

BEYOND DRONENBURG: RETHINKING THE RIGHT TO PRIVACY

INTRODUCTION

On 18 August 1984 the *New York Times* carried a front-page story under the headline, "U.S. Court Upholds Navy Discharge of a Homosexual."¹ The homosexual was James L. Dronenburg, a petty officer with an unblemished service record and top-security clearance who was forced to leave the navy after admitting that he had engaged in homosexual relations with a recruit.² The court was the United States Court of Appeals for the District of Columbia Circuit. Judge Robert H. Bork, a Reagan appointee and well-known proponent of judicial restraint,³ rejected Dronenburg's claim that the armed forces' policy mandating discharge of homosexuals violated his constitutional rights to privacy and equal protection of the laws.⁴

Dronenburg's case was far from unique. Despite the official military policy that "there are no homosexuals in the military because homosexuality is not tolerated,"⁵ it is estimated that, by armed forces' standards, approximately thirty percent of all military personnel are homosexuals.⁶ Moreover, between two and three thousand service members are discharged each year for homosexuality.⁷

However, Dronenburg's was more than a homosexual discharge case: despite the magnitude of the problem, few discharge cases make the front page of the *New York Times*. What attracted media attention was the language and tone of Judge Bork's ruling. Characterized as "the broadest and most ringing repudiation [of the view] that laws penalizing homosexual conduct are unconstitutional,"⁸ the *Dronenburg* decision is undoubtedly a setback for the

1. N.Y. Times, Aug. 18, 1984, at 1, col. 2.

2. *Id.* at 1, col. 2 and at 7, col. 6.

3. *Id.* at 7, col. 6.

4. *Dronenburg v. Zech*, 741 F.2d 1388, *reh'g denied*, 746 F.2d 1579 (1984).

5. Heilman, *The Constitutionality of Discharging Homosexual Military Personnel*, 12 COLUM. HUM. RTS. L. REV. 191, 192 n.18 (1980).

6. Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent Decisions Affecting Sexual Preference Discrimination in the Military*, 27 VILL. L. REV. 351, 353 (1982).

7. *Id.* at 352.

8. N.Y. Times, Aug. 18, 1984, at 7, col. 6.

gay and lesbian rights movement. But beyond this, the *Times* found the decision to be a frontal attack on the right to privacy. Bork's opinion expressed an unconcealed disdain "for the logic in the Supreme Court's 'right of privacy rulings' including those that struck down state laws banning abortion and restricting sale and use of contraceptives."⁹ Thus, the *Dronenburg* decision—a statement by an influential judge (Bork is often mentioned as a possible Reagan appointee to the United States Supreme Court)¹⁰ in a traditionally powerful court—stands as an indication of future problems for litigants seeking to use right-to-privacy arguments.

The right to personal privacy is a controversial and vulnerable right. Although the concept of privacy as a right has been a subject for legal commentators for almost a century,¹¹ the emergence of privacy as an independent constitutional right is a relatively recent development. The leading case establishing the right to privacy was, of course, *Griswold v. Connecticut*¹²—the case in which seven Supreme Court justices used the right to privacy as the basis for striking down a statute that prohibited the use of contraception by married persons. Confusion and dissension about the right to privacy—its source, its nature, and its limits—started among its original proponents. The seven justices who found that the Constitution included a right to privacy could not agree as to its source and produced four separate opinions, each with a different theory of privacy. Justice Douglas, delivering the opinion of the Court, found the right to privacy not in any explicit clause of the Constitution, but rather in the "penumbras" (or zones of privacy) created by specific guarantees contained in the first, third, fourth, fifth, and ninth amendments.¹³ Douglas specifically rejected the fourteenth amendment due process clause as a source for the right to privacy.¹⁴ Justice Clark signed Douglas's opinion. Justice Goldberg, in a concurrence signed by Chief Justice Warren and Justice Brennan, joined Douglas's opinion and the judgment, thereby giving it a majority of five.¹⁵ While agreeing with Douglas's analysis, Goldberg

9. N.Y. Times, Aug. 23, 1984, at B8, col. 3.

10. N.Y. Times, Aug. 18, 1984, at 7, col. 6; Dworkin, *Reagan's Justice*, N.Y. Rev. Books, Nov. 8, 1984, at 27, col. 1.

11. See, e.g., the classic law review article on privacy, Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

12. 381 U.S. 479 (1965).

13. *Id.* at 484.

14. *Id.* at 481-82.

15. *Id.* at 486.

wrote a separate opinion stressing the importance of the ninth amendment.¹⁶ For Goldberg, the ninth amendment¹⁷ was proof that the liberties protected by the fourteenth amendment due process clause include fundamental personal rights not enumerated in the first eight amendments.¹⁸ Goldberg found privacy to be just such a fundamental right.¹⁹ Justice Harlan, concurring in the judgment but not in Douglas's majority opinion, found the right to privacy directly in the fourteenth amendment, without resorting to the specific guarantees of the Bill of Rights, because it implicates values "implicit in the concept of ordered liberty."²⁰ Justice White, in a separate concurrence with the judgment only, put forth a second due process analysis.²¹

Griswold has come to stand for right to privacy; the Court has reaffirmed the existence of the right and relied on *Griswold* as precedent in more than a dozen cases,²² including *Roe v. Wade*,²³ where the right to privacy was held to be the source of a woman's right to an abortion. However, neither these Supreme Court decisions nor the lower-court decisions that follow them depend exclusively on Justice Douglas's opinion. All four *Griswold* opinions, with their different privacy theories, continue to be cited, sometimes in conjunction with each other, sometimes as if they were all interchangeable.²⁴ Justice Harlan's theory, which makes the standard for the right to privacy essentially identical to that for substantive due process, has been particularly influential, even though a majority of five justices specifically rejected this basis for the right to privacy.²⁵

16. *Id.* at 487.

17. 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."

18. *Griswold*, 381 U.S. at 487-93.

19. *Id.* at 494.

20. *Id.* at 500 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

21. *Id.* at 502.

22. *Loving v. Virginia*, 388 U.S. 1 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Bodie v. Connecticut*, 401 U.S. 371 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

23. 410 U.S. 113 (1973).

24. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (quoting *Griswold*, 381 U.S. at 481), 448-49 (quoting *id.* at 498 (Goldberg, J., concurring)), 449 (citing *id.* at 505-07 (White, J., concurring)).

25. In *Roe v. Wade*, 410 U.S. 113 (1973), a majority of the Court adopted Harlan's view

The right to privacy has been much discussed and analyzed. In the twenty years since *Griswold*, pro-privacy commentators have tried to build a stronger foundation for the right, thereby encouraging courts to use it more expansively.²⁶ Much of this commentary optimistically assumes that courts will remain sympathetic to the expansion of personal rights and that constitutional protection will ultimately be given to consensual adult sex.²⁷ The *Dronenburg* decision—which states that homosexual conduct would be protected only if “any and all private sexual behavior [were protected] . . . a conclusion we are unwilling to draw”²⁸—challenges those assumptions.

The *Dronenburg* case exposes the shortcomings of a civil libertarian approach that leaves too much to a court's discretion and good will. The far-reaching language and aggressive tone of Judge Bork's opinion send a warning that conservative courts will not expand—and may even roll back—the limits of the right to privacy. For those who would seek to find constitutional protection for homosexuals, sexual freedom, and personal privacy generally, *Dronenburg* signals a time for rethinking right-to-privacy arguments and litigation strategies. *Dronenburg* offers little solace to right-to-privacy proponents. Instead, it gives them some direction in reformulating their arguments and strategies: After *Dronenburg*, can a homosexual litigant successfully argue that the right to privacy protects his or her consensual sexual behavior? Given the reality of facing a conservative court, what litigation situations might offer such a person the best chance for success? Which arguments—those based on penumbral²⁹ or substantive due process³⁰

when it found a right to privacy “broad enough to encompass a woman's decision whether or not to terminate her pregnancy” in the “Fourteenth Amendment's concept of personal liberty and restrictions upon state action.” *Id.* at 153. Even Justice Stewart, one of the *Griswold* dissenters, was finally won over by, and cited at length from, Harlan's “thorough and thoughtful” discussion of substantive due process. *Id.* at 168 n.3, 169 (Stewart, J., concurring)(citing *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting)).

26. See Richards, *Sexual Autonomy and the Constitutional Right to Privacy*, 30 HASTINGS L.J. 957 (1979).

27. See Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83, 98-100 (1980), which surveys forty-one law review articles and notes published between 1965 and 1979, exploring the relationship of the right to privacy and consensual adult sex. Only three of these works are negative or equivocal on the issue of whether the right to privacy extends to “adult sexual freedom.” *Id.* at 98.

28. *Dronenburg*, 741 F.2d at 1396.

29. In this note, the “penumbral” theory of right to privacy is that expressed in Justice Douglas's majority opinion in *Griswold*, unsupplemented by any material from that decision's concurring opinions. For Justice Douglas, the sources of the right to privacy are the

theories—make the best use of the *Griswold* legacy in order to ex-

penumbras, or buffer zones, that surround the specific constitutional guarantees of the first, third, fourth, fifth, and ninth amendments and protect those guarantees from erosion. *Griswold*, 381 U.S. at 484. Although not mentioned in the Constitution, privacy is one of the "peripheral rights" without which "the specific rights would be less secure." *Id.* at 482-83.

Douglas's characterization of penumbral rights as peripheral does not relegate them to marginality or minimize their importance. Rather, penumbral rights define the outermost boundaries of the specific constitutional guarantees. Penumbras are extensions of the rights themselves: "[their] existence is necessary in making the express guarantees fully meaningful." *Id.* at 483.

To illustrate how penumbras operate, Douglas used a series of first amendment examples. Although the specific grants of the first amendment are limited to freedoms of religion, speech, press, and assembly, Douglas noted that the Court in its previous decisions had recognized that the amendment provided much more expansive protection. *Id.* at 482. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought and freedom to teach—indeed the freedom of the entire university community." *Id.* (citations omitted). All these penumbral rights and freedoms are necessary so that the "State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* Likewise, the Court had recognized a first amendment penumbral right of association, and that right is similarly expansive: it protects "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." *Id.* at 483 (citing *NAACP v. Button*, 371 U.S. 415, 430-31 (1962)).

Douglas detailed only the first amendment penumbras, but made it clear that each of the amendments mentioned provides a separate basis for some aspect of privacy. Of particular importance are the fourth amendment's penumbral rights of "privacy and repose," *id.* at 485, which go beyond the specific grant of security from unreasonable searches and seizures and protect "against all government invasions 'of the sanctity of [one's] home and the privacies of life.'" *Id.* at 484 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). What makes the idea of policing the bedroom so offensive is not the "breaking of . . . doors, and the rummaging of . . . drawers," rather it is the violation of the right to privacy—"the invasion of the right of personal security [and] personal liberty [as well as] private property." *Id.*

Douglas's examples illustrate that, although the scope of penumbral rights is limited because they attach only to the specific guarantees of the Bill of Rights, nonetheless these limits are to be drawn expansively and these rights are to be interpreted broadly to effectuate the policies and concerns underlying the specific guarantees. Although Douglas's opinion ends with a eulogy to marriage ("a coming together . . . intimate to the degree of being sacred," *id.* at 486), his analysis does not limit the right to privacy to marital, or even traditional, relationships. The nature of penumbral rights, like that of the enumerated rights to which they attach, is libertarian and countermajoritarian. Their underlying purpose is to protect those in the greatest need—unpopular groups and individuals, minorities, those who come under criminal suspicion.

Thus, for Justice Douglas (and for the purpose of this note), to argue in favor of a penumbral right to privacy is to assume (1) that the source of the right is the penumbras of the first, third, fourth, fifth, and ninth amendments, (2) that the scope of the right is limited by what is necessary to protect and effect the specific guarantees of those amendments, and (3) that the nature of the specific guarantees and the right to privacy itself is expansive, libertarian, and often countermajoritarian.

30. In this note, *substantive due process* refers to what is probably the most influential modern formulation of that doctrine—that developed by Justice Harlan in his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting) and his concurrence in *Griswold v. Connecticut*, 381 U.S. 479 (1964) (Harlan, J., concurring). Justice Harlan believed that

pand the right to privacy to cover sexual activities and identities?

