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NOTES

Dronenburg v. Zech: The Wrong Case for Asserting A Right of Privacy for Homosexuals

In 1965 the Supreme Court decided *Griswold v. Connecticut*¹ and opened the courts to litigation over constitutional protection for a right of privacy.² As subsequent cases extended the right of privacy to new areas of human activity,³ the parameters of the doctrine grew with no clear bounds.⁴ Advocates of homosexual rights seized on this unstructured development⁵ as a promising constitutional foundation on which to anchor protection for homosexual individuals throughout society,⁶ only to be disappointed in their early efforts.⁷

In the armed services homosexual persons faced the most rigid institutional discrimination.⁸ Prior to 1973 most challenges to the military's prohibition of homosexuality involved individuals who were not admitted homosexuals and whose cases turned on procedural questions.⁹ More recent attacks have claimed constitutional protection for persons admitting homosexual preference or conduct.¹⁰ These attacks have had limited success;¹¹ most courts point to the spe-

1. 381 U.S. 479 (1965).

2. *Notes On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973) [hereinafter cited as *Notes on Privacy*]. The concept of a guaranteed right to privacy first was considered seriously in Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See Lasson, *Homosexual Rights: The Law in Flux and Conflict*, 9 U. BALT. L. REV. 47, 52 (1979).

3. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives); see also *infra* notes 40-52 and accompanying text (equal protection basis for privacy); *infra* notes 67-78 and accompanying text (substantive due process basis for privacy).

4. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (Court recognized that it has not marked the outer limits of the privacy right).

5. See *Notes on Privacy*, *supra* note 2, at 673, 720.

6. The Kinsey Institute for Sex Research reported that as of 1977 approximately 9.13% of the American population had had more than an incidental homosexual experience. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 800 n.4 (1979) (citing Letter from Paul H. Gebhard, Kinsey Institute for Sex Research (Mar. 18, 1977)). Professor Rivera notes that "homosexual" should be used as an adjective rather than as a noun because "a person's sexual preference is but one part of his or her character." *Id.* at 804.

7. See Note, *Expanding the Right of Sexual Privacy*, 27 LOY. L. REV. 1279, 1284 n.34 (1981); *Notes on Privacy*, *supra* note 2, at 720.

8. See Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 319-20 (1980); Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination in the Military*, 27 VILL. L. REV. 351 (1981). Although it is difficult to estimate, "[s]ociological data indicate that approximately thirty percent of servicemembers can be classified as 'homosexuals' under the armed forces regulations." *Id.* at 353.

9. See Rivera, *supra* note 6, at 841; Comment, *Homosexual Conduct in the Military: No Faggots in Military Woodpiles*, 1983 ARIZ. ST. L.J. 79, 80 n.4; Comment, *supra* note 3, at 355-56; see also *Clackum v. United States*, 296 F.2d 226 (Ct. Cl. 1960) (servicewoman entitled to recover back pay when she received no predischARGE hearing on homosexual charges).

10. See Rivera, *supra* note 6, at 841; Comment, *supra* note 8, at 356.

11. See, e.g., *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (Army regulations on homosexual status found unconstitutional); *Matlovich v. Secretary of the Air Force*, 23 Fair Empl. Prac. Cas. (BNA) 1251 (D.D.C. 1980) (Air Force failed to justify regulations on homosexuality). But cf. *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) (Army

cial needs of the military¹² as restricting their consideration of constitutional protection for homosexual persons.¹³

In *Dronenburg v. Zech*,¹⁴ however, a panel of the United States Court of Appeals for the District of Columbia Circuit flatly denied that there is any constitutional haven for homosexuals under the right-of-privacy doctrine.¹⁵ In affirming the discharge of Petty Officer Dronenburg,¹⁶ the court gave only cursory attention to the military context of the case.¹⁷ By limiting the right of privacy to marriage and traditional family relationships,¹⁸ *Dronenburg* reaches beyond the treatment of homosexuals in the armed services and threatens to slam the door on any assertion by homosexual men and women of a right of privacy.

The facts in *Dronenburg* were undisputed.¹⁹ For nine years Dronenburg built an unblemished Navy service record as a Korean linguist and cryptographer.²⁰ In August 1980 the Navy began an investigation of Dronenburg, based on sworn statements by a seaman recruit implicating Dronenburg in several homosexual acts on the Navy base.²¹ After a hearing before a Navy Administrative Discharge Board in which Dronenburg admitted the allegations, the Board recommended his discharge for "misconduct due to homosexual acts."²² The

discharge of homosexual serviceman for fraudulent enlistment upheld); *Watkins v. United States Army*, 721 F.2d 687 (9th Cir. 1983) (absent showing that Army prohibition on homosexuality is unconstitutional, court cannot force Army to retain avowed homosexual officer); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981) (court-martial based on charges of sodomy upheld); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (Army regulations prohibiting homosexual conduct upheld), *cert. denied*, 452 U.S. 905 (1981); *infra* notes 136-68 and accompanying text (cases involving homosexual status within military generally prove more successful than those involving homosexual conduct).

12. See *infra* notes 87-105 and accompanying text.

13. See, e.g., *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1382 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Beller v. Middendorf*, 632 F.2d 788, 810-11 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). But cf. *Matthews v. Marsh*, No. 82-0216 (D. Me. April 3, 1984) (where no actual homosexual conduct alleged, mandatory rejection from ROTC program for person identifying herself as homosexual violated first amendment), *noted in* 52 U.S.L.W. 2569 (April 17, 1984).

14. 741 F.2d 1388 (D.C. Cir. 1984).

15. *Id.* at 1389.

16. *Id.*

17. *Id.* at 1398.

18. *Id.* at 1395-96.

19. Brief for Appellees at 2, *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984); Opening Brief for Appellant at 4, *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

20. Dronenburg received consistently high evaluations from his superiors and never was disciplined by the Navy for any misconduct until his discharge. Trained as a Korean language specialist, Dronenburg provided services which apparently were so important that the Navy paid him a \$12,000 bonus to reenlist in 1979. Opening Brief for Appellant at 4-5, *Dronenburg*.

21. At the time these events occurred Dronenburg was 27 years old. The seaman recruit who reported the incidents was 19 years old and was a fellow student of Dronenburg's at the Defense Language Institute. See *Dronenburg*, 741 F.2d at 1389.

22. *Id.* at 1389. Dronenburg's discharge was based on his violation of SEC/NAV Instruction 1900.9C (Jan. 20, 1978). These regulations later were replaced by SEC/NAV Instruction 1900.9D (Mar. 12, 1981), which implemented a Department of Defense Directive, now codified at 32 C.F.R. § 41, Appendix A, Part 1 H (1984). The relevant portion of SEC/NAV Instruction 1900.9C stated that "[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 a military environment seriously impairs combat readiness, efficiency, security and morale." This policy is continued by Instruction 1900.9D. *Dronenburg*, 741 F.2d at 1389 n.1.

