THE RIGHT TO BE LEFT ALONE V. THE CRIME AGAINST NATURE:
AN ANALYSIS OF BOWERS V. HARDWICK

by

Gwendolyn Beth Torges

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ABSTRACT

This qualitative case study analyzed the United States Supreme Court’s opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and the historical and legal background leading up to the case. Often characterized as a decision representing an emotional rejection of homosexuality rather than a reasoned application of constitutional privacy precedent, this inquiry sought to identify and document the determinants of the outcome in *Bowers*, in which a slim majority of the Court ruled that the constitutional right of privacy did not prohibit states from regulating homosexual sodomy. The study demonstrated that although homophobia certainly played a part in the *Bowers* decision, that the opinion was not necessarily inconsistent with previous privacy decisions such as *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973). The author concluded that the dominant insight gleaned from *Bowers* is that there is no such thing as a constitutionally protected right of privacy, at least not in the way that privacy is conventionally understood. The *Bowers* opinion illuminates that the Court’s privacy jurisprudence has been more about the privileging of certain relationships (such as that between husband and wife or doctor and patient) than it has been about personal privacy. Such relationships serve an important limiting principle. The author concluded that the outcome in *Bowers* was not the insufficiency of the claim of a right to privacy, but the insufficiency of any limiting principle. The research documented and analyzed history of the two bodies of law most relevant to the *Bowers* opinion: state law which criminalized sodomy; and constitutional protection of individual privacy.
INTRODUCTION

In August of 1982, a friend from out of town came to visit Michael Hardwick at the bar where he worked in Atlanta, Georgia. In between serving drinks, Hardwick had a chance to chat and catch up with his friend. As the night had progressed, so had the romantic feelings between the couple, and in the wee hours of August 3, after the bar closed and Hardwick finished his duties, the two left together and went to Hardwick’s home, where they retired to Hardwick’s bedroom. The encounter became progressively more intimate, and the two engaged in oral sex. At one point, however, Hardwick had the uneasy feeling that he and his friend were being watched. He looked toward the door of his bedroom, which stood slightly ajar, and through it could make out the figure of a uniformed police officer. “What are you doing in my bedroom?” asked Hardwick. “I caught you in the act of sodomy, and you’re under arrest,” replied the officer (Irons 1988, 395). Hardwick’s guest was a man, and Georgia’s sodomy law included acts of oral as well as anal sex – between both heterosexuals and homosexuals.

The next several hours would prove to be a frightening and degrading experience for Hardwick and his companion. They spent more than twelve hours in an Atlanta jail, where the arresting officer made sure it was known, both to his fellow officers as well as the other inmates, that the two were being held for “cocksucking.”

Thus began the chain of events that would ultimately pit “the right to be let alone” – one of the most cherished of American values – against what has been called one of the oldest crimes in the Western legal tradition, the “crime against nature.” The battle continued to the United States Supreme Court, in the 1986 case of Bowers v. Hardwick,
478 U.S. 186. That the U.S. Constitution would keep Georgia police out of his bedroom seemed like a foregone conclusion to Michael Hardwick and his lawyers. "They were sure I would win," recalled Hardwick (Irons 1988, 401).

Despite the absence of the word "privacy" in the Constitution, the Supreme Court, in a series of cases beginning in 1965, had proclaimed that Americans did indeed have a "fundamental right" to privacy surrounding certain intimate relationships and settings. Although the High Court had never applied the right of privacy within the particular context Hardwick brought before them, it seemed a simple matter and a very small step to include the private act of Hardwick and his guest within the right of privacy. Hardwick was not asking the Court to protect the "gay lifestyle" or to extend "special rights" to gays. Indeed, Georgia's law banned sodomy across the board, for heterosexuals, homosexuals, single persons and married couples. All Hardwick's case was suggesting was that the Georgia police had no business deciding which intimate acts Hardwick could or could not participate with another consenting adult in his own bedroom.

On June 30, 1986, however, the Supreme Court held that the right to privacy did not extend to Michael Hardwick's bedroom if he chose to engage in "the offense of sodomy" with another man. The decision was met, in the majority of the media, with shock and outrage. In a nation that prides itself on liberty, tolerance and the "right to be let alone," how could the Court allow the state of Georgia into the lives and bedrooms of its citizens to tell them that there were intimate acts they could not engage in with other

\footnote{The Georgia law provided that, "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" (Georgia Code Ann. 16-6-2 (1984)). The crime was a felony punishable by one to twenty years in prison.}
consenting adults? Was our distaste for the “crime against nature” so extreme that it outweighed our love of the “right to be let alone”? Perhaps. But that is only part of the story. But there is an alternative explanation. It’s not so much that the Bowers opinion represented the end of the line when it came to a constitutionally protected right to privacy. It’s more that the opinion in Bowers made very clear something even more startling: that there was no such thing as a constitutionally based right to privacy, at least not in the sense that the word privacy is typically understood.

That the Court declined the invitation to extend its privacy jurisprudence to include, as Justice Byron White wrote, the act of “homosexual sodomy” should not have come as a surprise. A thorough analysis of the case shows that the Court’s opinion in Bowers does not represent a departure in doctrine, but that the case is consistent with the string of so-called privacy decisions leading up to Bowers.

Decisions of the Supreme Court share a characteristic with presidential elections, which are based on the electoral college. Given the winner-take-all nature of each, both exaggerate the outcomes, and both mask just how close the struggles really were. In the Bowers case, a razor-thin 5 to 4 majority – one vote of which for a short time actually went the other way – resulted in a complete loss for Hardwick’s case and its claim to privacy. The outcome of the case obscures the deep philosophic struggle that went into the decision. A fuller understanding of the conflict between the right to be let alone and the crime against nature requires a historical and philosophical analysis of each. The history of Bowers is the story of a head-on collision between two areas. One story is about the clumsy evolution of a constitutional right of privacy; the other is the tale of
attempts by state governments to regulate intimate conduct. *Bowers v. Hardwick* was the point at which the two stories intersected before the United States Supreme Court. Michael Hardwick’s personal story did not create the controversy; his experience provided the vehicle to take this controversy before the Court.

Chapters 1 and 6 focus on Michael Hardwick and his case. Chapter 1 describes the details leading to his arrest and how his case progressed up through the decision of the Court of Appeals for the Eleventh Circuit. Chapter 6 examines the case once it reached the United States Supreme Court. The material in between examines the two key areas of law in *Bowers*, privacy and sodomy.

In Chapter 2, the concept of privacy is explored, in both legal and non-legal contexts. It is little wonder that courts have disagreed about what the right to privacy protects, as the term itself is so ambiguous and expansive as to be almost meaningless. What is clear, however, is that constitutional notions of privacy are far narrower than the way the term is generally understood. The term privacy has been used two ways by the Supreme Court, and these will be discussed in chapters 4 and 5. Specifically, Chapter 4 examines the Court’s use of privacy as a shorthand for the protections listed in the Fourth Amendment, i.e., the right against unreasonable search and seizure. Chapter 5 traces the evolution of the Court’s other use of privacy — as a euphemism for some substantive liberty interest too indelicate to state directly. The long, odd history of sodomy statutes is detailed and analyzed in Chapter 3.

I approach the *Bowers* case as neither advocate nor apologist, but as someone seeking to describe and (hopefully) to explain a central aspect of the decision. The questions that were most interesting to me did not lend themselves to neat classifications within a particular
discipline or methodology. In many ways, this project more closely resembles a law review article than an example of political science work, but, for better or for worse, the final product defies either characterization. The absence of a strong normative stance or advocacy of legal doctrine would render it out of place in most law reviews (not to mention that it doesn’t have nearly enough footnotes for that). And its lack of predictions or more rigorously tested alternate hypotheses fall short of the expectations of mainstream political science. My approach is rather simple and straightforward: I look to the history of two areas of law and try to identify patterns. I do not limit my observations to the decisions themselves, but consider the factual scenarios giving rise to the litigation. Along the way I include a healthy dose of textual analysis of both state and federal court opinions to clarify ambiguity, uncover hidden assumptions, and point to both patterns and inconsistencies in the case law of both constitutional privacy and state sodomy.

It was not until midway through the project that I realized how very political these stories and cases were. Two very political themes emerge: the struggle over what level of authority states’ majority-elected legislatures have to regulate intimate aspects of our lives in a way disfavoring a minority, and the proper role of the courts, as anti-majoritarian institutions, in overriding state authority in issues not specifically covered in the Constitution; and the continued struggle to find not only a real-world balance between the two, but the theoretical search for principles to figure out what the balance should be. Thus, just as for the Supreme Court, Michael Bowers and the very personal facts of his life – as intriguing and important as they are – provided merely the framework and the starting point for this study.
CHAPTER 1:
WHAT ARE YOU DOING IN MY BEDROOM?
THE BACKGROUND OF BOWERS V. HARDWICK

"What is liberty if you can't control your own bedroom?"

-- Patricia Schroeder
Interview, ABC, This Week
July 9, 1989

The Supreme Court opinion bearing Michael Hardwick's name contained very little information either about the man himself, or about the details surrounding his arrest. By the time Hardwick's case reached the United States Supreme Court, Hardwick and his experience with the Georgia criminal justice system were reduced to an introductory sentence: "In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent's home." The only additional piece of information about Hardwick included in the opinion was that Hardwick had "asserted that he was a practicing homosexual," and therefore the Georgia law "placed him in imminent danger of arrest" (Bowers v. Hardwick, 478 U.S. 186, 187). No additional details about Hardwick or the circumstances of his arrest were mentioned.

In part, this absence of detail owes to the fact that Michael Hardwick was never prosecuted for violating Georgia's sodomy law.\(^1\) His case was never presented to a grand jury, and the district attorney's office indicated that the state would not take additional action unless "further evidence develops" (Petition for Writ of Certiorari, Appendix 8).

\(^1\) Georgia's sodomy law at the time read: "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" (Official Code of Georgia Annotated, Section 16-6-2 (a) (1984)). The law was a felony, punishable by one to twenty years in prison.
There was, therefore, no trial record which would have provided more detail. Neither the opinion of the lower federal court nor even the brief supplied on behalf of Hardwick’s attorneys gave the Supreme Court much more information than was relayed in the final opinion.

The lack of human detail in the Court’s opinion is not in itself noteworthy, for the Supreme Court concerns itself more with clarifying law and setting precedent than it does with the details of the individual case before it. However, what got lost in the details of *Bowers v. Hardwick* was that Michael Hardwick—like millions of other gays and lesbians in the United States—was harassed for being homosexual, and the anti-sodomy law became a convenient tool of harassment. In this chapter, I look beyond the opportunity which Hardwick’s arrest provided for challenging the authority of states to regulate intimate sexual behavior, and flesh out some of the circumstances surrounding the arrest. I then discuss the procedural history of the case on its way to the United States Supreme Court.

**Michael Hardwick: An Accidental Activist**

Twenty-eight years old at the time of his arrest, Michael Hardwick was not what you’d call a political activist. The extent of his political activism prior to his arrest was marching in the Gay Pride parade (Harris 1986, 2B). Indeed, prior to his arrest, he didn’t know what the word “sodomy” meant (Moyers 1987) and he didn’t know that Georgia law forbade him from engaging in the only sexual encounters of interest to him (Irons 1988, 392).

Born in 1954, Hardwick was raised in a Catholic family in Miami, Florida, the
youngest of four children. He described his childhood as “pretty normal” (Irons 1988, 392). “There were picnics in the back yard, a sandbox, big shade trees,” according to one interview with Hardwick (Harris 1986, 2B). His parents divorced when he was twelve years old.

During his high school years he was on his school’s gymnastics team and dated a cheerleader. He led “an active and heterosexual life” (Harris 1986, 2B). Like many young people in the 1960s, he searched for a larger meaning to life. He experimented with drugs and listened to the Beatles. After using heroin he went into a rehab program at eighteen years of age, and afterward counseled other young people (Harris 1986, 2B).

In college at Florida State University in Gainesville he studied botany and horticulture, in hope of becoming a landscape architect. During his college years his soul searching continued. He still wanted to figure out what to do with his life. For a while, the nature of his quest took a spiritual turn. He began meditating, studying Sanskrit, and he seriously considered becoming a Buddhist monk. “My family was all Catholic, so they were rather disturbed about this,” said Hardwick. (Irons 1988, 392). “They were actually relieved when I told them I was coming out instead. Their attitude was, Thank God!”

Hardwick was twenty-one years old when he fell in love with a man for the first time. It was that same year that he told his mother and sister that he was gay, “And I’ve been out ever since then.” (Irons 1988, 392). Hardwick’s father was not as receptive to the news that his son was gay. “His father couldn’t deal with it,” said Hardwick’s mother. “He said it was a fad he’d outgrow.” Hardwick’s father died of cancer in 1981 (Harris 1986, 2B).
The next few years took Hardwick to Georgia, Tennessee, and back to Georgia. During that time, he started two businesses (one a successful landscaping company, the second a health-food store that went bust), and tended bar periodically. After he closed his health food store in 1981, he went to visit a female friend in Atlanta, and ended up staying and getting a job at a gay bar that was getting ready to open a discotheque. Warm and gregarious, Hardwick had always done well with his bartending gigs. “He exudes energy, a warm smile. They [customers] like his style.” By 1982 he was bringing in a comfortable $600 a week (Harris 1986, B1).

One night, Hardwick stayed until daylight the next morning to help with the preparations for the new club.² On his way out, he stopped by the bar and was given a beer. “I was kind of debating whether I wanted to leave, because I was pretty exhausted, or stay and finish the beer,” he said. Once outside, he decided that he “wasn’t really in the mood for the beer,” and tossed the bottle into a trashcan near the front door of the bar, just as police officer Keith Torrick was driving by (Irons 1988, 393).

Hardwick continued to walk, and the officer turned the car around. He stopped Hardwick, who was then about a block from the bar, and asked him where the beer was. Hardwick told him he’d thrown the beer away, and the 23-year-old patrolman made him get in the car and took him back to the trashcan to prove it. The officer asked Hardwick what he had been doing, and Hardwick answered that he worked at the bar, “which immediately identified me as a homosexual, because he knew it was a homosexual bar,”

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² One account said he stayed to install a new stereo system (Leonard 1993, 154), but in an interview with Peter Irons, Hardwick said he stayed to help put up insulation (Irons 1988, 393).
said Hardwick. He was enjoying his position as opposed to my position,” said Hardwick, describing the officer’s attitude toward him (emphasis in original) (Irons 1988, 393).

The officer drove back to the bar so Hardwick could show him where the beer bottle was. Hardwick was sitting in the back of the squad car, which had no handles on the inside, and so was unable to step out of the car to show Torrick, so he told Torrick it was in the trashcan. Without getting out of the car, Torrick said he couldn’t see it. In frustration, Hardwick said, “Fine, just give me a ticket for drinking in public.” He later recalled that, “He was just busting my chops because he knew I was gay” (Irons 1988, 394).

Torrick issued a ticket for possession of an open container of alcohol in public, in violation of an Atlanta ordinance (Leonard 1993, 154) which carried a $50 fine (Garrow 1994, 653). The ticket stated that Hardwick must make a court appearance on Wednesday, July 13, at noon (Garrow 1994, 653). July 13, however, was a Tuesday, not a Wednesday.

At noon on Tuesday, July 13, officer Torrick waited for Hardwick to appear at the Atlanta Municipal Courthouse. About two hours later, when Hardwick had not appeared, Torrick personally processed a warrant for Hardwick’s arrest, which saved the normal 48-hour processing time for warrants. It was the first time Torrick had processed a warrant himself in more than a decade. “I think there is reason to believe that he had it out for me,” said Hardwick (Irons 1988, 394).

That afternoon, Torrick went with the warrant to Hardwick’s home, which he shared with several roommates (Garrow 1994, 653). Hardwick was not there, but when he returned his roommates informed him that an officer had come looking for him.
Hardwick rushed to the court, and showed the county clerk the discrepancy in dates on the ticket, and told him that an officer had already been at his home with an arrest warrant. Not knowing that Torrick had hand-processed the warrant, the clerk told Hardwick that it was impossible that a warrant had already been issued. The clerk took the ticket before the judge, and Hardwick was fined $50, which he paid on the spot. The clerk gave Hardwick a receipt “just in case I had any problems with it further down the road,” said Hardwick. “That was that, and I thought I had taken care of it and everything was finished, and I didn’t give it much thought” (Irons 1988, 394).

A couple of weeks later, Hardwick’s mother visited him in Atlanta for a few days. Early one morning while she was there, Hardwick was on his way home from work, when he was assaulted. As Hardwick recalled it,

I came home one morning after work at 6:30 [a.m.] and there were three guys standing in front of my house. I cannot say for sure that they had anything to do with this, but they were very straight, middle thirties, civilian clothes. I got out of the car, turned around, and they said “Michael” and I said yes, and they proceeded to beat the hell out of me. Tore all the cartilage out of my nose, kicked me in the face, cracked about six of my ribs. I passed out. I don’t know how long I was unconscious. When I came to, all I could think was, God, I don’t want my mom to see me like this! (emphasis in original) (Irons 1988, 394).

Hardwick made his way to his bedroom without his mother seeing him, and went to bed. Later that morning, his mother followed a small trail of blood leading to Hardwick’s bedroom, where she found him passed out. She became very upset, and Hardwick tried to reassure her, telling her that it “was like a fluke accident, these guys were drunk or whatever.” But that was not the truth. “They weren’t drunk, they weren’t ruffians, and they knew who I was,” said Hardwick. He was able to calm her enough to
go ahead and leave as planned to visit a friend in Pennsylvania (Irons 1988, 394).

A few days later, a married male friend of Hardwick’s came to Atlanta from North Carolina to apply for a job, and he visited Hardwick at the bar where he worked. That same night, another friend of Hardwick’s was also at the bar, and became drunk enough that Hardwick confiscated his car keys and hired a cab to take the man back to Hardwick’s house, where he fell asleep on the couch in the living room. Hardwick and his friend from North Carolina came home later, but the man on the couch did not wake as they passed on the way to Hardwick’s bedroom (Irons 1988, 394).

At about 8:30 a.m. that morning, Officer Torrick arrived at Hardwick’s house with the arrest warrant, now invalid for three weeks, as Hardwick had already cleared it. Torrick, however, had not ever checked to see if the ticket had been paid. The man sleeping off his hangover on the couch invited the officer in, and said that he thought Hardwick might be in the back bedroom. The guest was unaware that Hardwick was not alone (Leonard 1993, 154).

Hardwick and his friend from North Carolina were involved in a sex act in Hardwick’s bedroom. Officer Torrick went down the hallway to the bedroom, where the door was not shut tight, and he opened it just a bit. Hardwick heard the noise and looked toward the bedroom door. “I looked up and there was nobody there,” said Hardwick. “I just blew it off as the wind and went back to what I was involved in, which was mutual oral sex.” After about 30 seconds, Hardwick had the feeling he was being watched and again looked toward the door. That’s when he realized that Officer Torrick had been watching him (Irons 1988, 395).
Torrick identified himself and announced that Hardwick was under arrest. "For what? What are you doing in my bedroom?" asked Hardwick. Torrick said that he had an arrest warrant, and Hardwick explained that he'd already paid the ticket and the charge had been cleared. Torrick replied that that was immaterial, and that he'd entered in "good faith," as he believed the warrant was still active. It was then that Torrick announced that Hardwick and his companion were now under arrest for sodomy (Garrow 1994, 653). Hardwick asked Torrick to leave the room while he and his guest dressed, but Torrick responded that "There's no reason for that, because I have already seen you in your most intimate aspect," and he watched while the two men dressed (Irons 1988, 396). While he waited, Torrick noticed a small amount of marijuana on the nightstand, and added possession of the drug to the charges (Garrow 1994, 653).

After they dressed, Torrick took them outside, handcuffed them, put them in the squad car, and drove them to a police station, where they were booked on sodomy charges. While their arrest was being processed, Torrick "made sure everyone in the holding cells and the guards and people who were processing us knew I was in there for 'cocksucking,'" recalled Hardwick, and "that I should be able to get what I was looking for. The guards were having a real good time with that." After a couple of hours, the officers moved Hardwick and his companion to the third floor, "where there [were] convicted criminals," and Torrick once again made sure it was known what the two men had been booked for. Hardwick was held for about twelve hours, and his friend a bit longer. Hardwick later described the experience as a humiliating "nightmare" (Irons 1988, 396).
The perfect test case

Hardwick and his friend’s release from jail might well have been the end of the story. The idea of using their harrowing experience as a platform from which to launch a legal struggle against the nation’s sodomy laws never occurred to either of the two men, and both would have been happy simply to put the disturbing event behind them. This was especially true of Hardwick’s friend, who desperately hoped to avoid a scandal, news of which might reach his home back in North Carolina, jeopardizing both his job and his marriage.

Enter Clint Sumrall. For five years, Sumrall had combed through Atlanta’s court records and police blotters, looking for sodomy arrests and just the right set of facts for a “test case,” as many advocates believed that such laws were an unconstitutional violation of privacy (Irons 1988, 395). Sodomy charges were not uncommon. Indeed, in 1982, Sumrall’s records, which he logged into a computer database for the Georgia chapter of the ACLU, indicated that 44 people were serving time for sodomy (Harris 1986, 2B). However, the factual situations did not usually lend themselves for use as a test case. Most often, sodomy charges were brought in conjunction with sexual assault, as a way to trump up the charges. Other sodomy arrests involved statutory rape between an adult and a minor. Still other sodomy arrests were made in the context of unsavory public situations, such as at public bathhouses or certain parks known to be gay hangouts. None of the situations that Sumrall routinely found provided the vehicle necessary for a successful challenge.

And then Sumrall saw Michael Hardwick’s name, and the charge of sodomy with
an adult companion, and that the arrest had been made in the privacy of Hardwick’s bedroom. To Sumrall, this seemed almost perfect. It was the kind of situation that Justice William O. Douglas had warned about in the seminal privacy case, *Griswold v. Connecticut*, 381 U.S. 479 (1965) – police intrusion into the bedroom, legal charges regarding intimate sexual conduct, followed by twelve humiliating and horrifying hours in jail. The circumstances were right. But Sumrall needed to find out if the parties were willing. Many of those arrested on sodomy charges were reluctant to draw attention to their cases, for they feared the embarrassment, potential loss of employment, and harassment that would likely accompany the attention. About three days after the arrest, Sumrall contacted Hardwick and ask if they could meet to discuss his case. By this time, Hardwick’s mother had returned from her trip, and she accompanied Hardwick to the meeting (Irons 1988, 396).

Ten lawyers were present at that initial meeting, most affiliated in some way with the ACLU, but some also from the Georgians Opposed to Archaic Laws (Harris 1986, 2B). They explained to Hardwick and his mother that in order to challenge the validity of a law, an actual factual situation is necessary, because courts will not issue rulings based on hypothetical situations. Sumrall described his search of the last five years, and said how difficult it had been to find just the right case. Hardwick asked the attorneys “What was the worst that could happen?” and “What was the best that could happen?” “They explained to me,” recalled Hardwick, that “the judge could make an example out of me and give me twenty years in jail.” This possibility, of course, frightened Hardwick’s mother. “Do you realize I’ll be dead before I see you again?” she said (emphasis in
original) (Irons 1988, 297).

For the next few days, Hardwick considered whether or not he would be willing participate in a test case. He talked about his case with one of the lawyers who had been present at the meeting, former Atlanta city councilman and political activist John Sweet. Sweet tried to convince Hardwick that he should turn his personal annoyance into an opportunity to benefit all gay and lesbian individuals. "We had a talk about the epic quality of the struggle," said Sweet. "I told him that if he chose to, he could be a part of it." (Harris 1986, 2B). Sweet suggested that Hardwick at least write in a journal about the events of his arrest, and while Hardwick wrote, he became angry. "I realized that if there was anything I could do, even if it was just laying the foundation to change this horrendous law, that I would feel pretty bad about myself if I just walked away from it," said Hardwick. What most influenced Hardwick was Sumrall’s description of trying to find an appropriate test case. Not only did Hardwick’s situation present a good case, but Hardwick was already “out,” and his job would not be impacted by negative publicity. “There’s a lot of different reasons why people would not want to go on with it. I was fortunate enough to have a supportive family who knew I was gay. I’m a bartender, so I can always work in a gay bar. And I was arrested in my own house. So I was a perfect test case,” said Hardwick (Irons 1988, 397).

Hardwick contacted Sumrall and told him he’d decided to cooperate and would let the ACLU use his situation as a test case. “Let’s go for it,” he told Sweet (Harris 1986, 2B). John Sweet and Louis Levenson were the two attorneys of the ten who Hardwick chose to help him begin navigating Georgia’s courts. Both Sweet and Levenson were
prominent attorneys in Atlanta with good track records, and Sweet was also known in and around Atlanta for his previous service on the city council. The lawyers explained that Hardwick would have to go through a trial and be convicted so the challenge could go forward. First, though, there was the matter of the marijuana possession that needed to be cleared up. Since possession of small amounts of marijuana was a misdemeanor, that part of the case could be dispensed with in municipal court. The lawyers advised Hardwick to plead guilty to the marijuana possession and pay the fine, and then Hardwick would go to the Superior Court, where felony cases were heard, and plead not guilty. "So here I go, marching into municipal court with two of the best hot-shot lawyers in Georgia on a possession-of-marijuana misdemeanor," recalled Hardwick. Officer Torrick was called to testify before the judge, and he explained how he did not realize that the warrant had been cleared. The only questions Sweet and Levenson had for the officer was why he waited for about 30 seconds, watching the two men, before he identified himself. "He answered that the lights were low in the room and he wasn't sure what was going on," said Hardwick. "The judge kind of chuckled and asked my attorneys how I pled, and they said 'Guilty' with no argument. We didn't want them to get suspicious as to what we were up to," said Hardwick, referring to the fact that the attorneys would not want to alert the Atlanta prosecutors that they were preparing a test case (Irons 1988, 398).

The following morning, the municipal court passed the records of the case to the Superior Court for trial pending action of the grand jury on the sodomy charges. Hardwick recalled that it was at that point that the prosecutor's office became suspicious. "[W]hen the prosecutors saw who was representing me, and saw that I pled guilty on the
marijuana charge, they got suspicious,” said Hardwick. “They sensed that something was coming and they didn’t want to get involved in it.” (Irons 1988, 398). The Superior Court scheduled a grand jury hearing for October 7, 1982. In the weeks prior to the hearing, Hardwick continued to meet with the lawyers about once a week, discussing the case and preparing to give testimony when asked. October 7, however, came and went without Hardwick’s case being presented to the grand jury. The statute of limitations for the sodomy charge was four years, which meant that Hardwick would be vulnerable to prosecution at any time during the next four years – but it also meant that there was only a four-year window of opportunity within which to challenge the law using Hardwick’s arrest.

“At that point it was very touchy,” said Hardwick. He later recalled that the lawyers told him that “You can let things ride, but what we really need to do – and we’re taking a very large chance – is to push it.” The lawyers wanted to ask the district attorney’s office what their intentions were. Hardwick agreed to let the lawyers “push it.” Levenson’s office inquired as to the intentions of the district attorney, saying that Hardwick wanted resolution and either wanted to be cleared of the charges or to be prosecuted, because he did not want to live for the next four years with the threat of a prosecution hanging over his head. Assistant District Attorney Kenneth L. Marshall responded with a short letter on January 7, 1983. Writing on behalf of Fulton District Attorney Lewis R. Slaton, the letter, in its entirety, read:

Dear Louis [Levenson],

This is to confirm our position on the above-styled case. Michael
Hardwick and his co-defendant [sic] cases were not presented to the Grand Jury on October 7, 1982. Unless further evidence develops, the cases will remain as not presented to the Grand Jury (Bowers v. Hardwick, Petition for a Writ of Certiorari, 85-140, 1985, Joint Appendix, 8).

It is unclear exactly why the district attorney’s office did not pursue the case, since they had clear evidence in the eyewitness testimony of Officer Torrick. According to Hardwick, the attorneys believed it was because the prosecutor’s office suspected a test case was being mounted, and wanted to take the ammunition away from the lawyers. Other sources, however, have attributed the prosecution’s lack of action to the fact that, given the circumstances surrounding Hardwick’s arrest, a jury might likely acquit Hardwick (Garrow 1994, 655). The lack of prosecutorial enthusiasm in Hardwick’s case was not all that unusual. In general, at the time of Hardwick’s arrest in 1982, the Atlanta police force was not particularly aggressive in the enforcement of the sodomy statute with regard to consensual behavior between same-sex partners.

Unlike many prosecutors who defended entrapment tactics and police sweeps of parks and gay bars, [Fulton County District Attorney Lewis] Slaton kept a relatively tight rein on his troops. Most of the gays arrested in public places like Piedmont Park, even if the police witnessed acts of sodomy, were simply charged with the misdemeanor offense of ‘public indecency’ (Irons 1990, 383).

Indeed, Slaton himself seemed to have had misgivings about the law.

“Consensual sodomy should be a misdemeanor, not a felony, but nobody has the courage to push it that way,” he told an Atlanta reporter (Irons 1990, 383). This may partly explain why Slaton refused to go forward with a prosecution of Hardwick. He may also have wished to avoid the probable publicity and political controversy likely to be inspired
by a trial of this nature.

Slaton, a sixty-year-old, no-nonsense prosecutor, declined to discuss his reasons for keeping the case out of court. Most likely, he did not want to arouse the Atlanta gay community and its enemies, who obeyed an uneasy truce in the Virginia Highland area and in Piedmont Park, where gays congregated and competed in softball leagues, complete with uniforms, raunchy team names, and cheerleaders. Slaton undoubtedly knew that Officer Torick’s [the arresting officer] expired warrant, his earlier arrest of Michael, and disputes over how he gained entrance to Michael’s house might embarrass the police and prosecutors (Irons 1990, 383).

The dilemma of Slaton’s office was representative of the uncomfortable position prosecutors found themselves in across the country in the states which still outlawed consensual sodomy. The law remained on the books and was resistant to repeal efforts, yet no one was exactly enthusiastic about prosecuting private, consensual sexual activity.

As federal judge Robert Bork put it, “The statutes [regarding private sexual activity] are never enforced, but legislators, who would be aghast at any enforcement effort, nevertheless often refuse to repeal them” (Bork 1991, 250).

Taking It To The Federal Courts

With no action by the prosecutor, the criminal case had come to a dead end.

Sweet and Levenson discussed the matter with other members of the ACLU, and it was decided that they would try filing for a declaratory judgment in federal district court.³ Full-time ACLU attorney Kathleen Wilde helped to prepare the brief, and later became

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³ The purpose of a declaratory judgement is to engage the opinion of the court on some question of the law, though no action is ordered. A declaratory judgement stands by itself; there is no ensuing execution of the judgment. This is as opposed to a direct action, which seeks some executory action (Gifis 1991).
the lead attorney in the case. “I ended up getting very, very close to her,” said Hardwick. “She was the perfect lawyer to work with me and we saw eye-to-eye on everything” (Irons 1988, 399).

The suit named Fulton County District Attorney Lewis R. Slaton, and Atlanta Public Safety Commissioner George Napper as defendants in the case, with Attorney General Michael A. Bowers listed as the lead defendant (Leonard 1993, 155). Among other things, the brief filed by Wilde claimed that Hardwick “...is a practicing homosexual who regularly engages in private homosexual acts and will do so in the future” (Garrow 1994, 654).

Georgia's sodomy law made no reference to the gender of the persons involved in act of sodomy, which meant that heterosexuals (married or single) as well as homosexuals were subject to prosecution -- although it was rarely enforced against heterosexuals in private settings in absence of coercion, and its application to married couples was constitutionally questionable in light of the Court’s 1965 decision in *Griswold v. Connecticut*.\(^4\) Because the law was most vulnerable in its application to married couples, Wilde recruited a married couple to join the complaint. “John and Mary Doe” stated that after they learned of Hardwick’s arrest, they had been “chilled and deterred” from some of the sexual practices that they had enjoyed in the past (*Bowers v. Hardwick*, 85-140, Petition for Certiorari, App. A, 2).

The complaint said that the Georgia sodomy law was an unconstitutional

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\(^4\) In *Griswold v. Connecticut*, the Court ruled that a constitutional right of marital privacy voided a Connecticut law which prohibited use of contraception. This case is discussed in detail in Chapter 5.
infringement on the privacy rights of Hardwick and the Does. Specifically, the suit said the law was "...unconstitutional in that it violated their right of privacy under the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and that it violated due process of law, was unconstitutionally over broad, and violated their freedom of expression and association" (Bowers v. Hardwick, 85-140, Petition for Certiorari, App. B, 3). The state filed a motion to dismiss, saying there was no adequate claim upon which relief could be granted.

About two months later, the district court, in an order entered by federal district judge Robert H. Hall, granted the defendant's motion to dismiss, saying that the Does did not have standing to bring the suit, as they had never been arrested as a result of the law, and that Hardwick, though he did have standing, did not have a valid claim as a result of the Supreme Court's 1976 summary affirmance of Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 901. In Doe v. Commonwealth, a three-judge district court upheld the constitutionality of a Virginia anti-sodomy law against allegations that the law violated due process, freedom of expression, and the right of privacy as it related to homosexual conduct. "Judge Hall saw that this [case] was going to be a major thing," recalled Hardwick. "So he immediately dismissed the case and said that I did not have a case" (Irons 1988, 399).

Hardwick's lawyers decided to pursue the matter. "My lawyers had assured me that [Judge Hall's dismissal] was okay," said Hardwick. They appealed the dismissal to the U.S. Court of Appeals for the Eleventh Circuit. It was two years before the appellate court issued a ruling, in May of 1985. During that time, Hardwick's lawyers told him that
it was important that he continue to live in Atlanta. If he were to move – particularly if he moved out of state – it would likely have rendered the case moot, as he would no longer have been vulnerable to prosecution by the Atlanta prosecutor. “I didn’t realize when I went into all of this that I was going to be suing the police commissioner,” said Hardwick. “Nor did I realize that while in the federal courts I had to continue to live in a city where the KKK was rather strong.” In order to avoid publicity, Hardwick rented an apartment under a friend’s name, and set up all of his utilities under that name, so that reporters and others would not be able to easily locate him. “I was still working as a bartender, plus I had opened up a floral shop with a friend of mine, but all in his name again, because I didn’t want them to have any way of tracing me, especially after the beating. I lived very incognito” during that time, he said (Irons 1988, 399).

A Temporary Victory

Finally, in May of 1985, the appellate court issued its ruling. By a two to one vote, the appellate court reversed the district court. The majority opinion, authored by Circuit Judge Frank M. Johnson, was a forceful defense of privacy, specifically including privacy for homosexuals. Johnson himself, however, was not overly enamored with the idea of homosexuality, and considered it a kind of illness or abnormality. “Personally, I think it’s disgusting,” the judge told his clerks while they were working on the case. “But until we find a cure, society ought to tolerate conduct of this kind between consenting adults in the privacy of their own home” (Bass 1993, 424).

Judge Johnson thought it best to focus on the privacy aspect of the case. For most cases, Judge Johnson would issue a memo to his clerks, giving the general outline of what
he wanted, have them draft the opinion, and then he would edit the drafts they wrote. He followed his usual process for the Hardwick case, instructing his clerks to use the cases in which the Supreme Court referred to a constitutional right of privacy. Johnson suggested to his clerks that they focus on the sexual liberty implied in these cases, and he told them to “write it strong.” His clerks came up with the idea of creating an analogy between the intimate association involved in marriage and the intimate association involved in a homosexual relationship. In this way, the associational aspects of the privacy cases were also emphasized (Bass 1993, 424).

After reading a draft of the opinion, Johnson is reported to have gone to his clerks and said with a laugh, “Oh, they’re going to call me the sodomy judge.” He also noted that the analogy between homosexual sex and sex in marriage did not have precedent. “If you were on the Supreme Court,” said one of his clerks, “you’d write it any way you wanted.” To which the judge replied, “Leave it in” (Bass 424).

The opinion, Hardwick v. Bowers, 760 F.2d 1202 (1985), first addressed issues of standing. Johnson agreed with the ruling of the district court that John and Mary Doe lacked standing because “They have not been arrested or threatened with arrest for sodomy” (Bowers v. Hardwick, 85-140, Petition for Certiorari, App. C, 11). Hardwick’s situation was different, reasoned Johnson, in part because of his arrest, and in part because of “the continuing resolve on the part of the State to enforce the sodomy statute

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5 Most notably, these cases included Griswold v. Connecticut, 381 U.S. 479 (1965), the case in which the Supreme Court fully articulated the idea of a constitutionally projected right to privacy; Roe v. Wade, 410 U.S. 113 (1973), in which the Court said the right to privacy encompassed the right of a woman to terminate her pregnancy; and Stanley v. Georgia, 394 U.S. 557 (1969), in which the Court ruled that a man could not (footnote continued on next page)
against homosexuals and the authenticity of Hardwick’s desire to engage in the proscribed activity in the future” (App. C, 11).

Johnson then dealt with the questions regarding the effect of *Doe v. Commonwealth*. The district court had ruled that in light of *Doe*, Hardwick did not have a valid claim. Johnson, however, offered a different interpretation of *Doe’s* impact. While he acknowledged that a summary affirmance of the Supreme Court does have binding precedential effect, “…finding the precise limits of a summary affirmance has proven to be no easy task” (App. C, 13). Johnson qualified the nature of the binding effect in *Doe*, saying that in a summary affirmance, “…because the Court disposes of the case without explaining its reasons, the holding must be carefully limited” (App. C, 13). Furthermore, a summary affirmance “…represents an approval by the Supreme Court of the judgment below but should not be taken as an endorsement of the reasoning of the lower court” (App. C, 13). In other words, because *Doe* was a summary affirmance, Johnson reasoned that it was impossible to determine whether the Court had agreed with the constitutional issues, or whether it had affirmed the case on the more limited basis that the plaintiffs in *Doe* lacked standing. And, unlike Hardwick, the *Doe* plaintiffs had not suffered an arrest.

Furthermore, Johnson went on to say that “doctrinal developments” after *Doe* indicated that though the Court had not explicitly overruled *Doe*, the questions raised in *Doe* were now open. Additionally, *Doe* could not be interpreted as controlling all of be prosecuted for the private possession and viewing of legally obscene material. The Court’s privacy decisions are examined in Chapter 5.
Hardwick’s legal claims, as “He alleges that the Georgia statute violates his First Amendment freedom of association, a claim not addressed by the jurisdictional statement or the district court opinion in Doe” (App. C, 17, note 6). In particular, Johnson argued that two Supreme Court opinions in the years since Doe left certain questions unresolved, and signaled a willingness by the Court to investigate these issues further. He pointed to a footnote in Carey v. Population Services, 431 U.S. 678 (1977), which said 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 among adults” (footnote 5).

Another “doctrinal development” cited by Johnson as evidence that the Court was now willing to entertain questions about the constitutionality of state regulation of private consensual sex between adults occurred when the Court granted certiorari in New York v. Uplinger, 467 U.S. 246 (1984), then later dismissed the writ as improperly granted. This case involved a New York law which prohibited loitering in public places for the purpose of engaging in or soliciting another person to engage in “deviate sexual behavior.”

Johnson noted that after receiving the briefs of the parties and hearing the oral arguments in Uplinger, the Court dismissed the certiorari as wrongly granted, and said that the Uplinger case presented an “inappropriate vehicle” for resolving the “important constitutional issues” raised. From this, Johnson reasoned that, “It is fair to conclude … that the Supreme Court was prepared to address the constitutionality of state regulations like Georgia’s sodomy statute but chose to address the issue when presented more directly in another case” (App. C, 20-21).
Turning finally to the merits of Hardwick's claim, Johnson asserted that "The Georgia sodomy statute infringes upon the fundamental constitutional rights of Michael Hardwick" (App. C, 22). What were the fundamental rights in question? Johnson never squarely labeled the specific right or rights in question, at times referring to a "right of privacy," but at other times referring to "associational interests." Although he relied on Supreme Court precedent which articulated a constitutional right to privacy, Johnson emphasized that constitutional privacy "is not limited to conduct that takes place strictly in private." He argued that "The Constitution prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society" (App. 22).

Among the personal decisions protected were those involving "important associational interests." When the Supreme Court had protected a right of marital privacy in Griswold v. Connecticut, Johnson claimed that the underlying value protected was the "opportunity for mutual support and self-expression." Johnson pointed to Eisenstadt v. Baird, 405 U.S. 438 (1972),\(^6\) to support the claim that marriage was not the only associational interest protected by the Constitution, and he concluded that "For some, the sexual activity in question here serves the same purpose as the intimacy of marriage" (App. C, 24). Additionally, because Hardwick's conduct had occurred in his home, Hardwick's claim was "bolstered." "[T]he constitutional claim of protection of privacy," he wrote, "reaches its height when the state attempts to regulate an activity in the home" (App. C, 24).

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\(^6\) In Eisenstadt, the Court ruled that a law that prohibited distribution of contraceptives to unmarried couples violated the equal protection clause of the Fourteenth Amendment.
The opinion was rather ambiguous, specifically regarding just what rights were infringed upon by Georgia's sodomy law. The phrase "the right of privacy" was used rather sparingly, and implied that whatever rights were in question, they were as much related to "associational" interests as they were to privacy interests. This was no doubt due in large part to the fact that the Doe opinion had rejected the argument that the Virginia sodomy law violated the right to privacy. In focusing attention on associational interests, even if his interpretation of the precedential impact of Doe was incorrect, such a finding would not automatically render the heart of his decision void.

Johnson said the rights involved (whatever they were) were protected by the Ninth Amendment, and by "the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment" (App. C, 26). The opinion did not go so far as to strike down the privacy law per se. Rather, the case was remanded for trial, with the proviso that the state, when regulating private sexual activity, must demonstrate a compelling interest. In other words, Johnson acknowledged that the sodomy law infringed on a fundamental right, and thus would be subjected to heightened scrutiny by the courts – a very difficult standard to meet. In absence of a compelling justification, Georgia's sodomy law would be unenforceable.

**All The Way To The Supreme Court**

Eight days after the Hardwick decision was issued, on May 30, 1985, Attorney General Bowers filed for a rehearing en banc with the Court of Appeals for the Eleventh Circuit, which was denied on June 13, 1985. Just a few days later, on July 25, Bowers
filed a petition for a *writ of certiorari* with the Supreme Court, contending that the Court of Appeals had erred on two counts: first, the state’s brief disputed the appellate court’s interpretation of the precedential value of *Doe v. Commonwealth*, saying that the merits of *Doe* were indeed binding on the lower courts. Second, the state’s brief disputed the appellate court’s finding that the law infringed on a fundamental right, thus requiring the state to show a compelling interest before it could prohibit sodomy.

That John and Mary Doe had been eliminated from the case gave the state a tactical opportunity to frame the issue very narrowly, focusing on the specific act of homosexual sodomy rather than a broader right to privacy or right of association. Thus, the question the state presented to the Supreme Court was, “Whether the Court of Appeals erred in concluding that Georgia’s sodomy statute infringes upon the fundamental rights of homosexuals and in requiring the State of Georgia to demonstrate a compelling state interest in order to support the constitutionality of the statute.” In other words, was there a constitutionally protected fundamental right to homosexual sodomy?

The Supreme Court did hear the case, and one year later Michael Hardwick had his answer: No, there was no fundamental right to engage in homosexual sodomy. The result was that states could – and some still do – regulate private, consensual sexual behavior between adults. Hardwick’s lawyers had assured him, and he had believed, that he had a constitutional right to privacy which encompassed what he did with another consenting adult in the privacy of his bedroom. But if his right to privacy didn’t include the ability to engage in the most intimate acts of life, it didn’t seem like much of a right at all. What was a “right to privacy” anyway? What Hardwick’s lawyers hadn’t told him was that the legal...
foundations upon which the right to privacy had been built were awkwardly constructed and lacked clear boundaries. This shaky legal foundation was cast on top of a concept so ambiguous and hard to define that its precise meaning continues to elude scholars and lawyers alike. Chapter 2 examines the complex concept we call privacy. Chapters 4 and 5 examine privacy in the context of constitutional law.
CHAPTER 2
PRIVACY: THE HISTORY OF AN ELUSIVE CONCEPT

"The makers of our Constitution ... conferred, as against the government, the right to be let alone – the most comprehensive of rights and the most valued by civilized men."

-- Louis D. Brandeis
Olmstead v. United States, (1928) (dissenting opinion)

One of the most oft-cited and eloquent definitions of privacy is the “right to be let alone.” But what does that mean? The right to be left alone by whom or from what? Under what circumstances? And when is the right to be let alone outweighed by other rights, or by society’s interest in creating and maintaining a certain type of society?

Whatever the “right to be let alone” means, in 1986 a majority of the High Court declared it did not mean that Michael Hardwick and another individual had the right to engage in consensual intimate acts in the privacy of Hardwick’s bedroom. So what does it mean?

In this chapter, I examine both philosophical and legal conceptions of privacy. As we will see, to date, there is still no universally accepted definition of privacy, either in legal or non-legal usage. This definitional dilemma lies at the heart of the controversy in defining and protecting a right of privacy, for just what are the courts protecting? Of all the confusion surrounding the term – and thus the confusion surrounding the nature of the right – the point most critical to the current study is the confusion and disagreement over whether privacy is a right with intrinsic value, or is valued as an instrumental right. Put another way, do we value privacy in and of itself? Or is privacy used as a vehicle to protect other values and actions?
The first part of this chapter provides a brief history of the word privacy, in a non-legal context. I then describe and examine some of the legal definitions. This is followed by a discussion on the three sources of privacy law: federal statutes, nineteenth-century tort law, and judicial interpretation of the Constitution. In particular, the latter part of this chapter is devoted to an examination of the concept of privacy within tort law. Privacy is one of the few constitution rights to evolve almost directly from the law of torts. A detailed examination of the constitutional conception of privacy will be saved for the chapters 4 and 5.

Privacy: What Is It?

Colin J. Bennett (1995) noted that “It is an almost customary feature of any analysis of privacy to begin with a disclaimer about the inherent difficulty, perhaps impossibility, of defining exactly what ‘privacy’ is, and of disaggregating its various dimensions.” This analysis is no exception. A wealth of ambiguity surrounds not only legal notions of privacy, but the concept of privacy in general. Defining privacy is more than just an academic starting point, for expansion of privacy rights in the United States has no doubt been hindered in part by the fact that there is no clear, agreed-upon legal definition of privacy. After more than 100 years of development, privacy is still referred to as an “emerging right” (Standler 1997) and there is still no consensus on exactly what

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1 Bennett seemed to have given up on the hope, and seemed to even doubt the utility of coming up with a satisfactory definition. “For the purposes of this review, however, it would be misleading and confining even to try to provide a general definition of ‘privacy’ to focus the analysis. All definitions, to some extent, are based on questionable assumptions about individualism, and about the distinction between the realms of civil society and the state. Many gloss over essential cultural, class-related or gender differences. It is those very assumptions that require careful interrogation if the ‘politics’ of privacy are to be unearthed.” This led Bennett to the plausible conclusion that “any claim to define ... privacy raises more questions than it answers” (Bennett 1995).
liberties are included in a right to privacy. "...[A] discussion of privacy is typically a list of examples where the right has been recognized, instead of a simple definition" (Standler 1997).

The term has defied clear definition by governments and think tanks alike. A 1993 report issued for Congress by the now-defunct Office of Technology Assessment devoted an entire three-page side bar to defining the term, with only limited success.² And in 1995, an entire symposium, sponsored by the Hubert H. Humphrey Institute of Public Affairs and the Connecticut Foundation for Open Government, Inc., was dedicated to the task of defining privacy, again, with only limited success.

Nor, to date, has the Supreme Court defined privacy. Rather, the Court has draped the word over certain actions that seem like they ought to be protected somehow, but for which there is no enumerated protection in the Constitution. Although certain rights have been recognized by the Supreme Court under the rubric of privacy, the Court has yet to articulate a clear method or test for determining which privacy rights are protected. "Thus, individuals in the United States exercise privacy rights at their own risk" (Krotoszynski 1991, 1401). Such was certainly the case for Michael Hardwick.

General Definitions Of Privacy

Perhaps Justice Hugo Black put it best when he described privacy as "a broad, abstract and ambiguous concept" (Levinson 1992, 671). Legal scholars and practitioners

²Ultimately, the report came to the less-than-satisfactory conclusion that privacy does not possess a "single, clear definition" (p. 7), and offered a definition of privacy meant only to serve within the confines of the report. "Privacy will refer to the balance struck by society between an individual's right to keep information confidential and the society benefit derived from sharing the information, and how that balance is codified into legislation giving individuals the means to control information about themselves" (Office of Technology Assessment 1993, 7).
are not the only ones to struggle with a definition of privacy. Authors, poets and playwrights alike have used the word in ambiguous and often paradoxical ways, with widely varying connotations. Such an etymological exercise is not without merit here, as the clusters of meanings which emerge and the connotations surrounding those clusters have some corollary with legal definitions which later emerge.

The word privacy is derived from the Latin privatus, which means “apart from the state” (OED 1989, 515). According to Ronald Huebert (1997), the word “privacy” came relatively late to be used in the English language. If it was used at all in the Middle Ages, it was common enough to make its way to the Middle English Dictionary. By the mid-fifteenth century, an early form of the word (“privace”) made its way to the pages of the Oxford English Dictionary. But by the time of the Renaissance period, according to Huebert, the word appeared with much more frequency. Huebert claimed that in early usage, the words “privacy” and “private” had four distinct, though overlapping, meanings. The first meaning had to do with status or, more accurately, absence of status. “Under this rubric what is distinctive about the private is a deficiency, a lack: the private is not the public.” Even today, some derivations of “private” still connote this absence of status, such as military use of the word “private,” which denotes the absence of rank. In this first definition, the public is generally more important than the private. “This first cluster of meanings is clearly hierarchical: in warfare, in religion, and in education, public consensus prevails over private initiative or intuition.”

A second usage, or “cluster of meanings,” to use Huebert’s label, is more closely related to property and ownership. Here, privacy is not considered a social ill, but a
refuge from the chaos of public life. Property provided a tangible way for an individual to be "away from the state." Although government still had access to and control over the individual, these situations would be limited when the individual was within the confines of his private property.

Privacy becomes more closely linked with secrecy in a third cluster of meanings identified by Huebert. At various times, "privacy" and "private" referred to either concealing something, or the actual place of concealment. The link between privacy and secrecy is manifest in such contemporary phrases as "private and confidential." Privacy is also used at times to describe the link between sexuality and secrecy, such as in "private parts."

The final early usage of privacy dealt with what Huebert termed "interiority." By interiority, Huebert meant an inner state of mind. Into this psychological state individuals can retreat from the world's opinion, and opinions of one's own creation can have the space to develop. It is interesting to note that privacy began as a concept that carried negative connotations as a threat to the commonwealth, but developed into an idea associated with mental tranquility and creativity. Indeed, allowing, or even encouraging, a sphere of interiority would be consistent with a liberal political system, such as the one the writers of the Constitution wanted to create. This evolution from pejorative to positive seems to coincide with privacy's transformation from a term that is purely related to property to a less tangible definition. "It would also be possible to observe a preponderance of material interpretations of privacy (property, status) in the earlier texts, and spiritual interpretations (secrecy, interiority) in later ones." Likewise,
legal definitions of privacy are related to property, but later come to include a more psychological element.

Unfortunately, the ambiguities and multiple meanings that plague general definitions of privacy have not been greatly decreased when scholars within the fields of philosophy, law and political science have attempted to define it. Not unlike the word’s usage in literature, theoretical, political and legal definitions of privacy are inconsistent. “‘Privacy’ has been used to denote many quite different things and has varied connotations” (Office of Technology Assessment 1993, 7). As sociologist Edward Shils noted:

Numerous meanings crowd in the mind that tries to analyze privacy: the privacy of private property; privacy as a proprietary interest in name and image; privacy as the keeping of one’s affairs to oneself; the privacy of the internal affairs of a voluntary association or of a business; privacy as the physical absence of others who are unqualified by kinship, affection or other attributes to be present; respect for privacy as the respect for the desire of another person not to disclose or to have disclosed information about what he is doing or has done; the privacy of sexual and familial affairs; the desire for privacy as the desire not to be observed by another person or persons; the privacy of the private citizen as opposed to the public official; and these are only a few (Shils 1972).

Similar to Huebert’s “cluster of meanings”, Judith Wagner DeCew described privacy as “a cluster concept” of various, but related, ideas that include an individual’s right to control information, maintain independence, and form relationships (DeCew 1997).

Conceptualizing privacy perhaps becomes easier when it is considered in a framework of public versus private. As noted earlier, the Latin *privatus* means “apart from the state.” Thus, we can consider public those things which can rightfully be
regulated by government. Privacy, then, becomes those things which are under the control of the individual. Notions of privacy are central to a liberal political tradition. The government, according to this tradition, has the responsibility of not only regulating public life, but of fostering -- at least to some degree -- the ability of individuals to make certain personal choices without outside interference. Edward Shils argued that privacy is necessary to a healthy liberal democracy. Privacy, he said, shores up the boundaries between competing centers of power, and reinforces the boundaries between the citizen and the state (Shils 1966, 290).

This notion of public versus private, however, is not without its critics. Some have argued that the "private and the public are inextricably intertwined and interlaced. They cannot be treated as separate entities" (Bensmen and Lilienfeld 1979, 182, as quoted in Bennett 1995).

The cliché that a "man's home is his castle"\(^3\) illustrates that privacy is at times a spatial concept -- i.e., private acts might sometimes be considered those conducted behind closed doors, particularly in one's home -- but not always. Some actions, such as child abuse or rape, are not considered private even when conducted in the home, while other actions, such as confiding in an attorney or obtaining information about an abortion, are private even though they might be conducted in public.

\(^3\) The idea of home as castle was articulated as early as 1604 in *dicta* by Lord Coke in the *Semanyne case*. He wrote "that the house of everyone is to him his castle and fortress, as well as his defense against injury and violence, as for his repose... for where else shall a man be safe, if it be not in his house?" Lord Coke was justifying the killing of thieves, if such action were in defense of one's home and possessions and took place within one's home (DeCew 1991, 20).
The relationship between privacy and confidentiality, or secrecy, deserves some attention. As stated in the previous paragraph, not all things conducted secretly or outside of general observation are considered private, while many actions within view of others are so considered. No doubt, then, that at least some of the difficulty in defining privacy is due in part to the fact that the terms “privacy” and “confidentiality” are often used interchangeably. “Neither term possesses a single, clear definition, and theorists argue variously that privacy and confidentiality (and the counterpart to confidentiality, secrecy) may be concepts that are the same, completely distinct, or in some cases overlapping” (Breunig 1993, 7). The philosophical literature on the subject has not settled the issue. One philosopher, whose notions of privacy are laced with confidentiality and secrecy, is Ruth Gavison (1980). For Gavison, one’s level of privacy correlates with the degree to which one is known to others, coupled with the level of accessibility others have to the details of one’s life. Thus, high levels of privacy would necessitate “limited access in the senses of solitude, secrecy and anonymity” (Gavison 1980, 421).

Charles Fried (1968) argued that it is not so much the quantity of information available about oneself that matters most to whether or not someone feels her privacy has been violated; rather, it is the quality of control she has over the information. We might feel comfortable if someone knows a general fact about us, such as if we just had surgery. But we would feel uncomfortable—and as if our privacy had been violated—were the minute details of the surgery broadly known. Similarly, we may be comfortable with
certain details about our lives being public if they are framed in a positive or neutral way, but not if those details are portrayed pejoratively.

That privacy and secrecy are so often intertwined may well tend to cast privacy in a more pejorative light than would otherwise be the case. In many contexts in which the word secrecy is used, there is a tendency to assume that whatever the thing is that is secret must somehow be bad or wrong. After all, if we are doing everything the way we are supposed to, why should we be so jealous of our privacy? However, scholars such as Anita Allen (1988) have pointed out that not all secrecy conceals negative facts.

According to Sissela Bok (1984), privacy and secrecy are indeed distinct concepts, but they are often equated because “privacy is such a central part of what secrecy protects” (p. 10). Thus, for Bok, secrecy is a tool for protecting one’s privacy, not unlike the idea posited by some that protection of property *per se* is not so important as the fact that private property is one way of achieving privacy.

This discussion of privacy and secrecy may well lead one to the conclusion that a “right to privacy” is in many ways a misnomer for a right of personal autonomy. That is, the right to make a variety of personal choices free from governmental intrusion or control. This begs the question of whether privacy has intrinsic value and is an end in itself (Rule *et al.* 1980, 22), or if it is an instrumental or strategic value, to achieve some other goal (Bok 1988; Sieghart 1976, 76). I believe that this question of intrinsic versus instrumental value lies at the heart of the failure of the Supreme Court to articulate a clear notion of privacy and just what a privacy right entails.
Alan Westin (1967) identified several functions of privacy which could also be called goals, if one were to view privacy as an instrumental conception. He claimed that it promotes freedom of association; it helps protect the voting process; it helps protect organizations, such as newspapers or think tanks that operate as critics of government; it helps shield citizens from abuse by law enforcement officials; and it helps protect academic institutions from government meddling (p. 25).

As mentioned above, privacy is not hailed by all as an always-positive concept or an always-desirable right. Some feminists have criticized notions of privacy, arguing that

"...privacy can be used to shield domination, repression, degradation, and even physical harm to women and others. Granting special status to privacy protection is thus detrimental to women because the powerful use it to dominate and control women, to enforce the silence and helplessness of women, and to cover up abuse. Therefore privacy is seen as a tool to sustain and increase the marginalization of women and others without power (DeCew 1997, 5)."

In a similar vein, the early feminist Simone de Beauvoir once claimed that, “The only public good is that which assures the private good of the citizens” (Eigen and Siegel 1993, 567). Bennett (1995) summarized the feminine critique this way:

"[T]he public/private dichotomy (and by extension much theorization about privacy) has also been regarded as inherently gendered. Feminists have critiqued liberalism for reifying a distinction between a private, domestic (female) world, and a public sphere that is chiefly the preserve of men (Pateman 1983; Allen 1985). Anita Allen and Erin Mack (1990) critique Warren and Brandeis on these grounds: they “were not critical of..."

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4 Nor is this feminist critique of privacy altogether new. As far back as the seventeenth century, a similar criticism was launched by women against the writings and teachings of Presbyterian minister William Gouge. Gouge published a book – from which he gave many sermons – on the proper conduct of married couples. In one chapter, “Of the lawfulness of private functions in a familie,” he discussed the role of the woman in the private realm of the home. Gouge implied that it is most likely that the woman will find her primary role in the home, and he argued that women should take pride in this role. Apparently, the women in Gouge’s church were not convinced. “[W]hen he preached the oral version of some portion of this text, ‘much exception was taken against the application of a wife’s subjection to the restraining of her from disposing the common goods of the family without, or against her husbands consent’” (Huebert 1997).
the ways in which homelife, assertions of masculine personality, and norms of female modesty contributed to women's lacking autonomous decisionmaking and meaningful forms of individual privacy.” They advocated “too much of the wrong kinds of privacy -- too much modesty, seclusion, reserve and compelled intimacy -- and too little individual modes of personal privacy and autonomous private choice” (Bennett 1995, 477).

Another critique of privacy, noted by Bennett (1990), comes from political theorists who have argued that the liberal political tradition espoused by Locke and Mill – and which is essential to notions of privacy – is not the only, nor necessarily the best, vision of democracy. Theorists such as Carole Patemen (1970) have criticized the liberal model of democracy, offering a model that relies not so much on protection of the individual as it does on notions of community involvement and participation. Privacy rights work against that communitarian notion. Some theorists have gone so far as to characterize the American obsession with individualism and privacy as a pathology:

The cult of privacy seems specifically designed as a defence mechanism for the protection of anti-social behaviour.... The cult of privacy rests on an individualist conception of society, not merely in the innocent and beneficial sense of a society in which the welfare of individuals is conceived as the end of all social organisation, but in the more specific sense of 'each for himself and the devil take the hindmost' (Arndt 1949, 69, as quoted in Bennett 1995).

In his “Economic Theory of Privacy,” Richard Posner (1978), too, was skeptical of a privacy right. Privacy, he argued, fosters the ability of people to manipulate information so as to misrepresent themselves and thus to deceive others in society, including the government.

Additionally, those in some industries such as advertising, marketing, and information technology, have viewed privacy as the enemy of the free exchange of ideas.
The entire privacy debate has been the assertion of individual, isolated atomism in alliance with fiat law versus the free exchange of ideas (letters, telephone) as envisioned by the Constitutional framework. As such, privacy as a broad brush right diminishes liberty and elevates the state. Fortunately, over the 25 year debate, real public opinion and the advances in technology have preserved First Amendment freedoms from the privacy agenda.... The United States leads in every area of the information economy because we took the long view and put free speech over privacy in the lexicon of values that matter most (Posch 1996, 356).

Even advocates of privacy rights have acknowledged that a right of privacy, like the right to free speech, is not absolute, but must be weighed against not only competing public interests, such as the prevention of harm to others, but also against other individual freedoms, such as freedom of expression (Fenwick and Phillipson 1996, 450). Indeed, privacy questions become particularly complicated when a right of privacy, which is unenumerated, comes into conflict with expressly enumerated rights, perhaps most notably the freedom of expression.

That privacy can be both procedural and substantive further complicates legal definitions. The Fourth Amendment, which protects against unreasonable searches and seizures, exemplifies a procedural right of privacy. That is, government officials may search and seize, but they must go through a particular process or procedure before doing so. More contemporary notions of privacy are substantive in nature, including such disparate things as abortion and the right to doctor-assisted suicide. As will be discussed in Chapter 4, in the section on locating a right to privacy within the Constitution, it was when the Court expanded ideas of privacy from a procedural to a substantive right that most of the controversy began. Some critics have levied charges that the Court was
engaged in nothing more than another *Lochner*-era exercise of importing its own ideology through the due process clause of the Fourteenth Amendment.

Privacy applies only to persons, and not to businesses.\(^5\) However, for all intents and purposes, businesses have rights that are similar to privacy rights, but they are framed in terms of property rights. Confidential business information, for example, is treated as a property right, whereas confidential personal information is not (Standler 1997).

Sometimes privacy conceptions apply to possessions, such as suitcases or purses, and other times they do not. The Supreme Court, for example, has ruled police do not need a warrant to examine the contents of luggage or other "containers" within a car if there was probable cause to search the car. *California v. Acevedo*, 500 U.S. 565 (1991). The *Acevedo* case might have more to do, however, with the location of the luggage in a car. More recently, in *Bond v. U.S.*, 529 U.S. 334 (2000), the Court ruled that one's expectation of privacy did extend to one's luggage when traveling, and a warrant was necessary to search the contents of luggage on a bus.

A rather interesting, if peculiar, area of privacy law involves whether or not one's garbage is considered private. The Court, in 1988, ruled that it is not. *California v. Greenwood*, 486 U.S. 35 (1988). The case involved local police officers, who suspected that Billy Greenwood was involved in illegal drug sales, but they did not have enough evidence to secure a warrant. So the police "clawed through the trash" he left at his curbside to be picked up, and found enough evidence to obtain a warrant. (Brennan

dissenting, 46). Upon searching his residence they did find the illegal drugs they were looking for, and subsequently secured a conviction. Greenwood appealed the conviction on the grounds that the searching of his trash without a warrant violated the Fourth Amendment. The Court, in a 6-2 decision, disagreed, saying there was not a reasonable expectation of privacy surrounding one's garbage, as garbage is "readily accessible to animals, children, scavengers, snoops, and other members of the public" (White for the majority, 35). The dissenter disagreed, saying that the public ought to be able to expect the government to act more civilized than animals and children. "Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior" (Brennan for the dissenter, 45).^* 

Of course, the fact that privacy is difficult to define certainly does not make it unique in American jurisprudence. Indeed, concepts far less complex than privacy have challenged the Court's definitional abilities. In frustration over the difficulty to define obscenity, Justice Potter Stewart wrote, "I shall not today attempt further to define the kinds of material ... embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing do. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184 (1964).^* Likewise, "[P]rivacy, like an elephant, is perhaps more readily recognized than described" (Young

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^* Perhaps the most famous incidence involving trash snooping involved Henry Kissinger. "Just how embarrassing a search can be even for innocent parties was demonstrated in 1975, when the National Enquirer made off with five bags of refuse from outside the home of Secretary of State Henry Kissinger and published its gleanings" (Sanders 1988, 54).

^* On defining obscenity, William J. Brennan is reported to have said, "I finally gave up. If you can't define it [pornography], you can't prosecute people for it" (Hentoff 1999).
1978, 2). But while the trouble of developing clear definitions is common to constitutional law, the lack of a clear standard is particularly problematic when it comes to privacy issues for two reasons. First, the concept of privacy goes to the very core of how we define ourselves as individuals, and is, in a certain sense, the backdrop for other fundamental rights, such as the right of free speech or freedom of association. A private sphere allows us to exist within a majoritarian society without becoming subsumed by it. Privacy represents a distance between an individual and his or her society, and this distance is the core of all other civil liberties (Ernst and Schwartz 1962, 1). Second, since a right of privacy is not specifically articulated in the Constitution, lack of a clear definition compounds the difficulties of claiming such a right.

A common failing of privacy definitions is that they tend to be overly narrow or overly broad. Many definitions are context specific and leave out much of what we would normally consider privacy. Perhaps the most famous description of privacy as "the right to be let alone" falls into the category of being overly broad. Allen (1988) argued that if privacy means the "right to be let alone," then any harmful act of one person toward another could be framed as a violation of privacy. 8

8 Though in contemporary times the definition of privacy as "the right to be left alone" is probably most often associated with Justice Brandeis, Brandeis did not coin the phrase. In 1880, writing about personal immunity, Thomas M. Cooley said that "The right to one's person may be said to be a right to be let alone" (Cooley 1880). A dozen years later, Samuel D. Warren and Louis Brandeis would incorporate the phrase into their seminal article in the Harvard Law Review "The Right to Privacy." Later, Justice Brandeis used the phrase in his famous dissent in Olmstead v. United States, 277 U.S. 438 (1928). Once again, not all commentators value equally the "right to be let alone." "It is no answer that, in Brandeis's phrase, people have 'the right to be let alone.' Few people want to be let alone. They want to manipulate the world around them by selective disclosure of facts about themselves. Why should others be asked to take their self-serving claims at face value and prevented from obtaining the information necessary to verify or disprove these claims?" (Posner 1978, 20).
Privacy rights can be considered a derivative of property rights in two ways. First, private property is one concrete way to ensure a degree of insulation, or privacy, from both society and from government. Second, modern conceptions of privacy recognize a kind of psychological property right. That is, giving individuals control over personal information or personal choices implies that when private information is divulged, or when personal choices are limited, individuals suffer psychological anguish. A right of privacy “reflects the individual’s psychological need to preserve an intrusion-free zone of personality and family” (Robertson 1993, 104).

Definitional difficulties notwithstanding, most legal notions of privacy can be placed into one of three broad categories:

(1) the government’s interest in the private, secret, and intimate details of a person’s life; (2) the government’s interest in protecting people from invasions of privacy by news media and other individuals; and (3) the individual’s interest in personal autonomy (Lieberman 1992, 407).

**Sources Of Privacy Law**

Discussions of privacy can take two different directions, the nature of the right or the source of the right (Standler 1997). Part of the difference between legal definitions of privacy has to do with the various sources and origins of privacy law. Thus, discussions of privacy become clearer and more focused when the term is defined within the context of a particular strain of privacy law. Privacy law in the United States

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9 Although the distinction between the nature of the right and the origins of the right as pointed out by Standler (1997) are useful, in this chapter I will be discussing them together.
originates from three primary sources: nineteenth-century common law of torts, twentieth-century statutes, and judicial constitutional interpretation.

One distinction between the three strains of privacy law revolves around the question of who or what is being restrained by invoking a privacy protection. Tort law usually involves privacy rights of one citizen claimed against another citizen or group of citizens. Conceptions of privacy within constitutional law protect the privacy of citizens against the state. And the federal privacy statutes of the twentieth century are divided between those that protect the individual from invasions of privacy from the state and those that protect her from the abuses of private parties.

Twentieth-century Statutes

The easiest and most straightforward of the three strains of privacy law to discuss and understand is the strain of privacy law arising under twentieth-century statutes. Privacy statutes were the congressional reaction to public fear of two twentieth-century phenomena: the vast growth in size, scope and responsibility of government agencies; and the stunning technological advancements which allowed collection and dissemination of the details of one’s personal life in ways before unimaginable. Both of these phenomena, which generated public fear regarding invasions of privacy, motivated lawmakers to create statutory definitions and protections of privacy. Privacy in this context can be defined as the right to some degree of control over the flow of information.

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10 This strain of privacy law is easier to deal with because it is positive, statutory law, and thus its precise date of origin and reason for existence are much more obvious. Unfortunately, however, this is also the strain of privacy law of least consequence to the present inquiry.
about oneself, both in terms of controlling when the government can have access to personal information at all, and in terms of controlling the flow of information already obtained by the government.

The second phenomena of the twentieth century which spawned public privacy concerns was the quantum leap in technology which allowed for exponentially greater collection and distribution of information about individuals. Devices developed which allowed electronic eavesdropping, and which subsequently generated much statutory law protecting individuals from both the government and other private parties from abusing such technology to gain information about someone that was not otherwise obtainable.

Public concern over government abuse of electronic surveillance reached a peak in the 1970s, in the wake of Watergate.

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11 The goal of these laws is to balance the interests of the privacy of the individual, versus the legitimate needs of law enforcement officials. See, for example, 47 U.S.C., section 605 of the Federal Communications Act, which provided that “no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person”; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which regulates the use of electronic surveillance by law enforcement agencies with regard to telephone conversations and face-to-face communication; the Electronic Privacy Communications Act of 1986, which extended protection over some of the newer technologies, such as cellular phones and e-mail.

12 As the country watched in horror, a real-life intrigue unfolded, involving illegal and unethical use of electronic surveillance by people close to the President. These revelations formed what John Kingdon (1984) would term a “focusing event,” and in 1975 Congress launched an investigation by forming an 11-member committee (the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, often dubbed the “Church Committee” after its chairman, Frank Church) to determine the level to which the government had been involved in “illegal, improper, or unethical activities” (U.S. Senate 1976). The committee’s report included evidence of four decades of governmental abuse of electronic surveillance. The committee concluded that,

Too many people have been spied upon by too many Government agencies and [too] much information has been collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on the behalf of a foreign power. The Government, operating primarily through secret informants, but also using other intrusive techniques such as wiretaps, microphone "bugs," surreptitious mail opening, and break-

(footnote continued on next page)
More recently, due to advancements in electronics and, perhaps most notably, in information technologies such as computers and the Internet, information can be gathered, organized and disseminated on a mind-boggling scale. The abuses of privacy made possible by the computer revolution and the Internet have generated—and continue to generate—much legislation. Information about individuals is compiled by a variety of private agencies, such as credit bureaus, mass marketers, and employers. Congress has passed several laws to try to protect the public against the abuse of privacy related to the gathering of this information.\textsuperscript{13}

Privacy Within The Common Law

The origins of privacy within both tort law and constitutional law are more difficult to locate with precision, and their conceptions of privacy are more abstract. Privacy represents a somewhat unique area of American law in that a constitutional right of privacy, born of judicial interpretation of the Constitution, was first conceived within tort law. So although the strain of privacy law most pertinent to Michael Hardwick is

\textsuperscript{13} See, for example, the U.S. Privacy Act of 1974, which allows individuals access to government records pertaining to themselves, and restricts agencies from distributing personal information without permission, except under certain pre-defined circumstances; the Buckley-Pell Amendment to the Family Education Rights and Privacy Act, which requires educational institutions to maintain confidentiality of student records. Other examples include the Fair Credit Reporting Act 15 U.S.C. 1681 (1992); the Equal Credit Opportunity Act 15 U.S.C. 1691 (1974), Fair Credit Billing Act 15 U.S.C. 1661 (1993); the Right to Financial Privacy Act 12 U.S.C. 3401 (1978); the Electronic Communication Privacy Act of 1986 18 U.S.C. 2701; etc.
obviously judicial interpretation of the Constitution, it is necessary to examine the
 genesis of a privacy right in the law of torts in some detail, as this sheds light on the
 original conceptual framework underlying a right to privacy, and because there is
 something of a blur between where tort protections of privacy stop and constitutional
 ones begin. That privacy law was born of torts law also helps to explain its confusing
 nature. For unlike statutory law, torts law was created in a somewhat _ad hoc_ fashion.

The blur between privacy torts and constitutional privacy can be noted even in the
 use of the language in both contexts. In both areas of law, privacy is referred to as a
 "right." This, of course, is common parlance in constitutional theory and jurisprudence,
 but "rights-talk" is unusual in the language of torts, as the framework of torts tends to
 revolve around interests rather than rights. "...[T]he privacy tort is virtually the only tort
 spoken of and written about in terms of a right rather than the more familiar tort
 references to conduct of the defendant or damages suffered by the plaintiff" (Leebron

An action in tort seeks redress for harmful behavior that lies outside of criminal
 law, and which does not involve a contract. A tort is a "harmful wrong (other than a
 breach of contract) for which courts will provide a remedy, usually damages, to a private
 party" (Gifford 1992, 876). When a court determines that one party has caused injury to
 another, the court will order redress of the wrong, usually in the form of monetary
 compensation. Over time, common law courts recognized certain legal expectations or
 obligations that citizens within society were bound to follow. Originally, torts involved
 only tangible, serious wrongs, such as bodily injury or damage to possessions or property.
Furthermore, early tort law required intentional conduct on the part of the defendant.\textsuperscript{14}

By the mid-nineteenth century, however, torts had become construed more broadly in two ways: requirements of intentional conduct gave way to requirements of the lesser standard of negligence, and the harms which could be brought to court began to be less tangible in nature, gradually evolving to include injury to things such as intellectual property, reputation, and privacy.

To complicate matters further, even within tort law, there are two conceptions of privacy. One body of tort law defines privacy as a right against being disturbed by conduct that would subject the personal details of someone’s life to humiliating public exposure. A second strain of privacy torts defines privacy as using someone’s image or reputation for monetary gain without permission.

Although the legal community, even just within tort law, has failed to arrive at a single definition of privacy, a classification of four basic privacy rights, set forth by William L. Prosser in an influential 1960 article, has come to be generally accepted (Petersen 1995).\textsuperscript{15} Prosser, too, found privacy to be difficult to define. He wrote that all of the judicial decisions rendered regarding privacy in the realm of torts fell into “four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that

\textsuperscript{14} In tort actions, as in other types of civil actions, the plaintiff is the party who brings the suit or complaint, while the defendant is the party responding to the complaint.

\textsuperscript{15} “Although Dean Prosser said he was not trying to define the law of privacy torts, his definitions have been almost wholly accepted by the Restatement (Second) of Torts and are virtually the only privacy torts recognized today. See Restatement (Second) of Torts § 652A (1977)” (Petersen 1995).
each represents an interference with the right of the plaintiff . . . 'to be let alone’”

(Prosser 1960, 389). Prosser’s four categories of privacy rights are:

(1) “Publicity which places the plaintiff in a false light in the public eye.”

(2) “Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.”

(3) “Public disclosure of embarrassing private facts about the plaintiff.”

(4) “Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness” (Prosser 1960, 389)

The first category, which is publication that puts a person in a false light, is similar to defamation. The difference is that in a defamation suit, it must be shown that the information is false, whereas in a privacy suit, the information is generally true but it creates a false impression about the person bringing the suit (Standler 1997).

The second category, which is the unreasonable intrusion upon the seclusion of another, includes the invasion of one’s home (things such as entering the home uninvited or looking into a window or tapping a phone), unwanted perusal of another’s personal belongings such as a wallet or suitcase, or obtaining personal information about another person, such as their checking account balance without their consent (Standler 1997).

The third category, public disclosure of private facts, includes the unwanted publication of private information about a person. This would include publication without consent of such things as photographs of the person in his or her home, private financial data or medical records, or information about family disputes or sexual relations (Standler 1997).
Finally, the fourth category of appropriation, protects a person from having her name or likeness used without her permission in association with a product label or in an advertising campaign. Very similar to this is the right of publicity. The difference is that a right of privacy protects "injury to personal feelings," whereas the right of publicity protects against unauthorized commercial use of one's name or likeness. "As a practical matter, celebrities generally sue under the right of publicity, while ordinary citizens sue under privacy" (Standler 1997).

The tort right that most closely resembles what Hardwick was looking for is the second type, the right to be free of intrusion, although in Hardwick's case, he wished to be free from intrusion by the state—rather than from a private party—in pursuing sexual activities. Although it may seem like something of a stretch between the two, an examination of the tort cases that articulated a privacy right helps shed light on the kinds of constitutional protection Hardwick sought, for, as stated above, the constitutional notions of privacy evolved from torts law.

**Judicial Recognition of Privacy in Torts**

American courts first gave expression to the idea of a right of privacy in the nineteenth century. The early American privacy cases were not really discussing a privacy right *per se* but, like many of their English precedents, characterized a privacy right as more of a right of property. In 1848, a New York court, in *Hoyt v. MacKenzie and Others*, 3 Barb Ch. 320 (N.Y. Chancery Ct.), recognized a right of property regarding letters between individuals. The case involved the personal correspondence of
Hoyt. Some letters of his were stolen by MacKenzie, and later published for profit. Hoyt maintained that since the letters were his, only he or the authors of the letters should have the right to publish them, and he did not want to have them published in any event. The lower court sided with Hoyt, and issued an injunction to stop publication and sale of the letters. New York’s high court, however, reversed the lower court. While the opinion did recognize a right of literary property which, in some instances, would prohibit the publishing of private correspondence, the court rejected that right in the Hoyt case. The opinion said that only correspondence with literary value was protected. The court further reasoned that the correspondence in question had no literary value, or else Hoyt himself would have had it published. Thus, the court was not so much recognizing a right to keep personal subjects from public view as it was recognizing an intellectual property right (Ernst and Schwartz 1962, 26-28).

A few years later, in 1855, the New York Court of Appeals would revisit the question of private letters and the extent to which the owners of the letters had the right to keep them private. James Woolsey v. Own B. Judd, 4 Duer 379. Again, the right was treated as a property right, but the court, in *dicta*, gave voice to the idea that something less tangible – though perhaps even more important – was actually at stake other than solely a property right. The court recognized a psychological component of privacy, the anguish and embarrassment that public scrutiny of personal facts can cause to individuals.

We agree ... [that the publication of personal letters] is, perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings which can well be imagined. It strikes at the root of that free interchange of advice, opinions and sentiments, which seems
essential to the well-being of society, and may involve whole families in
great distress from the public display of facts and circumstances which
were reposed in the bosom of others, in the fullest and most affecting
confidence that they should remain forever inviolable secrets (Woolsey
and Judd, as excerpted in Ernst and Schwartz 1962, 30-1).

But the court was mindful that there was no previously established right of
privacy per se, and was unwilling to create one at that juncture. "[W]e must not be
understood to assert, that these considerations are alone sufficient to justify the
interposition of a court." The court did, however, assert that the right of privacy could be
protected as a property right, a right which was not dependent upon the property in
question having either literary or monetary value, as in Hoyt. "[I]t follows that the
distinction which has been supposed to exist between letters possessing a value as literary
compositions, and ordinary letters of friendship or business, is wholly groundless. The
right of property is the same in all, and in all is entitled to the same protection" (Ernst and
Schwartz 1962, 31). The court, it seems, was bolstering the property right with the intent
of carving out some sort of protection for privacy. "The result ... was the protection of a
right that was both more subtle and more profound than any that had existed previously"
(Ernest and Schwartz 1962, 44).

The Warren and Brandeis Article

The idea that there was a separate, more substantive, general right of privacy was
given structure and scholarly respectability by an 1890 publication in the Harvard Law
Review. The authors of "The Right to Privacy" were Harvard Law School graduates
Samuel D. Warren and Louis D. Brandeis, both working as lawyers in Boston at the time.
It has been suggested, most notably by William Prosser in his famous 1960 article on privacy that, especially for Warren, the idea of finding a right of privacy in American case law was initiated by more than an erudite interest. Prosser said that the catalyst for the article was the unwanted publicity of Warren’s daughter’s wedding in the local tabloids. This story found its way into many articles on the subject, but has since been discredited (Barron 1979). Other sources prior to Prosser’s article, however, have noted that Warren had at times found himself the object of unwanted publicity and that this, at least in part, had motivated the writing of the article. For example, according to Brandeis biographer Alpheus Thomas Mason, writing in 1946,

> On January 25, 1883, Warren had married Miss Mabel Bayard, daughter of Senator Thomas Francis Bayard, Sr. They set up housekeeping in Boston’s exclusive Back Bay section and began to entertain elaborately. The *Saturday Evening Gazette*, which specialized in ‘blue blood items,’ naturally reported their activities in lurid detail. This annoyed Warren, who took the matter up with Brandeis. The article (‘The Right to Privacy’) was the result” (Mason 1946, 104).

While numerous works cite the Warren and Brandeis article as the start of a right to privacy – Roscoe Pound said it did nothing less than add a chapter to the law (Ernst and Schwartz 1962, 46) – David W. Leebron (1991) pointed out that prior to the article “there was both substantial legal protection for privacy and a widespread recognition that some right of privacy existed,” and this is indicated in the cases discussed above. What was novel and ultimately so influential about the article, according to Leebron, was that the authors insisted “that the right of privacy was independent of any property right and that the protection tort law extends to that right was independent of other recognized torts, such as defamation” (Leebron 1991, 77) (emphasis added). Put another way,
Warren and Brandeis, although extracting the general tort law principles on which they relied from both property cases and defamation, established the new right as distinct and deserving of protection independent of any property or reputational interest (Leebron 1991, 77).

Perhaps what made the article even more important, from the perspective of privacy as a constitutional law principle, is that unlike most torts interests, which are expressed against another private party, Warren and Brandeis frame the right as one to be asserted against all, including, presumably, the state:

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world (Warren and Brandeis 1890, 204).

Brandeis and Warren argued that a separate and general right to privacy was implied in both English and American common law, and even before. “That the individual shall have full protection in persona and in property is a principle as old as the common law” (p. 196). Though the lawyers did acknowledge that explicitly recognizing a separate right of privacy would constitute recognizing a “new” right, they argued that such adaptation of legal concepts to meet the change in ideas and technology was not without numerous precedents. Indeed, they applauded the flexibility of the common law that can evolve to meet the changing needs of mankind.

[But] it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society (p. 199).

Questioning whether it was the proper role of the courts to recognize a right to privacy was pointless for Warren and Brandeis, whose argument was laced with more than a bit of historical determinism; unavoidable changes in society would lead to more
sophisticated demands from the law, and the courts would eventually recognize those needs. They wrote:

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensation which came with the advance of civilization, made it clear to one that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature (p. 201).

They noted that “in very early times, the law gave a remedy only for physical interference with life and property” (p. 198). Then, as times changed and the recognition of a person’s intellectual, emotional and spiritual nature became generally accepted, the scope of legal rights expanded as well. Protection against actual bodily injury was expanded to include attempts to inflict bodily injury. Later, it was expanded to include protection of reputation, thus giving rise to prohibitions against libel and slander. And so, “the term ‘property’ has grown to comprise every form of possession – intangible, as well as tangible” (p. 207).

The advances in technology which gave rise to cameras that could capture more detailed images from greater distances, coupled with the voracious appetite of newspapers to publish images of well-known individuals, led Warren and Brandeis to argue that the time for another expansion of legal principles had come. They traced the common-law history of how property rights expanded into intellectual property rights. Earlier courts had concluded, they argued, that literary and artistic works have many similarities with other forms of property, such as the fact that such works are transferable, and they possess a value. Originally, though, such works had a value only if they were
published or reproduced (as was discussed earlier in this chapter in the Hoyt case). When the courts expanded this protection to include not merely actual profits, but to the peace of mind gained by preventing publication at all, it became much more difficult to claim this kind of intangible right as a property right, at least in the way the term had been commonly understood to that point. When various courts recognized the right to keep letters private independent of their worth, argued Warren and Brandeis, a broader principle than a strict right of property was established. Thus, a right to be “let alone” had already been articulated by the courts. Brandeis and Warren called this right that of an “inviolate personality.” The authors claimed that if this right had indeed already been recognized with regard to writing and art, it should apply to other media as well, such as photography, for it was not a particular medium which was being protected, but the communication of personal ideas or images which was being protected.

Judges, they argued, had been stretching the limits of a right of property to include something that, although related, was in fact a separate right. They concluded that there had already been a right to privacy articulated in the law, though it had not been formally labeled as such. They wrote:

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relations, domestic or otherwise” (Warren and Brandeis 1890, 210) (emphasis added).
Thus it would seem that Warren and Brandeis were offering judges a kind of respectable rationale, almost a cover, to extend a right of privacy. The principle was already there, they argued. Although the courts had not referred to a separate right of privacy, for all intents and purposes, that is exactly what it the courts had already done. The time had come, they maintained, for the courts to explicitly recognize what had already occurred implicitly.

The Warren and Brandeis article started a lively academic debate on whether a right of privacy existed independent of a right of property. Nor was the article’s impact purely academic, for within two years of publication, substantial citation and discussion of Warren and Brandeis’s article found their way into the pages of at least three state court opinions (Ernst and Schwartz 1962, 71). The article has also figured importantly in many Supreme Court decisions on privacy, but that discussion will be saved for later.

One of the early state decisions which borrowed from the Warren and Brandeis piece is worth mentioning: Pavesich v. New England Life Insurance Co., 50 S.E. 68 (1905). Pavesich was the first case in which a state high court—the Georgia Supreme Court—squarely adopted an unequivocal right of privacy. Not only did the majority opinion recognize a right of privacy independent of a right of property, but it found that right in its own state constitution— even though the right to privacy was not explicitly mentioned— sixty years before the U.S. Supreme Court would make a similar finding in the U.S. Constitution. The irony here was that the Pavesich case originated in Atlanta. Eight decades later, Michael Hardwick, a citizen of Atlanta, was arrested for an intimate, consensual act, committed in his own bedroom. The Pavesich decision recently hit the
national headlines again when in November of 1998, the Georgia high court struck down the very anti-sodomy law that landed Hardwick in jail. *Powell v. State*, 510 S.E.2d 18.16

The *Pavesich* case involved the use of Paolo Pavesich’s picture in an insurance ad without his permission. The ad carried two pictures: one of a well-heeled Pavesich, with the words, “Do it now. The man who did,” and a second of a slouching, sickly looking man accompanied by the words, “Do it while you can. The man who didn’t.” At the bottom of the ad it read, “Their two pictures tell their own story.” (*Pavesich*, p. 68).17 Pavesich sued the New England Life Insurance Company

With reasoning very similar to that within the Warren and Brandeis article, the opinion discussed the evolution of a right of property in the common law from a right that at one time protected only tangible property, but had more recently come to include more. The opinion specifically invoked the Warren and Brandeis article three times, and twice made implied references (pp. 74-76). The court ultimately said that a right of privacy *did* exist, and was protected by the due process clause within the Georgia State Constitution.

If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy; and this is no new idea in Georgia law. The right of privacy within certain limits is a right derived from natural law, recognized by the principles of municipal law, and guaranteed to persons in this State by the constitution of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law (p. 71).

16 An extensive discussion of *Powell v. State* appears in Chapter 3.

17 Amusingly, the editorial page editor of Atlanta’s leading newspaper got the captions mixed up when he commented on the *Powell* decision. “The majority found its vision in a 1904 state Supreme Court decision in which an Atlantan, Paolo Pavesich, sued the New England Mutual Life Insurance Co. for using his photo in an Atlanta Constitution advertisement. The advertisement took his likeness and represented him, without his permission or knowledge, to be the bad example of a failure to buy one of its policies” (*Atlanta Journal*, Nov. 25, 1998, p. A14). If such had been the case, Pavesich really would have had something to complain about!
Indeed, the court was so enthused about a right to privacy that it concluded with the following words:

So thoroughly satisfied are we that the law recognizes within proper limits, as a legal right, the right of privacy ... we venture to predict that the day will come when the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability (p. 81).

That day has yet to come.
CHAPTER 3:  
THE QUEER CAREER OF SODOMY LAW IN THE UNITED STATES

In the Wonderland of America’s legal codes, the sex laws are like a version of Lewis Carroll’s “Jabberwocky,” with a vengeance: “Tis brillig, and the slithy toves did lewdly and lasciviously gyre and gimble in the wabe. All prurient were the borogoves, and the mome raths did fornicate.” When the law talks this way, ordinary sexual knowledge goes on vacation, and the moralists’ battle is more than half won.

-- Michael Warner  
The Trouble with Normal

I believe that the understanding of the term, if you say two people are having a sexual relationship, most people believe that includes intercourse.... Before I got into this case and heard all I’ve heard, and seen all I’ve seen, I would have thought that that’s what nearly everybody thought it meant.

-- President Bill Clinton  
Grand Jury Testimony  
August 17, 1998

While President Bill Clinton’s hair-splitting definitions of sexual relations can probably best be understood as an attempt to avoid perjury charges, there is more than a little bit of truth to his observation (however insincere) that a majority of Americans associate sexual relations – or perhaps more accurately “normal” sexual relations – as intercourse between a man and a woman.¹ Moreover, the linguistic dance between Clinton and the attorneys illustrates just how difficult defining sex can be.

