

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 8, 1986

85-140 Bowers v. Hardwick

MEMORANDUM TO THE CONFERENCE:

At Conference last week, I expressed the view that in some cases it would violate the Eighth Amendment to imprison a person for a private act of homosexual sodomy. I continue to think that in such cases imprisonment would constitute cruel and unusual punishment. I relied primarily on Robinson v. California.

At Conference, given my view as to the Eighth Amendment, my vote was to affirm but on this ground rather than the view of four other Justices that there was a violation of a fundamental substantive constitutional right - as CALL held. I did not agree that there is a substantive due process right to engage in conduct that for centuries has been recognized as deviant, and not in the best interest of preserving humanity. I may say generally, that I also hesitate to create another substantive due process right.

I write this memorandum today because upon further study as to exactly what is before us, I conclude that my "bottom line" should be to reverse rather than affirm. The only question presented by the parties is the substantive due process issue, and - as several of you noted at Conference - my Eighth Amendment view was not addressed by the court below or by the parties.

In sum, my more carefully considered view is that I will vote to reverse but will write separately to explain my view of this case generally. I will not know, until I see the writing, whether I can join an opinion finding no substantive due process right or simply join the judgment.

L.F.P. 2
L.F.P., Jr.

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Source: Library of Congress, Justice Thurgood Marshall Papers.

The day following Powell's circulation of his memorandum, on April 9, 1986, Chief Justice Burger assigned Justice White to write an opinion for the majority. In late April and May, he circulated three drafts of his proposed opinion. In June, Blackmun circulated his proposed dissent, and Powell circulated his concurring opinion, explaining the importance for him of the fact that Hardwick had not been tried, convicted, and sentenced, as well as explaining his view that, if penalties for sodomy (such as the twenty-year sentence that Hardwick would have faced) were imposed, they might violate the Eighth Amendment's ban against "cruel and unusual punishment."

Bowers v. Hardwick

478 U.S. 186, 106 S.Ct. 2841 (1986)

On a Saturday morning in Atlanta, Georgia, Michael Hardwick was arrested in his bedroom after a police officer discovered him in bed with another male. The officer was there to serve an arrest warrant for Hardwick's failure to appear in court on a charge of drinking in public. One of Hardwick's housemates had answered the door when he arrived and told the officer that Michael was not at home, but that he could look in his room. After Hardwick's arrest, the local prosecutor decided (as was his practice) not to seek an indictment under Georgia's law punishing heterosexual and homosexual sodomy. He dropped the sodomy charge against Hardwick. However, Hardwick had already joined forces with the American Civil Liberties Union in filing a lawsuit, challenging the constitutionality of the law. Federal district court Judge Robert Hall dismissed their suit, but the Eleventh Circuit Court of Appeals reversed in holding that the right of privacy protects individuals from punishment for their "consensual sexual behavior." That ruling was appealed by Georgia's attorney general, Michael Bowers, to the Supreme Court, which granted review.

The Court's decision was five to four, and the majority's opinion was announced by Justice White. Chief Justice Burger and Justice Powell delivered concurring opinions. Dissents were by Justices Blackmun and Stevens, who were joined by Justices Brennan and Marshall.

Justice WHITE delivers the opinion of the Court.

In August 1982, 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.

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.

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 the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with . . . respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in *Carey v. Population Services International*, 431 U.S. 678 (1977). *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were described as dealing with child rearing and education; *Prince v. Massachusetts*, 321 U.S. 158 (1944), with family relationships; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), with procreation; *Loving v. Virginia*, 388 U.S. 1 (1967), with marriage; *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), with contraception; and *Roe v. Wade*, 410 U.S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. . . .

Accepting the decisions in these cases and the above description of them, we 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. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Precedent aside, however, respondent would have us announce . . . 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 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. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer*, *Prince*, and *Pierce* fall in this category, as do the privacy cases from *Griswold* to *Carey*.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319 (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 liber-

ties appeared in *Moore v. East Cleveland*, 431 U.S. 494 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this 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 that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen 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 cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the faceoff between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. 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. . . .

