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CASENOTES

BOWERS v. HARDWICK.* THE CONSTITUTIONALITY OF GEORGIA'S SODOMY STATUTE

The United States Constitution has been interpreted to provide a fundamental right of privacy which protects individuals from unwarranted governmental intrusions.¹ This fundamental right has been extended to family-related matters,² marriage,³ and procreation.⁴ In Bowers v. Hardwick,⁵ the United States Supreme Court was

1. Stanley v. Georgia, 394 U.S. 557, 564 (1969). The Court recognized the right of privacy in Stanley, stating that there is a fundamental right to be free from unwarranted governmental intrusions into one's privacy, except in very limited circumstances. Id. The Court further stated that:

[T]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man.

Id. (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). See also Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
2. See Moore v. City of East Cleveland, 431 U.S. 494 (1977) (city ordinance which limited the dwelling occupancy to closely related individuals was an unconstitutional invasion of the fundamental right of family choice); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parent's decision to withhold their child from compulsory school attendance was upheld as parents have a fundamental right to decide on a child's education); Prince v. Massachusetts, 321 U.S. 158 (1944) (there is a realm of family life which the state cannot enter without substantial justification); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (state statute restricting the teaching of a foreign language to a child invades the child's fundamental right of liberty).

3. See Zablocki v. Redhail, 434 U.S. 374 (1978) (state statute requiring child support payments as a prerequisite to a marriage license violated an individual's fundamental right to marry); Loving v. Virginia, 388 U.S. 1 (1967) (Virginia statute criminalizing inter-racial marriage held to be unconstitutional).
4. See Carey v. Population Services Int'l, 431 U.S. 678 (1977) (law prohibiting the advertisement or display of contraceptives imposes on the fundamental right to bear or beget children and must be justified by a compelling state interest); Planned
asked to decide whether the fundamental right of privacy, given to family-related matters, extends to the homosexual act of sodomy. If so, a Georgia law criminalizing consensual sodomy would be unconstitutional. The Court, utilizing an unduly restrictive analysis of fundamental rights, held that the Constitution does not bestow upon homosexuals a fundamental right to engage in sodomy. Therefore, the Court upheld the Georgia statute criminalizing consensual sodomy.

Michael Hardwick was charged in 1982 with violating a Georgia statute which criminalized the consensual act of sodomy. Hardwick was arrested in the bedroom of his own home where he was engaging in the act of sodomy. After a preliminary hearing, the charges against Hardwick were dismissed.

Hardwick then brought suit against Georgia's Attorney General in the District Court for the Northern District of Georgia seeking a declaratory judgment that the Georgia statute criminalizing sodomy was unconstitutional. Hardwick contended that the Georgia statute...
ute infringed upon his fundamental rights of privacy and intimate association. The district court, relying on the Supreme Court's summary affirmance of Doe v. Commonwealth's Attorney for the City of Richmond, which upheld the constitutionality of a similar Virginia sodomy statute, granted the defendant's motion to dismiss.

The United States Court of Appeals for the Eleventh Circuit reversed and remanded, stating that Doe was distinguishable and that later Supreme Court decisions had undermined the holding in Doe. Relying on privacy case law, the Eleventh Circuit held that the Doe's complaint for lack of a justiciable controversy. Id. The district court stated that “the Does are unable to show that they have sustained or are in immediate danger of sustaining some direct injury as a result of the statute's enforcement.” Id. Because the Does could not show any immediate danger or direct injury, the district court dismissed their complaint. Id. at 18. The court of appeals affirmed the district court's judgment dismissing the Doe's claim for lack of standing. Hardwick, 760 F.2d at 1206-1207. The Does did not challenge that holding in the Supreme Court. Hardwick, 106 S. Ct. at 2842, n.2.

16. The district court stated that the Virginia statute, V. A. Code 18.1-212 (1950), which defines sodomy as:
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 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.
is quite similar to Georgia's statute in question and that all constitutional arguments made by Hardwick were rejected in Doe. Hardwick, 106 S. Ct. 2842, n. 1-2.

17. Hardwick, 106 S. Ct. at 2842. The three defendants, Michael Bowers, Lewis Slayton, and George Napper, all filed motions to dismiss for failure to state a claim upon which relief could be granted. Id.

18. The court of appeals remanded the case for a new trial to determine if the State of Georgia could show a compelling reason for upholding its sodomy statute. Hardwick, 760 F.2d at 1213. The court further stated that the Georgia sodomy statute must be the most narrowly drawn means of safeguarding the state's interest in order to be constitutional. Id.

19. The court of appeals stated that Doe was distinguishable because the Court could have approved Doe without addressing any of the constitutional questions that Hardwick brought forth since the plaintiff in Doe clearly lacked standing. Id. at 1207. “Hence, the constitutional issues presented in Doe were issues listed in the jurisdictional statement but not necessary to the disposition of that case.” Id. at 1207-08.

