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***Bowers v. Hardwick*: An Incomplete Constitutional Analysis**

Homosexuals and incidents of homosexual sodomy have existed throughout history.¹ Plato,² Julius Caesar,³ Kings Edward II and Henry III,⁴ and Leonardo da Vinci⁵ were all homosexuals. More recent examples include Gertrude Stein,⁶ J. Edgar Hoover,⁷ and John Maynard Keynes.⁸ Homosexuality has been called an abominable sin not fit to be named among Christians, a way of life, an illness, and a crime against nature.⁹ For nearly as long as there have been homosexuals, sodomy has been a crime.¹⁰ Under the Code of Justinian¹¹ and the laws of the thirteen colonies¹² it was a capital offense. Today sodomy is a crime punishable by fine and imprisonment in nearly half the states.¹³

One homosexual, Michael Hardwick, was arrested and charged under Georgia's sodomy statute.¹⁴ In *Bowers v. Hardwick*¹⁵ he brought an action seeking a declaratory judgment that the Georgia statute violated his constitutional rights under the first, fourth, fifth, eighth, ninth, and fourteenth amendments. Ultimately, the United States Supreme Court dismissed Hardwick's suit for failing to state a claim on which relief could be granted.¹⁶ In doing so, the

1. V. BULLOUGH, *HOMOSEXUALITY: A HISTORY* 2 (1979).

2. M. GREIF, *THE GAY BOOK OF DAYS* 104 (1982).

3. *Id.* at 123. But see V. BULLOUGH, *supra* note 1, at 139 (questioning evidence surrounding Julius Caesar's homosexuality).

4. V. BULLOUGH, *supra* note 1, at 141-43.

5. V. BULLOUGH, *supra* note 1, at 145.

6. V. BULLOUGH, *supra* note 1, at 148.

7. M. GREIF, *supra* note 2, at 16. But see V. BULLOUGH, *supra* note 1, at 139 (questioning evidence surrounding J. Edgar Hoover's homosexuality).

8. V. BULLOUGH, *supra* note 1, at 148.

9. V. BULLOUGH, *supra* note 1, at 1, 19, 35-36.

10. V. BULLOUGH, *supra* note 1, at 31.

11. The Justinian Code is more formally known as the *Corpus juris civilis*, "the sixth-century encyclopedic collection of Roman laws made under the sponsorship of the Emperor Justinian. It is Justinian's collection which served as the basis of canon law (the law of the Christian Church) and civil law (both European and English)." V. BULLOUGH, *supra* note 1, at 32. The Justinian Code incorporated an even earlier law promulgated in 390 A.D.:

All persons who have the shameful custom of condemning a man's body, acting the part of a woman's, to the sufferance of an alien sex (for they appear not to be different from women), shall expiate a crime of this kind by avenging flames in the sight of the people.

Id. at 31.

12. V. BULLOUGH, *supra* note 1, at 43-44.

13. *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 n.9 (1986) [hereinafter *Survey*].

14. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2842 (1986). Section 16-6-2 of the Georgia Code provides, in part:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . . (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.

GA. CODE ANN. § 16-6-2 (1984).

15. 106 S. Ct. 2841 (1986) (5-4 decision).

16. *Id.* at 2843, 2847. The Supreme Court reversed the court of appeals, thus agreeing with the district court's dismissal of Hardwick's claim pursuant to Federal Rule of Civil Procedure 12(b)(6). See *id.* at 2843. Rule 12(b) allows defensive pleaders the option of raising seven enumerated defenses

Supreme Court failed to consider many of the issues Hardwick raised, such as privacy and due process, and others that, although Hardwick did not raise them, the Court should nevertheless have considered, such as establishment and equal protection. Because the Supreme Court did not expressly examine these constitutional claims, its opinion leaves doubt whether dismissal was appropriate. This Note reexamines those issues that the Court considered and also analyzes those the Court ignored. The Note concludes that *Bowers* raised issues inappropriate for pretrial dismissal that should have been considered at trial.

In August 1982 Atlanta police arrested Michael Hardwick in his home and charged him with committing the crime of sodomy.¹⁷ After a preliminary hearing, however, the district attorney decided not to present the case to a grand jury unless further evidence developed.¹⁸ Hardwick then brought suit in the United States District Court for the Northern District of Georgia, challenging the constitutionality of the Georgia sodomy statute.¹⁹ An admitted homosexual, Hardwick claimed that the statute placed him in imminent danger of arrest for the acts of sodomy he had committed.²⁰ The complaint named Michael Bowers, Attorney General of Georgia, and other state officials as defendants.²¹

Defendants moved to dismiss for failure to state a claim on which relief could be granted.²² Such a dismissal is proper only if there are no possible grounds that would support the claim.²³ The district court, relying on *Doe v. Commonwealth's Attorney*,²⁴ granted defendant's motion.²⁵ In *Doe* plaintiff homosexuals challenged the constitutionality of Virginia's sodomy laws.²⁶ The district court in *Doe* upheld the Virginia statute,²⁷ reasoning that the right of privacy did not extend to homosexual sodomy,²⁸ and the United States Supreme Court summarily affirmed the lower court's ruling.²⁹ The *Hardwick* district court found *Doe* to be on point and the Supreme Court's summary affirmance to

and objections by motion prior to their responsive pleading. Courts may consider such motions before trial. Rule 12(b)(6) is the specific defense of "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

17. *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986); see GA. CODE ANN. § 16-6-2 (1984).

18. *Bowers*, 106 S. Ct. at 2842.

19. *Id.*

20. *Id.*

21. *Bowers*, 760 F.2d at 1204. In addition to Attorney General Bowers, Hardwick named as defendants Lewis Slaton, District Attorney for Fulton County, and George Napper, Public Safety Commissioner of Atlanta. *Id.* Joining Hardwick in his complaint were John and Mary Doe, a married heterosexual couple who claimed to have been "chilled and deterred" from engaging in activities proscribed by the Georgia statute. *Id.* The appellate court affirmed the dismissal of the Does' claim, however, for a lack of standing. *Id.* at 1207.

22. *Id.* at 1204.

23. See *Bowers*, 106 S. Ct. at 2849 (Blackmun, J., dissenting); *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974); *Part v. Great Lakes Express Co.*, 484 F.2d 767, 773 (7th Cir. 1973); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 601-02 (1969).

24. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.*, 425 U.S. 901 (1976).

25. *Bowers*, 106 S. Ct. at 2842.

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

27. *Id.*

28. *Id.* at 1200, 1202. For further discussion of *Doe*, see *infra* text accompanying notes 97-103.

29. See *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 901 (1976).

be binding.³⁰

Hardwick appealed the dismissal to the United States Court of Appeals for the Eleventh Circuit. The court of appeals distinguished *Doe*, citing later Supreme Court cases indicating a willingness to reconsider the right of privacy issue.³¹ Relying on *Griswold v. Connecticut*,³² the appellate court went on to hold that the Georgia statute violated Hardwick's constitutional right of privacy.³³ In *Griswold* a married couple challenged Connecticut's right to prohibit the sale of contraceptives. The Supreme Court struck down the law, holding that it violated the couple's right of privacy.³⁴ The court of appeals in *Hardwick* cited later Supreme Court cases that extended the privacy doctrine to unmarried couples' right to contraceptives,³⁵ women's right to abortions,³⁶ and individuals' privacy interest in their homes.³⁷ It was a small step for the *Hardwick* court of appeals to hold that the right of privacy protected individuals' sexual conduct in their homes.³⁸ The appellate court ruled that for the statute to be upheld, the state would have to prove that the statute supported a compelling interest.³⁹

Defendants petitioned the Supreme Court for a writ of certiorari.⁴⁰ The Court took the case, determined the court of appeals had erred, and reversed its judgment.⁴¹ After defining the issue as whether homosexuals have a constitutional right to engage in sodomy, the Supreme Court refused to extend the right of privacy to homosexual behavior.⁴² It reasoned that the *Griswold* line of cases established a right of privacy only in matters of family, marriage, and procreation.⁴³ The Court stated, "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated"⁴⁴

In addition, the Court reaffirmed the standard by which a claimed right qualifies for constitutional protection.⁴⁵ The right must be "implicit in the con-

30. *Bowers*, 760 F.2d at 1204.

31. *Id.* at 1208-09. The court of appeals reasoned that the Supreme Court's affirmation could have been based on the fact the *Doe* plaintiffs lacked standing, rather than on the constitutional claims. *Id.* at 1207-08. The appellate court concluded that it should be bound only by "the most narrow plausible rationale for the summary decision [standing]." *Id.* at 1208.

32. 381 U.S. 479 (1965).

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

34. *Griswold*, 381 U.S. at 484-86. The right of privacy, however, is not expressly mentioned in the Constitution. "The constitutional origins of this right were hotly disputed; no more than three Justices could agree on any one theory about its parentage. Nonetheless, seven Justices did agree that a protectable intention had been asserted." Note, *On Privacy: Constitutional Protection For Personal Liberty*, 48 N.Y.U. L. REV. 670, 671 (1973).

35. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

36. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

37. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

38. See *Bowers*, 760 F.2d at 1212.

39. *Id.* at 1213. The state would have to prove also that the statute was the most narrowly drawn means of supporting the state interest. *Id.*

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

41. *Id.*

42. *Id.*

43. *Id.* at 2843-44.

44. *Id.* at 2844.

