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and Your Right to Privacy:
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INTRODUCTION

Like so many other privacy issues, concern over sexual freedom took on more than intellectual overtones with the advent of greater public discussion. As courts and government appeared to enter the most private domain of all, the bedroom, the public’s interest in privacy issues dealing with sexual freedom increased dramatically. This bibliography should serve as a valuable tool for researchers who have an interest in this highly controversial area of social concern.

SCOPE

The bibliography which follows is intended to be used as a research tool for those scholars already well-versed in the area, as well as for those...
who are looking to find an introduction to this highly controversial and socially relevant area of concern. The time period covered is from 1980-1992. All entries are arranged alphabetically by the author’s last name, and annotations are provided for those titles which are not clearly indicative of the content of the article. All of the material presented has been reviewed by the author.

OVERVIEW

The issue of sexual freedom is not new. It has, however, become a more publicly controversial issue with the advent of greater legal, scholarly, and media scrutiny. As with most other privacy concerns, the analysis of this issue begins with a review of its constitutional elements, whether explicit or implied. The literature then reflects investigators’ concerns with specific court cases, as well as with religious, moral and ethical aspects of this topic; In addition, specific sexual freedom sub-category concerns such as pornography, homosexuality, and prostitution are addressed.

The first concern analysts focus on in reviewing cases involving the question of whether or not individuals do in fact have a right to sexual freedom, is whether or not references to such a right may be found in the Constitution. Lacking any such direct constitutional references, commentators often seek evidence of indirect or implied reference, either in constitutional history or by way of subsequent court interpretation.

Constitutional analysis generally seems oriented toward a review from a specific perspective. For example, Richard Mohr’s article, “Mr. Justice Douglas at Sodom: Gays and Privacy,” looks at cases that considered privacy issues in general, explains why the author feels that privacy should be considered a fundamental and constitutional right, and concludes that such a right should apply to homosexuals.

Similarly, in an article that is of particular contemporary interest, Harley Diamond, in “Homosexuals in the Military: They Would Rather Fight than Switch,” argues that this group is clearly being discriminated against “in contravention of their constitutional right to privacy . . . (in particular) that military regulations excluding homosexuals impinge upon constitutional rights in three major areas: freedom of association or the right to be homosexual, personal autonomy or the right to participate in private consensual sex, and the right to be let alone.”

In a more general constitutional sense, Kevin Fitzgerald reviews the relationship between the constitution and the actions of adults in “Constitutional Law: The Right of Privacy and its Application to Sexual Activity Between Consenting Adults.”
Other articles dealing with specific issues that relate to sexual freedom are also included. For example, Ruth Colker reviews one of these more limited areas in “Pornography and Privacy: Towards the Development of a Group Based Theory for Sex Based Intrusions of Privacy.” Another limited area, prostitution, is considered by Kathleen Daly in “The Social Control of Sexuality: A Case Study of the Criminalization of Prostitution in the Progressive Era.” AIDS, too, is an issue that doesn’t escape attention, being reviewed in this context by Kristine Gobbie in “AIDS and Government: Regulation of Sexual Behavior.”

The religious viewpoint, as might be expected during a period of fundamentalist resurgence, has not been overlooked, either, as indicated by several of the referenced articles. Lynn Buzzard reviews the ways in which churches use public disciplinary procedures to ensure compliance with church doctrine in “Scarlet Letter Lawsuits: Private Affairs and Public Judgments.” James Wood, alternatively, takes a broader view on the religious aspect of the sexual freedom issue in his article, “Religion, the State, and Sexual Morality,” while other writers consider the role of religion in the debate as part of the larger social concern increasingly evidenced by the public as a whole.

Finally, scholars have looked at actions taken by the courts, most specifically the Supreme Court, regarding sexual freedom. Chief among such evaluations have been those oriented toward an analysis of the Bowers case and its implications for individual sexual freedom.

In Bowers v. Hardwick, the Court upheld the criminality of a state sodomy statute, a decision that has been reviewed extensively in the literature, and one that serves to illustrate the potential for controversy that inheres to the sexual freedom issue. Jeffrey Soderberg, in “Bowers v. Hardwick: The Supreme Court Redefines Constitutional Rights: Analysis,” discusses the ways in which the Court has looked at the powers of the states under the 14th Amendment. He concludes that this decision opposes general rights to individual privacy, and that it serves to detract from “the growth and development of our societal values.”

Several other authors deal with Bowers, each taking particular analytical viewpoints. For example, Nan Faylor considers ways to respond to the decision using state laws as described in her article, “The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws.” Along the same lines, A.S. Cohan reviews Bowers to examine “The State in the Bedroom: What Some Adults May Not do After Hardwick v. Bowers.” A final variant on the Bowers analysis is taken by Norman Vieria in “Hardwick and the Right of Privacy,” in which he looks at this case and its
relationship to *Roe v. Wade* and finds that the Court is guilty of far-reaching "doctrinal deficiencies."

As this brief overview clearly indicates, sexual freedom, as a subset of the general privacy issue, is one that is itself both legally and socially complex. As an increasingly publicized concern, and as one that potentially affects individual citizens in an area considered truly personal, this issue appears to be one that will continue to be important in the privacy arena. It is also one that is sure to remain in public view so long as any of its wide-ranging aspects continue to command both legal scrutiny and public attention.

**MONOGRAPHS**


**PERIODICAL ARTICLES**


to gain the right to do, sexually, in our bedrooms as we choose, we must make that which we do known publically. The example used is that of gay rights protesters marching for privacy rights.