20. Id. The court of appeals stated that “[e]ven if Doe had been resolved on the constitutional grounds now asserted by Hardwick, the Supreme Court has indicated since that time that the constitutionality of the statutes such as the one in question here is not covered by Doe but, rather remains an open question.” Id. at 1208. The circuit court added that summary dispositions only bind lower courts until the Supreme Court indicates differently. Id. The circuit court continued stating that “[d]octinal development need not take the form of outright reversal of the earlier case. The Supreme Court may indicate it's willingness to reverse or reconsider a prior opinion with such clarity that a lower court may properly refuse to follow what appears to be binding precedent.” Id. at 1208. Also, the Court's expressions can work to erode an earlier summary affirmance which does not carry the same weight as the argued opinion. Id.

The court of appeals cited two Supreme Court actions which demonstrate that
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The sodomy statute infringed upon Hardwick's fundamental right of privacy. The Supreme Court granted certiorari to resolve a conflict among the circuits.

The Supreme Court held that the Constitution does not guarantee a fundamental right to engage in homosexual sodomy. The fact that the crime was committed in the privacy of Hardwick's home did not limit the state's right to enforce the statute. To uphold the sodomy statute, the Court held that Georgia need only prove a rational basis for legislation criminalizing sodomy. The Court concluded that Georgia had a rational basis to enact legislation criminalizing sodomy because a state has the power to regulate the conduct and morality of its citizens.

In deciding whether the Constitution guarantees a fundamental right of privacy protecting homosexual sodomy, the Supreme Court rejected the Eleventh Circuit's argument that the Georgia sodomy statute infringed on Hardwick's right of privacy. The Eleventh Circuit had read a broad right of privacy from several Supreme Court decisions. The Supreme Court distinguished the holdings in its earlier right of privacy decisions, however, from the present summary affirmance in Doe is not binding. The Supreme Court stated in footnotes 17 that it has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults. Hardwick, 760 F.2d at 1209. Second, in dismissing the writ of certiorari in New York v. Uplinger, 467 U.S. 246, 249 (1983), a case which covered deviate behavior, the Supreme Court stated that the case presented an inappropriate vehicle for resolving important constitutional issues raised by state laws prohibiting sodomy. Hardwick, 760 F.2d at 1210. For these reasons, the court of appeals ruled that the summary affirmance in Doe had been undermined.

21. See supra notes 2-4.
22. Hardwick, 760 F.2d at 1211.
24. See Baker v. Wade, 743 F.2d 236 (5th Cir. 1984), rev'd, 769 F.2d 289 (5th Cir. 1984) (en banc) (the Fifth Circuit reversed the district court, stating that the sodomy statute, Tex. Penal Code Ann. 21.06 did not violate the equal protection clause of the fourteenth amendment because morality is a legitimate state interest); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), reh'g denied, 746 F.2d 1579 (D.C. Cir. 1984) (Navy's policy of mandatory discharge for homosexual conduct does not violate any constitutional right to privacy or equal protection).
26. Id. at 2846.
27. The rational basis test is a less demanding test than the compelling interest requirement, and is met if the statute in question bears any rational relation to a legitimate state objective. See Roe v. Wade, 410 U.S. 113, 172-73 (1973) (Rehnquist, J., dissenting).
29. Id.
30. See supra notes 2-4, and 6.
31. Hardwick, 760 F.2d 1202.
The Court construed the holdings of *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade* narrowly, and found that the right of privacy is limited to such activities as marriage, procreation, and child rearing.

The Court stated that nowhere in its prior decisions was there any precedent for the proposition that all private consensual sexual activity is insulated from state restrictions. To the contrary, the Court held that the fundamental right of privacy belonging to married couples in decisions of procreation could not be expanded to encompass the sexual acts of homosexuals. The Court concluded that the choice to engage in the homosexual act of sodomy is not an implicit fundamental right under the Constitution.

The Court defined a fundamental right as one "deeply rooted in tradition and implicit in the concept of ordered liberty." It further noted that if fundamental rights are sacrificed, liberty and justice cannot exist. The Court reasoned that since there was a long tradition in the United States of condemning the act of sodomy, the choice to engage in homosexual sodomy could not be interpreted as a fundamental right. Moreover, the Court refused to expand fun-