¹ In a sworn deposition taken in the case of Jones v. Clinton No. L.R.-C-94-290 (E.D. Ark.) (1998), Clinton denied ever having had sexual relations with Monica Lewinsky. The above quote, which he made (footnote continued on next page)
A historical examination of sodomy statutes and their interpretation by state courts in the United States attests to the persistence – and insistence – of the view that, until relatively recently, intercourse between people of opposite genders, within the confines of a marriage relationship, is the only “officially” sanctioned form of sexual relations. But the record regarding sodomy statutes isn’t as straightforward as one might imagine. One of the peculiar aspects of the history of sodomy laws in the United States is the fact that over time the definition of sodomy has become both more vague and more inclusive. Whereas one would assume that legal definitions would become more precise as generations of courts and legislatures leave their impact, such has not been the case with regard to sodomy statutes. Though in colonial times the word sodomy could generally be understood as an act of anal intercourse between two men, the term now typically includes a wide variety of sexual acts, between people of the opposite gender as well as same sex acts and, in some instances, including sex acts with animals. Curiously, however, as sodomy statutes became more inclusive and thus, on the one hand, less discriminatory – at least in that the prohibited acts applied to heterosexual as well as same-sex acts – sodomy statutes began to serve a more discriminatory purpose –

a year and a half later before a grand jury, was Clinton’s attempt to claim that he had not perjured himself in the deposition – notwithstanding the fact that he had been forced to admit that he’d engaged in oral sex with Lewinsky. It is interesting to note that until December of 1994, the act of oral sex per se would have been a felony in Washington, D.C. “It is a felony to take the sexual organ of another person into one’s mouth or anus, or to place one’s sexual organ in the mouth or anus of another or to have carnal copulation in an opening of the body other than the sexual parts of another person.” D.C. CODE ANN. § 22-1112 (Posner 1996, 67). And, as author Michael Warner humorously points out, “Actually, Clinton and Lewinsky were lucky; if that blow job had taken place just across the Potomac River in Virginia, it would have been a felony” (Warner 1999, 26). (The punishment for the “crime against nature” in Virginia is five to 20 years.)
particularly in the period between the 1890s and the 1950s. That is, sodomy laws provided a way to discriminate against not only certain acts, but against the gay population. In more recent times, though private, consensual acts of same-sex sodomy are rarely prosecuted, sodomy statutes have served as the basis and justification for discriminating against the gay community.\(^2\)

The irony is that the constitutional notion of privacy – while it may have served to protect the heterosexual relationship – in some ways exacerbated the situation for homosexuals. The Court’s decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), served to insulate the “marital bed” from the eyes of law enforcement officials, and the subsequent decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), similarly protected the bed of unmarried heterosexual couples. Taken together, these decisions said that what the heterosexual couple does behind closed doors is not the business of the criminal justice system. Thus, the heterosexual couple can emerge from the bedroom and it is possible that everything that occurred there was procreative (and therefore legal) sex. But when the same-sex couple comes out of the bedroom, if sodomy statutes exist – particularly with the current broad definitions of sodomy – it is assumed that their actions were criminal. Thus the very act of declaring oneself homosexual and having a partner implies criminal activity – even if the act *per se* is not prosecuted.

Ironically, though in recent years it is gay organizations which have led the fight to strike sodomy laws from the books, homosexuals actually make up a minority of those

\(^2\) Sodomy laws are sometimes used to indirectly discriminate against gays. For example, states that outlaw homosexual activity can justify the denial of adoption to an admitted homosexual.
prosecuted under sodomy statutes (and historically always have). For another peculiar aspect of the history of sodomy statutes is that the typical way these laws are used is to mete out tougher sentences to defendants being charged with rape or sexual assault, or to secure a conviction in the case where the state cannot prove coercion.

A look at the history of sodomy laws in the United States is important to this study for two reasons. First, such a background provides a fuller understanding of the difficulties Michael Hardwick and his lawyers faced when challenging Georgia’s sodomy statute. Although Hardwick’s is certainly the most famous challenge to sodomy statutes, scores of others have attempted to challenge sodomy statutes, the earliest challenge dating as far back as 1810 (Murphy 1990, 52).

Second, such an examination is necessary to properly evaluate Justice White’s jurisprudence in the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986). To determine whether a state law forbidding sodomy was an unconstitutional violation of liberty within the Fourteenth Amendment’s due process clause, Justice White relied heavily on historical analysis. Claiming that sodomy laws were present both in 1791 (the date the Bill of Rights was ratified) and 1868 (the ratification date of the Fourteenth Amendment), White concluded that the framers of both the Bill of Rights and of the Fourteenth Amendment could not have meant for homosexual sodomy statutes to be considered unconstitutional.

Proscriptions against [sodomy] have ancient roots.... Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 states in the Union had criminal sodomy laws (*Bowers v. Hardwick* 478 U.S. 186, 193-194)(footnotes omitted).
But, as suggested above, the history of sodomy statutes is more complex than Justice White’s review of the law suggested. First, White emphasized that homosexual sodomy has always been prohibited. But, as will be explored in this chapter, the legislative record is not at all clear that it was only homosexual sodomy being prohibited. Second, sodomy statutes were not used to prosecute acts of oral sex until the turn of the century. This is of particular importance with regard to the Bowers case, because Michael Hardwick was arrested for an act of oral sex. So while sodomy statutes have, as White suggested, been on the books since the inception of the United States, the way they have been interpreted and enforced has evolved. An examination of these statutes allows for a more educated critique of White’s historical analysis.

Of course, an examination of early sodomy statutes in a vacuum is not terribly revealing. A quick perusal of the codes of any state will yield many quirky, quaint or anachronistic laws that remain on the books, despite their seeming ridiculousness or disuse. That is why it is important to look at the persistence of these laws. That is, to what extent have these laws survived challenge in court, thus evidencing continued interest in keeping them? And, finally, just who have been the targets of these laws? Have the laws been enforced selectively? And if so, which groups have been the primary targets of enforcement?

Indeed, White construed the question before the Court quite narrowly so as specifically not to have to deal with the question of sodomy between heterosexuals. And the Court addressed only the question of homosexual sodomy in spite of the fact that Georgia’s law did not distinguish between homosexual and heterosexual sodomy, and in spite of the fact that petitioners John and Mary Doe, who petitioned the court...

(footnote continued on next page)
Taken together, an examination of the term sodomy, sodomy statutes, selected enforcement statistics and judicial interpretation and application of sodomy laws demonstrate that the historical record surrounding sodomy laws renders White's historical analysis quite unsatisfactory. However, neither do the facts completely vindicate White's critics, those who would argue that White purposefully distorted the record to advance his homophobic agenda. What I hope to show is that the historical evidence is ambiguous enough to support either, both, or neither of the arguments of White or his critics. As I will argue later, the ambiguity of the history of sodomy statutes, coupled with the amorphous nature of a constitutional right to privacy, provided an equation that was very likely to add up to an unsatisfactory outcome for a group with a negative social construction (i.e., homosexuals).

An examination of American's sodomy laws in particular, and an examination of sex laws and our attitudes about them more generally, also has importance beyond the scope of the current study. How we think about sex as a society – particularly "deviant" sex – is revealing. Just how tolerant are we as a society? How strong are our beliefs in privacy, if what's being done in private is not the norm? "Conflicts over sex have been fundamental to modern culture for at least as long as people have been speaking of

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4 A voluminous literature commenting on the Bowers decision now exists, little of which is complimentary, and much of which is extremely damming. The following titles are typical of the tone of these critiques: "Making the Best of an Unfortunate Decision" (Mitchell Lloyd Brooks, 63 N.Y.U. Law Rev. 154 (1988)); "Bowers v. Hardwick: Precedent by Personal Predilection" (54 U. Chi. L. R. 648 (1987)); "Bowers v. Hardwick and the Legitimatization of Homophobia in America" (30 Howard L. J. 537 (1987)); "The Tradition of Prejudice versus the Principle of Equality: Homosexuals and Heightened Equal
democracy and autonomy” (Warner 1999, 24). A history of America’s sodomy laws reads like the history of so many other unpopular minorities in this country.

A history of the country’s sodomy laws is also instructive regarding the role of government in protecting liberty and privacy. Two opposing visions of government emerge, both supported by philosophers, legislators and judges. In one vision, profoundly influenced by the writings of John Stuart Mill, the role of the state in protecting liberty and privacy is to remain uninvolved except where the action of an individual causes harm to another. A competing vision advocates that the government go further, in an effort to protect such group goods as society’s morals and traditions, even in the absence of direct harm. There is perhaps no better historical record of this debate than the case law regarding sexual liberty in general, and sodomy law in particular. As state court opinions are the most-used primary source material for this chapter, the pages which follow return again and again to this debate.

One caveat is in order: although a history of sodomy laws in the United States will reveal much about societal attitudes toward homosexuals and others outside the sexual mainstream, such a history is by no means the complete history of even the legal experiences of gays and others who’ve been on the wrong side of America’s sex laws. Sodomy laws are certainly one way in which society has sought to control the sexual desires of its citizens. However, other statutes, most notably those prohibiting “lewd and lascivious” behavior, have probably been used to a much greater extent to control the gay population in particular. Because charges of “lewd and lascivious” behavior are

generally misdemeanors, while sodomy laws – particularly in the past – were generally felonies, law enforcement officials tended to use the lesser charges because they could be enforced as summary judgments and thus would not necessitate jury trials. When examining the sodomy arrest records, one can only assume that these arrests comprise a tiny fraction of the charges actually brought against the gay population. Unfortunately, the police records of most states and municipalities do not categorize “lewd and lascivious” acts, so it becomes impossible to do more than infer what percentage of those arrests in a given year were targeted at the gay community.

Sodomy: The crime not fit to be named

At first blush, defining sodomy would seem a simple task compared to the exercise of defining privacy in the previous chapters. After all, it would seem that whereas privacy is describing an ambiguous and amorphous concept, sodomy is describing a physical act. But sex acts evade easy definition or description. Trying to define sex is not unlike chasing a dog which has escaped its lease and runs just out of reach, pausing now and again while the distance is closed between human and beast, giving one false hope that the chase is over and the leash will be successfully slipped over the pet’s head. Though the dog is in sight at all times, and is at times frustratingly close, it continues to bound just out of reach. Definitions which seem appropriate on the formal pages of a state’s statutory code, tucked between dry, stuffy definitions of tax categories and zoning laws, are so superficial and non-specific as to be almost useless, while those definitions with enough specificity to be serviceable are indelicate, to say the least. Even
when modesty is discarded, however, sexual acts defy easy, clear-cut description, capable of capturing all acts of a sexual nature. A quick return to the Clinton/Lewinsky affair illustrates this point nicely. In January of 1998, the painfully detailed definition of “sexual relations” agreed upon by lawyers on both sides of the Clinton/Jones dispute read:

For the purposes of this deposition, a person engages in ‘sexual relations’ when the person knowingly engages in or causes –

(1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person;

(2) contact between any part of the person’s body or an object and the genitals or anus of another person; or

(3) contact between the genitals or anus of the person and any part of another person’s body.

‘Contact’ means intentional touching, either directly or through clothing.

(Deposition Exhibit 1, Paula Jones v. William Jefferson Clinton and Danny Ferguson, No. LR-C-94-290 (E.D. Ark.), January 17, 1997).

As exhaustive as the above definition of sexual relations was, Clinton proceeded to deny having had sexual relations with Lewinsky – both under oath in the Jones deposition, and again weeks later on national television – and continued to do so even when confronted with enormous evidence to the contrary, as well as throughout his subsequent grand jury hearing, House impeachment and Senate trial. When questioned by attorney William Bennett before a grand jury, Clinton explained why he didn’t consider his relationship with Lewinsky as “sexual,” nor numerous acts of fellatio performed by her on him as “sex,” this way:
Q: Well, the grand jury would like to know, Mr. President, why it is that you think that oral sex performed on you does not fall within the definition of sexual relations as used in your deposition.

A: Because that is -- if the deponent is the person who has oral sex performed on him, then the contact is with -- not with anything on that list, but with the lips of another person. It seems to be self-evident that that's what it is.... Let me remind you, sir, I read this carefully. And I thought about it. I thought about what 'contact' meant. I thought about what "intent to arouse or gratify" meant.... I didn't like any of this. But I had done my best to deal with it and the -- that's what I thought. And I think that's what most people would think reading that [the Jones definition of sexual relations].


So what would Clinton term the contact between himself and Lewinsky? When forced to give some adjective to the relationship, Clinton told the grand jury – and the nation later that day on television – that his relationship was “inappropriate,” though not “sexual.”

When I was alone with Monica Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong. These encounters did not consist of sexual intercourse. They did not constitute sexual relations as I understood that term to be defined at my January 17th, 1998 deposition. But they did involve inappropriate intimate contact (emphasis added) (Transcript of videotaped testimony of William Jefferson Clinton before the Grand Jury empanelled for Independent Counsel Kenneth Starr, August 17, 1998).

The Clinton episode, of course, lies far outside the concern of this research. But what it clearly illustrates is the difficulty of defining sexual acts with any precision, even in very specific situations and when modesty is not a limitation. Though Clinton’s “misunderstandings” were hardly naive, they demonstrate, rather succinctly and persuasively, that regardless of the clarity of the intentions of those writing the definitions, sex is hard to define. In spite of the fact that Clinton’s semantic gymnastics
trounce all over the spirit of the definition, in the final analysis one is forced to
begrudgingly admit that in hair-splitting legal terms, he is within a gray area that makes
his claims at least feasible in a legal sense. What makes this point so germane to the
study at hand is that any assessment of Justice White’s finding that certain types of
behavior have always been prohibited by law requires knowledge about the intent of
sodomy laws. In other words, what acts were early judges and legislatures trying to
proscribe, and for what ends? The ambiguity surrounding both a definition of the act
itself and surrounding the laws attempting to prohibit the act, makes intent extremely
difficult to determine. This, coupled with the scarce documentation related to any state
legislative debate regarding intent about most laws – and sex laws in particular – makes
assessing White’s inferences drawn from sodomy legal history difficult at best.

Nor are early court records of tremendous help for, as noted by historian Lawrence R.
Murphy,

> Victorian standards of morality prevailing in 19th century America frowned strongly on the public discussion of sex – all the more so deviant sex; judges and juries felt exceedingly uncomfortable hearing or writing opinions regarding bestiality, pederasty, buggery, fellatio, or even masturbation (Murphy 1990, 49).

Murphy argues persuasively that the embarrassment of the public in general with sexual
issues was demonstrated inside the court as well as out, with the result that “the nation’s
repressive attitudes toward sexuality came to dominate the legal system, frequently
depriving defendants of rights assured to others accused of criminal activity” (Murphy
1990, 50).
Thus the vague and incomplete historical record creates the opportunity for those with political agendas at opposite ends of the ideological continuum to use “objective” facts and history to support their claims.

**Etymology**

Both casual and legal definitions of sodomy are extraordinarily ambiguous and wide-ranging. A quick perusal of legal and non-legal definitions of sodomy raises almost as many questions as it answers. For example, is sodomy an act, or is it a desire? Is it a homosexual concept, or can heterosexuals engage in the act as well? Which act is worse (i.e., more blame worthy in both a legal and social sense), sodomy within a heterosexual or a homosexual relationship? Can two women engage in an act of sodomy? Would such an act be prohibited by law? Does sodomy include just anal sex, or is oral sex included as well? Is penetration required? Is orgasm required?

That dictionary definitions do more to obscure than clarify, is exemplified by the Webster’s dictionary entry on sodomy, which defines the word as “any sexual intercourse held to be abnormal” (Guralnik 1984, 1353). Nor is sodomy always defined as an act in casual reference (though legal definitions do refer to an act). The 1984 *Webster's New Collegiate Dictionary*, for example, defines sodomy as both act and desire: "1. the manifestation of sexual desire toward a member of one's own sex; 2. erotic activity with a member of one's own sex" (Goldstein 1988, 1080). And whereas the dictionary definition specifies “intercourse” as a component of sodomy, legal definitions generally do not require intercourse. Use of a legal rather than general dictionary does little to clarify
meaning. The discussion of sodomy in *Barron’s Law Dictionary* begins simply with “crime against nature,” and later says that it includes both bestiality and buggery, “and in many jurisdictions has been expanded to cover other acts of unnatural sexual intercourse” (Gifis 1991, 477). There is no further discussion about what “unnatural” sex is.

The obvious historical roots of the word are Biblical. Sodom, so the story goes, was a city in which the citizens were extraordinarily sinful. God becomes so angry and disgusted with Sodom that he destroys the city and its inhabitants. Although people generally associate Sodom somehow with homosexuality, many scholars argue that a closer reading of the 27 Biblical passages which reference Sodom indicate that either homosexuality was only one of many sins (Horner 1978), or that homosexual acts are not specifically mentioned or implied (Boswell 1980, 98).

Over time and from place to place, sodomy has meant everything “from ordinary sexual intercourse in an atypical position to oral contact with animals” (Boswell 1980, 335). Even today in the United States, “There is no uniform definition that specifies which acts constitute ‘sodomy’” (Posner and Silbaugh 1996, 65). Perhaps the only activities that safely escape designation as sodomy at one time or another are acts which have reproductive possibilities between married persons.

A word closely associated with sodomy, particularly in England, is buggery. Indeed, in England and primarily in the New England Colonies, the term buggery was used more often than sodomy. Many scholars posit that the term buggery comes from the label given eleventh century Bulgarian heretics (Murphy 1990, 52), and described the act as insertion of a man’s penis into the anus of another man, the anus of a woman, or the
anus of an animal (Burg 1980, 71). Whether or not sodomy carries the exact same meaning as buggery is debatable. Some scholars, however, make the argument that buggery was broader than sodomy, in that several early definitions of buggery included acts between humans and animals, whereas sodomy seems to be limited, in most (though not all) cases, to acts between humans (Goldstein 1988, 1084). That there was at least some distinction between the two would seem to be rather obvious by the fact that at least some colonial statutes included both terms in their list of prohibited acts. In 1636, for example, the Plymouth colony outlined eight offenses punishable by death, and included both sodomy and buggery in the list (Katz 1983, 74). Likewise, when the representatives of the Rhode Island colony met to draft a body of laws in 1647, both sodomy and buggery made the list of capital crimes (Katz 1983, 91). When the Rhode Island laws were revised in 1663, both terms were also included. “[W]hosoever shall perpetuate and commit the Detestable and Abominable Crimes of Sodomy, or Buggery, and be thereof Lawfully Convicted, shall suffer the Pains of Death...” (Katz 1983, 105). And when the representatives of New Jersey created their first codes, both sodomy and buggery were listed as capital offenses (Katz 1983, 106). Although early Pennsylvania laws prohibited only sodomy, buggery was added when a new sodomy law was passed in 1706. (Indeed, the title of this law was the “Act Against Sodomy and Buggery.”) (Katz 1983, 125).

5 A wealth of primary sources have been gathered and published by Jonathon Ned Katz in Gay/Lesbian Almanac: A New Documentary (1983). The book includes colonial and early state statutes, court records, newspaper accounts, etc.
Whatever its exact origin, the term buggery seems to be the secular version of sodomy. And, whatever its exact definition, buggery has the distinction of being the first law in England to make a secular crime of an act that until then had been only a sin noted and punished by the church. The statute, passed in 1533 at the urging of King Henry VIII, mandated death for the act, and was a small legal step in the overall breaking away of England from the church and the secularization of law in England (Katz 1983, 36). The first secular trial for buggery was in England in 1553 (Goldstein 1988, 1084). In contemporary usage, there seems to be no difference between the terms. Both the *Webster’s New World Dictionary* and the *Barron’s Law Dictionary* list “see sodomy” in their entries for buggery. North Carolina is the only state that still uses the word buggery.

Whether colonies, and later the states, used the term “buggery” or “sodomy” depended in part on the relative influence of the clergy over their legislative bodies. Those colonies which were more overtly theological in orientation, such as a majority of the New England colonies, tended to adopt the more biblically linked sodomy, while colonies with more secular origins tended to opt for buggery, particularly in the South (Katz 1983).

Whatever distinction can be made between them, definitions of both sodomy and buggery in English common law tended to be quite vague. Edward Coke defined it as “a detestable and abominable sin, amongst Christians not to be named,” and William Blackstone defined it as “the infamous crime against nature” (Murphy 1990, 52).
Interestingly, by 1868, many states had dropped the words "sodomy" or "buggery" and replaced them with the more genteel-sounding, oblique phrases used by Coke and Blackstone. Though not originally the intent, these more vague phrases would eventually allow a broader array of activities to be read into sodomy statutes by prosecutors and judges. By the later half of the nineteenth century, the "infamous crime against nature" seemed to have become the phrase of choice. Some statutes also used the word "unnatural" intercourse to describe the prohibited acts. The predominance of the "crime against nature" language by the 1860s suggests that the influence of the clergy over state legislatures was, to a large extent, replaced by the influence of philosophers, medical experts, and the legal community, all who by this time had adopted a natural law philosophy (Katz 1983, 39). Thus, the reason sodomy was wrong was not so much that it was a sin, but because it went against the natural biological order of things, a crime against a secular "nature" instead of (or in addition to) a crime against God or religion.

More recently -- since the 1960s -- several states have used the phrase "deviate" sexual acts to label anal and oral sex. This language, no doubt, exemplifies the influence

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6 The year 1868 is significant, as this marks the year the Fourteenth Amendment was ratified. In the majority opinion of Bowers, Justice White makes note of the fact that all states at that time had anti-sodomy statutes. He does this because in his opinion he advocates the use of history and original intent to help determine which rights should be included as a part of "liberty" within the due process clause of the Fourteenth Amendment. He first includes of a list of sodomy statutes from the time of the writing of the U.S. Constitution, then another list at the time of ratification of the Fourteenth Amendment. The list contemporary to ratification of the Fourteenth Amendment is to demonstrate that whatever it was that Congress intended to prohibit the states from regulating, it could not have been sodomy, as all states at that time held such statutes.

7 The vague terms and definitions were probably a result of both delicacy and a concern that too precise a definition might not cover all categories of undesired sex acts.
of the Model Penal Code, first drafted in 1955, which recommended decriminalization of the majority of adult, consensual, private sexual acts.

Even in contemporary legislation regarding sodomy, the language of Coke and Blackstone survives. Below is a table summarizing the language of states still using these antiquated phrases.

**TABLE 3.1**
Adjectives used in state statutes to describe sodomy.

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>&quot;A person who knowingly and without force commits the infamous crime against nature with an adult is guilty of a misdemeanor.&quot; ARIZ. REV. STAT. ANN. § 13-1411 (enacted 1965).</td>
</tr>
<tr>
<td>Idaho</td>
<td>&quot;The infamous crime against nature is a felony.&quot; IDAHO CODE § 18-6605 (enacted 1972).</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>&quot;Whoever commits the abominable and detestable crime against nature is guilty of a felony.&quot; MASS. GEN. LAWS ch. 272, § 34 (enacted 1887).</td>
</tr>
<tr>
<td>Michigan</td>
<td>&quot;It is a felony to commit the abominable and detestable crime against nature.&quot; MICH. COMP. LAWS ANN. § 750.158 (enacted 1931).</td>
</tr>
<tr>
<td>Mississippi</td>
<td>&quot;Every person convicted of the detestable and abominable crime against nature is guilty of a felony.&quot; MISS. CODE, ANN. § 97-29-59 (enacted 1848).</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>&quot;It is a felony to commit the detestable and abominable crime against nature.&quot; OKLA. STAT. ANN. tit. 21, §§ 886 (enacted 1910).</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>&quot;Anyone who commits the abominable and detestable crime against nature with another person commits a felony carrying a seven-year sentence.&quot; R.I. GEN. LAWS § 11-10-1 (enacted 1896).</td>
</tr>
<tr>
<td>Virginia</td>
<td>&quot;It is a felony designated as a crime against nature to carnally know any male or female person by or with the anus or mouth or to submit to such carnal knowledge.&quot; VA. CODE ANN. § 18.2-361 (enacted 1950).</td>
</tr>
</tbody>
</table>

* From Posner, 1996.
Authority To Regulate Sexual Practices

State authority to regulate such issues as the intimate sexual practices of its citizens is part of what is broadly referred to as the state’s police powers. Police powers include the power of a state to regulate the health, safety, welfare and morals of its citizens. Although in contemporary times there may be some who would argue that regulation of sodomy might fall under a state’s obligation to protect the health of its citizens (to prevent, for example, the spread of the HIV virus), in earlier times it was assumed that regulation of sodomy was viewed as a state attempt to protect morality. Historically, courts in the United States have given their blessing to state regulation of morality. In 1878, the Supreme Court commented, “Whatever differences of opinion may exist as to the extent and boundaries of definition of it [a state’s police powers], there seems to be no doubt that it does extend to ... the preservation of good order and the public morals” Beer Co. v. Massachusetts, 97 U.S. 25.8

Eras Of Sodomy Law

What follows is an historical examination of sodomy statutes in the United States, grouped into eras: Colonial through 1890s, 1890s through 1961, and 1961 to present.9

During each of these eras, respectively, the nature of the language and the underlying

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8 A more detailed discussion of the justifications states have given to defend regulation of sexual activity is provided later in this chapter.

9 Law professor William Eskridge has devised a more complex set of eras of sodomy law which he discusses in “Hardwick and Historiography” (1999 U. Ill. L. Rev. 631).
agendas of the statutes varied. Moreover, whatever the intent of the authors of the
statutes, the actual use of the laws also varied, and will be discussed.

During colonial times and throughout most of the nineteenth century, the primary
purpose of sodomy statutes was to protect the family unit and foster procreative sex. As
a matter of practice, however, the laws were used to prosecute those who forced the
sexual act upon another, or seduced a minor (what we would today call statutory rape).
During this period, sodomy statutes were interpreted as prohibiting anal intercourse --
primarily between men, but also between men and women, but generally not between
women. The focus was on the particular act (i.e., sodomy), and not on a class of persons
(i.e., homosexuals).

During the second era, 1890s through 1950s, both statutory and judicial
definitions of sodomy expanded widely, so that a much broader array of acts were
included (e.g., oral sex). Additionally, it was during this time that the laws were often
used to target the homosexual population, particularly in metropolitan areas such as New
York City. In addition to using the statutes to harass and control the homosexual
population, the laws continued to be used against sexual predators.

The third era, the 1960s to present, represents a time when many states
decriminalized many consensual, private sex acts between adults, including sodomy.
However, for a few states, it has also been a time of “specification” (narrowing sodomy
laws to include only homosexual acts) and of recalcitrance. Decriminalization was
accomplished primarily through legislative enactment, but also through court challenges
to sodomy statutes. Once again, use of the laws against sexual predators continued to be the primary use of the laws in practice.

Colonial Era through 1890s: Protecting Procreation

As with most areas of law, colonial America inherited its sodomy laws from England. In the early colonial era, sodomy was always a capital crime, along with such crimes as treason, murder, witchcraft, arson, rape and blasphemy (Katz 1983, 76). The first colonial code was issued in 1610 by the governor of Virginia, and among the crimes listed was sodomy. “No man shall commit the horrible, detestable sins of Sodomie upon pain of death” (Katz 1983, 68). In 1636, Plymouth codified its laws, creating eight categories of capital crimes, with sodomy and buggery among them (Katz 1983, 74). Between 1610 and 1740, the colonies had written and/or revised at least 30 sodomy statutes (Katz 1983). Though not one of the early statutes defines sodomy, early prosecution records indicate that penetration – though not orgasm – was a necessary condition for an act to be considered sodomy (Theuman 1991).

Most (though not all) early statutory definitions of sodomy tended to leave unspecified whether the acts in question were between a same-sex couple or male-female couple. However, historical records tend to indicate that sodomy between men was the chief target. For example, in 1636 the Massachusetts Bay Colony rejected the suggestion

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10 A variety of primary and secondary sources were used to compile a history of sodomy law in the United States, including statutes, court proceedings, commentaries, and secondary sources. The most useful source for this section was the aforementioned compilation of primary documents in Katz’s Gay/Lesbian Almanac (1983).
by Reverend John Cotton that relations between women be included in the definition of sodomy (Katz 1993, 85). And although sexual relations between women were outlawed in 1756 in the New Haven Colony, that offense was dropped when the Colony was annexed by Connecticut in 1665 (Eskridge 1999, 645). During the colonial era, there were as many as 20 prosecutions for sodomy, and at least four people were executed for the crime (Eskridge 1999, 645).

By the time the Bill of Rights was ratified, nine states had criminal statutes prohibiting sodomy,¹¹ and in the other four it was a felony common law crime.¹² Of the sodomy statutes in place in 1791, only three states specified same-sex sodomy as the illegal act (Katz 1983).¹³ Whether the other states left definitions of sodomy vague because they wanted to prohibit the act completely, or because they assumed that sodomy implied anal intercourse just between men is unclear and somewhat contradicted in the

¹¹ Connecticut, Delaware, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina (Bowers, note 6).

¹² Georgia, Maryland, Virginia and New Jersey (Bowers, note 6).

¹³ Though there is some scholarly debate concerning the exact origins of the words, the general consensus is that the terms "homosexual" and "heterosexual" are actually of relatively recent vintage, being coined circa 1870 (Foucault 1978, 43), at roughly the time that human sexuality was becoming a topic of increased interest to the secular fields of medicine and psychology. In the United States, it was at about this time that psychologists introduced the idea that the gender to which one was sexually attracted was an important characteristic of the personality. In earlier times, it was thought that people engaged in sexual acts, but the object of those affections was not a defining characteristic of the person. While some scholars, such as Foucault, say that the term homosexual was coined by those hostile to homosexuals and was used to oppress them, other scholars claim that the word was first used by the gay community itself – though the term later came to be used in an oppressive way. "A statement was made that the term 'homosexual' was coined by psychologists, and was an instrument of oppression, I'd like to address this misconception. The term was first coined, not by members of the medical community, but by the forefathers of the modern gay rights movement in Germany in the mid-late 1800's. Karoly Maria Kertbeny first invented (and used) the term in a letter to fellow homosexual rights pioneer Karl Heinrich Ulrich in 1868. The first public use of the term or category was in 1869 in two pamphlets which Kertbeny published anonymously in Berlin" (Sullivan 1997, 143).
early prosecution records though, as stated in the previous paragraph, most historical
documents tend to suggest that anal intercourse between men was the primary act
 targeted. However, this has also been a point of scholarly debate. Indeed, some scholars
have suggested that acts of heterosexual sodomy may well have been regarded as more
heinous and objectionable than homosexual sodomy, because in the nineteenth century,
some believed sodomy caused miscarriages or birth defects (Goldstein 1988, 1085).

One of the most thorough analyses of early challenges to sodomy statutes in the
appellate courts is by Lawrence R. Murphy (1990). According to Murphy, sodomy
statutes were challenged in state appeals courts 14 times between 1800 and 1889, and 212
times between 1890 and 1949. Of the 14 cases prior to 1890, only two of them were in
the antebellum period. In both cases, sodomy convictions were challenged on the basis
of sodomy not being adequately defined. In 1810 in Maryland, a man was convicted of
assault with an intent to sodomize a 19-year-old male. Davis v. The State, 3 MD Rep.
154 (Ct. App. 1810). The vitriolic but vague language of the court seems to indicate that
anal intercourse had been attempted. The defendant appealed his conviction, saying that
the Maryland law did not define sodomy, nor did it prohibit its attempt. The court,
however, was not convinced. In rather emotional and damning language, the court said
that “The crime of sodomy is too well known to be misunderstood, and too disgusting to
be defined further than by merely naming it.” The court further praised the legislature for

14 Murphy uses appellate cases for these tend to be the ones with the most complete records.
not having "descend[ed] to a particular designation of a single offense" (Murphy 1990, 53).

The other pre-Civil War appeal of a sodomy conviction was in Virginia in 1812. In *Commonwealth v. Thomas*, 1VA Cas. 307, a man was prosecuted for penetrating a mare under a statute prohibiting buggery. The jury hearing the case felt the act was so "novel" that it queried the state's General Court (an appellate court) as to whether sex with an animal could be considered buggery. The jury was also concerned because there was no evidence of ejaculation, and emission had been required in most English common law buggery cases. In an unanimous opinion, the General Court answered the jury, saying that "the penetration of a beast, by a man, against the order of nature, [even] without emission" did constitute buggery. "Thereafter," writes Murphy,

> courts routinely reaffirmed that state laws prohibiting sodomy, buggery, the 'crime against nature,' or 'the unmentionable crime,' applied to actions between men and such animals as cows, dogs, horses, mules, or pigs. Some statutes even added prohibitions against sex with birds, reptiles or insects" (Murphy 1990, 54).

Just what was the motivation of the states in outlawing sodomy during this era? William Eskridge (1999) has identified three policy agendas underlying sodomy statutes. First and foremost, he notes that such statutes were motivated by a desire to foster procreative sex within marriage (646). Under this rubric, bodily pleasures in general are suspect, unless redeemed by some other worthy purpose such as procreation. Thus, sodomy becomes like other crimes against "public morals and decency." This is illustrated, according to Eskridge, by the placement of sodomy laws "in the same title or
chapter as, and in close proximity with, adultery, fornication, blasphemy and incest”

(646).

A second policy agenda, according to Eskridge, was the protection of vulnerable people against nonconsensual sexual assault (647). This is supported by the fact that many “early state criminal codes listed sodomy with other crimes of assault, typically adjacent to rape” (647). Additionally, the rules of evidence at the time made it much more likely that prosecutions would be successful only in the case of rape or seduction, and not in the case of adult consensual acts. Adults who engaged in consensual sodomy were considered the accomplices of each other, and most states required corroboration separate from the accomplices to prove that the crime had occurred. Thus, most consensual acts were extremely difficult to prosecute. Where the penetration was by force or with a minor, however, the victim was not an accomplice, and so their testimony could stand on its own (647). Thus, the majority of the prosecutions for sodomy arising in the nineteenth century were cases in which force or seduction were involved.

A third motivation for regulating sodomy, according to Eskridge, was the social enforcement of gender roles (648). This, however, was a later development, and will be discussed within the context of the next era of sodomy statutes: 1880s to 1950s.

1880s to 1950s: Targeting Groups and Lifestyles

In the late nineteenth century, sodomy became more broadly defined – both by statute and through judicial interpretation – to include women and acts of oral sex. Not coincidentally, as the list of acts covered by sodomy acts expanded, the number of those
arrested under sodomy statutes increased (Eskridge 1999). The dramatic increase in sodomy arrests did not occur in a vacuum, for the post Civil War decades saw dramatic increases in arrests of all types. Probably the single greatest factor contributing to the rise in sodomy arrests in particular (and the rise in criminal arrests in general), was the urbanization of the United States. Urbanization meant that large numbers of people were brought together in close proximity, and those with non-traditional sexual tastes could find others with similar interests more easily than had been the case in rural America.

As crime rates increased, so did the concerns of lawmakers and others charged with maintaining an orderly society. Those seeking scapegoats for the upsurge of crime began to blame the “degenerates” of society, including immigrants, African Americans, prostitutes and, increasingly, “gender inverts.” Gender inverts were those who “inverted” gender, mostly by cross dressing and by their mannerisms. They included women who would dress as men in order to “pass,” as well as “fairies.” Women “inverted” for both sexual and economic reasons. “Fairies” were men who took on female dress and the passive sexual role in their relationships with men. Anthony Comstock, founder of the New York Society for the Prevention of Vice and the catalyst behind many infamous “Comstock laws” (such as the laws prohibiting contraception that gave rise to the Griswold case), said this about gender inverts:

These inverts are not fit to live with the rest of mankind. They ought to have branded in their foreheads the word “Unclean,” and as the lepers of

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old, they ought to cry "Unclean! Unclean!" as they go about, and instead of the [sodomy] law making 20 years imprisonment the penalty for their crime, it ought to be imprisonment for life (Comstock’s alleged reaction to reading the autobiography of a gender invert, as quoted in Eskridge 1999, 654).

Acts of oral sex were not prosecuted and punished until the 1880s in England, and not until the 1890s in the United States (Goldstein 1988, 1085). Although some judges in the United States used the ambiguity of sodomy statutes to include oral sex, they admitted that doing so was a new interpretation of the common law. Pennsylvania was the first state to provide a definition of sodomy, which is noteworthy for its specificity, its inclusion of oral sex, and its inclusion of women.

The terms sodomy and buggery ... shall be understood to be a carnal copulation by human beings with each other against nature *res veneria in ano*, or with a beast, and shall be taken to cover and include the act or acts where any person shall willfully and wickedly have carnal knowledge, in a manner against nature, of any other person, by penetrating the mouth of such person; and any person who shall wickedly suffer or permit any other person to wickedly and indecently penetrate, in a manner against nature, his or her mouth, by carnal intercourse, he, she and every such person, committing any of the acts aforesaid or suffering the same to be committed as aforesaid, shall be guilty of the crime of sodomy or buggery (Act of June 11, 1879, Pa. Laws 148, as quoted in Eskridge 1999, 656-57).

The expansion of sodomy laws to include oral sex – both by legislative revision and by judicial interpretation – was no doubt influenced to some degree by the trial in England

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16 States which revised their laws to include oral sex within the definition of sodomy were New York (1886), Ohio (1889), Wyoming (1890), Louisiana (1896), Wisconsin (1897), Iowa (1902), Washington (1909), Missouri (1911), Oregon (1913), Nebraska (1913), North Dakota (1913), Alaska (1915), Virginia (1916), Minnesota (1921), Utah (1923) and West Virginia (1931). Other states included oral sex within separate statutes which prohibited “gross indecency” (Michigan, 1903), or “unnatural and lascivious acts” (Massachusetts, 1887; New Hampshire, 1899; Maryland, 1916; Arizona, 1917; and Florida, 1917), or “carnal indecency” (New Jersey, 1906), or “fellatio and cunnilingus” and “oral copulation” (California, 1915, 1921) (Eskridge 1993, 657).
of author and playwright Oscar Wilde. Wilde had been publicly accused of being a sodomite, and sued for libel. During the libel trial, several witnesses described Wilde’s homosexual activities. The judge dismissed Wilde’s libel suit, and he was arrested and prosecuted for sodomy and “gross indecency” (oral sex). The two criminal trials which resulted became international sensations, and U.S. newspapers carried vivid accounts, including graphic testimony of male prostitutes whom Wilde had solicited for sex (Eskridge 1999).

One of the earliest cases in the U.S. in which a simple sodomy statute was used to prosecute an instance of oral sex was in Illinois in 1897. In *Honselman v. People*, 168 Ill. 172, 175, 48 N.E. 304, 305, the Illinois court announced that "the legislature included in the crime against nature other forms of the offense than sodomy or buggery" (*Honselman v. People*, as quoted in Goldstein 1988, 1085).

1960 To Present: Era Of Decriminalization

The third and final era of sodomy laws has been marked by a substantial and relatively rapid reversal of sodomy statutes. In 1960, all 50 states and the District of Columbia had sodomy statutes. In 1961, the Illinois legislature became the country’s first to drop criminal sanctions for sodomy. It would be another decade before the second state, Connecticut, followed suit, but between 1971 and 1978, 21 states repealed their sodomy statutes. To date, 24 state legislatures have decriminalized sodomy. A summary of legislative repeal of sodomy laws is produced in the following table:

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TABLE 3.2
States that have legislatively declassified sodomy
(in chronological order)

1961 (July 28)    Illinois
1971 (June 2)     Colorado
1971 (July 2)     Oregon
1971 (Oct. 1)     Connecticut
1972 (April)      Hawaii
1972 (July 6)     Delaware
1972 (Dec. 14)    Ohio
1973 (July 2)     New Hampshire
1975 (April 3)    New Mexico
1975 (May 12)     California
1975 (June 27)    Washington
1976 (Feb. 25)    Indiana
1976 (Feb. 26)    South Dakota
1976 (Mar. 1)     Maine
1976 (Mar. 11)    West Virginia
1976 (June 28)    Iowa
1977 (Feb. 24)    Wyoming
1977 (March 19)   North Dakota
1977 (April 23)   Vermont
1977 (June 1)     Nebraska
1978 (July 17)    Alaska
1978 (Aug. 10)    New Jersey
1983 (May 5)      Wisconsin
1993 (June 16)    Nevada
1994 (Dec. 28)    District of Columbia

By far the most important catalyst toward repeal of sodomy laws was the advent of the Model Penal Code. Illinois's repeal of its sodomy law came as a result of its adoption of the Model Penal Code. The same was true of Connecticut and a majority of the other states which eventually declassified sodomy.

As the title suggests, the Model Penal Code is a statement of the ideal or model codes for a state. First drafted in 1955 by the American Law Institute, the code is intended to serve as an example to provide guidance for state legislatures. That the American Law Institute should advocate declassification of sodomy was extraordinarily important in terms of garnering support for the idea, for the membership of the group was primarily comprised of conservative, establishment lawyers. As the writers of the first
Model Penal Code considered sexual statutes, it was clear that all sex laws, but particularly those involving sodomy, were not uniformly enforced. Selective enforcement coupled with the generally libertarian and Millsian\textsuperscript{18} attitudes of the drafters of the Model Code led them to recommend decriminalization of most victimless acts. They put it this way:

No harm to the secular interests of the community is involved in a typical sex practice in private between consenting adults. This area of private morals is the distinctive concern of spiritual authorities. (ALI, Model Penal Code, 1955).

Furthermore, criminalization of consensual activity drained scarce police resources, led to blackmail activity, and undermined “the protection to which every individual is entitled against state interference in his personal affairs when he is not hurting others” (Eskridge 1999, 36). This led the drafters of the Model Code to eventually limit proscription of homosexual behavior to actions which involved “force, adult corruption of minors and public offenses” (Griffith 1973, 43). It also included a more specific definition of sodomy than was the case in most states. The Model Code said that sodomy was “deviate sexual intercourse,” and then described the specific acts prohibited.

As Table 3.2 above shows, state decriminalization of sodomy slowed to a crawl by the end of the 1970s. The process of repeal was gradually replaced by what Nan Hunter (1992) has termed “specification.” Rather than decriminalize sodomy, eight

\textsuperscript{18} By “Millsian,” I mean to say that their attitudes reflected the harm principle articulated by John Stuart Mill, that the key determination of what behavior is rightfully prohibited by law ought to be guided by whether or not the behavior causes harm to another. Behavior which does not cause harm should not be regulated by the state, according to this approach.
states have instead opted to amend their statutes to prohibit sodomy only between same
sex couples. This is summarized in Table 3.3, below.

**TABLE 3.3**
**States that have “specified” their sodomy statutes**
(in chronological order)

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Montana*</td>
<td>1973</td>
</tr>
<tr>
<td>Texas</td>
<td>1973</td>
</tr>
<tr>
<td>Kentucky*</td>
<td>1974</td>
</tr>
<tr>
<td>Arkansas</td>
<td>1977</td>
</tr>
<tr>
<td>Missouri</td>
<td>1977</td>
</tr>
<tr>
<td>Nevada</td>
<td>1977</td>
</tr>
<tr>
<td>Kansas</td>
<td>1983</td>
</tr>
<tr>
<td>Tennessee*</td>
<td>1989</td>
</tr>
</tbody>
</table>

*Denotes states in which the state court has declared the sodomy law unconstitutional. Kentucky’s statute was declared unconstitutional in 1992, Tennessee’s in 1996, and Montana’s in 1997. These cases are discussed in detail below.

Why did states specify? With pressure to repeal the laws completely, and the precedent set by *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) that private, consensual relationships between married couples, and to some extent between unmarried, heterosexual couples, were protected to some degree, state legislators may have hoped that narrowing the scope of the laws would insulate them from privacy challenges. Commentary preceding the Model Penal Code’s section on “Deviate Sexual Intercourse Between Consenting Adults” had this to say about prohibiting deviate sex acts between husband and wife:

> [C]urrent scientific thinking confirms that so-called deviate sexual intercourse may be part of a healthy and normal marital relationship. While it is difficult to see that non-standard sexual intimacy between spouses occasions any harm of which the state properly might take cognizance, it is easy to identify criminal sanctions for such conduct as
inconsistent with the social goal of protecting the marital relationship against outside interference. Indeed, it seems likely that the newly enunciated constitutional right of marital privacy extends to all forms of consensual sexual activity between husband and wife. It is probable, therefore, that imposition of criminal punishment for such behavior is not only unwise, but is also constitutionally impermissible (*Model Penal Code* § 213.2 CMT. 2, 1962, revised 1980).

Ironically, the privacy protection which benefited heterosexual couples in some ways worked to the disadvantage of same-sex couples, for it was the heterosexual *relationship* that was being protected and sanctioned, not the acts *per se*.

Why didn’t states simply repeal sodomy laws altogether, like so many of their neighbors? Nan Hunter speculates that the increased visibility and success of the gay civil rights movement during this era may have increased anxiety in some more conservative or religious segments of the population who then put pressure on their legislators. It may have been too politically costly for legislators to decriminalize sodomy laws in districts where most of their constituents were conservative. Helen Ingram and Anne Schneider (1993) have developed a model to help explain why certain groups have an easier time than others persuading legislators to pass laws sympathetic to their causes. The traditional wisdom is that power, measured in terms of both money and voting blocks, is the sole causal factor. Ingram and Schneider argue, however, that there is another dimension to consider – social construction. The authors point out that all other things being equal, it is more costly, in terms of reputation, to politically assist a group with a negative social construction than one with a positive social construction. Below is a diagram, modified from a diagram they present in their article, to help illustrate this point.
Groups in the top left square are powerful, and have a positive social construction. These are the groups one can expect to have the easiest time influencing legislators, for the rewards are large, and the costs are low. The bottom left square represents groups which are powerful, but may have a negative social construction. These groups, argue Ingram and Schneider, will still be able to muscle their wills onto some legislators, but legislators will be more resistant and more cautious in their legislating for these groups, for while the groups may deliver in terms of campaign contributions or voting blocks, there will be a cost to the legislator in terms of the perception by some segments of their constituencies. The top right-hand box represents those groups having a positive social construction, though little political power. Ingram and Schneider argue that while the
benefits in terms of contributions or voting blocks might be small from such groups, there is also little reputational cost, and legislators may be willing to pass legislation favorable to them, particularly of the warm, fuzzy, "feel-good" type. Finally, the bottom right-hand box represents those groups which have a negative social construction, and little power to go with it. These are the groups, argue Ingram and Schneider, that will tend to be perpetually under-served by legislators. This model may help to explain the foot-dragging by some legislatures regarding the repeal of sodomy laws. A review of the states which still have sodomy laws on the books reveals that these are not states with large, visible gay communities. It may be the case that it is too politically costly for the legislators in these more conservative states to pass legislation perceived as sympathetic to homosexuals and often perceived as an assault on the traditional family. That is, legislators who attach their names to sodomy repeal risk not only being labeled as "pro-gay" but as "anti-family."

Although the Model Penal Code decriminalized all private, consensual sex between adults, the commentary attached indicated that the Code's drafters knew how controversial such a change was. About homosexual relations, the commentary said:

Here, particularly a legitimate state interest in suppression of such conduct is arguably more plausible. Because ordinary genital copulation is not possible between persons of the same gender, homosexual relations typically involve some sort of deviate sexual intercourse as that term is defined in Section 213. The popular aversion to such conduct arises not so much from the physical characteristics of sexuality as from the fact of sexual gratification with a person of one's own gender. This type of sexual preference constitutes a far more dramatic contravention of societal norms and prevailing moral attitudes than is involved [with married couples or between non-married heterosexuals] (Model Penal Code § 213.2 CMT 2, 1962, revised 1980).
The overall influence of the Model Penal Code on sodomy laws probably cannot be overstated. In addition to the great number of states which decriminalized sodomy, a number of other states decreased the sanctions associated with sodomy. Where once sodomy was classified as a serious felony, eight of the remaining 16 states which have sodomy laws classify it as a misdemeanor. Additionally, judges who heard challenges to sodomy statutes were also influenced, as a number of them made reference to the Model Penal Code in their decisions.

State Courts And Sodomy Law

As already noted, Court challenges to sodomy statutes are by no means a recent phenomenon. Sodomy statutes have been challenged in a variety of ways since the early nineteenth century (see, for example, some of the cases cited earlier in this chapter). Challenges to sodomy laws have increased exponentially in recent years, “apparently as a result of changing sexual mores which are typified by the claim that what consenting adults do in private should be their own business and nobody else’s” (20 ALR 4th 1009,3). Until relatively recently, however, state sodomy laws withstood the challenges. In this section, I will briefly discuss the general categories of challenges that have been launched against sodomy laws, and why these challenges were not successful.19

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19 The entirety of this section on unsuccessful court challenges to state sodomy statutes draws heavily upon an annotation of the ALR (20 ALR4th 1009). Unless otherwise noted, all references in this section refer to this citation.
Justiciability: From the outset, challenges to state sodomy statutes have been plagued by difficulties, not the least of which has been finding appropriate, justiciable cases. Of course, even those who wish to challenge sodomy laws don’t object to all of their proscriptions. Few challenge a legislature’s authority to prohibit public sexual acts, coercive acts, acts involving minors or incest. Those prohibitions which are objectionable – private, consensual acts – are very rarely discovered, let alone prosecuted. This, coupled with our system’s requirement that courts decide only cases or controversies, means that cases which could act as vehicles to challenge the law are few and far between.

Sometimes, even when a justiciable case arises, claims raised by the litigants can be resolved short of invoking constitutional principles. This point is illustrated nicely in the dissenting opinion in a 1977 case. In this case, a New Jersey man who had been prosecuted for rape was eventually convicted instead of fornication, because the state failed to make the case that the sex had been coerced. The man challenged the law as an unconstitutional violation of privacy, with which the majority of the court agreed. The dissenter in the case, however, argued that the case in question could be resolved to the satisfaction of the defendant, without invoking a constitutional claim. He said that the trial judge erred when he instructed the jury that fornication was a lesser, included offense of rape, and on that basis alone the fornication conviction should be overturned.

20 Article III of the U.S. Constitution contains the requirement that the federal courts hear only “cases or controversies.” Though this is not binding upon the states, all states either have a similar requirement in their state constitutions, or have developed analogous cannons of construction.
“[T]here is the sound, oft-expressed principle that constitutional questions should not be reached and resolved unless absolutely imperative in the disposition of the litigation” (State v. Saunders, 381 A.2d 333 (1977), 230).

Until recently, efforts to have a court issue injunctive orders or declarations of unconstitutionality in the absence of a factual scenario were dismissed because the court said the threat of prosecution for private, consensual acts was so remote as to make it an improper question. (See, for example, Dawson v. Vance 329 F Supp 1320, (1971)). This has presented gay activists with an interesting challenge not faced by other civil rights groups who’ve taken to the courts. By comparison, legal advocacy groups such as the National Association for the Advancement of Colored People’s Legal Defense Fund (NAACP LDF) had it relatively easy locating factual situations with which to challenge segregation. And unfortunately for groups such as the Lambda Legal Defense Fund or the American Civil Liberties Union – the two groups which have been most involved in challenging sodomy statutes – even when situations arise within a justiciable framework, more often than not the facts have been less than ideal in terms of garnering enthusiastic support. The typical factual scenario involves either someone who has been charged with rape and the lesser but included offense of sodomy, or someone arrested during a sting operation for soliciting an undercover officer for sex in a public environment known to be

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21 The Lambda Legal Defense Fund was the first organization created specifically to litigate on behalf of gays and lesbians. Ironically, Lambda’s first case, in 1972, was to fight for the organization’s right to exist as a non-profit group, for a New York trial court denied the group this status, saying that while discrimination might exist against the gay and lesbian community, it was not enough to warrant a non-profit organization. This decision was later overruled by the New York Court of Appeals.
a gay hangout. These are not the kind of factual scenarios that fund-raising campaigns are built on. By contrast, the NAACP’s LDF had 10-year-old Linda Brown (of the landmark Brown v. Board of Education, 347 U.S. 483 (1954) decision), forced to make the two-mile walk to the black grade school, when there was another grade school just down the road that happened to be all white.

This is why the American Civil Liberties Union so enthusiastically pursued Michael Hardwick and encouraged him to challenge the Georgia sodomy statute, in spite of the fact that he hadn’t been prosecuted. The officer having witnessed a private, consensual act in the privacy of Hardwick’s home was just the kind of scenario advocacy lawyers believed might be used to bring down the country’s sodomy laws.²²

Part of the reason prosecutions for private, consensual acts of sodomy, particularly within a marital relationship, are so rare is that even if prosecutors wanted to press charges, those charges often are hard to prove. For example, witnesses are often lacking, spousal privilege limits testimony, etc. Additionally, as discussed above, under the rules of procedure in the nineteenth century, testimony of accomplices in the crime (in this case, either person involved in the act) were not admissible without a corroborating witness²³. An excellent discussion of these difficulties is found in the Texas case of Pruett v. State, 463 SW2d 191 (1970). Nor do witnesses go far in solving

²² Not that the Bowers scenario was totally without problems. As already noted, the arresting officer also confiscated a small amount of marijuana that was lying on Hardwick’s nightstand, and Hardwick’s partner was a married junior high school teacher.

²³ An excellent discussion of these difficulties is found in the Texas case of Pruett v. State, 463 SW2d 191 (1970).
the problem, for if the parties hope to challenge the law on a right to privacy basis, courts have found the presence of witnesses, or even the use of photographs, to make the acts “public.”

Void for vagueness: Notwithstanding these justiciable difficulties, over time sodomy statutes have been challenged in a sizable number of cases for a variety of reasons – although, as mentioned above, these challenges have more often than not arisen out of less-than-desirable factual situations such as rape charges or solicitation cases. Many people prosecuted on sodomy charges have claimed the laws were unconstitutionally vague. A part of due process requires that individuals be given “fair warning” of criminal conduct (see United States v. Harriss, 347 U.S. 612 (1954)). To pass constitutional muster, a law must state the prohibited activity clearly enough that the average person would be able to ascertain when he or she was breaking the law. As discussed in the beginning of this chapter, many sodomy statutes have described the prohibited behavior in very general terms, sometimes doing little more than declaring the “crime against nature” to be illegal. Although a few courts have agreed that phrases such as “crime against nature” or “lewd and lascivious conduct” were unconstitutionally

24 See, for example, the following cases, all of which privacy challenges failed because the court considered the acts to have been public: Carter v. State, 500 SW2d 368 (1973), and Arkansas case involving a car parked on the highway at a rest stop; People v. Baldwin, 37 Cal App 3d 385 (1974), a California case involving sodomy in a public restroom in view of a known observer; Harris v. United States, 315 A2d 569 (1974), a D.C. case involving closed booths in a gay health club; or Lovisi v. Slayton, 363 F Supp 620 (1973), a Virginia case in which the individuals involved in the sex act allowed others to observe them.

25 A second criteria is that penalties for violating the law be clear and specific, though this has generally not been at issue with sodomy statutes.
vague, the vast majority have found the contrary.\textsuperscript{26} Citing the long history of the use of the terms “sodomy,” “buggery,” or “crime against nature,” courts have generally ruled that most people understand the terms, or that the definition has been clarified by court precedent. A New Hampshire court, for example, ruled in 1975 that the state did not have to prove that the “unnatural acts” proscribed by law were still unnatural according to contemporary values and practices (State v. Lemire 345 A2d 906). A New York court noted that the word “sodomy” and use of the word “knows” to indicate sexual intercourse were as old as the Book of Genesis, but that everyone still understood the terms (Farr v. Mancusi, NY S 2d 161 (1972)).

In 1975, a void for vagueness challenge of Tennessee’s crime against nature law was reviewed by the U.S. Supreme Court and the law was deemed precise enough to meet due process standards. In Rose v. Locke, 423 U.S. 48, the Court held that applying the law to acts of cunnilingus, even though that act was not mentioned in the statute, did meet the “due process standard of giving sufficient warning that men may so conduct themselves as to avoid that which is forbidden.”\textsuperscript{27} The Court said that because the Tennessee court had always rejected claims that the law was to be construed narrowly, that could be considered sufficient and clear notice that it would apply to acts such as cunnilingus. The Court, quoting from Robinson v. United States, 324 U.S. 282 (1945),

\textsuperscript{26} Indeed, the ALR reviewed more than 120 cases in which sodomy laws had been challenged, and out of that number, only three courts agreed that the phrase “crimes against nature” was unconstitutionally vague.

\textsuperscript{27} In this case, a man had entered the apartment of a female neighbor, saying he wanted to use the phone. He then threatened her with a knife, forced her to disrobe, and performed cunnilingus on her. He was prosecuted with the state’s “crime against nature” statute – which did not specifically mention cunnilingus as one of the actions included – and was sentenced to five to seven years in prison.
noted that “[i]n most English words and phrases there lurk uncertainties,” and went on to say that

Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.

The Court said that the phrase “crimes against nature” is no more vague than many phrases originating in common law, and that “The phrase has been in use among English-speaking people for many centuries.”

American courts have also not been sympathetic to arguments that indictments on charges of sodomy or crimes against nature lack specificity, saying generally that too many details would be indecent, and that sodomy is such a disgusting and degrading crime that simply using the language in the statute was sufficient to list the crime. (See, for example, *Jaquith v. Commonwealth*, 120 NE2d 189 (1954) or *State v. Bluain* 315 So 2d 749 (1975)). All of this has been compounded by the reticence of courts to use graphic language or language precise enough to be helpful. Finally, courts have ruled that the emotional language of phrases such as “the abominable and detestable crime against nature” are not inflammatory or discriminatory. (See, for example, *State v. White*, 217 A2d 212 (1966)).

**First Amendment challenges:** Sodomy statutes have been challenged under a wide variety of First Amendment claims, generally unsuccessfully. The courts have rejected arguments that sexual acts are protected forms of expression, noting that sexual conduct is more than “pure speech.” (See, for example, *Swiker v. Cade* 381 F. Supp 988 (1974), or *State v. Bateman*, 113 Ariz 107 (1976)).
Nor have courts been persuaded that sex acts are protected expression, even when performed within a play. A federal court ruled that if the play in question was obscene, the acts would not be protected. And even if the play was not obscene, when speech and non-speech elements are included in the same action, an important government reason for regulating the nonspeech element would justify any incidental First Amendment infringements (Raphael v. Hogan, 305 F. Supp 749 (1969)). Likewise, a California court rejected the argument that the sex acts in a play were protected under the First Amendment as expression and as a form of entertainment. Though previous courts had recognized that entertainment was protected by the First Amendment, the California court said it was not entertainment in and of itself that was protected, but the ideas often conveyed as entertainment. The court said that the Romans probably considered watching lions eat Christians was entertainment, but that the court would not protect that activity (People v. Drolet, 30 Cal App 3d 207 (1973)).

The First Amendment’s establishment clause has also been used to challenge sodomy laws. Some litigants have made the argument that because sodomy laws grew out of religious doctrine, codifying those prohibitions violated the establishment clause. The courts, however, have maintained that sodomy laws have a legitimate secular purpose (Hatheway v. Secretary of Army, F2d 1376 (1981)), and that if such a doctrine were embraced many criminal laws would be in jeopardy (Conner v. State, 490 SW2d 114 (1973)).

**Cruel and Unusual Punishment:** The Eighth Amendment of the federal Constitution prohibits “cruel and unusual punishment,” and most of the states have
parallel provisions, and several sodomy laws have been unsuccessfully challenged on this basis. The laws have been challenged in two ways: that criminalizing sodomy in and of itself constitutes cruel and unusual punishment, and that the sentences imposed are excessive.

Regarding the first argument, a California court rejected documentation from various modern authorities that claimed sodomy statutes served no compelling purpose but to impose morality on a minority. The court ruled that it was up to the legislature to decide whether conduct should be criminalized or left to moral sanctions (People v. Roberts, 256 Cal App 2d 488 (1967)). A Michigan court said that the state’s criminal sanctions against sodomy were constitutional because the law punished conduct, and did not punish a predisposition or condition (People v. Stevenson, 28 Mich App 538 (1970).

The length of sentences for sodomy violations have been challenged in a number of states, but always without success. Courts have reasoned that if the sentences meted out are within the limits set by the legislature, then they are not cruel and unusual. (See, for example, State v. Wallace, 504 SW2d 324 (1974), or State v. Dayton, 535 SW2d 469 (1976).

**Privacy and equal protection claims:** In the limited number of instances in which sodomy laws have been struck down as unconstitutional, the successful arguments have involved a constitutional right to privacy (either state or federal), and use of equal protection analysis (either state or federal). This is not to say, however, that these

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28 In my research, I did not find a single case where this argument was successful.
doctrines have always been successful. Indeed, a privacy argument did not convince a majority of the Supreme Court that Georgia’s sodomy law was invalid in the *Bowers* case.

Nor was a federal appeals court convinced, a decade earlier, that Virginia’s sodomy law was invalid on privacy grounds, among other things. In *Doe v. Commonwealth’s Attorney for Richmond*, 403 F Supp 1199 (1976), homosexual defendants sought injunctive and declaratory relief from the law, saying that enforcement of the law violated privacy rights, due process, the right of freedom of expression, and the Eighth Amendment’s prohibition against cruel and unusual punishment. The court rejected all of these claims, emphasizing those parts of the *Griswold* decision that talk of a right to privacy in the context of the marital relationship, as well as those caveats in *Griswold* that indicated that the right of privacy did not apply to homosexual relationships.^[29]  

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29 In 1976, when *Doe v. Commonwealth* was decided, procedural rules required that constitutional challenges to state laws be heard by a three-judge district court, and then appealed directly to the U.S. Supreme Court. The Court had to either take the case, or summarily affirm or reverse the lower-court’s decision. This is different than the procedure today, in which litigants wishing to have the Supreme Court review a lower-court decision file a *writ of certiorari* asking the Court to review the case. Under today’s rule, the Court can simply deny *certiorari*, and this holds no precedential value. Under the rules in place in 1976, however, it was assumed that summary affirmance meant that the Supreme Court largely agreed with the decision and rationale of the lower court. Justices William Brennan, Thurgood Marshall and John Paul Stevens voted to hear the case and issue a full opinion, but the Court’s “rule of four” criteria would have required one more vote. As the summary affirmance was not accompanied by an opinion, there is no discussion of why the Court agreed with the lower-court’s decision. Until 1986 when the Court heard *Bowers*, many state courts relied on *Doe v. Commonwealth* for guidance, though many scholars argued that the precedential value of *Doe* was limited because it was summarily affirmed and not affirmed on the merits (*Rubenstein* 1993, 100).
In the next section, I discuss the cases in which sodomy laws were overturned using either equal protection analysis, constitutional privacy, or both. But before turning to that, it is instructive to take a quick look at the cases which were not successful.

The cases challenging sodomy statutes as a violation of a constitutional right to privacy were all, of course, in the post-Griswold era. As stated above, some states had/have laws which proscribe all acts of sodomy, while others targeted – and continue to target – same-sex acts. If, as the Court indicated in Griswold, there was a marital right to privacy that made it unconstitutional to prohibit the use of contraceptives, then it seemed logical that the right to privacy might also extend to sodomy in the context of marriage. After 1972, when the Court ruled in Eisenstadt that unmarried couples also had a right to privacy which protected their choice to use contraceptives, many thought that this logic might be successfully applied to sodomy statutes. Additionally, if states outlawed sodomy only between same-sex couples, many thought it reasonable to suppose that this would be a violation of equal protection before the law.

With the exception of the cases discussed below, laws challenged on either privacy or equal protection grounds were held generally valid – though some courts made exceptions for particular situations, the bulk of which were that the law could not be constitutionally applied to private, unforced acts of sodomy between a married couple (see, for example, Carter v. State, 500 SW2d 368 (Arkansas, 1973); Dixon v. State, 268 NE2d 84 (Indiana, 1971); State v. Worthington, 582, SW2d 286 (Missouri, 1979); State v. Elliot, 551 P2d 1352 (New Mexico, 1976); State v. Poe, 252 NE2d 843 (North Carolina, 1979); or State v. Santos, 413 A2d 58 (Rhode Island, 1980).
Other courts found sodomy laws to be valid, even when applied to married couples generally, or when applied to married couples within the factual context of the case before them. For example, a Virginia court held that the marital right to privacy was waived when the coupled performed oral sex in front of on-lookers (Lovisi v. Slayton, 539 F2d 349 (1976)). The marital exception also has not held when the acts of sodomy were forced (see Towler v. Peyton, 303 F. Supp 581 (Virginia, 1969)).

Equal protection analysis has been advanced to strike down sodomy statutes, with mixed results. Courts in several states rejected arguments that applying sodomy statutes only to unmarried couples violated equal protection guarantees by creating a discriminatory classification (see, for example, Raphael v. Hogan, 305 F Supp 749 (New York, 1969); Neville v. State, 430 A2d 570 (Maryland, 1981); or State v. Poe, 252 SE2d 843 (North Carolina, 1979). On the other hand, other state courts agreed that application of sodomy statutes to unmarried persons while excluding married couples did create an unreasonably discriminatory classification, thus violating equal protection of the law. Some of these successful challenges will be discussed in the next section. To date, equal protection challenges to laws which target same-sex sodomy only have not been successful, as with only a few minor exceptions (discussed below), courts have not found homosexuals to constitute a suspect classification, which would invoke heightened scrutiny by the courts.

30 See, for example, Warner v. State, 489 P2d 526 (Oklahoma, 1971).
Equal protection considerations were not an issue in the Bowers case, because Georgia’s sodomy statute applied to all, regardless of marital status and regardless of whether the acts were between persons of the same or opposite sex. In oral arguments, Michael Hobbes, the attorney for the state, was asked about the application of the statute to married couples. He conceded that such application would probably violate the marital right of privacy.

State Courts And Sodomy Laws: Stories Of Successful Challenges

To date, sodomy laws have been declared unconstitutional by the courts of several states -- definitively in seven states,\(^{31}\) and inconclusively in four more.\(^{32}\) When viewing the cases together, very few generalizations can be made about the cases, for each arose in a very different kind of factual situation, and each invoked disparate legal theories. This is particularly true of the three cases which preceded the Bowers decision, for other

\(^{31}\) New Jersey, Pennsylvania, New York, Kentucky, Tennessee, Montana and Georgia.

\(^{32}\) By inconclusively, I mean either that a case has been decided by a state appellate court but has not yet been challenged in the respective state’s high court, or a case in which some part of a sodomy law has been declared unconstitutional, and other application of the law remains unclear. These states include Louisiana, Maryland, Michigan and Texas. In Louisiana, an appellate court in 1999 struck down the sodomy law as unconstitutional, but this will most likely be challenged. This case is discussed later in the chapter. In Maryland, the “Unnatural and Perverted Sexual Practices Act” made same-sex oral sex a crime, but this was successfully challenged at the trial level. To prohibit the lawsuit from going further, the state entered negotiations with the ACLU (the group that brought the case) and agreed that the state’s sodomy law, which prohibited anal sex, should also be struck down. This was done by a Baltimore trial court in January 1999. Since all of the state’s criminal prosecutions are conducted in Baltimore, both of deviate sex acts are not “invalid and unenforceable” (ACLU Website). In Michigan, a trial court found the state’s “crime against nature” law to be unconstitutional (Michigan Organization for Human Rights v. Kelly, 1990), but this applied only to Wayne County. In 1992, an appellate court held that outside of Wayne County, the law was constitutional. This has yet to be resolved. In Texas, a state appellate court found the sodomy statute to be unconstitutional (England v. Dallas, 1994). Another case was also initiated in 1999, as the result of two men being convicted for having oral sex. Each was fined $125.
than the fact that these three pioneer decisions were issued in eastern states (New Jersey, Pennsylvania and New York), they have very little else in common. While these cases broke important legal ground, they are not exactly the type of stunning successes hoped for by leaders in the gay rights movement, as the litigants – particularly in the first two cases – were not exactly poster children for a civil rights movement.

Why was success in challenging sodomy statutes so slow in coming? There are the obvious reasons: courts are reluctant to infringe on legislative prerogative; anti-homosexual feelings run deep and powerful in a majority of the people, etc. But an examination of challenges to state sodomy statutes – even successful challenges – indicates that such challenges often arise out of factual situations which are off-color, tawdry, or even violent. It may be the case that this has inhibited some judges from more aggressively pursuing privacy protections. As one judge said when addressing the constitutionality of a fornication law,\(^\text{33}\)

Bluntly put, this case is a wretched vehicle for addressing the questions which counsel for the respective parties would have us answer. It seems somehow incongruous to use the soaring phrases of Mr. Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, (1928), as support for the proposition that the [state] is powerless to prohibit ... indiscriminate group fornicating by – or indeed, among – complete strangers exhibiting remarkable dexterity in the confined quarters of a parked automobile on a deserted lot in Newark *State v. Saunders*, 381 A.2d 333 (1977).

Interestingly, though New Jersey is technically the first state in which a sodomy statute was successfully challenged on constitutional grounds, it is not often credited as such. This is probably due to the fact that by the time the New Jersey appellate court

handed down its decision in *State v. Ciuffini* 395 A.2d 904 (1978), the decision was in some sense moot. Between the time the case was appealed and the date the court issued its opinion, the legislature had adopted a suggestion of the New Jersey Criminal Law Revision Committee to decriminalize private consensual sodomy. Thus, the court's boldness in declaring the law an unconstitutional violation of the right to privacy is substantially diminished. Nor did the case provide a particularly strong theory to pursue in future cases. And the especially unsavory facts of the case, involving as it did charges of assault and impairing the morals of a child, made it a less-than-ideal case to tout for civil rights purposes. The case and its precedents, however, are worth examination, because New Jersey has an interesting and well-developed history of a right to privacy based on the state constitution, independent of any federal right to privacy.

The facts in the *Ciuffini* case are as follows: On a summer night in 1975, Walter S. Ciuffini picked up a 16-year-old male hitchhiker. Ciuffini told the young man he was having a party and invited him to his house to attend. Upon finding no one else there, the younger man later told a jury that he became suspicious and told Ciuffini he wanted to leave, and in response to that Ciuffini struck him on the forehead. Ciuffini and

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34 The legislature wrote the bill and it was signed into law by the governor in 1978, before *Ciuffini* was issued, though it did not technically go into effect until 1979, almost a year after the *Ciuffini* decision was handed down.

35 Prior to trial, the state dropped the charge of impairing the morals of a minor, as the victim was 16 years old at the time of the incident. This is probably because of the fact that though New Jersey did not have an age of legal consent for men, the age of consent for female sexual conduct was 16 years old. Had the state gone forward with that charge it would have raised equal protection issues.

36 The name of the alleged victim does not appear in the appellate decision, referring to the young man simple as “N.”
the young man then had a sexual encounter, in which both were partially disrobed. The youth told the jury that he was very scared, and that Ciuffini performed oral sex on him, and then Ciuffini put his penis between the young man’s buttocks. After about a half an hour of this type of activity, the young man ran out of the house and to his home, about a mile and a half away, and went to bed. The police were notified of the encounter after the young man told his mother about it the following morning. Though Ciuffini maintained that the exchange had been non-violent and consensual, he was convicted of assault with intent to commit sodomy (State v. Ciuffini 395 A.2d 904, 905).

Ciuffini appealed his conviction on the basis that the trial judge had not allowed testimony regarding the youth’s consent. At the time of the trial, the controlling precedent on the issue of private, consensual sodomy was State v. Lair 62 N.J. 388 (1973). In that case, defendant Lair asserted that private, consensual sex between adults was protected by a right of privacy. The New Jersey Supreme Court said that Lair could not be protected from a sodomy prosecution because he and his female partner were not married, but agreed that a privacy right would protect such sexual conduct within a marriage. Interestingly, the New Jersey Criminal Law Revision Commission, mentioned above, had already issued its report, in 1971, recommending decriminalization of sodomy between consenting adults at the time the Lair decision was issued. The court made

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37 Although Ciuffini had originally been charged with sodomy as well as intent to commit sodomy, the trial judge dismissed the sodomy charges as there was no evidence of penetration. Though the New Jersey sodomy law (N.J.S.A. 2A:143-1) was not explicit in its definition of sodomy, precedent indicated that sodomy included anal intercourse and bestiality, but not oral sex. Penetration was required, but emission was not (p. 905). To prosecute oral sex, New Jersey had in the past used its “private lewdness” law (N.J.S.A. 2A:115-1) to charge accused individuals with criminally indecent exposure.
explicit note of that fact, asserting that the problems surrounding consensual sex could be remedied if the legislature would adopt the commission’s proposal. Mere mention of the report suggests that the court felt sympathetic toward decriminalization of sodomy, but would defer to the legislature. “The wisdom of this or of any other like proposal is, of course, purely a matter for legislative determination” State v. Lair 62 N.J. 388 (1973), 397-98.

In reviewing Ciuffini’s case, however, the New Jersey Supreme Court said that it believed that in the years since Lair was handed down that two subsequent cases had implicitly overruled it: State v. J.O. 69 N.J. 574 (1976) and State v. Saunders, 75 N.J. 200 (1977). In the first case, the state supreme court said that the law against “private lewdness” did not include consensual oral sex between adult males. Again, the Court made mention of the proposal of the New Jersey Criminal Law Reform Commission for the decriminalization of most consensual, private adult sexual activity, and said that it agreed with the recommendation. “A private consensual act between adults such as committed by defendants, should not be within the ambit of criminal statutes” State v. J.O. 69 N.J. 574, 577.

A year later, in the Saunders case, the court ruled that New Jersey’s fornication law (N.J.S.A. 2A:110-1), which prohibited sex between unmarried couples, was an unconstitutional violation of the right to privacy. Though the New Jersey Constitution does not specifically mention a right to privacy, the court in that case said that decisions about intimate sexual relationships are “necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard” (p. 213).
The *Ciuffini* decision is rarely cited. As suggested above, this is probably due in large part to the fact that the New Jersey legislature did finally adopt the recommendation to decriminalize sodomy prior to release of the *Ciuffini* opinion. But in light of the fact that this was, indeed, the first successful challenge of a sodomy statute, it is somewhat surprising that more references have not been made to the case. Perhaps this can be explained by the fact that the decision is rather short (just over four pages), fairly technical, and nowhere explains from where it derives a right of privacy robust enough to restrict the state’s authority to regulate sexual activity. The court gives only two hints of why it found the way it did. First, that the court makes so many references to the recommendations that the legislature decriminalize sodomy suggests that it agrees with this notion. Referring to the decision in *Saunders* to strike down the fornication law, the court says, “In sum, the court’s legal and constitutional perception coincided with the dimensions of the pending legislative reform” (p. 907).

Second, the court hints that it agrees with the notions of privacy developed in *Saunders* and other privacy cases. The discussion of a right of privacy is far more detailed in the *Saunders* decision than in the *Ciuffini* opinion. Because of the detailed and cogent discussion of privacy, and because a fornication law seems like a relatively

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38 The case was cited only in 16 subsequent decisions, the majority (all but four) of those being in New Jersey trial cases. Compare this with the number of citations in the two other pre-Bowers decisions of *Commonwealth v. Bonadio*, with 180 citations, and *People v. Onofre*, with 225 citations (citation numbers according to Sheppard’s).
close parallel to sodomy laws, it is somewhat surprising that more attention has not been given to the case by lawyers and scholars alike. Like so many of the other cases cited here, the factual scenario giving rise to *Saunders* is less than appealing. In the early hours of a July morning in 1973, two women were walking home from a bar when three men drove up in a car. From there, the details diverge, depending on who's telling the story. The women claimed they were forced into the car, taken to a parking lot and raped. Later that night the women told police that they didn’t try to escape because the men had been armed. Two of the three men (Charles Saunders and Bernard Busby) were charged with rape, assault with intent to rape, and armed robbery. In testimony, the men claimed that each of them had engaged in sex with the two women, but that it had been consensual. The men said the women agreed to have sex with them in exchange for “reefers” (marijuana cigarettes). During cross-examination, both women admitted to

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39 The prohibition against fornication is similar in some ways to prohibitions against sodomy in that both seek to dissuade non-procreative sex and extra-marital sex, and both laws arise out of a Puritan environment. However, there are two important differences that might make fornication law a less-than-perfect analogy. Interestingly, fornication was not a common law crime. And second, fornication does not seem to have raised the degree of disgust and fear as did sodomy. Compare the following explanation of fornication by Blackstone (and quoted from the *Saunders* decision) with the more heated and disdainful discussions of sodomy by Blackstone, Coke and others in the early part of this chapter: “In the year 1650, when the ruling power found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and willful adultery were made capital crimes, but also the repeated act of keeping a brothel, or committing fornication were (upon a second conviction) made felony without benefit of clergy. But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the cannon law....” (*W. Blackstone commentaries*, Book IV, Ch. IV, 64-65, as quoted in *Saunders*, p. 226). Apparently, however, the New Jersey Assembly disagreed with Blackstone about the propriety of such a law, as the fornication law dates back to 1704. Fornication is defined by the marital status of the woman. Early interpretation of the law required pregnancy as proof of the act, but that was later dropped, and was interpreted to include all acts of sexual intercourse involving an unmarried woman (p. 210, note 4).

40 It is unclear from the appellate decision why the charges were not pressed against the third man.
having been arrested for prostitution in the past, but said that they had not solicited the three men.

The judge, apparently not impressed with the testimony of the women, instructed the jury that if they did not find the defendants guilty of rape there was the possibility of finding them guilty of fornication as a lesser included offense of rape. He defined fornication as "an act of illicit sexual intercourse by a man, married or single, with an unmarried woman" (p. 205). The judge told the jury that they should consider the charges in the order of gravity, starting with the rape charge. If they found the defendants not guilty of rape, they could consider the lesser offense of fornication. The attorney for the defendants objected, pointing out that the statute was only rarely and selectively applied. But the judge responded, "Here is a situation in which there appears to be, and it is up to the jury to decide, an open admission in court of fornication, and I don't think the Court can ignore it since it is in the statute" (p. 205). After a short deliberation, the jury returned guilty verdicts on the fornication counts, and not guilty verdicts on all other counts. Saunders was fined $50, and Busby, who had spent seven months in jail while waiting for the trial, was sentenced to time spent.

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41 Fornication was prohibited by N.J.S.A. 2A:110-1.

42 The judge said the state had the burden to prove that the act occurred. He did not, however, make any reference to the marital status of the women.

43 This notion — that the law is on the books and if there is evidence of its violation prosecution must ensue — is one of the contentions of those who fight sodomy statutes. That is, if a law is on the books, it is always able to be applied.
Saunders made a motion for acquittal, and claimed that the fornication law was unconstitutional for three reasons. First, he said the history of uneven enforcement of the law made it a violation of the Fourteenth Amendment’s equal protection clause. Second, he argued that the law violated a zone of privacy recognized by federal law in such decisions as *Griswold v. Connecticut* and *Eisenstadt v. Baird*. Finally, he said that the law also violated the privacy implied in the New Jersey Constitution, specifically Article I par.1, which read:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty ... and of pursuing and obtaining safety and happiness  
> *(New Jersey Constitution 1947, Art. I, par. 1)*

All three of these points have also often been used to challenge sodomy statutes.

As to the issue of rare and selective enforcement, Saunders submitted before the trial court expert testimony and documentary testimony to try to show that many people actually violate the fornication law, but few are ever prosecuted. The trial judge, while conceding that the law was rarely enforced, said there was no evidence of “purposeful discrimination based on an arbitrary or invidious classification” (p. 206), and added that “the very nature of the crime makes enforcement difficult” (p. 207). The judge thus found no violation of the Fourteenth Amendment, and the Appellate Division and New Jersey Supreme Court agreed. After dismissing the Fourteenth Amendment issue, the majority in *Saunders* began its discussion of privacy, asserting that though neither the federal nor the New Jersey Constitutions articulated a right to privacy, “both documents have been construed to include such a right” (p. 210). The majority blended its discussion of federal and state privacy, first discussing the traditional line-up of federal
privacy cases, and then moved on to New Jersey cases which dealt with privacy concerns. Although the majority noted that the federal privacy cases had dealt to date primarily with issues of marriage and procreation, they asserted that the underlying right in these cases was the right of personal choice and personal autonomy.

Any discussion of the right of privacy must focus on the ultimate interest which protection the Constitution seeks to ensure – the freedom of personal development. Whether one defines the concept as a "right to 'intimacy' and a freedom to do intimate things" or "a right to the 'integrity' of ones' personality," the crux of the matter is that governmental regulation of private personal behavior under the police power is sharply limited" (p. 214).

The majority pointed out that the U.S. Supreme Court had not specifically addressed fornication under the rubric of privacy, and indeed the Court had in some instances included caveats that the right to privacy did not necessarily stop the state from regulating sexual behavior. It is difficult to discern if the New Jersey Court believed that the U.S. Supreme Court would consider a fornication law a violation of the right to privacy, or if the majority was simply pointing out how illogical they felt it would be if the Supreme Court were to find otherwise. But they expressed their confidence in the consistency of their decision with the Supreme Court's other privacy rulings this way:

[O]ur decision today is consistent with the tenor and thrust of the Court’s more recent decisions. As we stated earlier, the Court in Carey and Wade underscored the inherently private nature of a person’s decision to bear or beget children. It would be rather anomalous if such a decision could be constitutionally protected while the more fundamental decision as to whether to engage in the conduct which is a necessary prerequisite to child-bearing could be constitutionally prohibited (p. 214).

Although the majority in Saunders thus expressed its confidence that the federal right to privacy would invalidate the fornication law, they then cited the privacy
protections within the New Jersey Constitution, almost like a contingency plan. They noted that previous privacy decisions from New Jersey’s courts had construed privacy as a right of personal autonomy, and not a right dealing only with marriage and procreation. They noted, for example, that in 1976, just one year before the Saunders opinion, the New Jersey Supreme Court issued a ground-breaking privacy decision in the cause célèbre of Karen Ann Quinlan, 355 A.2d 647. In 1975, then-21-year-old Quinlan fell into a vegetative coma from which doctors believed she would never recover. Her meager, deteriorating existence required the assistance of a respirator and intravenous feeding. Though her parents wished to remove Quinlan from the respirator, the hospital’s doctors refused to do so, and so Quinlan’s father turned to the courts asking for two things. First, he asked to be appointed as Quinlan’s guardian. Under the circumstances, this was a rather unremarkable request which the court granted without further controversy. He then, on his daughter’s behalf, asked the court to issue an injunction requiring the hospital to remove Quinlan from the respirator – even though all involved believed that would cause her death. The request was framed as an assertion of the constitutional rights of religion, of protection against cruel and unusual punishment, and of a right to privacy. The court quickly dispensed with the questions of religion and cruel and unusual punishment. With regard to the right of privacy, the court set the tone of its discussion at the outset by invoking a personal-autonomy type of privacy. “The right we here discuss is included within the class of what have been called rights of ‘personality’”

44 Interestingly, Quinlan did not die shortly after being removed from the respirator according to court orders. Indeed, she lived for nine additional years until she died of pneumonia in 1985.
The court then briefly summarized the federal right to privacy, citing cases such as *Griswold, Eisenstadt, Stanley v. Georgia*, 394 U.S. 557 (1969), and *Roe v. Wade*, 410 U.S. 113 (1973). Describing the privacy right articulated in *Roe*, the court said that “Presumably this right is broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain conditions” (p. 663).

In a one-sentence paragraph the court then asserted: “Nor is such right of privacy forgotten in the New Jersey Constitution” (p. 663), after which Art. 1, par. 1 of the New Jersey Constitution is cited. Somewhat surprisingly, the court did not explain how the right to be taken off life support systems is embraced by a right to privacy, nor did they cite precedent that might have illuminated their logic. Instead, the court focused on the severity of Quinlan's condition, and the invasive nature of the procedures necessary to keep her alive. The court implied that invasive medical procedures violate a right to some sort of bodily privacy, though they did not spell this out. The court then used a balancing of the interest test to determine when the patient’s right of privacy outweighed the state’s interest in protecting human life.

We think that the State’s interest *contra* weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual’s rights overcome the State interest (p. 664).

Having recognized, without much ado, a right to privacy broad enough to embrace a right to die, it is not surprising that the New Jersey courts would later find the right to privacy broad enough to include a right to engage in consensual sexual activity.
There was, however, one part of the decision that could be used by those opposing such an interpretation of privacy. In justifying the transfer of the right to privacy to Quinlan's father, the court noted that most people, when faced with the reality of a loved one in a situation similar to Quinlan's tragic condition, would probably support the decision to have her taken off the respirator. Though the court mentioned this with the goal of allowing a proxy to assert such a grave right on the part of another, an artifact of that argument is that it could be construed to imply that courts ought to consider what the majority of people in society believe to be correct and weight that heavily. One of the issues that courts have grappled with when considering the constitutionality of sodomy laws is the fact that striking down these laws goes against the values of the majority as expressed through their elected representatives.

Returning to the *Saunders* case regarding the state fornication law, the court devoted much more discussion to the notion that state constitutions can be interpreted as offering greater protection than the U.S. Constitution. They noted that

Although the State right is not necessarily broader in all respects, the lack of constraints imposed by considerations of federalism permits this Court to demand stronger and more persuasive showings of a public interest in allowing the State to prohibit sexual practices than would be required by the United States Supreme Court (p. 216-17).

Having established that the fornication statute impinges on a "fundamental right" of privacy, the majority next considered whether the state had some compelling interest in forbidding fornication. The state cited four reasons for the law: preventing venereal disease, preventing pregnancies out of wedlock, protecting the marital relationship, and protecting public morals. The court rather quickly dismissed the first two justifications,
and said that there is no evidence that the law had worked at all toward achieving those goals. Regarding the last two state justifications, the court made a distinction between private morality and public morality. It held that while the state may regulate “activities which are designed to further public morality,” decisions regarding whether or not to marry and whether or not to have sex outside of marriage are private, personal decisions, and “they neither lend themselves to official coercion or sanction, nor fall within the regulatory power of those who are elected to govern” (p. 219). The majority, however, gave no guidance as to how to determine in the future what things constitute public versus private morality.

A final point worth noting about the majority decision in Saunders is the discussion of the appropriate role of the state in a free society. Though the court did not specifically quote John Stuart Mill, as did the authors of the Model Penal Code and the authors of many of the state sodomy cases that will be discussed below, it invoked the spirit of a Mill-like philosophy to justify the advancement of a privacy right strong enough to limit the power of an elected body. The court noted that their invalidation of the fornication statute did not mean it was condoning the behavior. The passage is interesting because similar passages occur in most of the subsequent decisions of courts striking down sodomy statutes. Like the New Jersey court, most of the decisions which have struck down sodomy laws have noted that this should not be interpreted to mean that the behavior is condoned, but that society should be tolerant of private behavior absent direct harm to others. The following passage from Saunders is as eloquent a
defense of privacy and personal autonomy as any penned elsewhere, and it is surprising that so few have quoted it.

Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate "remedy" for such conduct cannot come from legislative fiat. Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right of personal autonomy is fundamental to a free society. Persons who view fornication as opprobrious conduct may seek strenuously to dissuade people from engaging in it. However, they may not inhibit such conduct through the coercive power of the criminal law. As aptly stated by Sir Francis Bacon, "[t]he sum of behavior is to retain a man's own dignity without intruding on the liberty of others." The fornication statute mocks the dignity of both offenders and enforcers. Surely police have more pressing duties than to search out adults who live a so-called "wayward" life. Surely the dignity of the law is undermined when an intimate personal activity between consenting adults can be dragged into court and "exposed." More importantly, the liberty which is the birthright of every individual suffers unduly when the State can so grossly intrude on personal autonomy (p. 219).

The concurring opinion in Saunders, authored by Judge Schreiber, is also worth noting for its strong defense of judicial federalism. Since the decision predates the Bowers opinion, the majority based its decision on a combination of federal and state privacy rights. Almost as if prescient, Schreiber said that he believed that the majority had "misgauged the scope" of federal privacy decisions. For that reason, he said, "I would rest the invalidity of this statute squarely on the ground that it conflicts with ... the New Jersey Constitution" (p. 220). Schreiber went on to present an even more detailed discussion of privacy precedent in New Jersey cases. Perhaps the most remarkable of his findings was a 1790 case in which a New Jersey court specifically mentioned a right of privacy having to do with sexual activity.
As mentioned above, the 1978 Ciuffini case was technically the first state decision
to strike down a sodomy law. But because at about the same time the New Jersey
legislature decided to repeal the law, a Pennsylvania decision is usually cited as being the
first. Two years after Ciuffini, the Pennsylvania high court, in Commonwealth v.
Bonadio, 490 Pa. 91 (1980), said that in regulating non-commercial sexual behavior
between consenting adults in private, the state had exceeded its police power authority.
Furthermore, the court said, the law, because it sanctioned sodomy (what it called
"deviate sexual intercourse") only "between human beings who are not husband and
wife" (P.L. 1482, No. 334, § 1, 18 Pa.C.S.A. § 3101 (1973)),\(^{45}\) violated the equal
protection clause of the Fourteenth Amendment.

Not only does the statute in question exceed the proper bounds of the
police power, but, in addition, it offends the Constitution by creating a
classification based on marital status (making deviate acts criminal only
when performed between unmarried persons) where such differential
treatment is not supported by a sufficient state interest and thereby denies
equal protection of the laws (Bonadio, 9).

The majority opinion in Bonadio reads like an advocacy lawyer's dream. The
tightly written four-page opinion makes short work of questions of justiciability raised by
the state and then, appealing to both the Model Penal Code and Millian ideals of liberty,\(^{46}\)
the majority flatly asserts that state interference in such intimate matters as sex in private

\(^{45}\) The full text of the statute read "A person who engages in deviate sexual intercourse under the
circumstances not covered by section 3123 of this title [relating to involuntary deviate sexual intercourse] is
guilty of a misdemeanor of the second degree" (P.L. 1482, No. 334, § 1, 18 Pa.C.S.A. § 3124 (1973)).
'Deviate sexual intercourse' is defined as "Sexual intercourse per os or per anus between human beings
who are not husband and wife, and any form of sexual intercourse with an animal" (P.L. 1482, No. 334, §
1, 18 Pa.C.S.A. § 3101 (1973)).
between consenting adults clearly exceeds any rightful interpretation of the police powers.

The Voluntary Deviate Sexual Intercourse Statute has only one possible purpose: to regulate the private conduct of consenting adults. Such a purpose, we believe, exceeds the valid bounds of the police power.... The police power should properly be exercised to protect each individual’s right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others (emphasis in original) (Bonadio, 5).

