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Constitutional Law: Right to Privacy: Consensual Sodomous Acts Are Not Protected by the Constitution

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CASENOTE

CONSTITUTIONAL LAW: RIGHT TO PRIVACY: CONSENSUAL SODOMOUS ACTS ARE NOT PROTECTED BY THE CONSTITUTION—*Bowers v. Hardwick*, 106A S. Ct. 2841 (interim ed. 1986).

I. INTRODUCTION

Although not expressly mentioned in the United States Constitution, a constitutional right to privacy has been recognized by the United States Supreme Court.[1] Recently, however, the Court ruled by a narrow margin that the zone of protected conduct does not include private homosexual conduct.[2] *Bowers v. Hardwick* is illustrative of the Court's unwillingness to extend the right to privacy beyond its previously ill-defined parameters. It further suggests a refusal on the part of the Court to extend the zone of privacy for heterosexual activity as well as homosexual activity.[3] This casenote first discusses the history of the right to privacy including its constitutional basis.[4] The casenote then analyzes the Court's rationale for its conclusion in *Bowers*.[5] Finally, the impact of the Court's decision for both homosexuals and heterosexuals is examined.[6]

II. FACTS AND HOLDING

While serving a warrant to Michael Hardwick on August 3, 1982, a police officer observed a man performing an act of fellatio[7] with Hardwick.[8] Both were arrested in Hardwick's home pursuant to section 16-6-2 of the Georgia Code[9] which makes an act of sodomy a criminal

1. *See* Roe v. Wade, 410 U.S. 113, 152–70 (1973).
2. Bowers v. Hardwick, 106A S. Ct. 2841 (interim ed. 1986).
3. Greenhouse, *High Court, 5-4, Says States Have the Right to Outlaw Private Homosexual Acts: Privacy Law and History*, N.Y. Times, July 1, 1986, at 1, col. 4.
4. *See infra* notes 18–34 and accompanying text.
5. *See infra* notes 35–90 and accompanying text.
6. *See infra* notes 103–07 and accompanying text.
7. *See* D. WEST, HOMOSEXUALITY 13 (1967) (defining fellatio as the act of inserting the penis into the partner's mouth).
8. Hardwick v. Bowers, 760 F.2d 1202, 1204 (11th Cir. 1985).
9. GA. CODE ANN. § 16-6-2 (1984). This law provides:

> (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. A

offense punishable by a maximum of twenty years in prison. Subsequently, Hardwick brought suit in federal district court contending that the statute was repugnant to the United States Constitution.[10] The district court dismissed the matter for failure to state a claim upon which relief could be granted.[11] The United States Court of Appeals for the Eleventh Circuit reversed, holding that the Georgia statute violated Hardwick's right to privacy as protected by the ninth and fourteenth amendments of the United States Constitution.[12]

The United States Supreme Court granted certiorari to hear the case.[13] After a brief review of the history of cases dealing with the right to privacy,[14] the Court found 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."[15] Relying on the fact that homosexual conduct of this nature has been proscribed for many years, the Court rejected respondent's claim that a fundamental right to engage in sodomy exists, labeling such a claim "facetious."[16] Subsequently, the Court reversed the Court of Appeals for the Eleventh Circuit's ruling.[17]

III. Background

As early as 1891, a right of personal privacy was recognized by the United States Supreme Court.[18] The right to privacy in its most elementary form is the freedom from unjustifiable governmental intrusions into an individual's most intimate affairs.[19] It is an important

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person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

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

10. *Bowers*, 106A S. Ct. at 2842.

11. *Id.*

12. *Bowers*, 760 F.2d at 1212.

13. *Bowers*, 106A S. Ct. at 2843.

14. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973) (addressing abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (addressing contraception); Loving v. Virginia, 388 U.S. 1 (1967) (addressing marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (addressing contraception); Prince v. Massachusetts, 321 U.S. 158 (1944) (addressing family relationships); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (addressing procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (addressing child rearing and education).