33. 381 U.S. 479 (1965).
34. 405 U.S. 438 (1972).
36. *Hardwick*, 106 S. Ct. at 2844. The Court stated that the right of privacy that had been established in the *Griswold* line of cases did not bar state enforcement of private consensual sexual activity. *Id.* (citing *Carey*, 431 U.S. at 688, n.5). In footnote five of *Carey*, the Supreme Court stressed that a state need not show a compelling interest "whenever it implicates sexual freedom" or "affect[s] adult sexual relations." *Carey*, 431 U.S. at 688, n.5. The Court in *Carey* limited the state to showing a compelling interest only when it "burden[s] an individual's right to decide to prevent contraception or terminate pregnancy by substantially limiting access to the means of effectuating that decision." *Id.* See generally *Note, On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. Rev. 670, 719-738 (1973).
37. *See supra* note 6. *See also* *Carey*, 431 U.S. at 694, n.17.
39. In *Hardwick*, the Court finally acted to decide the issues brought up in footnote five and seventeen of *Carey*. *Id.* at 2844.
40. *Id.* at 2844 (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (majority opinion of Powell, J.)).
42. The *Hardwick* Court stated that judges should not impose their own personal values on the states and the Federal Government when identifying rights not explicitly stated in the Constitution. *Hardwick*, 106 S. Ct. at 2846. Instead, judges should rely on the history and tradition of the nation when interpreting the Constitution to see if a fundamental right exists. *Id.* The Court stated that the criminalization of sodomy has an ancient tradition in our country, since it was forbidden at common law and since the original 13 states all had sodomy statutes. *Id.* at 2844. In addition, all fifty states outlawed sodomy until 1961, when Illinois adopted the Model Penal code, and today twenty-four states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. *Id.* at 2844-45. See generally *Survey on the Constitutional Right to Privacy in the*
damental rights to include consensual sexual activity under the authority of the Due Process Clause, stating that expanding the Constitution is not the role of the judiciary. The Court added that a judicial system loses legitimacy when it tries to expand the fundamental rights under the Constitution. Therefore, courts should be hesitant in doing so.

The Court then addressed Hardwick's assertion of the right to privacy in his own home. Hardwick contended that victimless acts committed in the privacy of the home, even though illegal when performed in public, are protected from state interference. He cited Stanley v. Georgia for this proposition. The Court, however, distinguished Stanley stating that the decision was based on the first amendment right of free speech and not the right of privacy.

The Court recalled that in Stanley it stated that certain crimes such as the possession of drugs, firearms and stolen goods, although victimless, do not escape state prosecution simply because they are committed in the home. The Court reasoned that if Hardwick's argument was accepted and consensual homosexuals' acts committed in the home were exempt from punishment, the state would be deprived of the ability to outlaw adultery, incest, and other sexual crimes committed in the home. The Court was unwilling to go that far.


43. Hardwick, 106 S. Ct. at 2846.
44. Id. at 2846.
45. Id.
46. Id.
47. 394 U.S. 557 (1969). In Stanley, the defendant was prosecuted under Ga. CODE ANN. 26-6301 (Supp. 1968) which criminalized possession of obscene material. Id. Stanley was convicted for knowingly having possession of obscene material in his home. Id. at 558. Stanley contended that the Georgia obscenity statute was unconstitutional because it punished mere private possession of obscene material. Id. at 559. The court in Stanley stated that the Constitution protects the right to receive information and ideas, regardless of their social worth, and to be generally free from governmental intrusion into one's privacy and control of one's thoughts. Id. at 564-65.
48. The Court in Stanley based its decision on the first amendment stating that "[i]f the first amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." Id. at 565. The Court rejected Georgia's argument that the state does not have the right to control the moral content of a person's thoughts. Id.
49. In Stanley, the Court stated:
What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

Id. at 568, n.11.
The last argument the Court addressed was Hardwick's contention that Georgia failed to meet the required burden of proof to establish a rational basis for its sodomy statute. Hardwick asserted that under the Due Process Clause there was no rational basis for Georgia's statute except for the traditional belief of the majority of Georgias citizens that homosexual sodomy is immoral and ethically unacceptable. Responding to that argument, the Court stated that the law is constantly based on questions of morality. If all laws representing moral choices were invalidated under the Due Process Clause, the courts would be overloaded with cases.

The Supreme Court's decision in *Hardwick v. Bowers* is incorrect for three reasons. First, the Court ignores the plain language and legislative intent of the statute. Second, the Court misinterprets the fundamental right of privacy established in previous Supreme Court decisions. Finally, the Court should have used the compelling interest test to determine the constitutionality of Georgia's sodomy statute.

51. Id.
52. Id.
53. Id.
In 1968, the Georgia legislature amended the sodomy statute in response to court decisions which refused to apply the old statute to certain heterosexual and lesbian acts. The revisions broadened the plain language of the statute, making irrelevant the sex and marital status of any person who engages in the act of sodomy. Thus, if the Supreme Court had examined the legislative intent of the statute, it would have found that the proper reading of the revised statute was to punish heterosexuals as well as homosexuals, and married people as well as single.

