NOTES

PROCESS, PRIVACY, AND THE SUPREME COURT

In its 1986 term, the United States Supreme Court handed down a 5 to 4 decision which refused to protect the private sexual practices of consenting male homosexuals. In *Bowers v. Hardwick*,[1] the Court reversed an Eleventh Circuit Court of Appeals decision[2] which struck down a Georgia statute prohibiting sodomy.[3] The appeals court had reasoned that the Constitution prevents the states from interfering in certain individual decisions critical to a person's personal autonomy.[4] Because such decisions are essentially private, the court reasoned, they were beyond the reach of governmental interference in a civilized society.[5] In reversing, the Supreme Court held that the right of privacy and its attendant protections applied only to the area of family, marriage, or procreation,[6] and thereby distinguished and refused to recognize what it referred to as the "claimed constitutional right of homosexuals to engage in acts of sodomy . . . ."[7]

The right of privacy has no textual basis in the United States Constitution. Some courts, however, have recognized it as a natural right[8] having constitutional impor-

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[1] 106 S. Ct. 2841 (1986). Chief Justice Burger, and Justices O'Connor, Powell, Rehnquist, and White found in the majority. Justices Blackmun, Brennan, Stevens, and Marshall comprised the minority. Originally, Justice Powell voted in Hardwick's favor. With the Powell vote, Justice Blackmun would have written the majority opinion. Boston Globe, July 13, 1986, at 2, col. 3.

[2] Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986).

[3] The Georgia sodomy statute provides in pertinent part:

> (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 year nor more than 20 years.

GA. CODE ANN. § 16-6-2 (1984).

[4] *Hardwick*, 760 F.2d at 1211.

[5] *Id.*

[6] *Bowers*, 106 S. Ct. at 2844.

[7] *Id.* See *infra* notes 222 and 232 and accompanying text for Justice Blackmun's response to this characterization.

[8] Blackstone wrote, "when [the Maker] created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, . . . and gave him also the faculty of reason to discover the purport of those laws." 1 W. BLACKSTONE, COMMENTARIES *39–40. These rules are implicitly correct, Blackstone continued, because they are the product of the Creator's wisdom. *Id.* at *40. Natural laws, he concluded, are reflected in the perfection of God's plan and enacted positive laws must necessarily conform with their antecedents in natural law; "[t]hese are the eternal immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms . . . . Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to everyone his due . . . ." *Id.*

Justice and the laws of nature are so "inseparably interwoven," Blackstone noted, that the former cannot be attained except by observing the latter. *Id.* Thus, in Blackstone's view, natural law and ethics are synonymous, and observation of the legal system demonstrates that acts that enrich one's happiness are invariably legal, while actions destructive of one's happiness are forbidden. *Id.*

tance.[9] Originally enunciated in a famous nineteenth century law review article by Professors Warren and Brandeis,[10] the judiciary has fashioned privacy rights in a variety of situations and circumstances.

Initially, the privacy right served as a basis for providing a cause of action in tort cases in which, typically, a person's likeness was used without permission for packaging or advertisement purposes.[11] This novel cause of action arose at the turn of the century as the technology of photography made a new type of personal invasion possible. The courts were required to make common law without precedent.[12] Because these were generally cases of first impression the courts searched for a policy with which they could apply existing law in a new area.[13] Adjudicating novel litigation requires a reasoned development of existing legal doctrine.[14]

More recently, the Court made novel application of existing law in the 1965 case of *Griswold v. Connecticut*.[15] The Supreme Court found unconstitutional a Connecticut statute which prohibited dissemination of contraceptive drugs or devices.[16] It reasoned that the specific guarantees in the Bill of Rights have penumbras, or emanations, which create zones of privacy[17] and held that the Constitution guaranteed a married couple the right to make contraceptive decisions without state interference.[18] Evidently the Court rec-

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at *41. Not surprisingly, Blackstone's tenets are controversial. *See, e.g.*, Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165 (1982). Professor Dworkin comments, "[n]atural law insists that what the law is depends in some way on what the law should be." *Id.* at 165.

[9] *See* Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 958–64 (1979).

[10] Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter Warren and Brandeis].

[11] *See, e.g.*, Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

[12] The Warren and Brandeis article begins with an epigraph: "It could be done only on principles of private justice, moral fitness, and public convenience, which when applied to a new subject, make common law without a precedent; much more when received and approved by usage." Warren and Brandeis, *supra* note 10, at 193 (citing Justice Willes in Millar v. Taylor, 4 Burr. 2303, 2312 (1769)).

[13] *See generally* HART AND SACKS, THE LEGAL PROCESS — BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 421–77 (tent. ed. 1958) [hereinafter HART AND SACKS].

[14] *See id.* at 469 (excerpting Warren and Brandeis, *supra* note 10). It is not clear what directs judicial reasoning when precedent is lacking. *See* Fuller, *The Forms and Limits of Adjudication* (an unpublished paper presented by Lon L. Fuller at Harvard University on Nov. 19, 1957) (*excerpted in* HART AND SACKS, *supra* note 13, at 421). Professor Fuller addressed the question of whether a decision had to be reached by applying a previously established rule or standard. *Id.* Fuller stated that for a decision to be rational it must be based on some rule, principle, or standard. *Id.* The principle need not necessarily be expressed in existing case law, however. Fuller recognized successful adjudication in cases where there appeared to be no previously established rules. *Id.* at 421–22. Furthermore, he formulated what is the courts' claim to acceptance in these emerging areas of law with no exact jurisprudential antecedent. *Id.* at 422. According to Fuller, although the decision must imply some standard or principle, it need not be one that was established before the case came to bar. *Id.* at 423. The justness of the newly articulated rule, although unfamiliar, will be recognized in a new situation if it is rationally derived from a principle indicative of shared purpose in the society. *Id.* at 424. New law, to be well received, must not seem to be the product of arbitrary judicial fiat, but the product of reasoning. *Id.* at 425. According to Professor Fuller, "the efficacy of adjudication depends upon a faith in its essential rationality." *Id.*

[15] 381 U.S. 479 (1965).

[16] *Id.* at 485.

[17] *Id.* at 484.

[18] *Id.* at 485. The Court stated that "[t]he present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.*

ognized that in holding the statute unconstitutional it was performing what some might consider a legislative function, and disclaimed the notion by stating, "[w]e do not sit as a super-legislature . . . ."[19] The disclaimer notwithstanding, however, twenty-two years later in *Bowers v. Hardwick* — the most recent Supreme Court case to construe privacy rights — the specter of judicial legislation is still present. As the majority wrote, "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[20]

This note will show how the privacy right first entered the legal language at the turn of the century. It will then outline how modern courts "found" the constitutional right of privacy in the mid-1960's and the treatment the right received in the succeeding quarter century. This framework will serve as a basis for examining the reasoning in *Doe v. Commonwealth's Attorney for Richmond*,[21] *Baker v. Wade*,[22] *Dronenburg v. Zech*,[23] and *Hardwick v. Bowers*,[24] four lower court cases in which gay men challenged the constitutionality of laws proscribing homosexual rights.[25] The next section will examine *Bowers v. Hardwick*,[26] a Supreme Court case which construed the right of privacy as it pertains to homosexual activity, and illustrate why the majority opinion's logic is flawed.[27] The note will demonstrate how the majority misperceived the true nature of the privacy right and will compare the different claims to acceptance that a court and legislature have in establishing a new right. Finally, the note will analyze why it was within the Court's legitimate purview to develop the privacy right through a reasoned elaboration of principle.

I. Evolution of the Right to Privacy

The starting point for any examination of privacy rights is the 1890 Harvard Law Review article written by Samuel Warren and Louis Brandeis.[28] In response to the invention of photography which created a new threat to personal privacy,[29] the authors attempted to demonstrate how the law must evolve to secure for the individual the right to be let alone.[30] At the outset, the authors postulated that new laws are merely mani-

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[19] *Id.* at 482.

[20] 106 S. Ct. 2841, 2846 (1986).

[21] 403 F. Supp. 1199 (E.D. Va. 1975).

[22] 553 F. Supp. 1121 (N.D. Texas 1982).

[23] 741 F.2d 1388 (D.C. Cir. 1984).

[24] 760 F.2d 1202 (11th Cir. 1985).

[25] See *infra* notes 127–200 and accompanying text for a discussion of the lower court cases.

[26] 106 S. Ct. 2841 (1986).

[27] See *infra* notes 201–51 and accompanying text for a discussion of the Supreme Court case.

[28] Warren and Brandeis, *supra* note 10.

[29] *Id.* at 195.

[30] *Id.* At the turn of the century, the New York Court of Appeals addressed and rejected a right of privacy claim when Abigail Roberson asked if an individual had a cause of action for the unauthorized commercial use of her likeness. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556, 64 N.E. 442, 447 (1902). A flour manufacturer expropriated the likeness without Roberson's knowledge or consent, and used it in an advertisement. *Id.* at 542, 64 N.E. at 442. The plaintiff asked that the court enjoin the defendant company from further circulating the likeness. *Id.* at 543, 64 N.E. at 442.

The defendant asserted that the plaintiff's complaint stated "no cause of action known to the common law, either in law or in equity." *Id.* at 539, 64 N.E. at 442. The court agreed, finding that

festations of preexisting common law rights to protection,[31] and that political, social, and economic changes frequently require the courts to redefine the exact nature and extent of such protection.[32]

Warren and Brandeis explained that although the law initially served only to protect explicit forms of property such as land or livestock,[33] later there came a recognition that the law might also protect a person's spiritual nature, sensibility and intellect.[34] As the scope of legal rights broadened, the constitutional guarantees of life, liberty, and property[35] took on new meanings.[36] Warren and Brandeis reasoned that this "recognition of the legal value of sensations" explained much of the development of the common law.[37] For instance, the law of assault developed out of the law of battery: the courts recognized that not only should people be protected from physical injury, but also they should be protected from fear of such injury.[38] As society evolved and recognized the importance of human emotion, the law responded by expanding its notion of what constituted a legally protectable interest.[39] The law of slander and libel developed, for example, when the courts recognized that a person's reputation and standing in the community were worthy of legal protection.[40]

Summarizing the development of common law, Warren and Brandeis concluded:

> This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the ad-

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no precedent existed for this type of action. *Id.* at 543–44, 64 N.E. at 443. The court reviewed the authorities upon which the "right of privacy" was said to rest and concluded that all those authorities were rooted in property or contract law. *Id.* at 555, 64 N.E. at 447. Because Roberson's claim implicated neither of these areas, however, the court found no cause of action. The court held simply that Abigail Roberson had suffered an unredressable wrong. *Id.* at 556, 64 N.E. at 447.

A dissenting judge argued that existing legal principles should have been interpreted to provide Roberson with a right of action. *Id.* at 560–66, 64 N.E. at 449–51 (Gray, J., dissenting). Analogizing from property law, he observed that the common law had always recognized the inviolate nature of property and the person. *Id.* at 561, 64 N.E. at 449 (Gray, J., dissenting). His opinion argued that the absence of exact precedent, therefore, was of no material importance. *Id.* (Gray, J., dissenting). The dissent recognized that social evolution, and the development of new technologies, created conditions which the rigid application of the common law could not adequately meet. *Id.* (Gray, J., dissenting). Furthermore, it recognized that judicial law was dynamic in nature and regarded equity as the agency which brought law and society into harmony. *Id.* at 562, 64 N.E. at 449 (Gray, J., dissenting).

[31] Warren and Brandeis, *supra* note 10, at 193.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] U.S. CONST. amend. V.

[36] Warren and Brandeis, *supra* note 10, at 193. According to the authors, "now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession — intangible as well as tangible." *Id.*

[37] *Id.*

[38] *Id.* at 193–94.