Dronenburg is the beginning, not the end, of this inquiry. Although *Dronenburg*—and Judge Bork's opinion—have been the focus of media attention and critical commentary,³¹ other courts have contemporaneously ruled on whether the right to privacy protects private consensual homosexual acts. While *Dronenburg* was being drummed out of the navy with loud fanfare, a quiet revolu-

the fourteenth (and fifth) amendment guarantee that persons cannot be deprived of "life, liberty, or property, without due process of law" is more than just a procedural safeguard. Because a legislature using "even the fairest possible procedure" is capable of "destroy[ing] the enjoyment of all three," *Poe*, 367 U.S. at 541, due process, to be a meaningful guarantee, must also protect some substantive rights from government encroachment. Harlan defined such substantive rights, worthy of due process protection, as "fundamental." *Id.* These fundamental rights are not limited to the enumerated rights of the first eight amendments; they are "more general and inclusive than the specific prohibitions" of the Bill of Rights. *Id.* at 542.

Harlan was eager to dispel his colleagues' expressed fears that recognition of somewhat amorphous fundamental rights would encourage judges to inject their personal values into constitutional interpretation. *Griswold*, 381 U.S. at 500-02. Addressing this concern, Harlan set outer limits for fundamental rights: such rights must reflect "basic values 'implicit in the concept of ordered liberty.'" *Id.* at 500 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Ordered liberty is the historical balance that has been struck between the "liberty of the individual . . . and the demands of organized society." *Poe*, 367 U.S. at 542. A court is not free to change that balance at its own will; it must rely on choices made by the societal and political order, that is, on received tradition. *Id.* "A decision of this Court which radically departs from [tradition] could not long survive, while a decision which builds on what has survived is likely to be sound." *Id.*

If the conservative and majoritarian nature of Harlan's approach is muted in his elucidation of fundamental rights, it resonates more clearly in his discussion of the right of married persons to use contraceptives. Harlan sharply distinguished between the intimacies of husband and wife, "an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected," *id.* at 553, and the intimacies of adulterers, fornicators, and homosexuals, "which the law has always forbidden and which can have no claim to social protection." *Id.* For Harlan, it is not the quality of the intimacy itself that protects it as a matter of fundamental right, rather it is the context of the intimacy, which is one traditionally sanctioned by society and recognized by law, that merits protection.

Thus, for Justice Harlan (and for the purpose of this note), to argue that the right to privacy derives from substantive due process is to assume (1) that the source of the right is the fourteenth amendment, (2) that the scope of the right is limited by "basic values implicit in the concept of ordered liberty," and (3) that the nature of those basic values and the right to privacy itself is traditional, conservative, and majoritarian.

31. See, e.g., Dworkin, *supra* note 10; Note, *Dronenburg v. Zech: Judicial Restraint or Judicial Prejudice?*, 3 YALE L. & POL'Y REV. 245 (1984); Note, *Dronenburg v. Zech: The Right of Privacy and Its Future*, 14 CAP. U.L. REV. 313 (1985); Note, *Dronenburg v. Zech: Sexual Preference Discrimination Sanctioned in the Name of Judicial Restraint*, 5 PACE L. REV. 847 (1985); Note, *Dronenburg v. Zech: The Wrong Case for Asserting a Right of Privacy for Homosexuals*, 63 N.C.L. REV. 749 (1985); Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and Dronenburg v. Zech*, 10 U. DAYTON L. REV. 767 (1985).

tion has been occurring in right-to-privacy jurisprudence. With aid from and coordination by gay and lesbian advocacy groups,³² homosexuals have been challenging state sodomy laws on privacy grounds and meeting with some success.³³ In November 1985 the Supreme Court agreed to review one such case.³⁴ Thus, in its 1986 Term, the Supreme Court has an opportunity to resolve whether the right to privacy protects homosexual (or any sexual) conduct, though it is by no means certain that the Court will do so.³⁵ Whatever the Court does, the appearance of a body of privacy decisions provides an opportunity to explore the issue as it has evolved thus far, both to evaluate past efforts and to suggest future directions for privacy analysis.

This note uses the *Dronenburg* decision to reveal the pitfalls of relying on certain kinds of right-to-privacy arguments. It contrasts the right-to-privacy arguments in *Dronenburg* with those in other cases—in the military-discharge and sodomy-statute contexts—where litigants have successfully persuaded courts that the right to privacy protects private consensual homosexual behavior.

32. Lambda Legal Defense and Education Fund filed an amicus brief in *People v. Onofre*, 51 N.Y.2d 476, 481, 415 N.E.2d 936, 937, 434 N.Y.S.2d 947, 948 (1980). National Gay Rights Advocates, the Texas Human Rights Foundation, and Lambda each filed amicus briefs in three appellate reviews of *Baker v. Wade*, 743 F.2d 236, 238 (5th Cir. 1984); 769 F.2d 289, 290 (5th Cir. 1985) (en banc); 774 F.2d 1285, 1286 (5th Cir. 1985) (denial of rehearing en banc). Lambda, as part of its Ad Hoc Task Force on Sodomy Law Reform, coordinated the filing of seven amicus briefs to the Supreme Court in *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), cert. granted, 54 U.S.L.W. 3292 (Nov. 5, 1985) (No. 85-140). 1986 LESB. GAY L. NOTES 13-14. Furthermore, the Lambda Task Force on Sodomy Law Reform is currently coordinating and participating in sodomy statute challenges in Louisiana, Nevada, and Arizona. 1985 LESB. GAY L. NOTES 1, 40-41, 45.

33. See, e.g., *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981); *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), cert. granted, 54 U.S.L.W. 3292 (Nov. 5, 1985) (No. 85-140).

34. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), cert. granted, 54 U.S.L.W. 3292 (Nov. 5, 1985) (No. 85-140). The Supreme Court also currently has before it a writ of certiorari in a second sodomy statute challenge. *Baker v. Wade*, 743 F.2d 236 (5th Cir. 1984), rev'd on rehearing 769 F.2d 289 (5th Cir. 1985) (en banc), petition for cert. filed 54 U.S.L.W. 3517 (Feb. 11, 1986) (No. 85-1225).

35. The Supreme Court has had several opportunities to decide whether the right to privacy protects homosexual conduct and has each time declined to do so. Instead the Court has disposed of cases containing the issue by giving summary affirmation, *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd mem., 425 U.S. 901 (1976); by refusing to grant certiorari, *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981); even by changing its mind about granting certiorari after hearing oral arguments, *New York v. Uplinger*, 58 N.Y.2d 936, 447 N.E.2d 62, 460 N.Y.S.2d 514, cert. granted, 464 U.S. 812 (1983), cert. dismissed, 104 S. Ct. 2332 (1984). Both *Hardwick* and *Baker* present other issues that the Court can address if it chooses to get sidetracked away from privacy.

Finally, it examines the right-to-privacy questions and arguments currently before the Supreme Court.

I. *Dronenburg v. Zech*: DRONENBURG'S ARGUMENT

At the time he received an administrative discharge, James L. Dronenburg had served in the navy for nine years as a linguist and cryptographer and had an unblemished service record.³⁶ The navy began investigating Dronenburg after a nineteen-year-old seaman made sworn statements that Dronenburg had repeatedly engaged in homosexual acts.³⁷ The navy then formally charged Dronenburg with misconduct under SEC/NAV Instruction 1900.9C (20 Jan. 1978) which provides that "[a]ny member [of the navy] who . . . engages in homosexual acts shall normally be separated from the naval services."³⁸ Before a navy administrative discharge board, Dronenburg admitted engaging in homosexual acts in a navy barracks; the board subsequently voted to discharge him for misconduct.³⁹ The secretary of the navy reviewed Dronenburg's case, upheld the board's decision, but upgraded his discharge to honorable.⁴⁰ Dronenburg filed suit in district court, claiming that the navy policy mandating discharge for homosexuals violated both his constitutional right to privacy and equal protection of the laws.⁴¹ The district court granted a summary judgment to the navy on the grounds that the Constitution did not protect private, consensual, homosexual conduct.⁴² Judge Bork, writing for a three-member panel of the United States Court of Appeals for the District of Columbia Circuit, affirmed this decision.⁴³

Dronenburg's reason for challenging the constitutionality of navy regulation 1900.9C was a simple (and at least in part a pragmatic) one. He was widely known—even prior to the discharge hearing—to be a homosexual,⁴⁴ and he acknowledged that he had engaged in homosexual acts at the navy barracks.⁴⁵ Navy regulations in operation at the time of Dronenburg's discharge allowed

36. *Dronenburg*, 741 F.2d at 1389.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Appellant's Opening Brief on Appeal at 4, *Dronenburg*.

45. *Dronenburg*, 741 F.2d at 1389.

an individual who had committed a homosexual act to be retained only in the absence of a "proclivity to repeat such an act."⁴⁶ Thus Dronenburg could argue neither that the regulation was inapplicable to him nor that there were mitigating circumstances. Dronenburg wanted the opportunity to demonstrate that the regulation was unfair to him and to other homosexuals, not because sexuality is irrelevant to retention in the armed forces, but because other factors—personal characteristics, abilities, and prior service record—were equally relevant.⁴⁷ He wanted the navy to have to show that his homosexuality adversely affected his job performance, and he wanted his case judged on its individual merits⁴⁸ rather than foreclosed by the navy's assertion that "The presence of [a homosexual] . . . in a military environment seriously impairs combat readiness, efficiency, security and morale."⁴⁹

At his navy discharge hearing, Dronenburg had tried unsuccessfully to challenge the navy's assertions about the necessity for its homosexual discharge policy.⁵⁰ In reviewing his case, the federal courts would apply a deferential rational-basis standard and thus refuse to probe the navy's assertions unless Dronenburg was able to establish a reason for heightened scrutiny of the navy's discharge policy. Therefore, he argued that if his consensual sexual behavior was constitutionally protected by the right to privacy or by equal protection, such behavior could not be infringed without compelling justification, the highest level of scrutiny.⁵¹ Ultimately, Judge Bork rejected both the privacy and equal protection arguments, applied the rational-basis test, and upheld the navy regulation because it advanced the legitimate end of maintaining discipline and morale, which are "almost certain to be harm[ed]" as the result of homosexual conduct.⁵²

Both Dronenburg's brief and Bork's opinion focused primarily on the right-to-privacy issue.⁵³ Dronenburg argued that whether

46. Appellant's Opening Brief on Appeal at 7 n.9, *Dronenburg* (quoting SEC/NAV Instruction 1900.9C).

47. See *id.* at 4-6.

48. See *id.* at 11-12.

49. *Id.* at 7 (quoting SEC/NAV Instruction 1900.9C).

50. *Id.* at 6 n.8.

51. *Id.* at 12-13, 31-32.

52. 741 F.2d at 1398.

53. Dronenburg's equal protection argument, Appellant's Opening Brief on Appeal at 25-30, *Dronenburg*, will not be discussed here. Without explicitly advocating that homosexuals constitute a suspect class, Dronenburg argued that "[h]omosexuals as a class share

the navy should be able to exclude those who engaged in homosexual acts was "entirely controlled by the line of Supreme Court decisions which have established a protected zone of privacy interests."⁵⁴ Included in these interests is an "individual's right to privacy in matters touching adult sexuality."⁵⁵ Through this "line of . . . decisions," beginning with *Griswold*, runs a "thread of principle: that the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her body" without a compelling state interest and then only by the least restrictive means.⁵⁶

Before following his thread of principle through specific right-to-privacy cases, Dronenburg attempted to locate its source. This first question is critical because privacy is not mentioned in the Constitution. Dronenburg chose the broadest source for privacy—the constitutional system itself, which, he argued, depends on the concept of limited government, the idea that "government may not needlessly interfere with personal liberty."⁵⁷ He termed "unfortunate" Justice Douglas's description of privacy as a penumbral right: the description tends to make privacy into "a constitutional stepchild of its due process, free speech and equal protection brethren,"⁵⁸ whereas "privacy, properly understood, is not a derivative or subsidiary right but is a *primary* constitutional principle from which other enumerated guarantees are derived."⁵⁹ This description of privacy, especially its emphasis on the concept of personal liberty and its aversion to the concept of penumbral rights, looks suspiciously like a substantive due process analysis of the type suggested by Justice Harlan's *Griswold* concurrence rather than the fundamental right approach endorsed by the *Griswold* majority.⁶⁰

many characteristics with groups which have received heightened solicitude under the equal protection clause," *id.* at 26, and "constitute a discrete minority which has limited political power and has historically been the object of both popular prejudice and disfavored treatment by the government." *Id.* at 26-27. The navy regulation, which treats homosexuals differently from heterosexuals, ought therefore be the subject of "searching inquiry" for "potentially invidious discrimination." *Id.* at 28.

54. Appellant's Opening Brief on Appeal at 13, *Dronenburg*.

55. *Id.*

56. *Id.* at 15.

57. *Id.* at 17.

