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Bowers v. Hardwick: No Constitutional Protection for Private Consensual Homosexual Intimacy

Joan Brinson Dressler

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NOTE

***Bowers v. Hardwick*: No Constitutional Protection for Private Consensual Homosexual Intimacy**

I. INTRODUCTION

All fifty states prohibited homosexual behavior in the 1950s.¹ Successful challenges to sodomy² statutes began in the 1960s when Illinois adopted the American Law Institute's Model Penal Code which decriminalized adult consensual private sexual conduct.³ Today, half the states continue to criminalize private consensual sodomy.⁴ Justification for the statutes ranges from majoritarian morality principles and public welfare concerns to religious and biblical teachings.⁵

Resorting to the judiciary had been somewhat successful for homosexuals in matters such as professional licensing, public employment, and immigration.⁶ Gay rights activists were encouraged by the number of states whose legislatures chose to repeal their sodomy statutes. Legal and social commentators were optimistic that the constitutionally protected freedom of intimate association would be extended to homosexual associations as well as to heterosexual ones.⁷ Although the issue of consensual homosexual conduct had arisen in unsuccessful challenges to the constitutionality of sodomy laws and in military discharge proceedings,⁸ the Supreme Court had never resolved the issue or articulated a principle

1. Rivera, Book Review, 132 U. PA. L. REV. 391, 410 (1984) (reviewing J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983)).

2. Sodomy generally refers to copulation with a member of the same sex or with an animal, or anal or oral copulation with a member of the opposite sex. State statutes vary as to practices and parties to which they apply. Annotation, *Validity of Statute Making Sodomy a Criminal Offense*, 20 A.L.R.4th 1009 (1982).

3. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2845 n.7 (1986).

4. *Id.* at 2845. States which criminalize sodomy are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia and the District of Columbia. *Id.* at 2847 n.1.

5. *Leviticus* 18:22: "Thou shalt not lie with mankind, as with womankind: it is ambomination." *Leviticus* 20:13: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them."

6. See Rivera., *supra* note 1.

7. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 682 (1980).

8. Comment, *Dronenburg v. Zech: Strict Construction or Abdication of Judicial Responsibility?*, 12 HASTINGS CONST. L.Q. 643, 644 (1985).

of personal privacy to explain those decisions⁹ until the June 1986 decision of *Bowers v. Hardwick*.¹⁰

This note discusses several pertinent cases decided prior to *Bowers* and looks at constitutional challenges to sodomy laws after *Bowers* in an effort to understand the development, downfall and any future hope of establishing legal recognition of homosexuals' rights to private consensual sexual intimacy.

II. PERTINENT CASES DECIDED PRIOR TO *BOWERS v. HARDWICK*

The case which is perhaps most frequently cited by sodomy statute defenders is *Doe v. Commonwealth's Attorney*.¹¹ The United States District Court for the Eastern District of Virginia refused to invalidate Virginia's sodomy statute¹² which was challenged by adult male homosexuals. The plaintiffs relied on *Griswold v. Connecticut*,¹³ but the court limited *Griswold* to "trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the nurture of family life."¹⁴ The court quoted language from Justice Harlan's dissent in *Poe v. Ullman*,¹⁵ noting that "[a]dultery, homosexuality and the like are sexual intimacies which the State forbids."¹⁶ The plaintiffs argued that adult consensual homosexual relations performed in private should be constitutionally protected, but the court, borrowing again from Justice Harlan's dissent in *Poe*, held that privately practiced homosexuality is not immune from criminal inquiry because of the state's "rightful concern for its people's moral welfare."¹⁷ The court stated further that Virginia's statute was rationally related to suppressing crime in private or public and that such a goal was within the state's police power.¹⁸

The United States Supreme Court summarily affirmed the lower court's decision.¹⁹ While states rely on *Doe* to support the constitutional-

9. *Id.*

10. 106 S. Ct. 2841 (1986).

11. 425 U.S. 901 (1976), *summarily aff'g*, 403 F. Supp. 1199 (E.D. Va. 1975).

12. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1203 (1975). Virginia's statute provided that "[I]f any person shall carnally know . . . any male or female person by the anus or by or with the mouth . . . he or she shall be guilty of a felony. . . ." *Id.* at 1200.

13. 381 U.S. 479 (1965) (invalidating statute that prohibited the use of contraception by married people because of marital privacy).

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

15. 367 U.S. 497, 553 (1961); also quoted by Justice Goldberg in his concurrence to *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965).

16. *Doe*, 403 F. Supp. at 1201 (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1971) (Harlan, J., dissenting)).

17. *Id.* at 1202.

