The Right to Privacy: Or How the Supreme Court Got the Government Out of the Bedroom

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In December of 1890, Mr. Samuel D. Warren and Mr. Louis Brandeis (later to be Supreme Court Justice Brandeis) published an article in the Harvard Law Journal entitled *The Right to Privacy.* The article concerned itself primarily with the right of individuals to be sheltered from the tabloid press. However, it presented for the first time the concept that people had a right beyond the right to life for, as the learned gentlemen put it, “the right to life has come to mean the right to enjoy life, - the right to be left alone.” Today, the right to privacy means the right to be free from government interference in those intimate matters that are essential to the enjoyment of life and freedom. The path to that right of privacy has passed through the Supreme Court of the United States.

Today, we consider the right of privacy to be one of the basic rights given to us by the U.S. Constitution and its Bill of Rights. We expect to be free from government interference in our way of life, our choices of partners, our intimate preferences, our families, and our lifestyle. It has not always been so. While Messrs. Warren and Brandeis may have coined the phrase “right of privacy,” and believed in its existence, the courts of America did not until more than

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1 4 Harv. L. Rev. 193.
2 Id. at 193.
seventy years later. In the Supreme Court landmark search and seizure case of *Mapp v. Ohio*,
the Court declared, “the Fourth Amendment right of privacy has been declared enforceable
against the states through the Due Process Clause of the Fourteenth.”

Prior to 1965, the few Supreme Court cases involving the right of privacy had all been
Fourth Amendment search and seizure cases. In that year, the Supreme Court heard the case of a
director of a medical clinic and a doctor who were appealing their conviction, in Connecticut, for
dispensing birth control advice and devices to married couples in violation of the law. The
defendants argued that the accessory statute was unconstitutional as it violated the Fourteenth
Amendment’s Due Process Clause. The Supreme Court, however, went further and granted
standing to the defendants to argue whether there was a fundamental right to privacy, and did
that right include the right to use birth control devices.

The Court found a right of privacy in the Third, Fourth, Fifth and Ninth Amendments.
As Justice William O. Douglas wrote in the opinion of the Court,

> Would we allow the police to search the sacred precincts of marital bedrooms for
telltale signs of the use of contraceptives? The very idea is repulsive to the notions of
privacy surrounding the marriage relationship.

> We deal with a right of privacy older than the Bill of Rights -- older than our
political parties, older than our school system. Marriage is a coming together for
better or for worse, hopefully enduring, and intimate to the degree of being sacred. It
is an association that promotes a way of life, not causes; a harmony in living, not
political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an
association for as noble a purpose as any involved in our prior decisions.

> Interestingly, while the Court was taking this first step toward getting the Government
out of the bedroom, they nonetheless, reaffirmed the state’s right to control intimate behavior.

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5 *Griswold*, 381 U.S. at 486.
Justice Arthur Goldberg, in his concurring opinion, in which he was joined by Chief Justice Warren and Justice Brennan, wrote that, “the Court’s holding today in no way interfered with a State’s proper regulation of sexual promiscuity or misconduct.”6 He then went on to quote from Justice Harlan’s dissent in *Poe v. Ullman,*7

> Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.8

The Court’s decision in *Griswold* “represented a major expansion of the constitutional protection of privacy.”9 This constitutional protection of privacy was expanded even further in 1972. In the case of *Eisenstadt v. Baird,*10 the Court found that, “[i]f 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.”11 Thus was access to birth control made available to married and unmarried alike.

In March of 1970, an unnamed single woman instituted a federal action seeking a declaratory judgment that the Texas abortion statutes12 were unconstitutional on their face, and an injunction restraining the District Attorney in Dallas County, Texas from enforcing them. The Court identified the unnamed single woman with the pseudonym, Jane Roe. The case was *Roe v. Wade.*13 Dr. James Hubert Hallford joined her in her case. Dr. Hallford was a licensed

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6 *Id.* at 498-499.
8 *Griswold,* 381 U.S. at 499 (Goldberg, J. concurring).
11 *Id.* at 453.
12 Texas State Penal Code Articles 1191-1194 and 1196.
physician who police arrested for violations of the Texas abortion statutes. Dr. Hallford claimed that the Texas abortion statutes were “vague and uncertain”\textsuperscript{14} and therefore violated the Fourteenth Amendment, and that they violated both his and his patients’ right to privacy in the doctor/patient relationship. He claimed that the First, Fourth, Fifth, Ninth and Fourteenth Amendments guaranteed these rights. The Court found that Dr. Hallford did not have standing to proceed with a federal action while he was under indictment for a state offense and the Court dismissed his appeal.

Ms. Roe contended that the Texas statutes invaded her right as a pregnant woman to terminate her pregnancy, a right enclosed within the “concept of personal “liberty” embodied in the Fourteenth Amendment’s Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras.”\textsuperscript{15}

In his opinion, Justice Blackmun wrote, “[t]he Constitution does not explicitly mention any right of privacy. In a line of decisions . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”\textsuperscript{16} He goes on, “[t]hese decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty” are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, contraception, family relationships, and child rearing and education.”\textsuperscript{17} He then

\textsuperscript{14} Id. at 121.
\textsuperscript{15} Id. at 129.
\textsuperscript{16} Id. at 152.
\textsuperscript{17} Id. at 152-153 (internal citations omitted).
opined, “[t]his right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”

In deciding *Roe*, the Court balanced the interest that the individual had in making reproductive choices against the community’s legitimate interest in protecting the life of the fetus. According to the Court, in order for the state to interfere in the “fundamental rights” of individuals, particularly as they affected the right of privacy, they must show a “compelling state interest.” Despite the ruling in *Roe*, the controversy over abortion goes on. “The very nature of *Roe* has kept it in the forefront of controversy. . . . Cases are brought regularly which seek to narrow the holding itself or involve a peripheral issue deriving from it.”