58. *Id.*

59. *Id.*

60. Dronenburg, however, did not rely on Justice Harlan's *Griswold* concurrence. He cited only two Supreme Court opinions in support of his proposition (both from dissents, in cases that preceded *Griswold*): Justice Douglas's statement in *Poe v. Ullman*, 367 U.S. 497,

Having suggested a source for the privacy principle, Dronenburg then tried to trace the thread of that principle through selected Supreme Court right-to-privacy cases beginning with *Griswold*. In all, six cases were briefly mentioned; two of these were disposed of in one footnote. There is little analysis of the cases; each is simply presented as illustrative of one aspect of the larger, more comprehensive right. For example, the *Griswold* decision is based on the "right to marital use of contraceptives and the more generalized right to privacy as necessarily implied by the values embodied in the more explicitly stated constitutional guarantees."⁶¹ This was also Dronenburg's only reference to Douglas's theory of penumbral rights, which based privacy on emanations from the first, third, fourth, fifth, and ninth amendments.

Other cases Dronenburg cited were *Loving v. Virginia*,⁶² *Stanley v. Georgia*,⁶³ *Eisenstadt v. Baird*,⁶⁴ *Roe v. Wade*,⁶⁵ and *Carey v. Population Services International*.⁶⁶ For Dronenburg, *Loving*, in which the Court invalidated a state ban on interracial marriage, stood for the "privacy right to choose a marital partner";⁶⁷ while *Roe* represented recognition of a privacy right in a "woman's choice to have an abortion."⁶⁸ In *Stanley*, the Court set aside a conviction for private possession of obscene material and accepted the plaintiff's "'right to satisfy his intellectual and emotional needs in the privacy of his own home'" as another facet of the general right to privacy.⁶⁹ Dronenburg highlighted that the *Stanley* Court did not use the asserted immorality of the plaintiff's behavior to deny that behavior constitutional protection.⁷⁰ In *Eisenstadt*, the Court struck down a state statute prohibiting the distribution of contraceptives to unmarried persons and clarified that the right to privacy protected individuals in their fundamental de-

521 (1961), that the right to privacy "emanates from the totality of the constitutional scheme under which we live"; and Justice Brandeis's famous description of the "right to be let alone" in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), as "the most comprehensive of rights and the right most valued by civilized men." Appellant's Opening Brief on Appeal at 17, *Dronenburg*.

61. *Id.* at 18.

62. 388 U.S. 1 (1967).

63. 394 U.S. 557 (1969).

64. 405 U.S. 438 (1972).

65. 410 U.S. 113 (1973).

66. 431 U.S. 678 (1977).

67. Appellant's Opening Brief on Appeal at 18 n.20, *Dronenburg*.

68. *Id.*

69. *Stanley*, 394 U.S. at 565.

70. Appellant's Opening Brief on Appeal at 19, *Dronenburg*.

cision-making, not merely the marital relationship.⁷¹ To Dronenburg, this signified that the privacy right was not confined to individuals in state-sanctioned relationships.⁷² Finally, Dronenburg cited *Carey* for the proposition that the Supreme Court had not yet set the "outer limits" of the right to privacy.⁷³ He concluded that the foregoing cases demonstrated that the line should be drawn expansively enough to include "intimate personal decisions regarding consensual adult sexual conduct."⁷⁴ To further bolster support for this proposition, Dronenburg quoted from two dissenting opinions in federal-court cases, cited four law review articles and one book, and cited, without analysis, favorable holdings from one federal and two state court cases.⁷⁵ He then reiterated two right-to-privacy themes that were most favorable to this interpretation. First, it is the "intimate and highly personal" nature of sexuality itself—not the institution of marriage—that calls forth the constitutional right to privacy.⁷⁶ And second, the right to pri-

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

72. Appellant's Opening Brief on Appeal at 19, *Dronenburg*.

73. *Id.*

74. *Id.* at 19-20.

75. *Id.* at 20-21 (quoting *Miller v. Rumsfeld*, 647 F.2d 80, 85-86 (9th Cir. 1981) (Norris, J., dissenting) and *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1203 (E.D. Va. 1975) (Merhige, J., dissenting); citing Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Bazelon, *Probing Privacy*, 12 GONZ. L. REV. (1977); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974); J. ELY, *DEMOCRACY AND DISTRUST* 162-64 (1980); *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980)).

76. Appellant's Opening Brief on Appeal at 22, *Dronenburg* (quoting Judge Merhige's opinion in *Lovisi v. Slayton*, 363 F. Supp. 620 (E.D. Va. 1973)). The entire text used by Dronenburg was:

It is not marriage vows which make intimate and highly personal the sexual behavior of human beings. It is, instead, the nature of sexuality itself or something intensely private to the individual that calls forth constitutional protection. While the condition of marriage would doubtless make more difficult an attempt by government to justify an intrusion upon sexual behavior, this condition is not a prerequisite to the operation of the right of privacy.

Id. (quoting *Lovisi*, 363 F. Supp. at 625). He also reiterates Justice Brennan's quote from *Eisenstadt*:

[T]he married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. (quoting *Eisenstadt*, 405 U.S. at 453).

vacy protects even those activities such as abortion and extramarital sex that run counter to traditional morality.⁷⁷

Assuming the appeals court accepted all of the above, Dronenburg faced one final obstacle: the district court's reliance on *Doe v. Commonwealth's Attorney*.⁷⁸ In *Doe*, the Supreme Court summarily affirmed a district-court order denying injunctive and declaratory relief to homosexuals who had challenged Virginia's sodomy statute.⁷⁹ Dronenburg argued that by affirming *Doe* the Supreme Court did not endorse the idea that private consensual homosexual activity was not protected by the right to privacy.⁸⁰ Instead, Dronenburg argued that a summary affirmation without any rationale is of limited precedential value: it should stand only as an endorsement of the lower court's result, not of its reasoning.⁸¹ This interpretation is supported by Justice Brennan's assertion in the plurality opinion (joined by three other justices) in *Carey* that "the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."⁸² Dronenburg ended by citing examples of other courts that have refused to accept *Doe* as controlling on this issue.⁸³

Before turning to Judge Bork's opinion, the salient features of Dronenburg's appellate brief can be identified. First, Dronenburg apparently relied on substantive due process as the primary constitutional source for the right to privacy, despite the fact that substantive due process is a difficult standard to meet, often turning on traditional (and conservative) mores. Second, Dronenburg argued for a right of privacy comprehensive enough to encompass "an individual's freedom to control intimate personal decisions regarding his or her own body,"⁸⁴ in effect a broad appeal to principle rather than a clearly argued explication and analysis of the relevant case law. By moving to the highest level of generality,

77. Appellant's Opening Brief on Appeal at 23, *Dronenburg* (citing *Roe* and *Eisenstadt*).

78. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

79. *Doe*, 425 U.S. at 901.

80. Appellant's Opening Brief on Appeal at 23, *Dronenburg*.

81. *Id.* at 24.

82. *Id.* at 25 (quoting *Carey*, 431 U.S. 678, 694 n.17 (1977)).

83. *Id.* at 25 (citing *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980); *Baker v. Wade*, 553 F.Supp. 1121 (N.D. Tex. 1982)).

84. *Id.* at 15.

Dronenburg attempted to allow space for the court to create the most expansive privacy rights; the court declined his invitation.

II. *Dronenburg v. Zech*: JUDGE BORK'S OPINION

Judge Bork's opinion is expansive, but not in the way Dronenburg intended. Not only did Bork reject Dronenburg's arguments, but he went beyond what was necessary to decide the case, engaging in what four of the circuit judges reviewing the decision for possible rehearing en banc characterized as a "twelve-page attack on the right of privacy"⁸⁵ and an exercise in "general spring cleaning of constitutional law."⁸⁶ In fact, Bork's opinion is neither judicious nor judicial. Its tone is much more that of an aggressive advocate than of an impartial judge. Bork took each of Dronenburg's arguments in turn and provided the corresponding counterarguments. There is no weighing of competing interests or principles (the government's brief is never cited or mentioned). Bork's dual purpose seemed to be to decimate Dronenburg's argument and recast an entire body of privacy law in his own terms.

Bork attacked Dronenburg's argument—that the right to privacy protected homosexual conduct—on two fronts. First, he argued that the issue was already settled, that the Supreme Court had "expressly disclaimed any such sweep" for the right of privacy.⁸⁷ In support of this proposition Bork cited Justice Harlan's dissent in *Poe v. Ullman*⁸⁸ and the Supreme Court's summary affirmation of *Doe v. Commonwealth's Attorney*.⁸⁹ Bork's reliance on *Poe* is odd. Harlan's dissent (which Bork does not even quote, giving instead only a page reference) states his belief that the right to privacy, under a substantive due process analysis, need not cover "[a]dultery, homosexuality and the like . . . intimacies which the law has always forbidden and which can have no claim to social protection."⁹⁰ Bork urged that Harlan's view was "adopted in *Griswold*,"⁹¹ but provided no rationale as to why this twenty-two-year-

85. *Dronenburg v. Zech*, 746 F.2d 1579, 1581 (1984) (Robinson, C.J., dissenting from denial of suggestion to hear the case en banc. Robinson was joined by Judges Wald, Mikva, and Edwards.).

86. *Id.* at 1580.

87. *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (1984).

88. *Id.* (citing 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

89. *Id.* (citing 425 U.S. 901 (1976) *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975)).

90. *Poe*, 367 U.S. at 553.

91. *Dronenburg*, 741 F.2d at 1391.

old dissent dictum should control over all subsequent right-to-privacy decisions. Bork's use of *Doe* is controversial in light of commentary challenging *Doe's* precedential value.⁹² Even Bork acknowledged the possibility that *Doe* was a "somewhat ambiguous precedent."⁹³ Bork did not respond to Dronenburg's suggestion that the *Carey* footnote, asserting that the Supreme Court had not ruled on whether the Court protects private consensual sexual behavior, should control over *Doe*.⁹⁴

Bork then proceeded to his second line of attack, that the particular right-to-privacy cases cited by Dronenburg were not sufficiently broad to encompass a right to private homosexual consensual acts. According to Bork, each Supreme Court right-to-privacy case yielded only a narrow fact-specific decision. Thus *Griswold* and *Loving* stand only for the sanctity of marriage.⁹⁵ *Eisenstadt* and *Roe* stand only for the right to decide whether to beget or bear a child.⁹⁶ Bork criticized the Supreme Court for creating these rights not explicitly granted in the Constitution⁹⁷ and complained that the Court has given no guidance to lower courts on the limits of these rights or how they are to be applied.⁹⁸ Because lower courts lack this guidance, Bork argued, they can only ask whether an activity falls into the protected categories on which the Supreme Court has already spoken. He listed these categories: "marriage, procreation, contraception, family relationships, and child rearing and education,"⁹⁹ and concluded that "[i]t need hardly be said that none of these covers a right to homosexual conduct."¹⁰⁰

Because homosexual conduct does not fall into any of the established categories, the only remaining question was whether there is a principle underlying these categories that is broad enough to also encompass homosexual conduct. Dronenburg had argued that "an individual's freedom to control intimate personal

92. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 943 (1978); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 *CORN. L. REV.* 563, 593 (1977); Note, *Due Process Privacy and the Path of Progress*, 1979 *U. ILL. L.F.* 469, 506 (1979).

93. *Dronenburg*, 741 F.2d at 1392.

94. See Appellant's Opening Brief on Appeal at 25, *Dronenburg* (quoting *Carey*, 431 U.S. at 694 n.17).

95. *Dronenburg*, 741 F.2d at 1392-93.

96. *Id.* at 1393-94.

97. *Id.* at 1396 n.5.

98. *Id.* at 1395.

99. *Id.*

100. *Id.* at 1395-96.

decisions regarding his or her own body"¹⁰¹ was just such a principle. The court agreed that such a principle would explain *Griswold* and its progeny, "but then so would many other, less sweeping principles."¹⁰² Bork stated that the only test that the United States Supreme Court has provided to decide whether a right ought to be protected is whether that right is "'fundamental' or 'implicit in the concept of ordered liberty.'"¹⁰³ Bork refused to conclude that the right to engage in homosexual conduct is a right of this kind.¹⁰⁴ The right to homosexual conduct could only be fundamental if the right to all private sexual behavior is fundamental—"a conclusion we are unwilling to draw."¹⁰⁵ Because the constitutionality of all private sexual behavior was not before the *Dronenburg* court, Bork's statement is dicta. But it indicates that Bork would apply a substantive due process standard to any activity seeking constitutional protection under a privacy rubric. Substantive due process is not only a difficult standard to meet, but arguably not the appropriate standard under *Griswold* and its progeny.

