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Sodomy ruling by high court poses threat to liberal counterculture

by Edward Spannaus

Few U.S. Supreme Court decisions in recent years have provoked a greater hue and cry than its June 30 anti-sodomy ruling in the case *Bowers v. Hardwick*. In its 5-4 ruling, the Court upheld the constitutionality of the Georgia anti-sodomy law, overriding the arguments of the appellants that there exists a fundamental constitutional right to engage in homosexual sodomy.

Not only did overt homosexuals take to the streets for demonstrations, but the Eastern Establishment press—led by the *New York Times* and the *Washington Post*—are still howling about the potential reversal of a "60-years broadening of the sphere of privacy rights protected by the Constitution." Their moaning and groaning is accompanied by cartoons of "sex police" invading the home, and warnings of a Supreme Court Justice hiding under every bed.

Hyperbole aside, the liberals have real reason to be upset. The moral corruption of our culture, characterized by the rise of the radical counterculture of the 1960s and 1970s, and the Yuppie "me generation" of the 1980s, has been accompanied by a corruption of our constitutional law. For years, a shifting majority of the Supreme Court has attempted to write into the Constitution a libertarian notion of individual rights and personal privacy which is in fundamental conflict with the basic premises of that document.

This is most clearly expressed in Justice Harry Blackmun's dissenting opinion in the *Bowers* case, in which he says that the court protects certain rights associated with the family:

> . . .not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "The concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"

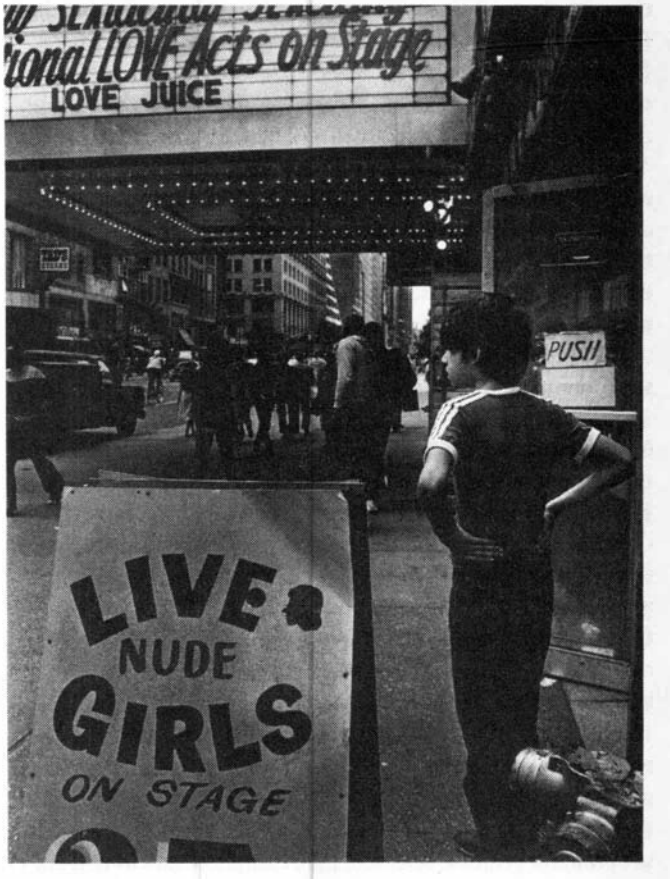
Hedonistic personal liberty was never the purpose of our republic. Our forefathers fought for *political* liberty, understood to be essential for a republic in which the moral and intellectual development of the individual could flourish. Our Constitution is fundamentally Augustinian in conception, recognizing a higher purpose to existence than mere individual self-gratification.

Yet Blackmun is absolutely explicit in his rejection of such a conception, in his efforts to give a libertarian cast to the Court's earlier "privacy" rulings:

> We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply.

Blackmun goes on to argue that since sexual intimacy is "a sensitive, key relationship of human existence":

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships. . . . The Court claims that its decision today merely refuses to recognize a fun-



The liberals are upset with the Supreme Court ruling for good reason. Hedonistic personal liberty was never the purpose of our republic.

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damental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

In the *Bowers* case, and in the related abortion and pornography cases, it is clear that the liberals, led by Blackmun, have a much clearer idea what they are fighting *against*, than the so-called conservatives have of what they are fighting *for*. The liberals are fighting to sever any connection between morality and law. The "conservatives," unfortunate to say, may be waging a vigorous and sometimes bitter battle against unbridled liberalism, but they are not fighting for Augustinian culture or a conception of the Constitution which comports with the natural-law outlook of the Founding Fathers.

The Rehnquist-led bloc in the Court has no positive conception of the Constitution, in the sense that Franklin, Washington, Hamilton, and Marshall understood the Constitution as creating a republic in which the moral development of its citizens—the creation of *virtue* in the population—was the ultimate object. While Rehnquist and company may be personally opposed to abortion, pornography, selling contraceptives to minors, and sodomy, the consistent thread in their rulings and dissents is that the *states* can more or less do what they want in these areas, and that the federal government and the Supreme Court shouldn't get in the way. If a state legislature wants to legalize abortion on demand, or legalize pornography, so be it.

Let's look at the *Bowers* ruling from this standpoint. It does *not* say that sodomy is unconstitutional. It explicitly does *not* even say that sodomy is wrong. It does not say that a state cannot legalize sodomy. What it says, is that the federal government—through its judiciary branch—cannot overturn a state law outlawing sodomy, on the grounds that the right to practice sodomy is protected by the Constitution.

The same ideological prejudice holds true with respect to the bitter split in the court on the issue of abortion. The four-person bloc on the court which now opposes *Roe v. Wade* is not asserting a "right to life" inherent in the U.S. Constitution; they are merely arguing that the Constitution does not convey a right to abortion on demand. They would uphold state laws restricting free access to abortions performed for the "convenience, whim or caprice of the putative mother"; but likewise they would uphold the states' right to legalize abortion on demand.

Despite this, the political significance of the *Bowers* ruling goes beyond the limitations of the majority's own reasoning. It reflects the popular reaction against the counterculture and the "gay lobby" which has been catalyzed by the AIDS crisis, and it is giving encouragement and impetus to the developing citizens' revolt against the destructive effects which the rise of the counterculture has had on our society over the past two decades.

Excerpts from the Supreme Court ruling

Below are excerpts from the Supreme Court ruling on the right of states to make sodomy illegal, in the case of Bowers, Attorney General of Georgia *v.* Hardwick et al.

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. . . .

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. . . .

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. . . .

Striving to assure itself and the public that announcing

rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko* v. *Connecticut* . . . it was said that this category includes those fundamental liberties that are "implicit in the concept or ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore* v. *East Cleveland,* . . . where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition.". . .

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally, Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 Miami U. L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Survey, Miami U. L. Rev., *supra,* at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. . . . Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. . . . And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis. . . .

Chief Justice Warren Burger wrote a separate opinion, concurring with the Court, printed in full.

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

As the Court notes, *ante* at 5, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality in the Western Christian Tradition 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, c. 6. Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, an heinous act, "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." Blackstone's Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.