The Court, choosing to overlook the broad language of the statute, decided Hardwick on the narrow proposition that the Georgia statute applies only to homosexuals. The Court focused the issue of fundamental rights entirely on homosexual acts, instead of all consensual sexual relations between adults. The decision ignored Hardwick's claim that the Georgia statute violated his fundamental rights of privacy and intimate association, which he stated were not dependent on his sexual preference. The Court stated that fundamental rights can only be established through moral tradition and a long legislative history.


56. Riley v. Garrett, 219 Ga. 345, 348, 133 S.E.2d 367, 370 (1963) (the Supreme Court of Georgia held that 26:5901 did not prohibit heterosexual cunnilingus); Thompson v. Aldredge, 187 Ga. 467, 200 S.E. 799 (1939) (the Georgia Supreme Court held that 26:5901 did not prohibit lesbian activity).


58. See supra notes 55-57.


60. Hardwick, 106 S. Ct. at 2842, n.2. The Court states in a footnote that since the Does' claim that the Georgia statute chilled and deterred them from engaging in heterosexual sodomy was denied as for a lack of standing, Hardwick's challenge to the Georgia statute is the only proper claim before the Court. Id. The Court refused to rule on the constitutionality of the Georgia statute as it applied to heterosexuals. Id.

61. See supra note 60.
The Court, however, misinterpreted its own earlier decisions establishing the right of privacy.

The fundamental right of privacy is not based on the morality of sodomy and the long legislative history of sodomy statutes in the United States. The fundamental right of privacy is the individual's protection from unwarranted governmental intrusions in intimate decisions which directly affect his personal life. The constitutional right of privacy protects an individual's choice in marriage and family related matters, not because of the sanctity of the family and marriage, but because every person has a fundamental right to make personal decisions which affect his self-definition. The Court did...
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recognize the historical development of the right of privacy. In so doing, however, it justified excluding homosexuals.66

The constitutional right of privacy in sexual matters was established in *Griswold v. Connecticut*.67 The *Griswold* decision was based on the Court's finding that an individual's right to privacy in sexual matters in protected under the penumbra of the Bill of Rights.68 *Griswold* stressed the fact that an individual's right to privacy is a protection against "all intrusions of the sanctity of a man's home and privacies of his life."69 The Court went on to apply the compelling interest test stating that the government cannot control private activities under the authority of broad statutes which invade an individual's fundamental freedoms.70 Although *Griswold* was confined to the traditional marital relationship, *Griswold* implanted the right to personal autonomy in sexual behavior.71 This right of personal autonomy, or intimate association, was expanded further in

court's decision, Judge Mehrigge stated that "[i]t 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 for constitutional protection." Louisi, 363 F. Supp. at 625.

66. See supra note 6.

67. *Griswold*, 381 U.S. at 479, 481-86. The right of personal privacy is not explicit in the Constitution or in the Bill of Rights. There has been some difficulty in finding the exact origins of the right of sexual privacy since the Justices in *Griswold* differed as to its constitutional foundations. Justice Douglass, who wrote the majority opinion in *Griswold*, based the right to privacy on the penumbras of the first, third, fourth, fifth and ninth amendments. Id. at 482-85. Justice Goldberg, who concurred, emphasized the ninth and fourteenth amendments. Id. at 487-93. Justice Harlan concurred, even though he disagreed with Douglass' view, stating that the right of privacy was so "implicit in the concept of ordered liberty" that it was protected from state infringement under the due process clause of the fourteenth amendment. Id. at 499-500. See generally Eichbaum, *Towards an Autonomy - Based Theory of Constitutional Privacy: Beyond the Ideology of Family Privacy*, 14 HARV. C.R.-C.L.L. REV. 361 (1979) (*Griswold* was the first case to recognize the right of privacy in sexual relations and the fact that only an autonomy-based right of privacy can adequately protect the individual against the conflicting majority value); Ludd, *The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right to Be Let Alone*, 10 U. DAYTON L. REV. 705 (1985) (*Griswold* repudiated a long established judicial reluctance to address matters of sexual privacy); Note, *Sexual Autonomy and the Right to Privacy*, 30 Hastings L.J. 972 (1979) [hereinafter Note, *Sexual Autonomy*]; Note, *Doe v. Commonwealth's Attorney: A Set-Back for Right of Privacy*, 65 Ky. L.J. 748 (1977) [hereinafter Note, *Set-Back for Right of Privacy*]; Note, *Expanding Sexual Privacy*, supra note 57 at 1284; Note, *Sodomy - Constitutional Law - Texas Statute Prohibiting Sodomy is Unconstitutional*, 49 Tex. L. REV. 400 (1971) [hereinafter Note, *Texas Sodomy Statute*].

68. *Griswold*, 381 U.S. at 484-485.

69. Id. (citing Boyd v. United States, 116 U.S. 616, 630 (1886)). In *Boyd*, the Court stated that the fourth and fifth amendments protect against government intrusions. 116 U.S. at 630. *The Boyd* Court further stated that "[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of personal security." Id. at 630.