15. *Bowers*, 106A S. Ct. at 2844.

16. *Id.* at 2846.

17. *Id.* at 2847.

18. *See* Union Pac. R.R. v. Botsford, 141 U.S. 250, 251 (1891) (holding that a court cannot order plaintiff in a personal injury case to submit to a surgical examination in advance of trial).

19. Stanley v. Georgia, 394 U.S. 557, 564 (1969) (reversing a conviction for knowing pos-

right, inherent in our society, that protects both adults and minors.[20] However, over the years, the areas protected by this constitutional right have been ambiguously defined, perhaps because the Constitution does not expressly mention the right to privacy or the actions protected under its purview.[21] In an effort to find a source for the right to privacy, the United States Supreme Court has declared that it emanates from a variety of constitutional provisions, including the first amendment's guarantee of freedoms of religion, speech, press, and assembly;[22] the fourth amendment's guarantee of freedom from unreasonable searches and seizures;[23] the fifth amendment's due process clause;[24] the ninth amendment's protection of those rights retained by the people;[25] and the fourteenth amendment's due process clause;[26] as well as the penumbras of the Bill of Rights as outlined in *Griswold v. Connecticut*,[27] giving individuals a constitutional right to privacy which emanates from the peripheral rights of the first, third, fourth, fifth, and ninth amendments.[28] Regardless of how the source of the right to privacy has been defined, the areas protected by this right have been expanded by the Court over the years.

This expansion of the right to privacy is thwarted by *Bowers* at a time when a variety of personal decisions are protected by the Court. Among those areas that have received protection from governmental intrusion are decisions regarding: marriage;[29] contraception;[30] procrea-

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session of obscene material, the Court holding the first amendment proscribes making possession of obscene material a crime).

20. Planned Parenthood v. Danforth, 428 U.S. 52, 53–54 (1976) (In extending the right to privacy to minors, the Court held a state law unconstitutional which required parental consent to an abortion during the first 12 weeks of pregnancy by a single woman under 18 years of age.).

21. *See* Roe v. Wade, 410 U.S. 113, 152 (1973).

22. *See, e.g., Stanley*, 394 U.S. at 565, 568.

23. Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (careful search of a person's clothing by a police officer *not* violating the person's rights under the fourth amendment); Katz v. United States, 389 U.S. 347, 350 (1967) (evidence obtained by warrantless intrusions by the FBI with electronic devices *violating* the fourth amendment); Boyd v. United States, 116 U.S. 616, 627–28 (1886) (law requiring defendant to produce private papers for trial or else assume a confession on behalf of that defendant violated the fourth and fifth amendments).

24. *Roe*, 410 U.S. at 152.

25. Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (a state law proscribing the distribution of contraception information violating the constitutional right to privacy).

26. *Meyer*, 262 U.S. at 397–99 (reversing the conviction of a teacher who taught German and thus violated a state law prohibiting the teaching of foreign languages to children).

27. 381 U.S. 479 (1965).

28. *Griswold*, 381 U.S. at 483–85.

29. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding a state law, prohibiting marriage between persons solely on the basis of race, violated the fourteenth amendment).

30. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (considering that distribution of contraceptives to married persons is permitted, the Court held unconstitutional a law proscribing the distribution of contraceptives to unmarried persons as violative of constitutional right to privacy

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tion;[31] family relationships;[32] child rearing and education;[33] and abortion.[34] What areas will be protected by the right to privacy in the future? What areas will be denied protection? An understanding of the areas of conduct that are protected by the right to privacy has become much more difficult as a result of the *Bowers* decision, and the *Bowers* opinion provides little guidance in answering the questions that it raises.

