



Education Department Resource

## **Bowers v. Hardwick and the "Right to Be Left Alone"**

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### INTRODUCTION

Many Americans feel that what people do in the privacy of their own homes is their business. As the old saying goes, "A man's home is his castle," they argue: He should be free to do as he wishes there, as long as what he is doing hurts no one else. However, there is another train of thought in American history as well. Dating back to colonial times, governments have made laws that restrict what people can do in their homes, particularly with regard to sexual activity. A whole body of laws, called "sodomy laws," were instituted in colonial times, threatening individuals with penalties ranging up to death for engaging in certain sexual activities with other consenting adults. As of this writing in 1993, 23 states continue to have such laws, which often apply to both heterosexual and homosexual acts.

In the early 1980's, gay and lesbian activists decided to challenge the constitutionality of these laws in court, arguing that they violated the "right of privacy" to which citizens are entitled. A "test case" was launched, designed to result in a judicial decision declaring that all such state laws violated the "Supreme law of the land" (the federal Constitution). Journalist Randy Shilts describes the incident that triggered the case called *Bowers v. Hardwick* :

"The debate centered on a twenty-nine-year-old bartender named Michael Hardwick, arrested by Atlanta police on the night of

August 2, 1982. The police officer knocked on Hardwick's front door to serve a warrant for public intoxication; a house guest pointed the officer toward Hardwick's bedroom door. The policemen opened the door and saw Hardwick engage in oral sex with another man. When the policeman said he was serving his warrant, Hardwick explained that he had already cleared up the matter in court and offered to show the officer his receipt. That no longer mattered, the policemen said, because he had found Hardwick engaging in a violation of the Georgia law that banned oral and anal sex. Hardwick and his companion spent the next twelve hours in jail."

The charges against Hardwick were later dropped by a county prosecutor. Seeing an ideal opportunity to challenge the constitutionality of the law itself, though, the American Civil Liberties Union worked with Hardwick to file a suit against the state. This suit challenged the right of the state to make such a law in the first place. Hardwick won his case at the 11th District Court of Appeals. Georgia Attorney General Bowers then appealed to the Supreme Court for a final verdict on whether or not Georgia had the right to make such laws.

The Supreme Court heard the case in 1986. In a 5-4 vote, it upheld the constitutionality of "sodomy laws." As is the custom, one Justice (in this case, Justice Byron White) was assigned to write the Court's "decision," explaining the views of the majority. Justices who oppose the decision have the right to

write a "dissent" explaining their reasoning, written in this case by Justice Harry Blackmun. In both "opinions" (as they are called), the Justices refer to specific Constitutional Amendments as well as the Georgia sodomy law itself. Key laws referred to in the case are listed in Reading 15-A. Justice White's decision is Reading 15-B, with a "concurring" (supporting) decision written by Chief Justice Warren Burger in Reading 15-C. The dissent by Judge Blackmun is Reading 15-D.

READING 15-A: TEXT OF IMPORTANT LAWS RELATING TO THE CASE.

Below are listed several clauses of the Constitution to which the Justices refer in their decision, as well as the sodomy law of the state of Georgia:

FIRST AMENDMENT. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition government for a redress of grievances.

FOURTH AMENDMENT. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...

NINTH AMENDMENT. The enumeration of certain rights shall not be construed to deny or disparage others retained by the people. FOURTEENTH AMENDMENT, Section I ["due process" clause]: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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 equal protection of the laws. GA. 16-6-2 [GEORGIA SODOMY LAW]: "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."

READING 15-B: MAJORITY OPINION, BY JUSTICE BYRON WHITE.

In August 1982 respondent Hardwick (hereinafter respondent) was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed. [i.e., the charges were dropped]

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution...

[T]he [Federal District Court] went on to hold that the Georgia statute violated the respondent's [Hardwick's] fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment ... We agree with the petitioner [the state of Georgia] that the Court of Appeals erred, and hence reversed its judgment.

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, 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 and hence invalidates the laws of many states that still make such conduct illegal and have done so for a very long time...

