

## Note

# Between Two Spheres: Comparing State and Federal Approaches to the Right to Privacy and Prohibitions Against Sodomy

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### INTRODUCTION

Whatever the views of most Americans on homosexuality, they should nevertheless care about prohibitions on gay sex, for those laws reveal the precariousness of more popular freedoms. In that spirit, this Note compares two legal approaches to the right to privacy through the lens of sodomy laws.<sup>1</sup> The battle in federal court over sodomy laws ended in 1986 with the Supreme Court's decision in *Bowers v. Hardwick*,<sup>2</sup> but state-based challenges are flourishing. Last year, a Minnesota trial court struck down that state's sodomy law in a decision that became the law of the state for want of appeal by the attorney general.<sup>3</sup> Meanwhile, a Louisiana judge

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1. This Note considers sodomy laws generally, and most sodomy laws apply to both opposite- and same-sex acts. Further, although the technical common-law definition applied only to anal sex, the phrase "sodomy laws" as used in legal opinions and in this Note refers to laws that prohibit both oral and anal sex. But at the end of the day, we all know that the word "sodomy" means one thing to most people, at least on first impression: men having sex with other men. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) ("[T]he 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.") (internal quotation marks omitted).

2. 478 U.S. 186 (1986).

3. *See Doe v. Ventura*, No. MC 01-489 (Minn. Dist. Ct. May 15, 2001) (declaring section 609.293 of the Minnesota Statutes a violation of the state constitutional right to privacy); *Doe v. Ventura*, No. MC 01-489 (Minn. Dist. Ct. July 2, 2001) (granting the plaintiffs' motion for class certification so that relief would apply statewide); Pam Louwagie, *State Won't Appeal Class-Action Sodomy Ruling*, STAR TRIB. (Minneapolis), Sept. 1, 2001, at 3B (indicating that the judge's relief applied statewide but may not be binding on prosecutors outside her jurisdiction).

threw down the gauntlet to her state's supreme court, daring it to overrule her decision that Louisiana's sodomy law violated the state constitutional right to privacy.<sup>4</sup> Virginia's Supreme Court refused very recently to strike down its state's law.<sup>5</sup> Similar challenges are pending in Texas<sup>6</sup> and Arkansas.<sup>7</sup>

As these cases show, laws against particular sexual practices are open to several legal challenges. Free expression, equal protection, due process, and privacy come most quickly to mind, and it is the last of these that this Note considers. The right to privacy<sup>8</sup> under both the federal and various

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4. See Janet McConnaughey, *La. Court To Hear Sodomy Law Case*, ASSOCIATED PRESS, Jan. 8, 2001, 2001 WL 3650222; Michael Perlstein, *Statute Forbidding Sodomy Violates Privacy, Judge Says*, TIMES-PICAYUNE (New Orleans), Mar. 10, 2001, at 3. In 1999, Judge Carolyn Gill-Jefferson struck down the law on privacy grounds. Later, in July 2000, the Louisiana Supreme Court ruled in a separate criminal case that there was no state constitutional right to privacy that protected sodomy, see *State v. Smith*, 99-0606 (La. 7/6/00), 766 So. 2d 501, and it ordered her to reconsider her decision. On March 9, 2001, immediately after oral argument on the subject, the judge affirmed her earlier decision. See Transcript of Oral Argument and Ruling at 15-17, *La. Electorate of Gays and Lesbians, Inc. v. State*, No. 94-9260 (La. Civ. Dist. Ct. Mar. 9, 2001); Perlstein, *supra*. The Louisiana Supreme Court has yet to schedule oral argument on the appeal. The effort to invalidate the law has run eight years and come before the state supreme court four times. Interview with John D. Rawls, Counsel for Plaintiff in *Louisiana Electorate* (Nov. 14, 2001).

5. See *DePriest v. Commonwealth*, 537 S.E.2d 1 (Va. Ct. App. 2000) (upholding sodomy convictions against a state privacy challenge where the defendants solicited or committed the acts in public). On June 1, 2001, a panel of the Virginia Supreme Court refused to hear an appeal of the case, and the full court denied a petition for rehearing without comment on July 27. Rhonda Smith, *Virginia Sodomy Case Loses Final Appeal*, WASH. BLADE, Aug. 17, 2001, <http://www.geocities.com/privacylaws/USA/Virginia/vanews84.htm>.

6. See *infra* note 159 and accompanying text.

7. See Traci Shurley, *Same-Sex Sodomy Law Deemed Unconstitutional*, ARK. DEMOCRAT-GAZETTE, Mar. 24, 2001, at A1. The state is appealing the decision in *Picado v. Jegley*, No. CV 99-7048 (Ark. Cir. Ct. Mar. 23, 2001), available at <http://www.lambdalegal.org/sections/library/decisions/picadodecision.pdf>, to the Arkansas Supreme Court, which has agreed to hear it. See *Arkansas High Court Considers Gay Sex Ban*, GAY.COM NEWS, Oct. 31, 2001, at <http://www.gay.com/news/article.html?2001/10/31/3>.

8. For a comprehensive survey of the right to privacy, its philosophical foundations, and its evolution in American case law, see RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW* (1999). See also RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY* (1987) (reviewing the evolution of the right to privacy at the federal level). A critical distinction exists between informational and substantive rights to privacy. Informational privacy protects details we would like to keep from public view, like medical records, but it provides no liberty, no substantive right to perform certain acts like abortion. The right to privacy was originally conceived as a cause of action in tort against those who exposed personal information to the public. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (describing the tort of invasion of privacy as a compilation of four different torts). Substantive privacy, the subject of this Note, is a right held against the state's power to legislate, and it has two different origins. First, and most familiar, is the personhood justification, which asserts that the ability to make choices within a certain realm free from state intrusion is essential to human dignity. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("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 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 men."); William M. Beaney, *The Constitutional Right to*

state constitutions has been advanced as a basis for invalidating sodomy laws with varying degrees of success. Surveying the privacy case law at both the federal and state levels, this Note finds that courts upholding sodomy laws had a particular vision of the right to privacy; one that turned on the nature of the act nominated for protection. But this approach to privacy betrays the basic philosophical premise of a privacy right, that the state should not be able to reach beyond certain boundaries with its power, including the judicial gaze. On the other hand, certain state decisions striking down sodomy laws approached the question of privacy from the standpoint of a content-neutral boundary: It does not matter so much what act you wish to commit in private, but rather whether the act falls on your side of the line, within the private sphere. Rather than evaluate sodomy's place in our cultural tradition, these courts asked only whether the sex act is private, in the sense of being invisible, contained, or harmless.<sup>9</sup>

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*Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212, 214 (“[O]ur Constitution and our system of constitutional government reflect a decision that government is limited in the powers and methods it may use. Powers are withheld from government or, alternatively stated, freedoms or liberties of the citizen are set forth in order to guarantee that the individual, his personality, and those things stamped with his personality shall be free from official interference, except where a rational basis for intrusion exists.”); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964) (deriving the right to privacy from human dignity, such that without protection provided against the government, a citizen “would be less of a man, less of a master over his own destiny”); Joseph Kupfer, *Privacy, Autonomy, and Self-Concept*, 24 AM. PHIL. Q. 81, 82 (1987) (“[P]rivacy is essential to the development and maintenance of an autonomous self.”); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989) (“[S]ome acts, faculties, or qualities are so important to our identity as persons—as human beings—that they must remain inviolable, at least as against the state.”).

Second is the social contract justification, which is rooted more in a fear of tyranny than a concern with human flourishing. Every law encroaches on man's natural right to complete freedom (an absolute right to privacy, if you will), and it must therefore be justified by some countervailing, legitimate end of government (usually the prevention of harm). See generally JOEL FEINBERG, *HARM TO OTHERS* 9-15 (1984) (outlining and critiquing the “presumptive case for liberty”); OWEN M. FISS, 8 *TROUBLED BEGINNINGS OF THE MODERN STATE*, 1888-1910, at 159 (Stanley N. Katz ed., 1993) (“Such limits [of the social contract] require that every exercise of federal power be justified in terms of the ends for which that power was created.”); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (defining a social contract understanding of the state). But see Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 12-13 (1999) (criticizing the overuse of the term “social contract” to describe “just about any example of a judge grappling with issues of freedom from government restraint”).

In the end, the distinction between social contract and personhood justifications is a false one, because the logic of the two rationales converges: Limits on state power are essential to human dignity. Courts tend to draw on both rationales without distinguishing them, and so this Note will not belabor the distinction.

9. The use of third-party harm as a limit on freedom is generally traced to JOHN STUART MILL, *ON LIBERTY* 70-86 (David Spitz ed., W.W. Norton & Co. 1975) (1859). Mill concludes “that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.” *Id.* at 10. He offers several justifications for this principle of limited government. One is a concern for human flourishing akin to the personhood justification for privacy: Allowing individuals the freedom to make choices is “a mode of strengthening [people's] active faculties, exercising their judgment.” *Id.* at 101. Another, which he calls “the most cogent reason for restricting the interference of government[,]

Looking deeper, this Note finds that the cases with content-neutral approaches to sodomy laws all rested on content-neutral privacy precedents, while the federal right to privacy was born in a murky ad hoc analysis of tradition, where protection existed only for activities the majority already valued. The strong claim of this Note, then, is that *Griswold v. Connecticut*<sup>10</sup> and its progeny laid the groundwork for *Bowers* by failing to articulate a philosophically sound understanding of privacy. Meanwhile, a different standard guided states that struck down their sodomy laws. The implications of this comparison extend beyond the narrow question of sodomy laws to substantive privacy more generally. To the extent the right to privacy exists to limit state intrusion on important choices, how you frame the question of privacy dramatically affects both the community's discourse about rights and, often, the ultimate legal outcome of unanticipated questions.