18. *Id.*

19. 425 U.S. 901 (1976). "[D]enial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950).

ity of their sodomy statutes, opponents question the precedential effect of the summary affirmance. Although sodomy laws appear to conflict with the holdings of the *Griswold* line of privacy rights cases,²⁰ the Supreme Court's summary affirmance left the question open. In its 1977 decision of *Carey v. Population Services International*,²¹ the Supreme Court observed that "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 . . . and we do not purport to answer that question now."²²

The Court's remark in *Carey* provided the impetus, in a few states, for successful challenges to sodomy statutes. Massachusetts limited criminal sexual activity to solicitation and public sexual touching in the presence of people who might be offended by the act.²³ Pennsylvania's statute criminalizing voluntary deviate sexual intercourse was held to violate equal protection and to exceed police power bounds.²⁴

In *People v. Onofre*,²⁵ New York's statute which imposed criminal sanctions for consensual sodomy between unmarried but not married persons was held unconstitutional on privacy and equal protection grounds. The statute was challenged by both homosexuals and heterosexuals who had been convicted under the law. The New York Court of Appeals acknowledged "a right of independence in making certain kinds of important decisions, undeterred by governmental restraint . . . referred to . . . as 'freedom of conduct.'"²⁶ The court disagreed with the state's argument that a fundamental right of personal decision extends only to marital intimacy and procreation.²⁷ Relying in part on *Stanley v. Georgia*,²⁸ along with the *Griswold* line of cases,²⁹ the court stated:

[P]rotecting under the cloak of the right of privacy individual decisions

20. The *Griswold* line of cases refers to those decisions in which the Supreme Court defined and protected private rights of individuals, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state statute that prohibited use of contraceptives by married people) and including but not limited to about a dozen other cases, such as *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating state statute that prohibited distribution of contraceptives except by pharmacists and physicians to married persons) and *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating state statute which criminalized abortion except for purposes of saving mother's life).

21. 431 U.S. 678 (1977) (invalidating New York law which criminalized selling or distributing contraceptives to minors under sixteen; the statute allowed only licensed pharmacists to distribute contraceptives to persons sixteen or over and prohibited anyone from advertising or displaying contraceptives).

22. *Id.* at 688 n.5.

23. *Commonwealth v. Sefranka*, 302 Mass. 108, 414 N.E.2d 602 (1980).

24. *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980).

25. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

26. *Id.* at 485, 415 N.E.2d at 939, 434 N.Y.S.2d at 949.

27. *Id.*

28. 394 U.S. 557 (1969) (invalidating state statute criminalizing possession of obscene material within privacy of one's home).

29. See *supra* text accompanying note 21.

as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions—such as those made by defendants before us—to seek sexual gratification from what at least once was commonly regarded as “deviant” conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting.³⁰

The court found that the state demonstrated no rational basis for the statute and its intrusion into people’s lives.³¹ As to the equal protection claim, the court ruled that the statute, on its face, discriminated between married and unmarried people³² and that there was no relationship between the law and the objective tendered by the state of protecting and nurturing marriage.³³

The United States Supreme Court denied the state’s petition for certiorari. The lower court’s decision on federal constitutional grounds stood, thus extending the right of privacy to consensual sodomy in New York.

Two years later, New York’s highest court heard a case related to *Onofre* in which criminal defendants challenged the constitutionality of a statute proscribing loitering in public for purposes of soliciting deviate sexual intercourse. In *People v. Uplinger*,³⁴ the New York Court of Appeals ruled that, after *Onofre*, the conduct (consensual sodomy) contemplated by the loitering statute was no longer criminal, and the state had no basis for punishing loitering for that purpose.³⁵ The state filed a writ of certiorari which the Supreme Court granted.³⁶ Petitioners urged the Court to consider the constitutionality of state laws which criminalize adult consensual sodomy.³⁷ The Supreme Court considered the briefs, heard oral arguments³⁸ and dismissed the writ as improvidently granted.³⁹ Again, the Court failed to address the issue of private consensual homosexual conduct.

While sodomy statute challenges were considered to be better forums for the right to privacy than were military discharge cases,⁴⁰ the 1984

30. *Onofre*, 51 N.Y.2d at 488, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951.

31. *Id.* at 490, 415 N.E.2d at 941-42, 434 N.Y.S.2d at 951.

32. *Id.* at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 952.

33. *Id.* at 491-92, 415 N.E.2d at 942-43, 434 N.Y.S.2d at 953.

34. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514, *cert. granted*, 464 U.S. 812 (1983), *cert. dismissed*, 467 U.S. 246 (1984).

35. *Id.* at 938, 447 N.E.2d at 63, 460 N.Y.S.2d 515.

36. 464 U.S. 812 (1983).

37. *New York v. Uplinger*, 467 U.S. 246 (1984).

38. *Hardwick v. Bowers*, 760 F.2d 1202, 1210 (11th Cir. 1985).

39. *Id.* at 1210.

40. Note, *Beyond Dronenburg: Rethinking the Right to Privacy*, 11 VT. L. REV. 299, 326 (1986). The author notes that the central issues in military discharge cases are employment discrimination and military necessity while sodomy statute challenges are focused more on privacy.

decision of *Dronenburg v. Zech*⁴¹ in the District of Columbia Court of Appeals was indicative of problems to come for future litigants basing their challenges on right-to-privacy arguments.⁴²

James Dronenburg had an outstanding nine-year record of service with the Navy prior to his 1981 discharge for misconduct due to homosexual acts, a violation of Navy regulations.⁴³ Dronenburg sued, challenging the Navy's policy of discharging all homosexuals.⁴⁴ The Navy's motion for summary judgment was granted,⁴⁵ and Dronenburg again appealed.⁴⁶ His discharge was affirmed.⁴⁷

The *Dronenburg* decision has been described as "the broadest and most ringing repudiation of the view that laws penalizing homosexual conduct are unconstitutional."⁴⁸ Judge Bork's opinion has been characterized as expressing "an unconcealed disdain 'for the logic in the Supreme Court's "right of privacy rulings" including those that struck down state laws banning abortion and restricting the sale and use of contraceptives.'"⁴⁹ In reviewing the Supreme Court's privacy decisions, Judge Bork noted that "though the [Supreme] Court gave an illustrative list of privacy rights, it also denied that the right was as broad as the right to do as one pleases with one's body."⁵⁰ Judge Bork recognized the Supreme Court's reluctance to create new constitutional rights, stating, "If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that the lower courts should not do so."⁵¹ The Navy's policy of mandating the discharge of those engaged in homosexual conduct was determined to be a rational means of achieving the legitimate state interests of maintaining discipline and morale, rank and command systems, recruitment, and security.⁵²

The *Dronenburg* decision exemplifies the courts' traditional deference

41. 741 F.2d 1388 (D.C. Cir. 1984).