[39] *Id.* at 194.

[40] *Id.* The authors also chronicle a similar evolution in the law of property:

> Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks.

Id. at 194–95 (citations omitted).

> vance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.[41]

By subrogating the importance of actual laws to the underlying legal principles which require a body of laws to exist, the authors suggested that new claims — irrespective of their exact nature — should be recognized as novel manifestations of preexisting claims: ones which have always existed and which arose from each person's need for protection in our society.[42]

When faced with a newly claimed right, judicial reasoning is the acceptable method through which courts apply old law to new claims.[43] Through a process of deliberation, courts tap into the underlying right seeking protection. The legal system is not based upon the blind application of established rules to specific cases.[44] Rather, the common law is a process of applying known rules to newly made claims through a reasoned elaboration of principle.[45]

The evolution of privacy rights exemplifies the reasoned extension of law.[46] The Court implicitly recognized a right of privacy in early cases, specifically in the areas of child rearing and education, which the Court viewed as falling within a "private realm of family life."[47] In the 1923 case of *Meyer v. Nebraska*,[48] the Court, objecting to the state's

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[41] *Id.* at 195.

[42] *Id.* at 213.

[43] *See generally* LEVI, AN INTRODUCTION TO LEGAL REASONING 1–8 (1948).

[44] *Id.* Dean Levi notes that "[i]t is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge . . . ." *Id.* at 1.

[45] *Id.* at 2–3. Dean Levi claims that judicial reasoning is essentially a process rooted in the doctrine of precedent. *Id.* at 1–2. Rules established in earlier cases are applied to similar situations as they arise. *Id.* at 2. The dynamic quality of the law, however, requires that the application be somewhat imperfect. Factually duplicative cases rarely arise; similar cases that are parallel, however, do. *Id.* The scope of the prior rule may be wide enough to have legitimate application, and it is the finding of similarities or differences between cases that is the crucial step in the process of legal reasoning. *Id.* In this manner, cases that seem different may be treated as though they are the same: "A working legal system must . . . be willing to pick out key similarities and to reason from them to the justice of applying a common classification." *Id.* The classification may, by necessity, change from time to time, but it does so in an orderly and organized fashion through the reasoned elaboration of principle. *Id.* at 4. Levi explains that this change occurs not only as novel legal situations are presented, but additionally, as society's expectations change. *Id.* The classifications must remain somewhat ambiguous in order to permit the infusion of new ideas. *Id.* Levi labels this a "moving classification system." *Id.*

[46] In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court provided a right of legal access to contraception based on a reasoned elaboration of the right of privacy. The case opened the courts to litigation over constitutional protection of privacy rights. *See generally* Note, *On Privacy: Constitutional Protection For Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973). The *Griswold* plaintiffs implicitly claimed a right of sexual autonomy — a claim never asserted previously, at least not directly. Critics of the *Griswold* decision attacked the "newly" found constitutional right to privacy as a subjective expression of judicial ideology. Richards, *supra* note 9, at 957. The Supreme Court, however, carefully cited related case law when it sustained the privacy right. *Griswold*, 381 U.S. at 482–85. The Court, therefore, had not exactly fabricated a right out of thin air, but tapped the underlying principles of earlier cases.

[47] Pierce v. Society of Sisters, 321 U.S. 158, 166 (1944).

[48] 262 U.S. 390 (1923).

intrusion into private family matters, struck down a statute which prohibited teaching foreign languages to children under a certain age.[49] Although the state had an interest in fostering patriotism among its young, apparently furthered by proscribing use of foreign languages, the Court held that the state's interest was overridden by a parent's right to chart the course of his or her child's education.[50] Similarly, two years later, in *Pierce v. Society of Sisters*,[51] the Court invalidated an Oregon state law which required parents to send their children to public rather than parochial schools.[52] Recognizing the private nature of religious choices, the Court found the law an impermissible intrusion upon the parents' right to choose where to educate their children.[53]

In sum, although the Court may have been without precedent when called on in 1961 to decide *Poe v. Ullman*,[54] a case regarding legal access to contraceptives, it was not without related cases from which privacy rights could be inferred.[55] The divided Court, however, declined to address the plaintiff's claim and found the case nonjusticiable.[56] *Poe*, therefore, is most noteworthy for its dissenting opinions.[57] In dissent, Justice Douglas wrote that the *Poe* petitioner's fourteenth amendment rights had been abridged.[58] In language reminiscent of the Warren and Brandeis article,[59] Justice Douglas wrote that the claim should have been adjudicated because social evolution often puts community issues in a new perspective and exposes new needs which must be addressed.[60] Justice Douglas stated that the Connecticut law intruded upon the most personal sanctum of the home and invaded the privacy implicit in a free society.[61] He concluded that the notion of privacy was not unfounded; rather it "emanated" from the Constitution.[62]

Unlike the Douglas dissent, which focused on the extent to which the state legitimately might regulate private behavior, Justice Harlan stressed the quintessential privacy implicit in the marital relationship.[63] Justice Harlan found repugnant an intrusion of the criminal justice system into the very heart of marital privacy, especially in light of the state's acknowledgment of the sanctity of marriage.[64] Justice Harlan, however, explicitly stated that the right of privacy was not absolute and distinguished some sexual misconduct as appropriately subject to criminal inquiry no matter how privately practiced.[65]

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[49] *Id.* at 403.

[50] *Id.* at 401.

[51] 268 U.S. 510 (1925).

[52] *Id.* at 530, 534–35.

[53] *Id.*

[54] 367 U.S. 497 (1961).

[55] See *supra* notes 47–53 and accompanying text for examples of earlier privacy cases the Court cited.

[56] *Poe*, 367 U.S. at 508–09.

[57] Justices Black, Douglas, Harlan, and Stewart dissented.

[58] *Poe*, 367 U.S at 515 (Douglas, J., dissenting).

[59] See *supra* notes 28–42 and accompanying text for discussion of the article.

[60] *Poe*, 367 U.S. at 518 (Douglas, J., dissenting).

[61] *Id.* at 521 (Douglas, J., dissenting).

[62] *Id.* (citations omitted). Justice Douglas's use of the word "emanation" is noteworthy because it appears again in the penumbra theory he articulated in *Griswold* five years later. See *infra* notes 70–71 and accompanying text for the language of the *Griswold* opinion.

[63] *Poe*, 367 U.S. at 553 (Harlan, J., dissenting).

[64] *Id.* (Harlan, J., dissenting).

[65] *Id.* (Harlan, J., dissenting). Justice Harlan stated that "[a]dultery, homosexuality and the like

The majority of the Court in *Poe v. Ullman* did not address the substantive constitutional questions presented. Therefore, the underlying question of whether personal autonomy in the realm of private sexual relations should receive constitutional protection remained unanswered.[66] Within five years, however, the same issues confronted the Court in *Griswold v. Connecticut*.[67] Here, the directors of Connecticut's Planned Parenthood League were convicted of providing married persons with contraceptive information and devices in violation of state law.[68] This time, with Justice Douglas writing for the majority, the Court held that the Connecticut statute violated rights implicit in the Constitution.[69] Justice Douglas found constitutional support for the decision in the first, third, fourth, fifth, and ninth amendments.[70] The Court concluded that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[71] The Court thus gave explicit recognition to a constitutional right of privacy.[72]

Justice Goldberg wrote a concurring opinion joined by Chief Justice Warren and Justice Brennan.[73] He found that the language and history of the ninth amendment supported the right of marital privacy, although the Constitution mentioned no such right explicitly.[74] Justice Goldberg asserted that Justice Stewart's dissenting argument that no general right of privacy could be found in the Constitution[75] was disingenuous because the Court had never previously held that only rights specifically mentioned in the Constitution were protected.[76]

From the legislative history of the ninth amendment,[77] Justice Goldberg found support from James Madison, the amendment's author, for the concept that the Constitution secures unenumerated rights against government interference.[78] Justice Goldberg wrote that to hold that marital privacy may be infringed merely because such a right is not explicitly guaranteed in the Constitution ignores the purpose of the ninth

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are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage . . . ." *Id.* at 553 (Harlan, J., dissenting). Thus, Justice Harlan presumably distinguishes "[a]dultery, homosexuality and the like" from sexual intimacy between husband and wife because the enumerated "crimes" are not an extension of marital intimacy. See *infra* notes 127–251 and accompanying text for a discussion of court's treatment of homosexuals' privacy claims.

[66] Ludd, *The Aftermath of* Doe v. Commonwealth's Attorney*: In Search of the Right to Be Let Alone*, 10 U. DAYTON L. REV. 705, 721 (1985) [hereinafter Ludd].

[67] 381 U.S. 479 (1965).

[68] *Id.* at 480.

[69] *Id.* at 481–86.

[70] *Id.* at 484. Justice Douglas reiterated that the third amendment prohibits peacetime quartering of soldiers; the fourth amendment prohibits unreasonable searches and seizures; the fifth amendment protects against self-incrimination; and the ninth amendment reserves to the people rights not otherwise enumerated in the Bill of Rights. *Id.*

[71] *Id.*

[72] *Id.* at 485. The Court stated "[t]hese cases bear witness that the right of privacy which presses for recognition here is a legitimate one." *Id.*

[73] *Id.* at 486 (Goldberg, J., concurring).

[74] *Id.* at 486–87 (Goldberg, J., concurring).

[75] *Id.* at 530 (Stewart, J., dissenting).

[76] *Id.* at 486 n.1 (Goldberg, J., concurring).

[77] *Id.* at 488–91 (Goldberg, J., concurring).

[78] *Id.* at 489 (Goldberg, J., concurring).

amendment.[79] In analysis similar to the Harlan dissent in *Poe*,[80] Justice Goldberg concluded by distinguishing the guarantee of liberty implicit in marital privacy from the "State's proper regulation of sexual promiscuity or misconduct."[81] The Court, therefore, recognized a qualified right of privacy which allowed individuals to make some personal decisions without state interference.

Although in *Griswold* the Supreme Court finally recognized the right of sexual privacy as worthy of constitutional protection, the Court limited that right to decisions within the confines of the traditional marriage relationship. This changed in 1972 when the Court, again under the ambit of privacy, used equal protection analysis to extend the right of contraceptive freedom to unmarried persons.[82] In *Eisenstadt v. Baird*, the Court characterized the *Griswold* privacy right in far more expansive terms. Noting that the rule in *Griswold* nominally applied to a married couple, Justice Brennan stated that a couple was comprised of two autonomous persons.[83] He saw the right of privacy as the right of the *individual*, whether married or single, to be free from impermissible governmental intrusion.[84]

Thus, what had been recognized initially as a marital right, the *Eisenstadt* Court now extended to others. The Court specifically discredited the artificially narrow holding in *Griswold* which allowed privacy rights for married individuals but left those who were unmarried without constitutional (or contraceptive) protection.[85] *Eisenstadt* also signaled the Court's willingness to use an additional constitutional mechanism when protecting personal autonomy: the Equal Protection clause of the fourteenth amendment.[86]

Against this background of a broadening view of personal privacy rights and an emerging willingness to apply equal protection analysis to cases relating to sexual relations[87] the Court decided *Roe v. Wade*.[88] In *Roe*, a pregnant single woman brought a class action challenging the constitutionality of a Texas law which proscribed abortion except with a doctor's permission for the purpose of saving the mother's life.[89] The

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[79] *Id.* at 491 (Goldberg, J., concurring). Justice Goldberg specifically stated:

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

Id.

[80] *Poe*, 367 U.S. at 553 (Harlan, J., dissenting). See *supra* notes 63–65 and accompanying text for a discussion of Justice Harlan's dissent.

[81] *Griswold*, 381 U.S. at 498–99 (Goldberg, J., concurring).

[82] Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

[83] *Id.* at 453.

