Sodomy Laws: The Government's Vehicle to Impose the Majority's Social Values

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SODOMY LAWS: THE GOVERNMENT'S VEHICLE TO IMPOSE THE MAJORITY'S SOCIAL VALUES

Aimée D. Dayhoff†

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I. INTRODUCTION

In the past two decades, the Minnesota legislature has repeatedly been confronted with legislation aimed at repealing the state’s age-old sodomy statute. Ultimately, the bills have met their demise, even as recently as the past legislative session. On June 22, 2000, the Minnesota Civil Liberties Union ("MCLU") decided to

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1. Sodomy is defined in Minnesota as “carnally knowing any person by the anus or by or with the mouth.” MINN. STAT. § 609.293, subd. 1 (1998).
2. Margaret Zack & Rosalind Bentley, MCLU Suing To Abolish State’s Anti-Sodomy Law, STAR TRIB., June 23, 2000, at A1 (stating that several attempts have been made to repeal the law, including a bill introduced in 1987).
3. Id.
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judicially challenge the constitutionality of Minnesota’s sodomy law. Minnesota’s version of the law makes it illegal for both homosexuals and heterosexuals to engage in consensual acts of sodomy.

The notion that sodomy should be forbidden by law is not a new one, but rather one that has been around since the founding of the thirteen colonies. As recently as 1961, all fifty states had anti-sodomy laws. Today, however, only eighteen states have some form of statute banning sodomy between either heterosexuals and/or homosexuals.

This article will trace the origin of sodomy laws from biblical times to the present, highlighting both Griswold v. Connecticut and Bowers v. Hardwick as the two cases that forced the courts to begin dealing with the right to privacy and its applicability to married couples and homosexuals. The article will then examine Minnesota’s right to privacy as found in the state constitution and analyze its relevance in determining the unconstitutionality of Minnesota’s sodomy statute.

4. Id.
5. MINN. STAT. § 609.293, subd. 5 (1998).
6. David A. J. Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. REV. 800, 808 (1986) (citing Bowers v. Hardwick, 478 U.S. 186, 193-94 (1986)) (stating that all thirteen colonies at the time the Bill of Rights was ratified, and all but five of the thirty-seven states when the Fourteenth Amendment was ratified in 1868, had criminal sodomy laws).
11. This article will not address the constitutionality of forcible or public sodomy because numerous Minnesota cases have shown that even the broadest constitutional interpretation does not allow for the protection of these kinds of sodomy.
II. HISTORICAL SIGNIFICANCE

Written references to sodomy date back to biblical times and Hebraic law. The Bible does not explicitly mention the word “sodomy,” but it does prohibit sexual relations between men. Thus, the criminalization of sodomy stems from the Old Testament’s prohibition on this type of behavior. The illegality persisted throughout the medieval period in England where sodomy was considered a religious offense. Sodomy’s criminal status crossed the Atlantic to the British colonies in America, setting the stage for the historical antecedent of the United States’ prohibition of the practice in modern times.

A. Biblical Foundation

The word “sodomy” can be traced back to biblical times, and the cities of Sodom and Gomorrah. The two cities were destroyed because of the inhabitants’ godlessness. The specific evil acts that caused the destruction of Sodom and Gomorrah are not set out in detail, but several different biblical sections comment on the downfall of the two cities.

Judaic law’s views on sodomy persevered into the Middle Ages.

E.g., State v. Gray, 413 N.W.2d 107, 113-114 (Minn. 1987) (holding that public acts of sodomy are prohibited and are not protected by a right to privacy); State v. Witt, 245 N.W.2d 612, 615 (Minn. 1976) (holding that forcible sodomy is prohibited under Minnesota law).

13. Id.
14. Id. (discussing early English law’s view on sodomy).
15. Id. at 649. The court discusses the evolution of sodomy laws in England and their incorporation into American law. Id.
16. Id. at 648 (stating that “sodomy appears originally as part of the Hebraic law, taking its name from the practices reputedly indulged in by the inhabitants of Sodom and Gomorrah”); Genesis 19:24-28 (describing the destruction of the two cities). See also Arthur E. Brooks, Doe and Dronenburg: Sodomy Statutes Are Constitutional, 26 WM. & MARY L. REV. 645, 648 (1985) (giving biblical background on sodomy laws).
17. 2 Peter 2:6, 10 (stating that “God condemned the cities of Sodom and Gomorrah ... and made them an example of what will happen to the godless”); Genesis 19:5 (Today’s English Version) (providing as one example of the godlessness of the people men wanting to have sex with other men).
18. Ezekiel 16:49 (stating that pride, greed, laziness and failure to aid the poor all contributed to the demise of Sodom); Harris v. State, 457 P.2d 638, 648 (Alaska 1969) (referring to the Bible’s prohibition of sex between two men); Brooks, supra note 16, at 648 (referring to several verses in the book of Leviticus that prohibit sexual acts, such as adultery, homosexuality, bestiality, and incest).
Its impact on England did not occur until the passage of the Statute of Henry VIII. Before the birth of the Statute, sodomy was not a recognizable common law offense. Because early Anglo-American law had its basis in English law, England's views on sodomy were incorporated into many states' statutory language.

B. From Early Colonial Period To Today

As the colonies formed, the need for local laws arose. As early as the first American colony, Jamestown, the English influence on legislating morality began to appear in the formation of the laws. The colonists dismissed sodomy as immoral and unchristian, just as the Bible implicitly characterized it as a sin.

The early colonists' idea that prohibiting sodomy would protect morality is still alive and well today. Until the 1960s, no one formally questioned the absence of a rational basis for the government's prohibition of behavior that some simply believed to be immoral.

19. See Harris, 457 P.2d at 649 (stating that the Statute of Henry VIII outlawed "buggery"). Buggery is defined as "sodomy or bestiality." BLACK'S LAW DICTIONARY 189 (7th ed. 1999).
21. See Harris, 457 P.2d at 649.
23. Id. at 649-50 (describing the Virginia legislature's disgust of the crime of sodomy); Leviticus 18:22 ("Thou shalt not lie with mankind, as with womankind: it is abomination"); The Letter from Jude 1:7 (Good News) ("Remember Sodom and Gomorrah, and the nearby towns, whose people acted as those angels did and indulged in sexual immorality and perversion ....").
24. Doe v. Commonwealth's Attorney for Richmond, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (stating that if the State believes punishment for private homosexual practices is appropriate to promote morality and decency, then it may do so) (emphasis added); Hayes v. Howell 308 S.E.2d 170, 176 (Ga. 1983) (declaring that a state's police power gives it the authority to legislate for the protection of the citizens' lives, health and property, and to preserve good order and public morals) (emphasis added). See also Richards, supra note 6, at 811 (quoting Bowers v. Hardwick, 478 U.S. 186, 211 (1986)).

That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgment on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.

Id.; Bowers, 478 U.S. at 196 (declaring that no rational basis for the Georgia sodomy law exists except that a majority of Georgia residents believe that sodomy is immoral and not acceptable and that the law is repeatedly based on notions of morality).
"unacceptable."25 As an example of cultural context, in the 1950s and the 1960s, the shows on television depicted June and Ward Cleaver-type families, in which sexual issues were never even implied.26

Now, however, our popular culture is filled with sexual scenes on both daytime and nighttime television, and even homosexuality has found its way into the confines of our homes with Emmy winning shows like Will & Grace.27 Along with society's new social discourse have come calls for changes in the laws.28

III. THE CASES

Two United States Supreme Court decisions are crucial to the current sodomy debate. In the first case, Griswold v. Connecticut,29 the Court acknowledged that a right to privacy exists under the federal Constitution.30 In the second case, Bowers v. Hardwick,31 the Court upheld Georgia's sodomy statute as being constitutional.32 Close examination of both cases is necessary to fully understand the controversy surrounding state sodomy laws.