45. *Id.*

cept of ordered liberty' ”⁴⁶ or “ ‘deeply rooted in this Nation’s history and tradition.’ ”⁴⁷ Given that laws have proscribed sodomy for centuries,⁴⁸ the Court found it obvious that neither standard would allow the extension of a fundamental right to the right of homosexuals to engage in sodomy.⁴⁹

Finally, the Court held that homosexual conduct is not protected even when it occurs in the home. It distinguished *Stanley v. Georgia*,⁵⁰ a case involving the private possession of obscene material,⁵¹ on the ground that *Stanley* relied entirely on the first amendment freedoms of speech and press, not the fourth amendment sanctity of the home.⁵²

Justice Powell provided the critical swing vote in this five to four decision.⁵³ Like the majority, he found no constitutional right to engage in homosexual sodomy.⁵⁴ In his concurring opinion, however, Justice Powell stated that had *Hardwick* been imprisoned for any substantial length of time, an eighth amendment issue of cruel and unusual punishment would have been raised.⁵⁵ Justice Powell reasoned that because *Hardwick* had not yet been tried, the issue was not properly before the Court.⁵⁶

In a dissenting opinion Justice Blackmun criticized the majority opinion on several grounds. First, Justice Blackmun argued that the Court focused too narrowly on homosexual sodomy when it should have considered the broader right of individuals to control the nature of their intimate relationships.⁵⁷ Second, he stated that even if the right of privacy under the due process clause did not protect *Hardwick*, the fourth amendment encompassed *Hardwick*’s intimate conduct because it occurred in his home.⁵⁸ Last, Justice Blackmun asserted that the majority based its holding on the historical prohibition of sodomy and such reliance was improper.⁵⁹

In past cases homosexuals have sought protection under almost every constitutional rubric in the Bill of Rights. Most actions have relied primarily on the right of privacy⁶⁰ and the first amendment rights of free speech and expression.⁶¹ Other suits have been based on the equal protection clauses of state con-

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

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

48. *Id.* at 2845-46 (citing *Survey*, *supra* note 13, at 524 n.9).

49. *Id.* at 2846.

50. 394 U.S. 557 (1969).

51. *Id.* at 558-59.

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

53. *See id.* at 2847-48 (Powell, J., concurring).

54. *Id.* at 2847 (Powell, J., concurring).

55. *Id.*

56. *Id.* at 2848 (Powell, J., concurring).

57. *Id.* (Blackmun, J., dissenting).

58. *Id.* at 2850-53 (Blackmun, J., dissenting).

59. *Id.* at 2854-55 (Blackmun, J., dissenting).

60. *See, e.g.,* *People v. Onofre*, 51 N.Y.2d 476, 486-89, 415 N.E.2d 936, 940-41, 434 N.Y.S.2d 947, 950-51 (1980), *cert. denied*, 451 U.S. 987 (1981).

61. *See, e.g.,* *Aumiller v. University of Del.*, 434 F. Supp. 1273, 1302 (D. Del. 1977).

stitutions⁶² and the due process clause of the fifth amendment to the United States Constitution.⁶³ Still other actions have relied on the first amendment establishment clause and on the eighth amendment proscription of cruel and unusual punishment.⁶⁴ At least one suit was based on the fourteenth amendment limitations on police power.⁶⁵ In most of these cases, parties challenging state sodomy laws have relied on more than one theory to justify their constitutional claim.⁶⁶

The first theory, the right of privacy, stresses the fundamental import of an individual's sexuality in contrast to the weak interest a state has in regulating private, consensual sexual behavior.⁶⁷ The argument is grounded in the classic notion that people have a right to make decisions of fundamental importance to them that are beyond the permissible reach of the state. Note, for example, Justice Brandeis' famous dissent in *Olmstead v. United States*,⁶⁸ in which he wrote that the Constitution's framers "conferred, as against the Government, *the right to be let alone*—the most comprehensive of rights and the right most valued by civilized men."⁶⁹

Although not explicit in the Constitution, Supreme Court decisions have established the privacy doctrine as a constitutional right. In *Griswold* the Court held that the right to privacy protects the use of contraceptives by married couples.⁷⁰ In *Eisenstadt v. Baird*⁷¹ the Court found that both the equal protection clause and the right of privacy confer on unmarried couples the right to obtain contraceptives.⁷² Extending the right of privacy beyond the marital relationship, the Court wrote:

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.⁷³

Having extended protection to unmarried persons using contraceptives, the

62. See, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 467-68, 595 P.2d 592, 597-98, 156 Cal. Rptr. 14, 19-20 (1979).

63. See, e.g., *benShalom v. Secretary of Army*, 489 F. Supp. 964, 976-77 (E.D. Wis. 1980).

64. See Richards, *Homosexuality and the Constitutional Right To Privacy*, 8 N.Y.U. REV. L. & SOC. CHANGE 311, 311 (1979).

65. See, e.g., *Commonwealth v. Bonadio*, 490 Pa. 91, 99, 415 A.2d 47, 51 (1980).

66. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (right to privacy, equal protection); *Doe*, 403 F. Supp. at 1199 (due process, freedom of expression, right to privacy, cruel and unusual punishment).

67. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1288 (1985).

68. 277 U.S. 438 (1928).

69. *Id.* at 478 (Brandeis, J., dissenting) (emphasis added); see also J. MILL, ON LIBERTY 81 (E. Rapaport ed. 1978) (noting that society should not interfere with "purely personal conduct").

70. *Griswold*, 381 U.S. at 485-86.

71. 405 U.S. 438 (1972).

72. *Id.* at 453-54.

73. *Id.* at 453.

Court in *Roe v. Wade*⁷⁴ took only a small step in holding that the right of privacy covered a woman's right to an abortion.⁷⁵ Three years later, in *Planned Parenthood v. Danforth*,⁷⁶ the Supreme Court again extended the right of privacy to individuals when it held that neither the consent of parents of a female minor⁷⁷ nor the consent of the husband⁷⁸ may be required for a woman to have an abortion. More recently, in *Carey v. Population Services International*,⁷⁹ the Supreme Court ruled that a New York law which criminalized the unauthorized sale or distribution of contraceptives violated the right of privacy.⁸⁰ The Court reiterated its earlier statements that the right of personal privacy includes an interest in independently making certain important decisions.⁸¹

Several commentators interpreted the *Griswold* line of cases to mean that the privacy doctrine encompasses a broad right to sexual self-determination that includes the right to engage in homosexual behavior.⁸² The Court, however, had not yet settled on a standard or formula by which to apply the privacy doctrine.⁸³ Instead, the Court used indefinite terms like rights "implicit in the concept of ordered liberty"⁸⁴ or rights "deeply rooted in this Nation's history and tradition."⁸⁵

Regardless, several courts have used the right of privacy to attack the constitutionality of state sodomy laws.⁸⁶ Often courts suggest that sodomy statutes as applied to married couples might be unconstitutional.⁸⁷ Some courts have held that a state cannot regulate private consensual heterosexual activities, re-

74. 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

75. *Id.* at 153. Justice Blackmun wrote, "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*; see Comment, *The Right of Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. Tol. L. Rev. 811, 823 (1984).

76. 428 U.S. 52 (1976).

77. *Id.* at 72-75.

78. *Id.* at 67-71.

79. 431 U.S. 678 (1977).

80. *Id.* at 684-91.

81. *Id.* at 684. The Court wrote, "This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.'" *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

82. See J. BAER, *EQUALITY UNDER THE CONSTITUTION* 231 (1983) ("The courts have refused, on nonexistent grounds, to extend this right [of privacy] to homosexuals."); Richards, *supra* note 64, at 311 ("There is no principled way to defend the earlier right to privacy cases and not extend the right to homosexuality.");

83. See Richards, *supra* note 64, at 311; Comment, *supra* note 75, at 828.

84. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); see Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 230 (1965). When deciding whether to extend protection to homosexual sodomy, the *Bowers* Court invoked the "implicit in the concept of ordered liberty" standard. *Bowers*, 106 S. Ct. at 2844 (quoting *Palko*, 302 U.S. at 325).

85. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), *quoted in Bowers*, 106 S. Ct. at 2844.

86. Comment, *supra* note 75, at 835.

87. See *Bowers*, 106 S. Ct. at 2858 n.10 ("Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple.") (Stevens, J., dissenting). But see *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.) (en banc) (married couple's conviction for sodomy upheld because they effectively waived the right of privacy by allowing a third party to participate in their sexual activities, and by taking photographs of these activities that the couple's children later found and took to school), *cert. denied*, 429 U.S. 977 (1976).

ardless of whether the participants are married.⁸⁸ A few courts have extended constitutional protection to homosexual sodomy.⁸⁹ In *People v. Onofre*,⁹⁰ for example, the New York Court of Appeals expressly extended constitutional protection to homosexual conduct.⁹¹ The court invalidated a New York statute criminalizing any act of sodomy, reasoning that the privacy doctrine protected "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."⁹² The majority of courts, however, have refused to extend the right of privacy to consensual sexual behavior outside of marriage, much less to homosexual conduct.⁹³ In *Hughes v. State*,⁹⁴ for example, a case involving a criminal prosecution for sodomy, the Maryland Court of Special Appeals held that the privacy doctrine established by *Griswold* "clearly does not lend itself to either a heterosexual or homosexual relationship between unmarried persons."⁹⁵ The *Hughes* court read the *Griswold* right of privacy as limited to marital intimacy.⁹⁶

The United States Supreme Court first considered the constitutionality of state sodomy laws in *Doe*.⁹⁷ Plaintiff homosexuals brought suit seeking a declaratory judgment on the constitutionality of Virginia's sodomy law.⁹⁸ The *Doe* plaintiffs argued that the statute violated their rights to privacy, due process, freedom of expression, and freedom from cruel and unusual punishment.⁹⁹ The district court, however, found no violations.¹⁰⁰ Examining *Griswold* and Justice Harlan's dissent in *Poe v. Ullman*,¹⁰¹ the court found no nexus between homosexual sodomy and marriage, family, and the home on which to extend the privacy doctrine's protection.¹⁰² On appeal the Supreme Court summarily affirmed

88. See, e.g., *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6 (1976); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d. 47 (1980).