Judge Bork's somewhat disingenuous inability to perceive any principle in the right-to-privacy cases¹⁰⁶ is consistent with his theory that inferior federal courts have a limited role in developing "new" rights.¹⁰⁷ Bork believes that, although the "Supreme Court has decided that it may create new constitutional rights,"¹⁰⁸ lower courts ought refrain from doing so.¹⁰⁹ Instead, their role should be limited to deciding "whether the Supreme Court has created a right which, fairly defined, covers the case before us or . . . has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide."¹¹⁰ This is Bork's notion of what the court did in *Dronenburg*: it found that, "fairly defined"—that is, lacking specific direction from the Supreme

101. Appellant's Opening Brief on Appeal at 15, *Dronenburg*.

102. *Dronenburg*, 741 F.2d at 1396.

103. *Id.*

104. *Id.*

105. *Id.*

106. A critique of Bork's selective treatment of the privacy cases that *Dronenburg* cited as precedent is beyond the scope of this note. For this critique, see Saphire, *supra* note 31, at 780-94.

107. For a more complete discussion of Bork's jurisprudence, and in particular, his view of the role of inferior federal courts, see Saphire, *supra* note 31, at 802-08.

108. *Dronenburg*, 741 F.2d at 1396 n.5.

109. *Id.* at 1396.

110. *Id.* at 1396 n.5.

Court—the right to privacy cases did not cover consensual homosexual behavior.

On its face Bork's is a strikingly minimalist view, but a closer look reveals the underlying judicial hubris that provoked his colleagues on the District of Columbia Circuit to chide him that "[j]udicial restraint begins at home."¹¹¹ In his *Dronenburg* decision, Bork quoted (twice) Justice White's warning (from his dissent in *Moore v. City of East Cleveland*) that a court flirts with "illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."¹¹² Clearly Bork believes the Supreme Court privacy cases exemplify just such a dangerous flirtation. When the Supreme Court loses its head and gives out new rights, the lower courts—like trustees reining in a spendthrift—must act to halt the squandering of the constitutional trust. Thus, Bork's "limited" role would give lower courts (Bork) the power to ignore (and effectively veto) broad policy messages from the Supreme Court.¹¹³ But this exercise of power is couched in passive terms as an inability to "find [a] . . . constitutional right to engage in homosexual conduct" and a lack of "warrant to create one."¹¹⁴

One commentator places Judge Bork in the "originalist" school of constitutional scholarship,¹¹⁵ which holds that when interpreting the Constitution, "a court [ought] confine itself to the constitutional text read in light of the Framers' understanding of the words they used and supplemented by reference to values derivable from the constitutional structure."¹¹⁶ In *Dronenburg*, Bork himself states that "when in academic life, [he had] expressed the view that no court should create new constitutional rights;¹¹⁷ that is, rights must be fairly derived by standard modes of legal inter-

111. *Dronenburg*, 746 F.2d 1579, 1580 (Robinson, C.J., dissenting from denial of suggestion to hear case en banc, joined by Justices Wald, Mikva, and Edwards).

112. *Dronenburg*, 741 F.2d at 1396 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

113. Ironically, Bork argues that if inferior courts "begin to create new rights freely, the volume of decisions would mean that many would evade Supreme Court review." *Id.* at 1397.

114. *Id.*

115. *Saphire*, *supra* note 31, at 797.

116. *Id.* at 796.

117. Before his appointment to the federal bench, Bork was a faculty member at Yale Law School. For his "academic" views on constitutional interpretation, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971); and Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 *WASH. U.L.Q.* 695.

pretation from the text, structure, and history of the Constitution."¹¹⁸

Given Judge Bork's preferred mode of constitutional interpretation and his pronounced antipathy to privacy doctrine, it was perhaps irrelevant how *Dronenburg* argued that the Constitution protected his homosexual conduct. However, when arguing for right-to-privacy protection before a conservative bench more attentive to the policy directives of the Supreme Court and less extremely originalist than the panel that heard *Dronenburg*, the form of such arguments might make some difference. The word *privacy* does not appear in the text of the Constitution; nonetheless, one can argue that the right to privacy is in the structure and history of the document. But how best to enable an astigmatic court to see a constitutional right to privacy? A substantive due process theory,¹¹⁹ which looks to the broad principles of fairness, may be a less effective lens than a penumbral theory,¹²⁰ which looks to explicit guarantees in the Bill of Rights.

Each enumerated constitutional guarantee identifies an area of concern that its drafters and the courts have recognized as needing special protection. Thus, the first, third, fourth, fifth, and ninth amendments—which Justice Douglas identified as the sources of the right to privacy in *Griswold*—each provides an independent concrete base upon which to build privacy arguments. *Dronenburg* demonstrates the necessity of arguing these narrower, more specific, alternative doctrinal sources for the right to privacy. Sections III and IV of this note explore some of these arguments as they have appeared in other right-to-privacy cases where protection of sexual identities and behaviors have been at issue.

III. *Dronenburg* IN CONTEXT

In many ways the *Dronenburg* result is not surprising. Most homosexuals who have appealed their military discharges in federal courts have lost, regardless of the grounds for their appeals.¹²¹

118. *Dronenburg*, 741 F.2d at 1396 n.5 (emphasis added).

119. For an extended discussion of the source, nature, and scope of the substantive due process theory of privacy, see *supra* note 30.

120. For an extended discussion of the source, nature, and scope of the penumbral theory of privacy, see *supra* note 29.

121. See, e.g., *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) (discharge does not violate procedural due process, fifth amendment substantive due process, or equal protection); *Watkins v. United States Army*, 721 F.2d 687 (9th Cir. 1081)(equity principles

Courts traditionally have been extremely deferential to military decisions, especially those regarding military personnel.¹²² Right-to-privacy arguments are a relatively new addition to the small arsenal of legal theories that homosexuals have used to challenge their forced separation from the armed forces. At first glance, privacy appears to be an attractive ground for such challenges because recognition of consensual sexual behavior as a fundamental right should require courts to go beyond complete deference and instead scrutinize the reasons for the military's policy mandating exclusion of homosexuals. However, even prior to *Dronenburg*, the right to privacy had failed to prevent the discharge of armed service personnel who admitted (or were proved to have engaged in) homosexual acts. A major pre-*Dronenburg* case, *Beller v. Middendorf*,¹²³ further illustrates the special problems of using privacy theories in a military context as well as the reasons why discharge cases are a poor forum for right-to-privacy arguments.

The *Beller* court was the first court of appeals to be presented directly with whether the right to privacy protects homosexual activities of individuals in the military. The *Beller* decision resulted from consolidating appeals from three discharge cases decided by district courts in the Ninth Circuit.¹²⁴ Each of the three plaintiffs—Dennis Beller,¹²⁵ James Miller,¹²⁶ and Mary Saal¹²⁷—was,

do not estop the army from discharging a homosexual, even though the army knew about his sexual orientation for fourteen years prior to his discharge); *Hatheway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981) (discharge does not violate first amendment establishment clause); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (discharge does not violate procedural due process).

122. See, e.g., *Parker v. Levy*, 417 U.S. 733 (1974); *Orloff v. Willoughby*, 345 U.S. 83 (1953); *Dilley v. Alexander*, 603 F.2d 914 (D.C. Cir. 1979); *Pauls v. Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

123. 632 F.2d 788 (9th Cir. 1980).

124. *Id.*

125. Dennis Beller had served for fifteen years when the navy decided to upgrade his security clearance to top secret. In the process of a routine background investigation, the navy discovered that Beller had had "contacts with homosexual groups." 632 F.2d at 794. Beller was questioned by navy investigators and signed a document stating that he had engaged in sex with males, believed himself to be bisexual, and had frequented gay bars. *Id.* Beller was then separated from the navy with an honorable discharge based on unfitness. *Id.* at 795. He brought suit to enjoin the navy from discharging him involuntarily and to expunge his service record. *Id.*

126. James Miller had been in the service for seven years when he was investigated by the Naval Investigation Service (NIS) for reasons unrelated to homosexuality. 632 F.2d at 793. During an interview with NIS, he admitted that he had engaged in homosexual acts with Taiwanese nationals while stationed in Taiwan. *Id.* at 793-94. He was transferred to California, served for another year, and was given a security clearance. Then he was called before a hearing board to consider his discharge for reasons of homosexuality. *Id.* at 794.

like James Dronenburg, a member of the navy with a good service record. Each admitted engaging in homosexual acts; each received an administrative hearing and was ordered discharged.¹²⁸ In the consolidated appeal, the three challenged the constitutionality of the navy regulation and proceedings under which each had been discharged.¹²⁹

The *Beller* court treated the question of constitutionality of homosexual discharges as one involving interrelated procedural and substantive due process issues.¹³⁰ After eliminating the procedural due process issue by holding that the plaintiffs had neither a property¹³¹ nor liberty¹³² interest that warranted protection, the court nevertheless engaged in a truly strange, unprecedented form of hybrid due process analysis that demonstrates the lengths to which a court will go to avoid dealing directly with a difficult issue.

The *Beller* court acknowledged that the plaintiffs' constitutional attack was "based on the claim that the [homosexual] conduct prohibited by the [navy discharge] regulation was protected as an aspect of the fundamental right of privacy."¹³³ However, the court believed that it was not necessary "to address the question whether consensual private homosexual conduct is a fundamental right."¹³⁴ According to the *Beller* court, the traditional two-stage analysis—Is this a fundamental right? If so, give heightened scrutiny to the governmental action—was an "all-or-nothing . . . ap-

The hearing board voted two to one to retain him. He was examined by a navy medical officer who found that "despite [his] homosexual episodes, [Miller] did not appear to be a homosexual" and recommended his retention. *Id.* However, after his case was reviewed by the naval hierarchy, he was finally discharged for misconduct as the result of his in-service homosexual acts. *Id.* Miller sued to have the navy restrained from discharging him or, alternatively, to have his discharge upgraded to honorable. The court granted summary judgment to the navy, but stayed his discharge pending appeal. *Id.*

127. Mary Saal enlisted, received training as an air traffic controller, and entered into a three-year contract with the navy. 632 F.2d at 792-93. After fourteen months and a navy investigation, she signed a statement saying that she had had homosexual relations with a navy co-worker. *Id.* Saal had an administrative hearing at which she admitted that her homosexual relationship was ongoing and that she intended to continue it. *Id.* at 793. She then filed suit to enjoin the navy from discharging her. While the court proceedings were continuing, her enlistment contract ran out and she was discharged. She then sued to reenlist. *Id.*

128. 632 F.2d at 792.

129. *Id.*

130. *Id.* at 801.

131. *Id.* at 805.

132. *Id.* at 807.

133. *Id.*

134. *Id.*

proach" that was insufficiently complex.¹³⁵ Instead, the court used a different analysis, which it believed had been endorsed by the United States Supreme Court.¹³⁶ This analysis involved a "case-by-case balancing" of the individual's interest, the importance of the government's interest, the degree of government infringement on the individual, and the sensitivity of the government to the tailoring of alternative means to achieve its interests.¹³⁷ Having laid out this formula in lieu of a fundamental rights analysis, the *Beller*

135. *Id.* at 807 n.19.

136. *Id.* at 807.

137. *Id.* As support for this approach, the *Beller* court cited *Zablocki v. Redhail*, 434 U.S. 374 (1978); Justice Stewart's concurrence in *Zablocki*, 434 U.S. at 396; Justice Harlan's concurrence in *Williams v. Illinois*, 399 U.S. 235, 260 (1970); and Justice Powell's plurality opinion in *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977). *Id.*

Judge Norris, dissenting from the Ninth Circuit's rejection of the suggestion to rehear *Beller* en banc, challenged the court's reliance on each of these sources:

First, the panel cites *Zablocki v. Redhail*. *Zablocki*, however, provides no support whatsoever for a balancing approach Indeed, the Court specifically relied on *Griswold*—the seminal case in the Court's development of the fundamental rights approach—for its substantive due process analysis. The *Zablocki* Court reemphasized the most significant component of that approach: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

Second, the *Beller* panel cites the concurring opinion of Justice Stewart in *Zablocki*, and in particular Justice Stewart's quotation of Justice Harlan's concurring opinion in *Williams v. Illinois*. Both Justice Harlan and Justice Stewart argued for a substantive due process approach of a less categorical nature, and in that sense they do provide support for the *Beller* panel's balancing approach. It would be inaccurate, however, to suggest that this is the approach of the Court itself. Neither Justice Stewart nor Justice Harlan wrote for the majority of the Court. Justice Harlan's argument for a balancing approach is, as one would expect, eloquent and thought-provoking. Never, however, has it been accepted by the Court.