Secretary of the Navy reviewed the case at Dronenburg's request and granted an honorable discharge, effective April 21, 1981.²³ Dronenburg filed suit in the United States District Court for the District of Columbia alleging that the Navy's mandatory policy of discharging homosexuals "solely on the basis of their sexual orientation, without regard to individual fitness to serve,"²⁴ violated Dronenburg's constitutional rights of privacy and equal protection.²⁵ The district court granted summary judgment for the Navy;²⁶ Dronenburg appealed to the United States Court of Appeals for the District of Columbia Circuit.²⁷

In his opinion for the court Judge Bork dealt summarily with issues of regulatory interpretation²⁸ and jurisdiction²⁹ before giving attention to the right-of-privacy issue.³⁰ The bulk of the opinion analyzes past Supreme Court decisions involving the right-of-privacy doctrine³¹ in an attempt to discern whether the right encompasses homosexual conduct.³² The court claimed not to have relied on the "somewhat ambiguous precedent"³³ of *Doe v. Commonwealth's Attorney*,³⁴ in which a state antisodomy law was found not to violate the right of privacy. The *Dronenburg* court, however, indicated that "[i]f a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context."³⁵ In evaluating the Supreme Court's major privacy cases, the court of appeals emphasized the lack of gui-

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

24. Opening Brief for Appellant at 1, *Dronenburg*.

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

26. The district court's opinion was not published.

27. *Dronenburg*, 741 F.2d at 1389. The three-member panel hearing Dronenburg's appeal included Judge David W. Williams, Senior Judge from the United States District Court for the Central District of California, and Judges Antonin Scalia and Robert H. Bork of the United States Court of Appeals for the District of Columbia Circuit.

28. Judge Bork found that discharge for homosexual conduct was not "invariably mandatory." *Id.* at 1389 n.1. Dronenburg had argued that the regulations were, in practice, mandatory for all active homosexual service members. Opening Brief for Appellant at 7-8, *Dronenburg*. Dronenburg later relied on this argument to claim that the regulations were overly broad. *Id.* at 47-50.

Dronenburg also attempted to demonstrate that the Navy's distinction between discharge for homosexual "conduct" as opposed to homosexual "status" was meaningless. *Id.* at 10-12. Judge Bork, however, apparently sided with the Navy's narrower definition of the issue and found that the regulations involved homosexual conduct.

29. Primarily following its own decision in *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978), the court determined that it had jurisdiction to decide the constitutionality of a military discharge. *Dronenburg*, 741 F.2d at 1390-91.

30. The opinion recognized Dronenburg's constitutional arguments as based on both the right of privacy and equal protection. It stated that "[r]esolution of the second argument is to some extent dependent upon that of the first," and spent little time on the equal protection argument. *Dronenburg*, 741 F.2d at 1390.

31. *Id.* at 1391-95; see *infra* notes 37-55 and accompanying text.

32. *Dronenburg*, 741 F.2d at 1391.

33. *Id.* at 1392.

34. 425 U.S. 901 (1976). The Supreme Court summarily affirmed the district court's opinion in *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975) (state law prohibiting sodomy upheld as constitutional), *aff'd mem.*, 425 U.S. 901 (1976). It was the Supreme Court's summary affirmance that led Judge Bork in *Dronenburg* to view the *Doe* decision as an ambiguous one. Despite Judge Bork's denial of reliance on *Doe*, however, he cited cases holding that a summary affirmance is a decision on the merits and binding on lower courts. *Dronenburg*, 741 F.2d at 1392; see *infra* notes 118-21 and accompanying text.

35. *Dronenburg*, 741 F.2d at 1392.

dance provided to lower courts in determining which claims fall within constitutional privacy protection.³⁶

In the court of appeals' view, *Griswold v. Connecticut*³⁷—the seminal right-of-privacy case—had discussed a general right of privacy within the “‘zones’” or “‘penumbras’” of various amendments,³⁸ but articulated nothing concrete about the protection of privacy except that privacy protects the right of a husband and wife to use contraceptives.³⁹ The court quickly disposed of *Loving v. Virginia*⁴⁰ as an opinion deriving from the equal protection clause the right of people from different racial groups to marry.⁴¹ The court also classified *Eisenstadt v. Baird*⁴² as an equal protection case.⁴³ Relying on *Griswold*, the *Eisenstadt* Court had reasoned that no rational purpose justified allowing distribution of contraceptives to married persons but not to unmarried persons.⁴⁴ The *Dronenburg* court cited language from *Eisenstadt* that emphasized the importance of individual choice in matters of procreation,⁴⁵ but found no criteria on which it could rely to apply *Eisenstadt* to future privacy cases.⁴⁶ *Roe v. Wade*⁴⁷ gave a fuller explanation of the right-of-privacy doctrine,⁴⁸ but the *Dronenburg*

36. *Id.*

37. 381 U.S. 479 (1965).

38. *Dronenburg*, 741 F.2d at 1392 (quoting *Griswold*, 381 U.S. at 484). The *Dronenburg* court discussed only Justice Douglas' Opinion for the Court in *Griswold*, one of four opinions written in favor of the holding.

39. *Id.* Although Douglas stressed the sanctity of marital privacy in *Griswold*, his opinion was based broadly on the emanations of several specific guarantees of the constitution—including the first amendment right of association, the third amendment protection against quartering soldiers, the fourth amendment right against unreasonable searches and seizures, and the fifth amendment right against forced self-incrimination. See *Griswold*, 381 U.S. at 484.

40. 388 U.S. 1 (1967) (state antimiscegenation statute that prevented Whites from marrying Blacks and Indians held unconstitutional).

41. *Dronenburg*, 741 F.2d at 1393. The court noted that *Loving* involved a brief due process analysis and a recognition of marriage as a constitutional right, but stated that *Loving* failed to offer any support for *Dronenburg's* case. *Id.*

42. 405 U.S. 438 (1972) (statute prohibiting distribution of contraceptives to unmarried persons held invalid).

43. *Dronenburg*, 741 F.2d 1393.

44. *Eisenstadt*, 405 U.S. at 447.

45. If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. 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 makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Dronenburg, 741 F.2d at 1393 (quoting *Eisenstadt*, 405 U.S. at 453).

46. *Id.* at 1393-94. The court overlooked two important aspects of *Eisenstadt*. The *Eisenstadt* holding had extended a privacy right beyond marriage to encompass a socially unacceptable premarital or extramarital relationship. The opinion also had held that the statute failed to meet a rational relationship test, which requires a statute to bear a rational relation to a legitimate state purpose. See *Kelley v. Johnson*, 425 U.S. 238 (1976). The *Dronenburg* opinion treated this same rational relationship test as a light burden for the Navy to satisfy. See *Dronenburg*, 741 F.2d at 1398.

47. 410 U.S. 113 (1973) (statutory prohibition of abortion held unconstitutional).

48. The *Dronenburg* court quoted the *Roe* opinion's recognition of a constitutional guarantee of privacy for those personal rights that are deemed “‘fundamental’” or “‘implicit in the concept of ordered liberty.’” *Dronenburg*, 741 F.2d at 1394 (quoting *Roe*, 410 U.S. at 152).

court focused on *Roe*'s limitations on privacy protection.⁴⁹ The court claimed that the Supreme Court had failed to articulate a guiding principle to inform lower courts about the parameters of the right of privacy.⁵⁰ Finally, the opinion mentions *Carey v. Population Services International*⁵¹ as holding that the Constitution protects an individual's right to make "'decisions in matters of childbearing.'" ⁵² Thus, the *Dronenburg* court discussed only marriage, procreation, and family elements in analyzing these right-to-privacy cases.

In reviewing these major cases the court found no general principle "even approaching in breadth" the right to homosexual conduct claimed by *Dronenburg*.⁵³ The court of appeals refused to extend the right of privacy to fact situations beyond those treated in the earlier cases—marriage, procreation, contraception, family relationships, child rearing, and education⁵⁴—stating, "We would find it impossible to conclude that a right to homosexual conduct is 'fundamental' or 'implicit in the concept of ordered liberty' unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw."⁵⁵

The best justification for the court's holding lies in its strict adherence to principles of judicial restraint.⁵⁶ Although it recognized that Supreme Court decisions "create" constitutional protections that lower courts are bound to follow, the court held that prior cases contain no principle or methodology that would justify protection for private, consensual homosexual conduct.⁵⁷ The

49. *Id.* at 1394-95. The court, however, did not emphasize that in *Roe* the limits on the woman's right to choose abortion arose from "compelling" state interests in protecting health and potential life at certain times in the pregnancy. Under a strict scrutiny analysis, a court must find a compelling interest before a statute can be allowed to infringe on fundamental rights. *Roe*, 410 U.S. at 155.