89. See, e.g., *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982) (holding that state's sodomy law violated homosexual's rights of privacy and equal protection), *rev'd*, 769 F.2d 289 (5th Cir. 1985); *Acanfona v. Board of Educ.*, 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974); see Comment, *supra* note 75, at 836.

90. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

91. *Id.* at 485, 415 N.E.2d at 938-39, 434 N.Y.S.2d at 949.

92. *Id.* at 488, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951.

93. Comment, *supra* note 75, at 837; see, e.g., *State v. Poe*, 40 N.C. App. 385, 252 S.E.2d 843, *disc. review denied*, 298 N.C. 303, 259 S.E.2d 304 (1979), *appeal dismissed*, 445 U.S. 947 (1980); *State v. Santos*, 413 A.2d 58 (R.I. 1980). Both *Poe* and *Santos* involved criminal convictions for forced sodomy, when there was an issue concerning the victims' consent. The courts held that even with consent, the activities would not be protected. *Poe*, 40 N.C. App. at 387-88, 252 S.E.2d at 844-45; *Santos*, 413 A.2d at 67-68.

94. 14 Md. App. 497, 287 A.2d 299 (Md. Ct. Spec. App.), *cert. denied*, 409 U.S. 1025 (1972).

95. *Id.* at 505, 289 A.2d at 305.

96. *Id.*

97. 425 U.S. 901 (1976); see Comment, *supra* note 75, at 838.

98. *Doe*, 403 F. Supp. at 1200. Virginia's sodomy law was codified at VA. CODE ANN. § 18.1-212 (1950) (repealed 1975). Virginia's current statute criminalizes only forcible, not consensual, sodomy. See VA. CODE ANN. § 18.2-67.1 (1982 & Supp. 1986).

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

100. *Id.*

101. 367 U.S. 497 (1961).

102. *Doe*, 403 F. Supp. at 1200-02. The court also reasoned that because states had long criminalized sodomy, such laws were supported by some rational basis of state interest. *Id.* at 1202-03.

the lower court's judgment.¹⁰³

Doe, however, was not the final word on the constitutionality of sodomy laws: first, procedural aspects of the Court's summary affirmance put *Doe*'s precedential weight in question;¹⁰⁴ and second, later Supreme Court decisions seem to undermine *Doe*'s authority.¹⁰⁵ Based on these questions, the courts in *Onofre* and a few other cases have distinguished *Doe* and extended the right of privacy to homosexual sodomy.¹⁰⁶ Most courts, however, have refused to extend the right of privacy beyond the traditional institutional frameworks of marriage, procreation, and family.¹⁰⁷

In addition to the right of privacy given to individuals under the fourteenth amendment, the fourth amendment imbues the home with a separate privacy interest.¹⁰⁸ The fourth amendment guarantees "[t]he right of the people to be

103. *Doe*, 425 U.S. at 901.

104. The Supreme Court has stated, "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties . . ." *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (emphasis added); *accord* *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court stated that a summary affirmance is "not of the same precedential value as would be an opinion of [the Supreme] Court treating the [same] question on the merits." *Id.* at 671.

Yet, in *Hicks v. Miranda*, 422 U.S. 332 (1975), the Court wrote, "'Votes to affirm summarily . . . are votes on the merits of the case . . .'" *Id.* at 344 (quoting *Ohio ex rel. Eaton v. Prince*, 360 U.S. 246, 247 (1959)). The *Hicks* Court went on to state that a Supreme Court summary affirmance has binding precedential weight. *Id.*; *accord* J. MOORE, H. BENDIX & B. RINGLE, *MOORE'S FEDERAL PRACTICE* ¶ 400.05-1 (2d ed. 1982) ("[S]ummary affirmances of lower federal court judgments . . . are decisions on the merits, and are binding upon lower courts . . ."). As a result of this uncertainty, courts have held both ways regarding whether *Doe* is binding. For decisions relying on *Doe*, see *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (en banc); *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir.) (en banc), cert. denied, 429 U.S. 977 (1976); *Berg v. Clayton*, 436 F. Supp. 76 (D.D.C. 1977). For decisions distinguishing *Doe*, see *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985); *benShalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980); *Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947.

105. Even if *Doe*'s precedential weight was not uncertain because of summary affirmance questions, later decisions undermined *Doe*'s authority. See *Bowers*, 760 F.2d at 1209. In *Carey*, for example, the Court wrote that it "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." *Carey*, 431 U.S. at 688 n.5, 694 n.17. The Court stated also that although individual decisions relating to marriage, procreation, contraceptives, and the family were clearly protected, it had not yet defined the "outer limits" of the privacy doctrine. *Id.* at 684-85.

In *New York v. Uplinger*, 467 U.S. 246 (1984), the Court dismissed a writ of certiorari as improvidently granted in a case involving a statute proscribing loitering in public for the purpose of soliciting another to engage in deviate sexual behavior. *Id.* at 247-49; see N.Y. PENAL LAW § 240.35-3 (McKinney 1980). The Court stated that *Uplinger* was an inappropriate vehicle for resolving constitutional issues, including the constitutionality of sodomy laws. See *Uplinger*, 467 U.S. at 247-49; *Bowers*, 760 F.2d at 1210.

A lower court is not bound by Supreme Court decisions it believes the Court would overrule today. *Indianapolis Airport Auth. v. American Airlines, Inc.*, 733 F.2d 1262, 1272 (7th Cir. 1984); see, e.g., *Norris v. United States*, 687 F.2d 899, 902-04 (7th Cir. 1982); *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956) (per curiam). Given that rule, along with *Carey* and *Uplinger*, a few courts have declined to follow *Doe*. See, e.g., *Bowers*, 760 F.2d at 1210; *benShalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980); *Onofre*, 51 N.Y.2d at 476, 415 N.E.2d at 936, 434 N.Y.S.2d at 947.

106. See, e.g., *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985); *benShalom v. Secretary of Army*, 489 F. Supp. 964 (E.D. Wis. 1980); *Onofre*, 51 N.Y.2d at 476, 415 N.E.2d at 936, 434 N.Y.S.2d at 947.

107. See Note, *supra* note 67, at 1288-89.

108. E.g., *United States v. Karo*, 468 U.S. 705 (1984); *Payton v. New York*, 445 U.S. 573, 601

secure in their . . . houses.”¹⁰⁹ In *United States v. Orito*¹¹⁰ the Supreme Court stated, “The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education.”¹¹¹ Activities that would otherwise be illegal are often protected merely because they occur in the home. In *Stanley*, for example, a man had the right to possess and watch in his home obscene films that would not have had constitutional protection if publicly displayed.¹¹² In the context of homosexual sodomy, behavior that would be illegal if conducted in public, as in a restroom or car, is arguably protected if conducted in the privacy of the home. In most cases in which the defendant is arrested for committing sodomy in the home, like in *Bowers* or in *Onofre*, a fourth amendment claim for privacy supplements the more general claim of privacy under the fourteenth amendment.¹¹³

A second constitutional claim under which homosexuals have sought protection is the equal protection clause of the fourteenth amendment.¹¹⁴ The purpose of the clause is to protect people from unequal treatment based on irrelevant characteristics that do not belie a person’s moral or social worth and that are not legitimate bases of state regulation.¹¹⁵ Statutes that on their face distinguish between married couples’ acts of sodomy and such acts committed by homosexuals or unmarried heterosexuals raise an issue of equal protection.

In both *Onofre* and *Commonwealth v. Bonadio*¹¹⁶ defendants successfully challenged such a statute.¹¹⁷ In *Bonadio* unmarried heterosexuals were arrested in an adult club for violating the state sodomy statute. Because the sodomy statute distinguished between sodomy committed by married people and sodomy committed by unmarried people, the Pennsylvania Supreme Court held it violated the equal protection clause.¹¹⁸ Similarly, statutes that do not expressly discriminate on the basis of marriage, but that are enforced only against unmar-

(1980) (There is an “overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.”); see *Bowers*, 106 S. Ct. at 2850-51 (Blackmun, J., dissenting).

109. U.S. CONST. amend. IV.

110. 413 U.S. 139 (1973). The Supreme Court distinguished *Stanley*, which protected the private possession of obscene material in the home, from *Orito* because *Orito* involved the interstate transportation of such material. *Id.*

111. *Id.* at 142.

112. The *Stanley* Court reasoned that the state’s interest in proscribing obscenity did not overcome the first amendment in all instances, particularly because Stanley’s possession of the films in his home added an extra dimension of constitutional protection under the privacy doctrine. *Stanley*, 394 U.S. at 563-65.

113. See *Bowers*, 106 S. Ct. at 2850-53 (Blackmun, J., dissenting).

114. No state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV; see, e.g., *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979); *Commonwealth v. Bonadio*, 490 Pa. 109, 415 A.2d 47 (1980).