IV. ANALYSIS

In reaching its decision that the Georgia statute[35] was constitutional insofar as it criminalized acts of consensual homosexual sodomy,[36] the United States Supreme Court was confronted with several important issues. Initially, the Court discussed whether the conduct in this case bore any resemblance to the actions protected by the constitutional right to privacy in previous cases.[37] The Court also inquired as to whether the protection of morality was an adequate basis for establishing the law.[38] Finally, the Court considered whether the right to engage in consensual, homosexual sodomy is implicit in the concept of ordered liberty.[39]

A. The Court's Narrow Perspective

The issue, as posed by the majority, "is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[40] Although even a cursory glance at section 16-6-2 of the Georgia Code[41] makes it apparent that heterosexuals as well as homosexuals are proscribed from committing acts of sodomy, the Court chose not to discuss

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and equal protection rights).

31. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541–42 (1942) (invalidating Oklahoma's Habitual Criminal Sterilization Act which provided for sterilization after a third conviction for a felony involving moral turpitude).

32. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (upholding a statute making it a crime for a male under 18 or a female under 12 years of age to sell periodicals in public places despite religious convictions; also holding that family life cannot be disrupted by the state without a substantial justification).

33. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (sustaining a challenge by private schools to a state law requiring children to attend public schools).

34. *Roe,* 410 U.S. at 154.

35. GA. CODE ANN. § 16-6-2 (1984).

36. Bowers v. Hardwick, 106A S. Ct. 2841, 2843 (interim ed. 1986).

37. *Id.* at 2843–44.

38. *Id.* at 2846.

39. *Id.*

40. *Id.* at 2843.

41. GA. CODE ANN. § 16-6-2 (1984).

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the law as it applies to heterosexuals.[42]

As Justice Blackmun cogently disputed this limited focus in his dissenting opinion: "[Michael Hardwick's] claim that § 16-6-2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation."[43] While it is the practice of the Burger Court to draw its decisions narrowly,[44] ultimately this decision indicates both the Supreme Court's and "Georgia's apparent willingness to enforce against homosexuals a law [which] it seems not to have any desire to enforce against heterosexuals."[45]

B. The Court's Constitutional Analysis

1. Comparison with Other Privacy Cases

The Supreme Court has established that the right to privacy is a fundamental right protected by the United States Constitution.[46] In order for a state legally to intrude upon a person's fundamental rights, the intrusive law must be supported by a necessary and compelling state interest.[47] If no fundamental right is involved, the intrusive law need only be rationally related to a legitimate state goal.[48] Therefore, the first question before the Court in *Bowers* was whether the Georgia statute violated Michael Hardwick's fundamental right to privacy. In making its decision, the Court examined the conduct of Michael Hardwick and compared it with activities[49] which the Court has found to be protected by the right to privacy.[50]

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42. Just five months after its decision in *Bowers*, the Supreme Court denied certiorari of an Oklahoma criminal case which held that its "crime against nature" statute, OKLA. STAT. tit. 21, § 886 (1981), was unconstitutional insofar as it bars private acts of oral and anal sex between heterosexual adults. Oklahoma v. Post, 715 P.2d 1105 (Okla. 1986), *cert. denied*, 55 U.S.L.W. 3258 (U.S. Oct. 14, 1986) (No. 85-2071). The Supreme Court obviously chooses to enforce sodomy statutes against homosexuals but not heterosexuals.

43. *Bowers*, 106A S. Ct. at 2849 (Blackmun, J., dissenting).

44. *CBS Special: The Burger Years* (CBS television broadcast, July 9, 1986) (hosted by Bill Moyers).

45. *Bowers*, 106A S. Ct. at 2849 (Blackmun, J., dissenting) (The statute itself does not differentiate between acts of homosexual sodomy and heterosexual sodomy.).

46. *Griswold*, 381 U.S. at 484–86.

47. *Id.*

48. Railway Express Agency v. New York, 336 U.S. 106, 110 (1949). The Court upheld a New York regulation providing that

> "[N]o person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

Id. at 107.

49. *See* cases cited *supra* note 14.

50. *Bowers*, 106A S. Ct. at 2843–44.