That the Bonadio case did not become more of a model for the gay rights movement is somewhat surprising, for the police powers argument is less complicated and the privacy argument has certain shortcomings which make it less than ideal in terms of achieving a broader agenda of gay rights. Successful privacy arguments rest, to some extent, on an implicit acknowledgement that the policing of some types of activities is so inherently difficult that to do so creates more harms than the benefits of successful enforcement. On the other hand, police power arguments, such as the one used in Bonadio asserts simply that some moral issues are simply beyond rightful regulation by the state.

Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority. Indeed, what is considered to be ‘moral’ changes with the times and is dependent upon societal background. Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals. Enactment of the Voluntary Deviate Sexual Intercourse Statute ... is not properly the realm of the temporal police power (Bonadio, 5).

46 Indeed, about a quarter of the majority’s opinion was an extended quote from John Stuart Mill’s On Liberty.
The Pennsylvania high court had an opportunity to consider the question of privacy, as a brief filed for the defendants at the appellate level claimed that on its face, the sodomy law was unconstitutional in that it violated both a right to privacy (protected by the federal Constitution) and the equal protection clause of the Fourteenth Amendment. In an interesting maneuver, however, the court said that since the appellees did have standing on equal protection grounds, and their subsequent decision rested solely on the equal protection clause and police power arguments, there was no need to consider whether the appellees had standing to assert a right of privacy claim.

Appellees termed their challenge as 'on the face' only in the sense that they have not gone to trial for violation of the statute: enforcement, however, has been undertaken against them and for this reason they have standing to raise, at minimum, the assertion that the statute impermissibly discriminates against unmarried persons, a class of which appellees are members else the statute would have no application to them whatsoever. We do not need to determine, therefore, whether appellees have standing to raise other asserted constitutional issues including, *inter alia*, the right of privacy, since we base our decision solely upon equal protection grounds (*Bonadio*, 2).

Why did the court engage in somewhat questionable fancy footwork to avoid the privacy question when it seems that the majority would have been sympathetic to privacy claims? The answer may lie in the somewhat unsavory details of the case. An interesting aspect of the *Bonadio* case was that the litigants weren’t exactly Linda Brown, nor were the particulars of the case conducive to a robust defense of privacy. Indeed, the litigants and the facts of the case were not even detailed in the majority opinion, which is somewhat unusual in any court opinion. It was not until a rather caustic dissenting opinion that the facts are revealed.
Two of the appellees, Mildred Kannitz (who went by the stage name of "Dawn Delight") and Shanne Wimbel were exotic dancers at the Penthouse Theater in downtown Pittsburgh. One night in 1979, plainclothes officers were in the audience of a performance by Kannitz and Wimbel. During the show, the two women performed oral sex on members of the audience and were arrested for voluntary deviate sexual intercourse, as were the patrons who engaged in the acts. The theater’s cashier, Michael Bonadio, and the theater’s manager, Patrick Gagliano, were also arrested and charged with criminal conspiracy. After being charged, Kannitz, Wimbel, Gagliano and Bonadio filed a motion to quash the information, on the grounds that the Voluntary Deviate Sexual Intercourse law was unconstitutional.

The rather tawdry and public nature of the factual situation might have made a credible defense of privacy difficult. As one dissenter noted, "The record plainly demonstrates that these appellants engaged in the proscribed conduct on a stage before a public audience and in plain view of the arresting officers" (Bonadio, Roberts dissenting). A second dissenter elaborated on this point:

The majority attempts to avoid the privacy issue by reasoning there was not a valid exercise of the state’s police power in the prohibition of this type of conduct. The absurdity of such a position does require demonstration. Here we have a public display of the most depraved type of sexual behavior for pay. Any member of the public who pays the fee can witness and participate in this conduct. That the majority would suggest that this is beyond the state’s power to regulate public health, safety, welfare, and morals is incredible. I assume that regulation of prostitution and hard core pornography are also now prohibited by today’s [sic] ruling (Bonadio, Nix dissenting).

Just a few months later, New York’s high court struck down that state’s sodomy law. Just as in the Bonadio case in Pennsylvania, in People v. Onofre 51. N.Y.2d 476
(1980), the New York Court of Appeals\(^\text{47}\) said sodomy laws targeted at unmarried people violated the equal protection clause of the Fourteenth Amendment. But the New York Court went much farther than the Pennsylvania court in affirming a fundamental right to privacy protected by the U.S. Constitution. "[W]e agree with defendants' contentions that [the New York sodomy statute] violates both their right of privacy and the right to equal protection of the laws guaranteed them by the United States Constitution" (Onofre 1980, 485). The case is interesting, for if the majority and dissenting opinions had been reversed, they read very much like what the U.S. Supreme Court would later say in Bowers.

The Onofre opinion, written by Judge Jones and signed by Judges Wachtler, Fuchsberg and Meyer, actually involved three separate cases which the court considered together because they presented a common question: "whether the provision of our State’s Penal Law that makes consensual sodomy a crime is a violation of rights protected by the United States Constitution" (Onofre 1980, 483). The three cases provided the court with the opportunity to examine a rather wide spectrum of behavior which was prohibited under the New York law.

The statute in question was § 130.38\(^\text{48}\) of New York penal code, which regarded consensual sodomy. "A person is guilty of consensual sodomy when he engages in

\(^{47}\) In New York, the state high court is labeled the "Court of Appeals" rather than the more traditional "Supreme Court."

\(^{48}\) Section 130.38 was enacted in 1965, the year in which New York revised its criminal laws to more closely resemble the Model Penal Code. Interestingly, the commission charged with making recommendations for New York's revised laws had dropped all sanctions against consensual sodomy. The legislature, however, did not adopt this recommendation by the commission, and retained the sanctions against sodomy. According to the New York Legislative Annotations, the reason that the legislature opted
deviate sexual intercourse with another person.” Deviate sexual intercourse “means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.”

In the lead case, Ronald Onofre had been convicted of consensual sodomy with a 17-year-old male in his home. In the second case, Conde J. Peoples and Philip S. Goss were convicted of engaging in an act of oral sex while in a car parked on a street in Buffalo in the early hours of the morning. The third case involved Mary Sweat, who had also been convicted for performing oral sex on a male while in a truck parked on a city street in Buffalo.

Just as in the Pennsylvania case, the latter two cases were problematic in terms of claiming a privacy right, because of the arguably public location in which the acts occurred (i.e., in vehicles parked on public streets). The prosecuting attorneys in the two cases involving the sex acts in vehicles made the argument that the acts were public because the acts “could have been observed by a passerby should one have happened on the vehicles and looked inside” (p. 485). Indeed, in oral arguments even the defense attorneys conceded that the acts took place “in public.” But rather than side-stepping the privacy issue like their Pennsylvania counterparts by deciding the case solely on equal protection grounds, the New York court faced the privacy question head on.

Very early in the opinion, the majority acknowledged that some of the conduct in question might be in some way public. But they went on to say that the right of privacy to retain the anti-sodomy provision was “based largely upon the premises that deletion thereof might ostensibly be construed as legislative approval of deviate conduct” (NY Legis Ann 1965, 51-52).
was not equated with secrecy. Instead, they posited that the right of privacy involved something closer to a right of “freedom of conduct.” The right of privacy, in the context of the cases, the court said, “is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint” (p. 485).

Having defined privacy as a right to personal decision and certain conduct following from those decisions, the court then tried to determine whether or not consensual sodomy fell within a privacy right. Interestingly, even though the court announced a privacy right, instead of focusing on the scope of privacy, the court instead focused on the legitimate scope of a state’s police powers. The decision seemed to imply that the legislature can only criminally prohibit actions which cause harm, thus invoking the philosophy of Mill. It emphasized that the state had not produced any evidence that acts of sodomy harmed either the individual or society. In the absence of evidence of harm, the court concluded that no legislative purpose was being served, and thus there was no rational basis for the law. To emphasize its rejection of legislative regulation of consensual sodomy, the court pointed out that since privacy was a fundamental right, legislation which impinges on it should be examined with heightened scrutiny. But in the current situation, the court said, the legislation did not even pass a mere rationality test, let alone a test of strict scrutiny.

The court explicitly rejected the idea that the legislature could prohibit sodomy for moral purposes. “[I]t is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended
enforcement of moral or theological values” (p. 489, note 3). Somewhat oddly, after declaring that it is not the role of the legislature to legislate morality, the court went on to make a distinction between “private morality” and “public morality,” and implied that while the state might have some significant role in regulating public morality, the realm of private morality is beyond its reach. Presumably, the court implicitly accepted the argument that the acts which took place in the vehicles fell within the realm of private morality. The court also repeatedly emphasized that in all of the three situations before it, the acts involved were “non-commercial.” Presumably it highlighted this point so that the decision would not be interpreted as allowing prostitution.

In the final lines of the majority opinion, the court asserted that their decision did “not plow new ground,” and referred to Pennsylvania’s decision in Bonadio. It noted that the Pennsylvania court reached its decision “for some of the same reasons that underlie our decision ... even in a case in which the defendants were charged with commission of deviant acts of sexual conduct with members of the audience at performances in a public theatre for which an admission fee had been charged” (p. 493). The New York court conveniently ignored the fact that the Pennsylvania court based its decision on equal protection grounds and not on privacy grounds.

In a two-paragraph concurrence, Judge Jasen rejected the privacy arguments advanced by the majority, adding that he believed the legislature did have the authority to make moral judgments. However, he did find the sodomy law in violation of the equal protection clause of the Fourteenth Amendment.
In an impassioned dissent, Judge Gabrielli, joined by Judge Cooke, made arguments in favor of upholding the sodomy law which were very much like the arguments Justice White made six years later for the majority in *Bowers*. Gabrielli accused the majority of creating a "wholly new legal concept bearing little resemblance to the familiar principles enunciated in *Griswold v. Connecticut* and its progeny" (p. 495). Not only did the majority fail to create a theoretical framework from which to determine what other actions might be protected by a right of privacy, but they use faulty logic to determine more broadly what constitutes a fundamental right, according to Gabrielli.

By suggesting that the activity proscribed in this case involves a 'fundamental right' simply because it entails no significant danger to health, the majority has created a truly circular constitutional theory and has, in effect, injected an additional level of confusion into this already rather murky area of the law. (p. 498).

In addition, Gabrielli expressed great concern that no limiting principle to determine the scope of what might be done in private is articulated by the majority. As discussed in Chapter 6, the concern with finding a limiting principle would become a major focus of the oral arguments in the *Bowers* case. Like Justice White later did in the *Bowers* decision, Gabrielli looked to history to determine what rights were fundamental, noting the "continuous and unbroken history of anti-sodomy laws in the United States," (p. 503) as well as the ancient European proscriptions against sodomy.

A final similarity between Gabrielli’s dissent and the majority opinion in *Bowers* was the way in which the question was framed. Neither opinion asked whether the right of privacy extended to consensual homosexual activity. Rather, both asked whether the specific act in question was a fundamental right. Whereas Justice White asked whether a
right to "homosexual sodomy" was a fundamental right, Gabrielli asked whether a "generalized right to sexual gratification" was a fundamental right, and found that it was not (p. 503).

Gabrielli concluded his dissent by rejecting the equal protection argument, noting that "marital status has never been recognized as a 'suspect classification,'" and thus the legislature could make a distinction between married and unmarried persons if the law "bears some rational relation to a legitimate governmental interest" (p. 504).

There were no successful challenges to sodomy laws in state courts between the 1980 Onofre case and 1986, when Bowers was decided by the U.S. Supreme Court. After Bowers, of course, state courts could no longer read the U.S. Constitution as prohibiting state sanctions against sodomy. Thus, any successful challenge to state sodomy statutes after 1986 would have to rely on something other than a right to privacy located in the U.S. Constitution.

The New Judicial Federalism and State Sodomy Challenges

In a series of influential articles and lectures in the 1970s and 1980s, William Brennan suggested that the nation's High Court might no longer be the best place to seek protection and expansion of individual liberties. The high hopes created by many Warren Court decisions could no longer be guaranteed with the advent of the more conservative Burger Court. Where, then, should those litigating for individual liberties turn? To their state courts, suggested Brennan. He argued for a revitalization of what has become termed the "new judicial federalism," the notion that state courts are free to interpret their
own state constitutions as offering more protection than the federal Constitution. Thus, if gay advocates wanted to find sodomy statutes unconstitutional, they might have greater success, according to this theory, if they look for, say, a right to privacy in their state constitution rather than the national Constitution. This suggestion took on particular resonance after the Bowers disaster.

The first case which seemed to use Brennan's idea as a model came in 1992 in Commonwealth of Kentucky v. Wasson 842 S.W.2d 487. Saying that Kentucky's sodomy statute violated both privacy rights and equal protection claims, the majority opinion clearly and explicitly asserted that the issues were decided "solely on state constitutional law grounds" (p. 488). The thrust of the argument was that a majority could not impose its moral will on an unpopular minority, unless it could be proved that the actions involved would cause harm to others.

The Wasson case is what I term an "accidental" test case as opposed to a planned test case. That is, defendant Jeffrey Wasson did not set out to break the law with the intention of testing its constitutionality. Rather, Wasson engaged in the prohibited behavior because he desired to do so for its own sake. Interestingly, though the Wasson decision was not handed down until 1992, the facts giving rise to the case occurred in 1985 — the year prior to the Bowers ruling.

Jeffrey Wasson, along with four other men, was charged with soliciting an undercover police officer to engage in "deviate" sexual activities. Kentucky law prohibited "deviate sexual intercourse with another of the same sex" KRS 500.100, and defined "deviate" sex as "any act of sexual gratification involving the sex organs of one
(1) person and the mouth or anus of another” KRS 500.010(1). Police in Lexington had an undercover operation in which they would go to areas known to be gay pickup places. Then, with concealed tape recorders playing, they would engage men in discussions to see whether they would be solicited for sexual contact. Toward the end of a 20-minute taped conversation between Wasson and an undercover officer, Wasson invited the officer to his home. After additional questioning, Wasson suggested sexual activities which were considered “deviate” according to Kentucky law. The conversation suggested that the sexual contact would have been consensual, was to have taken place in the privacy of Wasson’s home, and no money was offered or solicited.

Wasson’s lawyer moved that the trial court both dismiss the charges as being violative of Wasson’s privacy rights, but also asked the judge to hold off until the U.S. Supreme Court handed down its decision in Bowers. The attorney noted the similarities between the Georgia case and the facts in Wasson and, presumably, assumed that the Supreme Court would rule in favor of striking down Georgia’s sodomy statute. When the opposite result materialized, the lawyer filed a second motion to dismiss the case, this time using provisions of the Kentucky Constitution that hinted at a right to privacy, and a right to equal protection before the law. The lawyer also invoked the Eight Amendment of the U.S. Constitution involving protection from cruel and unusual punishment.

49 It is unclear from reading the decision in Commonwealth v. Wasson exactly what behavior was discussed, but the court’s opinion indicated that oral sex was one of those acts.

50 The attorney’s use of the Eighth Amendment was presumably inspired by Justice Powell’s concurring opinion in Bowers. As will be discussed in Chapter 6, part of the reason Powell opted to vote with the majority was because Michael Hardwick had not actually been prosecuted. Had he been prosecuted and

(footnote continued on next page)
trial judge, Lewis Paisley, after hearing witnesses for the defense, dismissed the charges on the constitutional grounds of privacy and equal protection. The appeals judge, Charles M. Tackett, affirmed the dismissal.

The majority opinion of the Supreme Court of Kentucky, which affirmed the ruling of the appellate court, was written in three parts: in the first part, the court emphasized the notion of a dual court system and judicial federalism; in the second part, the court argued why the sodomy statute was in violation of a right to privacy within the Kentucky Constitution; and finally, the court argued that the law was also in conflict with notions of equal protection.

The court detailed the fundamentals of federal system, emphasizing that state constitutions can – and often do – provide greater protection of individual liberties than does the U.S. Constitution.

Contrary to popular belief, the Bill of Rights of the United States Constitution represents neither the primary source nor the maximum guarantee of state constitutional liberty (p. 492).

Quoting from a previous Kentucky case involving establishment of religion issues, the court said:

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received the maximum penalty for sodomy (as much as 20 years in Georgia), Powell’s decision indicated that he might have found such a punishment for sodomy to be “cruel and unusual.”

Seven expert witnesses testified in support of Wasson, ranging from a cultural anthropologist to a sex researcher to a professor of medicine. These expert witnesses provided a range of viewpoints, but all affirming the same type of points: (1) that homosexuality is within the normal range of human sexual activity and has been present in all human societies and (2) that no rational purpose is served by anti-sodomy laws and that the laws may even exacerbate some legislative goals, such as the containment of the spread of AIDS.
We have recognized protection of individual rights greater than the federal floor in a number of cases.... The problem in this case is not whether the challenged statute passes muster under the federal constitution as interpreted by the United States Supreme Court, but whether it satisfies the much more detailed and explicit proscriptions of the Kentucky Constitution.

The court concluded that privacy rights within the Kentucky Constitution were not limited to interpretations of the correlative privacy rights found in the federal Constitution.

[We] hold the guarantees of individual liberty provided in our 1891 Kentucky Constitution offer greater protection of the right of privacy than provided by the Federal constitution as interpreted by the United States Supreme Court.... (p. 491).

Regarding the privacy question, lawyers for the State of Kentucky argued that there was no privacy right violated, because Bowers had settled the issue of privacy in favor of the states, and that the “Kentucky Constitution did not intend to confer any greater right to privacy than was afforded by the U.S. Constitution” (p 490).

The majority of the Kentucky high court, however, said that because the sodomy law was struck down based on state as opposed to federal constitutional provisions, that Bowers was not applicable.

We discuss Bowers in particular, and federal cases in general, not in the process of construing the United States Constitution or federal law, but only where their reasoning is relevant to discussing questions of state law (p. 488).

Like the U.S. Constitution, the Kentucky Constitution nowhere specifically mentions a right to privacy. But the Kentucky court affirmed that such a right was implied by Section 2 of the Kentucky Constitution which reads:
§ 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

The majority listed several decisions in which a right of privacy, found within the Kentucky Constitution, had been used to strike down state legislation. The cases citing privacy went back as far as 1909, but the topics covered by precedent were limited in scope to the private possession of alcohol and tobacco. The logic underlying the Kentucky privacy cases was not unlike that in Stanley v. Georgia, 394 U.S. 557 (1969). That is, private possession and use of something that would be illegal to manufacture or sell in the public sphere was protected by the court when the item was used in the privacy of the home. The privacy right asserted in Stanley was first and foremost a sort of spatial privacy right and only secondarily a right of personal autonomy. Kentucky case precedent lacked the type of personal autonomy definition of privacy necessary to protect sexual behavior, and this was pointed out in the dissenting opinion in Wasson.

[T]he majority must and does rest its entire case on a line of decisions rendered by this Court in the early twentieth century in which a right of privacy was held to exist with respect to the consumption of alcoholic beverages and the use of tobacco products (p. 19).

After finding Kentucky's sodomy statute a violation of the right to privacy as protected by Kentucky's Constitution, the majority also found the law to be incompatible with Section 3 of the state's constitution, which asserts that "all men, when they form a social compact, are equal." The majority dismissed Bowers as irrelevant, because in

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52 Stanley v. Georgia involved the private possession of pornographic materials that were illegal to buy or sell outside the home, but the Supreme Court said that a right of privacy protected individual possession in the home.
Bowers, the Georgia law in question prohibited all acts of sodomy, not just those between homosexuals. Thus, questions arising under the equal protection clause of the Fourteenth Amendment were not considered in Bowers. The Kentucky court did not, however, use the Fourteenth Amendment's equal protection clause, but relied instead on Section 3 of the Kentucky Constitution. In doing so, the Kentucky court seemed to imply that although it would find the sodomy law in violation of the Fourteenth Amendment, it wished to avoid the possibility that the U.S. Supreme Court might find otherwise.

We do not speculate on how the United States Supreme Court as presently constituted will decide whether the sexual preference of homosexuals is entitled to protection under the Equal Protection Clause of the Federal Constitution. We need not speculate as to whether male and/or female homosexuals will be allowed status as a protected class if and when the United States Supreme Court confronts this issue. They are a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky Constitution. All are entitled to equal treatment, unless there is a substantial governmental interest, a rational basis for different treatment.... We have concluded that it is “arbitrary” for the majority to criminalize sexual activity solely on the basis of majoritarian sexual preference, and that it denied “equal” treatment under the law when there is no rational basis, as this term is used and applied in our Kentucky cases.... In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform. (p. 501-502)

Like the New York high court in Onofre, the Kentucky court put much emphasis on the fact that homosexual sodomy is a victimless crime and, just as in the Bonadio case, invoked the writings of John Stuart Mill. It made specific reference to an expert witness, a psychologist, who testified that the sexual acts in question were neither harmful nor

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53 For a discussion of the various definitions and types of privacy, refer to Chapter 2.
pathological, and to a variety of \textit{amicus} briefs filed by numerous medical and social
science groups, attesting to the fact that homosexuality was not abnormal nor harmful.

The majority also rejected the argument that while consensual homosexual acts lack a
particular victim the actions contribute to the overall deterioration of society.

Likewise, the majority forcefully rejected arguments by the state that history
justified proscription of sodomy. Historical arguments for sodomy laws fell short in two
ways, according to the court. First, they found fault with the argument \textit{per se}.

We view the United States Supreme Court decision in \textit{Bowers v. Hardwick}
as a misdirected application of the theory of original intent. To illustrate:
as a theory of majoritarian morality, miscegenation was an offense with
ancient roots. It is highly unlikely that protecting the rights of persons of
different races to copulate was one of the considerations behind the
Fourteenth Amendment. Nevertheless, in \textit{Loving v. Virginia}, 388 U.S. 1
(1967), the United States Supreme Court recognized that a contemporary,
enlightened interpretation of the liberty interest involved in the sexual act
made its punishment constitutionally impermissible (p. 497).

Second, the court argued that the contemporary definition of sodomy – to include acts of
oral sex – was not consistent with a historical justification of sodomy laws. That is, oral
sex was a relatively new addition, and had not always been prohibited.

A significant part of the Commonwealth’s argument rests on the
proposition that homosexual sodomy was punished as an offense at
commmon law, that it has been punished by the state in Kentucky since
1860, predating our Kentucky Constitution.... This, of course, would lend
credence to the historical and traditional basis for punishing acts of
sodomy, but for the fact that “sodomy” as defined at common law and in
this 1860 statute is an offense significantly different from KRS 510.100
[the section of the state code outlawing “deviate” sexual acts], limited to
anal intercourse between men. Unlike the present statute our common law
tradition punished neither oral copulation nor any form of deviate sexual
activity between women.
The victory for the right to privacy was not overwhelming. Just as the outcome of the Bowers decision was the result of a bare majority (a 5-4 decision), so, too, was the outcome in favor of defendant Wasson. Two of the Kentucky Supreme Court’s seven justices\(^{54}\) filed vigorous dissents, and one a concurrence,\(^{55}\) creating a 4-3 split. Taken together, the dissenting opinions are roughly as long as the majority and concurring opinions (about 9,000 words).

The two dissenting opinions made many similar attacks on the majority opinion. Both dissenting opinions said the majority got it wrong on both counts – i.e., that the Kentucky Constitution did not recognize a right to privacy broad enough to include sodomy, and that the majority’s equal protection argument was flawed. Both authors criticized the majority’s dismissal of sodomy’s ancient proscription, and in doing so, both relied heavily upon White’s analysis in Bowers. Both also disagreed that Kentucky precedent supported the kind of privacy right articulated by the majority. Justice Lambert, for example, said the Court’s seemingly heavy reliance upon Kentucky precedent was disingenuous, for two reasons. As mentioned above, Lambert pointed out that the line of privacy cases relied upon by the majority dealt with the private use of alcohol and tobacco, and not with a type of privacy more closely related to personal autonomy. In a second argument against the majority’s use of precedent, Lambert said that precedent, when it related to controversial judicial interpretation of constitutional law, should not be as binding as was precedent in other areas of law, such as judicial

\(^{54}\) Justices Lambert and Wintersheimer each filed separate dissenting opinions.
interpretation of statutes or of the common law. This was so, according to Lambert, because in the latter areas of law, judicial error could be relatively easily corrected by legislatures. But in the area of constitutional interpretation, judicial rulings are the final word unless supermajorities could be organized to amend the constitution. He summarized his argument on this point in the following way:

As the majority relies entirely on the doctrine of *stare decisis*, brief comment on its use in the context of constitutional interpretation is appropriate. When courts construe statutes or principles of common law, error in such construction is subject to correction by the people through their elected representatives. With constitutional interpretation, however, such correction is not possible. As only the highest court of a jurisdiction possesses power to say finally what the constitution means (save the right of the people to amend it), courts have a duty to continually re-examine their prior constitutional interpretations to prevent perpetuation of error. Thus, the doctrine of *stare decisis* lacks the vigor in the arena of constitutional law that it possesses in other fields (p. 503).

What to rely on then for guidance when interpreting a constitution? The text itself, according to Lambert – thus in this case, the Kentucky Constitution. The majority relied on an overly broad interpretation of precedent – precedent that itself was questionable in nature.

Perhaps the greatest mischief to be found in the majority opinion is in its discovery of a constitutional right which lacks any textual support... The fact that this Court broadly declared a right of privacy prior to World War I in cases which one suspects were influenced by local economic forces does not mean that such a doctrine should be applied in the extreme nearly a century later to a moral question not remotely considered by the [Court at that time] (p. 505).

Both dissenting opinions implied that not only is the privacy right articulated by the majority an inaccurate interpretation of the Kentucky Constitution, both dissents also

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55 Chief Justice Stephens joined with Lambert.
hinted that the privacy right put forth by the U.S. Supreme Court in *Griswold v. Connecticut* was also questionable. Justice Winters put this sentiment most strongly when he wrote that "'Emanations and penumbras' are more suited to a seance or a psychic experience rather than to a judicial opinion at any level in any court" (p. 512).  

Both dissenting opinions attacked the majority’s liberal use of the philosophy of John Stuart Mill. Both dissenting opinions also explicitly accused the majority of judicial activism. And both dissenting opinions criticized the majority’s interpretation and use of judicial federalism, saying that the majority’s dismissal of *Bowers* was illogical and that judicial federalism was little more than intellectual cover for the majority to fashion the kind of social policy it wanted.

Like the *Bowers* case, the result reached by both the majority and dissenters in the Kentucky Supreme Court depended in large part on the framing of the question. Both dissenters in the Kentucky case argued that the majority had framed the question wrong, but here the similarities of the two dissenters stop, for they each saw the error the majority made in the framing of the question in a different way. For Justice Lambert, the question should not have been: Do the citizens of Kentucky have a right to engage in sodomy? Rather, Lambert argued that the appropriate question before the court should have been whether the Kentucky Constitution denied the legislature the right to prohibit certain conduct.

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56 As will be discussed in detail in the next chapter, the Court, in *Griswold*, said that though the U.S. Constitution did not specifically mention a right to privacy that a privacy right was implied in the "penumbras" or shadows of the Constitution. "[S]pecific guarantees ... have penumbras, formed by emanations from those guarantees that help give them life and substance" (p. 484).
The issue here is not whether private homosexual conduct should be allowed or prohibited. The only question properly before this Court is whether the Constitution of Kentucky denies the legislative branch a right to prohibit such conduct. Nothing in the majority opinion demonstrates such a limitation on legislative prerogative (p. 503).

Justice Wintersheimer reframed the question differently. For him, the judicial activism of the majority lay not only in their extension of the right to privacy, but in their very framing of the question. In the very first sentence of his dissent, Wintersheimer pointed out that in the context of the case before the court, the actual law in question would be one prohibiting solicitation, and not sodomy. The proposition for the sexual act was made in public, he argued, and couldn’t therefore be defended by a right to privacy – a right which he did not find in the Kentucky Constitution at any rate.

The majority opinion ... totally misstates the case and proceeds to attack a statute that is not the direct subject of the criminal charge originally made in this case. The majority opinion asserts that this is a case about privacy and yet it completely ignores that the criminal act for which the defendant was charged was a proposition made to a total stranger on a public street in downtown Lexington, Kentucky. Under such circumstances, there is no reasonable expectation of privacy.... Solicitation to commit any crime on a public street ... is simply not a private matter (p. 509).

Wintersheimer then accused the majority of dropping the solicitation issue not for reasons of Justiciability, but to achieve its own political agenda of working its way toward creating a right to privacy.

The majority opinion quickly departs from the solicitation aspect of the case, claiming it was not preserved, to something it prefers, the privacy issue, which it invented especially for the case (p. 509).

After an extended attack on both the right of privacy the majority found in the Kentucky Constitution, as well as the federal privacy right articulated in such cases as
Griswold, Wintersheimer turned to the equal protection issue. He wrote that the equal protection logic used by the majority was suspect, because it relied, in part, on the writings of Professor Lawrence H. Tribe from his *American Constitutional Law*.

“Professor Tribe’s objectivity is doubtful since he represented respondent Hardwick in the Supreme Court of the United States. No doubt, Tribe’s argument quoted in the majority opinion was made in the Supreme Court and rejected” (p. 510, note 5).57

At the end of his dissent, Wintersheimer virtually turned the privacy issue on its head by returning to his original point that the aspect involved in the *Wasson* case was solicitation rather than privacy. He made the argument that the solicitation of a private sexual act on a public street was a violation of the privacy of the individual being solicited.

Privacy is an issue full of emotion. There is nothing that makes any person angrier than the suspicion that somebody is looking over their shoulder or peering into their private affairs. Every citizen feels vulnerable and ineffectual when our right to privacy is violated.... Clearly every individual has an absolute right to be left alone from the public solicitation to engage in sodomy (p. 518) (emphasis added).

Thus, Wintersheimer introduced a novel and rather clever idea by accusing the majority of violating the privacy rights of society by allowing solicitation of sodomy on public streets. “Privacy is a marvelous concept,” he wrote, “but it has been totally distorted by the majority opinion. It is ironic that the ... majority blithely tramples on the rights of the majority of the public” (p. 510).

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57 Just as a note of interest, in oral arguments before the Supreme Court, Tribe did not introduce his test for who and who does not make up a suspect classification, as the equal protection clause was not at issue in *Bowers*. 
The *Wasson* case was important for two reasons. First, it was the first case in which a state court squarely used its own constitution to strike down a sodomy law. And second, it was the first court to say that homosexuals made up a suspect classification which triggered strict scrutiny by the court when their rights were infringed upon by the legislature. The majority seemed to enthusiastically adopt the arguments of the Wasson’s lawyers, by highlighting the testimony of all seven of the expert witnesses who testified on his behalf, and by their liberal reference to the many *amicus curiae* briefs filed in the case. In spite of this, the *Wasson* decision was viewed with cautious optimism as a victory for gay rights. As a note in the *Harvard Law Review* (1993) pointed out shortly after *Wasson* was handed down, the majority opinion lacked the clarity and substance to serve as a strong model for litigators in other states. The article concluded that the importance of *Wasson* might lie more in its ability to inspire rather than to be used as a model.

The next two states in which sodomy statutes were struck down by the state’s high courts were Tennessee (1996) and Montana (1997). The Tennessee and Montana cases are similar in that they both were planned test cases. In both cases, small groups of gay and lesbian individuals used state enabling statutes to file motions that the sodomy laws in their respective states were unconstitutional. In both cases, lawyers for the states vigorously fought the motions on issues of standing. Both states also defended their sodomy statutes on the basis of protecting the public’s health and morals. But in each case, the state’s high court found that those challenging the sodomy statutes did have standing, and that the sodomy laws violated their right to privacy as found in their state
constitutions. And both courts made liberal references to the Kentucky case, as well as the New York and Pennsylvania cases.

There is, however, one significant point of difference in the two otherwise similar cases: the Tennessee Constitution, like the other constitutions discussed so far, had no specific reference to privacy. The Montana Constitution, in contrast, did have an explicit privacy right articulated, which will be discussed below.

The Tennessee case is important for it was the first case in which a formal test case successfully challenged a state sodomy law. In the Tennessee case, *Campbell v. Sundquist* 926 S.W. 2d 250 (1996), five gay and lesbian individuals challenged the constitutionality of Tennessee’s Homosexual Practices Act (HPA). The law made it a misdemeanor “for any person to engage in consensual sexual penetration ... with a person of the same gender” T.C.A. § 39-13-510 (1991). Sexual penetration “means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body, but emission of semen is not required....” T.C.A. § 39-13-501(7) (1991). The plaintiffs all said that they regularly violated the HPA, and feared prosecution and the possible ramifications from prosecution, such as loss of jobs or housing.

As noted above, issues of standing have often been an obstacle in successfully challenging sodomy statutes, and this was certainly true of the Tennessee case. Issues of standing are particularly complicated when litigants seek to have a statute declared unconstitutional without having been prosecuted or having suffered in some way from the
law. Indeed, the Tennessee court devoted nearly one-third of its 18-page opinion to issues of justiciability. The plaintiffs used a Tennessee enabling law — the Declaratory Judgment Act — to file a petition for declaratory and injunctive relief from the court, saying that the law violated their privacy rights under the Tennessee Constitution. In response, the state said that the case should be dismissed, since not any of the petitioners had actually been arrested or prosecuted under the act, and that prosecutions of private, consensual sexual activity between adults was rarely prosecuted in any case, thus making the claim of the petitioners purely hypothetical. The plaintiffs, however, argued that because they were homosexuals, the law was a latent threat to them, and this threat was an injury "not common to the body of citizenry" (p. 255). The trial court granted standing, and the majority in the appellate decision agreed with them.

We think the plaintiffs’ status as homosexuals confers upon them an interest distinct from that of the general public with respect to the HPA, and that they are therefore entitled to maintain an action under the Declaratory Judgment Act even though none of them have been prosecuted under the HPA (p. 256).

After dealing with the justiciability issues, the Tennessee court next launched into the by-now familiar drill regarding judicial federalism, arguing that the rights under the Tennessee Constitution were not necessarily identical to rights protected by the U.S. Constitution, and that Tennessee could and often did provide more expansive rights.

Both the Tennessee Constitution and this State’s constitutional jurisprudence establish that the right to privacy provided to Tennesseans under our Constitution is in fact more extensive than the corresponding right to privacy provided by the Federal Constitution.... We think it is consistent with this State’s Constitution and constitutional jurisprudence to hold that an adult’s right to engage in consensual and noncommercial sexual activities in the privacy of that adult’s home is a matter of intimate personal concern which is at the heart of Tennessee’s protection of the
right to privacy, and that this right should not be diminished or afforded less constitutional protection when the adults engaging in that private activity are of the same gender (p. 262).

In comparison to some of the other states reviewed earlier in this section, privacy doctrine in Tennessee was relatively new and underdeveloped when the court reviewed *Campbell*. Indeed, the first express recognition of a Tennessee privacy right came just four years prior, in 1992, in *Davis v. Davis* 842 S.W.2d 588. In that case, a couple with fertility problems had had test-tube embryos created and frozen to be implanted in Mary Davis’s uterus at some future date. In the meantime, the marriage disintegrated into divorce. Some time after the divorce, Mrs. Davis tried to give the embryos to a childless couple. Junior Davis sought to stop the donation of the embryos, saying that if the embryos were donated and successfully implanted and brought to term, it would force him to become a father against his will. The Tennessee Supreme Court ruled that a right to privacy grounded in the Tennessee Constitution offered a protection broad enough to encompass the right *not* to procreate. In finding a privacy protection in the Tennessee Constitution, the court used a method similar to Justice Douglas in *Griswold*. That is, the court said that a right of privacy is implied in several parts of the Tennessee Constitution.

The right to privacy, or personal autonomy ("the right to be let alone"), while not mentioned explicitly in our state constitution, is nevertheless reflected in several sections of the Tennessee Declaration of Rights, including provisions in Section 3 guaranteeing freedom of worship ("no human authority can, in any case whatever, control or interfere with the rights of conscience"); those in Section 7 prohibiting unreasonable searches and seizures ("the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures"); those in Section 19 guaranteeing freedom of speech and press ("free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizens may freely speak, write, and print on any subject, being responsible for the abuse of that liberty"); and the provisions in
Section 27 regulating the quartering of soldiers ("no soldier shall, in time of peace, be quartered in any house without the consent of the owner") (Davis 1992, 601).

Additionally, the Tennessee Constitution has a "law of the land" provision, in Article I, Section 8, that functions roughly like the due process of the Fifth and Fourteenth amendments of the federal Constitution.

No man to be disturbed but by law – That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

The Tennessee court’s analysis is unique in that it declared the HPA was unconstitutional because it is overly broad in scope, forbidding sexual contact in the privacy of the home. In this way, the Tennessee court emphasized the spatial aspect of privacy rather than the personal autonomy aspect of privacy. It is unclear why the Tennessee court chose this route, especially when the precedent in Davis was so much more of a personal autonomy approach. Other courts, such as the Kentucky court in Wasson or the Pennsylvania court in Bonadio did not have the luxury of emphasizing the home, for the acts in those cases either occurred or were agreed to in public.

After declaring privacy a fundamental right protected by the Tennessee Constitution, the court then explicitly invoked a strict scrutiny analysis to examine the justifications offered by the state for the HPA. The state offered five justifications: to discourage non-procreative activities; to discourage the choice of a homosexual lifestyle, which is stigmatized by society and thus leads to higher rates of suicide, depression and substance abuse; to discourage short-lived, shallow sexual encounters, which will weaken the overall fabric of society; to prevent the spread of disease; and to promote the moral
values of Tennessee citizens. The court dismissed all five justifications, arguing that they are either not compelling, or were overly broad.

Though the Tennessee court did not directly invoke Millsian philosophy as a justification for its decision, it did approvingly point to the Kentucky court’s decision in *Wasson*, which, as mentioned above, did rely substantially on the philosophy of John Stuart Mill. “The [Kentucky] court concluded that the will of the majority could not be imposed upon the minority absent some showing of harmful consequences created by the actions of the minority,” (p. 265) the Tennessee court said.

**An Explicit Right To Privacy**

A formal test case having finally been successful in striking down a state sodomy statute, the way was in some sense made easier when a similar strategy was employed a year later in Montana. In *Gryczan v. State*, 942 P.2d 112 (1997), three men and three women claiming to be homosexual, filed a complaint challenging the constitutionality of Montana’s Deviate Sexual Conduct law, saying that it violated the privacy provisions of the Montana Constitution as well as the due process clause of the Fourteenth Amendment of the U.S. Constitution.

In addition to having the Tennessee case as precedent, the fact that the Montana Constitution has an explicit reference to privacy would seem to make striking down a sodomy statute in that state all the easier and more clear cut. As the Montana case illustrated, however, an explicitly articulated right to privacy was not the panacea that might have been expected. The Montana high court still had to determine just what the
privacy provision was intended to protect. Nor was the pressure to limit the scope of privacy presented only by the state. Indeed, the court itself had enunciated a limiting doctrine in a 1991 case which the state used in *Gryczan* to limit the definition of privacy.

The Deviate Sexual Conduct law in Montana (§ 45-5-505, MCA) prohibited “sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal” (§ 45-2-101(20) MCA). “Sexual contact” was defined as “any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party” (§ 45-2-101(65) MCA). “Sexual intercourse” was defined as “penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by any body member of another person, or penetration of the vulva or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient” (§ 45-2-101 (66) MCA).58

Like the Tennessee case, the Montana litigants brought the challenge under an enabling statute, the Uniform Declaratory Judgments Act (Title 27, Chapter 8 of the Montana Code). They said that though they had never been prosecuted under the statute, the mere existence of the law had injured them. They explicitly stated that the nature of

58 Originally, Montana had a “crimes against nature” law. This was replaced by the Deviate Sexual Conduct law in 1973, and in 1981 the law was amended to add a $50,000 fine. Two more amendments were made to the law in 1991: a subsection specifying a greater penalty when the law was nonconsensual was deleted, and a section was added which did not allow information related to HIV treatment or testing to be used in prosecution. Attempts to decriminalize the private acts in question in 1991, 1993 and 1995 were defeated in the legislature (p. 116).
the injury was emotional, that the law caused damage to their self-esteem and dignity, and fear of loss of their jobs or custody of their children.

Predictably, the state contended that the litigants did not have standing because the law was so rarely enforced and because none of those presenting the challenge had been prosecuted under the law. In reviewing justiciability doctrines, the Montana court said that actual prosecutions were not the only means of assessing the viability of a law. The fact that the law at the time of the challenge was only 24 years old and that it had been revised as recently as 1991 indicated an active interest in the law on the part of the legislature. Thus, fear of prosecution was not wholly imaginative.

When addressing the claim of emotional injury, the court actually went further than the individuals themselves who brought the claim, saying not only do the respondents suffer the psychological stress associated with not being able to fulfill their sexual desires, but that laws targeting homosexuals created a more violent atmosphere in society at large.

The psychological injuries suffered by Respondents stem from the repression of their desires for sexual expression and from deprivation of their personal autonomy. In addition, there is evidence to show that there is a correlation between homosexual sodomy laws and homophobic violence. The National Institute for Justice has concluded that gays are the most frequent victims of hate violence today. Thus, homosexuals in Montana live not only with the psychological impact of the fear of prosecution under the statute but the fear that violence may be directed at them because they are seen as criminals (p. 446).

Having established standing, the court then reviewed federal privacy jurisprudence. Interestingly, in addition to the usual line of privacy cases cited, the Montana high court followed the lead of the lower court which first heard the case --
Montana District Court -- in which special attention was given to the Supreme Court's
decision in *Katz v. United States*, 389 U.S. 347 (1967), particularly the concurring
opinion by Justice Harlan which summarized the rules surrounding expectations of
privacy in the context of a search. Although the *Katz* opinion had been cited in passing
in other state sodomy cases, the Montana trial court was the first to draw upon the rule
enunciated there. The rule enunciated in *Katz* set out some of the guidelines for when a
warrant was a necessary prerequisite of a search. The two-part test said a warrant was
required if (1) the individual involved has an expectation of privacy, and (2) if the
expectation would be considered reasonable by society at large. The Montana trial court
adopted this test to help it determine the meaning and scope of privacy by saying that
there was an expectation of privacy with regard to private intimate relations. The
Montana court ended its discussion of federal privacy cases with a paragraph on the
*Bowers* decision, noting that the Supreme Court had not protected the kind of activity
sought by the litigants in *Gryczan*.

    Hinting that it disagreed with the reasoning in *Bowers*, the Montana court
shrugged off the limits of *Bowers* by declaring the privacy protection within the Montana
Constitution to be more expansive than that under the federal Constitution. “Regardless

59 Though *Katz v. U.S.* is an important and oft-cited case in Fourth Amendment jurisprudence, it has not
generally been given much attention in the context of privacy cases which seek a right of personal
autonomy. The *Katz* decision, which overruled *Olmstead v. United States*, is generally associated with
privacy in the spatial sense, setting out some of the parameters of when a warrantless search is permissible
under the Fourth Amendment. In *Katz*, the Supreme Court ruled that placing a bug on a public phone booth
without a warrant was a violation of the Fourth Amendment’s protection against unreasonable searches.
The two-prong test enunciated by Harlan in *Katz* said that a warrant was a necessary prerequisite of a
search if (1) the person involved has an expectation of privacy, and (2) the expectation would be
recognized as reasonable by society.
of whether *Bowers* was correctly decided, we have long held that Montana’s Constitution affords citizens broader protection of their right to privacy than does the federal Constitution” (p. 121).

As mentioned above, the Montana Constitution – unlike the federal Constitution and the constitutions of the states discussed thus far – explicitly mentions a right to privacy in Article II, Section 10:

Right of privacy. The right of individual privacy is essential to the well being of a free society and shall not be infringed without the showing of a compelling state interest.

Thus, unlike the courts before it in Kentucky and Tennessee – which have no explicit constitutional guarantees of privacy – the Montana Court did not have to jump through the usual hoops of teasing out a right to privacy from other parts of the state constitution. But even the direct assertion of a privacy right in the Montana Constitution did not necessarily grant protection to sexual behavior. Although the Montana Constitution promised a right to privacy, it did not define just how broad that right to privacy was, or what behavior it was intended to protect. Thus the Montana court had to contend with the assertion of the state that the right to privacy in the Montana Constitution was analogous to the right of privacy developed in federal jurisprudence, and offered no greater protection. Thus, the level of privacy protection expressed in the *Bowers* decision would be binding on Montana, argued lawyers for the state.

The ambiguity surrounding a definition of privacy – even when the term privacy is explicitly used – was why the trial court looked to *Katz* for guidance. The trial court implied that one test of what is covered would be those things for which the average,
reasonable person would expect a right to privacy. And the court squarely placed intimate sexual relations among those expectations. The court went on to say that though a society might not approve of the particular sexual activities of another, that was not to say that society would be unwilling to recognize that individuals have a reasonable expectation to assume that their personal sex lives would remain outside the scrutiny of the state. The state, however, claimed that Katz was not the appropriate test. Instead, the state contended that the more appropriate analysis could be derived from Palko v. Connecticut 302 U.S. 319 (1937). That is, to determine which privacy rights are fundamental and thus limit the police power of the state, the state argued that the question should be if the statute in question violated "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (Palko, p. 328). The Palko analysis was not invoked out of thin air. The state relied in part on White's opinion in Bowers, but also relied on an earlier Montana case, in which the Montana Supreme Court had used Palko-derived analysis to find the limits of privacy protection offered by the Montana Constitution.

In Town of Ennis v. Stewart, 247 Mont. 355 (1991), several property owners had attempted to use the privacy provision of the Montana Constitution to keep from being forced to hook up their homes to a city water system. Prior to the city water system being constructed, homeowners in Ennis had used wells from their private property. They were

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60 Palko involved the question of whether the Fifth Amendment's prohibition against double jeopardy should be held applicable to the states as part of the Fourteenth Amendment's due process clause. Justice Cardozo developed the "fundamental fairness" test to determine which rights were so important that they ought to apply to the states.
reluctant to tap into the city water supplies as there was a substantial up-front hook-up fee as well as monthly water charges. They mounted an argument that they had a privacy right to use the wells on their private property. In answer, the Montana Supreme Court had looked to federal privacy jurisprudence, and used a modified Palko test to determine which privacy rights were fundamental or implicit in the concept of ordered liberty (Ennis, 807 P.2d at 182). The court decided that the rights that the homeowners claimed had been violated were not of "constitutional magnitude," and thus the Town did not need to demonstrate a compelling interest, but only needed to show a rational relationship between the ordinance and the achievement of a legitimate government interest.

The Montana Supreme Court dismissed the Ennis precedent by saying that while the kind of rights sought by the homeowners had not been of constitutional magnitude, certainly the rights sought by the litigants in Gryczan were. The court then asserted that the kind of privacy in the Montana Constitution was a type that

...explicitly protects individual or personal-autonomy privacy as a fundamental right.... It is hard to imagine any activity that adults would consider more fundamental, more private, and thus, more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity (p. 450).

The court asserted that the right of privacy involved in the Gryczan case would pass either the Katz or the Palko test, and was thus a fundamental right. The court next considered whether the state had a compelling interest to regulate same-sex activity. The state offered two justifications: protecting public health by preventing the spread of HIV, and protecting public morals. Citing the data compiled by the Centers for Disease
Control and by the Montana Public Health Association, the court concluded that the law had failed at decreasing the spread of HIV.

Regarding the contention that the law furthered the protection of public morals, the court recognized the authority of the state to make laws which often reflected the morality of the majority, but added that “its ability to regulate morals and enact laws reflecting moral choices is not without limits” (p. 454). The court then quoted a passage from the Tennessee case (which the Tennessee court borrowed from Pennsylvania’s *Bonadio* case) in which a Millsian philosophy was advanced. That is, that a majority will should not be used to prohibit conduct that did not harm others.

In an accompanying opinion in which he concurred in part and dissented in part, Chief Justice Turnage agreed that the Montana Deviate Sexual Conduct act was unconstitutional, but that he “would base that determination on violation of constitutional guarantees of equal protection under the Fourteenth Amendment to the United States Constitution,” as well as the equal protection provision in Montana’s constitution (Article II, Section 4). Citing other cases, such as Kentucky’s *Wasson*, Turnage found ample evidence that the classification of Montana’s sodomy law – prohibiting the behavior for same-sex individuals but not for heterosexuals – had no rational basis and is thus unconstitutional. “To be treated equally under the law is a far broader constitutional right, together with the right of due process, than any other constitutional guarantee in either the federal or state constitution” (p. 457).

Why the emphasis on equal protection rather than a right of privacy, especially when privacy is explicitly mentioned in the Montana Constitution? Turnage invoked a
slippery slope argument, saying that as decided by the majority, the case would allow all sorts of challenges of other so-called victimless crime laws.

The opinion of the majority, I submit, is an open-door invitation to challenges of legislative enactments by the people of Montana, through their constitutionally-empowered legislature, prohibiting conduct that they believe to be destructive to Montana’s society as a whole. There are many such statutes on the books that not only have a rational basis but are very important to the people of Montana.

I submit that this Court should not be surprised if one of the first challenges under the theory espoused by the majority in this case will be to [the law] which provides severe criminal sanctions for a person who purposely aids or solicits another to commit suicide. The majority opinion cites with approval the District Court’s statement that “a person’s decision as to sexual matters is probably one of the most private areas of a person’s life.” This statement is correct. However, there is something in the lives of people equally private and more important – the right to life or death (p. 458). Finally, in perhaps the most symbolically important case to date, the Georgia high court invalidated the state anti-sodomy statute using privacy protections found within the Georgia Constitution -- symbolically important because Georgia was the state which gave rise to the Bowers case.

**Georgia’s Sodomy Law**

Georgia was one of four states\(^{61}\) which did not have a criminal statute regarding sodomy in 1791. However, sodomy in Georgia, as well as the other states lacking criminal statutes on sodomy, was considered a common law crime.\(^{62}\) Georgia enacted its

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\(^{61}\) The other three states were Maryland, New Jersey and Virginia.

\(^{62}\) The Georgia General Assembly adopted the common law of England as the law of Georgia in 1784 (*Bowers v. Hardwick*, note 5).
first sodomy statute in 1816. The version challenged by Michael Hardwick in 1986 was enacted in 1833. "Sodomy consists of performing or submitting to any sexual act involving the sex organs of one person and the mouth or anus of another. It is a felony" GA. CODE ANN. § 16-6-2.

As in other instances discussed above, the case which finally dealt the death blow to Georgia’s sodomy law came from a factual scenario that is hardly laudable. Anthony San Juan Powell was charged with rape and aggravated sodomy of his wife’s 17-year-old niece. The charges stemmed from accusations by the niece that Powell forced her to have sex with him, and also performed an act of cunnilingus with her against her will. Powell admitted to the sex acts, but said they had been consensual. The judge informed the jury about Georgia’s sodomy statute. This meant that if the jury found that the state did not prove beyond a reasonable doubt that the acts had been forced, it could still find Powell guilty of the lesser offense of sodomy – which is exactly what happened. The jury acquitted Powell of the rape and aggravated sodomy charges, but found him guilty of sodomy. Powell appealed his conviction, saying that the law was a violation of his privacy under the Georgia Constitution.

What made Powell v. State, 510 S.E.2d 18 (1998), different from Bowers v. Hardwick? First, and most importantly, Powell contended that the statute violated his right to privacy under the Georgia Constitution as opposed to the U.S. Constitution. Second, in terms of justiciability, Powell had the advantage of having been prosecuted and convicted under the statute. And third, because there had been prosecution and
conviction by the state, the case could be appealed to the state high court, rather than
taking the route of the federal courts, as Hardwick had been forced to do.

No doubt aware of the shadow of *Bowers*, at the outset the majority of the
Georgia Supreme Court in *Powell* contended with that notorious precedent.

Privacy rights protected by the U.S. Constitution are not at issue in this
case. Thus, not applicable to this discussion [is] *Bowers v. Hardwick*,
where the U.S. Supreme Court ruled that the right of privacy protected by
the U.S. Constitution did not insulate private sexual conduct between
consenting homosexual adults from state proscription because the U.S.
Constitution did not “extend a fundamental right to homosexuals to
engage in acts of consensual sodomy” (p. 329).

Having dismissed *Bowers*, the *Powell* opinion was somewhat unusual as it offered
no additional discussion of federal privacy, save one additional footnote in which the
now-obligatory rhetoric was recited regarding judicial federalism and the authority of
states to interpret their own constitutions as providing greater protection than the federal
Constitution (see footnote 3, p. 331). As noted above, even cases in which sodomy laws
were struck down using state privacy provisions, such as in Kentucky, Tennessee and
Montana, substantial discussions of federal privacy jurisprudence were provided. A
decision not to further discuss federal privacy law might have been an attempt on the part
of the Georgia court to distance itself from *Bowers*, and more squarely strike down the
law under state privacy provisions.

After noting that “The right of privacy has a long and distinguished history in
Georgia” (p. 329), the majority opinion reviewed Georgia privacy precedent, beginning
with the 1905 decision in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, which was
discussed in detail in the previous chapter. The court recited the Georgia cases touching
on the right of privacy, then began citing the cases, discussed in the previous pages, in which other state courts had recognized a right to privacy robust enough to strike state sodomy laws, noting that “Georgia is not alone in providing its citizens with a broader right of privacy than that provided by the federal Constitution” (p. 331).

What, however, was the scope of privacy protected under the Georgia Constitution? The majority teased out a criteria from Pavesich and its progeny that was something of a cross between the Katz test (discussed above) and the Millsian harm principle espoused by so many other state courts. Pavesich, wrote the court, recognized that the “‘right of personal liberty’ ... embraced ‘the right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law’” (p. 329). The Powell majority cited another sentence from the Pavesich decision which strongly smacked of Mill’s harm principle. “‘Liberty’ includes ‘the right to live as one will, so long as that will does not interfere with the rights of another or of the public’” (p. 329). Thus, the majority concluded that

We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity (p. 332).

Though the court did not formally spell out a test to determine the scope of the privacy protection, it seemed to simply suggest that privacy included those things which one does privately, unless those actions caused harm to others.

Having determined that the right claimed by Powell was a “fundamental right,” the court then asked if the state has a compelling purpose for the sodomy law. The state advanced only one purpose for the legislation: to protect the public’s morality. Drawing
heavily on the conclusions reached in the Tennessee, Kentucky and Pennsylvania cases regarding protection of public morals falling short as a compelling reason for state regulation of private, consensual sexual activity, the Georgia court concluded that while it was certainly within the realm of a state’s police powers to protect the public morals, such a purpose was not compelling enough to justify abridgement of a fundamental right. “We agree with our fellow jurists that legislative enactments setting ‘social morality’ are not exempt from judicial review testing their constitutional mettle” (p. 336).

In a particularly caustic dissent, Justice Carley advanced arguments much like the majority opinion in Bowers. Additionally, Carley claimed that the majority had misinterpreted Pavesich, purposefully ignoring that part of the 1905 decision which discussed the limits of privacy.

In its haste to confer upon Powell a constitutionally protected right to engage in private consensual acts of sodomy, the majority simply seizes upon Pavesich’s general recognition of the guarantee of “liberty” afforded to Georgia citizens under the state constitution, while choosing to ignore completely Pavesich’s equally important recognition of the principle that Georgia citizens also have the responsibility to comply with this state’s criminal law.

Like his dissenting colleague in the Montana case, Carley worried that a privacy right would create a potential slippery slope.

Moreover, the majority does not purport to limit to sexual offenses the application of its new found authority to declare this state’s criminal statutes unconstitutional. By equating the general constitutional guarantee of “liberty” to all Georgia citizens with the right of each individual to engage in self-indulgent but self-contained acts of permissiveness, it appears that the majority has now called into constitutional question any criminal statute which proscribes an act that, at least to the satisfaction of a majority of this Court, does not cause sufficient harm to anyone other than the actual participants. Thus, to give but one example, the
constitutionality of criminal laws which forbid the possession and use of certain drugs has suddenly become questionable (p. 342).

With regard to private sexual acts, Carley accused the majority of distinguishing between private acts of sodomy and other acts that it says it said the state could continue to proscribe — such as incest — by simple fiat.

The only conclusion to be drawn is that the majority simply has decided that legislative proscription of the right of adults to engage in consensual sodomy is now politically incorrect and unconstitutional, but that it still is politically correct and constitutional for the General Assembly to prohibit adult relatives from engaging in consensual sexual intercourse (p. 342).

Taking the slippery slope to the extreme, Carley wrote that

The majority opinion will have anomalous results. For example, it remains criminal for a father and his adult daughter or stepdaughter to engage in consensual sexual intercourse, but they may now lawfully perform consensual acts of anal and oral sodomy (p. 342).

In the time since the Georgia decision was handed down in November of 1998, one additional state, Louisiana, is poised to strike down its 1805 “crimes against nature” statute. At the time of this writing, a Louisiana appellate court has declared Louisiana’s sodomy statute an unconstitutional violation of the privacy protection afforded by the state constitution. Interestingly, Louisiana’s Attorney General (Richard Leyoub), though given adequate notice of State v. Smith, did not file an amicus brief outlining the state’s objections to overruling the statute. Although newspaper accounts have quoted sources

63 According to Louisiana Revised Statute 14:89 A (1), a crime against nature is “the unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S:14:41, 14:42, 14:42.1 or 14:43. Emission is not necessary; and when committed by a human being with another, the use of genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.” Sodomy is prohibited separately under LRS 14:41.
that indicate the case will be challenged in Louisiana’s Supreme Court, the seeming lack of interest in fighting the appellate court’s ruling may signal approval of overturning the statute – though the attorney general has refused to comment.

Once again, the facts giving rise to the Louisiana challenge are hardly what the gay rights advocacy lawyer is looking for. In this case, Mitchell E. Smith was charged and prosecuted for one count of rape and one count of aggravated crime against nature of Yvonne Lauro.

According to the record as summarized in the appellate opinion, Lauro and Smith met one afternoon in 1995 at a bar, “Brewski’s Lounge,” where they were sitting near one another and began chatting. After some conversation and at least one drink, they left together to go to another bar, and from there went to a motel. To this point, the testimony of Lauro and Smith are similar, but diverge from here. Lauro said that she had been feeling poorly, probably as the result of drinking in combination with the medication she took for epilepsy (which she said caused her to become intoxicated more quickly). She admitted that she did agree to go to the motel, but only because Smith promised that there would be no sexual relations of any kind. Once at the motel, Lauro said that Smith took off his clothes. Over her protests, she said he forced her to have oral, anal and vaginal sex with him, after which he drove her home. Lauro went straight to her room, claiming she did not want to be lectured by her mother. The next day, Lauro called both the police and her boyfriend and told them about the incident. She told them both that she had been forced to go to the motel because she was afraid her boyfriend would be angry and break up with her if she admitted she’d been out drinking and flirting with other men. She told
police the same story so her boyfriend wouldn’t find out she’d lied to him. It wasn’t until she was later presented with the testimony of a waitress who’d seen Lauro and Smith leave to go to the motel – in what looked like to her a friendly and voluntary manner – that Lauro admitted she’d willingly agreed to go to the motel.

According to Smith’s account, Lauro had agreed to go to the motel to “fool around.” He also denied that she’d protested or claimed rape, and said that she stopped him only to ask if he had a condom. When he told her he didn’t, she said she didn’t think she could “go through with this,” and instead she performed an act of oral sex on him, which he accepted.

At a bench trial (Smith had waived his right to a jury trial), the court found Lauro to be an unreliable witness and that Smith was not guilty of rape. However, since both Smith and Lauro stated that oral sex had occurred, the court found Smith guilty of a “crime against nature.” The court sentenced him the three years, suspended the sentence, and then placed him on two years active probation and ordered him to pay various fines.

Smith appealed the case, claiming that the law was unconstitutional because of its vagueness, its overbreadth, and because it violated the right to privacy. The Louisiana appellate court considered the charges of vagueness and overbreadth, but dismissed them in light of the overwhelming number of cases in which crimes against nature laws had withstood such claims, both in Louisiana and elsewhere.

Similar to Montana, Louisiana’s Constitution had an explicit privacy provision in Article I, Section 5, which provided that “every individual shall be secure in his person against unreasonable invasions of privacy.” The court noted that Louisiana’s crimes
against nature law had been challenged once before on federal privacy grounds (*State v. McCoy*, 337 So. 2d 192 (1976), but the court had rejected the challenge. The court added, however, that no mention of the state constitution or state privacy provisions had been mentioned in the earlier case. Without much further ado or justification, the court announced that "There can be no doubt that the right of consenting adults to engage in private non-commercial sexual activity, free from governmental interference, is protected by the privacy clause of the Louisiana Constitution" (p. 653). The court then asked if there might be a compelling state interest in burdening the right to privacy. Calling special attention to the fact that the attorney general did not file an *amicus* brief, the court drew upon the justifications used by other states, such as Georgia, Tennessee and Kentucky. The court then made quick work of dismissing the state justifications, generally using the logic employed by each respective state court.

The queer career of state sodomy statutes is by no means over. Although states which no longer have active anti-sodomy statutes now outnumber those which do, several states still retain criminal prohibitions against sodomy. The following chapter discusses the federal so-called privacy cases.
CHAPTER 4
CONSTITUTIONAL PRIVACY PART 1:
FROM SHORT-HAND TO SUBSTANCE

After the Supreme Court issued its decision in *Bowers v. Hardwick*, newspapers across the land proclaimed the sudden death of privacy in the United States.¹ Not only was privacy dead, but the bulk of Court observers seemed surprised and alarmed by the demise of such a robust legal concept. “[T]he Court broke sharply with decades of decisions that appeared to enshrine privacy as a fundamental constitutional value.”² “What’s the state doing in our bedrooms?” asked one headline,³ while another paper warned that “many citizens are very nervous. The Court’s ruling has not only worried homosexuals, but has scared the pants off heterosexuals as well.”⁴

Could the Supreme Court possibly be so homophobic as to toss away the notion of privacy, just to stymie gays from having sexual relations? Was the Court so conservatively activist that it would reverse itself after more than two decades of privacy cases? No.⁵ The truth is that all along, rumors of privacy’s health and vigor had been


² *Wichita Eagle-Beacon*, July 5, 1986.

³ *San Jose Mercury News*, July 5, 1986.


⁵ This is not to say that the majority of the Court was not also homophobic and conservatively activist. But I hope to demonstrate in this chapter that there is another plausible reading of *Bowers*.
greatly exaggerated. What the majority opinion in *Bowers* illuminated was that “penumbras”\(^6\) make for bad law. Upon closer scrutiny, the ephemeral penumbras of constitutional privacy gave way not to the bright light following an eclipse, but to the complete darkness of the umbra,\(^7\) where privacy could no longer be seen at all.

What I hope to show in this chapter and in Chapter 5 is that there really is not—and never was—any such thing as a right to privacy, at least in the way we would commonly understand the term. As noted in Chapter 2, discussions of legal notions of privacy center either around the nature of the right or the source of the right. In this chapter and the next, I focus on federal judicial interpretation as the source of a privacy right. In this context, two separate, loosely connected, definitions of a privacy right emerge. In the older of the privacy definitions, privacy is nothing more than a short-hand for those things protected by the Fourth Amendment standing alone, or by the Fourth Amendment fortified by the Fifth Amendment’s protection against compulsory self-incriminating testimony. That is, privacy is the right to live free of unwarranted government intrusion, particularly in the home, but including also a much narrower right to be free of unwarranted government intrusion when in public. The definition of privacy emerging from the Fourth and Fifth Amendments is the subject of this chapter.

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\(^6\) As will be discussed in detail later in the following chapter, Justice Douglass used the word “penumbras,” meaning shadows (or, more precisely, “the partly lighted area surrounding the complete shadow of a body, as the moon, in full eclipse” (Guralnik 1984, 1053)), to locate the right to privacy in the Constitution. That is, the right of privacy “emanates from the penumbras” of various provisions within the Bill of Rights.

\(^7\) During a total eclipse, the umbra is the “perfect or complete shadow, in which no direct light is received from the source of illumination” (Guralnik 1984, 1542).
In Chapter 5, I examine the strain of privacy found in the so-called privacy cases\(^8\) -- the one which Michael Hardwick and his lawyers believed would protect his ability to engage in consensual intimate relations in his own bedroom. I argue there that in this strain of constitutional law, "privacy" turns out to be little more than a euphemism for "liberty" within the due process clause of the Fourteenth Amendment – especially when the particular liberty in question is too unsavory to speak of more directly. So, rather than a right to buy condoms, or a right to have sex, or the right to an abortion, we have a right to "privacy." Even constructed in this rather narrow way, why didn’t the right to privacy include the right to engage in "homosexual sodomy"? Because there are layers of euphemisms in the privacy decisions. Thus, it wasn’t a right to buy condoms or the right to have sex without worry of pregnancy, but the right of "marital relations." Nor was it the right to terminate an unwanted pregnancy, but the right of the patient-doctor relationship to discuss all the options available to a pregnant woman, which would enable her to make a "choice." The right to engage in homosexual sodomy couldn’t be neatly tucked inside some other construct such as "marital relations" or communication between doctor-patient.

**There Is No Such Thing As A Right To Privacy\(^9\)**

In Chapter 2, I suggested that how far one is willing to extend a right of privacy is based in large part on whether one values privacy as an intrinsic or an instrumental right.

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\(^9\) The sub-title “there is no such thing as a right to privacy” as well as some of the ideas in this section (specifically the argument that privacy has no intrinsic value in our legal system) was derived from Stanley Fish’s *There’s No Such Thing as Free Speech, And It’s a Good Thing, Too.*
While individuals may value a right to privacy *per se*, it would be practically impossible for a political system or a society to give privacy the status of an intrinsically valuable right. Within a society, privacy is instrumentally valuable, for it fosters and protects much that is valuable to individuals and society, particularly within a liberal democracy. However, because privacy veils actions, it is impossible for a society interested in self-preservation to give blanket protection to a right of privacy. As the Supreme Court decisions in this chapter and Chapter 5 illustrate, privacy interests are only cautiously and jealously meted out, one narrow privacy right at a time.

Those who would like to find a substantive privacy right in the Constitution point to various provisions, particularly within the Bill of Rights, and argue that the fact that all of these various provisions hint at a right to privacy indicate that the framers of the Bill of Rights surely meant to protect the right to privacy. On the contrary, I would argue that the very presence of so many privacy-tinged protections in the Bill of Rights suggests that the authors very much had privacy on their minds, and still didn’t give privacy more concrete, specific expression. Although the word privacy was not as widely used as today, it was a word known and used in the eighteenth century. Of the dozens of suggestions for amendments to the new Constitution submitted by the thirteen states, not

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10 This is exactly the type of reasoning that Justice Douglas uses in *Griswold*, which will be discussed in the following chapter in detail.

11 Examples of eighteenth-century usage of privacy from the Oxford English Dictionary include: “Though the defendant might not object to a small window looking into his yard, a larger one might be very inconvenient to him, by disturbing his privacy, and enabling people to come through to trespass upon is property” (1814); and “The motive and end ... is to guard the independence and privacy of their homes” (1856) (Simpson and Weiner 1989, 515).
one of them contained a specific mention of a right of privacy, though almost all of them included some provision similar to the Fourth Amendment.

Absent some specifically articulated limiting principle, it would be extremely difficult to craft a substantive right of privacy that didn’t protect too much. The writers of the Bill of Rights contented themselves instead with a procedural protection of privacy (i.e., the Fourth Amendment), in addition to the hints of privacy located elsewhere, such as in the Fifth Amendment’s right against compulsory self-incrimination, or the Third Amendment’s right against being forced to house government troops.

I am not suggesting that the writers of the Constitution and Bill of Rights did not have some limiting principle in mind, or that they were incapable of expressing such a principle. Certainly there were those who would have filled the Constitution and the Bill of Rights with far more substantive detail. But many, such as James Madison, were convinced that the best way to protect the rights of citizens was through procedural limitations rather more substantive limitations. It was Madison’s hope that procedural limitations would limit the government so that the task of further definition of specific substantive rights would be unnecessary. While it has not worked out quite that way, what a more abstract and procedural limitation upon government has done is allow each successive generation of law makers, law enforcers and law interpreters to flesh out the specifics.

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12 To appreciate how much more detailed some members of the 1789 Congress would have liked to make the Bill of Rights, see the suggestions for the Bill of Rights from the states of Virginia and Pennsylvania.
As was discussed in Chapter 4, on state sodomy laws, state courts that have recognized a privacy right within their own state constitutions have faced the dilemma of a limiting principle – even those states in which the state constitution specifically asserts a right of privacy. The bulk of them have invoked, quite explicitly, the philosophy of John Stuart Mill as both justification for and limiting principle of a constitutional right to privacy.

In contrast, the Supreme Court has not ever identified a limiting principle for privacy, which is why privacy has only been identified one tiny bit at a time, and why it is so hard to predict what the Court will and will not include under the umbrella of privacy. Why has the Court not articulated some limiting principle for a right to privacy? The reason, I believe, is twofold: the need for the authors of privacy opinions to garner a majority, and the fear of being accused of *Lochner*-era style jurisprudence. The right of privacy has been established in such small increments in part because those writing the opinions needed to define the right as narrowly as possible in the hope of securing the agreement of a majority of justices. And while a majority might be able to agree that a state law prohibiting use of condoms should be struck down, that same majority would probably not agree on how to go about a broader definition of privacy. This is particularly true in light of the fact that the primary criticism of the privacy cases has been that they are nothing more than a second era of substantive due process, a second *Lochner* era. During the *Lochner* era, the right being promoted by the Court was the
liberty of contract. The guiding and limiting principle for liberty of contract jurisprudence was an economic theory influenced heavily by Herbert Spencer and other classical economists. Critics of liberty of contract argued against the use of economic theory as a guiding principle for constitutional interpretation. As Oliver Wendell Holmes put it in his dissent in *Lochner*, "the Fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics" (p. 75).

In his majority opinion in *Griswold*, Justice Douglas tried to preempt any suggestion that the right to privacy was analogous to liberty of contract, arguing that it was not based on any extra-constitutional philosophies.

Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation.... We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions (p. 482).

Of course Justice Douglas did have some limiting principle in mind, for the right of privacy is so amorphous as to be meaningless without one. But in an effort to secure a majority of the Court and to deny association with the *Lochner* era, his limiting principle — whatever it might have been — was never articulated. Thus what Douglas did in *Griswold* was not so much to find a right of privacy as it was to find a way to strike down a state law that he found extremely objectionable, but a law for which there was no obvious constitutional prohibition. In this way, the right to privacy, as its critics contend, really is nothing more than a revisiting of *Lochner*-style doctrine.

Liberty of contract doctrine "holds that parties capable of entering into a contract and giving their consent to its terms ought not to be curbed by the state, save to protect the health, welfare, and morals of the community or to prevent criminal activities" (Hoffer 1992, 195). The Lochner era, named for the case of *Lochner v. New York*, 198 U.S. 45 (1905), extended from the 1890s through the 1930s.
But there is, I would argue, one significant difference between *Lochner-*era jurisprudence and the privacy jurisprudence extant in the privacy cases. Whereas the *Lochner-*era cases rested on economic theory to guide and shape them, privacy jurisprudence has evolved out of common law doctrines. Viewed in this way, privacy becomes much more like the other rights articulated in the Bill of Rights than was the liberty of contract doctrine. A great many of the protections listed in the Bill of Rights were statements of common law protections. Indeed, most of the procedural protections afforded those accused of a crime – such as the right to trial by jury, the right against double jeopardy, etc. – were common law protections. Liberty of contract was not a common law principle, and so when justices of the *Lochner* era used liberty of contract doctrine, they were importing new doctrines rather than ones that had evolved and matured within the common law.

But the problem with privacy – and quite likely the reason the writers of the Bill of Rights did not enumerate a right to privacy – is that it is difficult to grant a privacy right that is not too broad. American legal theory and jurisprudence recognizes an absolute right to freedom of belief. It also recognizes the authority of the government to regulate most types of action. Expression falls somewhere midway between belief and action. The more pure and abstract the expression, the more absolute protection the Court has extended to it. The closer the expression has been linked to action – particularly illegal action – the more willing the Court has been to let the government regulate it. Because most speech lies closer to belief than to action, the writers of the Bill of Rights were comfortable in a seemingly absolute protection (i.e., “Congress shall make
no law... abridging the freedom speech, or of the press...”). But as privacy would, more often than not, protect action, they were unwilling to articulate any type of protection of privacy per se.

At this point I would seem to have contradicted myself. On the one hand, I am saying that there is no such thing as privacy, while on the other hand, I have made the argument that the privacy recognized by Douglas in *Griswold* is derived from the common law. The paradox can be stated this way: that there are certain aspects of actions which are manifestations of an inviolate personality that should be beyond the scope of government intrusion is a theme that has evolved in the common law. But using the word “privacy” as a catch-all for these actions is meaningless. As I said before, privacy becomes a euphemism for rights that are too unsavory to claim outright. Thus, the Court has not been in the business of protecting privacy per se, but protecting some other right they find important but, for whatever reason, difficult to state as a fundamental right worthy of constitutional protection (e.g., claiming that the right to use condoms is a fundamental right lacks a certain jurisprudential dignity we tend to expect in our fundamental rights). Privacy is a worthy goal only in the context that it protects some action deemed worthy. It is used as a euphemism when the right in question would not withstand closer examination or illumination.

**The Right To Privacy: Location, Location, Location.**

As mentioned in Chapter 2, a right of privacy can either be discussed in terms of the source of the right or the nature of the right. And in this chapter, the discussion
focuses around judicial constitutional interpretation of the right as a source of a privacy right. However, the difficulty in defining a constitutional right to privacy – as well as the very tenuous and vulnerable nature of privacy protection – is due in no small part to the fact that privacy is nowhere specifically mentioned in the Constitution. Thus, even when the source is narrowed to the Constitution, different types of privacy rights emerge. "It is, perhaps, slightly odd that a Constitution celebrated for the restraint it places upon governments in their dealings with citizens should say so little directly about the private activities of those citizens" (Cohan 1989, 44). Different conceptions of privacy, therefore, will necessarily be related to where various justices have located a right of privacy within the Constitution. Though many justices might be convinced that there is a limit to which the government can interfere with the private details of one's life, there is honest disagreement over the extent and location of that right. Indeed, location of the privacy right is critical, for where a justice decides to place or "find" the privacy right will influence just how broad they believe the privacy protection is.

For example, constitutional notions of privacy are both procedural and substantive. Procedural notions of privacy revolve around Fourth Amendment requirements that the government will go through a specified procedure before it invades one's home. Substantive notions of privacy suggest that certain human activities are beyond the scope

\[14\] Having said that, however, it is not necessarily the case that a specific right to privacy would have protected Michael Hardwick. As is noted in the next chapter on the history of sodomy laws in the U.S., courts in states which have a specific privacy provision in their state constitutions have also grappled with decisions over exactly what is protected by the right to privacy.
of government to regulate, and it is this idea of privacy that might more accurately be labeled a right of personal autonomy.

In important ways, the U.S. Supreme Court has more constraints than state courts when it comes to recognizing a right to privacy. When state high courts make a ruling, there are a variety of sources of law from which they can draw from. In the absence of positive law, state courts may incorporate common law principles. As a general rule, state courts first look to the common law within their own state. However, when such principles are absent or incomplete, state judges may then look to the common law of other states for principles and guidance. State courts often also borrow principles from the pronouncements of the high courts of other states – though they are under no obligation to follow the lead of other state courts. Finally, state courts can look to the federal courts for guidance. In areas touching on federal questions, of course, the mandates of the federal courts are binding. But on issues which involve only state constitutional issues, the state court may borrow from principles developed in federal courts – or they can decide to ignore those principles. Thus, state courts have a luxury of flexibility not available to the federal courts. As noted by McWhirter and Bible (1992),

> Because state supreme courts are the final arbiters of the meaning of both the state constitution and the content of the state’s common law, they are free to base their decisions on either one (p. 8).

> Since the Constitution sets up the federal government as having enumerated powers only, the federal government did not inherit a common law in the strictest sense.

While federal judges may look to the common law to help understand the meaning of particular terms, they may not ‘incorporate’ common law principles into the U.S. Constitution or federal statutes unless they conclude that was the intent of the authors (McWhirter and Bible 1992, 8).
As noted in Chapter 2, legal notions of privacy were first recognized in state torts law, a type of common law. Additionally, as discussed in Chapter 3, many state constitutions have explicit recognitions of a privacy right. Thus, state courts can recognize a right to privacy from the common law, or as an interpretation of their state constitution. Additionally, they can look to their peer-courts in other states, using — or not using -- their decisions to guide and inform their own.

In contrast, the U.S. Supreme Court – if so inclined – must locate a right to privacy squarely within the U.S. Constitution. And this is where the trouble begins. Because a right of privacy is nowhere explicitly mentioned in the Constitution, those justices recognizing a right to privacy must “find” that right. The history of federal privacy jurisprudence reads like a buried treasure map.

In federal case law, privacy has been located within the Constitution in six ways: (1) within the Fourth Amendment’s protection against unwarranted search and seizure; (2) derived from a combination of promises within the Fourth and Fifth Amendments; (3) emanating from the “penumbras,” or shadows, of several provisions within the Bill of Rights; (4) as part of the scope of liberty within the due process clause of the Fourteenth Amendment; (5) as a right protected by the Ninth Amendment, which promises that there are rights retained by the people, though not enumerated in the Constitution;\(^{15}\) or (6) a

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\(^{15}\) The Ninth Amendment provides that “[t] enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” It is one of the vaguest and least-used amendments in the Bill of Rights, being largely ignored by the Supreme Court until after World War II. The Ninth Amendment was advocated by those, such as Alexander Hamilton, in *The Federalist*, no. 84, who believed that “bills of rights ... are not only unnecessary in the proposed Constitution, but would even be dangerous.” Identifying unenumerated rights remains highly controversial.
Two strains of privacy law can be identified within federal constitutional jurisprudence. One is related to the right of the individual to be free from excessive government scrutiny in private, while the other is related to personal autonomy. The type of privacy which manifests as the right to be free from undue government invasion of home and personal space is most obviously located within the Fourth Amendment; the Fourth Amendment is often invoked in tandem with the Fifth Amendment’s prohibition against forced confession. Taken together, these two protections within the Bill of Rights form a kind of privacy right which directs the government away from the private sphere of the individual unless there is credible evidence to suggest that an individual is violating the law. Perhaps Justice Brandeis’s admittedly vague definition of privacy as the “right to be let alone” best summarizes this type of privacy right, notwithstanding the problems with the Brandeis definition suggested in Chapter 2.

The remainder of this chapter focuses on the Fourth and Fifth Amendments as the source of a right to privacy. Chapter 5 will be devoted to the various other provisions in the Constitution which have been used to invoke a privacy right.

**Origins of the Fourth Amendment**

The Fourth Amendment reads

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath
or affirmation, and particularly describing the place to be searched, and
the persons or things to be seized.

Aspects of the Fourth Amendment were borrowed from English common law, while other requirements are uniquely American, having been inspired by practices of
British officials in the years preceding the War for Independence. During that time, writs
of assistance became common in port cities such as Boston. The writs were used by
British customs officials to search for goods smuggled by colonists hoping to avoid
tariffs and restrictions on trade. Authorized by Parliament and good for the life of the
King plus six months after, writs of assistance were particularly detested by the colonists
because they gave petty officers of the crown broad authority to search where ever and
whenever they chose, as they were not limited to particular individuals or particular
places. Indeed, the officials did not even need to have evidence that someone had broken
the law to search and seize (Landynski 1992, 314).

James Otis, on behalf of a group of Boston merchants, launched a suit against
customs officials in 1761 to stop the use of the writs. During his five hours of arguments,
Otis is reported to have said, “A man’s house is his castle; and whilst he is quiet, he is as
well guarded as a prince in his castle.” Though Otis lost the case, the hatred of the writs
of assistance is thought to be one of the primary causes of the Revolution. Indeed, John

16 See, for example, Semayne’s Case 5 Coke’s Rep. 91a (1603), or Entick v. Carrington 19 Howell’s State
Trials 1029 (1705).

17 The colonists were not alone in their hatred of arbitrary government intrusion into one’s personal
dwelling. In 1763, English statesman William Pitt said in Parliament, ”The poorest man may in his cottage
bid defiance to all the force of the crown. It may be frail -- its roof may shake -- the wind may blow
through it -- the storm may enter, the rain may enter -- but the King of England cannot enter -- all his force
dares not cross the threshold of the ruined tenement” (Findlaw Annotation 1994).
Adams, who witnessed the case, said the American Revolution began with that lawsuit (McWhirter 1994, 2).

While the Fourth Amendment is considered one of the most important protections in the Bill of Rights, it is also one of the most ambiguous, and raises more questions than it answers. Note, for example, that the amendment does not prohibit all searches and seizures, just "unreasonable" ones – but the Amendment does not define unreasonable. Does that mean a warrant is always required? Are people protected on the streets, or just in their homes? What about businesses? Or hotel rooms? Was it a protection merely against trespass on private property, or was the Fourth Amendment meant to protect privacy of the individual as well?

The task of defining "unreasonable" has fallen to the Supreme Court. Even today, notwithstanding a tremendous body of case law in which the federal courts have attempted to clarify the meaning and scope of the Fourth Amendment, much about the Fourth Amendment remains unclear. Interpretations have varied between narrow, literal meanings which tie the right closely to property, and expansive readings which surround individuals with a cloak of protection against undue government intrusion. "Despite hundreds of Fourth Amendment decisions over the years, this area of the law continues to pose novel questions, and the justices retain a keen interest in it" (Greenhouse 2000). Whether the Amendment is closely aligned with private property rights or rights of the individual may hinge upon how one interprets the relationship between the two clauses in the Fourth Amendment (Findlaw.com Annotation 1994). The first clause asserts the right to be protected from an unreasonable search or seizure, while the second clause discusses
the things necessary to get a warrant. If the two clauses are read together, it would seem to indicate that the only "reasonable" searches and seizures are those for which a warrant was obtained. If read separately, it could mean that there are warrantless searches that are reasonable -- and, conversely, that some warranted searches are unreasonable. Thus, if one accepts the first reading (that the clauses should be read together), the right is tied closely to property. The second interpretation would seem to indicate that there are more factors to consider, and protection is more than spatial in nature.

The Fourth Amendment, of course, does not use the word privacy. It asserts the right of individuals to be “secure in their persons, houses, papers and effects.” To be secure means to be safe or “free from danger, free from risk of loss” (Merriam-Webster Online 2000). But the word secure has connotations beyond just “safe” or “protected;” there are implications of privacy as well – privacy in the sense of keeping details from the public eye. Consider, for example, the use of the word secure when associated with confidential communication and the desire to keep information from being intercepted by unauthorized persons: “Only one phone in the embassy was secure” (Dictionary.com 2000). Consider, too, the following entry in the Cambridge International Dictionary of English:

(British) A security blanket is protection for a person or place threatened by a violent attack which involves preventing details of an activity from being discovered by the public. A security blanket was thrown around the President's visit because of the bomb threats. (Cambridge International Dictionary of English 2000).

What, exactly, were the writers of the Fourth Amendment trying to protect? To the extent that the Fourth Amendment can be viewed as a protection of privacy, did the writers view that right as intrinsic or instrumental? A plausible argument can be made
that the writers of the Fourth Amendment viewed an individual's privacy as intrinsically valuable. The protection against search and seizure was not written to protect a relationship, such as marriage. It was meant to keep government out of the individual's private life unless there was a compelling reason to do otherwise. Indeed, it surely was not lost on the founders that often the persons being protected by the Amendment would actually have committed crimes. But unless evidence of the crimes spilled outside an individual's house, the government was not to interfere. Thus it would seem that they felt a right of privacy — at least within the space of some sort of personal property — was intrinsically important enough to shield some individuals who would be breaking the law and who, because of the shield of the Fourth Amendment, would never be caught.

On the other hand, it is important to remember that the writers of the Fourth Amendment sought only to shield citizens from the national government, and not from their state governments.\(^{18}\) The reason a more extensive list of rights was not included in the body of the Constitution\(^ {19}\) was that it was believed that the national government being created by the new document was so limited that it would not have the ability to infringe on personal liberties. The scope of national laws and national law enforcement envisioned at the time was rather narrow, being limited primarily to trade issues, both international and interstate. It would be the states that would have the responsibility for creating and enforcing criminal codes. It may be the case that the writers of the Fourth

\(^{18}\) For a discussion of the non-applicability of the Bill of Rights to state governments, see the Supreme Court's decision in *Barron v. Baltimore*, 32 U.S. 243 (1833).

\(^{19}\) A select list of restraints against the federal government was included in the body of the Constitution: the writ of habeas corpus and the prohibition of ex post facto laws and bills of attainder (Article I, Sect. 9).
Amendment believed that the type of laws issued from the national government would be of lesser importance in terms of protecting citizens, and so if the national government were hampered to some extent in enforcing its laws because of the prohibition on unreasonable searches and seizures, then so be it. Considered in this light, it could mean that the privacy right implicated in the Fourth Amendment is instrumental in nature in that it is protecting the citizens from a national government which was regarded suspiciously in the first place. During the years before the Revolutionary War, the practice of subverting British customs laws was hardly regarded as shameful. Indeed, at times it was applauded. Consider the following, written by Benjamin Franklin:

A coast fifteen hundred miles in length could not in all parts be guarded, even by the whole navy of England; especially when their restraining authority was by all the inhabitants deemed unconstitutional, the smuggling of course considered as patriotism (Franklin 1772).

The Fourth Amendment suggests that there is something more important at stake than the taxes that might be lost to the government. But whether or not that “something” was more important than the implementation of the type of prohibitions typically made by states -- such as prohibitions against murder or violence -- was not illuminated by the Fourth Amendment.

Supreme Court Interpretation of the Fourth Amendment

The Fourth Amendment's protection is a both more and less encompassing than the British protection. First, the Fourth Amendment distinguishes not between legal and

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20 The discussion of Fourth Amendment jurisprudence presented here is in no way intended to be exhaustive. I discuss the cases which most involve the evolution of the conception of privacy.
illegal searches and seizures, but reasonable and unreasonable searches and seizures (although the Amendment in no way prohibits either the federal government or the states from specifying illegal searches and seizures). The appeal to reason rather than to law suggests that some searches and seizures, while done in the name of the law, might still be unreasonable, thus affording greater protection than provided for by law alone. It may be the case that the authors of the Fourth Amendment, from experience, knew both that laws themselves can be unreasonable, and that too literal of a reading of the law might sometimes result in an unreasonable result. The writers of the Fourth Amendment tried to improve upon the British system in a second way, by requiring judicial supervision over the issuance of a search warrant.

The Supreme Court’s first word on just what the Fourth Amendment meant and the scope of its protection didn’t come until almost a century after the Amendment’s ratification, in 1886 in Boyd v. United States, 116 U.S. 616, and thus Boyd is often the starting point of either a discussion of the Fourth Amendment or of the right of privacy. The Court, however, implicated a right to privacy – particularly the privacy of ideas and communication – in a case almost a decade earlier. The question directly at issue in ex parte Jackson, 96 U.S. 727 (1877), was whether or not Congress’s authority over the Post Office included the ability to prohibit the mailing of pornographic material, as they had done in a section of the Comstock Act of 1873. While the Court acknowledged in theory Congress’s almost absolute authority to decide what types of things could or could not be mailed, they noted the problems inherent in implementing this authority because of the right of individuals to keep the content of their letters private.
The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail (emphasis added) (ex parte Jackson, 732).

The Court went on to note that the location of private letters was of no consequence.

The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution” (p. 733).

But other than stressing that the material contained in letters was private and that the protection of that material is important, the language in ex parte Jackson sheds little light on just what privacy is.

As mentioned above, the first Supreme Court opinion to focus squarely on the scope of the Fourth Amendment was Boyd v. United States 116 U.S. 616 (1886), “a case that will be remembered a long as civil liberty lives in the United States” (Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 434 (1928)). In deciding how to interpret the Fourth Amendment, the Court first sought to determine just what the authors of the Bill of Rights hoped to achieve with the Amendment.

When it comes to amendments that make up the Bill of Rights, the Supreme Court has found it almost impossible to even begin interpreting them without first deciding what the main goals of the amendments are (McWhirter 1994, 14).
In its initial interpretation of the Fourth Amendment, the Court asserted that the Fourth Amendment was designed to protect property rights, but that the right of property encompassed the notion that some things were meant to remain private.

The law giving rise to the case was a federal customs law designed to prohibit importers of goods from evading federal tariffs created by an 1874 law\(^2\) -- the very type of law (i.e., a tariff) which inspired the Fourth Amendment. Although the case concerned only the taxes on a few cases of glass, the Court said the issues involved presented “a very grave question of constitutional law involving the personal security, and the privileges and immunities of the citizen” (Boyd 1886, 618).

The defendants in the case were suspected of having possession of 29 cases of imported glass on which the federal tariffs were not paid. The cases of glass were seized by federal authorities in a port in New York. In their trial, the owners of the glass claimed that they had not violated the law and were entitled to have the glass returned to them. A district judge -- empowered by a provision in the act -- ordered the men to bring an invoice into court, to prove whether the glass had been purchased from domestic or international sources. The merchants obeyed the court and produced the invoice -- which supported the allegations of the prosecution -- but objected to the constitutionality of the law.

Section 5 of the act authorized the court to order that invoices be produced when so desired by the district attorney. The law instructed that those receiving such orders would come to court with the requested invoices and, in the presence of the judge, the
invoices could be inspected by the district attorney – though the owner of the papers, with their attorneys, could be present during the examination, and could keep the papers after the government’s attorney was finished inspecting and copying them. Thus, the invoices were never actually “seized” by the government. The law further stated that failure to produce the appropriate invoices would be considered a confession that the allegations of the district attorney were true.