[84] *Id.* (emphasis in original). The Court stated,

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make up. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion . . . .

Id. (emphasis in original).

[85] Ludd, *supra* note 66, at 725.

[86] *Id.*

[87] *Id.*

[88] 410 U.S. 113 (1973).

[89] *Id.* at 118.

Court held the statute unconstitutional by a 7 to 2 vote. Writing for the majority, Justice Blackmun noted that although the Constitution does not explicitly mention a right of privacy,[90] in past decisions the Court had recognized a constitutional dimension to privacy rights.[91] Constitutional protection extended to those personal rights the Court deemed "'fundamental' or 'implicit in the concept of ordered liberty.'"[92] Within this arena, Justice Blackmun wrote, was a woman's decision whether to terminate her pregnancy.[93] He noted that the right of privacy was not absolute[94] and reasoned that the woman's privacy right diminished in constitutionally significant proportion to the increasing medical likelihood of the fetus's viability.[95] The opinion concluded that the right of personal privacy included the abortion decision, but that consideration of important state regulatory interests qualified the right.[96]

In 1977, the Court addressed the rights of minors to make procreational decisions. *Carey v. Population Services International*[97] invalidated a New York statute forbidding the sale of contraception to minors. The Court concluded that while it had not yet enunciated the outer limits of the privacy right,[98] procreative decisions were the essence of constitutionally protected choices.[99] In a footnote, Justice Brennan stated that the Court had not yet determined what limits, if any, a state may put on consensual sexual behavior between adults.[100] Justice Rehnquist, in a dissenting opinion,[101] responded to the Brennan footnote by observing that the Court need not rule on the validity of every statute dealing with consensual sexual behavior before establishing that certain consensual acts were prohibited.[102]

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[90] *Id.* at 152.

[91] *Id.* The Court observed that "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.*

[92] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[93] *Id.* at 153.

[94] *Id.* at 154.

[95] *Id.* at 162–64. *See* Ludd, *supra* note 66, at 726.

[96] *Roe*, 410 U.S. at 154. In *Planned Parenthood of Cent. Missouri v. Danforth*, the Court bolstered the woman's right to make this personal decision by holding that "the State may not constitutionally require the consent of the spouse . . . as a condition for abortion during the first 12 weeks of pregnancy." 428 U.S. 52, 69 (1976). The Court further noted, "the State may not impose a blanket provision . . . requiring the consent of a parent . . . as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." *Id.* at 74.

[97] 431 U.S. 678 (1977).

[98] *Id.* at 684.

[99] *Id.* at 685. *Carey* is a plurality decision. A handy table of the various holdings — and the justices joining in those holdings — may be found in 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, 990 n.103 (1985).

[100] *Carey*, 431 U.S. at 694 n.17. Justice Brennan noted, "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual behavior] among adults." *Id.*

[101] *Id.* at 717 (Rehnquist, J., dissenting). In dissent, Justice Rehnquist speculated how "[t]hose who valiantly . . . defended . . . Bunker Hill in 1775" might react to "the right of commercial vendors . . . to peddle [contraceptives] to unmarried minors through . . . vending machines located in the mens' rooms of truck stops . . . ." *Id.* (Rehnquist, J., dissenting).

[102] *Id.* at 718 n.2 (Rehnquist, J., dissenting). Justice Rehnquist contended, "[w]hile we have not ruled on every conceivable regulation affecting such conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been definitely established." *Id.* (Rehnquist, J., dissenting).

Although not directly in the line of contraception cases (generally referred to as *Griswold* and its progeny!) two related cases decided in the same period are extremely important to the development of privacy rights. In the 1969 case of *Loving v. Commonwealth of Virginia*[103] the Court addressed the marital privacy question from a slightly different perspective. The issue in *Loving* was the constitutionality of a state anti-miscegenation statute[104] previously upheld by the Virginia courts.[105] In reversing, the Supreme Court employed analysis familiar from the *Griswold* opinions.[106] The Court noted that although marriage traditionally had been subject to state regulation without federal intervention, states did not have unlimited power to regulate marriage.[107]

In characterizing the freedom to marry as an essential personal right, the Court recognized once again that marital decisions are fundamental to individual existence and survival.[108] It concluded that the decision to marry a person of another race was an individual one, and the state could not infringe that right.[109]

In 1969, the Court addressed a tangential, yet related, privacy issue. *Stanley v. Georgia*[110] questioned whether a state obscenity statute was unconstitutional insofar as it punished mere private possession of obscene matter. The case arose when law enforcement agents searched the defendant's home for evidence of a bookmaking operation.[111] In the course of the search the police discovered obscene films.[112] Stanley was charged with possession of obscene matter in violation of Georgia law[113] and convicted.[114] In reversing the conviction, the Supreme Court held that under the Constitution, states

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[103] 388 U.S. 1 (1967).

[104] The Virginia Code stated: "If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one year nor more than five years." VA. CODE ANN. § 20-59 (1960 Repl. Vol.).

[105] *Loving*, 388 U.S. at 3. The Court cited the unpublished trial court's language:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id.

[106] See *supra* notes 66–81 and accompanying text for a discussion of the *Griswold* opinions.

[107] *Loving*, 388 U.S. at 7. The *Loving* Court found that

> While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power . . . the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer v. Nebraska* . . . and *Skinner v. Oklahoma*.

Id. (citations omitted).

[108] *Id.* at 12.

[109] *Id. See also*, W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION 233–34 (1983). The authors assert that *Loving* functions "to signal potential changes in the law of marriage. These changes favor the increased autonomy of the parties and the decline of State involvement in marriage . . . . Compared to these fundamental questions, the problem of interracial marriage that gave rise to *Loving* appears to be of less significance." *Id.*

[110] 394 U.S. 557 (1969).

[111] *Id.* at 558.

[112] *Id.*

[113] The Georgia Code makes knowing possession of obscene matter a felony punishable by incarceration for one to five years. GA. CODE ANN. § 26-6301 (Supp. 1968).

[114] *Stanley*, 394 U.S. at 559.

could not make private possession of obscene matter criminal.[115] Although recognizing that the first amendment evinces a valid governmental interest in dealing with the problem of obscenity,[116] the Court nonetheless held that the state's interest was neither absolute nor, in every context, could it be insulated from constitutional inquiry.[117] In recognizing this distinction, the Court limited its prior rulings — generally dealing with manufacture or distribution of pornography[118] — and placed private possession of obscene materials beyond the state's reach.[119] Again, as in *Loving*, the Court's reasoning emphasized fundamental rights and freedoms.[120] Citing *Griswold* and *Society of Sisters* as cases which stood for the constitutional right of individuals to receive information,[121] the Court stated that the right to receive information and ideas, regardless of their perceived social worth, was fundamental in our society.[122] Furthermore, this right took on an "added dimension" in the privacy of a person's home.[123] The Court characterized that right as the fundamental right to be free from unwarranted governmental intrusion into one's privacy and held that in only very limited circumstances could a state or federal government compromise it.[124]

The decisions in *Griswold* and related cases established the constitutional right of privacy. As a judicially-created right with no textual basis in the Constitution, however, the scope of the right remained unclear.[125] The courts could interpret the line of privacy cases as restricting the right of privacy to family-based decisions; alternatively, courts might interpret the cases as expanding the right of privacy to protect individual autonomy.[126]

II. Privacy Rights and Homosexual Activity

A. *Lower Court Cases*

The constitutional right of privacy as initially conceived by the Court was rooted in, and limited to, the marital relationship.[127] Although extended in some cases to unmarried

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[115] *Id.*

[116] *Id.* at 563.

[117] *Id.*

[118] *See, e.g.*, Roth v. United States, 354 U.S. 476 (1967) (sustaining statute which makes punishable the mailing of obscene material).

[119] *Stanley*, 394 U.S. at 564.

[120] *Id.* at 564–66.

[121] *Id.* at 564.

[122] *Id.*

[123] *Id.*

[124] *Id.* The *Stanley* Court concluded,

> Whatever may be the justifications for other statutes regarding obscenity, we do not think they reach into the privacy of one's own home. 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.

Id. at 565.

[125] Survey, *The Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 563 (1986).

[126] *Id.*

[127] See *supra* notes 67–81 and accompanying text for references to the initial cases which construed the constitutional right of privacy.

individuals as well,[128] it was unclear whether the protected rights extended to reach private consensual activity between homosexual adults. The lower courts confronted this controversy on a number of occasions and in a number of jurisdictions, with disparate results. Applying a right founded in one set of factual circumstances (marital sexuality) to a related but somewhat different area (homosexuality) demonstrates how courts struggle to determine the breadth and reach of prior case law.

Among the earliest cases to address the extent to which privacy rights reached homosexual activity was *Doe v. Commonwealth's Attorney for the City of Richmond*.[129] The case is noteworthy both for its refusal to extend constitutionally protected privacy rights[130] and its controversial summary affirmance by the Supreme Court.[131] In *Doe*, the plaintiff challenged a Virginia statute making sodomy a crime.[132] The majority declined to hold that the statute offended the Constitution and stated that the wisdom of the state policy was an issue for the state to determine.[133] The majority reconciled this decision with prior Supreme Court privacy cases because the Court had ruled that the Constitution only condemns state legislation which trespassed upon the right of privacy within marriage.[134] The *Doe* court relied on Justice Goldberg's concurrence in *Griswold*, which itself relied upon Justice Harlan's dissent in *Poe v. Ullman* for its ruling.[135] Denying that such authority, based as it was on a dissent, was any less commanding,[136] the majority explicitly distinguished homosexual activity (which the state proscribed) from marriage (which the state allowed and protected).[137] The court found, consequently, "no authoritative judicial bar to the proscription of homosexuality — since it is obviously no portion of marriage, home or family life . . . ."[138]

Thus the *Doe* majority narrowly interpreted the right of privacy, finding that it reached only the areas of family, marriage, and procreation. A dissenting opinion by Judge Merhige, however, characterized privacy rights in far more expansive terms.[139] Judge Merhige wrote that the majority misapplied the precedential value of *Griswold* through an over-adherence to its factual circumstances.[140] Rather, he believed *Griswold* and the related cases protected the right of the individual to be free from unwarranted

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[128] See *supra* notes 82–86 and accompanying text for a discussion of *Eisenstadt v. Baird*.

[129] 403 F. Supp. 1199 (E.D. Va. 1975).

[130] *Id.* at 1202.

[131] 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975). See *infra* notes 172–74 and 190–91 and accompanying text for treatment of the summary affirmance by other courts.

[132] The Virginia Code reads in pertinent part:

> Crimes against nature. — If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony and shall be confined in the penitentiary not less than one year nor more than three years.

VA. CODE ANN. § 18.1-212 (1960).

[133] *Doe*, 403 F. Supp. at 1200.

[134] *Id.* The *Doe* court stated that "the Constitution condemns State legislation that trespasses upon the privacy of the incidents of *marriage* . . . ." *Id.* (emphasis added).

[135] *Id.* at 1201.

[136] *Id.*

[137] *Id.* (citing Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

[138] *Id.*

[139] *Id.* at 1203 (Merhige, J., dissenting).