115. See Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1065 (1979); Note, *supra* note 67, at 1299.

116. 490 Pa. 109, 415 A.2d 47 (1980).

117. *Onofre*, 51 N.Y.2d at 485, 415 N.E.2d at 937-38, 434 N.Y.S.2d at 949; *Bonadio*, 490 Pa. at 99, 415 A.2d at 51; see Comment, *supra* note 75, at 845.

118. *Bonadio*, 490 Pa. at 99, 415 A.2d at 51.

ried couples or homosexuals raise an equal protection issue.¹¹⁹ Several courts, however, have held that sodomy laws do not unconstitutionally discriminate against homosexuals, either as written or as applied.¹²⁰ In *United States v. Cozart*,¹²¹ for example, the District of Columbia Court of Appeals held that a mere failure to prosecute heterosexuals for sodomy did not show discriminatory enforcement when homosexuals were tried for the same conduct.¹²²

The equal protection clause also provides constitutional protection for certain suspect classes of individuals who have suffered broad societal discrimination.¹²³ In *Loving v. Virginia*,¹²⁴ for example, the state charged a racially mixed married couple with violating Virginia's miscegenation statute. The Supreme Court invalidated the law because race is a suspect class.¹²⁵ Like the privacy doctrine, equal protection's "suspectness" is piecemeal in the common law. Classifications based on illegitimacy¹²⁶ and gender,¹²⁷ for example, have been subject to close scrutiny while old age¹²⁸ and income level¹²⁹ classifications attract only minimal examination.

In *San Antonio Independent School District v. Rodriguez*,¹³⁰ however, the Supreme Court set out four criteria for determining the existence of a suspect class. First, the group must be stigmatized from a history of prejudice.¹³¹ Second, the class must suffer from unequal treatment.¹³² Third, the classification must be based on some immutable trait that all members share.¹³³ Last, the group must be a discrete and insular minority unable to protect its interests

119. Comment, *supra* note 75, at 846-47.

120. See, e.g., *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (Navy regulation permitting discharge for homosexual activity does not violate rights to privacy and equal protection); *Hatheway v. Secretary of Army*, 641 F.2d 1376 (9th Cir.) (prosecuting only heterosexuals under military regulation that makes it a crime to engage in sodomy with another person of same or opposite sex does not violate equal protection), *cert. denied*, 454 U.S. 864 (1981); *State v. Bateman*, 113 Ariz. 107, 547 P.2d 6 (1976), *cert. denied*, 429 U.S. 864 (1977). But see *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976).

121. 321 A.2d 342 (D.C. 1974).

122. *Id.* at 344.

123. See Note, *supra* note 67, at 1298.

124. 388 U.S. 1 (1967).

125. *Id.*

126. *Lalli v. Lalli*, 439 U.S. 259 (1979) (classifications based on illegitimacy not subject to strict scrutiny but must be substantially related to permissible state interests).

127. *Craig v. Boren*, 429 U.S. 190 (1976) (classifications by gender must serve important governmental objectives and must be substantially related to achievement of such objectives).

128. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (strict scrutiny is not the proper standard for testing validity of statute requiring retirement at age 50 for state policemen; rather the statute must be rationally related to its purpose).

129. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (school financing systems bore rational relationship to legitimate state purpose).

130. 411 U.S. 1 (1973). In *Rodriguez* plaintiffs brought a suit on behalf of school children in poor school districts claiming that the allocation of resources according to property taxes violated the equal protection clause. The Supreme Court held that poor people do not fit the "traditional indicia of suspectness." *Id.* at 28; see Comment, *supra* note 75, at 848; Note, *supra* note 67, at 1298-1300.

131. *Rodriguez*, 411 U.S. at 28.

132. *Id.*; see *Matthews v. Lucas*, 427 U.S. 495, 505-06 (1976) (law has long placed the illegitimate child in an inferior position).

133. *Rodriguez*, 411 U.S. at 28; see *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion) (sex is an immutable characteristic).

through ordinary political means.¹³⁴ Groups qualifying for suspect classification receive heightened judicial protection, usually in the form of voiding discriminatory laws.¹³⁵ Thus far, however, courts have limited protection to traditional groups and have refused to hold homosexuals to be a suspect class.¹³⁶

Just as homosexuals have used privacy and equal protection, they have also used the first amendment protection of speech, expression, and association in their pursuit of homosexual rights.¹³⁷ A number of courts have found extensive first amendment protection of homosexual activities, including the right to associate freely,¹³⁸ to advocate homosexual rights,¹³⁹ and to engage in symbolic expression.¹⁴⁰ In *Fricke v. Lynch*¹⁴¹ the United States District Court for the District of Rhode Island held that a male high school student could take a male date to the high school prom because such an act was symbolic and therefore protected by the first amendment. A few courts, however, have refused to recognize these first amendment rights.¹⁴²

All courts, regardless of how broadly they interpret the first amendment, "have drawn a distinction between the words spoken and the reality they repre-

134. *Rodriguez*, 411 U.S. at 28; see *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

135. Traditionally, courts have applied two standards of scrutiny: strict and minimal. Comment, *supra* note 75, at 847. Strict scrutiny requires that the state show a necessary and compelling interest in discriminating against the suspect class. See *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967). Application of strict scrutiny is almost always fatal to the statute in question. *E.g.*, *Loving*, 388 U.S. at 1; *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (state must show "pressing public necessity").

Minimal scrutiny, however, requires only some rational relationship between the law and a permissible state objective. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (economic legislation will be upheld if it is reasonable and bears a rational relationship to state objective); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday blue laws will not be set aside if any facts can reasonably justify them). Statutes almost always survive minimal scrutiny. *E.g.*, *Boraas*, 416 U.S. at 7-8; *McGowan*, 366 U.S. at 426. In *McGowan* the Court held that the rational relationship test would be satisfied if "any state of facts reasonably may be conceived to justify" the law. *McGowan*, 366 U.S. at 426.

Because the choice between strict or minimal is so extreme, courts have developed an intermediate level of scrutiny. Note, *supra* note 67, at 1298; see *Lalli v. Lalli*, 439 U.S. 259 (1978) (standard for illegitimacy); *Reed v. Reed*, 404 U.S. 71 (1971) (standard for gender). This new level of scrutiny requires that the law be substantially related to an important state goal. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 199 (1976); *Reed*, 404 U.S. at 76. Intermediate review is similar to a balancing test or rule of reason. See Note, *supra* note 67, at 1298.

136. See Comment, *supra* note 75, at 848-50; Note, *supra* note 67, at 1298-99.

137. See U.S. CONST. amend. I. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Supreme Court split the freedom of association into two parts: intimate and expressive association. This split effectively subsumed the freedom of association into the rights of privacy and freedom of expression. *Id.* at 617-18. As a result, freedom of association is not a separate ground for asserting homosexual rights. See Note, *supra* note 67, at 1292-93.

138. See, *e.g.*, *Gay Lib v. University of Mo.*, 558 F.2d 848, 857 (8th Cir. 1977) (public university's refusal to recognize gay student organization violates first amendment), *cert. denied*, 434 U.S. 1080 (1978).

139. See, *e.g.*, *Aumiller v. University of Del.*, 434 F. Supp. 1273 (D. Del. 1977) (teacher's first amendment rights violated when state university refused to renew his contract after his comments about homosexuality appeared in newspaper).

140. See, *e.g.*, *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980).

141. 491 F. Supp. 381 (D.R.I. 1980).

142. See Note, *supra* note 67, at 1293.

sent—the expression is protected, the lifestyle is not.”¹⁴³ An ROTC cadet was discharged under army regulations for saying “I am a lesbian” to a superior officer. The United States District Court for the District of Maine ordered the cadet’s reenrollment and held that a statement of desire or intent, without lesbian conduct, was protected speech.¹⁴⁴ Although there are arguments for extending first amendment protection to homosexual sodomy,¹⁴⁵ the speech/conduct distinction is well established, and courts steadfastly have refused to break it down.¹⁴⁶ For that reason challenges to sodomy statutes have not relied on the first amendment.

Like the freedom of speech and expression, the ninth amendment is available to challenge sodomy laws, but is seldom used.¹⁴⁷ The ninth amendment reads: “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁴⁸ It serves as a catch-all for those “essential rights” deeply rooted in society, but which have no express support elsewhere in the Constitution.¹⁴⁹ Privacy is an example of such a right.¹⁵⁰ When the Supreme Court propounds a new right, however, it leaves itself open to criticism that it is making, not interpreting, law.¹⁵¹ For that reason courts generally resist finding rights under the ninth amendment¹⁵² and have refused to extend to homosexuals the right to engage in sodomy on this basis.¹⁵³

In addition to possible challenges under the ninth amendment, sodomy laws may be attacked¹⁵⁴ under the eighth amendment proscription of cruel and

143. See Note, *supra* note 67, at 1293.

144. *Matthew v. Marsh*, No. 82-0216 (D. Me. Apr. 3, 1984), *vacated*, No. 84-1482 (1st Cir. Feb. 22, 1985), *cited in* Note, *supra* note 67, at 1295; see *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (naval petty officer discharged for homosexual activity); *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984) (high school guidance counselor terminated for homosexual activity), *cert. denied*, 470 U.S. 1009 (1985).