Part I explores the federal approach to privacy jurisprudence. Contrary to popular liberal wisdom, the Court decided *Bowers* correctly, given how it framed the question of privacy rights in earlier cases. State courts upholding sodomy laws against federal privacy challenges prior to *Bowers* confirm that it was the most reasonable interpretation of precedent. But the federal approach to privacy, which I call "act-based," is illogical and adverse to the right itself. Part II presents an alternative, the "spatial approach," using three states as examples. All three states share with the Supreme Court an extratextual approach to privacy rights: Their constitutions do not expressly guarantee that right. The biggest difference between the two categories of jurisdictions is their initial approaches to privacy. How the courts originally defined privacy, usually decades earlier, foreshadowed how they would later rule on sodomy. Decisions from other courts striking down sodomy laws had a similar tack. This spatial approach is superior to the act-based approach because it often produces a progressive result in privacy cases, and even where it does not,<sup>11</sup> it yields a more useful discourse about rights

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is the great evil of adding unnecessarily to its power," *id.* at 102, an echo of social contract theory. Courts often quote Mill's conclusion, but not his rationales, leaving the harm principle ungrounded. This Note, to the extent that it assumes a substantive right to privacy, will not choose between its rationales (e.g., personhood and social contract). Instead, I offer here a better test (a spatial approach) for the limits on the right, one that is more consistent with either rationale. Therefore, although some attempt to justify the harm principle is made, *see infra* Section II.F, this Note seeks more to deploy the harm principle than to justify it.

10. 381 U.S. 479 (1965).

11. Few would believe that prostitution should be legalized, even though the arguments against sodomy laws would seem to compel that result. For general overviews of the right to privacy and its application to sexual acts, see *SEX, MORALITY, AND THE LAW* (Lori Gruen & George E. Panichas eds., 1997), which discusses homosexuality, prostitution, pornography, abortion, sexual harassment, and rape; Meredith Gould, "Not the Law's Business": *The Current Predicament for Sexual Minorities*, in *LEGISLATING MORALITY* 315 (Kim Ezra Shienbaum ed., 1988); and Kim Ezra Shienbaum, *Overview: Perspectives on Sex, the State and Public Policy*, in *LEGISLATING MORALITY*, *supra*, at 1.

in our polity. To the extent that the spatial approach was abandoned years ago in the realm of the criminal law, this Note urges its reappraisal and reincorporation at the federal level.<sup>12</sup>

#### I. FEDERAL LAW: THE FUNDAMENTAL ACTS TEST FOR PRIVACY

The Supreme Court's decision not to overturn Georgia's sodomy law as applied to homosexuals created a firestorm of opposition and galvanized the gay rights movement.<sup>13</sup> For many, the decision was plainly wrongheaded,<sup>14</sup> and its tone needlessly hostile. Particularly from the perspective of those outside the legal profession, the case went far beyond the narrow question of privacy rights to the political status (or lack thereof) of homosexuals. Yet for all of the visceral reaction against it, *Bowers* applied the same test for privacy rights as previous decisions on sexual privacy, and it did so correctly. Accepting arguendo the Court's framing of the question, there should be little doubt it reached the right answer. Those who think otherwise are under the misimpression that precedent in the realm of sexual privacy created content-neutral boundaries. In reality, there is no federal right to privacy that shields us from the gaze of the state, and there has never been one. The Court's sexual privacy jurisprudence has relied on a case-by-case evaluation of the act in question, regardless of whether it can be viewed from the outside or whether it creates third-party harms. In doing so, the Court has asked a majoritarian question of value prior to the question of privacy. Something is private only if the Court (and most of America) does not mind watching.

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12. See *infra* notes 187-190 and accompanying text.

13. See EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 6 (1990).

14. For arguments that the Supreme Court's pre-*Bowers* privacy cases compel protection of same-sex intimacy, see WALTER BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 52-73 (1973); John Arthur, *Privacy, Homosexuality, and the Constitution*, in *READINGS IN THE PHILOSOPHY OF LAW* 570 (John Arthur & William H. Shaw eds., 2d ed. 1993); Rubinfeld, *supra* note 8, at 748; and Mark John Kappelhoff, Note, *Bowers v. Hardwick: Is There a Right to Privacy?*, 37 AM. U. L. REV. 487 (1988). See also Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (criticizing the Court's approach to privacy, particularly its authoritarian reliance on history and tradition, and urging a republican approach that appreciates Hardwick's claim as a political right); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992) (rejecting privacy as the paradigm for understanding the law's regulation of homosexuality). For a comprehensive survey of regulations of sodomy at the time *Bowers* was decided, see Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986). For criticism of both *Bowers* and state cases striking down sodomy laws, comparing *Bowers* to its Kentucky and Texas analogues, see Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355 (1998).

A. *Bowers v. Hardwick*

Simply put, the Supreme Court decided not to strike down sodomy laws as applied to homosexuals because there is no American tradition of accepting homosexual sex. From the very beginning of the opinion, the Supreme Court in *Bowers* cast the case as a question of the “fundamental rights of homosexuals.”<sup>15</sup> In asking repeatedly whether homosexuals in particular have a “fundamental right . . . to engage in sodomy,”<sup>16</sup> it is no wonder the Court concluded such a claim is “at best, facetious.”<sup>17</sup> The Court, in the following paragraph, set out the test for determining whether a given act is fundamental and falls within the constitutional boundaries of the right to privacy:

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. . . . [T]his category includes those fundamental liberties that are “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed” . . . [and] those liberties that are “deeply rooted in this Nation’s history and tradition.”<sup>18</sup>

In other words, the test for whether homosexual sodomy is protected by a constitutional right to privacy requires an evaluation of the traditional status of homosexual sex per se. And, if we ask whether there has been a tradition of treating homosexuals as equal, much less accepting sodomy as normal, healthy sexual activity, there is little doubt that the answer to that question is no.<sup>19</sup> The extent of the right to privacy depends on whether the act you wish to commit is fundamental, meaning “traditional,” necessary for “ordered liberty,” or “deeply rooted” in history—valued by the majority of people in our nation over time. It relies on an act-based conception of

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15. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986); *see also id.* at 188 n.2 (“We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.”).

16. *Id.* at 190; *see also id.* at 191 (“constitutional right of homosexuals to engage in acts of sodomy”); *id.* (“fundamental right to engage in homosexual sodomy”); *id.* at 192 (“a fundamental right to homosexuals to engage in acts of consensual sodomy”); *id.* at 196 (Burger, C.J., concurring) (“[I]n constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.”).

17. *Id.* at 194 (majority opinion).

18. *Id.* at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937); and *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

19. *See* Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *THE LESBIAN AND GAY STUDIES READER* 3, 13-14 (Henry Abelove et al. eds., 1993) (discussing the traditional hierarchy of sexual practices in America).

privacy and ignores spatial boundaries entirely. Of course, by these terms, there is no privacy right to homosexual sodomy.

One might object, as Justice Blackmun did in dissent, that the law at issue applied equally to heterosexual sodomy.<sup>20</sup> This is, of course, true, but as the privacy question has been framed in terms of fundamental acts, the Court could easily have reached the conclusion that there is no fundamental right to heterosexual oral or anal sex.<sup>21</sup> Scientific research suggested a majority of Americans engaged in oral sex,<sup>22</sup> but the behavior remained taboo, even for straight persons.<sup>23</sup> *Bowers* was not the first decision to declare 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.”<sup>24</sup> Nor was it the only case to rely on history to evaluate whether a certain activity falls within the right to privacy.<sup>25</sup> The Court’s reliance on history put it on precarious ground since the history of attitudes toward homosexuals is, at least, contested,<sup>26</sup> but as I explain next, the methodology of *Bowers* followed precedent.

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20. “A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents. . . . [T]he Court’s almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used.” *Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

21. See *State v. Pilcher*, 242 N.W.2d 348, 365-66 (Iowa 1976) (Reynoldson, J., dissenting). The court in *Pilcher* struck down the state’s gender-neutral sodomy law only as applied to consenting heterosexual couples (but not homosexuals) based on federal case law. In dissent, Justice Reynoldson argued that the majority should not have considered the private, consensual nature of the sex but only the specific nature of the act in determining “whether the right of consenting non-spouses to engage in sodomitical activity is *fundamental* in a constitutional sense.” *Id.*

22. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 103 (1994); John Arthur, *Privacy, Homosexuality, and the Constitution*, in *READINGS IN THE PHILOSOPHY OF LAW* 570, 577 (John Arthur & William H. Shaw eds., 2d ed. 1993) (noting that studies suggest approximately ninety percent of heterosexual couples engage in oral sex and twenty-five percent in anal sex (citing Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents, *Bowers* (No. 85-140))).