We first register our disagreement with the Court of Appeals and with respondent [Hardwick] that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and have for all intents and purposes decided this case... [W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent [Hardwick]...

Precedent aside, however, respondent [Hardwick] would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clause of the Fifth and Fourteenth Amendments, which appear to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Causes have been interpreted to have substantive content ... recognizing rights that have little or no textual support in the constitutional language...

[However] the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut* (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland* (1977), where they are

characterized as those liberties "deeply rooted in the Nation's history and tradition."

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against such acts have ancient roots ... Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults... Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no [re]cognizable roots in the language or design of the Constitution... There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent [Hardwick], however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley v. Georgia* (1969), where the Court held that the First Amendment prevents conviction for

possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law when they are committed at home. Stanley itself recognized that its holding [judgment] offered no protection for the possession in the home of drugs, firearms, or stolen goods. And if the respondent's [Hardwick's] submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult ... to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent [Hardwick] asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent [Hardwick] makes

no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Accordingly, the judgment of the Court of Appeals is Reversed.

READING 15-C: CONCURRING OPINION  
BY CHIEF JUSTICE WARREN BURGER

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to engage in homosexual sodomy.

As the Court notes, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law... During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and a "crime not fit to be named." The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continually in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative

authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

READING 15-D: DISSENT BY JUSTICE  
HARRY BLACKMUN

JUSTICE BLACKMUN, with whom  
JUSTICE BRENNAN, JUSTICE  
MARSHALL, and JUSTICE STEVENS join,  
dissenting.

[T]his case is about "the most  
comprehensive of rights and the right most  
valued by civilized men," namely "the right  
to be left alone."

The statute at issue, Ga. Code Ann. 16-6-2  
(1984), denies individuals the right to decide  
for themselves whether to engage in  
particular forms of private, consensual  
sexual activity. The Court concludes that 16-  
-6-2 is valid essentially because "the laws of  
... many States ... still make such conduct  
illegal and have done so for a very long  
time." ... Like Justice Holmes, I believe that  
"[i]t is revolting to have no better reason for  
a rule of law than that 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." I believe we must analyze  
respondent Hardwick's claim in the light of  
the values that underlie the constitutional  
right to privacy. If that right means  
anything, it means that, before Georgia can  
prosecute its citizens for making choices  
about the most intimate aspects of their  
lives, it must do more than assert that the  
choice they have made is an "abominable  
crime not fit to be named among  
Christians."

I

... A fair reading of the statute and of the  
complaint clearly reveals that the majority  
has distorted the question that this case  
presents.

First, the Court's almost obsessive focus on  
homosexual activity is particularly hard to  
justify in light of the broad language that  
Georgia has used. Unlike the Court, the  
Georgia Legislature has not proceeded on  
the assumption that homosexuals are so  
different from other citizens that their lives  
may be controlled in a way that would not  
be tolerated if it limited the lives of those  
other citizens... The sex or status of the  
persons who engage in the act is irrelevant  
as a matter of state law. In fact, to the extent  
that I can discern a legislative purpose for  
Georgia's 1968 enactment of 16-6-2, that  
purpose seems to have been to broaden the  
coverage of the law to reach heterosexual as  
well as homosexual activity. I therefore see  
no basis for the Court's decision ... to defend  
16-6-2 solely on the grounds that it prohibits  
homosexual activity. Michael Hardwick's  
standing may rest in significant part on  
Georgia's apparent willingness to enforce  
against homosexuals a law it seems not to  
have any desire to enforce against  
heterosexuals. But his claim that 16-6-2  
involves an unconstitutional intrusion into  
his privacy and his right of intimate  
association does not depend in any way on  
his sexual orientation...

II

"Our cases long have recognized that the  
Constitution embodies a promise that a  
certain private sphere of individual liberty  
will be kept largely beyond the reach of  
government." *Thornburgh v. American  
College of Obstetricians & Gynecologists*,  
(1986). In construing the right to privacy, the  
Court has proceeded along two somewhat  
distinct, albeit complementary, lines. First, it  
has recognized a privacy interest with  
reference to certain decisions that are  
properly for the individual to make...  
Second, it has recognized a privacy interest  
with reference to certain places without  
regard for the particular activities in which  
the individuals who occupy them are  
engaged...

