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COMMENTS

CONSTITUTIONAL LAW—THE RIGHT TO PRIVACY—*Bowers v. Hardwick* — The Supreme Court held in *Bowers v. Hardwick*[1] that a Georgia statute[2] making consensual sodomy a crime is constitutional. The statute provides that "a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth and anus of another."[3] The statute carries a maximum penalty of twenty years imprisonment if convicted.[4] In the wake of controversy over the Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney for the City of Richmond*,[5] the Court granted certiorari in *Bowers* to justify the proposition that sodomy is not protected as a right of privacy.[6]

Both the common law and religious doctrine have long held that sodomy is a detestable and criminal act.[7] In addition to the

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1. 106 S. Ct. 2841 (1986).

2. GA. CODE ANN. §§ 16-6.62 (1984).

3. *Id.* It is important to note that the statute is gender neutral. The decision of the Supreme Court holds, however, that the statute is constitutional as far as sodomy between homosexuals is concerned, but does not answer the question whether the statute as applied to heterosexuals is equally enforceable.

4. *Id.*

5. 403 F. Supp. 1199 (E.D. Va. 1975), *summarily aff'd*, 425 U.S. 901 (1976). The decision in *Doe* involved an action brought by homosexuals in Virginia who sought declaratory relief as to the unconstitutionality of the Virginia anti-sodomy law. The district court found that the statute was constitutional and that the state's right to enforce such a law is predicated upon the right of the state to promote morality and decency among it citizens. Repeal of the law, according to the court, was a task for the legislature, not the judiciary. The controversy that arose because of the Supreme Court's summary affirmance was the inability of many State and Federal courts to determine the meaning intended by the affirmance. Indeed, in Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), the circuit court held that the *Doe* decision was based on plaintiff's lack of standing to bring suit and not on any constitutional issue. *Contra* Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) which held that the *Doe* decision was based on constitutional grounds.

6. 106 S. Ct. at 2842-43.

7. *See* Note, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645 (1985); Comment, *The Right to Privacy and other Constitutional Challenges to Sodomy Statutes*, 15 U. TOL. L. REV. 811 (1984).

state of Georgia,[8] some 23 other states and the District of Columbia currently have sodomy statutes on their books.[9] Of these states, Georgia authorizes one of the longest possible sentences for conviction.[10] This comment will explain the rationale behind the majority's opinion in *Bowers*,[11] by analyzing the majority decision, together with the concurring and dissenting opinions as they relate to the right of privacy.

I. DISTRICT COURT AND COURT OF APPEALS DECISIONS

A. *Facts*

Michael Hardwick was arrested in August, 1982 on charges of committing sodomy in the bedroom of his home with another consenting adult male.[12] After a hearing in the Municipal Court of Atlanta, his case was transferred to the Superior Court where the District Attorney decided not to present the case to a grand jury unless further evidence developed.[13]

Hardwick, in the meantime, filed suit in federal district court seeking to declare the Georgia statute unconstitutional.[14]

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8. For a history of the Georgia sodomy law, see Evans, *The Crimes Against Nature*, 16 J. OF PUBL. L. 159 (1967).

9. 106 S. Ct. at 2847 n.1. The states that currently have sodomy laws in effect are: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia. Most of the sodomy statutes currently enforced throughout the nation classify consensual sodomy as a misdemeanor. Most states' sodomy statutes are geared toward forced or aggravated sodomy (i.e., against the individual's will) and sodomy with a minor. *Id.* In fact, Justice Powell, in his concurrence, brought up the issue of whether the penalty imposed under the Georgia statute may be violative of the eighth amendment's protection against cruel and unusual punishment. *See infra* notes 146-151 and accompanying text.

10. 106 S. Ct. at 2847 n.1. The Georgia statute carries a maximum penalty of up to 20 years imprisonment. *Id.* Consider the penalty in other states: Florida only carries a 60 day maximum penalty, FLA. STAT. ANN. §§ 800.02 (West 1987); Kentucky carries a 90 day to 12 month maximum, KY. REV. STAT. ANN. §§ 510.100 (Michie/Bobbs-Merill 1986); Kansas carries a 6 month penalty, KAN. STAT. ANN. §§ 21-3505 (1986); and Texas carries only a maximum fine of two hundred dollars, TEX. PENAL CODE ANN. §§ 21.06 (Vernon 1974). Note that Kansas changed the wording of its statute in 1983 to make sodomy a crime only between members of the same sex.

11. Justice White wrote the 5 to 4 majority opinion in which Justices Powell, Rehnquist, O'Connor and Chief Justice Burger all joined. Justices Blackmun, Stevens, Brennan and Marshall dissented. Justices Blackmun and Stevens wrote dissenting opinions.

12. Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

13. *Id.* at 1204.

14. *Id.*

He alleged in his complaint that he was a practicing homosexual who regularly engaged in private homosexual conduct and would continue to do so in the future.[15] He was joined in the suit by John and Mary Doe, a heterosexual couple who claimed their desire to engage in the activity proscribed by the statute but had been "chilled and deterred" by the existence of the statute and by Hardwick's arrest.[16] Named as defendants in Hardwick's suit were the Attorney General of Goergia, the District Attorney of Fulton County, and the Public Safety Commissioner.[17] All three parties filed motions to dismiss.[18]

The District Court for the Northern District of Georgia granted the defendants' motions to dismiss holding that the Does lacked standing to bring suit and that Hardwick, although he possessed standing, had no legal claim due to the Supreme Court's summary affirmance of *Doe*.[19] Plaintiff appealed the dismissal of his suit to the Eleventh Circuit Court of Appeals.[20]

B. Eleventh Circuit Decision

The Eleventh Circuit reversed the lower court decision. The reversal was predicated upon two factors: first, the standing of the parties to bring suit and, second, and more importantly, the effects of *Doe* on Hardwick's claim.[21] Standing to sue, the court stated, depended upon whether the threat of prosecution under the statute was real and immediate or imaginary and speculative.[22] The likelihood of prosecution is determined by examining the identity and the interests of the parties involved in the litigation.[23] To determine how real or imagined the threat of prosecution is, the court must measure the interests of the state in enforcing the statute, against the individual's interest in engaging in the prohibited activity.[24] According to the Eleventh Cir-

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *See supra* note 5.
20. Hardwick, 760 F.2d at 1202.
21. *Id.*
22. *Id.* at 1205. (Johnson, J., for the Eleventh Circuit majority citing Steffel v. Thompson, 415 U.S. 452, 459 (1974)).
23. *Id.*
24. *Id.* at 1206.

cuit, Hardwick's arrest and his admission that he would engage in the prohibited activity in the future, presented a clear and immediate threat of future prosecution. Thus, Hardwick's standing to sue was clearly legitimate.[25] The Does' standing was less clear.

The Court held that the Does' failure to present any evidence of the likelihood of future prosecution for engaging in sodomy resulted in a lack of standing.[26] The Does claimed that the existence of the statute coupled with the literal applicability to their situation put them in a position to be prosecuted.[27] The Eleventh Circuit held that absent any evidence which would prove the likelihood of prosecution under the statute, the Does had failed to meet their burden.[28] The circuit court affirmed the lower court judgment stating, "[t]he Does did not allege in their complaint that they faced a serious risk of prosecution" nor did they claim "membership in a group especially likely to be prosecuted."[29]

The circuit court, however, reversed the district court's dismissal of Hardwick's claim, holding that the Supreme Court's summary affirmance in *Doe* was not binding upon Hardwick.[30] A summary affirmance has binding precedential effect,[31] but because the court gives no explanation or reason for its decision, the holding must be carefully construed.[32] A summary affirmance represents the Supreme Court's approval of a lower court decision, but is not necessarily an endorsement of the lower court's reasoning.[33] *Doe,* according to the Eleventh Circuit, was dismissed in the district court because of the plaintiff's lack of standing to sue.[34] Since Hardwick clearly had standing, the sum-