A case of significance that followed *Roe* was *Webster v. Reproductive Health Services*. The significance of *Webster* was, while the Supreme Court specifically upheld its decision in *Roe*, it invalidated the *Roe* trimester viability test. The Court allowed, as constitutional, a Missouri law that required physicians to determine the “viability” of the fetus before performing an abortion. The law prohibited abortions when the fetus was viable, except to protect the life or health of the mother. As a result, the “fundamental interest/compelling state interest balancing test for analyzing privacy claims was left intact,” but the Court recognized a greater degree of state interest in the life of the fetus.

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18 Id. at 153.
19 Id. at 155.
20 Marsha B. Freeman, *Their Love Is Here to Stay: Why the Supreme Court Cannot Turn Back the Hands of Time*, 17 Cordozo J.L. & Gender 1, 17 (2010).
22 Id. at 520.
23 Krotoszynski, *supra* at 1439.
The Court did not always come down on the side of personal liberty against community interest. In *Bowers v. Hardwick*, the Court decided “the right of privacy under the liberty clause of the fourteenth amendment did not protect individuals who wished to engage in private homosexual sodomy.” As Justice White wrote in the opinion of the Court, “we think it evident that none of the rights announced in those cases [previous right of privacy cases] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand has been demonstrated. . . . any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from the state proscription is unsupportable.” However, Justice Blackmun, joined by Justices Brennan, Marshall and Stevens, issued a scathing dissent. “This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one’s value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.” Justice Stevens, joined by Justices Brennan and Marshall, wrote an equally compelling dissent. “Paradoxically as it may seem, our prior cases thus establish that a State may not prohibit sodomy within the sacred precincts of marital bedrooms, or indeed, between unmarried heterosexual adults. In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed” and “[t]he essential liberty that

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25 Krotoszynski, supra at 1440.
26 *Bowers*, 478 U.S. at 190-191.
27 *Id.* at 213 (Blackmun, J. dissenting) (internal citations omitted).
animated the development of the law . . . surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.”

It would be seventeen years before the opinions expressed by Justices Blackmun and Stevens would be tested again. In 2003, the Court heard the case of two men, John Geddes Lawrence and Tyron Garner. The case was *Lawrence v. Texas.*

Houston police received a report of a disturbance and dispatched officers to the residence of John Geddes Lawrence. The officers observed Mr. Lawrence engaged in anal intercourse with Mr. Tyron Garner. The two men were arrested and charged with “deviant sexual intercourse” under Texas Penal Code Ann. §21.06(a) (2003) which states, “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” In §21.01(1) of the Penal Code “deviate sexual intercourse” is defined as, “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” Messrs. Lawrence and Garner challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment. Relying on the previous Supreme Court ruling in *Bowers v. Hardwick,* the Court of Appeals for the Texas Fourteenth District rejected their arguments under both the Equal Protection and Due Process clauses of the Fourteenth Amendment and confirmed their convictions.

The primary questions before the Court were whether the conviction of the petitioners under the Texas statute that forbade two adult individuals of the same sex from engaging in

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28 *Id.* at 218 (Stevens, J. dissenting) (internal citations omitted) (internal quotation marks omitted).
30 478 U.S. 186, *supra.*
31 *Id.* at 563.
certain sexual intimacy in private was an unconstitutional violation of the petitioner’s rights of liberty and privacy under the Fourteenth Amendment Due Process Clause. In addition, did the fact that two individuals of the same sex engaging in the same sexual intimacy did not violate any Texas statute render the convictions unconstitutional under the Equal Protection Clause of the Fourteenth Amendment? An additional question was whether the Court’s previous decision in *Bowers v. Hardwick*, should be overruled.\(^{32}\)

Justice Kennedy wrote the opinion of the Court. It was determined that the Court in *Bowers* had erred. As Justice Kennedy wrote, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”\(^{33}\) The Court further held that,

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.\(^{34}\)

With their decision in *Lawrence*, the Supreme Court closed the circle around the right of privacy. Now, consenting adults could engage in sexual conduct without interference or control by the State. Whether married or unmarried, hetero- or homosexual, the guarantee of liberty under the Fourteenth Amendment provided an umbrella under which they could pursue their relationships in the manner of their choice. “[D]ecisions recognizing an individual’s right to privacy merely demonstrate the community’s willingness to allow individuals to make their own

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\(^{32}\) Id. at 564.
\(^{33}\) Id. at 578.
\(^{34}\) Id. (internal quotation marks omitted).
moral decisions.  

It is interesting to consider how the Court’s ruling in Lawrence is predictive of how the Court might rule when it is faced with a same-sex marriage case. “One of the major questions, of course, will be how changes on the Court over the past few years will affect those legal issues. Will the more conservative factions of the Roberts Court halt the extension of Lawrence into the civil arena, or will the addition of two justices newly appointed by a Democratic president hasten it?”

What is the future of the right of privacy? Will a future, more conservative court eventually overturn Roe v. Wade? Will a Democratic president have the opportunity to appoint enough “liberal” justices to the Supreme Court to assure the Court’s sanction of same-sex marriages?

Justices may come and go, and the political scene will shift from season to season but once having found a right to exist, the Court is reluctant to take it away. The Court established the right to privacy in our jurisprudence. As Justices Kennedy, O’Connor and Souter stated in the majority opinion in Planned Parenthood of Southeastern Pa. v. Casey, a reversal of Roe v. Wade, and with it the foundation of the right of privacy, would be, “at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the law.”

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35 Krotoszynski, supra at 1440.
36 Freeman, supra at 25.
38 Id. at 869.