, but the cost to individual liberty which should be constitutionally protected is quite different.

Homosexuals are not considered a suspect class under equal protection laws and thus are not entitled to the more stringent standard for review of laws which purport to discriminate against them. Despite strong parallels between equal protection cases which deny a substantive right to an individual based on characteristics such as race, religion, national origin and sex,[177] the homosexual individual is left without constitutional remedy in the area of equal protection.[178] Since the decision of *Bowers v. Hardwick*, the individual is also left without a right to privacy claim. Based on the broad Georgia statute that the Supreme Court found to pass constitutional standards, we may all be left without a right to privacy claim, if that claim is based on adult consensual sexual activity unrelated to the traditional values of marriage, family and procreation.

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172. *Id.* at 510. For an analysis of this issue, *see* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

173. 713 S.W.2d at 510.

174. *Id.*

175. 741 F.2d 1388, 1397 (D.C. Cir. 1984).

176. *Id.* at 511-12.

177. *See, e.g.*, Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979).

178. In the area of employment discrimination, Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex. This has been determined specifically not to protect individuals on the basis of their sexual preference. *See* Desantis v. Pac. Telephone & Telegraph Co., 608 F.2d 327 (9th Cir. 1979).