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The Supreme Court distinguished Mr. Hardwick's conduct from other protected conduct.[51] The Court's exegesis in making this determination can best be described as short and perfunctory: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand has been demonstrated, either by the Court of Appeals [in past cases] or by respondent [today]."[52] The Supreme Court, however, failed to provide tangible support to show how Hardwick's activities differed from those activities which have been protected by the right to privacy. An article in the *Atlanta Constitution* summed up the problem:

> The facts of the case are not especially illuminating. . . . Hardwick was apprehended not in a lover's lane or public park, but in his own bedroom. Furthermore, the arresting officer discovered the crime only by happenstance while delivering a routine warrant. To most fair-minded people, for whom the privacy of the bedroom is the appropriate setting for sexual intimacies, the state's interest can hardly be obvious. There, of all places, we should be safe from prying eyes.[53]

Furthermore, there are significant similarities between the situation in *Bowers* and those found in previous Supreme Court cases in which activities were found to be protected by the right to privacy. In *Boyd v. United States*,[54] intimate endeavors involving "the sanctity of a man's home and the privacies of life"[55] warranted protection. In *Griswold*,[56] the idea of bedroom searches for signs of contraceptives was described by the Court as "repulsive."[57] It is difficult to discern how the Court can distinguish between the use of contraceptives within the privacy of one's bedroom and the choice of sexual practices within the privacy of one's bedroom. After examining the similarities between these cases, one may easily conclude that the Supreme Court arbitrarily distinguished Hardwick's conduct from previously protected activities, without the necessary support to reach its conclusion.

Approximately one-half of the states have laws which criminalize consensual sexual activity between adults.[58] In a recent New York

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51. *Id.* at 2844.

52. *Id.*

53. Swanson, *Seeds of Intolerance Nourished by Court's Sodomy Ruling*, Atlanta Const., July 16, 1986, at A15, col. 1.

54. 116 U.S. 616 (1886).

55. *Id.* at 630.

56. 381 U.S. 479 (1965).

57. *Id.* at 485.

58. *See, e.g.*, ALA. CODE § 13A-6-65 (1975); ARIZ. REV. STAT. ANN. § 13-1411 (Supp. 1986); ARK. STAT. ANN. § 41-1813 (1975); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ANN. § 800.02 (West 1976); GA. CODE ANN. § 16-6-2 (1984); IDAHO CODE § 18-6605 (Supp. 1986); KAN. STAT. ANN. § 21-3505 (1974); KY. REV. STAT. ANN. § 510.100 (Bobbs-Merrill 1975); LA.

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Court of Appeals decision,[59] the rationale for overruling a sodomy statute similar to the Georgia law at issue in *Bowers* was found controlling in the very cases which the *Bowers* Court rejected as irrelevant:

> In light of these decisions, protecting under the cloak of the right of privacy individual decisions 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.[60]

2. The Concept of Ordered Liberty

In deciding whether Michael Hardwick's conduct was constitutionally protected, the United States Supreme Court also referred to the standard articulated in *Palko v. Connecticut*,[61] examining whether Hardwick's act of fellatio was "implicit in the concept of ordered liberty."[62] In answering this question, the Court analyzed past laws and tradition as well as any "ancient roots"[63] which prohibited acts of sodomy.

The Court curtly labeled respondent's claim as meritless,[64] without considering that history and tradition are not always an accurate measure of what should be constitutionally protected. "[T]here is a kind of fallacy in resorting to the presumed wisdom of the ancients."[65] Certainly not all of history's traditions are viable examples that should be emulated today. Worth remembering are the traditions denying women

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REV. STAT. ANN. § 14:89 (West Supp. 1982); MD. CODE ANN. art. 27, §§ 553–554 (1982); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1970); MICH. COMP. LAWS ANN. § 750.158 (West 1968); MINN. STAT. ANN. § 609.293 (West Supp. 1987); MISS. CODE ANN. § 97-29-59 (1972); MONT. CODE ANN. § 45-5-505 (1985); NEV. REV. STAT. § 201.190 (1986); N.C. GEN. STAT. § 14-177 (1986); OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 1987); R.I. GEN. LAWS 11-10-1 (Supp. 1986); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-2-612 (1982); TEX. PENAL CODE ANN. § 12.01 (Vernon 1974); UTAH CODE ANN. § 76-5-403 (Supp. 1986); VA. CODE ANN. § 18.2-361 (1982); WIS. STAT. ANN. § 944.17 (West Supp. 1986).