23. “President Clinton’s well-publicized dalliance with Monica Lewinsky has helped popularize an act that had long been taboo. . . . [T]he Sexgate scandal brought the discussion of oral sex out into the open and planted it firmly in the cultural lexicon.” Christopher Francescani, *Sex and the City Teen: An Old Taboo Is Suddenly a Popular Practice*, N.Y. POST, July 25, 1999, at 25.

24. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (internal citations omitted).

25. See *infra* notes 40-46 and accompanying text (discussing *Roe v. Wade*). It is not the last case either. See *Washington v. Glucksberg*, 521 U.S. 702, 710-28 (1997) (relying on the tradition of laws against suicide in upholding a state’s prohibition on physician-assisted suicide); *Michael H. v. Gerald D.*, 491 U.S. 110, 122-26 (1989) (relying on history to reject a biological father’s claim to visitation rights with his child, who was born of an adulterous relationship).

26. See JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* (1980); David M. Halperin, *Sex Before Sexuality: Pederasty, Politics, and Power in Classical Athens*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 37 (Martin Duberman et al. eds., 1989).

B. *The Ambiguous Triad: Griswold, Eisenstadt, and Roe*

Three cases dealing with sexual privacy paved the road for *Bowers* by relying on a certain understanding of privacy: It is a right that protects those acts that are fundamental to personhood, as defined by history. Although the spatial theories of privacy played cameo roles, the federal sexual triumvirate ultimately rejected them.

*Griswold v. Connecticut*, the first Supreme Court case to recognize a federal right to substantive privacy, struck down a state law prohibiting the use of contraceptive devices.<sup>27</sup> The basis for the right, however, was unclear from the opinion. In the abstract, the right to privacy is a freedom from state action within certain “zones.”<sup>28</sup> Those zones of privacy are created by the specific freedoms in the Bill of Rights. The Fourth Amendment, therefore, in prohibiting unreasonable searches and seizures, actually prohibits much more. It offers a person security in his home against various intrusions, including, the opinion seems to say, the intrusion by the police “to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives.”<sup>29</sup> From the first part of the opinion, then, rose a general principle that there is a line drawn between the state and the home, and the government must show something extra to cross that line with regulations. This sounds like the spatial theory of privacy.

But in applying the right to privacy to the statute at issue, much more hung on the Court’s approval of marriage than the privacy of the home or limits on state power. The last two paragraphs emphasized the uniqueness of marriage and the “maximum destructive impact upon that relationship” that the law would have:<sup>30</sup> “This law . . . operates directly on an intimate relation of husband and wife . . . .”<sup>31</sup> The Court was “repuls[ed]” at the thought of police searching “marital bedrooms” in particular—not the bedrooms of masturbators, fornicators, adulterers, homosexuals, or others outside that “noble” association.<sup>32</sup> As a state court interpreting *Griswold* said, “The rationale of the *Griswold* holding flows from its eulogy of the marital status and lacking such status the rule has no foundation.”<sup>33</sup> The emphasis on status indicated that only particular acts (those between married persons) were protected. Certainly, the decision had some elements of a spatial test, but they disappeared by the end of the opinion.<sup>34</sup>

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27. 381 U.S. 479 (1965).

28. *Id.* at 484.

29. *Id.* at 485.

30. *Id.*

31. *Id.* at 482.

32. *Id.* at 485-86.

33. *Hughes v. State*, 287 A.2d 299, 305 (Md. Ct. Spec. App. 1972).

34. Justice Goldberg, concurring and joined by two others, emphasized the Ninth Amendment, but he limited his reading in the same way by emphasizing the “basic and



And so, what began as a potentially sweeping opinion ended as a narrow act of judicial benevolence to a particular class of persons. When unmarried persons challenged a similar law in Massachusetts,<sup>35</sup> *Griswold* was broadened to include them,<sup>36</sup> but without accounting for the necessary philosophical shift. The Court struck down the law because it lacked a rational relationship to its ends and because it violated the Equal Protection Clause. The Court avoided deciding whether access to contraception is “‘fundamental [to] human rights.’”<sup>37</sup> But assuming *arguendo* that *Griswold* did stand for a right to contraceptive devices, the Court recognized that in *Griswold* “the right of privacy in question inhered in the marital relationship.”<sup>38</sup> It responded:

[T]he marital 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.<sup>39</sup>

*Eisenstadt*'s answer to *Griswold*, then, was that because the act in question, deciding whether to engage in procreative sex, was equally “fundamental” to both married and single persons, it fell within the zone of privacy regardless of the marital status of the parties involved. To the extent that *Eisenstadt* was a case about privacy, it suggested that the right to privacy must be enjoyed on equal terms, but it failed to provide a basis for the right itself. The foundation of *Griswold*, the uniqueness of the marital relationship, was replaced by something even more amorphous, the “fundamentally affects” test. After *Eisenstadt*, the basis for the right to privacy was even less clear, because the Court there denied the role of tradition in deciding what acts must be protected. Whatever was “fundamental” was private, which required a case-by-case analysis of the act in question. The language of the line drawn at the door to the marital bedroom, the idea that some locations are too sacred to be subject to scrutiny, was left behind in the opening paragraphs of *Griswold*.

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fundamental” nature of the “right of privacy in marriage.” *Griswold*, 381 U.S. at 487, 491 (Goldberg, J., concurring). This is why it is “beyond doubt” that the Connecticut statutes prohibiting adultery and fornication, as well as other “regulation[s] of sexual promiscuity or misconduct,” are constitutional. *Id.* at 498-99.

35. MASS. GEN. LAWS ANN. ch. 272, §§ 21-21A (West 2000) (prohibiting distribution of contraceptive devices for the purpose of preventing pregnancy except to married persons by a physician).

36. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

37. *Id.* at 453 (quoting the opinion below).

38. *Id.*

39. *Id.* (citation omitted, second emphasis added).

Third was *Roe v. Wade*.<sup>40</sup> The bulk of the opinion recounted the history of laws against abortion, with the Court concluding that those prohibitions were not as deeply rooted as conventionally thought.<sup>41</sup> This was an essential foundation for the privacy analysis that followed, which returned tradition to its central place in act-based privacy analysis. The Court made reference to “a guarantee of certain areas or zones of privacy,”<sup>42</sup> but it qualified this spatial language by saying that precedent “make[s] 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”<sup>43</sup>—picking up on the “fundamentally affects” language at the end of *Eisenstadt* and providing the test used later in *Bowers*. A woman’s right to an abortion was linked to the historical tradition of permitting abortion that the Court found.<sup>44</sup> Without saying where it lies, what it contains, or where it ends, the Court asserted that the right to privacy is “broad enough” to allow a woman to choose to terminate her pregnancy.<sup>45</sup> As with its precedents, little in *Roe* provided the basis for this right. The Court specifically denied, however, that the right to privacy guarantees “an unlimited right to do with one’s body as one pleases.”<sup>46</sup>

These three decisions laid the groundwork that made *Bowers* a consistent decision. The triad of sexuality opinions dealt only with heterosexual sex, and specifically the decision of whether to procreate. In that sense, they were narrow in scope and, as Justice White pointed out in *Bowers*, completely unrelated to gay sex.<sup>47</sup> None of these opinions provided a solid explanation of the origin, nature, or limits of the right to privacy. It began in the penumbras of *Griswold* and ended in the Due Process Clause of *Roe*. All that remained consistent was the test for what counted as private: acts that are fundamental or traditional, valued by a majority of people. This is an act-based conception of the right to privacy; there exists no line beyond which the Court will refuse to look, no truly private space into which a citizen can withdraw and do as he pleases.

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40. 410 U.S. 113 (1973).

41. *Id.* at 136 (“[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.”); *id.* at 140 (“It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect.”).

42. *Id.* at 152.

43. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (citations omitted).

44. *Id.* at 140 (“[A] woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”).

45. *Id.* at 153.

46. *Id.* at 154.

47. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

*C. State Decisions in Line with Bowers*

Earlier I made the claim that *Bowers* was consistently decided, and pre-*Bowers* state court sodomy decisions bear that out. These courts used the same test for privacy in *Griswold* and its progeny that I have claimed existed, and their methodology, evaluating the act and the history of disapproval of homosexuals, was very similar to *Bowers*'s. Since this Note compares two approaches to the right to privacy, it makes sense to review briefly more decisions of the *Bowers* type and flesh out what I mean by the act-based approach to privacy and sodomy laws. These decisions support my causal claim: To the extent these state court decisions can be said to flow from *Griswold*, *Eisenstadt*, and *Roe*, they suggest that you can predict how a sodomy law will fare from how a jurisdiction first framed the right to privacy.

State courts looking to *Griswold*, *Eisenstadt*, and *Roe* to decide whether their sodomy laws were unconstitutional did two things. First, they considered the act itself and its traditional unpopularity. At the state level, applying federal law, judges made no secret of their personal discomfort. Instead of explaining the actual act two defendants stood accused of performing, the Arkansas Supreme Court preferred to note (in the third sentence of an opinion upholding the state's sodomy law) that the arresting officer vomited three times.<sup>48</sup> "Sodomy has been considered wrong since early times in our civilization," opined the Arizona Supreme Court.<sup>49</sup> The state has long had authority to make "unnatural sexual relations a crime," said another.<sup>50</sup> The right to consensual sex is not "of such a fundamental nature [nor] so 'implicit in the concept of ordered liberty' to warrant its inclusion in the guarantee of personal privacy."<sup>51</sup> It is nothing more than a "perverted sex practice," punished "in the promotion of morality and decency."<sup>52</sup> Second, these decisions understood federal privacy law to be status-based, and therefore act-based, as opposed to spatial. As much as possible, the right to privacy established by *Griswold* was limited to those acts linked with the family and procreation. So, for instance, one court held that "the [federal] right of privacy is closely related to the decision whether or not to have a child."<sup>53</sup> The Supreme Court "was concerned only with government trespass upon the sanctity of home and family life and offered

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48. *Carter v. State*, 500 S.W.2d 368, 370 (Ark. 1973). *But see supra* note 7 (discussing a pending challenge to the law).