42. Note, *supra* note 40, at 300.

43. *Dronenburg*, 741 F.2d at 1389.

44. *Id.*

45. *Id.*

46. The panel consisted of Circuit Judges Bork (appointed by President Reagan) and Scalia (later appointed to the United States Supreme Court by President Reagan) and Senior District Judge Williams (from the United States District Court for the Central District of California). Judge Bork wrote the opinion of the court.

47. *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

48. Note, *supra* note 40, at 299 (quoting N.Y. Times, Aug. 18, 1984, at 7, col. 6).

49. *Id.* at 300.

50. *Dronenburg*, 741 F.2d at 1395.

51. *Id.* at 1396. The court of appeals held that *Doe v. Commonwealth's Attorney* was controlling notwithstanding that the case involved civilians. The court held in dictatorial language that the military may justify restrictions on its personnel that go beyond the needs of civilian society. The court stated that even if *Doe* were ambiguous precedent, the ninth amendment right to privacy would not be extended to cover Dronenburg's conduct. *Dronenburg*, 741 F.2d at 1392.

52. *Id.* at 1398.

to the military.⁵³ Most homosexuals who have appealed their military discharges have lost.⁵⁴ However, the court of appeals gave only cursory attention to the military context of *Dronenburg* and limited privacy rights to traditional marriage and familial relationships.⁵⁵ *Dronenburg* reached beyond the treatment of homosexuals in the military and threatened to slam the door on privacy assertions by homosexual men and women.⁵⁶

While *Dronenburg* was contesting his discharge from the Navy, the constitutionality of sodomy statutes in Texas⁵⁷ and Georgia⁵⁸ was being challenged.

The District Court for the Northern District of Texas agreed with the plaintiff's claim that a Texas statute proscribing "engaging in deviate sexual intercourse⁵⁹ with another individual of the same sex" violated rights of privacy and equal protection in *Baker v. Wade*.⁶⁰ However, the United States Court of Appeals for the Fifth Circuit reversed the lower court and found the statute constitutional.⁶¹ The court ruled that *Doe v. Commonwealth's Attorney*⁶² is controlling authority until the Supreme Court indicates otherwise,⁶³ thus disregarding the privacy claim. As to the equal protection argument, the Fifth Circuit determined the proper standard of review to be whether the statute was rationally related to a legitimate state interest.⁶⁴ The court acknowledged society's "strong objection to homosexual conduct" and expressed that implementing morality is a permissible objective of the state. Therefore, the court held, the statute does not deprive plaintiff of equal protection of the law.⁶⁵

Approximately three months before the *Baker v. Wade* decision was handed down in Texas, Michael Hardwick had obtained a more favorable result in his challenge to Georgia's sodomy law. Although the

53. Note, *supra* note 40, at 317.

54. *Id.* at 316.

55. Note, *Dronenburg v. Zech: The Wrong Case for Asserting a Right of Privacy for Homosexuals*, 63 N.C.L. REV. 749, 750 (1985).

56. *Id.*

57. *Baker v. Wade*, 553 F. Supp. 121 (N.D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *reh'g granted en banc and rev'd*, 769 F.2d 289 (5th Cir. 1985).

58. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir.), *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985), *cert. granted and rev'd*, 106 S. Ct. 2841 (1986).

59. "[A]ny contact between any part of the genitals of one person and the mouth or anus of another person." *Baker v. Wade*, 769 F.2d 289, 291 n.1 (quoting TEX. PENAL CODE ANN. § 21.01(1) (Vernon 1974)).

60. 553 F. Supp. 1121, 1148 (N. D. Tex. 1982), *appeal dismissed*, 743 F.2d 236 (5th Cir. 1984), *reh'g granted en banc and rev'd*, 769 F.2d 289 (5th Cir. 1985).

61. *Baker*, 769 F.2d at 291.

62. 425 U.S. 901 (1976).

63. *Baker*, 769 F.2d at 292. *But see Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950).

64. *Id.*

65. *Id.*

District Court for the Northern District of Georgia dismissed Hardwick's claim in April 1983,⁶⁶ the Eleventh Circuit Court of Appeals reversed and remanded the case for trial, holding that the statute infringed on Hardwick's constitutional rights and that the state should be required to show a compelling interest for such a statute.⁶⁷

The contradictory decisions of *Hardwick* in the Eleventh Circuit and *Baker* in the Fifth Circuit Court of Appeals provided the impetus for the Supreme Court to address the sodomy issue and clarify the constitutional limits within which a state may regulate private consensual sexual intimacy.