Finally, the *Beller* panel cites *Moore v. City of East Cleveland*. *Moore* demonstrates that the Court is struggling with the substantive due process doctrine: the case produced six opinions. Justice Powell's plurality opinion does not, however, abandon the fundamental rights approach. Indeed, citing *Griswold* and *Roe*, the Court distinguished the two categories of substantive due process cases. First, the cases involving regulations which do not infringe fundamental rights, in which regulations are upheld if they "b[ear] a rational relationship to permissible state objectives." Second, the special cases involving regulations which infringe fundamental rights, where "the usual judicial deference to the legislature is inappropriate."

The *Beller* panel simply strikes off on its own down the balancing path; it is not in any sense accurate to suggest that the recent decisions of the Supreme Court compel or even allow this.

Miller v. Rumsfeld, 647 F.2d 80, 81-82 (9th Cir. 1982) (Norris, J., dissenting from a rejection to rehear *Beller v. Middendorf*, 632 F.2d 788 (1980)(en banc)(citations omitted)).

court then asked what level of scrutiny should be applied. The court decided that neither a rational basis test nor a compelling state interest test was appropriate because the "case before us lies somewhere between these two standards."¹³⁸

After putting forth this elaborate methodology, the *Beller* court did very little with it. The court asserted that substantial (academic) authority supported the idea that homosexual activity should be recognized as a fundamental right.¹³⁹ Then, to support the contrary view, the court cited *Doe* and federal court cases that follow it.¹⁴⁰ Despite these cases, the court was willing to assume for the sake of argument that some kinds of government regulation of private consensual behavior would be unconstitutional (for example, in cases where the "state seeks to use its criminal processes to coerce persons to comply with a moral precept, even if they are consenting adults acting in private without injuring each other").¹⁴¹ The court clearly distinguished that kind of case from the one then before it: in the military discharge context any "heightened solicitude . . . for consensual private homosexual conduct" is outweighed by the "importance of the governmental interests furthered, and to some extent the relative impracticality at this time of achieving the [g]overnment's goals by regulations which turn precisely on the facts of an individual case."¹⁴² After all this maneuvering, the *Beller* court reached the real crux of the matter—the navy's assertion of government interest made all the difference in the outcome of the case: "Regulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities."¹⁴³

The *Beller* decision goes a long way around before reaching a very predictable end—deference to navy policy. Even if the court had recognized as fundamental the right to engage in private, consensual homosexual behavior, it still could have reached this end. But it preferred to avoid the privacy issue as much as possible, refused to face the inescapable issue of whether a fundamental right was involved, and gave merely a token application to its own

138. *Id.* at 808-09.

139. *Id.* at 809.

140. *Id.* at 809-10.

141. *Id.* at 810.

142. *Id.*

143. *Id.* at 811.

balancing test.¹⁴⁴ It seemed comfortable only when justifying the military policy.¹⁴⁵

The *Beller* case, despite its unconventional and arguably incorrect analysis, has provided a handy precedent for courts caught in the military discharge/right-to-privacy bind. *Beller* has been reaffirmed in other Ninth Circuit cases¹⁴⁶ and has recently been adopted by the Tenth Circuit as well.¹⁴⁷ In *Dronenburg*, Judge

144. The Navy's blanket rule requiring discharge of all who have engaged in homosexual conduct is perhaps broader than necessary to accomplish some of its goals In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, however, we conclude that at the present time the regulation represents a reasonable effort to accommodate the needs of the Government with the interests of the individual.

Id. at 812.

145. The nature of the employer—the Navy—is crucial to our decision. While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces Regulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities.

There are multiple grounds for the Navy to deem this regulation appropriate for the full and efficient accomplishment of its mission. The Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own. The Navy, moreover, could conclude rationally that toleration of homosexual conduct, as expressed in a less broad prohibition, might be understood as tacit approval.

An affidavit from the Assistant Chief of Naval Personnel . . . outlines the Navy's reasons for its policy. The Navy "perceive[s] that homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars." The Navy is concerned about tensions between known homosexuals and other members who "despise/detest homosexuality"; undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands; and possible adverse impact on recruiting. These concerns are especially serious, says the Navy, where enlisted personnel must on occasion be in confined situations for long periods.

. . . It should be plain from our opinion that the constitutionality of the regulations stems from the needs of the military, the Navy in particular, and from the unique accommodation between military demands and what might be constitutionally protected activity in some other contexts.

Id. at 810-12.

146. *Hatheway v. Secretary of the Army*, 641 F.2d 1376, 1384 (9th Cir. 1981).

147. *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984).

Bork failed to advance right-to-privacy law; in *Beller*, the court made *bad* law. Together they illustrate the hazards of using military discharge cases as a forum for trying to expand the right to privacy.

In fact, only one admitted homosexual was ultimately successful in using right-to-privacy arguments to overturn a military discharge.¹⁴⁸ In that 1980 case, *benShalom v. Secretary of the Army*,¹⁴⁹ the United States District Court for the Eastern District of Wisconsin issued a writ of mandamus ordering the army to reinstate a homosexual petitioner into the reserves "with all duties, responsibilities and privileges earned by her prior to discharge."¹⁵⁰ The petitioner, Miriam benShalom, had enlisted in the army reserves for a three-year period.¹⁵¹ After one year she graduated from drill sergeant training and began her duties as an instructor.¹⁵² Ten days later she was informed by letter that the army was considering discharging her.¹⁵³ Although she was originally charged with engaging in homosexual activities, her discharge was processed under a regulation that allowed for discharge of any soldier who displayed homosexual tendencies, even if he or she has committed no homosexual acts.¹⁵⁴ At her hearing, the army presented evidence that benShalom had publicly acknowledged that she was a homosexual in conversation with fellow reservists, in a class, in an interview with an army newspaper, and while teaching.¹⁵⁵ There was no evidence that she had engaged in homosexual acts or had made any homosexual advances.¹⁵⁶ Despite the fact that "she was a fine candidate for drill sergeants school, a capable soldier, and an excellent instructor," the hearing board found her unsuitable for service because of her homosexuality.¹⁵⁷ When she was denied further review by the army, she brought the mandamus

148. In *Matthews v. Marsh*, No. 82-0216 (D. Me. Apr. 3, 1984), a federal magistrate followed *benShalom*, see *infra* notes 149-72 and accompanying text, in reinstating a lesbian to an ROTC program. The army appealed and tried to introduce new evidence of Matthews's homosexual conduct. 755 F.2d 182, 183 (1985). Rather than hearing the new evidence, the appeals court remanded for further proceedings in the district court. *Id.* at 184.

149. 489 F. Supp. 964 (E.D. Wis. 1980).

150. *Id.* at 977.

151. *Id.* at 969.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

action, arguing that the army policy violated several of her constitutional rights, including her right to privacy.¹⁵⁸

The *benShalom* decision differs from *Dronenburg* in one critical way: the *benShalom* court did not have to reach—and refused to decide—whether private sexual conduct was constitutionally protected. Instead, the *benShalom* court distinguished between homosexual activity and homosexual personality and preferences, and held that the latter were constitutionally protected by the right to privacy. In support of this proposition, the court relied on both penumbral and substantive due process rights to privacy.

Initially, the court examined the relevant army regulation, which made admissions of homosexuality evidence sufficient for discharge,¹⁵⁹ and found that it violated soldiers' rights "to free association, expression and speech" under the first amendment.¹⁶⁰ With regard to *benShalom*, the strength of these first amendment interests was sufficient to "carry the day over the needs of the military."¹⁶¹ However, the court's analysis then went beyond *benShalom*'s pure first amendment claims and found that she was entitled to further constitutional protection.

The first amendment by itself protected *benShalom*'s admissions of homosexuality; privacy concerns, originating in penumbra surrounding the first amendment, necessitated protection of her association with others and of her "homosexual personality."¹⁶² The first amendment protects freedom of association; the right to privacy guarantees individuals privacy in those associations.¹⁶³ More broadly, privacy "protects manifestations of [one's] personality," and that no matter how "displeasing, disgusting, and immoral" that personality may seem to many, these are "social judgments, not ingredients for gaging constitutional permissibility."¹⁶⁴ These privacy interests are rooted in the first amendment, but penumbral privacy itself sustains them and gives them life. By exploring the first amendment penumbral origins of privacy, the *benShalom* court found a scope for privacy broad enough to protect homosexual personality, regardless of whether homosexuality is so-

158. *Id.*

159. *Id.* at 973.

160. *Id.* at 974.

161. *Id.* at 975.

162. *Id.* at 975-76.

163. *Id.*

164. *Id.* at 976.

cially acceptable.

As Justice Douglas's *Griswold* opinion made clear, the first amendment is not the only source for privacy rights,¹⁶⁵ but in *ben-Shalom*, first amendment concerns were so strongly implicated that the court did not need to explore other sources. Although *ben-Shalom* had raised a ninth amendment challenge, the court did not deal with it except to cite the ninth amendment as additional support for protection of the "privacy of one's personality."¹⁶⁶ *Ben-Shalom* did not raise, and the court did not address, any fourth amendment issues. Nonetheless, these alternative sources remain available for argument in other, factually more appropriate cases.¹⁶⁷

The *benShalom* court also recognized a right to privacy grounded in substantive due process:¹⁶⁸ a right to be independent in making important personal decisions about things essential to one's identity.¹⁶⁹ The right of autonomous choice-making, which was essential to the outcome of the Supreme Court cases affirming a woman's right to choose an abortion (and by extension to choose to engage in sex and to choose not to bear a child), here analogously protects a homosexual's right to choose sexual partners of his or her preference.

While the law remains unsettled as to whether private sexual conduct between consenting adults is protected by the right of privacy; the court believes that constitutional privacy principles clearly protect one's sexual preferences in and of themselves from government regulation.¹⁷⁰

Thus, if the army wants to control sexual preferences, it must at minimum prove a "nexus between the sexual preference and the soldier's military capabilities."¹⁷¹

165. See *supra* note 29.

166. 489 F. Supp. at 976.

167. See, e.g., discussion of *Hardwick v. Bowers*, *infra* notes 237-66 and accompanying text.

168. Substantive due process is used here, as it is throughout this note, to refer to the fifth and fourteenth amendment source of privacy. See *supra* note 30. The *benShalom* court also engaged in a fifth amendment substantive due process analysis that is not a privacy analysis. Under the fifth amendment standard, the court evaluated whether the army regulation under which *benShalom* was discharged was arbitrary and capricious. *benShalom*, 489 F. Supp. at 976-77.

169. *Id.*

170. *Id.* at 976 (citations omitted).

171. *Id.*

Although the *benShalom* court explicitly refused to rule on whether a right to privacy protects homosexual conduct, there is every indication that, had it reached the question, it would have ruled favorably. In its first amendment analysis, the *benShalom* court found the limit to first amendment penumbral tolerance—the place at which government may intervene to restrict personality—to occur when the individual engages in “unlawful conduct.”¹⁷² Following the court’s logic, because federal law does not forbid homosexual conduct, no government agency ought restrict it. Under its substantive due process analysis, the court already demanded a nexus between sexual preferences and military capabilities that could easily be expanded to a nexus between sexual conduct and military capabilities. The next step—that full protection of sexual personality and sexual preference demands protection of sexual acts—was not beyond the court’s reach.

If asked to decide the issue, there are indications that the *benShalom* court would have had little difficulty expanding privacy to include private homosexual conduct. In any event, the case illustrates the wisdom of carefully separating out the penumbral and substantive due process aspects of the right to privacy and arguing each in mutually supportive ways.

IV. EXPANDING THE RIGHT TO PRIVACY: ARGUMENTS

When arguing for expansion of the right to privacy—under either a penumbral or a substantive due process approach—a key problem is choosing arguments at an appropriate level of generality, so that the scope of the right will be broad enough to cover a particular behavior.¹⁷³ If a litigant chooses a narrow approach and argues, for example, that privacy inheres in the marital relationship, then much behavior—all nonmarital heterosexual activities and all homosexual activities—will fall outside of the right. If a litigant argues broadly, for example, that all sexual activity is intimate and therefore beyond the reach of state regulation, then all kinds of problematic sexual activities are swept in—nonconsensual sex, sex with minors, public sex acts. This is a special problem for a homosexual litigant who seeks to differentiate his or her sexual activities from other activities that have traditionally been socially disfavored, such as adultery, incest, rape, prostitution, bestiality,

172. *Id.*

173. L. TRIBE, *supra* note 92, at 944, 946.

and pederasty.