   In 1951, a television station in Houston caused a public outcry when it planned to air a bedding commercial showing a husband and wife in a double bed. ... In 1967, The Ed Sullivan Show required the Rolling Stones to perform Let's Spend the Night Together as Let's Spend Some Time Together. Id.
29. 381 U.S. 479 (1965).
30. Lackland H. Bloom, Jr., The Legacy of Griswold, 16 Ohio N.U. L. Rev. 511, 511 (1989) (stating that Griswold was considered a landmark case for many reasons, including that it recognized the right to privacy).
32. Id. at 196.
A. **Griswold v. Connecticut**

*Griswold v. Connecticut* is arguably the first case that really brought the right to privacy debate to the forefront. The case centers on a Connecticut law that forbade the use of contraceptives.

Two doctors were charged with violating the Connecticut birth control law because they helped a married couple acquire contraceptives. The doctors appealed their case to the United States Supreme Court, contending that the Connecticut law intruded upon the right of marital privacy. The Court agreed with them and reversed the Connecticut Supreme Court of Errors. The majority and concurring opinions disagreed on which amendment of the Constitution secures a right to privacy, but they all agreed that a right to privacy does indeed exist.

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34. *Griswold*, 381 U.S. at 480. The statute’s language reads as: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conceptions shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” Id. (quoting CONN. GEN. STAT. § 53-32 (1958)).

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

36. *Id.* at 481.

37. *Id.* at 486.

38. *Id.* at 484. A portion of the majority opinion follows: The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one .... The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’

*Id.* (citation omitted); *see also* *id.* at 486-87 (Goldberg, J., concurring) (stating that even though the right of privacy is not explicitly written in the Constitution, it is referred to in the language of the Ninth Amendment); *id.* at 502 (White, J., concurring) (applying the Fourteenth Amendment’s due process in believing the Connecticut law to be unconstitutional). *But see id.* at 509 (Black, J., dissenting)
The majority in *Griswold* appeared to be offended by the idea that the government would regulate what married couples do behind closed doors. The Court championed the institution of marriage and implied that allowing the government’s invasion of marital privacy would undermine the personal nature of marriage. Justice Goldberg, in his concurring opinion, focused his attention on the notion of fundamental rights. He concluded that the right to privacy is a fundamental right, derived from the Constitution.

(disagreeing with the majority and concurring opinions because no constitutional provision exists that guarantees a complete right to privacy). “Penumbra” is defined as “a surrounding area or periphery of uncertain extent; in constitutional law, the Supreme Court has ruled that the specific guarantees in the Bill of Rights have penumbras containing implied rights, esp. the right of privacy.” BLACK’S LAW DICTIONARY, 1155 (7th ed. 1999).

39. 381 U.S. at 485-86 (stating that the idea that the government would police marital bedrooms for signs of contraceptive use is repulsive to the concept of marriage being a private institution between two people).

40. Id. at 486.

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It 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. Yet it is an association for as noble purpose as any involved in our prior decisions.

Id.; see also Schnably, supra note 33, at 861-62 (citing Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 757, 739 (1989)) (arguing that “personhood” includes the idea that a person’s private life provides an escape from the state’s power).


41. *Griswold*, 381 U.S. at 493. Justice Goldberg wrote:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the ‘tradition and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there)…as to be ranked as fundamental.’ The inquiry is whether a right involved ‘is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice…which lie at the base of all our civil and political institutions.’

Id. (citations omitted).


The protection guaranteed by the [Fourth and Fifth] amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most
Justice White, in his concurring opinion, took issue with Connecticut’s claim that the statute served a vital state interest in discouraging promiscuity and extra-marital undertakings. 43

Interestingly, the dissent agreed with all of the majority and concurring opinions’ reasons why the statute is offensive. 44 Nevertheless, Justice Black and Justice Stewart failed to find any constitutional provision that included and guaranteed a right to privacy. 45 This case achieved such significance because it laid the groundwork for many more challenges to government’s intrusion into all citizens’ private lives. 46

B. Bowers v. Hardwick

Compared to Griswold and subsequent cases, Bowers v. Hardwick signals a divergence from the Supreme Court’s continued expansion of the scope of activities protected by the right to privacy. 47 This case is different from the others previously cited because it involves the issue of homosexuality. 48

comprehensive of rights and the most valued by civilized men.

Id.

43. Id. at 505 (White, J., concurring). Justice White strongly voiced his opinion in stating that:

[T]he statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal. . . . I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State’s ban on illicit sexual relationships.

Id.

44. Id. at 507 (Black, J., dissenting); id. at 527 (Stewart, J., dissenting).

45. Id. at 510 (admitting to liking his privacy as much as anyone, but believing the government does have a right to invade one’s privacy absent a constitutional provision saying otherwise); see also id. at 527 (stating that the Court must decide if the statute is unconstitutional, not whether it is silly or unwise).

46. Shnably, supra note 33, at 863 (analyzing the importance of Griswold in examining Roe v. Wade and Bowers v. Hardwick); see also David Helscher, Griswold v. Connecticut and the Unenumerated Right of Privacy, 15 N. ILL. U.L. REV. 33, 50-52 (1994) (citing to many precedent-setting cases that arose out of Griswold); Bloom Jr., supra note 30, at 511 (stating that another reason for Griswold’s importance is that it led to a line of controversial cases involving abortion).

47. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) (giving women the right to choose whether or not to bear children); Roe v. Wade, 410 U.S. 113, 113 (1973) (legalizing abortion); Eisenstadt v. Baird, 405 U.S. 438, 438 (1972) (choosing to use contraceptives is a fundamental right); Loving v. Virginia, 388 U.S. 1, 12 (1967) (allowing couples to marry interracially); Griswold, 381 U.S. 479, 485-86 (declaring that the right to use contraceptives is covered by a constitutional right to privacy).

In the fall of 1982, Hardwick was charged with violating Georgia's anti-sodomy statute by engaging in sodomy with another adult male in his own home. Even though the District Attorney decided against presenting the case to a grand jury, Hardwick brought suit in federal district court. He alleged that the statute was unconstitutional on several fronts, but the court dismissed his claim. The Court of Appeals for the Eleventh Circuit then reversed the district court, relying on the Supreme Court's reasoning in Griswold. In a five to four vote, the Supreme Court reversed the Eleventh Circuit's judgment. In delivering its opinion, the Court seemed to lose sight of the fact that the Georgia statute applied to both heterosexuals and homosexuals.

49. Id. at 187-88. The Georgia statute reads as follows:

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

GA. CODE. ANN. § 16-6-2 (2000).

50. Bowers, 478 U.S. at 188.

51. Id. (stating that the district court granted Bowers' motion to dismiss on the grounds that Hardwick failed to state a claim). See also Daniel Joseph Langin, Bowers v. Hardwick: The Right of Privacy and the Question of Intimate Relations, 72 IOWA L. REV. 1443, 1453 (1987). The author explained how the district court relied on Doe v. Commonwealth's Attorney for Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), in which the United States Supreme Court affirmed the federal district court's decision that Virginia's sodomy laws were constitutional. The federal district court found the statute valid because no fundamental right to commit sodomy existed. Id. (citations omitted).

52. Hardwick v. Bowers, 760 F.2d 1202, 1210-13 (11th Cir. 1985) (stating that sodomy was protected by the "quintessential privacy" derived from both the Ninth and Fourteenth Amendments). The district court relied on Doe v. Commonwealth's Attorney for Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), in dismissing Hardwick's action due to his failure to state a claim. The Eleventh Circuit, however, felt that because later decisions undermined Doe, Hardwick did state a valid claim. Bowers, 478 U.S. at 188-89.