Although much of the Court’s discussion in *Boyd* hinges on the Fourth Amendment, the merchants in the case had not claimed that the law violated their Fourth Amendment rights but, rather, their Fifth Amendment right against self-incrimination. The Court explained, however, that the protections in the Fourth and Fifth amendments each implicates and illuminates the other, and ruled that the procedures outlined in the law violated both constitutional protections. Attorneys for the U.S. argued that the law was not unconstitutional because it authorized production of the invoices in civil cases, and “expressly excepts criminal suits and proceedings” (p. 633). The Fifth Amendment, argued the attorneys, was applicable only in criminal cases, and that their suit against the claimants was a civil proceeding.

The Court noted that civil and criminal provisions in the Act were so inextricably intertwined that the collection of information would have to be governed under the rules of criminal procedure. Furthermore, the Court said that English common law suggested

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21 The law was an “Act to amend the customs revenue laws,” passed June 22, 1874 (16 St. 186).

22 The Fifth Amendment provides that no one “shall be compelled in any criminal case to be a witness against himself.”
that the rights against search and seizure as well as against being compelled to produce evidence to the government were applicable in civil as well as criminal proceedings.

Why hadn’t the claimants in *Boyd* claimed violation of Fourth as well as Fifth Amendment protections? Most probably because there was not a “search” nor a “seizure” in the technical sense. That is, there was no invasion of property involved, as the claimants were to bring the evidence to court themselves, nor did the claimants ever have to give up possession of the invoice, they merely had to produce it for inspection. The Court, however, used the opportunity presented in *Boyd* to broadly and abstractly define the protections in the Fourth Amendment, and asserted that the requirement of the act to produce personal records to the prosecutor did amount to a type of seizure.

It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching among his papers, are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment of the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure (*Boyd*, p. 621).

The opinion in *Boyd* suggested that the right in question is important and the scope of the protection somewhat broad, but never was the right itself defined. The Court said that the purpose of the Fourth Amendment was to protect the "privacies of life," but failed to define just exactly what those privacies might be -- though it did leave a few hints. The decision said that stolen goods are not protected by the Fourth Amendment, but a "man’s private books and papers," as well as the information in them, were. Thus,
in *Boyd*, the practice of using “privacy” as a shorthand for “persons, papers and effects” had begun.

Throughout the *Boyd* decision, the Court relied heavily on the celebrated 1765 British opinion written by Lord Camden in *Entick v. Carrington*, quoting several pages of the opinion. *Entick v. Carrington* was a civil action against crown officers who, under the authorization of general warrants, had gone into several homes looking for writings connected with pamphlets in which the King had been criticized. In the *Entick* opinion, Lord Camden chastised the use of such writs as destructive of "all the comforts of society." Camden distinguished between stolen goods and a man's papers. Stolen goods, claimed Camden, could be held by the government during a trial because it had been alleged that the goods did not rightfully belong to the person in the first place, and if his innocence has proven, the goods could be returned to him and all will be righted. But a man's papers were his alone, and if they were subject to a search, even if his innocence was proven, the information leaked from those papers could never be returned. The innocent man, then, suffered along with the guilty if his private information was made public. Private ideas and information, then, deserved an even higher degree of protection than material possessions.

Papers are the owner's goods and chattels, they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection, and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and ferried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect (*Entick v. Carrington*, as quoted in *Boyd v. U.S.*, 627, 628).
Thus, though we tend to regard the protection afforded by the Fourth Amendment as procedural, the language of Lord Camden and of the Court's opinion in Boyd suggested that there was a substantive as well as a procedural protection contained in the Amendment -- especially when the Fourth Amendment was considered along with the Fifth Amendment's prohibition against self incrimination. It would seem that what emerged was a procedural right with regard to the search and seizure of goods said to be wrongfully possessed, but a substantive right with regard to information or the private details of one's life. In this sense, the Court was distinguishing ideas from things, and perhaps this is the core of whether and when the right is procedural or substantive.

Because the ownership of tangible possessions is disputable, and wrongfully seized goods can be completely returned and restored, the right against seizure of things is procedural. At the same time, the Court was acknowledging that ideas about an individual, whether communicated verbally or on paper, are indisputably the right of the individual – and only the individual – and once taken can never be returned. The right becomes more substantive. That is, in some instances, the government cannot seize ideas, no matter what procedures it goes through.

This notion of a more absolute protection of ideas than of things is hardly surprising or new. Consider, for example, the absolute wording of the First Amendment as compared with the more limited wording of the Fourth Amendment. “Congress shall make no law ... abridging the freedom of speech, or of the press,” the First Amendment provides, whereas the Fourth Amendment protects only against “unreasonable” searches and seizures. Likewise, the protection in the Fifth Amendment regarding testimony – the
conveyance of ideas as opposed to action – is stated without caveat as “No person ... shall be compelled in any criminal case to be a witness against himself.”

Violation of the Fourth Amendment: So what?

In spite of vitriolic pronouncements by judges against unreasonable searches and seizures by the government, items and information were often gathered in such a way as to violate the principles of the Fourth Amendment anyway. The Fourth Amendment merely prohibits unreasonable search and seizure, but does not specify the remedy for a violation. Once obtained, the common law tradition had been to allow the evidence to be used in court. Under British law, the only sanctions available to victims of illegal searches and seizures was to bring a civil action against the individuals who had done the actual searching and seizing, usually in the form of a suit for trespass. The case of *Entick v. Carrington*, mentioned above, is an example of such a suit for damages.

The situation was similar in the United States. The tradition, both at the state and the federal level, was to admit evidence, regardless of how it was obtained. As put by Justice Day, “...the courts do not stop to inquire as to the means by which the evidence was obtained” (*Adams v. New York*, 192 U.S. 585, 594 (1904)). The same was true of testimony which violated the Fifth Amendment. What, then, was the point of having these protections, if the products of illegal searches and seizures could be used in court anyway? The point, according the Day, was to provide a means for the victims of unlawful searches and seizures to have a civil remedy – after the fact – against the officers or agents who performed the illegal search and seizure. Additionally, the Fourth
and Fifth amendments would prevent Congress from passing legislation which *prima facie* violated their protections, or at least give the courts reason to strike such legislation down as unconstitutional – as was the case in *Boyd*. Day put it this way:

> We think they [the Fourth and Fifth Amendments] were never intended to have that effect [of excluding illegally gained evidence], but are rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property, and to render invalid legislation or judicial procedure having such effect" (*Adams v. New York*, 192 U.S. 585, 598 (1904)).

The suits could not be brought against the government agency, for an agency could not authorize illegal means of obtaining information. The problem with after-the-fact remedies for violating someone’s Fourth or Fifth Amendment rights was that they did little to deter officials from doing so. The victim of the trespass could only sue the official(s) involved, and only for actual damage to property and not for any kind of punitive damages – and even these kinds of suits against government officials were relatively rare and offered little actual deterrence to unreasonable search and seizure.

Besides reiteration of the point that evidence obtained in violation of the Fourth Amendment could be used in court, the *Adams* case illustrates that by 1904, the Court was still using the full language of the Fourth Amendment and had not yet substituted privacy as a shorthand. Day writes, for example, that

> The security intended to be guaranteed by the 4th Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted (p. 598).
As stated above, the remedies available once the Fourth Amendment had been violated were slight, and thus the incentive to violate the Fourth Amendment in order to procure evidence outweighed the disincentives offered by the remedies. The Court finally recognized as much in 1914 in *Weeks v. United States*, 232 U.S. 383. In this case, Fremont Weeks was arrested at his place of employment in Kansas City, Missouri, and charged with selling lottery tickets through the mail. At the same time, other police officers were at his home. They were told by a neighbor where the key was kept and, without a warrant, went through the house and took various papers and articles, which were later handed over to the prosecuting authorities. Weeks petitioned the Court for return of his papers and possessions, saying that since they had been obtained without a warrant his Fourth Amendment rights had been violated. The court declined to return the items, citing several precedents including *Adams*, discussed above. Writing for a unanimous Court, Justice Day – the author of the *Adams* opinion – said that *Adams* was not controlling in this case. In *Adams*, the materials objected to “were incidentally seized in the lawful execution of a warrant, and not in the wrongful invasion of the home of a citizen” (p. 395). In other words, the initial entry into the home had been authorized in *Adams*, and though some of the items seized had not been listed in the search warrant, this did not violate the Fourth Amendment. The point of the Fourth Amendment, according to Day, was to protect citizens from “invasions of the home and privacy of the citizens, and the seizure of their private papers” (p. 390). No such initial authorization had been made in the *Weeks* case, and this was what distinguished it from *Adams*. If the government were allowed to violate the most important part of the Fourth Amendment –
going into the home unwarranted – and still use the materials gathered, the Fourth Amendment would lose its efficacy.

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution (p. 393).

That the items gained would otherwise prove the guilt of the defendant was no longer to be the most important consideration. “The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land” (p. 393). This notion that information and items seized in violation of the Fourth Amendment could not be used as evidence would later come to be known as the exclusionary rule. The exclusionary rule, however, barred only the federal government from using evidence seized contrary to the Fourth Amendment, not the states.

**Privacy As A Shorthand For The Fourth Amendment**

Once again, while noting that privacy was a part of what was being protected by the Fourth Amendment, the Court used the full language of the Fourth Amendment, i.e., the “right to be secure against such searches and seizures” (p. 393). Not just yet had the Court substituted the word privacy for this phrase. And indeed, it might never have come to pass. But in 1916, President Woodrow Wilson appointed to the Court one of privacy’s most eloquent and famous advocates: Louis Dembitz Brandeis – the lawyer who co-
authored the famous 1890 *Harvard Law Review* article, “The Right to Privacy,” discussed at length in Chapter 2. Roscoe Pound, the Dean of Harvard Law School when Warren and Brandeis wrote the article, credited the article with “nothing less than add[ing] a chapter to our law” (Strum 1993, 98). Brandeis would go on to extend that chapter by applying his ideas regarding privacy to intrusions of the government as well as intrusions by the press. Perhaps his most important influence, with regard to a constitutional right to privacy, was that he introduced the Court to the language of privacy – so much so that his colleagues also began to use the word more and more in their jurisprudence.

During his 23 years on the bench, privacy was a part of the overall personal liberty that Brandeis defended against government intrusion – both state and federal. For Brandeis, the status of being a U.S. citizen imbued the individual with inalienable liberties. Brandeis was not as concerned about the specific phrase or clause which would protect individual liberty as he was convinced that the totality of the Constitution made citizens immune from certain kinds of governmental interference. This is not meant to imply that Brandeis’s jurisprudence was slipshod or in any way deficient. On the contrary, “Brandeis, in his lengthy dissents, provided the analysis of the law and, especially, the facts and conditions surrounding a law that would influence future jurisprudence” (Urofsky 1992, 391). He believed that personal liberty was essential to the well-being of a democracy. His views as well as his personal style of jurisprudence are particularly well illustrated in his dissenting opinion in *Gilbert v. Minnesota*, 254 U.S. 325 (1920). Although a case that deals with First Amendment issues, it is relevant to the
current study as it shows how important Brandeis believed personal privacy was to every aspect of liberty. The case also illustrates the dynamic vision Brandeis had of the law. Brandeis suggested in his dissent that privacy is such an important value that the states as well as the federal government should not violate it. Brandeis also found privacy implicated in parts of the Constitution other than the Fourth and Fifth Amendments, foreshadowing the approach that Douglas would take 45 years later in *Griswold*.

The case dealt with the constitutionality of a Minnesota sedition law, passed during World War I, which made it illegal to “interfere with or discourage the enlistment of men in the military or naval forces of the United States or of the state of Minnesota.” Specifically, the law forbade any one to teach, either in writing or verbally, ideas which might discourage someone from joining the military, punishable by fine and imprisonment. Joseph Gilbert, an organizer for a farmers group that sought political and economic reform (Jenson 1992, 830), was prosecuted for making skeptical remarks regarding conscription at a group meeting. The tenor of his remarks was hardly revolutionary. He was reported to have said, among other things, “I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours” (p. 327). He was found guilty and sentenced to one year imprisonment and a $500 fine. His conviction was affirmed by Minnesota’s high court.

In his appeal to the U.S. Supreme Court, Gilbert’s lawyers offered two reasons why they believed the Minnesota law to be unconstitutional. First, appealing to the doctrine of federal preemption that had been established in matters of interstate commerce, they said that since the Constitution delegates the power to create a military to the federal
government, any regulation regarding military issues should be reserved to the federal
government alone. Secondly, they said that all U.S. citizens have an “inherent right of free
speech” when it came to matters regarding the national government and its policies.

Rejecting the argument regarding federal preemption, Justice McKenna, writing
for the majority, advanced a vision of federalism in which the states could – and even
should – make laws which complement the policies and interests of the national
government. Gilbert’s second argument – that the law violated his inherent right of free
speech – was quickly dismissed. The Court agreed that the right of free speech is
inherent, “but it is not absolute; it is subject to restriction and limitation” (p. 332). In
times of war, seditious speech would cause a clear and present danger to the country,
argued the majority, and anti-sedition laws were appropriate safeguards. Furthermore, it
was reiterated that the First Amendment guarded only against federal actions, not state
actions. Concluding the opinion, McKenna wrote, “It would be a travesty on the
constitutional privilege he invokes to assign him its protection” (p. 333).

Brandeis issued a vigorous dissent which had all the characteristics of the kind of
dissents for which he would eventually become famous: it included innovative analysis of
the law, it advocated a holistic interpretation of the Constitution, it stressed the
importance of contemporary context, it cited sources other than legal precedent, and it
ardently defended the liberty of the individual.

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23 During his years as an advocacy lawyer, Brandeis pioneered the use of briefs that relied less on legal
precedent and more on social and economic studies and statistics. First used in his arguments before the
Supreme Court in *Muller v. Oregon*, 208 U.S. 412 (1908) (supporting the constitutionality of a state
maximum hour law for women), such briefs are now commonly used and often referred to as “Brandeis
briefs.”
"That such a law is inconsistent with the conceptions of liberty hitherto prevailing seems clear" (p. 336), Brandeis admonished the seven-justice majority. Brandeis agreed with and elaborated on both arguments Gilbert's lawyers had offered to contest the law. He conceded that the right of speech was not absolute, and that under certain circumstances Congress might be authorized to limit speech, such as in times of war. But Congress exercised exclusive jurisdiction over issues related to the military, he wrote, and states could only legislate to the extent that Congress explicitly granted them the right to do so. Nor should absence of federal regulation in the area be seen as permission for the states to legislate, he argued. If there were not federal laws in an area within Congress's exclusive jurisdiction, then it should be interpreted as Congress's intention that there be no laws in that area. Brandeis suggested that the absence of any federal statute similar to Minnesota's law might be evidence of Congress's commitment to free speech.

But Congress might conclude that the most effective army or navy would be one composed wholly of men who had enlisted with full appreciation of the limitations and obligations which the service imposes, and in the face of efforts to discourage their doing so.... Congress, legislating for a people justly proud of liberties theretofore enjoyed and suspicious or resentful of any interference with them, might conclude that even in times of great danger, the most effective means of securing support from the great body of citizens is to accord to all full freedom to criticize the acts and administration of their country... (p. 337, 338).

To support this argument, Brandeis included a lengthy footnote quoting from an Army instruction book sent to recruiting officers, in which they were encouraged not to glorify or misrepresent what recruits could expect from military life.

All progress and success rests fundamentally on truth. Hence never resort to indirection or misrepresentation or suppression of part of the facts in order to push a wavering case over the line. Recruits signed up on misrepresented facts or partial information do not make good soldiers.
They resent being fooled just as you would, and will never yield their full value to a government whose agents obtained their services in a way not fully square. Therefore tell your prospect anything he wants to know about the army. If the real facts are not strong enough to win him, you don’t want him anyway (note 5).

It was regarding Gilbert’s second argument, that free speech is an inherent right of U.S. citizens, that Brandeis mounted his most passionate arguments. Brandeis did not rely on the First Amendment alone. He flatly asserted that the right to speak freely about the federal government is a privilege and immunity of every U.S. citizen, “which, even before adoption of the Fourteenth Amendment, a state was powerless to curtail” (emphasis added) (p. 337). The right of free speech in a democracy was inherent, because without it, the citizen could not make informed choices, and thus it was the duty of the federal government not only to refrain from curtailing free speech itself, but it also has the obligation of keeping states from interfering with that freedom, Brandeis argued. The Minnesota law was particularly obnoxious, he wrote, “For the statute aims to prevent, not acts, but beliefs” (p. 335). Furthermore, Brandeis argued that because the law forbade anyone to teach pacifist beliefs that it abridged not only free speech, but was also an invasion of privacy. The law, he wrote, made no exception regarding the relationship of the parties discussing their beliefs or where they those beliefs were discussed.

Thus the statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism (p. 335, 336).

Because Brandeis argued that the right of free speech was a privilege and immunity of U.S. citizenship he postponed, for the time being, the question of what rights
were afforded citizens via the due process clause of the Fourteenth Amendment. \textsuperscript{24} "As the Minnesota statute is in my opinion invalid because it interferes with federal functions and with the right of a citizens of the United States to discuss them, I see no occasion to consider whether it violates also the Fourteenth Amendment" (p. 343). Thus, even without the direct assistance of the Bill of Rights, Brandeis made an argument for individual privacy as a constitutional right.

Brandeis’s comment regarding the Fourteenth Amendment should not be read as evidence that he did not support incorporation of provisions within the Bill of Rights through that Amendment’s due process clause, nor should it be interpreted to mean that he disparaged substantive due process. For at the close of his dissent, he simultaneously took a jab at liberty of contract doctrine and implied that the Fourteenth Amendment might be put to better use in protecting individual liberties than the interests of big business.

But I have difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial of the right of an employer to discriminate against a workman because he is a member of a trade union, the right of a business man to conduct a private employment agency, or to contract outside the state for insurance of his property, although the Legislature deems it inimical to the public welfare, does not include the liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism.... I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property (references omitted) (p. 343).

\textsuperscript{24} The \textit{Gilbert} case predates much of the Court’s activity to selectively incorporate parts of the Bill of Rights as binding on the states through the due process clause of the Fourteenth Amendment. The notable exception was \textit{Chicago, Burlington & Quincy Railroad Company v. Chicago}, 166 U.S. 226 (1897), in which the Court held that the right to just compensation for private property taken by the states was protected by the Fourteenth Amendment’s due process clause.
Fourth Amendment Not A Law of Trespass

Although it happened with fits and starts, the Supreme Court has asserted that the Fourth Amendment protection against search and seizure is not simply a prohibition against trespass, which is another way that the American protection varies from the British protection. The Court's first decision making that separation explicit came in its 1924 decision in Hester v. United States, 265 U.S. 57. In that case, federal agents believed that Charles Hester was making illegal alcoholic beverages, so they went to his farm and hid about 100 yards from his house. From their hiding place on Hester's private property, they saw him hand over a jug of moonshine whiskey. In an ensuing chase, two jugs of the illegal whiskey were dropped, and the arrests were made. Hester said that since the agents did not have warrants, they were illegally on his property, and thus the exclusionary rule should apply. In a tersely worded decision (barely one page in length) Holmes responded for a unanimous Court that "It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure" (emphasis added) (p. 265). The Court said that the Fourth Amendment protects "people in their 'persons, houses, papers and effects,'" and "is not extended to the open fields" (p. 265).

As noted above, the Court's interpretation of the Fourth Amendment at times tied the right closely to property, while at other times it interpreted the right more loosely to protect privacy. The Supreme Court opinion which most closely aligned the Fourth Amendment with property came in the famous 1928 Olmstead v. U.S. 277 U.S. 438

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25 Indeed, "fits and starts" is putting it mildly. While, as will be discussed, the Court first separated the Fourth Amendment from the law of trespass in 1924, there would be almost four decades — between 1928 and 1967 — in which the Court would again align the Fourth Amendment with the law of trespass.
ruling. In this case, a slim majority (5-4) refused to include telephone conversations which had been illegally intercepted by federal agents through the use of wiretaps as protected by the Fourth and Fifth amendments. Because the taps had been inserted on public property and there had been no physical intrusion into the homes of the defendants, the Court ruled that the Fourth Amendment had not been violated.

Olmstead was prosecuted and convicted for illegal sale and transport of alcohol in violation of the National Prohibition Act. The bulk of the evidence used to convict him came from telephone conversations which were wiretapped by four federal agents, without a warrant, and in violation of Washington state law, where Olmstead lived and operated his underground alcohol sales ring. Olmstead's lawyers argued that the information from the phone calls should be excluded, as it had been gathered without a warrant and was thus in violation of the Fourth Amendment, and because it amounted to having Olmstead incriminate himself, in violation of the Fifth Amendment. His lawyers added that because wiretapping was a violation of Washington state law, the agents were committing a crime when they tapped Olmstead's phone, and on that basis the information should not be admitted as evidence as well.

Chief Justice Taft, writing for the majority, was not persuaded. He quickly dispensed with the Fifth Amendment argument, saying "There is no room in the present case for applying the Fifth Amendment, unless the Fourth Amendment was first violated." Thus, "Our consideration must be confined to the Fourth Amendment" (Olmstead, 462). The incriminating evidence given by Olmstead had not been coerced, but had been spoken voluntarily, according to Taft.
Referring somewhat disparagingly to the *Weeks* decision as "striking" and "sweeping," Taft went on to discuss the historical purpose of the Fourth Amendment, and found its protection to be far more narrow than his predecessors had in *Boyd* and *Weeks* or even *Jackson*. He emphasized the tangible nature of "persons, houses, papers and effects," and said the Fourth Amendment was meant to protect only trespass within the home, and the seizing of tangible items. Because the agents had installed the wiretaps without any physical trespass onto the property of those being listened to, he said no Fourth Amendment violation had occurred. He rejected the idea that the Fourth Amendment could be applied to the "hearing or sight" of evidence.

Having finished with Fourth Amendment questions, Taft then considered whether the fact that the information was seized in violation of state law should render it inadmissible in court. Looking to common law, Taft concluded that the method used to gather the information should not bear on whether or not it could be used as evidence. "The common-law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained" (p. 467). Prior to the *Weeks* ruling, courts had always admitted evidence, no matter in what manner it was gained. Indeed, this is what led the Court to issue the exclusionary rule, for though there were common-law actions that could later be brought against the officials who illegally gained evidence, that brought little relief to those who had been the victims of illegal evidence gathering, nor did it prove to be much of an disincentive to officials to stay within the guidelines of the law. However, the *Weeks* ruling, as interpreted by Taft, applied only to information gathered in violation of the Fourth Amendment, not to evidence which violated some
other law, such as the Washington state law in question. Responding to assertions that
the exclusionary rule should be extended to include illegally or unethically obtained
evidence as well as unconstitutionally obtained evidence, Taft wrote that:

A standard which would forbid the reception of evidence, if obtained by
other than nice ethical conduct by government officials, would make
society suffer and give criminals greater immunity than has been known
heretofore (p. 468).

Although he did not explicitly state as much, Taft employed a balancing test, weighing the
rights of those accused of crimes against the good of society in stopping crime. Taft feared
that extending the Fourth Amendment to include the new telephone technology would
unduly strip law enforcement officials of an effective means of gathering evidence about
crimes. Articulating his sympathies for the challenges of law enforcement, Taft wrote that
"those who realize the difficulties in bringing offenders to justice may well deem it wise
that the exclusion of evidence should be confined to cases where rights under the
Constitution would be violated by admitting it" (p. 369). Taft issued an implied invitation
to Congress, if they were so inclined, to pass legislation making it illegal for federal
officers to wiretap without a warrant, along with a procedural rule to prohibit admission of
evidence gained illegally. Until such time as Congress did so, however, Taft saw no reason
to prohibit the use of wiretapping to aid law enforcement officials.

In one of the most often-cited dissents in Supreme Court history, Justice Brandeis
blasted the majority for a reading of the Fourth Amendment so literally that it stripped the
Amendment, he said, of its spirit and intent. In language and arguments reminiscent of
his Harvard Law Review article, Brandeis once again made an eloquent and impasioned
plea for the right of privacy – this time to be teased from a broad interpretation of the
Fourth and Fifth amendments rather than tort law. He wrote that those things most important to an individual might well encompass more than tangible things.

The makers of our constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth” (p. 479).

In the decisions following Olmstead, the Court increasingly embraced the Brandeis notion that the Fourth Amendment protected a right to privacy. Gradually, the “right of privacy” came to replace the right against “unreasonable searches and seizures.”

Shortly after the Olmstead decision, Congress launched an extensive investigation of the use of wiretapping in federal law enforcement, and it became clear in testimony that federal agents often tapped phone lines without a warrant, particularly in pursuit of violators of prohibition laws (Nardone v. U.S., 302 U.S. 379, 1937). That at least some members of Congress disapproved of the practice is demonstrated by the fact that several bills were proposed to outlaw wiretapping without a warrant. However, none of these bills was passed. A few years later, in 1934, Congress did pass a law to protect the content of private electronic communications – though it was unclear just who it was protecting the public from. Although the primary purpose of the Communications Act of 1934 was to set up the Federal Communications Commission, Section 605 of the act
prohibited anyone working to transmit electronic signals from making the contents of those transmissions public, punishable by fine and imprisonment. The section, however, referred only to "persons assisting" in the electronic transmission, and made no reference to law enforcement. Although Olmstead remained good law almost four decades, the effects of that decision were, for the most part, reversed less then ten years later by the Court’s decision in Nardone v. United States 302 U.S. 379 (1937), when a 7-2 majority asserted that Section 605 applied to law enforcement officials. The facts in Nardone were similar to those in Olmstead: defendants were convicted of smuggling alcohol and most of the evidence had been obtained by federal agents who wiretapped telephone conversations without a warrant. The question before the Court was whether or not "persons" included federal agents. The majority said that without specific language to indicate otherwise, "persons" would indeed include federal agents. Like Taft had done in Olmstead, Justice Roberts, who wrote the majority opinion in Nardone,

26 Section 605 of the Communications Act of 1934, entitled “Unauthorized Publication of Communications,” reads, in full, “No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.”
weighed the interests of society in fighting crime versus the individual’s interest in keeping private phone conversations private. Roberts found the practice of wiretapping without a warrant to be so “destructive of personal liberty” and so “violative of privacy” as to outweigh the hindrance which would be borne by federal agents. Although the Nardone decision did not overturn Olmstead, it came close to doing so when it said that by enacting Section 605 Congress likely sought to protect the privacy “embodied in the Fourth and Fifth Amendments of the Constitution” (p. 383). In a caustic dissent, Justice Sutherland – who had voted with the Taft majority in Olmstead – played doomsayer.

The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court” (p. 385).

Sutherland, too, weighed the rights of personal privacy against the needs of society to enforce the law, but found the scale tilted heavily in favor of society and the freedom of federal agents. And while he admitted that eavesdropping was unseemly, he condemned the majority for finding government officials to be no more than “persons” before the law and accused them of glorifying personal privacy.

My abhorrence of the odious practices of the town gossip, the peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gains of criminals, in the same category, is to lose all sense of proportion. In view of the safeguards against abuse of power furnished by the order of the Attorney General, and in the light of the deadly conflict constantly being waged between the forces of law and order and the desperate criminals who infest the land, we well may pause to consider whether the application of the rule which forbids an invasion of the privacy of the telephone communications is not being carried in the present case to a point where the necessity of public
protection against crime is being submerged by an overflow of sentimentality” (p. 387).

The practical effect of *Nardone* was application of an exclusionary rule-like doctrine to wiretapping by federal agents\(^\text{27}\), though *Olmstead’s* primary finding – that conversations were not included in the Fourth Amendment’s protection – would not be overruled until 1967, implicitly in *Berger v. New York* 388 U.S. 41, and explicitly in *Katz v. U.S.* 389 U.S. 347.

By the 1940s, the word privacy had become highly visible in Fourth Amendment Supreme Court opinions. Where the word had once made an occasional appearance by which ever justice was arguing for a more expansive interpretation of the Fourth Amendment, the word became to be commonly used as a shorthand for the protection offered by the Fourth Amendment, or the protections of the Fourth and Fifth amendments read together. Take, for example, the 1948 case of *Trupiano v. U.S.*, 334 U.S. 699. Federal agents, looking for unlawful stills, inspected a private barn without either an arrest warrant or a search warrant – even though they’d had plenty of time to get one. The important question before the Court was whether the word “houses” in the Fourth Amendment protected only homes, or other private buildings. A slim (five to four) majority ruled that the Fourth Amendment included other private buildings as well as homes. What is interesting for the purposes of this study is that both the majority and the dissenters invoked the language of privacy. Justice Murphy, for the majority, wrote:

\(^{27}\) That is, that information gathered in violation of the Court’s interpretation of Section 605 of the Communications Act would not be admissible evidence.
The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy. [Regarding the difference between having and not have a warrant,] It is a difference upon which depends much of the potency of the right of privacy (emphasis added) (p. 710).

Also using the language of privacy, Chief Justice Vinson, on behalf of the dissenters, wrote:

[T]he vital rights of privacy protected by the Fourth Amendment are not denied by seizure of contraband materials.... (p. 714)

Another example of how both the majority and the dissenters by the late 1940s used privacy as a shorthand for the protection of the Fourth Amendment is seen in Harris v. U.S., 331 U.S. 145 (1947), a case which related to the legality of searches incidental to lawful arrests. Writing for the majority, Chief Justice Vinson virtually equated privacy with the Fourth Amendment. “This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment are ‘to be regarded as the very essence of constitutional liberty’” (p. 150). Justice Frankfurter, writing for the dissenters, did likewise. Of the “right to be let alone,” he wrote, “To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment” (p. 159).

No doubt the increased use of the word privacy can largely be attributed to the influence of Brandeis. But the use of the language of privacy and the firm conviction that it was protected by the Constitution did not retire with Brandeis. When Brandeis left the bench in 1939, his successor, William Douglas, carried on the fight for the “right to be let alone.” As was noted by legal scholars McWhirter and Bible (1992),
Although a justice’s replacement usually does not hold a philosophy similar to that of the justice he replaces, this was the case with these two men. In a very real sense they occupied the “privacy” seat on the Court for over half a century (p. 91)

Douglas’s vision of privacy was not identical to his predecessor’s, however. Indeed, in the 1942 decision of *Goldman v. United States*, 316 U.S. 129, Douglas voted with the majority to uphold the *Olmstead* precedent, by not extending the protection of the Fourth Amendment to a bugged conversation. The facts in *Goldman* (which was actually two cases), had to do with conspiracy of a lawyer, Goldman, and a debtor, Shulman, to violate federal bankruptcy law. The scheme had to do with the debtor selling his assets for one price, but reporting a lower price – with the help of his lawyer – to his creditors. The lawyer and the debtor would then split the profits. Goldman tried to get a second lawyer, Hoffman, who worked on behalf of the creditors, in on the deal, but Hoffman refused. Goldman continued to try to persuade Hoffman, and Hoffman finally said he would comply, but instead went to the bankruptcy referee and reported the plan. A federal agent told Hoffman he should continue to negotiate with Goldman and his client, as if he were going along with the plan. In the meantime, federal agents, with the help of the building management, went to Shulman’s office and installed listening devices in the partition wall. Then, on several occasions, agents and a stenographer listened to and transcribed parts of conversations between Hoffman, Goldman and Shulman, as well as Shulman’s half of incriminating phone conversations.

When Shulman and Goldman learned of the bugging, they made a motion to suppress the evidence, saying that the placement of the bugging equipment in Shulman’s office violated his Fourth Amendment rights, and that use of his half of the telephone
conversations violated Section 605 of the Federal Communications Act of 1934. In making their Fourth Amendment argument, lawyers for Shulman and Goldman urged the Court to view the circumstances in Goldman as different than those in Olmstead. In Goldman, the three men had been talking within the confines of Shulman’s office, and did not intend for their voices to go further, whereas in Olmstead, the individuals involved had projected their voices, via telephones, out into the world where they could be easily intercepted. They were arguing for something akin to a “reasonable expectation of privacy” rationale, something that the Court would adopt a quarter of a century later in Katz v. United States (1967).

The majority, with which Douglas voted, rejected both arguments. As for the “expectation of privacy” argument, the Court said,

We think ... the distinction is too nice for practical application of the constitutional guarantee and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the Olmstead case (p. 136).

As for the contention that the officers violated Section 605, the Court distinguished between “interception” – the thing prohibited by the Act – and simple eavesdropping. Because agents were privy only to Shulman’s half of the conversation and did not tap the phone lines, they had simply eavesdropped, which was permissible under the law.

How could Douglas – who would later go on to “find” a substantive right of privacy in the Constitution – have voted this way in Goldman? A decade later Douglas

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28 The Federal Communications Act was discussed earlier in this chapter; Section 605 of the Act prohibited anyone from intercepting phone calls without a warrant. As discussed above, the Court’s decision in Nardone interpreted Section 605 such that it worked like the exclusionary rule with respect to phone conversations intercepted without a warrant.
admitted regret for siding with the majority in Goldman. In his dissent in On Lee v. United States, 343 U.S. 747 (1952), Douglas explained his change of heart this way:

The Court held in Olmstead v. United States over powerful dissents by Mr. Justice Holmes, Mr. Justice Brandeis, Mr. Justice Butler, and Chief Justice Stone that wire tapping by federal officials was not a violation of the Fourth and Fifth Amendment. Since that time, the issue has been constantly stirred by those dissents and by an increasing use of wire tapping by the police. Fourteen years later in Goldman v. United States the issue was again presented to the Court. I joined in an opinion of the Court written by Mr. Justice Roberts, which adhered to the Olmstead case, refusing to overrule it. Since that time various aspects of the problem have appeared again and again in the cases coming before us. I now more fully appreciate the vice of the practices spawned by Olmstead and Goldman. Reflection on them has brought new insight to me. I now feel that I was wrong in the Goldman case (p. 763).

In addition to time and experience, I believe another factor can help explain the discrepancy between the Goldman decision and numerous later opinions in which Douglas defends a right of privacy. The facts in the Goldman case were such that the place of the bugging was in an office within a public building. Later in his career, Douglas would cast his vote in favor of allowing access to business records of regulated industries. Judging from his voting record, it appears that Douglas distinguished between business records and the more intimate details of a life. For Douglas, the sanctity of the home prevailed over all, and other aspects of life, such as one’s place of business, received a lesser degree of protection.

This distinction between personal life and business life is illustrated nicely by Douglas’s opinion in Davis v. U.S., 328 U.S. 582 (1946). The case involved the seizure, without a warrant, of gasoline ration coupons. While Davis was away from the gas station he owned, federal agents went to the station and purchased gas from one of
Davis's employees. The agents were successful in purchasing gasoline without the coupons, for an extra 20 cents per gallon. When they arrested her, she said she had been instructed by Davis to sell gas without the coupons. When Davis returned he, too, was arrested, and while one agent measured the amount of gasoline left in the tanks, another questioned Davis and demanded to see his rationing coupons. Some of the coupons were kept in a locked office, which Davis at first refused to open. He eventually did so, though he claimed that the agents threatened him, which they later denied.

Writing for the majority, Douglas recited the Fourth and Fifth Amendments and wrote that "the interplay of these two constitutional provisions ... reflects a dual purpose -- protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him" (p. 588). But in this case, Douglas made a distinction between private property and government property. "We are thus dealing not with private papers or documents but with public property in the custody of a citizen" (p. 589). Furthermore, the location of the seizure mattered as well. "The filling station was a place of business, not a private residence," and thus "the normal restraints against intrusion on one's privacy, as we have seen, are relaxed" (p. 593).

It was Douglas's extreme respect for personal privacy, particularly the privacy of intimate relationships, such as that between husband and wife or parent and child, that eventually led him to adopt a broader interpretation of the Fourth Amendment in all situations -- business as well as personal. No doubt the many cases which came before the Court telling of government agents abusing their authority to obtain evidence
influenced him. And it was quite probable that he, like a majority of the American public, had come to fear that the ever-more-sophisticated electronic surveillance equipment in the hands of a few unscrupulous government agents could turn the government into Big Brother. It was perhaps to preserve the sanctity of the home from a slippery slope of government intrusion that he broadened his interpretation of the Fourth and Fifth amendments and polished his privacy rhetoric. As he said in his dissent in *On Lee*,

> The nature of the instrument that science or engineering develops is not important. The controlling, the decisive factor is the invasion of privacy against the command of the Fourth and Fifth Amendments (emphasis added) (p. 765).

Two years after the *On Lee* decision, a case with the kind of Orwellian facts that Douglas seemed to fear came before the Court, and in his dissent in *Irvine v. California*, 347 U.S. 128 (1954), Douglas made a passionate plea for privacy. Irvine was a bookie. Although local police had long-suspected as much, they lacked hard evidence. One afternoon in December of 1951, when Mr. and Mrs. Irvine were away from their home, an officer arranged for a locksmith to go to the house and make a key. Two days later, again when Mr. and Mrs. Irvine were away, police went to the home, this time accompanied by a technician. Though they had no warrant, the police entered the house using the key that had been made, and installed a concealed microphone in the hall. On two subsequent visits they installed two more microphones, one in a closet and another in the couple’s bedroom. Wires from the three mikes were strung through a hole the technician drilled in the ceiling, and then the wires were extended to a neighboring garage where officers waited for conversations to be transmitted. The bugs remained in the home for over a month, during which time the officers listened to all conversations in
the house until they were satisfied they'd heard enough conversations laced with bookmaking lingo, and they made their arrest. Over Irvine's objection that the information was gathered by methods in violation of the Fourteenth Amendment and should thus be inadmissible, officers testified about the conversations they overheard, and Irvine was successfully convicted under California's antigambling laws.

Calling the behavior of the officers "almost incredible if it were not admitted" and admitting that it would be hard to imagine a situation in which the principles of the Fourth Amendment could have been any "more flagrantly, deliberately, and persistently violated" (p. 132), the majority nonetheless declined the opportunity to extend the exclusionary rule to the states. The Court repeated the arguments from Wolf v. Colorado, that barring admission was not the only way to deal with officials who illegally search and seize, and it was best left up to the states to determine their own remedies.

Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best. Some discretion is

29 Five years earlier, in Wolf v. Colorado, the Court held that a prohibition similar to that of the Fourth Amendment applied to the states. Justice Frankfurter, writing for the Court, said that the "core" of the Fourth Amendment applied to the states. It was not until Mapp v. Ohio, 367 U.S. 643 (1961), that the full Fourth Amendment was applied to the states.

30 A second objection - outside the scope of inquiry here, but interesting nonetheless - was made regarding admission of Irvine's "federal wagering tax stamp." Federal tax law required special taxes on wagering. Those involved in wagering professionally were supposed to apply for the wagering tax stamp before they could file tax information on wagering income. Irvine said that payment of the federal tax was the equivalent of a federal license for bookmaking. The Court was not persuaded, saying that the federal law did not condone wagering nor exempt practitioners from state law.
still left to the states in criminal cases, for which they are largely responsible, and we think it is for them to determine which rule best serves them (p. 136, 137).

"The search and seizure conducted in this case," Douglas wrote in his dissent, "smack of the police state, not the free America the Bill of Rights envisaged" (p. 149). Douglas went so far as to accuse the majority of approving tactics similar to the British searches that inspired the Fourth Amendment.

In those days courts put their sanction behind the unlawful invasion of privacy by issuing the general warrant that permitted unlimited searches. There is no essential difference between that and the action we take today. Today we compound the grievance against which Otis complained (p. 150).

Furthermore, asserted Douglas, "Not only is privacy invaded. The lawless invasion is officially approved as the means of sending a man to prison" (p. 150).

Douglas chided the majority for not taking the opportunity to apply the exclusionary doctrine to the states. "If unreasonable searches and seizures that violate the privacy which the Fourth Amendment protects are to be outlawed, this is the time and the occasion to do it" (p. 153). The lack of such restraints on state law enforcement was, he said, "part of the deterioration which civil liberties have suffered in recent years" (p. 151). And just as it had been for Brandeis before him, the civil liberty most cherished by Douglas was "the right to be let alone."

**Privacy: Rewriting the Fourth Amendment?**

Two final Fourth Amendment cases deserve attention before focusing on the personal autonomy-type of privacy that Michael Hardwick would seek to use to strike down Georgia’s sodomy law. Almost four decades after Brandeis’s celebrated *Olmstead*
dissent, Brandeis was vindicated by two cases in 1967.\textsuperscript{31} Taken together, \textit{Berger v. New York}, 388 U.S. 41, and \textit{Katz v. United States}, 389 U.S. 347, asserted that conversation fell within the protection of the Fourth Amendment, and that the Amendment's protection was based not on property or trespass, but protected the person in a much wider array of situations than before. Although these cases came two years after the Court had "found" a personal autonomy-type of privacy in \textit{Griswold v. Connecticut} they are worth discussion because they illustrate two points. First, the majority opinions in these two cases show how much the concept of Fourth Amendment privacy had evolved from a procedural protection of tangible places and things to a protection of less tangible things such as personality and a personal space surrounding the individual in certain situations. And second, the dissenting opinions in both illustrate that not everyone was enamored with either the language of privacy, nor the implications of a the more substantive variety of privacy announced in \textit{Griswold}. Indeed, in the wake of \textit{Griswold}, there were some members of the Court who grew to resent use of the word privacy even as a shorthand for Fourth Amendment protections.

In \textit{Berger v. New York}, the Court struck down a New York law that authorized warrants for eavesdropping if law enforcement officials swore that they had reason to believe that eavesdropping would produce information about a crime, and if they named the person whose conversation they wished to hear. The case involved Berger, who was convicted for conspiracy to bribe an official of the New York State Liquor Authority. The information used to convict him was obtained with the use of recording devices that state

\textsuperscript{31} Although both of these decisions were issued in 1967, the \textit{Berger} decision was issued at the close of the (footnote continued on next page)
agents put in two offices for 60 days. The agents had obtained a warrant on the basis of a
tip from a disgruntled bar owner that there were officials at the Liquor Authority who could
be bribed. After listening to phone conversations for two weeks, the agents arrested Berger
as the “go-between” who arranged for the illegally obtained liquor licenses.

Berger’s lawyers objected to use of the taped conversations, saying that the New
York law authorizing the warrants was overbroad, allowing “trespassory intrusions into
private, constitutionally protected premises,” and because the state requirement to obtain
a warrant was “reasonable grounds,” and this was not as stringent as the Fourth
Amendment’s “probable cause” requirement. In an opinion authored by Justice Clark,
the Court agreed, and struck down the law. Noting that “The basic purpose of [the
Fourth] Amendment, as recognized in countless decisions of the Court, is to safeguard
the privacy and security of individuals against arbitrary invasions by governmental
officials” (emphasis added) (p. 54), Clark then discussed the nature of eavesdropping. He
asserted that “By its very nature, eavesdropping involves an intrusion on privacy that is
broad in scope” (p. 56), particularly with the advent of technology that allowed ever more
sophisticated ways of listening to private conversations. As a result, “The law, though
jealous of individual privacy, has not kept pace with these advances in scientific
knowledge” (p. 49). According to the majority, the New York law lacked the
“particularization” required by the Fourth Amendment. That is, the oath must describe
the particular place to be searched, and the New York law required only that a specific
person be named. Clark asserted that this broad authorization was worse than the general

1966-67 term, while the Katz decision was issued in December of the 1967-68 term.
writs which inspired the Fourth Amendment. The purpose of the Fourth Amendment, he wrote, was “to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed” (p. 59). The Court further found the 60-day warrant period to be excessive and sweeping, thus avoiding “prompt execution.”

In a concurring opinion, Douglas applauded the majority for its *sub silentio* overruling of *Olmstead*. But he noted his belief that the use of electronic surveillance, particularly bugging, was so invasive of privacy that it “is a violation of the Fourth and Fifth Amendments, no matter with what nicety and precision a warrant may be drawn” (p. 48). Bugging, he wrote,

is the greatest of all invasions of privacy. It places a government agent in the bedroom, in the business conference, in the social hour, in the lawyer’s office – everywhere and anywhere a “bug” can be placed (p. 48).

Douglas emphasized that electronic eavesdropping “constitutes a dragnet” which captures not only conversations regarding crimes but “the most intimate of conversations” as well, citing a case in which innocent conversations had been taped between husband and wife and mother and daughter. As will be discussed in the Chapter 5, the idea of the sanctity and privilege of certain relationships was the foundation upon which Douglas built his right of privacy in *Griswold*.

In a mordant dissent pointedly critical of his brethren, Justice Black castigated not only what he saw to be Douglas’s rewriting of the Fourth Amendment, but took the opportunity to attack the exclusionary rule, as well as to disparage the use of privacy as shorthand for the Fourth Amendment.
It should now be clear that in order to strike down the New York law the Court has been compelled to rewrite completely the Fourth Amendment. By substituting the word “privacy” for the language of the first clause of the Amendment, the Court expands the scope of the Amendment to include oral conversations... (p. 86).

The gist of Black’s argument was that the Fourth Amendment was meant to be a procedural protection only, and by substituting the concept of privacy for the words of the Fourth Amendment, the Court had created a substantive protection which was not only unconstitutional, in Black’s view, but a bad idea as well. Black did not quarrel with the majority’s contention that electronic eavesdropping invaded privacy. Rather, he was simply convinced that protection of privacy was not the purpose of the Fourth Amendment.

The ability of the government to investigate crime was important to society, and the purpose of the Fourth Amendment, according to Black, was only to slow the process down enough that “unreasonable” attempts to gain evidence could be ferreted out.

Obviously, those who wrote this Fourth Amendment knew from experience that searches and seizures were too valuable to law enforcement to prohibit them entirely, but also knew at the same time that while searches or seizures must not be stopped, they should be slowed down, and warrants should be issued only after studied caution (p. 74).

Nor should the fact that evidence was sometimes obtained by methods which some might characterize as “unreasonable” mean that such evidence cannot be used at trial, he argued. Black was convinced that if the authors of the Fourth Amendment intended as much, they would have explicitly said so. To support this argument, he pointed to other amendments which he said did include more precise and clear instructions.

There are constitutional amendments that speak in clear and unambiguous prohibitions or commands. The First, for illustration, declares that
“Congress shall make no law ... abridging the freedom of speech, or of the press....” The Fifth declares that a person shall not be held to answer for a capital or otherwise infamous crime except on a grand jury indictment; shall not twice be put in jeopardy of life or limb for the same offense; nor be compelled in any criminal case to be a witness against himself. These provisions of the First and Fifth Amendments, as well as others I need not mention at this time, are clear unconditional commands that something shall not be done. Particularly of interest in comparison with the Fourth Amendment is the Fifth Amendment’s prohibition against compelling a person to be a witness against himself. The Fifth Amendment’s language forbids a court to hear evidence against a person that he has been compelled to give, without regard to reasonableness or anything else. Unlike all of these just-named Fifth Amendment provisions, the Fourth Amendment relating to searches and seizures contains no such unequivocal commands.... Had the framers of this Amendment desired to prohibit the use in court of evidence secured by an unreasonable search or seizure, they would have used plain appropriate language to do so....” (p. 74 – 76).

Black argued that the problem with the majority was that use of the word “privacy” was misleading them. Not only did this right of privacy “play sleight-of-hand tricks” with the Fourth Amendment, but it was an unworkable concept in and of itself. This “judge-made” notion of privacy unduly fettered law enforcement, and would ultimately undermine an ordered society.

No man’s privacy, property, liberty or life is secure, if organized or even unorganized criminals can go their way unmolested, ever and ever further in their unbounded lawlessness (p. 73, 74).

Beyond whatever privacy might mean in the context of the Fourth Amendment, Black criticized the notion of privacy itself for its ambiguity and unlimited nature. He stated that the framers of the Bill of Rights would specifically not have included such a principle.

It is impossible for me to think that the wise Framers of the Fourth Amendment would ever have dreamed about drafting an amendment to
protect the “right of privacy.” That expression, like a chameleon, has a different color for every turning (p. 77).

Very likely referring to the *Griswold* decision, Black said that notions of “privacy” did nothing more than to give “this Court a useful new tool, as I see it, both to usurp the policy-making power of Congress and to hold more state and federal laws unconstitutional when the Court entertains a sufficient hostility to them” (p. 77). Black continued his attack on the Court’s interpretation of the Fourth Amendment and on its reliance on privacy several months later when he dissented in another case in which the Court included conversation within the scope of the Fourth Amendment.

*Katz v. United States*, 389 U.S. 347 1967, represented an important shift in the way the Court viewed the protection offered by the Fourth Amendment. Instead of focusing on “constitutionally protected areas” as it had in the past – even as recently as *Berger* – the Court said that the more correct focus was on someone’s “expectation of privacy.” The opinion in *Katz* is striking for how explicitly the majority both embraced the notion of privacy, and the extent to which it relied on the penumbral-type reasoning from the *Griswold* opinion.³²

The case involved the conviction of a man under a federal law which prohibited discussion of gambling information on interstate telephone lines. The evidence used by the prosecution had been gathered with the help of a recording device which had been

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³² In referring to the various provisions of the Constitution that connote a right to privacy, the Court said, in footnote number 5, “The First Amendment, for example, imposes limitations upon governmental abridgment of ‘freedom to associate and privacy in one’s associations.’” The Third Amendment’s prohibition against the consensual peace-time quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment, too “reflects the Constitution’s concern for ... the right of each individual ‘to a private enclave where he may lead a private life.’” (citations omitted).
attached to the glass on the outside of a public telephone booth. The government argued that the information obtained was not a violation of the Fourth Amendment because a phone booth is a public place, and because there was no physical intrusion into the booth itself. In their brief to the Court, Katz’s lawyers presented two questions. First, was a phone booth a constitutionally protected area, and second, did the electronic device need to physically invade the space to constitute a violation of privacy, as protected by the Fourth Amendment?

At the outset, Justice Stewart, writing for the majority, announced that “We decline to adopt this formulation of the issues.” The Court’s objection, he wrote, was twofold: first, the phrase “constitutionally protected area” was misleading in that it directed the focus to property rather than people, and second, the Fourth Amendment “cannot be translated into a general ‘right to privacy’” (p. 351). However, Stewart’s problem with the substitution of the word privacy as a shorthand for the Fourth Amendment was nothing at all like Black’s objection. On the contrary, Stewart said the problem with the concept of privacy was that it didn’t go far enough. “That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all” (p. 350).

Attorneys for the government argued that the agents had acted in reasonable, restricted ways, and therefore the Court should, in essence, “retroactively validate their conduct” (p. 355). “That,” wrote Stewart, “we cannot do” (p. 355). For in the absence of a handful of “specifically established and well-delineated exceptions,” preauthorization of a search by a neutral magistrate lay at the heart of the Fourth Amendment. That Katz
had left the privacy of his home and was in public did not mean he'd left his constitutional protections at home. “Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures” (p. 359), Stewart wrote. “For the Fourth Amendment protects people, not places... [W]hat he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected” (p. 351).

In a concurring opinion cited perhaps more often than the majority opinion, Justice Harlan summarized what he understood to be the two-part requirement of Katz. He praised the Court for overturning the Olmstead precedent which required physical intrusion to trigger the Fourth Amendment. In light of the ever-increasing technological advances which made eavesdropping easier from more remote locations, the former doctrine made for “bad physics as well as bad law” (p. 362). Under the new doctrine, the crux of the matter was a twofold “reasonable expectation” of privacy: first, that the individual exhibited a personal or subjective expectation of privacy; and second, that the expectation was one that society would also find reasonable.

In an opinion very similar in tone and argument to his Berger dissent, Black made essentially two points. First, that the Fourth Amendment did not protect a general right to privacy, and it was only through the “clever word juggling” of “language-stretching” judges that one was ever recognized in the first place. And second, he vigorously opposed any interpretation of the Constitution “to bring it into harmony with the times” (p. 364). He remained thus convinced that the Fourth Amendment did not apply to
conversations obtained through wiretapping, nor did he believe that the Amendment supported the exclusionary rule. "With this decision," he wrote,

the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy (p. 374).

Part of the rewriting he referred to, no doubt, was included in the Court's finding of a more substantive right to privacy, implied not only in the Fourth Amendment, but in various other penumbras of the Constitution as well. It was that substantive notion of privacy to which Michael Hardwick would turn in the hope of striking down Georgia's sodomy law, to which I now turn my attention.
CHAPTER 5
CONSTITUTIONAL PRIVACY PART II: PRIVACY AS EUPHEMISM

All declare for liberty and proceed to disagree among themselves as to its true meaning.

-- Justice Stanley Reed
Breard v. Alexandria, 1951

As chapters 2 and 4 illustrate, defining privacy is no small task. Finally, in this chapter, I discuss the strain of privacy law most pertinent to the Bowers decision. In the previous chapter, I suggested that there is no such thing as privacy in constitutional jurisprudence, at least not in the way the term is commonly understood. Instead, constitutional notions of privacy have developed along two lines. First, privacy has been used as a shorthand for those things protected by the Fourth Amendment, and I discussed this development in the last chapter. The other use of privacy – and the one much more relevant to the current study – is as a euphemism for protecting liberty interests, when stating the actual liberty being protected seems unsavory posited as a fundamental right. Thus, instead of a right to buy condoms or a right to an abortion, justices have cloaked these rights in the more high-sounding rhetoric of privacy.

In this chapter, I discuss the line of Supreme Court decisions involving privacy leading up to Bowers. Along the way, I hope to illuminate why the Court has been willing to protect some things under the auspices of privacy (e.g., the right to contraception and the right to abortion), while being unwilling to extend the right to privacy to homosexual sodomy. Ultimately, I hope to show that the string of so-called privacy cases, beginning with the landmark 1965 Griswold v. Connecticut, 381 U.S. 479,
decision and culminating in Bowers, has been less about a right to privacy, and more about the privileging of certain relationships, such as that between husband and wife or between doctor and patient – both of which receive legal and constitutional protection outside of the Court’s privacy jurisprudence.

The reason the landmark privacy decisions have been based on privileged relationships is that this was a way for the Court to do two things. First, framing privacy within the context of a relationship allowed the Court to circumvent the largest problem with privacy – i.e., coming up with a limiting principle. Second, the use of the marital relationship and the doctor-patient relationship allowed the Court to bolster its justification of a privacy right by drawing upon the arguments that come pre-packaged with these special relationships. These two points will be developed throughout the rest of this chapter.

Griswold is typically cited as the case in which the Court created or discovered a right to privacy.¹ Notwithstanding all the commentary and controversy surrounding this case, there is much about Griswold that was not new. The use of substantive due process to strike down state laws in non-economic areas was not novel, as will be discussed below. Nor was the use of a “penumbral” logic – i.e., the protection of non-enumerated rights which are related to or “emanate” from specific protections in the Constitution –

¹ A few examples from American government textbooks illustrate this point. “It was not until 1965 in Griswold v. Connecticut that the Warren Court formally named and used the right to privacy to strike down a Connecticut law.... (Edwards and Lippucci 1998, 598); “In Griswold, seven justices decided that various portions of the Bill of Rights, including the First, Third, Fourth, Fifth, and Fourteenth amendments, cast “penumbras” ... thereby creating zones of privacy .... a right the Court concluded could be read into the U.S. Constitution” (O’Connor and Sabato 1999, 179); “Griswold established a zone of personal autonomy, protected by the Constitution....” (Janda, Barry and Goldman 1998, 309).
unprecedented, as will also be discussed below. What, then, made *Griswold* and its progeny the center of a storm of controversy? As one commentator put it, “What made *Griswold* a landmark case was the Court’s willingness to explicitly justify at length this practice of investing such unenumerated rights with full constitutional status” (McCann 1992, 352). And, I would argue, *Griswold* was different because instead of simply stating the liberty interest involved (the right to use contraceptives), the Court introduced the language of privacy in the sense of personal autonomy, which would naturally cause alarm to critics—ironically on both sides of the political fence.

**Foreshadowing The Penumbras**

One of the aspects of the *Griswold* decision most harshly criticized was Douglas’s use of “penumbral” logic—both in the sense of finding non-enumerated rights implied, or in the shadows of other rights expressly listed, and simply for use of the word itself. But such penumbral or derivational logic was hardly unprecedented, nor did the Court’s articulation of other unenumerated rights meet with the harsh criticism that came in the aftermath of *Griswold* and its progeny. Consider, for example, the right of association. The right of association protects one’s ability to be a member of any organization other than organizations created specifically for illegal purposes (such as a gambling syndicate). The right of association, like the right of privacy, is nowhere mentioned in the Constitution. Yet despite its unenumerated status, the right of association does not share with privacy a tortured history, either in Supreme Court jurisprudence, or in

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2 The definition and standard usage of the word were discussed in the previous chapter.
negative commentary by Court observers. Some might make the argument that freedom of association was more easily embraced by the Court and its critics because it was merely a logical extension of the enumerated right of assembly and the right to petition government. The right to peaceably assemble and the right to petition government, combined with the protection of speech and ideas promised in the free expression clauses, give rise to a right of association so that individuals may develop and advance their ideas in concert with others holding similar ideas. Thus the right of association can be thought of as something akin to "penumbral" in nature, being found in the shadows of the First Amendment, but also constituting a separate and independent right, not unlike the way the right of privacy has been articulated.

The reason that the right of association did not meet with the same kind of voluminous criticism as privacy, I would argue, is because the right of association protects ideas rather than action. Thus, there is not the concern with a limiting principle as there is with privacy, for privacy shields actions as well as ideas and expression. The trick with recognizing a right of privacy is to state the right in such a way that it would protect either only a particular, narrowly defined action, or to couple the right of privacy with some other right. As noted by Gavison (1980), "privacy is seldom protected in the absence of some other interest" (p. 426). I would take this one step further and argue that

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3 The First Amendment provides that "Congress shall make no law ... prohibiting ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

4 See, for example, *NAACP v. Alabama*, 357 U.S. 449 (1958), which provides a discussion of how the right of association is implied by other provisions in the First Amendment. In this case, in which the Court struck down an Alabama law that required the NAACP to provide a list of its membership, the Court said that the right of association was so fundamental as to fall within the protection of the Fourteenth Amendment.
privacy is only invoked when the naming of the right in question is too discomforting to name explicitly. The key, then, to whether or not a privacy argument will work is whether or not the awkward liberty interest can be paired with some other liberty interest. In *Griswold v. Connecticut*, the case typically cited as the first privacy case, the Court coupled the right of privacy with the privilege accorded to the marital relationship. Thereafter, the right of privacy was framed either in the context of a relationship, or framed merely as a "choice"—e.g., the choice of bearing a child, the choice of euthanasia, etc. And while everyone knows that choices are often followed by action, the emphasis was put on the choice, i.e., on the realm of ideas, rather than the action following the choice.

It is worth noting at least briefly that even use of "penumbral" language was not initiated in *Griswold*, but has a rather lengthy history in Supreme Court jurisprudence. The word "penumbra"made its way into at least twenty-one decisions previous to *Griswold*. One historian tracked use of the word in legal writing as far back as 1873, in a law review article written by Oliver Wendell Holmes. Holmes subsequently used the word in at least three decisions while he was a member of the Massachusetts Supreme Judicial Court, and in four of his opinions for the U.S. Supreme Court (Garrow 1994, 264). Eight of the twenty-one uses of penumbra in Supreme Court opinions prior to *Griswold* were by Justice Douglas, the author of *Griswold*.

**Other Unenumerated Rights In Pre-Gr iswold Era**

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5 Appendix A includes a list of the cases and the passage the word was used in.
After *Griswold*, most non-economic substantive due process claims have been discussed under the umbrella of privacy. That is, in the post-*Griswold* era, some cases have come after-the-fact to be classified as privacy cases – even though privacy claims were not advanced in the language of the decisions. Two early examples cited in hindsight as part of the privacy family of cases which deserve brief mention here are: *Meyer v. Nebraska*, 626 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Although neither of these cases invokes the language of privacy, they were nevertheless referred to as precedent in the privacy cases and are often cited by scholars as privacy cases because they were both framed to involve personal decisions of families, specifically, educational choices by parents. In *Meyer v. Nebraska*, the Court was asked to consider the constitutionality of a law which forbade teaching children any modern language other than English. The Oregon law in question in *Pierce v. Society of Sisters* required almost all children between the ages of eight and sixteen to be educated in public schools. In both instances, the Court invalidated the laws.

Considered together, the cases are interesting in two respects. First, although the interests at stake (the right to learn German and the right to go to a parochial school) are not specifically articulated in the Constitution, it would have been relatively easy for the Court to frame the questions in a way in which the rights involved would have found protection under the First Amendment. For instance, in *Meyer*, “The statute could have been invalidated as a state restriction upon the freedom to communicate knowledge, a right embraced by the concept of freedom of speech” (Cortner and Lytle 1971, 40). And in *Pierce*, “it appeared that the most obvious right interfered with by the statute was
freedom of religion” (Cortner and Lytle 1971, 40). However, these cases were decided by the Court just before the incorporation phase, and applying prohibitions in the First Amendment to the states would have required the Court to hold that the due process clause of the Fourteenth Amendment made at least some of the provisions in the Bill of Rights binding on the states as well as on the federal government – which in 1923 and 1925 the Court was apparently still reluctant to do.

The second interesting aspect of these cases is the method the Court chose to invalidate the state laws, since it did not do so through incorporating provisions of the Bill of Rights. In both cases, the Court struck down the laws on general substantive due process grounds. That is, the Court held the statutes violated a general liberty interest as protected by the Fourteenth Amendment’s due process clause – but in neither case did the Court advance any kind of theory about why the right to teach German or the right to attend a private school might be considered as liberty interests, nor did the Court indicate what other kinds of rights it might protect by this method in the future. Justifying its striking down of the restrictive language law on the basis of the Fourteenth Amendment’s due process clause, the Court said

> The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect (p. 400).

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6 In retrospect, 1925 would prove to be a pivotal year for selective incorporation, as that was the year that the Court issued its opinion in *Gitlow v. New York*, 268 U.S. 652 (1925), which is considered the case which started the process of applying protections within the Bill of Rights as limiting state as well as federal action.
And regarding its decision to strike the law requiring children to attend public schools, the Court said

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only (p. 41).

Nor were these rather cursory explanations for this use of “liberty” to strike state laws seriously challenged. Holmes, joined by Sutherland, did issue a one-paragraph dissent in *Meyer*, but his objection was not so much that he believed the Court to be misusing the due process clause of the Fourteenth Amendment as it was that he believed the law forbidding the teaching of languages other than English to be a good idea. “We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one” (p. 412). The *Pierce* decision was unanimous.

One way – and, I argue, the correct way – to make sense of these rulings (as well as the apparent lack of protest) is to read them as in keeping with the *Lochner-*era decisions. That is, in the 1920s it was not uncommon for the Court to strike state statutes on liberty of contract grounds, and these two laws in question were viewed by the Court as just another unreasonable infringement by the state upon the rights of their citizens. Indeed, the *Pierce* case was framed, in part, as an intrusion upon the economic freedom of the school because the owners of the school would lose their livelihoods as a result of the law. Lacking any other justification or explanation of the rights extended in *Meyer* and *Pierce*, the most reasonable alternative would simply be to view these cases as in keeping with other *Lochner-*era decisions.
The Court has, however, also recognized unenumerated rights as fundamental in the post-Lochner/pre-Griswold era, namely, the right to procreate and the right to travel abroad. In 1942, in *Skinner v. Oklahoma*, 316 U.S. 535, the Court elevated the right to procreate to the status of a fundamental right. The Oklahoma law in question was an early type of “three strikes and you’re out” law. It authorized states to sterilize individuals who were convicted of three crimes “amounting to felonies involving moral turpitude” (*Skinner*, p. 536). The defendant, Skinner, who had been convicted once for stealing chickens and twice for armed robbery, was ordered to be sterilized after a jury determined that sterilization would not impair Skinner’s health (other than to render him sterile).

The Court did not declare all compulsory sterilization laws unconstitutional *prima facie*, nor did the majority use due process analysis to strike down the Oklahoma statute. Perhaps the most conclusive thing about the majority opinion, written by Justice Douglas, was that it states that the ability to have offspring is “a basic liberty.” As such, any laws threatening to sterilize classifications of people were to be subjected to strict scrutiny. The decision did not render all sterilization laws unconstitutional, only that such laws would be given closer scrutiny by the Court. Upon examination, Douglas found Oklahoma’s law to be a violation of the Fourteenth Amendment’s equal protection clause. He pointed to certain disparities in the way offenses were classified into felonies and non-felonies, noting, for example, that fraud was classified by Oklahoma as a felony, whereas embezzlement was classified as a misdemeanor. He reasoned that there was no rational basis to conclude that those who committed fraud were more likely than
embezzlers to pass on those traits to children. In a concurring opinion, Chief Justice Harlan F. Stone rejected equal protection analysis, and instead advanced the argument that the law was a denial of due process because it did not require a hearing to determine if the criminal traits in question were capable of genetic transmission. In a second concurring opinion, Justice Robert Jackson agreed in general terms with the arguments of Douglas and Stone, but argued that objections to the law should go even deeper than due process or equal protection grounds. He wrote that the sterilization procedures were little more than biological experiments, based on very little reliable evidence, and that a legislature should not be allowed to compromise the dignity of a minority in this way.

Like Meyers and Pierce, privacy was not mentioned in Skinner. It has only been in the post-Griswold era that these cases are included in the list of privacy cases, not because the court used the logic of privacy to justify the decisions, but because all three have something to do with choices involving families and parenting. In each of these three decisions, it was a specific liberty interest that was considered fundamental – not a right of privacy.

The right to travel abroad was recognized as a fundamental right by the Court in Kent v. Dulles, 357 U.S. 116 (1958). Rockwell Kent had applied for a passport in order to travel to England to attend a conference. His request was denied by the State Department, which at the time had a policy of refusing passports to Communists or those with suspected Communist sympathies. The State Department argued that it was exercising its discretion as authorized under the Immigration and Nationality Act of 1952, which, it said, allowed the Department to deny passports to citizens based on their
beliefs or associations. Kent applied to the Court for declaratory relief, arguing that this violated his First Amendment rights of expression and association, as well as his right to travel.

Although the Court reached its decision based on statutory grounds rather than constitutional grounds, Justice Douglas, writing for the majority, ignored the First Amendment issues raised by Kent, but asserted that the right to travel was a fundamental liberty protected by the Fifth Amendment's due process clause. Indeed, considering the fact that the case was decided on statutory grounds rather than constitutional grounds, Douglas's defense of the right to travel as a fundamental right was rather extended.

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. 12 Chafee, Three Human Rights in the Constitution of 1787 (1956), 171-181, 187 et seq., shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See Crandall v. Nevada, 6 Wall. 35, 44; Williams v. Fears, 179 U.S. 270, 274; Edwards v. California, 314 U.S. 160. "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." Id., at 197.

Freedom of movement also furthered important social values. As Chafee put it:

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7 A bare majority (5 to 4) agreed that the State Department had exceeded its authority under the 1952 law, and thus the Secretary of State did not have authority to deny passports based only on the beliefs or association of an applicant. The Court added that, "any Act of Congress purporting to do so would raise grave constitutional questions" (p. 117).
"Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life - marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home." Id., at 195-196. And see Vestal, Freedom of Movement, 41 Iowa L. Rev. 6, 13-14.

Freedom to travel is, indeed, an important aspect of the citizen's "liberty" (pp. 126-127).

The difference between these post-Lochner cases and the pre-Lochner cases of Meyer and Pierce is that in the latter two cases, the Court used notions of substantive due process to justify a constitutional status for the unenumerated rights involved. In the post-Lochner cases, the Court claimed fundamental status for certain unenumerated rights, but the laws themselves (or application of the law) was voided by the use of some other constitutional provision, such as the use of an equal protection analysis in Skinner.

A Fundamental Right To Use Contraceptives?

By the 1960s, the Court had recognized as fundamental such non-enumerated rights as the right to association, the right to make certain educational choices for one's children, the right to procreate and the right to travel - all without undue controversy. And, as discussed in the previous chapter, by the 1960s the Court had long become comfortable articulating the idea that what the Fourth Amendment as well as the Fifth
Amendment's right against self incrimination were really protecting was a right to privacy. But what did the right to privacy protect besides protection against "undue" government intrusion? Was the right to privacy merely a procedural protection which set guidelines for government investigations, or was there something more substantive, some areas into which the government simply could not intrude at all? By 1965, the Court was ready to fashion its first major opinion on the subject. The right to privacy did not emerge as a result of interest groups fighting for a right of privacy per se. The context for the Court's first majority opinion in which the right of privacy was acknowledged was the legality of birth control. Specifically, the constitutionality of a Connecticut law banning the use of contraceptives was challenged.

Passed in 1879, during the Comstock era, the Connecticut law criminalized – for doctor and patient alike – prescription or even use of any form of birth control. A second law which forbade anyone to aid someone in committing a crime made physicians and health professionals vulnerable to prosecution as well. The prohibition against use was what made the Connecticut law particularly unique among state anti-contraception laws, and what made the law particularly obnoxious to proponents of birth control. By all accounts, the law was not actively enforced. Indeed, it was not uncommon to find vending

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8 In 1873, largely as a result of the influence of anti-obscenity zealot Anthony Comstock, Congress passed the Act for the Suppression of Trade in, and the Circulation of, Obscene Literature and Articles of Immoral Use, more commonly known as the Comstock law. Among other things, the law prohibited using the mails for any "article or thing designed or intended for the prevention of conception or procuring of abortion." The law was enormously influential, and within a few years, most states had adopted similar laws.

9 Section 6246 of the Connecticut code made it a criminal offense to "use any drug, medicinal article or instrument" to prevent conception (italics mine).

10 Other states targeted transport, sales or prescription of contraceptive devices rather than use.
machines dispensing condoms adorning the walls of the men's rooms at Connecticut gas stations, or to find drug stores selling the contraband (Garrow 1994, 188). But the law did discourage wide sale and dissemination of information about birth control. What worried birth control supporters even more was that it discouraged birth control clinics that advocates wanted to sponsor so that poor women as well as the wealthy could have information about and access to safe, effective birth control. And, despite concerted effort, not enough support could be found in the legislature to repeal the law.

Those who fought for reform of the contraceptive laws tried to approach the problem in ways which they thought had the greatest likelihood of success, which meant for many in the movement that the strategy used was more incremental and conservative than they might have ideally hoped for. So while many reformers wanted outright repeal of the contraceptive law, they first fought for certain exceptions to the law. Since the primary reasons for the law were religious and moral, reformers tried to minimize the "immorality" of their quest by focusing their liberalization efforts on exceptions for married couples rather than outright repeal of the law. This strategy was evident in advocates's work in the field, in their legislative efforts, and in their litigation strategies.

In the field, the work of reformers consisted of disseminating contraceptive devices and information. The leaders of the movement were careful to ensure that official policy advocated that only married women would be referred to the clinics. Moreover, many advocates tried to stress the health aspects of birth control rather than the choice aspect. For example, in 1935, frustrated by its lack of success in the legislature, the Connecticut Birth Control League (CBCL) quietly opened a birth control
clinic in Hartford, hoping that law enforcement officials would turn a blind eye. When such proved to be the case, the League discreetly opened more clinics. Until 1939, the clinics quietly went about the business of dispensing birth control, but only to married women. It wasn’t until 1939 that the clinics became a public issue, when a Hartford newspaper ran the headline “Birth Control Clinic is Operating In City” (Garrow 1994, 3). In response to the reaction from opponents of birth control, League members and sympathetic doctors tried to cast the work of the clinic in a way that focused on health rather than choice. One doctor told reporters that the operation in Hartford was a gynecological clinic which, in the course of its operations, sometimes gave information about birth control methods. But such information, assured one doctor, “is provided purely on a health basis. A woman whose health would be seriously endangered by childbearing might get medical advice at the clinic on birth control, but not a robust, healthy woman” (Garrow 1994, 4). In agreement, another of the clinic’s doctors added, “That’s a long way from the popular conception of a birth control clinic where any woman may go who doesn’t want to have children” (Garrow 1994, 4).

When describing the work of another clinic the CBLC was to open, one of the group’s leaders said that information and services would be “given only to married women living with their husbands” (Garrow 1994, 57). In 1940, one man wrote to tell the League’s leaders that his wife, who had been a long-time patient of one of the League’s clinics, had left him. “I understand that she is running around a great deal,” he wrote. “The authorities tell me that she must be an oversexed person as well as mental.” Shortly after the letter was received, a note was inserted into the woman’s file at the
clinic: “Separated from husband – Give her no more supplies. Discontinued.” One of the League’s doctors penned a sympathetic note to the man. “We are very glad to have the information you sent us about your wife as it is not our policy to furnish any supplies to married women who are not living with their husband” (Garrow 1994, 76).

Likewise, legislative efforts focused on allowing married couples access to birth control in the name of health. In 1931, for example, the CBCL decided that they would push for a “doctor’s bill” rather than for straight repeal. The doctor’s bill was to allow birth control prescribed by a doctor.

“Not long after that election [of 1930] the CBCL women decided that their 1931 initiative would have to be a “doctor’s bill” rather than a repeal one. There was a “pretty general feeling,” they told the ABCL, [American Birth Control League] “especially on the part of the women members of the legislature, that there would be less opposition to the ‘doctors’ bill’ than to a straight repeal bill,” which some supporters had “criticized as too ‘radical’ a step” (Garrow 1994, 25).

The doctor’s bill garnered more support than any liberalization proposal before it in the Connecticut legislature, but was still facing insurmountable opposition. Members of the CBCL then proposed than an amendment to the bill be added, “expressly limiting the application of the bill’s medical exception to married women” (italics in original) (Garrow 1994, 33). The amendment was enough to gain victory in the house, but was flatly rejected in the senate.

Early efforts to persuade the courts to more liberally interpret the Connecticut birth control laws also focused on marriage and health, and no privacy arguments appeared in the first two challenges to the law. The first legal challenge to the Connecticut law was the result of the chain of events put into motion by the 1939
newspaper article, mentioned above, that publicly announced the presence of birth control clinics in Hartford. Authorities, who until then had "overlooked" the activities of the clinic (which operated on a small but steady scale, dispensing birth control advice and information to a few married women each week), could no longer do so when a few outraged citizens called in response to the article, and so they reluctantly took action. The article ran on a Friday in June of 1939, and the following Monday morning, a warrant was issued which authorized Hartford police to enter the clinic and seize evidence supporting criminal violation of the 1879 statute. A few days later, arrest warrants were issued for three individuals involved with the clinic – two physicians who had counseled women and the director of the clinic (who was a CBLC member).

In their briefs challenging the arrests, lawyers for the CBLC argued that the law amounted to "an unconstitutional interference with the individual liberty of the citizens of Connecticut," in violation of due process as provided in both the Connecticut and U.S. constitutions – especially when no exceptions were made for physicians to prescribe to married women whose health was at stake (Garrow 1994, 68). For this last point, the lawyers relied on federal court precedent¹¹ that indicated that "statutes with respect to

¹¹ Twice – in 1936 and again in 1939 – federal courts had ruled that the federal Comstock law could not be applied in instances where the public health was involved. In U.S. v. One Package, 86 F.2d 737 (1936), the Second Circuit Court of Appeals ruled against the government's seizure of birth control materials that had been shipped to a doctor. Three years later in U.S. v. Belaval, U.S.D.C. 2. P.R., #4589 CR, a federal judge in Puerto Rico dismissed criminal charges against two doctors and four assistants for distributing contraceptives in violation of the 1873 law. Relying heavily on One Package, the court in Belaval insisted that where the health of a woman was at stake, it was "not only the right but the duty of the physician ... to prescribe contraceptives" (as quoted in Garrow 1994, p. 60). Taken together, advocates of birth control reform interpreted the cases to mean that "birth control could be prescribed and distributed in all instances where doctors believed the avoidance of pregnancy would be beneficial to a woman's health" (Garrow 1994, 42).
contraceptive[s] are not to be construed as interfering with the bona fide practice of medicine" (Garrow 1994, 69). They argued that denial of birth control in cases where "pregnancy would jeopardize life" (State v. Nelson, 126 Conn. 412 (1940), p. 8) would constitute a clear denial of life without due process of law. The lawyers argued further that since the legislative intent of the law was to deter obscenity and immorality, exceptions to the law based on health would not violate the spirit of the law. The lawyers called the decision of a married couple regarding whether or not to have children an inalienable right. Using a Millian philosophy, they argued that the state "has no right to govern or attempt to govern the conduct of a citizen of a state if his conduct does not in any degree impinge upon a similar freedom of conduct of other citizens of the state" (Garrow 1994, 78).

The Connecticut Supreme Court was not persuaded. In a three to two decision in State v. Nelson, 126 Conn. 412 (1940), the Connecticut high court upheld the statute, flatly rejecting any "doctor’s exception." "A cardinal rule is that statutory construction by the judiciary is controlled by the intention of the Legislature" the court said (p. 5). Any "doctor’s exception" to the law would presume, the court reasoned, that the legislature had overlooked situations related to health. But after reviewing the legislative record, they concluded that both the language of the statute as well as the repeated unsuccessful attempts at repeal and reform of the law to include just such an exception was proof that the legislature did not intend for there to be medical exceptions. The court observed that well-intended exceptions to protect the health of married women might lead

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12 The two dissenters did not file an opinion.
down the slippery slope of less scrupulous doctors "extend[ing] the field of exemption indefinitely" (p. 19).

Where legislative intent was clear, laws would only be limited, the court said, where the consequences of a law were unreasonable, or where they impaired generally accepted rights. The court said that complete prohibition of contraceptives in pursuit of public morality was an acceptable legislative rationale.

Whatever may be our own opinion regarding the general subject, it is not for us to say that the legislature might not reasonably hold that the artificial limitation of even legitimate childbearing would be inimical to the public welfare and, as well, that use of contraceptives ... would be injurious to public morals; indeed, it is not precluded from consideration that not all married people are immune from temptation or inclination to extra-marital indulgence, as to which risk of illegitimate pregnancy is a recognized deterrent deemed desirable in the interests of morality (p. 18).

In response to the Millian arguments, that citizens ought to be allowed to do with their bodies those things which did not harm anyone else, the court turned the argument against itself. Activities which add to the overall decline of public morality cause harm to other citizens in that they "endanger the vital interests of society," it said (p. 17).

As for allegations of due process violation, the court, employing a very literal interpretation of the due process clause, accused the lawyers of presenting arguments that went beyond the facts of the case. According to the testimony of the doctors given at trial, they had prescribed contraceptives in the interest of the general health of the women they counseled, and nothing in the record indicated there had been an instance when the life of a woman had been threatened. Therefore, the court reasoned, the due process clause, which protected "life, liberty or property" (and not "health, liberty or property"), could not, in the current case, be invoked.
Taking their cue from the court, lawyers for the CBCL decided to try to mount a declaratory test case in which they could press the due process issue. They hoped to recruit not only a doctor, but a patient, ideally "a married woman who would be very likely to lose her life" if refused birth control and she became pregnant (Garrow 1994, 92). Nelson had been a test case of sorts, but one which I would call an incidental test case. The investigation by the authorities of the clinic had come as a result of pressure from birth control opponents after the article about the clinic had been published. However, there is evidence to indicate that the prosecutor would have not pursued prosecutions had it not been for the encouragement of the CBLC itself. And so while this hadn't exactly been a friendly suit, the prosecutor had certainly worked with the group, especially with regard to the choice of whom to arrest. Their next legal challenge, the League decided, would have to be contrived in order to get just the right set of circumstances to strike the statute.

Simply coming up with good cases to test the constitutionality of Connecticut's birth control law was in and of itself no small task, never mind the difficulties faced when once inside the courtroom. As the Connecticut courts had noted in Nelson, enforcement of the law was relatively rare, given the private nature of the crime, particularly with respect to use — which is why many in the CBLC were actually delighted when the newspaper article had led to arrests. Obtaining willing litigants to test the law by alternative methods was not easy, given the nature of the crime. On the one hand, doctors were reluctant to cooperate in test cases, for by subjecting themselves to criminal prosecution and conviction, they risked losing their licenses to practice medicine. On the other hand, patients, too, were reluctant to step forward because of the public exposure in
so delicate and private an issue. Non-medical clinic staff, who were typically advocates in the movement and were often the most eager to participate in test cases, but their legal claims at issue were the weakest.

Some months after the Nelson defeat, Connecticut birth control activists had put together what they hoped was a stronger case. This time, the case was formally staged. The lawyers for Planned Parenthood of Connecticut\(^\text{13}\) hoped to obtain a declaratory judgment holding the law unconstitutional.\(^\text{14}\) Dr. Wilder Tileston, a 65-year-old physician with a small private practice who also taught at Yale Medical School, was sought out (with considerable help from Planned Parenthood) and documented the situations of three married women for whom a pregnancy would be a health risk, even life-threatening. Lawyers for Planned Parenthood named New Haven County State's Attorney Abraham S. Ullman (who had served in that position for less than four months at the time) as the defendant. The argument on behalf of Tileston — somewhat flawed and inadequate from the start — was that because he could not advise his patients about contraception, it put them at risk of becoming pregnant, and that since for these women pregnancy would be life threatening, this was a denial of life without due process, in

\(^\text{13}\) In May of 1942, the CBLC changed its name to the Planned Parenthood League of Connecticut (PPLC).

\(^\text{14}\) Generally, when litigants go to court they seek active relief (e.g., an injunction to do or not do something, the setting aside of a lower court's ruling, or some sort of monetary damages). A declaratory judgment is passive relief, in that it "merely defines legal relations through declaratory judgments" (Clermont 1992, 223). Until the 1930s, issuing declaratory judgments would have been considered a violation of the doctrines of justiciability (defined and discussed in the following paragraph). But in the 1930s in a variety of situations it was becoming clear that there needed to be some way to determine the scope and precise meaning of the law before a dispute had progressed to the point where a court would consider it justiciable under the old rules. In the 1930s, the Supreme Court began to issue declaratory judgments, and in 1934 Congress passed the Federal Declaratory Judgment Act of 1934, which the Court sanctioned one year later in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227.
violation of the Fourteenth Amendment. The case was unsuccessful in the Connecticut courts, with the Connecticut Supreme Court again upholding the law.

The result in the state courts came as no surprise to the lawyers, who hoped for a more sympathetic ruling from the U.S. Supreme Court. It is important to remember that Supreme Court jurisprudence is not shaped by law and legal theory alone. Nor are political considerations or the personal predilections of the Justices who sit on the Court at a given time the only extra-legal influences. Judicial opinions are, to some degree, influenced and limited by the factual situations presented to the Court. As any student of law knows, the Supreme Court does not issue theoretical or advisory opinions, but only opinions within the context of an actual "case or controversy," as required by Article III of the Constitution.\(^\text{15}\) This is not to say, however, that all cases presented to the Court are there as a result of mere happenstance, for many of the cases – most particularly cases which challenge the constitutionality of a law – are brought as test cases. Test cases provide interest groups with the opportunity to shape and stage a great deal about a case brought before the court – though doctrines of justiciability will exclude cases which are overly contrived. But even the presentation of the seemingly perfect test case does not ensure that the Supreme Court will issue a ruling on the case, for increasingly since the 1920s, access to the Court has become discretionary, and the Court has the ability to

\(^\text{15}\) The "cases or controversies" requirement in Article III, section 2, limits the federal courts to tackling questions only in the context of an actual adversarial dispute. This allows the Court to more fully consider how the law works in practice. Thus, "When parties contend in a real dispute, each side is permitted to be zealously represented and the court may consider the legal issues against the backdrop of real facts" (Stoneking 1992, 129).
influence, to a large extent, its docket by picking and choosing the cases it will hear. Of the approximately 7,000 cases each year for which a writ of certiorari is sought, the Court, on average, selects roughly 100 cases, which is less than two percent. This gives the Court the luxury of tremendous leeway in which cases it will issue rulings. Cases in which a declaratory judgment is sought face even greater obstacles than cases in which the parties seek actual relief, as this provides a relatively easy out should the Court decide it wants to duck the issues which the merits of a case cover – i.e., the Court can rely on some other aspect of justiciability, such as mootness or ripeness, to say that the seekers of the judgment need a more concrete situation.

Moreover, the context in which the declaratory judgments originated was in private disputes, such as to identify rights and responsibilities with regard to patent law or laws regulating insurance. The Court was particularly reluctant to issue declaratory judgments in cases in which the petitioners wanted the Court to rule on the constitutionality of legislation – which was, of course, exactly what the Connecticut lawyers were hoping for.

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16 Prior to 1925, most cases came to the Supreme Court by writs of error or by appeal rather than on petition of a writ of certiorari, which meant that the Court was legally obligated to hear every case which was correctly and legally on the docket. In 1925, Congress passed the so-called “Judges Bill.” The bill – named for the prominent role that then-Chief Justice Taft played in initiating and authoring the bill – increased the ability of the Court to pick and choose by increasing the amount of jurisdiction which was certiorari as opposed to mandatory appeal or writ of error. Over time, Congress decreased the categories of appeal and writ of error, and since passage of a 1988 law, with the exception of cases of original jurisdiction (which are defined and mandated by the Constitution), the Supreme Court has almost entire control of its docket (Perry 1992, 131-133).

17 See, for example, Justice Brandeis’s concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), in which the authority of Congress to establish the Tennessee Valley Authority was questioned. The Court upheld the Tennessee Valley Authority Act, but Brandeis believed the constitutionality of the act should never have been considered. In his concurring opinion, he created a list of rules he felt should govern the Court in ruling on the constitutionality of legislation. Often referred to as the “Ashwander rules,” Brandeis recommended: (1) The Court will not determine the constitutionality of legislation in nonadversary proceedings; (2) it will not anticipate a question of constitutional law; (3) it will (footnote continued on next page)
In a brief *per curiam* decision, *Tileston v. Ullman*, 318 U.S. 44 (1943), the Court ruled that Dr. Tileston did not have standing under the Fourteenth Amendment, because the lives in jeopardy were those of his patients, not his own life, and he could not assert a due process violation on their behalf.

The complaint set out in detail the danger to the lives of appellant's patients in the event that they should bear children, but contained no allegations asserting any claim under the Fourteenth Amendment infringement of appellant's liberty or his property rights.... There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf (p. 44, 47).

More than a decade passed, and despite continued efforts at legislative reform, the Connecticut anti-contraceptive law stood intact, and prospects for repeal of the law seemed as remote as ever. Some reformers toyed with the idea of mounting another test case, as many advocates and scholars believed the courts still offered the best hope of changing the law. A document written in 1950 by professors Edward Etherington and Joseph Brodley of Yale Law School suggested that, “With such large political reasons opposing the change of the Act in the legislature, and with such grave legal doubts hovering over a referendum, it may be that the best chance of an alteration in the law is through the courts” (p. 1). However, the professors also noted that mounting such a challenge would not be easy, for the right litigants would be hard to come by.

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not formulate a rule of constitutional law broader than needed; (4) it will not rule on constitutionality if there is another ground for deciding the case; (5) it will not determine a statute's validity unless the person complaining has been injured by it; (6) it will not invalidate a statute at the instance of persons who have taken advantage of its benefits; and (7) the Court will always ascertain whether any reasonable interpretation of a statute will allow it to avoid the constitutional issue.
Even the bare raising of the birth control issue in the courts represents a very ticklish question. There seems little chance of raising it directly. A citizen would not wish to suffer the sensationalism which might be attached to him were he to violate the law. This would be especially true of one who is sick, whose life is in danger – the very person who would be able to bring the strongest case. Similarly, a doctor, fearing the harm that might be done to his reputation, would be reluctant to participate as a defendant (Etherington and Brodley 1950, 1).

For several years, birth control reformers were at a stalemate with the legislature, and with little hope in the courts. But the 1950 report had noted that “A possible way around this difficulty [of getting the case into court] would be to find a crusader of the Margaret Sanger ilk, who would perhaps welcome the martyrdom” (Etherington and Brodley 1950, 1). Enter Lee Buxton, Fowler Harper and Estelle Griswold – a doctor, a lawyer and the director of the Planned Parenthood League of Connecticut, respectively. Not martyrs exactly, but talented and enthusiastic proponents of reform, willing to put their reputations on the line for the cause. Unlike some of her predecessors, Estelle Griswold was more optimistic about litigation and more pessimistic about legislative reform, and privately hoped for some opportunity to bring a test case. Lee Buxton, chairman of Yale’s ob/gyn department, started thinking about a test case after the PPLC asked him to testify at a legislative hearing regarding the effects of the birth control law on women’s health. Buxton willingly shared stories about women he’d met whose health had been adversely affected by unwanted pregnancies. In his testimony before the legislators, he focused particularly on the stories of two women he’d seen earlier that year, one who had died and another who suffered a cerebral hemorrhage, both related to their pregnancies. Like so many efforts before, Buxton’s testimony had little effect, and proponents of the anti-contraceptive law remained bitterly opposed to repeal. Buxton’s
duties as chair of the ob/gyn department included work at an infertility clinic sponsored by the PPLC, and in the months following his appearance before the legislature, he met three more couples for whom a pregnancy would be damaging to the health of the woman. Buxton began to wonder if there was some way around the legislature.

One day at a party, Buxton ran into an acquaintance, Fowler Harper, an outspoken and brash Yale Law School Professor, and Buxton told him about his patients and his concern about Connecticut’s antiquated birth control laws. According to Buxton, Harper “thought maybe we could make a case for the laws being unconstitutional – infringing on my rights as a doctor and the patients’s rights to be treated” (Garrow 1994, 145). Harper did not yet include privacy as one of the arguments against the validity of the law. But a few weeks after Buxton and Harper’s conversation, Harper met a young man whose negative experience with the anti-contraceptive statute sparked an idea in Harper. The young man, Marvin Durnig, had met his wife Jean the previous fall, while they were both graduate students at Yale. By the end of the semester, the couple had decided they would get married, and in January, Jean went to Yale’s student health center to be fitted for a diaphragm. The doctor at the center told Jean that it was illegal for her to obtain birth control advice or devices in Connecticut, but that she could go New York to a Planned Parenthood clinic. Jean did make the day’s drive to New York to get a diaphragm, but was annoyed by the inconvenience the law had caused her. Marvin, too, found the law ridiculous, and was upset at the trouble it had caused his soon-to-be wife (the couple married on the first of February, 1958). When Marvin later complained about
the incident to one of his law professors, Tom Emerson. Emerson responded with, “Go talk to Fowler Harper. Fowler is thinking about a case” (Garrow 1994, 147).