[140] *Id.* (Merhige, J., dissenting).

governmental intrusion into those private decisions which were solely matters of individual concern.[141] The dissent further recognized that *Eisenstadt v. Baird* went beyond *Griswold* to remove the marital/nonmarital distinction regarding private sexual acts.[142] The Merhige dissent would protect the right of an adult to select a sexual partner, whether heterosexual or homosexual, because that is a personal prerogative which should not, without compelling justification, be infringed by state regulation.[143] Based upon the record presented to the court, Judge Merhige could divine only one justification for the statute: the "promotion of morality and decency."[144] He cited *Stanley v. Georgia* in support of his conclusion that the Constitution prohibits state regulation of socially unpopular activity conducted within the privacy of the home.[145] He concluded:

> [F]undamental rights of such an intimate facet of an individual's life as sex, absent circumstances warranting intrusion by the State, are to be respected. My brothers, I respectfully suggest, have by today's ruling misinterpreted the issue — the issue centers not around morality or decency, but the constitutional right of privacy.[146]

Seven years later, in the 1982 case of *Baker v. Wade*, a Texas Federal District Court also attempted to discern the scope of constitutional privacy right protection.[147] The *Baker* court felt it was not bound by the Supreme Court's summary affirmance of *Doe*[148] because that decision, without an opinion, did not resolve the issues presented in the case at bar.[149] And because summary affirmances do not bind a lower court except in cases precisely on point,[150] the *Baker* court felt free to reach the merits of the case.[151]

In an eloquent and sympathetic opinion,[152] the *Baker* court recognized a constitutional guarantee protecting fundamental liberties from undue governmental interference.[153] Admitting that the prior cases nominally addressed marital and family issues, the majority held that those decisions did not establish the outer limits of the right to

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[141] *Id.* (Merhige, J., dissenting).

[142] *Id.* at 1204 (Merhige, J., dissenting). Because of this, Judge Merhige characterized the majority's reliance on Justice Harlan's opinion in *Poe v. Ullman* as "misplaced." *Id.* at 1203–04 (Merhige, J., dissenting).

[143] *Id.* at 1204 (Merhige, J., dissenting). Judge Merhige saw no compelling state interest to justify the anti-sodomy statute. *Id.* at 1205 (Merhige, J., dissenting). He characterized as "unworthy of judicial response" the notion presented by the defendants that "the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones . . . ." *Id.* (Merhige, J., dissenting).

[144] *Id.* at 1205 (Merhige, J., dissenting).

[145] *Id.* (Merhige, J., dissenting).

[146] *Id.* (Merhige, J., dissenting).

[147] 553 F. Supp. 1121 (N.D. Texas 1982) *rev'd*, 769 F.2d 289 (5th Cir. 1985).

[148] 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975). See *supra* notes 129–46 and accompanying text for a discussion of *Doe*.

[149] *Wade*, 553 F. Supp. at 1137.

[150] *Id.*

[151] *Id.* at 1138.

[152] *See id.* at 1126–28.

[153] *Id.* at 1134.

privacy.[154] Extending the reasoning of the contraception cases,[155] the *Baker* court found that the right to make private, intimate choices without governmental intrusion pertained not only to a husband and wife, or an unmarried male and female, but also to homosexuals choosing to engage in private sexual activity.[156] The majority held, therefore, that the right of privacy extended to private sexual conduct between consenting adults, whether heterosexual or homosexual.[157]

The *Baker* court noted that privacy rights logically could not be limited to marital and procreative choices without ignoring the effects of *Stanley* and *Eisenstadt*.[158] Given that under *Stanley* the *Baker* plaintiff could possess homoerotic materials in the privacy of his home, the court found ludicrous any attempt to draw some constitutional distinction between the right to sexual gratification through viewing pornographic material and gratification with a consenting adult partner.[159] Accordingly, the court held that a fundamental right of privacy protected homosexual conduct when practiced privately between consenting adults.[160] The court noted that although there may be widespread public distaste for homosexuals, such adverse feeling did not justify denial of privacy rights.[161] The court explained that controversial issues must be resolved free from emotion, bias, and predilection.[162]

The Fifth Circuit, however, reversed the district court's decision.[163] The appellate court considered the Supreme Court's summary affirmance of *Doe* binding.[164] The court held that because the decision in *Doe* unquestionably rested on the merits of the case, it followed that the lower court was bound by *Doe* as controlling precedent.[165]

The 1984 case of *Dronenburg v. Zech*[166] concerned the United States Navy's policy requiring dismissal of homosexuals.[167] The petitioner served for nine years as a linguist

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[154] *Id.* at 1135. The court observed that the "[d]evelopment of this area of the law has proceeded on almost a case-by-case basis, and there are still other fundamental personal liberties — besides those involved in past Supreme Court decisions — that are protected by the right of privacy." *Id. See also id.* at 1135 n.37.

[155] *Id.* at 1140. The court found that "[t]he right of two individuals to choose what type of sexual conduct they will enjoy in private is just as personal, just as important, just as sensitive — indeed, even more so — than the decision by the same couple to engage in sex using a contraceptive to prevent unwanted pregnancy." *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* at 1141.

[160] *Id.*

[161] *Id.* at 1145.

[162] *Id.* The court quoted Justice Holmes' famous *Lochner* dissent: "[The Constitution] is made for a people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment . . . ." Lochner v. New York, 198 U.S. 45, 79 (1905) (Holmes, J., dissenting).

[163] *See* Baker v. Wade, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986).

[164] *Id.* at 292.

[165] *Id.* The Fifth Circuit noted that lower courts "should follow that controlling authority until the Supreme Court itself has issued an unequivocal statement that *Doe* no longer controls." *Id.*

[166] 741 F.2d 1388 (D.C. Cir. 1984). The military setting arguably complicates the privacy issue. *See* Note, Dronenburg v. Zech, *The Wrong Case for Asserting a Right of Privacy for Homosexuals*, 63 N.C.L. REV. 749, 756–58 (1985).

[167] *Dronenburg*, 741 F.2d at 1388–89. The Navy regulation provides in pertinent part, "[a]ny member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in military environment seriously

and cryptographer with top-security clearance. He claimed that his 1981 discharge violated his constitutional right of privacy.[168]

Judge Bork, writing for the District of Columbia Circuit,[169] viewed the privacy right articulated by the prior Supreme Court cases in extremely narrow terms. Responding to the Appellant's Opening Brief on Appeal, which characterized the cases from *Griswold* to *Carey* as developing a right of privacy of constitutional dimension,[170] Judge Bork ruled that whatever the thread of principle discernible from the prior privacy right cases, the Supreme Court had never defined the right broadly enough to encompass homosexual conduct.[171] Furthermore, although he described *Doe v. Commonweath's Attorney*[172] as "somewhat ambiguous precedent,"[173] he felt it bound lower federal courts.[174]

Judge Bork characterized a homosexual's privacy right as distinct from the privacy rights found in marriage, procreation, and family life.[175] He also stated that intermediate level judges were not authorized to extend legal doctrine enunciated by the Supreme Court without the higher Court's explicit direction.[176] He viewed *Griswold* as a case that stressed the sanctity of marriage and held that the opinion did not indicate what other activities might be protected by the right of privacy.[177] Furthermore, because the Court had not provided any guidance for reasoning about future privacy claims, Judge Bork reasoned that the *Griswold* privacy protection should not be extended to protect the appellant's conduct.[178] Similarly, he noted that the Supreme Court had articulated no principles in *Roe v. Wade*[179] which might guide lower courts in the expanded application of privacy rights.[180]

The *Dronenburg* court, therefore, fashioned its decision not only on the distinctly non-marital nature of homosexuality but also upon general theories of judicial restraint.[181] Noting that even if the Supreme Court could create new constitutional rights,[182]

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impairs combat readiness, efficiency, security and morale." SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix at 216.

[168] *Dronenburg*, 741 F.2d at 1389. Dronenburg filed suit in federal district court challenging the Navy's policy that mandated discharge of all homosexuals. The district court's opinion was not published. When the district court granted summary judgment for the Navy, Dronenburg appealed the adverse judgment to the Eleventh Circuit Court of Appeals in 1983.

[169] Antonin Scalia, now an Associate Justice of the Supreme Court, was a member of the D.C. Circuit when it decided *Dronenburg*.

[170] *Dronenburg*, 741 F.2d at 1391.

[171] *Id.*

[172] 403 F. Supp 1199 (E.D. Va. 1975). See *supra* notes 129–46 and accompanying text for a discussion of *Doe*.

[173] *Dronenburg*, 741 F.2d at 1392.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 1396 n.5. *See also* Comment, Dronenburg v. Zech: *Strict Construction or Abdication of Judicial Responsibility?*, 12 HASTINGS CONST. L.Q. 669, 673 (1985) [hereinafter Comment, *Dronenburg v. Zech*].

[177] *Dronenburg*, 741 F.2d at 1392.

[178] *Id.*

[179] *Id.* at 1394–95 (citing Roe v. Wade, 410 U.S. 113, 153–54 (1973)).

[180] *Id.* at 1395. The *Dronenburg* court stated that "the Court provided no explanatory principle that informs a lower court how to reason about what is and is not encompassed by the right of privacy." *Id.*

[181] *Id.* at 1396.

[182] Judge Bork candidly pointed out he did not share the belief that the Supreme Court could create new constitutional rights. *Id.* at 1396 n.5.

Judge Bork wrote that lower courts clearly should refrain from doing so.[183] Therefore, he concluded, the Constitution provides no constitutional right to engage in homosexual conduct and judges have no power to create such a right.[184]

B. Hardwick v. Bowers *and* Bowers v. Hardwick

Hardwick v. Bowers, decided by the Eleventh Circuit Court of Appeals in 1985, challenged the constitutionality of the state's anti-sodomy statute.[185] This ruling became the basis for the most recent Supreme Court decision addressing the law governing private homosexual activity.[186] On August 3, 1982, a policeman arrested Michael Hardwick, aged 29, in his bedroom for practicing oral sex with another man.[187] The arresting officer — admitted to the apartment by another occupant — was there to serve a warrant for Hardwick's failure to pay an earlier fine.[188] The officer arrested both men and charged them with sodomy. Sodomy is a felony under Georgia law, punishable by up to 20 years in prison.[189]

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[183] *Id.* at 1396. The court observed that "[w]e have no guidance from the Constitution or, as we have shown with respect to the cases at hand, from articulated Supreme Court principle." *Id.*

[184] *Id.* at 1397. This statement goes beyond the context of the case, which only concerned the Navy's blanket policy of discharging homosexuals, and reached homosexual conduct in general. *Id.* Furthermore, Judge Bork labeled as "completely frivolous" Dronenburg's argument that the military policy of across-the-board exclusion of homosexuals was grounded in the majoritarian prejudice that homosexuality is not socially acceptable and that under such a policy no minority rights would be safe from discrimination. *Id.* Because the policy was not unconstitutional per se, the court stated that it need only address the question of whether the Navy's policy was rationally related to a permissible end. *Id.* at 1397–98. In response to that question, the court held,

> To ask the question is to answer it. The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate. This very case illustrates dangers of the sort the Navy is entitled to consider . . . .

Id. Therefore, using a minimum rationality review, the court upheld the Navy regulation as rationally related to the legitimate end manifested in the judiciary's deference to military decisions. *Id.* *See also* Casenote, Dronenburg v. Zech*: Judicial Restraint or Judicial Prejudice?*, 3 YALE L. & POL'Y REV. 245, 248–49 (1984) (criticizing Judge Bork's "shallow analysis" and unconvincing demonstration of support for the regulation). Another commentator felt that the decision revealed the court's "faith in majoritarian morality and its distrust of the privacy doctrine . . . ." Comment, *Dronenburg v. Zech*, *supra* note 176, at 671. The D.C. Circuit denied Dronenburg's petition for rehearing *en banc*, notwithstanding an emotional dissent. 746 F.2d 1579 (D.C. Cir. 1984) (per curiam) (Robinson, C.J., Wald, Mikva, and Edwards, JJ., dissenting). Writing for the dissenters, Chief Judge Robinson stated he was "deeply troubled" by Judge Bork's "revisionist view of constitutional jurisprudence," and characterized the "extravagant exegesis on the constitutional right of privacy [as] wholly unnecessary to decide the case before the court." *Id.* at 1580 (Robinson, C.J., dissenting). He found "particularly inappropriate" Judge Bork's decision to "wipe away selected Supreme Court decisions in the name of judicial restraint," and characterized the decision as a "general spring cleaning of constitutional law." *Id.* (Robinson, C.J., dissenting). "Judicial restraint," he concluded, "begins at home . . . . [T]he constitutional right of privacy, whatever its genesis, is by now firmly established. An intermediate judge may regret its presence, but he or she must apply it diligently." *Id.* (Robinson, C.J., dissenting).