70. See supra note 64.

later Supreme Court decisions.

In *Eisenstadt v. Baird*, the Court broadened the scope of the right to privacy to include sexual autonomy beyond the confines of the institution of marriage. Although the Court only applied an objective rational test, the Court could not find a rational reason to distinguish between the sexual relations of married and unmarried individuals. In later cases relating to the right of privacy and sexual autonomy, the Court returned to the traditional compelling interest test.

In *Roe v. Wade* and *Doe v. Bolton*, the Court again was asked to determine the constitutional boundaries of state regulation of personal autonomy in sexual relations. The Court held that the abortion statutes of Texas and Georgia were unconstitutional because they violated the fourteenth amendment’s concept of personal liberty. In *Roe*, the majority stated that the right to personal privacy was fundamental and implicit in the concept of ordered liberty. Because such rights were fundamental, the Court applied the

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73. *Eisenstadt*, 405 U.S. at 446-455. In *Eisenstadt*, the Court was asked to decide whether a Massachusetts law which prohibited the sale of contraceptives to an unmarried individual is constitutional. *Id.* at 440-443. The Court stated that the statute “violates the right of single persons under the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 446-447. The Court further stated, that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and married alike.” *Id.* at 453.

74. *Id.* at 447. In applying the objective rational test of the equal protection clause, the Court stated:

> The Equal Protection Clause . . . does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of a criteria wholly unrelated to the objectives of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objective of the legislature, so that all persons similarly circumstanced shall be treated alike.

*Id.* (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

75. *Eisenstadt*, 405 U.S. at 448-455. The *Eisenstadt* Court, in discussing the right to privacy established in *Griswold*, stated that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* at 453.

76. 410 U.S. 113 (1973).


79. *Id.* at 147-164. The Court stated that the abortion statutes violated the due process clause of the fourteenth amendment which protects the right of privacy against state action and unwarranted government intrusions. *Id.* Under the right of privacy, the Court included a woman’s right to terminate her pregnancy. *Id.*

80. *Id.* at 152. The Court stated that the Constitution does not explicitly mention any right of privacy, however, there is a guaranteed right of personal privacy in certain areas or zones of privacy. *Id.* The Court, or individual justices, have found the fundamental right of privacy in the first and fourth amendments, Stanley v. Georgia, 394 U.S. 577, 564 (1969), in the fourth and fifth amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States,
compelling interest test to both cases. These decisions, viewed together, established a fundamental right of privacy in intimate personal decisions which is independent of family matters and marriage. An individual’s decision to engage in homosexual activity is a personal decision independent of traditional concepts which must be protected under the penumbra of the Bill of Rights.

An individual’s sexual preference is a personal matter having a profound effect on his life. The decision to engage in consensual homosexual sodomy is one of great importance for an individual’s physical, as well as mental, well-being. Because an individual’s decision to be a homosexual is similar to the decisions of abortion, marriage, and procreation, the Bill of Rights should protect such decisions from governmental intrusions. A state must protect a homosexual’s fundamental right of privacy extended in the Bill of Rights, unless the state can show a compelling reason for limiting the fundamental right of privacy.

Having failed to address the right of privacy from the viewpoint of personal autonomy, the Court did not decide whether there was a fundamental right of privacy in an individual’s decision of sexual

116 U.S. 616 (1886), in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-485 (1965), in the ninth amendment, id. at 486 (Goldberg, J., concurring), and in the concept of liberty guaranteed under the first section of the fourteenth amendment, Meyer v. Nebraska, 262 U.S. 390, 399 (1923). From the cases cited above, it is clear that only personal rights are included in the fundamental right of privacy. Roe, 410 U.S. at 152.

81. Roe, 410 U.S. at 155; Bolton, 410 U.S. at 211-212.
82. See supra note 80.
83. See Karst, supra note 64, at 641; Rivera, supra note 63, at 955; Note, Set-Back for the Right of Privacy, supra note 67, at 757.
85. See N.I.M.H. Report, supra note 84, at 6; R. Scur, Crimes Without Victims 110-111 (1965); D. West, supra note 84, at 102. Note, supra note 84, at 1620.
86. See supra note 84.
87. See Note, The Constitutionality of Laws Against Private Homosexual Conduct, 72 Mich. L. Rev. 1613, 1624 (1974). The key question is whether the right of sexual privacy is interpreted as a fundamental right. Id. If the right of sexual privacy is determined to be a fundamental right, the state will have to meet a compelling interest test. See also W. Barnett, supra note 57, at 4; G. Gunther, Constitutional Law, Cases and Materials (10th ed. 1980); L. Tribe, American Constitutional Law (1978).
Therefore, the Court had no reason to ask the state to provide a compelling reason to justify Georgia's sodomy statute. Instead, the Court proceeded under a rational basis test and found that the State of Georgia had satisfied the test. However, if the Court were to recognize a homosexual's fundamental right of privacy in sexual decisions, and were to ask the State of Georgia to provide a compelling reason to uphold the constitutionality of Georgia's sodomy statute, it is unlikely the state could ever do so.