49. *State v. Bateman*, 547 P.2d 6, 10 (Ariz. 1976).

50. *People v. Ragsdale*, 177 Cal. App. 2d 676, 679 (Ct. App. 1960).

51. *State v. Santos*, 413 A.2d 58, 68 (R.I. 1980) (citations omitted).

52. *Kelly v. State*, 412 A.2d 1274, 1275 (Md. Ct. Spec. App. 1980).

53. *Santos*, 413 A.2d at 67-68. Never mind that sodomy can be understood as a form of birth control.

no privacy protection to the plaintiffs.”<sup>54</sup> And, sodomy “is obviously no portion of marriage, home or family life.”<sup>55</sup> “[T]o strike down a statute proscribing cunnilingus, fellatio, and the whole field of other unnatural or perverted sexual practice . . . is not consistent with the description of the marriage relationship and right of privacy described by Mr. Justice Douglas.”<sup>56</sup>

All of these opinions share an acceptance that the fundamental question is whether “the right of privacy applies to the conduct of the type prohibited.”<sup>57</sup> They did not consider a spatial test for privacy, noting only secondarily whether the act was visible or not. In other words, my description of the federal test for the right to privacy, as an act-based test, was what most state courts adopted when facing the same question *Bowers* faced, but beforehand. This suggests not only that *Bowers* was consistent with its precedents (since other courts came out the same way), but also that it was not a fluke: There is some causal connection between a court’s understanding of privacy’s origin and the viability of sodomy laws. That, in turn, suggests that how you frame the question of privacy determines how a court will come out on a privacy challenge: Act-based tests for privacy always let sodomy laws stand. To the extent I have identified a discernible methodology in the federal case law, I am now in a position to critique that methodology and to offer an alternative.

#### D. *The Problem with Federal Privacy Jurisprudence*

The act-based test for privacy that the Supreme Court uses is problematic for several reasons: It is arbitrary, depending on the judge’s preferences; it is a weak individual right to the extent it relies on the will of the majority; it fails to protect the very individuality that justifies the right; and it is paradoxical, hiding only what we like to view while at the same time failing to protect most of what we would like to hide.

First, it is more arbitrary than a content-neutral spatial test would be. As the emotional language of the privacy opinions indicates, the conclusion that certain decisions and actions are fundamental enough to deserve protection is charged with personal prejudices about the most intimate issues. Not so with the declaration that certain spaces are “private,” simply because the latter decision is relatively neutral. It does not require the judge to engage his personal biases, while the act-based test requires that he rely

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54. *People v. Penn*, 247 N.W.2d 575, 579 (Mich. Ct. App. 1976) (citing *Doe v. Commonwealth*, 403 F. Supp. 1199 (E.D. Va. 1975) (upholding Virginia’s sodomy law), *aff’d mem.*, 425 U.S. 901 (1976)).

55. *Kelly*, 412 A.2d at 1275 (internal quotation marks omitted).

56. *Hughes v. State*, 287 A.2d 299, 304 (Md. Ct. Spec. App. 1972).

57. *Neville v. State*, 430 A.2d 570, 576 (Md. 1981).

on them as a proxy for the majority's. Deciding what physical boundaries deserve protection leaves less room for subjectivity.<sup>58</sup> And even though there will always be dispute over where to draw the content-neutral line, any line allows you *some* space to which you may withdraw and act as you wish. The judge may not like what you do, he may not think it rooted in personhood and deserving of protection, but that does not matter as long as you are able to hide beyond the boundary created by the right to privacy (and there are no externalities or other justifications for legislative intervention). Ultimately, this allows more freedom for people to deviate from the majority's preferences.

Second, a right to privacy is pointless if you can only hide what everyone approves of, essentially the standard articulated by the Supreme Court in the fundamental rights test. That which the majority approves of (say, contraception as opposed to homosexual sex) needs less protection because the consequences of discovery, in terms of embarrassment, prosecution, and so forth, are much less severe. As the dissent in *Griswold* pointed out, laws that annoy the majority of people are more easily fixed through the legislative process.<sup>59</sup>

Third, an act-based conception of privacy is ultimately self-defeating when written into law. Instead of asking whether a particular act is fundamental to *you*, the petitioner (perhaps a homosexual), the Court's test asks whether the act is traditionally important. This makes an individual right, by definition a right against the will of the majority, dependent on that very will. But privacy is most valuable when the majority condemns the proposed conduct. An act-based conception of privacy is ultimately

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58. For example, it is a constitutional no-brainer that the law may prohibit the sale of sex toys. *See Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020, 1024 n.1 (5th Cir. June 1981) (upholding a Texas obscenity law that, inter alia, outlawed the sale of "device[s] designed and marketed as useful primarily for stimulation of the human genital organs"); *see also Sewell v. Georgia*, 435 U.S. 982 (1978) (dismissing the appeal of a conviction under a similar statute for want of a substantial federal question); *Miller v. California*, 413 U.S. 15 (1973) (sustaining obscenity laws that prohibit obscene devices). "Artificial vaginas" and "rubber devices shaped like penises" are so culturally marginal that the Supreme Court did not pause in *Sewell* before rejecting claims that the Constitution provides for the freedom to sell them. Choice of contraceptive methods, however, falls within the penumbras of the Bill of Rights. Of course, there is a serious distinction between condoms and sex toys; lack of access to the former has far greater consequences. But from the standpoint of the right to privacy, personhood is as implicated (and compromised) by regulations of what devices you can use with your partner. The judgment that you may use condoms but not sex toys in your home, because the former is more rooted to your dignity, is arbitrary.

Of course, a judge's private biases might come into play in deciding what counts as a private space. For example, a socially conservative judge might find that a parked car is private when a married heterosexual couple is necking and arrested for public lewdness, but that same judge might conclude otherwise if the couple were gay. Still, once the judge concludes that the space is private for the straight couple, he is bound to use the same line between public and private in any subsequent gay case.

59. *Griswold v. Connecticut*, 381 U.S. 479, 531 (1985) (Stewart, J., dissenting).

self-defeating because it fails to protect the individuality, the deviation from the norm, that is the very reason for its existence.

Fourth, there is something paradoxical about a right to privacy that exists only under the approving gaze of the judge. The act-based right to privacy requires observation and judgment of exactly what you want to hide from view. In other words, the Court must first scrutinize the act publicly before it can be kept private. This is odd since the right to privacy is most meaningful when we wish to shield ourselves from the gaze and judgment of others. Without that ability to withdraw, there is no real right to privacy, because the Court is always looking.

Fifth, and finally, the Court's "fundamental to ordered liberty" standard is a high bar to reach to shield most of the banalities of our lives from public view. Consider the article that first conceived of a "right to privacy" as "the right to be let alone."<sup>60</sup> Brandeis and Warren proposed a right to privacy that is content-neutral, in that the individual is permitted to "fix the limits of the publicity" given to his "thought, sentiment, or emotion" "wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed."<sup>61</sup> The right against publicity protects "the acts and sayings of a man in his social and domestic relations,"<sup>62</sup> even the totally banal "domestic occurrence," such as whether a couple had dinner or not the night before.<sup>63</sup> The right exists regardless of the harm caused by the invasion, whether trivial or great: "[I]f privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting."<sup>64</sup> The right proposed in this seminal article was not contingent on the fundamental nature of the information that the individual wishes to keep private. What is fundamental is the distance an individual needs to establish between himself and the rest of the world in order to be human.<sup>65</sup> That line, not the acts behind it, is fundamental. This content-neutrality is exactly what is missing in the sexual privacy cases discussed above.<sup>66</sup>

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60. Warren & Brandeis, *supra* note 8, at 195-96 (citation omitted). Justices Brandeis and Warren sought to ground a restraint on unauthorized commercial use of people's images or the publication of gossip, and thus the context of the discussion differs from that of *Griswold* and its progeny. The article focused on ways to keep private acts from being made public, not whether certain private acts should be illegal, but to the extent the badge of illegality requires a public gaze into the private sphere, similar principles are involved.

61. *Id.* at 198-99.

62. *Id.* at 214.

63. *Id.* at 201.

64. *Id.* at 205.

65. *Id.* at 196 ("The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world . . .").