Dronenburg, literally caught in a compromising situation, was forced to characterize privacy very broadly. He argued that a "thread of principle" in the right-to-privacy cases protected "an individual's freedom to control intimate personal decisions regarding his or her own body."¹⁷⁴ Judge Bork, of course, was not sympathetic and disclaimed such a breadth for the right to privacy.¹⁷⁵ But even a sympathetic judge might be reluctant to find such a broad-based right to private consensual homosexual behavior in the context of a military discharge case. Homosexuals in the military represent a relatively small segment of the general population. Even if a court found a privacy right covering homosexual behavior, given traditional deference to the military, that court would likely uphold the discharge policy. Yet the ramification of a court finding such a privacy right would be enormous: it would set the stage for reversing discrimination against homosexuals in wide-ranging contexts and thus be a major step forward for gay and lesbian rights. Probably only the most libertarian judges would feel comfortable making such a far-reaching decision in such a narrow context.

In contrast to military discharge cases (where the central issues are employment discrimination and military necessity), sodomy statute challenges, which focus exclusively on the constitutionality of restrictions on consensual sexual behavior, have been better forums for the right to privacy.¹⁷⁶ When the issue is stripped

174. Appellant's Opening Brief on Appeal at 15, *Dronenburg*. According to Dronenburg, failure to recognize this right of "personal autonomy," *id.* at 16, would have drastic consequences: "If the military can defend its blanket exclusion of homosexuals on the ground that they are offensive to the majority and to the military's view of what is socially acceptable, then no rights are safe from encroachment and no minority is protected against discrimination." *Id.* at 11-12. And, "It is, indeed, precisely the right of the minority, of the unorthodox, of the repugnant, which must be protected lest we all become vulnerable to an Orwellian world in which one's lovers are found by the state, instead of by the heart." *Id.* at 53-54.

175. "In [the *Griswold* line] of cases . . . we do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. . . . It is true that the principle appellant advances would explain all of these cases, but then so would many other, less sweeping principles. 741 F.2d at 1395-96. Additionally, Bork stated "Whatever thread of principle may be discerned in the right-of-privacy cases, we do not think it is the one discerned by appellant. Certainly the Supreme Court has never defined the right so broadly as to encompass homosexual conduct. *Id.* at 1391.

176. Sodomy statutes take a variety of forms: some attempt to proscribe certain sexual practices for everyone, some are only directed against unmarried persons, some only against homosexuals. Thus, sodomy case law deals with two aspects of sexuality which sometimes

down to the bare essentials—when does society have the right to enforce criminal sanctions for private consensual sex acts?—courts (both state and federal) have been more willing to find a fundamental right to privacy and expand it beyond the limits set by the Supreme Court.¹⁷⁷ Recognizing the superiority of sodomy statute challenges as a forum for right to privacy, gay and lesbian advocacy groups have been a major force in bringing and sustaining these challenges.¹⁷⁸

Three of these cases—*People v. Onofre*,¹⁷⁹ *Baker v. Wade*,¹⁸⁰ and *Hardwick v. Bowers*¹⁸¹—are of interest here in light of their use of both penumbral and substantive due process arguments to expand the right to privacy. Furthermore, the *Baker* and *Hardwick* litigation has resulted in a split between the Fifth and Eleventh Circuits on whether the right to privacy protects private consensual homosexual conduct. The Supreme Court, by agreeing to review *Hardwick* during its 1986 Term,¹⁸² has an opportunity to resolve the conflict and redefine the scope of privacy.¹⁸³

A. *People v. Onofre*

In *Onofre*, defendants convicted under New York's law criminalizing consensual sodomy challenged that law as unconstitutional.¹⁸⁴ (New York made it a crime for unmarried persons to

merge: first, which sex acts an individual may participate in, and second, who he or she may act with. The second concern implicates equal protection analysis, as well as the right to privacy.

177. See *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985); *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982); *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981); *State v. Ciuffini*, 164 N.J. Super. 145, 395 A.2d 904 (1978); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977); *State v. Pilcher*, 242 N.W. 2d 348 (Iowa 1976). But see *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985); *State v. Santos*, 413 A.2d 58 (R.I. 1980); *State v. Poe*, 40 N.C. App. 385, 252 S.E.2d 843 (1979); *State v. Elliott*, 89 N.M. 305, 551 P.2d 1352 (1976).

178. See *supra* note 32.

179. 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981).

180. 553 F. Supp. 1121 (N.D. Tex. 1982), opinion supplemented, 106 F.R.D. 526 (1985), aff'd, 743 F.2d 236 (5th Cir. 1984), rev'd on rehearing, 769 F.2d 289 (5th Cir. 1985) (en banc), reh'g denied, 774 F.2d 1285 (5th Cir. 1985).

181. 760 F.2d 1202 (11th Cir. 1985).

182. *Id.*, cert. granted, 54 U.S.L.W. 3293 (Nov. 5, 1985) (No. 85-140).

183. The Court also has *Baker's* petition for certiorari before it, but at this time has not yet decided whether to hear that case. *Baker*, 769 F.2d 289 (5th Cir. 1985) (en banc), petition for cert. filed, 54 U.S.L.W. 3517 (Feb. 11, 1986) (No. 85-1225).

184. 51 N.Y.2d at 483, 415 N.E.2d at 937, 434 N.Y.S.2d at 948.

engage in "deviate sexual intercourse.")¹⁸⁵ The case consolidated three appeals: Ronald Onofre, convicted of committing deviate sexual intercourse in his home with a seventeen-year-old male;¹⁸⁶ Conde Peoples and Philip Goss, convicted of engaging in oral sodomy in a parked car;¹⁸⁷ and Mary Sweat, convicted of engaging in a similar act with a male in a parked truck.¹⁸⁸ Each defendant argued that his or her conviction violated the right to privacy and equal protection.¹⁸⁹ In response, New York conceded that there was a fundamental right of personal decision-making, but argued that this right protected only two aspects of sexual behavior: marital intimacy (by virtue of a narrow reading of *Griswold*) and procreative choice (by reason of *Eisenstadt* and *Roe*).¹⁹⁰

The New York Court of Appeals refused to take such a narrow view of the right to privacy. The court defined privacy as "a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint."¹⁹¹ In creating this definition, the court relied on a penumbral as well as on a substantive due process analysis: it found sources of privacy in the first, fourth, ninth, and fourteenth amendments (both the equal protection and due process clauses), not just in the concept of

185. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948-49. The relevant New York statutes were as follows:

§ 130.38 Consensual sodomy.

A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

§ 130.00 Sex offenses; definitions of terms.

...

2. Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

Id. Note that the New York statute is somewhat narrow in defining "deviate sexual intercourse." It proscribes only three specific acts, by no means the full range of sexual activities possible in either heterosexual or homosexual relationships. Moreover, these acts are only deviate when performed by unmarried persons.

186. *Id.* at 483, 415 N.E.2d at 937, 434 N.Y.S.2d at 948.

187. *Id.* at 484, 415 N.E.2d at 938, 434 N.Y.S.2d at 948.

188. *Id.*

189. *Id.* at 485, 415 N.E.2d at 938-39, 434 N.Y.S.2d at 949. The court stated at the outset that the latter two incidents (in parked vehicles) were arguably not private, but could nonetheless be covered by equal protection. The real focus of the right-to-privacy argument is the sexual activity that took place in Onofre's home between himself and another male. *Id.* at 485 n.2, 415 N.E.2d at 938 n.2, 434 N.Y.S.2d at 949 n.2.

190. *Id.* at 486-87, 415 N.E.2d at 939, 434 N.Y.S.2d at 950.

191. *Id.* at 485, 415 N.E.2d at 939, 434 N.Y.S.2d at 949.

liberty.¹⁹²

The key to the *Onofre* court's analysis was what the court perceived as the forging together of these diverse privacy themes in *Eisenstadt* and in *Stanley v. Georgia*.¹⁹³ In *Stanley*, without denying that government has broad powers to regulate obscenity,¹⁹⁴ the Court held that "private possession of obscene matter cannot constitutionally be made a crime."¹⁹⁵ In *Stanley*, as in *Eisenstadt* and *Griswold*, the Court protected choice making—whether to read an obscene book, whether to use contraceptives—from government interference. However, because these particular choices implicated fundamental rights, no artificial line could be drawn between protecting the choice and protecting the behavior inextricably bound up with the choice. By allowing persons to make choices about the consequences of their sexual encounters, *Griswold* and *Eisenstadt* protected the resulting sexual encounters.¹⁹⁶ By permitting persons to choose to have obscene materials in their own homes, *Stanley* protected the resulting sexual gratification.¹⁹⁷ The right to choose makes no sense absent protection for the concomitant behavior. Whereas the particular amendments that are the sources of privacy may protect only beliefs and thoughts, the *Onofre* court points to the fact that the *Stanley* and *Eisenstadt* decisions explicitly adopted Justice Brandeis's view that privacy (or the right to be left alone) protects emotions and sensations as well.¹⁹⁸

192. The court, quoting *Lovisi v. Slayton*, 363 F. Supp. 620, 624 (1973) on the sources of privacy, apparently embraces them all:

The right, which has been called "the most comprehensive of rights and the right most valued by civilized men" (*Olmstead v. United States*, 277 U.S. 438, 478 [Brandeis, J., dissenting]), "has been viewed as emanating from the first amendment's guarantee of freedom of association, *NAACP v. Alabama*, 357 U.S. 449 (1958); and of speech, *Stanley v. Georgia*, 394 U.S. 557 (1969); the fourth amendment, *Terry v. Ohio*, 392 U.S. 1 (1968); the equal protection clause of the fourteenth amendment, *Loving v. Virginia*, 388 U.S. 1 (1967); the ninth amendment, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring); the penumbras of the Bill of Rights, *id.*; and the concept of liberty guaranteed by the due process clause of the fourteenth amendment, *Roe v. Wade*, 410 U.S. 113 (1973)."

Onofre, 51 N.Y.2d at 485-86, 415 N.E.2d at 939, 434 N.Y.S.2d at 949.

193. 394 U.S. 557 (1969).

194. *Id.* at 568.

195. *Id.* at 559.

196. *Onofre*, 51 N.Y.2d at 487, 415 N.E.2d at 940, 434 N.Y.S.2d at 950.

197. *Id.*

198. 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

Applying these principles from *Stanley* and *Eisenstadt* to the facts before it, the *Onofre* court held that the right to privacy protected decisions to seek sexual gratification from "deviant conduct . . . so long as the decisions are made by adults in a noncommercial, private setting."¹⁹⁹ Had the *Onofre* court been operating solely under a substantive due process standard, the private setting would have made no difference. Instead, the key inquiry would have been whether the right to consensual sexual behavior was one traditionally recognized as fundamental to the concept of ordered liberty. The *Onofre* court carefully divorced "public morality" from protected rights: The decision to use pornography or contraception might also offend public morality, and presumably society can try to limit public access to them. But if an individual uses them in a private, noncommercial (and consensual) setting, he or she is exercising a private morality that is protected absent a showing of public harm.²⁰⁰ The *Onofre* court found that the state had failed to show that its sodomy statute would advance public morality "or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State."²⁰¹ Public morality would be affected only if the individual's activities involved commercialization, force, involvement with minors, or intrusion on the public—that is, where some harm to the public can be demonstrated.²⁰² Absent any of these factors, personal distaste, even "disapproval by a majority of the populace,"²⁰³ is not sufficient to sustain regulation of private, consensual sexual behavior.

The *Onofre* decision, like the *benShalom* decision,²⁰⁴ illustrates the advantages of using penumbral arguments to complement substantive due process ones for the source and nature 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 comprehensive of rights and the right most valued by civilized man. *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

Id. at 487-88, 415 N.E.2d at 940, 434 N.Y.S.2d at 950-51 (quoting *Stanley*, 394 U.S. at 564).

199. *Id.* at 488, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951.

200. *Id.* at 489-90, 415 N.E.2d at 941, 434 N.Y.S.2d at 951-52.

201. *Id.* at 490, 415 N.E.2d at 941, 434 N.Y.S.2d at 952.

202. *Id.* Although the court does not articulate a standard that scrutinizes regulations that impinge on fundamental rights, some heightened scrutiny is involved. The court states that the state's "historical, conventional characterization" of sodomy as harmful is not enough. *Id.* at 491, 415 N.E.2d at 942, 434 N.Y.S.2d at 952-53.

203. *Id.* at 490, 415 N.E.2d at 942, 434 N.Y.S.2d at 952.

