

**THE RIGHT TO PRIVACY: A MAN'S HOME
IS NO LONGER HIS CASTLE —
*BOWERS v. HARDWICK***

A land of settled government,
A land of just and old renown,
Where Freedom slowly broadens down
From precedent to precedent;
Should banded unions persecute
Opinion, and induce a time
When single thought is civil crime,
And individual freedom mute.*

INTRODUCTION

Writing on the right to privacy, Samuel D. Warren and Louis D. Brandeis believed that “[i]t is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented.”¹ The notion of personal liberty has been considered among those fundamental rights necessary for individuals to possess if the society in which they live is to be free.² Courts have struggled, for over two decades, to determine the scope and definition of the right to privacy.³ The interests involved are just as vehement, and the process just as difficult, today as in decades past.

The latest decision to share in the struggle is *Bowers v. Hardwick*.⁴ *Bowers* placed before the United States Supreme Court the question of whether homosexual sodomy, as prohibited by Georgia's anti-sodomy statute,⁵ fell within the constitutionally protected right

* Tennyson, *You Ask Me, Why, Though Ill at Ease*, reprinted in 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1109 (1979).

1. Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 215 (1890). The authors based the “general right of the individual to be let alone” on the “principle of . . . an inviolate personality.” *Id.* at 205. Warren and Brandeis stated that the “object in view is to protect the privacy of private life” because “[t]he protection of society must come mainly through a recognition of the [privacy] rights of the individual.” *Id.* at 215, 219-20.

2. *Id.* at 219-20.

3. *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965). The *Griswold* Court developed the right to privacy in 1965. See *infra* notes 157-65 and accompanying text.

4. 106 S. Ct. 2841 (1986).

5. GA. CODE ANN. § 16-6-2 (1984). This section provides:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another

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

The Georgia statute does not address homosexual sodomy exclusively, but prohibits

to privacy.⁶ The Court held that the privacy right did not include a constitutional right to engage in adult consensual homosexual activity.⁷

Bowers presents an opportunity for the discussion of a dichotomy in American cultural thought: individual autonomy versus public morality. This Note examines the libertarian theory which the framers found influential when drafting the federal constitution.⁸ Libertarian theory conditions government's prohibition of individual conduct upon a showing of actual harm caused by that conduct.⁹ In contrast, this Note examines "majoritarian" philosophical thought, the antithesis of libertarian theory.¹⁰ Majoritarian reasoning is that society should be able to impose the moral views of the majority on all based on the majority's right to rid society of those behaviors it finds repugnant.¹¹ Specifically, this Note explores the philosophical bases of libertarian¹² and majoritarian¹³ theories, and examines their impact on American jurisprudence.¹⁴ Applying these theories, this Note provides an overview of Supreme Court privacy cases and traces the development of the privacy right.¹⁵ This Note further determines whether *Bowers* was decided in harmony with, or in divergence from, both libertarian philosophy and the right to privacy as articulated in precedent.¹⁶ Finally, this Note determines whether the Court properly relied on history as a basis for its decision.¹⁷

FACTS AND HOLDING

After Michael Hardwick committed sodomy with an adult male in his home, he was charged with violating a Georgia statute¹⁸ prohibiting such conduct.¹⁹ Subsequent to the preliminary hearing,

sodomy regardless of whether the parties engaging in it were of the same or different sex, married or unmarried. *See id.*

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

7. *Id.* at 2843.

8. *See infra* notes 105-26 and accompanying text.

9. *See infra* notes 110-16 and accompanying text.

10. *See infra* notes 127-36 and accompanying text.

11. *See* Ludd, *The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right to be Let Alone*, U. DAYTON L. REV. 705, 714 (1985) (interpreting Lord Patrick Devlin's majoritarian theory).

12. *See infra* notes 120-26 and accompanying text.

13. *See infra* notes 127-36 and accompanying text.

14. *See infra* notes 102-36 and accompanying text.

15. *See infra* notes 138-206 and accompanying text.

16. *See infra* notes 219-58 and accompanying text.

17. *See infra* notes 259-69 and accompanying text.

18. GA. CODE ANN. § 16-6-2 (1984).

19. *Bowers*, 106 S. Ct. at 2842. Petitioner *Bowers* is the Attorney General of Georgia. *Id.*

however, the State chose not to pursue the charge.²⁰

Hardwick then brought suit challenging the constitutionality of the sodomy statute in the United States District Court for the Northern District of Georgia.²¹ His claim was two-fold. First, to establish his standing to sue, Hardwick alleged that he was a practicing homosexual and the statute placed him in imminent danger of arrest.²² Second, Hardwick asserted that the statute violated his constitutional rights to privacy, due process, and freedom of expression and association.²³

The state of Georgia, as defendant, filed a motion to dismiss for failure to state a claim, arguing that the validity of sodomy laws had been resolved²⁴ in *Doe v. Commonwealth's Attorney*.²⁵ The district

20. *Id.* In fact, Georgia has not prosecuted anyone under this statute for several decades. *Id.* at 4922 n.2 (Powell, J., concurring). According to Justice Powell, this history of non-enforcement, combined with the repeal of similar statutes by twenty-six states, is indicative of the decline of laws prohibiting private, consensual conduct. *Id.* Twentieth century prosecution for sodomy, in fact, is limited to instances involving "either gross indiscretion or forceful action." Slovenko, *Foreward: The Homosexual and Society: A Historical Perspective*, 10 U. DAYTON L. REV. 445, 447 (1985). See also *State v. Mortimer*, 105 Ariz. 472, —, 467 P.2d 60, 61 (1970) (indicating that gross indiscretion included an adult male performing masturbation on another at a bus stop); *State v. Trego*, 83 N.M. 511, —, 494 P.2d 173, 174 (1972) (indicating that forceful action included an adult male raping a minor male).

21. *Bowers*, 106 S. Ct. at 2842. Two additional plaintiffs, John and Mary Doe, a married couple, joined Hardwick in challenging the statute. They asserted a desire to engage in sexual activity proscribed by the statute while in their home, but had been "chilled and deterred" from the activity by both the statute's existence and Hardwick's arrest. *Id.* at 2842 n.2. The district court held, however, that the Does lacked standing because they neither sustained, nor were in imminent danger of sustaining, any direct injury from the statute's enforcement. *Id.* The sole issue in *Bowers*, therefore, was Hardwick's challenge as applied to consensual homosexual sodomy. No opinion on the constitutionality of the statute as applied to heterosexual acts of sodomy was expressed. *Id.* Ironically, the Georgia Attorney General conceded that the sodomy "statute would be unconstitutional if applied to a married couple." *Id.* at 2858 n.10.

22. *Id.* at 2842. Hardwick's standing was an important issue because he presented an anticipatory challenge to the statute, as opposed to waiting until he had been prosecuted under it to bring suit. Specifically, his past arrest, combined with the state's resolve to enforce the statute against homosexuals and Hardwick's sincere desire to engage in the proscribed activity in the future, was held by the Eleventh Circuit to be sufficient to satisfy standing. *Hardwick v. Bowers*, 760 F.2d 1202, 1206, *reh'g denied*, 765 F.2d 1123 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986). For relevant analyses of the standing issue, see *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (discussing the threat of injury requirement for standing); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) (recognizing that petitioners' having attributes in common with persons who may have been injured is insufficient to satisfy the requirement that petitioners themselves have been injured); *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961) (holding that petitioners lacked standing because of a failure to allege the threat of personal prosecution for violating the law).

23. *Hardwick v. Bowers*, No. C83-273A, slip op. at 1 (N.D. Ga. Apr. 18, 1983) (contained in Petition for Certiorari, *Bowers v. Hardwick* at app. A. 106 S. Ct. 2841 (1986)).

24. *Bowers*, 760 F.2d at 1024.

25. 403 F. Supp. 1179 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

court, interpreting *Doe* as controlling, granted the dismissal.²⁶

On appeal to the Eleventh Circuit Court of Appeals, Hardwick argued that prior cases involving abortion,²⁷ contraception,²⁸ marriage,²⁹ family relationships,³⁰ procreation,³¹ and child rearing and education³² had construed the Constitution to prohibit states from unduly interfering in private decisions critical to personal autonomy, including the decision to engage in private consensual homosexual sodomy.³³ He further argued that Supreme Court precedent protecting conduct in the home which would not have been protected otherwise³⁴ had construed the Constitution to similarly protect homosexual sodomy from state proscription when performed in the home.³⁵

The Eleventh Circuit agreed with Hardwick's arguments and re-

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

27. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 434 (1983) (noting that the state's "hospitalization requirement places a significant obstacle in the path of women seeking an abortion"); *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (invalidating a law requiring a minor to obtain parental consent to abortion); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that "the right of personal privacy includes the abortion decision.").

28. *Carey v. Population Services Int'l*, 431 U.S. 678, 689 (1977) (reasoning that limited access to contraceptives burdens one's right to use contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that "a ban on distribution [of contraceptives] to unmarried persons [is] impermissible"); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (asserting that "a law . . . forbidding the use of contraceptives . . . cannot stand").

29. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (reasoning that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth . . . and family relationships."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating a statute prohibiting miscegenation).

30. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (invalidating a zoning ordinance as an "intru[sion] on choices concerning [the] family"); *Dike v. School Bd.*, 650 F.2d 783, 785 (5th Cir. 1981) (stating that a mother's "interest in nurturing her child by breastfeeding is entitled . . . to constitutional protection").

31. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (invalidating a statute which required sterilization of certain felony offenders).

32. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (articulating that the state cannot standardize the education of children by forcing them to attend public schools exclusively); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (voiding a law which prohibited teaching foreign languages to children because it interfered with the power of parents to control the education of their children); *Stough v. Crenshaw County Bd. of Educ.*, 744 F.2d 1479, 1480 (11th Cir. 1984) (holding that the "individual rights [of] parents outweigh the legitimate interests of the [school] board in operating . . . its school system.").

33. *Bowers*, 760 F.2d at 1211-12.

34. *Payton v. New York*, 455 U.S. 573, 589-90 (asserting that the constitutional protection of privacy reaches its height with regulation of activity in the home); *Moore*, 431 U.S. at 520-21 (Stevens, J., concurring) (reasoning that the internal composition of the home is beyond the city's power to regulate); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that the Constitution prohibits making in-home possession of obscene material a crime).

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

versed the lower court's decision.³⁶ The court held that the Georgia statute violated a fundamental right held by Hardwick because homosexual activity was a "private and . . . intimate association beyond the reach of state regulation."³⁷ Further, the court reasoned that "[a]lthough [Hardwick's] behavior is not procreative, it does involve important associational interests. . . . [T]he intimate associations protected by the Constitution are not limited to those with a procreative purpose."³⁸

In addition to stressing intimate association as a reason to find a fundamental right to engage in homosexual sodomy, the Eleventh Circuit placed special emphasis on "the fact that [Hardwick] plan[ne]d to carry out his sexual activity in private."³⁹ The court stated that "the constitutional protection of privacy reaches its height when the state attempts to regulate an activity in the home."⁴⁰ The court then remanded the case for trial, at which time, to prevail, the state would be required to demonstrate that its statute served a compelling interest and implemented the most narrowly drawn means of achieving that interest.⁴¹

Although the district court's decision was based exclusively on *Doe*, which was summarily affirmed by the Supreme Court, the Eleventh Circuit nevertheless reversed the district court's decision.⁴² In distinguishing *Doe*, the Eleventh Circuit held that the district court's reliance on that case was erroneous because, in the court's view, *Doe* had no precedential value as applied to *Bowers*.⁴³

36. *Id.* at 1211-13.