66. One might object, as Justice Blackmun did in dissent in *Bowers*, that the spatial approach is very much a part of federal jurisprudence. *See Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) ("[The Court] has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy

## II. STATE LAW: THE SPATIAL APPROACH TO PRIVACY

Three states and assorted other decisions take an approach to privacy that I named “spatial.”<sup>67</sup> A spatial theory of privacy protects certain physical zones by drawing lines between the government’s power and some other space or location, be it the home, the bedroom, or an individual’s body. It is “a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged.”<sup>68</sup> Courts draw on both the social contract justification (which emphasizes the limits of state power) and the personhood justification (which emphasizes the distance we need from observation and regulation in order to have dignity) to ground the spatial right to privacy, and the opinions jumble the two together. But the important distinction is between the spatial and the act-based approaches. Not surprisingly, the states whose original privacy decisions involved content-neutral spatial boundaries came out differently on the question of sodomy from the Supreme Court. Where the state had a tradition of evaluating the right to privacy based on more objective criteria, such as visibility or harm, opinions evaluating sodomy had a much different ring (and result).

### A. *Kentucky*

In 1992, Jeffrey Wasson propositioned a male undercover police officer at a Lexington, Kentucky, parking area and was convicted under a Kentucky statute that made same-sex sexual contact and its solicitation misdemeanors.<sup>69</sup> The state supreme court overturned the conviction and struck down the sodomy statute on the ground that it violated Wasson’s

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them are engaged.”). The cases he cited, however, all involved either the First or the Fourth Amendment, which provided the bases for protection, not the right to privacy.

67. Five states—Georgia, Kentucky, Tennessee, Montana, and Minnesota—have struck down sodomy laws on state constitutional privacy grounds. Montana’s constitution, however, contains an explicit right to privacy, and it is not discussed here, for that difference makes comparison with the Supreme Court inappropriate. *See Gryczan v. State*, 942 P.2d 112 (Mont. 1997). Minnesota’s challenge involved a trial court judge who entered declaratory relief to a class of plaintiffs, and the state chose not to appeal. It remains unclear, however, whether her decision has statewide effect. *See supra* note 3. New York, Maryland, and Pennsylvania state courts struck down the laws based on the grounds of equal protection, *see Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980), a consent decree, *see Williams v. State*, No. 98036031/CC-1059, 1998 Extra LEXIS 260 (Cir. Ct. Balt. City Oct. 15, 1998), and the Federal Constitution, *see People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980). Iowa struck down its law as applied to heterosexuals only, *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976), relying on federal privacy and equal protection grounds. In 1978, the state legislature repealed the law entirely.

68. *Bowers*, 478 U.S. at 204 (Blackmun, J., dissenting).

69. Sodomy was defined as “deviate sexual intercourse with another person of the same sex.” KY. REV. STAT. ANN. § 510.100 (Michie 1999). Solicitation thereof was a Class B misdemeanor. *Id.* § 506.030(2)(e).

rights to privacy and equal protection under the Kentucky Constitution.<sup>70</sup> Repeatedly distinguishing the state and federal constitutions, the court drew on what it called the state's "rich and compelling tradition of recognizing and protecting individual rights from state intrusion,"<sup>71</sup> depicting privacy as a right presumptively held by an individual in all affairs absent the risk of harm to himself or others.<sup>72</sup> Declining to use its own voice, the court quoted heavily language that drew a line between the government and the individual and placed the burden on the government to justify its "intrusive power" with something more than the morals of the majority.<sup>73</sup>

The concept of privacy relied on in *Wasson* is distinctly Millian,<sup>74</sup> resembles traditional social contract theory, and has its precedent in *Commonwealth v. Campbell*, a Prohibition-era case in which the court held that the state may not prohibit the personal, private consumption of alcohol, because it posed no danger to the safety of the public.<sup>75</sup> Under the aegis of a state statute, the town of Nicholasville prohibited transporting more than a quart of alcohol into the town.<sup>76</sup> On appeal, the state supreme court found

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70. See *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

71. *Id.* at 492.

72. See *id.* at 495 ("The theory of our government is to allow the largest liberty to the individual commensurate with the public safety . . . ." (quoting *Commonwealth v. Campbell*, 117 S.W. 383, 387 (Ky. 1909))); see also *id.* at 494, 496-98.

73. *Id.* at 492 (using the words "intrusive" or "intrusion" to reference the state's power three times on the same page); see also *id.* at 494 ("[T]he highest of all moral obligations [is] to protect each individual in the rights of life, liberty, and the pursuit of happiness, provided that he shall in no wise injure his neighbor in so doing." (alteration in original) (internal quotation marks omitted)); *id.* at 494-95 ("It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned . . . . [L]et a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws." (alteration in original) (quoting *Campbell*, 117 S.W. at 385-86)); *id.* at 496 ("The power of the state to regulate and control the conduct of a private individual is confined to those cases where his conduct injuriously affects others." (quoting *Commonwealth v. Smith*, 173 S.W. 340, 343 (Ky. 1915))); *id.* ("[I]mmorality in private . . . is placed beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution."); *id.* ("The [harm] principle requires liberty of taste and pursuits; . . . of doing as we like . . . without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong." (quoting JOHN STUART MILL, ON LIBERTY (1859))); *id.* ("Public indignation, while given due weight, should be subject to the overriding test of rational and critical analysis, drawing the line at harmful consequences to others."); *id.* at 498 ("[L]egislating penal sanctions solely to maintain widely held concepts of morality and aesthetics is a costly enterprise. It sacrifices personal liberty, not because the actor's conduct results in harm to another citizen but only because it is inconsistent with the majoritarian notion of acceptable behavior." (quoting MODEL PENAL CODE § 213.2 cmt. (1980))).

74. By "Millian" I mean a conception of the right to privacy that is bounded only by third-party harms. In other words, under one reading of Mill, the legislature cannot forbid any private act unless it has negative externalities. See *supra* note 9 (discussing the relationship between the right to privacy and Mill's harm principle).

75. See 117 S.W. 383, 385-87 (Ky. 1909). The first Kentucky case to recognize a right to privacy under state law was *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927), which recognized a cause of action of a debtor against his creditor who posted his debt in the window of his store for all to see.

76. *Campbell*, 117 S.W. 383.



that in prescribing how far the legislature could go to regulate the sale of alcohol, the state constitution implicitly denied it the power of prohibiting liquor entirely.<sup>77</sup> The court made a broader argument, however, that the

Bill of Rights, which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness . . . would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public.<sup>78</sup>

The court's argument was not that liquor possession in particular is fundamental to ordered liberty, but rather that alcohol consumption falls within a certain private space, one of several "matters in which [an individual] alone is concerned" that cannot be regulated without injury to society.<sup>79</sup> Privacy is an absolute right that is never surrendered, even upon entry into civil society, and the boundary it provides between the state and the individual exists regardless of what is done within that boundary, absent externalities. It is the space, not the act, that is protected.<sup>80</sup> The rationale in *Campbell* was followed in several cases, suggesting that it was more than an anomaly.<sup>81</sup>

The vision of privacy articulated in *Campbell* and affirmed in *Wasson* used the state's constitution to draw a line in space between the individual and the government, protecting all that falls behind the line, regardless of its moral content or how fundamental it is to ordered liberty. The state must justify any restriction of individual activity behind that line by an externality that harms another. The content-neutral approach to privacy established in *Campbell* laid the groundwork for the court in *Wasson*

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77. *Id.* at 384-85.

78. *Id.* at 385.

79. *Id.*

80. At the close of the opinion, however, the court blurred the distinction by saying: "The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution, and cannot be abridged . . ." *Id.* at 387. Nevertheless, the bulk of the opinion is devoted to defending privacy based on injury to others, not the value of the act of alcohol possession itself.

81. *See* *Lewis v. Commonwealth*, 247 S.W. 749, 751 (Ky. 1923) (holding that intoxication in a hotel room where no other person's peace was disturbed did not violate the state's public drunkenness statute); *Commonwealth v. Smith*, 173 S.W. 340, 343 (Ky. 1915) (holding that consumption of alcohol in a doctor's office after hours was not sufficiently injurious to others to justify state prohibition); *Adams Express Co. v. Commonwealth*, 157 S.W. 908, 912 (Ky. 1913) (holding that a law prohibiting possession of more than a gallon of alcohol "abridge[d] the personal liberty of the citizen in the right to personally use liquor"); *Hershberg v. City of Barbourville*, 133 S.W. 985, 986 (Ky. 1911) (holding that a law that prohibited smoking within the city limits, even in the privacy of one's home, was "an invasion of his right to control his own personal indulgences"). *But see* *Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000) (holding *Campbell* inapplicable to a statute prohibiting the growth of hemp because the statute was motivated by concern for the well-being of the citizens of Kentucky and not public morality).

eighty-three years later. In fact, the court in *Wasson* explicitly equated homosexuality and alcohol as “incendiary moral issue[s],”<sup>82</sup> condemned by society at different points in time. The burden on *Wasson* was to argue, then, that his behavior did not carry with it harmful third-party effects. Seven expert witnesses testified about the nature of homosexuality on *Wasson*’s behalf, while the state argued that the moral norms of the community were sufficient to justify the law.<sup>83</sup> The only argument advanced by the state that the court considered at least facially valid was that the statute existed to prevent the spread of AIDS. The court rejected this as specious, however, concluding that there was no legislative purpose save to “single out homosexual acts for different treatment.”<sup>84</sup> Absent injury to society, therefore, the court followed *Campbell* and declared that sodomy fell entirely within the boundary of *Wasson*’s right to privacy.