204. See *supra* text accompanying notes 149-72.

privacy rights. Penumbral rights offer a narrower standard than substantive due process—the plaintiff must show some connection to specific provisions in the Bill of Rights rather than appeal to the broader, but more amorphous concept of liberty. But once the source for the right is found in a particular amendment, one can refer to specific concerns underlying that source, whereas the definition of liberty is often dependent on traditional, historical, public-consensus concerns. Thus *Stanley*, which was a minor part of Dronenburg's argument,²⁰⁵ became (along with *Eisenstadt*) the centerpiece of the argument in *Onofre*.²⁰⁶

B. *Baker v. Wade*

In *Baker v. Wade*, Donald Baker sought a declaration that Texas's sodomy statute, which proscribed "deviate sexual intercourse" between persons of the same sex,²⁰⁷ was unconstitutional on right to privacy and equal protection grounds.²⁰⁸ Baker was successful in the federal trial court, and when neither the state of Texas nor any of the suit's named defendants chose to appeal,²⁰⁹ it appeared that right-to-privacy advocates would see the broadest expansion of the right to date. However, shortly after the trial court reached its decision, Baker's legal victory started to deteriorate. Danny Hill, a county attorney who had not been a named defendant at the trial level, sought to intervene for the purpose of taking an appeal.²¹⁰ The basis of the appeal was to be that there

205. Appellant's Opening Brief on Appeal at 18-19, *Dronenburg*. Judge Bork, who went to great lengths to distinguish all other cases Dronenburg relied on, completely ignored Dronenburg's reliance on *Stanley*.

206. In contrast, *Roe v. Wade*, 410 U.S. 113 (1973), which Dronenburg cited no fewer than five times (Appellant's Opening Brief on Appeal at 3, 11, 23, 32, and 50, *Dronenburg*) and which he identified as one of his "chiefly relied upon" cases (Appellant's Opening Brief on Appeal at v, vii, *Dronenburg*), is almost insignificant in *Onofre*. Of all the United States Supreme Court privacy cases, *Roe* is one of the most dependent on substantive due process, and its holding (that privacy protects a woman's choice, in consultation with her doctor, to have an abortion) is one of the narrowest. *Onofre* demonstrates that, in order to expand the right to privacy, choice making must be closely linked to a penumbral source for privacy.

207. The relevant portions of the Texas penal code provide:

A person commits an offense if he [or she] engages in deviate sexual intercourse with another individual of the same sex.

"Deviate sexual intercourse" means any contact between any part of the genitals of one person and the mouth or anus of another person.

Baker v. Wade, 553 F. Supp. 1121, 1124 (N.D. Tex. 1982).

208. *Id.* at 1125.

209. *Baker*, 106 F.R.D. 526, 528 (N.D. Tex. 1985).

210. *Id.*

was new evidence—the threat of acquired immune deficiency syndrome (AIDS)—to support the state's interest in regulating homosexual sodomy.²¹¹ Hill was turned back by the trial²¹² and appellate courts,²¹³ but the Fifth Circuit sitting en banc allowed Hill to intervene and ultimately overturned the trial court's decision, not on the basis of AIDS but on the basis of an older nemesis, *Doe v. Commonwealth's Attorney*.²¹⁴ Baker has filed a writ of certiorari to the United States Supreme Court which has not yet been acted on.²¹⁵ Despite uncertainty as to its ultimate outcome, *Baker* provides another interesting investigation of the sources and nature of the right to privacy.

In finding that the Texas sodomy statute violated the right to privacy and equal protection, the United States District Court for the Northern District of Texas closely and explicitly followed the *Onofre* court's lead, relying heavily on *Eisenstadt* and *Stanley*.²¹⁶ Moreover, the *Baker* court not only rejected *Doe v. Commonwealth's Attorney* as controlling precedent,²¹⁷ but adopted the rea-

211. *Id.* at 528-30.

212. *Id.* at 538.

213. *Baker*, 743 F.2d 238, 244 (5th Cir. 1984).

214. *Baker*, 769 F.2d 289, 291, 292 (5th Cir. 1985) (en banc).

215. *Baker*, 769 F.2d 289 (5th Cir. 1985) (en banc), *petition for cert. filed*, 54 U.S.L.W. 3517 (Feb. 11, 1986) (No. 85-1225).

216. *Baker*, 553 F. Supp. at 1140-41.

217. *Id.* at 1137-38. The *Baker* court stated that the Supreme Court's summary affirmation of *Doe* did not resolve issues identical to those presented in *Baker*. In *Doe* the court had held the right to privacy did not protect sodomitic acts of either homosexuals or heterosexuals; in *Baker*, the plaintiff argued that the right to privacy and equal protection should protect him from a statute that proscribed only homosexual acts and therefore discriminated against homosexuals. *Id.* at 1138.

The *Baker* court also stated that two "doctrinal developments" had occurred since *Doe* which indicated that *Doe* was to be given little weight. The first was the Supreme Court's decision in *Carey v. Population Services*, 431 U.S. 678 (1977). In that case, decided fifteen months after the summary affirmation of *Doe*, six Supreme Court justices (Brennan, Stewart, Marshall, Blackmun, Stevens, and White) agreed that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults . . . and we do not purport to answer that question now." *Id.* at 1138 (quoting *Carey*, 431 U.S. 678, 688 n.5 (1977)).

The second development was the Supreme Court's denial of certiorari in the case of *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981). Although the Supreme Court's denial of certiorari is of no precedential value, the *Baker* court believed that letting *Onofre* stand created a practical problem: sodomy was now constitutionally protected in New York, but not in Virginia. Because the Supreme Court had offered no direction as to which approach was correct, and because it stated in *Carey* that the question was open, the *Baker* court stated that the issue of whether a state statute could constitutionally prohibit private consensual homosexual conduct was

soning of the *Doe* dissent as part of its opinion.²¹⁸

That dissent, by Judge Merhige, which is widely quoted in privacy cases dealing with consensual sex,²¹⁹ states in relevant part:

I view those cases [*Roe* and *Griswold*] as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concern. A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest.

Griswold . . . in its context, applied the right of privacy in sexual matters to the marital relationship. *Eisenstadt* . . . however, clearly demonstrates that the right to privacy in sexual relationships is not limited to the marital relationship. Both *Roe* . . . and *Eisenstadt* . . . cogently demonstrate that intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category. The exercise of that right, whether heterosexual or homosexual, should not be proscribed by state regulation absent compelling justification.²²⁰

Note that Judge Merhige, like Dronenburg, found a "thread of principle" connecting *Griswold*, *Eisenstadt*, and *Roe*: "that every individual has a right to be free from unwarranted governmental intrusion into one's decisions on private matters of intimate concerns." Further, Merhige found the source of this right in the due process clause, without reference to any other sources (Justice Harlan's approach). Finally, he saw the right as a very broad one, protecting "intimate personal decisions or private matters of substantial importance to the well-being of the individual involved." By using this expansive language the court attempted to find a scope for privacy as broad as its source.

As already discussed, the key problem with arguing that pure

properly before it. *Id.* at 1139.

218. *Baker*, 553 F. Supp. at 1137, 1140.

219. See, e.g., Appellant's Opening Brief on Appeal at 20-21, *Dronenburg*.

220. *Doe*, 403 F. Supp. 1199, 1203-04 (E.D. Va. 1975)(Merhige, J., dissenting).

substantive due process protects a homosexual's sexual behavior is that the standard it employs is one emphasizing traditional values and public consensus. The *Baker* court looked at the traditional values imbedded in the nature of the choice, not in who was making the choice. The choice is "what type of sexual conduct [two individuals] will enjoy in private,²²¹ a choice just as personal, just as important, just as sensitive—indeed, even more so—than the decision [to use contraceptives]."²²² The nature of the choice is no different for homosexuals than for heterosexuals,²²³ and the court concluded that privacy protects the consensual sexual behavior of both.²²⁴

The *Baker* court also refused to accept the traditional approbation of homosexuality as the basis for a decision on whether the right to consensual homosexual conduct is fundamental in contemporary society. Instead, the court was receptive to Baker's personal testimony²²⁵ and that of his expert witnesses.²²⁶ This testimony es-

221. *Baker*, 553 F. Supp. at 1140.

222. *Id.*

223. From the testimony of the plaintiff, Donald F. Baker, about his life—the reluctant, painful recognition of his homosexuality; his disgust and self-loathing and fear; his isolation and suffering; and the eventual reconciliation of his "exclusive homosexuality" with his devout religious beliefs and family values—it is evident that Baker's resulting decisions concerning his sexual needs and desires are of the most personal, intimate and important concern (just as they are for heterosexuals).

Id. at 1140 n.52.

In *Dronenburg*, Judge Bork stated that he was unable, without direction from the United States Supreme Court, to tell if a particular personal decision was as fundamental as the decision to bear or beget a child (which was the principle he held *Eisenstadt* stood for). In *Baker*, Judge Buchmeyer used the degree of personal intimacy and self-identity as the standard.

224. *Baker*, 553 F. Supp. at 1140 and at 1140 n.51.

225. In right-to-privacy cases, taking the plaintiff where and as you find him or her is a bad idea. Plaintiffs who use right to privacy, like *Dronenburg*, as a last desperate maneuver, are least likely to have success. In *Baker*, on the other hand, the plaintiff was handpicked; that one fact may explain some of his success before the trial court. Unlike *Doe*, where the plaintiffs chose to remain anonymous, Donald Baker presented himself for the court's (and the public's) scrutiny. Baker was willing to tell his life story in great detail for the record—his family and religious background, his feelings about his homosexuality, his coming-out experience, etc. *Baker*, 553 F. Supp. at 1126-28. It did not hurt his case that "[d]uring the trial, Donald Baker dressed conservatively, was very articulate, and had the appearance that most people might expect of a school teacher or bank executive." *Id.* at 1127 n.7. (Baker was, in fact, a teacher. *Id.* at 1128.) He had other impressive credentials: a master's degree in education from Southern Methodist University, *id.* at 1126, an excellent service record in the navy, *id.* at 1127, and a good job record. *Id.* at 1128 n.10. He had no criminal record and was, in fact, a model citizen—a devout and active Christian, and a Democratic party precinct captain and convention delegate. *Id.* at 1126. Baker's personal profile made it very difficult for the court to attach any of the typical homosexual stereotypes to his behav-

tablished that in Texas alone there were 700,000 individuals who, as "exclusive homosexuals," would be labeled criminals by the law.²²⁷ Only a small minority of these persons could change their sexual orientation even if they wanted to.²²⁸ Baker's experts in psychology and sociology further established that homosexuality was not a disease or a mental disorder by standards of the American Psychiatric Association, the American Anthropological Association, the American Bar Association, the American Psychological Association, or the American Medical Association.²²⁹ Several countries (England, France, Holland, Finland) and twenty-one states in the United States have decriminalized consensual sodomy without negative effects.²³⁰ These facts supported the idea that popular attitudes toward homosexuality have changed and are continuing to change, and that the traditional fear of and prejudice against homosexuals were not appropriate standards by which to judge whether their sexual behavior ought be protected by a fundamental right. Baker's evidence was also relevant to show that the state had no compelling interest in regulating the fundamental right.²³¹

Sitting en banc, the Fifth Circuit took just one paragraph to dispose of all Baker's carefully accumulated evidence. The Fifth Circuit stated it was precluded from reaching the merits of the case by the Supreme Court's summary affirmation in *Doe* "for the reasons stated by the District of Columbia Court in *Dronenburg*

ior and helped make his substantive due process arguments easier for the court to accept.

Moreover, as a gay activist who traveled and spoke all around the state of Texas and the country, *id.* at 1128, Baker (like benShalom) was involved in exercising his first amendment rights to speak out on homosexuality, to associate with homosexuals, to exhibit a homosexual personality and preferences. All these first amendment activities could bolster a right-to-privacy claim based on first amendment penumbral rights.

226. Baker did not depend on his own testimony to establish the growing social acceptability of homosexuality, but retained experts in several fields to support this contention. *Id.* at 1129-31. He chose extremely credible experts, nationally known for lifetime work in the area of homosexuality, *id.* at 1129, who were not professional expert witnesses—unlike those chosen by the defendants. *Id.* at 1131-32. In addition, he chose experts from several fields, not just psychiatry. He used a sociologist and even a theologian to testify about changing attitudes and social standards. *Id.* at 1129. He included in the record testimony of actual harm done to homosexuals by legislation similar to Texas's, as well as testimony on the ineffectiveness of such legislation in enforcing morality. *Id.* at 1143. Placing such testimony in the record is important, not only to create a stronger case on appeal, but also to educate judges out of their own prejudices.

227. *Id.* at 1129.

228. *Id.* at 1129, 1130.

229. *Id.* at 1130.

230. *Id.*

231. *Id.* at 1130-31.