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* The Does only asserted in their complaint that they were "chilled and deterred" by Hardwick's arrest and did not present any evidence that they were involved in any group that was especially prone to be prosecuted. The Does' failure to request any evidentiary pre-trial hearing to prove the likelihood of future prosecution left the court with no alternative but to dismiss their claim.
29. *Id.*
30. *See supra* note 5.
31. Hicks v. Miranda, 422 U.S. 332 (1975).
32. *Hardwick,* 760 F.2d at 1207.
33. *Id.*
34. *Id.*

mary affirmance was not binding upon him.[35] The court further reasoned that even if *Doe* had been decided on constitutional grounds,[36] the Supreme Court had indicated that the constitutionality of such statutes remained an open question.[37] Summary dispositions bind lower courts only until the Supreme Court states otherwise.[38] "Developments subsequent to the *Doe* decision undermine[d] whatever controlling weight it once may have possessed."[39]

The circuit court held that the Supreme Court's decision in *Carey v. Population Services International*,[40] which held that a state could not impose a restriction on the sale of contraceptives to minors,[41] implied that the Court had left open the question of what kind of private consensual behavior could be regulated by the states.[42] The court also held that the Supreme Court's dismissal of its original grant of certiorari in *New York v. Uplinger*[43] signalled that the question of state regulation of consensual sexual behavior remained open.[44]

In *Uplinger*, the New York Court of Appeals held unconstitutional a state statute which prohibited persons from loitering in a public place for the purpose of engaging in or soliciting another person to engage in deviant sexual behavior.[45] The decision in *Uplinger* was prompted by *People v. Onofre*,[46] which invalidated the New York State sodomy law.[47] The Court's failure

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35. *See supra* note 5.

36. Judge Johnson pointed out that even if the *Doe* affirmance was binding on Hardwick, the Court did not address the question of whether the Georgia statute violates the first amendment's freedom of association, as Hardwick alleged in his complaint. Thus, Hardwick would still have standing to sue. *Hardwick*, 760 F.2d at 1208 n.6.

37. *Id.* at 1208.

38. Hicks v. Miranda, 422 U.S. 332 (1975).

39. 760 F.2d at 1209.

40. 431 U.S. 678 (1977).

41. *Id.* at 700.

42. The court looked to two footnotes in the majority opinion in *Carey*, which stated that the "Court has not definitively answered the difficult question of whether and to what extent the Constitution prohibits state statutes from regulating private consensual sexual behavior among adults." 431 U.S. at 678 nn. 5 & 17.

43. 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514 (1983).

44. *Hardwick*, 760 F.2d at 1210.

45. 58 N.Y.2d at 936, 447 N.E.2d at 63, 460 N.Y.S.2d at 515.

46. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981).

47. *Hardwick*, 760 F.2d at 1210.

to hear arguments in *Uplinger* coupled with its ambiguity in *Carey* led the circuit court to conclude that the question of the validity of regulating consensual sexual activity among adults remained open.[48]

Regardless of Hardwick's standing to sue or whether the *Doe* decision was binding, the underlying issue that warranted examination by the court was whether the state could regulate consensual sexual activity between adults within the confines of the home.[49] The Eleventh Circuit held that prior precedent had established a right of personal privacy which extended to consensual sexual activity between adults.[50] The court took this rationale one step further and declared that the Supreme Court's holdings in *Griswold v. Connecticut*,[51] *Eisenstadt v. Baird*[52] and *Stanley v. Georgia*,[53] implied a fundamental right to engage in sodomy.[54] The court explained that the activity Hardwick wished to engage in "is so quintessentially private and lies at the very heart of intimate association" that it is beyond the reach of state regulation and is protected by the ninth amendment.[55] The Eleventh Circuit remanded the case stating that the state, in order to prevail, must prove that it has a compelling interest in

48. *Id.* at 1209-10 (citing *Carey*, 431 U.S. at 694 n.17, where the Supreme Court stated that "the Court does not purport" to answer the question of whether and to what extent the Constitution prohibits states from regulating sexual behavior between adults).

49. The issue seems to be different depending upon which court is answering the question. In the Supreme Court's determination, the relevant issue is whether a fundamental right to engage in homosexual sodomy exists. *See infra* note 69.

50. 760 F.2d at 1211-12 (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services Int'l, 431 U.S. 678 (1977); Stanley v. Georgia, 394 U.S. 557 (1969)).

51. 381 U.S. 479 (1965).

52. 405 U.S. 438 (1972).

53. 394 U.S. 557 (1969).

54. *Hardwick*, 760 F.2d at 1212. Both *Griswold* and *Eisenstadt* deal with the right to contraception which is encompassed within an individual's right to privacy. Many courts have extended the right to contraception to mean that the individuals are free to choose and regulate their own sexual behavior with that of other consenting adults. 760 F.2d at 1211. In *Stanley*, the right of privacy was viewed as within the fourth amendment guarantee to be free of intrusive search and seizure. The holding in *Stanley* seems to suggest that an individual is free to perform certain adult activity in the home without fear of unwarranted governmental intrusion as long as that activity is consented to by another adult partner, and the activity does not threaten others nor violate the rights of others. Extending and combining the holdings of these cases would constitute a right to engage in consensual sodomy in the home between consenting adults regardless of gender.

55. *Id.* "The enumeration in the Constitution, or certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

regulating the behavior in question, and that the statute is the most narrowly drawn means of safeguarding that interest.[56]

C. Dissent

Judge Kravitch dissented in part and concurred in part with the majority opinion of the Eleventh Circuit.[57] While agreeing that the majority was correct in its conclusion that Hardwick had proper standing to challenge the constitutionality of the Georgia statute, Judge Kravitch claimed that the majority erred in its opinion in two respects.[58] First, the court had no right to speculate that the summary affirmance of *Doe* was based upon the plaintiff's lack of standing.[59] The dissent argued that if the Supreme Court had decided that the plaintiff in *Doe* lacked standing, the Court would not have had jurisdiction to hear the case and would not have been able to summarily affirm the judgment of the district court.[60]

Second, the dissent argued that the court erred in determining that the summary affirmance of *Doe* had been undermined by *Carey, Uplinger* and *Onofre*.[61] The dissent claimed that the *Carey* opinion did not leave open the question of whether the right to privacy invalidated state legislation regulating private sexual conduct. Rather, the dissent asserted, the Court said that the right of privacy did not extend as far as plaintiffs in the case would have liked.[62] Judge Kravitch further noted that the Supreme Court's dismissal of its writ of certiorari in *Uplinger* was not, as the majority asserted, a signal that *Doe* was no longer good law.[63]

According to the Eleventh Circuit majority opinion, *Uplinger* signalled that *Doe* was no longer good law based upon

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56. 760 F.2d at 1213. The circuit court intimated that the controversy in question involved a fundamental right thus warranting a strict scrutiny review. The Supreme Court, on the other hand, found no violation of any fundamental right, and thus found strict scrutiny inapplicable. 106 S. Ct. at 2844.

57. *Hardwick*, 760 F.2d at 1213.

58. *Id.*

59. *Id.*

60. *Id.* at 1214.

61. *Id.*

62. *Hardwick*, 760 F.2d at 1215.

63. *Id.*

the ambiguity of the Supreme Court's order denying certiorari.[64] The Court's order stated that *Uplinger* "provides an inappropriate vehicle for resolving the important constitutional issues raised by the parties."[65] The majority inferred this statement as meaning: 1) that "important constitutional issues" included whether the right of privacy invalidated all state sodomy laws, and 2) that the Supreme Court intended to reverse or reconsider *Doe*, but decided to wait for another case.[66] In his dissent, Judge Kravitch concluded that these "inferential leaps" were too great to take and unless and until the Supreme Court indicates otherwise, the courts were bound by the *Doe* decision.[67]

II. THE SUPREME COURT DECISION

A. Majority Opinion

The Supreme Court granted certiorari to determine whether the Georgia sodomy statute violated the fundamental rights of homosexuals.[68] Two reasons exist why *Bowers* was chosen for review: first, other circuit courts had reached conclusions contrary to that decided by the Eleventh Circuit[69] and, second, to judge "the limits of the court's role in carrying out its constitutional mandate."[70]

The respondent advanced three arguments as to why the Georgia statute was unconstitutional.[71] Hardwick asserted:

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64. *Id.* at 1210.

65. *Id.*

66. *Hardwick*, 760 F.2d at 1216.

67. *Id.*

68. *Bowers*, 106 S. Ct. at 2843. Justice White stated that:

> The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

69. 106 S. Ct. at 2843 & n.3 (citing Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) and Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984)). Note also that several states have recently arrived at decisions similar to that of the Eleventh Circuit. *See, e.g.*, 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); State v. Pilcher, 242 N.W.2d 348 (Iowa 1976); and Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980). All three cases were decided subsequent to the *Doe* decision.