[185] 760 F.2d 1202 (11th Cir. 1985).

[186] Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

[187] N.Y. Times, July 1, 1986, at A19, col. 3. Neither the Supreme Court nor Eleventh Circuit opinions set forth the facts.

[188] *Id.*

[189] *Id.* See *supra* note 3 for the text of the statute.

1. *Hardwick v. Bowers*

Despite some feeling that *Doe v. Commonwealth's Attorney* disposed of Hardwick's claim,[190] the court held that doctrinal developments after *Doe* undermined whatever controlling weight it once might have possessed.[191] With the way clear to reach the merits

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[190] *Hardwick*, 760 F.2d at 1207–08. As noted earlier, *supra* notes 147–51, the Supreme Court's summary affirmance of *Doe* created confusion in the lower courts and provided "ambiguous precedent." Dronenburg v. Zech, 741 F.2d 1388, 1392 (D.C. Cir. 1984). Lower courts were mystified as to the exact issues resolved by the decision, as well as to its binding authority. Baker v. Wade, 553 F. Supp. 1121, 1137 (N.D. Texas 1982). *But see Dronenburg*, 741 F.2d at 1392 (Judge Bork finding the summary affirmance to be binding). The plaintiffs in *Doe* were homosexuals who had neither been arrested nor threatened with prosecution. *Hardwick*, 760 F.2d at 1207 n.5. Because the plaintiffs had no more than a generalized grievance regarding the statute, they may have lacked proper standing to challenge the law. *Id.* Legal claims must arise from a genuine case or controversy and require a plaintiff with a personal stake in the outcome sufficient to assure the proper adversarial presentation of the case. *Id.* at 1204. That Doe was a proper plaintiff, the *Hardwick* court stated, could not readily be discerned from the Supreme Court's decision. *Id.* at 1207. The Eleventh Circuit noted in *Hardwick*,

> The fact that the Supreme Court in *Doe* affirmed a dismissal on the merits below rather than vacating the judgment with instructions to dismiss for lack of subject matter jurisdiction does not demonstrate that the Court reached the merits of the case. While an appellate court that finds lack of standing normally will vacate the judgment and remand for dismissal, the Supreme Court has not uniformly followed that course.

Id. at 1207 n.5. Therefore, the *Hardwick* majority, while acknowledging that the summary affirmance was binding, felt that the *Doe* holding must be carefully limited because the Court disposed of the case without explaining its reasons. *Id.* at 1207. The *Hardwick* court explained that although the *Doe* holding denied the plaintiff's claim for an injunction invalidating the sodomy statute, and addressed the constitutional issues presented, the Supreme Court in its summary affirmance could have approved the result without addressing the constitutional issues because the plaintiffs in *Doe* "plainly lacked standing to sue." *Id.* Because the lack of standing is an issue more narrow than the constitutional issue, the *Hardwick* court stated, a lower court rationally could assume that the Supreme Court decided the case on the narrower ground. *Id.* at 1208. The *Hardwick* majority, therefore, construed *Doe* as an affirmance based on the plaintiffs' lack of standing, but not controlling on the case at bar. *Id.*

Irrespective of this, the *Hardwick* court also concluded that because Hardwick alleged that the sodomy statute violated his first amendment rights (a claim not addressed in the district court opinion of *Doe*), the summary affirmance could not control in all of Hardwick's legal claims. *Id.* at n.6. Judge Kravitch, however, stated that the Eleventh Circuit had no authority to reach the merits of Hardwick's constitutional claim. *Id.* at 1213 (Kravitch, J., concurring in part and dissenting in part). She found the majority's argument for declining to follow *Doe* unpersuasive, would have recognized the summary affirmance as having binding precedential effect on the merits, and would have affirmed the district court's dismissal of Hardwick's complaint for failure to state a claim upon which relief could be granted. *Id.* (Kravitch, J., concurring in part and dissenting in part).

[191] The *Hardwick* court cited a number of actions by the Supreme Court which indicated the constitutional issue purportedly foreclosed by *Doe* might still be unsettled. *Hardwick*, 760 F.2d at 1209. The first indication was found in Carey v. Population Services, 431 U.S. 678 (1977). See *supra* notes 97–102 and accompanying text for a discussion of *Carey*. In *Carey*, the Court, *inter alia*, invalidated a New York statute that prohibited the sale of non-prescription contraceptives. A concurring opinion by Justice Powell took exception to the majority's unnecessarily broad action of subjecting all state regulations affecting adult sexual relations to the strictest standard of judicial review. *Carey*, 431 U.S. at 703 (Powell, J., concurring). Justice Brennan, writing for the majority, responded that the holding did have limits: it applied only to state regulations that burdened an individual's right to prevent conception by substantially limiting access to contraceptives. *Id.* at 688 n.5. Justice Brennan then observed that "the Court has not definitively answered the difficult

of the case, the court analyzed the constitutional claim presented.[192] The Eleventh Circuit first characterized the issue as one of personal autonomy and explained that the Constitution prevents the states from unduly interfering in certain individual decisions critical to personal autonomy.[193] Because those decisions are essentially private, the court described them as beyond the legitimate reach of a civilized society.[194] Although prior privacy cases involved procreative or family issues and Hardwick's claim implicated neither, the court held the petitioner's desire to engage privately in sexual activity with another consenting adult involved important associational interests.[195] The majority recognized the importance of sexual intimacy for all persons and, therefore, did not limit the right to the strict contours of a traditional marriage.[196] The court reasoned that the intimate association protected against state interference is not found in the marriage relationship alone.[197] Because this conduct might serve for Hardwick the same purpose as the intimacy in marriage, the court concluded that the protection afforded by privacy rights should reach his claim.[198]

Citing *Stanley v. Georgia*, the court asserted that the fact that Hardwick had carried out his sexual activity at home bolstered its significance as an activity protected by privacy

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question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Id.* (quoting *id.*, 431 U.S. at 694 n.17).

Because the Court cited a law review comment in footnote 17 of its opinion regarding application of Supreme Court precedent to overturning state statutes outlawing private consensual sexual activity such as sodomy, the *Hardwick* court concluded that the issue remained unsettled. *Hardwick*, 760 F.2d at 1209. The court decided to hear the merits of Michael Hardwick's claim despite Justice Rehnquist's statement in his *Carey* dissent that he considered the question closed. *Id. See also Hardwick*, 760 F.2d at 1214–15 (Kravitch, J., concurring in part and dissenting in part).

New York v. Uplinger, 464 U.S. 812 (1983), is the second post-*Doe* development which the *Hardwick* court felt undermined the binding authority of *Doe*'s summary affirmance. In *Uplinger*, the Supreme Court granted certiorari but later dismissed the writ as improvidently granted. 467 U.S. 246 (1984). *Uplinger* came to the Court from the New York Court of Appeals. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983). That court had invalidated a state statute prohibiting persons from loitering in a public place for the purpose of engaging in deviate sexual behavior. *Id.* at 938, 447 N.E.2d at 63, 460 N.Y.S.2d at 515. In so ruling, the court relied on the earlier New York case of People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981), which held that the United States Constitution invalidated a state statute criminalizing any act of sodomy between two persons. *Hardwick*, 760 F.2d at 1210. In *Uplinger*, the Supreme Court granted certiorari to consider the constitutionality of state laws criminalizing consensual adult sodomy. *Id.* The Court received briefs and heard oral arguments before deciding that the case was an inappropriate vehicle for resolving the important constitutional issues raised, the *Hardwick* court noted. *Id.* Based on these factors, the *Hardwick* court concluded that the constitutional questions presented by Hardwick remained open for consideration and that the district court had erred in dismissing his claim. *Id.* at 1210.

[192] *Hardwick*, 760 F.2d at 1210.

[193] *Id.* at 1211.

[194] *Id.*

[195] *Id.*

[196] *Id.* at 1211–12. The Eleventh Circuit observed that "[t]he marital relationship is also significant because of the unsurpassed opportunity for mutual support and self expression that it provides." *Id.* The court viewed the marital relationship protected in *Griswold* and the associational interests protected in Zablocki v. Redhail, 434 U.S. 374, 385–86 (1978) (statute which placed certain restrictions on the right of remarriage held to infringe the fundamental right to marry) as being conceptually distinct. *Hardwick*, 760 F.2d at 1212.

[197] *Hardwick*, 760 F.2d at 1212.

[198] *Id.*

rights.[199] The court concluded, therefore, that the activity Hardwick hoped to engage in was quintessentially private. His relationship was an intimate association beyond the scope of state regulation.[200]

2. *Bowers v. Hardwick*

In *Bowers v. Hardwick*, the Supreme Court reversed the Eleventh Circuit's decision.[201] Writing for the majority, Justice White characterized the right of privacy announced in prior cases as inhering only in marriage, family, and procreation.[202] Justice White held that none of the rights announced in the marital/procreative cases could be analogized to reach homosexual activity.[203] While conceding that many cases had recognized rights having little or no textual support in the language of the Constitution, Justice White wrote that the Court should only cautiously announce rights not readily identifiable in the Constitution. This caution assures the public that the justices are not creating rights out of their own values.[204] He noted that historically, to limit the category of rights which would qualify for heightened judicial protection, the Court had established a policy of reviewing only those liberties characterized as "deeply rooted in this Nation's history and traditions."[205] Because the proscription against sodomy had ancient roots,[206] Justice White found no mandate to extend to homosexuals a fundamental right to engage in acts of consensual sex.[207] In fact, he characterized a claim to that right as "at best, facetious."[208] Justice White also reasoned that judicial restraint militated against extending privacy protection to reach homosexual activity.[209] He stated that he was disinclined to discover "new" fundamental rights,[210] which he viewed as a legislative rather than judicial responsibility.[211]

The majority dismissed Hardwick's argument that *Stanley v. Georgia* protected his conduct. Justice White distinguished *Stanley* as a decision firmly grounded in the first

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[199] *Id.*

[200] *Id.*

[201] 106 S. Ct. 2841, 2843 (1986).

[202] *Id.*

[203] *Id.* at 2844. The Court stated, "we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . ." *Id.*

[204] *Id.*

[205] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) and Moore v. Cleveland, 431 U.S. 494, 503 (1977)).

[206] *Id.* Justice White stated that sodomy was a criminal offense forbidden by the laws of the original thirteen states when they ratified the Bill of Rights. *Id.* at 2844 & n.5. When the states ratified the fourteenth amendment in 1868, all but five of the thirty-seven states had criminal sodomy laws. *Id.* at 2844, 2845 n.6. Until 1961, all fifty states outlawed sodomy. *Id.* at 2845. Currently, twenty-four states and the District of Columbia provide criminal penalties for sodomy performed in private between consenting adults. *Id.*

[207] *Id.* at 2844.

[208] *Id.* at 2846.

[209] *Id.* See *supra* note 20 and accompanying text for the supporting language from Justice White's opinion.

[210] *Bowers*, 106 S. Ct. at 2846.