54. Id. at 190 (stating that the issue to be determined is whether a constitutional provision exists that gives homosexuals the right to engage in sodomy); see also Thomas B. Stoddard, Bowers v. Hardwick: Precedent by Personal Predilection, 54 U. CHI. L. REV. 648, 652 (1987) (arguing that Bowers went from being a sex privacy case to a gay rights case); Lynne N. Henderson, Legality and Empathy, 85 MICH. L. REV. 1574, 1640-41 (1987). The author contends the state argued that Georgia's sodomy statute only applied to homosexuals by saying:

[H]omosexual sodomy is anathema of basic units of our society—marriage and the family...if the legal distinctions between the intimacies of marriage and homosexual sodomy are lost, it is certainly possible to make the assumption...that the order of society, our way of life, could be changed in a harmful way. Id. (quoting Brief of Pet'r at 36-38, Bowers,
The majority disputed the Eleventh Circuit's reliance on case law by distinguishing the facts in those cases from the facts in this case. All of the cases relied on by the Eleventh Circuit involved the notions of marriage, family, and procreation. In *Bowers*, the majority failed to find that "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."

The Court provided two tests for determining which individual liberties are so important that they merit heightened judicial protection. The first test involves fundamental liberties that are ""implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed."

The second test consists of ""liberties that are 'deeply rooted in this Nation's history and tradition.'" Justice White, writing for the majority, failed to provide a concrete answer as to why the Court rejected both tests in its decision not to extend the right to engage in consensual sodomy to homosexuals. The Court simply disposed of the two tests by stating ""it is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."

The majority then appealed to history in reaching its conclusion, without providing an argument that justifies treating homosexuals and heterosexuals differently under Georgia's sodomy statute.

In his dissent, Justice Blackmun summed up the case as being

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478 U.S. 186).
55. *Bowers*, 478 U.S. at 190 (citing cases that dealt with child rearing, family relationships, procreation, contraception, marriage and abortion).
58. *Id.* at 191-92.
60. *Id.* at 191 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).
61. *Id.* at 195-96 (comparing homosexual sodomy to adultery, incest and other sexual crimes).
62. *Id.* at 192.
63. *Id.* at 192-94 (pointing to original thirteen colonies' criminalization of sodomy in dismissing the notion that the right to engage in sodomous behavior is "facetious"); see also *Richards*, supra note 6, at 855 (pointing to the fact that the Court offers no argument of principle in explaining its different treatment of homosexuals and heterosexuals under Georgia's anti-sodomy statute).
about "the right to be let alone" and nothing more.\(^\text{64}\) As was the Court in *Griswold*, Justice Blackmun seemed greatly disturbed by the idea that the government can regulate what people choose to do behind closed doors.\(^\text{65}\) He went on to say that the courts could not simply rely on their religious beliefs in upholding the validity of Georgia's sodomy statute.\(^\text{66}\)

The dissenting opinion also took issue with the majority's application of the statute solely to homosexuals.\(^\text{67}\) According to Justice Blackmun, the majority also misinterpreted *Stanley v. Georgia*.\(^\text{68}\)

In *Stanley*, the Supreme Court held that the First Amendment protects a person's right to have obscene reading material in the privacy of one's home.\(^\text{69}\) Hardwick relied on *Stanley* to support his claim that when homosexual conduct occurs in the privacy of one's home, the outcome of the case should be different.\(^\text{70}\) Justice White, writing for the majority, quickly dismissed the applicability of *Stanley* to the case at hand by stating that *Stanley* "was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution...."\(^\text{71}\) Justice Blackmun, however, correctly pointed out that *Stanley* was decided on the Court's interpretation of the Fourth Amendment's special protection for an individual in his home.\(^\text{72}\)

\(^{64}\) Bowers, 478 U.S. at 199 (Brandeis, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928)).

\(^{65}\) Id. Quoting Justice Holmes, Justice Blackmun states:

> I believe that "[i]t 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."

Id. (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

\(^{66}\) Id. at 200 (criticizing the judicial system basing its conclusion on the fact that people believe sodomy is unchristian).

\(^{67}\) Id. at 201, 209 n.4 (refuting the majority's comparison of homosexual sodomy to incest, etc., by stating that there are sound differences between consensual, private sexual acts and incest and adultery).

\(^{68}\) 394 U.S. 557 (1969).

\(^{69}\) Bowers, 478 U.S. at 195 (discussing *Stanley*, 394 U.S. at 565).

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id. at 207 (Blackmun, J., dissenting) (quoting *Stanley*, 394 U.S. at 564-65).
Finally, Justice Blackmun disagreed with the state's claim that to permit Hardwick's behavior would interfere with its ability "to maintain a decent society." He found that the state, as well as the majority, failed to differentiate between "laws that protect public sensibilities and those that enforce private morality."  

Justice Stevens also wrote a dissent in which he addressed the majority's decision to limit the Georgia statute only to homosexuals engaging in private acts of sodomy. He asserted that two possible rationales might exist to explain the majority's limiting of the statute's applicability solely to homosexuals.

The first possibility he put forth was that homosexuals do not have the same claim to liberty that the majority shares. He quickly refuted this suggestion by pointing to the language "all men are created equal" and interpreting it to mean that all people, regardless of sexual preference, share the same interest in liberty. Whether one is heterosexual or homosexual, deciding how to conduct one's self in both private and public is an intimate and individual choice.

The second possibility Justice Stevens offered was that the state has the power to limit the scope of a general statute to apply only to a certain class of individuals. Even so, Justice Stevens supported Justice Blackmun's thoughts, their emotions and their sensations...These are the rights that appellant is asserting in this case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.

Id.; see also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973) (finding that the Fourth Amendment, and not the First Amendment, supported the outcome in Stanley, otherwise the Court would not have needed to narrow its holding on the basis that "a man's home is his castle").

73. **Bowers**, 478 U.S. at 210 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I, 413 U.S. at 59-60).
74. **Id.** at 212. See also O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (holding that public intolerance cannot constitutionally mandate depriving a person of physical liberty).
75. **Bowers**, 478 U.S. at 219 (Stevens, J., dissenting).
76. **Id.** at 218-19.
77. **Id.** at 218.
78. **Id.**
79. **Id.** at 218-19 (stating that homosexuals and heterosexuals have the same interest in deciding how to live one's life, both publicly and privately).
80. **Id.** at 218.
81. **Id.** See also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68-69 (1973) (stating that morally neutral justification is legitimate to protect society's
assessment that the state only put forth Judeo-Christian and prejudicial reasoning for its decision to limit the scope of Georgia’s statute. Because the anti-sodomy statute is rarely, if ever, used to prohibit private, consensual sex, Justice Stevens opined that the majority’s limited application of the statute was baseless.

The decision in Bowers is disturbing for the sheer reason that the United States Supreme Court refused to extend to homosexuals the same rights as heterosexuals—the right to choose how to conduct one’s self in the privacy of one’s home. Because the majority concluded that homosexuals have no fundamental right to engage in consensual sexual acts behind closed doors, the Court essentially gave the legislature a carte blanche to impose the majority’s will on disfavored groups in society.