70. 106 S. Ct. at 2843.

71. Many commentators suggest four arguments as to the unconstitutionality of sodomy statutes. These arguments are: 1) they are void for overbreadth and vagueness; 2)

1) that prior precedent has established a right of privacy which infers a right to engage in consensual sexual activity;[72] 2) that prior precedent aside, there exists a fundamental right to engage in sodomy;[73] and 3) that even if a fundamental right to engage in sodomy does not exist, no rational basis exists for the law, thereby invalidating the statute.[74]

1. The Right to Engage in Sodomy is Not Inferred from the Right of Privacy Doctrine

Justice White, writing for the majority, asserted that prior precedent concerning the right of individual privacy did not apply in this case.[75] He claimed that prior right of privacy cases such as *Griswold, Eisenstadt, Carey* and *Roe v. Wade,* dealt with issues of family, marriage, and procreation.[76] No relation exists, nor had respondent demonstrated any, between family, marriage or procreation, and homosexual activity.[77] Justice White construed the issue in *Bowers* as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[78]

The right to engage in homosexual sodomy does not warrant the same protection as has been given in prior cases dealing with a right to privacy because those cases have dealt primarily with family relationships[79] and child rearing.[80] Sodomy, claimed the

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they impose cruel and unusual punishment; 3) they invade the right to privacy; and 4) they violate the equal protection clause. *See,* Note, *The Constitutionality of Sodomy Statutes* 45 FORDHAM L. REV. 553 (1976) [hereinafter *The Constitutionality of Sodomy Statutes]; see, also,* Note, *Expanding the Rights of Sexual Privacy,* 27 LOY. L. REV. 1279 (1981).

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

73. *Id.* at 2844.

74. *Id.* at 2846.

75. *Id.* at 2844.

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

77. *Id.*

78. *Id.* at 2843. The statute on its face is gender neutral, yet the majority only sought to determine its applicability to homosexuals. *See* GA. CODE ANN. §§ 16-6-2 (1984); *see, also, supra* note 3. Justice Blackmun brought up this very point in his dissent. *See* 106 S. Ct. at 2849.

79. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (focusing upon the right of religious freedom).

80. 106 S. Ct. at 2843. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (focusing upon the right of parents to educate their children as they choose).

Court, bears no resemblance to either category.[81] More recent cases, however, have dealt with the right of privacy concerning contraception,[82] abortion,[83] and obscenity.[84] The majority held that this line of cases did not support the proposition that consensual activity is within the realm of the privacy doctrine.[85] Most notably, Justice White observed that the Court emphasized in *Carey* that the privacy right, protected by the due process clause under the *Griswold* line of cases did not extend to consensual sexual activity.[86]

The right of privacy invoked by the respondent was based upon *Griswold* and those cases subsequently decided.[87] Justice Douglas, writing for the majority in *Griswold,* stated that the rights guaranteed by the Bill of Rights have "penumbras" which are "formed by emanations from those guarantees that help give them life and substance."[88] He held that "various guarantees create zones of privacy."[89] Justice Douglas voiced his concern about the invasion of the marital relationship stating, "would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives?"[90] For Justice White, in *Bowers,* a right to privacy does not exist in a vacuum, but rather, it is the nature of certain interpersonal relationships that confer the right.[91] Sodomy is not encompassed within these relationships and is thus afforded no protection.[92]

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81. 106 S. Ct. at 2844.

82. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

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

84. Stanley v. Georgia, 394 U.S. 557 (1969). *See also supra* note 54.

85. 106 S. Ct. at 2844.

86. *Id. Contra* Hardwick v. Bowers, 760 F.2d at 1205. *See also supra* note 42 and accompanying text.

87. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972), Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services Int'l, 431 U.S. 678 (1977); Stanley v. Georgia, 394 U.S. 557 (1969). *Griswold* has become the so-called "father" of the right to privacy doctrine.

88. *Griswold,* 381 U.S. at 484.

89. *Id.* Applying these principles, Justice Douglas held that a state law prohibiting married couples from access to contraception was unconstitutional and an invasion of the marital relationship.

90. *Id.* at 485. We should also question whether we would or should allow the police to search any bedroom for telltale signs of consensual sodomy.

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

92. *Id.*

Justice White's concurring opinion in *Griswold* stated that restricting the use of contraceptives by married couples deprived them of liberty without due process, a violation of the fourteenth amendment.[93] While agreeing that married couples could not be restricted from obtaining contraception, Justice White implied that a state law prohibiting individuals wishing to engage in illicit sexual relations from obtaining contraception would be within the state's power.[94]

Seven years after the *Griswold* decision, the Court held in *Eisenstadt v. Baird* that the right to contraception is afforded to non-married couples as well as to married.[95] Justice Brennan wrote the majortiy opinion holding that a prohibition against the use of contraceptives by unmarried individuals was violative of the equal protection clause of the fourteenth amendment.[96] The important factor to consider in Justice Brennan's view is that regardless of whether the right to contraception is inferred in the marital relationship,[97] it is the fact that the right of privacy, if it is to mean anything, is "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[98] This indicates the view that individuals have the right to engage in intimate interpersonal relationships and decision making free of governmental intrusion. Read in conjunction, *Griswold* and *Eisenstadt* imply that an individual's private, intimate decisions regarding the nature of his interpersonal relationships are protected as fundamental rights of privacy.[99]

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93. *Griswold*, 381 U.S. at 502.

94. *Id.* at 505-06. Justice White wrote that State proscriptions against illicit sexual relations are constitutionally void. *See also Eisenstadt*, 405 U.S. at 463-65.

95. *Eisenstadt*, 405 U.S. at 438. Justice White, concurring in the majority opinion, bases his concurrence upon constitutional doctrine (i.e., that a conviction cannot be "upheld upon a theory which could not constitutionally support a verdict' "). *Id.* at 465 (quoting Street v. New York, 394 U.S. 576, 586 (1969)). True to his concurrence in *Griswold*, Justice White stated that he "perceive[d] no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried." *Id.* at 465.

96. *Id.* at 443.

97. *See, Griswold*, 381 U.S. at 502-06.

98. 405 U.S. at 453.

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

In *Stanley v. Georgia,*[100] which held that an individual may view obscene materials in the privacy of his home free of governmental intrusion, the Court proclaimed that the constitutional heritage of the United States "rebels at the thought of giving government the power to control men's minds."[101] Justice Marshall, writing for the majority in *Stanley,* held that a state's assertion that it has the right to protect individuals from the effects of obscenity is nothing more "than the assertion that the state has the right to control the moral content of a person's thoughts."[102] *Stanley* implies that a right of privacy extends to certain activities which occur within the confines of the home which might not be protected outside the home.[103]

In rejecting the argument that *Stanley* held that private adult behavior which occurs in the home is insulated from governmental intrusion, Justice White in *Bowers* asserted that *Stanley* encompassed strictly a first amendment issue.[104] Since the respondent presented no first amendment argument, *Stanley* was not controlling in this case.[105] Distinguishing *Stanley,* and rejecting the notion that the violation of the due process clause found in *Griswold, Eisenstadt,* and *Roe*[106] extends to sodomy, Justice White next refuted the argument that a fundamental right to engage in sodomy exists.[107]

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100. 394 U.S. 557 (1967) (appellant was arrested in his home after police, armed with a warrant to search his home for evidence of illicit bookmaking activity, came across obscene films in his bedroom; appellant was then charged and convicted of violating a Georgia statute banning the possession of obscene material).

101. *Id.* at 565.

102. *Id.*

103. Justice Marshall stated that "whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home." *Id.*

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

105. *Id. But see* court of appeals decision, Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985).