37. *Id.* at 1212.

38. *Id.* at 1211 (citations omitted). Specifically, the court relied on the ninth amendment and the due process clause of the fourteenth amendment in protecting homosexual sodomy. The court further stated that "the Supreme Court's analysis of the right to privacy in *Griswold*, *Eisenstadt* and *Stanley* leads [to the conclusion] that the Georgia sodomy statute implicate[d] a fundamental right." *Id.* at 1212 (citations omitted). See *infra* notes 159-91 and accompanying text.

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." U.S. CONST. amend. IX.

The fourteenth amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. See also *infra* notes 207-09 and accompanying text.

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

40. *Id.* (citations omitted).

41. *Id.* at 1213.

42. *Id.*

43. *Id.* at 1207-08. Instead of interpreting *Doe* as having been affirmed on the merits, thereby validating sodomy laws as the district court had assumed, the Eleventh Circuit determined that the Supreme Court's affirmation was based on the more narrow issue of standing. Specifically, the Eleventh Circuit reasoned that *Doe* could have

The Georgia Attorney General refused to believe that Georgia's sodomy statute violated a fundamental right held by homosexuals and petitioned the Supreme Court for certiorari.⁴⁴ The Supreme Court granted the state's petition due to a split of authority in the circuit courts regarding the question of whether the federal constitution provided homosexuals with a fundamental right to engage in sodomy.⁴⁵

been affirmed by the Supreme Court on either one of two separate issues: the constitutional validity of the state's sodomy statute, or the plaintiffs' lack of standing. *Id.* at 1208. However, because *Doe* was summarily affirmed, the Court did not explain which issue was decided. The Eleventh Circuit interpreted the decision as being based on the more narrow ground of standing. Disposed on that basis, the Eleventh Circuit reasoned that *Doe* would not be controlling in deciding the much broader issue of whether a state's sodomy statute is constitutional. Further, the Eleventh Circuit believed that even if *Doe* had been resolved on constitutional grounds, the Supreme Court had indicated since then that the constitutionality of sodomy statutes remained an open question. *Id.* at 1208-10.

The dissent concentrated primarily on the precedential value of *Doe*, arguing that the Supreme Court's summary affirmance reached the merits, and affirmed the lower court judgment upholding the constitutionality of a state's sodomy statute. The dissent's argument was three-fold. First, the dissent provided that prior Supreme Court cases have declared summary affirmances as votes on the merits of a case. *Id.* at 1213 (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959)). Second, the dissent argued that allowable lower court interpretations of a summary affirmance by the Court are limited to those issues discussed in the jurisdictional statement of the affirmed case, and that *Doe's* jurisdictional statement discussed only the constitutionality of a sodomy statute, not the issue of standing. *Id.* at 1214. Third, the dissent reasoned that if the Supreme Court had decided that the plaintiffs in *Doe* lacked standing, it would not have had jurisdiction to decide the case. In this circumstance, the Court would have dismissed the appeal, instead of summarily affirming the judgment. *Id.* at 1214-15. The dissent further stated that the Court has never indicated whether the constitutionality of sodomy statutes was an open question. *Id.* Rather, the dissent argued, the Court has only acknowledged that it has yet to pass on the validity of various types of statutes regulating sexual activity, and this acknowledgment was incorrectly interpreted by the majority. *Id.* at 1215.

See also C. WRIGHT, LAW OF FEDERAL COURTS 757-58 (4th ed. 1983) ("Summary disposition of an appeal . . . by affirmance . . . is a disposition on the merits.") (footnote omitted); Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and Dronenburg v. Zech*, 10 U. DAYTON L. REV. 767, 772-77 (1985) (analyzing *Doe's* precedential value); Note, *Hardwick v. Bowers: An Attempt to Pull the Meaning of Doe v. Commonwealth's Attorney Out of the Closet*, 39 U. MIAMI L. REV. 973, 983-88 (1985) (discussing the precedential value of *Doe*).

Interestingly, the question whether the district court was obligated to follow *Doe* was later resolved, but the question of *Doe's* ultimate precedential value was never answered. The Supreme Court, upon hearing *Bowers*, decided to give plenary consideration to the merits of *Bowers* rather than rely on its earlier "action" in *Doe*. Reliance on *Doe*, therefore, was not necessary. *Bowers*, 106 S. Ct. at 2843 n.4.

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

45. *Id.* See *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc) (holding a sodomy statute not unconstitutional on equal protection grounds); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (C.D. Cir. 1984) (holding Navy rules prohibiting homosexual conduct constitutional). Justice White, writing for the majority of the *Bowers* Court, carefully defined the issue in *Bowers*, writing:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular,

Before the Supreme Court, Hardwick reasserted his contentions that Supreme Court precedent construed the Constitution to prohibit state intervention into both private decision-making and one's home,⁴⁶ and also asserted that, precedent aside, the creation of a fundamental right to engage in homosexual sodomy was warranted.⁴⁷ He further argued that, even if the Court refused to find a fundamental right, the Georgia statute should fall for lack of rational support because the statute was based only on the voting majority's belief that homosexuality was immoral.⁴⁸

The Supreme Court, in a 5-4 decision, rejected all of Hardwick's contentions.⁴⁹ Justice White, writing for Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor, found no connection between the claimed fundamental right to engage in homosexual sodomy and the line of cases which announced fundamental privacy rights in family relationships, marriage and procreation.⁵⁰ Further, the Court found no support for any theory holding that this line of cases endorsed constitutional protection for private consensual sexual conduct between adults.⁵¹

The Court similarly found no connection between the claimed right to perform homosexual sodomy in the home and precedent protecting an otherwise illegal activity when performed in the home.⁵² Moreover, the majority stated that granting a right to perform homosexual sodomy would make it difficult to continue proscribing adultery, incest, and other sexual crimes when committed in the home.⁵³

The Court also refused to announce, on its own authority, a fundamental right to participate in homosexual sodomy.⁵⁴ Citing earlier cases, the Court defined fundamental rights as those " 'deeply rooted

are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . .

Bowers, 106 S. Ct. at 2843.

46. *Bowers*, 106 S. Ct. at 2843-44, 2846. See *supra* notes 27-34 and accompanying text.

47. *Bowers*, 106 S. Ct. at 2844.

48. *Id.* at 2846.

49. *Id.* at 2843-46.

50. *Id.* at 2842-44. See *supra* notes 27-33 and accompanying text.

51. *Id.* at 2843-44.

52. *Id.* at 2846. Specifically, the Court stated that its decision in *Stanley v. Georgia*, 394 U.S. 557 (1969), on which Hardwick relied, was grounded in the first amendment, whereas Hardwick's claim was grounded in the fourteenth. In this light, the Court reasoned, *Stanley* cannot support Hardwick's claim. *Bowers*, 106 S. Ct. at 2846. See *supra* note 34 and accompanying text.

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

54. *Id.* at 2844.

in this Nation's history' ”⁵⁵ and “ ‘implicit in . . . ordered liberty [such that] neither liberty nor justice would exist if they were sacrificed.’ ”⁵⁶ Employing this definition, the court held that a right to engage in homosexual sodomy was not within “the nature of rights qualifi[ed] for heightened judicial protection” because “[p]roscriptions against that conduct have ancient roots.”⁵⁷ In light of these roots, the Court called Hardwick’s claim “facetious.”⁵⁸

The refusal to create a fundamental right to homosexual sodomy was also based on the Court’s renitence to extend the substantive arm of the due process clause in the fifth and fourteenth amendments to embrace “rights not readily identifiable in the Constitution’s text.”⁵⁹ Hardwick’s claim was insufficient to overcome such resistance.⁶⁰

Finding no fundamental right, the Supreme Court considered Hardwick’s claim that the Georgia statute should be declared unconstitutional for lack of rational support.⁶¹ Justice White disagreed with the claim that majority sentiments regarding the morality of homosexuality were inadequate to uphold the law.⁶² He stated, simply, that laws are consistently based on notions of morality.⁶³

Chief Justice Burger concurred in the judgment, writing separately to “underscore” his belief that no fundamental right to homosexual sodomy exists and that state legislatures were, therefore, free to enact sodomy statutes.⁶⁴ Chief Justice Burger’s reasoning was based primarily on the historical proscription of homosexual conduct, as such conduct had been condemned “throughout the history of Western Civilization” and by “Judeo-Christian moral and ethical standards.”⁶⁵

55. *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

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

57. *Id.* at 2844-45 & nn.5-6.

58. *Id.* at 2846.

59. *Id.* at 2844.

60. *Id.* at 2846.

61. *Id.*

62. *Id.*

63. *Id.* Justice White concluded that the Georgia sodomy statute could not be reviewed under the eighth or ninth amendments or the equal protection clause of the fourteenth amendment because Hardwick did not appeal on these bases. *Id.* at 2846 n.8.

The eighth amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. See *supra* note 38.

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

65. *Id.* (Burger, C.J., concurring). See generally Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 545-49 (1985) (discussing the Judeo-Christian heritage); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L. J. 957, 998-99 (1979) (arguing that the free exercise and establishment clauses of the

Also concurring, Justice Powell believed that no fundamental right existed as claimed by Hardwick.⁶⁶ Justice Powell did not agree, however, with the potential twenty-year prison term authorized by the Georgia statute and stated that such a sentence would create a serious eighth amendment issue if appropriately challenged.⁶⁷

Contrasting the majority and concurring opinions' refusal to extend Supreme Court precedent granting privacy rights in the family, marriage, and procreation contexts to include intimate homosexual relations, Justice Blackmun, joined in dissent by Justices Brennan, Marshall and Stevens, stated that the majority "depriv[ed] individuals of the right to choose for themselves how to conduct their intimate relationships."⁶⁸ Justice Blackmun believed that privacy protection should have been extended to homosexual sodomy based on the Court's prior decisions recognizing privacy interests in "certain decisions that are properly before the individual to make"⁶⁹ and

first amendment stand as an absolute bar to enforcement of theological ethics). For an examination of both religious and secular sanctions against homosexuality, see Barrett, *Legal Homophobia and the Christian Church*, 30 HASTINGS L. REV. 1019, 1019-27 (1979).

66. *Bowers*, 106 S. Ct. at 2847.