III. HARDWICK'S CHALLENGE TO GEORGIA'S SODOMY STATUTE

A. *Facts*

On August 3, 1982, a police officer went to the Atlanta home of Michael Hardwick to serve him a warrant for failing to pay a fine for drunkenness.⁶⁸ When a roommate let the officer into the house, he observed Hardwick and another man having sex in Hardwick's bedroom.⁶⁹ The officer arrested Hardwick for violating Georgia's sodomy law.⁷⁰

Georgia's sodomy statute states: "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."⁷¹ Convictions are punishable by imprisonment for not less than one year nor more than twenty years.⁷²

Hardwick's case was heard in the Atlanta Municipal Court, and he was bound over to Fulton Superior Court.⁷³ The District Attorney did not present the case to the grand jury, and he formally stated that he would not do so unless further evidence developed.⁷⁴

On February 14, 1983, Hardwick and John and Mary Doe filed a complaint in the United States District Court for the Northern District of Georgia against Georgia Attorney General Michael Bowers, Fulton County District Attorney Lewis Slaton, and Atlanta Public Safety Commissioner George Napper.⁷⁵ The plaintiffs sought a judgment declaring Georgia's sodomy statute unconstitutional in so far as it makes private

66. Brief for Appellant at 2, 5, *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985) (No. 83-8378). The court relied on *Doe v. Commonwealth's Attorney* in foreclosing Hardwick's claim.

67. *Hardwick*, 760 F.2d at 1211.

68. Note, *supra* note 40.

69. *Id.* at 336-37.

70. *Hardwick*, 760 F.2d at 1204.

71. GA. CODE ANN. § 16-6-2 (1984).

72. *Id.*

73. Brief, *supra* note 66, at 4.

74. *Id.*

75. *Id.* at 2.

consensual sodomy between adults a crime.⁷⁶ Hardwick alleged that he regularly engages in private homosexual acts, and because of his desire to do so in the future, is in imminent danger of arrest, prosecution and imprisonment.⁷⁷ Plaintiffs John and Mary Doe, a married couple, alleged that the statute applied equally to homosexuals and heterosexuals and that they were deterred from engaging in certain sexual activities proscribed by the statute.⁷⁸

In April 1983, the district court judge granted the defendants' motions to dismiss for failure to state a claim upon which relief may be granted.⁷⁹ The court ruled that the Does had no justiciable claim⁸⁰ and that Hardwick's arguments were foreclosed by the Supreme Court's summary affirmation of the validity of Virginia's sodomy statute in *Doe v. Commonwealth's Attorney*.⁸¹

After the plaintiffs' motion to reconsider was denied, they filed notice of appeal on May 19, 1983.⁸²

B. *The Court of Appeals decision*

Hardwick argued strenuously that the lower court erred in relying on *Doe v. Commonwealth's Attorney* to bar his claim.⁸³ Hardwick contended that a summary affirmation merely reflects the Court's concurrence with the result reached below and not necessarily the basis for the result.⁸⁴ Hardwick distinguished *Doe* on its facts, pointing out that the plaintiffs in *Doe* had never been arrested and showed no evidence of imminent threat of harm.⁸⁵ Hardwick contended that doctrinal developments occurring since *Doe* indicate that *Doe* should be given little if any weight.⁸⁶ Hardwick referred to several cases in which the issue of private consensual homosexual conduct had been addressed⁸⁷ but noted that the Supreme Court had yet to definitively decide the question.

The court of appeals agreed with Hardwick and construed *Doe* as not controlling in this case.⁸⁸ The court pointed out two actions of the Supreme Court which demonstrated that the sodomy issue remained un-

76. *Id.*

77. *Id.* at 4.

78. *Id.* at 5.

79. *Id.* at 2.

80. *Id.* at 5.

81. *Id.*

82. *Id.* at 3. The court of appeals affirmed that the Does had no standing and ruled that Hardwick did, reversing and remanding the dismissal as to Hardwick. The issue of standing is not the focus of this note. For the court of appeals' discussion of the standing issue, see 760 F.2d at 1204-07.

83. Brief, *supra* note 66, at 12-19.

84. *Id.* at 12-13.

85. *Id.* at 13-14.

86. *Id.* at 17.

87. *Id.* at 17-19. See decisions discussed in part II of this note.

88. *Hardwick*, 760 F.2d at 1208.

settled. First, the Court commented in *Carey v. Population Services International*⁸⁹ that it had “not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults.”⁹⁰ The *Hardwick* court stated that the *Carey* footnote clearly encompassed private consensual sodomy.⁹¹ Second, in dismissing the writ in *New York v. Uplinger*⁹² after considering the briefs and hearing oral argument,⁹³ the Supreme Court remarked that *Uplinger* was an “inappropriate vehicle” for resolving the ‘important constitutional issues’ raised by the parties,⁹⁴ and that the Court was concerned by the petitioner’s decision not to challenge *Onofre*⁹⁵ which weighed heavily in the *Uplinger* decision.⁹⁶

Next, plaintiff Hardwick contended that a fundamental right of privacy extends to private sexual conduct between consenting adults, including homosexuals.⁹⁷ Hardwick argued that the logic of the decisions reached in *Onofre* and by the district court in *Baker* “pushes inexorably to the conclusion . . . that the constitutional right of privacy extends to . . . homosexuals.”⁹⁸ Hardwick also contended that homosexuals are a socially disfavored group deserving of the strict standard of evaluating governmental interests.⁹⁹ In the alternative, Hardwick argued, he must be afforded an opportunity to show that Georgia’s sodomy statute is not reasonably or rationally related to the stated interest of public morality.¹⁰⁰

The court of appeals again agreed with Hardwick, noting that “[t]he Constitution prevents the states from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society.”¹⁰¹ The court refused to limit “strict” constitutional protection to intimate associations with a procreative purpose¹⁰² or to the marriage relationship.¹⁰³ “The benefits of marriage can inure to individuals

89. 431 U.S. 678 (1977).