[211] *Id.* The Court observed that "[o]therwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Id.*

amendment.[212] Hardwick's right of privacy, he continued, had no similar support in the text of the Constitution.[213]

Finally, the Court dismissed Hardwick's claim that the Georgia statute needed a more rational basis than the presumed belief by the popular majority that homosexual sodomy was immoral and unacceptable.[214] Justice White claimed that law constantly was based on notions of morality.[215] He therefore disagreed that the general population's sentiments about the morality of homosexuality should be declared an inadequate justification for the statute.[216]

In a short concurring opinion, Chief Justice Burger underscored the historic disapprobation society has placed on homosexual conduct.[217] He cited Judeo-Christian ethical standards, Roman law, and the ecclesiastical courts of England.[218] He further cited Blackstone's description of "the infamous crime against nature . . . the very mention of which is a disgrace to human nature . . . and a crime not fit to be named."[219] Chief Justice Burger concluded that only by casting aside millennia of moral teaching could the Court protect the rights of homosexuals to practice consensual sodomy.[220]

Justice Blackmun authored a dissenting opinion and took the unusual and dramatic step of reading it from the bench.[221] He argued that the majority failed to recognize the legal principles which lay beneath the factual surface of Hardwick's claim:

> 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 . . . . 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."[222]

Justice Blackmun believed the Court should have analyzed the respondent's claim in light of the values which underlie the constitutional right of privacy.[223] He viewed the

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[212] *Id.*

[213] *Id.* To rule otherwise, Justice White stated, would further confuse the limits to which victimless crimes (such as drug use) would be immunized from prosecution merely because committed at home. *Id.* Even if Hardwick had limited his claim to the right of privacy for voluntary sexual conduct between consenting adults, the Court noted that distinguishing between the claimed right of homosexual conduct and other privately practiced adult conduct clearly susceptible to prosecution — such as adultery and incest — would be difficult. *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.* But see *supra* note 162 and accompanying text for Justice Holmes' words on the same subject.

[217] *Id.* at 2847 (Burger, C.J., concurring).

[218] *Id.* (Burger, C.J., concurring).

[219] *Id.* (Burger, C.J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES *215).

[220] *Id.* (Burger, C.J., concurring).

[221] N.Y. Times, July 1, 1986, at 1, col. 6.

[222] *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (citations omitted)). Compare with text *supra* at note 146 for similar language by Judge Merhige in his *Doe v. Commonwealth's Attorney* dissent.

[223] *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting). Justice Blackmun also took exception to the majority's failure to give the Georgia statute a close reading. *Id.* (Blackmun, J., dissenting). In particular, he found that "[u]nlike the Court, the Georgia legislature has not proceeded on the assumption that homosexuals are so different from other citizens . . . ." *Id.* at 2849 (Blackmun, J., dissenting). He elaborated that the statutory language criminalizes sodomy for heterosexuals as well as homosexuals, yet the petitioner defended the law on the grounds that it prohibits homosexual

Georgia law as interfering with Hardwick's constitutionally protected interests in privacy and freedom of intimate association,[224] and he chastised the Court for ignoring this infringement.[225]

The Blackmun dissent recognized the larger issue which Hardwick's claim addressed: the constitutional promise that a private sphere of individual liberty would be kept beyond the reach of governmental interference.[226] Justice Blackmun felt this promise was valid both in regard to certain decisions which the individual was entitled to make, as well as to certain places where he or she was entitled to make them.[227] He accused the majority of misapplying the precedential value of the prior privacy cases by rigidly adhering to the marital/procreative model from which the cases arose.[228] While the prior cases may have arisen from circumstances related to the family, Justice Blackmun explained that limiting privacy rights to that factual situation would do violence to the basic reasons certain rights associated with the family initially were accorded protection: because these rights contributed so directly to individual welfare.[229] Justice Black-

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activity. *Id.* (Blackmun, J., dissenting). Justice Blackmun felt that Hardwick's claim might rest in significant part upon "Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals." *Id.* (Blackmun, J., dissenting). See *infra* notes 243–51 and accompanying text for Justice Stevens' equal protection analysis.

[224] *Bowers*, 106 S. Ct. at 2850 (Blackmun, J., dissenting).

[225] *Id.* (Blackmun, J., dissenting). Justice Blackmun wrote, "[t]he Court's cramped reading of the issue before it makes for a short opinion, but does little to make for a persuasive one." *Id.* (Blackmun, J., dissenting).

[226] *Id.* (Blackmun, J., dissenting) (citing Thornburgh v. American College of Obst. & Gyn, 106 S. Ct. 2169, 2184 (1986)).

[227] *Id.* at 2850–51 (Blackmun, J., dissenting). Justice Blackmun viewed decisions regarding education of one's child or termination of a pregnancy as examples of private decisions. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion decision protected by the Constitution); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (course of a child's education is determined by parents rather than the State). Illustrative of protected private enclaves are United States v. Kiro, 468 U.S. 705 (1984) (electronic surveillance of private residence violates fourth amendment right of those who have a justifiable interest in the privacy of the residence); Payton v. New York, 445 U.S. 573 (1980) (under the fourth amendment, private residence may not be entered to effect an arrest without a warrant); Rios v. United States, 364 U.S. 253 (1960) (fourth amendment guarantee of no unreasonable search and seizure also protects places other than private residence). Justice Blackmun felt that Hardwick's claim implicated both the decisional and spacial aspects of the right to privacy. *Bowers*, 106 S. Ct. at 2850–51 (Blackmun, J., dissenting).

[228] *Id.* at 2851 (Blackmun, J., dissenting).

[229] *Id.* (Blackmun, J., dissenting) (citing Moore v. East Cleveland, 421 U.S. 494, 501 (1977)). Justice Blackmun contended,

> [w]e protect those rights 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. [T]he concept of privacy embodies the "moral fact that a person belongs to himself and not others nor to society as a whole."

Id. at 2851 (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obst. & Gyn., 106 S. Ct. 2169, 2187, n.5 (1986)). Similarly, Justice Blackmun noted, the Court protects the right to marry because marriage promotes "a bilateral loyalty, not commercial or social projects." *Id.* (Blackmun, J., dissenting) (quoting *Griswold*, 381 U.S. 479, 486 (1965)). He stated that the Court protects procreative choices because children "so dramatically alter an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply." *Id.* (Blackmun, J., dissenting). In addition, Justice Blackmun stated, the Court protects the family "because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households." *Id.* (Blackmun, J., dissenting).

mun recognized that the underlying interest protected by privacy rights was related to human need and the emotional enrichment found in close ties with others.[230] And because intimate sexual relationships are so significant to self definition, Justice Blackmun urged that individuals be allowed to choose freely the nature of those relationships.[231]

While the majority contended it only refused to recognize a fundamental right to engage in homosexual sodomy, Justice Blackmun believed that the majority actually ignored the fundamental interest all individuals have in controlling the nature of their intimate associations.[232] Similarly, by ignoring the special significance which the fourth amendment attaches to the home, Justice Blackmun felt that the majority failed to consider the broader principles of personal security which had informed the Court's prior privacy decisions.[233] He characterized the Court's treatment of *Stanley v. Georgia* as "entirely unconvincing"[234] and noted that although the majority dismissed *Stanley* as a first amendment case,[235] the *Stanley* Court itself had anchored its holding in the fourth amendment's protection of the home.[236] He concluded, therefore, that fourth amendment guarantees provided a textual basis for Hardwick's claim and discredited the majority's ruling that the privacy right had no support in the text of the Constitution.[237]

Finally, Justice Blackmun attacked the Court's reliance on social and biblical prohibitions against homosexuality as a justification for upholding the Georgia law. He claimed that neither the length of time a majority has held a conviction nor the passion with

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[230] *Id.* (Blackmun, J., dissenting) (citing Roberts v. United States Jaycees, 468 U.S. 600, 619 (1984)).

[231] *Id.* (Blackmun, J., dissenting). He reasoned, "in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds." *Id.* (Blackmun, J., dissenting) (emphasis in original).

[232] *Id.* at 2852 (Blackmun, J., dissenting).

[233] *Id.* (Blackmun, J., dissenting).

[234] *Id.* (Blackmun, J., dissenting).

[235] *Id.* at 2846.

[236] *Id.* at 2852 (Blackmun, J., dissenting).

[237] *Id.* at 2853 (Blackmun, J., dissenting) (quoting *Bowers*, 106 S. Ct. at 2846). The Blackmun dissent further criticized the majority's treatment of *Stanley*, *id.* at 2846, which maintained that extension of the privacy right might lead to a protection of all victimless crimes so long as practiced in the home. *Id.* at 2853–54 (Blackmun, J., dissenting). He saw no reason to equate consensual homosexual sex with possession in the home of drugs, fire arms, or stolen goods — all offenses to which *Stanley*, in Justice Blackmun's view, refused to extend protection. *Id.* (Blackmun, J., dissenting). *See Stanley*, 394 U.S. at 568 n.11. Justice Blackmun distinguished voluntary sexual activity from drugs and weapons possession. He termed voluntary sexual activity properly "victimless," while drugs and weapons are not victimless because they are inherently dangerous. *Bowers*, 106 S. Ct. at 2853 (Blackmun, J., dissenting).

Nor could Justice Blackmun agree with the majority's conclusion that approving one type of voluntary sexual conduct between adults would interfere with the Court's ability to proscribe adultery and incest. *Id.* at 2853 n.4 (Blackmun, J., dissenting). *See id.* at 2846. Justice Blackmun reasoned that both adultery and incest are analytically distinct from the voluntary conduct involved in *Bowers* because adultery is likely to injure third parties and the absence of true consent allows for a blanket prohibition of incest. *Id.* at 2853 n.4 (Blackmun, J., dissenting). Furthermore, he criticized the majority for making the conceptual error of grouping private consensual homosexual activity with adultery and incest; more appropriately, he contended, the Court should group homosexual activity with private consensual heterosexual activity between unmarried persons or married persons, including anal and oral sex within marriage. *Id.* (Blackmun, J., dissenting).

which it defends that conviction justifies removing legislation from the Court's scrutiny.[238] He analogized the Hardwick claim to *Loving v. Virginia*,[239] where the state relied on religious justification for its miscegenation statute. Upon review, however, the Supreme Court invalidated the law and recognized freedom of choice to marry as a vital personal right.[240] Justice Blackmun argued that the majority's reliance on traditional Judeo-Christian values undermined rather than buttressed its position. The legitimacy of legislation does not depend upon conformity with religious doctrine, he stated.[241] Rather, Justice Blackmun noted, legislation should respect the intellectually and spiritually diverse social organization of our nation: "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[242]

In a separate dissent, Justice Stevens made an equal protection argument. He pointed out that the Georgia statute, and the rationale of the Court's opinion, would have to apply equally to married or unmarried persons, and to persons of the same or different genders.[243] Because the statute on its face prohibits both homosexual and heterosexual sodomy, the proper analysis of its constitutionality, according to Justice Stevens, required a consideration of two questions.[244] First, could the statute totally prohibit the conduct? And second, if not, was there justification for its selective enforcement against homosexuals?[245]

For Justice Stevens, the privacy cases of *Griswold* through *Carey* answered the first question in the negative. Those decisions insured that individuals were at liberty to engage in sexual conduct that others condemned as immoral.[246] The second question —

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[238] *Id.* at 2853 (Blackmun, J., dissenting). Justice Blackmun showed his hand early with respect to this issue. He began his dissent by citing Justice Holmes:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id. at 2848 (Blackmun, J., dissenting) (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

[239] See *supra* notes 103–09 and accompanying text for a discussion of the Court's treatment of *Loving*.

[240] *Bowers*, 106 S. Ct. at 2854 n.5 (Blackmun, J., dissenting) (citing *Loving*, 388 U.S. at 12). Justice Stevens, in his dissent, also analogized to *Loving*. He noted, interestingly, that society once treated miscegenation as a crime similar to sodomy. *Id.* at 2857 n.9 (Stevens, J., dissenting).

[241] *Id.* at 2854–55 (Blackmun, J., dissenting).