For whatever reason, Durning’s story of wife’s inconvenience provoked a stronger reaction in Harper than the stories about Dr. Buxton’s patients whose health had been negatively impacted by their pregnancies. Durning later recalled that Harper had become “outraged” about the “governmental intrusion” into marital privacy which the law promoted (Garrow 1994, 147). Shortly after, when Harper was telling another lawyer about the test cases he hoped to pursue, he said that the most important argument he’d come up with—more important than the rights of a doctor or of a patient—was the “more basic assertion ... that any married couple should be able to obtain and use contraceptives without obstruction or intrusion by the state” (Garrow 1994, 153).

Five related complaints were filed with the Superior Court (all naming the state’s attorney Ab Ullman—the very same official who’d been named in the *Tileston* case). All of the cases asserted that the anti-birth control law violated some aspect of the plaintiffs’ right to due process under the Fourteenth Amendment. Dr. Buxton’s case claimed the statute limited his “property” and his “liberty.” The claims in the cases of the three patient plaintiffs alleged infringement of “life” and “liberty.” And the case involving a young married couple asserted simply that their “liberty” had been violated (Garrow 1994, 154).

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18 Lee Buxton was the only plaintiff to use his real name. In securing plaintiffs for the case, Buxton and Harper had promised anonymity, and so the patients—who were indeed real people with real, actual problems—became known as “Jane Doe,” “Ralph and Rena Roe,” “Harold and Hanna Hoe,” and “Paul and Pauline Poe.”
In her arguments at the initial hearing in December of 1958, Harper's co-attorney, Katie Roraback, emphasized the sanctity of the marital relationship.

“These people have the right to be allowed to continue normal marital relations without being inhibited by the state.... A statute which by its very terms may inhibit the most personal relationship of marriage is itself unreasonable” and, therefore, unconstitutional (Garrow 1994, 158).

The primary argument put forth by the lawyer for the state was that the previous court rulings in Nelson and Tileston had already decided the issue, and the cases were thus non-justiciable. The state’s lawyer also contested the use of the fictitious names, implying that the facts accompanying each name were also contrived, and “as such cannot invoke the powers of the Court to solve purely academic problems” (Garrow 1994, 159).

Not surprisingly, a few weeks later, Judge Frank Healy issued a terse opinion upholding the state’s objections to the cases. Harper and Roraback filed petitions of appeal to the Connecticut Supreme Court in all five cases. The briefs highlighted the fact that four of the five cases were substantially different than the situations in Nelson and Tileston because the plaintiffs were patients rather than doctors or clinic personnel.

Harper had come to believe that most important case of the five was that filed on behalf of the Dumings (“Ralph and Rena Roe”), the case in which the claim was made that the anti-contraceptive law violated the liberty of any married couple – regardless of

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19 The state’s attorney seemed to misunderstand the use of fictitious names in this case. Generally, the device of using fictitious names is adopted in civil proceedings when the defendant is unknown at the time a complaint is filed, with a promise that if and when the true names are discovered they will replace the fictitious names. Naming a fictitious defendant keeps a case alive by halting the statute of limitations. When used in this way, if no actual name has been presented by the time the trial starts, the case is dismissed. Because of the extraordinarily private nature of the subject of birth control, the lawyers for PPL had promised anonymity. The use of the fictitious names to protect the identity of the plaintiffs was subsequently sanctioned by the U.S. Supreme Court.
health issues. Based on the *Nelson* and *Tileston* precedent, a “doctor’s exception” to the Connecticut law seemed unlikely, especially in light of the legislative history which left clear that the legislature had expressly rejected such exceptions. The violation of liberty which intrusion into the marital relationship represented did not have the historical baggage that a doctor’s exception had – that is, clearly there was no intent for the legislature to purposefully intrude on the intimacies of husband and wife for its own sake.

All of the briefs were surprisingly direct and explicit that the right in question was that of married couples to have sex.

If their rights to life and liberty have meaning they must ... include the right to marriage and the enjoyment of the fullest bounties which that relationship can give.... Sexual intercourse is not a mere adjunct of marriage, which may or may not be engaged in depending on the health and bent of the husband and wife. It is a part of the basic fabric of the whole marital relationship (Garrow 1994, 161).

But this ode to marriage was not enough to move the Connecticut high court, which voted unanimously to uphold the law in December of 1959. Completely ignoring the Fourteenth Amendment claims, the court said that while the cases differed somewhat in their presentation of facts and legal claims from *Nelson* and *Tileston*, the overall issues were the same, leaving the former cases as controlling.

Harper went ahead and filed a petition for a writ of certiorari with the United States Supreme Court. He eventually decided to file just two petitions, one on behalf of

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20 Harper was thus quite disappointed when the couple informed him that they would be leaving the state at the end of the semester. Once the Durnings were no longer residents their claim would be moot, requiring that their complaint be withdrawn. Though Harper was lucky enough to quickly locate another young couple willing to participate as plaintiffs – willing enough even to use their real names – the case would have to start over, in superior court, and might not catch up to the others in time for an appeal to the U.S. Supreme Court.
Dr. Buxton (Buxton v. Ullman, 364 U.S. 807), and the other on behalf of the patients (Poe v. Ullman, 376 U.S. 497). It was to this second case that Harper gave the greatest attention, incorporating many of the arguments from the case regarding the young couple. Harper did, of course, devote a good portion of the brief to describing the health risks pregnancies would create for the women named in the case. But the passion and force of his arguments came when he wrote about the extreme state intrusion into the marital relationship that the law represented. Though the brief was laced with the language of privacy, Harper did not argue that privacy was protected by the Fourteenth Amendment. "Appellants are not contending," he wrote, "that their rights of privacy, as such, are directly protected by the Fourteenth Amendment." Instead, Harper argued that the fundamental right involved was "marital intercourse." However, a result of the state limitation of marital intercourse inherent in the law would mean that "their privacy is mercilessly being invaded." Harper was asking the Court to weigh the tremendous hardship to the individual that such a violation would necessarily involve against the "theoretical, if not entirely fictitious, advantages of the laws as promoting public morality" (Garrow 1994, 167).

Harper was assuming the universal appeal of a privacy violation argument, though he did not tuck privacy itself under the auspices of the Fourteenth Amendment. Whether or not it was because he was convinced that the actual right at stake was marital sex rather than privacy, or whether he simply believed that the privacy argument would be more difficult to make is difficult to tell. Perhaps Harper was hedging his bets. To develop the argument that marital sex deserved status as a fundamental right, Harper
drew upon *Meyer v. Nebraska* to make the claim that the Court had already recognized the right “to marry, establish a home and bring up children.” (Garrow 1994, 166). And this, he argued, included the right to marital sex which would occur within that home. “The right to marry and establish a home ... necessarily implies the right to engage in *normal* marital relations” (emphasis added). To advance his argument that the right to marital relations embraced the right to use contraceptives, Harper cited the Court’s conclusion in *Skinner v. Oklahoma* that “the right to engage in such relations embodies a personal freedom of privacy to procreate or not procreate as the individuals may desire or as medical factors may dictate” (p. 167). Thus, for couples worried about the health risks of a pregnancy to be told by the legislature that abstinence was the only acceptable alternative to contraception was to deny them a fundamental right. “Legislation which leaves total abstention as the only alternative to death or impaired health is on its face arbitrary and unreasonable,” and thus is “an unreasonable and arbitrary intrusion into the private affairs of the citizens of Connecticut.” But in case the Court was not persuaded that the right of marital relations and its accompanying right of contraception were fundamental, Harper also attacked the law’s purported purpose. Attorneys for the state argued that the law deterred sexual relationships outside of marriage by forcing illicit encounters to bear the risk of illegitimate children. This claim to protection of public morals, Harper asserted, was at best “theoretical,” and at worst “entirely fictitious.”

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21 I emphasize the use of the word “normal” here because of the implications of this argument for the *Bowers* case, i.e., that only intercourse between married couples is entitled to protection as a fundamental right.
As already noted, Harper did not assert a right of privacy as an independent right protected by the Fourteenth Amendment – at least not privacy in the sense of personal autonomy. Nor did he discuss the idea of enumerated rights casting shadows in which other related rights resided. Instead, he used what I would call an “overlapping,” or “synergistic” logic. For after concluding that the right to marry and the right to procreate implied the right to sexual relations, Harper made reference to the spatial privacy implied by some Fourth Amendment cases. He cited the Court’s decision a few years earlier in *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952) as indicating that the Fourth Amendment – whatever else it might protect – was particularly protective of the home.22 As discussed in the previous chapter, by this time privacy had become a shorthand for the protections afforded by the Fourth Amendment. Harper seemed to be suggesting that the presence of the two rights – the right of marital sex and the special protection afforded the home by the Fourth Amendment – overlapping as they did here, made an even greater, or synergistic, constitutional claim. “[I]t is precisely their homes and, indeed, in the most private part thereof that is invaded. They want to be let alone in the bedroom” (Garrow 1994, 167). I would argue that Harper invoked the famous phrase of Cooley and Brandeis not merely for the rhetorical flourish it provided, but because he hoped to add the weight of the Fourth Amendment to his claim about marital sex.

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22 Sometimes referred to as the Captive Audience Case, *PUC v. Pollack* involved a challenge to the broadcasting of radio programs on public buses. Two commuters challenged the broadcasts, saying that they infringed on their constitutional right to privacy. The Court rejected the challenge by distinguishing between public places and the home. “However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance” (p. 463).
Harper was careful to leave the door open for the Court to allow for a doctor's exception by not making the claim that all legislative intrusions were invalid – though he did come very close to this when he asserted that "they insist that marital intercourse may not be rationed, censored or regulated by priest, legislator or bureaucrat." Apparently, the only third person Harper would allow into the bedroom was the doctor. "These married persons contend that they have a constitutional right to marital intercourse in the privacy of their homes under medically approved conditions and under circumstances mutually satisfactory to them" (p. 168). Harper closed his brief with a rhetorical, yet almost personal, question for the justices to ponder, one which seemed to ask the justices to examine their personal feelings and natural instincts as well as the legal arguments. With regard to marital intercourse, "What right, it might be asked, is more fundamental or more personal?" At the very least, Harper hoped his question might be compelling enough to persuade at least four of the justices to vote to grant a writ of certiorari.\(^{23}\)

Five justices voted to hear *Buxton and Poe*,\(^{24}\) and the cases were scheduled for oral argument in the fall of 1960. By the time a case is argued before the Supreme Court, the justices, both independently and with the assistance of their clerks, have done a substantial amount of research regarding the case and precedents affecting it. It is not uncommon for justices to ask their clerks to prepare legal memos detailing the issues involved in a case and possible legal theories which will be pertinent for written opinions.

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\(^{23}\) By tradition, if four justices favor it, a writ of certiorari will be granted in a case.

\(^{24}\) Chief Justice Warren, along with Justices Brennan, Douglas, Harlan and Stewart voted to grant cert. Justices Black, Clark and Whittaker voted to deny cert; Justice Frankfurter did not vote.
Memos between the justices and their clerks can often offer insight into the evolution of a legal doctrine behind the scenes, before the polished version makes its way to the final opinions released for public consumption and posterity. Although the amount and depth of interaction varies greatly from justice to justice and clerk to clerk, in general, clerks play a far more important role than simply compiling lists of cases. They also act as sounding boards and are often instrumental in suggesting and shaping legal doctrines used by the justices. It is not uncommon for a justice to embrace many of the arguments developed by a clerk.

It was one of Justice Harlan’s clerks, Charles Fried, who most clearly articulated the legal problems with Harper’s challenge to the Connecticut law, in a memo written to Justice Harlan prior to oral arguments. The claim in Poe, as Fried saw it, was that “married couples have a right to engage in marital relations without the fear – in some cases – of death or serious illness.” However,

the trouble with this argument is that it assumes what is yet to be proven: that married couples have some kind of innate right to marital relations, and that if the choice must be between contraception on one hand and abstinence or serious danger on the other that the couple has the right to resort to contraception (Garrow 1994, 175).

Rather than a right to marital relations, Fried argued that “the substantive right” in the case “is one of privacy.” “[T]he right to privacy is one which enjoys specific constitutional sanction,” particularly in light of the fact that the purpose of the Fourth Amendment is “the

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25 Fried’s post-clerk career has included professorships at several law schools, and a stint as Solicitor General during the Reagan administration from 1985 to 1989. He is currently a professor emeritus at Harvard Law School. Hoping to learn more about what led Fried to his conclusions regarding the Poe case and the right to privacy generally, I contacted Fried by e-mail in May of 2000. He had no comment. “I do not feel at liberty to discuss my work for Justice Harlan” (Fried 2000).
right to privacy of the home," Fried wrote. For Harper, the privacy argument was
tangential; it worked to support his primary contention that the state’s intrusion into the
marital relationship was unreasonable and undesirable. That is, the privacy violation
resulting from the law was a negative consequence of the violation of the right of marital
privacy. In contrast, Fried’s argument placed privacy front and center. It was the right of
privacy that was violated by the law, and the right to privacy, according to Fried’s
reasoning, included the right to marital relations. “[A] married couple, enjoying that status
in the eyes of the state, in their intimate and specifically marital relations may follow their
inclination and consciences without interference” by the state (p. 174).

The strength of Fried’s argument was less in its legal reasoning and more in the
attractiveness of privacy as a euphemism for marital sex. Harper’s instincts were on
target. That is, he was correct in his assessment that most people would react negatively
to the loss of privacy the Connecticut law represented, even if it wasn’t a concept
specifically protected by the Constitution. The difficulty with Harper’s claim lay in the
fact that a majority of the justices would have to agree that marital sex was a fundamental
right. Such a proposition had two major difficulties. First, the Court was reluctant to
proclaim fundamental rights not articulated in the Constitution. Many justices were loathe
to invite the criticism that would surely follow any return to substantive due process. The
second obstacle was related less to doctrine and more to the sensitivities of the justices.
Whatever they might have personally thought about ranking sex as a fundamental value, no
justice was thrilled about using the authority vested in the Supreme Court to proclaim that
sex was a fundamental right. Some justices, in particular, were uncomfortable about
discussions involving sex. Historian David Garrow has noted that Chief Justice Warren "was very much a family man and a traditionalist, someone who was discomforted ... by any discussion concerning sex" (Garrow 1994, 181). Garrow also noted that Justice "Black like Warren was something of a prude on sexual matters" (p. 181).

It wasn't that the Court had never been asked to deal with indelicate issues before. Indeed, the Court heard a number of cases in the 1950s and 1960s involving pornography. But pornography was different. In the first place, the First Amendment contained an explicit command that Congress would not make any law "abridging the freedom of speech, or of the press." Second, pornography could be classified in the realm of ideas, as pornography dealt with depictions of acts rather than actions themselves. Finally, pornography could be defended with the dignified language of free speech. It was not the right of someone to sell a postcard depicting a woman and a horse involved in a sexual act the Court had to defend, but the right of free speech, with all its attendant venerated connotations.

While positioning privacy as the specific right protected would still leave the Court vulnerable to attacks of launching a second Lochner-era, it would allow the court to at least cloak the issue (i.e., marital sex) in the more dignified and appealing language of privacy. Many of Fried's ideas did make their way into a final opinion in Poe, but only in Harlan's dissent, for a majority of the Court decided to duck the issues in Poe by dismissing the case, saying that it was not a justiciable controversy. The majority

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emphasized the non-enforcement of the law – both in general and in the specific instance of the parties before the Court – as a primary reason for refusing to consider the merits of the case. “The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication,” wrote Justice Frankfurter. “This Court cannot be umpire to debates concerning harmless, empty shadows” (p. 508).

Oddly, the decision practically mocked Dr. Buxton for obeying the law, implying that if indeed he was dissuaded from prescribing birth control because of the statute, that would be illogical on his part. The Court almost seemed to be encouraging him to actually break the law to find out for certain if it would be enforced.

We cannot agree that if Dr. Buxton’s compliance with these statutes is uncoerced by the risk of their enforcement, his patients are entitled to a declaratory judgment concerning the statute's validity. And, with due regard to Dr. Buxton’s standing as a physician and to his personal sensitiveness, we cannot accept, as the basis of constitutional adjudication, other than as chimerical the fear of enforcement of provisions that have during so many years gone uniformly and without exception unenforced (p. 508)

In a short concurring opinion, Justice Brennan commented that the real issue at stake was over birth control clinics and not the use of contraceptives by “isolated and individual married couples” (p. 509).

Poe, overtaken as it was by Griswold in 1965, would remain little more than a footnote in constitutional law history if it weren’t for the two dissents filed by Justices Harlan and Douglas. These opinions serve as kind of a rough draft or forerunner of the Griswold majority opinion, and an analysis of the Douglas and Harlan dissents in Poe permits a closer examination of the evolution of constitutional privacy.
Both justices devoted substantial portions of their dissents to discussions of justiciability, and both accused the majority of claiming non-justiciability as a way of ducking the substantive issues in the case. "In short," wrote Justice Harlan, "I fear that the Court has indulged in a bit of slight of hand to be rid of this case" (p. 533). "What are these people – doctor and patients – to do?" asked Justice Douglas. "Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today’s decision we leave them no other alternatives" (p. 513).

Both dissenting opinions then examined the constitutional issues involved. After a cursory reading of the two dissents, they appear very similar, for both attack the law as a violation of due process protected by the Fourteenth Amendment, and both dissents support a substantive definition of due process. Upon closer examination of the two texts, however, it becomes clearer that Douglas advocated a broader notion of privacy than Harlan. Douglas distinguished between private and public life generally, whereas Harlan prized certain kinds of privacy more than others. Douglas argued that the state must stay out of private decisions generally, whereas Harlan was relatively specific that it was the very special private relationship between husband and wife that needed to be protected.

The two opinions also differed in the way they justified privacy as being included as a kind of liberty. Douglas was less precise in his finding of privacy in the Constitution. For Douglas, a right of privacy seemed almost self evident, for he began

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27 Justice Douglas’s dissent also included a section which attacked the law as an impairment of the First Amendment rights of the doctor to freely communicate with a patient. "The right of the doctor to advise his patients according to his best lights seems so obviously within the First Amendment rights as to need no extended discussion," wrote Douglas (p. 513). Quoting Zechariah Chafee, Douglas wrote, "the First Amendment and other parts of the law erect a fence inside which men can talk" (p. 513).
his discussion of privacy by noting that “privacy ... is implicit in a free society” (p. 521). But, added, “This notion of privacy is not drawn from the blue” (p. 521). So where, then, did the notion of privacy come from? In a sentence foreshadowing the argument he would make four years later in Griswold, “It emanates from the totality of the constitutional scheme under which we live” (p. 521). Notions of liberty, he argued, come from both “emanations of other specific guarantees,” but also “from experience with the requirements of a free society” (p. 517).

As if hoping to pre-empt his critics, Douglas discussed the Lochner era, and why privacy was different than liberty of contract. He argued that it was not substantive due process per se that was offensive but, rather, the doctrine of liberty of contract. “The error of the old Court, as I see it,” Douglas wrote, “was not in entertaining inquires concerning the constitutionality of social legislation but in applying the standards that it did” (p. 517). The problem with liberty of contract, according to Douglas, was that it was not “particularized,” that is, that it did not emanate from a specific location within the Constitution. “Social legislation dealing with business and economic matters touches no particularized prohibition of the Constitution, unless it be the provision of the Fifth Amendment that private property should not be taken for public use without just compensation” (p. 517-518).

Douglas did refer to the imposition the law placed upon the marriage relationship, but it was not nearly so central to his argument in Poe as it was for Harlan, nor as important as it would be in his majority opinion in Griswold. In Poe, Douglas was most
concerned about the specter of police in the bedroom – a theme he invoked many times in his Fourth Amendment jurisprudence.

In contrast, intrusion into the marriage relationship necessitated by the Connecticut law was Harlan’s primary objection to it. “[T]he most substantial claim which these married persons press is their right to enjoy the privacy of their marital relations free of the enquiry of the criminal law, whether it be in a prosecution of them or of a doctor whom they have consulted” (p. 536). Like Douglas, Harlan argued that the law represented an invasion of privacy, and that privacy was protected by the Fourteenth Amendment. Liberty, wrote Harlan, “is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints” (p. 543). To determine the meaning of liberty, one looked to the Constitution and to history, reasoned Harlan. He defended the right of the state, in general, to legislate to promote public morality, and he was careful to reject Millian-styled philosophies which would protect private behavior simply because it did not harm others. He thus explicitly excluded from protection “laws forbidding adultery, fornication and homosexual practices” (emphasis mine) (p. 546).

Marriage was different than these other activities, according to Harlan, because the family represents the core of what the Constitution and society was set up to protect. He argued that such protections as provided by the Third and Fourth amendments were not established because there is something sacred about property, but because private property was a tool used by convention and by law to protect the family that resided within the property. “Certainly the safeguarding of the home does not follow merely
from the sanctity of property rights,” wrote Harlan. “The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection from the principles of more than one explicitly granted Constitutional right” (p. 552-553). Harlan again emphasized that a marriage within a home was entitled to more protection than others in a home. “I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced” (emphasis mine) (p. 553). Punishing a married couple for exercising their marital intimacy was, however, “surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection” (p. 553).

Harlan thus made a distinction between types of intimacies, a distinction not based on harm to third parties, but based upon legally recognized relationships. It was one thing to ban an intimacy altogether, and he acknowledged the right of the state to do so. But it was something else to not only allow an intimacy such as marriage, but to foster it, and then seek to regulate within the confines of the privileged relationship. “[T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected” (p. 553).

Harlan was trying to balance the needs of an ordered society with the individual need of liberty and privacy. What he seemed to be saying in his Poe dissent was that you can’t give people privacy, and then to proceed to regulate it. But although he did not speak of it in these terms, he seemed to fear that a grant of a general right of privacy
would be too broad and would not have a limiting principle. A legally created and protected marriage relationship struck something of a balance between the two. It allowed the state to regulate much of human intimacy and sexuality, but gave individuals the one outlet of the marriage relationship within which it allowed such physical and spiritual intimacies. Marriage, then, became a kind of compromise. One limits ones sexual inclinations to a single partner and within the home. What Harlan seemed to be suggesting was that imposing regulations regarding birth control was to take away the one area of freedom allowed by the state.

**Poe Round Two**

Members of the PPLC decided to go ahead and open birth control clinics. If authorities didn’t interfere, then women would still have access to birth control. But if the authorities did interfere – perhaps with an arrest – even better, for then the Court’s claim of non-enforcement could be disproved. This time, they didn’t have to wait more than a decade. For that, much of the thanks goes to curmudgeon James Morris, who helped ensure they would get both the official attention and the arrests that had been recommended to them in 1950 by Yale Law School Professors Etherington and Brodley (discussed above).

*Poe* was handed down in June, and by November, the PPLC had created a medical advisory board and set up a clinic. On Thursday morning, November 2, 1961, Estelle Griswold, Fowler Harper, Lee Buxton and other members of the PPLC held a news conference to announce the opening of the clinic, which was attended by more than three dozen reporters, and the story made local headlines in that afternoon’s papers.
Whereas local law enforcement might have been tempted to turn a blind eye to the clinics, West Haven resident James Morris, a 42-year-old Catholic and father of five, was not. After reading about the clinic, Morris first called the Connecticut State Police to complain. He was referred to the New Haven Police Department, who told him to try the mayor. Several referrals and phone calls later, Morris spoke with prosecutor Julius Maretz, who reluctantly said he would launch an investigation (Garrow 1994, 202).

Friday afternoon, two officers went to the New Haven clinic, which had a session that afternoon and would be counseling several woman about birth control. Griswold was informed of the arrival and the police and went to greet them. The officers “quickly realized that Estelle Griswold was quite overjoyed to see them,” and for more than an hour and a half she detailed the activities of the clinic to the two men (Garrow 1994 203). Dr. Buxton later arrived, and told of his work for the clinic. After reviewing the report of the officers, Maretz told the two officers to go back to the clinic and to ask Griswold for the names of at least two women who’d received services from the clinic. Having voluntary witnesses would mean that patient records would not have to be seized.

Together, Griswold and Harper were able to come up with two married women who would be willing to make statements to police about their visits to the clinic. One woman, Joan Forsberg, was a Yale Divinity School graduate, mother of three, and wife of a pastor. She went to the police station and detailed her interaction with the clinic, including what services and supplies she’d gotten there. The police interview was friendly, and at the end of the interview, the officer asked if she’d like to make some sort of closing statement. “I shall be very happy to see the time when information about birth
control is legally made available to all married women in this state" (Garrow 1994, 206). The second woman to go to the police department to give a statement was Rosemary Stevens, the wife of one of Harper’s younger colleagues at Yale. After detailing her visit to the clinic and telling the officer about the contraceptive jelly she’d obtained, the officer again asked for some sort of closing statement. “This opportunity should be made available to all women in this state,” she said. The officer stopped his transcription and asked, “Don’t you mean married women, Mrs. Stevens?” (emphasis in original). She reluctantly added “married” to her statement. In an interview with Garrow more than 30 years later she said, “I still feel badly about that.” Just a week and a day after the clinic had opened, the PPLC finally had the arrests they’d been looking for: prosecutor Maretz signed warrants for the arrest of Estelle Griswold and Lee Buxton.

A bench trial ensued, at which it was established that Griswold and Buxton had indeed broken the law. The two were fined one hundred dollars each, and an appeal was filed with an intermediate three-judge court of appeals, which upheld the convictions. The case was then appealed the to Connecticut Supreme Court which, in May of 1964, affirmed the convictions, citing the Nelson, Tileston, and Poe precedents. By September of 1964, Harper filed an appeal with the United States Supreme Court.

In his brief, Harper incorporated the arguments from the Douglas and Harlan dissents in Poe. He presented the Court with three constitutional arguments against the statute. First, as had been suggested by both dissenters in Poe, he argued that the law was a violation of the Fourteenth Amendment due process rights of Buxton and Griswold, as well as the patients of the clinic. Second, taking his cue from the Douglas dissent, Harper
argued that the law represented a violation of the First Amendment’s right to free speech. And finally, he said the law was an intrusion into his client’s right of privacy, in violation of the Fourth, Ninth and Fourteenth amendments. The Ninth Amendment argument was intended to bolster the privacy claim. He said that the right of marital privacy “is a violation of precisely the kind of ‘right’ which the Ninth Amendment was intended to secure” (Garrow 1994, 226). The Supreme Court was apparently impressed by the brief, as in December of 1964, all nine justices voted to grant cert to what one clerk labeled as “Poe round two” (Garrow 1994, 229).

**Striking Down A Silly Law: Constitutional Doctrine Or General Outrage?**

There was perhaps only one thing regarding the *Griswold* case on which all the justices were in agreement: it was “an uncommonly silly law” at stake. At the conference after *Griswold* was argued, seven justices did agree that the Connecticut birth control law was unconstitutional. But there was little consensus on just why the silly law was unconstitutional. Constitutional justifications considered by the justices for striking the law ran the gamut from due process arguments to equal protection arguments, to right of association arguments to privacy arguments. In spite of the vagueness in doctrine, most of those favoring voiding the law were fairly adamant and sure in their assessment.

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28 According to Garrow, Harper’s Ninth Amendment arguments were heavily influenced by a 1962 law review article written by New York University Law Professor Norman Redlich (“Are Certain Rights ... Retained by the People?” *New York University Law Review* 37:787-812. In the article, Redlich suggested that the Ninth Amendment offered an alternative to substantive due process. The Ninth Amendment’s guarantee that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” could be used to protect rights not specifically mentioned. The strength of this approach would be that it would not he associated with all of the negative connotations associated with the *Lochner-*era.

29 From Justice Potter Stewart’s dissent, p. 527.
that the law was somehow wrong. Perhaps the only common thing to be said of the approaches is that the seven justices advocating striking the law were somehow outraged by the law and its implications. The doctrinal dilemma for the Court was not resolved during oral arguments in late March of 1965, nor during the subsequent conferences and private conversations in the following weeks. Ultimately, the final majority opinion was not completely satisfactory to anyone. And the changes necessary to secure a majority vote – the additions here, the deletions there, and the overall editing – resulted in a decision that has been roundly criticized, even by those who applauded the outcome.

The two members of the Court who seemed most sure of their arguments were Justices Harlan and Douglas. But this was largely, of course, because the two had extensively asserted their views on the issues four years earlier in their respective Poe dissents. At the first conference after Griswold had been argued, Harlan simply and succinctly indicated that he still believed the law was an invasion of liberty as promised by the Fourteenth Amendment (Garrow 1994, 242). Likewise, Justice Douglas resounded many of the same themes from his Poe dissent. At conference he emphasized once again his belief that the right of association, which the Court had derived from the First Amendment’s right of expression and assembly, surely included the personal relationship between husband and wife (Garrow 1994, 241).

Justices Clark, Brennan and Warren had voted with the majority in Poe. At the conference, Clark said he now largely agreed with Douglas. He did not clarify his reasons as to why, except to say that the marriage relationship was certainly an area where people had the “right to be alone.” However, he didn’t talk about a privacy right
per se, but referred to the fact that the Court had previously said that people have a right to marry and have children, and implied that the right to use birth control would be a similar right. Brennan, too, said he would support striking the law, primarily because of the law's invasion of personal privacy, though he did not indicate on what constitutional provisions he thought a right to privacy was based (Garrow 1994, 241-242).

Chief Justice Warren, who said he was "bothered by the case," seemed to be more clear about doctrines for striking the law which he could not support than he was about a rationale he could embrace. He was adamantly opposed to a substantive due process approach, not wanting to incite criticism that the Court had returned to the Lochner era. He did not support an argument based on the First Amendment right of doctors. Nor did he feel comfortable asserting that the state had no legitimate interest in birth control, as "that would lead me to trouble on abortions." And, finally, "I do not accept the privacy argument" (Garrow 1994, 240).

This, of course, didn't leave Warren with many options. A comment that he scribbled on a memo suggests that he wished the issue would simply resolve itself, for he wrote that he would advocate holding off on a decision until after the Connecticut legislature adjourned, to give them a chance to repeal the law. At the first conference held after oral arguments for the case, Warren indicated that he might be able to support the idea that the law was overbroad, since it dealt with "a confidential association, the most intimate in our life." Alternatively, he said that he might be able to support an

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30 A law may be struck down as overbroad if in addition to prohibiting some unprotected activity, it infringes on activity that is protected by the Constitution, especially the right of free speech.
argument drawn from an 1886 decision, *Yick Wo v. Hopkins*, 118 U.S. 356.\(^{31}\) Such an approach had been suggested to him in a memo from one of his clerks, John Hart Ely. The Court in *Yick Wo* had determined that a law which is valid on its face can be considered an unconstitutional violation of the Fourteenth Amendment’s equal protection clause if, in practice, it is administered in such a way that results in discrimination that would otherwise be illegal. Since the record indicated that only clinics appeared to be at risk for prosecution, and not wealthier couples who sought advice from a private physician, such could be seen to discriminate against the poor who were the primary clients of the clinics (Garrow 1994, 237-240).

Neither Justices Goldberg nor White were members of the Court when *Poe* was decided. In conference, Goldberg said that there was no compelling interest that could justify a law like the one at hand. Like Douglas, he emphasized the idea of the right of association. He mentioned two recent cases in which the Court had used the right of association to strike laws which penalized people for membership in the Communist

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\(^{31}\) *Yick Wo v. Hopkins* dealt with a San Francisco ordinance implemented in such a way that it discriminated against Chinese laundry owners. The law, passed at a time when anti-Chinese sentiment was high in California, required all commercial laundries – except those operating in brick buildings – to obtain a license. The city’s Board of Supervisor’s held complete discretion over who did or did not receive a license. In 1885, Yick Wo and 200 other Chinese laundry owners were denied licenses. Only one Chinese laundry received a license, probably only because the Board of Supervisors did not realize the owner was Chinese. All commercial laundries owned by whites were either approved by the Board, or had their laundries in brick buildings (most Chinese laundries were located in wooden buildings). Yick Wo was arrested and convicted for operating his laundry without a license, and fined $10, which he refused to pay and was thus sentenced to 10 day’s jail time (the law carried a maximum sentence of a $1,000 and six months in jail). After failing to receive a writ of habeas corpus from the California Supreme Court, Yick Wo appealed to the U.S. Supreme Court. Despite the state’s contention that the law was made to protect the public safety, the Court ruled that the ordinance, though valid on its face, was enforced in such a way that it discriminated against Chinese because of their race, and was thus in violation of the Fourteenth Amendment’s equal protection clause. “Though a law be fair on its face and impartial in appearance, yet, if it is administered by public authority with an evil eye and an unequal hand, so as practically to make illegal
Party. He said that if one had the right to join a political party, then one “can join his wife and live with her as he likes” (Garrow 1994, 243). At the conference, Justice White said only that he intended to vote to strike the law.

The two members of the Court who indicated that they would vote to uphold the law—Justices Black and Stewart—had both been on the Court when Poe was decided. Justice Stewart said he couldn’t find anything in the Constitution that would prohibit the state from enacting the law. Justice Black agreed but went further, attacking some of the doctrines voiced by other justices, such as due process or an expansion of the right of association.

The *Griswold* Opinion: Creating Doctrine Or Finding Consensus?

By tradition, if the Chief Justice is with the majority, he is responsible for assigning someone to write the majority opinion. Sometimes opinions are simply assigned according to work loads of the various justices; at other times, a justice with a particular specialization or passion in a specific area will be given cases which fall into that area. But sometimes the decision becomes as political as it is practical, and the *Griswold* case certainly fell into the latter category. The fact that there were so many differing opinions as to what the basis for striking the law was meant that the writing of the opinion would have to be handled with special care. A few days after the conference in which the *Griswold* case had been discussed, Douglas was assigned the case. According to Garrow, Justice Harlan was particularly disappointed. Harlan’s Poe dissent

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discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution” (p. 362).
had received far more praise than either the majority's opinion refusing cert or Douglas's dissent. However, Harlan's strong due process argument was not acceptable to either the Chief or to Douglas. Though Douglas was not generally thought of as having a gift for consensus building, Warren decided that it was Douglas that came closer to the consensus of the justices on the issue than any of the others, and though his crafting of the opinion might not be as remarkable as if assigned to someone else, Warren believed that Douglas's opinion would be the least likely to doctrinally offend, and so offered the best hope of garnering at least five justices to join him.

Within ten days of the assignment, Douglas penned a first draft of the *Griswold* opinion. The first draft was quite a bit shorter and simpler than had been his *Poe* dissent. The thrust of the argument was that the right of association surely included the intimate association between husband and wife, and between a couple and a physician who might counsel them on birth control. Noting that "the association of husband and wife is not mentioned in the Constitution nor in the Bill of Rights," Douglas cited *Meyers* and *Pierce*, and said that these decisions had interpreted the First Amendment as including "peripheral rights," particularly with respect to political associations. He also drew upon the Court's more recent decisions in cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958), in which the Court had ruled that the right of association, derived from the First Amendment, protected affiliation with political groups. "We would, indeed, have difficulty protecting the intimacies of one's relations to the NAACP and not the intimacies of one's marriage relation. Marriage is the essence of one form of the expression of love, admiration, and loyalty" (Garrow 1994, 245).
Perhaps the most notable aspect of Douglas's first draft of the opinion which would give rise to a right of privacy was that privacy was scarcely mentioned, and not at all relied upon to strike the law. Similar to the approach Harper had taken in his Poe brief, Douglas mentioned that privacy is violated by such a law, but such a violation is merely part of the fallout from the violation of the constitutionally protected right – the right of marital association. The difference between Douglas's draft and Harper's brief was that Douglas mentioned privacy far less than had Harper. It is mentioned in an almost offhand manner. Likewise, the famous "penumbras" passage so prominently featured in the final draft of Griswold was little more than a rhetorical flourish in the first draft. "The prospects of police with warrants searching the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives in repulsive to the idea of privacy and of association that make up a goodly part of the penumbra of the Constitution and the Bill of Rights" (Garrow 1994, 246). Whereas in the final version of Griswold Douglas would make reference to "a right of privacy older than the Bill of Rights," the original text referred to "a right of association as old as the Bill of Rights"32 (emphasis added)(Garrow 1994, 245-246). At the suggestion of his clerk, Jim Campbell, Douglas added more privacy language similar to that he had written in Poe. As hoped for by Warren, Douglas's rough draft included very little discussion of and no reliance on a theory of substantive due process. Once again, as he had in Poe, Douglas eschewed any parallels between striking down the contraceptive laws and Lochner-era jurisprudence.

32 When justifying that something is a fundamental right, the Court has regularly asked if the right has always been valued by society. In this respect, Douglas gained years and points for his argument by (footnote continued on next page)
Douglas showed the first draft only to Brennan. In response, Brennan sent a letter back with his suggestions. In the letter, the more familiar outlines of *Griswold* began to emerge. Brennan’s letter praised the Douglas draft for its rejection of *Lochner*. As Douglas had pointed out, Brennan reiterated that the Bill of Rights did not make specific reference to the marriage relationship. That, of course, was the “obstacle we must hurdle.” The letter indicated concern that Douglas’s emphasis on the family unit as sacred, much of which came from *Meyer* and *Pierce* (both issued during the *Lochner*-era), might be vulnerable to attack as being little more than *Lochner*-era rationale applied to a non-economic statute. Brennan’s letter went on to suggest that an emphasis on privacy rather than squarely on the association of husband and wife, might help to avoid the substantive due process accusations.

The Brennan letter suggested that an argument could be made that in the same way that there are peripheral rights, such as the right of association, implied by the First Amendment, there are also peripheral rights suggested elsewhere in the Bill of Rights.

Instead of expanding the First Amendment right of association to include marriage, why not say that what has been done for the First Amendment can also be done for some of the other fundamental guarantees in of the Bill of Rights? In other words, where fundamentals are concerned, the Bill of Rights guarantees are but expressions or examples of those rights, and do not preclude applications or extensions of those rights to situations unanticipated by the Framers (Garrow 1994, 247).

The letter suggested that a right of privacy is implied when the purposes of the Third and Fourth amendments, and the self-incrimination clause of the Fifth Amendment, are considered together. These amendments indicate that the framers of the Constitution substituting privacy for association. Note that in the original, his right of association was “as old as the Bill (footnote continued on next page)
were concerned with providing special protection for the home and the right to be left alone there. I am not entirely sure why Brennan believed that a claim to privacy derived from multiple parts of the Bill of Rights would fare better against attacks alleging that the Court was resorting to Lochner-styled jurisprudence than an argument that expanded the already-articulated right of association. Perhaps he believed that the stretch from political associations to intimate social associations was too far. Or perhaps he believed that the more references to the specifics in the Bill of Rights, the greater the claim that the Court was merely illuminating a right already there, not creating one based on their own preferences. In some ways, the approach is similar to Harper’s “synergistic” approach from the Poe brief. That is, sometimes an issue is covered by overlapping parts of more than one amendment, and such areas should be given extra scrutiny by the Court.

Whatever his motivations, Brennan’s letter specifically encouraged an opinion in which the outlines of the right of privacy would not be drawn with much specificity. “All that is necessary for the decision of this case is the recognition that, whatever the contours of a constitutional right to privacy, it would preclude application of the statute before us to married couples. For it is plain that, in our civilization, the marital relationship above all else is endowed with privacy” (Garrow 1994, 247).

In addition to his hope that a more general argument based on privacy would avoid accusations of relying on substantive due process, Brennan closed his letter by noting a second virtue of his approach: “I think there is a better chance that it will command a court” (Garrow 1994, 247). Whether Douglas was impressed and moved by

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of Rights,” whereas his right of privacy was “older than the Bill of Rights.”
Brennan’s doctrinal suggestions, or merely acting politically to secure as many votes as possible, we cannot be sure. But whichever the case, the second draft of Douglas’s opinion incorporated a great deal of Brennan’s suggestions. Rather than protect the husband and wife relationship by expanding the right of association, Douglas’s new version used a right of privacy to shield the relationship. Thus the long shadow of criticism cast by the *Lochner*-era had, in part, given rise to a theory of privacy rooted in the shadows of the Bill of Rights rather than in a substantive interpretation of due process.

Douglas forwarded his revised opinion to Brennan and Warren. A note to Brennan from one of his clerks indicated that the Brennan chambers, overall, were pleased with the influence of Brennan’s letter on the opinion. The note indicated that perhaps Brennan might want to suggest to Douglas that the section on “penumbras” and “emanations” might be elaborated upon, but that otherwise the changes comprised a clear “victory” for Brennan’s point of view.

The reaction down the hall in Warren’s chambers was decidedly negative. In a memo to Warren, John Hart Ely – the clerk who had suggested the Equal Protection approach derived from *Yick Wo*, condemned the Douglas opinion, warning that “When one seizes upon a right which does not appear in the Constitution, that right can be given whatever shape and scope the person discussing it wishes it to have” (Garrow 1994, 248).

Ely felt so strongly about the opinion that he advised Warren not to join it. Better to wait to see if another justice would write an opinion with which he could join, he advised
Warren. If one did not materialize, Ely offered to help author a concurrence which would rely on the *Yick Wo* logic.

On April 28, a draft of the *Griswold* opinion was circulated to all the justices. Justices Clark and Goldberg sent notes to Douglas indicating they would join him. Justice Harlan asked that a line be added at the end that said he concurred, based on his reasoning in *Poe*. (Harlan later changed his mind and issued a short concurrence.) Stewart indicated he would write a dissent, but Warren, White and Black did not immediately respond, though it was clear from the conference that Black would dissent.

At that point, although it was still clear that seven of the justices were going to vote to strike down the Connecticut law, it was uncertain whether or not the Douglas opinion would secure enough votes to be the majority opinion, for only Justices Brennan, Clark and Goldberg had indicated that they would definitely join Douglas, making four votes, but not the necessary five for an opinion to be considered the majority opinion. Warren did not feel comfortable joining the opinion, and Douglas had yet to hear back from White. Meanwhile, Goldberg decided to draft a concurring opinion in which he fleshed out his views on the Ninth Amendment, which Brennan joined. A few days later, White issued a concurring opinion, which avoided privacy language but struck down the statute on due process grounds. Warren had still not decided what he would do. Ely told Warren that he thought the White opinion was the best of the lot to date, and suggested that perhaps Warren could discuss the possibility of White adding a section using a *Yick Wo*-style analysis. Warren did decide to join White’s concurrence, but only briefly. For a couple of days later, Warren removed his name from the White concurrence, and
instead joined in Goldberg’s concurrence. Since the Goldberg opinion explicitly said that its authors also joined with the Douglas opinion, this, indirectly, gave the Douglas opinion the fifth vote necessary for it to be the majority opinion. According to Garrow, this allowed Warren to solve the dilemma by giving Douglas’s opinion the vote it needed, but without signing the Douglas opinion directly. “From the outside, it was a distinction without a difference, but given how long and hard the Chief had wrestled with the constitutional implications of Griswold ... it was a distinction that doubtless made Earl Warren feel somewhat more comfortable about signing on to so potentially open-ended a decision” (Garrow 1994, 252). After a bit more editing, the six opinions in the case were sent to the Supreme Court’s print shop. The Court announced its decision to strike down Connecticut’s ant contraception law on Monday, June 7, 1965.

**Chasing Away The Shadows Of Lochner**

There is one thing that all six opinions had in common: all castigated Lochner-era jurisprudence. Those voting to reverse went to great lengths to justify voiding the Connecticut law in ways which would seem different than decisions issued in the hey day of economic substantive due process. The two dissenters said the efforts of the majority did little more than to dress up Lochner-style reasoning in privacy’s clothing.

Though Douglas had incorporated most of Brennan’s suggestions, the first part of the opinion (discussing issues of justiciability) still emphasized the idea of relationships – not only the relationship between a husband and wife, but the relationship between a couple and a physician (or other health professional who might advise them about
contraception). Douglas's mention of the latter relationship was required in part because it was Dr. Lee Buxton and Estelle Griswold who raised the claims rather than patients themselves. The Court was right, he wrote, to grant standing to the two, for otherwise "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them" (p. 481).

The very first sentence that deals with the merits of the case disavows any adherence to the principles of the Lochner-era. "[W]e are met with a wide range of questions that implicate the due process clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York, should be our guide," wrote Douglas. "But we decline that invitation as we did in West Coast Hotel Co. v. Parrish, Olsen v. Nebraska, Lincoln Union v. Northwestern Co., Williamson v. Lee Optical Co., [and] Giboney v. Empire Storage Co." (p. 482). Douglas's list of cases here is rather curious. Two of the five were authored by Douglas (Olsen v. Nebraska and Williamson v. Lee Optical Co.), and two others by Black (Lincoln Union v. Northwestern Co. and Giboney v. Empire Storage). All five cases, issued between 1937 and 1949, were decisions in which the Court affirmed state laws related to economic regulation, and explicitly and at length rejected economic substantive due process arguments. The Court, of course, did this many times during that period. But Douglas's particular selection seems to subtly suggest three things. First, and most obviously, by approvingly citing

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33 See, for example, Nebbia v. New York, 291 U.S. 502 (1934); Hegeman Farms v. Baldwin, 293 U.S. 163 (1934); Borden's Farm Products v. Eyck, 297 U.S. 251 (1936); West Coast Hotel Co. v. Parrish, (1937); (footnote continued on next page)
cases which clearly discredited liberty of contract doctrine, Douglas was suggesting that he was following in a tradition of anti-economic substantive due process. Second, that he included two decisions which he authored may well have been meant to remind the reader that he himself followed in the tradition of rejecting the doctrine of the *Lochner*-era. And third, juxtaposing his own anti-liberty of contract decisions next to two of Black's decisions was meant, I believe, to suggest that he and Black were of the same mind on this issue — at least in the past with regard to liberty of contract. For, as will be discussed below, Black's attack against the majority opinion in *Griswold* was particularly forceful. But in another way, the choice of these two particular opinions by Black was rather counterintuitive. Both *Lincoln Union v. Northwest Co.* and *Giboney v. Empire Storage* were cases in which state laws having to do with the relations between employers and labor unions were challenged. In both cases, litigants argued, among other things, that the statutes violated notions of liberty of contract. And in both instances the Court upheld the statutes, and explained at some length that the Court no longer followed in the *Lochner* line of cases. The interesting twist is that in both of the cases, the statutes worked *against* the interest of the unions, and it was attorneys representing the labor unions who based their claims, in part, on the doctrine of liberty of contract. The even more striking thing about the choice of these two cases, within the context of *Griswold*, was that in both cases the labor unions used not only liberty of contract arguments, but

*California State Auto Association v. Maloney*, 341 U.S. 105 (1951); or *Day-Brite Lighting v. Missouri*, 342 U.S. 421 (1952), to name a few.

34 This is in contrast to the types of laws which the Court struck down in the days of *Lochner*. In those cases, the Court struck down legislation which were passed with the worker in mind, and it was attorneys representing business interests that developed and used the liberty of contract doctrine.

(footnote continued on next page)
they also argued for expanded interpretations of the First Amendment that would have protected their union activities. In both decisions, Black included substantial passages in which he argued against more expansive interpretations of the First Amendment. He was particularly hostile toward right of association arguments advanced by the unions in *Lincoln*. It is unclear why, then – when so many other decisions could have been cited to demonstrate that the Court no longer followed *Lochner* – Douglas would choose two such cases which also attack expansive interpretations of the First Amendment, including the right of association, when so much of Douglas's rationale in the case rests on a right of association – a discussion of which he initiated just two sentences later.

There was one more puzzling aspect about Douglas's repudiation of *Lochner*-era jurisprudence, contained in the juxtaposition of the following two sentences:

> We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation (emphasis mine)(p. 482).

In the first sentence, he rejected a substantive due process approach in areas related to "economic problems, business affairs or social conditions." But in the following sentence, he said that the Connecticut law "operates directly on an intimate relation between husband and wife." Certainly, laws related to birth control affect social issues, and so it would seem that Douglas contradicted himself. But perhaps by social

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35 In *Lincoln*, the law forbade "closed shops" (i.e., a job for which union membership is a prerequisite of employment). The unions argued this violated their First Amendment right of association. And in *Giboney*, Missouri had an antitrade restraint law, which it used to restrict picketing. The unions argued that their right to picket was protected under the First Amendment's right of assembly and right of petition.

(footnote continued on next page)
conditions he was referring to macro social issues, such as legislation related to poverty or the like. But whatever he meant by “social conditions,” it is clear that he thought the relationship between husband and wife was different. This simple juxtaposition of sentences illustrates just how much Douglas relied on the device of a relationship to justify and limit a right of privacy.

Douglas next set out to incorporate the suggestion of Brennan, that the logic used in the right of association cases be expanded. The argument went something like: the Court had already recognized that certain shadows cast by the First Amendment include a right of association. Just as the First Amendment casts shadows including unenumerated – though related – rights, so, too, do other specific guarantees cast shadows. Several guarantees are related to something like a right of privacy. Therefore, the Constitution protects a right of privacy.

Douglas did this by first listing three rights not listed in the Constitution, yet recognized by the Court: the right of association, the right of parents to chose their children’s school, and the right to study in a particular language, and then he briefly discussed the *Meyer* and *Pierce* decisions. He called these unenumerated rights “peripheral” rights, and suggested that enumerated rights themselves would be devalued if the peripheral rights were stripped away. It was almost as if he was saying that recognizing peripheral rights somehow honored the explicit rights. “Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and *Meyer* cases” (p. 482). The odd thing, of course, was that
neither Pierce nor Meyer articulated a “peripheral” rights-styled argument. Indeed, as discussed above, in neither case was a strong rationale offered for finding the laws unconstitutional. This can be explained, in part, by the style of opinion writing at that time. The trend has been toward longer and more detailed opinions. During the early decades of this century, opinions tended to be far shorter, with far less explanation and justification. “Judges in the latter half of the twentieth century value an explicitness and a painstaking process of working through every step of the reasoning. Holmes [and other justices of his era] would have been impatient with all that” (Garner 1992, 611). But the lack of rationalization can also be seen as an assumption that Meyer and Pierce were employing the same substantive due process logic as so many other cases of the era, but using it in a non-economic arena.

After citing cases from which the Court had inferred a right of association in the First Amendment, Douglas began the penumbra argument.

In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.... The foregoing cases suggest that specific guarantees in the Bill of rights have penumbras, formed by emanations from those guarantees that help give them life and substance” (p. 483-484).

So, having made the point that the First Amendment has penumbras that include a right of association, he extended the logic, as had been suggested by the Brennan letter.

“Various guarantees [in the Constitution] create zones of privacy.” Those guarantees are contained

...in the penumbra of the First Amendment..., as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of
the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" (p. 484).

Douglas then recited a list of Fourth Amendment cases which refer to a right of privacy (as was discussed in the last chapter). Without distinguishing between the kind of privacy protected in those cases (the right against unreasonable search and seizure) and the right being argued for in Griswold, Douglas simply said that "These cases bear witness that the right of privacy which presses for recognition here is a legitimate one" (p. 485).

Douglas did little to give shape to his notion of privacy. Nowhere did he define a right of privacy, include some sort of list of things that might be protected by the right, or even set out some sort of broad parameters. We learn only that the marital relationship lies within the zone of privacy and that the right is very old.

We deal here with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred (p. 485).

It is critical, I think, that Douglas phrased it as "a" right of privacy rather than "the" right of privacy. While the phrasing could suggest that the particular right of privacy in question (here the marital relationship) is only one of the various rights of privacy, I think that the following sentence, which launched straight into marriage, as well as the difference between the first draft of the decision, which discussed a right of association, indicate that Douglas's focus was the marital relationship. It almost
appeared that it was immaterial what he called it – a right of privacy or a right of
association, or whatever – so long as that relationship was protected. It was clear that for
Douglas that the marriage relationship was the true fundamental right, and privacy was
simply the vehicle that helped him get an extra vote for his opinion (i.e., Brennan’s vote).
I’m not suggesting that some sort of concept of privacy was not of importance to
Douglas, for clearly his Fourth Amendment opinions (discussed in the previous chapter)
suggest otherwise. But just as clear from his Fourth Amendment jurisprudence is the
suggestion that Douglas did not value a right of privacy *per se*, but valued the fact that it
could protect the intimacies of a home, and particularly the intimacies of a marriage
relationship.\(^\text{36}\) Perhaps influenced by an age of ever-increasing surveillance technology,
coupled with the government’s evident abuse of that technology in this period, Douglas
clearly feared some Orwellian-style government, and the specter of police in the
bedroom. But those fears didn’t extend to other private spheres, such as the records of a
private business. As quoted above, the marital relationship, for Douglas, was almost
“sacred.”

In the final paragraph of his opinion, Douglas referred to the marital relationship
as an association, and noted that though the marital relationship is not political,
commercial or designed to convey a social message, that the relationship “is an
association for as noble a purpose as any involved in our prior decisions” (p. 486). And
so in scarcely less than four pages, notwithstanding his protests otherwise, Douglas
kicked off what has often been referred to as a second era of substantive due process.

\(^{36}\) See discussion about Douglas’s Fourth Amendment jurisprudence in the previous chapter.
Marital Privacy Yes, Penumbras No: The Concurring Opinions

As stated above, three concurring opinions were filed – one by Goldberg, joined by Warren and Brennan, one by Harlan and one by White. Of course, the authors of the three concurring opinions agreed that the law was unconstitutional. The disagreement centered over what provision of the U.S. Constitution made the law unconstitutional. The concurrences and two dissenting opinions foreshadowed the debates that scholars and critics would have over the issue of constitutional privacy.

The most striking thing that all three concurrences shared with the majority opinion was that the marital relationship was considered of utmost importance and deserved immense respect. Of the concurrences, the Goldberg concurrence was the most similar in approach to the Douglas opinion, for the Goldberg opinion also embraced a theory of rights implied by specific promises within the Constitution. The Goldberg opinion only briefly discussed a broad or generic right of privacy, but instead stressed that it is “marital privacy” at issue. “The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy – that of the marital relation and the marital home” (p. 495). The most prominent feature of the Goldberg concurrence was its heavy reliance on the Ninth Amendment. The Ninth Amendment, argued Goldberg, should shape interpretation of the Fourteenth Amendment’s due process clause, particularly the relationship between the due process clause and the specific guarantees in the Bill of Rights. For Goldberg, the Ninth Amendment supported the idea that “liberty” in the Fourteenth Amendment should not be restricted to those things protected in
amendments One through Eight. Liberty gains content from those things implied in the specific guarantees as well as from the experience gained from governing a free society.

In an unusual twist, Goldberg offered a novel argument regarding whether or not “liberty” within the Fourteenth Amendment ought to be limited to those things in amendments One through Eight, or inclusive of other important rights. He argued that the exclusion of a specifically enumerated right of familial or marital privacy actually offered evidence that amendments One through Eight were not the only guarantees of rights protected by the totality of the Constitution.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the state from disrupting the traditional relation of the family – a relations as old and as fundamental as our entire civilization – surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgement by the Government though not specifically mentioned in the Constitution” (p. 495, 496).

Goldberg argued that striking a law such as Connecticut’s birth control law was different than the practice of the Court in the *Lochner*-era because of the nature of the rights affected. He argued that in the *Lochner*-era, it was merely economic rights with which legislatures were theoretically interfering, whereas marital privacy was a fundamental right.

It is clear that Goldberg was not relying on any type of Millian philosophy to strike the Connecticut law, for he explicitly stated that other intimate adult acts were “admittedly a legitimate subject of state concern” (p. 498). “[I]t should be said of the Court’s holding today that it in no way interferes with a State’s proper regulation of
sexual promiscuity or misconduct” (p. 498, 499), and quoted from Harlan’s *Poe* dissent which advocated state restriction of “adultery, homosexuality and the like” (emphasis mine) (p. 499).

Harlan’s concurrence was as much a statement about his anti-incorporation views as it was about justifying the striking of the Connecticut law. Indeed, his anti-incorporation sentiment was probably the reason Harlan penned a concurrence at all, rather than simply including a sentence referencing his dissent in *Poe*. Harlan had long maintained that the Court was misguided in its incorporation exercise. He believed that the meaning of the Fourteenth Amendment’s due process clause was distinct from and independent of those rights in the Bill of Rights. If the goal of looking to the Bill of Rights for guidance in determining the meaning and scope of due process was to impose judicial self-restraint, Harlan argued that the results were more “hollow than real” (p. 501). For guidance in determining the content of due process, Harlan said justices should look to history and the country’s basic values, always tempering these with notions of federalism and separation of powers.

Justice White’s concurring opinion appeared last. His opinion is of particular relevance to the current study, for twenty-one years after a majority (including White) of the Court found that a right to privacy protected the marriage relationship, Justice White wrote the majority opinion in *Bowers*, which said that the right did not extend to protect a homosexual relationship. White, like Harlan, rejected using incorporation as a guide for which rights were included in notions of due process. White’s opinion advocated a balancing approach. That is, White argued that laws “regulating sensitive areas of
The sensitive area of liberty in this case, according to White, was the marriage relationship. Thus White’s opinion, like those of Douglas, Goldberg and Harlan, focused attention on the law’s impact on the marriage relationship, and not the impact of the law in other contexts.

White asked two questions: What was the goal of the law and did the law effectively further that purpose? The purpose of the law, according to White, was to deter “all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital” (p. 505). For our purposes it is important to note that White had no quarrel with the purpose of the law, saying that deterring all sexual relations outside marriage was “concededly a permissible and legitimate legislative goal” (p. 505).

The problem for White was that the law was overly broad in its application to married couples. The general purpose of banning use of contraceptives would be to deter illicit relationships, because without birth control, such encounters would run the risk of causing a pregnancy. White reasoned that the purpose of banning use even within marriage was to deter extramarital affairs. He supposed that the state was suggesting that if married couples were allowed to use contraceptives, then the devices would be accessible to them for use in other contexts. A ban on the devices, even in the context of marriage, would then deter or limit extramarital affairs because of the fear of pregnancy.

White doubted the effectiveness of the law generally, and noted that contraceptives had been available in Connecticut despite the use ban. But ineffectiveness
alone would not make the law unconstitutional. It was only when the law burdened the marriage relationship that its effectiveness – or lack thereof – needed to be examined. And after such examination, White concluded that the ineffectiveness of the law coupled with its burden upon the marriage relationship made it a violation of due process.

I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law (p. 507).

Dissenters Stewart and Black each authored opinions joined by the other. Each took the opportunity to lecture the Court about the evils of judicial activism and accused the majority of engaging in *Lochner*-style jurisprudence. Though both justices went on the record as finding the law offensive, neither could find any constitutional prohibition against passage of such an “uncommonly silly law” (Stewart, p. 527). Black was especially hostile toward the majority and concurring opinions, and his remarks seemed to go beyond the *Griswold* case and to be a lecture on contemporary interpretations by the Court generally.

It is worth repeating that all of the opinions which advocated striking the law did so only with regard to its application to married couples. Nowhere in the majority opinion or in any of the concurrences was the law questioned in other situations. Part of this could be explained by the specific record before the Court in *Griswold*, involving, as it did, application of the law to married couples. But all of the opinions went further and stated that regulation of any sexual relations outside of marriage was the proper domain of the legislature. Thus the right articulated in *Griswold* was quite narrow. That the right was articulated in terms of privacy was almost an accident. The privacy language
allowed the Court to protect a rather delicate area as a fundamental right without stating it outright. In other words, the Court did not have to declare a right to use a diaphragm or the right to unfettered sex in marriage. Rather, it could cloak these things in the more dignified language of privacy. Use of privacy was also, in part, a result of Douglas’s efforts to secure a majority vote for his opinion. As stated before, the justices in the majority were particularly anxious to avoid a ruling that would too closely parallel *Lochner*-style jurisprudence. Using privacy and pointing to the hints of privacy in other parts of the Bill of Rights seemed to make *Griswold* more of an incorporation case — or at least that’s what they hoped to achieve — and by this point in history selective incorporation had been accepted by a majority of the justices.

In the cases involving sexual and reproductive liberty that followed *Griswold*, the Court would extend the right of privacy if there was a relationship implicated which received legal protection elsewhere. Thus, a doctor and patient would be veiled by the right of privacy when the doctor advised his client about abortion, but two men, with no relationship recognized elsewhere in the law, would not be protected.

**Post-*Griswold* Privacy**

Two post-*Griswold* rulings are of particular relevance to the current analysis: *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade*, 410 U.S. 113 (1973). As will be discussed below, the *Roe* decision is consistent with my argument that the privacy cases have not been so much about privacy as they have been about the privileging of certain relationships. But another case, *Eisenstadt*, considered at the same time as *Roe*, would seem to undermine this argument. In the following section, I argue that *Eisenstadt*
was different than *Griswold* or *Roe*, because it relied on the equal protection clause rather than on the due process clause.

**Eisenstadt v. Baird: Extension Of Privacy Via Equal Protection**

The common textbook description of *Eisenstadt v. Baird* is that it "expanded the right of privacy articulated in *Griswold v. Connecticut*" (Maltese 1992, 247). While this is true, it is important to note the way in which the Court expanded the right. In *Eisenstadt*, as opposed to *Roe v. Wade*, the Court used the equal protection clause to expand the right. The Court did not state that the right of unmarried persons to use contraceptives was a fundamental right. Instead, the Court noted that the law in question created classifications which would violate the equal protection clause. The Court’s conclusion required it to examine and evaluate the purpose of the law. Ultimately, the Court found three purposes for the law. Using somewhat circular logic, the Court dismissed as implausible two of the legislative goals, and then found the third goal to be a violation of equal protection.

The case involved a Massachusetts law which made it a felony “for anyone to give away a drug, medicine, instrument, or article for the prevention of conception except in the care of (1) a registered physician administering or prescribing it for a married person or (2) an active registered pharmacist furnishing it to a married person presenting a registered physician’s prescription” (p. 438). William L. Baird, a rather colorful character who believed that simple contraceptives such as vaginal foam should be made widely available without prescription, decided to test the Massachusetts law. Prior to
testing the Massachusetts law, Baird, a former medical student and former marketing employee for Emko Pharmaceuticals (which produced a vaginal contraceptive foam), had already been active in New Jersey and New York trying to bring about reform of contraceptive laws (Garrow 1994, 314-320).

To challenge the Massachusetts law, Baird accepted an invitation from Boston University students to speak about contraceptives and distribute birth control devices “to interested coeds” (Garrow 1994, 320). The meeting was widely publicized, and Baird made it clear that he both intended to break the law and hoped to get arrested as a result so that the law could be tested in court. In April of 1967, Baird appeared before a crowd of between 1,500 and 2,000 students, reporters, and seven officers from the Boston Police Department. His hour-long lecture decried laws which made contraceptives difficult to obtain, and told the female students that they were being “enchained by men who have no right to dictate to you the privacy of your bodies” (Garrow 1994, 321). At the end of the lecture, Baird announced that he would be distributing packages of vaginal foam contraceptives, and invited any one who wanted one to come forward. Baird handed packages to about twenty young women who stepped up to the stage, and several more women removed packages from a box on the podium. At about this time, the officers came forward, one put his hand on Baird’s shoulder, and announced that he was under arrest. Baird’s arrest was greeted by a standing ovation from the crowd. None of the women accepting the foam packages were identified or detained (Garrow 1994, 321).

Baird was subsequently convicted at a bench trial in the Massachusetts Superior Court for exhibiting contraceptives and for distributing the foam packages. The
Massachusetts Supreme Judicial Court set aside the conviction for exhibiting the contraceptives, saying that it violated the First Amendment’s protection of expression, but sustained the conviction for passing out the vaginal foam. The District Court dismissed Baird’s petition for a writ of habeas corpus, but the Court of Appeals for the First Circuit overruled the dismissal and remanded the case, telling the lower court to grant the writ discharging Baird. The Sheriff of Suffolk County, Eisenstadt, then filed a petition for a writ of certiorari with the U.S. Supreme Court, which was granted in 1971.

The bulk of the majority opinion, written by Justice Brennan and joined by Douglas, Stewart and Marshall, examined and challenged the legislative purpose of the Massachusetts law. Noting that the purpose of the law was “not altogether clear,” Brennan found in the record of the lower courts three reasons which had been advanced: to protect health, to protect morals, and to “limit contraception in and of itself” (p. 443).

In considering the two state goals of protecting health and protecting morals, Brennan looked to the Massachusetts criminal code for evidence that one or the other of these reasons were indeed the purpose of the law. In both cases, Brennan found examples of contradictions and holes in the law which undermined those goals. He therefore concluded that because of the contradiction in the law, neither protection of health nor protection of morals could be considered the goals of a rational legislature.

The Massachusetts high court had noted that one state purpose of the law was to protect the public health by preventing the “distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences”
Brennan noted that prior to the *Griswold* ruling, contraceptives had been banned altogether, and that the Massachusetts legislature had added the exception for married persons (if prescribed by a doctor) not with the public health in mind, but merely to make “what it thought were the precise accommodation[s] necessary to escape the *Griswold* ruling” (p. 452). If health precautions necessitated that a physician prescribe birth control devices for married persons, “that need is as great for unmarried persons as for married persons” (p. 452). “If the prohibition … is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality” (p. 452). The majority opinion further noted that not all contraceptive devices pose a health hazard, and so the law was overbroad. Brennan finished his thrashing of the logic of a health purpose by noting that the Massachusetts law was unnecessary, as federal law already regulated the distribution of harmful drugs.

The majority opinion was no kinder to the logic that the purpose of the law was to protect the public morals. Brennan observed that there was little evidence to suggest that the ban on contraceptives had significantly decreased fornication or adultery. Additionally, federal precedent such as *U.S. v. One Package*, 86 F.2d 737 (1936), and *U.S. v. Belaval*, U.S.D.C. 2. P.R., #4589 CR (1938) (see discussion of these cases in footnote 11, this chapter) meant that the Massachusetts law could not prohibit the distribution of contraceptives if they were to prevent disease rather than pregnancy.

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37 The case was decided by only seven justices, as Rehnquist and Powell did not participate.
which, according to the majority, further strained the logic that the law could effectively protect morals. Brennan also noted that when doctors prescribed contraceptives to married persons, no attempt was made to determine if the contraceptives were to be used for illicit affairs as opposed to being used within the marriage. “Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim” (p. 449). And if fear of pregnancy did not deter illicit relations, argued Brennan, that would then mean that the Massachusetts legislature had “prescribed pregnancy and the birth of an unwanted child as a punishment for fornication.” The Court could not attribute such a warped “scheme of values” that this would have implied to the Massachusetts legislature.

It is important to note that the Court did not say that regulation of sex outside of marriage was an illegitimate goal. The Court made the argument that the goal was not furthered by the law, and that such a purpose would have meant that the legislature was prescribing pregnancy as the punishment for fornication, a purpose the Court was unwilling to attribute to the legislature. The Court conceded both that regulation of sex outside of marriage was a legitimate goal, and that if the law had actually deterred single people more than it did married people from illicit encounters, then such a classification would have been permissible. The significance of this seemingly technical point is that once again, the Court had extended a right having to do with sexual freedom – but in a very narrow way which could be applied very narrowly if the Court were inclined to do so – as it was sixteen years later in its Bowers ruling.
Having thus dispensed with the two arguably legitimate rationales for the law, Brennan then attacked the straw man: that the law was simply a ban on contraception as being immoral *per se*. Brennan quoted approvingly from the Court of Appeals:

> To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state (p. 452-453).

In the very next sentence, Brennan sidestepped the question of whether or not the right to contraceptives was a fundamental right. “We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access contraceptives may be, the rights must be the same for the unmarried and married alike” (p. 453). In this way, the majority of the Court was able to opt out of answering the difficult and indelicate question of whether or not there existed a fundamental right to contraception. Whereas in *Griswold* the Court could discuss such a question by using the “marital relationship” to cloak and limit the right, such was not the case in *Eisenstadt*. Instead, the majority chose to focus on the weakest and most implausible legislative goal – that contraception was immoral in and of itself – and thus declared that if such were not the case for married persons, such could not be the case for unmarried persons.

*Eisenstadt*, then, is different in nature from *Griswold, Roe* or *Bowers*. In these three cases, the Court asked questions about fundamental rights and used (or refused to use) the due process clause to strike state legislation. In contrast, *Eisenstadt* rested on an equal protection argument – the scope of which was quite narrow in terms of precedent
for Bowers. The Court made no statement about whether or not an unmarried couple – or anyone, for that matter – had a fundamental right to contraception. Nor did it imply that people had a fundamental right to sexual relations outside of marriage. Indeed, the Court at several points recognized that such regulation was legitimate and appropriate. Thus, if a future court were inclined to read the Eisenstadt precedent very narrowly with regard to homosexual relations, it could say that the only implication of Eisenstadt would be that any laws prohibiting contraception to homosexuals would be a violation of the equal protection clause. But of course, such legislation would be absurd. And federal precedent already barred prohibition of condoms – the one contraceptive device that gays might also use – if the devices were used to limit the spread of disease.

While Eisenstadt could be read narrowly as applied to homosexuals, there was a sentence in the opinion that could be read broadly with regard to a woman’s right to have control over conception and, by extension, control over the decision to bear – or not bear – a child:

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 (p. 453).

The sentence was particularly relevant, for the first draft of Brennan’s Eisenstadt opinion – which included the above sentence – was circulated the same day that the Court heard oral arguments in Roe v. Wade and Doe v. Bolton. It was, perhaps, a signal that at least some members of the Court might be sympathetic to the idea of striking state abortion laws as unconstitutional – and that the appropriate constitutional vehicle to do so might well be the right to privacy. Eisenstadt thus served as a link between Griswold and Roe.
The Right To Privacy And Abortion

Classification of the abortion cases as privacy cases stretches the boundaries of a definition of privacy. While women might well wish to keep a decision to terminate a pregnancy relatively private in the sense of not wanting knowledge of the abortion widely known, that’s not the right that advocates of abortion were seeking in the courts. The act in question was termination of a pregnancy, which in almost all cases is not going to be within the home or some other sphere traditionally considered private, but typically at a clinic, hospital or doctor’s office, which are public places. This strained use of privacy did not go unnoticed. As one federal judge put it, “I think it’s [privacy] a bad word in this area, but apparently everybody wants to use it. I think it’s something different from privacy, but I haven’t come up with a phrase myself yet, but I just know ‘privacy’ won’t do” (Garrow 1992, 442). So why place the right to terminate a pregnancy under the rubric of privacy?

Challenging abortion statutes as impairing a fundamental right to privacy was as much about timing and expediency as it was about proper classification of a legal right. Although legal challenges to abortion laws had been considered earlier, actual cases were not brought until the mid-1960s – at about the time the Court issued its decision in *Griswold*. Those interested in repealing abortion laws seized upon the privacy right articulated in *Griswold*, and reasoned that the right to use contraception implied the right

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38 Comment by Judge Irving Goldberg, during oral arguments of *Roe v. Wade* at a three-judge panel in Houston.
to control pregnancy. Abortion represented another way of controlling pregnancy. Thus, the privacy right articulated in *Griswold* offered pro-choice advocates the constitutional argument they had been seeking. And, once again, the rhetoric of privacy could serve the Court as a euphemism for a substantive liberty interest which was discomforting to state outright. So, rather than a fundamental right to an abortion, the Court could cloak the abortion clinic in the language of privacy.

After *Griswold*, lawyers and scholars were quick to note that privacy arguments might be fruitfully used to challenge abortion statutes. Even before the Court handed down *Griswold*, those optimistic that the Court would strike the Connecticut birth control law were already thinking about its implications. Testifying before the New York Commission on Revision of the Penal law in 1954, members of the Committee for a Human Abortion Law told the commission that “recognition in the law of the fundamental right of privacy is developing in the direction of acknowledgement that there is a basic constitutional right for a married couple to decide ... how many children are appropriate” (Garrow 1994, 297).

Writing just a few months after the Court handed down its decision in *Griswold*, one of the lawyers involved in preparation of the case reflected on the right to privacy and its future. At some point in the future, if the Court gave a broad interpretation to privacy, Emerson predicted that “the way would be open for an attack upon significant aspects of the abortion laws” (Emerson 1965, 232).

*Griswold* and its implications for abortion laws inspired a young man named Roy Lucas to write a paper while still in law school about how a test case attacking abortion
laws might be put together. He developed his paper and his arguments more fully after graduating from law school. Because Lucas was trying to follow the Griswold model, he emphasized not only privacy as a fundamental right, but he also recognized the centrality of the marital relationship to the decision. Griswold, he wrote, “rested on the broad principle of marital privacy and the physician’s right to advise on the use of contraceptives for the purpose of family planning.” This argument could be tailored, Lucas believed, to work as an attack on state abortion laws, if termination of a pregnancy were viewed as one possible means of family planning. The key argument, he wrote, would center around “the fundamental interests of a woman in marital privacy and personal autonomy in controlling her reproductive processes” (Garrow 1994, 339). He later put it quite bluntly to the U.S. Supreme Court in 1968 in a petition for a writ of certiorari for a challenge to a New Jersey abortion law. Griswold, he wrote, protects the “personal autonomy of a woman with respect to her reproductive capacities.” Thus, “Certainly the right to control the planning of one’s own family is a corollary of the broad right of marital privacy whether contraception or abortion after the failure of contraception is at issue” 39 (Garrow 1994, 365).

In a later version of the paper, Lucas began to speak of not only the relationship between the husband and wife, but of the relationship between a woman and her physician. Abortion, he said, was a “fundamental right of marital privacy, human dignity, and personal autonomy reserved to the pregnant woman acting on the advice of a licensed physician” (Garrow 1994, 339). Ultimately, it would be the relationship

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39 The case was Morin v. Garra, 54 N.J. 82. The U.S. Supreme Court declined to hear the case.
between client-physician that would be key to shaping a right to privacy that could encompass abortion.

In the years following the *Griswold* ruling, pro-choice lawyers and reformers increasingly spoke of *Griswold*-styled challenges. At a 1968 conference of the Association for the Study of Abortion, the *New York Times* reported one speaker as saying that *Griswold* "is being quoted increasingly frequently as a manifesto which points to the right of the individual woman to decide against pregnancy even though abortion is involved" (Garrow 1994, 358). And in 1969, former Supreme Court Justice Tom C. Clark published an article that said that the reasoning in *Griswold* was, in his opinion, applicable to abortion laws as well as contraception laws. This insight took on particular relevance in light of the fact that Justice Clark had been one of the justices to join with Douglas in the majority opinion in *Griswold*. In no uncertain terms, Clark wrote that "abortion falls within that sensitive area of privacy – the marital relation" (Clark 1969, 8).

Advocates of repeal of abortion laws, however, did not put all of their eggs in the privacy basket. They also argued that restrictive abortion laws violated the freedom of association between a doctor and a woman. According to one advocacy lawyer, the "freedom of association includes the physician-patient relationship, and that treatment of the patient is a constitutionally protected feature of this relationship unless the state can show an overriding interest" (Garrow 1992, 353). Another line of constitutional attack focused on the vagueness and ambiguity surrounding abortion laws. Many of the abortion laws included exceptions which would allow for abortions where the "life" or the "health" of the mother was threatened. Abortion advocates stressed that these terms
were so vague as to be useless to the doctor in determining if he or she were within the law when performing an abortion. Another line of legal reasoning suggested that the “patient has a fundamental right to regulate the size of her family,” and such a right “is a corollary of the right to marital privacy” as set forth in *Griswold* (Garrow 1992, 353). And finally, at least one lawyer believed that a historical analysis of state abortion laws would be the best weapon against them. After researching New York’s abortion laws, Cyril Means concluded that the only reason for the laws had been to protect the woman from the perils of termination procedures during the time when such procedures were more dangerous. With the improved techniques which made abortion one of the safer medical procedures, Means reasoned that the laws, which had been constitutional at the time because of their purpose of protecting the woman, had become unconstitutional as the dangers had become far more limited (Garrow 1994, 357).

The centrality of the marriage relationship to the *Griswold* opinion was reaffirmed in 1967, when a three-judge panel of the Second District Court of Appeals rejected an attempt to strike a California abortion law using a *Griswold*-styled argument. The case involved Leon Belous, a physician who had been convicted in 1966 for referring a college student to a Mexican abortion doctor who had a practice in California, but no U.S. medical license. The appellate court rejected the attempt to invoke *Griswold* by noting that the young woman Belous had referred had been single. The case was later successfully appealed in the state’s courts. In one of the *amicus* briefs filed with the California Supreme Court, the role of the doctor was emphasized. “We think proper constitutional interpretation [of *Griswold*] requires both contraception and early abortion
by licensed physicians to remain private matters" (Garrow 1994, 365). The brief
ceded that a stronger case might be made that abortion was constitutional within the
marriage relationship, but the centrality of the doctor continued to be prominent. "[A]n
even stronger claim to constitutional protection can be asserted by the married woman
acting to preserve and protect her family, with the support of her husband under the
guidance of her doctor" (Garrow 1994, 365).

In *People v. Belous*, 71 Cal. 2d 954 (1969), the California Supreme Court
overturned Belous's conviction – but it did so on the basis of the vagueness in the
language of the statute in force when Belous was arrested. The law said abortions
could be performed only if it was “necessary to preserve” the life of the woman. A four
to three majority ruled that the words “necessary” and “preserve” were unconstitutionally
vague, and did not provide enough guidance for the doctor to determine what was or was
not a lawful abortion.

Although the California court overturned the conviction on the basis of the law
being unconstitutionally vague, the majority in *dicta* discussed the implications of
privacy for abortion more generally. Invoking *Griswold* and other cases such as *Meyer v.
Nebraska* and *Pierce v. Society of Sisters*, the majority declared that

The fundamental right of the woman to choose whether to bear children
follows from the Supreme Court’s and this court’s repeated
acknowledgement of a ‘right to privacy’ or ‘liberty’ in matters related to
marriage, family, and sex. That such a right is not enumerated in either the
United States or California Constitutions is no impediment to the existence
of the right (p. 960).

40 The law under which Belous had been convicted had been revised in 1967 – after Belous’s conviction –
to allow abortion in a greater variety of instances. The decision in *Belous* had no effect on the revised law.
A few months later, a federal judge followed California's lead, and found a District of Columbia abortion law unconstitutionally vague. In *U.S. v. Vuitch* 305 F. Supp. 1032 (1969), the District Court for D.C. dismissed an indictment brought against Dr. Vuitch for performing an abortion, saying that the law was unconstitutionally vague. Like the California law, the federal law prohibited abortions except when done "as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine." And, like the California court, the District Court took issue with the ambiguous language of the law, especially the word "health." In particular, the court expressed concern that the statute did not make clear whether considerations of health included psychological as well as physical factors. The District Court also discussed how the concept of privacy, articulated in *Griswold*, demonstrated that "as a secular matter a woman's liberty and right of privacy extends to family, marriage and sex matters and may well include the right to remove an unwanted child at least in early stages of pregnancy" (p. 1040).

Two years later the U.S. Supreme Court reversed the District Court's ruling - but it did so in a way that would make it harder to prosecute doctors for performing abortions. Writing for the Court, Justice Black argued that the word "health" was not overly vague, and should be interpreted to mean that doctors could consider the psychological well-being as well as the physical condition of their patients when determining whether or not an abortion would be within the law. Black went on to say that when abortions were performed the burden of proof should be squarely on the government to show that the abortion was not to preserve the health or life of the woman, and not on the
doctor to show that it was. A broader definition of health, defined largely by the doctor him or herself, combined with placing the burden of proof on the government meant not only that fewer abortions would be considered illegal, but also that doctors would feel less threatened by the law and would thus be more likely to perform abortions.

The majority opinion did not discuss the *Griswold* implications for abortion, but Douglas addressed that point in a dissenting opinion. Douglas would have found the D.C. law unconstitutionally vague. But more importantly, he would have extended *Griswold*’s privacy doctrine to embrace termination of a pregnancy.

Abortion touches intimate affairs of the family, of marriage, of sex, which in *Griswold v. Connecticut*, we held to involve rights associated with several express constitutional rights and which are summed up in ‘the right of privacy…. There is a compelling personal interest in marital privacy and in the limitation of family size (p. 78).

Two years later, a majority of the Court would be willing to adopt a version of Douglas’s logic when it handed down the most famous of the so-called privacy cases, *Roe v. Wade*.

**Roe V. Wade: Abortion, The Right To Privacy And The Doctor-Patient Relationship**

As discussed above, by the time the Supreme Court heard the appeal to consider Texas’s abortion statutes in *Roe v. Wade*, a number of scholars, lawyers and judges believed that the privacy right coming out of *Griswold* could be used to successfully challenge the constitutionality of the country’s abortion laws. For advocates of the unconstitutionality of abortion laws, the right of privacy provided a constitutional foothold. For the Court, the rhetoric of privacy provided a way to strike a law they disagreed with, but using the more dignified language of privacy rather than saying in a more straightforward fashion that the right to abortion was a fundamental right. Of
course, abortion was discomforting in different ways than the discussion of contraceptives. Whereas the topic of birth control was an uncomfortable topic because of its sometimes embarrassing character, abortion was indelicate because of its profoundly controversial nature. As Justice Blackmun wrote in the early paragraphs of *Roe*, “We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy” (p. 116).

In some ways, the task before the Court in *Roe* was easier than it had been in *Griswold*; in other ways harder. This time around, the Court would not have to create a new doctrine from scratch, but could rely on the precedent set in *Griswold*. Nor would the Court have to concern itself as much with defining the boundaries of privacy. It could simply say that whatever else privacy might include, it included the right to terminate a pregnancy. But what made the issues in *Roe* more difficult was that with abortion, there was a compelling interest competing with the interests of the pregnant woman: the rights of the fetus. Whatever compelling state interests had been at stake in *Griswold*, they were largely ambiguous and somewhat scattered. In contrast, the compelling state interest in protecting another potential life was far more direct, tangible, and persuasive. As Justice Douglas wrote in an early, unassigned draft of *Doe v. Bolton*, abortion “is a rightful concern of society. The woman’s health is part of that concern; and the life of the fetus after quickening is another concern” (Garrow 1994, 534).

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41 *Doe v. Bolton* was a case heard by the Court at the same time as *Roe*, and is discussed here with the *Roe* opinion. I say here “unassigned draft” because although Chief Justice Burger had assigned both the *Doe* and *Roe* opinions to Blackmun, Douglas believed the Chief Justice was in the minority, and thus drafted his own opinion for the case, which he circulated only to Justice Brennan.
The problem of finding a limiting principle for privacy which had so vexed the Court in *Griswold* was present in *Roe*, but in a different form. The problem in *Griswold* had been that privacy might protect too much, and thus the husband-wife relationship was emphasized as a way of limiting those things protected. The problem in *Roe* was how to accommodate the rights of both the woman and the rights of the potential person she carried. Giving too broad a privacy protection to women seeking to terminate a pregnancy might protect too much. While there was no consensus on when it was during a pregnancy that the rights of the fetus began to outweigh the rights of the woman to terminate the pregnancy, almost everyone had some point prior to natural birth that was too late. Although justices such as Douglas wanted to give substantive and broad meaning to liberty within the Fourteen Amendment’s due process clause, there were limits. “There is no ‘liberty,’ in the absolute sense, to do with one’s body as one likes,” wrote Douglas (Garrow 1994, 535). The trick, then, was to come up with a way of putting a blanket of privacy on abortion without protecting all abortions – specifically late-term abortions. Where the husband-wife relationship had served as a limiting function in *Griswold*, it would once again be a relationship that would serve to limit and bolster the right of privacy which would include abortion: the doctor-patient relationship. Again referring to Douglas’s unassigned draft in the *Bolton* case, competing interests of the woman and the fetus “justify the state in treating the problem as a medical one” (Garrow 1994, 534). But when the problem became a medical one, then the attendant rights of the doctor-patient relationship would kick in. The law in question in *Bolton*, which required approval of all abortions by a committee, would be, according to Douglas,
"a total destruction of the freedom of association between physician and patient and the privacy which that entails" (Garrow 1994, 535).

The facts of the case in *Roe v. Wade* and its companion, *Doe v. Bolton*, have been rehearsed so often elsewhere that they will be given only brief attention here. The *Roe* case involved a challenge to the Texas abortion law, which represented the more severe abortion laws in effect at the time. The law prohibited obtaining an abortion except when deemed necessary to save the life of the mother. The *Doe* case was a challenge to a so-called reformed abortion law, which allowed abortions if performed in a hospital and approved by a hospital committee. Three petitioners initially sought declaratory and injunctive relief against the Texas law: Jane Roe, pregnant and single at the time the complaint was filed; John and Mary Doe, a married couple; and James Hallford, a doctor. Roe claimed that as a single woman, she wanted to terminate her pregnancy. The Doe’s complaint said that Mrs. Doe suffered from a “neural-chemical” disorder, and that if she were to become pregnant, she would hope to obtain an abortion. And Dr. Hallford said that the law was too vague, and interfered with the privacy of his doctor-patient relationships. In the *Doe* case, complaints were brought by Mary Doe, a pregnant woman who wanted to obtain an abortion, and a group of doctors, nurses, social workers and clergy who said that the law “chilled and deterred” their respective practices. In the *Roe* case, the Court granted standing only to Jane Roe. In the *Doe* case, standing was granted to Doe and the group of physicians and others. In the final draft, *Roe* was presented as the lead case, and it is there that the bulk of the constitutional issues are discussed.
Justice Blackmun’s original draft of the *Roe* decision would have invalidated the Texas abortion law on the grounds of being unconstitutionally vague— for reasons similar to those cited in *Belous* and *Vuitch*— and would have skirted the due process arguments. This upset some members of the Court who wanted to decide the case based on the core issues. For a number of reasons, perhaps most importantly that if the *Roe* decision had been released in 1972 it would have been voted on by only seven members of the Court, the case was held over and reargued the following term. Blackmun took the opportunity to do extensive research and rewriting.

Blackmun’s final opinion in *Roe* was quite long (more than 50 pages) and filled with research both regarding the history of state abortion legislation and the history of abortion practices. The first part of the *Roe* decision dealt with issues of justiciability, most importantly on the contention by the state that the case was moot since Jane Roe (Norma McCorvey) was no longer pregnant— though she had been pregnant at the time that she sought an injunction in federal court against County District Attorney Henry Wade, to keep him from enforcing the Texas law. “The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, and not simply at the date the action is initiated” (p. 125). Blackmun, however, argued that in this instance, since the relatively short period of gestation would perhaps forever preclude an abortion case from being appealed, to set aside the mootness issue, noting that “Our

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42 President Richard Nixon had just appointed Lewis Powell and William Rehnquist to the bench, and neither justice had been present during the initial argument of *Roe*. 
law should not be that rigid,” and also that a woman who files such a complaint might well become pregnant at another time in the future (p. 125).\(^3\)

Blackmun used his extensive summer research to argue that although abortion had always been practiced, legal prohibitions on abortion in the United States were relatively recent, most anti-abortion laws having been instituted in the last half of the nineteenth century. Blackmun used this historical analysis to suggest that anti-abortion sentiments were not so ancient as to have deep roots in the history and tradition of the American people.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19\(^{th}\) century, abortion was viewed with less disfavor than under most American statutes currently in effect (p. 138).

And to make sure that the message of his historical research did not escape the casual reader, Blackmun put it bluntly. “Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today” (p. 138).

Blackmun’s summer research had also included more contemporary medical issues related to abortion, such as regarding the development of the fetus at various points in the pregnancy, and this research proved to be critical to the balancing test he created in the opinion. He used the medical research to suggest that the strength of the woman’s interest in terminating her pregnancy was not fixed, but varied during the course of the pregnancy. He divided a pregnancy into three trimesters, and asserted that the woman’s

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\(^3\) In addition to Jane Roe, a physician and a married couple had also filed injunctive complaints. The Court ruled that they did not have standing.
interest was strongest during the first trimester, but that by the third trimester the state had a compelling interest in more strictly regulating abortion. Blackmun found that a woman’s interest in terminating her pregnancy—particularly during the first trimester—was protected by the right to privacy. Interestingly, however, Blackmun was not particular about the location within the Constitution of a right to privacy. Although he said that the majority of the Court favored a theory of privacy which included it as part of the definition of liberty within the Fourteenth Amendment, he seemed to say that it didn’t matter from where the right to privacy emanated.

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy (p. 153).

It was as if Blackmun was suggesting that the privacy genie had already been let out of the bottle, and whatever theoretical problems might exist with the right could be taken up elsewhere, but he was going to use the magic of privacy in this case. Blackmun noted that some lower courts, in deciding abortion cases, had invoked a right to privacy, though they differed on whether privacy was a part of due process or covered by the Ninth Amendment, or emanated from other parts of the Bill of Rights. What mattered, he argued, was not where privacy came from but that it was already extant. “[M]ost of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision” (emphasis added) (p. 155).

Blackmun was quick to add that the privacy of the abortion decision was not the woman’s alone, but must always be made in consultation with “her responsible
physician” (p. 153). This emphasis on framing the abortion question within the context of the doctor-patient relationship was asserted throughout the opinion. Note, for example, the way in which Blackmun summarized the decisions of the previous courts.

Those [courts] striking down state laws have generally scrutinized the State’s interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy (p. 156).

Here, not only did Blackmun frame abortion as a medical question but – and I would argue not coincidentally – he listed the physician first, even though it was clearly the pregnant woman who had more at stake in the decision. Nor was this the only reference that placed the woman in a position secondary to the physician, as is illustrated in the following sentence.