90. *Id.* at 688 n.5; see also *Hardwick*, 431 U.S. at 688 n.5.

91. *Hardwick*, 760 F.2d at 1209.

92. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514, *cert. granted*, 464 U.S. 812 (1983), *cert. dismissed*, 467 U.S. 246 (1984).

93. *Uplinger*, 467 U.S. at 246 (invalidating New York statute prohibiting loitering for soliciting deviate sexual intercourse after *Onofre* invalidated the sodomy statute).

94. *Hardwick*, 760 F.2d at 1210 (quoting *Uplinger*, 467 U.S. at 233-34).

95. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

96. *Hardwick*, 760 F.2d at 1210.

97. Brief, *supra* note 66, at 20-24.

98. *Id.* at 22.

99. *Id.* at 23.

100. *Id.* at 25-26.

101. *Hardwick*, 760 F.2d at 1211.

102. *Id.*

103. *Id.* at 1212.

outside the traditional marital relationship. For some, the sexual activity in question here serves the same purpose as the intimacy of marriage."¹⁰⁴ The court of appeals carried this further in stating that the activity in which Hardwick hopes to engage is "quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation,"¹⁰⁵ protected by the ninth amendment¹⁰⁶ and "the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment."¹⁰⁷ The court heeded the fact that Hardwick planned to carry out his sexual activities in private.¹⁰⁸ "[T]he constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home."¹⁰⁹

The court of appeals reversed the lower court's decision and remanded the case for trial, requiring the state to show a compelling interest in regulating sexual behavior and that the sodomy law "is the most narrowly drawn means of safeguarding that interest."¹¹⁰ Georgia officials appealed.¹¹¹

C. *The Supreme Court decision*

1. Introduction.

One commentator stated that for the Supreme Court "[t]o fully reject the *Hardwick* decision, [the Court] would not only have to turn away from twenty years of its own efforts to develop principled privacy, but would have to encourage lower courts from engaging in principled efforts as well."¹¹² The *Hardwick v. Bowers* controversy was described as follows:

On one level the two sides are arguing about whether the Constitution protects "traditional, moral values" as established by state legislatures and supported by historical inquiry, or whether it protects those intimate associations which are of supreme importance in an individual's life and which the individual has freely chosen. On another level, they are argu-

104. *Id.* The court openly acknowledged the resemblance between homosexual conduct and the intimate association of marriage.

105. *Id.*

106. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

107. *Hardwick*, 760 F.2d at 1212. "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . ." (U.S. CONST. amend. XIV, § 1)

108. *Hardwick*, 760 F.2d at 1212.

109. *Id.* The court relied in part upon *Stanley v. Georgia*, 394 U.S. 557 (1969) in which the Supreme Court held that a state may not make the private possession of obscene material a crime. "The absence of any public ramifications in this case plays a prominent part in our consideration of *Hardwick's* legal claim." *Hardwick*, 760 F.2d at 1212.

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

111. *Bowers*, 106 S. Ct. at 2843.

112. Note, *supra* note 40, at 341.

ing about whether, in a free and pluralistic society, private morality is to be determined by the majority or the individual.¹¹³

2. The majority opinion.

Justice White delivers the rather straightforward opinion of the Court which reverses the court of appeals decision. He states the issue as: [W]hether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidate the laws of the many states that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the court's role in carrying out its constitutional mandate.¹¹⁴

In addressing the issue as stated, Justice White emphasizes five main points:

(1) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy.

(2) The Court will not pronounce as fundamental the right to engage in homosexual sodomy.

(3) The Court will resist expanding its authority as well as the substantive reach of the due process clause of the fifth and fourteenth amendments, particularly in redefining fundamental rights.

(4) Sodomy is illegal conduct whether or not it is committed in the privacy of one's home.

(5) Majoritarian opinion regarding the immorality of homosexuality is an adequate rational basis for the sodomy statute.

Hardwick attempted to have the zones of privacy expanded to include consensual homosexual activity but the Court refused to extend privacy that far. The Court identifies previous privacy cases as limited to matters of child rearing and education,¹¹⁵ family relationships,¹¹⁶ procreation,¹¹⁷ marriage,¹¹⁸ contraception,¹¹⁹ and abortion.¹²⁰ "[W]e 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 that is asserted in this case."¹²¹ The Court finds no connection between family, marriage or procreation and homosexual activity,¹²² and any claim that the previous cases constitutionally protect any private

113. Goldstein, *The Georgia Sodomy Case: When May a State Criminalize Bedroom Activities?*, Preview No. 12, at 350 (1986).

114. *Bowers*, 106 S. Ct. at 2843.

115. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

116. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

117. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

118. *Loving v. Virginia*, 388 U.S. 1 (1967).

119. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

120. *Roe v. Wade*, 410 U.S. 113 (1973).

121. *Bowers*, 106 S. Ct. at 2844.