The Bowers decision also left the door open to a possible extension of the Court’s holding to heterosexuals. Arguably, non-
homosexual organizations could begin to challenge the constitutionality of the heterosexual prohibitions in order to force the courts to sort out their reasoning in right to privacy cases.\textsuperscript{87} One thing is for certain, the Supreme Court’s decision in \textit{Bowers} caused both homosexuals and heterosexuals alike to rethink their strategies for successfully repealing anti-sodomy statutes.\textsuperscript{88} Instead of contending that state sodomy laws violate the right to privacy protection under the federal Constitution, groups are looking to the right to privacy protections embodied in their own state constitutions.\textsuperscript{89}

\section*{IV. THE PRIVACY DEBATE}

The privacy debate dates back to the late nineteenth century when Samuel D. Warren and Louis D. Brandeis published a law review article that highlighted the issue.\textsuperscript{90} Since then, the Court has tried to resolve the debate with cases like \textit{Griswold} and \textit{Bowers}. Even though a century has passed since the issue’s introduction into our judicial system, the right to privacy still remains nebulous.\textsuperscript{91} The great confusion is the inability of the judiciary to agree on which, if any, of the constitutional amendments actually protect and guarantee the right to privacy.\textsuperscript{92} In order to fully understand the debate sodomy statute).

\begin{itemize}
\item \textsuperscript{87} Brantner, \textit{supra} note 84, at 508-09 (arguing that non-gay organizations may decide to challenge the constitutionality of anti-sodomy statutes because \textit{Bowers} provides solid ground for them to argue their case).
\item \textsuperscript{88} \textit{Id.} at 497 (stating that Kentucky, Michigan and Texas have all had their anti-sodomy statutes repealed based on state constitutional grounds).
\item \textsuperscript{89} Minnesota is the latest state in which groups are arguing that the state sodomy statute is unconstitutional under the right to privacy, as found in the state constitution. \textit{Zack & Bentley, supra} note 2; \textit{see also} Brantner, \textit{supra} note 84, at 508-09 (highlighting other states where groups looked to their state constitution in order to declare sodomy laws unconstitutional).
\item \textsuperscript{90} Thomas, \textit{supra} note 84, at 875 (citing Samuel D. Warren & Louis D. Brandeis, \textit{The Right to Privacy}, 4 \textit{Harv. L. Rev.} 193 (1890)).
\item \textsuperscript{91} Thomas, \textit{supra} note 84, at 875. \textit{See also} Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (stating that a zone of privacy exists, even though the right to privacy is not explicitly mentioned in the Constitution); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (finding that unmarried couple’s choice to use contraceptives fell within the zone of privacy); Griswold v. Connecticut, 381 U.S. 475, 484 (1965) (finding that the First, Third, Fourth, Fifth, and Ninth Amendments created a “zone of privacy”); David D. Meyer, \textit{The Paradox of Family Privacy}, 53 \textit{Vand. L. Rev.} 527, 531 (2000) (stating that the Supreme Court privacy cases thus far have only succeeded in creating a “doctrinal quagmire”).
\item \textsuperscript{92} Bowers v. Hardwick, 478 U.S. 186, 207 (1986) (Blackmun, J., dissenting) (discussing the holding in both \textit{Olmstead} and \textit{Stanley}, in which the court relied on
over the right to privacy, close examinations of the First, Fourth, Fifth, Ninth and Fourteenth Amendments are necessary.

A. The First Amendment

The First Amendment protects the freedom of religion, speech and the press. In *Griswold*, the Supreme Court cited to several First Amendment cases in ultimately reversing the Connecticut Supreme Court and finding the Connecticut contraceptive statute to be unconstitutional. The Court highlighted the notion that simply because a right is not expressly stated in any one amendment, does not mean that the right is not or should not be protected.

*Stanley v. Georgia* is one of the first cases to determine that the right to privacy is protected under the First Amendment. In *Stanley*, police had a search warrant for Stanley's alleged bookmaking activities and instead, discovered obscene material in a desk drawer. Stanley was arrested for violating Georgia's obscenity statute. The Georgia Supreme Court affirmed the trial court and

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the First and Fourteenth Amendments to determine if a right of privacy exists; *Carey*, 431 U.S. at 674 (stating that the Fourteenth Amendment guaranteed a right of personal privacy); *Griswold*, 381 U.S. at 484 (referring to the First, Third, Fourth, Fifth and Ninth Amendments as all creating zones of privacy). *But see Bowers*, 478 U.S. at 190 (holding by the majority that prior cases, which found a right to privacy exists to protect such fundamental rights as marriage, family and procreation, are not applicable to homosexual behavior).

93. U.S. CONST. amend. I. "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 the Government for a redress of grievances." *Id.*

94. *Griswold*, 381 U.S. at 482 (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); De Jonge v. Oregon, 299 U.S. 353 (1937); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. State, 262 U.S. 390 (1923) and stating that these cases all protect rights, such as the right of association, which are not expressly included in the First Amendment).

95. *Griswold*, 381 U.S. at 482-83 (concluding that even though expression of opinion is not explicitly included in the First Amendment, it exists as a constitutionally protected right and discussing the fact that several rights are not expressly mentioned in the Constitution, yet they have come to be protected under the umbrella of the First Amendment).


97. *Id.* at 560-62 (distinguishing *Stanley* from previous cases that did not find obscenity to be a protected right under the First Amendment).

98. *Id.* at 558.

99. *Id.* at 559 (quoting GA. CODE ANN. § 26 - 6301 (Supp. 1968)). The statute reads:

Any person who shall knowingly bring or cause to be brought into this
found that the states have the authority to deal with the situation as they see fit because obscenity is not a constitutionally protected right.\textsuperscript{100}

The United States Supreme Court, however, felt differently and reversed the Georgia Supreme Court, deciding that “mere private possession of obscene material cannot constitutionally be made a crime.”\textsuperscript{101} The Supreme Court’s decision hinged on the differentiation between commercial distribution of obscene material and mere private possession of such material.\textsuperscript{102} The Court found the state’s case essentially to contend that it has the power to regulate the moral content of its citizens’ thoughts.\textsuperscript{103} Furthermore, the Court went on to reject the state’s argument that exposure to obscene material may lead to deviant sexual behavior or sexual violence.\textsuperscript{104}

In applying the decision in \textit{Stanley} to current sodomy laws, a differentiation may be made between an individual’s private sexual practices and an individual’s sexual activity occurring in public.\textsuperscript{105}

\begin{itemize}
\item State for sale or exhibition, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter...if such person has knowledge...be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years.\ldots
\end{itemize}

\texttt{GA. CODE ANN. § 26-6301.}

\textsuperscript{100.} \textit{Stanley}, 394 U.S. at 560 (stating that because obscenity does not qualify as protected speech or press, the States can do as they please to protect their citizens’ welfare).

\textsuperscript{101.} \textit{Id.} at 559.

\textsuperscript{102.} \textit{Id.} at 563 (determining that previous cases may not be binding on private possession of obscene material).

\textsuperscript{103.} \textit{Id.} at 566 (quoting Kingsley Int’l. Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959)) (citation omitted). The Court essentially dismissed the state’s argument stating: “[t]his argument misconceives what it is the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by the majority \ldots.” \textit{Id.}

\textsuperscript{104.} \textit{Id.} at 566 (pointing to the lack of empirical evidence and suggesting that education and punishment for violating the law should be the deterrents used to prevent crime).

\textsuperscript{105.} Many cases enforce sodomy laws when the acts occur in public and fail to discuss the applicability of the laws if the act were committed in the confines of one’s home. Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996) (Fletcher, P.J., concurring specially) (holding that the privacy rights protected under Georgia’s constitution do not extend to sexual acts committed in public areas). \textit{See also} Stewart v. United States, 364 A.2d 1205, 1207 (D.C. 1976) (stating that the appellant concedes that his acts were not protected by the right to privacy because they
Referring to the Court’s disagreement with the state’s contention that it has the authority to legislate morality, arguably it can be extended to include the prohibition of controlling an adult person’s sexual activities that occur behind closed doors.\textsuperscript{106}

\textbf{B. The Fourth Amendment}

The Fourth Amendment protects the public from unreasonable searches and seizures.\textsuperscript{107} A number of cases have cited the Fourth Amendment as protecting an individual’s right to privacy.\textsuperscript{108} In 1886, the United States Supreme Court went so far as to say that “constitutional provisions for the security of person and property should be liberally construed... It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”\textsuperscript{109} The right to privacy, as encompassed in the Fourth Amendment, has been declared by the United States Supreme Court to be just as fundamental as freedom of speech, freedom of religion and freedom of the press.\textsuperscript{110}
With regard to state sodomy laws, which deem private sodomous acts as criminal, the Supreme Court's interpretation of the Fourth Amendment is crucial. To condemn private sexual dealings between two consenting adults as violating the law explicitly undermines the notion that the Fourth Amendment exists "as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'" Those states that criminalize sodomous acts even between heterosexuals, regardless of the existence of a marital relationship, only succeed in undermining the sanctity of marriage.