145. The first argument is that criminalizing homosexual sodomy “chills” the freedom of expression. The second is that homosexual sodomy is itself a form of expression, like speech, that should be protected by the first amendment. Note, *supra* note 67, at 1294-95. Neither argument has been successful. See *id.*

146. See, e.g., *Matthew v. Marsh*, No. 82-0216 (D. Me. Apr. 3, 1984), *vacated*, No. 84-1482 (1st Cir. Feb. 22, 1985), *cited in* Note, *supra* note 67, at 1295. Commentators, however, continue to criticize the distinction. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-7, at 599 (1978) (“The distinction between speech and conduct . . . has no real content.”); Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1387 (1982) (“How can this distinction between identity and conduct be tenable?”); Note, *supra* note 67, at 1295.

147. *But see Bowers*, 106 S. Ct. at 2849. Hardwick’s “complaint expressly invoked the Ninth Amendment.” *Id.*

148. U.S. CONST. amend. IX.

149. See *United States v. Choate*, 576 F.2d 165, 181 (9th Cir. 1978), *cert. denied*, 449 U.S. 951 (1980).

150. See *Griswold*, 381 U.S. at 486, 530.

151. Individual Justices have even admitted to making law. E.g., *Doe v. Bolton*, 410 U.S. 179, 221-22 (1973) (White, J., dissenting); *Roe*, 410 U.S. at 167-68 (Stewart, J., concurring).

152. See *Bowers*, 106 S. Ct. at 2845-46. For example, courts do not recognize an individual’s right to avoid a military draft, *United States v. Zaugh*, 445 F.2d 300 (9th Cir. 1971), or parents’ absolute right to the custody of their children, *In re Juvenile Appeal*, 189 Conn. 276, 455 A.2d 1313 (1983).

153. See, e.g., *Doe*, 403 F. Supp. 1199.

154. See, e.g., *Carter v. State*, 255 Ark. 225, 500 S.W.2d 368, *cert. denied*, 416 U.S. 905 (1973).

unusual punishment.¹⁵⁵ The cruel and unusual punishment clause circumscribes the criminal process by (1) limiting the kinds of punishment that can be imposed on criminals, (2) proscribing punishment grossly disproportionate to the severity of the crime, and (3) imposing substantive limits on what activities can be made criminal.¹⁵⁶ The last two guidelines are particularly important in challenging sodomy laws. The first argument is obvious: some states impose punishment wholly out of line with the severity of the crime of sodomy.¹⁵⁷ Even if a court struck down a sodomy statute on this basis, however, the state legislature could enact a sodomy law that imposes a less severe penalty.¹⁵⁸ The second argument is more subtle. A homosexual could assert that his or her homosexuality is an immutable status and that acts of sodomy are manifestations of that condition which should not be punished.¹⁵⁹ Although the Supreme Court has held other conditions, like drug addiction, to be immune from criminal penalties,¹⁶⁰ no court has offered such protection to homosexuals.¹⁶¹

Finally, there is an argument that sodomy statutes violate the first amendment prohibition of establishment of religion.¹⁶² It is clear that sodomy statutes have their origins in Judaeo-Christian doctrine.¹⁶³ Several courts have even appealed to Biblical authority in upholding such laws.¹⁶⁴ Therefore, sodomy statutes have no secular basis; instead they are an embodiment of Christian doctrine that violates the establishment clause.¹⁶⁵ The flaw in this argument, however, is that although sodomy laws have historic religious roots, secular interests may support them as well.¹⁶⁶ One such interest might be in the preservation of societal morals apart from any religious bases.¹⁶⁷ Another might be the prevention of the spread of Acquired Immune Deficiency Syndrome (AIDS). Although

155. U.S. CONST. amend. VIII.

156. See *Ingram v. Wright*, 430 U.S. 651 (1977).

157. Comment, *supra* note 75, at 864 & n.353. Several statutes impose sentences of up to 20 years for a single act of sodomy. See, e.g., GA. CODE ANN. § 16-6-2 (1984); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1970); R.I. GEN. LAWS § 11-10-1 (1969).

158. Comment, *supra* note 75, at 865.

159. Comment, *supra* note 75, at 861-62.

160. *Robinson v. California*, 370 U.S. 660 (1962). But see *Powell v. Texas*, 392 U.S. 514 (1968) (distinguishing status as alcoholic from act of public drunkenness).

161. See Comment, *supra* note 75, at 863-64. The problem here is like that confronted with the first amendment freedom of speech. See *supra* notes 143-46 and accompanying text. Courts distinguish between the condition and the symptom, so that drug addiction is protected, but drug use is not. See *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962). Similarly, homosexuality could be protected while acts of sodomy would not. Comment, *supra* note 75, at 863-64.

162. Richards, *supra* note 64, at 311-12; Comment, *supra* note 75, at 860. The first amendment states, "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

163. Comment, *supra* note 75, at 860.

164. See, e.g., *Bowers*, 106 S. Ct. at 2847 (Burger, C.J., concurring) ("Condemnation of [sodomy] is firmly rooted in Judaeo-Christian moral and ethical standards."); *Doe*, 403 F. Supp. at 1202-03 (laws prohibiting sodomy "[have] ancestry going back to Judaic and Christian law").

165. Richards, *supra* note 64, at 312; Comment, *supra* note 75, at 860-61.

166. Richards, *supra* note 64, at 312; Comment, *supra* note 75, at 860-61; see, e.g., *Hatheway v. Secretary of Army*, 641 F.2d 1376 (9th Cir.), cert. denied, 454 U.S. 864 (1981); *Carter v. State*, 255 Ark. 225, 500 S.W.2d 368 (1973), cert. denied, 416 U.S. 905 (1974); *Stewart v. United States*, 364 A.2d 1205 (D.C. 1976).

167. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (recognizing state's interest in

these secular interests may merely mask underlying religious beliefs, a court could rationalize the validity of sodomy laws on the basis of those interests.¹⁶⁸

In sum, sodomy statutes raise a variety of constitutional issues. In *Bowers* the Supreme Court had a duty to examine each of those issues in the setting of Michael Hardwick's action. The case was before the Court on defendant's motion to dismiss for failure to state a claim on which relief could be granted.¹⁶⁹ Moreover,

[i]t is a well settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."¹⁷⁰

Even if Hardwick did not raise issues under the eight or ninth amendments or the equal protection clause, the Court should not have dismissed his claim if any of those issues could have entitled him to relief. The majority in *Bowers* simply ignored these additional claims.¹⁷¹ Because *Bowers* has important implications for the right of privacy under the fourth and fourteenth amendments, it is necessary to reexamine the Court's opinion on this claim as well as issues arising

preserving morals); Comment, *supra* note 75, at 860-61 ("Morality and religion are not synonymous.").

168. There is one other, less important, potential constitutional challenge to sodomy statutes. Because many state sodomy laws proscribe "crimes against nature," *see, e.g.*, N.C. GEN. STAT. § 14-177 (1981), they may be open to a charge of unconstitutional vagueness. *See generally* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (A law is unconstitutionally vague if its language "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . .").

However, in *Rose v. Locke* the Supreme Court held that language like "crime against nature" had a common law definition sufficient to withstand a vagueness inquiry. *Rose v. Locke*, 423 U.S. 48, 49-53 (1975). Given *Rose*, a successful challenge to sodomy laws on vagueness grounds is unlikely. Furthermore, even if a law were struck down for vagueness, the state legislature could simply rewrite it. In *Bowers*, moreover, the statute at issue is quite specific: "A person commits . . . sodomy when he performs . . . any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1984).

169. *Bowers*, 106 S. Ct. at 2842-43; *see* FED. R. CIV. P. 12(b)(6).

170. *Bowers*, 106 S. Ct. at 2849 (Blackmun, J., dissenting) (quoting *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974)); *accord* *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."); *Parr v. Great Lakes Express Co.*, 484 F.2d 767, 773 (7th Cir. 1973) ("[A] complaint should not be dismissed merely because its allegations do not support the legal theory on which the pleader intends to proceed."); *Due v. Tallahassee Theaters, Inc.*, 333 F.2d 630, 631 (5th Cir. 1964) ("[I]f the complaint alleges facts which, under any theory of the law, would entitle the complainant to recover, the action may not be dismissed for failure to state a claim."); *United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963) ("[A] motion to dismiss for failure to state a cause of action should not be granted unless it appears certain that the plaintiff would be entitled to no relief under any state of facts which could prove in support of his claim."); 5 C. WRIGHT & A. MILLER, *supra* note 23, § 1357, at 601-02 ("The complaint should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.").

171. *See Bowers*, 106 S. Ct. at 2842-47. The Court simply noted that Hardwick did not pursue claims under the ninth or eighth amendments or under the equal protection clause of the fourteenth amendment. *Id.* at 2846 n.8. *But see id.* at 2849 (Blackmun, J., dissenting); Brief for Respondent at 19-29, *Bowers* (No. 85-140) (implying an equal protection claim).

under the eight and ninth amendments and the equal protection clause that the Court declined to address.