122. *Id.*

consensual sexual conduct is unsupportable.¹²³

The Court is unwilling to resort to the substantive content of the due process clauses of the fifth and fourteenth amendments to "subsum[e] rights that to a great extent are immune from federal or state regulation or proscription."¹²⁴ The Court states that it strives to assure the public that announcing rights not identifiable in the Constitution involves more than the Justices' imposing their value choices on the states and the federal government,¹²⁵ and that this is accomplished by identifying what rights qualify for heightened judicial protection.¹²⁶ Rights qualifying for higher levels of judicial protection are "those fundamental liberties that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed.'"¹²⁷ Fundamental liberties may also be described as those which are "deeply rooted in this Nation's history and tradition."¹²⁸ The Court holds that the right to engage in consensual homosexual sodomy fits neither formulation.¹²⁹ The Court notes that proscriptions of homosexuality date back to the ratification of the Bill of Rights and continue to current times, as evidenced by the existence of sodomy statutes in twenty-five states.¹³⁰

"The 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."¹³¹ The Court states that there should be great resistance to expanding the substantive reach of the due process clauses, otherwise the judiciary would be assuming authority to govern the country absent express constitutional authority.¹³²

The Court refuses to extend *Stanley v. Georgia*¹³³ to protect Hardwick's conduct. The Court notes that *Stanley* was firmly grounded in the first amendment¹³⁴ whereas Hardwick had no similar constitutional support.¹³⁵ The Court points out that illegal conduct is not always immunized because it occurs in the privacy of one's home.¹³⁶ The Court is

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

128. *Id.* (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

129. *Bowers*, 106 S. Ct. at 2844.

130. *Id.* at 2844-45.

131. *Id.* at 2846.

132. *Id.*

133. 394 U.S. 557 (1969) (first amendment prohibits conviction for possessing and reading obscene material in the privacy of one's home).

134. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

135. *Bowers*, 106 S. Ct. at 2846.

136. *Id.*

unwilling to approve of private consensual homosexual conduct while leaving adultery, incest, and other deviate sexual acts open to prosecution.¹³⁷

Hardwick asserted that majoritarian sentiment disfavoring homosexuality is an inadequate rational basis for the sodomy law. The Court disagreed, holding that laws are "constantly based on notions of morality."¹³⁸ Hardwick also failed to persuade the Court that majority sentiments viewing sodomy as immoral and unacceptable were adequate grounds upon which to invalidate sodomy statutes in twenty-five states.¹³⁹

Chief Justice Burger concurs in the opinion of the Court, emphasizing the historical proscriptions against sodomy and the rights of states to intervene in this area.¹⁴⁰ In a separate concurrence, Justice Powell notes his agreement that homosexuals have no fundamental right to engage in sodomy.¹⁴¹ Justice Powell implies, by way of dicta, that Hardwick had an eighth amendment claim¹⁴² because of the lengthy prison sentence authorized under the Georgia statute.¹⁴³ Justice Powell notes, however, that Hardwick had not been convicted, and Hardwick failed to raise an eighth amendment issue.

3. The dissents.

Justices Blackmun and Stevens authored separate dissents to the majority opinion.¹⁴⁴ The dissenters present a searching and persuasive argument, posing many issues which the majority did not reach in light of its refusal to find a fundamental right of homosexuals to engage in consensual sodomy.

Justice Blackmun first points out, after a careful review of the statute and the complaint, that the majority distorts the issue of this case.¹⁴⁵ Georgia's sodomy statute was broadened in 1968 to encompass both homosexual and heterosexual activity,¹⁴⁶ and the intrusion into Hardwick's privacy does not depend on his sexual orientation.¹⁴⁷

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 2847.

141. *Id.*

142. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

143. *Bowers*, 106 S. Ct. at 2847. Justice Powell notes that the Georgia statute authorizes imprisonment for up to twenty years for a single consensual act of sodomy.

144. Four Justices joined in the first dissent (Blackmun, Brennan, Marshall and Stevens) while three joined the second dissent (Stevens, Brennan and Marshall). Justice White was joined in the majority opinion by Chief Justice Burger and Justices Powell, Rehnquist and O'Connor.

145. *Bowers*, 106 S. Ct. at 2848.

146. *Id.* at 2849 n.1.

147. *Id.* at 2849.

Second, Justice Blackmun disagrees with the Court's refusal to consider whether Georgia's statute violated the eighth or ninth amendments or the equal protection clause of the fourteenth amendment.¹⁴⁸ Hardwick invoked the ninth amendment in his complaint¹⁴⁹ and relied upon *Griswold*¹⁵⁰ which identifies the ninth amendment as one of the specific constitutional provisions giving life and substance to privacy.¹⁵¹ More importantly, Justice Blackmun contends, Hardwick's complaint should not have been dismissed even if he did not advance eighth or ninth amendment claims or an equal protection claim if there was any ground entitling him to relief.¹⁵² "The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make for a persuasive one."¹⁵³

Justice Blackmun next points out that the Court has previously recognized a privacy interest with reference to certain decisions of individuals and certain places regardless of the activities taking place.¹⁵⁴ As to the decisional aspect, the dissent warns that the reasons why the family receives constitutional protection should not be ignored. "We 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."¹⁵⁵ The ability to define one's identity is central to the concept of liberty and is dependent upon enriching relationships with others.¹⁵⁶

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, 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.¹⁵⁷

Justice Blackmun states that the majority not only refuses to recognize a fundamental right of homosexuals to engage in sodomy, but that the Court actually refuses to recognize a fundamental right of all individuals to control the nature of their intimate associations with others.¹⁵⁸

As to the spatial aspect, Justice Blackmun states that the majority's

148. *Id.*

149. *Id.*

150. 381 U.S. 479 (1965).