In upholding the Georgia sodomy statute, the Court relied heavily on the proposition that the state has the right to regulate the conduct and morality of its citizens through the criminal justice system. The Court also relied on the fact that homosexual sodomy has traditionally been a criminal act in this country. Yet, the Court's reasoning is unwarranted under the Constitution.

The Constitution protects an individual's freedom to disagree with the majority. The freedom to be different does not only apply

88. See supra notes 6 and 37.
89. Hardwick, 106 S. Ct. at 2846.
90. Id.
91. Doe, 403 F. Supp. at 1203 (Merhige, J., dissenting). Judge Mehrige stated: Every individual has a right to be free from unwarranted government intrusions into one's decision on private matters of intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his own home, would appear to be a decision of the utmost privacy and intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest.

92. See supra notes 41-44. See also Paris, 413 U.S. at 49-60 (citing Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (the right of the nation and the states to maintain a decent society). See generally LORI DEVLIN, THE ENFORCEMENT OF MORALS (1965) (society should impose on all of its members the moral views of the majority). But see Dworkin, Lord Devlin and the Enforcement of Morals, 75 YALE L.J. 986 (1966) (the fact that a majority has a belief that homosexuality is immoral does not justify criminalizing it).
93. See West Virginia Board of Education, 319 U.S. at 641-642. As Justice Jackson stated in the majority opinion: We apply the limitation of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the so-
to limited situations, it extends to areas that touch the heart of the majority. The fact that majority beliefs are founded on time-honored tradition does not necessarily mean that they must be provided constitutional protection. The Constitution cannot act to justify the deprivation of a person's fundamental right of privacy because the majority of Georgia's constituents have always been uncomfortable with homosexuality.

There is no dispute that Government has the right to protect individuals from unwilling exposure to sexual activity that occurs in a public place. Publicly-displayed intimate behavior interferes with the observer's fundamental right of personal autonomy. The state is, therefore, justified in punishing public sexual activity. When the sexual activity occurs in the privacy of one's own home, however, the state may not intrude on that person's fundamental right of privacy and intimate association.

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95. See supra note 94.

96. See supra note 94. See, e.g., Roe v. Wade 410 U.S. 113, reh'g denied, 410 U.S. 959 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954). In Loving, the Court was asked to decide a similar issue, whether a statute which prevented inter-racial marriages could be justified on the grounds that the religious majority believed inter-racial marriages were immoral. Loving, 388 U.S. at 1-7. The Court held that the statute violated the Constitution, stating that the freedom to marry any person one chooses has long been recognized as a vital personal right essential to the pursuit of happiness. Id. at 12. This right is protected under the Constitution. Id.


98. See Paris Adult Theatre v. Slayton, 413 U.S. 49, 66, reh'g denied, 414 U.S. 881 (1973) (marital intercourse on a street corner can be forbidden despite the constitutional protection initiated in Griswold); Smaida v. United States, 352 F.2d 251, 257 (9th Cir. 1965) (the right of privacy does not encompass homosexual acts in public toilets); Raphael v. Hogan, 305 F. Supp. 749, 756 (S.D.N.Y. 1969) (simulated acts of sodomy performed in public is not allowed).

99. See supra note 98. See also J. Mills, supra note 94, at 9.

100. See Payton v. New York, 445 U.S. 573 (1980) (the warrantless search of a person's home invades his fundamental right to privacy, as the home is a place where...
Of course the state may punish certain crimes committed in the home.\(^{101}\) A legal distinction does exist, however, between the crimes that the Court sets forth and the crime of sodomy.\(^{102}\) The crimes the Court gives as examples are either inherently dangerous crimes or crimes which produce victims.\(^{103}\) The private consensual act of homosexual sodomy is not inherently dangerous, nor does it produce a victim.\(^{104}\) Thus, there is no compelling reason to criminalize sodomy.\(^{105}\)