The *Bowers* Court first discussed the right of privacy under the *Griswold* line of cases.¹⁷² Speaking of these cases, the Court wrote:

[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy No connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand has been demonstrated¹⁷³

In contrast, Justice Blackmun found the majority's search for a connection between homosexual sodomy and the institutions of marriage, family, and procreation to be a "superficial" analysis.¹⁷⁴ Justice Blackmun, along with commentators and other courts, believes the Court should have looked at the essence of these institutions to find a common ground on which to develop a simple and workable doctrine of privacy.¹⁷⁵ Commentators have proposed various formulations for such a doctrine. One judge has written: "I view [*Griswold*, *Eisenstadt*, and *Roe*] as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern."¹⁷⁶ In the context of sodomy laws, another court has written: " 'If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted government intrusion into matters fundamentally affecting a person' as the decision to engage in private sexual conduct with another consenting adult."¹⁷⁷ These commentators, looking for the essence of *Griswold*, *Eisenstadt*, and *Roe*, have found the individual's rights to be paramount. Marriage is fundamental because it is a way of life for individuals, not because it is an entity unto itself bonded for the social good; procreation is protected because parenthood changes a person's life forever, not because it has some religious or cultural significance; the family is fundamental because of its meaning for the individual, not because a nuclear family is proper for our society.¹⁷⁸ In short, "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"¹⁷⁹

Instead of a simple, workable doctrine, however, the *Bowers* Court leaves a right of privacy defined case by case in a piecemeal fashion. The majority delimit-

172. *Bowers*, 106 S. Ct. at 2843-44.

173. *Id.* at 2844.

174. *Id.* at 2851 (Blackmun, J., dissenting).

175. *Id.*; see, e.g., *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3338 (1986); *Doe*, 403 F. Supp. at 1203-04 (Merhige, J., dissenting); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637 (1980); Note, *The Armed Services Continued Degradation and Expulsion of Their Homosexual Members*: *Dronenburg v. Zech*, 54 U. CIN. L. REV. 1055, 1056-57 (1986).

176. *Doe*, 403 F. Supp. at 1203 (Merhige, J., dissenting).

177. *Baker v. Wade*, 553 F. Supp. 1121, 1140 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3338 (1986).

178. See *Bowers*, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

179. *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2187 n.5 (1986) (Stevens, J., concurring) (quoting Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288-89 (1977)).

its the privacy doctrine to interests only within traditional frameworks of marriage, procreation, and family.¹⁸⁰ Moreover, the Court gives no guidelines for what exactly is covered by a privacy interest in family, marriage, or procreation. For example, although unmarried couples, like married couples, have a right to contraceptives,¹⁸¹ it is unclear whether they have a right to engage in sodomy as do married persons. Without proper guidelines, the doctrine is conclusory, and because it is conclusory, lower courts will hesitate to break new ground with the privacy doctrine. In this way, the Supreme Court has reserved to itself utter dominance of the right of privacy; its application will be limited to the narrow circumstances of the cases the Court considers.

In addition to the privacy doctrine, the *Bowers* majority examined Hardwick's fourth amendment claim. Hardwick argued that because the homosexual act occurred in his bedroom, it should be protected by the sanctity of the home.¹⁸² Hardwick based this argument on *Stanley*. In *Stanley* the Supreme Court held that although a state may punish the public distribution of obscene material, it cannot punish the private possession of such material.¹⁸³ The *Bowers* majority distinguished *Stanley* by contending that the *Stanley* Court had relied entirely on the first amendment freedom of speech, not the fourth amendment protection of the home.¹⁸⁴

The Court, however, erred in this distinction. First, the *Stanley* opinion stated:

[I]n the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that [first amendment] right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.¹⁸⁵

Later in the opinion, the *Stanley* Court wrote, "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."¹⁸⁶ Second, the *Stanley* opinion quoted extensively from Justice Brandeis' dissent in *Olmstead*. Justice Brandeis wrote that the framers of the Constitution "conferred, as against the Government, the right to be let alone."¹⁸⁷ What is more significant about the *Stanley* Court's reliance on *Olmstead* is that *Olmstead* involved no first amendment issue.¹⁸⁸ Third, the *Stanley* Court distinguished *Roth v. United States*,¹⁸⁹ the leading obscenity case,

180. See *Bowers*, 106 S. Ct. at 2843-44.

181. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

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

183. *Stanley*, 394 U.S. at 564-65. Police found pornographic films in defendant's home while searching under a warrant for evidence of bookmaking activities. Stanley was charged with possession of obscene material in violation of Georgia law. *Id.*

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

185. *Stanley*, 394 U.S. at 564.

186. *Id.* at 565.

187. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). In *Olmstead* the Court held that evidence of an incriminating telephone conversation wire-tapped by the government and used in a criminal trial did not violate the fifth amendment.

188. *Bowers*, 106 S. Ct. at 2852-53 (Blackmun, J., dissenting).

189. 354 U.S. 476 (1957). In *Roth* defendant was charged with using the mails in violation of

on the ground that the defendant *privately* possessed obscene material, whereas *Roth* proscribed only public distribution of such material.¹⁹⁰ The *Stanley* Court *must* have relied in part on the fourth amendment or the Court could not have cited *Olmstead* or distinguished *Roth*. Fourth, other courts,¹⁹¹ and even the Supreme Court itself,¹⁹² have interpreted *Stanley* to involve fourth amendment protections.

Furthermore, the *Bowers* Court's interpretation of *Stanley* sets up a conflict with its earlier decisions that cannot be reconciled. Five years after *Stanley* the Supreme Court decided *Paris Adult Theatre I v. Slaton*.¹⁹³ In *Paris* the Court relied on *Roth* in holding that there is no fourth amendment right of privacy "to watch obscene movies in places of public accommodation."¹⁹⁴ There was a potential conflict between *Paris* and *Stanley* in that *Paris* involved the same conduct as in *Stanley*—watching obscene movies—but the conduct in *Paris* was not protected, whereas it was in *Stanley*. The *Paris* Court reconciled this conflict on the basis that *Stanley* watched obscene films in the privacy of his home, while the *Paris* Theater exhibited them in public.¹⁹⁵ The *Bowers* Court, by stating that *Stanley* did not involve the fourth amendment, removes this critical public/private distinction and throws *Stanley* back into direct conflict with *Paris*.¹⁹⁶

Finally, assuming that *Stanley* still has some meaning and that individuals may still possess pornographic material in private, the *Bowers* decision is irrational.¹⁹⁷ Under *Stanley* Michael Hardwick can enjoy movies, magazines, and video tapes that graphically depict sexual activity by homosexuals. Yet, under *Bowers*, Hardwick cannot perform the activities that he can watch. It is derisive and irrational for the Court to attempt to draw a constitutional distinction between Hardwick seeking sexual gratification by viewing obscene material and seeking gratification with a consenting adult partner in private.¹⁹⁸ Given this irrationality, the conflict between *Stanley* and *Paris*, and the earlier interpretations of *Stanley*, the *Bowers* Court was wrong to hold that the fourth amendment was not at issue in *Stanley*.¹⁹⁹

Apart from the discussion of Hardwick's privacy claims, the *Bowers* opinion reads as though the Court consciously attempted to avoid the other constitu-

federal obscenity statutes. The Supreme Court reasoned that because of a strong state interest in proscribing obscenity, obscene material is not protected by the constitutional freedoms of speech or press. *Id.*

190. *Stanley*, 394 U.S. at 560-64.

191. See, e.g., *Lovisi v. Slayton*, 539 F.2d 349, 351 n.3 (4th Cir.), cert. denied, 429 U.S. 977 (1976); *Doe*, 403 F. Supp. at 1205 (Merhige, J., dissenting); *Onofre*, 51 N.Y.2d at 487, 415 N.E.2d at 939, 434 N.Y.S.2d at 950.

192. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973).

193. 413 U.S. 49 (1973).

194. *Id.* at 66.

195. *Id.* at 66-68.

196. Moreover, without the public/private distinction, *Stanley* conflicts with the earlier *Roth* decision as well. See *supra* notes 189-90 and accompanying text.

197. See *Baker v. Wade*, 553 F. Supp. 1121, 1141 (N.D. Tex. 1982), rev'd, 769 F.2d 289 (5th Cir. 1985), cert. denied, 106 S. Ct. 3337 (1986).

198. See *id.*

199. In the alternative, the *Bowers* Court could have intended to overrule *Stanley* entirely. That would certainly remove any conflicts, but there is no suggestion to that effect in the *Bowers* opinion.

tional issues rather than address them head-on. In particular, the way the Supreme Court defined the issue before it seemed designed to skirt potential claims under the ninth amendment, the privacy doctrine, and the equal protection clause of the fourteenth amendment. Thus, the Court stated: "The issue presented 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."²⁰⁰ Thus the Court focused narrowly on homosexual sodomy and tradition. In contrast, Hardwick's brief stated: "At issue in this case is whether the State of Georgia may send its police into private bedrooms to arrest adults for engaging in consensual, noncommercial sexual acts, with no justification beyond the assertion that those acts are immoral."²⁰¹ There is no mention of homosexuality; instead Hardwick stressed the broader privacy issue. Like Hardwick, Justice Blackmun stated the issue as whether individuals have "the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity," again addressing a broad right of privacy.²⁰²

In connection with the ninth amendment claim, the Court's narrow focus on homosexual sodomy is a classic example of deciding an issue in the way it is defined. By concentrating on homosexual sodomy, the Supreme Court could look at the broad language of the Constitution and truthfully state that Hardwick's claim had no express support there.²⁰³ At that point the Court could have found a constitutional right of homosexuals to engage in sodomy only by extending the protection of the ninth amendment. Feigning a resistance to proclaiming judge-made law and a need to protect the Court's legitimacy,²⁰⁴ the Court raised two alternative straw tests that Hardwick's claimed right had to pass to receive constitutional recognition. To gain protection the right to engage in homosexual sodomy would have to be " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed,' "²⁰⁵ or be " 'deeply rooted in this Nation's history and tradition.' "²⁰⁶ Given the majority's focus on homosexuality and the tests' reliance on history and tradition, Hardwick's claim was destined to fail.