In other cases touching on privacy, the court took care to justify intrusions on private space by some external harm or legitimate state interest outside the “morals” of the public.<sup>85</sup> Many of the cases concerned sexual behavior in public<sup>86</sup> or private behavior that injured minors.<sup>87</sup> The court upheld a statute prohibiting drunk driving even on private property against a privacy challenge because of the danger that the driver would leave the property and do injury outside that zone.<sup>88</sup> But it struck down “unreasonable” regulations of nudist societies in excess of what was needed to preserve privacy,<sup>89</sup> and it reversed a conviction for lewdness where the only “lewd” conduct was in the “privacy” of the defendant’s home.<sup>90</sup>

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82. *Commonwealth v. Wasson*, 842 S.W.2d 487, 495 (Ky. 1992).

83. *Id.* at 489-90.

84. *Id.* at 501.

85. *See Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972) (upholding an abortion law against a federal privacy challenge because of the state’s compelling interest in preserving life); *Voneye v. Turner*, 240 S.W.2d 588 (Ky. 1951) (rejecting a privacy claim by an employee whose debts were made known to his employer by a creditor, and finding an employer has a natural interest in having his employee pay his debts).

86. *Hendricks v. Commonwealth*, 865 S.W.2d 332 (Ky. 1993) (holding that the right to privacy does not shield nude dancing in a public establishment); *Western Corp. v. Commonwealth*, 558 S.W.2d 605 (Ky. 1977) (upholding a conviction against a federal privacy claim for exhibition of an obscene movie in a public movie theater); *Keene v. Commonwealth*, 516 S.W.2d 852 (Ky. 1974) (same); *Cain v. Commonwealth*, 437 S.W.2d 769 (Ky. 1969) (same).

87. *Gilbert v. Commonwealth*, 838 S.W.2d 376 (Ky. 1991) (upholding against a privacy challenge a conviction of parents who forced minors to disrobe); *Bd. of Educ. v. Wood*, 717 S.W.2d 837, 840 (Ky. 1986) (upholding the termination of teachers for engaging in “immoral” behavior outside of the classroom in the privacy of their own home, i.e., smoking marijuana with minors).

88. *Lynch v. Commonwealth*, 902 S.W.2d 813 (Ky. 1995).

89. *See Roe v. Commonwealth*, 405 S.W.2d 25 (Ky. 1966) (striking down as an unreasonable exercise of the police power a regulation that required nudist societies to surround themselves with a twenty-foot-high wall and pay a \$1000 annual tax). The court found that shielding their neighbors’ view was all that could reasonably be required of the nudists.

90. *See Coleman v. Commonwealth*, 247 S.W.2d 535, 535 (Ky. 1952) (reversing a conviction based on lewdness where a man and woman were “scantily clad” in the defendant’s private

### B. *Georgia*

Twelve years after *Bowers*, the Georgia Supreme Court struck down that state's sodomy law. It also took a spatial approach to privacy, although with a slightly different flavor. Georgia's privacy jurisprudence put more emphasis on visibility and the importance of the home and less on the origins and limits of state power (although it explicitly referred to the social contract). In this regard, it relies more on the personhood justification for privacy than the social contract justification. Concern for human dignity and flourishing, not so much skepticism of state power, drove the court. But this distinction (in part a construction of my own imagination) has little practical significance: As in Kentucky, third-party harms were the only justification for limits on private acts conducted within the privacy of one's home.

In 1997 a jury acquitted Anthony San Juan Powell of rape and aggravated sodomy of his wife's niece, but it convicted him of the lesser included charge of sodomy.<sup>91</sup> On appeal the state supreme court ruled that the statute violated Powell's implicit state constitutional guarantees of privacy.<sup>92</sup> The court emphasized the "long and distinguished history" of the right to privacy within the state, which was the first U.S. jurisdiction to recognize a right to privacy.<sup>93</sup> In saying that "a citizen's right of privacy is strong enough to withstand a variety of attempts by the State to intrude in the citizen's life,"<sup>94</sup> the court recognized a boundary between the private individual's sphere of activity and the state. The language of "intrusion" is significant because it establishes a zone around the person, a zone that deserves particular protection from government interference.

The court reviewed the state's privacy precedents, and then, in one short paragraph, the court perfunctorily concluded that sodomy fell within the right to privacy, because the act was "non-commercial" and "occur[red] without force in a private home between persons legally capable of consenting to the act."<sup>95</sup> No distinction was made between types

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apartment). The court adhered to the common-law requirement that lewdness be committed in public. It did, however, note approvingly the fornication charge against the defendant, to which he pled guilty.

91. See GA. CODE ANN. § 16-6-2(a) (1999).

92. See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

93. *Id.* at 21 (citing *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905)). Georgia was the first state to recognize the right, long before the Supreme Court did, but the first judicial opinion in the United States recognizing a right to privacy was issued by a New York court. See *Roberson v. Rochester Folding-Box Co.*, 71 N.Y.S. 876 (App. Div. 1901), *rev'd*, 64 N.E. 442 (N.Y. 1902).

94. *Powell*, 510 S.E.2d at 22.

95. *Id.* at 24 ("We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.").

of sexual activity. The only requirement was that the activity be within the boundary of the home (or beyond the public gaze). Infringement of that right would be justified only if it were “narrowly tailored to effectuate” “a compelling state interest.”<sup>96</sup> In this case, the court concluded the “only possible purpose for the statute [was] to regulate the private conduct of consenting adults, [and] the public gain[ed] no benefit.”<sup>97</sup> Without impact beyond the boundary, the state was powerless to regulate. The court rejected the state’s argument that “social morality” and “due regard to the collective will of the citizens of Georgia” provided sufficient basis for the law. Repugnance on the part of the majority did not create a compelling justification needed to justify the invasion of privacy.<sup>98</sup>

The court’s opinion relied on precedent to define privacy and its origin. Like the Kentucky court, it preferred not to use its own voice to speak on this controversial issue, relying instead on a 1905 libel case that identified a right to privacy as implicit in the social contract.<sup>99</sup> *Pavesich v. New England Life Insurance Co.* was a libel suit by an artist against an insurance company that surreptitiously used a photograph of him in an advertisement. The court found that a right to privacy existed under the state constitution and that it provided a basis for an action in tort.<sup>100</sup> The harm was injury to the plaintiff’s reputation for truthfulness: The advertisement made him out to be a policyholder when his friends and acquaintances knew otherwise.<sup>101</sup>

*Pavesich* used history to support that the claim that the right to privacy is as old as society. The court cited provisions of Roman law forbidding one from attracting attention to someone who is merely minding his own business, the common-law maxim that “every man’s house is his castle” (which made eavesdropping an indictable offense), constitutional restrictions on searches and seizures,<sup>102</sup> and privileged communications.<sup>103</sup>

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96. *Id.*

97. *Id.* at 25.

98. The court itself said it “would not condone” the conduct at issue in this case. *Id.* at 25-26.

99. See *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 69-70 (Ga. 1905). The court stated:

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right . . . to invade the domain of those rights which it is necessarily to be presumed he has reserved, than he has to violate the valid regulations of the organized government under which he lives. . . . A right of privacy in matters purely private is therefore derived from natural law.

*Id.*

100. Although *Pavesich* was a civil suit, the right to privacy declared therein was grounded in Georgia’s constitution, specifically in its Due Process Clause. See *id.* at 71. Because the court relied on the social contract theory to guarantee an individual’s right to privacy, that right is equally good (at least in theory) against the state and another individual, and Georgia’s courts have not distinguished between the two parties. See Robert N. Katz, *The History of the Georgia Bill of Rights*, 3 GA. ST. U. L. REV. 83, 118-20 (1986) (tracing the evolution of the right to privacy under Georgia’s constitution).

101. *Pavesich*, 50 S.E. at 81.

102. *Id.* at 71.

Although this was a civil suit between two private parties, the logic of the opinion (and its examples) suggested that the right to privacy exists against the state as well as another individual. The opinion relied on a concept of reserved rights similar to that articulated by the Tenth Amendment of the U.S. Constitution, one that draws a line between the individual and the state and reserves rights to the individual unless the public good requires otherwise. That “line of demarkation which separates the right of privacy from the well-established rights of others”<sup>104</sup> is drawn according to third-party harms:

An individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy. . . . Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public.<sup>105</sup>

The court analyzed the right to privacy in visual terms, equating the right to privacy with the right to withdraw from the public gaze and do whatever one wants in “seclusion.”<sup>106</sup> That word, denoting the invisibility of the act, appears five times on one page. It is aligned with “privacy” and juxtaposed against “publicity,” “exhibition,” “gaze,” and “public.” Subject to public duty,

the body of a person cannot be put on exhibition at any time or at any place without his consent. . . . The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty.<sup>107</sup>

Of course, it makes sense to analyze a libel-photography case this way, but the powerful philosophical undertones of the language extend beyond the facts at bar.

In the years after *Pavesich*, Georgia’s courts continued to rely on this personhood conception of privacy. They have defined it in various ways as a right against “unnecessary public scrutiny,”<sup>108</sup> a right “to be free from unwarranted publicity . . . [or] the unwarranted appropriation or

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103. *See id.* at 73.

104. *Id.* at 79.

105. *Id.* at 70.