This means, on the other hand, that, for the period of pregnancy prior to this “compelling” point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated (emphasis added) (p. 163).

And this theme was repeated again, a few paragraphs later.

The [Roe] decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician (emphasis added) (p. 165-166).

In addition to the statements placing the abortion question in a medical context, simply the sheer volume of medical history and research included in the opinion indicates that Blackmun was trying to establish the abortion question as primarily a medical question rather than a legal or even a moral question.
That Blackmun was keen on framing the question as a medical one, to be decided by a doctor-patient – and not a legislature -- was illustrated yet again in the text of a statement Blackmun wrote just prior to the release of *Roe*. Normally when an opinion is released by the Court, the Court’s press office distributes written copies of an opinion downstairs to reporters, while upstairs in the Court room, the author of the opinion generally makes a few summary remarks about the case or, occasionally, reads an excerpt or two from the opinion. Blackmun, however, was anxious about the reception that the abortion cases were likely to receive from the public, and circulated a memo suggesting that a written statement – a sort of transcript of the comments he would make from the bench as the decision was being distributed – be made available to reporters who wanted one. “I anticipate the headlines that will be produced over the country,” Blackmun said in his memo, and he hoped that the proposed eight-page statement might help to keep the press from “going all the way off the deep end” when they reported on the decision (Garrow 1994, 587). Blackmun was eventually persuaded not to distribute copies of his statement, though he did read it when *Roe* was released. The text that he prepared emphasized even more clearly and succinctly than the opinion how much the decision relied on the doctor-patient framework. Calling abortion “essentially a medical decision,” Blackmun wrote that the *Roe* decision “cast the abortion decision and the responsibility for it upon the attending physician” (Garrow 1994, 587).

In a concurring opinion which appeared in the *Doe* case, Justice Douglas, not surprisingly, emphasized and expanded upon the concept of privacy. But, like the majority – and like he did in his *Griswold* opinion – he also emphasized privacy in the
context of a relationship, this time the relationship between doctor and patient. "The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship" (p. 219). But for Douglas, the physician-patient relationship only served to protect privacy if the physician was of the woman's choosing, and not a doctor or doctors imposed on her by the state. "To protect the woman's right of privacy, however, the control must be through the physician of her choice..." (p. 220). Thus, for Douglas, liberty as promised by the Fourteenth Amendment included the ability of the woman to chose her doctor. "The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values" (p. 219). The Georgia requirement of committee approval of abortions was thus constitutionally repugnant, wrote Douglas, a "total destruction of the right of privacy between physician and patient and the intimacy of relations which that entails" (p. 219).

It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy - the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment - becomes only a matter of theory not a reality, when a multiple-physician-approval system is mandated by the State (p. 219).

The doctor-patient relationship served much the same function as it did in *Griswold*. It bolstered the right of privacy by adding a legal interest that has been recognized independently elsewhere. It also served to limit the privacy right in question. The *Roe* opinion assumed that doctors would act responsibly, based on sound medical considerations, and not the predilections of an individual woman or even the doctor's
own personal preferences. The great faith which the Court invested in the doctor’s opinion was illustrated particularly well in the *Doe* opinion, where Blackmun discussed the requirement that all abortions be approved by a hospital committee. In their attack on this provision, the appellants claimed that the personal views of committee members who disdained extramarital sex and abortion would likely negatively influence their decisions whether or not to allow abortions. Although the Court did invalidate this provision on equal protection grounds, Blackmun rejected out-of-hand the accusation that licensed physicians would act in so unprofessional a manner as the appellants alleged.

The appellants’ suggestion is necessarily somewhat degrading to the conscientious physician, particularly the obstetrician, whose professional activity is concerned with the physical and mental welfare, the woes, the emotions, and the concern of his female patients. He, perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called “error,” and needs. The good physician – despite the presence of rascals in the medical profession, as in all others, *and we trust that most physicians are “good”* – will have sympathy and understanding for the pregnant patient that probably are not exceeded by those who participate in other areas of professional counselling” [sic] (emphasis added) (p. 196-197).

Trust in the physician was echoed in Chief Justice Burger’s concurring opinion. Responding to the accusation by the dissenters that the *Roe* decision would pave the way for abortion on demand, Burger wrote that “the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health” (p. 208).

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44 Blackmun noted that committee approval was not required for other medical procedures, and that the committee was thus “unduly restrictive of the patent’s rights and needs” (p. 197).
Reliance on the doctor-patient relationship also kept the definition of privacy from broadly ranging to other types of activity that the Court was unwilling to protect. And in the abortion cases, locating the right of privacy within the context of a relationship served an additional purpose: to shift some of the responsibility from the courts – and even from legislatures – and to the medical profession. In this way, the Court could claim that it was not acting as a super-legislature, but merely deferring to an expert.

In a concurring opinion in Roe, Justice Stewart attacked the Court’s use of privacy to void the abortion law, saying pointedly that Roe – and Griswold before it – were clearly examples of substantive due process in the tradition of Lochner.

The Court’s opinion in Griswold understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and is equally clear to me now, that the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the “liberty” that is protected by the Due Process clause of the Fourteenth Amendment. As so understood, Griswold stands as one in a long line of ... cases decided under the doctrine of substantive due process, and I now accept it as such” (p. 168).

Stewart agreed that the law was unconstitutional, but said that the Court should have been more forthright and admitted to using substantive due process rather than hide behind notions of privacy.

In his dissenting opinion, Justice Rehnquist also questioned the Court’s use of privacy, saying that the abortion issue had nothing to do with privacy.

I have difficulty in concluding, as the Court does, that the right of “privacy” is involved in this case. Texas, by the statute here challenged,
bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not “private” in the ordinary usage of that word. Nor is the “privacy” that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy (p. 172).

Justice White, in his six paragraph dissent in Roe and Doe, wrote that he was not persuaded by Blackmun’s historical analysis. He stated that the Court, “with scarcely any reason or authority for its action” had created a new right for mothers and doctors to “exterminate” human life. Although there was nothing inherently remarkable about White’s dissent, it takes on interest and relevance in light of the fact that he would later author the Bowers opinion. The core of White’s analysis was that unless there is a clear constitutional directive to do otherwise, the Court ought to defer to the choices of state legislatures. Calling the Roe and Doe majority opinions “an improvident and extravagant exercise of the power of judicial review,” White concluded that “I can in no event join the Court’s judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States” (p. 222). White would take a similarly deferential stance toward a state legislature fourteen years later in Bowers.

Griswold And Roe: Vindication Of Women’s Rights?

Taken together, the opinions in Griswold and Roe suggest that the rights of woman are not independent, but that a woman receives her rights, at least in part, from her relationships with a man or with a professional (in this case, a physician). It suggests, perhaps, that the woman alone is not to be trusted. Thus while at first blush the decisions
in *Griswold* and *Roe* would seem to advance the rights of women – and in practice this has certainly been the case – the subtle logic underlying the cases suggests that certain decisions are more properly made by a man or at least a professional. When examined from this perspective, *Griswold* and *Roe* did not vindicate the rights of women per se.

That the woman alone might not be competent to make decisions as important as those regarding abortion is suggested in the passage of *Roe* in which Blackmun lists the burdens to the woman if the state were to deny her an abortion.

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. *All these are factors the woman and her responsible physician necessarily will consider in consultation* (emphasis mine) (p. 153).

Recognizing that the rights of women were not as broad, but were connected to legally protected relationships helps better explain the outcome in *Bowers*.

**A Note On Legally Recognized And Protected Relationships**

I have argued in this chapter that privacy has been used two ways in constitutional law: as a short-hand for those things protected by the Fourth Amendment, and as a euphemism for a liberty interest, when the interest in question is of an indelicate or highly controversial nature. Most notably, a right of privacy has been invoked to strike down laws limiting use and information about contraceptives and laws limiting abortion in the
early stages of pregnancy. As discussed earlier, the most challenging aspect of a right to privacy is finding some sort of limiting principle. While a majority of state courts finding a right to privacy in their own constitutions have used a Mill-like philosophy to limit the right of privacy, the Court – apprehensive of inviting comparisons to *Lochner-*era jurisprudence – has been reticent to invoke extra-constitutional theories. And so the device of a relationship was used, in both *Griswold* and *Roe*, to both bolster and limit the right of privacy. It bolstered the right by adding to it another legally recognized dimension. Legally recognized relationships provide a useful atmosphere with already established boundaries within which to grant a privacy right. The idea underlying granting legal privileges to certain relationships is that some relationships are so important to both individuals and society as a whole that the security and openness fostered by privileging these relationships is more important than the illegal actions that might remain undetected as a by-product. Although most of the U.S. legal tradition revolves around rights defined for individuals, the area of privileged relationship carries an implicit acknowledgement that certain relationships are essential to the well being of individuals and the functioning of society as a whole. The assumption is that in certain pre-defined relationships, the purpose of the relationship is to pursue some activity or goal that is, in the vast majority of cases, important and legal. But for these relationships to flourish, privacy – in the sense of keeping information confidential – is essential. Most of the legal protections surrounding certain relationships have to do with privileging communication between two parties. It is recognized that some activities will be severely hampered without revelation of all pertinent facts. Thus, protecting the attorney-client
privilege promotes complete disclosure of all the facts and information, while protecting the physician promotes candor about physical symptoms and medical history.

Where the protection of these relationships usually manifests is in exempting one or both parties in one of these relationships from being required to testify in court about information learned as a result of the legally recognized relationship. The testimonial privilege helps to avoid a situation where a person with access to confidential information is caught in the dilemma of whether to provide truthful statements being requested by a court, or protecting professional and personal interests. “The interests of the protected person – perhaps partly out of realism – are thus given a higher value than the search for the facts” (Encyclopedia Britannica Online 2000).

Which relationships, then, receive protection? According to legal scholar Wigmore, the testimonial privilege relies on four conditions:

1. The communication must originate in an expectation that it will not be disclosed.
2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relationships between the parties.
3. The relationships must be one that, in the opinion of the community, ought to be carefully fostered.
4. The injury that would inure to the relationship by the disclosure of communications must be greater than the benefit that would be gained for the correct disposal of litigation by virtue of the disclosure (emphasis mine) (ABA 2000).

Note that Wigmore’s third condition is that the relationship must be one thought worthy of fostering by the community at large. Over time, a few relationships have gained this status. The oldest testimonial privilege belongs to the attorney-client relationship, going back as far as the reign of Elizabeth I. “It was then considered that such testimony against one to whom loyalty was owed would violate the attorney’s honor
as a gentleman" (ABA 2000). Other relationships which have received a privileged status include husband and wife, priest and confessioner, journalist and source, and physician and patient. There are also, in some states, limited protection for communication between accountant and client, and therapist and patient.

To receive legal protection, the relationship must have been recognized in form prior to the exchange of communication. Within a marriage relationship, this would mean a marriage license from a state. Within a professional relationship such as attorney-client or physician-patient, this would mean that one of the parties in the relationship holds a valid license to practice, and the two conferred about issues relevant to the attorney’s or physician’s professional capacity (i.e., the client sought legal advice from the attorney, the patient sought medical advice from the physician, etc.).

Types of legal relationships

There were two types of relationship involved in the privacy cases – the marital relationship and the physician-patient relationship. The physician-patient relationship represents one of a class of professional relationships recognized in American law, in which free communication is considered an essential element of the relationship. In these relationships, the right belongs to the client, not the professional. The legal protections accorded these professional relationships apply only to communication, and only communication pertinent to the professional relationship.

Protection of the marital relationship differs in that it is broader – applying to any information exchanged – and it is personal rather than professional. The original
rationale for the protection was that legally, the husband and wife were considered one entity. More recent rationales for privileged communication between husband and wife has focused on the fact that testifying against one’s spouse represents a profound conflict of interest and thus information obtained would tend to be unreliable. Additionally, the marriage relationship, being as intensely personal as it is, flourishes when the marriage partners can operate under the assumption that there will be no unnecessary state intrusion.

However, protection of the marital relationship is not meant to protect illegal behavior. Just as the assumption with professional relationships is that they exist to pursue lawful ends, it is similarly assumed that the pursuits of the married couple are lawful. The problem in Griswold was that Connecticut’s anti-contraception law made criminal an action which by its very nature was so extremely personal that any enforcement of the law would have required tactics anathema to the very kind of relationship marriage is supposed to foster.

As stated before, the beauty of relying on the marital relationship in Griswold was that it both bolstered the privacy argument and limited privacy. But the tactic also involved judicial sleight of hand. Whereas the privilege accorded the relationship applied only to information and communication, in fact it was an action – use of contraceptives – which was protected in Griswold. To downplay this, Douglas focused on the decision of whether or not to use birth control, rather than the action (to use a contraceptive device) which would often logically follow the decision. Roe, too, relied on a relationship to bolster and limit privacy, and also used the relationship as a way of focusing on the
abortion "decision." This time, of course, the relationship was a professional one between physician and patient.

I have argued in this chapter that constitutional privacy has been little more than a euphemism to protect some liberty interest too indelicate to name. I have also argued that to bolster and limit privacy, legally recognized relationships were relied on. What would be the implication for other types of privacy concerns? And what about the implications for two people who don’t have the benefit of some legally recognized relationship? More than a decade after *Roe*, Michael Hardwick and his lawyers would find this out.
CHAPTER 6

BOWERS V. HARDWICK AT THE SUPREME COURT

That case was not a major case, and one of the reasons I voted the way I did was the case was a frivolous case” brought “just to see what the court would do.”

-- Justice Lewis Powell
Washington Post, October 1990

Experts say the Bowers v. Hardwick decision is widely regarded as one of the more critical cases in the high court’s history because of the fundamentally different views the opinions offer on the breadth of constitutional rights and the place of morality in the law.

-- The National Law Journal
November 5, 1990

You could say Bowers was a sexy case, more interesting than the average Supreme Court fare. But it was also a touchy case, inviting, as it did, the Supreme Court into the bedroom. Whichever way it went, Bowers v. Hardwick was one of those cases destined to cause controversy, for it pit the venerated “right to be let alone” against the infamous “crime against nature.” For gay rights advocates and liberal scholars, the outcome was an abomination, and persuaded many that a majority of the Court were “vituperatively homophobic” (Hutchinson 1998, 451). It also seemed to affirm what Justice Brennan had been warning for over a decade – that the U.S. Supreme Court was no longer the place to look for expansion of personal liberties. As one commentator put it, “It seemed to many of us that the gate opened wide by the civil rights revolution had been slammed shut with sudden brutality” (Agrast 1991, 14). Those who favored the
Court's outcome were fewer and quieter,¹ and even many conservative critics judged
*Bowers* as a bad decision. Even Professor Charles Fried, who served as the Solicitor
General during Reagan's second term and led the administration's legal attack on *Roe v.
Wade*, commented that "I believe *Bowers* was wrongly decided,"² and that Justice
White's majority opinion was "stunningly harsh and dismissive" (Fried 1991, 82). For
others -- including Justice White -- *Bowers* was not so much about gay rights or even the
right of privacy as it was about the proper role of the judicial branch. "The opinion was
judicial modesty with a vengeance," observed Rex Lee, who served as Solicitor General
during President Reagan's first term (Hutchinson 1998, 454).

The study of *Bowers v. Hardwick* is interesting, in part, because at several
junctures along the way, had things been just a little different, there might have been a
very different outcome. From the time Attorney General Michael Bowers filed a petition
for a writ of certiorari for the Supreme Court to review the decision of the Court of
Appeals for the Eleventh Circuit about the Georgia sodomy law, the case could have
gone either way. At first, there weren't even enough votes to review the case. Later, at
the first conference vote, a majority of the Court voted to affirm the appellate court and
strike down the Georgia law. In this chapter, the oral arguments and written opinions of
*Bowers v. Hardwick* are examined. I also discuss the federal precedent related to sodomy
and homosexuality preceding *Bowers*.

¹ See, for example, David Robinson, Jr., "Sodomy and the Supreme Court," *Commentary* 82 (October
² As stated in personal correspondence with the author, May 28, 2000.
The Misadventures Of *Bowers V. Hardwick*

As one scholar put it, "*Bowers v. Hardwick* came to the Supreme Court as much by misadventure as by measured deliberation" (Hutchinson 1998, 452). Indeed, the record regarding who voted which way and when to grant or deny cert is murky, and accounts of the negotiations among the justices regarding *Bowers* differ. We do know that when the Court first considered the *Bowers* case in October of 1985, there weren’t enough votes\(^3\) to satisfy the Court’s "rule of four."\(^4\)

It is not entirely clear why the *Bowers* case did not originally garner four votes. There were certainly a number of legitimate reasons for the Court to review the case. For one thing, the appellate courts from different circuits had made conflicting decisions about the constitutional status of sodomy laws. Furthermore, as discussed in the previous chapter, the Supreme Court’s privacy opinions left much unclear – most particularly, whether or not the Court considered intimate sexual relations a fundamental right. As noted by the clerk who prepared the *Bowers* brief for the "discuss list,"\(^5\) "It is clear that

\(^3\) Cert votes are not public, and generally what is known about the cert votes in any given case is found in records that some justices keep in their private records. In the *Bowers* case, it is unclear how many votes to grant cert were first cast. According to Hutchinson (1998), there were three votes for cert – White, Rehnquist and Burger (p. 451). Garrow (1994) puts the initial number at two votes, Rehnquist and White (p. 656). But in an account by Epstein and Knight (1998), only White voted to grant cert, while Rehnquist voted to summarily reverse (p. 61). My interpretation of the Marshall and Powell papers suggests that Garrow got it right.

\(^4\) The "rule of four" refers to the Court’s tradition of granting a writ of certiorari if at least four justices favor reviewing a case. The rule was probably adopted sometime shortly after the Court of Appeals Act of 1891, which gave the Court discretion over a part of its docket (Ely 1992, 746).

\(^5\) The Court receives too many requests for a writ of certiorari for the justices to discuss each one, and so the "discuss list" evolved sometime after World War II to help manage the caseload. Before each conference, the Chief Justice (with the assistance of his clerks) puts together a list of cases with issues making them worthy of consideration, and these are the cases which get discussed and voted on by the justices. About 30 percent of cases filed make it to the discuss list, and the rest are rejected (Pratt 1992, 228).
the issue here is important enough to merit the Court’s attention” (Morrison, preliminary memo to the conference, October 11, 1985, Powell papers).

Notwithstanding the importance of the issue and the conflicting precedents in the federal courts, Bowers was a “troublesome case,” as noted by Justice Powell in the margins of two of the memos discussing Bowers. For starters, the factual situation giving rise to Bowers was troublesome in terms of standing and in terms of presenting a ripe controversy. Some believed, for example, that since Hardwick was never prosecuted that he did not have adequate standing. And, as noted by the brief for the discuss list, the appellate court in Hardwick v. Bowers, 760 F.2d 1202 (1985), “did not hold the statute unconstitutional. Rather, it stated an appropriate constitutional test in the abstract and remanded the case for trial.” Thus, concluded the clerk, “review by this Court is premature” and “The prematurity of the case precludes it from conflicting with any other Circuit” (Morrison, preliminary memo to the conference, September 25, 1985, Powell papers).

Another possible reason that the Court did not at first grant cert in the Bowers case might have been that the justices disagreed over the importance of the conflicting precedents in the circuit courts. Again quoting from the preliminary memo prepared for the discuss list, the clerk argued that White made too much of the conflict between the circuits, and that upon closer examination, no conflicts existed. He noted that Dronenburg did not necessarily conflict with Hardwick v. Bowers, as “Dronenburg was [103x699]® The Hardwick opinion is discussed in detail in Chapter 1.

a military case, and its discussion of Doe was dicta.” He explained that “At issue there was the constitutionality of a naval discharge regulation, and not the military sodomy law,” and that the only conclusion that could safely be drawn from Dronenburg was that “the standard by which military regulations must be judged is much lower than in a civilian conflict.” Likewise, the clerk found no conflict between Hardwick and Baker.8 “Baker,” he explained, “involved a declaratory judgment challenge to the constitutionality of a state sodomy law, and CA5 reversed the DC’s holding that the law was unconstitutional.” The clerk concluded that “Since the issues here are not framed concretely yet,” that “there is no conflict with Baker” (Morrison, preliminary memo for the conference, September, 1985, Powell papers).

Besides the more technical reasons for avoiding the Bowers case, there is reason to believe – as will be discussed shortly – that some more liberal members of the Court feared taking the case because it might provide the Court with an opportunity not only to deny Michael Hardwick the right to engage in sodomy, but might well pave the way for a pruning of privacy jurisprudence more generally, which might well have negative connotations for abortion law.

Finally, it may simply have been that the Court wished to put off issuing the final word on such a controversial and for some, perhaps, embarrassing topic – particularly if, as was likely, the discussion would focus on homosexual sodomy, for it was likely that the Does – the married couple joining Michael Hardwick in his challenge – did not have

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8 In Baker v. Wade, 769 F.2d 289 (1985), discussed below, the Court of Appeals for the Fifth Circuit reversed the finding of a district court which had declared Texas’s sodomy law unconstitutional.
standing. "[T]he Court may want to delay in the hope that it will receive a case raising
the issue in the context of heterosexuals, in which it might be less controversial and a
smaller step to find a right of sexual privacy" (Morrison, preliminary memo for the
conference, September 25, 1985, Powell papers). Powell seemed to be eager to avoid the
issue if possible, as suggested by his personal notes written on the first page of the
discuss list memo. "We can again avoid this highly controversial issue by holding that
CA11 misread Doe – i.e., reiterate binding effect of affirming a 3J/ct [three-judge court]
summarily." Or, "we simply could deny despite conflict" in the lower courts.

That initial brief noted that if the Court was interested in making the right of
intimate sexual relations a fundamental right, it could do so with far less controversy by
using a case involving heterosexuals. On the other hand, "If the Court finds no right to
sexual privacy, it might be more desirable to render such a decision in [a] case involving
homosexuals." In other words, if the Court wanted to once and for all say that yes,
Griswold and Eisenstadt and the rest of the privacy cases did imply a fundamental right
to sexual relations, then it would be better to wait for a case involving heterosexual sex.
But if the Court wanted to once and for all stop such interpretations – to avoid the slippery
slope that led to the state's inability to regulate incest, bigamy and other sorts of taboo
sexual relations – it might more conveniently do so in the context of homosexual relations.⁹

⁹ Two of Powell's four clerks recommended that Powell vote to deny cert on the substantive issues.
William J. Stuntz, in a note scribbled on the front of the memo, recommended that Powell vote to "grant
[cert] only if the Court wishes to decide the case on procedural issues (effect of summary affirmances).
Otherwise, DENY" (emphasis in original). Powell did vote to deny cert in the first conference, and on
Powell's copy of the White dissent from denial to grant cert, another clerk, Mike Mosman, printed "I
recommend that you continue to vote to deny. Mike."
If it had ended at that first conference, Michael Hardwick’s case would have been a significant step forward for gay rights, for the Court of Appeals for the Eleventh Circuit’s opinion in *Hardwick v. Bowers* would have been considered binding in at least the Eleventh Circuit, and would have provided precedent for litigants in other circuits to point to. However, at least one justice felt strongly that the Court should review the case. Justice White asked that the case be relisted — meaning that it was put on the “discuss list” a second time — and he wrote a draft dissent from denial of certiorari, offering his reasons why the Court should grant cert, and distributed his dissent to the other chambers. White argued simply that the Court should consider the case because of conflicting precedents coming out of the appellate courts of different circuits. For example, while the Eleventh Circuit Court’s opinion in *Hardwick v. Bowers* had found that the Georgia sodomy law had violated a fundamental right to privacy, other courts had concluded the opposite, such as in *Baker v. Wade*, 769 F.2d 289 (1985) and *Dronenburg v. Zezh*, 741 F.2d 1388 (1984). “Given this lack of consistency among the Circuits on this

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10 The Court receives too many requests for a writ of certiorari for the justices to discuss each one, and so the “discuss list” evolved sometime after World War II to help manage the caseload. Before each conference, the Chief Justice (with the assistance of his clerks) puts together a list of cases with issues making them worthy of consideration, and these are the cases which get discussed and voted on by the justices. About 30 percent of cases filed make it to the discuss list, and the rest are rejected (Pratt 1992, 228).

11 Occasionally after a case has failed to gain the four necessary votes to grant cert, a justice can try to persuade his or her colleagues by drafting and circulating a dissent from denial of certiorari. These denial of cert dissents are sometimes accompanied by a memo threatening to go public (i.e., publish the dissent) if the case does not pick up enough votes to grant cert (Epstein and Knight 1998, 59).
important constitutional question, I would grant the petition,” White wrote in his dissent (No. 85-140, White dissenting). The draft was circulated on October 17.

A few days later, a memo came from Brennan’s office saying that he would join with White’s dissent from denial. The decision to join White seems to have been the result of the influence of one of Brennan’s clerks (Hutchinson 1998; Garrow 1994). At the next conference, probably following Brennan’s lead, Justice Marshall indicated that he, too, would vote to grant cert, although another account has it that Marshall decided to vote to grant cert as the result learning that Justice Powell might be sympathetic to striking the sodomy law (Bull 1993, 33). Brennan, though, had a change of heart, quite likely as the result of conversations with Justice Blackmun, “who feared that if the Court granted certiorari, a majority would not only refuse to protect homosexual conduct but would also undermine Roe v. Wade in the process” (Hutchinson 1998, 452). According to Hutchinson,

Brennan was in a dilemma of multiple dimensions: he appeared to be flip-flopping and risked losing face with his colleagues; Blackmun’s pessimism over the case and its larger consequences was compelling; and yet he disagreed with the lower court and feared that waiting any longer would only mean that the conservative revolution symbolically led by Ronald Reagan would make the atmosphere for the petitioner’s argument worse (p. 452).

12 Just what makes a case “certworthy” is unclear and completely at the discretion of the justices, but Rule 10 of the Rules of the Supreme Court does give some broad guidelines regarding the criteria considered. One factor increasing the odds that cert will be granted deals with conflicting precedent, such as conflicts between the high courts of two states, conflicts between a state high court and a federal appellate court of another circuit, or if “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.”

13 Hutchinson characterized Brennan’s decision to join with White as “absentminded” (p. 452). According to Garrow, one of Brennan’s clerks was “enthusiastically convinced that Bowers was nothing short of ideal” (p. 656) in terms of presenting the issues in such a way that the Court could extend the right of privacy to embrace homosexual conduct.
Brennan did heed Blackmun’s advice a few days later, and sent a memo that said that after a “second look” at the case he had “decided to change my vote. I vote to deny” (Memo to the Conference from Brennan, October 23, 1985, Marshall papers). This, in turn, created a dilemma for Marshall, who “could not change his vote, too, without looking as if he were in lockstep with Brennan” (Hutchinson 1998, 452). Despite his clerks’s recommendations that he, like Brennan, could change his mind, Marshall stayed the course, perhaps partly to avoid too visibly following Brennan, but perhaps partly, too, because he was more optimistic that the Court would extend the privacy principle.

Marshall was strongly committed to the idea of privacy – particularly within the home – as was illustrated in his 1969 opinion in Stanley v. Georgia, 394 U.S. 557 (1969), the case in which the Court ruled that a man could not be prosecuted for possessing obscenity for his personal use within the privacy of his home. Even before Roe was issued, Marshall wrote, “I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults” (California v. Larue, 409 U.S. 109, 125 (1972), Marshall dissenting). Laurence Tribe, the Harvard Law Professor who made the oral argument before the Supreme Court in the Bowers case (although at the time the Court granted cert, he had not yet been asked to argue the case) later called Marshall’s vote a mistake. “The great tragedy of Hardwick is that Justice Marshall did not follow Justice Brennan’s lead and decide not to hear the case”\(^1\) (Bull 1993, 34) – though it may be that it was precisely because Marshall did initially follow Brennan’s

\(^1\) Perhaps Tribe is right on this point (that Marshall’s vote is the great tragedy of the Bowers case). Even so, it is also rather convenient for Tribe, in retrospect, that the tragedy can be attributed to forces preceding his own involvement in the case.
lead that the case was accepted. “When they [accepted the case] before I had been asked to argue it, I was dismayed,” said Tribe. “I think the case was lost when Marshall gambled and took the case.”

One day after Brennan’s memo changing his mind regarding cert, Chief Justice Burger issued a one-sentence memo regarding his vote. “I, too, have taken a second look and my tentative ‘join 3’ is now a grant” (Memo to the Conference from Burger, October 24, 1985, Marshall papers). Ultimately, it was White, Rehnquist, Burger and Marshall who provided the necessary four votes, and certiorari was granted November 4, 1985.

Federal Decisions On Sodomy And Homosexuality

As noted in the last chapter, *Griswold* almost immediately inspired pro-choice litigators to pursue a privacy protection for abortion. But it also caused some to consider the possibility of expanding the conception of privacy to include other intimate acts, such as consensual sodomy between same-sex partners. Just two years after *Griswold*, one reporter predicted, “If not next year or the next, then five years or ten years hence the United States Supreme Court will strike down existing state laws which make practicing homosexuals criminals” (Schott 1967, 59).

The Court’s application of a *Griswold*-type of privacy to abortion, as well as its decision to make contraceptives available to non-married couples in *Eisenstadt*, sparked speculation over whether the Court might be ready to use privacy to invalidate sodomy laws or other laws related to homosexuality. Although the vast majority of litigation challenging sodomy statutes had been in the state courts, in the last half of the 1970s a
number of cases related to sodomy and homosexuality were heard in the federal courts.\textsuperscript{15} It is important to note that some of the cases involved sodomy, but not homosexuality, while others involved homosexuality, but not sodomy. That is, just as it had been in state courts, some challenges in federal courts involved challenges to sodomy laws, but the challenges involved heterosexual litigants. Other cases involved challenges to government prohibitions of homosexuality \textit{per se}, but not a specific sodomy prohibition.

Using privacy arguments to strike sodomy laws was a tricky proposition, since the privacy protection articulated in \textit{Griswold} relied so heavily on the marital relationship. The right to privacy, however, did make sodomy laws vulnerable to challenge as applied to married couples. One of the earliest cases to use \textit{Griswold} to challenge a state sodomy law in the federal courts came out of Indiana. In \textit{Cotner v. Henry}, 394 F.2d 873 (1968), Charles O. Cotner was not trying to fight the sodomy statute in the name of gay rights, or any other public cause, for that matter. Cotner merely wanted to be released from prison, where he found himself as the result of a rather peculiar set of circumstances. Coincidentally, the facts of the case began in May of 1965, during the last few weeks that the Court was struggling with the \textit{Griswold} decision (which was released in June), when Cotner and his wife of 12 years, Jeane, had an argument which culminated in Jeane filing charges with the local police. Among the allegations were that Charles had committed

\textsuperscript{15} State challenges to sodomy statutes were discussed extensively in Chapter 3. While reference was made to a couple of the federal cases, they will be reviewed again here, to help the reader make better sense of the \textit{Bowers} ruling.
sodomy with her, in violation of Indiana’s sodomy law. As so often happens in
domestic dispute cases, by the time of the hearing in July, the Cotner’s had made up, and
Jeane told the judge she wanted to withdraw the complaint. For whatever reason, the
judge refused. The Cotners were quite surprised by this, and so Charles, without legal
counsel, assumed that the easiest route would be to plead guilty to the sodomy charge.
Charles expected either no punishment at all, or a token fine. Instead, the judge
sentenced Charles to two to fourteen years in prison.

On the one hand, this case presented an ideal vehicle to test the application of
Griswold beyond the use of contraceptives, to see whether the marital privacy right
extended to consensual sexual practices more generally within the marriage relationship.
As discussed in Chapter 3, so many of the sodomy cases have involved unsavory facts,
such as rape, minors, or sex in public places. But this was a case involving consensual
sodomy between a married couple in the privacy of their bedroom. However, Charles
Cotner had difficulty appealing his case for procedural reasons. Normally, when
someone appeals a case, it is required that the defendant or their lawyer register the
objection with the trial court at certain points in the pre-trial or trial process. Thus, when
Cotner petitioned the U.S. District Court for a writ of habeas corpus, claiming the law
was an unconstitutional violation of marital privacy as protected by the Fourteenth
Amendment and articulated in Griswold, the court refused because the appropriate

16 Indiana’s sodomy law at the time read: “Whoever commits the abominable and detestable crime against
nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of
twenty-one [21] years to commit masturbation or self-pollution, shall be deemed guilty of sodomy, and, on
conviction, shall be fined not less than one hundred dollars [$100] nor more than one thousand dollars
(footnote continued on next page)
procedure would have been to register his allegation of the law's unconstitutionality at the time he entered his plea. Cotner had not secured a lawyer for his initial meeting with the judge, because he hadn't thought it would be necessary. And because he pled guilty, he was not entitled to appeal in the state courts. He then appealed for a writ of habeas corpus in the Seventh Circuit Court of Appeals, which reversed his conviction by a two to one vote – after Cotner had served almost two years in prison for his conviction of committing consensual sodomy with his wife in his own bedroom.

In the majority opinion, the court agreed with Cotner's contention that the sodomy law was probably invalid as applied to married couples, absent evidence that the act had been nonconsensual. "The import of the Griswold decision," wrote the court, "is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty" (p. 875). In determining how to apply the Griswold precedent, the court extended application of Griswold beyond the context of contraceptives, apparently assuming that the operative principle underlying Griswold was Millsian in nature. Thus – at least with regard to marital sex – if there was no force or other demonstrable harmful effect, the state had no authority to ask what went on in the marital bedroom.

The affidavit [from Cotner's wife] contained no charge that he used force. He was prosecuted under a statute which prohibits sodomy but which does not explicitly mention force and which no Indiana court has construed as requiring force when applied to married couples in the privacy of their bedroom (p. 875-876).

[$1,000] to which may be added imprisonment in the state prison not less than two [2] nor more than fourteen [14] years" (Burns' Ind.Stat. Ch. 169 Sec. 10-4221).
Further evidence that the appellate court assumed that a no-harm-principle philosophy was at the core of *Griswold* was the court’s reference to the Model Penal Code’s recommendation that sodomy laws be dropped.\(^\text{17}\)

The American Law Institute Model Penal Code adopts the view that consensual private sexual conduct between adults should not ordinarily be subject to criminal sanction. Illinois, as well as many other states, has adopted this approach, although Indiana has not as yet joined the trend (p. 875, n. 3).

The special status accorded to the marriage relationship – particularly the marital bedroom – was highlighted in the following footnote.

We think that Cotner has standing to complain about Indiana’s intrusion into the privacy of Cotner’s marriage relation, even though his wife has made the complaint against him. It is essential to the preservation of the right of privacy that a husband have standing to protect the marital bedroom against unlawful intrusion (p. 875, n. 2).

Thus, the state would have the burden of demonstrating that it “had an interest in preventing such relations, which outweighed the constitutional right to marital privacy” (p. 875), though it did not indicate just what would constitute such a state interest, if anything, besides evidence of force.

The ruling was rather limited – and opaque – because the court stopped short of actually voiding the law as it applied to married couples. Because of the unusual situation of the case, “No appellate court in Indiana has had the opportunity to interpret the Indiana Sodomy Statute in light of its potential application to the privacy of married couples” (p. 875). In an interesting maneuver, the majority did not exactly void the law, \(^{17}\)

As discussed in Chapter 3, the American Law Institute overtly embraced a Millsian principle in their recommendations with regard to adult sexual acts.
but made recommendations about how the state courts could – and could not – interpret
the *Griswold* precedent.

Under *Griswold* Indiana courts could not interpret the statute constitutionally as making private consensual physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations, which outweighed the constitutional right to marital privacy. The Indiana courts might, however, construe the statute as being inapplicable to married couples or as outlawing such physical relations between married couples only when accomplished by force (p. 875).

To justify reversing the conviction – even though Cotner had not taken the usual route of appeals in the state courts – the majority said that the guilty plea was not valid because Cotner did not have full understanding of the sodomy statute in light of *Griswold*. It ordered Cotner’s release from custody, unless the state would decide to prosecute again, at which time Cotner could enter a plea of not guilty, thus making the normal appellate route in the state courts available to him. “This procedure could, if prosecution, conviction and appeal followed, give the Indiana courts an opportunity to resolve the substantial constitutional questions which may be involved in Cotner’s case” (p. 876).

The dissenter on the panel rejected the conclusion of the majority that the state would need to demonstrate that the action was non-consensual before it could proceed with prosecution. “The majority opinion injects the idea that the state should have shown that Cotner used force. I think such a theory is entirely unwarranted” (p. 876). The problem, as the dissenter perceived it, was the implied distinction the majority drew between enforcement of the statute inside versus outside the marital bedroom. He said that the difficulty with a right to privacy – even one as narrow as encompassing only the
marital bed – was that it protects too much in absence of some underlying theory and, to make his point, he took the argument toward its logical extreme.

I take it that if Cotner had shot his wife in the privacy of their bedroom, the majority of the panel which heard this appeal would not proclaim that there is a difference between a crime committed in the bedroom and otherwise. I take it that in such a case there would be no claim of “an unwarranted invasion of marital privacy under the Fourteenth Amendment.” I also assume that under such circumstances there would be no claim that Cotner’s conduct could not be questioned because, as the majority states, “it is essential to the preservation of the right of privacy that a husband have standing to protect the marital bedroom against unlawful intrusion” (p. 876).

The panel released its judgment in Cotner on April 17, 1968, and a request from the state for a rehearing en banc was denied about five weeks later. The state appealed to the U.S. Supreme Court for a writ of certiorari, which was denied in October of 1968. Because of the rather unique situation giving rise to Cotner and the complicated issues of jurisdiction and standing, the ruling had limited precedential value, except to indicate that at least two federal judges in the Seventh Circuit believed that Griswold would probably void state regulation of sexual practices of a married couple in the privacy of their bedroom, absent force or some other important (though undefined) state interest.

The next noteworthy challenge to a state’s sodomy laws in the federal courts using the privacy doctrine articulated in Griswold came in 1969 out of Texas. Although the facts giving rise to the case involved a gay man, the attack focused on how sodomy laws infringed on the privacy rights of married couples when such laws were applied universally. Alvin L. Buchanan, a gay man living in Dallas, had been arrested and convicted twice for consensual oral sex, the first time in a park restroom and the second time two months later in a department store restroom, which was in violation of Texas’s
sodomy law. The second jury recommended five years imprisonment. A Dallas attorney, Henry J. McCluskey, Jr., helped Buchanan challenge his conviction in the Texas courts, but he also decided to fight the law in the federal courts as well. The Court's decision in *Griswold* gave McCluskey an idea: he hoped to challenge the law on the grounds that it was overbroad. Although McCluskey doubted that the *Griswold* precedent could be used directly to assist Buchanan, relying as it did so heavily on the marital relationship, the Texas sodomy statute banned oral and anal sex without reference to the gender of the partners and without reference to marital status. McCluskey believed that if a right to privacy precluded the state from inquiring into the use of birth control in the marital bedroom, then it likely would apply to prohibiting the state from inquiring about specific sexual acts between married partners. And so in 1969, McCluskey filed a complaint in the federal courts alleging that the Texas sodomy law was unconstitutionally overbroad. In addition to Buchanan, three other plaintiffs were added: a married couple who said that the law threatened their intimate acts, which included oral and anal sex; and another gay man who claimed that the law criminalized his private sexual behavior (this to offset the fact that Buchanan had been arrested for public acts).

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18 At that time, Article 524 of the Texas Penal Code read as follows: "Sodomy: Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years."

19 The case was filed in the Fifth Circuit. At this time, federal law required any case challenging the constitutionality of a state or federal law to be brought before a special court composed of a federal appellate judge and two federal district judges.
Coincidentally, the connection between using privacy to attack sodomy statutes as well as to fight abortion statutes was more than theoretical. To help prepare the brief in the case, Buchanan sought advice from a childhood friend who had just finished a clerkship in the federal courts and had accepted a position with a bankruptcy firm in Dallas. Linda Coffee – the lawyer who would go on to work on the *Roe* case with Sarah Weddington -- was optimistic about the case McCluskey was building and offered advice, and the case was filed and argued in November, just a few weeks before Coffee was approached by Weddington in December about fighting abortion in the federal courts. Indeed, it was McCluskey who ended up introducing Coffee to Norma McCorvey (Jane Roe). McCorvey, at that time several weeks pregnant, had come to McCluskey’s office seeking legal help to arrange an adoption after she learned abortions were illegal in Texas.

In *Buchanan v. Batchelor*, 308 F. Supp. 729, a three-judge district court agreed with McCluskey’s argument that Texas’s sodomy statute was overbroad because it “operates directly on an intimate relation of husband and wife” (Garrow 1994, 402). The court referred to the *Griswold* ruling in finding a fundamental right to marital privacy, as well as the finding of the Seventh Circuit Court of Appeals in *Cotner*, that *Griswold* probably made sodomy statutes unenforceable as applied to married couples in private. Although the ruling benefited Buchanan in that it struck down the law completely, the

20 Charles Batchelor was Dallas’s chief of police.

21 The judges – Sarah Hughes, William Taylor and Irving Goldberg – were the same three that first heard the *Roe* case.
opinion focused attention squarely on the law’s infringement of marital privacy, and never directly confronted the issue of sodomy in other contexts.

Sodomy is not an act which has the approval of the majority of the people. In fact such conduct is probably offensive to the vast majority, but such opinion is not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct. Absent some demonstrable necessity, matters of (good or bad) taste are to be protected from regulation (p. 733).

The Buchanan victory was short-lived, however, for in 1971 the Supreme Court vacated and remanded the decision. The Court did not consider the merits, but cited recent rulings that limited action in the federal courts against state laws if state court actions were available to plaintiffs. (Garrow 1994, 485). Subsequently, in Pruett v. State, 463 S.W.2d 191 (1970) the Texas Court of criminal Appeals held that the Texas sodomy law was constitutional.

The Supreme Court twice held in per curiam decisions in the 1970s that sodomy laws were not unconstitutionally vague. The first case came out of Florida. There, two men caught in an amorous act had each been convicted in separate trials of violating Florida’s “crimes against nature” statute. One of the men had engaged in both oral and anal sex, the other only anal sex. The men sought habeas corpus relief in the federal courts, alleging that the law was unconstitutionally vague because it did not define what acts were included in “crimes against nature.” In 1966, the Florida Supreme Court had ruled that “crimes against nature” included both anal and oral sex, and under normal

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22 The Florida law read: “Whoever commits the abominable and detestable crime against nature, either with mankind or with beast, shall be guilty of a felony of the second degree, punishable as provided” (Fla. Stat. 800.01, Supp. 1973). The crime carried a sentence of up to 20 years in prison.
circumstances, the federal court probably would have declined to hear the case. The general rule was that if a state court rules that certain acts are included in a statute, then it is as if the act had been amended by the legislature to include those acts. However in *Wainwright*, there was an added twist. After the two men had been convicted, the Florida Supreme Court in 1971 overruled its previous decision, and said that the phrase “crimes against nature” was void for vagueness, and that the legislature should specifically spell out the acts included. In their appeal, the men argued that in light of the Florida Supreme Court’s decision declaring the law void for vagueness, their convictions should be reversed. The Court of Appeals for the Eleventh Circuit agreed, and reversed the convictions.

When the Supreme Court reviewed *Wainwright v. Stone*, 414 U.S. 21, in 1973, it reversed the Court of Appeals. In a per curiam decision, the Court pointed out that the Florida court had specifically stated that the ruling was only to apply to future cases, and would not be retroactive. Therefore, the Court said, at the time the action was committed, the men had “clear notice” that oral and anal sex were included in the state’s conception of “crimes against nature.”

Two years later, in *Rose v. Locke*, 423 U.S. 48 (1975), the Supreme Court again considered whether the phrase “crimes against nature” was unconstitutionally vague and overbroad as applied to cunnilingus. A Tennessee man had been convicted of forcing acts of cunnilingus on a woman, and was sentenced to five to seven years’ imprisonment.

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\(^{23}\) *Winters v. New York*, 333 U.S. 507, 514 (1948), stated that when a state’s high court has included an act within the definition of a crime, that interpretation “puts these words in the statute as definitely as if it had been so amended by the legislature.”
The state's law prohibited "crimes against nature," but the statute did not define what acts were included, nor had the Tennessee courts ever interpreted the law as applying to cunnilingus. Tennessee's appellate court affirmed the conviction, and the state's high court declined the invitation to review the case. The man appealed to the Court of Appeals for the Sixth Circuit, which accepted the case and agreed that the phrase "crimes against nature" was indeed unconstitutionally vague, as it did not give citizens "fair warning" that cunnilingus was included.

The Supreme Court granted cert to Tennessee's petition, and in a per curiam decision summarily reversed the appellate court. The Court noted that the phrase "crimes against nature" had been in use for hundreds of years, and was "no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes" (p. 50). The Court pointed out that in 1955, the Tennessee Court had interpreted the law to include fellatio, and reasoned that since courts of other states, such as Georgia and Maine, had interpreted "crimes against nature" to include cunnilingus, that "Anyone who cared to do so could certainly determine what particular acts have been considered crimes against nature" (p. 50). Put another way, the Court said that Tennessee courts had interpreted "crimes against nature" broadly in the past, and other courts that had also interpreted the phrase broadly had included cunnilingus in their definitions. Therefore, citizens of Tennessee could assume that cunnilingus was included as within the meaning of "crimes against nature."

24 The Tennessee law at the time read: "Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five (5) years nor more than fifteen (15) years" (Tenn. Code Ann. 39-707 (1955)).
Two brief but rather heated dissents were filed by Justices Brennan and Stewart, each joined by Justice Marshall. Brennan, in particular, found the ruling absurd. He did not think it reasonable to expect citizens to look to the interpretations of other states to determine the scope of an admittedly vague phrase.

I simply cannot comprehend how the fact that one state court has judicially construed its otherwise vague criminal statute to include particular conduct can, without explicit adoption of that state court's construction by the courts of the charging State, render an uninterrupted statute of the latter State also sufficiently concrete to withstand a charge of unconstitutional vagueness (p. 55).

Brennan was equally offended that the Court, in his view, was changing the guidelines regarding vagueness, but disposed of the case without hearing oral arguments. “It is difficult,” he wrote, “to recall a more patent instance of judicial irresponsibility” (p. 54). Justice Stewart’s dissent found the Court’s ruling illogical in similar ways. He also pointed out that the respondent “could, and probably should, be prosecuted for aggravated assault and battery,” but that using the “crimes against nature” law to prosecute him was unconstitutional.

It is difficult to say whether or not the Court in Rose was signaling a more general acceptance of sodomy laws, as the challenge dealt with the specificity of the law and not with the substance. And because the facts of the case involved heterosexuals and acts of forced sex, there was very little from which to draw implications about the disposition of the justices toward either homosexuality or toward sodomy laws in general. The only cue along these lines appears in Brennan’s dissent, in the following sentence: “American jurisdictions, however, expanded the term – some broadly and some narrowly – to include other sexual ‘aberrations’” (p. 53). That he put “aberrations” in quotation marks
suggests that he did not necessarily agree that any sexual acts other than intercourse between heterosexuals were necessarily aberrations.

The Supreme Court sent a relatively clear signal that it was not inclined to extend privacy arguments to embrace sodomy in 1976, when it summarily affirmed a federal appellate court decision upholding the constitutionality of Virginia’s sodomy law against several legal attacks, including privacy arguments. In 1974, the National Gay Task Force, with help from the local chapter of the American Civil Liberties Union, filed a suit on behalf of a gay man from Richmond, Virginia. The suit asked for a declaratory judgment that Virginia’s sodomy law was unconstitutional, as well as injunctive relief from enforcement of the law. The plaintiff contended that the law violated the privacy rights of adult homosexual men who wished to engage in consensual private sex acts with other men. The suit also alleged that the law violated other constitutional rights of due process, freedom of expression, and the prohibition against cruel and unusual punishment. To make the case about privacy, the complaint focused on the privacy protection in Griswold and progeny. The state defended the law, saying its purpose was to deter the “moral delinquency” that accompanies homosexual behavior.

The case, Doe v. Commonwealth’s Attorney for City of Richmond, 403 F.Supp. 1199 (1975), was heard before a special three-judge district court. The majority opinion rejected all of the claims, particularly ridiculing the privacy arguments. The opinion

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25 The Virginia sodomy law of the time read: “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.” (Virginia Code § 18.1-212 (1950).
argued that *Griswold* created rights related only to marriage and family, and that homosexuality was “obviously no portion of marriage, home or family life” (p. 1202). The court also cited passages from *Griswold* as well as from Harlan’s dissent in *Poe* in which homosexuality was specifically excluded from the embrace of privacy. The opinion observed that prohibition of sodomy was “not an upstart notion,” and then quoted from Leviticus. (p. 1202-1203).

Having found that sodomy between men was not a fundamental right, the court said that the state had only to show a rational relationship between the law and a legitimate government purpose. The court approved the state’s alleged purpose of the anti-sodomy statute, that prohibiting such acts would help curb moral delinquency and promote morality and decency. Furthermore, the court asserted that the state did not have to prove that the sodomy law actually did result in reducing moral delinquency, but that it was “sufficient to establish that conduct is *likely* to end in a contribution to moral delinquency” (p. 1199).

One of the three judges who heard the case, District Judge Robert Merhige, Jr., issued a dissent. Merhige’s argument had two primary points: that the right of privacy belonged to the individual, and that absent demonstrable external harm, conduct sanctioned for solely moral reasons could not be regulated when that conduct took place in the home. Merhige wrote that in finding that the right of privacy belonged only to the married couple or family, that the majority erred by “over-adherence” to the facts in *Griswold*, while ignoring the broader principle. He also relied on post-*Griswold* cases such as *Eisenstadt* and *Roe* to make the case that the underlying principle was that “every
individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern" (p. 1203). Furthermore, "A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern" (p. 1203).

Having made his point that the individual has a fundamental right to privacy, Merhige concluded that the rational basis test was not the appropriate test. Rather than make the positive case of what would be considered a compelling state interest, Merhige explained what would be outside the state's interest. To do this, he relied on what he interpreted as the lesson of Stanley v. Georgia, that "socially condemned activity, excepting that of demonstrable external effect, is and was intended by the Constitution to be beyond the scope of state regulation when conducted within the privacy of the home" (p. 1205).

One more aspect about the majority opinion is worth mentioning. Midway through the opinion, the court adopted what seemed to be a rather odd tactic. Ostensibly in an effort to demonstrate that sodomy was "likely to end in a contribution to moral delinquency," the court made an extended reference to another Virginia case that was then on appeal in the Fourth Circuit.

If such a prospect or expectation [that homosexuality contributes to moral delinquency] was in the mind of the General Assembly of Virginia, the prophecy proved only too true in the occurrences narrated in Lovisi v. Slayton, 363 F.Supp. 620.... The graphic outline by the District Judge there describes just such a sexual orgy as the statute was evidently intended to punish. The Lovisis, a married couple, advertised their wish "to meet people" and in response a man came to Virginia to meet the Lovisis on several occasions. In one instance the three of them
participated in acts of fellatio. Photographs of the conduct were taken by a set camera and the acts were witnessed by the wife’s daughters, aged 11 and 13. The pictures were carried by them to school (p. 1202).

The reference to the *Lovisi* case (discussed in Chapter 3) is curious for a couple of reasons. There was very little in common between the facts of the *Lovisi* case and the complaint by Doe. Doe was asking for protection of private consensual acts between two male adults, whereas the *Lovisi* case involved a heterosexual married couple and a third partner, whose acts became public rather than private when the children became an audience. The court made no attempt to explain inclusion of that particular case as an example. Was the court suggesting that the offensive part of the *Lovisi* scenario was the act of oral sex? Would it have been better if the acts witnessed by the children had been intercourse instead of fellatio? The court seemed to miss the point that the most troubling aspect of the *Lovisi* case was the public nature of the acts, exposing as they did the children to both live and photographed pornographic material. Although the opinion did not say as much, probably the underlying message of including the case was a warning against the slippery slope that an extension of the right to privacy might create. What was not mentioned in the majority opinion was that Judge Merhige – before he was chosen for the panel to hear *Doe* – had rejected a petition for habeas corpus filed by the Lovisis, who were both serving jail time. Their petition argued that the right to privacy coupled with the Supreme Court’s decision in *Eisenstadt*, meant that consensual sexual acts were beyond regulation of the state. In his rejection of their petition, Merhige agreed that private sexual acts were quite likely protected as a result of the precedent in *Griswold* and *Eisenstadt*. “It is not marriage vows which make intimate and highly
personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection” (Lovisi v. Slayton, 363 F.Supp. 620, 625). However, Merhige rejected the appeal for a writ of habeas corpus, saying that the “existence of seclusion in a sexual act ... is a necessary prerequisite to that act’s being protected from state regulation by the Constitution.” Since the acts were not private, “they relinquished their right to privacy in the performance of these acts, and they could lawfully be prosecuted” (p. 627).

After Merhige denied the Lovisis the writ of habeas corpus, they appealed their case to the Fourth Circuit Court of Appeals – where it still waited for a response when Merhige heard the Doe case. Indeed, the Court of Appeals did not issue its affirmance of Merhige’s denial until a few weeks after the Supreme Court issued its summary affirmance in Doe. It is quite likely that the inclusion of the Lovisi case was a subtle message to Merhige from the other two justices, telegraphing their belief that the slippery slope of privacy could turn into the kind of avalanche that might protect the behavior in Lovisi. The Lovisi case was appealed to the Supreme Court but, not surprisingly, the Court declined to review the case.

In their appeal to the Supreme Court, the lawyers for Doe took their cue from Merhige’s dissent, and stressed the Eisenstadt precedent, rather than relying almost exclusively on Griswold as they had in their complaint to the three-judge panel. The Supreme Court, by a 6 to 3 vote, summarily affirmed the lower court’s ruling without hearing oral arguments and without issuing an opinion. Justices Brennan, Marshall and
Stevens (a Ford appointee who’d been on the Bench for just three months at the time) dissented.

Legal commentators squabbled over the precedential value of *Doe v. Commonwealth*. Some believed that it indicated not only the Court’s unwillingness to assist in the attempts of gay rights activists to overturn sodomy statutes, but an unwillingness to further extend the right to privacy more generally. Others, however, were more optimistic, and believed *Doe* had a limited impact.

Despite doubts regarding the Supreme Court’s receptiveness to constitutional attacks on sodomy statutes, the early 1980s was a time of increased litigation attacking sodomy laws in the state courts, as opposed to the federal courts, and many of these are discussed extensively in Chapter 5. The belief of many gay rights strategists by this time was that the wisest course was to heed Justice Blackmun’s advice to fight against sodomy laws in the state courts. However, the issues often involved federal questions, which made them eligible for Supreme Court review, if the Court was so inclined.

Some scholars and litigators believed that the so-called reformed sodomy statutes (sodomy laws amended by legislatures to apply only to homosexuals – see Chapter 3 for a discussion) might be vulnerable to attack on equal protection grounds. One of the most noteworthy cases to challenge a reformed sodomy statute, *Baker v. Wade*, 553 F. Supp.

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27 See, for example the discussion of Elisa L. Fuller (1985), who argued that the *Doe* decision indicated simply the Court’s agreement that the plaintiff’s lacked standing and had no broader implications.
1121 (N.D. Tex. 1982), originated in Texas. Following the lead of many states, in 1974 the Texas legislature amended its sodomy statute to include only homosexual acts of oral or anal sex. By this time, the general sense was that such an action would preemptively protect sodomy statutes from challenges of being overbroad in their application to married couples. In 1979, Donald Baker, a religious man who had served in the Navy and was later a school teacher, filed a suit in the U.S. District Court for the Northern District of Texas, seeking a declaratory judgment holding the Texas sodomy law to be unconstitutional — the same tactic which had been taken a decade earlier in *Buchanan v. Batchelor*.

District Court Judge Jerry Buchmeyer not only agreed with the plaintiff, but wrote one of the most eloquent and unabashed judicial opinions ever attacking the constitutionality — or even the sense — of sodomy statutes. What set Buchmeyer’s opinion apart from most opinions regarding sodomy laws was that Buchmeyer neither skirted the issues nor made apologies for his findings. His approach was also somewhat unique, as a considerable part of the opinion was devoted to commenting on the

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28 The revision of the law in 1974 was part of a broader overhaul of the state’s criminal laws. While the state adopted some of the reforms regarding adult sexual activity recommended in the Model Penal Code (such as dropping prohibitions against adultery or fornication), the state kept the sodomy statute as applied to homosexuals — in spite of three attempts to repeal the law — though the penalty was significantly reduced, from a felony (which could result in two to 15 years imprisonment) to a Class C misdemeanor (a fine no greater than $200). After revision, the Texas sodomy law read: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. ‘Deviate sexual intercourse’ means any contact between any part of the genitals of one person and the mouth or anus of another person” (Texas Penal Code Ann. § 21.06 (1974)). The plaintiffs in *Baker v. Wade* asked the state for clarification of whether the law’s prohibition excluded oral sex between women since the law contained only the masculine pronoun. The response, which contained a rather humorous typo, read: “Section 21.06 proscribes a mole engaging in ‘deviate sexual intercourse’ with another mole and likewise proscribes a female engaging in ‘deviate sexual intercourse’ with another female” (emphasis added) (*Baker v. Wade*, Appendix A, n. 6).
credibility (and even likeability) of the plaintiff, Donald Baker. The opinion also remarked about the high level of credibility of the expert witnesses who testified on behalf of Baker.

Buchmeyer included a highly favorable and sympathetic description of Baker’s background and character. The description was extraordinarily detailed, going so far as to describe his mannerisms and attire. “During the trial, Donald Baker dressed conservatively, was very articulate, and had the appearance that most people might expect of a school teacher or bank executive” (p. 1127, n. 7). He repeatedly stressed that “Baker was a very sincere, very credible witness” (p. 1127), and went out of his way to portray Baker as a very “normal,” guy-next-door type.

There were aspects of the *Baker* opinion which were reminiscent of *Brown v. Board of Education* in terms of approach. That is, Buchmeyer highlighted the stigma and damage to the self esteem of homosexuals caused by anti-sodomy statutes, in much the same way that Chief Justice Earl Warren had focused on the psychological damage which segregation laws caused to black children. Buchmeyer described how in high school, Baker knew that “queers were bad,” and that by the time he got to college he became even more aware that he was “different.” He did “some study” of the “general area of homosexuality,” and learned it was illegal. He grew very disappointed in himself, and simply could not understand why he was having feelings that were “wrong” and “criminal” and “sinful” (p. 1127).

Buchmeyer wrote that as a result of societal attitudes and anti-gay laws, coupled with his growing attraction to men, that Baker had come to feel he was a “dirty, nasty thing” (p. 1127), and had on several occasions considered suicide. All told, according to
Buchmeyer’s analysis, criminal sanctions against sodomy were taking their toll on homosexual citizens.

[T]he existence of these criminal laws always, even if they are not enforced (like § 21.06), does result in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals – fear of arrest, loss of jobs, discovery, etc. – can cause severe mental health problems. Homosexuals, as criminals, are often alienated from society and institutions, particularly law enforcement officials. They do suffer discrimination in housing, employment and other areas (p. 1130).

In addition to the sympathetic portrayal of Baker, Buchmeyer cited approvingly the findings of the two expert witnesses who testified on behalf of Buchmeyer (a psychiatrist and a sociologist), noting the prestigious credentials of each.

These passages regarding Baker’s credibility and the harm caused to him by the sodomy law was juxtaposed to many pages devoted to undermining the credibility and highlighting the hypocrisy of the defendants and the witness for the state, who included a psychiatrist, District Attorney Henry Wade (of Roe v. Wade fame) and City Attorney Lee Holt. Buchmeyer savaged the credentials of the psychiatrist, noting that he was something of a career witness for the District Attorney and that “his opinions were not based on any independent research or supported by ‘any respected medical or psychiatric literature’” (p. 1131). Buchmeyer then included an extended passage from the deposition of District Attorney Wade which had been taken by Baker’s lawyer, in which he was asked to “explain how § 21.06 furthers the state’s interests in protecting decency, the welfare of society, procreation, morality, or any other interest” that the state might have for enactment of the law (p. 1132). To each of the questions regarding in what way the law might further one of the state’s interests, Wade answered “I don’t know of any.”
Buchmeyer used this as evidence that whatever reason the state had for limiting sodomy between same sex partners, it was not obvious, compelling, or even rational.

Buchmeyer also attacked the rationality of the law by pointing to various inconsistencies, such as that the law did not prohibit all homosexual conduct, as it prohibited only contact between the genitals of one person and the mouth or anus or another of the same sex. It did not prohibit homosexuals from kissing or sexually stimulating their partner with hands and fingers. Nor did § 21.06 condemn the use of an artificial device, such as a vibrator or dildo... (p. 1134).

Likewise, he noted that bestiality was prohibited by law only when it occurred in public. "Thus, under the Texas Penal Code, one may engage in private sexual acts with ‘an animal or fowl’... but may not engage in private oral or anal sex with a consenting adult of the same sex" (p. 1134, n. 29).

Buchmeyer then turned to the constitutional issues. After surveying the major privacy cases, Buchmeyer, without apology or caveat, asserted that "homosexual conduct in private between consenting adults is protected by a fundamental right of privacy. Any state restriction upon that right must be justified by some compelling state interest" (p. 1141). He concluded that the state did not have a compelling interest, since "the defendants have nothing to rely upon but the assertion of general platitudes" (morality, decency, etc.). Furthermore, he asserted that the law was "not even rationally related to any legitimate state interest" (p. 1143). The statute was also, he wrote, a prima facie violation of the Fourteenth Amendment’s equal protection clause, as it “discriminates against homosexuals by making acts criminal when committed by them, but not by heterosexuals” (p. 1143). And, as he had already concluded, the law had "no rational
relationship to legitimate state purposes” (1143). He fortified this finding by quoting once again from Wade’s deposition. “Q. What rational basis is there for that classification [of prohibiting only homosexual but not heterosexual sodomy], if you know of any?” Once again, Wade answered, “I don’t know of any” (p. 1144). By finding the law a violation of equal protection on its face, the District Court did not need to determine whether or not gays constituted a “suspect class,” as was argued by the plaintiff. However, in a footnote, Buchmeyer indicated that had the issues been reached, “this Court would hold that homosexuals are not a ‘suspect class’ ... since the Supreme Court has not even concluded yet that sex is a suspect class” (p. 1144).

One more unique passage of the decision is worth mention. Buchmeyer devoted a separate section to a discussion “public distaste” for homosexuality. The state had claimed that homosexual sodomy “is a practice which has been abhorred in western civilization and has long inspired an almost universal phobic response” (p. 1145). At the outset saying that “These are overstatements,” Buchmeyer said that nonetheless “even if there is widespread public distaste” that this did not justify the state’s denial of the right to privacy.

The rest of the *Baker v. Wade* story was as much about procedure as substance, and was rather strange. Wade (the Dallas prosecutor) decided not to appeal. However, in an unusual move, Danny Hill, a district attorney from another part of the state who had been included as part of the defendant class (Baker sued, among other things, to prevent any prosecutor from enforcing the law), brought an appeal. The U.S. Court of Appeals for the Fifth Circuit dismissed the appeal, holding that only Wade could have appealed.
Baker v. Wade, 743 F.2d 236 (5th Cir. 1984). Because the court concluded that the case had not been properly appealed, it did not rule upon the correctness of Judge Buchmeyer’s decision. This was one of those cases that the court decided to rehear on an en banc basis. In the en banc opinion, the court concluded that Hill was a proper appellant, and thus considered the merits of the case. The full court reversed Judge Buchmeyer’s ruling, finding that Texas’s sodomy law was constitutional. 774 F.2d 1285 (CA5 1985) (en banc). The author of the opinion for the en banc majority was Judge Thomas Reavley who, coincidentally, was a member of the three-judge panel that initially concluded that Hill was not a proper appellant.

There were two dissenting opinions. First, Judge Alvin Rubin (joined by six other judges) dissented from the majority’s holding that Hill was a proper appellant. Judge Irving Goldberg (alone) dissented also on the grounds that the sodomy law was unconstitutional. Although no other judge joined in Goldberg’s dissent, this is not necessarily telling, given that the merits of the case were almost a peripheral issue, with the propriety of Hill’s appeal being the focal point.

The plaintiff filed a motion asking the en banc majority to rehear the case (a pro forma action from the losing side in a case, though rarely successful). Not surprisingly, the motion was denied. But in an unusual move, Judge Reavley felt compelled to write

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29 After a case has been heard and ruled on by a federal appellate court, the litigants – or sometimes even the court itself – may request a rehearing en banc, meaning that the full court will consider the issues in the case (Rule 35 (a) (2), Federal Rules of Appellate Procedure). There are “two general types of cases that circuit judges consider to be worthy of en banc review: (1) those holdings that may affect large numbers of persons or cases; and (2) cases that interpret fundamental legal or constitutional rights” (McFeeley 1988, 262). Baker v. Wade, of course, involved both.
an additional opinion justifying the majority's conclusion that the Texas law was constitutional. The plaintiffs sought a writ of certiorari from the Supreme Court, but were denied. 478 U.S. 1022 (1986). Only Justice Marshall would have heard the case.

One more federal case must be discussed, for it demonstrated some of the difficulties associated with extending a right to privacy. Just as Judge Buchmeyer had written such an adamant argument in favor of including the private sexual conduct of homosexuals within the right of privacy, two years later in *Dronenburg v. Zech*, 741 F.2d 1388 (1984), a relatively new member of the Court of Appeals for the D.C. Circuit, Judge Robert Bork, wrote an equally adamant opinion foreclosing extension of the right of privacy to include private homosexual conduct.

The case involved a suit brought by James Dronenburg, who was discharged from the Navy for homosexual conduct. Dronenburg, who had an excellent record with the Navy, had a brief relationship with a young male recruit in a Navy barracks. After the relationship turned sour, the young man made sworn allegations to superiors that he had engaged in homosexual conduct numerous times with Dronenburg. Dronenburg at first denied the charges, but later admitted he was a homosexual. The Navy Administrative Discharge Board which heard the charges voted unanimously to discharge Dronenburg for misconduct due to homosexual acts, in violation of Navy rules. Dronenburg brought suit, saying that discharge based on his homosexuality violated his constitutional right to privacy, as well as his right to equal protection of the law. The district court

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30 The code regulating Navy conduct read that "any 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
summarily affirmed the Navy's decision, and held that private, consensual homosexual conduct was not constitutionally protected.

Circuit Judge Bork, joined by Circuit Judge Antonin Scalia and Senior District Judge Williams, unanimously affirmed the lower court. Far more extraordinary, however, was that the opinion went far beyond what was required by the case, and critiqued the privacy jurisprudence of the Supreme Court, going back to *Griswold*.

In Dronenberg's brief to the appellate court, it noted that in the privacy cases there was

...a thread of principle: that the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her own body (p. 1390).

To the extent the state makes any regulations at all regarding intimate decisions of the individual concerning their bodies, according to the appellant, it should only be in pursuit of a compelling state interest, and through the least restrictive means possible. Thus, private consensual homosexual conduct would fall within this zone of privacy and be constitutionally protected.

The appellate court did not believe Dronenburg had identified the correct underlying principle of the privacy cases. "Whatever thread of principles may be discerned in the right-of-privacy cases," wrote Bork, "we do not think it is the one discerned by appellant. Certainly, the Supreme Court has never defined the right so broadly as to encompass homosexual conduct" (p. 1391).

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member in a military environment seriously impairs combat readiness, efficiency, security and morale (SEC/NAV Instruction 1900.9C (Jan. 20, 1978)).
Although Bork conceded that the principle advanced by Dronenburg – that absent a compelling reason people should have control over their bodies – “would explain all of these cases,” he rejected it because “so would many other, less sweeping principles” (p. 1395). So what was the “thread of principles” that ran through the privacy cases? Or, as Bork put the question,

The question then becomes whether there is a more general principle that explains these cases and is capable of extrapolation to new claims not previously decided by the Supreme Court (p. 1395).

Bork reviewed the privacy cases to find the general principle, and found none – at least none that would provide guidance for other courts. After failing to find a general principle to assist the lower courts in applying privacy precedent, he looked at each privacy case individually to determine if there was at least enough of a principle to apply in the context presented by Dronenburg. He found none. Or, as he put it, “certainly none that favors appellant” (p. 1392).

Bork then discussed the role of lower courts in stopping the state from regulating conduct. He distinguished between application of precedent based on enumerated passages of the Constitution versus those based on rights “created” by the Supreme Court. When applying enumerated rights, lower courts should look to whatever guidance the Supreme Court provides in terms of an underlying principle. Absent that, or when the case in question requires additional guidance, judges could look to the Constitution itself. In cases involving new or penumbral rights, such as privacy, however, lower courts have no supplemental documents, he claimed, and have no basis for extending such a right to any situation not specifically covered before, or implied by some general reasoning.
provided by the Court. "[W]hen the Court creates new rights," he wrote, "lower courts have none of these materials available and can look only to what the Supreme Court has stated to be the principle involved" (p. 1395). Though sexual rights could be implied in the Court's privacy cases, absent a guiding principle or specific application of the right to privacy to homosexual conduct, the lower courts, according to Bork, lacked the authority to apply privacy to homosexuality.

The only thing resembling guidance from the Supreme Court, Bork complained, was that "only rights that are 'fundamental' or 'implicit in the concept of ordered liberty' are included in the right to privacy." But, he noted, "These formulations are not particularly helpful to us ... because they are less prescriptions of a mode of reasoning than they are conclusions about particular rights enunciated" (p. 1395). Then, using "implicit in the concept of ordered liberty" as a conceptual yardstick, Bork concluded that homosexual conduct did not measure up.

Bork's complaint about the lack of a guiding principle should not be viewed as an endorsement of the Supreme Court supplying general principles for unenumerated rights, however, but more as a criticism of creating penumbral rights at all. "That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will," (p. 1395) wrote Bork. He expressed his general disapproval for unenumerated rights, even if they came with fully articulated general principles, by referencing the Locher-era. "[T]he Court should be extremely reluctant to breathe still further substantive content into the due process clause so as to strike down legislation adopted by a State or city to promote its welfare" (p. 1395).
Having finished his lecture on the evils of judicially created rights, Bork reasoned that since homosexual conduct was not protected by the Constitution, the only question left was whether the Navy's policy was rationally related to some legitimate state interest, and concluded that it was. "The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline." Nor, he continued, was the Navy "required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate" (p. 1397).

Although laced with conservative bias - if not outright hostility toward liberal interpretation of the privacy precedents - Bork's opinion was not without some merit. Indeed, to escape criticisms of reverting to a *Lochner*-era style, the Court had purposefully avoided introducing any extra-constitutional philosophy that might have provided the kind of guidance that Bork noted was missing. And Bork was right that the previous privacy decisions were worded and presented in such a way as to suggest that only the specific situation in question was being covered by a right to privacy. In short, Bork was correctly noting the problem with the right to privacy as it had been haphazardly developed. Certainly, Bork's conclusion regarding whether or not the Court's privacy jurisprudence would encompass homosexual activity was not the only one that could have been drawn. But it would be unfair to suggest that it was not at least a *reasonable* conclusion, given the paradoxically specific yet ambiguous nature of the privacy cases.

Dronenburg appealed the decision to be heard en banc by the D.C. Circuit Court, but the petition lost by a seven to four vote. However, the four dissenters issued an opinion, taking the opportunity to comment on Bork's opinion (*Dronenburg v. Zech* 746
F.2d 1579 (1984)). Remarking sarcastically that "Judicial restraint begins at home," the dissenters asserted that "the panel's extravagant exegesis on the constitutional right of privacy was wholly unnecessary to decide the case" (p. 1580). Furthermore, they chided Bork for his lecturing style, noting that "the opinions of this court are not proper occasions to throw down gauntlets to the Supreme Court" (p. 1580). Proper or not, the gauntlet had been thrown, and the Supreme Court, albeit somewhat begrudgingly, had taken it up. Finally, the Supreme Court would settle the score over whether the "right to be let alone" precluded the states from prohibiting the "crime against nature."

Liberty Or Licentiousness? Brief For Petitioner Bowers

The state of Georgia filed its brief in the case of Bowers v. Hardwick on December 19, 1985. The final brief followed essentially the same format as had the petition for the writ of certiorari: the first portion was devoted to arguments which claimed that the Court's summary affirmance in Doe v. Commonwealth had already settled the issue in favor of the state, another section attacked the extension of constitutional privacy to protect homosexual sodomy, and the final section defended the legitimacy of morality as a legislative purpose and stressed the immorality of homosexual sodomy. And, just for good measure, the state insulted the lower court by accusing it of Lochner-style jurisprudence, saying it had "bowed to the temptation" of "placing its opinion above that of the representatives of the people" (p. 39)

Although the arguments remained basically the same, the last half of the final brief to the Court was filled with more rhetoric which decried sodomy and homosexuality as immoral. It also focused on the deleterious effect of making any analogy between a
same-sex relationship and marriage. Such an analogy, argued the state, would not serve to elevate gay relationships, but would desecrate marriage.

As mentioned earlier, the Court of Appeals of the Eleventh Circuit in *Hardwick v. Bowers* held that the Court’s summary affirmance in *Doe* was not binding for two reasons: first, because the Supreme Court could have affirmed the District Court in *Doe* based on issues of standing without ruling on the merits of the case. And second, whatever binding effect *Doe* might have had had been mitigated by “doctrinal developments” in subsequent privacy cases.

The brief for the state rehearsed the litany of cases which suggested that a summary affirmance by the Supreme Court indicated approval of the merits of a case. It concluded that the appellate court had engaged in impermissible speculation regarding the intent of the Supreme Court’s message in summarily affirming *Doe*. The brief then turned to attack the idea that “doctrinal developments” had reopened the question regarding the constitutionality of sodomy laws. The appellate court had cited two such “doctrinal developments”: first, the Court’s decision in *Carey v. Population Services International*, 431 U.S. 678, specifically the language in two footnotes indicating that the Court had not yet determined whether or not there was a fundamental right to engage in private sexual activity; and second, the Court’s dismissal of certiorari in *Uplinger v. New York*, the case in which New York’s high court struck down a law that forbade loitering in public places for the purpose of soliciting “deviate sexual behavior,” indicating, said the appellate court, that the Supreme Court was willing to consider the constitutionality of state laws banning sodomy.
Regarding the interpretation of the Court’s action in *Uplinger*, the state maintained that in the first place, the issues central to *Uplinger* were “vagueness, overbreadth, First Amendment equal protection and due process,” and the Court, in its dismissal, did not identify which of the issues it considered important (p. 15). And in the second place, the brief for Bowers pointed out that the structure of the opinion issued by New York’s high court “made it difficult to determine exactly which federal constitutional issues had been decided” (p. 16).

The issue in *Carey* related to the possible interpretation of a couple of footnotes, as well as the importance that should be attached to footnotes more generally. *Carey* involved the constitutionality of several provisions of a New York law regarding sale and advertising of contraceptives. Most relevant to the *Bowers* case were two provisions that the Court struck down: the banning of sale or distribution of contraceptives to anyone under 16, and the requirement that non-prescription contraceptives be distributed only by a licensed pharmacist, regardless of the age of the recipient. In its discussion of the scope of constitutional privacy were two footnotes (notes 5 and 17, but mostly note 17) that the appellate court in *Hardwick* used to indicate the Court’s willingness to reopen the question of the constitutionality of sodomy laws. In footnote 17, Justice Brennan, writing for the majority, stated that “We observe that the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults,” and, as had already been stated in note 5, “we do

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31 The third part of the law being challenged made it illegal for anyone, including pharmacists, to advertise or display contraceptives. This aspect of *Carey* is less relevant to *Bowers*, for in striking down that part of the law, the Court relied on First Amendment freedom of expression arguments, which are not pertinent here.
not purport to answer that question now.” The state argued that the appellate court misinterpreted the meaning of the comments, and overstated their importance. That the Court had not yet completely defined the privacy right did not mean that it necessarily included the right to engage in all private, consensual sexual relations without regulation, according to the state’s brief. Moreover, the brief warned against relying too heavily on footnotes, “especially where the reliance on footnotes is in derogation of a previous precedent of this Court on the merits of issues not involved in the case wherein the footnotes appear” (p. 14).

The brief then addressed the privacy arguments. Most simply put, the state’s argument went like this: homosexual sodomy is not included either within a fundamental right of privacy or within a right of association; nor does the fact that such acts take place in the home give the acts any special protection. One of the interesting aspects of this part of the brief is that the state articulated a theory of how to determine what rights were worthy of status as fundamental rights. Fundamental rights, according to the state, must meet at least one of the following four criteria: (1) the right must be linked in some way to some right specifically mentioned in the Constitution; (2) the right must be “based on some absolute truth or ethic engrained in American philosophy and which rises above the Constitution” (p. 20), such as a theory of natural law or a universal principle of morality; (3) the right must be embedded in the legal or social history and tradition of our society; or (4) “One other possible source of authority for judicial recognition of a fundamental right of privacy to engage in homosexual sodomy is the ‘consensus rationale’ discussed by some legal scholars” (p. 23)
The previous privacy cases, said the brief, had concerned issues of marriage, family and procreation. These rights, contended the state, fell into all of the above-mentioned categories, and were thus appropriately protected by a fundamental right to privacy.

The common principles of this Court’s privacy decisions have revolved around marriage, the family, the home and decisions as to whether through procreation the ancient cycles will begin again and, if so, in what manner the new generation will be brought up. These rights have always been with us, and are a part of us (p. 25).

In contrast, the brief argued, homosexual sodomy bore no resemblance to rights of marriage, family and procreation, nor did it fit into any of the state’s criteria for being worthy of status as a fundamental right. Moreover, placing homosexual sodomy in the same category as the rights associated with marriage, family and procreation did not elevate the right of sodomy; rather, it denigrated the entire category of rights.

The court below has ignored the traditions and collective conscience of this nation. By concluding that homosexual sodomy, for some, serves the same purpose as the intimacy of marriage, it has lowered the estate of marriage, which has traditionally been held an institution worthy of the protection and nurture of the State, to merely another alternative for sexual gratification (citations excluded) (p. 25).

The Georgia brief also took issue with the appellate court’s “attempts to bolster its conclusion with the observation that Hardwick intends to commit sodomy in his home” (p. 26). The majority in the Hardwick opinion had argued that taken together, the precedent in Stanley v. Georgia, 394 U.S. 557 (1969), as well as a string of Fourth Amendment cases such as Payton v. New York, 445 U.S. 573 (1980), stood for the proposition that the state could not regulate consensual sexual behavior within the home without unduly violating the right of privacy. The appellate court’s choice of Stanley was an obvious one, but its use of Payton less so. In Stanley, the Court held that someone
could not be punished for personal possession and use in the home of pornographic materials – even though the materials were considered legally obscene and the owner would have been punished had the materials been used or displayed in public. “Whatever may be the justifications for other statutes regulating obscenity” wrote Justice Marshall for the majority in *Stanley*, “we do not think they reach into the privacy of one’s own home” (394 U.S. 557, 565). The appellate court reasoned that the lesson of *Stanley* was that the home enhanced any privacy interests. The appellate court’s choice of *Payton* was not as obvious. In *Payton*, the question before the Court was whether the Fourth Amendment prohibited a police officer entering a home without and warrant and without consent to make a felony arrest for which there were no exigent circumstances. The Court concluded that since it had long been established that a warrantless and nonconsensual entry into a home to search for evidence is considered an unreasonable search, then the same should apply for arrests. *Payton* was not a privacy case in the sense of privacy as personal autonomy; what made the case relevant to the *Hardwick* opinion, according to the appellate court, was that the Supreme Court stated that the purpose of the Fourth Amendment was to preserve “the privacy and sanctity of the home” (p. 588). As discussed in Chapter 5, by the 1960s, the Court commonly used the word privacy as a shorthand for those things protected by the Fourth Amendment. According to the majority in *Hardwick*, the location of the act of sodomy mattered. Put another way,

The right of privacy extends to some activities that would not normally merit constitutional protection simply because those activities take on added significance under certain limited circumstances. In particular, the constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home (p. 1212).
The brief for the state argued that neither case was relevant to the constitutionality of sodomy statutes. The brief noted that although the Fourth Amendment does recognize the importance society places on the privacy of the home, it was the unreasonable physical entry of the officer being prohibited, and not a limitation on what was being regulated within the home. Stanley, too, was not relevant, argued the state, because the underlying right in question was not the right of privacy, but a First Amendment right “to receive information and ideas and the absolute prohibition, founded in the First Amendment, against attempts by the government to control the moral content of a person’s thoughts” (p. 27). But it was not ideas that was at stake in the Hardwick case, but actions, said the brief. The state argued that while the home might enhance the protection of fundamental rights – such as the right to express and receive ideas – it did not enhance the protection of non-fundamental rights. Thus, “It is not so much the place where any given activity occurs that determines whether the activity is protected as a fundamental right as it is the nature of the activity itself” (p. 28).

Finally, the state argued that homosexual sodomy was not protected by a First Amendment right of association. Once again, the state resounded the theme that not all associations are created equal. The brief noted that the Court had long recognized the traditional family, and the primacy of blood ties, while at the same time the Court had also historically refused to give special legal protection to other sorts of intimate relationships or alternative families. In particular, the brief noted the difference between the Court’s findings in Moore v. City of East Cleveland, 431 U.S. 494 (1977), and in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). In Belle Terre, the Court upheld a
local ordinance that limited occupancy in single-family dwellings to family units — family defined as including those related by blood, adoption or marriage — or groups that included not more than one or two unrelated individuals. The owners of a home in Long Island rented a house to six unrelated college students, and the owners and three of the students challenged the ordinance on the grounds that it violated their constitutional right to privacy. The Court rejected the substantive due process claim, saying that there was no fundamental right implicated, so only a rationality test was appropriate. Writing for the majority, Justice Douglass noted that “The police power is not confined to elimination of filth, stench, and unhealthy places,” and that it was an appropriate goal of the state to promote “A quiet place where yards are wide, people few, and motor vehicles restricted” (p. 9). In contrast, three years later in Moore, the Court accepted a substantive due process argument to strike down a similar ordinance that had more narrowly defined family. The ordinance in Moore defined family as essentially including only the nuclear family, and thus had prohibited a grandmother and grandson from living together. In striking down the restrictive definition of family, Powell, writing for the majority, asserted that, “Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition” (431 U.S. 494, 504).

In short, the state’s brief highlighted the fact that when it came to living arrangements, the Court had only been willing to extend a right of association to individuals connected by blood or marriage, and not to other types of associations.
Lions And Tigers And Gays, Oh My!

In its final pages, the brief for the state made its case as to why the regulation of homosexual sodomy constituted a legitimate state interest, and it was in these passages that the state articulated its more homophobic ideas, making apocalyptic predictions should the Court limit its ability to rid society of this scourge. Predictably, the brief invoked protection of the public health, asserting that “the legislature should be permitted to draw conclusions about the relationship of homosexual sodomy in the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases such as anorectal gonorrhea, Hepatitis A, Hepatitis B, enteric protozoal diseases, and Cytomegalovirus” (p. 37).

With particular vigor, the brief attacked the claim that pursuit of morality was not a legitimate state interest. The state very openly criticized homosexual sodomy as an immoral and thus abhorrent act, and suggested that allowing homosexual sodomy could eventually lead to the downfall of western civilization. Not only would homosexual sodomy lead to “other deviate practices such as sado-masochism, group orgies, or tranvestism, to name only a few,” but the act in and of itself “epitomizes moral delinquency” (p. 36). The state also alleged that homosexual activity is often practiced in public in “gay baths” and “gay bars” and “is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents, and, indeed, a possible relationship to crimes of violence” (p. 37).

But aside from the increased risks to public health or the possible connection between homosexual sodomy and crime, the state’s core contention was that elevating
homosexual sodomy to a fundamental right would denigrate and perhaps eventually destroy the family.

But perhaps the most profound legislative finding that can be made is that homosexual sodomy is the anathema of the basic units of our society – marriage and the family. To decriminalize or artificially withdraw the public’s expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institutions to merely other alternative lifestyles (38).

The state soberly predicted that after homosexual sodomy had destroyed the family, it would drag down the rest of society with it.

If the legal distinctions between the intimacies of marriage and homosexual sodomy are lost, it is certainly possible to make the assumption, perhaps improvable at this time, that the order of society, our way of life, could be changed in a harmful way. In prohibiting homosexual sodomy, the state’s interest was quite compelling, for what was at stake was the very “organization of society” (p. 38)

The brief closed with a dramatic, if not quite eloquent, statement on the meaning of liberty. Freedom, it said, should not be viewed as the ability to pursue one’s desires without limits. “Rather, true liberty can be found in the traditions and conscience of our people. The tradition and conscience of the people of Georgia have been expressed in Georgia’s sodomy statute. This conscience draws the necessary distinction between liberty and licentiousness, a distinction left utterly unobserved the by court below.”

There’s No Place Like Home: Brief For Michael Hardwick

The ACLU recruited Harvard Law Professor Lawrence Tribe to lead Hardwick’s team of lawyers, which also included a colleague of Tribe’s from Harvard Law, Kathleen Sullivan, and Kathleen Wilde, the ACLU-affiliated attorney who had worked with the case early on. Famous, ambitious, outspoken and talented, Tribe was a master of shaping
constitutional arguments in whatever image most complemented the policy preference he was pursuing at the moment. And, Tribe had a track record: he had already won ten of twelve cases that he argued before the Court (www.Tribelaw.com, 2000). Tribe, today still at Harvard Law and still described as frenetic in his championing of causes, holds an interesting place in American law, for he has oscillated between playing the role of neutral scholar and impassioned advocacy lawyer – though to watch him in action – and to judge by the often theoretically inconsistent positions he’s adopted in the pursuit of advocacy – one could easily assume that legal advocacy is Tribe’s first love.

Tribe knew that getting the court to strike the Georgia sodomy law would be a tough sell. As noted above, Tribe said that he was dismayed when he learned that the Court had granted cert in the case – which was before he had been asked to lead Hardwick’s legal team – for in retrospect he said he doubted whether a majority of the Court was willing to say that privacy included a much broader right to sexual freedom than had been articulated by the Court to date. But if there was an argument that could be constructed to do the job, Tribe was the man to construct it. In the preface to the first edition of his extremely popular treatise, *American Constitutional Law* (1978), Tribe denounced judicial restraint – particularly that practiced by the Burger Court, which he described as “unduly beholden to the status quo” – and argued that courts should take a more “candidly creative” role in their pursuit of justice.

I, for one, however, seriously doubt Tribe’s ex post facto claims that he was “dismayed” when he learned the Court would hear Hardwick’s case – particularly once *he* was asked to be lead counsel. The combination of his winning track record before the
Court, as well as his general (though inconsistent) optimism that courts will do the “right” thing (“right” meaning in agreement with Tribe’s preferences) even when – or perhaps especially when – legislatures won’t, made Bowers seem like a case that could be won.

Tribe’s academic works posit the Constitution as the protector of autonomy — a term he prefers to liberty. The purpose of the Constitution, according to Tribe, is to protect the “aspects of self which must be preserved and allowed the flourish.” And the self should be allowed to flourish in ways that a majority might find offensive or immoral. A core aspect, then, of the personality are the intimate relationships in which people engage, and absent immediate harm to others, the state should not deter the ways in which these associations express themselves. In other words, sexual relations are one of the ways in which personalities develop and express themselves, and are thus protected by the constitutional order.

Because majorities will often impose their visions of morality into law in ways that might stifle expression of the personality in intimate associations, the Court, according to Tribe, is the branch of government rightfully responsible for protecting autonomy and its assistance should be actively sought to strike such laws. On the issue of abortion, for example, Tribe argued that it would be intolerable to allow state legislatures to handle the issue, since some would allow abortion while others prohibited it. Issues which would infringe on the autonomy of the personality ought to be left up to the courts, since the courts are more sensitive to what’s right (right in this case being the protection of autonomy) than legislatures. The situation in Bowers was exactly the kind
of situation which Tribe believed is best decided by a court, because the court will more likely make the “right” decision.

Described as “cocky” even by his supporters, I believe Tribe thought he would win the case, though he undoubtedly knew that it would be a close vote. Some votes would be easy to predict. Justice Marshall, for example, could be counted on to strike the Georgia law, for his majority opinion in *Stanley v. Georgia* – even if less than satisfying theoretically – demonstrated a strong commitment to personal privacy, particularly in the home. Likewise, both Justices Brennan’s and Blackmun’s jealous protection of abortion rights would translate into support for any of the threads of privacy, and Brennan had voted with the majority in *Griswold*.

Those who would be a harder sell included Chief Justice Burger, who though he had voted with the majority in *Roe*, rejected the proposition that news reporters should have a right not to divulge sources before a grand jury, or greater immunity from police searches (though it would be difficult to say if these should be viewed more as attacks on privacy, or on the press). Justice Rehnquist would be the least likely to side with the decision of the Eleventh Circuit. Rehnquist had been one of two members to vote against the majority in *Roe*, and his fierce belief in state’s rights led him to interpret the Fourteenth Amendment’s due process and equal protection clauses as imposing minimal constraints on the states. He also generally deferred to legislative judgment and favored judicial restraint. Sandra Day O’Connor would also be difficult to persuade to strike the sodomy law. Like Rehnquist, she tended to defer to the legislative judgment of states. And at that time (1985-1986 term), pro-choice supporters suspected O’Connor might be
willing to overturn *Roe* after she indicated in her dissent in *Akron v. Akron Center for Reproductive Health,* (1983) that *Roe’s* trimester analysis might need to be reconsidered.\(^\text{32}\) Despite the fact that Justice White was a Kennedy appointee and had been with the majority in *Griswold,* he, too, would probably vote to uphold the Georgia statute. The only area of individual liberties in which White had voted strongly and consistently liberal was in discrimination cases. In other areas, he more often than not voted with the conservatives, usually because he shared with Rehnquist and O’Connor a deferent stance toward the elected branches of government, in the absence of clear constitutional or statutory direction to do otherwise. And, like Burger, he had voted against any sort of privilege for news reporters.