The states that criminalize sodomous acts between both homosexuals and heterosexuals simply succeed in imposing the government's morality on adults who have differing opinions on what falls within the scope of immoral behavior. The state anti-sodomy statutes are clearly in violation of the spirit of the Fourth Amendment's purpose to protect citizens from the government's intrusion into their houses, and thus, private lives.

44 (1897)). The Court talks of the significance of the right to privacy as found in both the Fourth and Fifth Amendments when it says that "the freedom from unconscionable invasions of privacy...do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty (secured)...only after years of struggle.'" Id.

111. Referring to the U.S. Supreme Court decisions in Griswold, Mapp, and Boyd.


113. Id. at 486. The majority, in finding Connecticut's anti-contraceptive statute to be unconstitutional, said the following:

We deal with the right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It 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. Yet it is an association for as noble a purpose as any involved in our prior decision.

Id.; see also Bowers, 478 U.S. 186, 217-18 (1986) (Stevens, J., dissenting) (stating that when married couples are behind closed doors, they, and not the State, should be able to choose how they conduct themselves). But see Schnably, supra note 33, at 876-77 (citing Elizabeth M. Schneider, The Violence of Privacy, 23 CONN. L. REV. 973 (1991)). Some argue that governmental intervention is necessary to ensure that women are no longer disempowered and subordinate. Several feminists believe the bedroom to be a "place of coercion, an arena in which men dominate women." Id. The following states have sodomy laws that pertain to both heterosexuals and homosexuals: Alabama, Arizona, Florida, Idaho, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, North Carolina, South Carolina, Utah and Virginia. See generally Lesbian & Gay Rights: State Sodomy Statutes, at http://www.aclu.org/issues/gay/sodomy/html (last updated Oct. 1999).
C. The Fifth Amendment

The Fifth Amendment contains a due process clause that secures protections from the government at the individual level.\(^\text{114}\) The right to privacy found in the Fifth Amendment is derived from the Self-Incrimination Clause.\(^\text{115}\) Historically, the Fifth Amendment prohibited governmental acts of arbitrariness.\(^\text{116}\) A rational basis for the law had to exist before the government could justifiably deny a person or group of persons due process under the law.\(^\text{117}\) In Griswold, the Court applied a more stringent standard, determining that the state must have a "compelling interest."\(^\text{118}\)

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\(^\text{114}\) The Fifth Amendment of the U.S. Constitution states:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.; William N. Eskridge Jr., A Tribute to Kenneth L. Karst: Destabilizing Due Process and Evolutive Equal Protection, 47 UCLA L. REV. 1183, 1183 (2000) (arguing that the Fifth Amendment’s Due Process Clause protects minority groups when the majority despises them).

\(^\text{115}\) U.S. CONST. amend. V.; Griswold, 381 U.S. at 484. “The Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.” Id.; see also Bowers, 478 U.S. at 191. The Court, even though it declined to extend the Fifth Amendment to encompass the right to privacy in relation to sodomy statutes, acknowledged that:

It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription.


\(^\text{117}\) Eskridge Jr., supra note 114, at 1191. Eskridge analyzes the Fifth Amendment’s Due Process Clause and its significance in relation to the governmental justification for Japanese internment camps and racial segregation in schools. See also Palko v. Connecticut, 302 U.S. 319, 326 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969) (stating that the State cannot restrict people’s freedoms unless a genuine public need exists).

\(^\text{118}\) Griswold, 381 U.S. at 497 (Goldberg, J., concurring). See also Bowers, 478 U.S. at 189. After the court of appeals remanded the case to trial, in order to prevail, “the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.” Id.; Roe v. Wade, 410 U.S. 113, 153-55 (1973) (stating that the State must demonstrate that
In Bowers, the state argued that Georgia's anti-sodomy statute was necessary to protect its citizens from the adverse effects caused by those who engage in sodomous acts.\textsuperscript{119} The Court ultimately agreed with the state, even though the state lacked proof to support its assertions that sodomous acts are "physically dangerous" or a threat to the public's well being.\textsuperscript{120}

The Court supported the state's view that sodomous acts "for hundreds of years, if not thousands, have been uniformly condemned as immoral."\textsuperscript{121} The phrase "compelling interest" may be vague, but nevertheless, the sheer fact that the majority may not approve of such behavior because of certain religious beliefs, clearly fails to reach the stringent standard set by the United States Supreme Court in Griswold.\textsuperscript{122}

D. The Ninth Amendment

The Ninth Amendment provides protection for those fundamental rights that are not enumerated in the prior eight amendments.\textsuperscript{123} This Amendment has been referred to as the "forgotten

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  \item the regulation advances a "compelling state interest"); Griswold, 381 U.S. at 497 (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)). "The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.'"
  \item Id.
  \item Bowers, 478 U.S. at 208-09. The state contended that the "general public health and welfare" may be affected by the possible spread of communicable diseases and rampant criminal activity by those who engage in sodomy. Nevertheless, the state failed to provide any evidence for its assertions. \textit{Id.}
  \item Id. Many others have put forth the argument that criminalizing sodomy will help protect the public health. Janet M. LaRue & Rory K. Nugent, Williams v. State: The Constitutionality and Necessity of Sodomy Laws, 29 U. BALT. L.F. 6, 13 (1999) (arguing that the State may exercise its police power to protect the public's safety, which is what the state is trying to do by eliminating "unnatural or perverted practices" that resulted in the HIV/AIDS epidemic).
  \item Bowers, 478 U.S. at 210. The crux of the state's argument, as well as the basis for the Court's upholding of the statute, rests upon the belief that people who engage in sodomous acts are immoral and they will corrupt society. \textit{Id.}
  \item Id.\textsuperscript{122} Griswold, 381 U.S. at 497 (Goldberg, J., concurring); see also Bowers, 478 U.S. at 211-12 (Blackmun, J., dissenting) (citing McGowen v. Maryland, 366 U.S. 420, 429-53 (1961)). "The legitimacy of secular legislation depends ... on whether the State can advance some justification for its law beyond conformity to religious doctrine .... A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus." \textit{Id.}
  \item U.S. CONST. amend. IX. The Ninth Amendment states, "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." \textit{Id.}; Griswold, 381 U.S. at 488 (Goldberg, J., concurring) (pointing to the history and language used by the Framers to support the proposition that the Ninth Amendment was created to protect the public's
\end{itemize}
amendment” because the United States Supreme Court has rarely been asked to interpret it.124 Until 1965 and Griswold, the Supreme Court had only referred to the Ninth Amendment in a handful of cases.125 Surprisingly, in reviewing the most well known right to privacy cases, the judiciary seems wary of delving into the Ninth Amendment for fear of “broaden[ing] the powers of [the Supreme] Court.”126

For example, in Bowers, the Court asserted that Hardwick did not base his defense on the Eighth, Ninth, or Fourteenth Amendment.127 The dissent, however, pointed out that Hardwick did in fact invoke the Ninth Amendment in his defense.128 Not only did Hardwick explicitly mention the Ninth Amendment in his defense, but he relied on Griswold, which interpreted the Ninth Amendment as protecting rights that may not be expressly enumerated in the other amendments.129

The Court’s actions indicate that it did not want to address the other fundamental rights that were not enumerated in the other amendments).