59. 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).

60. *Id.* at 488, 415 N.E.2d 936 at 940–41, 434 N.Y.S.2d at 951 (footnote omitted). For cases relied on by the *Onofre* court, see cases cited *supra* note 14.

61. 302 U.S. 325–26 (1937).

62. *Bowers*, 106A S. Ct. at 2844.

63. *Id.*

64. *Id.* at 2844–45 (The Court pointed out that sodomy was prohibited at common law and that all of the states outlawed it until 1961.).

65. Stengel, *Sex Busters*, TIME, July 21, 1986, at 12, 17.

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and blacks the right to vote;[66] permitting whites to enslave blacks;[67] and preventing whites from marrying blacks.[68] These customs were rooted in our country's tradition and laws but today are prohibited as draconian actions of our primitive past.[69] As author John Ely so eloquently opined: "There are, however, serious theoretical problems with tradition as a source of constitutional values. Its overtly backward-looking character highlights its undemocratic nature: it is hard to square with the theory of our government the proposition that yesterday's majority, assuming it was a majority, should control today's."[70] From a constitutional perspective, "it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."[71] This, however, is exactly what the *Bowers* Court did.

In ruling upon one traditional prohibition, the Court fails to consider a more fundamental tradition and "disregard[s] the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."[72] As evidenced by the majority opinion in *Stanley v. Georgia*:[73]

> 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 satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.[74]

In sum, the Supreme Court used traditional moral judgment to dispose of Michael Hardwick's ability to determine what conduct may be pursued in the privacy of his home.

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66. U.S. CONST. art. II, § 1 (not expressly giving women or blacks the right to vote).

67. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (Since slaves were looked upon as property, the United States Congress' Mississippi Compromise was declared to be an unconstitutional violation of an individual's right to take his own property into the newly settled territories.).

68. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

69. *See id.* at 12 (invalidating statutes preventing marriages between persons solely on the basis of race); U.S. CONST. amend. XIX (giving women the right to vote); U.S. CONST. amend. XV (giving blacks the right to vote); U.S. CONST. amend. XIII, § 1 (prohibiting slavery).

70. J. ELY, DEMOCRACY AND DISTRUST 62 (1980).

71. *Id.* at 69.

72. Payton v. New York, 445 U.S. 575, 601 (1980).

73. 394 U.S. 557 (1969).

74. *Id.* at 564 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

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C. *The Purpose of the Law*

1. Morality

In the alternative, the respondent, Michael Hardwick, argued that even if his actions were not fundamentally protected by the Constitution, the purpose of the law was not supported by a rational basis.[75] The question in this analysis is whether the means utilized by the law are rationally related to the end that is sought to be attained.[76] Sodomy laws find their viability within the scope of the police power of the state, which protects the health, safety, welfare, and morality of society.[77] Hardwick contended that Georgia's purported basis for the law, to protect the morality of its citizens, was not adequate.[78] The Court dismissed respondent's claim: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[79] It is true that both good and bad laws are based upon "notions of morality;"[80] it is incomprehensible that such a fundamental privacy question should be subordinate to state moral determinations apparently because of the weight of the courts' dockets.

The Court's decision to leave questions of sodomy laws to the states is not without support.[81] History has shown that sodomy has long been viewed as an unnatural act against man and God.[82] It was described as "detestable and abominable"[83] by the Greeks and the Romans and is proscribed by the Bible.[84] The original thirteen states prohibited acts of sodomy,[85] and today twenty-four states outlaw such conduct.[86] The history of societal prohibitions is long, but to justify a law merely by tradition and the *bare assertion* that it protects the morality of society is a gross injustice.