106. In *Roe,* the Supreme Court held that a Texas statute banning abortion was a violation of the due process clause.

107. 106 S. Ct. at 2844. The excuse that the relationships dealt with in the *Griswold* line of cases relate to marriage and procreation is inadequate. It is not the relationships themselves, but rather, the *nature* of the relationships which should confer protection. In other words, the fact that the relationships deal with intimate and private association amongst and between individuals is the primary reason why a right of privacy is inferred. Classification of the relationship as homosexual or heterosexual is unnecessary. These relationships simply deal with the right of an individual to choose with whom he or she wishes to associate and with whom he or she wishes to share intimate and personal rela-

2. There is No Fundamental Right to Engage in Sodomy

Respondent argued, and the Eleventh Circuit held,[108] that a fundamental right to engage in homosexual sodomy exists.[109] Justice White explained that the Court must go to great lengths to substantiate a position that a fundamental right exists.[110] Fundamental rights have been defined as those rights which qualify for heightened judicial protection.[111] They have been described as "those fundamental liberties that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if they were sacrificed.' "[112] Fundamental rights have also been characterized as "those liberties that are 'deeply rooted in this Nation's history and tradition.' "[113] The concept that fundamental rights are deeply rooted in our nation's history was advanced by Justice Goldberg in his concurring opinion to *Griswold* in which he described the ninth amendment as preserving a fundamental right of privacy to the people.[114] The concept of looking to the intent of the framers to determine what fundamental rights exist is a crucial factor in Justice White's opinion in *Bowers*[115]—thus he adopts the Goldberg approach used in *Griswold.*

Looking to past proscriptions against sodomy, Justice White determined that no fundamental right exists to engage in sodomy.[116] Proscriptions against sodomy were firmly planted at the time of the ratification of the Constitution evidencing a tradition that has long held sodomy a crime.[117] Sodomy had been a crime in all thirteen states that ratified the Bill of Rights; all but five of the thirty-seven states at the time of the ratification of the fourteenth amendment outlawed sodomy; and up until 1961 all

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tionships. In light of this distinction, the argument advanced by the Court is weakened.

108. *Hardwick*, 760 F.2d at 1212.

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

110. *Id.* at 2846.

111. *Id.* at 2944.

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

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

114. 381 U.S. at 486, 488-93 (Goldberg, J. concurring).

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

116. *Id.* For a further discussion of the ancient proscriptions against sodomy and other deviant sexual practices, see Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1976).

117. 106 S. Ct. at 2844-46.

fifty states outlawed sodomy.[118]

The respondent next argued that, conceding no fundamental right to engage in sodomy exists, the Court should discover a new fundamental right embedded in the constitution.[119]

Justice White held that there should be "great resistance" by the Court to creation of new fundamental rights from the due process clause.[120] The Judiciary, by expanding fundamental rights, "takes to itself further authority to govern the country without express Constitutional authority," and the Court "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[121]

The respondent argued that *Stanley* had created a fundamental right of privacy to engage in consensual sexual activity in the home,[122] and even if *Stanley* was found not to be controlling, the Georgia statute served no useful purpose since consensual sodomy is basically a victimless act.[123] The Court rejected both arguments.[124] *Stanley,* maintained the Court, was firmly grounded in first amendment rights and hence not controlling since the respondent's claim rested on fourteenth amendment grounds.[125] Second, victimless crimes are no less criminal simply because they occur in the home.[126] The Court further stated that were it to allow such voluntary consensual adult activity in the home, "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest and other sexual crimes."[127]

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118. *Id.* at 2844-45.
119. *Id.* at 2846.
120. *Id.*
121. *Id.*
122. *Id. See generally,* Stanley v. Georgia, 394 U.S. 557 (1969).
123. *Bowers,* S. Ct. at 2846.
124. *Id.*
125. *Id.*
126. *Id.* The Court argued that possession of firearms and drugs are no less dangerous simply because they occur in the home. What the Court fails to recognize is that drugs and firearms are inherently dangerous and the state has a compelling interest in deterring their use. The same cannot be said of sodomy.
127. *Id.* at 2846. The Court seems to confuse the issue—state governments regulate behavior such as adultery, incest, rape and child molestation because of the compelling state interests in protecting the preservation of the family and the prevention of physical and emotional harm. A similar argument cannot be made of consensual sodomy occuring in the home.

3. Morality is a Justifiable Rationale for the Sodomy Law

Respondent argued that even if prior precedent was not controlling in the determination of whether a fundamental right to engage in sodomy exists, and even if no fundamental right to engage in sodomy can be found in the Constitution, the Georgia statute is still unconstitutional because there is no rational basis for the law's existence except the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[128] The Court refuted the argument that morality is an inadequate rationale for the law, holding that "[t]he law, however, is constantly based upon notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[129]

A serious flaw in the Court's reasoning is that morality is a concept which is constantly changing and evolving.[130] Notions of morality must be weighed against the intent of the framers who, as Justice Brandeis once stated, "undertook to secure conditions favorable to the pursuit of happiness."[131] The question becomes, should morality impinge on the fundamental right to pursue one's own happiness as it relates to engaging in consensual adult sexual behavior?[132] Upholding morality, it is argued, is a compel-

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

129. *Id.*

130. *See* Loving v. Virginia, 388 U.S. 1 (1967). Also, compare Brown v. Board of Education, 347 U.S. 483 (1954) with Plessy v. Ferguson, 163 U.S. 537 (1896). Had notions of morality not changed in America we would never have passed the fourteenth amendment, nor allowed women to vote, nor integrated our school system, nor allowed interracial marriage. To merely dismiss the respondent's argument that morality is an insufficient basis to uphold the validity of the law is to do a disservice to the American system. The Court simply states that morality is a satisfactory rationale to uphold the law. Although this writer would agree with the Court to some extent, it would seem to be a worthless proposition without the Court's investigation as to the current moral trend in the nation. The Court's disregard for the number of states that have repealed sodomy laws and the number of states in which sodomy has been decriminalized, shows no deference to the feelings and desires of the American public.

131. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The right to engage in intimate relationships is encompassed in the pursuit of happiness. The individual's choice of with whom they wish to share private thoughts, feelings, expressions and social relations should be protected under the edict of the "pursuit of happiness." *See supra* note 108.

132. This is not meant to suggest that all law based upon notions of morality are void. It does suggest, however, that absent a compelling state interest, behavior such as

ling state interest because it serves to preserve and foster the social welfare of the people.[133] Further, it helps to enhance the general mental and physical health of the individuals in society.[134] Ideas concerning the value of morality in our society should be balanced against the principles established by our founding fathers who encompassed within the Declaration of Independence and the Constitution notions of morality within the realm of life, liberty, and the pursuit of happiness. In *Olmstead v. United States*,[135] Justice Brandeis, in discussing the intent of the framers in adopting the Bill of Rights stated:

> They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.*[136]

The Supreme Court felt, however, that a majoritarian belief that sodomy is morally wrong is an adequate rationale for the law's existence.[137] The Court reversed the appeals court ruling, commenting that the sodomy laws of some 25 States should not be invalidated on the basis that morality is an inadequate justification for the law.[138] The Court's opinion ended with a footnote indicating that respondent's failure to defend the judgment of the court of appeals on the ninth amendment, the equal protection clause or the eighth amendment, warranted no review of those issues by the Court at this time.[139]

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sodomy which occurs in the home between consenting adults should be beyond the reach of state power.

133. *See generally* Richards, *supra* note 116.

134. At least one commentator has written that proscriptions against homosexual sodomy are valid because they help in deterring the spread of AIDS. *See* Brook, *Doe and Dronenburg: Sodomy Statutes are Constitutional*, 26 WM. & MARY L. REV. 645 (1985).

135. 277 U.S. 438 (1928).

136. *Id.* at 478 (emphasis added).

137. 106 S. Ct. at 2846. "The law is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the court will be very busy indeed." *Id.*

138. *Id.*

139. *Id.* at 2846 n.8. Does the Court mean to infer that if *Hardwick* presented those issues he may have prevailed? Also, if the Court recognized that those issues do exist, then doesn't it have the duty to address them? *See infra* notes 171-72 and accompanying text. The Court used a rational relation test in deciding *Bowers*. Query whether the Court should have used a middle tier or strict scrutiny test in its determination. The

B. Concurring Opinions

1. Chief Justice Burger

Chief Justice Burger concurred in the Court's judgment and wrote separately to emphasize that the constitution does not grant a fundamental right to commit homosexual sodomy.[140] The Chief Justice discussed the ancient proscriptions against sodomy and traced their roots throughout western civilization.[141] To confer a fundamental right to engage in homosexual sodomy "would be to cast aside millennia of moral teaching."[142] The most important distinction in this case according to Chief Justice Burger is not "a question of 'personal' preferences but rather of the legislative authority of the state."[143] He found "nothing in the Constitution depriving a state of the power to enact the statute challenged here."[144] Chief Justice Burger's belief that the legislative authority controls the outcome of this case echoes that of Justice Rehnquist's dissenting opinion in *Carey*,[145] in which he stated:

Court implied that no suspect classification is involved in the present case, therefore, strict scrutiny is inapplicable. In Baker v. Wade, 769 F.2d 289 (1985), a case similar to *Bowers* challenging the Texas sodomy law, the Fifth Circuit Court of Appeals held:

> Because we have held that engaging in homosexual conduct is not a constitutionally protected liberty interest and because Baker has not cited any cases holding, and we refuse to hold, that homosexuals constitute a suspect or quasi-suspect classification, the standard of review is whether section 21.06 is rationally related to a legitimate state end.