151. *Bowers*, 106 S. Ct. at 2849.

152. *Id.* "[T]he court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."

153. *Id.* at 2850.

154. *Id.* at 2850-51.

155. *Id.* at 2851.

156. *Id.*

157. *Id.*

158. *Id.* at 2852.

interpretation of *Stanley v. Georgia*¹⁵⁹ "is symptomatic of [the Court's] overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases."¹⁶⁰ Justice Blackmun notes that *Stanley* was anchored in the fourth amendment rather than entirely in the first amendment as the majority states.¹⁶¹

The right of the people to be secure in their . . . houses . . . is perhaps the most textual of the various constitutional provisions that inform our understanding of the right to privacy . . . indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems . . . to be the heart of the Constitution's protection of privacy.¹⁶²

In addition, Justice Blackmun believes the majority slighted the question of whether Georgia justified its statute and infringed upon citizens' rights.¹⁶³ While the state asserts that the acts proscribed by the statute may have adverse consequences for general public health and welfare, nothing in the record showed the forbidden activity to be physically dangerous either to the participants or to others.¹⁶⁴ Justice Blackmun disagrees that the length of time sodomy has been morally condemned should withdraw the statute from scrutiny by the court.¹⁶⁵ "It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority."¹⁶⁶ Justice Blackmun finds fault with the state's religious justification of the law, stating that religious intolerance is no more a basis for punishment than is race.¹⁶⁷ Georgia's "protecting the public environment" argument in support of the statute is also dismissed by Justice Blackmun who notes that punishing intimate behavior carried out in public cannot dictate how states may regulate intimate behavior carried out in private, intimate places.¹⁶⁸

In his dissent Justice Stevens is concerned that Georgia's statute violates rights of intimate privacies already accorded constitutional protection, resulting in selective enforcement of the law.¹⁶⁹

First, acknowledging that Georgia's law applies equally to homosexuals and heterosexuals, men and women, married and unmarried, Justice Stevens notes that married persons are protected in their decisions con-

159. 394 U.S. 557 (1969).

160. *Bowers*, 106 S. Ct. at 2852.

161. *Id.* at 2852-53.

162. *Id.* at 2853.

163. *Id.*

164. *Id.*

165. *Id.* at 2854.

166. *Id.*

167. *Id.* at 2854-55.

168. *Id.* at 2855.

169. *Id.* at 2857-59.

cerning their physical relationship even when offspring are not intended and that this protection extends to unmarried people as well.¹⁷⁰ Justice Stevens believes that Georgia may not totally prohibit the activity proscribed by the statute in light of privacies previously accorded constitutional protection by the Court.¹⁷¹

Second, the issue of selective enforcement of the law follows from the determination that certain activity proscribed by the statute is constitutionally protected. The statute applies to all sodomy and does not single out homosexuals;¹⁷² moreover, the Georgia Attorney General concedes that the statute would be unconstitutional if applied to a married couple.¹⁷³ Justice Stevens observes that Georgia failed to justify why homosexual sodomy is unacceptable and why the law is selectively applied.¹⁷⁴ Justice Stevens also states that Hardwick's claim was sufficient to withstand a motion to dismiss.¹⁷⁵

Laurence H. Tribe represented Hardwick before the Supreme Court. He later admitted that this was his most painful loss before the Court.¹⁷⁶ Professor Tribe noted that "his major concern [was] not with sodomy per se, but with the right of privacy and the principle of limited government."¹⁷⁷ He questioned whether the decision uprooted the right of privacy, stating that "it seems 'unprincipled' for the Court to 'draw the line at combinations of body parts that the Justices find unpleasant to contemplate.'"¹⁷⁸

IV. CHALLENGES AFTER *BOWERS v. HARDWICK*

While *Bowers* was pending, Oklahoma's crime against nature statute¹⁷⁹ was challenged in *Post v. Oklahoma*.¹⁸⁰ *Post* claimed the statute violated his right to privacy as applied to nonviolent, private, consensual, adult activity; the Oklahoma Court of Appeals agreed.¹⁸¹ The court held that

170. *Id.* at 2857.

171. *Id.* at 2858 (relying on *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

172. *Bowers*, 106 S. Ct. at 2859.

173. *Id.* at 2858 n.10.

174. *Id.* at 2859.

175. *Id.*

176. U.S. Law Week's Constitutional Law Conference, 55 U.S.L.W. 2225, 2227 (Nov. 25, 1986).

177. *Id.*

178. *Id.* at 2226.

179. Oklahoma courts have determined that crimes against nature include unnatural sex acts of copulation between females, cunnilingus, fellatio, and rectal coitus. *Post v. Oklahoma*, 715 P.2d 1105, 1106 n.1 (Okla. Crim. App. 1986).

180. 715 P.2d 1105 (Okla. Crim. App. 1986), *cert. denied*, 55 U.S.L.W. 3249 (Oct. 14, 1986).