In short, the Court was saying that because homosexuality has been condemned for centuries, states may continue to criminalize it today.²⁰⁷ Both Justice Stevens and Justice Blackmun, in separate opinions, argued that neither the length of time a belief has been in force nor the fact a majority of society holds

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

201. Brief for Respondent at 1, *Bowers* (No. 85-140).

202. See *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting).

203. See *id.* at 2844-46.

204. *Id.* at 2846.

205. *Id.* at 2844 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

206. *Id.* (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). Commenting on these tests, the court in *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), remarked that they are less of a guide for lower courts to follow than conclusions about the specific rights in question. The Supreme Court will label a claimed right "fundamental" or "implicit in the concept of ordered liberty," then state it is protected. See *id.* at 1396.

207. *Bowers*, 106 S. Ct. at 2854 (Blackmun, J., dissenting).

such a belief should save it from the Court's closest scrutiny.²⁰⁸ Justice Blackmun quoted Justice Holmes for support:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."²⁰⁹

Had the majority considered the issue as defined by *Hardwick* or Justice Blackmun and examined it more fully under the Constitution, instead of blind tradition, the Court would have had a more difficult time refusing ninth amendment protection.

As it did with the ninth amendment, the majority defined the issue in a manner obscuring the right of privacy and equal protection claims. Although *Hardwick* challenged the constitutionality of Georgia's sodomy statute, which on its face prohibits all acts of sodomy including those between married couples,²¹⁰ the Court relegated the statute to a footnote and spent none of the opinion analyzing it.²¹¹ In doing so, however, the Court did not dispose of the claim; rather, it compounded the issue. First, because the statute's language is broad enough to include married couples within its proscription of sodomy, it is likely to be void on its face for infringing on married couples' right of privacy under *Griswold*. Second, that the statute is enforced only against homosexuals does not cure the privacy violation; instead, it raises a question of discriminatory enforcement. If the Georgia legislature did not see fit to limit the statute's application to homosexuals, how can the State justify such discrimination?²¹² Last, there is an equal protection issue, distinct from the sodomy statute, in that homosexuals as a class may require judicial protection.

To begin with, Justice Stevens analyzed the Georgia sodomy law in light of the right of privacy.²¹³ Section 16-6-2(a) of the Georgia code reads: "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."²¹⁴ On its face the statute applies to all persons, married or single, heterosexual or homosexual. "[I]ndividual decisions by married persons," however, "concern-

208. *Id.* at 2854 (Blackmun, J., dissenting); *id.* at 2857 (Stevens, J., dissenting).

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

210. For the text of the Georgia sodomy law, see *supra* note 14.

211. See *Bowers*, 106 S. Ct. at 2842 n.1.

212. See *id.* at 2850 n.2 (Blackmun, J., dissenting). In fact, the legislative intent behind Georgia's latest sodomy law may have been to expand its reach to heterosexual activities. Under the earlier statute, sodomy was "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." GA. CODE ANN. § 26-5901 (1933). Two Georgia Supreme Court cases limited that law's applicability. In *Thompson v. Aldredge*, 187 Ga. 467, 200 S.E. 799 (1939), the Georgia Supreme Court held that § 26-5901 did not prohibit lesbian activity. *Id.* at 467, 200 S.E. at 800. In a later case, the same court held that the statute did not prohibit heterosexual cunnilingus. *Riley v. Garrett*, 219 Ga. 345, 346-47, 133 S.E.2d 367, 369-70 (1963). The Georgia legislature may have enacted the current, broader statute in response to these restrictive cases. See *Bowers*, 106 S. Ct. at 2849 n.1 (Blackmun, J., dissenting) (citing Note, *The Crimes Against Nature*, 16 J. PUB. L. 159, 167 n.47 (1967)).

213. *Bowers*, 106 S. Ct. at 2856-58 (Stevens, J., dissenting).

214. GA. CODE ANN. § 16-6-2 (1984).

ing the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."²¹⁵ Furthermore, this same protection extends to intimate decisions made by unmarried persons.²¹⁶ States "may not prohibit sodomy within 'the sacred precincts of marital bedrooms' " or between unmarried, consenting, heterosexual adults.²¹⁷ Georgia's Attorney General even admitted that section 16-6-2 would be unconstitutional if applied to married couples.²¹⁸ Justice Stevens concluded that Georgia's sodomy statute is invalid because it attempts to criminalize activity that is constitutionally protected.²¹⁹ The *Bowers* majority, however, ignored this issue completely.

Second, because Georgia's sodomy law may not be enforced as written, the State's selective application to homosexuals necessarily discriminates against them and raises an issue of equal protection.²²⁰ Several courts have held that such discrimination violates the equal protection clause.²²¹ Once discrimination is established, the state must prove that it results from a "neutral and legitimate interest."²²² Speaking of such an interest, Chief Justice Weintraub of the New Jersey Supreme Court has stated: "I doubt the existence of a public interest sufficient to justify an edict that the homosexual shall behave as a heterosexual or not at all."²²³ In *Baker v. Wade*²²⁴ the District Attorney of Dallas County, Henry Wade, testified that "he knew of no rational basis" for discriminating between homosexuals and heterosexuals in applying sodomy statutes.²²⁵

Responding to Hardwick's argument that the Georgia sodomy law needs support from a legitimate interest, the *Bowers* Court merely stated that "[t]he law . . . is constantly based on notions of morality,"²²⁶ implying that the sodomy

215. *Bowers*, 106 S. Ct. at 2857 (Stevens, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)); see *supra* notes 67-73, 172-81 and accompanying text.

216. *Bowers*, 106 S. Ct. at 2857 (Stevens, J., dissenting) (citing *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) ("[T]he State could not, consistently with the Equal Protection Clause, outlaw distribution [of contraceptives] to unmarried but not to married persons.")).

217. *Bowers*, 106 S. Ct. at 2858 (Stevens, J., dissenting) (quoting *Griswold*, 381 U.S. at 485 and citing *Eisenstadt*, 405 U.S. at 453).

218. *Id.* at 2858 n.10 (Stevens, J., dissenting).

219. *Id.* at 2858 (Stevens, J., dissenting); see *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated on other grounds sub nom.* *Wade v. Buchanan*, 401 U.S. 989 (1971); *Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947.

220. Georgia stated or implied in its brief that it sought to enforce § 16-6-2 only against homosexuals. Brief for Petitioner at 20 *passim*, *Bowers* (No. 85-140).

221. *E.g.*, *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated on other grounds sub nom.* *Wade v. Buchanan*, 401 U.S. 989 (1971); *Pryor v. Municipal Court*, 25 Cal. 3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979); *Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947; see *Baker v. Wade*, 553 F. Supp. 1121, 1143 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986); *Doe*, 403 F. Supp. at 1204 (Merhige, J., dissenting); Comment, *supra* note 75, at 851.

222. See *Bowers*, 106 S. Ct. at 2859 (Stevens, J., dissenting).

223. *State v. Lair*, 62 N.J. 388, 398, 301 A.2d 748, 754 (1973) (Weintraub, C.J., concurring).

224. 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 3338 (1986).

225. *Id.* at 1145.

226. *Bowers*, 106 S. Ct. at 2846. The Court, however, cited no authority in support of its conclusion.

law needs nothing more. Yet it is not even clear that the law has firm moral support. In *Commonwealth v. Bonadio*²²⁷ the Pennsylvania Supreme Court wrote: "[T]o suggest that deviate acts are heinous if performed by unmarried persons but acceptable when done by married persons lacks even a rational basis, for requiring less moral behavior of married persons than is expected of unmarried persons is without basis in logic."²²⁸ The *Bonadio* rationale applies to *Bowers* by analogy. How can the Court suggest a sodomy law is justified on moral grounds when the Court applies two moral standards: a lax one for married couples and a strict one for homosexuals? Because Georgia's sodomy statute is applied only to homosexuals, *Bowers* clearly involved an equal protection issue. The majority's opinion, however, did not address equal protection.

Last, distinct from the statutory application problem, Hardwick's case raises an equal protection issue under the rubric of suspect classes.²²⁹ Suspect classification has four criteria: the group must suffer stigmatism, receive unequal treatment, be a discrete and insular minority, and possess an immutable distinguishing characteristic.²³⁰ Many commentators believe that there is a strong case for making homosexuals a suspect class.²³¹ As already noted, sodomy laws reflect religious doctrine and historic prejudice; homosexuals have long been the object of disgust and hate by much of society. Few would argue that there is no stigma attached to being homosexual.²³² Likewise, homosexuals suffer unequal treatment in areas such as housing, jobs, and child custody.²³³ As a group homosexuals are a discrete and insular minority: homosexual bars, newspapers, lobbyists, and neighborhoods show a sense of community; personal accounts in homosexual literature demonstrate that sexuality is fundamental to an individual's identity.²³⁴ Although authorities are not in complete agreement, most believe homosexuality is determined at an early age, perhaps before birth, and is beyond the control of the individual.²³⁵ Based on the Supreme Court's own criteria, little distinguishes homosexuality from protected classes like race. But the Court has never spoken on this issue, and it remained silent in *Bowers*.