. . . and by Judge Kravitch in her dissent in *Hardwick*"²³² However, even Judge Bork conceded that *Doe* may be "somewhat ambiguous precedent."²³³ Judge Kravitch argued more affirmatively for *Doe's* precedential value,²³⁴ but she was apparently unable to convince any of her Eleventh Circuit colleagues, two of whom outvoted her dissent,²³⁵ all of whom voted against rehearing *Hardwick*.²³⁶

Although it is difficult to tell what considerations moved the Fifth Circuit to dismiss so cavalierly Baker's right-to-privacy claim, two related possibilities emerge. First, the threat of AIDS, though never mentioned, might have been a consideration at some level, conscious or unconscious. Certainly AIDS will play a major role in any future case where a litigant argues that the right to privacy ought protect homosexual behavior—if not in finding the right, at least in tailoring allowable state regulation. Second, the Fifth Circuit may have been unconvinced by the very breadth of the lower court's substantive due process analysis. Faced with broadly based arguments, the circuit—like Judge Bork in *Dronenburg*²³⁷—discerned a principle in the ambiguous summary affirmation in *Doe* but not in twenty years of Supreme Court right-to-privacy decisions.

In its similarly summary disposal of Baker's equal protection claim, the circuit cites "the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries."²³⁸ If the court was truly influenced by homophobia, this would indicate that substantive due process cannot yet escape its roots in tradition and public consensus, where Justice Harlan had planted them.

C. *Hardwick v. Bowers*

Michael Hardwick was charged with sodomy when a police officer came to his house to serve him a warrant for failing to pay a fine for drunkenness.²³⁹ A roommate let the officer into the house,

232. 769 F.2d at 292.

233. *Dronenburg*, 741 F.2d at 1392.

234. *Hardwick*, 760 F.2d at 1213-14 (Kravitch, J., dissenting).

235. *Id.* at 1202.

236. *Hardwick*, 765 F.2d 1123 (11th Cir. 1985) (denial of rehearing en banc).

237. See *infra* notes 85-120 and accompanying text.

238. *Baker*, 769 F.2d at 292.

239. Gay Community News, July 27, 1985, at 1, col. 1.

where he saw Hardwick and another man participating in consensual sex in Hardwick's bedroom.²⁴⁰ Although his prosecution was ultimately not pursued, Hardwick challenged the constitutionality of Georgia's sodomy statute.²⁴¹ The defendants filed a motion for summary judgment for failure to state a claim, and the district court dismissed on that ground, ruling that *Doe* precluded Hardwick's claim.²⁴²

Because of the summary judgment context—the need to find whether Hardwick failed to state a claim—both parties extensively briefed the issue of whether *Doe* was good precedent.²⁴³ The majority and dissent engaged in a similar debate,²⁴⁴ with the majority ruling that *Doe* did not preclude it from reaching the substance of the case.²⁴⁵ Ultimately the court held that the Georgia sodomy statute violated Hardwick's right to privacy,²⁴⁶ a decision that the Eleventh Circuit let stand by refusing to review en banc.²⁴⁷ Thus the Eleventh and Fifth Circuits came into direct conflict, setting up current review by the Supreme Court.²⁴⁸

Hardwick relied on the reasoning of *Onofre*,²⁴⁹ arguing for the "right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by government restraint."²⁵⁰ In support of this proposition, Hardwick listed a variety of penumbral and substantive due process sources for privacy. Because of the special circumstances of his case—literally one of having a policeman in his bedroom—Hardwick placed special emphasis on the fourth amendment as a source of privacy. Citing Supreme Court

240. *Hardwick*, 760 F.2d at 1204.

241. *Id.* The Georgia sodomy statute provides:

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

Id. at n.1.

242. *Id.*

243. Brief of Appellants on Appeal at 12-19, *Hardwick*; Appellants' Reply Brief at 5-10, *Hardwick*; Supplemental Brief of Appellants at 4-7, *Hardwick*; Brief of Appellee Lewis R. Slaton at 8-20, *Hardwick*; Brief of Appellee Michael J. Bowers at 2-11, *Hardwick*.

244. *Hardwick*, 760 F.2d at 1207-10; *id.* at 1213-16 (Kravitch, J., dissenting).

245. *Id.* at 1208.

246. *Id.* at 1211.

247. *Hardwick*, 765 F.2d 1123 (11th Cir. 1985) (denial of rehearing en banc).

248. See *supra* notes 179-83 and accompanying text.

249. See *supra* notes 184-206 and accompanying text.

250. Brief of Appellants on Appeal at 20, *Hardwick* (quoting *Onofre*, 51 N.Y.2d at 485, 415 N.E.2d at 939, 434 N.Y.S.2d at 949).

precedent, Hardwick argued that at its core the fourth amendment stands for the right of an individual to "retreat into [one's] own home and there be free from unreasonable governmental intrusion."²⁵¹ The argument was not that the right to privacy only protected home-based activity, but rather that, in a case such as this one, fourth amendment privacy concerns demanded an even higher level of protection.

In asking the court to strictly scrutinize the Georgia sodomy statute, Hardwick explicitly drew on the libertarian nature of penumbral privacy. He argued that, because they are socially disfavored, homosexuals deserve greater rather than lesser constitutional protection.²⁵² Specifically Hardwick asked the court to look for possible prejudice, as well as rationality, when determining the legitimacy of a state regulation that affects homosexuals.²⁵³ Finally, Hardwick argued that, even if the court found his behavior was not protected by the right to privacy, the court should nonetheless permit his case to go to trial so that he could show as a factual matter that the Georgia sodomy statute had no rational relationship to any legitimate state interest.²⁵⁴

Hardwick was never asked to make this showing. Instead, the court of appeals found that Hardwick did have a constitutional right to privacy that protected his homosexual conduct and, therefore, that the sodomy statute, which restricted his behavior, deserved the highest scrutiny.²⁵⁵ The court found protection for Hardwick's behavior by merging the substantive due process and penumbral strands of privacy doctrine.

The *Hardwick* court cited the full line of substantive due process cases—not only the abortion cases, but also cases dealing with "intimate relationships such as marriage and other familial ties"²⁵⁶—as recognizing a right of personal autonomy that protects decision making.²⁵⁷ The court noted that, although these choices are made privately, that is to say by individuals on their own, out

251. *Id.* at 21 (quoting *Payton v. New York*, 445 U.S. 573, 589-90 (1980)).

252. *Id.* at 23-24.

253. *Id.* at 24 (citing *Plyler v. Doe*, 457 U.S. 202 (1982)).

254. *Id.* at 25.

255. *Hardwick*, 760 F.2d at 1211.

256. *Id.* (citations omitted). Note here marriage is only an illustration of, not a prototype for, intimate relationship; likewise, the court refers to familial—familylike—ties, not family.

257. *Id.*

of the public forum, the decisions that come out of those choice makings—whether to bear a child, whether to live in a “family” and what kind, how to educate children—have public consequences.²⁵⁸ However, the court held that these public consequences are insufficient to give the state free rein over the private choice-making.²⁵⁹

In the penumbral privacy cases—*Griswold*, *Eisenstadt*, and *Stanley*—the *Hardwick* court found a right of intimate association that went beyond marriage and, even more generally, went beyond relationships with procreative purposes.²⁶⁰ What makes marriage “intimate” and therefore worthy of protection is not only the possibility of creating a child, but the “opportunity for mutual support and self-expression.”²⁶¹ All of these things can be found and are found outside of marriage; wherever found, they are worthy of protection.

Finally, the court agreed with *Hardwick*—by citing the same fourth amendment precedent he had put forth in his brief²⁶²—that the home-based location of his activities provided an additional foundation for his right to privacy. In *Stanley*, the Supreme Court clearly distinguished the state’s generally broad power to regulate public obscenity from its much more restricted role once that same illegal obscene material was used in private homes.²⁶³ In *Hardwick*, the court found that *Hardwick*’s interest in privately conducting sexual relationships in his own home was “at least as substantial” as that of home users of obscene materials and that therefore he merited the same protection from state regulation.²⁶⁴

In summing up its decision that the right to privacy protects private homosexual conduct, the *Hardwick* court reiterated the bases for its conclusion. First, the court made clear that it had grounded its decision in Supreme Court precedent by stating that “the Supreme Court’s analysis of the right to privacy leads us to conclude that . . . a fundamental right [was implicated]” in *Hardwick*’s situation.²⁶⁵ Thus, unlike Judge Bork, the *Hardwick* court

258. *Id.*

259. *Id.*

260. *Id.* at 1211-12.

261. *Id.*

262. *Id.* at 1212 (citing *Payton v. New York*, 445 U.S. 573, 589-90 (1980)).

263. *Stanley*, 394 U.S. at 563-64.

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

265. *Id.* (citations omitted).

believed that its role as an inferior court was to implement Supreme Court policy directives as well as to carry out the Court's specific holdings.

The court then cited the specific Supreme Court precedent that it believed allowed the present expansion of privacy. It first listed the triad of *Griswold*, *Eisenstadt*, and *Stanley*,²⁶⁶—cases in which the Court had found the right to intimate association and, not coincidentally, the cases that most strongly support the penumbral view of privacy and hence the most explicitly libertarian. The court then listed as further independent sources of privacy the ninth amendment (for which the court cited Goldberg's *Griswold* concurrence)²⁶⁷ and the "notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment" (for which the court cited *Roe*).²⁶⁸

Note that the *Hardwick* court fully and explicitly incorporated both penumbral and substantive due process privacy into its decision. Also, insofar as the court relied on substantive due process, it cited fundamental fairness, not the concept of ordered liberty, as its standard. Thus, the court tried to move substantive due process somewhat away from its conservative, traditional foundations.

Hardwick brings a good case for expansion of the right to privacy before the Supreme Court. It is a good case not because it is a sure winner, but because it differs in key respects from *Dronenburg*; those differences may make it more difficult for the Court to respond with a Bork-like summary rejection.

The issue in *Hardwick* is a simple one: does the Constitution limit society's power to criminalize adult consensual homosexual conduct? There are no extraneous issues such as military necessity to muddle the case. Toward answering this question, *Hardwick* does more than ask the Court to search for *Dronenburg*'s "thread of principle" in its prior privacy cases. Instead, *Hardwick* explored the sources, scope, and nature of both penumbral and substantive due process privacy, arguing these theories both in the alternative and as mutually complimentary and integrated. The *Hardwick* facts are such that both first amendment concerns about intimate association and fourth amendment concerns about the special na-

266. *Id.*

267. *Id.* (citing *Griswold*, 381 U.S. at 486-94 (1965) (Goldberg, J., concurring)).

268. *Id.* (citing *Roe*, 410 U.S. at 152-53 (1973)).

ture of home-based behavior are strongly implicated. Insofar as the *Hardwick* court relied on substantive due process as a source for privacy, the court articulated its standard as fundamental fairness, a traditional due process concern that does not carry the conservative baggage that the concept of "ordered liberty" does. Furthermore, the court recognized the inevitable public consequences of all autonomous choice-making: society need not approve an individual's choices, it must only make room for them. Finally, for its expansion of privacy, the *Hardwick* court explicitly evoked the mandate of Supreme Court precedent, declaring its allegiance as an inferior federal court, to the effectuation, not the obstruction of Supreme Court policies. To fully reject the *Hardwick* decision, the Supreme Court would not only have to turn away from twenty years of its own efforts to develop principled privacy, but would have to encourage lower courts from engaging in principled efforts as well.

CONCLUSION

Judge Bork's opinion in *Dronenburg v. Zech* is, without a doubt, a setback for those who would advocate the expansion of the constitutional right of privacy to cover private consensual sexual behavior. To some extent the case can be explained away as a fluke—the wrong plaintiff in the wrong court at the wrong time. Right-to-privacy arguments have not fared well in military discharge cases generally, and Bork was openly hostile to *existing* privacy rights.

Yet Bork's decision, even if seen as limited by its context and the prejudices of its author, reveals some important nagging problems with right-to-privacy theory. Even in cases where courts have viewed the right sympathetically, they have often done little to explore its source and its nature. For proponents of expansion of the right, much work remains to make the right more palatable to middle-of-the-road judges.

Part of that task is to separate out the penumbral and substantive due process origins of the right and to develop the best arguments for each source. The penumbral theory has been undervalued. It needs to be developed in such a way that it draws more support from the specific guarantees of the Bill of Rights, especially those in the first and fourth amendments. Where substantive due process is utilized, the problem is to refocus the standard away

from one based on social mores. The next step is to use these two lines of argument in a creative synthesis rather than in a mutually destructive tension. This note has attempted to go one step beyond *Dronenburg* and to begin the process of rethinking and reformulating the right to privacy.

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