181. *Id.* at 1107. The court relied on *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Olmstead v. United States*, 277 U.S. 438 (1928); and *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 974 (1980).

the right of privacy "includes the right to select consensual adult sex partners"¹⁸² and "[e]xercise of this right cannot be proscribed by the State in the absence of a compelling justification."¹⁸³ The court further stated that the natural repugnance for abnormal sexual acts does not justify state regulation of these activities.¹⁸⁴

Homosexuality was not an issue in *Post*.¹⁸⁵ Oklahoma's statute was declared unconstitutional in so far as it bars private consensual oral and anal sex acts between heterosexual adults.¹⁸⁶ In October 1986, the Supreme Court refused to review the decision.¹⁸⁷

Homosexuality was, however, an issue in *Missouri v. Walsh*,¹⁸⁸ in which the Supreme Court of Missouri decided that a man who suggestively touched an undercover policeman must be tried for sexual misconduct.¹⁸⁹ The circuit court had dismissed the charge, holding the statute unconstitutional.¹⁹⁰ Walsh challenged the statute on privacy and equal protection grounds.¹⁹¹

Walsh contended Missouri's law made class distinctions, prohibiting males from sexual activity with males and females from sexual activity with females, but allowing male-female sexual activity.¹⁹² The Missouri Supreme Court disagreed, holding the statute applied equally to men and women "because it prohibits both classes from engaging in sexual activity with members of their own sex."¹⁹³ The court adopted the state's interpretation of the statute, "that it does not criminalize homosexuality, but only homosexual activity."¹⁹⁴ The court noted, however, that the statute does embody a classification based on sexual preference,¹⁹⁵ but that Walsh did not contend he was a member of a group.¹⁹⁶ The court further held that the homosexual classification is outside the present list of suspect classifications as well as "classifications to which the Supreme Court has applied an intermediate level of scrutiny."¹⁹⁷

182. *Post*, 715 P.2d at 1109.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. 55 U.S.L.W. 3249 (Oct. 14, 1986).

188. 713 S.W.2d 508 (Mo. 1986).

189. "A person commits the crime of sexual misconduct if he has deviate sexual intercourse with another person of the same sex." MO. ANN. STAT. § 566.090 (Vernon 1978). "[D]eviate sexual intercourse [is] any sexual act involving the genitals of one person and the mouth, tongue, hand or anus of another person." MO. ANN. STAT. § 566.010 (Vernon 1978).

190. *Walsh*, 713 S.W.2d at 508.

191. *Id.* at 509.

192. *Id.* at 510.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* Suspect classifications include race, national origin and alienage. Intermediate level

The Missouri court relied on *Bowers v. Hardwick*,¹⁹⁸ holding that there was no fundamental right to engage in private consensual homosexual activity and thus no justification for strictly scrutinizing the law.¹⁹⁹ The court then next addressed whether the statute bore a rational relation to a constitutionally permissible objective.²⁰⁰ The court determined that promoting morality is a valid state objective.²⁰¹ The court also recognized a legitimate interest in protecting public health and inhibiting the spread of sexually communicable diseases such as Acquired Immune Deficiency Syndrome (AIDS).²⁰² The court thought it irrelevant that AIDS was not discovered until after the statute was enacted because of other threats to public health related to anal intercourse and oral-genital sex.²⁰³

Walsh's dismissal was reversed and the case was remanded for trial.²⁰⁴ *Walsh* is the first defeat of challenges to state sodomy laws since *Bowers*.²⁰⁵ Sodomy laws in Minnesota, Louisiana and Arizona are currently being challenged.²⁰⁶ One commentator suggests that these cases are likely to be dismissed in the near future.²⁰⁷

V. CONCLUSION

The Supreme Court has effectively denied homosexuals the right to have sexual relations by upholding the constitutionality of Georgia's statute which proscribes private consensual sodomy.

The effect of sodomy statutes is not limited to the denial of sexual contact. Such laws stigmatize homosexuals and perpetuate the "sexual deviant" stereotype of gays.²⁰⁸ Sodomy laws lend support to discrimination against homosexuals in other aspects of their everyday lives.²⁰⁹

Judge Bork commented in *Dronenburg v. Zech*: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected

scrutiny is limited to gender-based classifications, illegitimacy, and children of illegal aliens. The court rejected arguments of the American Civil Liberties Union that homosexuals are a quasi-suspect class. See *Walsh*, 713 S.W.2d at 510-11.

198. 106 S. Ct. 2841 (1986).

199. *Walsh*, 713 S.W.2d at 511.

200. *Id.*

201. *Id.* at 511-12.

202. *Id.* at 512. AIDS was not mentioned explicitly in either *Bowers v. Hardwick* or *Baker v. Wade*. The Missouri Supreme Court appeared willing to openly discuss the health ramifications of homosexual conduct and even noted that the "general promiscuity" characteristic of homosexuals made them more deserving of regulation. See *Walsh*, 713 S.W.2d at 512-13.

203. *Id.* at 512.

204. *Id.* at 513.

205. Reidinger, *Trends in the Law*, 72 A.B.A. J. 78 (1986).

206. *Id.*

207. *Id.*

208. Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 802 (1984) (citation omitted).

209. *Id.* at 802-03.

representatives, not through the ukase of this court.”²¹⁰ Thus, if there is to be any decriminalization of sodomy in the future, efforts should be aimed at those remaining state legislatures which have not repealed their sodomy laws rather than attempting change through the judiciary.

JOAN BRINSON DRESSLER

210. *Dronenburg*, 741 F.2d at 1397.