67. *Id.* at 2847-48 (Powell, J., concurring). Of the 24 states still prohibiting sodomy, Georgia is one of two which authorize a 20-year sentence. *Id.* at 2847 n.1. Listed according to possible sentence length, the 24 states are: IDAHO CODE § 18-6605 (1979) (maximum sentence left to court's discretion, with a 5-year minimum); GA. CODE ANN. § 16-6-2 (1984) (20-year maximum); R.I. GEN. LAWS § 11-10-1 (1981) (20-year maximum); MICH. COMP. LAWS §§ 750.158 -388(a)-(b) (1968) (15-year and 5-year maximum, respectively); TENN. CODE ANN. § 39-2-612 (1982) (15-year maximum); D.C. CODE ANN. § 22-3502 (1981) (10-year maximum); MD. ANN. CODE art. 27, §§ 553-54 (1982) (10-year maximum); MISS. CODE ANN. § 97-29-59 (1973) (10-year maximum); MONT. CODE ANN. § 45-5-505 (1985) (10-year maximum); N.C. GEN. STAT. § 14-177 (1981) (10-year maximum); OKLA. STAT. tit. 21, § 886 (1983) (10-year maximum); NEV. REV. STAT. § 201.190 (1985) (6-year maximum); LA. REV. STAT. ANN. § 14:89 (West Supp. 1986) (5-year maximum); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985) (5-year maximum); VA. CODE ANN. § 18.2-361 (1982) (5-year maximum); ALA. CODE § 13A-6-65(a)(3) (1982) (1-year maximum); ARK. STAT. ANN. § 41-1813 (1977) (1-year maximum); KY. REV. STAT. ANN. § 510.100 (Baldwin 1985) (1-year maximum); MINN. STAT. § 609.293 (1984) (1-year maximum); MO. REV. STAT. § 566.090 (1978) (1-year maximum); KAN. STAT. ANN. § 21-3505 (Supp. 1985) (6-month maximum); UTAH CODE ANN. § 76-5-403 (1983) (6-month maximum); FLA. STAT. § 800.02 (1985) (60-day maximum); ARIZ. REV. STAT. ANN. §§ 13-1411 -1412 (West Supp. 1985) (30-day maximum); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974) (\$200 maximum fine). *Id.* at 2847 n.1. See also Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L. REV. 799, 949-51 (1979) (reviewing state statutes prohibiting homosexual conduct as of 1979).

Further, of those states prohibiting particular sexual conduct, only six prohibit homosexual conduct exclusively. ARK. STAT. ANN. § 41-1813 (1977); KAN. STAT. ANN. § 21-3505 (Supp. 1985); KY. REV. STAT. ANN. § 510.100 (1985); MO. REV. STAT. § 566.090 (1978); NEV. REV. STAT. § 201.190 (1985); TEX. PENAL CODE ANN. § 21.06 (Vernon 1974).

68. *Bowers*, 106 S. Ct. at 2856 (Blackmun, J., dissenting).

69. *Id.* at 2850 (Blackmun, J., dissenting) (citations omitted). See *supra* notes 27-35 and accompanying text.

"certain *places* without regard for the particular activities in which the individuals who occupy them are engaged."⁷⁰

Referring to the Court's holding that rights announced in prior decisions bore no resemblance to Hardwick's claimed right to engage in homosexual sodomy, Justice Blackmun stated that the majority " 'clos[ed] [its] eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment Due Process Clause.' "⁷¹ The right to marry was protected, Justice Blackmun explained, because it was deemed an association promoting a way of life, not because of a social or political plan;⁷² the decision whether to bear a child was protected because of the strong effect parenthood has on one's self-definition, not because of demographic or Biblical considerations;⁷³ and the family was protected because of its contribution to an individual's happiness, not because of a desire to have traditional households.⁷⁴ Similarly, Justice Blackmun argued, sexual intimacy "is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.' "⁷⁵

In addition to criticizing the majority's treatment of the decisional aspect of Hardwick's claim, Justice Blackmun's dissent objected to the majority's refusal to recognize the spatial aspect of the privacy right.⁷⁶ He argued that an individual's right to engage in intimate relationships in the home was an express guarantee of the fourth amendment and should, therefore, have been granted to Hardwick.⁷⁷

Moreover, Justice Blackmun asserted that the justifications Georgia advanced to support its statute were insufficient.⁷⁸ Two justifications were asserted: first, that the proscribed acts may have ad-

70. *Bowers*, 106 S. Ct. 2850-56 (Blackmun, J., dissenting) (emphasis in original).

71. *Id.* at 2851 (Blackmun, J., dissenting) (quoting *Moore*, 431 U.S. at 501). See *supra* note 34 and accompanying text.

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

73. *Id.*

74. *Id.*

75. *Id.* (quoting *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 63 (1973)).

76. *Id.* at 2852 (Blackmun, J., dissenting).

77. *Id.* at 2852-53. The fourth amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

Justice Blackmun concentrated primarily on the Court's statement that *Stanley*, upon which Hardwick's "spatial" argument was based, was decided only on the first amendment, thereby not supporting Hardwick's claim. Blackmun argued, on the other hand, that *Stanley* was decided upon the fourth amendment's protection of the home. *Bowers*, 106 S. Ct. at 2852-53 (Blackmun, J., dissenting). See *supra* notes 34-35, 52 and accompanying text.

78. *Bowers*, 106 S. Ct. at 2853, 2855 (Blackmun, J., dissenting).

verse consequences on " 'the general public health and welfare' "79 by spreading disease and fostering criminal activity; and second, that it is a " 'morally neutral' " protection of " 'the public environment.' "80 Justice Blackmun discarded the first justification by referring to the complete lack of evidence in its support.⁸¹ Dismissing the second justification, Justice Blackmun drew a distinction between laws protecting public sensibilities and the enforcement of private morality, concluding that the majority failed to see the difference.⁸²

Justice Blackmun's dissent further reasoned that the majority should have been required to affirm the Eleventh Circuit's judgment based on the procedural posture of the case.⁸³ *Bowers* was before the Court on the State of Georgia's motion to dismiss for failure to state a claim, thereby requiring the Court to affirm the lower court's judgment if there was any ground on which Hardwick could have been accorded relief.⁸⁴ Justice Blackmun contended that relief may have been possible under the eighth and ninth amendments, or the equal protection clause of the fourteenth amendment, and the majority's refusal to consider the case under these theories was incorrect merely because Hardwick failed to advance them.⁸⁵

Finally, Justice Blackmun objected to the Court's limitation of the case's application to only homosexual activity.⁸⁶ Justice Blackmun stated that Hardwick's claim to a right of privacy and intimate association was not dependent on his sexual preference.⁸⁷

Justice Stevens, joined in dissent by Justices Brennan and Marshall, also disagreed with the majority's narrowing of the sodomy issue to apply exclusively to homosexuals.⁸⁸ Justice Stevens believed that, because the Georgia statute did not create a heterosexual-homo-

79. *Id.* at 2853 (quoting Brief for Respondent at 37, *Bowers*).

80. *Id.* at 2855 (quoting *Paris Adult Theatre I*, 413 U.S. at 68-69).

81. *Id.* at 2853 (Blackmun, J., dissenting). Specifically, Justice Blackmun found no justification for the Court's attempt to equate private, consensual sexual activity with harmful activities such as the in-home possession of drugs, firearms or stolen goods. *Id.*

82. *Id.* at 2855 (Blackmun, J., dissenting).

83. *Id.* at 2848-49 (Blackmun, J., dissenting).

84. *Id.*

85. *Id.* & n.2 (Blackmun, J., dissenting) (quoting *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974) (stating that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."). See Lasson, *Civil Liberties for Homosexuals: The Law in Limbo*, 10 U. DAYTON L. REV. 645, 655-64 (1985) (analyzing equal protection and eighth amendment arguments against state intervention into homosexual practices). See also *supra* note 63 and accompanying text.

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

87. *Id.* See *supra* note 21.

88. *Id.* at 2856 (Stevens, J., dissenting). Justice Stevens found no support "for the conclusion that homosexual sodomy, *simpliciter*, is considered unacceptable conduct,

sexual distinction, a two-step analysis was required.⁸⁹ First, the court should have determined whether Georgia could prohibit sodomy by enacting a neutral law which applied equally to all persons.⁹⁰ Second, if Georgia could not prohibit sodomy by enacting a neutral law, then the court should have decided whether such a statute would be permitted to stand if Georgia declared that its enforcement would only apply against homosexuals.⁹¹

Justice Stevens answered the first question by stating that "it is perfectly clear that [states] may not totally prohibit [sodomy]."⁹² Justice Stevens' rationale was based on the belief that the liberty embodied in precedent contained the right to engage in nonreproductive sexual relations without state interference.⁹³

Following Justice Stevens' test, Georgia would then have the burden to justify selective enforcement against homosexuals.⁹⁴ To achieve such a justification, Justice Stevens reasoned, a state must show either that "[homosexuals] do not have the same interest in 'liberty' that others have," or that there is "a reason why [it] may be permitted to apply a generally applicable law to certain persons [and] not . . . to others."⁹⁵ The first possibility, according to Justice Stevens, would be an "unacceptable" justification because every citizen was "created equal" and holds the same liberty interest.⁹⁶ The second possibility, at least in this case, would also be "unacceptable."⁹⁷ As Justice Stevens reasoned, the Court determined that Georgia had justified its statute on the basis of a "presumed belief of a majority of the electorate . . . that homosexual sodomy is immoral."⁹⁸ This cannot justify Georgia's selective application, Justice Stevens argued, because the Georgia voters had never expressed this belief.⁹⁹ Rather, the voters' representatives enacted a law void of any heterosexual-ho-

[or] that the burden of justifying a selective application of the generally applicable law has been met." *Id.* at 2859.

89. *Id.* at 2857 (Stevens, J., dissenting).

90. *Id.*

91. *Id.*

92. *Id.* at 2858 (Stevens, J., dissenting). Justice Stevens reasoned that *Griswold* and *Eisenstadt* established that a state may not prohibit sodomy within "the sacred precincts of marital bedrooms," or between unmarried heterosexual adults. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 474, 485 (1965)).

93. *Id.* at 2857-58.

94. *Id.* at 2858.

95. *Id.*

96. *Id.* at 2858 (Stevens, J., dissenting). Justice Stevens believed that "[f]rom the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal . . . associations." *Id.*

97. *Id.*

98. *Id.* at 2858-59.

99. *Id.* at 2859.

mosexual distinction, presumably indicating that sodomy itself, not just homosexual sodomy, is immoral.¹⁰⁰ Therefore, Justice Stevens concluded, the majority not only lacked support for concluding that Georgia justified its selective application of the generally applicable sodomy statute, but also erred in relying on the distinction-free statute for its holding as applied only to homosexuals.¹⁰¹

BACKGROUND

EARLY CONCEPTS OF INDIVIDUAL AUTONOMY

The United States system of democracy was based primarily on the theory of natural rights advocated by John Locke.¹⁰² Locke's so-

100. *Id.* (Stevens, J., dissenting). In fact, Georgia's current statute broadened the prohibition of sodomy to encompass both heterosexual and homosexual activity. *Id.* at 2849 & n.1 (Blackmun, J., dissenting). Georgia's prior statute, defining sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman," was ruled not to encompass heterosexual cunnilingus. *Id.* at 2849 n.1 (Blackmun, J., dissenting) (quoting GA. CRIM. CODE § 26-5901 (1933)) (citing *Riley v. Garrett*, 219 Ga. 345, ___, 133 S.E.2d 367, 370 (1963)).