124. Griswold, 381 U.S. at 491 n.6 (Goldberg, J., concurring). The Court says that even though it has rarely been called upon to interpret this Amendment, it still merits attention. Id. at 490-91 (Goldberg, J., concurring).


126. Griswold, 381 U.S. at 520 (Black, J., dissenting). Justice Black goes on to say that the Framers did not intend the Ninth Amendment to bestow power upon the Court to declare the unconstitutionality of laws that “offend what this Court conceives to be the ‘(collective) conscience of our people’ ....” Id. Justice Stewart, in his dissent, provides the following reasons for the Court’s distance from the Ninth Amendment:

The Ninth Amendment ... which this Court held “states but a truism that all is retained which has not been surrendered,” was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, that all rights and powers not delegated to it were retained by the people and the individual States. Id. at 529-30 (citation omitted).


128. Id. at 201 (Blackmun, J., dissenting). Justice Blackmun sharply disagrees with the majority’s belief that Hardwick did not rest any of his defense on the Ninth Amendment. In his dissent, Justice Blackmun points no further than Hardwick’s reliance on Griswold. Id.

129. Id. at 189. The court of appeals relied on Griswold, Eisenstadt, and Roe in reversing the decision. See generally Griswold, 381 U.S. 479 (discussing the Framers’ belief that there are fundamental rights, other than those specifically enumerated in the first eight amendments, which should be protected from governmental infringement).
merits of the Ninth Amendment and its application to the right to privacy in the context of sodomous acts. Why the Court really failed to address the Ninth Amendment argument is unknown. Yet, because Hardwick expressly referred to the Ninth Amendment in his defense, the Court’s statement that he did not suggests that it simply did not want to explore the possibilities for fear that the statute would be found unconstitutional.130

E. The Fourteenth Amendment

The Fourteenth Amendment has a due process clause like the Fifth Amendment, but it also contains an equal protection clause.131 The Equal Protection Clause “requires the state to justify any difference in procedural or substantive treatment of one person vis-à-vis another.”132 Essentially, the Fourteenth Amendment “absorbs and applies to the states those specifics of the first eight amendments which express fundamental personal rights.”133 Interestingly, often times the judiciary appears to use the Fourteenth Amendment’s Due Process Clause and Equal Protection Clause interchangeably.134

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130. This assertion can be derived from the adamant stance that the Court took on sodomous acts being immoral, not “deeply rooted in this Nation’s history and tradition” and condemned by Judeo-Christian ethical standards. Bowers, 478 U.S. at 194-96; Thomas, supra note 84, at 893 (stating that simply relying on history involves a “value choice in that the Court selects the history upon which it will base its decision”).

131. U.S. CONST. amend. XIV, § 1. Section 1 states the following:
Section 1. 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 the equal protection of the laws.

132. EskridgeJr., supra note 114, at 1188.


134. One legal scholar puts forth the following observation:
Academics and judges who believe that constitutional interpretation must be faithful to the original meaning of constitutional texts are unlikely to distinguish the Due Process Clause and Equal Protection Clause .... Academics and judges who believe that constitutional interpretation must be faithful to normative visions of justice and citizenship are also unlikely to distinguish between the clauses .... EskridgeJr., supra note 114, at 1186 (citing Rutan v. Republican Party, 497 U.S. 62, 95-96, 96 n.1, 102-03 (1990) (Scalia, J., dissenting); Michael H. v. Gerald D., 491 U.S. 110, 137-41 (1989) (Brennan, J., dissenting); Padula v. Webster, 822 F.2d 97.
Arguments have been made both for and against using the two clauses in an undifferentiated manner. One argument consists of analyzing the two clauses’ impact on groups considered to be minorities. The Fourteenth Amendment’s Due Process Clause affects individuals, whereas its Equal Protection Clause affects a group of people. The Due Process Clause is more concerned with “my” rights, while the Equal Protection Clause is more concerned with “my” rights in relation to another person.

Arguably, different standards are applied to the two clauses: the Due Process Clause is one of non-arbitrariness, and the Equal Protection Clause is one of non-discrimination. Despite the different standards applied in determining the constitutionality of a law, the Fourteenth Amendment requires that the states enforce their laws in a just and equal manner. Unfortunately, Bowers demonstrates that in spite of the Fourteenth Amendment, the Court allows the discriminatory and selective enforcement of sodomy laws.

F. Summary

Clearly, right-to-privacy protections exist within several of the Amendments to the United States Constitution. This right to privacy can be interpreted to mean that criminalization of consensual sexual practices that occur in the privacy of homes are a violation
of a constitutionally protected right. The United States Supreme Court, however, held in *Bowers v. Hardwick* that Georgia's choice to criminalize sodomous acts between two consenting adults was constitutionally sound.\(^{141}\) Despite this ruling, the states themselves can still recognize the right to privacy under their individual constitutions.\(^{142}\)

V. THE CURRENT STATE OF MINNESOTA LAW

In recent years, many states, which in the past had sodomy laws in force, have since found them to be unconstitutional under their constitutions.\(^{143}\) Many other states have repealed their laws through legislative action.\(^{144}\) Nevertheless, Minnesota has yet to overturn the state's sodomy statute through either the legislature or the judiciary.\(^{145}\) Even so, Minnesota is considered to be a "very close"

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141. *Id.*
142. *Id.* at 190. The Court, in rendering its decision, only examined the constitutionality of sodomy laws under the federal Constitution. The Court stated that "[this case] raised 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." *Id.* (emphasis added). Subsequently, Georgia's supreme court struck down the 182-year old sodomy law in *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).


144. Twenty-five states plus the District of Columbia have repealed their sodomy laws through legislative action. The states, as well as the year they were repealed, are the following: Alaska (1980); California (1976); Colorado (1972); Connecticut (1971); Delaware (1973); District of Columbia (1993); Hawaii (1973); Illinois (1962); Indiana (1977); Iowa (1978); Maine (1976); Nebraska (1978); Nevada (1993); New Hampshire (1975); New Jersey (1979); New Mexico (1975); North Dakota (1973); Ohio (1974); Oregon (1972); Rhode Island (1998); South Dakota (1977); Vermont (1977); Washington (1976); West Virginia (1976); Wisconsin (1983); and Wyoming (1977). ACLU, *Status of U.S. Sodomy Laws*, at http://www.aclu.org/issues/gay/sodomy.html [hereinafter ACLU].

145. Minnesota Statute section 609.293 is still on the books. *Minn. Stat.* § 609.293 (1998). Jim Manahan, president of the MCLU, stated that even as recently as the past legislative session, the legislature has repeatedly attempted to re-
state in terms of the possibility of and the willingness to overturn the state sodomy law.146 Minnesota is the only state that received the National Gay and Lesbian Task Force’s “very close” rating, while states like Alabama, Arkansas, Mississippi and South Carolina received “long shot” ratings.147

On June 22, 2000, the Minnesota Civil Liberties Union (“MCLU”) and the American Civil Liberties Union (“ACLU”) Lesbian and Gay Rights Project filed a class-action lawsuit challenging the state’s sodomy statute.148 Minnesota’s sodomy statute makes it illegal for both heterosexuals and homosexuals to engage in private, consensual sodomous acts.149 According to the MCLU and the ACLU, “the suit is being filed on behalf of a diverse cross-section of state citizens, whose jobs, homes and relations with their children are jeopardized by possible enforcement of the sodomy law.”150

The suit alleges that the sodomy statute is unconstitutional because it violates an individual’s right to privacy as protected by the Minnesota Constitution.151 The two organizations viewed the legislative route as a dead end, so they exercised their only other option—attempting to have the law repealed in the judicial branch.152