[242] *Id.* at 2854 (Blackmun, J., dissenting) (quoting West Virginia Bd. of Educ. v. Barnett, 319 U.S. 624, 641–42 (1943)).

[243] *Bowers*, 106 S. Ct. at 2856 (Stevens, J., dissenting). In fact, five months after its decision in *Bowers*, the Supreme Court denied certiorari in an Oklahoma criminal case which declared unconstitutional a statute barring private acts of oral and anal sex between heterosexual adults. *See* Oklahoma v. Post, 715 P.2d 1105 (Okla. 1986), *cert. denied*, 107 S. Ct. 290 (1986). The Supreme Court is unwilling, apparently, to enforce against heterosexuals the same type of statute it enforces against homosexuals.

[244] *Bowers*, 106 S. Ct. at 2857 (Stevens, J., dissenting).

[245] *Id.* (Stevens, J., dissenting).

[246] *Id.* (Stevens, J., dissenting). Justice Stevens stated, "[t]he essential 'liberty' that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral." *Id.* at 2858 (Stevens, J., dissenting).

regarding selective application — Justice Stevens approached by examining whether those persons to whom the state wished to apply the statute had a different liberty interest than the general population. This he saw as plainly unacceptable.[247] Homosexuals and heterosexuals have the same interest in deciding how they will conduct their voluntary intimate associations. According to Justice Stevens, intrusive state regulation of that private conduct is equally burdensome on both groups.[248]

Justice Stevens also noted that the majority's presumption that the Georgia electorate disfavored homosexual sodomy was illogical.[249] The statute, on its face, makes no distinction between homosexuals and heterosexuals. The majority, according to Justice Stevens, should have presumed instead that the electorate found *all* sodomy immoral and unacceptable.[250] The language of the statute, however, did not support the majority's holding, in his view.[251]

III. Recognition of Rights Not Previously Recognized

Although the factual contexts of the cases construing privacy rights in the past quarter century have varied, the decisions defining the right reduce to variation on a single theme: the freedom of the individual to form intimate associations without state interference.[252] Because the right has not been articulated explicitly in these terms, the Supreme Court has not clearly defined the freedom, nor clearly delineated the reach of its application.[253] It has been explained insufficiently to allow for reasonable predictions of which activities will be constitutionally protected.[254] Justice Brandeis characterized the right of privacy as a comprehensive right — the right to be let alone:

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[247] *Id.* (Stevens, J., dissenting).

[248] *Id.* (Stevens, J., dissenting). One commentator argues that an assertion of gay rights is stronger if predicated solely upon an equal protection argument. *See* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv. L. Rev. 1285 (1985). The author claims that the privacy argument suffers from the fundamentally flawed misconception that homosexuality exists solely in the bedroom. *Id.* at 1289. Because sexuality is a continuous expression of personhood, having expression in private as well as public domains, *id.* at 1290, a more comprehensive assertion of rights is needed. *Id.* at 1287. An equal protection argument confronts prejudice affecting the private realm (such as statutes affecting a gay person's choice of sexual partner) *and* the public sphere (such as a policy affecting employment discrimination). *Id.* at 1297.

Similarly, another commentator has argued for a more expansive reading of the Equal Protection clause of the fourteenth amendment. *See generally* Baer, Equality Under the Constitution (1983). Such a liberalized view is warranted, Baer suggests, based upon the amendment's philosophical roots. *Id.* at 24. She advocates a new constitutional theory that will recognize new and important claims while remaining faithful to the history of equal protection. *Id.* at 31. A less stingy interpretation of the fourteenth amendment's promise of equality, she argues, and a modification of how the Court structures its suspect classification analysis, *see generally id.* at 105–30, would fulfill the promises of Reconstruction and meet the legitimate expectations of homosexual persons asserting a liberty claim under the Constitution. *See generally id.* at 225–52.

[249] *Bowers*, 106 S. Ct. at 2859 (Stevens, J., dissenting). *See id.* at 2846.

[250] *Id.* at 2859 (Stevens, J., dissenting) (emphasis in original).

[251] *Id.* (Stevens, J., dissenting).

[252] Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 625 (1980).

[253] *Id.* One commentator has described the privacy right as kaleidoscopic: "Just as a kaleidoscope presents an image for which there is no corresponding object, . . . [privacy] is a composite term whose sense is illusory." Gross, *The Concept of Privacy*, 42 N.Y.U. L. Rev. 34, 42 (1967).

[254] *Compare* Baker v. Wade, 553 F. Supp. 1121 (N.D. Texas 1982) (homosexual privacy protected) *with* Dronenburg v. Zech, 754 F.2d 1388 (D.C. Cir. 1984) (homosexual privacy not protected).

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.[255]

The right to be let alone, according to Justice Brandeis, protects the individual from unwarranted interference by the government. Some courts properly guard this comprehensive right by emphasizing the individual's right to act autonomously. Other courts, however, display a willingness to accord individual liberty only to those personal decisions made in the context of marriage. By characterizing the right to be let alone as a comprehensive right, however, Justice Brandeis spoke of the values which transcend the factual circumstances of a particular case. Consequently, an understanding of privacy will be improved if one looks beyond the decisions and identifies the real interest to be protected.[256]

Although the initial cases which identified a right of privacy were rooted in the context of marriage, family, or procreation,[257] the privacy cases place an equal emphasis on the right to personal autonomy. Decisions about family planning, a child's education, or the determination of whom one may marry are private matters; meddling in those decisions invades a person's privacy because it compromises that individual's autonomy.[258] Autonomy affords an individual the capacity to make independent moral judgments and the willingness and courage to exercise those judgments even when they are unpopular ones.[259] Autonomous individuals, of course, may be married or single, male or female, heterosexual or homosexual.

In cases involving voluntary homosexual activity, some courts continue to interpret privacy rights as limited to protecting only marital or family values.[260] Other courts recognize the broader aspects of privacy and view the right as protecting an individual's right to form intimate associations, either traditional or non-traditional.[261] How a court characterizes the right of privacy — either marital or individual — seems to direct the final disposition of the case.[262] In this way courts fashion either a narrow or expansive definition of privacy. The *Bowers v. Hardwick* majority employed the more restrictive

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[255] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[256] *See generally* Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421 (1980).

[257] *See, e.g.*, Roe v. Wade, 410 U.S. 479 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[258] Gross, *supra* note 253, at 38.

[259] Gavison, *supra* note 256, at 449.

[260] *See, e.g.*, Bowers v. Hardwick, 106 S. Ct. 2841 (1986); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

[261] Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1984); Baker v. Wade, 553 F. Supp. 1121 (N.D. Texas 1982); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975).

[262] *Bowers* illustrates this dichotomy. The majority chose to view privacy rights as relating to marriage, family, and procreation, *Bowers*, 106 S. Ct. at 2844, while the dissenting justices recognized a broader individual-rights based meaning of privacy: "what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others." *Id.* at 2852 (Blackmun, J., dissenting).

interpretation. The Supreme Court's commitment to an autonomy-based definition of privacy, however, would better guard the more egalitarian notion of protecting all individuals in their right to form fulfilling affectional ties. Such a commitment would permit the extension of that protected interest to all non-harmful consensual adult sexual activity, whether heterosexual or homosexual.

The two prevailing formulations of the privacy right which compete for the courts' acceptance are a right grounded in the conventional interests of marriage and family, and a privacy right grounded in notions of individual autonomy.[263] The autonomy-based notion is the more expansive of the two because, whereas married people clearly can retain individual rights, unmarried individuals cannot claim family-based rights. The autonomy-based right protects individuals and their right to make choices; it reinforces "that persons *as such* have a set of capacities that enable them, with a sense of separateness from other persons, to make independent decisions regarding appropriate life choices."[264]

The right of privacy rooted in marriage, while it incidentally protects the values of individuals who participate in the convention and whose values are harmonious with conventional morality, disregards individual choices altogether. Such a right only protects interests affiliated in some way with marital values — such as the choice of partner protected in *Loving* or the decision to use contraceptives protected in *Griswold*. Limiting which activities will be protected, by requiring that they be related to the family or marriage, severely impairs the underlying interest seeking protection: the right of *all* individuals to act intimately without undue governmental intrusion. The constitutional guarantee is seriously diminished in scope if it protects conventional modes of behavior but excludes unique or atypical variations.[265]

Laurence Tribe notes that because the right of personhood customarily has been limited to liberties recognized as fundamental in our society, it is crucial to define a right expansively when asserting a liberty claim.[266] Predicating privacy rights on the status of marriage is, therefore, unfairly conditional. The need for intimacy and the inappropriateness of state intrusion does not, after all, extinguish outside the marital state. Defining the right at a high enough level of generality, however, permits "unconventional variants to claim protection along with mainstream versions of the protected conduct."[267] Once the right of privacy is defined in terms general enough to tap into the underlying interest protected, it provides an umbrella capacious enough to subsume homosexual as well as heterosexual variants.[268] For the courts to tell active homosexuals that a right of privacy protects them in traditional marital and family decisions is analogous to the famous irony: "The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[269]

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[263] Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 362 (1979).

[264] Richards, *Taking 'Taking Rights Seriously' Seriously: Reflections on Dworkin and the American Revival of Natural Law*, 52 N.Y.U. L. REV. 1265, 1329 (1977) (emphasis in original).

[265] Eichbaum, *supra* note 263, at 365. Professor Eichbaum notes "[t]he human dignity protected by constitutional guarantees would be seriously diminished if people were not free to choose and adopt a lifestyle which allows expression of their uniqueness and individuality." *Id.*

[266] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-13, at 944 (1978 & Supp. 1979).

[267] *Id.* at § 15-13, at 946.

[268] *Id.*

[269] Eichbaum, *supra* note 263, at 367 (quoting A. FRANCE, LE LYS ROUGE, 117–18 (1894)).

The homosexual activity cases provide a correlation. Those judges who viewed homosexual activity as protected by the constitutional right of privacy employed an analysis evidencing acceptance of an autonomy-based definition.[270] Conversely, those judges who viewed privacy as family-based, and therefore limited, declined to protect homosexual activity.[271]

In *Doe v. Commonwealth's Attorney*, the majority upheld the state anti-sodomy law and found there was no authoritative judicial bar to the proscription of homosexuality because it was "obviously no portion of marriage, home or family life . . . ."[272] Similarly, in *Dronenburg v. Zech*,[273] Judge Bork, after examining the Supreme Court's privacy cases announced that the cases which served as the foundation for privacy rights were related to family and marital relationships. It hardly needed to be said, he wrote, that homosexual relationships were distinguishable.[274]

In contrast, Judge Merhige, dissenting in *Doe*, recognized that the right of privacy did not diminish when applied to parties not involved in a marital relationship. He felt that the freedom to choose an adult sexual partner was open to all individuals, irrespective of their sexual or affectional preference.[275] In *Baker v. Wade*, the majority characterized the right of privacy as protecting *personal* liberties from governmental interference,[276] and claimed that every *individual* had the right to decide important intimate matters without state interference.[277] On this basis, the privacy right encompassed the right of homosexual adults to engage in intimate sexual activity.[278] And the Eleventh Circuit in *Hardwick v. Bowers*[279] held that the Constitution prevented the states from "unduly interfering in certain *individual* decisions critical to personal *autonomy* . . . ."[280] The majority recognized that Hardwick's homosexual conduct, although not procreative, involved an important associational interest.[281] By looking beyond the factual surface to the next level of generality, the court recognized that the underlying interest

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[270] *See Bowers*, 106 S. Ct. at 2852 (Blackmun, J., dissenting); Baker v. Wade, 553 F. Supp. 1121, 1141 (N.D. Texas 1982); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1203 (E.D. Va. 1975) (Merhige, J., dissenting).