The *Bowers* Court, moreover, was silent on other constitutional challenges to Georgia's sodomy law, even when the Court's discussion implied them. The majority's reliance on religious dogma, for example, suggests a question of the

227. 490 Pa. 91, 415 A.2d 47 (1980).

228. *Id.* at 99, 415 A.2d at 51.

229. See *Bowers*, 106 S. Ct. at 2850 n.2; *supra* notes 123-36 and accompanying text.

230. See *supra* text accompanying notes 130-35.

231. *E.g.*, Comment, *supra* note 75, at 849; Note, *supra* note 67, at 1302.

232. See HISTORICAL PERSPECTIVES ON HOMOSEXUALITY (S. Licata & R. Peterson ed. 1981); J. KATZ, GAY AMERICAN HISTORY (1976); Note, *supra* note 67, at 1302. Even judges have denigrated homosexuals. *E.g.*, *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1039 (1970). Commenting on homosexual sodomy, Judge Skelton stated: "Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. Adult persons are even more conscious that this is true." *Id.* at 1378.

233. Note, *supra* note 67, at 1285-86.

234. Note, *supra* note 67, at 1304. For examples of homosexual literature, see A. BANNON, I AM A WOMAN (1959); R. BROWN, THE RUBYFRUIT JUNGLE (1973).

235. W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 151-60 (1973); Comment, *supra* note 75, at 849 (citing Bancroft, *Homosexuality in the Male*, CONTEMP. PSYCHIATRY 173, 178-79 (T. Silverstone & B. Barraclough ed. 1975)); Note, *supra* note 67, at 1302.

establishment clause.²³⁶ Chief Justice Burger wrote "separately to underscore [his] view" that "[c]ondemnation of [homosexual sodomy] is firmly rooted in Judaeo-Christian moral and ethical standards."²³⁷ The Chief Justice apparently believed he was bolstering the majority's opinion when in fact he put the establishment clause in issue, then said no more about it.

Likewise, Justice Powell noted that *Bowers* involved an eighth amendment issue of cruel and unusual punishment. He wrote: "The Georgia statute . . . authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue."²³⁸ Justice Powell went on to note that in Georgia an act of sodomy is a felony comparable to aggravated battery and robbery.²³⁹ But Justice Powell summarily ended his analysis at that point. He stated that because Hardwick had not yet been tried, the eighth amendment issue was not before the Court.²⁴⁰ It is true that Hardwick had not been tried at the time *Bowers* was decided; the district attorney decided not to prosecute Hardwick "unless further evidence developed."²⁴¹ The Georgia sodomy law, however, has a four year statute of limitations. Because Hardwick still may be tried for sodomy, the eighth amendment was properly before the Court. The majority, however, did not even compare Georgia's sodomy law with statutes in other states. Had it done so, the Court would have found that a majority of states no longer criminalize consensual sodomy.²⁴² Moreover, of all the major nations in North America and Europe, only the United States and the Soviet Union still punish such conduct.²⁴³ To avoid repetitious litigation, judicial economy suggests that the Court should have analyzed this issue to a conclusion.

Although Justice Powell touched on the obvious eighth amendment claim, both he and the rest of the majority missed the more subtle argument. In addition to proscribing punishment grossly disproportionate to the severity of the crime, the eighth amendment imposes a substantive limit on what activities can be made criminal in the first place.²⁴⁴ One such limit is that the state cannot pun-

236. *Bowers*, 106 S. Ct. at 2855 (Blackmun, J., dissenting); see *supra* notes 162-68 and accompanying text.

237. *Bowers*, 106 S. Ct. at 2847 (Burger, C.J., concurring).

238. *Id.* (Powell, J., concurring).

239. *Id.*

240. *Id.* at 2848 (Powell, J., concurring).

241. *Id.* at 2842. Perhaps the state's attorney was waiting for evidence of a favorable decision in *Bowers*.

242. *Survey*, *supra* note 13, at 524 n.9 (cited in *Bowers*, 106 S. Ct. at 2845-46). The Court stated that because 24 states and the District of Columbia still criminalize sodomy, such statutes have broad public approval. What the Supreme Court failed to recognize is that 24 is *less than* half the states. In fact, "[t]he vast majority of the American population lives in reformed jurisdictions where consensual sodomy is not criminalized." Brief of Respondents in Opposition to Petition for Writ of Certiorari at 12 n.6, *Bowers* (No. 85-140).

243. W. BARNETT, *supra* note 235, at 293. Countries in which consensual sodomy is legal include Spain, Portugal, Italy, Greece, Turkey, Poland, Iceland, France, Belgium, Netherlands, Denmark, Switzerland, Sweden, Hungary, Czechoslovakia, England and Wales, East and West Germany, Canada, Finland, Austria, and Norway. *Id.*

244. See *Ingraham v. Wright*, 430 U.S. 651 (1977).

ish a person for a condition over which he or she has no control, such as drug addiction or alcoholism.²⁴⁵ If homosexuality is immutable, then punishing sodomy effectively punishes homosexuals for urges beyond their control. In *Powell v. Texas*,²⁴⁶ however, the Court held that although alcoholism cannot be made criminal because it is an involuntary condition, public drunkenness can be made criminal because it is voluntary conduct. Based on the condition/conduct distinction, the *Bowers* Court could have defeated this argument: homosexuality would not be a crime, but sodomy would.²⁴⁷ But through oversight or deliberation, the Court never addressed the argument.

The eighth amendment argument, however, is not all the Court missed. The majority failed entirely to consider Hardwick's first amendment claim of freedom of association.²⁴⁸ Just two years prior to *Bowers*, the Supreme Court wrote:

[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.²⁴⁹

The Court went on to state that the Constitution protects such relationships because "individuals draw much of their emotional enrichment from close ties with others."²⁵⁰ Are homosexuals so different from heterosexuals that they do not need such "emotional enrichment?" Here again the *Bowers* Court was taciturn.

In sum, all of these constitutional issues—the first amendment's establishment clause and freedom of association, the eighth amendment's prohibition of cruel and unusual punishment, the ninth amendment's recognition of rights not explicit in the Constitution, and the fourteenth amendment's equal protection clause—were raised either by Michael Hardwick, commentators, or the *Bowers* Court itself. At best, however, the majority summarily dismissed such claims, like the eighth and ninth amendment challenges. The Court completely ignored other issues such as the freedom of association, establishment, and equal protection clauses. Because Hardwick's case was before the Court on a motion to dismiss for failure to state a claim, the majority had a duty to analyze these issues. Instead the opinion reads as if the majority made up its mind to deny homosexuals constitutional protection, then applied whatever law and tradition supported its position and ignored all authority and arguments to the contrary.

245. See *Bowers*, 106 S. Ct. at 2850 n.2 (Blackmun, J., dissenting); *supra* notes 159-61 and accompanying text.

246. 392 U.S. 514 (1968).

247. It seems odd to tell someone that he or she may be homosexual but that he or she cannot engage in sodomy. With such a dichotomy homosexuals have "no real choice but a life without any physical intimacy." *Bowers*, 106 S. Ct. at 2850 n.2 (Blackmun, J., dissenting).

248. *Bowers*, 760 F.2d at 1208 n.6; Brief for Respondents in Opposition to Petition for a Writ of Certiorari at 9-10, *Bowers* (No. 85-140); see *supra* notes 137-46 and accompanying text.

249. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); see *supra* note 137.

250. *Roberts*, 468 U.S. at 619.

Had the Court analyzed the contrary authority properly, it would not have been so quick to dismiss Hardwick's claim. As Justice Stevens noted, "[a]t the very least, . . . it [was] clear at [that] early stage of the litigation that [Hardwick] . . . alleged a constitutional claim sufficient to withstand a motion to dismiss."²⁵¹

Of the claims the *Bowers* Court examined—the right of privacy under both the fourth amendment and the due process clause of the fourteenth amendment—the majority created more issues than it resolved. The Court took the right of privacy established by the *Griswold* line of cases and limited it to those situations involving the family, procreation, and marriage. The Court, moreover, set up no guidelines by which to apply the privacy doctrine even within this narrow traditional framework. Without guidance lower courts will resist extending the doctrine to new situations; in effect, the Supreme Court has assured itself that privacy will remain limited unless and until the Court expressly rules otherwise. To confuse the privacy doctrine further, the majority took the leading fourth amendment case, *Stanley*, and read the concept of sanctity of the home out of it. In doing so, the *Bowers* Court put *Stanley* in direct conflict with other decisions such as *Paris* and *Roth*. The majority leaves this conflict unresolved. To paraphrase Justice Blackmun, "the Court's cramped reading of [the privacy issues] before it makes for a short opinion, but it does little to make for a persuasive one."²⁵²

The Court's treatment of the right of privacy and its nontreatment of Hardwick's other constitutional claims are the great failings of this opinion. Granted, questions of equal protection and freedom of association are difficult to resolve, but is that sufficient justification for the Court to shirk its duty to analyze them to conclusion? Or is it simply that such an analysis leads to a result inconsistent with the way the majority felt *Bowers* should turn out? And is there any reason for the Supreme Court to have left the privacy doctrine in such a confused and crippled state? This Note concludes with these questions unanswered, like so many of the issues in *Bowers*, and with the hope that the Court will find the opportunity to resolve them.

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251. *Bowers*, 106 S. Ct. at 2859 (Stevens, J., dissenting).

252. *Id.* at 2850 (Blackmun, J., dissenting).