The right to privacy is recognized in Minnesota. The Minnesota Supreme Court recognized an independent right to privacy under the state constitution in State v. Gray,153 and it further clarified its position in Jarvis v. Levine.154 In Gray, the defendant en-

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146. The National Gay and Lesbian Task Force (“NGLTF”) rated each state as “very close,” “best chances,” “not possible,” and “longshots” regarding the possibility of the sodomy statutes being overturned. Brantner, supra note 84, at 533 n.219.
147. Id. at 521-533.
149. MINN. STAT. § 609.293 (1998).
150. ACLU, supra note 144. The people represented in the lawsuit include: a quadriplegic man whose only form of intimacy is sodomy, a married elementary school teacher, a lesbian attorney, a gay law student, a divorced gay man, and the Minnesota Lavender Bar Association. All of these people could face some form of legal action (i.e. loss of teaching credentials, eviction from rented home, disbarment, and loss of visitation with children) due to their engagement in private, consensual sodomy. Id.
151. Sodomy Law, supra note 148. The suit is not alleging that Minnesota’s sodomy law violates the federal Constitution. Id.
152. Zack & Bentley, supra note 2. The current president of the MCLU points to the past failed attempts to repeal the law in the Legislature. Id.
153. 413 N.W.2d 107 (Minn. 1987).
154. 418 N.W.2d 139 (Minn. 1988).
gaged in sodomous acts with a minor and was charged with violating Minnesota’s sodomy statute.\textsuperscript{155} In the course of Gray’s case, the United States Supreme Court decided \textit{Bowers v. Hardwick}, in which it found Georgia’s sodomy law to be constitutional.\textsuperscript{156} The portion of Georgia’s sodomy statute scrutinized and upheld in \textit{Bowers} was very similar to Minnesota’s statutory provision under which Gray was charged.\textsuperscript{157}

The Minnesota Supreme Court followed the Supreme Court’s lead in \textit{Bowers} by refusing to expand the state constitutional protections to those that engage in commercial sex.\textsuperscript{158} The Minnesota Supreme Court was not willing to broaden its reading of the state constitution beyond the parameters that the Supreme Court established under the federal Constitution.\textsuperscript{159} Nevertheless, the Minnesota Supreme Court left open the possibility, that if raised properly, privacy rights could be “expanded beyond federal holdings.”\textsuperscript{160} By limiting its holding to only those that engage in commercial sex, the court drew a distinction between those that engage in sodomous acts commercially and those that do so privately.

A year later, the Minnesota Supreme Court further strengthened the notion that the state constitution guarantees a right to privacy.\textsuperscript{161} In \textit{Jarvis v. Levine}, the court found that a mental patient’s right to privacy was violated when medical personnel forcibly administered neuroleptic drugs.\textsuperscript{162} The court based its holding on Article I, sections 1, 2, and 10 of the Minnesota Constitution.\textsuperscript{163} In its

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  \item 155. \textit{Gray}, 413 N.W. 2d at 108.
  \item 156. \textit{Id.} at 109.
  \item 157. The Georgia statutory provision states: (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. \textit{GA. CODE ANN.} § 16-6-2 (1984). The Minnesota statutory provision states similarly: Subdivision 1. Definition. “Sodomy” means carnally knowing any person by the anus or by or with the mouth. \textit{MINN. STAT.} § 609.293, subd. 1 (1987).
  \item 158. The court fails to mention the applicability of Gray’s right to privacy argument in regards to private, consensual sodomous acts. The court merely says “to say that there exists a fundamental right under our constitution to engage in sodomous acts within a sex for compensation relationship...extend[s] that privacy right far beyond constitutional cases....” \textit{Gray}, 413 N.W.2d at 114 (emphasis added).
  \item 159. \textit{Id.}
  \item 160. \textit{Id.}
  \item 161. \textit{Jarvis v. Levine}, 418 N.W.2d 139, 140 (Minn. 1988) (stating that the forcible administration of medication without prior judicial approval violates a mental patient’s right of privacy under the state constitution).
  \item 162. \textit{Id.} at 148.
  \item 163. \textit{Id.} The Minnesota Constitution closely mirrors the U.S. Constitution.
\end{itemize}
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decision, the court explicitly stated that the holding was "not pursuant to any law or provision of the United States Constitution." In making this remark, as well as the "proper standing" comment in the Gray case, the Minnesota Supreme Court seemed to be encouraging a broadened interpretation of the state constitution, which could easily lead to the eradication of Minnesota's sodomy statute.

In the recent complaint, Doe v. Ventura, a diverse cross-section of Minnesota citizens is being represented. Minnesota's sodomy statute criminalizes both heterosexuals and homosexuals engaging in sodomous acts; therefore, the statute goes beyond discrimination based on sexual orientation and actually regulates sexual techniques of everyone, including traditional heterosexual couples. But those who most likely will experience a more realistic threat from the archaic state sodomy statutes are members of the gay and lesbian community.

The mentioned sections are as follows:

Section 1. Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.

Section 2. No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.

Section 10. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

MINN. CONST. art. I, §§ 1, 2, 10.

164. Jarvis, 418 N.W.2d at 148.

165. Sodomy Law, supra note 148.

166. Most Minnesotans fail to realize that the statute applies to their own sexual practices. MCLU legal counsel Teresa Nelson sums it up best as "[p]eople of all backgrounds and from across the ideological spectrum ought to be alarmed by this law: it invites the state into every bedroom in Minnesota." Id. Joni Thome, president of the Lavender Bar Association, shares Ms. Nelson's concern in stating that "this [statute] affects every person in Minnesota who is sexually active." Zack & Bentley, supra note 2.

167. Even the executive director of the Minnesota Family Council, Tom Prichard, supports this statement when he says that "the state should be involved in regulating private sexual behavior, but not when it comes to married heterosexual couples." Zack & Bentley, supra note 2. Beth Zemsky, executive director of the University of Minnesota's Gay, Lesbian, Bisexual, Transgender Programs Office responds to Mr. Prichard's assessment of the statute by saying that, "[Mr. Prich-
Many argue that the mere existence of sodomy laws is meaningless because they are rarely enforced. While this may be true, as thousands of laws fill our statute books and many are not enforced, reaching the conclusion that such laws are without consequence is inaccurate. Numerous incidents have occurred throughout the country that expressly disprove the harmlessness of sodomy statutes. The simple existence of these laws can result in many people being deprived of opportunity and living with fear of prosecution due to their indirect enforcement.

Employment discrimination is one such way that state sodomy laws are indirectly enforced. Throughout our nation's history, homosexuals have been deprived opportunities that have been readily available to others. The federal government willingly labeled gays and lesbians as "generally unsuitable" to hold government office. The common perception of the sodomy law, that it only applies to homosexuals, is voicing the same thing.


170. The most prominent case is Bowers v. Hardwick, in which police went to Michael Hardwick's house with an arrest warrant, and when they entered the house, Hardwick was engaged in sodomous acts with another male. The police charged him under Georgia's 182-year-old sodomy statute. Bowers, 478 U.S. 186, 186 (1986). Another notable incident arose in Rhode Island in 1997 when two men walked into the woods to have sex. One of the men went to the police to report that the other man had stolen his wallet. Police then charged the victim with "abominable and detestable crime[s] against nature." Bull, supra note 168.

171. Christopher R. Leslie, Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws, 35 HARV. C.R.-C.L. L. REV. 103, 104 (2000). The author discusses the abuse of sodomy statutes in discriminating against gays and lesbians in general, against their organizations, and in creating bias against gay and lesbian parents in custody disputes. Id.

fices, as "vulnerable to blackmail," as "sexual criminals," and as demonstrating "lack of regard for the laws of society."