Id. at 292.

It is yet to be seen whether homosexuals can be considered a suspect class. But, if we hold for the moment that a sodomy statute cannot be enforced to restrict married or heterosexual couples, as *Griswold* and *Eisenstadt* imply, from engaging in sodomy, then a law restricting homosexuals would be violative of the equal protection clause. This would be so because it would restrict what a man may do with another man while allowing a man to engage in that behavior with a woman. In such a case the Court would at least invoke middle tier scrutiny (i.e., gender based discrimination). What it basically comes down to is that the issue of whether homosexuals may engage in sodomy cannot be fully determined unless the Court rules on whether heterosexuals may.

140. *Bowers*, 106 S. Ct. at 2847. *See supra* note 69.

141. *Id. See supra* note 116. The idea that proscriptions against sodomy should somehow be a factor in deciding the constitutionality of the sodomy statute can also be found in Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985).

142. 106 S. Ct. at 2847.

143. *Id.*

144. *Id.*

145. 431 U.S. 678 (1977).

> The court here in effect holds that the first and fourteenth amendments not only guarantee full and free debate before a legislative judgment as to the moral dangers to which minors within the jurisdiction of the state should not be subjected but goes further and absolutely prevents the representatives of the majority from carrying out such a policy after the issues have been fully aired.[146]

While agreeing that no fundamental right to engage in sodomy is encompassed by any of the previously decided right of privacy cases (*Griswold*, etc.), the factor most important to the Chief Justice was the right of the state legislatures to regulate certain behavior of its citizens based on traditional notions of morality. The very essence of this case, however, contrary to the Chief Justice's belief, is whether a right to engage in sodomy is protected under a constitutional "zone of privacy."

2. Justice Powell

Justice Powell concurred in the majority opinion,[147] but noted that while he agreed that no fundamental right to engage in sodomy exists under the due process clause, the respondent may still have been entitled to some protection by the eighth amendment.[148] In his view, the Georgia statute, which carries a twenty-year sentence for a conviction of a single private consensual act,[149] creates a serious eighth amendment issue.[150] Under the Georgia statute, "a single act of sodomy even in the private setting of a home is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, first degree arson and robbery."[151] Justice Powell goes no further

146. *Id.* at 718 (Rehnquist, J., dissenting).

147. *Bowers*, 106 S. Ct. at 2847. (Powell, J., concurring).

148. *Id.* "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

149. GA. CODE ANN. §§ 16-6-2 (1984). In fact, among states that currently have sodomy laws, only Georgia and Rhode Island carry maximum penalties of up to 20 years imprisonment. *See* 106 S. Ct. at 2847 & n.1 (citing R.I. GEN LAWS §§ 11-10-1 (1981)). For a comparison of penalties between conviction for sodomy and for manslaughter among the states which currently have sodomy statutes, see *The Constitutionality of Sodomy Statutes, supra* note 72.

150. 106 S. Ct. at 2847.

151. *Id.*

in his analysis and leaves the eighth amendment issue open for future decision.[152] His rationale for not deciding the issue was that Hardwick had "not been tried, much less convicted and sentenced."[153] Therefore the issue was not a factor in the Court's decision.[154] Additionally, it was admitted at oral argument that prior to the complaint filed against Hardwick there had been no reported decision involving prosecution for private homosexual sodomy in several decades.[155] While inferring that the Georgia statute may be unconstitutional under the eighth amendment, Justice Powell nonetheless believed that a state has the right to enact such a statute.[156] In his concurring opinion to *Carey*, Justice Powell held that *Griswold* and *Roe* had been overextended in cases dealing wih sexual freedom. He stated, "neither our precedents nor sound principles of constitutional analysis requires state legislation to meet the exacting *compelling state interest* standard whenever it implicates sexual freedom."[157] This statement is in conformity with the majority's opinion in *Bowers* which used a rational relation test to scrutinize the constitutional validity of the Georgia statute.[158] It would seem that Justice Powell wrote his concurrence in order to alert future litigants challenging a sodomy statute that review of the law should be predicated upon an argument that the statute violates the eighth amendment. Thus it appears that *Bowers* leaves room for an eventual rehearing of the issue.

C. *Dissenting Opinions*

1. Justice Blackmun

Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, wrote a vigorous dissent which attacked the major-

152. *Id.*

153. *Id.* at 2848.

154. *Id.*

155. *Id.* at 2848 n.2. Justice Powell stated further that the suit had been brought by Hardwick for declaratory judgment challenging the validity of the statute. Although 26 states have repealed similar sodomy statutes, he refused to create a fundamental right for a behavior condemned for hundreds of years.

156. *Id.*

157. 431 U.S. at 705 (Powell, J., concurring).

158. *See* 106 S. Ct. at 2846. *See also supra* note 139.

ity's rationale for upholding the validity of the statute.[159] The dissent focused upon three faults in the majority's reasoning: 1) the framing of the issue by the majority;[160] 2) the Court's interpretation of the decision in *Stanley v. Georgia;*[161] and 3) "[t]he Court's failure to comprehend the magnitude of the liberty interests at stake."[162] This case, it is asserted, is simply about "the right to be let alone."[163] Justice Blackmun disagreed with the majority opinion that the Georgia statute is valid essentially because the laws of several states have made such conduct illegal for a very long time.[164] Quoting Justice Holmes, Justice Blackmun stated:

> 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.[165]

The notion that the state's idea of morality is a justified interest in upholding the sodomy law is meritless according to Justice Blackmun.[166]

Justice Blackmun asserted that "the Court's almost obsessive focus on homosexual activity" resulted in the failure to realize that the statute is written in gender neutral terms;[167] the sex or status of the persons engaging in the act is irrelevant.[168]

The majority should not have decided whether a fundamental right to engage in sodomy exists, but rather, the Court should have focused upon whether the statute is or is not a constitutional intrusion into the right to privacy, independent of sexual orientation.[169] According to Justice Blackmun, the statute must be applied to all individuals regardless of sexual

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159. *Bowers*, 106 S. Ct. at 2848.
160. *Id. See also supra* note 69.
161. 106 S. Ct. at 2852 (citing *Stanley*, 394 U.S. 557 (1969)).
162. *Id.* at 2853.
163. *Bowers*, 106 S. Ct. at 2848 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
164. *Id.*
165. *Id.* (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).
166. *Id.*
167. *Bowers*, 106 S. Ct. at 2849. *See also supra* notes 2 & 139.
168. *Id.*
169. *Id.*

preference.[170]

Justice Blackmun also stated that the majority erred when it failed to address any eighth or ninth amendment, or equal protection clause claim.[171] He asserted that the duty of the Supreme Court is to "affirm the Court of Appeals' judgment if there is *any* ground on which respondent may be entitled to relief."[172] In fact, Hardwick did present issues based on the ninth amendment[173] by way of *Griswold.*[174] Justice Goldberg, concurring in *Griswold,* wrote that, "[t]he language and history of the ninth amendment reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."[175] As Justice Goldberg further elaborated, "the ninth amendment shows a belief . . . that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."[176] In Justice Blackmun's view, the Court in *Bowers* had a duty to explore all possible areas which would entitle the respondent to relief.[177] Thus, even if the respondent failed to advance these claims, the Court should not pass over the issues if they are found to exist.[178]

The dissent stated that the respondent had made a "cognizable claim" that the sodomy law interfered with his constitutional right of privacy and freedom of association such that the eighth and ninth amendment as well as the equal protection clause claims should not have been "peremptorily dismissed."[179] The majority's "cramped reading of the issue," stated Justice Blackmun, "makes for a short opinion but does little to make for

170. *Id.*
171. *Bowers,* 106 S. Ct. at 2849-50.
172. *Id.* at 2849.
173. For text of ninth amendment, see *supra* note 57.
174. 106 S. Ct. at 2849 (citing *Griswold,* 381 U.S. at 484). In *Griswold,* Justice Douglas held that the "Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Further, that encompassed in these penumbras is a zone of privacy. 381 U.S. at 484.
175. *Griswold,* 381 U.S. at 488.
176. *Id.* at 492.
177. 106 S. Ct. at 2849.
178. *Id.* at 2850.
179. *Id.*

a persuasive one."[180]

The development and recognition of all applicable constitutional issues is a critical factor in determining whether a fundamental right exists.[181] *Griswold* and the cases decided subsequently have expanded the right of marital privacy from that of marital privacy to rights involving intimate association and private personal choice and decision making.[182] The constitutional question posed in *Bowers* falls into a category involving that of intimate association and private personal choice in matters regarding one's own body.[183] Though sodomy is considered outside the norm, it nonetheless involves a private personal decision concerning with whom one wishes to associate and with what one wishes to do with one's body.