Like any good political strategy, the challenge for Tribe was to come up with an argument that would neither sing to the choir nor waste effort in trying to change the minds of those already firmly opposed to his position. That meant that Tribe would take an approach aimed to court those votes which might be undecided. The two justices most difficult to predict on the issue were Justices Stevens and Powell. A Ford appointee, it was difficult to classify Stevens as either liberal or conservative, and he has often been labeled a “wildcard.” But his generally broad interpretation of the Fourth Amendment, as well as his votes, at times, for the less fortunate, at least made his vote a possibility. Justice Powell was the other vote which might go either way. A Nixon appointee, Henry J. Abraham described Powell as “Cautious and basically conservative, yet moderate and

\(^{32}\) Decisions which came after *Bowers* have indicated that O’Connor is not willing to overturn *Roe,* such as her refusal to join Chief Justice Rehnquist’s opinion in *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989), and *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).
utterly nondoctrinaire,” and said that he was “comfortable in the Court’s center” (Abraham 1992, 661). Powell had demonstrated support for abortion rights and the right to privacy by voting with the majority in *Roe* and by authoring the majority opinion in *Akron v. Akron Reproductive Health Services*, 462 U.S. 416 (1983), which struck down many limitations on abortion.

Tribe’s brief for Michael Hardwick was filed with the Supreme Court on January 31, 1986. The difference between the arguments contained in Tribe’s brief for the respondent, and the brief filed by Kathleen Wilde in September of 1985 opposing the granting of certiorari, were more matters of organization, emphasis and rhetorical style than they were of substantially different arguments. Tribe’s brief was written in simpler, less lawyerly language, which helped to highlight the brief’s main point: the government has no business rooting around in our bedrooms, asking questions about sex. “The State of Georgia,” began the argument, “would extend its criminal law into the very bedrooms of its citizens, to break up even wholly consensual, noncommercial sexual relations between willing adults. And the State contends before this Court that it may freely do so without giving any good reason” (Brief of respondent, 4).

Tribe’s brief also used more emotional language, particularly when talking about the home. Tribe alternatively used adjectives which conjured up warm, almost spiritual images of the home, or surrounded the word home or bedroom with sinister language, describing how the state was going to creep into the homes of average citizens to inquire

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33 Tribe liberally used phrases such as “sanctum of home and bedroom” (p. 6); “sanctuary of the home” (p. 8); “sanctity of the home” (pp. 4, 9 and 26).
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about and prosecute them for their sexual relations. Tribe was trying to establish, in part, that traditional social mores surrounding sodomy were not the only traditional values at stake, for sodomy laws infringed on another long-valued right, that of privacy within the home.

Surely the sincerity of the State’s claim that Section 16-6-2 implements universal morality is thrown into grave doubt by the fact that state after state has found it possible to preserve traditional norms without intruding its criminal law into the no less traditional inner sanctum of the private bedroom (p. 25).

The brief on behalf of Michael Hardwick made surprisingly little reference to Hardwick himself, or to homosexuality in general. Tribe made it clear that he was not arguing for the right of homosexual sodomy, but for the right of associational intimacy, specifically, “the right to engage in sexual intimacy as such” (p. 12). Argued this way, the gender of the partners or what particular body parts were involved receded in importance – or at least that’s what Tribe was hoping for. The brief seemed structured with an eye toward making the issue seem as “normal” and mainstream as possible. “It is striking,” wrote one scholar, “that the Brief for Respondent filed in Bowers ... never refers to Hardwick as gay, and refers only obliquely ... to the fact that his sexual partner was another man.... The brief’s reticence presumably reflects a tactical decision to do everything possible to present the case as one involving sexual privacy rather than gay rights” (Schnably 1991, 869).

34 Examples include: “state invasion of the home” (p. 3); “declare that a law reaching into the bedroom” (p. 5); “state control of our most private realm” (p. 6); “prospect of searches not just of the bedroom, but of the body cavities themselves” (note 26); “outrage of bedroom surveillance” (p. 18); “police the bedroom” (p. 21); “reach deeply into our homes and private lives” (p. 29).
Tribe's primary argument was that because it involved intimate associations and because it sought to regulate behavior in the home, Georgia's sodomy law required special justification. Though Wilde's brief had certainly pointed out that the law implicated personal associations which was particularly troubling when aimed at activity within the home, Tribe's brief put it in a punchier, one-two-three format which focused on the convergence of these two rights. First, the brief argued that "ordered liberty requires that intimate relationships between consenting adults be free from unjustified state intrusion." Second, "ordered liberty requires that the private home be a zone free from unjustified state intrusion." And third, "when relationships are both intimate in kind and insulated in the home, there is double reason to demand justification from any government that would root them out there" (emphasis in original) (Respondent's brief, i). Tribe's use of the phrase "ordered liberty" was no doubt used to invoke Justice Cardozo's rationale in *Palko v. Connecticut*, 302 U.S. 319 (1937).[^35]

Because the law infringed on two areas of rights, Tribe argued that the "intersection" or "convergence" of these two areas created "double reason" to "demand justification" regarding the state's interest. This convergence, or what I would call "synergistic" approach, was the crux of the argument for Hardwick. Within that framework, Tribe had two sections, one for each of two areas of rights Tribe argued the law infringed upon. In the section discussing the right of intimate association, Tribe

[^35]: In *Palko*, Cardozo argued that some rights were included in the meaning of due process because they are fundamental to our concepts of justice and liberty. States could not rightfully encroach on these rights because "they represented the very essence of a scheme of ordered liberty, ... principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" (p. 325).
rebutted the state’s claim that the previous privacy cases had dealt with only the relationships and decisions having to do with marriage, family and procreation. The state’s reading of these cases, argued Tribe, was to look at the “facts alone,” and ignored the “underlying principles” of those cases, thus reducing liberty interests to a “formula,” which, Tribe reminded the Court, had been warned against by Justice Harlan in Poe (p. 8). In the section which discussed the right of privacy within the home, Tribe relied on Fourth Amendment cases, with particular emphasis on the later cases in which the word privacy is substituted as a shorthand to refer to those protections afforded by the Fourth Amendment (see discussion of this phenomenon in Chapter 5).

The problem for Tribe, of course, was that neither of the interests he showcased had been previously declared as fundamental rights *per se*. Certainly, the Court had previously recognized a fundamental right to association, but such association had been either of a political/communicative nature, or had involved marriage or family. No general right of intimate association between two unmarried adults had ever been declared fundamental. Likewise, though the home was procedurally protected by the Fourth Amendment, there had never been a clear declaration that the state must show a compelling interest if conduct it regulated might occur in the home. Tribe argued that a procedural protection was insufficient when it infringed upon an intimate association.

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37 Recall that even in *Eisenstadt v. Baird* (the case in which the Court relied upon the equal protection clause to strike laws prohibiting contraceptives for unmarried couples), the Court did not find that the couple had a fundamental right to intimate association (and, indeed, expressly refused to rule on that question one way or the other).
"[A] Georgia citizen must be entitled to demand not only a warrant of the Georgia police
officer who enters his bedroom, but also a justification of the Georgia legislature when it
declares criminal the consensual intimacies he chooses to engage in there" (p. 19).

That neither right (intimate association or absolute privacy of the home) was
fundamental in and of itself is most likely what motivated Tribe's "synergistic" approach.
Tribe suggested that the synergism where intimate associations and the privacy of the
home converged demanded some level of heightened scrutiny by the Court. "The statute
should be tested for a close relationship to a compelling state interest" (p. 6). Perhaps
hedging his bets, Tribe suggested that possibly a lower standard, such as the one used by
the Court in \textit{Zablocki v. Redhail}, 434 U.S. 374 (1978), might be appropriate.\footnote{In \textit{Zablocki} – a case in which the Court ruled that the state of Wisconsin could not prohibit a marriage
because a man had not paid his court-ordered child support – the Court said it should use "critical
examination" of laws infringing the right of marriage. "Since our past decisions make clear that the right to
marry is of fundamental importance, and since the classification at issue here significantly interferes with
the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of
the classification is required" (p. 388).} "But even
if this Court should deem such scrutiny too strict, the statute should \textit{at the very least} be
tested for a 'fair and substantial relation' to a legitimate governmental objective"
(emphasis in original) (p. 6). In other words, Tribe asserted that a justification based
solely or primarily upon morality was not enough – at least not when a law touched upon
personal rights. So whether the test was a "compelling state interest," or a "fair and
substantial relation," Tribe's primary goal was any test which would force the state to
provide "a far more powerful justification" than the morality of the majority. "[T]his law
can be defended only if it can be shown to serve closely some state objective \textit{other than}
the bald assertion of one possible moral view” (p. 26-27). There was a subtle but important point here.

The decision of the lower court had not struck down the law as being unconstitutional on its face. Rather, the Court of Appeals for the Eleventh Circuit had ruled that because the law infringed on associational interests in the home, the law was subject to heightened scrutiny. "We therefore remand this case for trial, at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest” (Hardwick v. Bowers, 760 F.2d 1202 (1985) 23). Accordingly, Tribe did not ask for outright voiding of the law. He hoped that asking the Supreme Court only to remand and ask that the lower court find some justification for the sodomy law other than morality, would be more acceptable to the Court than striking the law outright.

As in all cases when lawyers argue for the expansion of a right, Tribe was as careful to say what he was not arguing for as he was to say what he was arguing for. Tribe tried to reassure the Court that if it agreed with his arguments that it were not necessarily opening the door to a whole new set of rights to be argued for in the future. Tribe insisted, for example, that the greater scrutiny he requested on behalf of couples in their bedrooms would not be required when the state sought to regulate sexual activity in the public sphere. Nor, Tribe argued, did granting Hardwick’s claim implicate laws seeking to prohibit any type of nonconsensual or commercial sex, or sexual activity involving minors. And the state would still be free to pass laws protecting its citizens from self-inflicted harm.
Addressing accusations from the state's brief, Tribe also said that affirmance of the appellate court would not include "any closer scrutiny of criminal laws against adultery or polygamy" (p. 23). The reason, according to Tribe, was that such laws "protect the estate of monogamous marriage. Marriage, unlike other manifestations of intimate association, is a contract controlled by the state, and, like 'any other institution,' it is subject to the control of the legislature" (p. 23). As Tribe later explained during oral arguments before the Court, because marriage was essentially a contract, it would be subject to all the same legislative controls as other contracts. But there was a drawback to this argument. What Tribe may have unwittingly done with this argument, however, was to subtly suggest that intimate associations within a marriage would be subject to greater control than the intimate associations of two casual acquaintances who took their relations home and shut the door. Consider the following from the brief:

Thus, close scrutiny of state intrusion upon private, consensual, noncommercial sexual acts, such as the intrusion which Hardwick challenges, does not suggest similar scrutiny of laws that would restrain those who have entered marriage contracts from violating those agreements (p. 45).

But this exertion of greater control over the married than the unmarried is exactly the opposite of what the Court had tried to accomplish in *Griswold* (and, in a different sense, even in *Roe*). In *Griswold*, it was precisely because the couple *was* married that the Court said the state should exercise less rather than greater control on the intimate life of the married couple. Because marriage was a relationship viewed as having legal goals that benefited society, the Court argued that the legislature should offer the couple some deference in certain personal choices. Although it was clearly not his objective to do so,
Tribe's arguments would allow the legislature greater leeway to go into the bedroom of a married couple, to prohibit adultery or regulate number of partners, in a way that it could not enter the bedroom of an unmarried couple. Marriage thus became less, rather than more, attractive (if one assumes that additional state control is unappealing to most people) – which would certainly be objectionable to a legislature concerned with public morality of the sort which inspired the anti-sodomy laws in the first place. It's not unlike the so-called "marriage-penalty" tax which generates debate today. Married couples fall into a slightly higher tax bracket than their unmarried peers who cohabitate. Such taxing schemes are inappropriate, argue some, precisely because they burden a relationship which legislatures have sought to foster and privilege.

There was an additional tension in Tribe's argument. On the one hand, he stressed the consensual, non-harmful aspect of Hardwick's intimate association. Tribe argued that the reason the state would still be able to regulate public sexual activity or self-inflicted harm was because "these statutes are transparently related to the State's fundamental duty to shield us from harms wrought to others – a concern wholly absent in the case of consensual adult sex" (p. 22-23). But he was careful not to go too far with the Millsian-styled argument, knowing, of course, of the Court's reluctance to adopt extra-constitutional philosophies. Indeed, he explicitly denied that he was suggesting that the Court adopt any such philosophy. "Respondent obviously does not contend that the Fourteenth Amendment enacted John Stuart Mill's *On Liberty*, any more than it enacted Herbert Spencer's *Social Statics*" (note 43). But without resort to something more than the spatial constraint of the home, Tribe's argument allowed too much. The only way
Tribe's theory *could* work was if he invoked some underlying principle to guide legislatures and courts as to what could and could not be regulated in the home.

**Ordered Liberty Relies On History And Tradition: The State's Reply To Respondent**

The state's reply brief made three points: First, that Hardwick's brief used the wrong test to determine the applicability of the right of privacy. Second, that ordered liberty does not protect all intimate relationships from regulation. And third, that ordered liberty does not protect all things occurring in a home. Infused in each of the three main points was the theme that history and tradition would not support the arguments made on behalf of Michael Hardwick. Throughout the brief, not only did the state maintain that historical analysis has, in fact, been the method used by the Court to determine which liberties are fundamental, but the state defended the correctness of such an approach, implying that other approaches are inferior. “Respondent seemingly argues that this Court should simply pull a standard for reviewing the Georgia sodomy statute out of thin air,” said the brief. “He rejects the historical analysis which this Court has previously used in its privacy decisions, and instead makes reference to the current decriminalization movement”\(^{39}\) (p. 7).

The right of privacy, argued the state, does not protect all things private, nor all intimate associations. Rather, “Only fundamental rights, implicit in the concept of ordered liberty, are protected by this right of privacy” (Petitioner's Reply Brief, 1). And,

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\(^{39}\) Here the brief for the state was referring to a short passage of Tribe's brief which argued that the decriminalization of sodomy in many states indicated that there was no longer consensus regarding the immorality of sodomy. The same conclusion, he argued, could be drawn from the recommendations in the Model Penal Code that sodomy be decriminalized.
said the brief, the way to determine which rights are implicit in the concept of ordered liberty was to look to history and tradition. "In many privacy decisions, including *Griswold* itself, the Court has emphasized its obedience to history in deciding whether activities and decisions are protected from government regulation under the right of privacy” (p. 2).

The State’s brief accused Tribe of misusing precedent involving intimate association by not addressing the fact that the Court protected certain associations only after engaging in historical analysis to determine if the association in question had historically been protected. The brief also accused Tribe of quoting out of context the language which generically refers to the right of association, without also noting that the Court, in its list of associations entitled to constitutional protection, listed associations all having to do with marriage, procreation, or cohabitation with relatives.

Interestingly, the State did not defend the history of anti-sodomy laws *per se*, but merely reiterated that the Court has found fundamental rights by looking to history, and the history of the U.S. supported no right of association for adults to engage in sexual relations. “Respondent may not like these historical facts, and presumably his ideal society would not countenance such regulations, but this is our history” (p. 11). The parting shot in state’s brief implied that Tribe might be better off directing his energies toward policy makers rather than the courts.

Respondent’s arguments may furnish persuasive policy grounds for the decriminalization of all intimate activities and all activities which occur in the privacy of the home. But his proposals are nonsense as constitutional law. Respondent totally confuses the concept of legislative desirability and constitutional requirement. Not all things good and desirable are required by the Constitution (p. 18).
Michael Hardwick was about to learn this the hard way.

**Friends Of The Court Register Their Opinions**

Twelve *amicus curiae* briefs\(^{40}\) were filed relating to the *Bowers* case; four on behalf of appellant Michael Bowers, and eight on behalf of respondent Michael Hardwick. All of the briefs filed on behalf of Bowers argued that (1) Michael Hardwick did not have standing; (2) that the privacy cases did not create a right to sexual liberty or individual autonomy, and (3) that such judge-created rights would lead down a slippery slope to justifications for all sorts of other rights, such as a right to incest, polygamy, or a right to use drugs recreationally in the privacy of one’s home. Three of the groups filing briefs in support of Bowers (The Rutherford Institute, the Concerned Women for America, and the Catholic League for Religious and Civil Rights), claimed that depriving the state of the authority to regulate private sexual conduct, such as sodomy, would produce negative consequences for families and social relations generally. Public health concern involving the spread of the HIV virus was the focus of the brief filed by David Robinson, Jr., a law professor at George Washington Law School. Presumably hoping to give the state evidence with which to make the argument that prohibiting sodomy protected the public health, Robinson warned the Court of a “potential catastrophe of  

\(^{40}\) Although at one time so-called “friend of the court” briefs assisted justices by providing an unbiased history or an exploration of a particular area of law, contemporary *amicus curiae* briefs are usually filed by some organization with an interest in persuading the Supreme Court toward some specific outcome in a dispute. *Amicus* briefs are filed with the Supreme Court, and become part of the public record for that case. It is unclear just how much influence *amicus* briefs actually have, but they are useful for understanding what segments of society might have had an interest in a particular outcome and why.
historic proportions" (Robinson 1986, 3) posed by the HIV virus and AIDS. “The only rational means of responding to this extraordinary tragedy is to change our behavior,” wrote Robinson (p. 4). And, as “the behavior believed to have infected about three-fourths of the victims is sodomy” (p. 4), Robinson urged the Court not to restrict the power of the states to “reassert traditional values” by taking appropriate precautionary measures, such as prohibiting “extraordinarily risky sexual activity” (p. 4).

For the most part, the briefs filed on behalf of Michael Hardwick emphasized the right of privacy recognized in previous cases, and tended to posit privacy and gay rights as the miner’s canary. That is, they argued that if the privacy rights of homosexuals were vulnerable, the right to privacy was vulnerable more generally. The amicus brief filed by National Organization of Women, for example, discussed the possible negative consequences for the right to abortion if the Court were to start weakening the right of privacy. Likewise, the brief of Association of the Bar of the City of New York by its Committee on Sex and Law warned that if the Court allowed the Georgia sodomy law to stand, it was opening the door to all sorts of other unwarranted government intrusion in the personal lives of its citizens. The brief filed by the Lambda Legal Defense Fund et al. emphasized the potential negative effects that upholding the law would have for rights of privacy important to heterosexuals. And the brief by the American Jewish Congress stated that though it did not approve of homosexuality, it was important to fight discrimination in all its forms.

A brief filed jointly by the American Psychological Association and the American Public Health Association asserted that the Georgia sodomy law punished sexual conduct
that is common – both in heterosexual and same-sex couples -- and not harmful. They
stressed that homosexuality is not a pathology, and that the freedom to explore intimacy
through sexual contact is important the health of individuals and to their intimate
relationships. They also criticized the law as a public health measure, but noted that the
law did not dissuade risky sexual behaviors. The authors also tried to persuade the Court
that homosexuals can’t corrupt or “recruit” youth into being homosexuals – a fear that
had long fueled discrimination against openly gay teachers or other professionals who
come into regular contact with children. Presumably, this was offered to reassure the
Court that striking down state sodomy laws would not result in an epidemic of
homosexuals coming of age if gays were not kept in the closet, and thus the state could
not claim to be “protecting” youth from homosexuality as a compelling interest. The
brief stated that

Research indicates that sexual orientation develops independently of
isolated sexual experiences, and the data do not support the idea that early
childhood homosexual activity has any direct relationship to later sexual
orientation. Indeed, there are no empirical data to support the popular
myth that homosexual orientation or behavior results from “contagion” by
other homosexuals (pp. 27-28).

These statements were accompanied by footnotes citing three pieces of scholarly research
on the subject. Such issues were not directly addressed in the Bowers opinion, so it is
difficult to gauge the impact, if any, which the APA amicus brief had on members of the
Court. That at least one member of the Court was concerned about the effect of

41 The impact was probably negligible on Chief Justice Burger, for he seems to have had a particular
distaste for the psychological and psychiatric professions. In a memo to Justice Powell regarding Bowers,
Burger wrote “You will remember my “degree” in Psychiatry, which led me to be very skeptical about that
breed of M.D.’s” (Memo of Burger to Powell, April 3, 1986). Additionally, while an appellate judge for
(footnote continued on next page)
homosexuals on children was evidenced by a memo written by Chief Justice Warren Burger to Justice Lewis Powell, in which Burger urged Powell to change his vote in the *Bowers* decision. Burger worried that a victory for Hardwick might “forbid the states from adopting any sort of policy that would exclude homosexuals from class rooms or state-sponsored boys' clubs and Boy Scout adult leadership” (Memo from Burger to Powell, April 3, 1986, Powell papers). Likewise, one of Justice Powell’s clerks warned that agreeing with the appellate court that stable monogamous homosexual relations served a similar purpose as marriage was a dangerous tactic, for “you would necessarily suggest that homosexuals have a right to adopt and raise children.” And, affirming the lower court could make it difficult for states to prohibit “avowed homosexual school teachers” (Notes of Mosman, April 1, 1986).

In 1988, the APA’s brief in the *Bowers* case was taken to task in an article published in *Psychological Reports*. The authors of the article challenged, in particular, the D.C. Circuit, Burger wrote disparagingly of psychiatrists serving as expert witnesses. “The jury wants and needs help from the expert, but it does not help a jury of laymen to be told of a diagnosis limited to the esoteric and swiftly changing vocabulary of psychiatry. Every technical description ought to be 'translated' in terms of 'what I mean by this,' followed by a down-to-earth concrete explanation in terms which convey meaning to laymen. A psychiatrist who gives a jury a diagnosis, for example, of 'psychoneurotic reaction, obsessive compulsive type' and fails to explain fully what this means, would contribute more to society if he were permitted to stay at his hospital post taking care of patients” (*Campbell v. United States*, 307 F.2d 597 (1962), Burger dissenting).

For the time being, the Chief Justice can lie easy in his grave, as the Court in June, 2000, upheld the right of the Boy Scouts of America to prohibit gays from holding positions as scout masters, basing their holding on the Boy Scouts claim that forcing them to accept gay Scout leaders would violate their First Amendment right of association (in this case, association being defined as the right to exclude certain members). *Bowers* was mentioned only tangentially, and only by the dissenters (*Boy Scouts of America* et al. v. *Dale*, 99-699, 2000). The Chief might have been surprised to learn, however, about the subsequent fallout for the Boy Scouts. Several local municipalities have moved to prohibit the Boy Scouts from continuing to use public property, since state and local law in some areas prohibits renting public lands to groups that discriminate. Additionally, by August of 2000, some financial backers of the Boy Scouts have withdrawn their support, amounting, to date to more than $13 million (Zemike 2000).
the brief's contention that there was no statistical link between early childhood homosexual experience and adult homosexuality. They claimed that information cited by the APA from the studies was taken out of context and misrepresented what those studies actually said. The article claimed that at best the APA's "evidence" did "not pertain to the APA's claims in the manner argued within the brief," and at worst were "contrary to the claims made by the APA" (Cameron and Cameron 1988, 256). The authors then gave detailed accounts of the three pieces of research cited, and showed how they were misrepresented in the amicus brief. Although the APA's possible misreporting of the research was ultimately not terribly significant, given that Georgia's sodomy law was upheld, such a manipulation of the research might have proven much more important had Michael Hardwick prevailed, and if the report had been cited by the Court as evidence in support of their decision. At the very least, the allegations of truth-stretching in the brief raise interesting and important questions regarding the role of experts and expert testimony – whether it be in the form of an amicus brief or actual testimony given at trial. The APA was no doubt motivated, at least in part, to file a brief in support of Michael Hardwick because of the apparent successful impact of such non-legal information in prior advocacy cases making use of "Brandeis briefs," such as Brown v. Board of Education.

A group of churches43 filed a joint brief on behalf of Michael Hardwick. They emphasized that the Georgia law infringed on the right of intimate association and

43 The group included the Presbyterian Church, The Philadelphia Yearly Meeting of Friends, the American Friends Service Committee, the Unitarian Universalist Association Office for Church and Society of the United Church of Christ, and the Right Reverend Paul Moore, Jr.
intruded into the sanctity of the home. They said that they did not agree that sodomy was morally wrong and, perhaps more importantly, they asserted that a law promoting “traditional moral values” is not an adequate justification for making private consensual sexual expression a crime.

Criminal laws that usurp the role of individual moral choice in the context of private consensual sexual expression between adults may not rely for their justification on vague invocations of “traditional moral values.” They must stand or fall on their intrinsic necessity, or lack thereof, to the public welfare (Bramlett 1986, 4).

One Justice’s Search For The Middle Ground

As is customary, in the days before oral arguments in the Bowers case, memos were circulated between Justices and their clerks, each Justice noting what issues were of particular concern so that the appropriate questions could be prepared and asked of counsel during the oral arguments. According to Garrow, “most [clerks] agreed wholeheartedly with Tribe’s analysis” (Garrow 1994, 658). Dan Richman, for example, who clerked for Justice Marshall and recommended that the Justice affirm the lower court, seemed anxious to impress on Marshall that this was not a “gay” case. “To repeat the point, which I’m sure many members of the Court will forget or ignore: THIS IS NOT A CASE ABOUT ONLY HOMOSEXUALS. ALL SORTS OF PEOPLE DO THIS KIND OF THING” (emphasis in original) (Bench Memo to Justice Marshall, prepared by Dan Richman, March 31, 1986, Marshall papers).

In at least one chamber, however, there was not universal enthusiasm for the arguments in Hardwick’s brief. Two of Justice Powell’s clerks that term held very
different ideas about the case. One clerk, Mike Mosman, disagreed with the Court of Appeals’ decision, and hoped Powell would vote to reverse. According to Powell biographer John C. Jeffries, “Mike Mosman was a Mormon by faith, a moralist by disposition, and a hard-nosed opponent of judicial innovation” (Jeffries 1994, 516). Holding a very different viewpoint on the issue was Cabell Channis, the most liberal of Powell’s clerks that term and who, unbeknownst to Powell, was gay.\footnote{The Powell papers do not indicate which of his clerks was gay, nor does the Powell biography reveal his identity. When I first approached John Jacob, the archivist for the Powell collection, to find out which clerk it was, he told me that the clerk had asked not to have his identity revealed to researchers. Months later, however, the clerk had changed his mind, and I received the following information from Jacob. “Cabell Chinnis is the clerk least likely to be allowed to join the Boy Scouts of America.”}

For his own part, Powell didn’t know what to make of the \textit{Bowers} case. Powell biographer John C. Jeffries, who called Powell’s participation in \textit{Bowers v. Hardwick} “Powell’s’ greatest defeat,” noted that “From the beginning, Powell found the case deeply troubling” (p. 514). Indeed, on two separate documents in Powell’s \textit{Bowers} files, he wrote in the margins that \textit{Bowers} was a “troublesome” case.\footnote{In a memo to Powell from Mosman dated April 1, 1986, Powell wrote at the top, “Prepared for me by Mike after we had discussed this troublesome case.” By the third week in May, Powell apparently wasn’t feeling much better about the case, for he wrote in the margin of a memo from himself to Mosman, “I find this a most troublesome case.” (Powell papers).}

And so Powell, who sought a middle ground between those who would uphold the sodomy law and those who would void it on substantive due process grounds, found little help from his clerks, who were unusually polarized on the issue.\footnote{Justice Powell had sought the middle ground on controversial issues before, perhaps most notably in his opinion in \textit{Regents of the University of California v. Bakke}, 438 U.S. 265 (1978). In that case, which considered the constitutionality of an affirmative action policy, four justices would have ruled the racial quota involved illegal, while four justices approved the use of racial quotas. Justice Powell’s separate opinion, which agreed in part with both factions, became controlling. Powell fashioned a middle ground in which he ruled that a specific quota was illegal, but that considering race as a factor to be weighed in favor}
clerks, who, disagreeing among themselves and acutely aware of the high emotions on both sides, walked on eggshells to avoid an open breach” (p. 522).

Powell apologetically assigned the case to Mosman. “Mike, I am sorry you had to be burdened with this case,” Powell wrote to Mosman in his first correspondence to the clerk regarding the case. That initial memo illustrated Powell’s ambivalence regarding a state’s prohibition of sodomy – ambivalent both in what he thought was the right course of action for a legislature on the subject, and ambivalent about what the Constitution permitted or required.

On the one hand, Powell clearly disapproved of the behavior and considered it at least an aberration if not morally wrong, as is demonstrated by the following passage. Note, in particular, Powell’s use of the word “normal” sexual relations, referring, presumably, to heterosexual intercourse, as well as his rather bizarre reference to the “animal world.”

In view of my age, general background and convictions as to what is best for society, I think a good deal can be said for the validity of statutes that criminalize sodomy. If it becomes sufficiently wide-spread, civilization itself will be severely weakened as the perpetuation of the human race depends on normal sexual relations just as is true in the animal world (p. 3).

In the next paragraph, on the other hand, Powell suggested that were he a legislator, he would “vote to decriminalize sodomy,” because it was “almost never enforced,” and

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47 The burden, however, was apparently not so great as to prevent Powell from a snicker or two at the subject. “The facts,” he wrote to Mosman, “are straight forward (if one can use that term in this case!)” (Memo by Powell to Mosman, March 31, 1986, Powell papers).
“police have more important responsibilities than snooping around trying to catch people in the act of sodomy” (p. 4).

Powell’s assessment of the constitutionality of sodomy laws was equally ambivalent, writing “I think substantial arguments can be made on both sides of this question (p. 5). He conceded that “Professor Tribe, with his usual overblown rhetoric” had constructed a persuasive argument, particularly in light of the Roe opinion (in which case Powell voted with the majority). The problem, however, “would be to identify some limiting principle,” and he recited the list of usual suspects that such a precedent might allow, such as “incest, bigamy and adultery.” Perhaps as an afterthought, he scribbled in the margin that “I recognize these examples are not fairly comparable” (p. 6).

Powell not only rejected Tribe’s suggestion that the home was the limiting principle, he was peculiarly offended by it.

I must say that when Professor Tribe refers to the “sanctity of the home”, I find his argument repellant. Also it is insensitive advocacy. “Home” is one of the most beautiful words in the English language. It usually connotes family, husband and wife, and children – although, of course, single persons, widows and widowers, and others also have genuine homes (p. 6).

Indeed, Powell seemed less troubled by the prospect of the slippery slope leading to incest or bigamy than the damage that the word “home” might incur.

[W]ould the term “home” embrace a hotel room, a mobile trailer (yes, I think), a private room made available in a house of prostitution or even in a public bar, the “sanctity” of a toilet in a public restroom? (p. 6)

Powell seemed to be aware of the confusion that belied his discussion of the case, for he confessed, “As you can see, Mike, I am not talking very much like a lawyer” (p. 6)

He also indicated that his decision could go either way, as was suggested by his closing
thought. "I will probably not make up my mind until after the oral arguments and the
Conference discussion" (p. 6).

Given his state of indecision, one cannot help but wonder what might have
happened if the case had been assigned to Chinnis rather than Mosman. For in the
twelve-page, carefully crafted bench memorandum drafted by Mosman, he clearly had
his mind set on helping Powell to make his decision, and he wanted that decision to be a
rejection of the decision of the Court of Appeals. Moreover, Mosman was a persuasive
writer. A 1984 graduate of Brigham Young University's J. Ruben Clark Law School,
Mosman's work had earned Powell's respect. Indeed, Mosman's summary of the case
and arguments on behalf of the state were in many respects better argued and more
persuasive than the briefs filed by the state itself. The Mosman memo is worthy of a
close reading, in part for the lucidity in which he summarizes his position on the
arguments (arguments which had the ear of Powell), and in part, because in the exchange
between Powell and Mosman, we can see the intellectual and personal struggle Powell
experienced throughout the Bowers case.

Mosman was not impressed by arguments that many organizations supported
decriminalization, or that decriminalization of sodomy would be better than
criminalization. Echoing the assessment in the state's reply brief that Tribe's proposals
seemed more appropriate fodder for a legislature than the courts, he wrote,

as you noted in your file memo, this is not a case that requires a judgment
about what one would do as a legislature, but about what the Constitution

48 On the first page Mosman's bench memo to Powell, Powell wrote, "Reviewed. Well written as usual" (Bench memo to Justice Powell, by Mike Mosman, March 29, 1986, Powell papers).
does or does not forbid the State from regulating. That self-evident point often gets lost in the discussion of this case in the briefs (p. 4).

Mosman maintained that another point got lost in the discussion: what the case was about in the first place, and he devoted several pages to winnowing down the issues. “It is extremely important,” he wrote, “to set out what this case is not about” (emphasis in original) (p. 2). Mosman was apparently not a fan of the famous Tribe, for he began his summary with the warning that “Mr. Tribe and some of the amici frame this case in apocalyptic terms that would require this Court to answer a host of questions not presented by the case” (p. 2-3).

First, Mosman advised Powell that the case was not about relations between married partners, noting that neither court below had given standing to John and Mary Doe. And, because of the facts, the case was not about the law’s application to unmarried heterosexual partners. What was left? “[T]he Court only should consider the precise application of the statute presented by this case – homosexual sodomy” (p. 3). Justice Powell set off the phrase “homosexual sodomy” with quotes, and wrote in the margin, “only issue.”

Mosman was equally adamant that “This is not a case about the ‘sanctity of the home’” (p. 4). He noted that Tribe relied on Stanley v. Georgia as well as other Fourth Amendment cases to make the “sanctity of the home” argument. Mosman accused Tribe of at best employing a “strained reading of standard Fourth Amendment cases” and at worst, “egregious misuses [sic] of a case.” (pp. 5, 6). Furthermore, Stanley, argued Mosman, was not an appropriate precedent for Hardwick to rely upon, for the distinguishing factor in Stanley was that it was “a First Amendment case involving freedom of thought,” and the “thought/action distinction is an important one” (p. 5). This
argument apparently resonated with Powell, for *Stanley* was the only case in the entire memo which he circled, and Powell drew an arrow to the margin and wrote “invoked only thought.” He also added emphasis to “thought” in the text of the memo by surrounding it with quotes.

Perhaps capitalizing on what he thought was most worrisome to Powell, Mosman made much of the problem of finding a limiting principle to the kind of privacy theory advanced by Tribe. While he seemed resigned to the Court’s past privacy decisions, he noted that the right to privacy was a “very dangerous, but necessary, tool” (p. 6) (which Powell underlined). The danger in this case, according to Mosman, was that Tribe wanted the Court to recognize a “broad-based right of sexual freedom” (p. 8). But under this formulation, “no limiting principle comes readily to mind” (p. 11), and Mosman rehearsed the slippery slope argument that other manifestations of sexual freedom would demand protection, such as prostitution or sex with multiple partners. The Court’s extensive use of history and tradition in the privacy cases had served more than just the purpose of determining what was included within the right of privacy. According to Mosman, reliance on history and tradition also served as one of the few limiting principles for a right to privacy. Mosman argued that historically, society – and the courts – had protected not all sexual relationships, but only those related to “marriage and other family relationships,” and he went through the list of privacy cases and identified the ways in which those cases related to marriage or family. His take on the abortion cases was rather novel and interesting – particularly in light of my thesis that the common denominator of the major privacy cases was that a legally recognized relationship served
to shape and limit the Court's privacy jurisprudence. Whereas the brief for Hardwick argued that the principle underlying the abortion cases was a right to sexual freedom absent the worry that a woman might be forced to bear an unwanted child as the result of her sexual relations. Mosman argued that

> For unmarried women, the abortion decision is not a decision about her commitment to her sexual partner; it is a decision about long-term commitments to her potential offspring. It involves a relationship at least as protected as the husband-wife relationship – the relationship of a mother and her child. It is not her interest in sexual freedom that protects even an unmarried minor's right to an abortion; rather, it is her potential relationship and commitment to a child she does not want to bear – her interest in not having the state require her to become a mother (p. 10).

I think Mosman's analysis here is a bit of a stretch, for none of the Court's abortion cases discuss the potential future relationship between mother and child, nor were such arguments brought up in the briefs or oral arguments in those cases. But what this analysis does underscore, I think, is that relationships do offer a rather clear and narrow option for limiting a right to privacy, as I have discussed throughout this manuscript.

Mosman's personal predilections perhaps most clearly colored his legal scholarship in a passage in which he applauded the Court's limiting of privacy to marriage, family and procreation. The use of history and tradition, argued Mosman, protects against "'constitutionalizing' temporary mood swings" of society (p. 8) And,

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49 Mosman was undoubtedly influenced by the work of Bruce Hafen, a well-known Mormon lawyer and scholar who, like Mosman, was also an alumnus of BYU's J. Ruben Clark Law School. Hafen's scholarly work focused on marriage and family, and argued against sexual liberty. An article by Hafen (1983), "The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests" (Michigan Law Review), advanced the argument that the Court's abortion cases were an acknowledgement of the special potential relationship between mother and child, and was not about a right of sexual liberty.
the fact that the right of privacy cases are limited to marriage, family, and procreation accurately reflects the traditions of our people. Personal sexual freedom is a newcomer among our national values, and may well be, as discussed earlier, a temporary national mood that fades... The right of privacy calls for the greatest judicial restraint, invalidating only those laws that impinge on those values that are basic to our country. I do not think this case involves any such value (p. 11-12).

Whether or not Bowers involved a value basic to society is what Powell found so troubling. If, as Mosman suggested, the only question before the Court was whether or not homosexual sodomy was a constituent member of the group of basic values, then Powell would have to agree with Mosman. But Powell’s records indicate that he was not completely comfortable with Mosman’s reading of what was involved. The two central points of Mosman’s analysis – first, that the only question before the Court was whether or not homosexual sodomy was a fundamental right, and second, that homosexual sodomy did not symbolize a basic American value – seemed sound. But the outcome – that the state could punish someone for a consensual, non-commercial, private act bothered Powell.

Out of the twelve pages of Mosman’s arguments which supported reversal of the appellate court’s decision, there had been only one suggestion of the possibility that Georgia’s law might be unconstitutional – though this possibility, he explained, was not a question in the current case because of the facts which Bowers presented to the Court. In his discussion of what the Bowers case was not about, Mosman wrote that “This is not a case about the means chosen to enforce the statute, or the range of punishment available under the statute” (emphasis in original) (p. 3). He was rejecting Tribe’s claim that the state could not use the force of the criminal law to impose its moral preferences into such
an intimate area of life. While Mosman conceded the point that “It may be constitutionally permissible for the state to discourage homosexual sodomy in many ways, yet constitutionally impermissible to put someone in prison for that offense,” he claimed this was beside the point, for that was “a separate issue not raised in this case,” because of the facts in Bowers. “Hardwick has not yet been prosecuted for the violation; for all the Court knows, he may be acquitted” (p. 3). In other words, had Hardwick actually been prosecuted and convicted (the sentence for sodomy was one to twenty years), Mosman wrote that he “would be inclined to conclude that criminalizing certain conduct could be constitutionally disproportionate to the conduct at issue” (p. 4).

Powell seemed to read this part of the brief with great interest, as a great deal of that passage is underlined. In spite of Mosman’s warning, Powell began to consider using some sort of Eighth Amendment argument which would allow him to concur with those on the court who would affirm the appellate court, but would allow him to do so without endorsing the essentially substantive due process argument. This might be the middle ground Powell searched for. The Eighth Amendment proportionality argument was both familiar and appealing to Justice Powell, who had authored the Court’s majority opinion five years earlier in Solem v. Helm, 463 U.S. 277 (1983). In that case, a majority of the Court held that a state recidivist statute which resulted in a life prison term with no parole for a man who wrote a bad check for $100 was in violation of the Eighth Amendment because of the disproportionality of the punishment. The gist of Powell’s argument had been that the man had received a punishment usually saved for society’s worst crimes, when the crimes he had committed were relatively minor.
In part, the *Bowers* case must have seemed “troublesome” to Powell because there was seemingly no chamber at the Court where he could find someone dispassionate enough about the issue to discuss his ideas about the case without trying to win his vote. Powell was, I think, a bit baffled by the intense polarization regarding a case that he deemed “frivolous.” And the case was “troublesome” to Powell not only in a legal sense, but in a more personal sense as well. Powell seemed at a loss to understand what might motivate someone to engage in homosexual sodomy in the first place. As Jeffries put it,

Powell’s search for a legal theory paralleled a search for personal understanding. Sexual activity between men was something he did not comprehend. Unable to say exactly what he wished to learn, he nonetheless realized that he needed to know more (Jeffries 1994, 521).

According to Jeffries, Powell wanted to discuss the case with someone with less conservative leanings than Mosman, and so he went to the clerk he thought the most liberal of that term’s cadre of clerks to review the case – Cabell Chinnis, the gay clerk mentioned above. The conversation reported in the Jeffries biography, if accurate, was not only quite extraordinary, but revealed the extent to which Powell was baffled by the whole homosexual issue in general. Jeffries description of the conversation between

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50 I say “if accurate,” because, like the entire Jeffries biography of Powell, the conversation is not documented. Indeed, much of the biography is written in a Bretheren-esque style, which is to say that it includes many quite lengthy, quotes of private exchanges that leaves one wondering how Jeffries could have known that. While the book does include a lengthy list of sources, Jeffries did not include footnotes, or any other method of correlating information in the text with the references. While this makes for a good read, it also makes the job of subsequent researchers exponentially more frustrating. According to John Jacob (who manages the Powell archives), Jeffries did interview several of Powell’s former clerks extensively, including the Chinnis, and presumably the exchange was based on that clerks recollections, as reported to Jeffries.
Powell and the clerk is so interesting that it is probably best left in tact, and so I include the following extended quote:

Powell came into the clerk’s office and casually asked him to review the arguments in this difficult case. When told that (as the clerk believed) 10 percent of the population was gay, Powell was incredulous. “I don’t believe I’ve ever met a homosexual,” he told his astonished clerk. “Certainly you have,” came back the reply, “but you just don’t know that they are.” In North Africa, Powell said, “not a single episode of homosexuality was reported” despite several months away from women, but the clerk insisted that the behavior would have occurred without Powell’s knowledge.

The discussion edged toward Powell’s true mission when he tried to find out from his startled clerk just what it meant to be gay:

“Are gay men not attracted to women at all?”

“They are attracted to women, but there is no sexual excitement.”

“None at all?”

“Justice Powell, a gay man could not get an erection to have sex with a woman.”

The answer left Powell even more confused. “Don’t you have to have an erection to perform sodomy?” he asked.

“Yes,” he was told, “but that’s because of the sexual excitement.”

What Powell found so difficult to grasp was that homosexuality was not an act of desperation, not the last resort of men deprived of women, but a logical expression of the desire and affection that gay men felt for other men.

A few days later he made another run at the same topic. Again the clerk tried to explain that gay men “love other men like straight men love women.” Powell still found it hard to follow. In the words of the clerk: “He had no concept of it at all. He couldn’t understand the idea of sexual attraction between two men. It just had no content for him.” (Jeffries 1994, 521-522).

While it may be true that the idea of homosexual attraction may not have held any emotional content for him, subsequent memos between Powell and Mosman suggest Powell’s willingness to take Chinnis’s word for it, and explore legal theories which might enable him to vote to affirm the lower court without calling sodomy a fundamental right.

After discussing the case with Chinnis, Powell apparently visited Mosman’s office to
discuss the possibility of finding some legal "middle ground" between allowing the sodomoy law to stand unchallenged and including sodomy on the list of fundamental rights. In three pages of what seem to be a very casual memo (the date and author being identified by Powell’s handwritten comments rather than in the memo itself), Mosman responded to the questions Powell posed during their conversation.

Powell apparently went to Mosman with two questions: First, might the Constitution “protect homosexual relationships that resemble marriage – stable, monogamous relationships involving members of the same sex”? (p. 1) And second, was there any other “middle course” that Powell might reasonably pursue? As for the analogy of homosexual unions to marriage, Mosman was clear: “I think this is not a good approach.” He offered two reasons. First, the logic would be circular. The Court had accorded constitutional protection to the marriage relationship “largely because marriage has traditionally fostered and protected in our society” (emphasis in original) (p. 1). Thus, it would be “bootstrapping” to then argue that “homosexual relationships are protected because they ‘resemble’ marriage” (p. 1). Second, Mosman argued that giving homosexual unions equal status as heterosexual marriages would make other state restrictions on homosexuality more difficult, such as prohibitions on adoption, or barring homosexuals from being public school teachers. In short, “the ‘marriage’ idea has too many implications...” (p. 2). Powell was apparently convinced, for in the margin he

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51 Powell wrote in the name of the case and date (April 1, ’86), followed by “(Prepared for me by Mike after we had discussed this troublesome case.)” Curiously, this was the only memo in Powell’s Bowers file in which the author did not identify himself. Perhaps the conservative Mosman did not want to be connected with helping Powell to devise a “middle course” in the case, in part for ideological reasons, and in part because these middle ground approaches employed strained legal reasoning.
wrote “I think Mike is right. I’ll forget this possible rationale,” and the subject was not again addressed in Powell’s Bowers files.

Mosman did suggest two “middle courses,” both related to the Eighth Amendment. As he had suggested in his original, twelve-page memo on Bowers, Mosman said that one possibility might be to make the argument that “it is constitutionally disproportionate to sentence someone to 1 year or more in jail merely for a consensual, private sex act” (p. 5), and he again referenced Powell’s majority opinion in Solem v. Helm. The other possibility, wrote Mosman, was to extrapolate and extend the arguments from the Court’s opinion in Robinson v. California, 370 U.S. 660 (1962), in which the Court invalidated a law that criminalized the status of being a drug addict. The Georgia law, of course, criminalized the conduct of sodomy and not the status of being homosexual. But Mosman pointed to Powell v. Texas, 392 U.S. 514 (1968), in which “five members of the Court concluded that Robinson also forbids criminalizing the act of getting drunk when the actor is an alcoholic,” because it was not reasonable to inflict penalties on someone for being in a condition he is powerless to change (p 3). Thus there was precedent to apply the “principle to conduct – getting intoxicated – that was naturally compelled by the ‘condition’ that the defendant was ‘powerless to change’” (emphasis in original) (p. 4). “Powell,” wrote Mosman, “is therefore fairly persuasive support for a holding that he may not be criminally punished merely for having sex” (p. 4). Powell liked this last argument. “This ‘middle course’ merits further thought. It has considerable logic,” he wrote in the margin. It might allow him the more moderate solution he sought, though he was not yet committed to that approach.
The story of Bowers is intriguing, in part, because of the many “what ifs” along the way. What if Michael Hardwick had been unwilling to help bring the case? What if the county attorney had prosecuted Hardwick? What if Marshall, too, had withdrawn his vote to grant cert? But perhaps the most compelling of the “what ifs” has to do with Powell’s clerk Cabell Channis. According to Jeffries, Channis and Powell had one more conversation before oral arguments.

In great distress, the clerk debated whether to tell Powell of his sexual orientation. Perhaps if Powell could put a familiar face to these incomprehensible urges, they would seem less bizarre and threatening. He came to the edge of an outright declaration but ultimately drew back, settling for a “very emotional” speech urging Powell to support sexual freedom as a fundamental right. “The right to love the person of my choice,” he argued, “would be far more important to me than the right to vote in elections (Jeffries 1994, 521-522).

What if Channis had told Powell he was gay?

Oral Arguments: Talking About The Crime Not Fit To Be Named

Oral arguments in the Bowers case were heard March 31, 1986. By the time the oral arguments were heard, forty-two lawyers had worked on the case. Michael Hardwick, who had moved to Florida at the end of 1985, came to D.C. to hear oral arguments, and he met with the lawyers for breakfast that morning. “I met with them early that morning for breakfast, and we were kind of psyching each other up,” recalled Hardwick. Hardwick went with the lawyers to the Supreme Court building, and witnessed the arguments, unbeknownst to the Justices or to the press. “I was going to be sitting with one of the people who wrote the amicus brief for Lambda,” said Hardwick,
“and they once again assured me that no one knew who I was. So I sat in the Supreme Court as a completely anonymous person” (Irons 1988, 400).

Like most first-time observers of oral arguments before the Supreme Court, Hardwick was awed by the experience. “The whole omnipresence of the room, the procedure of the judges coming in, is sort of overpowering,” he said. “I expected the room to be huge, but it wasn’t; it was a very small room. You could see the judges’ faces and their expressions no matter where you sat” (Irons 1988, 401).

Georgia Assistant Attorney General Michael Hobbs, who argued the case for the state, began his arguments by again limiting the question. “The question before the Court is, is there a fundamental right to engage in consensual, private, homosexual sodomy,” he said with just a hint of a Southern drawl (Transcript of oral argument). Hobbs, whose speaking style was unassuming and modest, emphasized two points in his comments: first, that there was no constitutional protection for relationships outside of marriage; and second, that the Fourth Amendment put only procedural, but not substantive, constraints on state authority to regulate private behavior. *Stanley*, he argued, should not be viewed by the Court has a Fourth Amendment case, but as a First Amendment case.

The justices’s questions to Hobbs also had two central themes: what had been the record of enforcement of the law in Georgia? And would the law be applicable to a married couple? Justice Rehnquist interrupted Hobbs to ask about the application of the sodomy law to a married couple. “Could it be constitutionally applied, or not?” Hobbs at first answered evasively, saying that *Griswold* would “make it very problematic.” Justice Rehnquist interrupted again, this time with some impatience. “Is it constitutional or
unconstitutional when applied to a married couple?" To which Hobbs was forced to reply, "I think it would be unconstitutional."

Hobbs discussed the historically central role of the family in society. He differentiated the Bowers case from the Court’s previous privacy decisions, arguing that those decisions had all involved marriage or family, and thus the Court had been protecting family relationships, and not the sex acts themselves. "The Constitution protects the family because the family is so rooted in the history and tradition of the nation," said Hobbs (Transcript of oral arguments). Hobbs conceded that "there are certain kinds of highly personal relationships which are entitled to heightened sanctuary from state intrusion," but stressed that it was only a "limited number of relationships and associations." The state offered the associations of marriage, children and other extended family certain protections because of the value of these relationships to the state. "This court has described those relationships as personal bonds which have a rather critical role in the culture and tradition of the nation by cultivating and transmitting cherished ideals and beliefs."

What Hardwick’s lawyers were really after was for "the definition of the family to be refined," warned Hobbs. "And it is this that the state of Georgia is most concerned about." And these arguments, which would redefine family and extend constitutional status to non-traditional types of relationships, were made in pursuit of protecting certain conduct, conduct which amounted to "little more than self gratification and indulgence."
Borrowing a page from Judge Buchmeyer’s decision in *Baker v. Wade*:\(^5^2\) Justice Stevens pressed Hobbs about the state’s interest – or apparent lack thereof – in procuring a conviction against Michael Hardwick. Why, he asked, in light of the fact that Hardwick had admitted that “he does this type of thing over and over again” hadn’t the state followed up with a prosecution?

Hobbs: Well, your Honor, to be quite frank, I do not know what was in the mind of the district attorney when he decided not to prosecute.”

Stevens: If they [the county prosecutors] thought there was an important public interest in enforcing this statute, why wouldn’t they take this discovery, get him to admit he’s committed all these acts, and then prosecute him?

Hobbs: Because at the time, Your Honor, we relied heavily, almost exclusively, on this Court for its decision in *Doe v. Commonwealth*. It was decided in *Doe v. Commonwealth* that...

Stevens: I can understand why that would win the lawsuit for you, but I find it puzzling as to how that indicates the public interest this statute was supposed to serve to stop this kind of conduct. It seems that maybe the state doesn’t have an interest. Otherwise, why wouldn’t they enforce it?

Hobbs: I think that most certainly the state does have an interest in enforcing this statute, and in maintaining the statute on our books. The Fourth Amendment makes enforcement of the statute very difficult.

Stevens: Or very easy, in this case. They were presented it on a silver platter, and they declined to go forward. It seems to me there’s some tension between the obvious ability to convict this gentleman and the supposed interest in general enforcement.

At which point, the badgered Hobbs simply stammered, “I would agree, Your Honor,” and said that unfortunately, that was the record of the case before them. Of

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\(^5^2\) As discussed earlier in this chapter, Judge Buchmeyer included extended passages of the transcript in which Texas District Attorney Henry Wade was asked about the state’s interest in criminally sanctioning sodomy.
course, Stevens was right and had made his point, and rather than continue to offer answers where there were none, Hobbs simply returned to his soliloquy on the dangers of redefining the family. He closed his comments with the predictable rehearsal of the list of evils that would be brought before the Court, all asking for constitutional protection, if the Court upheld the appellate court's ruling. "It is a right of the nation and the state to maintain a decent society," said Hobbs. But the decision about what was decent, "should be decided by the people," and not by the Court.

Notwithstanding his inability to satisfy Justice Stevens' line of questions, at least one Justice was suitably impressed by Hobbs' performance. In the notes he took during the arguments, he wrote and underlined "good lawyer" next to Hobbs name. This becomes rather amusing when compared to the parenthetical "torrent of words!" which he put beside Tribe's name.

In contrast, Michael Hardwick was not at all impressed by the state's attorney. "The guy from the state came up first and argued," said Hardwick, "and he was an idiot." Hardwick did not find the slippery slope that Hobbs warned of particularly credible or worrisome. "He kept going on about how the state did have a justified government interest in continuing to enforce the law because it prevented adultery and retarded children and bestiality, and that if they changed the law all of those things would be legal." Hardwick's overall assessment of Hobbs and his arguments: "He made absolutely no sense" (Irons 1988, 401).

"Then Laurence Tribe got up and articulately argued for about forty-five minutes," said Hardwick. "He was incredible. I've never seen any person more in
control of his senses than he was,” remarked Hardwick (Irons 1988, 401). “This case,” asserted Tribe, whose commanding presence and dramatic style contrasted sharply the quieter Hobbs (who had seemed a bit awed at the specter of the Court), “is about the limits of government.” Tribe tried to shift the focus from the conduct involved to the associational interests infringed. He said that the case was not about the state’s ability to protect children or preserve public decorum, or even to preserve marriage. “The power invoked here – and I think we must be clear about it – is the power to participate in the most intimate and, indeed, I must say, embarrassing detail, how every adult, married or unmarried, in every bedroom in Georgia will behave in the closest and most intimate social association with another adult.”

Justice Powell interrupted to ask the question which most plagued him.

“Professor Tribe, is there a limiting principle to your argument?” The rest of his question, as had his comments in an earlier memo, suggested that Powell was as alarmed – or perhaps even more so – by the prospect of the denigration of the word “home” as he was about the acts of bigamy, incest, etc., which might be protected there if Tribe’s argument carried the day. “You emphasize the home, and so would I, if I were arguing the case. But what about, to take an easy one, a motel room, or the back of an automobile, or a toilet, or wherever. What are limiting principles?”

I’m sure there comes a moment during the thirty minutes they are given to make their best case before the Supreme Court when every lawyer looks at the nine individuals on the bench and tries to assess the impact of their performance, making inferences based on their questions or the tone in which they are asked. Tribe later recalled that it was at
that moment that he became emboldened. Tribe, unaware of Powell’s over-sensitivity about the word “home,” seemed to have mistaken Powell’s legendary courteous and gentle approach for approval of his argument. In a letter Tribe wrote to Powell years later, he confided that

...I have long cherished the moment during that argument when you leaned forward and, commenting on the approach I was taking to the issue of personal privacy in one’s home, said gently that if you were in my shoes you’d be “arguing the case the same way.” Believing the argument in *Hardwick* to be one of my best, I appreciated your kind words – and appreciate them still (Letter by Tribe to Powell, October 26, 1990, Powell papers).

In answer to Powell, Tribe repeated his arguments about how the home was the limiting factor. “What about incest in the private home?” asked Powell. Tribe admitted that the “private home does not shield anything that one might do there,” and said that the state’s authority to enforce contracts would authorize it to punish actions such as adultery.

Powell interrupted again. “So the limiting principle is that it’s limited to sodomy?” And when pressed in this way, Tribe articulated something that sounded very much like a Millsian harm principle. “It includes all physical, sexual intimacy of a kind that are not demonstrably physically harmful, that are consensual and non-commercial, in the privacy of the home.”

Later in the argument, Powell asked Tribe how the home as a limiting principle might be applied. “Would you distinguish the home from the back of an automobile?” “Certainly, Justice Powell.” “And a public toilet?” “Certainly.” “What about a hotel room over night?” Tribe tried to steer the questioning in another direction. “We’re not arguing for absolute immunity, we’re arguing for heightened scrutiny.”
The weakest point in Tribe’s argument came while Chief Justice Burger pushed him on the incest question. Tribe answered effectively that the consent of children engaging in relations with their parents would not be legally recognized as real consent. “What about the adult child, perhaps?” Burger asked. “What about two consenting adults?” For a moment, Tribe lost his usual composure, for in the context of incest between adults, Tribe’s limiting principles of home and consent did not provide a clear rebuttal. He lapsed momentarily into the role of legal scholar, making an argument which was probably far too post-modern for any member of the Court.

I doubt, Mr. Chief Justice, that the state would have to approve, just because a woman is over 21, that if her father induces her to have sex that’s got to be consensual. We think the state can assume that there are certain relationships in the context of which – even if both people are adults – in the context of which consent, because of the power structure, may just be an illusion.

Tribe closed his arguments with rhetorical flourishes about limited government, and compared the Georgia law to “Big Brother” watching and dictating the details of one’s intimate life.

Michael Hardwick was pleased with Tribe’s performance, and felt optimistic about how the Court would rule in the case. “When he got done, everyone was very much pre-victory. They were sure I would win,” recalled Hardwick. “About forty of us went to lunch around the corner, and everything seemed very positive and optimistic,” he said. (Irons 1988, 401).

Hardwick left D.C. and returned to Miami, where he had gotten another job catering. “Then came the waiting period,” he said. “That was the worst phase for me,” he said, “because we never knew when the decision was coming. I would be on pins and
needles, and every time the phone rang I'd be jumping” (Irons 1988, 401). Hardwick would have to wait on pins and needles for four months while the Court decided the fate of the Georgia sodomy law.

The Conference

In the two days between the oral arguments and the conference at which Bowers was discussed and a vote taken, the justices went over their notes and prepared their thoughts regarding the case. As was his practice, Powell asked Mosman to assess the oral arguments. The memo, however, seemed to be geared more toward arming Powell with quick responses for issues that other justices would be likely to raise in conference. Not one criticism of Hobbs – the state’s attorney – was included. The bulk of the memo attacked Tribe’s limiting principles as being insufficient, and would unduly hamper the authority of the state. “The logic of Mr. Tribe’s position is expansive,” he wrote. What seemed to upset Mosman most about Tribe’s position was the assertion that in situations involving consensual activity within the home, the state’s interest in protecting morality was insufficient to justify state authority. “Mr. Tribe repeatedly – and condescendingly⁵³ – dismissed the state’s interest in legislating some moral principle,” wrote Mosman. But this Court repeatedly has stated that the state does have a legitimate interest in legislating morality.” Mosman argued that under Tribe’s requirements, the state would be helpless to prohibit “recreational drug use, at least with marijuana, incest, suicide, and bestiality,” and quite probably prostitution.

⁵³ Powell apparently seconded this assessment of Tribe’s attitude, for he underlined “condescendingly,” and wrote “Yes!” beside it.
The other point in the memo—and this was the one that really resembled notes for someone getting ready to defend one’s position in a debate, rather than consider issues with colleagues—was an attack not on one of Tribe’s positions, but on the line of questioning advanced by Justice Stevens. “Justice Stevens appeared to think the state did not really have an important interest in this statute, because it did not prosecute this case when it was handed to them on a ‘silver platter,’” wrote Mosman. “The state does not tell the county attorney which cases to prosecute, and the county attorney in Fulton County (Atlanta) may well have views on these matters that differ from the State.”

In spite of Mosman’s heavy-handed assessments, Powell asked his clerks to continue to think of alternative arguments with which he might be able to vote to invalidate the law, but indicated that he favored an Eighth Amendment approach, and would like to see that argument fleshed out. Mosman responded with an undated memo in which he told Powell that the Robinson/Powell argument could be used either to reverse or affirm—though Mosman favored reversal. “You could—quite properly—describe the case as only raising the question of whether the Constitution embodies a fundamental right to engage in homosexual sodomy,” wrote Mosman. “On that basis, you could vote to reverse.” If he voted to reverse, Mosman suggested that Powell could file a concurring opinion (if the majority voted to reverse, as Mosman hoped) which would explain that had Hardwick been convicted and sentenced to prison, you would have probably found it “unconstitutional to imprison someone for sodomy on the basis of Robinson/Powell.”
Mosman reluctantly explained that the Robinson/Powell “argument also could be sued to support affirmance, but for different reasons than express by the CA11.” In this scenario, Powell could argue that Hardwick had presented a facial challenge to the validity of the law, and therefore punishment could be “viewed in the abstract.” Powell could then conclude that any sentencing under the statute would violate the Eighth Amendment, and “therefore the statute is facially unconstitutional.” Mosman reminded Powell that Hardwick’s petition had not raised any Eighth Amendment questions. He concluded the memo with, “The strength of both positions is that it removes the fundamental unfairness of the statute without getting into the serious problems that would accompany recognition of a fundamental right.”

Powell also wanted to know if the sodomy law was a misdemeanor or a felony, and what punishment it prescribed. Powell was apparently still considering the plausibility of using a proportionality argument, for he also asked Mosman to what had been the punishments for violation of the Virginia sodomy law which had been at issue in Doe v. Commonwealth. If the punishment for Virginia’s sodomy law was substantially less than in Georgia, Powell might have been able to make the case that proportionality had not been an issue in Doe.

In an April 2 memo, Mosman informed Powell that sodomy in Georgia was “punishable by imprisonment for not less than one year nor more than 20 years,” and that the Virginia law “made sodomy a Class 6 felony punishable by not less than one year nor

54 In Powell’s March 31 memo to Mosman, discussed above, he had written, “Possibly the crime is a felony of some level.”
more than five years in prison.” Mosman also informed Powell that he and the other clerks had been unable to refine the Eighth Amendment theory any further. More striking, however, was Mosman’s recommendation that even should Powell decide to discuss Eighth Amendment difficulties with the law, that he should vote to uphold the statute anyway. “As to the Robinson/Powell argument,” he wrote, “the three of us who worked on the theory last night — Anne, Bill, and I — continue to recommend that you use that theory to vote to reverse and write separately to introduce the argument.” Mosman argued that it would be inappropriate to strike the law on Eighth Amendment grounds, as it had not been introduced by Hardwick’s lawyers, and because “This petitioner has not yet suffered, nor does it appear likely that he will suffer, any imprisonment.” Perhaps trying to reassure Powell, he added, “If he or someone else is convicted and sentenced, this argument will be available.” The final sentence of the two-paragraph memo left no doubt as to Mosman’s position on the subject. “We believe that it would be a mistake to create a fundamental right to protect this conduct.”

The handwritten notes that Powell took with him to the conference on April 2 suggest that he was still very much undecided about how he would vote. On the one hand, what figured most prominently on the single sheet from a yellow legal pad was the comment, “Not persuaded on case before us is a fundamental right. Hesitate.” On the other hand, the rest of the scribbling was devoted to outlining his arguments to strike the law on Eighth Amendment grounds. It appeared that Powell’s conversations with

\[55\] It is interesting to note that Chinnis was the only one of Powell’s four clerks that term who did not take part in that meeting.
Chinnis had made at least some impression on him, for in his brief summary of the case, Powell wrote, “He [Hardwick] alleges he has the *same* sexual desire as heterosexuals, directed however to men” (emphasis in original). It would thus probably constitute an Eighth Amendment violation, he wrote, “to punish him criminally (imprisonment) for conduct based on a natural sexual urge privately and with a consenting partner.” The rest of Powell’s notes explained, how the Court’s opinions in *Robinson v. California* and *Powell v. Texas* would support this decision (discussed above).

On April 2, the justices gathered in the conference room, shook hands, and sat around the long wooden table, the Chief Justice presiding at one end of the table, and Justice Brennan at the other, the remaining justices along the sides. As was customary, the Chief Justice began the conversation on *Bowers*. Sodomy, asserted Burger, was the only relevant issue before the Court. Because the Does did not have standing, marital privacy was not an issue. “Substantive due process,” he said, “is not unlimited.” He quoted the passage from Justice Harlan’s dissent in *Poe v. Ullman* in which Harlan specifically excluded homosexuality from behavior that would be protected by a right to privacy. Although he conceded that substantive due process had been invoked to extend privacy to areas besides marital privacy, he stressed how limited those applications had been. He then launched into a rather impassioned lecture about the history of sodomy law, stressing that it had been criminalized “for centuries.” The concept of privacy of the

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56 The conference remains one of the most mysterious aspects of the Supreme Court’s workings, as no one but the justices themselves are present. No formal records are kept, so what we know about conferences comes from informal notes taken by some justices when they become public record years later. The description of the *Bowers* discussion provided here is based on the conference notes of Justices Powell and Marshall, unless otherwise noted.
home was not operative, he argued, because there was no limiting principle, and would prohibit the state from criminalizing incest, prostitution, etc. The previous privacy decisions, he said, had to do with the decisions of the family. He pointed to Powell’s majority opinion in *Moore v. City of East Cleveland* to argue that it was because of the historical importance that society had always bestowed on the family that families had been extended certain privacy rights. But no aspect of family was involved in *Bowers*. Thus, he concluded, “There is no fundamental right to engage in sodomy.”

Justice Brennan voiced his opinion next. He said that the Chief had the question wrong. The central issue was not about a fundamental right to sodomy, but about the right of privacy, specifically, sexual privacy within the home. Brennan agreed with Tribe’s argument that two rights were implicated in *Bowers*: the right to privacy, and he referred to the Court’s precedents in *Griswold* and *Eisenstadt*, and the rights associated with the home, as implied in *Stanley*. *Stanley*, he said, implied that unless the interests of the state are quite strong, the home is a person’s “castle.” He rejected Burger’s contention that there was no limiting principle, echoing Tribe’s arguments about the intersection of home and privacy. He reminded the Court that affirming the decision would not prohibit the state from regulating activities in the home having to do with privacy, but just that the state would have to demonstrate some heightened justification. The state, he argued, had an obvious interest regarding incest or adultery.

It was Justice White’s turn next. He kept his remarks to a minimum, saying that on the whole, he agreed with what Burger had said. Justice Marshall, who followed, also
commented only briefly, saying that he supported the arguments of Brennan and that, in his opinion, *Stanley* was the controlling case.

Justice Blackmun began by praising the opinion of the appellate court, and said Frank Johnson had crafted a "great" opinion. Georgia, of course, had a strong, obvious interest in regulating the decency of the public environment, and he noted that Georgia was in the Bible belt, so that it was hardly surprising that sodomy was sanctioned. But he agreed with Brennan and Marshall that *Stanley* was relevant because nothing outside the home was involved. In a remark that might not have eased the worries of his more conservative colleagues, Blackmun said the situation before them was similar to the situation in England, when prostitution was decriminalized. He also suggested that *Loving v. Virginia* might be relevant, because the Georgia law infringed on married couples, too (it is unclear why he chose to cite *Loving* in this context rather than *Griswold*).

Powell, who spoke next, said he was not persuaded there was any fundamental due process right involved in the case, and he could cast his vote on due process grounds because of the lack of a limiting principle. "I would not agree that every person has a fundamental right to engage in sodomy any time, any place," he said. However, he hoped he might be able to find a "middle ground," and said he would be willing to view the case as presenting a facial challenge based on the Eighth Amendment, "If I find a violation of the Eighth Amendment." Then, turning to the notes he'd brought with him,
he went over his argument. *Robinson v. California* was possibly relevant, for it found that a criminal conviction for the status of being a drug addict was cruel and unusual. And, as implied in *Powell v. Texas*, if sodomy is closely linked with the condition of homosexuality – then any criminal sentence might constitute an Eighth Amendment violation. As if he were imparting a great secret to members of the conference, Powell leaned forward and said, “There are men who *can* gratify their sexual desire *only* with another man,” and after a brief pause to let that news sink in, he repeated his earlier assertion, “I’ve never known a homosexual.” Apparently, his fellow justices were more shocked by this assertion than the revelation that some men preferred men to women. Blackmun, who apparently knew that Chinnis was gay, told his clerks after the conference that he almost said, “Of course you have. You’ve even had gay clerks.” He said instead, “But surely, Lewis, you were approached as a boy?” Whatever response Powell made was not noted (Jeffries 1994, 528).

Powell continued with his argument. “Given this fact [that gay men can satisfy their sexual urges only with another man], I find it difficult lawfully to imprison such a person who confines his *abnormality* to a private setting with a consenting homo.” Powell stressed “abnormality” to emphasize the parallel with alcoholism or drug addiction. And, as if trying to convince himself, he added, “No one is adversely affected by such conduct.” Powell stressed that the strength of his formulation of the issue was that there would be no problems with finding a limiting principle. “Incest is different because of the genetic consequences. Rape is obviously different.” He concluded his

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[^57]: Justice Marshall’s notes refer to *Robinson* as the “California case concerning dope.”
comments by saying, “Possibly I could remand to determine whether Hardwick suffers from this abnormality.”

Rather than striking the “middle ground” he had hoped for, “Powell’s speech made no one happy,” as Jeffries put it.

The liberals thought his theory bizarre and the result distressingly narrow. It did no more than preclude criminal prosecution, a possibility that had never been realistic. This was at best a minor victory. The conservatives, on the other hand, were confused and disappointed. The Eighth amendment issue had not even been raised in the courts below. Why did Powell raise it now? And if Powell agreed with them that sodomy was not a constitutional right, how could a law against it be unconstitutional? (Jeffries 1994, 523).

Although clearly not comfortable with the situation, Powell concluded by indicating that he would vote to affirm the lower court’s opinion.

Justice Rehnquist followed Powell, and said that he agreed with Burger and White. He noted that much of “the criminal law has moral underpinnings.” The Stanley precedent was “unfortunate,” because it merely made the Bowers case more complex, not easier, as the liberals suggested.

Justice Stevens was the only justice who seemed to share—though to a lesser degree—Powell’s misgivings about the case. He agreed with Burger, White and Rehnquist that the histories and traditions of society favored reversal of the lower court’s decision. He also agreed with the conservatives that the moral convictions of a majority within a community was a legitimate state interest, and “justifies criminalizing deviant conduct” in public situations. Stevens struggle over voiding the law seemed to have less to do with the problem of a limiting principle than it did with his discomfort of approving sodomy, which he called “loathsome,” whether engaged in by homosexuals or
heterosexuals. Apparently, unlike Powell, Stevens had met homosexuals, for he felt compelled to state for the record, “I hate homos” (Garrow 1994, 660). But in situations where the privacy of the home was implicated, morality or dislike of the behavior was probably not sufficient justification, and “we have to live with it [homosexuality]” (Garrow 1994, 660). He also agreed with Blackmun’s assessment that since the law made no distinction between heterosexual and homosexual sodomy, that the law infringed on the privacy right of married couples.

O’Connor was the last to register her opinion. The Court, she said, has repeatedly stressed that the right of privacy is not absolute. In light of the fact that sodomy laws had been on the books at the time the Constitution was written, and in light of the fact that there was no obvious framework within the constitution that would preclude such laws, she had to conclude that there was no fundamental right to engage in sodomy.

That put the vote at five to four, in favor of affirming the decision of the eleventh circuit. By tradition, if the Chief Justice does not vote with the majority, the responsibility of assigning the opinion falls to the most senior justice within the majority. Brennan assigned the opinion to Blackmun. Burger assigned the dissenting opinion to White.

**It Ain’t Over ‘Til It’s Over**

In the days following the conference, Powell continued to feel torn about the Bowers case, and Burger seized the opportunity to try to lobby – or perhaps more aptly, bully – Powell to vote to reverse. The day after the conference, Burger sent a personal
three-page memo to Powell commenting on the Eighth Amendment theory. The memo is truly extraordinary, both for the passion with which Burger argued, and for its extreme homophobic sentiments – sentiments expressing a contempt so exaggerated that it made Steven’s “I hate homos” comment seem almost friendly by comparison. Indeed, the memo is so striking, that the best way to convey its meaning is simply to include it here, in its entirety.

Dear Lewis:

I have some further thoughts on your suggestion at Conference that Hardwick cannot be punished because of his “status” as a homosexual.

I suggest to you that this argument is not before us. Hardwick’s complaint seeking a declaratory judgment contains no such claim. The argument was certainly not pressed at all by Hardwick’s counsel in his brief or at oral argument. Hardwick’s brief does not even cite either the Eighth Amendment or Robinson v. California, 370 U.S. 660 (1962). There are only two citations to Robinson in the sixteen briefs that have been filed. The Amicus Brief of the Lambda Legal Defense Fund, at 20, cites Robinson merely in passing. The Amicus Brief for the Lesbian rights Project, at 25 n.46, cites Robinson in a footnote, but even that group concedes there is “an interesting debate,” yet to be resolved, about whether homosexuality is a “matter of genes ... or of personal choice.” Id., at 24-25.

You will remember my “degree” in Psychiatry, which led me to be very skeptical about that breed of M.D.’s. I have never heard of any responsible member (or even an “avant-garde” member) of the A.P.A. who recognized homosexuality as an “addiction” in the sense of drug addiction. It is simply without any basis in medicine, science, or common human experience. In fact these homosexuals themselves proclaim this is a matter of sexual “preference.” Moreover, even if

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58 Burger mentioned addiction here and later in his memo. It is unclear to me if he used “addiction” because he misheard Justice Powell when he called homosexuality an “abnormality,” or if he focused on addiction because in Robinson and Powell, the arguments were based on the litigant’s status as a drug addict and an alcoholic, respectively.
homosexuality is somehow conditioned, the decision to commit an act of sodomy is choice, pure and simple – maybe not so pure!

We can only speculate as to why Hardwick did not make this particular argument that you advance. Maybe Hardwick did not want to become subject to "compulsory treatment programs," Robinson, supra, at 665, that are prescribed for "helpless" people like narcotics addicts. But whatever the reason, are we really to ignore the theory of Hardwick's lawsuit and render an opinion on entirely different grounds without the guidance of any briefing or argument or even history?

Even if I thought that the Eighth Amendment issue were before us, I would reject it for the same reason that I reject the Fourteenth Amendment argument actually made by Hardwick. Both arguments are extremely dangerous because they prove far too much. The Fourteenth Amendment argument goes too far because there is no limiting principle that would allow the states to criminalize incest, prostitution or any other "consensual" sexual activity. Moreover, it would forbid the states from adopting any sort of policy that would exclude homosexuals from class rooms or state-sponsored boys' clubs and Boy Scout adult leadership.

The Eighth Amendment argument, while it avoids (at least for the present) the "slippery slope" of the Fourteenth Amendment argument, creates a potentially greater mischief. Georgia here criminalizes only the act of sodomy. If the act of sodomy is a "status," then what about the acts of incest, exhibitionism, rape, and drug possession. A drug addict must necessarily "possess" drug [sic] and can be convicted – at least up to now – for possession. In short, your argument would swallow up centuries of criminal law since anyone who could has a psychological dependency would be entitled to carry out (at least in private or with a consenting partner) whatever is necessary to satisfy his cravings.

There is no evidence that Hardwick is a "compulsive" homosexual so as to have even a colorable Eighth Amendment claim. See Powell v. Texas, 392 U.S. 514, 552 n.4 (1968) (WHITE, J., concurring). Homosexuality is obviously not the same as addiction to narcotics. By definition, one has the "status" of a narcotics addict only if one is physically compelled to take narcotics, but even that's controllable. But surely homosexuals are not "sex crazed" automatons who are "compelled" by their "status" to gratify their sexual appetites only by committing sodomy. Heterosexuals,
after all, manage to live in a society where sexual activities are often proscribed except within the bonds of marriage.\(^{59}\)

The record simply does not remotely support a conclusion that sodomy is compulsive. Moreover, I seriously doubt whether medical evidence would support this notion for all or even many homosexuals. It is extremely unlikely that what Western Civilization has for centuries viewed as a volitional, reprehensible act is, in reality, merely a conditioned response to which moral blame may not attach. Are those with an "orientation" towards rape to be let off merely because they allege that the act of rape is "irresistible" to them? Are we to excuse every "Jack the Ripper?"

Hardwick merely wishes to seek his own form of sexual gratification. Undoubtedly there are also those in society who wish seek [sic] gratification through incest, drug use, gambling, exhibitionism, prostitution, rape, and what not; such persons may even file complaints in federal court averring that they "regularly engage" in the prohibited acts and "will do so in the future." Complaint, in J.A., at 3. But that hardly establishes a basis for upholding a facial challenge to an otherwise valid statute. As Justice Holmes put it, "pretty much all law consists in forbidding men to do some things that they want to do...." Adkins v. Children's Hospital, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

April 13, an unlucky day, will mark my 30\(^{th}\) year on the Bench. This case presents for me the most far reaching issue of those 30 years. I hope you will excuse the energy with which I have stated my views, and I hope you will give them earnest consideration.

Regards
WEB

Powell circled the words "most far reaching issue" and wrote "Incredible statement!" Although Powell found the case troublesome, he didn't think it overwhelmingly important, years later calling it a "frivolous" case. As for Powell's reaction to the letter overall? "There is both sense and nonsense in this letter – mostly the

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\(^{59}\) I wonder what Clinton's Senate trial for impeachment would have looked like had Burger presided.
latter.” The memo did not stay a secret for long, and some believed that Burger’s memo had “gotten to” Powell (Jeffries 1994, 524).

Whether it was Burger who had “gotten to” Powell, or the advice of Mosman, or simply his own convictions on the issue is difficult to say. But some combination of these forces led Powell to change his vote. In an April 8 memo to all eight of his colleagues, Powell announced that after “further study as to exactly what is before us, I conclude that my ‘bottom line’ should be to reverse rather than affirm.” He made no mention of the Burger memo, or any other source of influence. Powell wrote that although he still believed that a prison sentence for a private act of homosexual sodomy constituted an Eighth Amendment violation, “as several of you noted at Conference – my Eighth Amendment view was not addressed by the court below or by the parties.” He reiterated that he did not believe there was a “substantive due process right to engage in conduct that for centuries has been recognized as deviant, and not in the best interest of preserving humanity.” Furthermore, he added, “I also hesitate to create another substantive due process right. He indicated that he would explain his view of the case. “I will not know,” he wrote, “until I see the writing, whether I can join an opinion finding no substantive due process right or simply join the judgment.”

Powell’s change in vote was followed by another memo from a colleague, but this one approached the subject with a far lighter tone than the Burger memo. “Dear Lewis,” wrote Stevens.

Your letter, which expresses some uncertainty as to whether your final vote would be one to reverse or to affirm brings to mind the disposition of the court in Coleman v. Miller, 307 U.S. 433, 446-447, where the Court, with all nine Justices participating, disposed of the question whether the
Lieutenant Governor of Kansas was part of the state legislature, by stating that the Court was “equally divided” on the issue.

Maybe we should follow a similar course in this case.

Powell apparently saw and liked the humor, for at the bottom, he wrote “4 ½ to 4 ½!” As aptly noted by Jeffries, “A split vote was technically impossible, but it precisely reflected Powell’s view” (p. 524).

**Drafted For The Majority, The Whizzer Takes The Handoff**

Powell’s change of heart put Burger in the majority, which meant that he had authority to assign the majority opinion. On April 9, Burger sent a memo to White. “In light of Lewis’ memo of April 8th,” he wrote, “this will serve as an assignment to you” of the majority opinion. The choice made much sense, particularly since Burger was the only other member of the majority who seemed to care a great deal about the case (as evidenced by his dissent from denial to grant cert), but whose views were so infused with impassioned predilections that probably even Burger himself realized that any majority opinion he authored would inevitably be filled with “nonsense.”

Besides his concern for the case, White was the sensible choice in another way. This was not a case amenable to high rhetoric, and no fancy legal philosophy was necessary to justify some new ground taken by the Court; Burger simply needed someone to get the job done. And, “Whizzer” White, as reporters dubbed him during his days as an All-American football player, “wrote a lot like he played,” recalled a former law partner. “Not pretty, not graceful, but he got the job done and didn’t leave anything standing in his wake” (Hutchinson 1998, 629). His method and philosophy of opinion
writing are well summarized by the advice he gave the clerks who wrote draft opinions for him: “Write a page a day for no more than twelve days. Do not create or apply any ‘tests’ – simply resolve the case on the basis of precedent” (Hutchinson 1998, 419).

Opinions should be aimed at getting the job done “precisely and unobtrusively,” without drawing “attention to its own elegance” (p. 363) and “without a lot of fuss” (p. 364).

Nor would the strong criticism the opinion was likely to gather be a problem. White was not the sort to be much bothered by the criticism that would likely attach to the opinion, having learned decades before to care little what reporters said about him during his football days. And he cared as little for academics as for sports reporters. “The[ir] criticism was a source more of pride or amusement than of pain to White. He had spent much of the last half century of his life not caring what others thought of him, especially in print” (Jeffries 1998, 384).

That Burger and White were bedfellows on an issue might seem odd, given that White was a Kennedy appointment, and that Burger was appointed by Nixon. But, as noted by The New Republic after White’s confirmation, “the appointment of a Supreme Court Justice is always something of a shot in the dark” (Jeffries 1998, 324). Perhaps the most accurate prediction regarding White’s jurisprudence was published in a paper from the new justice’s hometown in Colorado, right after confirmation.

[H]e will interpret the Constitution coldly, dispassionately, ever mindful of the separation of governmental powers. This, of course, would place him with the Conservatives, and it’s possible he may one day give his former boss the President [Kennedy], some unexpected decisions (Jeffries 1998, 325).
In addition to respecting the concept of separation of powers, White was the consummate restraintest judge. As he is reported to have said halfway through his career, "Judges have an exaggerated view of their role in our polity" (Hutchinson 1998, 8). On most issues, White was consistent in his deference to the political branches, even when the result was policy decisions with which he disagreed. White's strong commitment to judicial restraint was illustrated shortly after he was appointed to the Supreme Court. In Bell v. Maryland 378 U.S. 226 (1964), the Court considered whether "neutral" arrests by police when they were called upon to enforce the private discriminatory practices of business owners implied "state action."

I strongly object to the notion that the Fourteenth Amendment regulates private choice and that individual action is forbidden by the Constitution if thought by this Court to be irrational or unwise. Powers like this have historically been legislative powers, exercised by elected representatives after arriving at some consensus that specified behavior is inimical and must be controlled by the State (Hutchinson 1998, 351).

There can be little doubt that White was opposed to segregation and discrimination whatever its source, as he left the trenches of the battle against discrimination in Alabama, when he'd worked for Attorney General Robert Kennedy, to take his place on the Bench.

Notwithstanding his commitment to judicial restraint on most issues, he also had a great deal of respect for the more traditional model of the judge who closely followed

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60 In 1883, in the Civil Rights Cases, the Supreme Court invalidated the Civil Rights Act of 1875, a law passed by Congress to prohibit discrimination in public accommodations. Congress had based its authority for the law on the equal protection clause of the Fourteenth Amendment. The Court noted that the Fourteenth Amendment limited only state actions of arbitrary discrimination, not the actions of private business owners. The petitioners in Bell argued that although the segregationist policy of the business was private, the use of the police to enforce the policy implicated the state.
precedent and who “stick[s] to the cases” (Jeffries 1998, 364). In most instances, once a case had been decided, it was precedent, and White would resign himself to that fact, even if he had disagreed with the ruling at the time.

Whether White himself was “vituperatively homophobic” is difficult to say (though certain aspects of the decision, discussed below, could certainly suggest that), for he did not leave the kind hints left by Burger (e.g., his memo to Powell) or Stevens (e.g., “I hate homos”). And on most issues, it might not have mattered much anyway what White thought on the substantive issue at any rate, given his strong predilection for judicial deference.

What made Bowers of particular importance to White was that the case represented the intersection of issues which nagged him — the scope of judicial power, and the ramifications of the Court’s privacy jurisprudence. First and foremost, as just discussed, absent some clear constitutional directive, White believed strongly in a limited role for the courts.

Second, notwithstanding his general respect for precedent, White was adamantly opposed to the Court’s decision in Roe, and Bowers represented an opportunity for him to reduce the scope of Roe’s implications, if only in this rather narrow area of sodomy laws. Prior to the Bowers decision, if one had examined White’s voting record on privacy-related — but excluded Roe — it would have been easy to come to the conclusion that White generally supported the Court’s privacy jurisprudence. Nor did White always oppose invoking substantive due process to reach results. Indeed, at the same time Justice Blackmun was drafting the majority opinion for Roe, Justice White authored what

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eventually became the majority opinion\(^{62}\) in a case relying on much the same precedent as *Roe* – i.e., *Meyer v. Nebraska* and *Skinner v. Oklahoma*.

White's problem with *Roe* was not that he opposed abortion; rather, White viewed *Roe* as an “improvident and extravagant exercise” of judicial power, with “nothing in the language or history of the Constitution” to justify it. Years after the abortion case, White told his closest friend that *Roe* was the “only illegitimate decision the Court rendered during my tenure. In every other case there was something in the Constitution you could point to for support. There, nothing” (Hutchinson 1998, 368). And, according to White, “An illegitimate decision was entitled to no respect,” and White never did vote to support abortion (Hutchinson 1998, 369).

To many, White's record on substantive due process and privacy seemed inconsistent. But in White’s mind, there was no inconsistency, for the common thread of cases such as *Griswold* and *Stanley* was that the opinions “rested on the same foundation” of “profound, almost preconstitutional respect for the marriage relationship and the family unit” (Jeffries 1998, 371). White’s biographer described the Justice’s position this way:

> [T]he stickler for the law, with little patience for social engineering, could vote and speak like a legislator in areas touching the family.... The sanctity of the family structure, as he conceived it, was central to Byron White as a judge (Hutchinson 1998, 371-72).

For White, then, the limiting principle of a substantive due process right to privacy was marriage and the family. Although a host of judges, lawyers and scholars have categorized

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\(^{62}\) Originally, Justice Brennan was assigned to write a summary opinion dismissing the case due to procedural problems. White circulated a dissent, and the Court voted with White, 5 to 2, to reverse. (Hutchinson 1998, 370).
Roe as being related to ideas of family, White did not. “In Byron White’s world, simple rules are rigidly observed. What makes his behavior seem unpredictable is that he makes little effort to explain the hierarchy of the controlling principles” (Hutchinson 1998, 5).

Perhaps White felt in some way indirectly responsible that his use of substantive due process and notions of privacy had given rise to a case, such as Roe, that was not limited to the family unit. At any rate, Bowers gave him the opportunity to express his alarm that the right of privacy be extended beyond the context of family. While the limiting structure created by Blackmun in Roe – i.e., the relationship between doctor and patient – was enough to secure a majority, it was not satisfactory to White, because it was a non-familial relationship.

And so the shy justice with an “aggressive, and encompassing, view of his own privacy” (Hutchinson 1998, 2), someone who had assisted in the birthing of the privacy doctrine, was now in a position to restrain the monster that he inadvertently helped to create.

**White’s Quick And Dirty Sodomy Opinion**

White assigned the rough draft of the opinion to a clerk, with his customary “twelve pages/twelve days” deadline. Twelve days later, on April 21, the clerk, “who worked feverishly to prepare an opinion that broke as little doctrinal china as possible on the way to the result White required,” presented his draft to White. White told the clerk, “I got tired of waiting and did it last night” (Hutchinson 1998, 452). Justice White’s opinion, barely nine pages long, gets the job done, but with only the minimal in terms of
explaining his hierarchy of rights. Just as Justice Powell’s biographer described *Bowers* as Powell’s “greatest defeat,” White’s biographer described *Bowers* as a missed opportunity to illuminate his hierarchy of principles. “What could have been the culminating expression of long-standing convictions and obviously profound concerns ... impressed many as an intellectual hit-and-run incident” (Hutchinson 1998, 453).

Blackmun’s response to White’s initial draft was to indicate that he was working on a dissent. Rehnquist joined with White two days after the opinion was circulated. Powell wrote that he would “join the judgment but will probably write separately.” In a separate memo to Mosman, Powell confided, “It is not yet entirely clear how I can justify writing in view of Byron’s flat reversal of CA11, the effect of which is to sustain the validity of the Georgia statute.” And for several weeks, Powell continued to agonize over his Eighth Amendment theory. This intellectual turmoil is obvious in his first draft of a concurrence – one that never made its way to the print shop for circulation. On the one hand, Powell thought the state had “a substantial if not compelling” interest in “in assuring the continued existence over the centuries ahead of the human race.” He discounted the role of sex in terms of human fulfillment when he wrote, “Sodomy, a form of sexual gratification unrelated to family and children, may not have any redeeming societal purpose.” On the other hand, since sodomy laws were so difficult to enforce, he wondered if sodomy laws actually “serve any purpose.”

Mosman continued to erode Powell’s confidence about the applicability of the Eight Amendment, what he came to call sarcastically his “addiction” theory, referencing Burger’s letter. Mosman, taking his cue from Burger, stressed that a theory using
Robinson/Powell to prohibit criminalization of behavior if that behavior is somehow compelled or involuntary, was “an alarmingly broad principle to use.” Furthermore, wrote Mosman, “my impression is that it is not in accordance with your general views,” to which Powell wrote “True” in the margin. If Powell insisted on developing an Eighth Amendment theory, Mosman said Powell would probably be better served by adapting the proportionality argument advanced in Solem v. Helm. This tactic, suggested Mosman, would allow more “flexibility,” and had “the virtue of not ‘slapping down’ a state in advance for a disproportionate sentence, when in fact no sentence has been imposed.” He reminded Powell that Hardwick had not been imprisoned, and “it is better to wait until someone actually is sentenced before resolving this very thorny issue.” And, “If that never happens, then your basic constitutional concern that people not be sent to jail for homosexual conduct will have been satisfied.”