Conkle, Daniel O. “The Second Death of Substantive Due Process.” Indiana Law Journal 62:2(1987): 215-242. The author argues that the Supreme Court decision in Bowers v. Hardwick, in which the constitutionality of a criminal sodomy statute was upheld, effectively eliminates the right of substantive due process. The author traces the history of substantive due process and “considers the doctrine’s reemergence in the protection of a constitutional ‘right to privacy.’”


Diamond, Harley David. "Homosexuals in the Military: They Would Rather Fight than Switch." *John Marshall Law Review* 18:4(Summer 1985): 937-968. While seventy-five to eighty per cent of all homosexual soldiers successfully complete their terms of service, those who are discovered are invariably discharged. The author notes that despite their capabilities and patriotism, these individuals are being discriminated against "in contravention of their constitutional right to privacy." In particular, "military regulations excluding homosexuals impinge upon constitutional rights in three major areas: freedom of association or the right to be homosexual, personal autonomy or the right to participate in private consensual sex, and the right to be let alone." The military’s concern for potential problems regarding morale, recruitment, impartiality, and security is said to be overstated, and, given that no clear relationship between work performance and sexual orientation seems to exist, a "more rational, less exclusionary policy toward homosexuals" would serve to strengthen the military and better "conform to the constitutional concern for privacy."


Grey, Thomas C. "Eros, Civilization, and the Burger Court." *Law and Contemporary Problems* 43:3 (Summer 1980): 83-100. Offers one interpretation of the decisions of the Burger Court concerning sex, marriage, and the family. Addresses the question of why a conservative court got into this area at all, and once in, why it did not follow through and invalidate all laws that interfere with the private sex lives of consenting adults.


Examines cases that included privacy issues, explains why the author believes that privacy should be viewed as a fundamental and constitutional right, and argues that this right should be extended to include gay sex.


Oberstaedt, Mark J. "Constitutional Law: First Amendment: States May Proscribe the Private Possession of Non-Obscene Child Pornography: Osborne v. Ohio, 110 S. Ct. 1691 (1990)." *Seton Hall Law Review.* 21:2(1991): 410-444. In the recent case of *Osborne v. Ohio* (110 S. Ct. 1691, 1990), the Court found that the "private, at-home possession of non-obscene child pornography does not advance the purposes of the first amendment and therefore, was not constitutionally protected." This case, and a historical overview of the cases preceding it, is presented in order to illustrate the various limitations on an individual's first amendment rights, especially as related to issues of obscenity and privacy. The note considers the Court's protective attitude toward minors, and its willingness to balance the harm associated with restricted first amendment rights against the compelling state interest in ameliorating danger to children, even where the acts to be proscribed are not obscene. An in-depth discussion of Justice Brennan's dissent in *Osborne* is given, and viewed supportively by the author, who considers the holding in *Osborne* to have been flawed.


Rosales Arriola, Elvia. "Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority." Women’s Rights Law Reporter 10:2&3(January 1988): 143-176. Argues, among other things, that a broader doctrine of rights is necessary to improve the status of people identified as "gay." It is not sufficient to rely on an argument based on a constitutional right to privacy, because it addresses only the sexual aspect of gay life.


Soderberg, Jeffrey W. "Bowers v Hardwick: The Supreme Court Redefines Fundamental Rights: Analysis." *Villanova Law Review* 32:1(February 1987): 221-258. Involved here is a consideration of *Bowers v Hardwick*, and its effect on the Supreme Court’s efforts to examine the scope of the 14th amendment’s “generalized restrictions on the power of the states to regulate the activity of their citizenry.” Applying both the Bill of Rights and general questions of liberty and due process, the court, in 1965, began “redefining fundamental liberties protected by the 14th Amendment, recognizing a constitutional right of privacy.” In *Hardwick*, the Court has stepped back (in consideration of rights of intimate association), and limited fundamental personal rights of privacy. The author contends that in allowing the Georgia homosexual sodomy statute to stand, very serious damage is done to the maintenance and protection by the courts of more general rights to individual privacy. This decision opposes in a fundamental way “the growth and development of our societal values.”

“Substantive Due Process Comes Home to Roost: Fundamental Rights, Griswold to Bowers.” *Women’s Rights Law Reporter* 10:2&3(January 1988): 177-208. Argues that the decision in the Bower’s case, to allow the state of Georgia to enforce its laws against sodomy, reflects the fact that the due process clause is used to promote the political value judgments of the justices of the Supreme Court. That is, the right to engage in sodomy cannot be found in American tradition, so it is illegal. The fact that rights to obtain an abortion or to use contraceptives can be so located is not explained.


Thornton, Joseph Robert. “An Incomplete Constitutional Analysis.” *North Carolina Law Review* 65:5(June 1987): 1100-1123. Discusses the Georgia case in which a homosexual male was arrested in his own home and charged with committing the crime of sodomy. The author argues that the Supreme Court failed to expressly consider the applica-
tion of several amendments to the Constitution (including the 1st, 4th, 8th, 9th, and 14th) to the question of privacy rights accruing to homosexuals, in terms of speech, action, and locus of activity.


Vieria, Norman. “Hardwick and the Right of Privacy.” *University of Chicago Law Review* 55:4(Fall 1988): 1181-1191. A further explanation of the Supreme Court’s opinion in *Bowers v Hardwick*, distinguished by its assertion that *Hardwick* is at odds with *Roe v Wade* and its associated rationale. The Court, the author notes, is guilty of underlying doctrinal deficiencies, the implications of which are quite far reaching.

Wiel, Wendy T. “Constitutional Law—Fourteenth Amendment—Right to Privacy—Contraceptives—Minors—the United States Court of Appeals for the Sixth Circuit has held that a state-funded family planning center’s distribution of contraceptives does not violate the parents’ constitutional rights.” *Duquesne Law Review* 20(Fall 1981): 111-121.