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."... [T]he Court's conclusion ... ignores the warning in *Moore v. East Cleveland* (1977) 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." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" *Thornburgh v. American College of Obstetricians & Gynecologists* (1977). And so we protect the decision whether to marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*. We protect the decision whether or not to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply... And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households... The Court recognized in *Roberts* ... that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others."

Only the most willful 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." *Paris Adult Theater I v. Slaton* (1973)... The fact that individuals define

themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, 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 that an individual has to choose the form and nature of these intensely personal bonds ...

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and that the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no right or interests of others is not to be condemned because it is different." *Wisconsin v. Yoder*, (1972). The Court claims its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

## B

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance ... [O]ur understanding of the contours right to privacy depends on "reference to a 'place,'" *Katz v. United States*, the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefensible right of personal security, personal liberty, and private property.'" *California v. Ciraolo*, (1986), quoting *Boyd v. United States*, (1886)...

"The right of the people to be secure in their ... houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various Constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no ... support in the text of the Constitution." Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her home seems to me to be at the heart of the Constitution's protection of privacy.

### III

... It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved ... cannot provide an adequate justification for 16-6-2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends on whether the State can advance some justification for its law beyond its conformity to religious doctrine... Thus, far from buttressing his case, petitioner's [the state of Georgia] invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that 16-6-2 represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control prejudices, but neither can it tolerate them." *Palmore v. Sidotti*, (1984). No 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." *O'Connor v. Donaldson*, (1975).

Nor can 16-6-2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theater v. Slaton*, (1973). Certainly, some private behavior can affect society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by law."...

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be ... an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

### IV

... I can only hope that here, too, the Court will soon reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

### IMPORTANT TERMS

Sodomy Laws; Right Of Privacy; Constitutionality; Test Case; "Due Process" Clause.

### ACTIVITIES/QUESTIONS

1. Look closely at the documents in Reading 15-A. Remember that the Constitution automatically overrules any state law that conflicts with its principles. Does the Georgia law violate a constitutional principle, in your opinion? This is not asking whether or not you like the law: the question is, is the law constitutional?

2. Look at the specific circumstances concerning Michael Hardwick's arrest. Does this arrest itself seem constitutional, in light of Reading 15-A? Were his rights respected, in your opinion?

3. Justices White and Blackmun present the two very different interpretations of the case. Outline those views by answering the following questions:

-- What does each justice say is the central issue in the case?

-- Why does he say this is the central issue?

-- Why does he rule the way he does, in light of this issue?

-- What are the reasons for his ruling in this manner?

4. After answering #3, return to Reading 15-A and render your ruling on which Justice seems to be closer in his reasoning to the principles set forth in the Constitution. Write a letter to the Justice with whom you disagree, explaining why you feel his interpretation is wrong.

5. How does Justice Burger justify his views on sodomy? How does Justice Blackmun answer this argument?

6. Divide the class in two and debate the case. Another way to do this is to have nine

students role-play the Justices, researching what they can find out about the Justice to whom they are assigned and using this knowledge to explain his or her vote.

7. Write letters to the editor detailing your personal reaction to the Court's decision.

8. Draw up lists of activities within the home that you feel the government has no right to intervene in, and activities in which you think it may intervene. Compile lists on the board: Explain your reasoning and ask others to give feedback. How far should the government be able to go in regulating citizens' private lives? You might also want to research whether or not these activities are legal. Are there any surprises in what you discover?

9. Research earlier Supreme Court decisions that were later viewed negatively. These may include: *Dred Scot v. Sanford*; *Plessy v. Ferguson*; *Schenk v. the United States*; and *Korematsu v. the United States*. Do written or oral presentations on the circumstances of a case, the decision of the Court, and why it was later viewed as a mistake. Will Bowers one day join this list?

10. Read excerpts of Bob Woodward's *The Brethren* to gain an understanding of the workings of the Supreme Court in this time period, for either extra credit or for class.