101. *Id.* at 2859 (Stevens, J., dissenting). Aside from the Court's decision that homosexual sodomy is not constitutionally protected, one must recognize the problem that acquired immune deficiency syndrome ("AIDS") presents in the context of homosexual relations. Although AIDS is not spread by homosexuals exclusively, "homosexual and bisexual populations constitute the largest risk group to develop AIDS." Sicklick & Rubinstein, *A Medicial Review of AIDS*, 14 HOFSTRA L. REV. 5, 7 (1985). In light of this fact, combined with the high mortality rate of AIDS victims, the growing rate at which AIDS is spreading, and the lack of a known cure, AIDS poses a serious health problem with which cities, states, and courts will be forced to deal. Fuchsberg, *Introduction: Law, Social Policy, and the Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS)*, 14 HOFSTRA L. REV. 1, 1-2 (1985). Indeed, some cities have already begun to regulate homosexual behavior to control the spread of AIDS. See *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 631-32 (1986) [hereinafter *Survey*] (stating that San Francisco closed gay bathhouses suspected of promoting spread of AIDS, and that New York health directors granted authority to close gay bathhouses where "unsafe sex" took place). See also McGuirl & Gee, *AIDS: An Overview of the British, Australian, and American Responses*, 14 HOFSTRA L. REV. 107, 122-27 (1985) (discussing federal, state, and local legislative efforts to control AIDS). As the Court has now decided that homosexual sodomy is not constitutionally protected, cities, states, and localities may find it easier to justify legislation regulating homosexual conduct. See generally *Law, Social Policy, and the Contagious Disease: a Symposium on Acquired Immune Deficiency Syndrome (AIDS)*, 14 HOFSTRA L. REV. 1, 1 (1985) (stating that AIDS has become "a major health problem . . . that confronts the legal system with unprecedentedly difficult civil rights issues."); Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681, 687 (1985) (discussing the validity of AIDS-based discrimination).

102. Lasson, *supra* note 85, at 674. See Ludd, *The Aftermath of Doe v. Commonwealth's Attorney: In Search of the Right to be Let Alone*, 10 U. DAYTON L. REV. 705, 706 (1985) (stating that "our constitutional system is an amalgam of various . . . political and philosophical epistemologies."). The theory of "natural rights" involves a distinction between civil rights, which depend on one's participation in society, and rights already existing in nature, which involve purely personal interests. The theory provides that because civil rights affect others, they are properly the subject of govern-

cial contract theory emphasized the importance of populace supremacy over government and further determined that one was compelled by laws of nature to recognize certain inalienable rights held by others.¹⁰³

Accordingly, the libertarian theory, which the framers found influential, recognized the need to secure individual freedoms from government interference.¹⁰⁴ Libertarian thought can be understood through the writings of John Trenchard and Thomas Gordon.¹⁰⁵ Trenchard and Gordon stated that the purpose of government was to protect people in their liberty.¹⁰⁶ Speaking of one's "[p]assion for [l]iberty," they believed that "[p]ossession of it, is of [such] [i]mportance, that it seems the [p]arent of all [v]irtues."¹⁰⁷ Trenchard and Gordon created a distinction between actions that cause injury to others and actions limited to one's own affairs:

[I]t is foolish to say, that Government is concerned to meddle with the private Thoughts and Actions of Men, while they injure neither the society, nor any of its Members. Every Man is, in Nature and Reason, the Judge and Disposer of his own domestic Affairs; and, according to the Rules of Religion and Equity, every Man must carry his own Conscience, so that neither has the magistrate . . . or any body [sic] else, any manner of Power to model People's Speculations, no more than their Dreams. Government being intended to protect Men from the injuries of one another, and not to direct them in their own Affairs, in which no one is interested but themselves; it is plain, that their Thoughts and domestic Concerns are exempted intirely [sic] from its Jurisdiction.¹⁰⁸

ment regulation; natural rights, on the other hand, affect only the individual and should be deemed absolute. Lasson, *supra* note 85, at 674.

103. Lasson, *supra* note 85, at 674. See generally J. LOCKE, TWO TREATISES OF GOVERNMENT (2d ed. 1967) (discussing a theory of natural rights).

104. See *infra* notes 105-26 and accompanying text.

105. Trenchard & Gordon, *Cato's Letters in the Independent Whig*, in THE ENGLISH LIBERTARIAN HERITAGE (1965), quoted in Ludd, *supra* note 102, at 707. The draftsmen of our constitutional process believed that government must have the burden of proving the need to restrict individual liberty by demonstrating injury to an individual or to the collective. *Id.* at 715. Further, the early Americans found Libertarianism attractive because it was "most relevant to their situation and needs." *Id.* at 707 (quoting G. WOOD, THE CREATOR OF THE AMERICAN REPUBLIC 15 (1969)). See generally B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 35-54 (1967).

106. Ludd, *supra* note 102, at 707. Trenchard and Gordon stated, in effect, that government is to enforce civil law, which protects members of society from each other, not natural law, which allows people to direct their own personal lives. See Lasson, *supra* note 85, at 674. See also *supra* note 102 and accompanying text.

107. Ludd, *supra* note 102, at 707 (quoting Trenchard & Gordon, *Cato's Letters in the Independent Whig*, in THE ENGLISH LIBERTARIAN HERITAGE, 131 (1965)).

108. *Id.* (quoting Trenchard & Gordon, *Cato's Letters in the Independent Whig*, in THE ENGLISH LIBERTARIAN HERITAGE, 127-29 (1965)).

Although the protection of liberty was believed to be the greatest task of government, it was not seen as an unqualified right.¹⁰⁹ Trenchard and Gordon stated that one's liberty could be restricted, but only if injury would occur to another individual or to society.¹¹⁰ If injury to another was not present, libertarian thought regarded the activity in question as a private affair into which government did not have legitimate authority to intervene.¹¹¹

THE INFLUENCE OF JOHN STUART MILL

John Stuart Mill, whose essay *On Liberty*¹¹² had a great influence on American political thought,¹¹³ believed in limiting the government's intervention into personal autonomy by reserving the government's authority to intervene only in cases involving harm to others.¹¹⁴ Mill's theory rested on two principles: first, that "[a]ll restraint . . . is an evil . . . leaving people to themselves is always better . . . than controlling them."¹¹⁵ The second principle provided:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.¹¹⁶

109. *Id.* at 707-08.

110. *Id.* at 708. In describing the appropriate analysis under libertarianism, Professor Ludd stated that "[t]he litmus test of the legitimate parameters of individual behavior and the corresponding obligation of government may be described as the *harm factor*." *Id.*

111. *Id.*

112. Mill, *On Liberty*, in ON LIBERTY 3 (D. Spitz ed. 1975).

113. Levi, *The Value of Freedom: Mill's Liberty*, in ON LIBERTY 191 (D. Spitz ed. 1975). Levi remarked that Mill's essay, *On Liberty*, was "a source for the political and social theory of the Western world." *Id.*

114. Mill, *supra* note 112, at 10-11. See Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 448 (1982) (discussing individual autonomy as the ultimate sovereignty).

115. Lasson, *supra* note 85, at 674 (quoting RADCLIFF, LIMITS OF LIBERTY: STUDY OF MILLS ON LIBERTY 83 (1966)).

116. Mill, *supra* at 112, at 10-11. Although in agreement with Mill, Professor Lasson points out that Mill's theory is difficult to apply. Lasson, *supra* note 85, at 675 (questioning whether it may be possible to categorize laws into those which prevent harm to others and those which do not).

Interestingly, the drafters of the Model Penal Code agreed with Mill's view. The Code does not punish deviant sexual intercourse among consenting adults as long as it does not harm the community. *Bowers v. Hardwick*, 106 S. Ct. 2841, 2845 n.7 (1986) (citing MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962)). Further, the Wolfenden Committee on Homosexual Offenses and Prostitution in England also adopted Mill's view nearly 25 years ago. See *Survey, supra* note 101, at 613 (discussing the Wolfenden Report). Professor H.L.A. Hart, agreeing with the Wolfenden Report, could not understand "the assertion that conformity [per se] . . . is a value worth pur-

The requirement of demonstrating harm assisted the framers in protecting personal autonomy from conflicting majoritarian interests.¹¹⁷ Without this requirement, valid liberty interests held by individuals in the minority would have been subdued by majority definitions of right and wrong.¹¹⁸

THE VIEWS OF JAMES MADISON

James Madison, one of the most influential framers, advocated the development of safeguards within government processes to secure the protection of these interests from the majority.¹¹⁹ With a concern for the sanctity of the individual, Madison stated that "the real power lies in the majority . . . and the invasion of private rights is chiefly to be apprehended . . . from acts in which the government is the mere instrument of the majority."¹²⁰ Accordingly, Madison was not advocating "acts of government contrary to the sense of its constituents,"¹²¹ but was stating that government should not allow the popular majority to infringe on the rights of citizens who were among the weaker minority.¹²² To illustrate this point, Madison

suing.'" Note, *Constitutional Law - Right of Privacy - Consensual Sodomy and the Choice of a Moral Doctrine: New York's Permissive Position—People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981), 5 W. NEW ENG. L. REV. 75, 97 (1982) (quoting H. HART, LAW, LIBERTY AND MORALITY 67 (1963)). See also Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 603 (1967) (asserting that individuals should have the freedom to be immoral as long as no one is harmed).

117. Ludd, *supra* note 102, at 708.

118. *Id.* Thomas Paine defined these valid liberty interests as "those rights of acting as an individual for [one's] own comfort and happiness, which are not injurious to the natural rights of others." Lasson, *supra* note 85, at 674 (quoting F. COCKER, READINGS IN POLITICAL PHILOSOPHY 675 (1938)). John Adams referred to the maximization of individual liberty as the "stamina vitae" of government. Ludd, *supra* note 102, at 705 (quoting THE WORKS OF JOHN ADAMS 478-79 (C. Adams ed. 1850)). Further, Thomas Cooley described what the state of affairs may be without the actual harm requirement when he stated:

A general law may establish regulations upon subjects not properly falling within the province of government, and yet be desired and cheerfully submitted to by the majority, who might be inclined, under any circumstances, voluntarily to establish such regulations for themselves; while, on the other hand, the same law might to the minority be in the highest degree offensive, unjust and tyrannical." Ludd, *supra* note 102, at 711 (quoting Cooley, *Editorial Comment*, in J. STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 689 (M. Bigelow 5th ed. 1891)).

119. Ludd, *supra* note 102, at 708. See also Richards, *supra* note 65, at 961-62 (concluding that there is little question that the founding fathers believed the Bill of Rights to be a way of institutionalizing the safeguards).

120. Ludd, *supra* note 102, at 708-09 (quoting THE WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1960)).

121. *Id.* at 708 (quoting THE WRITINGS OF JAMES MADISON 272 (G. Hunt ed. 1960)).