Besides experiencing discrimination within the government, homosexuals experience employment discrimination in the private sector as well. As mentioned in the Doe complaint, a gay law student, who was preparing to sit for the bar exam at the time the complaint was filed, feared that he would fail to receive his license to practice law because his sexuality may suggest that he engages in illegal activities. His concern is not without merit considering the decision in State ex rel. Florida Bar v. Kimball. In this case, the court disbarred a practicing attorney. The court's disbarring of the attorney was based, in part, on the existing state sodomy law. Even though no recent cases of disbarment have been based on an attorney's sexual orientation, the fact that at least one has occurred in the past is enough to warrant alarm.

In terms of judicial employment, gays and lesbians have received disdain as well. In Minnesota, an openly gay judge was removed from the bench because he "may" be violating Minnesota's sodomy law. In North Carolina, an openly gay judge was accused of creating a conflict between being one who upholds the laws of the state, and one who openly breaks the state sodomy laws. As recently as 1997, homosexuals testified at congressional hearings for the Employment Non-Discrimination Act about their termination or denial of promotions due to their sexual orientation. Even as our country becomes more tolerant of alternative lifestyles, the homosexual community still experiences employment dis-

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174. Id. at 138 n.233.
175. Id. at 138 n.237 (quoting Exec. Order No. 10450, § 8, 18 Fed. Reg. 2489 (1953)).
176. Id. at 138 n.242 (quoting High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1363, 1365 (N.D. Cal. 1987), rev'd. 895 F.2d 563 (9th Cir. 1990)).
177. Zack & Bentley, supra note 2.
178. 96 So. 2d 825, 825 (Fla. 1957).
179. Id.
180. Id.
181. Sandra J. Grove, Constitutionality of Minnesota's Sodomy Law, 2 LAW & INEQ. 521, 534 (1984) (stating that the judge "openly contemplated future violation of [the sodomy statute] in mature homosexual relationships with his adult male peers").
182. Leslie, supra note 171, at 141-42.
183. Id. at 141.
crimination at every level and in every sector.

Yet another way sodomy laws are indirectly enforced is through custodial discrimination. Custodial issues are one of the most litigated issues affecting homosexuals today. The courts rely on the state sodomy laws in denying gay parents visitation and custody rights, as well as in taking children away from parents who are gay. The *Doe* complaint filed in Minnesota also represents a gay, divorced man who fears losing visitation with his children as a result of the state sodomy statute. If Minnesota were to follow other states’ leads in the realm of homosexual custodial issues, then his fear would be well founded.

The rationale behind automatically associating gays with illegal activity is faulty and troublesome. The presumption that because people are gay, they clearly commit criminal acts is a belief shared by many. For example, just as recently as this July, the Chairman of Equal Rights not Special Rights, Phil Burress, called for the arrest of Arizona Representative Jim Kolbe.

Mr. Kolbe is the only openly gay Republican in the House of Representatives. Mr. Burress sent a letter to Jim Nicholson, Republican National Committee Chairman, in response to Representative Kolbe’s upcoming address at the Republican National Convention. He called for Mr. Kolbe’s arrest because he clearly engages in sodomy, which is illegal in Arizona. Mr. Burress failed

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185. *Id.* The author contends that sodomy laws will become even more important in denying homosexual parents custody and visitation rights, once more research disproves any negative mental effects on children of gay parents. *Id.* at 148 n.304.

186. *Id.* at 149. The argument is put forth that because gay parents are “criminals,” they should not be granted custodial rights. *Id.* See also Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995).


188. Both Alabama and Virginia have repeatedly held that homosexual parents are not entitled to custody of their children due to their engagement in illegal activities. *In re R.W.*, 717 So. 2d 793, n.96 (Ala. 1998); Roe v. Roe, 324 S.E.2d 691 (Va. 1985).


190. *Id.*

191. *Id.*

192. Mr. Burress stated in his letter that “Mr. Kolbe as a self-described homosexual means nothing except to say that he engages in sodomy. Did you know that in Arizona, sodomy is against the law? Mr. Kolbe should be arrested when he returns to his home state for violating state law.” *Id.*
to quote witnesses or offer proof to support his assertions. He simply made the allegation and then allowed it to be posted on the Internet, accompanied by a message urging people to contact Chairman Nicholson to voice their concern.

In response, the ACLU points to Mr. Burress' letter in supporting its belief that sodomy laws do pose a threat to the gay and lesbian community. Just as North Carolina used its state's sodomy law to remove a judge from the bench, Mr. Burress and others would like to remove Representative Kolbe from office for violating Arizona's sodomy law. Possibly the real reason Mr. Burress would like to have Representative Kolbe arrested is not because he violated a law, but because Mr. Burress would like to impede or prohibit Representative Kolbe from being a representative of the people because his behavior is not viewed as being moral.

Mr. Burress was not alone either. The Mississippi-based American Family Association voiced its support for Mr. Burress' contention by posting his letter on its website and referring to him as "AFA's good friend and ally, [who] shared his excellent letter...." All of these various incidents around the country high-

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193. In a phone interview, Mr. Burress said that the letter to Mr. Nicholson was meant to be personal and tongue-in-cheek. The circulation on the Internet occurred without his permission. He said, however, that he sent the letter to call attention to the fact that Representative Kolbe probably or may engage in sodomous acts, and because he took an oath to uphold the laws of the land, he should be held accountable if he fails to do so. Credibility is the issue. On sodomy laws in general, Mr. Burress believes that both homosexual and heterosexual anal sodomy should be criminalized because those acts lead to the spreading of deadly diseases, namely HIV/AIDS. He feels that if the government criminalizes that type of behavior, coupled with an educational campaign, lives may be saved. Telephone Interview with Phil Burress, Chairman, Equal Rights not Special Rights (October 20, 2000).

194. ACLU, Calls for Arrest of Openly-Gay GOP Convention Speaker Reveal Danger of Sodomy Laws Nationwide, ACLU Says, at http://www.aclu.org/news/2000/n073100b.html (July 31, 2000). Michael Adams, associate director of the ACLU Lesbian and Gay Rights Project, claims that "groups argue that these laws are not enforced and do not present any real danger—but that they should remain on the books to send a moral message ... [these laws] can be used to try to intimidate and silence lesbian and gay Americans." Id.

195. American Family Association, supra note 189. In his letter to Jim Nicholson, Mr. Burress posed the question "[w]ould you agree that all lawmakers should insist that all laws be enforced?" Id.

196. Id. Others voiced their concern over Representative Kolbe speaking at the Republican Convention; one in particular told ABC News that he was "flabbergasted" by the decision to let him speak. Id.

197. Id. As mentioned earlier, Mr. Burress said that he did not give permission for his letter to be circulated. Telephone Interview with Phil Burress, Chairman,
light the danger that could and does result from the mere existence of these statutes.

VI. CONCLUSION

Despite legal debate around various amendments to the U.S. Constitution, because the United States Supreme Court upheld Georgia’s sodomy law under the United States Constitution in Bowers v. Hardwick, the argument that state sodomy laws violate the right to privacy as protected under the federal Constitution no longer wields influence. Now, however, states are beginning to find that their sodomy laws violate a person’s right to privacy as protected under their own constitutions. The Minnesota Supreme Court recognized a broad right to privacy guaranteed under its own constitution over a decade ago in State v. Gray. With the MCLU’s and ACLU’s current suit, Doe v. Ventura, Minnesota’s courts have a long overdue opportunity to overturn Minnesota’s sodomy law and eliminate the government’s ability to selectively enforce this archaic law against certain groups in society. Now is the time for the Minnesota judiciary to prohibit the policing of its citizens’ bedrooms.

Equal Rights not Special Rights (October 20, 2000).