[271] *See Bowers*, 106 S. Ct. at 2844; Dronenburg v. Zech, 741 F.2d 1388, 1395–96 (D.C. Cir. 1984); *Doe*, 403 F. Supp. at 1201–02.

[272] *Doe*, 403 F. Supp. at 1202. Interestingly, the *Doe* court also noted that to uphold the legislation, the state only need establish that the conduct likely would contribute to moral delinquency. *Id.* As an example of moral delinquency, the court cited Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973), which involved a married couple who engaged in group sex in front of the couple's children. *Doe*, 403 F. Supp. at 1202. Why such a case implicates homosexuals who, at least statistically, have fewer children than the general population is not entirely clear.

[273] 741 F.2d 1388 (D.C. Cir. 1984).

[274] *Id.* at 1395–96. The *Dronenburg* court observed that "[t]he Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be said that none of these cover a right to homosexual activity." *Id.*

[275] *Doe*, 403 F. Supp. at 1203 (Merhige, J., dissenting). Judge Merhige noted in dissent, "[t]o say that the right of privacy . . . is limited to marital, home or family life is unwarranted under the law." *Id.* (Merhige, J., dissenting).

[276] 553 F. Supp. at 1134 (emphasis added).

[277] *Id.* at 1140 (emphasis added).

[278] *Id.*

[279] 760 F.2d 1202 (11th Cir. 1985).

[280] *Id.* at 1211 (emphasis added).

[281] *Id.*

protected in the marital relationship was an important element of Hardwick's relationship as well: "the unsurpassed opportunity for mutual support and self-expression."[282]

Courts are not without direction when asked to adjudicate what appear to be novel claims. Rather than acting arbitrarily, courts can analogize from existing allied law and persuasively demonstrate that an untried right may be subsumed under a right already recognized.[283] Professors Warren and Brandeis noted that courts must constantly redefine the exact nature of legal rights so as to reflect accurately social change.[284] As civilization evolves and new claims are recognized as deserving legal protection, the courts must refine the law to accommodate these legitimately asserted claims.[285]

The law must be dynamic for a number of reasons. Technological advances create unthought of intrusions from which individuals need protection.[286] Similarly, the perceived need for a law can evaporate as social evolution exposes the impropriety of an outmoded piece of legislation. The anti-miscegenation statute invalidated in *Loving*, for example, seemed reasonable in the nineteenth century. As society became more enlightened, however, state-mandated segregation was recognized as untenable.[287]

These changes in the law do not require unprecedented judicial leaps of faith. Courts can, by a reasoned elaboration of principle, competently contour the law.[288] The judiciary is best suited for bringing law and society into harmony.[289] Anchored by principles indicative of shared purposes in society, such as the right to be free from undue governmental intrusion, judges legitimately fashion reasonable variations of established legal doctrine to reflect and accommodate rights not previously recognized, rights newly defined in light of social evolution.[290]

The courts that extended the privacy right initially found in marriage to an individual right *not* anchored to the marital convention did so upon a reasoned elaboration of principle. These courts viewed the underlying principle at a higher level of generality. From that vantage point it became clear that individual rights could not be limited to the status of marriage.[291]

Griswold established the principle that the state cannot interfere with a marital decision as personal as family planning. But *Eisenstadt* clarified that the right of privacy in sexual matters is not limited to married couples.[292] Because *Griswold* presumably would

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[282] *Id.* at 1211–12.

[283] See *supra* note 45 for a discussion of how the courts can approach novel litigation.

[284] See *supra* notes 31–42 and accompanying text for reference to Warren and Brandeis's discussion of the evolution of common law.

[285] *Id.*

[286] See *supra* note 30 for a discussion of Abigail Roberson's claim necessitated by the invention of photography.

[287] See *supra* notes 103–09 and accompanying text for a discussion of the Court's reasoning in *Loving*. See *supra* notes 238–40 and accompanying text for Justice Blackmun's analysis of *Loving*'s effect on *Bowers*.

[288] See *supra* note 45 for Levi's view on the development of the common law.

[289] *Id.*

[290] *See* Fuller, *supra* note 14.

[291] Karst, *supra* note 252, at 652. Professor Karst argues "[t]he logic of the freedom of intimate association — that is, the implication of the *values* that are the substantive components of this associational freedom — cannot be contained at the status boundaries of formal marriage . . . ." *Id.*

[292] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). As Justice Brennan wrote, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion . . . ." *Id.* (emphasis in original). This language is quoted in *Hardwick*

invalidate a state statute that prohibits consensual sodomy by a married couple, and *Eisenstadt* would invalidate a statute that applied to unmarried persons as well,[293] it is difficult to understand how the *Bowers* Court could sustain a statute that proscribes consensual sodomy between unmarried individuals, whether heterosexual or homosexual.[294]

Stanley v. Georgia reiterated the individual right of privacy against governmental intrusion. The *Stanley* decision put the regulation of socially disfavored activity beyond the reach of the state so long as the activity takes place within the confines of the home.[295] The Eleventh Circuit, in *Hardwick*, recognized that *Stanley* bolstered the court's ability to protect such activity.[296] The *Doe* dissent also recognized that *Stanley* stood for constitutional protection of socially condemned activity having no harmful external effect.[297] And the *Baker* court saw that the *Stanley* extension of the privacy right reached private, voluntary, intimate relationships between homosexuals.[298]

There is, therefore, a logical framework for challenging the constitutionality of sodomy laws. *Griswold* protects intimate activity in the marital relationship; *Eisenstadt* extends that protection to those not married; and *Stanley* protects even those activities in conflict with traditional mores so long as they are practiced in the home. Within this analytic structure, the majority in *Bowers v. Hardwick*[299] displayed flawed logic when it failed to invalidate the Georgia statute.

By claiming that the rights protected in the earlier privacy cases were limited to family, procreation, and marriage,[300] the Court ignored the logical extension provided by *Eisenstadt* and *Stanley*, and presented an analysis that was itself, at best, facetious.[301] Chief Justice Burger's concurring opinion was a gratuitous vehicle used simply to reiterate Blackstone's statement that sodomy is a heinous act "the very mention of which is a disgrace to human nature."[302] His opinion added little else in the way of analysis. If the right of privacy has, in the past, afforded the individual a right to use contraceptives,[303] to marry whom one chooses,[304] to have an abortion,[305] and to view pornography

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v. Bowers, 750 F.2d at 1211; Baker v. Wade, 553 F. Supp. 1121, 1140 (N.D. Texas 1982); and Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1204 (E.D. Va. 1975) (Merhige, J., dissenting).

[293] See *supra* notes 82–86 and accompanying text for a discussion of *Eisenstadt*'s effect on the *Griswold* holding.

[294] It is not clear how the *Bowers* majority made a distinction between heterosexuals and homosexuals. As Justice Stevens pointed out in his dissent, the majority failed to assume the burden of justifying a selective application of the law. *Bowers*, 106 S. Ct. at 2858–59 (Stevens, J., dissenting). Justice Stevens contended that neither a neutral or legitimate interest beyond habitual dislike of a disfavored group supported such a distinction. *Id.*

[295] 394 U.S. 557, 565 (1969).

[296] *Hardwick*, 760 F.2d at 1212.

[297] *Doe*, 403 F. Supp. at 1205 (Merhige, J., dissenting).

[298] *Baker*, 553 F. Supp. at 1141.

[299] 106 S. Ct. 2841 (1986).

[300] *Id.* at 2843.

[301] The majority cited *Eisenstadt* only in passing and characterized it as a case insuring contraceptive freedom. *Id.* Although *Stanley* received somewhat more textual attention, the Court dismissed its effect by claiming it was a decision firmly grounded in the first amendment. *Id.*

[302] *Id.* at 2847 (Burger, C.J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES *215).

[303] *Eisenstadt*, 404 U.S. 113.

[304] *Loving*, 388 U.S. 1.

[305] *Roe*, 410 U.S. 113.

in the home,[306] it seems capricious not to extend the same constitutional protection to private sexual conduct between persons of the same gender. If these cases do not support extending constitutional protection to homosexual conduct, the Court must produce a reasoned explanation for that conclusion rather than the illogical and emotional opinion provided in *Bowers*.

In contrast, Justice Blackmun's *Bowers* dissent recognized a unifying principle in the former privacy decisions which the majority refused to address:[307] an interest in individual liberty that protects both intimate associations and the private activity central to the fulfillment of personal autonomy.[308] The right of personal autonomy includes the right to be sexually intimate with a partner of one's own choosing. It encompasses homosexuals as well as heterosexuals. A well-reasoned *Bowers* opinion should have addressed this unifying principle and distinguished the sodomy statute it upheld from the liberty-infringing statutes invalidated in the Court's earlier decisions. The *Bowers* opinion failed to address prior Supreme Court decisions that developed a right of privacy not explicitly limited to married persons or heterosexuals. Such an omission does violence to a court's credibility which depends largely upon the reasoning it demonstrates in its written opinions.[309] Facile analyses impair a court's strongest claim to acceptance: its persuasiveness and the clear articulation of its logic.[310]

Finally, the majority opinion was insensitive in its refusal to recognize in homosexuals the same human need for sexual intimacy shared by the heterosexual population. The opinion only serves to exaggerate the perceived differences between homosexuals and heterosexuals and further insulate a minority struggling for a sense of dignity.[311] This insensitivity is a sad departure from a Constitution purporting "to protect Americans in their beliefs, their thoughts, their emotions, and their sensations."[312] The central role of sexuality is the same for all individuals. It provides "the independent status of a profound ecstasy that makes available to a modern person experiences increasingly inaccessible in public life: self transcendence, expression of private fantasy, release of inner tensions, and meaningful and acceptable expression of regressive desires to be again the free child — unafraid to lose control, playful, vulnerable, spontaneous, sensually loved . . . ." [313]

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[306] *Stanley*, 346 U.S. 557.

[307] *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting).

[308] *Id.* at 2852 (Blackmun, J., dissenting).

[309] *See generally* Fuller, *supra* note 14.

[310] A judicial decision's distinctive claim to acceptance is the persuasiveness of its logic and reasoning. Legislatures have their own distinctive claim to acceptance based on their (imperfectly) representative character and the fact that they are democratically elected. As a result, legislative enactments do not depend so heavily for legitimization on their innate persuasiveness. The *effectiveness* of legislation, on the other hand, may be crucially dependent on its persuasiveness and rationality. Legislatures and courts are good at different things. The former finds social and economic facts and balances conflicting and competing interests; the latter reasonably elaborates principle. For a nuanced presentation of this notion, see Ely, *Forward: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

[311] As one activist stated: "I think to love myself in a society that does not want me to do so is miraculous." ADAIR AND ADAIR, WORD IS OUT 249 (1978). This book is comprised entirely of interviews with gay people.

[312] Olmstead v. United States, 277 U.S. 438, 478 (1928).

[313] Richards, *supra* note 9, at 1003–04.

Conclusion

Courts have at their disposal the tools for demonstrating that rights take new forms and need novel definitions as society evolves. It is not a court's responsibility to create new rights, but rather to protect preexisting rights which manifest a new expression. Courts do this by persuasively and logically analogizing to allied rights and extending them so they take on a new dimension which society recognizes and accepts.

Throughout the cases evincing a right of privacy runs the common thread that the state cannot interfere with a person's inviolate right to form private consensual intimate associations. In *Bowers v. Hardwick*, the Court ignored the true interests protected by the right of privacy and, in so doing, betrayed the values it should have protected. As Justice Blackmun noted in his outstanding dissent, one can only hope that the Court will soon reconsider its analysis and recognize that depriving individuals of the right to decide which paths they will follow in their intimate relationships poses a far greater threat than tolerance of non-conformity ever could do.

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