122. *Id.* at 708-09. In agreement, Alexander Hamilton stated that one purpose of the Constitution was to prevent "serious oppressions of the minor party in the commu-

drew a distinction between the popular majority and the constitutional majority.¹²³ Because the Constitution is the ultimate governing authority, the sole source of government action should be those citizens who recognize constitutional principles, that is, the constitutional majority.¹²⁴ Madison believed that the constitutional majority should be followed even if the popular majority would have another outcome.¹²⁵ Further, Madison believed that it was the duty of the judiciary to monitor the legislature and prevent it from legitimizing a bias or prejudice of the majority.¹²⁶

MAJORITARIAN PHILOSOPHICAL THOUGHT

Contrary to the libertarian view that government has authority to intervene into personal autonomy only when harm to others is present, Lord Patrick Devlin argued that society should be able to impose the moral views of the majority on all its members because "[a]ny immorality is capable of affecting society injuriously."¹²⁷ Devlin felt that the law had as much authority to suppress vice as it did to suppress subversive activities.¹²⁸ To make this point, Devlin stated that "[t]here are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality."¹²⁹ Devlin cautioned, however, that "before a society can put a practice beyond the limits of tolerance there must be a deliberate judgment that the practice is injurious to society."¹³⁰

nity." THE FEDERALIST No. 78, at 527 (A. Hamilton) (J.E. Cooke ed. 1961). See Richards, *supra* note 65, at 982.

123. Ludd, *supra* note 102, at 709.

124. *Id.*

125. *Id.*

126. *Id.* at 709 & n.25, 711 (citing THE FEDERALIST No. 51, at 351 (J. Madison) (J.E. Cooke ed. 1961)).

127. Survey, *supra* note 101, at 613 (quoting P. DEVLIN, MORALS IN THE CRIMINAL LAW, THE ENFORCEMENT OF MORALS 15 (1965)). Devlin's arguments were unsuccessful in their attempt to rebut the Wolfenden Committee's findings. Ludd, *supra* note 102, at 712. See also *supra* note 116. Further, a critic of Devlin concluded that whatever injuries deviant sexual practices may cause, they may be "so small that it would be wise policy, a prudent protection of individual liberty from transient hysteria, to raise [a] constitutional barrier" protecting such practices from government intervention. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 991 (1966).

128. Survey, *supra* note 101, at 613 (quoting P. DEVLIN, MORALS IN THE CRIMINAL LAW 13-14 (1965)).

129. Ludd, *supra* note 102, at 712 (quoting P. DEVLIN, MORALS IN THE CRIMINAL LAW 14 (1965)). Critical of Devlin's view, H.L.A. Hart has stated that "no evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society." H. HART, LAW, LIBERTY, AND MORALITY 50 (1963).

130. Ludd, *supra* note 102, at 713 (quoting P. DEVLIN, MORALS IN THE CRIMINAL LAW 17 (1965)).

Devlin reasoned that individual freedom can be subject to majoritarian ideas of morality because the majority has a right to rid society of those behaviors it finds disgusting.¹³¹ Devlin did not believe, however, that a mere dislike of certain behavior was sufficient to limit an individual's autonomy, but felt that criminal prohibition was justified when the majority suffered "a real feeling of reprobation."¹³² Directing his theory to homosexuality in particular, Devlin wrote:

We should ask ourselves in the first instance whether, looking at [homosexuality] calmly and dispassionately, we regard it as a vice so abominable that its mere presence is an offense. If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it.¹³³

Devlin's views, although claimed to be incongruous as applied to the American system of government,¹³⁴ have had great influence on American legislatures.¹³⁵ The Supreme Court, however, has been

131. *Id.* at 714. Criticizing Devlin's reasoning, Professor Hart echoed Mill in writing: "No one should think even when popular morality is supported by an 'overwhelming majority' or marked by widespread 'intolerance, indignation, and disgust' that loyalty to democratic principles requires him to admit that its imposition on a minority is justified." H. HART, *supra* note 129, at 81. *See supra* notes 111-14 and accompanying text. *See also* J. FEINBERG, HARM TO OTHERS 15 (1984) (asserting that "moralistic considerations, when introduced as support for penal legislation, have no weight at all."). Devlin was influenced by the works of James Fitzjames Stephen. *See* J. STEPHEN, LIBERTY, EQUALITY AND FRATERNITY (1967).

132. Ludd, *supra* note 102, at 714 (citing P. DEVLIN, MORALS IN THE CRIMINAL LAW 17 (1965)).

133. Ludd, *supra* note 102, at 714 (quoting P. DEVLIN, MORALS IN THE CRIMINAL LAW 17 (1965)). An example of a lower court opinion which has refused to extend the right to privacy to homosexual sodomy is *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (1984) (holding that "we can find no constitutional right to engage in homosexual conduct."). *See also* *People v. Onofre*, 51 N.Y.2d 476, 496, 415 N.E.2d 936, 945-46, 434 N.Y.S.2d 955, 954-55 (1980) (Gabrielli, J., dissenting) (concluding that the right of homosexual sodomy is a concept bearing little resemblance to the familiar principles enunciated in *Griswold* and its progeny.).

134. Ludd, *supra* note 102, at 713. Devlin's theories are based on a philosophy different than that used to form the constitutional process in the United States. Devlin's ideas may be utilized by American legislatures, however, because they share the same initial objective, that is, to ensure "toleration of the maximum individual freedom that is consistent with the integrity of society." *Id.* at 713 (quoting P. DEVLIN, MORALS IN THE CRIMINAL LAW, THE ENFORCEMENT OF MORALS 16 (1965)).

135. *Id.* at 712 (stating that "moral principles [have been] inculcated into our codes for the regulation of individual conduct."). *Id.* at 713. *See generally* D. RICHARDS, THE MORAL CRITICISM OF THE LAW 104 (1977) (stating that "it is surely very plausible that law and morals have a deep and systematic connection of the kind Devlin suggests."). Many state laws challenged through the Supreme Court's right to privacy cases were based on the morality of society. *Survey, supra* note 101, at 617-22. *See infra* notes 159-206 and accompanying text.

Further, until 1961, every state had enacted a statute prohibiting sodomy, based on the moral principles of the majority. In 1961, Illinois adopted the Model Penal Code's

unwilling to accept morality as a sufficient justification to uphold legislative enactments when an individual's fundamental rights are involved.¹³⁶

DEVELOPMENT OF THE RIGHT TO PRIVACY

One writer has observed that "[t]he words of the Constitution don't take a judge very far and when that particular car runs out of gas he pulls his bicycle out of the trunk and pedals off into policy land."¹³⁷ In like fashion, the Supreme Court did not find the right to privacy in specific constitutional words or guarantees, but reasoned that such a right was created by "penumbras" of specific guarantees.¹³⁸ The Court's first intimation of these penumbras was given in *Meyer v. Nebraska*.¹³⁹

Meyer involved a teacher who was convicted of violating a state law prohibiting the teaching of foreign languages to children not yet in the eighth grade.¹⁴⁰ The Court held that the law violated a parental right to guide the education of one's children and to contract with a teacher to provide such education.¹⁴¹ Justice McReynolds' majority opinion based its decision on a fundamental right to "liberty" which, although not traceable to specific constitutional text, was determined to extend from the fourteenth amendment's due process clause.¹⁴² Broadly interpreting the concept of liberty, McReynolds stated:

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those

decriminalization of private, consensual sexual conduct involving adults. 1961 Ill. Laws 1985, 2006 (codified as amended at ILL. REV. STAT. ch. 38 (1983) (repealed 1984)). See *Bowers*, 106 S. Ct. at 2845 & n.7. See also *supra* note 116. For a list of those states retaining their sodomy laws, see *supra* note 67.

136. *Survey*, *supra* note 101, at 617-18. Specifically, the Court has been unwilling to accept a state interest in promoting morality as sufficiently compelling if no harm resulted from the statute's violation. *Id.* See also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (rejecting the contention that abortion was immoral, "not good for people," and must therefore be prohibited); *Stanley v. Georgia*, 394 U.S. 557, 566 (1969) (rejecting the notion that exposure to pornography may result in deviant sexual behavior).

137. Katz, *Sexual Morality and the Constitution: People v. Onofre*, 46 ALB. L. REV. 311, 344 (1982) (quoting Neely, Book Review, N.Y. Review of Books, Nov. 19, 1981, at 41 (reviewing G. HUGHES, HOW COURTS GOVERN AMERICA (1981))).

138. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). See also *Roe*, 410 U.S. at 152 (stating that "The Constitution does not explicitly mention any right of privacy.").

139. 262 U.S. 390, 401-03 (1923).

140. *Id.* at 396-97.

141. *Id.* at 400.

142. *Id.* at 399. See G. GUNTHER, CONSTITUTIONAL LAW 501-02 (11th ed. 1985).

privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁴³

The state argued that its law served two legitimate purposes and should, therefore, be upheld.¹⁴⁴ First, the state asserted that the law "foster[ed] a homogeneous people with American ideals" and second, that it protected the mental health of school children by limiting their studies.¹⁴⁵ Rejecting both claims, the Court ruled that neither adequately justified interference with one's liberty because neither had a "reasonable relation" to an end "within the competency of the state."¹⁴⁶

Whereas the *Meyer* Court employed the less strict "reasonable relation" test to determine whether a state law affecting a fundamental right unduly infringed on that right,¹⁴⁷ the Court in *Skinner v. Oklahoma*¹⁴⁸ abandoned this test and began reviewing such laws with "strict scrutiny."¹⁴⁹ Further, *Skinner* granted an individual, outside the family setting, freedom from invasion of personal liberty.¹⁵⁰

In *Skinner*, a state law required the sterilization of individuals convicted of two or more "felonies involving moral turpitude."¹⁵¹ After the petitioner was convicted of three crimes over an eight-year period, once for stealing chickens and twice for robbery with firearms, the state sought to enforce its law.¹⁵² The Court, however, prevented the law's enforcement by holding the law violative of the fourteenth amendment's equal protection clause.¹⁵³ Although decided on an equal protection basis, the Court stated that procreation was "a basic liberty" which could not be redeemed by an individual who had been sterilized.¹⁵⁴

143. *Meyer*, 262 U.S. at 399.

144. *Id.* at 401-03.

145. *Id.*

146. *Id.* at 399-400, 402-03. See also *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that a state cannot interfere "with the liberty of parents . . . to direct the upbringing and education of children under their control."); *Prince v. Massachusetts*, 321 U.S. 158, 168 (authorizing the state to intervene into the parent-child relationship to protect the child from "possible harms").

147. *Meyer*, 262 U.S. at 399-403.

148. 316 U.S. 535 (1942).

149. *Id.* at 541.

150. *Id.* See Comment, *The Right to Privacy and Other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811, 820 (1984).

151. *Skinner*, 316 U.S. at 536-37 (quoting OK. STAT. ANN., tit. 57, § 171 (1935)).

152. *Id.* at 537.