The Supreme Court accepts Georgia's assertion that concepts of

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75. *Bowers*, 106A S. Ct. at 2846.

76. *Railway Express*, 336 U.S. at 110.

77. *See, e.g.*, Hoke v. United States, 227 U.S. 308, 320–23 (1913) (upholding the Mann Act prohibiting the transportation of women in interstate commerce for immoral purposes).

78. *Bowers*, 106A S. Ct. at 2846.

79. *Id.*

80. *Id.*

81. *See, e.g.*, Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (rejecting the idea that private homosexual activity between consenting males is protected by the constitutional right to privacy); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975) (ruling that Virginia's law was constitutional in proscribing sodomous acts of consenting males in private).

82. Barton v. State, 79 Ga. App. 380, 382, 53 S.E.2d 707, 710 (1949).

83. *Id.*

84. *Genesis* 19:1–35.

85. Greenhouse, *Privacy Law and History*, N.Y. Times, July 1, 1986, at A19, col. 4.

86. *Id. See supra* note 58.

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morality are protected by this statute. Yet, "[t]he Court does not give reasons, or respond to the serious arguments on the other side, or explain why the Government's invocation of 'morality' is deemed sufficient here . . . ."[87] What the Georgia legislature has accomplished and the Supreme Court has approved is to impose its concept of private morality upon its citizens. As Justice Craven once stated: "It is dangerous to withdraw from any citizen the protection of the Constitution because he or she is amoral, immoral or just plain nasty."[88]

The Supreme Court in *Bowers* has denied Michael Hardwick his right to engage in private intimate actvity free from governmental interference, despite the previously asserted argument that "socially condemned activity, excepting demonstrable external effect, is and was intended by the Constitution to be beyond the scope of state regulation when conducted in the privacy of the home."[89] The Court did not require any proof of injurious effect as a result of Michael Hardwick's conduct; it simply accepted the morality rationale.[90]

2. Harmful Effects of Sodomy

Though the *Bowers* Court failed to elucidate the harmful effects of sodomy, the New York court in *People v. Onofre*[91] discussed, in depth, if and how consensual sodomy between adults harmed society.[92] In *Onofre*, three goals were posited to support the prohibition of sodomy: (1) to "protect the institution of marriage,"[93] (2) to "uphold public morality,"[94] and (3) to "prevent physical harm which might otherwise befall the participants."[95] After careful consideration, the *Onofre* court held that "there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct."[96] It would seem that the *Bowers* Court's reluctance to analyze this question stems from the probability that society is *not* injured by sodomous conduct. The Georgia legislature and the Supreme Court, absent a showing of any harm causally related to sodomy that would establish a state interest,

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87. Gerwirtz, *The Court Was 'Superficial' in the Homosexualty Case*, N.Y. Times, July 8, 1986, at A21, col. 2.

88. Lovisi v. Slayton, 539 F.2d 349, 355 (4th Cir. 1976) (Craven, J., dissenting).

89. *Doe*, 403 F. Supp. at 1205 (Merhige, J., dissenting).

90. *Bowers*, 106A S. Ct. at 2846.

91. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

92. *Id.* at 488-91, 415 N.E.2d at 938-43, 434 N.Y.S.2d at 951-53.

93. *Id.* at 488-89, 415 N.E.2d at 941, 434 N.Y.S.2d at 951.

94. *Id.*

95. *Id.*

96. *Id.* at 490, 415 N.E.2d at 941, 434 N.Y.S.2d at 952.

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have permitted a law to stand based on no more than personal notions of morality.