106. *Id.*

107. *Id.*

108. *Athens Observer, Inc. v. Anderson*, 263 S.E.2d 128, 130 (Ga. 1980) (granting a newspaper’s public-records request for an evaluation of university faculty that contained disparaging remarks of named professors).

exploitation of one's personality, the publicizing of one's private affairs with which the public ha[s] no legitimate concern,"<sup>109</sup> "the right to define one's circle of intimacy,"<sup>110</sup> and the right "to be free of unwarranted interference by the public about matters [with] which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life."<sup>111</sup> The right has been construed broadly enough to prevent the state from forcing food on a hunger-striking prisoner,<sup>112</sup> to allow a quadriplegic to disconnect his ventilator and end his life,<sup>113</sup> to shield disclosure of information contained in public records when they are "not the subject of 'legitimate public inquiry,'"<sup>114</sup> and to shield medical records from a prosecutor's ex parte subpoena.<sup>115</sup>

Where the state has rejected right-to-privacy arguments, it has not departed from the philosophical framework articulated in *Pavesich*. The fundamental question remained whether there are legitimate third-party claims that justify state intrusion beyond the boundary established by invisibility. In *Christensen v. State*, the Georgia Supreme Court upheld the sodomy law struck down in *Powell* two years later.<sup>116</sup> The cases are not entirely inconsistent, however. *Christensen* involved a solicitation for oral sex at a public rest area, and the court noted the sting operation was prompted by complaints from citizens who had been the subject of sexual advances and complained.<sup>117</sup> The court justified the law by saying it "promote[d] the public health, safety, morals, and welfare of its citizens," and suggested that "societal order" would be compromised by legalized sodomy.<sup>118</sup> The court perceived that a legal act of sodomy was in some sense visible by the public at large, influential, harmful, and therefore not within the veil of obscurity required for protection. The fact that the solicitation was public influenced the decision<sup>119</sup> and made it hard for the

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109. *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 882-83 (Ga. 1957) (internal quotation marks omitted, first alteration in original) (rejecting an employee's claim that a letter from a creditor to her employer violated her right to privacy, because "an employer has a natural and proper interest in the debts of his employees").

110. *Macon-Bibb County Water & Sewerage Auth. v. Reynolds*, 299 S.E.2d 594, 596 (Ga. Ct. App. 1983) (affirming a decision that the reduction in privacy caused by an easement could be factored into the value of a taking).

111. *Ga. Power Co. v. Busbin*, 254 S.E.2d 146, 149 (Ga. Ct. App. 1979) (holding that in an action for wrongful discharge and defamation, the trial court should have charged the jury on the right to privacy).

112. *Zant v. Prevatte*, 286 S.E.2d 715 (Ga. 1982).

113. *State v. McAfee*, 385 S.E.2d 651 (Ga. 1989).

114. *Harris v. Cox Enters.*, 348 S.E.2d 448, 451 (Ga. 1986).

115. *King v. State*, 535 S.E.2d 492 (Ga. 2000).

116. 468 S.E.2d 188 (Ga. 1996).

117. *Id.* at 189.

118. *Id.* at 190 & n.6.

119. *See id.* at 190 (Fletcher, J., concurring) ("Whatever the extent of the privacy rights under the Georgia constitution of consenting adults in their homes, these rights do not protect solicitation of explicit sexual acts from total strangers in public rest areas.").

justices in the majority to see what one dissenting justice pointed out, that the solicited sex would have occurred in the privacy (and obscurity) of a hotel room and that it would have been noncommercial.<sup>120</sup> Since the underlying act would have been private, and therefore legal, the solicitation of the act could not be punished.<sup>121</sup> A second dissenting justice argued that “the moral welfare of the public” did not present a compelling enough reason to compromise the right to privacy.<sup>122</sup> What matters is not the outcome of the case, but that the majority and minority spoke the same language in debating whether the act would have been private. The central question is whether the act in question is visible and harmful. The majority opinion is consistent with *Pavesich* in that the case involved a public act (as opposed to a private, invisible one), and the opinion performs the correct balancing test in asking whether that act extends beyond the veil of privacy. The only difference between *Christensen* and *Powell* is that the court ceased to recognize the connection between sodomy and social upheaval, an empirical, as opposed to philosophical, difference.

The court rejected other appeals to privacy in the realm of sexuality only when the court found that the act was either not private or not consensual. It upheld the solicitation-of-sodomy statute as applied to public<sup>123</sup> and commercial sex,<sup>124</sup> and the sodomy statute as applied to coerced sex<sup>125</sup> and sex with minors.<sup>126</sup> The court reaffirmed the state’s prohibitions on incest by reference to the coercive nature of the parent-child relationship.<sup>127</sup> It upheld obscenity laws on the ground that they regulated commercial, not private, behavior,<sup>128</sup> and as applied to protect minors.<sup>129</sup> Even in decisions not related to sexuality, the court’s touchstone was often

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120. *Id.* at 191 (Sears, J., dissenting).

121. *Id.* at 192.

122. *Id.* at 199 (Hunstein, J., dissenting) (internal quotation marks omitted).

123. *Stover v. State*, 350 S.E.2d 577 (Ga. 1986) (denying a privacy challenge by a defendant who had sex with a woman in the woods in the back of a pickup truck while his companions waited nearby).

124. *Howard v. State*, 527 S.E.2d 194 (Ga. 2000) (upholding the solicitation conviction of a defendant who locked a waitress in a restroom and demanded oral sex for twenty dollars). Courts have long distinguished regulations of commercial activity from regulations that apply to private individuals. This is why commercial sex loses the protection of the right to privacy, which is an individual right. Even though commercial activity can take place within the private sphere, it is not private because of its relation to money and the market.

125. *King v. State*, 458 S.E.2d 98 (Ga. 1995) (declining to reach the privacy question in a sodomy case involving a sixteen-year-old stepdaughter because there was no evidence of consent); *Stover v. State*, 350 S.E.2d 577 (Ga. 1986) (finding sodomy to be a lesser included offense of aggravated sodomy); *see also Mauk v. State*, 529 S.E.2d 197 (Ga. Ct. App. 2000) (upholding a sodomy conviction where the defendant forced a woman to perform oral sex at knifepoint in a field beside a highway).

126. *Ray v. State*, 389 S.E.2d 326 (Ga. 1990); *Gordon v. State*, 360 S.E.2d 253 (Ga. 1987).

127. *Benton v. State*, 461 S.E.2d 202 (Ga. 1995); *Richardson v. State*, 353 S.E.2d 342 (Ga. 1987).

128. *Morrison v. State*, 526 S.E.2d 336 (Ga. 2000).

129. *Hunter v. State*, 361 S.E.2d 787 (Ga. 1987).

the invisibility of the act<sup>130</sup> or its harmlessness.<sup>131</sup> Either way, the court has seemed concerned with whether the act or its consequences could be seen, whether they extended beyond the veil that shields our truly private acts. Largely absent from the decisions were paragraphs of moralizing or evaluation of the underlying act along some ethical spectrum. For the most part, the court restrained itself from rhetoric akin to that in *Bowers*.

### C. *Tennessee*

Of the state opinions striking down a sodomy law, Tennessee's bears the closest resemblance to the federal jurisprudence. Ultimately, however, the Tennessee test for privacy begins and ends as a spatial one, based both in the limits of state power and the human need for private spaces.

In 1993, an intermediate state court of appeals struck down the state's Homosexual Practices Act<sup>132</sup> for violating, inter alia, the right to privacy under the state constitution.<sup>133</sup> It reasoned that because the law applied to consensual sexual activity between adults "behind closed doors in an individual's home"<sup>134</sup> (the court emphasized precedents that shield the home in particular<sup>135</sup>), it infringed the state constitutional right to privacy.<sup>136</sup> The statute was, therefore, subject to strict scrutiny. Note an important distinction between this case and *Bowers*: The Tennessee court first considered whether the act fell within the category of "private" acts by asking where it took place, and then it considered whether there was a

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130. See *Macon Tel. Publ'g Co. v. Tatum*, 436 S.E.2d 655, 658 (Ga. 1993) (holding that a rape victim could not recover damages when a newspaper published her name after she shot her attacker because at that point she became an "object of a legitimate public interest"); *Doe v. Sears*, 263 S.E.2d 119 (Ga. 1980) (holding that a newspaper could obtain the names and addresses of delinquent public housing tenants because they waived their right of privacy by not paying on time, and the public has an interest in knowing who abuses the state's credit); *Gouldman-Taber Pontiac, Inc. v. Zerbst*, 100 S.E.2d 881, 883 (Ga. 1957) (rejecting an employee's claim that a letter from a creditor to her employer violated her right to privacy because in pursuing credit she waived her rights against background checks and other communications to secure potential loans).

131. See *Adams v. State*, 498 S.E.2d 268 (Ga. 1998) (compelling a criminal defendant to undergo an HIV test where a victim was at risk for transmission of the virus); *Dep't of Corr. v. Colbert*, 391 S.E.2d 759 (Ga. 1990) (allowing random drug tests of prison officials because the danger of transmission of illegal substances outweighed the invasion of privacy); *Blincoe v. State*, 204 S.E.2d 597, 598 (Ga. 1974) (upholding marijuana possession laws against a privacy challenge because of sufficient evidence that marijuana is dangerous and explaining that "[i]f marijuana is a perfectly harmless substance, then its possession can not constitutionally be made criminal").