153. *Id.* at 538. Specifically, the law violated equal protection because it laid "an unequal hand on those who have committed intrinsically the same quality of offense." *Id.* at 541. For example, the law was enforced against those who committed grand larceny, but not against those who were embezzlers. *Id.*

154. *Id.* Later Supreme Court cases refer to *Skinner* as having developed a right to privacy in making decision regarding procreation. See *Carey v. Population Services*

Chief Justice Stone, concurring in the judgment, believed the real question in *Skinner* was not whether equal protection of the laws was violated, but whether "such an invasion of personal liberty" could be justified under due process.¹⁵⁵ Concluding that it could not, Justice Stone wrote that "[t]here are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned."¹⁵⁶

Twenty-three years after developing constitutional penumbras of liberty in *Meyer* and *Skinner*, the Court employed these penumbras to create an independent, guaranteed right to privacy.¹⁵⁷ In *Griswold v. Connecticut*,¹⁵⁸ the Court stated: "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. Various guarantees create zones of privacy."¹⁵⁹

Int'l, 431 U.S. 678, 684-85 (1977) (citing *Skinner* as placing procreation "among the decisions that an individual may make without unjustified government interference."); *Roe*, 410 U.S. at 152 (citing *Skinner* as making clear that privacy extends to procreation). See also Adamany, *The Supreme Court at the Frontier of Politics: The Issue of Gay Rights*, 1980 HAMLINE L. REV. 185, 203.

155. *Skinner*, 316 U.S. at 544 (Stone, C.J., concurring).

156. *Id.* (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)). Justice Jackson, also concurring, agreed with Justice Stone's holding that due process had not been satisfied. *Id.* at 546. In addition, Justice Jackson echoed Mill in stating that "[t]here are limits to which a legislatively represented majority may [be free to act] at the expense of the dignity and personality and natural powers of a minority--even those who have been guilty of what the majority defines as crimes." *Id.* See *supra* notes 110-16 and accompanying text.

157. *Griswold*, 381 U.S. at 484. The right to privacy as incorporated into the fourteenth amendment due process clause applies to state, as well as federal, government. *Id.* at 481. See also Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 228-29 (1965) (discussing the creation of the right of privacy).

158. 381 U.S. 479 (1965).

159. *Griswold*, 381 U.S. at 484 (citing *Poe v. Ullman*, 367 U.S. 497, 516-22 (Douglas, J., dissenting)). The dissents in *Poe*, cited by the *Griswold* majority, were written by Justices Douglas and Harlan and provide a well reasoned basis in favor of expanding the concept of "liberty." *Poe*, 367 U.S. at 521 (Douglas, J., dissenting); *id.* at 552-53 (Harlan, J., dissenting). Justice Douglas believed that liberty did not have to emanate from a specific constitutional guarantee, but could be derived from "the totality of the constitutional scheme under which we live." *Id.* at 521 (Douglas, J., dissenting). In addition, Justice Douglas stated that "a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems emerge in new dimensions; needs, once never imagined, appear. To stop experimentation and the testing of new decrees and controls is to deprive society of a needed versatility." *Id.* at 518 (Douglas, J., dissenting).

Whereas Justice Douglas' arguments reached beyond the issue in *Poe*, that is, whether the state can justifiably intervene into the marriage relationship when one's decision to use contraceptives is at issue, Justice Harlan advocated a privacy right specifically limited to the marriage relationship. Justice Harlan wrote:

I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. . . . But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed

The *Griswold* Court granted constitutional protection to the privacy interest inherent in marriage relationships.¹⁶⁰ At issue in *Griswold* was the constitutionality of a state law prohibiting both the actual use and the recommendation to use contraceptives.¹⁶¹ Griswold, who was the Executive Director of Connecticut's Planned Parenthood, and a physician were convicted under this law for prescribing contraceptives to married women.¹⁶² Finding that the law imposed a "destructive impact" on the marital relationship,¹⁶³ Justice Douglas' majority opinion held that penumbral rights contained in the first, third, fourth, fifth, and ninth amendments surrounded the marital relationship with an impenetrable "zone of privacy" against government action.¹⁶⁴ Justice Douglas believed that strong protection was needed because the idea of state entrance into "the sacred precincts of marital bedrooms" was "repulsive to the notions of privacy surrounding the marriage relationship."¹⁶⁵

Concurring, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, agreed that the law at issue was unconstitutional, but reasoned that the decision should have been based solely on the ninth amendment.¹⁶⁶ After reviewing the ninth amendment's foundations, Justice Goldberg believed it demonstrated that all fundamental rights did not emanate from the first eight amendments¹⁶⁷ and that such rights could not be limited to specific constitutional guarantees.¹⁶⁸ Justice Goldberg stated that the ninth amendment expressly recognized the existence of "fundamental personal rights such as this one," which are protected from government

anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.

Id. at 552-53 (Harlan, J., dissenting).

160. *Griswold*, 381 U.S. at 485-86. See Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 84 (1980) (stating that "*Griswold* marked the first step in the constitutionalization of some contemporary version of John Stuart Mill's principle of liberty."). See also notes 110-16 and accompanying text.

161. *Griswold*, 381 U.S. at 480.

162. *Id.*

163. *Id.* at 485.

164. *Id.* at 484. Specifically, the majority held that the first amendment's right of association, the third amendment's prohibition against quartering soldiers in one's house during peace time, the fourth amendment guarantee to be secure in one's own person, house, and effects, the fifth amendment's self-incrimination clause, and the ninth amendment reservation of rights retained by the people effectively protected marital privacy. *Id.*

165. *Id.* at 485-86. Further, Justice Douglas, like Justice White in *Bowers*, took special care to communicate that the Court was not determining "the wisdom, need, and propriety of laws that touch . . . social conditions." *Id.* at 482. See *Bowers*, 106 S. Ct. at 2843. See *supra* note 45.

166. *Griswold*, 381 U.S. at 486-87 (Goldberg, J., concurring). See *supra* note 38.

167. *Id.* at 490, 493 (Goldberg, J., concurring).

168. *Id.*

abridgment.¹⁶⁹

RECOGNITION OF SPATIAL PRIVACY

*Stanley v. Georgia*¹⁷⁰ expanded the zone of privacy beyond the family related contexts of *Meyer* and *Griswold* to encompass activities taking place within the home.¹⁷¹ The Court held that an individual has the right to possess obscene materials within the home, although protection of such materials would not be granted outside the home.¹⁷²

The petitioner in *Stanley* was arrested for possessing pornographic films in violation of state law.¹⁷³ Relying on the first and fourteenth amendments as well as the right to "privacy of one's own home,"¹⁷⁴ the Court invalidated the law and prohibited states from making in-home possession and use of obscene material a crime.¹⁷⁵ Emphasizing Stanley's claim to in-home privacy, the Court stated that "the right to read or observe what he pleases--the right to satisfy his intellectual and emotional needs" takes on "an added dimension" when involving "the privacy of his home."¹⁷⁶ Referring to the purpose for which this right was created, the Court wrote:

[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

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.

169. *Id.* at 496 (Goldberg, J., concurring).

170. 394 U.S. 557 (1969).

171. *Id.* at 565. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (holding that "this privacy encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and childrearing."); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (recognizing "the sanctity of a man's home and the privacies of life."); *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1205 (E.D. Va. 1975) (Merhige, J., dissenting) (stating that socially undesirable, but harmless, activity is "beyond the scope of state regulation when conducted within the privacy of the home."); *Moreno v. United States Dep't of Agric.*, 345 F. Supp. 310, 314 (D.D.C. 1972), *aff'd*, 413 U.S. 528 (1973) (concluding that states cannot interfere with "privacy . . . in the home" in the "name of morality").

172. *Stanley*, 394 U.S. at 568.

173. *Id.* at 558.

174. *Id.* at 568.

175. *Id.* The first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

176. *Stanley*, 394 U.S. at 564-65.

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.¹⁷⁷

Stanley, therefore, stands for the proposition that greater degree of judicial scrutiny is required when government intervention into the home is at stake.¹⁷⁸

FURTHER PROTECTION OF INTIMATE ASSOCIATION

After the *Stanley* Court's recognition of a spatial privacy right, the Supreme Court in *Eisenstadt v. Baird*¹⁷⁹ again addressed a privacy interest with reference to one's intimate decisions.¹⁸⁰ The *Eisenstadt* Court extended *Griswold* by granting unmarried individuals the right to use contraceptives.¹⁸¹

At issue in *Eisenstadt* was a state law allowing married persons to use contraceptives, but prohibiting similar use by unmarried persons.¹⁸² Baird, following a college lecture on contraceptives, gave vaginal foam to an unmarried woman and was convicted under the state law.¹⁸³ Appealing his conviction, Baird argued that the law violated his right to equal protection by denying an unmarried person's right to contraceptives.¹⁸⁴ In agreement, the Court held that the law created an irrational and unequal classification between married and unmarried persons by making contraceptives available to married persons without prohibiting their "illicit sexual relations with unmarried persons."¹⁸⁵ Further, the Court rejected the state's claimed interest in preventing premarital sex as a justification to uphold the statute.¹⁸⁶ In doing so, the majority demonstrated the statute's arbitrary nature by comparing its punishment to that provided for under

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

178. *See id.*

179. 405 U.S. 438 (1972).

180. *Id.* at 453.

181. *Id.* at 447.

182. *Id.* at 442. Technically, the statute provided that unmarried individuals could not use contraceptives unless "to prevent, not pregnancy, but the spread of disease." *Id.*

183. *Id.* at 440. Although no evidence supported the woman's unmarried status, the Supreme Court relied on the court of appeals' determination that she was unmarried. *Id.* at 440 n.1.

184. *Id.* at 446.

185. *Id.* at 449. The Court in *Eisenstadt* did not apply the strict scrutiny-compelling state interest test as in *Griswold* because a fundamental freedom was not involved and the statute failed "even the more lenient equal protection standard." *Id.* If a fundamental freedom had been implicated, the law would have to be necessary to achieve a compelling state interest to be upheld. Under mere rationality, however, a state law need only be rationally related to a valid state interest. *Id.* at 447 n.7.

186. *Id.* at 449. The state based this argument on the "assumption that the fear of pregnancy operates as a deterrent to fornication." *Id.*

the state's fornication statute.¹⁸⁷ Whereas violation of the fornication statute was a misdemeanor with a thirty-dollar fine or three-month jail term, the law at issue was a felony with a five-year prison sentence.¹⁸⁸ The Court did not believe "that the legislature adopted a statute carrying a five-year penalty for its possible . . . deterrence of the commission of a ninety-day misdemeanor."¹⁸⁹

Although decided on equal protection grounds, *Eisenstadt* can be viewed as extending the privacy right to individuals outside the marital relationship.¹⁹⁰ In its now famous passage, the Court stated:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child.¹⁹¹

Whereas the right of an individual, married or unmarried, to decide not to have a child prior to its conception was decided in *Eisenstadt's* contraception decision, the right to decide not to have a child after conception was decided in *Roe v. Wade*.¹⁹² Justice Blackmun, writing for the majority, found that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁹³

Petitioner Roe, an unmarried pregnant woman, challenged a state statute which made abortions illegal,¹⁹⁴ seeking to prove that the statute invaded a woman's right to decide whether to terminate

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 453. See Adamany, *supra* note 154, at 203. Professor Adamany stated that *Eisenstadt's* expansion of privacy to include contraception, protecting both married couples and unmarried individuals, "has now become settled constitutional doctrine through its repeated citation in cases turning on the due process clause rather than the equal protection clause." *Id.* See also *Carey*, 431 U.S. at 684-85 (citing *Eisenstadt*, 405 U.S. at 443-46) (placing contraception "among the decisions that an individual may make without unjustified government interference"); *Roe*, 410 U.S. at 152 (citing *Eisenstadt*, 405 U.S. at 453-54) (extending privacy to include contraception); *Paris Adult Theatre I*, 413 U.S. at 65 (stating that *Eisenstadt* extended the right to privacy to include procreation).