D. Individuality

Historically, certain intimate decisions have been protected by the Constitution as personal actions secure from governmental interference.[97] Protecting individuality was certainly one of the goals of our Constitution. Variation and individuality breed strength and independence for America. It has long been settled that open debate and freedom of speech challenges our static government and provides vitality to our democracy.[98] This process is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keat's poems or Donne's sermons."[99] Just as in speech "one man's vulgarity is another's lyric,"[100] so too in sex one man's horror is another's fulfillment. "Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[101] As phrased in *Roe v. Wade*: "[The Constitution] is made for 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 upon the question whether statutes embodying them conflict with the Constitution of the United States."[102]

E. The Impact of Bowers

The impact of the *Bowers* decision is clear for homosexuals—increased discrimination which may be reflected in increased problems involving housing, employment, child custody rights, the police, and the court system.[103] The impact for those supporting homosexual rights will be a shift in concentration from the national level to a local one in order to strike down laws which encroach upon their freedoms.

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97. Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984) (upholding a Minnesota statute prohibiting sex discrimination in a place of public accommodation).

98. New York Times v. Sullivan, 376 U.S. 254, 270 (1974) (Frankfurter, J., dissenting) (Under first and fourteenth amendments, the state cannot award damages to a public official for defamatory falsehood regarding his conduct unless actual malice is proven.).

99. Winters v. New York, 333 U.S. 507, 528 (1948) (state's right to proscribe the distribution of obscene magazines).

100. Cohen v. California, 403 U.S. 15, 25 (1971) (holding that the state cannot, consistently with the first amendment, make the display of the words "Fuck the Draft" a criminal offense).

101. O'Conner v. Donaldson, 422 U.S. 563, 575 (1975) (addressing the constitutional right to liberty of a patient confined to a Florida state mental hospital for nearly 15 years).

102. *Roe*, 410 U.S. at 117 (brackets in original) (quoting Justice Holmes' vindicated dissent in Lochner v. New York, 198 U.S. 45, 76 (1905)).

103. *See* Swanson, *supra* note 53, at A15, col. 4.

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Homosexuals are not, however, the only class of persons affected by *Bowers*. Although the Does, a heterosexual couple, were found not to have standing to sue,[104] the Supreme Court's unwillingness to decide if Georgia's law was constitutional as applied to heterosexuals leaves undisturbed similar laws regarding heterosexuals. In practical terms, however, the ability of the state to enforce sodomy laws is limited.[105]

Police departments across the nation obviously have more pressing matters to attend to than investigating the sexual habits of citizens. Questions arise not only as to who will enforce the law but also as to how it will be enforced. It can safely be said that the police of our country have no method or plan to eradicate this behavior nor any strong desire to do so.[106] The real issue then becomes how this decision will affect future privacy cases. Absent any opprobrious impact that may occur to the sex lives of heterosexuals, this decision may serve to have a profound effect on future privacy cases. In light of the change in mood indicated by *Bowers*, the outcome of future decisions regarding abortion, divorce, contraception, and the rights of minorities must now be in question.[107]

V. CONCLUSION

In *Bowers v. Hardwick*,[108] the United States Supreme Court has thwarted the expansion of the right to privacy.[109] In an effort to protect traditions[110] and in the interest of morality,[111] the Court has concluded that private, consensual sodomy between homosexuals is not immune from governmental interference.[112] The ability of courts to draw determinative guidelines from *Bowers* for future privacy questions has been complicated by the Supreme Court's brief analysis, which fails adequately to distinguish Hardwick's conduct from previously protected actions.[113] The inadequacies of the decision can only exacerbate its impact; yet, the Court's opinion stands as the supreme authority which will affect the personal lives of many Americans for years to come.

Shaun Andrew Roberts

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104. Hardwick v. Bowers, 760 F.2d 1202, 1204–07 (11th Cir. 1985).
105. *Gays Fear Effects of Sodomy Ruling*, Dayton Daily News, July 1, 1986, at 6, col. 1.
106. *Id.*
107. *See* Swanson, *supra* note 53, at A15, col. 3.
108. 106A S. Ct. 2841 (interim ed. 1986).
109. *See supra* notes 46–74 and accompanying text.
110. *Id.*
111. *See supra* notes 75–90 and accompanying text.
112. *Bowers*, 106A S. Ct. at 2847.
113. *See supra* notes 46–60 and accompanying text.

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