The state cannot provide a compelling reason to criminalize the homosexual act of sodomy because there is not substantial empirical evidence that homosexuality affects the health,\(^{106}\) marriage,\(^{107}\) or an individual expects privacy); Paris Adult Theatre v. Slayton, 413 U.S. 49, 66 (1973) (the right of people to be secure in their home is expressly guaranteed under the fourth amendment and is at the heart of the Constitution's protection of privacy); California v. LaRue, 409 U.S. 109, 132 (1972) (Marshall, J., dissenting) (there is a serious doubt whether the state may constitutionally assert an interest in regulating any sexual acts between consenting adults); Stanley v. Georgia, 394 U.S. 557, 558 (1969) (the right of privacy is the right to read or observe what a man pleases in order to satisfy his intellectual and emotional needs in the privacy of one's own home); Katz v. United States, 389 U.S. 347, 361 (1967) (the right to privacy depends on the reference to the place of privacy and whether privacy can be reasonably expected in that place). See also Ely, The Wages of a Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 930 (1973) (the right of privacy protects against governmental snooping); Karst, supra note 64, at 648 (our laws typically let people choose their intimate associations without direct interference); Warren & Brandeis, supra note 1, at 199 (there is no explicit textual basis for the right of privacy in the Constitution, as it was first developed out of tort law); Wilkenson & White, Constitutional Protection for Personal Lifestyles, 62 CORNELL L. REV. 563, 589-91 (1977) (the right to privacy in the home is not absolute, as it is illegal to commit murder, however, an individual enjoys a constitutional right to do anything in the home that does not harm others).\(^{102}\)

Hardwick, 106 S. Ct. at 2853 (Blackmun, J., dissenting). The majority states that the protection afforded to obscene material in Stanley cannot be extended to crimes in the home. Id. at 2846. The majority states that the possession of drugs, firearms and stolen goods are victimless crimes, like sodomy, but still they are enforced. Id. However, drugs and weapons are inherently dangerous and for property to be stolen, there must be a victim. Id. at 2853 (Blackmun, J., dissenting). Consensual sodomy is truly victimless and is not inherently dangerous. Id. See, e.g., McLaughlin v. United States, 106 S. Ct. 1677 (1986) (drugs and weapons are inherently dangerous and possession of stolen property is not victimless, as someone must have been wrongfully denied of it).\(^{103}\)

Hardwick, 106 S. Ct. at 2846. See supra note 102.\(^{104}\)

See Model Penal Code 207.5 commentary at 277 (Ten. Draft No. 4, 1955). The Model Penal Code, which was first adopted in 1961 does not punish "deviate sexual intercourse" among consenting adults because there is no harm to the secular interests of the community. Id. See also Wolfenden Report of Committee on Homosexual Offenses and Prostitution 31-33 (1963) [hereinafter Wolfenden Report] (it is not the law's function to intrude on personal choices of citizens, or to advocate any specific pattern of sexual behavior); Comment, Private Consensual Adult Behavior: The Requirement of the Harm to Others in the Enforcement of Morality, 14 U.C.L.A. L. REV. 581, 603 (1967) (a person should be free to be immoral, so long as he does not harm others).\(^{105}\)

See infra notes 106-08.\(^{106}\)

See Comment, Sexual Freedom for Consenting Adults - Why Not?, PAC.
sexual activity of society as a whole. In fact, most empirical evi-

L.J. 206, 223 (1971). There is no substantial proof that state sodomy laws prevent the spread of venereal disease. Id. In fact, state sodomy laws may even contribute to the spread of venereal disease because sodomy laws discourage long stable relationships, encourage one-night stands, and discourage a homosexual from seeking medical treatment or diagnosis. Id. Note, Sexual Autonomy, supra note 67, at 986. Venereal disease is not common among all homosexuals, as lesbians and stable homosexual relationships are no more prone to catch the disease as a heterosexual in a stable relationship. Id. The problem of venereal disease is fostered by the fact that state sodomy laws and laws which prohibit homosexual marriages discourage stable homosexual relationships. Id. In addition, medical attempts to treat the disease are made more difficult because of the fear of prosecution and discrimination if a homosexual should come forward for medical treatment. Id. Many states could not pass a compelling interest test because venereal disease is also spread by fornication and adultery, yet, few states have statutes prohibiting these acts. Id. Survey, supra note 42, at 623-635. It is unlikely that a state could find a narrow enough means for criminalizing sodomy, under the theory that the prevention of AIDS is a compelling state interest, because this could not have been the goal of the legislatures when they enacted sodomy legislation. Id. See generally United States Congress, OFFICE OF TECHNOLOGY ASSESSMENT, REVIEW OF THE PUBLIC HEALTH SERVICE RESPONSE TO AIDS 6 (Wash., D.C. pub. no. OTA-TM-H-24) (Feb. 1985) [hereinafter GOVERNMENT RESPONSE TO AIDS]; G. HENRY, ALL THE SEXES 366 (1955); M. HOFFMAN, THE GAY WORLD 168 (1968); Jackson, Syphilis, The Role of the Homosexual, 19 MED. SERVICES J. CANADA 631, 634 (1963); Schofield, Social Aspects of Homosexuality, 40 BRIT. J. VENEREAL DISEASES 129, 130 (1964); Trice, Homosexual Transmission of Venereal Diseases, 88 MEDICAL TIMES 1286 (1960).