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

51. 431 U.S. 678 (1977) (statute limiting distribution of contraceptives for persons over 16 years of age to licensed pharmacists and completely denying contraceptives for persons under age 16 held invalid).

52. *Dronenburg*, 741 F.2d at 1395 (quoting *Carey*, 431 U.S. at 687).

53. *Id.*

54. *Id.* The court noted the lack of guidance from outside sources and implied that it agreed with the characterization of the right of privacy as a judge-created right, wholly apart from the Constitution. For an argument that constitutional interpretation must include broad recognition of individual rights, 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).

55. *Dronenburg*, 741 F.2d at 1396. The court referred to tests of whether a right is protected by the due process clause from any restrictions outside a "compelling" state interest. See *supra* note 49. In converting *Dronenburg*'s argument to a larger issue involving "all private sexual behavior," the court ignored limitations on the right of privacy for homosexual conduct that other opinions have recognized. See, e.g., *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 973 (E.D. Wis. 1980); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1204-05 (E.D. Va. 1975) (Merhige, J., dissenting), *aff'd mem.*, 425 U.S. 901 (1976).

56. *Dronenburg*, 741 F.2d at 1396-97. Judge Bork admitted his personal view that no courts, not even the Supreme Court, should create new constitutional rights apart from the text, structure, and history of the Constitution. *Id.* at 1396 n.5. But see *Dronenburg v. Zech*, 746 F.2d 1579, 1580 (D.C. Cir. 1984) (Robinson, J., dissenting) ("We find particularly inappropriate the panel's attempt to wipe away selected Supreme Court decisions in the name of judicial restraint."), *denying reh'g to* 741 F.2d 1388 (D.C. Cir. 1984).

57. *Dronenburg*, 741 F.2d at 1396-97. The court criticized *Dronenburg*'s assertion that all minority views of morality are protected by the Constitution. The court seems to overstate *Dronenburg*'s position, which merely was that constitutional protection cannot be denied simply

opinion briefly discusses the Navy regulation against homosexuality and found a "rational relation"⁵⁸ between the policy of discharging homosexuals and legitimate military interests in maintaining discipline, good order, and morale.⁵⁹ The court, however, treated the particular facts of Dronenburg's case and the military context in which the controversy arose as minor issues relative to its major holding—that all private homosexual conduct falls outside constitutional protection of personal privacy.⁶⁰

The Supreme Court has not developed the right-of-privacy doctrine with thoroughgoing consistency.⁶¹ Earlier privacy decisions referred to various specific guarantees of liberty in the Constitution, trying to locate a doctrinal foothold for the privacy protection.⁶² In his majority opinion in *Griswold*, Justice Douglas used a broad-based approach to the privacy interests protected by "emanations" from several amendments.⁶³ He noted the fourth and fifth amendment bars to unreasonable governmental intrusion and found that the law recognizes a right of privacy within the "marital bedroom."⁶⁴ Justice Goldberg's concurring opinion based the right of privacy on the ninth amendment's reservation of fundamental rights to the people.⁶⁵ The ambiguity created by these competing theories in *Griswold* arose particularly from the majority's attempt to avoid substantive due process as a foundation for its decision.⁶⁶

Substantive due process refers to the use of the due process clause in the fifth and fourteenth amendments to protect certain unenumerated rights as guar-

because one's view of morality is a minority view. See Opening Brief for Appellant at 13, *Dronenburg*.

58. The court followed *Kelley v. Johnson*, 425 U.S. 238, 247-49 (1976), in finding that under an equal protection analysis, if no fundamental right is infringed and no "suspect classification" is involved, a statute need only pass a minimum level of review. If a law uses a suspect classification or burdens a fundamental right, however, the court must use a stricter level of scrutiny. See *Shapiro v. Thompson*, 394 U.S. 618, 658-63 (1968) (Harlan, J., dissenting).

59. *Dronenburg*, 741 F.2d at 1398. The court held that the rationality of the Navy regulations is self-evident and that "[t]he Navy is not required to produce social science data on the results of controlled experiments to prove what common sense and common experience demonstrate." *Id.*

60. *Id.*

61. See *supra* notes 3-4 and accompanying text. Justice Brandeis expounded his theory of privacy in *Olmstead v. United States*, 277 U.S. 438 (1928):

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 man.

Id. at 478 (Brandeis, J., dissenting).

62. *Notes on Privacy, supra* note 2, at 671; see *Roe*, 410 U.S. at 153; *Griswold*, 381 U.S. at 481-86 (examining "specific guarantees").

63. *Griswold*, 381 U.S. at 484; see *supra* notes 38-39.

64. *Griswold*, 381 U.S. at 485. In *Roe* the Court cited a line of cases protecting the right of privacy as against unreasonable searches and seizures. *Roe*, 410 U.S. at 152; see, e.g., *Terry v. Ohio*, 393 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967).

65. *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring).

66. See Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 653 (1980). Justice Stewart criticized the majority's invocation of substantive due process in *Griswold*, 381 U.S. at 527-31 (Stewart, J., dissenting), but Justice Douglas denied the accusation. *Griswold*, 381 U.S. at 481-82.

anteed "liberties."⁶⁷ Although the Supreme Court has condemned the use of this doctrine to guarantee economic rights,⁶⁸ it continues to apply substantive due process analysis for personal liberties in privacy cases.⁶⁹ The *Griswold* line of cases had antecedents in early substantive due process decisions that had protected rights of educating⁷⁰ and raising⁷¹ children. Substantive due process then provided the support for invalidating regulations concerning marriage,⁷² contraception,⁷³ procreation,⁷⁴ and abortion.⁷⁵ Throughout these cases the Supreme Court has struggled to define "fundamental liberties" and "fundamental rights," but has reached no consensus.⁷⁶ The definition of "fundamental liberty" based on traditions and "the collective conscience of the people" seems to block due process claims by groups traditionally perceived by society as deviants.⁷⁷ In *Roe v. Wade*, however, the Supreme Court extended substantive due process protection to women choosing to have abortions, despite the existence of century-old state laws prohibiting abortion practice.⁷⁸

To confuse the picture even further, in *Stanley v. Georgia*⁷⁹ the Supreme Court added a first amendment component to what the constitutional right of privacy encompasses.⁸⁰ Apart from holding that the government could not unreasonably restrict the material a person reads or views in his or her own

67. See *Notes on Privacy*, *supra* note 2, at 671-72.

68. See *Nebbia v. New York*, 291 U.S. 502, 530-39 (1934); *Notes on Privacy*, *supra* note 2, at 671-72.

69. See *Notes on Privacy*, *supra* note 2, at 672; see also *Roe*, 410 U.S. at 168 (Stewart, J., concurring) (accepting substantive due process as basis of *Griswold*).

70. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (denial of education in foreign language unconstitutional).

71. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (denial of access to private school infringed parents' right to raise child).

72. *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

73. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 538 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

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

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

76. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 n.17 (1977) ("We observe that the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior."); *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (To determine fundamental rights, judges must look to "the traditions and collective conscience of the people."); see also *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) ("Liberty" either emanates from the specific guarantees of the Constitution or from experience in a free society.); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, [guaranteed liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

77. See *Griswold*, 381 U.S. at 493, 498-99 (Goldberg, J., concurring) (excluding homosexuality from protection as a fundamental liberty rooted in the traditions and conscience of society).

78. *Roe*, 410 U.S. at 139-41, 153.