191. *Eisenstadt*, 405 U.S. at 453.

192. 410 U.S. 113, 153 (1973). See also *Doe v. Bolton*, 410 U.S. 179, 197 (1973) (supporting the Supreme Court's expansion of the privacy right into the area of abortion decisions).

193. *Roe*, 410 U.S. at 153.

194. *Id.* at 120. Roe sued in class action on behalf of herself and all other similarly situated women. *Id.*

her pregnancy.¹⁹⁵ Roe argued that a woman's right to decide was a personal liberty discoverable in the "Due Process Clause; or in personal, marital, familial, and sexual privacy . . . protected by the Bill of Rights or its penumbras . . . or among those rights reserved to the people by the Ninth Amendment."¹⁹⁶ After considering the history of abortion,¹⁹⁷ cases developing the right to privacy,¹⁹⁸ and the potential detriment to emotional and physical health of unwanted pregnancy,¹⁹⁹ the Court concluded that the privacy right included a woman's decision regarding abortion.²⁰⁰ The Court granted protection from state intervention, however, only up through the sixth month of pregnancy, after which fetal viability brought the interests of a "potential life" into play.²⁰¹

Four years after *Roe*, the Court, in *Carey v. Population Services International*,²⁰² granted minors similar right to privacy in making procreative decisions.²⁰³ The Court prohibited a state from requiring parental consent before a minor could exercise the choice to use contraceptives.²⁰⁴ In particular, the Court held that a state may not impose a blanket prohibition on distributing contraceptives to minors.²⁰⁵ Further, the statute lacked an interest sufficiently com-

195. *Id.* at 129.

196. *Id.* (citations omitted).

197. *Id.* at 129-41.

198. *Id.* at 152-53.

199. *Id.* at 153.

200. *Id.* at 154. See *Survey, supra* note 101, at 559-60. Although the Court stated that the right to privacy was founded in the fourteenth amendment's concept of liberty, it suggested that the right may emanate from the ninth amendment's reservation of rights to the people. *Roe*, 410 U.S. at 153. See also *supra* notes 166-69 and accompanying text.

Justice Stewart, concurring in *Roe*, firmly believed that the right to privacy could be "rationally understood only as [from] the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment." *Roe*, 410 U.S. at 167-68 (Stewart, J., concurring). See also *Paul v. Davis*, 424 U.S. 693, 713 (1976) (stating that privacy cases dealt "generally with the . . . Fourteenth Amendment.").

201. *Roe*, 410 U.S. at 159-64. At this point, the state's interest becomes sufficiently compelling to infringe on a pregnant woman's freedom of choice. *Id.* at 162-63. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 69-75 (1976) (holding that a pregnant woman's interest in choice is superior to her husband's interest in the child, and a minor's interest in choice above parental interest in controlling children's behavior).

202. 431 U.S. 678 (1977).

203. *Id.* at 694.

204. *Id.*

205. *Id.* Justice Brennan's majority opinion, citing *Danforth*, reasoned that since the state may not impose a blanket prohibition or a requirement of parental consent on the choice of a minor to have an abortion, the constitutionality of prohibiting the distribution of contraceptives to minors was *a fortiori* foreclosed. *Id.* at 693-94. Justice Brennan stated that "the state's interest in protection of the mental and physical health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive." *Id.* at 694. See *supra* note 201.

pling to justify infringement of a minor's, as well as an adult's, right to decide whether to bear a child.²⁰⁶

SOME UNRESOLVED QUESTIONS

The *Meyer-Griswold-Roe* line of cases developed a constitutional right to privacy, fashioning that right to conform to various circumstances on a case-by-case basis.²⁰⁷ The source of that right, whether it be in penumbras of specific guarantees in the Bill of Rights, the ninth amendment, or the fourteenth amendment, has not been resolved.²⁰⁸ Of even greater significance, however, is that the Court has not determined the scope of the right.²⁰⁹ Referring to private consensual sexual behavior in particular, Justice Brennan, in *Carey*, stated that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults."²¹⁰ The *Meyer-Griswold-Roe* line can be seen in two separate and distinct lights: one limiting the right of privacy to decisions concerning the family, and the other expanding the right to protect individual autonomy from state intervention.²¹¹ In *Bowers*, the Supreme Court answered Justice Brennan's question, insofar as it relates to homosexual conduct, by choosing the former.²¹²

ANALYSIS

In *Bowers v. Hardwick*,²¹³ the Supreme Court held that state regulation of private consensual sexual behavior among homosexuals is not prohibited by the Constitution because the zone of privacy enumerated in *Griswold v. Connecticut*²¹⁴ was not intended to prevent state interference with individual autonomy generally, but rather was designed to operate in the limited context of familial situations.²¹⁵ However, an analysis of the *Bowers* holding in light of the relationship between government and the individual under liberta-

206. *Carey*, 431 U.S. at 693.

207. Adamany, *supra* note 154, at 192.

208. See *supra* notes 159, 166-69 and accompanying text. See also *supra* note 200.

209. Adamany, *supra* note 154, at 192.

210. *Carey*, 431 U.S. at 688 n.5, 694 n.17.

211. See *Survey*, *supra* note 101, at 563.

212. *Bowers*, 106 S. Ct. at 2844 (stating that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.").

213. 106 S. Ct. 2841 (1986).

214. 381 U.S. 479 (1965).

215. *Bowers*, 106 S. Ct. at 2844 (stating that "none of the rights announced in [the privacy cases] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.").

rian philosophy,²¹⁶ as well as Supreme Court decisions developing the right to privacy, will reveal the Supreme Court's incorrect divergence from both.²¹⁷ Further, this Note's examination of the Court's reliance on history to reach its decision will reveal why such reliance was improper.²¹⁸

DIVERGENCE FROM LIBERTARIAN THOUGHT

As espoused by Trenchard and Gordon and John Stuart Mill, libertarian thought assisted James Madison and the framers in creating a government which respected individual autonomy by preventing majority usurpation of contrary minority views and allowing intervention into an individual's private affairs *only* if an individual's conduct was injurious to another individual or society as a whole.²¹⁹ To perpetuate such a relationship between government and the individual, two burdens were necessarily imposed on the government:²²⁰ first, the government had the burden to demonstrate actual harm resulting from one's conduct before such conduct could be infringed upon; and second, the government's burden could be met only upon a showing of injury to society or one of its members.²²¹ Placing these burdens on the government prevented "domestic" concerns of the individual from being the subject of intrusion by majoritarian interests and for that reason was found influential by the framers and subsequently accepted as a tenet of American jurisprudence.²²²

Rather than accepting this analysis and following libertarian thought, the *Bowers* Court implicitly followed Lord Devlin's view of protecting society as a whole, not its individual members, by subjecting individual freedom to majoritarian ideas of morality.²²³ When faced directly with the claim "that majority sentiments about the morality of homosexuality should be declared inadequate" to uphold Georgia's sodomy law, the Court simply stated: "We do not agree."²²⁴ In so doing, it failed in its duty to prevent the legislature from legitimizing a majoritarian prejudice, a failure which the framers feared

216. See *infra* notes 219-34 and accompanying text.

217. See *infra* notes 235-58 and accompanying text.

218. See *infra* notes 260-69 and accompanying text.

219. See *supra* notes 117-26 and accompanying text.

220. Ludd, *supra* note 102, at 708.

221. *Id.*

222. *Id.* See *supra* notes 117-26 and accompanying text.

223. See *supra* notes 48-49, 61-63, 127-33 and accompanying text. Cf. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (reasoning that "[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage.").

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

and sought to avoid.²²⁵

Further, Lord Devlin's view contains a serious flaw.²²⁶ Devlin contended that if society has "a real feeling of reprobation"²²⁷ toward a certain behavior, it has the right to impose criminal sanctions on that behavior.²²⁸ The flaw in this theory becomes apparent when one realizes that the "feeling of reprobation" claimed to harm society "manifests" itself only in the thoughts of society's individual members, as opposed to causing actual, concrete harm to those members.²²⁹ If one is "harmed" merely by the thoughts of homosexual acts, a law prohibiting the acts will not cause the thoughts themselves to cease.²³⁰

The *Bowers* Court declined to require actual harm to result from Hardwick's conduct prior to its prohibition.²³¹ Such a requirement, however, would have sheltered Hardwick's liberty interest, as well as the liberty interest generally, from majority definitions of right and wrong.²³² A showing of a nexus between the prohibited conduct and a resulting harm to society or one of its members, as opposed to allowing state interention merely on the basis of popular attitudes, achieves the libertarian goal that individual liberty be restricted only when the performance of that liberty would cause harm to another.²³³ Lacking this requirement, government is able to abrogate libertarian principles and unjustly interfere with the "private actions of men."²³⁴

DIVERGENCE FROM PRECEDENT

Creating a distinction between the rights announced in the

225. See *supra* note 122 and accompanying text. See also Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 611 (1977) (concluding that the "compelling mission of the Constitution has been to protect sanctuaries of individual behavior from the hand of the state.").

226. Lasson, *supra* note 85, at 675.

227. P. DEVLIN, *MORALS IN THE CRIMINAL LAW* 17 (1965).

228. See Ludd, *supra* note 102, at 713-14. See *supra* notes 130-32 and accompanying text.

229. Lasson, *supra* note 85, at 675-76. See *supra* note 127 and accompanying text.

230. Lasson, *supra* note 85, at 675-76. See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 898 (1978) (concluding that community power over the individual should always be limited when harms exist primarily in the mind of the beholder).

231. See *supra* notes 46-63 and accompanying text.

232. See *supra* notes 117-18 and accompanying text.

233. See *supra* notes 117-20 and accompanying text. Professor Richards eloquently wrote of the importance of such a requirement: "To appeal to popular attitudes . . . is precisely to withhold human rights when, as a shield against majoritarian oppression, they are most exigently needed." Richards, *supra* note 65, at 1018.

234. Ludd, *supra* note 102, at 707 (quoting Trenchard & Gordon, *Cato's Letters in the Independent Whig*, in *THE ENGLISH LIBERTARIAN HERITAGE* 127 (1965)). See *supra* notes 108-11 and accompanying text.