Ironically, Powell’s attempt to find a “middle course” in Robinson’s interpretation of the Eighth Amendment may have fueled White’s resolve to free the states from judicial preference – especially when he viewed such creativity as nothing more than substantive due process by another name. Consider the following passage from White’s dissent in Robinson.

Finally, I deem this application of “cruel and unusual punishment” so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than its own notions of ordered liberty. If this case involved economic regulation, the present Court’s allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it
obviously cannot match either the States or Congress in expert understanding (Hutchinson 1998, 338).

So whereas Powell’s middle course might have attracted justices merely “allergic” to substantive due process but offended by the sodomy statute, White viewed such judicial creativity in pursuit of a specific policy outcome as unacceptable.

The Majority Opinion: A Straight And Narrow History

White’s opinion got straight to the task at hand, and can be easily summarized as follows:

1. **Declaration of Fundamental Rights is Serious Business:**
   Declaration of fundamental rights of things not in the Constitution is serious business that strains the legitimacy of the Court, and should only be undertaken in extremely limited circumstances. Courts are closest to illegitimacy when inferring rights into the Constitution.

2. **Just one question before the Court:**
   The only question before the Court is: Is the right to engage in homosexual sodomy a fundamental right?

3. **Sodomy is not a fundamental right:**
   Using any standard to determine what makes a right fundamental – i.e., reference to history, reference to things that are “fundamental to ordered liberty,” etc. – homosexual sodomy cannot be considered a fundamental right. Sodomy has always been prohibited and objecting to this in terms of a constitutional right is a new thing.

4. **The privacy cases are not about a right to sexual freedom:**
   Privacy is not in the Constitution. The previous privacy cases have been about marriage, family and procreation. They are not about sexual freedom.

5. **The location of the conduct is irrelevant:**
   White makes two points here. First, that *Stanley* is irrelevant, because it was based on the First Amendment, which protects ideas, not conduct. Second, that conduct occurs in the home is not a sufficient limiting principle.
6. **Morality is a sufficient justification for a law:**
Morality alone provides a rational basis for the law.

Although White asserted that the only question before the Court was whether or not homosexual sodomy constituted a fundamental right, White had a different question in mind. For White, the real question was: Can the Court ever impose its views on the majority by overriding legislation in absence of a constitutional directive, and if so, when? The answer White would have most liked to have given was: No, the Court, in absence of a constitutional directive, is powerless to limit the political branches. However, two factors precluded White from giving this answer. First, White had an almost equally strong instinct that the Court should follow precedent, and it would be impossible to deny the many cases of non-economic substantive due process. “It is true,” wrote White, as if confessing a sin, “that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have a substantive content,” and that many of these cases recognized rights “that have little or no textual support in the constitutional language” (p. 191). Second, notwithstanding White’s general rejection of substantive due process, it was also impossible for him to deny that he, too, had engaged in the process, most notably in *Griswold v. Connecticut* and in *Stanley v. Illinois*.

And so White admitted that there were times when notions of substantive due process had carried the day, but such instances should be extremely rare. What rights could pass constitutional muster? White relied on precedent to locate tests, and found
two: (1) the Palko test, which “includes those fundamental liberties that are ‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if [they] were sacrificed’”; and (2) the Moore test, “where they are characterized as those liberties that are ‘deeply rooted in this Nation’s history and tradition’” (p. 191-192). White included Griswold in this category (i.e., that it looked to history and tradition to justify placement of marital privacy in the realm of fundamental right) – never mind that Griswold preceded Moore by some dozen years. Having thus stacked the analytical deck, White could say – with a clear conscience – that “It is obvious to us that neither of these formulations would extend a fundamental right of homosexuals to engage in acts of consensual sodomy” (p. 192).

Many commentators – including the dissenters – have complained that White got the question wrong in the first place. “This case is,” wrote Blackmun, “no more about a ‘fundamental right to engage in homosexual sodomy,’ as the Court purports to declare than Stanley v. Georgia, was about a fundamental right to watch obscene movies, or Katz v. United States, was about a fundamental right to place interstate bets from a telephone booth” (citations omitted) (p. 199). But without apologizing for White, I really don’t believe that even if he had formulated the question as Brennan might have (or as Tribe actually did put it), i.e., can a state “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?” (Brief for Respondent, 85-140) that White would have answered differently – though it might have made a difference for others. White was trying to demonstrate what he believed to be the proper way to ask if a right was
fundamental absent some anchor in the Constitution – i.e., not in the most sweeping terms, but in terms of the very narrow situation brought before the Court. For it was the type of sweeping way in which Blackmun extended the right of privacy to include abortion that so offended White in Roe. Sweeping generalizations were for legislatures, not courts.

I must emphasize here that I am not comfortable being put in the position of apologist for either Justice White or the Bowers decision. But in all fairness, while Bowers certainly can be understood as being “vituperatively homophobic” (especially if White’s opinion is read in conjunction with Burger’s concurrence, discussed below), I am merely suggesting that there is another plausible reading, one more in keeping with the observation of Rex Lee, that Bowers was “judicial modesty with a vengeance.” Was White homophobic? Given his age and background, most probably, at least to the extent that a majority of men at the time – and still today – exhibit some degree of either latent or outright homophobia. What I would suggest, however, is that for White, that was not the deciding factor. I would submit that even had White been “gay-friendly,” the result would have been the same. White’s unpublished dissent in Bell v. Maryland 378 U.S. 226 (1964) supports this conclusion. For White, this was not a case about sodomy, it was a case about the proper role of the Court, particularly in the area of asserting unenumerated rights. He said as much in the following passage:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930’s, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of
the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance (p. 194-195).

And White demonstrated as much by using the tests from precedent, mentioned above. White felt that both tests could be satisfied by reviewing the legislative record regarding sodomy in the U.S. He provided information indicating that all colonies had some sort of common law tradition prohibiting sodomy, and as time went on, all the states at some early point adopted anti-sodomy statutes. He documented the existence of anti-sodomy statutes present in 1868, when the Fourteenth Amendment was ratified. Note that even White’s historical analysis was rather measured (at least compared with Burger’s concurrence, discussed below). That is, as it was the U.S. Constitution he was interpreting, he did not find it relevant to go back any further than to about the time of the Constitution – even though, as Burger pointed out, he might have taken the history of sodomy statutes much further back into time. After White’s history presentation he concluded that “Against this background, to claim that a right to engage in such conduct is ‘deeply rooted in this nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious” (p. 194).

Next to asserting that the Court should maintain a restraintest role, White’s next priority in crafting the Bowers opinion was to set the record straight (pun intended) regarding the Court’s privacy jurisprudence. The Court’s privacy cases, going back to Meyer v. Nebraska and ending with Roe, according to White, were about marriage,
family, and procreative choices. "We think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case" (p. 191). But the point he really wanted to get across was this: [A]ny claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable" (p. 191).

Having accomplished his primary goals (i.e., explaining the proper role of the Courts and casting the previous privacy decisions as narrowly as possible), White made short work of the remaining arguments put forth by Hardwick. That the conduct took place in the home did not alter his conclusions. Stanley v. Georgia, he wrote, was different, for it was “firmly grounded in the First Amendment,” (p. 195) and White could find no similar constitutional principle in the facts of Bowers. Additionally, the home as castle argument was problematic, as “Its limits are also difficult to discern” (p. 195), and he wrote.

And if respondent’s submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road (p. 195-196).

One small task remained, to address the challenge by Hardwick that if laws must have a rational basis, and the only basis for the sodomy law was morality, such a rationale was inadequate. White brushed the contention aside with one sentence. “The law, however, is constantly based on notions of morality, and if all laws representing
essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”

**Burger’s Concurrence: Everything White Said, Plus Homosexuality Is Bad, Very Bad**

One can only imagine what Sigmund Freud’s review of the *Bowers* opinion would have looked like, but there is no doubt that the psychotherapist who saw sexual innuendo everywhere would have had a field day with Chief Justice Burger’s concurring opinion. In perhaps one of the most gratuitous concurrences in Supreme Court history, Burger filed a separate opinion merely “to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy” (p. 196). It was almost as if the Chief felt compelled to register his opinion separately lest anyone think that he was either lukewarm on the issue, or voted with the majority primarily in support of White’s views about judicial restraint.

The bulk of the 250-word concurrence was devoted to two points: Laws proscribing sodomy are *very* old, and sodomy is *very* bad. Apparently not satisfied with White’s description of sodomy laws as having “ancient roots,” the Chief pointed out that “the proscriptions against sodomy have *very* ‘ancient roots’” (emphasis mine) (p. 197). Whereas White had been satisfied to note that sodomy laws were a part of common law, and detailed the laws in effect at the time of the founding, and again when the Fourteenth Amendment was ratified, Burger pointed out that sodomy had been proscribed under Roman Law, and were among the first secular laws in England. Thus, any constitutional protection of sodomy “would be to cast aside millennia of moral teaching” (p. 197).
Nor was notation of the lengthy history of sodomy laws enough, for the Chief apparently also felt the need to underscore the fact that sodomy was bad. Burger quoted Blackstone’s descriptions of sodomy as “an offense of ‘deeper malignity’ than rape, a heinous act ‘the very mention of which is a disgrace to human nature,’ and a ‘crime not fit to be named.’” (p. 197).

**Powell’s Concurrence: The Middle Ground Slips Further To The Right**

As described above, at the April 2 conference, Justice Powell indicated that he would vote to strike the law, but would not do so on substantive due process grounds. Rather, he intended to invoke an Eighth Amendment argument. And, as already reported, some combination of Burger’s tirade and Mosman’s quieter persuasive efforts had eroded Powell’s confidence enough that he would vote with the majority, but would write a concurrence which would give strong indication that any criminal punishment for private acts of sodomy would probably be unconstitutional under the Eighth Amendment – if such a case arose in which someone was actually prosecuted and sentenced to jail (although he still vacillated between the proportionality theory and his “addiction” theory). But by the time he wrote his concurrence, his resolve had become weak – so weak that it did not serve to bridge the gap between the majority and the dissenters, but served only more as an odd footnote, most often lost in the shuffle when *Bowers* was discussed in the press and the academy.

Indeed, Powell’s “addiction” theory was articulated more clearly and forcefully in a footnote of Blackmun’s dissent than they were in Powell’s concurrence. Blackmun
criticized the majority for refusing to consider whether the sodomy law might violate the Eighth or Ninth amendments or the equal protection clause of the Fourteenth Amendment, even if they believed that it did not raise a valid due process issue. And in an extended footnote, he set out Powell’s theory. Powell’s draft copy of Blackmun’s dissent had no marks of any kind in the margins by the Eighth Amendment argument. Indeed, the only part of the dissent that elicited much response from him was Blackmun’s use of a part of Powell’s majority opinion in *Moore v. City of East Cleveland*. In that passage (which will be examined in more detail below), Blackmun quoted Powell as warning against interpreting the privacy cases as only protecting the family, and looking to the reasons *why* the Court has protected rights associated with the family — i.e., because associational rights are an important part of a person’s life, and the protection of family contributes to the happiness of individuals. Powell underlined Blackmun’s uses of the word “family,” and on the first page of the draft wrote, “Harry relies on *Moore v. East Cleveland* — incredible! Analogize the ‘family’ to sodomy.” Indeed, Blackmun’s use of Powell’s words in this context so upset Powell, that on the day he read Blackmun’s dissent, he penned two drafts of a “possible footnote” for his concurring opinion. Both drafts of the footnote made essentially the same statement, i.e., that Powell was

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63 Blackmun stressed that he had yet to determine whether or not the Eighth Amendment theory would carry the day, because he believed that “Hardwick has stated a cognizable claim that 16-6-2 interferes with constitutionally protected interests in privacy and freedom of intimate association.” However, the Eighth Amendment theory was not “so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed” (p. 202).
incredulous that his rhetoric regarding the sanctity of the family could be twisted to support a right to engage in sodomy.\textsuperscript{64}

I find it more than a little curious to cite, much less analogize, Moore's focus on the importance of the "family" to the conduct of sodomy in private. The fundamental reason for the condemnation of sodomy has been its antithesis to family. The preservation of civilization depends upon the family and the bearing of children (Powell, draft one of "possible footnote," Powell papers).

In the end, Powell's advanced neither of his Eighth Amendment theories, but simply said that although he agreed there was no fundamental right to engage in homosexual sodomy – but, he added, prison sentences for acts of private consensual sodomy "would create a serious Eighth Amendment issue." He noted, however, that Hardwick "has not been tried, much less convicted and sentenced. Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons, this constitutional argument is not before us." Powell also pointed out that there had not been a conviction for an act of private homosexual sodomy since 1939. Given the seeming non-enforcement of the law, coupled with "the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right."

The Dissent: It's All In How You Ask The Question

\textsuperscript{64} Coincidentally, two days before, Powell had commented in a memo to Mosman that he found White's opinion "well written," and he seemed tickled that White had referred to Powell's opinion in Moore, when he wrote about creating appropriate tests for determining the scope of fundamental rights. "He [White] even relies on my opinion in Moore. City of East Cleveland – an opinion I believe Byron criticized at the time," wrote Powell.
The most eloquent writing in *Bowers* is found in Justice Blackmun’s dissent. The opinion’s basic argument was that White asked the wrong question, a question that could only be answered one way. That the majority insisted on this very narrow question with the predetermined answer suggested to Blackmun that the majority simply did not understand the “magnitude of the liberty interests at stake in this case” (p. 208).

More in keeping with the privacy cases that came before, Blackmun focused on personal decisions rather on the specific actions involved. For Blackmun, the interest at stake was the right of individuals to make decisions about the nature of their intimate associations with others in the privacy of their homes.

Blackmun accused the majority of distorting the question in two ways. “first, the Court’s almost obsessive focus on homosexual activity is hard to justify in light of the broad language Georgia has used” (p. 200). He emphasized the fact that the law applied to heterosexuals – including married couples – as well as homosexuals. He asserted that Hardwick’s claim that the sodomy law “involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.”

Second, Blackmun objected to the Court’s focus on substantive due process, and its refusal to consider the possibility that the statute might be unconstitutional in some other way. It is likely that this point was made and developed with the hope of attracting Powell’s vote, as Powell had written in the memo in which he changed his vote that the Eighth Amendment issue was not before the Court. As mentioned above, Blackmun mentioned the possibility that the statute violated the Eighth Amendment, and he
sketched out Powell's "addiction" theory. Furthermore, the majority had not considered what implications the Ninth Amendment might have for the case, or the possibility of some equal protection violation, especially one structured along the lines of *Yick Wo v. Hopkins*. If Georgia's sodomy statute was enforced in a discriminatory manner – as seemed likely – then "a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class" (p. 208, note 2). Blackmun maintained that "the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is any ground on which respondent may be entitled to relief." The importance of this reasoning was that "even if respondent did not advance claims based on the Eight or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief" (p. 201)

Not only was the majority's statement of the question too narrow, Blackmun also accused the majority of describing the privacy precedents in such restricted terms as to distort their meaning – and it was here that Blackmun referred to Powell's opinion in *Moore v. East Cleveland*, and its warning against interpreting privacy cases so narrowly that the underlying right being protected gets lost. Referring to the rights protected in the privacy cases, Blackmun wrote, "We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life" (p. 204)

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65 In this case, discussed in the previous chapter, the Court ruled that laws which on their face do not violate the equal protection clause may in practice raise equal protection issues if they are applied in a discriminatory manner.
In his discussion of the privacy cases, Blackmun tried to demonstrate that each dealt with some individual right, not just rights related to marriage, family and procreation. As for the privacy cases dealing with family and marriage, "[W]e protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households" (p. 205). And as for the abortion cases and other cases dealing with procreative choice, "We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply" (p. 205).

Like the majority's portrayal of the privacy cases, Blackmun criticized their portrayal of relevant Fourth Amendment cases, particularly Stanley v. Georgia. "The Court's treatment of this aspect of the case," wrote Blackmun, "is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there" (p. 206). In particular, Stanley was more than a First Amendment case. "Stanley rested as much on the Court's understanding of the Fourth Amendment as it did the First" (p. 207), wrote Blackmun. Such limited reading of the Fourth Amendment cases was putting procedure over substance. "Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be at the heart of the Constitution's protection of privacy" (p. 208).
Blackmun was not at all persuaded by the Court’s recitation of the history of sodomy laws. Quoting Holmes, Blackmun asserted that “It is revolting to have no better reason for a rule of law than that it was laid down in the Time of Henry IV” (p 200). Nor was the fact that a majority regarded the behavior in question as intensely distasteful enough to save the law from constitutional scrutiny. “I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court’s security” (p. 210). Blackmun argued that when the state infringes on personal choices about how one will conduct one’s intimate associations, morality is not enough of a justification – especially when the targeted conduct is not harmful to others. “This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one’s value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently” (citations omitted) (p. 213).

Blackmun concluded by noting that in 1940, the Court had ruled that the flag salute could be compelled, but that by 1943 – just three years later – the Court realized the gravity of its error in limiting personal rights and reversed itself. “I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do” (p. 214).

Stevens’s Dissent
Justice Steven filed a dissent of his own, with which Justices Brennan and Marshall joined. The thrust of his opinion was that at the very least, Hardwick had “alleged a constitutional claim sufficient to withstand a motion to dismiss” (p. 220). Like Blackmun, Stevens asserted that the majority had too narrowly set out the right at stake. He argued that the *Bowers* case, and the privacy cases preceding it, dealt with “the individual’s right to make certain unusually important decisions that will affect his own, or his family’s destiny” (p. 217). He said that such decisions implicated “basic values” and were “fundamental,” and were also “dignified by history and tradition” (p. 517).

Stevens also rejected the strong emphasis the majority had placed on the “ancient roots” of sodomy laws, noting that in *Loving v. Virginia*, the case in which the Court held a law invalid that prohibited interracial marriage, that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient for upholding a law prohibiting the practice” (p. 216).

Stevens focused his arguments on the fact that the law applied to heterosexuals as well as homosexuals, and criticized the majority for not considering the implications of this. Stevens said that the Court should ask two questions. First, could the state rightfully ban sodomy for everyone? And second, if not, could the sodomy statute be saved by applying it only against homosexuals.

While Stevens conceded that society had an interest in encouraging certain “traditions in expressing affection for one another” and in explaining “the relative advantages and disadvantages of different forms of intimate expression,” he doubted that the state could coerce or prohibit a particular type of intimate expression, especially
within the confines of “a legally sanctioned and protected relationship such as marriage.” The liberty articulated in such cases as *Griswold* and *Carey*, Stevens reasoned, “surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral” that the privacy cases indicated that the state clearly could not ban sodomy within the marriage relationship and, because of *Eisenstadt*, probably could not ban the conduct between unmarried heterosexual couples. And, “If the Georgia statute cannot be enforced as it is written — if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia’s citizens — the State must assume the burden of justifying a selective application of its law” (p. 217). Either there is a reason why some would not have the same interest in “liberty” that others have, or there was some neutral and legitimate interest in selective enforcement. Stevens dismissed the first option as clearly unacceptable. With regard to the latter option, “A policy of selective application must be supported by ... something more substantial than a habitual dislike for, or ignorance about, the disfavored group” (219).

Drawing conclusions from his line of questioning at the oral arguments — that the non-enforcement of the statute seemed to undermine the state’s purported interest in the law — Stevens reasoned that the state apparently did not “even believe that all homosexuals who violate this state should be punished” (p. 219). He said that Hardwick was a case in point, since it would have been rather easy to prosecute him and yet the state did not go forward with a prosecution.

Therefore, Stevens concluded that “Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion
that homosexual sodomy, simpliciter, is considered unacceptable conduct in the State, and that the burden of justifying a selective application of the generally applicable law has been met.

The Continued Misadventures Of Bowers V. Hardwick

On Monday, June 30, 1986, the Court publicly released its decision in Bowers v. Hardwick. "They made it the last decision of the year, of course," recalled Michael Hardwick, who was waiting for the Court's decision in Florida. Hardwick believed that the Court's timing was strategic. "They waited until just after all of the Gay Pride Parades around the country" (Irons 1988, 401). Gay Pride parades in cities around the world are typically in late June, 66 timed to celebrate the anniversary of the Stonewall uprising of June 26, 1969. 67 Hardwick was probably wrong about the Court's timing. Notwithstanding the fact that the justices were probably unaware of the parades and celebrations, drafts of the opinions were still circulating until the last of June. It is not uncommon for the Court to release a flurry of opinions during the last couple of weeks of a term.

Hardwick was alone when he got the news about the Court's decision to uphold Georgia's sodomy law. "I was at work when I heard about the decision," said Hardwick.

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66 The following is a sampling of cities and dates of Gay Pride celebrations in 2000: Chicago, June 25; Houston, June 24; London, June 19-July 2; New York City, June 18-25.

67 On the last weekend in June, 1969, New York City police and agents of the Alcoholic Beverage Control Board entered a gay bar - the Stonewall Inn - ostensibly to check for violations of alcohol laws, but with the usual motive of shutting down a gay bar. Predictably, the police and agents found violations of state alcohol laws, and began to order patrons to go home. "Instead of quietly slipping away into the night, as we had done for years, hustlers, drag queens, students and other patrons held their ground and fought back" (Sportinit.com 2000). Someone dislodged a parking meter and used it to block the entrance of the bar, trapping the police inside. The police destroyed the bar and called for backup protection. The crowd grew, someone set a fire, and thus began three days of riots and protests, and a new call for Gay Power.
At the time, Hardwick worked catering a complimentary buffet for a bar in Miami. He would arrive several hours before the patrons each day to prepare the food. "On this particular morning, I could not sleep, and I got to work about nine o'clock. A friend of mine had been watching cable news and had seen it and knew where to find me and came over," said Hardwick. "When I opened the door he was crying and saying that he was sorry, and I didn't know what the hell he was talking about. Finally, I calmed him down and he told me what had happened: that I had lost by a five-to-four vote."

Both Justices White and Blackmun took the unusual step of reading extended portions of their opinions from the bench, in what amounted to an "open display of the bitterness within the Court" regarding the case (Jeffries 1994, 529). Predictably, the decision was met with widespread criticism, both in the press and in the academy, and came to be labeled by gay rights groups as their Dred Scott decision (Kamen 1986).

"I was totally stunned," said Hardwick. After Hardwick's friend told him about the Court's decision, he left, and Hardwick was alone with his thoughts for about four hours and "that's when it really sunk in," he said.

I just cried - not so much because I had failed but because to me it was frightening to think that in the year of 1986 our Supreme Court, next to God, could make a decision that was more suitable to the mentality of the Spanish Inquisition. It was frightening and it stunned me. I was scared. I had been fighting this case for five years and every one had seemed so confident that I was really not expecting this decision the way that they handed it down (Irons 1988, 402).

Even at that point in time, Hardwick felt certain there must be some other avenue that could be pursued. He called his lawyers. "I called Kathy Wilde and I called Laurence Tribe. I think he was more devastated than I was. Nobody expected it. I was
calling for some kind of reaffirming that everything was going to be okay and that something could be done. But they said, That’s it! There’s nothing we can do” (Irons 1988, 402).

Two weeks after the opinion was released, on Sunday, July 13, the *Washington Post* ran a front-page story featuring Justice Powell’s picture, accompanied by the headline, “Powell Changed Vote in Sodomy Case: Different Outcome Seen Likely If Homosexual Had Been Prosecuted.”

Hardwick did not take the news well. “I learned later that I originally had five votes in my favor on the Supreme Court,” he said. “Justice Powell came out a week later and said to the press that he had originally decided in my favor. I still don’t understand why Powell changed his mind in my case. What a half-assed decision!”

The *Post* article, written by reporter Al Kamen, attempted to piece together what had transpired in the twelve weeks between oral arguments, on March 31, and the Court’s announcement of the opinion. Kamen was remarkably accurate in his description of how Powell had originally voted to invalidate the law, but had subsequently changed his mind. Particularly striking was the article’s description of Powell’s thought and intellectual struggle involved in the *Bowers* case, and included a short description of Powell’s “addiction” theory. The article said that the information for the story had been provided by “informed sources.” Three short paragraphs in the article lead me to conclude that the source of the information was the memos between Powell and Mosman – though it is unclear if someone from within Powell’s chamber provided the memos to Kamen. In the
following passage from the *Post* article, note the similarity between the information reported by the *Post* and the exchanges between Powell and his clerk, Mosman.

Powell, sources said, dislikes antisodomy laws, feeling that they are useless, never enforced and unenforceable. . . .

The sources said that Powell would vote to repeal antisodomy laws if he were a legislator. There have been proscriptions against sodomy from the first days of recorded history. The court would virtually have to cast these aside under Blackmun's theory, Powell felt.

In addition, Powell has long had trouble with the notion that the court could substitute its views of morality for those of elected officials. He was reluctant to have the court recognize more special rights not spelled out in the Constitution, the sources said.

These remarks are little more than a paraphrasing of sentiments contained in Powell's early memos to Mosman regarding the case. It seems rather easy to conclude that the reporter, Al Kamen, had somehow obtained copies of the memos. And Kamen was no stranger to investigative-style reporting in the Court's chambers, having assisted Robert Woodward and Scott Armstrong in writing *The Brethren*. However, it's difficult to guess who might have passed on the information to the reporter. It is unlikely that Mosman would have had the motivation to leak the information. It also seems unlikely that it was Cabell Chinnis, the gay clerk who Powell told that he "had never met a homosexual," for, on the whole, clerks are extremely loyal to the Justice for whom they work, and breaches of confidence are relatively rare. It is possible that a clerk of one of the dissenters — particularly either one of Blackmun's or Marshall's clerks, might have made the copies available to the *Post*. One clue pointing away from Powell's clerks is

68 Although it is possible that Powell himself leaked the story to the press, the *Post* article gave no indication where the reporter got his information.
the fact that the Post apparently did not have access to Powell’s entire Bowers file, for there was no mention of Burger’s shrill memo.

Aside from the embarrassment that such a leak might cause Powell, there might seem to be little motivation for someone to leak the information about Powell’s change of vote. And if embarrassing Powell or the Court had been the motivation, it seems likely that the Burger memo would have somehow also appeared on Kamen’s desk. It is plausible to believe that the leak came as a last-ditch attempt to get a different outcome in the Bowers case. After the Supreme Court has issued an opinion, there is one more procedural step – although one that rarely changes the outcome – that attorneys for the losing side can take, which is to file a petition requesting the Court to reconsider its opinion. The Post article, which was published before Tribe had filed for the rehearing, may well have been an attempt to telegraph to Tribe the themes that might be most persuasive to the Court. And, indeed, Tribe’s petition did emphasize the Eighth Amendment issues. Tribe noted, for example, that Hardwick actually had been jailed when he’d been arrested. Furthermore, “it is the very criminalization of an involuntary condition, not the terms of any specific sentence imposed, that violates the Constitution.” Responding to the arguments in Stevens’s dissent, Tribe noted that the actual record “contains nothing as to the gender of Hardwick’s partner.” And, no doubt in an attempt to appeal to Justice Blackmun’s interests, Tribe argued that the Court’s decision in Bowers could well be the beginning of the end for the Court’s privacy cases – specifically for Roe. Tribe closed his brief with a the admonition that the proper question was “not
what Respondent Michael Hardwick was doing in the privacy of his own bedroom, but
what the State of Georgia was doing there."

Powell’s change of mind in the Bowers case made headlines again in 1990, but
this time Powell himself was the source. In October of 1990, the former Justice gave a
talk on the establishment clause to a group of students of the New York University
School of Law. During the question and answer session, second year law student Katie
Watson asked Powell about his vote switch in the Bowers decision. Powell replied that “I
think I probably made a mistake in that one.” He said that Bowers “was not a major case,
and one of the reasons I voted the way I did was the case was a frivolous case,” said the
Justice. He added, “When I had the opportunity to reread the opinions a few months
later, I thought the dissent had the better of the arguments.”

One of those who read the headlines regarding Powell’s mistake was Laurence
Tribe. In a letter to the Justice, dated October 26, 1990, Tribe wrote, “I read with great
interest the newspaper stories quoting your statement that you ‘probably made a mistake’
in voting with the majority in Bowers v. Hardwick.” He told the Justice (as discussed
earlier in the chapter) that

I have long cherished the moment during that argument when you leaned
forward and, commenting on the approach I was taking to the issue of
personal privacy in one’s home, said gently that if you were in my shoes
you’d be “arguing the case the same way.” Believing the argument in
Hardwick to be one of my best, I appreciated your kind words – and
appreciate them still.

He confided to the Justice that “I greatly admire the candor and courage of your public
expression of belated agreement with the dissent in Hardwick and wanted to let you know
as much.” Then, Tribe made a rather odd request, surrounded by obsequious – and somehow insincere – rhetoric.

Should you be willing to reply to this letter, my wife and I would count your response among our most significant mementos. You remain a hero for us both, and we would of course honor any wish you might express that we respect the privacy of any letter you might write.

I trust it’s not too bold of me to make that request – or to add that the country greatly misses your wisdom on the Court.

Powell did honor Tribe’s request for a letter, though I doubt from the content that it holds a place as one of the Tribes’s “most significant memos.” “I had forgotten that you had argued Bowers,” replied Powell. However, after thanking Tribe for his “generous view of my service on the Court,” Powell did confirm that “The press correctly quoted me as having said that ‘I probably made a mistake’” regarding the Bowers case.

And so Justice Powell, who had once before disappointed Tribe – as well as Michael Hardwick and advocates of personal privacy – disappointed him again.

Although he remained silent during the five years it took to litigate the case, Hardwick became something of a spokesperson for the movement to strike sodomy laws. In August of 1986, he spoke out publicly about the case for the first time on the Phil Donahue show, which was followed by several other talk show appearances and newspaper articles.

CHAPTER 7
CONCLUSION

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

Justice Louis Brandeis, dissenting
Olmstead v. U.S. 277 U.S. 438 (1928)

Even today—not withstanding the insecurities and cries for increased security triggered by the terrorist attacks of September 11, 2001—the right of privacy is cited by a majority American public as one of the most valued of rights.\(^1\) Not only do Americans believe privacy is important, but they also believe that it's a constitutionally protected right.\(^2\)

But in 1986, the constitutional right to privacy failed to protect the intimate acts of Michael Hardwick and his male companion from state regulation, even in the privacy of his bedroom. Pointed to as a classic example of bad jurisprudence, the common

\(^1\) For example, in August of 2002, 81% of those polled reported that the right to privacy as "essential." Perhaps surprisingly, this represented an increase over 1997, when 78% reported that privacy was "essential" (Center for Survey Research and Analysis 2002). In a different poll, 92% reported that they opposed government investigation of non-violent protesters, and 77% reported that they opposed warrantless searches of suspected terrorists (Institute for Public Policy and Social Research 2002).

\(^2\) In a 1999 Harris Poll, 70% responded that the Constitution guaranteed citizens the right to privacy (Harris 1999).
reading of Bowers v. Hardwick is that it was a "vituperatively homophobic" decision. The assumption is that it was made by justices so disgusted by, or ignorant about, gays that they were willing to subvert the right to privacy in an effort not to condone that behavior. While there is truth to this reading, the issues go deeper than homophobia. In one sense, the Bowers decision was neither about the right of privacy nor about sodomy; it was about the scope of judicial review and about the limits of judicial authority to "create" fundamental rights not found in the text of the Constitution. The bitterness that was so obvious in the pages of both the majority and dissenting opinions in the case had more to do with doctrinal divisions than with the justices' individual attitudes toward homosexuality. This is not to say that the decision and the justices who authored it were not homophobic. Some certainly were. There is, however, a significant alternative reading of Bowers.

The Bowers decision illumined the fact that there is no such thing as a constitutional right to privacy. Certainly there is no constitutional right to privacy in the way we would commonly understand the term. The Court's so-called "privacy cases" had not been so much about privacy as they had been about privileging certain relationships. The word privacy is not used in the Constitution or the Bill of Rights. Privacy has been used two ways in the Supreme Court's jurisprudence. The term has been used as a shorthand for those rights protected by the Fourth Amendment (i.e., the right against unreasonable search and seizure) -- or the Fourth Amendment supplemented with the Fifth Amendment's self-incrimination clause.
Second, privacy has been used as a euphemism for some substantive liberty interest when the specific interest was too indelicate to name outright. This way, the Court did not have to proclaim a fundamental right to use a diaphragm, or a fundamental right to terminate a pregnancy. It could avoid general embarrassment and gain majority support by speaking of a right to privacy. In this sense, "privacy" has served to allow the Court to discuss particular forms of conduct under a general rhetorical rubric – similar, in one sense, to the way the Court has discussed the right of "free speech." The Court has never had to talk about the right to print nude pictures per se, because it was able to invoke high-sounding free speech rhetoric.

The unenumerated status of privacy is problematic enough. What also sets privacy apart from free speech, however, is that whereas free speech protects ideas, privacy protects conduct. As a nation we are relatively comfortable about extending broad, unlimited protection to ideas. When it comes to behavior, however, we have required a limiting principle.

Several state courts in recent years have struck down their sodomy laws as an infringement on a privacy right included in their state constitutions. The limiting principle adopted in most of these opinions has been based on the harm principle in John Stuart Mill’s *On Liberty* (i.e., consensual adult conduct that causes no demonstrable harm to others should not be regulated). Indeed, some state court opinions have included extended passages from *On Liberty*. But the United States Supreme Court has never adopted either a Millsian principle or any other limiting philosophy in its privacy jurisprudence. The Court’s reluctance to do so comes from the fear that importing some
extra-constitutional philosophy would smack too much of *Lochner*-era jurisprudence – something the Court has gone to great lengths to avoid since its repudiation of *Lochner* in the late 1930s.

This is the point at which the Court’s emphasis on particular human relationships has come into play. The Court’s decisions in *Griswold v. Connecticut* and *Roe v. Wade* -- the cases in which the Court said that a constitutional right to privacy prohibited states from denying contraceptives to married couples and interfering with a woman’s choice to terminate her pregnancy, respectively -- were built around recognition of the special relationships involved, i.e., the husband-wife and doctor-patient relationships. Focusing on the relationships has served two functions. Certain relationships (e.g., husband-wife, doctor-patient, attorney-client, etc.) have legal recognition and protection elsewhere in the law. Privacy claims have always fared better when coupled with another interest (what I will refer to later as “synergistic” reasoning).

Second, and most important, the concept of a relationship serves a limiting function. By framing certain conduct as a relational decision, the Court can assume that any conduct resulting from one of these decisions is in the best interest of society as a whole. Designated relationships serve functions so important to society that we have extended them a higher level of legal protection than we extend to other relationships, or even to individuals. This has been done even with the knowledge that that higher degree of protection might well, at times, hide illegal conduct. The assumption is that these relationships are entered into with legal purposes that provide a good for society. The principle is, that to function optimally, these relationships require a certain degree of
seclusion from the public eye. This seclusion fosters the trust and disclosure necessary to these relationships. What illegal conduct might be concealed is small compared with the damage done to the relationship and to the rights of the individuals that too closely policing these relationships would entail.

Viewed in this way, the Court in *Griswold* and *Roe* was merely protecting the relationship between husband and wife, and doctor and patient, respectively. These relationships have the advantage of being well defined and serving important societal interests. The occasional conduct that might not be approved by a majority has been considered by the Court as a tolerable component of the overall constructive goals of the relationships. Because the status and goals of certain relationships are predefined by society, relationships have an automatic limiting principle. Decisions and actions taking place within the predefined relationship, and related to the overall goals of the relationship, must not be too closely scrutinized. Thus the purpose of *Griswold* and *Roe* was to keep the state outside the boundaries of the relationships involved.

The factor that tipped the scales against Hardwick’s case was not the insufficiency of the claims made, but the insufficiency of the limiting principle. Hardwick’s argument stressed the home as a limiting principle. But the Supreme Court majority concluded that “home” protects too much. Hardwick’s lawyers also argued that the right to intimate association was involved. For a majority of the Court, however, the nature of the association in question had not previously been recognized by the law and was not enduring enough or specific enough to provide the limits they felt necessary, without resorting to some broader, extra-constitutional principle.
Postscript: Seventeen Years After Bowers, A “Seismic Shift”

During the final stages of writing this analysis, the Supreme Court explicitly and forcefully overruled Bowers v. Hardwick. “Bowers was not correct when it was decided, and is not correct today,” wrote Justice Kennedy for the 6-3 majority in Lawrence v. Texas, 539 U.S. 558, 2003. “It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.” The Court’s decision invalidated Texas’ Homosexual Conduct Law, which prohibited “deviate sexual intercourse with another individual of the same sex.” Kennedy’s opinion was an eloquent statement defending the right of individuals – gay as well as straight – to not only be allowed to choose the nature of their most intimate relationships, but to be allowed to do so with dignity and absent the stigma of laws justified by nothing more than a irrational disapproval of homosexuality. By focusing on the right of individuals to engage in the intimate relationships of their choice rather than the right to engage in a particular sexual act, Kennedy elevated and transformed the debate. To an unprecedented degree, Kennedy unabashedly embraced the doctrine of substantive due process to keep the state outside of the bedroom of consenting adults.

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3 In an article posted on their webpage, the Lambda Legal Defense and Education Fund, which brought the case, referred to the Court’s decision in Lawrence v. Texas, 539 U.S. 558, 2003, as a “seismic shift” in the direction of gay rights. “Lambda Legal’s … victory transforms progress into social legitimacy and legal protections that LGBT [lesbian, gay, bisexual and transgendered] people can take to the bank” ( Lambda Legal 2003).

4 Tex. Penal Code Ann. § 21.06(a) (2003). It provides: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” The statute defines “deviate sexual intercourse” as: “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” § 21.01(1).
Although the landmark *Lawrence* ruling represented a dramatic shift for the future of gay rights and introduced a new chapter in substantive due process jurisprudence, the logic of Justice Kennedy's opinion did not erode the cogency of the analysis put forth in the previous pages. Indeed, the opinion further highlighted the centrality of relationships to the Court's privacy cases. The difference between *Lawrence* and the previous privacy cases is that Kennedy extended a liberty protection beyond just legally recognized relationships to all intimate relationships between consenting adults. Rather than relying on the limiting principle provided by legally recognized relationships — such as that between husband and wife or doctor and patient — Kennedy limited the liberty in three ways — one constitutional, one constitutionally derived, and one extra-constitutional. Kennedy acknowledged the spatial privacy accorded the home by the Fourth Amendment, and coupled that with the right to engage in intimate association derived from the First Amendment, but limited the relational decisions to those that cause no harm to others, thus invoking an extra-constitutional limiting principle.

The remainder of this chapter — and of this work — will examine the *Lawrence* case, and locate it within the broader context of the Court's privacy decisions.

**Another "Perfect" Test Case**

The facts of *Lawrence* were reminiscent of those in *Bowers*, in that the arrest in *Lawrence* involved the intimate conduct of two consenting adults in the privacy of a home. The arrest thus provided gay activists with a "clean case," meaning that the incident involved no other illegal activity (Graham 2004). As in Georgia, arrests and
prosecutions for consensual acts of sodomy between adults were rare in Texas,\(^5\) and so finding the right kind of case to challenge the law was difficult. "The arrests in some ways delighted gay activists," wrote *Washington Post* reporter Paul Duggan. "They said the case not only provides a long-awaited legal platform to challenge the Texas law, but also has a public-awareness benefit, offering facts that underscore their warnings about privacy. Here, they contend, was an instance of government authority literally reaching under a person's blankets" (Duggan 1998).

Even the district attorney who prosecuted the case seemed to view the arrest as an opportunity to question the constitutionality of the law. Had the charges simply been dropped, the two men would have lacked the standing necessary to challenge the sodomy statute. "We need to get this [sodomy law] off the books," said Harris County District Attorney John B. Holmes, Jr. "I've always said that the best way to get rid of a bad law is to enforce it" (Dyer, 1998a). When asked by an Associated Press reporter why he was going to prosecute the men in spite of the fact that the act was private and consensual, Holmes replied, "Wouldn't it be presumptuous if the district attorney said 'I'm only going to prosecute the crimes I agree with'?" (Langford 1998).

But although the factual scenario in *Lawrence* was ideal for challenging sodomy statutes, the two men arrested weren't political activists, and neither man was exactly a role model for the gay rights movement. "They [Lawrence and Gamer] are not the kind of people that the lawyers want to comment on this case," said Ray Hill, a long-time gay

\(^5\) According to Harris County District Attorney John B. Holmes, Jr., there had only been two or three sodomy prosecutions in the previous three decades, and even those were not entirely private acts, as those cases "involved homosexual contact witnessed by others in a public jail" (Dyer 1998b).
right advocate in Houston who knew both men. “They were never a couple…. They are not articulate” (Nichols 2003).

Tyron Garner, 31, was unemployed at the time he was arrested for having sex with 55-year-old John Geddes Lawrence. Lawrence, a quiet man who kept mostly to himself, worked as a medical technologist (Nichols 2003). Both men had criminal records. Lawrence’s past included two convictions for drunken driving and one for murder-by-automobile. Harris County records indicated that Garner had been arrested for assault, drunken driving, and possession of a small amount of marijuana, and also listed him as having two convictions for assault. (Nichols 2003). Garner was involved in a stormy, often violent relationship with 39-year-old boyfriend Robert Royce Eubanks (Nichols 2003). Living together in an apartment in the suburbs of Houston, the passionate quarrels between Garner and Eubanks frequently led to violence. The couple also had a history of filing frequent—and sometimes false—police reports against each other. 

The Facts of Lawrence v. Texas

On a Friday afternoon in 1998, Garner and Eubanks helped their friend John Lawrence—who resided in the same apartment complex—move some new furniture he’d purchased into his apartment. After completing the chore, the three men went to dinner at a Mexican restaurant and enjoyed a few margaritas together. After dinner, the men

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6 In May of 1998, for example, Eubanks obtained a temporary restraining order against Garner, claiming that Garner had “stabbed me on my right finger with a box cutter” and “grabbed a hot iron and burned me” and “then sexually assaulted me.” The case was later dropped, and Garner and Eubanks resumed their relationship (Nichols 2003).
returned to Lawrence’s apartment. As the evening wore on, Eubanks, who had become suspicious that something was going on between his boyfriend and Lawrence, began to argue with Gamer and told Gamer it was time to go home. When Gamer refused, Eubanks left, claiming he was going for a walk to buy a soda, but instead went to a payphone and called police. Eubanks lied to police, telling them that an armed intruder was “going crazy” in Lawrence’s apartment (Reinert 2004).

A short time later, two Harris County deputies entered Lawrence’s unlocked apartment with their weapons drawn to look for the gunman. Moving quickly and quietly through the apartment, the deputies failed to encounter the alleged gunman. Instead, in one of the back bedrooms, they found Gamer and Lawrence engaged in anal sex. “[W]earing only handcuffs and underwear,” the two men were roughly taken down a flight of stairs, shoved into a police car and taken to the police station (Reinert 2004, A1). They were charged with violating Texas’s Homosexual Conduct Law, and spent the night in jail. The statute made it a Class C misdemeanor, punishable by up to a $500 fine, for persons of the same gender to engage in sexual activity. Tex. Penal Code Ann. § 21.06(a) (2003).

Lawrence and Gamer had no idea that the intimate act witnessed by the police was a crime. “I was totally dumbfounded,” recalled Lawrence about the experience (Reinert 2004). Exacerbating the humiliation of the arrest was the embarrassment of having their names and photographs carried by the media. “I didn’t enjoy being outted

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7 Eubanks subsequently pled no contest to filing a false police report and was sentenced to 30 days in jail. He was released on October 13, 1998, after serving 14 days (Langford 1998).
with my mugshot on TV. It was degrading to me,” said Gamer. Although Lawrence and
Gamer believed what had happened to them was unjust, neither was politically active,
and they had no plans for protest or legal action. As the shock of the events wore off,
anger set in. “I didn’t know how I was going to handle this,” said Lawrence. “So I called
my dad, and my dad said, ‘You will find a good lawyer’” (Reinert 2004).

A friend of Lawrence and Gamer’s contacted Mitchell Katine, an openly gay
Houston lawyer, and told him about the arrest. At first, Katine didn’t believe that the two
men had been arrested only for the crime of sodomy. “In my 17 years practicing law,
representing gay and lesbian people, I had never heard of anybody who’d been arrested
and charged with this crime,” said Katine (Graham 2004). Katine believed that there had
to be an underlying crime. “I thought there had to be drugs, prostitution, maybe they’d
been out on the balcony.” He asked that the actual documents from the arrest be faxed
to his office, and was astonished to see that the sole charge was homosexual conduct.
“Hey, we might have something here,” Katine recalled thinking. Because the bulk of
Katine’s practice consisted of real estate law, he felt he needed the help of constitutional
experts. He immediately contacted friends at the Lambda Legal Defense and Education
Fund in New York City. A few hours and several phone calls later, it was agreed that
lawyers from Lambda would serve as lead counsel in the case, and Katine, working pro
bono, would serve as the local cooperating attorney in Houston. In that role, Katine
would assist Lawrence and Gamer on court visits and act as a liaison between Lambda
and the two men (Katine 2004). Ruth Harlow, Legal Director for Lambda, was the
primary Lambda attorney initially assigned to work with Katine (Brewer 1999).
Lawyers at Lambda hailed the case as a godsend. "The case could not have come at a better time," said Lambda attorney Suzanne Goldberg, and noted that the organization was "already in the midst of strategic challenges nationwide" (Graham 2004). What Lambda lawyers liked most about the Lawrence case, according to Goldberg, was that it "offered a perfect example of how the sodomy laws empowered the states to invade the privacy of a person's home to prosecute for consensual sex" (Graham 2004).

Indeed, the facts of the case seemed almost a little too perfect to some, leading critics to accuse Lambda of setting it up. The false police report was what raised the most suspicion, and local Republican leaders, who supported the sodomy statute, tried to disparage the case by questioning the circumstances surrounding the arrest, and contended that the case was staged "solely for the purpose of attacking the law." (Brewer 1998). "The facts themselves sound suspicious," said Harris County Republican Party Chairman Gary Polland. "That's why I wonder if this case was a set-up, if it was set up as a challenge" (Brewer 1998). Nor were local officials the only ones to question the facts of the case. Nationally syndicated conservative columnist William F. Buckley noted that, "The pending case is similar to Bowers in almost every respect: Two men in Houston, Texas, were arrested for engaging in such activity. A suspicion floats across the mind: Might this thing have been set up? Police do not poke around looking for homosexuals having at it, any more than they bust in to establish that you are smoking a marijuana cigarette" (Buckley 2003). Another critic, Richard Lessner, shared

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8 Richard Lessner at that time was director of American Renewal, a lobbying organization associated with the conservative Family Research Council.
Buckley’s skepticism. “[T]he unlikely arrests make it appear the whole thing was staged precisely as a test case,” (Lessner 2003). Still another observer wrote that, “This whole case was a set up from the beginning by the Lambda Legal Foundation,” and accused Lambda of “seeking to press the radical homosexual agenda through the courts of this land (Benham 2003).” In an amicus brief filed in support of Texas, lawyers for the American Center for Law and Justice advised the Court against granting cert because of the “contrived” facts, and warned the Court not to let itself be “used”:

The ACLJ is also committed to the rule of law and judicial restraint. In this case petitioners, in what may well be a contrived test case, request a sweeping, novel constitutional decision based upon the most sparse record conceivable. This Court, however, is not a forum for abstract debates on constitutional questions. The ACLJ urges this Court to dismiss the writ as improvidently granted and to decline to let itself be used, in this possibly artificial test case, for political purposes (ACLJ 2003).

Lawrence and Garner’s lawyers consistently denied that the case had been crafted by lawyers and emphasized the unwelcomed personal humiliation endured by the two men. “We’ve said over and over again that this was not staged,” said attorney Katine. “Anyone looking at the

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9 Many others also believed that Lambda had set up the scenario. Here are a few examples: “The facts of the Lawrence Case look staged to begin with. According to the story, cops were called to the house on a report of an intruder…. My money says Tyron and John set themselves up to challenge the law…” (Worden 2003); “many commentators think this case was a ‘set up,’ as was the Roe v. Wade case that abolished the right of states to ban abortions” (Christian Law Association 2003); “Kelly Shackelford of the Free Market Foundation told Family News In Focus that most people think it was somewhat of a set-up. He explains that in Lawrence v. Texas, someone contacted police about a situation involving a gun, and that when police went to handle the situation they caught people in the act of homosexual sodomy” (Brown et al. 2002); “The sodomy laws in question were not being used to oppress anyone; it appears the plaintiffs had to set up a situation to even have the cops come and issue a ticket for the offense so they cold start this lawsuit” (Penraker 2003); “How on earth did they get caught anyway? It may have been a set up by gay rights groups to get a good ‘case’ to oppose” (PropheticZero 2003); “As it turned out, the complaint [about a gunman to police] was completely fraudulent, which has led many to speculate that it was a set-up for a test case to overturn Texas’ anti-sodomy statute” (Hoadley 2003).

Some commentators went so far as to suggest that Bowers, too, had been staged: “Lawrence, like Bowers, was a trumped-up test case” (Federalism Project 2003). “The recent U.S. Supreme Court decision in Lawrence v. Texas …. was not entirely unexpected because the underlying scenario was set up to permit a revisiting of the legal issues surrounding the factual predicate of its predecessor, Bowers v. Hardwick…. In both cases, the police were called ostensibly to investigate other criminal activity and found, instead, two men engaging in sexual activity forbidden under relevant state statutes. Thus, both cases were transparently “set-ups” to provide test cases to challenge the state statutes” (Fielding 2003).
facts can clearly see this was not a staged event. It was real and it was terrible for these men. It (the late-night arrest) was not a pleasant experience to go through” (Brewer 1998).

Although Garner and Lawrence’s arrest presented an opportunity to challenge the constitutionality of the law, it was by no means certain that the two men would agree to take the case forward, knowing that it would undoubtedly draw a great deal of unwanted public attention. Both men were shy by nature and, as noted above, the men were hardly activists, and neither relished additional “outing” or having their personal lives – including their police records – scrutinized. “We never chose to be public figures or to take on this fight,” said Lawrence. “But we also never thought we could be arrested this way” (Nichols 2003). One of the Lambda lawyers who worked on the Lawrence case noted that Lawrence and Garner were “reluctant standard-bearers for the principles that are at stake here, but they believe in them very strongly” (Nichols 2003).

And even if the case was pursued, there was also no guarantee that the prosecutor would go forward with the charges, and no way to be sure that at trial the men would not be acquitted. Katine, working with Lambda lawyers to come up with the best legal strategy, advised Lawrence and Garner to plead no contest to the sodomy charges (Sallee 1998, A29).

**The Procedural Path of Lawrence**

In a justice of the peace court, Lawrence and Garner, accompanied by Katine and lawyers from Lambda, stood before Judge Mike Parrott and entered pleas of no contest to
the charges of deviant homosexual conduct on November 20, 1998. Each man was fined $125, but did not pay it. In order to move the case to the next level, appeals bonds of $322.50 each were posted (Dallas Morning News 1998, 42A).

The defendants themselves were practically lost in the shuffle of attorneys and reporters. "I don't know if they ever made a sound," recalled Judge Parrott of the proceeding. "They were just normal guys standing there... (and) did what they were told" (Nichols 2003). Lawrence and Garner had only a few comments after their court appearance. "I hope the law changes," said Garner. "I feel like my civil rights were violated and I wasn't doing anything wrong." Lawrence characterized the arrest as "sort of Gestapo" (Dallas Morning News 1998, 42A).

Exercising their right to a trial de novo in the Harris County Criminal Court, they filed a motion before Judge Sherman A. Ross to quash the charges on constitutional grounds in December of 1998. After their motion was denied, they again pled no contest, and were each fined $200 and allowed to immediately file an appeal with the 14th Court of Appeals in Houston (Brewer 1998).

Eleven months later, Lambda attorney Ruth Harlow stood before a three-judge panel – as well as a packed courtroom of observers and students – and asked the court to declare Texas’ Homosexual Conduct law unconstitutional and vacate the convictions of Lawrence and Garner. With Lawrence, Garner and Katine seated closely behind her, Harlow argued that the Texas law violated the equal protection clauses in both the Texas and U.S.

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10 Coincidentally, three days after they filed their no-contest pleas, the Georgia Supreme Court struck down the sodomy law that had been at issue in Bowers. In Powell v. State, 270 Ga. 327, Georgia’s high court ruled that the state’s sodomy law violated the privacy right contained in the Georgia Constitution.
Constitutions because it singled out homosexual conduct, thus discriminating against gays. Harlow contended that the law also violated federal and state constitutional claims to privacy regarding intimate decisions made in the home. She noted that courts in Georgia, Louisiana, Montana and Tennessee had recently invalidated sodomy laws based on state privacy protections, and that laws similar to the one in Texas had been recently struck down in Kentucky and Maryland based on equal protection arguments (Brewer 1999).

Arguing on behalf of the state, Harris County Assistant District Attorney Bill Delmore noted that because homosexual acts have never been considered a fundamental right and because Texas law had for so long deemed such conduct inappropriate that the state could criminalize homosexual conduct as part of its responsibility for protecting the morals of the people of Texas. The law served a legitimate state purpose, he said, in preserving traditional moral principles and promoting family values. He went on to say that if moral standards changed, then it was the prerogative of the legislature, not the courts, to change the law. He said that equal protection arguments against the statute were baseless, because homosexuals had never been recognized as a suspect class (Brewer 1999).

Delmore added that since the law applied to heterosexuals who engage in homosexual acts that it did not discriminate against gays. Harlow countered that such reasoning would be akin to passing a law against attending Mass, and claiming that it didn’t target Catholics (Brewer 1999).

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11 The Fourteenth Amendment of the U.S. Constitution provides that: "... Nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws" U.S. Constitution, Amendment XIV. The Equal Rights Amendment of the Texas Constitution provides that "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative" Texas Constitution, Article I, §3a (1972).
When asked how the state justified the Homosexual Conduct law, Delmore conceded that he could not "even see how he could begin to frame an argument that there was a compelling State interest." *Lawrence v. State*, No. 14-99-00109-CR (2000). He repeated the State's position that since there was no gender discrimination and no fundamental right burdened that the State's responsibility to protect public morals was sufficient justification (Brewer 1999).

Lawrence and Garner enjoyed their first legal victory in June of 2000, when two of the three judges who heard the case reversed their convictions and struck down the Homosexual Conduct law, arguing that it violated the Equal Rights Amendment of the Texas Constitution (*Lawrence v. State*, No. 14-99-00109-CR, 2000). The opinion did not address either the federal equal protection arguments or the due process privacy concerns. Writing for the two-person majority, Justice John S. Anderson\(^\text{12}\) focused attention on the change made to the sodomy law in 1973. Texas's original sodomy statute, adopted in 1860, had banned sodomy for all Texans. In 1973, the legislature revised the law, banning the conduct only for same-sex couples. That change, according to Anderson, created a double standard similar to sex-based discrimination, and was thus a violation of Texas' Equal Rights Amendment. He wrote that

\[1\] In 1973, the Texas Legislature created two standards, demarcated by the sex of the actors.... Thus, after 1974, the distinction between legal and illegal conduct was not the act, but rather the sex of one of the participants (p. 3-4).

The opinion rejected the state's claim of preserving conventional morality as sufficient reason to discriminate. "It is not enough for the state to say it has an important

\(^{12}\) Joined by Chief Justice Paul Murphy.
interest furthered by the discriminatory law because even the loftiest goal does not justify sex-based discrimination in light of the ERA’s clear prohibition (n. 7).

Dissenting Justice J. Harvey Hudson faulted Anderson’s logic, and agreed with the state that the ERA protected against sex discrimination and that the Homosexual Conduct law did not constitute sex-based discrimination because it applied equally to men and women if they engaged in the specified acts. “[T]he history of the Texas Equal Rights Amendment,” wrote Anderson, “suggests the people of this state intended to grant to women the same rights as those already enjoyed by men, not to abolish criminal sanctions imposed for homosexual conduct” (p. 14) Hudson echoed the prosecution’s arguments by noting that decriminalization of consensual sexual acts was best handled by the legislature. “As a court, we must presume the legislature has correctly assessed the moral repugnance of activities it has chosen to penalize with criminal sanctions....” (p. 15).

When told about the opinion, Lawrence said he was pleased that his nightmare may have led to a positive change in the law, and that he was “thankful and relieved that this horrible experience may finally be over” (Sieber 2000). But the decision, while important, did not invalidate the law statewide, as the ruling applied only to the thirteen counties under jurisdiction of the 14th Court of Appeals, and not to Texas’s 241 other counties.

An unbiased judiciary?

When the opinion was released on June 8, 2000, state prosecutors told reporters they would probably pursue the matter by taking the case directly to the Texas Court of Criminal Appeals, which serves as the court of last resort for appeals of criminal cases, so
that the matter could be resolved quickly. But within a few days, prosecutors changed
their strategy, and instead requested a hearing *en banc* of all nine justices of the 14th
Court of Appeals. Prosecutors publicly justified this tactic by saying that it gave them
more options. If the case went directly to the state’s high court and the court declined to
review the case, there could be no further action by the prosecutors. By asking first for a
rehearing, the prosecutors might persuade the full court to reverse itself and, failing that,
they still had the option to take the case to the high court (Brewer 2000).

The prosecution’s motivation, however, may well have been more about partisan
politics and less about maximizing litigation opportunities. Republican Party reaction to
the 14th Court of Appeals’ decision was public, swift and severe. Party leaders were
distressed that a court that consisted entirely of elected members of their own party could
issue a ruling so out of step with party philosophy, and the timing of the decision
provided the perfect opportunity for party leaders to vent their frustration. One week
after the court’s ruling was issued, more than 8,000 GOP delegates converged on
Houston for the statewide convention. Adopted on day two of the convention (June
16), the 2000 Texas Republican Party Platform took aim at the *Lawrence* decision in
three separate planks, going as far as to specifically name and chastise the two justices
who voted to strike the sodomy law. The party’s plank on “Judicial Activism” read:

Judicial Activism – The Party stands strongly against activist judges, who use
their power to usurp the clear will of the people. We publicly rebuke judges Chief
Justice Murphy and John Anderson, who ruled that the 100 year-old Texas
sodomy law is unconstitutional, and ask that all members of the Republican Party
of Texas oppose their re-election, and activist judges like them, and support non-
activist judges as their opponents (2000 Texas Republican Party Platform).

13 Texas’ 14th Court of Appeals is also located in Houston.
The party also added a short plank regarding sodomy statutes: “Texas Sodomy Statutes- The party opposes the decriminalization of sodomy” (2000 Texas Republican Party Platform). And a new statement of the party’s stance on homosexuality was also included in the platform. It read,

Homosexuality - The Party believes that the practice of sodomy tears at the fabric of society, contributes to the breakdown of the family unit, and leads to the spread of dangerous, communicable diseases. Homosexual behavior is contrary to the fundamental, unchanging truths that have been ordained by God, recognized by our country’s founders, and shared by the majority of Texans. Homosexuality must not be presented as an acceptable “alternative” lifestyle in our public education and policy, nor should “family” be redefined to include homosexual “couples.” We are opposed to any granting of special legal entitlements, recognition, or privileges including, but not limited to, marriage between persons of the same sex, custody of children by homosexuals, homosexual partner insurance or retirement benefits. We oppose any criminal or civil penalties against those who oppose homosexuality out of faith, conviction, or belief in traditional values (2000 Texas Republican Party Platform). 

And just to make sure all Texas Republicans were aware of all of the provisions in the platform, a plank labeled “Support of Platform” was included. The provision made Party support for office seekers contingent upon filing a signed copy of the 2000 Platform. The plank read,

Support of Platform – Any person filing as a Republican candidate for a public or Party office shall be provided a current copy of the Party platform at the time of filing. The candidate shall be asked to read and initial each page of the platform and sign a statement affirming he/she has read the entire platform. The individual accepting the signed statement shall review the initialed platform and maintain a

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14 Although only the ‘Judicial Activism’ plank explicitly referenced the Lawrence case, there is little doubt that the planks on “Homosexuality” and “Sodomy Statutes” were written to make the Party’s disdain for the case – and others like it – perfectly clear. By comparison, the 1996 Texas Republican Party Platform made no reference to sodomy laws, and the only reference to homosexuality was to demonstrate disapproval for President Bill Clinton’s “attempt to lift the ban on homosexuals in the military.” While the 1996 platform did express disdain for “activist judges” at the federal level, there was no reference to state judges (1996 Texas Republican Party Primary).
list of those who have complied with this request. This will become effective in the 2002 election. We strongly encourage Republican candidates, officeholders, and Party officials to support the Republican Party Platform and fellow Republican candidates and officeholders. We direct the Executive Campaign Committee to strongly consider candidates’ support of the Party platform when granting financial or other support (2000 Texas Republican Party Platform).

Inserting the planks into the platform was largely the work of Harris County Republican Chairman Gary Polland, who “harangued party caucuses” behind the scenes until anti-gay, anti-judicial activist language was included (Fleck 2000a).

Polland (whose political abilities had earned him the nickname “Scary Gary” (Fleck 2000a)) wanted to go even further, and devised a plan to either force Justices Anderson and Murphy into compliance with the party line or pressure them off the bench. At a “Victory 2000” dinner following the convention, Polland persuaded party treasurer Paul Simpson to draft a letter asking Justice Anderson – who authored the *Lawrence* opinion – to either retract his opinion or resign (Jeffreys 2000, 6). “For whatever reason, I agreed to do it,” recalled Simpson. The letter told Anderson that his ruling had no legal basis (Bernstine 2000) and that his opinion “blatantly defies the Republican Party Platform and creates potential for further damage to our society” (Fleck 2000a). Polland distributed the letter to the party chairmen of the surrounding 13 counties under the jurisdiction of the 14th Court of Appeals, and asked for their signatures before sending the letter to Justice Anderson. After receiving very little support for the letter (only one chairperson indicated willingness to sign it), Polland decided not to send it. It was, however, widely circulated, and a copy was faxed anonymously to Anderson’s office (Fleck 2000b).

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15 Houston is in Harris County.
But the letter may well have achieved its intended effect, though in a rather roundabout way. As mentioned above, instead of taking their case to the state’s high court, prosecutors filed for a rehearing en banc of the appellate court on Friday, June 23 – just one week after the Texas Republican convention, and a few days after circulation of the letter to pressure Anderson (Brewer 2000). About two weeks later on Monday, July 11, lawyers from both sides received a letter saying the 14th Court of Appeals would reconsider the opinion. Later that week, however, a spokesperson for the Court tried to backpedal, saying that the letter may have been “unclear,” and that the letter was “merely asking both sides for additional briefing before the court will decide whether to grant an en banc hearing” (Jeffreys 2000). This statement came after local news outlets revealed that Texas House Judicial Affairs Committee and the police were independently planning to investigate allegations that the Republican tactics violated state laws prohibiting retaliation against or coercion of public servants. A second letter from the court, dated September 13, informed attorneys for both sides that “The Court has granted the State’s Motion for rehearing en banc without hearing oral argument” (Log Cabin Republicans of Houston 2000).

In March, 2001, the 14th Court overturned the earlier panel, and upheld the constitutionality of the Homosexual Conduct law. Writing for the 7-2 majority, Justice

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16 Harris County Prosecutor John Holmes – whose office was also the one handling the Lawrence case – did investigate the letter-writing incident, but decided that because the letter had never been signed and sent to Justice Anderson that nothing illegal had occurred (Fleck 2000c). The Texas House Committee on Judicial Affairs came to a similar conclusion after holding a public hearing on September 27 (Baker 2000).

17 The two dissenters were Justices Murphy and Anderson – the same Justices who made up the majority on the court’s earlier panel decision.
Harvey Hudson dispensed with the equal protection claims by stating that the law did not facially target homosexuals *per se*, but merely a particular action.\(^{18}\) He acknowledged that the law might disproportionately impact homosexuals, but argued that since homosexuals did not constitute a suspect class, the law need only be rationally related to the state’s legitimate interest in preserving the public morals, specifically, “family values.” *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001).

Similarly unimpressed with the privacy arguments, the majority rehearsed the reasoning from the *Bowers* opinion, i.e., that homosexual conduct was not a right that is “implicit in the concept of ordered liberty” nor “deeply rooted in this Nation’s history and tradition” (p. 62). Perhaps in reaction to claims that the sodomy law reflected only a narrow, biblical notion of morality, the majority embellished the *Bowers* argument by referring to a “long history of repressing homosexual behavior” extending well before and outside the American Judeo-Christian experience. In a nod to multiculturalism, the court cheerfully noted that, “In addition to an American tradition of statutory proscription, homosexual conduct has historically been repudiated by many religious faiths,” including “our society’s three major religions – Judaism, Christianity, and Islam”(n. 34). Although the court agreed with the claim that the “modern trend has been to decriminalize many forms of consensual sexual conduct,” it noted that “cultural trends and political movements” were not legitimate concerns of the court, and that only the legislature could make such moral and ethical judgments (p. 63).

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\(^{18}\) The court noted that “we cannot assume homosexual conduct is limited only to those possessing a homosexual ‘orientation.’” Referencing the sexuality orientation continuum used by sex researcher Dr. Alfred Kinsey, the court argued that, “Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct” (n. 6).
In the final few lines of the opinion, the court flatly rejected any John Stuart Mills-inspired arguments that private, consensual sexual behavior between adults is somehow "constitutionally insulated from state proscription." Nor did the majority accept the proposition that no harm comes of such acts. "Simply put," wrote Justice Hudson, "commission of what the legislature determines as an immoral act, even if consensual and private, is an injury against society itself" (p. 64).

In his dissenting opinion, Justice Anderson used generally the same arguments from his panel opinion, but presented them in greater detail and with a far more combative tone. What seemed to rankle Anderson most was what he perceived as the inconsistency and illogic of the majority's argument. Once again, Anderson emphasized that the constitutional problems originated in 1973, when the general prohibition against sodomy for all Texans was replaced with a law that prohibited only same-sex couples from engaging in the act. "That [the Homosexual Conduct law] is not gender neutral on its face," argued Anderson, "is demonstrated by the language in the statute," by clearly specifying "what the genders of the actors must be to constitute a criminal offense" (n. 9).

Even absent a suspect classification, Anderson argued that the law lacked any rational relationship to the state's purported purpose of promoting "family values" — which, he noted, were never defined by the state, but likely had "some relationship to the institutions of marriage and procreation" (p. 73). "To contend, as the State must," wrote Anderson, "that a man somehow promotes family values by engaging in deviate sexual intercourse with a woman, but undermines those values by performing the same deviate sex act with a man, does not, in my view, constitute a showing of an exceedingly
persuasive justification" for the law. "Sodomy is either immoral or it is not" (p. 76).

Anderson surmised that the state’s use of “family values” and “public morals” to justify the law was “nothing more than politically-charged, thinly-veiled, animus-driven clichés” (p. 77).

In an obvious attempt to pre-empt allegations that the all-Republican court been politically motivated to rehear the case and reverse itself, one Justice included an unusual concurring opinion that responded directly to the court’s critics. “There is simply no place for suggesting,” wrote Justice Leslie Brock Yates, “that members of this Court are pandering to certain political groups or deciding a case as a means to achieve a politically desired end” (p. 66). Generally, concurring opinions are written by judges who agree with the conclusion of the majority, “but may state different reasons why such conclusion is reached” (Gifis 1996, 92). Although Yates agreed “with the result reached by, and the reasoning utilized by” the majority, she wrote separately “only to address [the allegation] that by overruling the prior panel’s decision, this Court will have succumbed to improper political pressure” (p. 66). Some critics had suggested that because of the political controversy created by the letter-writing episode, that the 14th Court of Appeals should remove itself and refer the decision for rehearing and any subsequent decisions to another Texas court (Fleck 2000b). “But the response to such a reckless and irresponsible act [i.e., the letter] cannot be that we ignore our duty to decide the law we have been entrusted to interpret” wrote Justice Yates. Turning the argument around, Yates argued that to recuse themselves would only add “unnecessarily to the already politically charged climate....” (p. 67).
After defeat at the 14th Court of Appeals, the attorneys for Lawrence and Garner appealed their case to the Texas Court of Criminal Appeals, which has discretionary power to accept or reject cases. On April 17, 2002, the Texas high court declined to hear the case. Having exhausted all state appeals, Lawrence and Garner could now ask the U.S. Supreme Court to review their case. A petition for the writ of certiorari was filed with the Court on July 16, 2002. The petition made three central claims: first, that the Texas Homosexual Conduct law violated the equal protection clause of the Fourteenth Amendment; second, that the law violated liberty and privacy interests protected by the due process clause of the Fourteenth Amendment; and third, that the Court ought to overrule Bowers v. Hardwick (Lawrence v. Texas, Petition for the Writ of Certiorari, p ii).

After a petitioner has asked the Supreme Court to review a case, the opposing party is notified by the Court and given 30 days to file a brief in opposition. Such briefs, however, are not mandatory, and simply not responding is a common strategy among state prosecutors when a case they won below is appealed to the Court because it “displays the proper disdain for a frivolous petition” (Bishop and Sarles 1999). Such was the approach adopted by Houston Assistant District Attorney Bill Delmore – who had handled the case at the 14th Court of Appeals – when his office learned that the Lawrence team had asked the Supreme Court to review the case. Delmore told a reporter that he “decided not to risk calling more attention to [the case] by filing a response brief,” and hoped that the case would simply “get lost” in the shuffle of the thousands of petitions received by the Supreme Court each year (Reinert 2002, A1).
The Court, however, requested a response brief, which indicated to observers that at least some Justices might be interested in hearing the case. Prosecutors complied with the request, filing their opposition brief in October of 2002. While acknowledging that “Morality is a fluid concept, and public opinion regarding moral issues may change over time,” the state argued that the appropriate venue for the debate over Texas’ sodomy law was the Texas legislature, and not the courts (Respondent’s Brief in Opposition, 20). The brief for the state also noted that the 14th Court of Appeals “broke no new ground” and merely “rendered a decision which is squarely consistent with the decisions of this Court” (p. 4).

On December 2, 2002 – more than four years after police had arrested Lawrence and Garner – the Supreme Court agreed to hear the case.

De ja vu all over again: Lawrence goes to the Supreme Court

On Wednesday, March 26, 2003, lawyers for both sides in Lawrence v. Texas presented their oral arguments before the members of the Supreme Court. Lambda recruited New York attorney Paul Smith to argue on behalf of Lawrence and Garner. Smith had the two prerequisites sought by Lambda: he was openly gay, and he had experience, having previously argued eight cases before the Supreme Court (Mauro 2003). Harris County’s top prosecutor, Chuck Rosenthal, argued on behalf of the state.

Several aspects of the dialogue between the Justices and the counselors was reminiscent of the oral arguments in Bowers. As in Bowers, for example, counsel for the

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19 Coincidentally, Smith clerked for Justice Lewis Powell in 1981. As was previously noted, Powell – who was the swing vote in Bowers – believed he had never met a homosexual before (Mauro 2003).
state of Texas was clearly not enthusiastic about his role in defending Texas' sodomy statute, as was evidenced by his low-key, awkward presentation and his difficulty in answering many of the Justices' questions. And though the topics of sodomy and homosexuality seemed to cause less discomfort and stammering among the Justices than had been the case 17 years before, they didn't make it through the hour of arguments without a bit of giggling.²⁰

It also became clear that some Justices still viewed homosexuality with, if not disdain, at least caution. Chief Justice William Rehnquist, for example, voiced his concern that gay elementary teachers might somehow recruit children. "If you prevail, Mr. Smith, and this law is struck down," said Rehnquist, "do you think that would also mean that a State could not prefer heterosexuals to homosexuals to teach kindergarten?" (p. 20). In one of the only moments in which he seemed flustered, Paul Smith responded that keeping gay teachers out of classrooms would be problematic without some important state justification or some demonstration of concrete harm to the children. "The children might – might be induced to – to follow the path of homosexuality," offered Rehnquist. "And that would not be – that would not be enough?" (p. 21).

The echoes of Bowers could also be heard in the occasional slippery slope questions that punctuated the arguments, such as those posed by Justice Antonin Scalia to Smith. "You probably say the same thing about adultery," accused Scalia. "You think

²⁰ At one point while Justice Stephan Breyer was questioning State's attorney Chuck Rosenthal, Breyer became frustrated when Rosenthal skirted the question for the third time. Breyer, who is known for staying with a question until an attorney has answered to his satisfaction said to Rosenthal, "My question was, getting to those sort of three or four basic points, I would like to hear your straight answer to those points" (emphasis added), at which point the audience – as well as other members of the Court – broke into laughter (Lawrence v. Texas, Transcript of Oral Argument 33).
adultery laws are unconstitutional?” Before Smith could complete his response, Scalia interrupted with a similar question about whether a state had the right to limit marriage to heterosexual couples (p. 25). But Smith was well prepared. “As for adultery and all of the other parade of horribles which people have raised in their briefs,” Smith said confidently, “it seems to me you’ve got to look at the individual interests and the State interests, and their [sic] dramatically different in all of those cases – incest, prostitution, bestiality – with all of these there’s either very little of an individual interest or there’s very heightened state interest or both....” (pp. 25-26).

In spite of the similarities, the arguments in *Lawrence* were much more than a rerun of those in *Bowers* in several important aspects. Differences revolved around the role of history; a reframing of the nature of the right involved; the addition of equal protection analysis; noticeably less use of the language of privacy and more reliance on language centered around personal relationships; and more attention to the collateral damage caused by laws that criminalize homosexual conduct.

First, Smith reframed and refined the historical discussion of sodomy laws and the proper role of history in determining which rights are fundamental. He advised the Court that history should serve “as a starting point, not the end of the analysis” (p. 4). The treatment of the historical record in *Bowers* was deficient in two ways, according to Smith. He said that the history of sodomy laws was far more complicated than had been portrayed in *Bowers*, noting that statutory prohibitions against same-sex conduct were relatively modern additions to the law. The Court had also erred, argued Smith, by focusing too narrowly on the history of a particular sexual act – i.e., homosexual sodomy
rather than "looking at the issue in general terms, which is the right of everyone to decide for themselves about consensual private sexual intimacy" (p. 5).

Smith was careful in his wording of the right in question, never asking the Court to find a fundamental right to engage a particular sexual act, but framing the right as one of making decisions about personal relationships, and imploring the Court simply to recognize that, starting with Griswold, the Court had already amassed precedent demonstrating that "among the fundamental rights that are implicit in our concept of ordered liberty must be the right of all adult couples, whether same-sex or not, to be free from unwarranted State intrusion into their personal decisions about their preferred forms of sexual expression" (p. 4). Put this way, Smith was not asking the Court for anything new, but simply to recognize that the choice of sexual relationships was already well established in such cases as Griswold, Eisenstadt, Roe and Casey.

Whereas in Bowers the case had focused only on the due process protection of the Fourteenth Amendment, the fact that the Texas law targeted sodomy only for same-sex couples implicated equal protection concerns as well as due process concerns. Perhaps the most striking thing about the addition of the equal protection line of argumentation was that during the hour-long discussion, the analytical framework used for one was often employed for the other and vice versa, with the result being a kind of hybrid analysis that recognized the intertwined nature of due process and equal protection rights. Added to that was a strain of argument that asked the Court to take evolving standards into consideration, similar to the "evolving standards of decency" doctrine used by the
Court in recent Eighth Amendment cases. Smith noted that since the Court had last considered the issue in 1986, many states had dropped their laws against consensual sodomy.

Some of the Justices tried to pinpoint just which analysis Smith was relying upon. "On your substantive due process submission, Mr. Smith," said Rehnquist, "certainly the kind of conduct we're talking about here has been banned for a long time. Now you point to a trend in the other direction, which would be fine if you're talking about the Eighth Amendment, but I think our case is like Glucksberg, say, if you're talking about a right that is going to be sustained, it has to have been recognized for a long time. And that simply isn't so" (p. 4).

Smith disagreed. "If you look at the history as a whole, you find a much more complicated picture. First of all, you find that sodomy was regulated going back to the founding for everyone, and indeed, the laws in the 19th Century didn't focus on same-sex couples, they focused on particular ...." (p. 4).

Again interrupting Smith, Rehnquist noted the overlap of due process analysis and equal protection analysis. "You're getting to your equal protection argument now. Let's - let's separate the two. The first is your fundamental right argument," said Rehnquist, "which has nothing to do with equal protection .... and so the same-sex/other-sex aspect doesn't come into it," he stated flatly.

"I think it does come into it," Smith disagreed. He continued,

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21 In 1958, Chief Justice Earl Warren wrote that proper interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles, 356 U.S. 86, 100). More recently, in 2002, the Court noted that a national consensus against executing the mentally retarded had evolved, and thus such executions were unconstitutional (Atkins v. Virginia, 536 U.S. 304).
They [Lawrence and Garner] bring two constitutional claims to the Court today. First, among the fundamental rights that are implicit in our concept of ordered liberty, must by the right of all couples, whether same-sex or not, to be free from unwarranted State intrusion into their personal decisions about their preferred forms of sexual expression. Second, there’s no legitimate and rational justification under the Equal Protection Clause for a law that regulates forms of sexual intimacy that are permitted in the State only for same-sex couples, thereby creating a kind of second-class citizenship to that group of people” (p. 4).

Throughout the questioning, the modes of analysis continued to be deeply intertwined. The frustration of at least one Justice is demonstrated in the following exchange:

Justice Scalia: The equal protection and on to the –

Mr. Smith: No, I was still talking about the level of scrutiny under equal protection, your Honor.

Justice Scalia: Maybe you ought to hold up one hand so I’ll know which?
Mr. Smith: It’s hard when you have these two points to shift back and forth (p. 19).

Later in the arguments, Smith told the Court that the analysis in Bowers was also deficient because it overlooked or ignored the fact that gay individuals entered in to relationships that, while not recognized by law, were indeed familial relationships, and that sexual intimacy served the same purpose in gay relationships as for heterosexual relationships. “[I]t has to be apparent to the Court by now,” said Smith, that there are gay families, that family relationship are established, that thee are hundreds of thousands of people registered … in the 2000 Census who have formed gay families, gay partnerships, many of them raising children, and that for those people, the opportunity to engage in sexual expression as they will in the privacy of their own homes performs much the same function that it does in the marital context, that you can’t protect one without the other, that it doesn’t make sense to draw a line there and that you should protect it for everyone. That this is a fundamental matter of American values (p. 23).
Smith also talked about the collateral damage caused by the Texas Homosexual Conduct law. “Here you have a statute that while it purports to just regulate sexual behavior, has all sorts of collateral effects on people,” said Smith. He pointed to the fact that gays in states with sodomy laws are regularly “denied visitation to their own children, they’re denied custody of children, they’re denied public employment. They’re denied private employment, because they’re labeled as criminals merely because they’ve been identified as homosexuals” (p. 20).

When it came time for Rosenthal to argue, the bulk of the Court’s questioning focused on two questions: what rational basis did the law have, and was anyone harmed by the homosexual conduct specified in the law?

Justices David Souter and Stephan Breyer seemed troubled that the sole purpose of the law appeared to rest upon a moral judgment without demonstration of harm. “You’ve not given a rational basis,” Breyer said to Rosenthal with some frustration, “except to repeat the word morality” (p. 43).

Justice Souter continued where Breyer left off. “When the state criminalizes behavior as immoral, customarily what it points to is not simply an isolated moral judgment alone, but it points to a moral judgment which is backed up by some demonstration of harm to other people” said Souter. “What kind of harm to others can you point to in this case to take it out of the category of simple moral disapproval, per se?” (p. 44). When Rosenthal noted that there are other victimless crimes, such as taking illegal drugs, Souter criticized the analogy. “Do you point to a kind of harm here to an individual or to the individual’s partner, which is comparable to the harm that results
from the deterioration of the body and mind from drug-taking? I mean, I don’t see the parallel between the two situations” (p. 44).

The Supreme Court Overturns Bowers

On June 26, 2003, the Court handed down its decision in Lawrence. Writing for a six-person majority, Justice Kennedy blasted the Bowers decision and reframed the Court’s approach to substantive due process. He concluded that Texas Homosexual Conduct law furthered no legitimate state interest that would justify the state’s intrusion into the private lives and relationships of its citizens, nor justify the collateral damage endured by homosexuals.

In sweeping, eloquent language, Kennedy embraced a substantive interpretation of liberty, one that emphasized freedom from government. “Liberty,” he wrote

protects the person from unwarranted government intrusions.... Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions (emphasis added) (Lawrence v. Texas, 539 U.S. 558, 562).

Kennedy noted that the law could be struck using the equal protection clause, but that doing so would leave the Bowers decision in tact. Because Bowers allowed states to demean the lives of gays, Kennedy argued that it must be specifically overruled.

Keenly aware that departure from stare decises should never be taken lightly, Kennedy devoted the lion’s share of the Lawrence opinion to a discussion of the two major problems with Bowers: first, that the Bowers Court framed the question wrong, and second, that the opinion relied on an inaccurate history of sodomy laws. Kennedy noted
that in *Bowers*, the Court said that "The issue presented here is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy...." (p. 566). The very statement of the question, wrote Kennedy, "discloses the Court's own failure to appreciate the extent of the liberty at stake," and added that "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim put forward...." (p. 567).

With regard to the history of sodomy laws, Kennedy noted that "The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character" (p. 570). He also noted that the *Bowers* Court had ignored many legal trends apparent at that time, such as the fact that a majority of states had already done away with their sodomy laws, and that authorities such as the Model Penal Code had advocated decriminalization of private sexual acts (p. 572).

One of the most novel aspects of the opinion was Kennedy's reliance on international authorities. He pointed out, for example, that "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in the opposite direction." Among the authorities that the *Bowers* Court should have considered, according to Kennedy, were: (1) Great Britain's Wolfenden Report, which in 1957 had recommended repeal of laws punishing homosexual conduct; and (2) the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R.
(1981) which held that laws prohibiting homosexual conduct were invalid under the

Having overturned Bowers, Kennedy concluded that Lawrence and Garner were
“entitled to respect for their private lives,” and that the “Due Process Clause gives them
the full right to engage in their conduct without intervention of the government” (p. 525-
526).

Although Kennedy did not invoke a limiting principle, he made it clear that the
state may sometimes legitimately regulate private sexual behavior when such behavior
would involve harm to others. But instead of articulating a general principle of what was
involved in the Lawrence case, Kennedy took an opposite approach, and offered a
specific list of what was not involved. “The present case,” Kennedy wrote, “does not
involve minors. It does not involve persons who might be injured or coerced or who are
situated in relationships where consent might not easily be refused. It does not involve
public conduct or prostitution” (p. 525). The common denominator underlying
Kennedy’s list is that there is no harm done to others.

Perhaps the greatest achievement of the Lawrence opinion was Kennedy’s
recognition of the intertwined nature of the rights bestowed by the due process and equal
protection clauses, and his attempt to reconcile them into a coherent analysis where one
informs the other. As was illustrated in the oral arguments for Lawrence, substantive due
process and equal protection have relied on different types of analysis. Substantive due
process analysis has tended to rely on the backward looking practice of identifying those
rights that have historically been recognized. In contrast, equal protection analysis is a
forward-looking exercise that requires that all be treated equally. Throughout the

*Lawrence* opinion, Kennedy described the two-step dance between due process and equal protection — e.g., *Griswold* found a substantive due process right for married couples to use contraception, followed by the Court’s application of that right to single people in *Eisenstadt.*

In the final lines of *Lawrence,* Kennedy leaves open the door for the Court of articulate freedoms that might not necessarily find their roots in history.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom (p. 578-579).

In a concurring opinion, Justice Sandra Day O’Connor wrote that she would vote to strike the law, but on equal protection grounds. Justice Antonin Scalia delivered a scathing dissent, in which he was joined by Justices William Rehnquist and Clarence Thomas.

**One Nation, After All**

It was somehow fitting that the *Lawrence* decision was announced on June 26, 2003 — just two days before the Gay Pride Parades would be held across the nation, and two days before Mitchell Katine, John Lawrence and Tyron Garner would serve as the Grand Marshall’s in Houston’s Gay Pride Parade. At a talk to UCLA law students in January, 2004, Katine recalled what for him had been the most meaningful and symbolic
moment of the day that the Court issued its historic *Lawrence* decision. "We were all waiting for this decision," said Katine, recalling his thoughts on the morning of June 26, "and we had to be prepared for a loss, because the *Bowers v. Hardwick* lawyers thought they were going to win and they lost big." Katine said that throughout the country on that day, there were "39 protests/rallies that were planned throughout the country, because we didn’t know if we were going to win or going to lose." And then the official reports started to come in that they had won the case – and not only that they had won the case, but that it had been in a 6-3 decision, and not just a 5-4 decision, and not only that, but that *Bowers* had been overturned. "The Supreme Court made it clear that we as homosexuals were finally included as part of the United States," said Mitchell. "As a result of this decision, there were no protests held, there were rallies held from coast to coast." But in Mitchell’s opinion, the most significant moment occurred in a rally held in San Francisco. "The gigantic gay pride flag that flies on the flagpole at the entrance to Castro Street was brought down for the first time, and the American flag was raised. And the crowd said the Pledge of the Allegiance. That demonstrates the meaning of this decision to all of us" (Katine 2004).
APPENDIX A:
USE OF “PENUMBRA” IN SUPREME COURT JURISPRUDENCE

Hanover Star Milling Co. v. Metcalf, 240 U.S. 203 (1916), Justice Holmes, concurring:

“For the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled” (p. 426).

Schlesinger v. Wisconsin, 270 U.S. 230 (1926); Justice Holmes, dissenting:

“But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured” (p. 241).

Spring v. Government of the Philippine Islands, 277 U.S. 189 (1928); Justice Holmes, dissenting:

“The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other” (p. 209).

Olmstead v. U.S., 277 U.S. 438 (1928); Justice Holmes, dissenting:

“My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them” (p. 469).

Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission, 291 U.S. 587 (1934); Justice Stone, dissenting:

“When the courts are faced with interpretation of the particular, administration breaks down and the manifest purpose of the Legislature is defeated unless it is recognized that, surrounding granted powers, there must be a penumbra which will give scope for practical operation” (p. 607).

Dayton Power and Light Co. v. Public Utilities Commission, 292 U.S. 290 (1934); Justice Cardozo:

“For the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled” (p. 308).

Schecter Poultry v. U.S., 295 U.S. 495 (1935); Justice Cardozo, dissenting:
"There is no **penumbra** of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere" (p. 554).

*Helvering v. Davis*, 301 U.S. 619 (1937); Justice Cardozo:

"Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a **penumbra** in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment" (p. 640).

*Coleman v. Miller*, 307 U.S. 433 (1939); Justice Frankfurter, dissenting:

"No doubt the bounds of such legal interest have a **penumbra** which gives some freedom in judging fulfillment of our jurisdictional requirements. The doctrines affecting standing to sue in the federal courts will not be treated as mechanical yardsticks in assessing state court ascertainment of legal interest brought here for review" (p. 465).

*U.S. v. Classic*, 313 U.S. 299 (1941); Justice Douglas, dissenting:

"It is not enough for us to find in the vague **penumbra** of a statute some offense about which Congress could have legislated and then to particularize it as a crime because it is highly offensive" (p. 332).

*General Committee v. Missouri-Kansas-Texas Railway Co.*, 320 U.S. 323 (1943); Justice Douglas:

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the **penumbra** of those few principles which it codified" (p. 336).

*Screws v. U.S.*, 325 U.S. 91 (1945); Justice Rutledge, concurring:

"But, it is said, a **penumbra** of rights may be involved, which none can know until decision has been made and infraction may occur before it is had. It seems doubtful this could be true in any case involving the abuse of official function which the statute requires and, if it could, that one guilty of such an abuse should have immunity for that reason. Furthermore, the doubtful character of the right infringed could give reason at the most to invalidate the particular charge, not for
outlawing the statute or narrowly restricting its application in advance of compelling occasion” (p. 130, 131).

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945); Justice Jackson:

“It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power” (p. 315).

Fernandez v. Weiner, 326 U.S. 340 (1945); Justice Stone:

“Considerations of practical administrative convenience and cost in the administration of tax laws afford adequate grounds for imposing a tax on a well recognized and defined class, without attempting to extend it so as to embrace a penumbra of special and more or less casual interests which in each case may or may not resemble the taxed class” (p. 360).

General Box Co. v. U.S., 351 U.S. 159 (1956); Justice Douglas, dissenting:

“The problem lies in the penumbra of Louisiana law, making all the more difficult a prediction as to what the Louisiana courts would hold” (p. 169).

Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); Justice Douglas:

“Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem” (p. 458).

Smith v. Sperling, 354 U.S. 91 (1957); Justice Douglas:

“It may show a dispute that lies in the penumbra of business judgment, unaffected by fraud. But that issue goes to the merits, not to jurisdiction” (p. 95).

Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958); Justice Douglas:

“We deal here with a problem in the penumbra of the law where generally the Executive and the Legislative are supreme” (p. 317).

Uphaus v. Wyman, 360 U.S. 72 (1959); Justice Brennan, dissenting:
"The choice was to reach the end of exposure through the process of investigation, backed with the contempt power and the making of reports to the Legislature, of persons and groups thought to be somehow related to offenses under the statute or, further, to an uncertain **penumbra** of conduct about the proscribed area of the statute" (p. 99).

*Wilson v. Schnettler*, 365 U.S. 381 (1961); Justice Douglas, dissenting:

"The judicial discretion to deny declaratory relief is in the **penumbra** of the constitutional requirement of 'case or controversy'" (p. 392).

*Federal Power Commission v. Texaco*, 377 U.S. 33 (1964); Justice Douglas:

"There is symmetry in that construction as the choice, so far as circuits are concerned, is then left between that State, the "principal place of business" (with no **penumbra** of other places of business, as here), or the District of Columbia where the Commission sits" (p. 39).
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