79. 394 U.S. 557 (1969) (criminal statute penalizing the private possession of obscene material held unconstitutional).

80. Although *Stanley* involved first amendment protection, the Supreme Court acknowledged in *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66 (1973) its privacy basis for *Stanley*. The *Paris* opinion limited *Stanley* to protection for "privacy of the home." *Id.* The Court upheld state prohibition of obscene material in places of public accommodation, even for consenting adults. *Id.* at 69; see Note, *supra* note 7, at 1286 n.47; see also *Baker v. Wade*, 553 F. Supp. 1121, 1141 n.53 (N.D. Tex. 1982) (*Stanley* supported fundamental right of privacy within the home).

home,⁸¹ *Stanley* indicated that the setting of an activity may determine the degree of privacy protection given to such an activity.⁸² In *Griswold* the Supreme Court also indicated that the freedom of association⁸³ guaranteed by the first amendment would protect a privacy right.⁸⁴ Thus, although substantive due process remains the basic analytic framework for cases involving privacy claims,⁸⁵ the first amendment may offer additional protection for future claimants.⁸⁶

In contrast with this line of privacy decisions is the Supreme Court's recently developed method for reviewing administrative decisions within the armed services.⁸⁷ Since 1974, in a series of decisions in which military regulations and practices have been challenged,⁸⁸ a majority of the Supreme Court has accepted the idea that the armed services constitute a "separate community."⁸⁹ Because of their mission, the services may place greater restrictions on individual liberty than those allowed in civilian life.⁹⁰

In *Parker v. Levy*⁹¹ the Court upheld the conviction of an army captain court-martialed for "conduct unbecoming an officer and a gentleman."⁹² The Court's justification for a less stringent application of first amendment protection rested on the recognition of "[t]he fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, [which] may render

81. *Stanley*, 394 U.S. at 565.

82. See Note, *supra* note 7, at 1285; *Notes on Privacy*, *supra* note 2, at 733. Some opinions imply that *Stanley* creates a right to privacy in one's home that would include masturbation as a protected activity in the home. Presumably, defendant in *Stanley* used the obscene materials in his home for sexual gratification. See *Baker v. Wade*, 553 F. Supp. 1121, 1141 (N.D. Tex. 1982).

83. Professor Karst has combined the right of privacy with the first amendment freedom of association to argue for a right of "intimate association." Karst, *supra* note 66, at 657-58.

84. *Griswold*, 381 U.S. at 483 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958)).

85. See *Notes on Privacy*, *supra* note 2, at 673. The privacy cases follow a two-tiered standard of review. First, the court considers whether the affected conduct constitutes a fundamental right. If not, the court need only find a rational relation between the regulation and a permissible state objective. If the regulation affects a fundamental right, the court applies strict scrutiny to the regulation. Comment, *supra* note 9, at 102-03; see *supra* note 58.

86. See, e.g., *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984) (citing *Matthews v. Marsh*, No. 82-0216 (D. Me. April 3, 1984), noted in 52 U.S.L.W. 2569) (April 17, 1984).

87. For a general discussion of this development, see Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. REV. 178, 184-207 (1984).

88. See, e.g., *Chappell v. Wallace*, 103 S. Ct. 2362 (1983) (enlisted members of the military denied damages action against officers based on violations of constitutional rights); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (Military Selective Service Act requiring draft registration for males but not for females upheld as constitutional); *Brown v. Glines*, 444 U.S. 348 (1980) (Air Force regulation prohibiting unauthorized circulation of petitions on base upheld); *Middendorf v. Henry*, 425 U.S. 25 (1976) (no sixth amendment right to counsel for Marine Corps' summary court-martial proceeding); *Greer v. Spock*, 424 U.S. 828 (1976) (Army prohibition on biased political speeches and unapproved distribution of literature upheld); *Parker v. Levy*, 417 U.S. 733 (1974) (Army disciplinary regulations did not violate due process).

89. See, e.g., *Parker v. Levy*, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.").

90. See Hirschhorn, *supra* note 87, at 178.

91. 417 U.S. 733 (1974).

92. *Id.* at 757. The petitioner had harshly criticized the United States' involvement in the Vietnam War and had urged minority soldiers not to fight. The Court held that the statute was not unconstitutionally vague and that the Army had not violated petitioner's first amendment rights by punishing him for his statements. *Id.* at 761.

permissible within the military that which would be constitutionally impermissible outside it."⁹³

In subsequent cases the Court has noted these unique needs of the military and taken a position of "healthy deference" to administrative and legislative decisions within the armed services.⁹⁴ The Court has not abandoned its power of constitutional review in military cases,⁹⁵ but has applied a balancing test to weigh the individual's interest against the potential interference that a successful challenge to military policy would cause to the proper function⁹⁶ of the armed forces.⁹⁷ A majority of the Supreme Court has deferred to military statutes or regulations against individual claims arising under the first,⁹⁸ fifth,⁹⁹ sixth,¹⁰⁰ and fourteenth amendments.¹⁰¹

A minority of the Court¹⁰² has criticized these decisions harshly for losing sight of the Court's duty to protect the constitutional rights of all citizens.¹⁰³ The dissenters in these recent armed forces cases insist on their responsibility to "judge" the rule or decision in light of standard constitutional principles.¹⁰⁴ De-

93. *Id.* at 758. Critics such as Justice Brennan refer to such language as the "military necessity" justification. See *Brown v. Glines*, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting); *Greer v. Spock*, 424 U.S. 828, 852-53 (1976) (Brennan, J., dissenting).

94. *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981); see also *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (constitutional authority to regulate land and naval forces entitles Congress to "particular deference").

95. *Brown v. Glines*, 444 U.S. 348, 349 (1980); *Middendorf v. Henry*, 425 U.S. 25, 50 (1976) (Powell, J., concurring); *Parker*, 417 U.S. at 758.

96. In *Greer v. Spock*, 424 U.S. 828 (1976), the Supreme Court stated that the basic purpose of the military is to "train soldiers" rather than to provide a public forum for political candidates. *Id.* at 837-38.

97. Hirschhorn, *supra* note 87, at 180. In his article, Professor Hirschhorn argues that the type of judicial review that gives primacy to individual rights is not compatible with the constitutional principle of the military as an instrument of the civilian population. He characterizes the armed forces as

an example of a rational bureaucracy: a hierarchical organization characterized by a specialized division of labor . . . in which each individual's role is to pursue goals established by the heads of the hierarchy through methods that they have calculated will attain their goals. In any such organization the needs and desires of an individual member may conflict with the demands of his role; if he chooses to follow the former, the functioning of the organization is impeded.

Id. at 218-19.

98. *Brown v. Glines*, 444 U.S. 348, 361 (1980) (Air Force regulation that required persons to seek approval from commander before circulating petition held constitutional); *Greer v. Spock*, 424 U.S. 828, 839 (1976) (prohibition of candidates' speeches on military base to keep base politically neutral was constitutional); *Parker*, 417 U.S. at 761 (court-martial for disrespectful language upheld).

99. *Middendorf v. Henry*, 425 U.S. 25, 48 (1976) (lack of counsel at summary court-martial did not violate either the fifth or the sixth amendments).

100. *Id.*

101. *Rostker v. Goldberg*, 453 U.S. 57, 66-67 (1981) (male-only draft did not violate equal protection clause).

102. Justices Brennan and Marshall consistently have criticized the majority's deferential stance in military cases. See Hirschhorn, *supra* note 87, at 204-06.

103. *Rostker v. Goldberg*, 453 U.S. 57, 112 (1981) (Marshall, J., dissenting).