Meyer-Griswold-Roe line of cases and the claimed right in *Bowers*, the Supreme Court stated that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."²³⁵ It is arguable, however, that such a connection exists in the theory underlying the *Meyer-Griswold-Roe* decisions, namely, that the right to privacy is based on the individual's right to be free from government intervention.²³⁶

Liberty, as defined by the Supreme Court, includes "a right of personal privacy, or a guarantee of certain areas or zones of privacy."²³⁷ This zone of privacy "by definition concerns the most intimate of human activities and relationships"²³⁸ and includes the "right of the *individual*. . . to be free from unwarranted governmental intrusion."²³⁹ Indeed, the Court has stated that "the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected *intimate relationship*."²⁴⁰ Arguably, then, the right of privacy articulated by the Court was based on the theory that moral ideas, to be constitutionally enforceable, must be grounded on respect for personal autonomy.²⁴¹ So defined, the right of privacy "expresses an underlying moral principle resting on the enhancement of sexual autonomy, the self-determination of the role of sexuality in one's life which protects the values foundational to the concept of human rights."²⁴² Asserted under this construction, Hardwick's privacy claim should have fallen within the protected zone.²⁴³

Further, the right of privacy articulated in *Griswold* cannot be logically limited to formal marriages.²⁴⁴ Formal associational status "is neither a necessary nor a sufficient condition for the realization of the values of intimate association."²⁴⁵ As one writer has aptly

235. *Bowers*, 106 S. Ct. at 2844. See *supra* notes 50-51 and accompanying text.

236. Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice and Dronenburg v. Zech*, 10 U. DAYTON L. REV. 767, 780-88 (1984).

237. *Roe v. Wade*, 410 U.S. 13, 152 (1973).

238. *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977).

239. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). See also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (stating that privacy includes "the interest in independence in making certain kinds of important decisions.").

240. *Paris Adult Theatre I v. Seton*, 413 U.S. 49, 66 n.13 (1973) (emphasis added).

241. Richards, *supra* note 65, at 1006.

242. *Id.*

243. See *supra* notes 33-48 and accompanying text.

244. Saphire, *supra* note 236, at 790. See *supra* notes 69-75 and accompanying text.

245. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 647 (1980). See *Lovisi v. Slayton*, 363 F. Supp. 620, 625 (E.D. Va. 1973), wherein the court stated:

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. While the condition of marriage would doubtless make more diffi-

observed:

[S]ince anti-contraceptive laws are based on the concept that nonprocreational sex is unnatural, the *Griswold* court properly invoked the right of privacy to invalidate the Connecticut statute. For similar reasons, laws prohibiting the use of pornography in the home were invalidated. Subsequently, abortion laws were also struck down because the traditional objection to them rested, in large part, on . . . moral condemnation that was not clearly sustained by sound argument.

If the right to privacy extends to sex among unmarried couples or even to autoeroticism in the home, it is difficult to understand how in a principled way the Court could decline to consider fully the application of this right to private, consensual, deviant sex acts.²⁴⁶

Therefore, the Court should have followed prior privacy decisions construing the privacy right to be based on an individual's right to be free from government intervention.²⁴⁷ So construed, Hardwick's privacy claim should have been included within privacy protection.²⁴⁸

INCORRECT INTERPRETATION OF SPATIAL PRIVACY

The Court has recognized a heightened privacy interest in the home.²⁴⁹ The *Stanley v. Georgia*²⁵⁰ Court held that the state's power to prohibit public distribution of obscene material did not extend to the private possession of such material in the home.²⁵¹ The *Bowers* Court distinguished *Stanley* as being grounded entirely in the first amendment and, thus, not proper precedent for a claim based on the

cult an attempt by government to justify an intrusion upon sexual behavior, this condition is not a prerequisite to the operation of the right of privacy.

Id.

246. Richards, *supra* note 65, at 981 (footnote omitted). Professor Richards continued:

The Court might distinguish between heterosexual and homosexual forms of sexual activity; but could this distinction be defended rationally? At bottom, such a view must rest on the belief that homosexual or deviant sex is unnatural. Under this view, such practices would have to be excluded altogether from the scope of the constitutional right to privacy just as obscenity is excluded from first amendment protection. However, an analysis of the application of the notion of the "unnatural" to deviant sex acts and an examination of the moral force of the constitutional right to privacy seems to compel the clear and decisive rejection of such a view.

Id. at 981-82.

247. *See supra* note 236 and accompanying text.

248. *See supra* note 243 and accompanying text.

249. *See supra* notes 171-76 and accompanying text.

250. 394 U.S. 557 (1969).

251. *Id.* at 568. *See supra* notes 170-76 and accompanying text.

right to privacy.²⁵² However, a reading of *Stanley* that establishes a right to privacy in the home, based on the fourth amendment, is more persuasive.²⁵³ Particular emphasis was placed on "the right to satisfy . . . intellectual and emotional needs in the privacy of [one's] own home."²⁵⁴ The *Stanley* Court stated, in fact, that "the context of this case [involves] the privacy of a person's own home," an element giving the case "an added dimension."²⁵⁵ Indeed, in a later case, the Court suggested that reliance on the fourth amendment was necessary to reach its decision in *Stanley*:

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the privacy of the home, which was hardly more than a reaffirmation that a man's home is his castle.²⁵⁶

Therefore, the Court's distinction between the *Bowers* privacy claim and the *Stanley* first amendment reliance is unconvincing.²⁵⁷ Rather, *Stanley* should have been followed as valid precedent and its reaffirmation that a "man's home is his castle" should have been reaffirmed.²⁵⁸

IMPROPER RELIANCE ON HISTORY

The *Bowers* Court reasoned that Georgia's sodomy statute was valid because "[p]roscriptions against that conduct have ancient roots"²⁵⁹ and "many States . . . still make such conduct illegal and have done so for a very long time."²⁶⁰ However, the fact that a practice has been prohibited in the past is an insufficient reason to condone its prohibition in the present.²⁶¹ Indeed, the Court's own precedent demonstrates this, as history and tradition were insufficient ground to uphold a law prohibiting miscegenation.²⁶²

At the time the miscegenation issue was before the Court, six-

252. *Bowers*, 106 S. Ct. at 2846. See *supra* note 52 and accompanying text.

253. Adamany, *supra* note 154, at 198 (quoting *Stanley*, 394 U.S. at 565). See *supra* notes 76-77 and accompanying text.

254. *Stanley*, 394 U.S. at 565. See *supra* note 176 and accompanying text.

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

256. *Paris Adult Theatre I*, 413 U.S. at 66.

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

258. See *supra* notes 176, 236 and accompanying text.

259. *Bowers*, 106 S. Ct. at 2844.

260. *Id.* at 2843. See *supra* notes 54-58 and accompanying text.

261. *Bowers*, 106 S. Ct. at 2857 (Stevens, J., dissenting).

262. *Id.* at 2857 & n.9 (Stevens, J., dissenting). See *Bowers*, 106 S. Ct. at 2854 n.5 (Blackmun, J., dissenting). See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating a law which prohibited interracial marriages).

teen states prohibited interracial marriage.²⁶³ The Court, however, refused to adhere to tradition and determined that the antimiscegenation statute violated an individual's freedom of choice to marry.²⁶⁴ In comparison, twenty-four states prohibited sodomy at the time the *Bowers* case was before the Court.²⁶⁵ Yet, the *Bowers* Court refused to break from tradition and determined that the antisodomy statute should be upheld in light of its "ancient roots."²⁶⁶

Moreover, the Court failed to heed Justice Holmes' admonition given nearly a century ago:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²⁶⁷

Instead of resting uncritically on history, tradition, and the status quo, the Court should have determined that Hardwick's claim fell within the protected zone of privacy based on the underlying values inherent in personal autonomy.²⁶⁸ Further, a state should be held to a standard greater than merely showing one's nonconformity today with values espoused yesterday, especially before the state is granted the authority to prosecute individuals for engaging in intimate aspects of life.²⁶⁹

CONCLUSION

The Supreme Court's decision in *Bowers* permits state proscription of private consensual sexual behavior among homosexuals because the right to privacy was not designed to protect individual

263. *Loving*, 388 U.S. at 6 n.5. See *Bowers*, 106 S. Ct. at 2854 n.5 (Blackmun, J., dissenting).

264. *Loving*, 388 U.S. at 12.

265. *Bowers*, 106 S. Ct. at 2845. Technically, 24 states and the District of Columbia retained statutes prohibiting sodomy. *Id.*

266. *Id.*

267. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

268. See *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting). See also D. RICHARDS, *THE MORAL CRITICISM OF LAW* 106 (1977) (reasoning that "the empirical objectivity of existing custom has nothing to do with the notions of moral impartiality and objectivity which are, or should be, of judicial concern in determining the public morality on which the law rests.").

269. *Bowers*, 106 S. Ct. at 2848 (Blackmun, J., dissenting). Jonathan Katz has taken the position that sodomy was condemned in the colonies because it inhibited the maximization of procreation needed to build the labor force. J. KATZ, *GAY/LESBIAN ALMANAC* 33 (1983). Katz suggested that "[m]aximized procreation in the early colonies was connected closely with survival." *Id.* at 31. Sodomy, because it posed a threat to procreation and the colonial effort, was made a capital crime. *Id.* However, Katz asserted, the same justification no longer exists because the need for "baby production" is not the same in present day America. *Id.* at 33.

autonomy generally, but privacy inherent in certain familial situations.²⁷⁰ This holding, however, is not only contrary to the libertarian theory that the framers found influential,²⁷¹ but also to prior Supreme Court decisions articulating the right to privacy.²⁷²

Libertarian theory provides that the government's authority to restrict an individual's liberty by prohibiting certain conduct is conditional on the government's demonstration of actual harm caused by that conduct to an individual or society.²⁷³ Without this required showing of harm, individual liberty is subject to limitation by majority beliefs of right and wrong.²⁷⁴ The *Bowers* Court, however, permitted the prohibition of individual liberty without requiring a demonstration of harm.²⁷⁵ Consequently, government was allowed to restrict personal autonomy where its exercise was not empirically demonstrated to warrant restriction.

The *Bowers* decision is also contrary to prior Supreme Court decisions articulating the right to privacy.²⁷⁶ The *Bowers* Court determined that no connection existed between the Court's prior privacy decisions and Hardwick's claim to private homosexual activity.²⁷⁷ The privacy right developed in Supreme Court privacy decisions, however, was based on a respect for personal autonomy, and encompassed the protection of intimate activities, especially when those activities had taken place in the home.²⁷⁸ Under this construction of the Court's privacy decisions, Hardwick's privacy claim deserved constitutional protection.

Further, the Court's reliance on tradition to justify its holding was improper, as Supreme Court precedent has demonstrated that history and tradition are insufficient grounds on which to base present-day decisions.²⁷⁹ The *Bowers* Court should have declared, as authors Warren and Brandeis did nearly a century ago, that "[t]he . . . law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands."²⁸⁰

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270. See *supra* notes 49-58, 212-15 and accompanying text.
271. See *supra* notes 104-26, 219-34 and accompanying text.
272. See *supra* notes 138-206, 235-58 and accompanying text.
273. See *supra* notes 110-11 and accompanying text.
274. See *supra* notes 117-20 and accompanying text.
275. See *supra* notes 222-25, 231-65 and accompanying text.
276. See *supra* notes 235-58 and accompanying text.
277. See *supra* note 235 and accompanying text.
278. See *supra* notes 236-43 and accompanying text.
279. See *supra* notes 259-69 and accompanying text.
280. Warren & Brandeis, *supra* note 1, at 220.