107. See Doe, 403 F. Supp. at 1205. Judge Mehridge did not believe that the State of Virginia provided any evidence that private, adult, consensual, homosexual behavior causes harm to any individual or society as a whole. Id. Responding to his judicial colleagues in Doe, he wrote:

To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriage and prevent the dissolution of existing ones is unworthy of judicial response. In any event, what we know as men is not forgotten as judges - it is difficult to envision any substantial number of heterosexual marriages being in danger of dissolution because of the private sexual activities of homosexuals.

Id. See also M. BANE, HERE TO STAY 115 (1976). People do not get divorced because homosexuality looks attractive to them. Id. People get divorced because their heterosexual marriage did not work out. Id. A. BELL & M. WEINBERG, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 195-231 (1978). When homosexuals are persuaded to engage in heterosexual marriages through sodomy statutes and discrimination, they tend to result in divorce. Id. So, by persuading homosexuals into a homosexual marriage, the state is acting to increase the divorce rate. Id. A homosexual can survive in a heterosexual marriage by using sexual fantasies of men to experience an erotic feeling. Id. However, this frustrates a homosexual’s natural feeling, just to conform with a conventional marriage. D. WEST, supra note 84, at 23-34. Because of this, it is hard to have a marriage between a homosexual and heterosexual. Id. See also P. WILS, ON THE SEXUAL DILEMMA 52-53 (1973). By prohibiting homosexual conduct, the state is not protecting the interest of marriage because the prohibition has no effect on homosexuals who have no interest in heterosexual marriage. Homosexuals will probably not enter into a heterosexual marriage regardless of the prohibition. D. West, supra note 84, at 233-34. Id. See generally Note, supra note 84, at 1634-1635 (extramarital heterosexual conduct may have more of a detrimental effect on marriage than homosexual conduct); Note, Private Consensual Homosexual Behavior: The Crime and It’s Enforcement, 70 YALE J.L. 623, 629 (1961) (private adult consensual homosexual acts pose no threat to the institution of marriage).

108. See R. MITCHELL, THE HOMOSEXUAL AND THE LAW 12 (1969) (no proven correlation between homosexual conduct and the incidence of sexual violence); R. SCHUR, CRIMES WITHOUT VICTIMS 110-111 (1966) (there is no proof that homosexual-
ence proves that statutes which make sodomy illegal have a negative effect on society.\textsuperscript{109} Considering the statistical evidence, it is unlikely that Georgia could find a compelling reason to justify invading the homes, hearts, and minds of citizens who choose to live their lives differently from the majority.\textsuperscript{110}

It is unlikely that Georgia's sodomy statute will have a major effect on limiting homosexual activity because of the lack of enforcement the state has shown in the past.\textsuperscript{111} It is likely, however, that the decision will become precedent for upholding sodomy statutes in other states. The existence of these statutes places a public stigma on homosexuals that is not justified under the Constitution.\textsuperscript{112} Although the recent trend in the states of our nation has been to slowly abrogate sodomy statutes in recognition of increased acceptance of alternative lifestyles,\textsuperscript{113} the Supreme Court's decision in

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\textsuperscript{109} See supra notes 106-108.

\textsuperscript{110} Id.

\textsuperscript{111} See Hardwick, 106 S. Ct. at 2848. The State of Georgia has not prosecuted anyone for private consensual homosexual sodomy since 1939. Id. Also, Hardwick's case was dropped before it even reached a grand jury. Hardwick, 106 S. Ct. at 2842. See also Floscowe, Homosexuality - A Cross Cultural Approach (D.W. Cory ed. 1956); R. Schur, supra note 108, at 79; Fisher, The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private Consenting Adult Homosexual Behavior Be Excluded?, 30 M.D. L. Rev. 91, 112 (1970); Comment, California's "Consenting Adults" Law: The Sex Act in Prospective, 13 San Diego L. Rev. 439 (1976); Project, The Consenting Adult Homosexual and the Law: An Empirical Study of the Enforcement and Administration in Los Angeles County, 13 U.C.L.A. L. Rev. 643 (1966) (all these sources state that homosexual sodomy statutes are rarely enforced). The estimation is one prosecution for every 6,000,000 acts. A. Karlan, supra note 84, at 613. There is also concern that if sodomy statutes were to be enforced, the jails would become overcrowded. W. Churchill, supra note 84, at 238. There are estimations that if all sodomy laws were enforced against heterosexuals and homosexuals, 95% of the white American male population would be convicted for violating these crimes once. A. Kinsey, W. Pomeroy & C. Martin, Sexual Behavior in the Human Male, 390-93 (1948).

\textsuperscript{112} See L. Tribe, supra note 87, at 989.

\textsuperscript{113} See Survey, supra note 40, at 524 n.9. Twenty-six states have abrogated their sodomy statutes since Illinois adopted the Model Penal Code in 1961. Id.
Hardwick is a major setback to that movement. Thus, the legislative stigma against homosexuality unfortunately will continue.

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