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

Chief Justice BURGER concurring.

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 commit homosexual sodomy. . . .

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.

Justice POWELL concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right—*i.e.*, no substantive right under the Due Process Clause—such as that claimed by respondent, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The

Georgia statute at issue in this case, Ga.Code Ann. § 16-6-2, authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, § 16-5-24, first degree arson, § 16-7-60 and robbery, § 16-8-40.

In this case, however, respondent has not been tried, much less convicted and sentenced. Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

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

This case is no more about “a fundamental right to engage in homosexual sodomy,” as the Court purports to declare, than *Stanley v. Georgia*, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States*, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.” *Olmstead v. United States*, 277 U.S. 438 (1928) (BRANDEIS, J., dissenting).

The statute at issue, Ga.Code Ann. § 16-6-2, 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.” But the fact that the moral judgments expressed by statutes like § 16-6-2 may be “natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.” *Roe v. Wade*, 410 U.S. 113 (1973), quoting *Lochner v. New York*, (198 U.S. 45 (1905) (HOLMES, J., dissenting). Like Justice HOLMES, 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.” HOLMES, *The Path of the Law*, 10 Harv.L.Rev. 457, 469 (1897). I believe we must analyze respondent’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.’” . . .

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

First, the Court’s almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language 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 choices of those other citizens. Rather, Georgia has provided that “[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.” 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 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. . . .

Second, I disagree with the Court’s refusal to consider whether § 16-6-2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. . . . Even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that § 16-6-2 interferes with constitutionally protected interests in privacy and freedom of intimate association. . . .

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.” While it is true that these cases may be characterized by their connection to protection of the family, the Court’s conclusion that they extend no further than this boundary ignores the warning in *Moore v. East Cleveland*, 431 U.S. 494 (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.’” . . .

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 Theatre I v. Slaton*, [413 U.S. 49 (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 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 the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin v. Yoder*, [406 U.S. 215 (1972)]. The Court claims that 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.

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. . . .

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for § 16-6-2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Inasmuch as this case was dismissed by the District Court on the pleadings, it is not surprising that the record before us is barren of any evidence to support petitioner's claim. In light of the state of the record, I see no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," to which *Stanley* refused to extend its protection. None of the behavior so mentioned in *Stanley* can properly be viewed as "[v]ictimless," drugs and weapons are inherently dangerous, and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by § 16-6-2 to be physically dangerous, either to the persons engaged in it or to others.

The core of petitioner's defense of § 16-6-2, however, is that respondent and others who engage in the conduct prohibited by § 16-6-2 interfere with Georgia's exercise of the "'right of the Nation and of the States to maintain a decent society,'" *Paris Adult Theatre I v. Slaton*. Essentially, petitioner argues, and the Court agrees, that the fact that

the acts described in § 16-6-2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. . . .

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny. . . . As Justice JACKSON wrote so eloquently for the Court in *West Virginia Board of Education v. Barnette*, [319 U.S. 624] (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." 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 instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. . . .

Nor can § 16-6-2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theatre I*. Certainly, some private behavior can affect the fabric of 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 not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. . . .

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 a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

Like the statute that is challenged in this case, the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes. Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law. That condemnation was equally damning for heterosexual and homosexual sodomy. Moreover, it provided no special exemption for married couples. The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature." . . .

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. . . .

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

"These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. . . ." [Quoting *Fitzgerald v. Porter Memorial Hospital*, 523 F.d 716 (CA7 1975)].

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the State—to decide. The essential "liberty" that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within "the sacred precincts of marital bedrooms," *Griswold*, or, indeed, between unmarried heterosexual adults. *Eisenstadt*. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by § 16-6-2 of the Georgia Criminal Code.

If the Georgia statute cannot be enforced as it is written—if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens—the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.

The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. . . .

I respectfully dissent.