The development of a right to privacy and freedom of choice can be traced in *Roe, Stanley,* and *Carey.* In *Roe,* the Court held that a right to an abortion can be found in the fourteenth amendment concept of personal liberty as well as in the ninth amendment.[184] Similarly, in *Stanley,* the Court held that the right to receive information and ideas, regardless of their social worth, are protected by the first and fourteenth amend-

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180. *Id.*

181. *Id.*

182. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973).

183. If *Roe* stands for anything, it is the right individuals have to make a choice, free of governmental intrusion, as to what one wishes to do with her body. This is not to suggest that the state or the Court should condone, for example, a person's right to self-mutilation, but does suggest that a person may use their body to engage in consensual sexual activity with another adult. This would hold true whether the behavior be sodomy, sado-masochism, etc.

184. *Roe* 410 U.S. at 153. It is difficult to ascertain how a court can rule that abortion is legal while sodomy is not. The state's interest in the abortion issue is much more compelling than its interest in controlling sodomy. As regards the abortion issue, the courts and society are dealing with the question of whether we are destroying human life by allowing abortions. The sodomy issue deals with whether the state has a compelling enough reason to *control the private* consensual sexual activity of adults. According to *Roe,* a woman has a fundamental right to make an intimate and personal choice regarding the use of her body (i.e., a woman is allowed to terminate her pregnancy in the first trimester). However, in certain states that same woman could not engage or perform oral or anal sex with another consenting adult. *See supra* note 9. This seems to be inconsistent. The court will allow a woman to terminate a fetus (what some may call "potential life"), but will not allow her to make an intimate choice regarding the nature of her sexual and personal relationships with another adult. Why should the court allow a woman to make an extremely personal choice about abortion, yet restrict the right of two consenting adults to carry on their sexual relationship in a mutually satisfying and stimulating manner?

ments.[185] Justice Marshall, writing for the majority in *Stanley*, held, "[i]f the first amendment means anything, it means that a state has no business telling a man sitting alone in his own house what books he may read or what films he may watch."[186]

In *Carey*, the Court determined that the due process clause of the fourteenth amendment conferred a fundamental right to decide "whether or not to bear or beget a child."[187] Justice Brennan, writing for the majority in *Carey*, held that the right of minors to obtain contraception exists "because such access is . . . [a] constitutionally protected right of childbearing."[188]

In its decision that sodomy is not constitutionally protected, the Court gave little deference to the "zone of privacy" that it had mandated in the *Griswold* line of cases.[189] The critical determination that the Court made in its opinion regarding *Griswold* and its progeny is the type of relationships that the Court sought to protect in those cases.[190] The Court held that the special nature of family, procreation, and marital relationships warrants a higher level of protection than other relationships, for example, homosexual ones.[191] The crucial determination expressed by Justice Blackmun is not a matter of what the relationships stand for but why we protect those relationships in the first place.[192]

The Supreme Court has proceeded along two distinct lines in right to privacy cases. First, "it has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make."[193] Second, "it has recognized a privacy

185. *Stanley*, 394 U.S. at 557.

186. *Id.* at 565. Doesn't it also mean that a state has no business telling a man whom he may have sex with in his home or in what manner he performs it? Freedom of *sexual expression* can be encompassed as an "emanation" of free speech guaranteed by the first amendment.

187. *Carey*, 431 U.S. at 686.

188. *Id.* at 688. Similarly the issue should not be whether a fundamental right to engage in sodomy exists, but whether a fundamental right of interpersonal association is being violated by the Georgia law.

189. *Bowers*, 106 S. Ct. at 2852. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Carey v. Population Services Int'l, 431 U.S. 678 (1977); and Stanley v. Georgia, 394 U.S. 557 (1969).

190. 106 S. Ct. at 2851-52. *See also supra* note 107.

191. 106 S. Ct. at 2851.

192. *Id.*

193. *Id.* at 2850. *Roe* falls into this category.

interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged."[194] Justice Blackmun postulated that the right of privacy thus embodied decisional as well as spatial aspects.[195] *Bowers* presents both these aspects.

The majority's conclusion that none of the rights delineated in the Court's prior decisions dealing with an individual's right to make certain decisions free of governmental intrusion bore any resemblance to the claimed constitutional right to engage in acts of sodomy ignores the warning, according to Justice Blackmun, "against 'clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause.' "[196] Those rights are protected "not because they contribute, in some direct and material way, to the general public's welfare, but because they form a central part of an individual's life."[197] Justice Blackmun concluded, "we protect the decision whether to marry precisely because marriage 'is an association that promotes a way of life,' "[198] "we protect the decision whether to have a child because parenthood alters so dramatically an individual's self definition,"[199] and "we protect the family because it contributes so powerfully to the happiness of individuals."[200]

Building upon these premises, Justice Blackmun maintained that only "willfull blindness could obscure the fact that sexual intimacy is a 'sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.' "[201]

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests . . . that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an

194. *Id.* at 2850-51. *Stanley* falls into this category.
195. *Id.* at 2844.
196. 106 S. Ct. at 2851 (quoting Moore v. East Cleveland, 431 U.S. 494, 501 (1977)).
197. *Id.*
198. *Id.* (quoting *Griswold*, 381 U.S. at 486).
199. *Id.*
200. 106 S. Ct. at 2851.
201. *Id.* (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

> individual has to *choose* the form and nature of these intensely personal bonds.[202]

Inherent in the premise that individuals have the right to choose how to conduct their lives is an acceptance that individuals will make different choices.[203] Justice Blackmun argued that a "way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[204] The majority opinion, which held that a fundamental right to engage in sodomy does not exist,[205] is, in actuality, according to Justice Blackmun, a failure of the Court to recognize a "fundamental interest all individuals have in controlling the nature of their intimate associations with others."[206]

The second aspect of the privacy issue is its spatial dimension. Justice Blackmun stated that the possible prosecution that the respondent faced presented a fourth amendment issue.[207] Relying upon the Court's holding in *Stanley,* Justice Blackmun held that the fourth amendment provides special protection for the individual in his home.[208] *Stanley,* however, only briefly touched on the fourth amendment. Justice Stewart, concurring in *Stanley,* voiced his concern that if the Court were to uphold the conviction of the defendant it would:

> [I]nvite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.[209]

Justice Stewart's opinion in *Stanley* was consistent with that of Justice Brandeis' dissent in *Olmstead v. United States.*[210] Justice Brandeis expressed his belief that an individ-

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202. *Id.*
203. *Id.* at 2852.
204. 106 S. Ct. at 2852 (quoting Wisconsin v. Yoder, 406 U.S. 205, 223-24 (1972)).
205. *Id.* at 2844.
206. *Id.* at 2852. *Cf.* Loving v. Virginia, 388 U.S. 1 (1967).
207. 106 S. Ct. at 2852.
208. *Id.*
209. 394 U.S. at 572 (Stewart, J., concurring). Query whether suspicion that acts of sodomy are being committed in a person's home gives probable cause for the state to enter that home?
210. 277 U.S. 438, 478 (1928) (Stewart, J., dissenting). *See also supra* note 131.

ual has a right to satisfy his own intellectual and emotional needs in the privacy of his own home.[211] The reliance of the *Stanley* Court upon *Olmstead* suggests that *Stanley* rested as much on the fourth amendment as on the first.[212] Relying on *Paris Adult Theatre I v. Slaton*,[213] Justice Blackmun in *Bowers* asserted that *Stanley* stood for a reaffirmation that "a man's home is his castle."[214] The very "heart of the Constitution's protection of privacy is the right of an individual to conduct intimate relationships in the intimacy of his or her own home."[215]

The petitioner's justification for supporting the proposition that the Georgia statute furthered legitimate state interests was incorrect in Justice Blackmun's view.[216] The petitioner asserted that the acts made criminal by the statute may have serious adverse consequences to society such as the spread of communicable diseases or fostering other criminal behavior.[217]

Justice White stated for the majority in *Bowers* that otherwise victimless crimes are no less criminal because they occur within the confines of the home.[218] Justice Blackmun saw no justification for equating private consensual sexual conduct with the possession in the home of drugs, guns or stolen property.[219] Nothing in the record before the Court provided any justification for finding that sodomy posed any danger to the persons so engaged or to others.[220]

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211. *Id.* at 478.