104. Justice Brennan warned in *Brown*:

To be sure, generals and admirals, not federal judges, are all expert about military needs. But it is equally true that judges, not military officers, possess the competence and authority to interpret and apply the First Amendment This Court abdicates its responsibility

spite these protests, the present Supreme Court seems prepared to uphold almost all military regulations unless they are so unreasonable that they become arbitrary or capricious.¹⁰⁵

As the Supreme Court battled within its ranks on issues relating to a constitutional right of privacy¹⁰⁶ and its stance toward the military as a "separate community,"¹⁰⁷ the lower courts, at both the state and federal level, began to face the issue of homosexual rights.¹⁰⁸ Initial attempts to establish and protect the legal rights of homosexual persons met formidable barriers in state laws prohibiting consensual sodomy.¹⁰⁹ After *Griswold* a majority of courts held that the newly-recognized right of marital privacy protected married couples from criminal sanctions for consensual sodomy.¹¹⁰ In 1975, however, when a group of homosexual males¹¹¹ sought similar protection, the United States District Court for the Eastern District of Virginia refused to invalidate a Virginia statute governing "crimes against nature."¹¹² In *Doe v. Commonwealth's Attorney*¹¹³ the lower court relied heavily on dicta from past Supreme Court opinions¹¹⁴ that implicitly approved of criminal sanctions for homosexuality.¹¹⁵ The *Doe* opinion limited constitutional protection under *Griswold* to marriage, home, or family life¹¹⁶ and found "no authoritative judicial bar to the proscription of homosexuality."¹¹⁷ The Supreme Court summarily affirmed *Doe*, offering no explanation for its decision.¹¹⁸ Confusion continues to surround *Doe*,¹¹⁹ partic-

ity to safeguard free expression when it reflexively bows before the shibboleth of military necessity.

Brown v. Glines, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting).

105. See Greer v. Spock, 424 U.S. 828, 840 (1976).

106. See *supra* notes 61-78 and accompanying text.

107. See *supra* notes 87-105 and accompanying text.

108. See Comment, *supra* note 8, at 352-53.

109. Until 1961 every state treated consensual sodomy between adults as a criminal act. See Note, *supra* note 7, at 1281.

110. *Id.* at 1258 n.35; see, e.g., Lovisi v. Slayton, 363 F. Supp. 620 (E.D. Va. 1973) (married couple's conviction under sodomy law upheld because acts were performed in presence of a third party), *aff'd*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976).

111. The case began as a class action on behalf of all homosexuals similarly situated. The court then switched to joining petitioners' claims. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1200 n.1 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

112. The Virginia statute, typical of many states' statutes, stated:

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.

Id. at 1200 (quoting VA. CODE § 18.1-212 (1950)).

113. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

114. *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring); *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

115. *Doe*, 403 F. Supp. at 1201-02. The *Dronenburg* opinion also cited these cases for the proposition that the right of privacy does not protect homosexual conduct. *Dronenburg*, 741 F.2d at 1391 (citing *Doe*, 425 U.S. at 1200; *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

116. *Doe*, 403 F. Supp. at 1202.

117. *Id.* In a vigorous dissent, Judge Merhige found ample judicial support for invalidating the statute. *Doe*, 403 F. Supp. at 1203-05 (Merhige, J., dissenting).

118. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976). *Doe* has been criticized as an institutional decision by the Supreme Court not to write an opinion in this area. Karst, *supra* note 66, at 692. Although a summary affirmance is a vote on the merits of a case, *Ohio ex rel. Eaton v.*

ularly because the Supreme Court stated, one year later, that it had not decided the constitutionality of statutes regulating private consensual sex among adults.¹²⁰ Despite the Supreme Court's unsettled position, several courts recently have found ample constitutional grounds for invalidating state laws prohibiting consensual sodomy.¹²¹

Federal courts granted protection for homosexual employees of the federal government even before states began invalidating their sodomy laws.¹²² In *Norton v. Macy*¹²³ the United States Court of Appeals for the District of Columbia Circuit ruled that no federal employee could be dismissed solely because of private homosexual conduct, unless the employer proved a "nexus" between the conduct and job efficiency.¹²⁴ By 1975 the Civil Service Commission had revised its regulations to incorporate the nexus requirement of *Norton*.¹²⁵ Other homosexual employees in the public sector have sought and won constitutional protection under the first amendment.¹²⁶

Price, 360 U.S. 246, 247 (1959), and binds lower courts until otherwise informed by the Supreme Court, *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975), it may carry less weight than an adverse decision on the merits, *Port Auth. Bondholders Protective Comm. v. Port of New York Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967), *cert. denied*, 391 U.S. 903 (1967).

119. See, e.g., *Rich v. Secretary of the Army*, 735 F.2d 1220, 1228 n.8 (10th Cir. 1984); *Baker v. Wade*, 553 F. Supp. 1121, 1138 (N.D. Tex. 1982).

120. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n.5 (1977); see *supra* note 76. Plaintiff in *Dronenburg* argued that the Supreme Court had affirmed *Doe* based on lack of standing since the petitioners had not been convicted under the statute. See *Dronenburg*, 741 F.2d at 1392.

In addition, the Supreme Court recently faced the *Doe* issue in *New York v. Uplinger*, 104 S. Ct. 2332 (1984). After oral argument, the Court vacated certiorari because the case was not an appropriate "vehicle" for resolving the question of how far constitutional protection extends for homosexual activity. *Id.* at 2334 (no precise constitutional question presented by court of appeals). See Appellant's Petition for Rehearing with Suggestion of Rehearing *en banc* at 16, *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

121. See *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982) (sodomy statute violated constitutional rights of homosexual persons); *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 (1982) (because fundamental right of privacy protects homosexual behavior, sodomy statute invalid); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980) (statute prohibiting sodomy between unmarried persons violated equal protection rights). Both *Baker* and *Onofre* relied heavily on *Stanley* and *Eisenstadt* as proof that the right of privacy extends beyond marriage and procreation cases. See *Baker*, 553 F. Supp. at 1141; *Onofre*, 51 N.Y.2d at 490, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 952.

122. See *Rivera*, *supra* note 6, at 818; Comment, *supra* note 9, at 86.

123. 417 F.2d 1161 (D.C. Cir. 1969). Most commentators regard this case as the landmark decision on rights of homosexual employees of the federal government. See *Rivera*, *supra* note 6, at 818. Interestingly, the same court that decided *Dronenburg* had decided *Norton* 15 years earlier.

124. Although the decision was based primarily on procedural due process, Judge Bazelon clearly implied that a right to privacy existed for the petitioner. *Norton*, 417 F.2d at 1165.

125. 5 C.F.R. § 731.202(a) (1984) (person may be dismissed from federal employment only when "this action will promote the efficiency of the service"); see *Rivera*, *supra* note 8, at 317-19.

126. See, e.g., *National Gay Task Force v. Board of Educ. of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984) (portion of state statute allowing dismissal of teacher for advocating repeal of anti-sodomy law violated first amendment protection), *aff'd per curiam by an equally divided court*, No. 83-2030 (U.S. March 26, 1985); *Acanfora v. Board of Educ.*, 359 F. Supp. 843 (D. Md.) (teacher's public statements about homosexual status protected but teacher denied relief on other grounds), *aff'd*, 491 F.2d 498 (4th Cir. 1973), *cert. denied*, 419 U.S. 836 (1974).

Justice Powell took no part in the *Gay Task Force* decision, which resulted in an evenly-divided Court. The Court, however, failed to explain why it had chosen to decide *Gay Task Force*, but had set for reargument the other cases that had been argued without Justice Powell's presence. *Wall St. J.*, March 27, 1985, at 17, col. 6. The Court apparently is avoiding a written opinion involving homosexual rights.