212. 106 S. Ct. at 2852-53.

213. 413 U.S. 49 (1973).

214. 106 S. Ct. at 2853 (quoting *Paris Adult Theater I*, 413 U.S. at 66).

215. *Id. Cf.* United States v. Buck, 342 A.2d 48 (D.C. Cir. 1975). The District of Columbia court held in *Buck* that a right of privacy for individuals to engage in sodomy does not extend beyond the seclusion of the home. This decision is interesting in light of the fact that the District of Columbia currently has a sodomy law in effect. The court's conclusion supports Justice Blackmun's notion of a partial right of privacy. This at least suggests that the court has an option in deciding future cases challenging the constitutional validity of sodomy laws.

216. 106 S. Ct. at 2853.

217. *Id. See also supra* note 134.

218. 106 S. Ct. at 2846. "Victimless crimes, such as the possession and use of illegal drugs do not escape the law where they are committed at home." *Id.* Justice Black in *Stanley* stated that the Court's holding "in no way infringes upon the power of the State or Federal government to make possession of other items such as narcotics, firearms or stolen goods a crime." 394 U.S. at 568 n.11.

219. 106 S. Ct. at 2853. Drugs and firearms are inherently dangerous, and for property to have been stolen, someone must have been wrongfully deprived of it.

220. *Id. But cf.* Brook, *supra* note 134.

A second justification posed by the petitioner was that Georgia had a right to uphold the moral welfare of its citizens by proscribing deviant activity.[221] Petitioner argued that ancient proscriptions against sodomy are sufficient enough reasons for the state to ban it today.[222] In Justice Blackmun's view, the notion that "the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny," is without merit.[223] Justice Blackmun drew a parallel between *Loving v. Virginia*[224] and *Bowers*.[225] The *Loving* Court had held that the justification for the original anti-miscegenation statute was no longer compelling and that the freedom of choice to marry "had long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness of free men."[226] The basis for anti-miscegenation statutes was reliance upon religious beliefs that God had kept all races of the world separate so they would not mix.[227] According to Justice Blackmun, traditional Judeo-Christian values which proscribe sodomy do not "provide an adequate justification" for a sodomy law.[228] The fact that certain, but not all, religious groups condemn the behavior at issue gives the states no more power to regulate that behavior than it would to punish such behavior because of "racial animus."[229] The remainder of Justice Blackmun's dissent focused upon his disagreement with the State of Georgia's assertion that its position was justified by a "morally neutral" exercise of the State's power to "protect the public environment."[230]

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221. 106 S. Ct. at 2854. Petitioner argued that the respondent and others who engage in "the conduct prohibited by §§ 16-6-2 interfere with Georgia's exercise of the 'right of the Nation and of the States to maintain a decent society.' " *Id.* (quoting *Paris Adult Theatre I*, 413 U.S. at 59-60).

222. *Id.*

223. *Id.*

224. 388 U.S. 1 (1967).

225. 106 S. Ct. at 2854 n.5. In *Loving*, the Supreme Court found Virginia's anti-miscegenation statute to be unconstitutional. *Id.* (citing *Loving*, 388 U.S. at 3, 7-12).

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

227. *Id.* at 3.

228. 106 S. Ct. at 2854.

229. *Id.* at 2855. Justice Blackmun stated that "[n]o matter how uncomfortable a certain group may make the majority of this Court, we have held that '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.' " *Id.* (quoting O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)).

230. *Id.* (quoting *Paris Adult Thetre I*, 413 U.S. at 68-69).

People will not abandon morality simply because certain private sexual conduct deemed deviant is not punished by law.[231] There is a difference between laws that protect public sensibilities and those that enforce private morality.[232] In *Paris Adult Theatre I* great deference was given to the Court's holding in *Stanley*.[233] The Court stated that it declined to "equate privacy of the home . . . with a zone of privacy that follows a distributor or consumer of obscene materials wherever he goes."[234] The sanctity of the home and the value that Americans place on it warrants greater protection by the Court of certain activity that occurs in the home.[235]

"Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations."[236] Justice Blackmun stated that "the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others."[237] In *Bowers*, no interference with

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231. *Id.* (citing H.L.A. Hart, *Immorality and Treason, reprinted in* THE LAW AS LITERATURE 220, 225 (L. Blom-Cooper ed. 1961)). This seems to be a very valid point. Would anyone suggest that citizens of those states which have repealed laws banning sodomy between consenting adults are less moral than citizens of the State of Georgia?

232. *Id.* For example, laws that make it criminal for individuals to expose themselves in public, protect public sensibilities. In such a situation the state is protecting the public sensibilities of its citizens as opposed to the liberty interest of the exhibitionist.

233. In *Paris Adult Theatre I*, owners of an "adult" movie theatre challenged a Georgia statute which made the exhibition of obscene movies a crime (the same statute as applied in *Stanley*). The Court held that obscene material is not entitled to protection under the first amendment as a form of free speech and that the state has a legitimate interest in regulating the commerce of obscene materials and its exhibition in places of public accommodation. 413 U.S. at 54, 57-69.

234. *Id.* at 66.

235. Justice Burger writing for the majority in *Paris Adult Theatre I* held, "[o]ur Constitution establishes a broad range of conditions on the exercise of power by the states, but for us to say that our constitution incorporates the proposition that conduct involving consenting adults only is beyond state regulation, is a step we are unwilling to take." *Id.* at 68. Some thirteen years later the Court is still unwilling to take that step. While it may be a great step to take, the Court doesn't even attempt to get any "footing." The Court makes no compromise in its decision. While it is reasonable to assert that not all consensual activity between adults is beyond the reach of state power, it is also reasonable to assert that certain situations involving consenting adults should be free of governmental intrusion.

236. 106 S. Ct. at 2855.

237. *Id. See also*, Raphael v. Hogan, 305 F. Supp. 749 (S.D.N.Y. 1969); Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1976).

the rights of others is implicated by allowing consensual sodomy to occur in the home. The fact that sodomy may be distasteful to some people does not present a compelling state interest supporting the validity of the statute.[238] For Justice Blackmun, *Bowers* "involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest."[239] Justice Blackmun concluded that it is his hope that:

> [The] Court soon will reconsider its analysis and conclude that depriving individuals of the right to . . . conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.[240]

2. Justice Stevens

Justice Stevens, joined by Justices Brennan and Marshall, dissented from the majority opinion basing his dissent on the belief that the sodomy statute violates the equal protection clause.[241] Justice Stevens' reading of *Griswold* is that the right of marital privacy extends to acts of sodomy.[242] Justice Stevens begins his analysis by posing two questions necessary for consideration of the constitutionality of the statute.[243] The first question is, "may a state totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction?"[244] The second question is, "[i]f not, may

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238. Justice Blackmun stated, "the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior in intimate places." 106 S. Ct. at 2855.

239. *Id.* at 2856. Justice Blackmun strikes at the very heart of the controversy. He would have no problem with the majority opinion if it sought to ban public displays of sodomy (i.e., in a public park or public restroom). However, the crux of Justice Blackmun's argument is that no moral justification exists for banning certain consensual sexual adult activity in the home. The mere fact that others in the community, even if a majority, find sodomy distasteful is not compelling enough to ban individuals from participating in the activity in their home. The fact that certain individuals do not adhere to the value system of others does not warrant a justification for the state's right to proscribe sodomy.