Attempts to establish rights for homosexual members of the military have met stronger opposition.¹²⁷ The armed services continue to follow their long-standing policies¹²⁸ that "homosexuality is incompatible with military service."¹²⁹ Courts often have avoided considering the constitutionality of the military practice of discharging homosexuals¹³⁰ by dismissing challenges to these regulations for failure to exhaust administrative remedies.¹³¹ *Doe v. Chafee*¹³² triggered a series of recent cases in which admitted homosexuals have directly attacked military discrimination.¹³³ In *Chafee* the United States District Court for the Northern District of California applied a "nexus" test,¹³⁴ but found against the Navy seaman because he admitted that his homosexual relationship had affected his performance.¹³⁵

Although some decisions have favored the homosexual person challenging a specific discharge,¹³⁶ cases turning on the constitutionality of the regulation have tended to uphold the military judgment.¹³⁷ *Matlovich v. Secretary of the Air Force*¹³⁸ involved a fact situation strikingly similar to that in *Dronenburg*.¹³⁹

127. See Rivera, *supra* note 8, at 319-20; Comment, *supra* note 8, at 351.

128. In 1949 the Department of Defense adopted a policy that treated known homosexual servicemembers as "military liabilities and security risks who must be eliminated." Comment, *supra* note 8, at 354.

129. 32 C.F.R. § 41, app. A, pt. 1, at 25 (1984); see *supra* note 22. This Department of Defense Directive to all armed services further states:

The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission As used in this section: Homosexual means a person, regardless of sex, who engages in, or intends to engage in homosexual acts.

130. The Navy has claimed that although processing homosexual individuals for discharge is mandatory, actual discharge is not. See Comment, *supra* note 9, at 87. *Dronenburg* argued that discharge for practicing homosexual members is mandatory because by definition they do not fit the exceptions for incidental homosexual behavior. Opening Brief for Appellant, *supra* note 19, at 7-8; see *supra* note 28.

131. See, e.g., *Von Hoffburg v. Alexander*, 615 F.2d 633 (5th Cir. 1980); *Champagne v. Schlesinger*, 506 F.2d 979 (7th Cir. 1974); *Heisel v. Chalbeck*, 405 F. Supp. 361 (M.D. Fla. 1976); see Comment, *supra* note 8, at 356-57.

132. 355 F. Supp. 112 (N.D. Cal. 1973).

133. See *supra* notes 9-10 and accompanying text.

134. *Chafee*, 355 F. Supp. at 115. The court followed the nexus requirement articulated in *Norton v. Macy*, 417 F.2d 1161, 1165 (D.C. Cir. 1969). See *supra* notes 122-25 and accompanying text.

135. *Chafee*, 355 F. Supp. at 115. Chafee felt that his relationship with his shipmate created too much tension for him on board the ship.

136. See, e.g., *Matthews v. Marsh*, No. 82-0216 (D.C. Me. April 3, 1984) (excluding person from ROTC program without a showing of any homosexual activity violates first amendment), cited in *Rich v. Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (Army regulation permitting discharge of soldier for homosexuality without proof of overt homosexual acts is unconstitutional); *Matlovich v. Secretary of the Air Force*, 23 Fair Empl. Prac. Cas. (BNA) 1251 (D.D.C. 1980).

137. See, e.g., *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); *Beller v. Midendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

138. 23 Fair Empl. Prac. Cas. (BNA) 1251 (D.D.C. 1980).

139. Petitioner in *Matlovich* was an admitted homosexual with a 12 year record of excellent military service. In contrast to *Dronenburg*, *Matlovich* was not charged with any homosexual activity on the base or with another serviceman. See *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 853-54 (D.C. Cir. 1978), on remand, 23 Fair Empl. Prac. Cas. (BNA) 1251 (D.D.C. 1980).

Neither the appellate court¹⁴⁰ nor the district court on remand¹⁴¹ ever decided the right-of-privacy issue raised by the case. Instead, the district court ordered Matlovich reinstated because the Air Force had failed to demonstrate the existence of any fair and objective standards for considering discharge of a homosexual.¹⁴² In *benShalom v. Secretary of the Army*¹⁴³ the court dealt directly with a constitutional challenge to military policy.¹⁴⁴ Although the court recognized its obligation to give deference to military administration,¹⁴⁵ the first amendment protection of the petitioner's homosexual status predominated.¹⁴⁶ The opinion carefully noted that the Army had produced no evidence that benShalom had engaged in homosexual conduct on or off duty.¹⁴⁷ In addition to first amendment protection, the court determined that benShalom's personal identity was protected by the right-of-privacy doctrine.¹⁴⁸ The court concluded that the discharge was arbitrary and capricious because the Army had failed to prove a nexus between petitioner's homosexual status and her performance in the military.¹⁴⁹

Although cases such as *Matlovich* and *benShalom* break new ground for asserting homosexual rights against military policy,¹⁵⁰ they stop short of constitutional protection for homosexual conduct.¹⁵¹ Three recent appellate decisions have taken a deferential position toward military policies prohibiting homosexual behavior.¹⁵² *Rich v. Secretary of the Army*¹⁵³ and *Hatheway v. Secretary of*

140. 591 F.2d 852 (D.C. Cir. 1978).

141. *Matlovich*, 23 Fair Empl. Prac. Cas. (BNA) at 1252.

142. The district court judge chided the Air Force for "either through a total breakdown in its own communications or by an intentional trifling with the legal powers, [misleading] two courts and [confusing] the issues in this long, drawn-out case." *Id.* at 1251. Subsequent to this decision and a similar decision concerning Navy regulations, see *Berg v. Claytor*, 436 F. Supp. 76 (D.D.C. 1977), vacated and remanded, 591 F.2d 849 (D.C. Cir. 1978), the Department of Defense issued its revised regulations clarifying the exceptions to the required discharge of homosexual servicemembers. See Comment, *supra* note 8, at 360; *supra* notes 22, 129.

143. 489 F. Supp. 964 (E.D. Wis. 1980).

144. Petitioner admitted her homosexuality but was not charged with any homosexual conduct. The Army had discharged her for evidencing "homosexual tendencies, desire, or interest." *Id.* at 969.

145. *Id.* at 970-71. The court noted that "[r]estricted judicial review is not, however, the equivalent of no judicial review." *Id.* at 971.

146. *Id.* at 974. The court held that the regulations infringed on petitioner's right to associate with homosexuals, her right to receive information and ideas about homosexuality, and her freedom of expression and speech. *Id.*

147. *Id.* at 973. The court indicated that the Army had reason to regulate sexual activities involving servicemembers on the base and servicemembers on duty. *Id.*

148. *Id.* at 975-76. The court stated: "If what the United States Supreme Court itself has termed the right of 'personal privacy' . . . means anything, it should safely encompass an individual's right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as one's personality, self-image, and indeed, one's very identity." *Id.* at 975.

This statement reflects the opinion of the majority of authorities who now assert that homosexual preference is determined, almost irreversibly, at an early age. See *Baker v. Wade*, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982); Lasson, *supra* note 2, at 59; Richards, *supra* note 54, at 985-86.

149. *benShalom*, 489 F. Supp. at 977.

150. See Comment, *supra* note 8, at 354.

151. See *supra* notes 142-49 and accompanying text.

152. *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

the Army¹⁵⁴ follow the balancing approach articulated in *Beller v. Middendorf*.¹⁵⁵ The *Beller* court had made it clear "at the outset that th[e] case [did] not require [the court] to address the question whether consensual private homosexual conduct is a fundamental right."¹⁵⁶ Instead, the *Beller* court held that it must assess the regulations prohibiting homosexual conduct within the armed services differently from a regulation in a civilian context.¹⁵⁷ Balancing the unique needs of the military against "whatever heightened solicitude is appropriate for consensual private homosexual conduct,"¹⁵⁸ the court found the disputed regulations and discharges constitutional.¹⁵⁹ In *Hatheway*¹⁶⁰ the United States Court of Appeals for the Ninth Circuit reaffirmed this narrow approach to privacy protection for homosexuals in the armed forces. The court, however, applied an intermediate level of review on the equal protection question,¹⁶¹ noting that the Navy has a "compelling"¹⁶² interest in maintaining a strong military force, and that homosexual conduct compromises the Navy's ability to achieve that goal.¹⁶³ Finally, in *Rich* the United States Court of Appeals for the Tenth Circuit invoked the arguments raised in *Beller* and *Hatheway* supporting military policy.¹⁶⁴ The court accepted the justifications for the Army's policy of not permitting homosexuals to enlist¹⁶⁵ and found a sufficient nexus between petitioner's homosexuality and his unsuitability for the Army.¹⁶⁶ *Rich* characterized the effect of this policy on petitioner's first amendment rights as "incidental,"¹⁶⁷ and determined that the special needs of the military made

153. 735 F.2d 1220 (10th Cir. 1984).

154. 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981).

155. 632 F.2d 788, 807 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). This approach balances the nature of the individual interest infringed, the importance of the government interest furthered, the degree of infringement, and the sensitivity of the government entity to more carefully narrowed alternatives.

156. *Id.* The courts in both *Rich* and *Hatheway* also declined to decide this unsettled question. See *Rich*, 735 F.2d at 1228; *Hatheway*, 641 F.2d at 1381.

157. *Beller*, 632 F.2d at 810; see also Comment, *supra* note 8, at 366 (interpreting *Beller* as decision on military policy only).

158. *Beller*, 632 F.2d at 810.

159. *Id.* at 812.

160. The court-martial against petitioner in *Hatheway* was based on homosexual sodomy committed on the Army base. In discussing the right of privacy, the court found that because petitioner committed the acts in front of two other people, his claim to privacy was minimized. *Hatheway*, 641 F.2d at 1384.

161. *Id.* at 1382. The *Beller* opinion described its intermediate-level review of Army regulations as lying somewhere between the lowest level of scrutiny and strict scrutiny. *Beller*, 632 F.2d at 808-09; see *supra* note 58.

162. Although the court only needed to find an "important" government interest served by the regulation, the court found a "compelling" interest. *Hatheway*, 641 F.2d at 1382.

163. *Id.*

164. *Rich*, 735 F.2d at 1227-29. Although the basis of the holding was petitioner's false enlistment, the court decided the constitutionality of the Army's prohibition on homosexuality. *Id.* at 1226-29.

165. *Id.* at 1227-28 n.7. The Army offered evidence to show that homosexual servicemembers would be detrimental to good order, discipline, morale, and military effectiveness because their presence would cause tension between homosexuals and heterosexuals forced to live and work together, and would have an adverse impact on recruiting efforts.

166. *Id.* at 1228 n.7. The court claimed that it need not make a case-by-case nexus determination if there was a sufficient nexus between the policies and the Army's purpose.

167. *Id.* at 1229.

such restrictions permissible.¹⁶⁸

In contrast with these decisions from other courts of appeals, *Dronenburg* limits the constitutional right of privacy for any homosexual conduct.¹⁶⁹ The court emphasized that Supreme Court right-of-privacy decisions have involved marriage, procreation, contraception, family relationships, child rearing, and education.¹⁷⁰ In the *Dronenburg* court's view, such matters clearly do not cover a right to engage in homosexual activities.¹⁷¹ Although the court correctly characterized the Supreme Court's articulation of "fundamental rights" as "less prescriptions of a mode of reasoning than they are conclusions about particular rights enunciated,"¹⁷² it deduced its own overstated conclusion that definition of homosexual conduct as a fundamental right necessarily implies that "any and all" private sexual conduct is protected.¹⁷³

Discussing the problem of defining a fundamental right, however, does not resolve the issue. Although judicial restraint is necessary to prevent judges from roaming "where unguided speculation might take them,"¹⁷⁴ the *Dronenburg* opinion takes this admonition too literally. The court ignored significant case law and factors considered in recent opinions that should have guided its analysis of the case.¹⁷⁵

168. *Id.* (citing *Parker v. Levy*, 417 U.S. 733 (1974)). The court, however, did note a recent case in which first amendment principles outweighed the military needs. *Matthews v. Marsh*, No. 82-0216 (D. Me. April 3, 1984), cited in *Rich*, 735 F.2d at 1229.

169. *Dronenburg*, 741 F.2d at 1395-96.

170. *Id.*

171. *Id.*; see also *Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (freedom of choice in matter of personal appearance not equal to protection in matters of procreation, marriage, and family life); *Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983) (supporting limitation on right-to-privacy cases).

172. *Dronenburg*, 741 F.2d at 1396. In *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan stated:

Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

Id. at 542 (Harlan, J., dissenting).

173. *Dronenburg*, 741 F.2d at 1396. *Dronenburg* sought qualified protection for all consensual, private sexual conduct between adults. See Opening Brief for Appellant at 19-22, *Dronenburg*; see also *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1204-05 (E.D. Va. 1975) (Merhige, J., dissenting) (right of privacy only protects nonpublic activity between consenting adults), *aff'd mem.*, 425 U.S. 901 (1976); *Lasson, supra* note 2, at 57 (privacy right must be limited so that a private activity does not affect the public welfare adversely).

174. *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

175. In a harsh dissent from the denial of a rehearing *en banc*, Judge Robinson criticized the *Dronenburg* opinion for conducting a "general spring cleaning of constitutional law." *Dronenburg v. Zech*, 746 F.2d 1579, 1580 (D.C. Cir. 1984) (Robinson, J., dissenting), *denying reh'g* to 741 F.2d 1388 (D.C. Cir. 1984).

Instead of conscientiously attempting to discern the principles underlying the Supreme Court's privacy decisions, the panel has in effect thrown up their hands and decided to confine these decisions to their facts. Such an approach to "interpretation" is as clear an abdication of judicial responsibility as would be a decision upholding all privacy claims the Supreme Court has not expressly rejected.

Id. at 1580.

First, *Dronenburg* oversimplifies the scope of the constitutional right of privacy by cataloguing selected Supreme Court decisions¹⁷⁶ and finding no holding expressly protecting homosexual conduct.¹⁷⁷ The court concentrated on cases protecting rights within marriage or within traditional family relationships.¹⁷⁸ Other opinions, however, strongly emphasize the impact of *Stanley*,¹⁷⁹ *Eisenstadt*, and *Roe*¹⁸⁰ and find a broader principle supporting protection for an individual's right to make intimate personal decisions.¹⁸¹ Such opinions interpret *Stanley* as protecting any consensual sexual behavior within the privacy of the home.¹⁸² These opinions also interpret *Eisenstadt* and *Roe* as expanding the right of privacy beyond marital intimacy to include traditionally unacceptable adult relationships.¹⁸³ By refusing to evaluate the underlying principles in the privacy cases, the *Dronenburg* court essentially refused to judge any claim of constitutional protection under the right of privacy until the Supreme Court explicitly decides an identical issue.¹⁸⁴

Second, the military setting of *Dronenburg's* case provided the court with an obvious analytic framework¹⁸⁵ that the court relegated to minor importance.¹⁸⁶ The separate community doctrine supported by a majority of the Supreme Court allows lower courts to give greater deference to military restrictions on individual rights.¹⁸⁷ Without deciding whether all private consensual homosexual conduct falls under constitutional protection, the courts of appeals for the Ninth and Tenth Circuits have upheld military regulations prohibiting homosexual conduct by members of the armed services.¹⁸⁸ *Dronenburg* not only fails to cite any of these recent opinions, but also fails to follow their narrow holdings, which limit consideration of homosexual rights to the restrictions im-

176. See *supra* notes 38-52 and accompanying text.

177. See *supra* notes 53-55 and accompanying text.

178. Professor Hafen's definition of "traditional" family relationships involves a blood-marriage-adoption test. Childbearing and childrearing cases would fall within this category. See Hafen, *supra* note 171, at 527.