240. *Id.; accord* Griswold v. Connecticut, 381 U.S. 479 (1965).

241. 106 S. Ct. at 2857.

242. *Id.* at 2858.

243. *Id.* at 2857.

244. *Id.*

the State save the statute by announcing that it will only enforce the law against homosexuals?"[245]

In answering the first question posed, Justice Stevens asserted that prior precedent has made two propositions abundantly clear.[246] First, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[247] Second, "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, . . . are protected by the Due Process Clause of the Fourteenth Amendment."[248] The Georgia statute as it stands could therefore not be enforced against married couples due to the right of marital privacy.[249] This same protection is afforded to unmarried individuals by way of *Eisenstadt* and *Carey*.[250] "The essential 'liberty' that animated the development of law in cases like *Griswold, Eisenstadt* and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral."[251]

Reasoning that Georgia could not enforce the statute against married or unmarried couples, Justice Stevens asserted that Georgia must carry the burden of justifying why it would selectively apply the statute to homosexuals.[252] The record in *Bowers* indicates no substantial relationship to exist: "Either the persons to whom Georgia seeks to apply its statute do not have the same interest in 'liberty' that others have, or there must be a compelling reason why the state may apply a generally applicable law to certain persons that it does not to others."[253] To Justice Stevens, both possibilities are unacceptable because it is obvious that both homosexuals and heterosexuals have the same

245. 106 S. Ct. at 2857.

246. *Id.*

247. *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967)).

248. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

249. 106 S. Ct. at 2858 (citing *Griswold,* 381 U.S. at 485.

250. *Id.*

251. *Id.*

252. *Id.* Although Justice Stevens does not refer to it here, Justice Powell contended in his concurrence to Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring) that the selective application of a law based on gender must bear "a fair and substantial rational relation to the state's asserted objective." *Id.*

253. 106 S. Ct. at 2858.

interest in liberty.[254] Thus, Justice Stevens addressed three factors which led him to conclude that the statute is void: 1) the failure of the Georgia prosecutor to prosecute the respondent even in view of the fact that Hardwick admitted to having engaged in sodomy and admitted that he would engage in it in the future;[255] 2) Georgia's failure to enforce the statute for decades;[256] and 3) the failure of the petitioner to advance any argument which justified selective enforcement of the statute against homosexuals.[257]

Similar arguments were invoked in *Eisenstadt* and *Carey*. The critical determination for the Court to make in *Eisenstadt* was whether some rational ground existed that explained the different treatment accorded married and unmarried individuals regarding their respective rights to contraception.[258] The Court held that deterrence of pre-marital sex was just as ineffective a rationale for the anti-contraception law as was the justification of deterring extra-marital sexual relations invoked in *Griswold*.[259]

Expanding upon the principles enunciated in *Eisenstadt* and *Griswold*, the *Carey* Court pronounced that the issues dealt with in those cases were not whether a fundamental right to contraception exists, but whether a fundamental right of access to contraception is "essential for the exercise of the constitutionally protected right of decisions in matters of child bearing."[260] The Court also held that the state advanced no argument compelling enough to justify barring minors access to contraception while allowing its sale to adults.[261]

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254. *Id.* State intrusions into the private conduct of either is equally burdensome.

255. *Id.* at 2859.

256. *Id.* at 2859 n.11. The last prosecution in Georgia for violation of the statute was in 1939. Thompson v. Aldredge, 187 Ga. 467, 200 S.E. 799 (1939).

257. 106 S. Ct. at 2859.

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

259. *Id.*

260. *Carey*, 431 U.S. at 688-89.

261. *Id.* at 694. The *Carey* court pointed to Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) to justify its holding that minors have the right to contraception. *Danforth* extended the right to have an abortion to minors. The *Carey* court reasoned that if a state could not impose restrictions on the right of minor to have an abortion, it could not restrict the right of a minor to obtain access to contraceptives. The state's interest in the protection of the mental and physical health of the pregnant mother and in protection of potential early life are clearly more implicated by the abor-

Justice Stevens, concurring in *Carey,* found fault in the majority's analysis analogizing the right to contraception with the right of abortion as it related to minors.[262] He explained that the constitutional rights which protect a minor's right to an abortion do not afford the same protection as to the use of contraceptives.[263] Instead, Justice Stevens asserted that "the statutory prohibition [allowing access to contraceptives by minors] denies them and their parents *a choice* which if available would reduce their exposure to disease or unwarranted pregnancy."[264]

The doctrinal developments which emerge from the line of privacy cases is that the right of choice is a fundamental right extending to all individuals, married or unmarried, adult or minor.[265] Similarly in *Bowers,* the issue is not whether a fundamental right to engage in sodomy exists, but whether the right to decide and choose the nature of one's own intimate interpersonal relationships exists, and whether this right extends only to heterosexuals, thus, excluding homosexuals.[266] To Justice Stevens, the inability of the state of Georgia to justify selective application of the statute to homosexuals as opposed to heterosexuals warranted an affirmation of the district court decision.[267]

CONCLUSION

Do we have the "right to be let alone" as Justice Brandeis enunciated in *Olmstead v. United States,*[268] or does the government have the power to regulate consensual behavior of adults within the confines of their home? *Bowers* leaves many issues unresolved. For example, because of the failure of the Court to address the sodomy law on equal protection grounds, the public

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tion decision than by the decision to use a nonhazardous contraceptive.

262. 431 U.S. at 713 (Stevens, J., concurring).

263. *Id.*

264. *Id.* at 714 (emphasis added). The right of personal choice is crucial in all right of privacy cases.

265. The issues in *Eisenstadt* and *Carey* both deal with a right to choose whether or not to bear children. The decision in *Carey* conferred such right upon minors.

266. The equal protection clause has been used by several states to overturn sodomy laws. *See* 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); Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980). *See also The Constitutionality of Sodomy Statutes, supra* note 72, at 585-92.

267. *Bowers,* 106 S. Ct. at 2859.

268. 277 U.S. at 478 (Brandeis, J., dissenting).

is left to ponder *why* the statute may be selectively enforced against homosexuals. The Court also failed to address any questions of whether the eighth or ninth amendments are violated by the statute.

The majority's justification of its position that no fundamental right to engage in sodomy exists is weak at best. Justice White held that the Court would not invalidate the statute because to do so would invalidate the laws of some twenty-three other states and the District of Columbia which currently enforce sodomy statutes.[269] Surely Justice White does not suggest that the number of states which have the same or similar statute on their books is determinative of whether that statute is constitutional. It is the merits of the statute which should determine its constitutional validity and not the number of states which currently retain the same or similar statutes in their codes. It is quite possible that all those states could be wrong. It would also be a sad commentary were the Court to simply uphold a statute simply because it has existed for a prolonged period of time. Further, the majority's failure to recognize a trend among the states to repeal consensual sodomy laws is representative of a Court that pays little attention to public attitudes, especially when claiming to pay attention to these attitudes.[270]

What we must realize is that the Constitution is a constantly evolving instrument. Examining the intent of the framers in constitutional analysis must be reconciled with the needs and desires of an ever changing and growing society. We should not stagnate in the ideology and often archaic reasoning of the past but should evaluate constitutional concepts in terms of the needs, desires, choices and goals of the people of today. The Constitution must serve to define and mandate the fundamental rights common to all people.

Bowers seemingly is a retreat from the evolution of a privacy doctrine which gives all Americans the right of personal choice regarding consensual intimate relationships. We must always question a court's decision which denies an individual his right to make a personal choice about the nature of his intimate relationships. We must further be alarmed when a court decides

269. 106 S. Ct. at 2845.

270. Since 1961, over half the states have repealed their sodomy laws. *Id.*

that the physical expression involved in an intimate interpersonal relationship involving consenting adults can be restricted by the state, within the confines of one's home. We also must query just how far *Bowers* may reach in curtailing the right of privacy and the right we have to be let alone.[271]

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271. The failure of the Court to resolve the equal protection clause issue or any eighth or ninth amendment violations seems to indicate that the controversy over the constitutionality of sodomy laws is far from over. It seems very likely that these issues will be resolved in the near future.