179. The *Dronenburg* opinion completely omitted any discussion of *Stanley*; *Dronenburg*, however, had noted the case as one of his chief authorities. Opening Brief for Appellant at vi, *Dronenburg*.

180. Professor Hafen noted that the contraception and abortion decisions go the furthest in departing from the blood-marriage-adoption test because they protect unmarried individuals with unborn, prospective children. Hafen, *supra* note 171, at 527.

181. See, e.g., *Baker v. Wade*, 553 F. Supp. 1121, 1141 (N.D. Tex. 1982) ("right of privacy does extend to private, voluntary, intimate relationships"); *Ben-Shalom v. Secretary of the Army*, 489 F. Supp. 964, 975 (E.D. Wis. 1980) (Constitution protects the "privacy of the integral components of one's personality"); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1204 (E.D. Va. 1975) (Merhige, J., dissenting) (due process clause protects the right to select consenting adult sexual partners), *aff'd mem.*, 425 U.S. 901 (1976); see also *Karst*, *supra* note 66, at 629 (freedom of "intimate association" involves as close a personal relationship as a marriage or family relationship); *Richards*, *supra* note 54, at 964-72 (fusing autonomy and equality as values underlying human rights concept).

182. See *supra* note 82.

183. See *supra* note 121.

184. See *supra* note 56.

185. See *supra* notes 87-105 and accompanying text.

186. The court discussed the military necessity idea only as support for the Navy regulation. The court, however, did not expressly limit its decision to the military context. *Dronenburg*, 741 F.2d at 1392, 1398.

187. See *supra* notes 89-90 and accompanying text.

188. See *supra* notes 152-68 and accompanying text.

posed by the military's separate community.¹⁸⁹

Last, the *Dronenburg* opinion gave little attention to the facts of the case.¹⁹⁰ In finding a rational relation between the homosexual prohibition and the legitimate interests of the Navy, the court briefly speculated on the harmful effects of *Dronenburg's* conduct.¹⁹¹ The holding, however, does not require the Navy to prove any actual effect of *Dronenburg's* relationship or of homosexual conduct in general on the efficient operation of the Navy.¹⁹² If *Dronenburg* had been a civil servant working in a federal agency, the court could not have upheld his discharge without some proof that his homosexual conduct affected his job fitness.¹⁹³ Some cases reviewing military discharges require the same showing of a nexus between homosexuality and military fitness.¹⁹⁴ *Dronenburg* might have difficulty arguing against a showing that his conduct did affect his performance in the Navy;¹⁹⁵ the court, however, presumably would require no such showing under any circumstances.¹⁹⁶

In short, the *Dronenburg* court handed down the most restrictive decision in the recent development of case law concerning the rights of homosexuals. By expanding the analysis beyond the military context, the *Dronenburg* decision broadly affects all cases seeking right-of-privacy protection for homosexual persons. The court failed to follow its own warning on judicial restraint and decided larger issues in areas of constitutional protection for private conduct that should have remained separate from the military setting of this case.¹⁹⁷ Significantly, the opinion discussed no recent lower federal court decision involving homosexual rights in either a military or a civilian context.¹⁹⁸ By omitting any consideration of contemporary homosexual rights case law, the court presented a holding that is out of step with cases expanding legal protection for homosex-

189. *Rich*, 735 F.2d at 1228; *Hathaway*, 641 F.2d at 1382; *Beller*, 632 F.2d at 810. Although the *Dronenburg* court cited *Beller* at the very end of its decision, it did not limit its holding to the military facts. *Dronenburg*, 741 F.2d at 1398.

190. The court mentioned the underlying facts only once after its initial fact summary. See *Dronenburg*, 741 F.2d at 1398.

191. *Id.*

192. *Id.*; see *supra* note 59.

193. See *supra* notes 123-25 and accompanying text.

194. *benShalom v. Secretary of the Army*, 489 F. Supp. at 977; *Doe v. Chafee*, 355 F. Supp. at 115; see *supra* notes 132-35, 143-49 and accompanying text.

195. *Dronenburg's* activities in the Navy barracks would violate even the more liberal test established in *benShalom*. *benShalom*, 489 F. Supp. at 973.

196. *Dronenburg v. Zech*, 746 F.2d 1579, 1581 (D.C. Cir. 1984) (Robinson, J., dissenting) (equal protection principles require analysis of the Navy's mandatory discharge for any homosexual conduct because problems arising from heterosexual conduct are considered on a case-by-case basis), *denying reh'g* to 741 F.2d 1388 (D.C. Cir. 1984).

197. If followed, the opinion would cut against decisions in areas of criminal sodomy and public employment that expand the right of privacy in civilian contexts. See *supra* notes 106-26 and accompanying text.

198. The opinion cited *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978) in examining a jurisdictional question, *Dronenburg*, 741 F.2d at 1390, but failed to follow its subsequent history. See *Matlovich v. Secretary of the Air Force*, 23 Fair Empl. Prac. Cas. (BNA) 1251 (D.D.C. 1980) (on remand) (Air Force failed to justify regulations on homosexuality). The court also cited *Beller v. Middendorf*, 632 F.2d 788 (9th Cir.), *cert. denied*, 452 U.S. 905 (1980), but offers no discussion of *Beller's* analysis. *Dronenburg*, 741 F.2d at 1398.

ual individuals in areas such as criminal law and public employment.¹⁹⁹ Among the armed services decisions, the *Dronenburg* court's treatment of the right of privacy blurs distinctions drawn by other courts between broad protection for homosexual status and a more restrictive position on homosexual conduct.²⁰⁰

Dronenburg is not the best test case to determine whether the right of privacy protects private consensual homosexual behavior between adults.²⁰¹ Besides posing a challenge to military regulations, the case involves activities occurring on military premises and a relationship between a petty officer and a lower ranked enlisted man.²⁰² The primary drawback of the court of appeals' decision is the court's failure to limit its analysis to treatment of the weaknesses in the case.²⁰³ At the very least, the case should have affirmed *Dronenburg*'s discharge based on judicial deference to military decisions. As it now reads, however, *Dronenburg* threatens to cut short any assertion of a right of privacy for homosexual individuals.

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199. See *supra* note 197.

200. See, e.g., *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980) (where no showing of homosexual conduct, discharge based on petitioner's homosexual preference was unconstitutional); *Matthews v. Marsh*, No. 82-0216 (D.C. Me. April 3, 1984) (where no evidence of homosexual conduct, exclusion from ROTC program violated first amendment rights of homosexual student), noted in 52 U.S.L.W. 2569.

201. It is no secret that "[the] tendency in the development of new constitutional doctrine is for a clear-cut paradigm case to be identified, and for institutional litigators, scholars, and other lawyers to research for analogies that are 'close enough' in functional or doctrinal terms to justify application of a similar principle." Karst, *supra* note 66, at 662.

202. The court particularly emphasized that the activity had taken place on the base and had been with a less experienced serviceman. *Dronenburg*, 741 F.2d at 1389, 1398.

203. Although the full bench of the court of appeals denied a rehearing for this case, four justices strongly objected to the decision and dissented from the denial of rehearing *en banc*. See *Dronenburg v. Zech*, 746 F.2d 1579, 1580 (D.C. Cir. 1984) (Robinson, J., dissenting).