132. *Campbell v. Sundquist*, 926 S.W.2d 250, 255 (Tenn. Ct. App. 1996) ("It is a Class C misdemeanor for any person to engage in consensual sexual penetration, as defined in § 39-13-501(7), with a person of the same gender." (quoting TENN. CODE ANN. § 39-13-510 (1991))).

133. *Id.* at 262.

134. *Id.* at 261.

135. *Id.* at 261 n.9 (citing *Cravens v. State*, 256 S.W. 431, 432 (Tenn. 1923) (extolling the right against illegal searches as "the very foundation of our state"); and *State v. Graham*, 35 Tenn. (3 Sneed) 134 (1855) (emphasizing, in a public profanity case, the difference between public acts and those conducted in private that cause no harm)).

136. *Campbell*, 926 S.W.2d at 261-62.



legitimate state objective that would justify regulation. The court did not question whether the act was fundamental, but only whether it was visible.

The court rejected out of hand all of the state's arguments but one: The act advanced the morals of Tennessee citizens, as defined by the majority of those citizens. The court granted that morality provided a valid basis for laws in general (and in this sense its reasoning was closer to the federal approach than Georgia's and Kentucky's), but the court held that public morality alone could not justify a compromise of fundamental rights such as privacy.<sup>137</sup> A law justified only by majoritarian morality would not survive strict scrutiny.<sup>138</sup> It was, therefore, both the invisibility of the act and its harmlessness that left homosexual sex within the right to privacy. Unlike the Georgia and Kentucky courts, this court relied much less on a fundamental precedent with broad privacy language. The opinion was very similar to *Griswold* in relying on a series of specific constitutional protections to define the boundaries of a broader right to privacy.<sup>139</sup> But like those in Georgia and Kentucky, the opinion (and the precedent on which it relied) emphasized the space an individual needs to be human, not the content of what she wishes to do within that space. In this respect it is one of the spatial privacy cases and distinguishable from the federal approach.

The right to privacy was first identified in the Tennessee Constitution in 1992, just four years earlier, in *Davis v. Davis*.<sup>140</sup> In that case, the Tennessee Supreme Court refused to let Mary Sue Davis donate frozen embryos to a childless couple after her divorce from Junior Lewis Davis. Junior Davis objected to the use of the embryos, fertilized with his sperm, and demanded that they be destroyed. The court sided with Mr. Davis, finding that his right not to procreate, located in his right to privacy, outweighed Mrs. Davis's interests.<sup>141</sup> The decision relied heavily on federal case law, emphasizing fundamental rights for the proposition that the decision to procreate is fundamental enough to rest within the right to privacy.<sup>142</sup> At the same time, however, the Tennessee court repeatedly mentioned "autonomy"<sup>143</sup> and explained how privacy is rooted in individual liberty, a

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137. *See id.* at 264-65. Note that the Tennessee Constitution does not explicitly guarantee a right to privacy, however.

138. *Id.* at 266 ("Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals.").

139. *See id.* at 260 (relying on the freedom to worship, prohibitions against unreasonable search and seizure, the freedom of speech and press, and prohibitions against the quartering of soldiers).

140. 842 S.W.2d 588 (Tenn. 1992).

141. *Id.* at 603.

142. As the Tennessee court described it, the right to liberty includes the right to privacy, and although the boundaries of those rights are not clearly demarcated, the most fundamental rights fall within them. *See id.* at 598-601.

143. Defined in BLACK'S LAW DICTIONARY 130 (7th ed. 1999) as "the right of self-government."

liberty that runs “even to the extent of overthrowing the government.”<sup>144</sup> That liberty erects a boundary between the government’s power and the private sphere, preventing “unwarranted governmental intrusion into matters such as the one now before us, involving intimate questions of personal and family concern.”<sup>145</sup> The burden was on the state to justify interference in the decision of the gamete-providers. Since “no other person or entity has an interest sufficient to permit interference . . . because no one else bears the consequences of these decisions in the way that the gamete-providers do,” the parties of the case had the right to control the disposition of the embryos.<sup>146</sup> Thus, even though there was something of the “fundamentally affects” test within this opinion, it also relied on spatial privacy by erecting a content-neutral boundary between the state and the individual and requiring the government to justify interference. In other words, of all three state precedents, *Davis* is the most like *Griswold* because it contains two different approaches to privacy, one evaluating the nature of the act, the other the act’s place behind or in front of the privacy-autonomy line. And, like the Supreme Court, Tennessee could have taken the right to privacy in either direction and been consistent with precedent. It happened to follow the broader interpretation, for in *Campbell* the language about the fundamental, personal nature of the act in question, sodomy, all but disappeared. Consensual adult sex was private not so much because of a tradition of protecting certain sexual acts (the *Bowers* approach to the question), but because the act took place in the home, a site of personal autonomy.

Between *Davis* and *Campbell* the Tennessee Supreme Court considered four other cases touching on the state right to privacy, all in the realm of parental rights.<sup>147</sup> If nothing else, the line of Tennessee cases before *Campbell* would have made it very easy for the state’s supreme court to dismiss *Campbell*’s challenge even more easily than Justice White did Michael Hardwick’s. Privacy, until that point, applied only to the realm of family and home. That Tennessee did not do this, even against popular

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144. *Davis*, 842 S.W.2d at 599.

145. *Id.* at 600.

146. *Id.* at 602.

147. See *Simmons v. Simmons*, 900 S.W.2d 682 (Tenn. 1995) (denying grandparents’ visitation request where the children were in custody of the natural mother and her second husband, an adoptive father); *Nale v. Robertson*, 871 S.W.2d 674 (Tenn. 1994) (relying in part on the state right to privacy in granting a natural father’s request for custody over the prospective adoptive parents’ request); *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994) (eliminating parental immunity in the case of an automobile accident where the child died); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) (striking down the Grandparents’ Visitation Act as a violation of fit, married parents’ right to privacy in parenting decisions). Subsequently, the Tennessee Supreme Court denied that the right to privacy created a cause of action against private actors, *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997), and struck down a statute restricting abortion as a violation of the right to privacy, *Planned Parenthood v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000).

opinion,<sup>148</sup> suggests the power of a content-neutral precedent. Tennessee is a particularly interesting case because its privacy jurisprudence lines up with federal law at two crucial points. *Davis*, like *Griswold*, provided both an act-based and a spatial justification for the right to privacy, and subsequent decisions on the right to privacy were about the family and procreation, even more, it would seem, than *Eisenstadt* and *Roe*. The most relevant difference, it seems, is that where *Griswold* backed away from the spatial justification and relied most on the fundamental rights of married persons, *Davis* relied in great part on the state constitution and the argument for privacy from autonomy. Prior to *Davis* the Tennessee courts did not deal frequently with privacy challenges, but the supreme court never rejected a state-based right to privacy. Certain cases suggested in dicta a common-law (as opposed to constitutional) right to privacy existed in the state,<sup>149</sup> and two other cases upheld laws against federal privacy challenges on public safety grounds.<sup>150</sup>

#### D. *Causation or Correlation?*

The above discussion reveals that the Kentucky, Georgia, and Tennessee supreme courts have approached the question of privacy differently from the Supreme Court, even though all four courts interpreted constitutions that make no specific mention of the right to privacy, and two of the three state courts dealt with challenges to sodomy laws by same-sex couples.<sup>151</sup> Two states embraced rights to privacy long before the Supreme Court, and all three state courts provided a thicker philosophical justification, each with a slightly different emphasis. These courts specifically avoided evaluating the act in question for its traditional value or fundamental nature and instead asked content-neutral questions: Is the act visible? Is the act harmful to third parties or those who cannot consent? Does the government have a justification to act? The strong claim of this Note, then, is that the original precedents of *Pavesich*, *Campbell*, and, to a

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148. See *infra* notes 153-158 and accompanying text.

149. See *Martin v. Senators, Inc.*, 418 S.W.2d 660 (Tenn. 1967) (holding that the plaintiff waived whatever right to privacy might have existed); *Langford v. Vanderbilt Univ.*, 287 S.W.2d 32 (Tenn. 1956) (assuming for purposes of the case that a right to privacy existed and holding that it had been waived). *But see* *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997) (dismissing a suit against an employer by a former employee who was fired after a random drug test because the right to privacy does not apply against private parties).

150. See *Gaskin v. State*, 490 S.W.2d 521 (Tenn. 1973) (upholding a statute prohibiting marijuana possession); *Arutanoff v. Metro. Gov't*, 448 S.W.2d 408 (Tenn. 1969) (upholding a statute requiring motorcyclists to wear helmets).

151. Some courts have struck down sodomy laws when challenged by heterosexuals. See, e.g., *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980). Although it is possible that the sexuality of the parties affects the outcome of sodomy cases, that is a topic for a different Note.

lesser extent, *Davis* accomplished what *Griswold* could not: They laid the groundwork for future privacy decisions and allowed for analysis, not merely a subjective interpretation of how important (or popular) a particular act is. As one scholar put it:

Any analysis of a constitutional right of privacy must be founded on an understanding of the underlying premise for the right. The philosophical or political basis for a privacy right will determine the scope of that right. Although the Supreme Court has couched the privacy right in many different terms, the *Bowers* opinion reflected a narrow right delimited by the majority's determination of which conduct was valuable to society.<sup>152</sup>

When *Bowers* reached the Supreme Court, it was too easy for Justice White to look at *Griswold* and conclude that it was "facetious" to protect homosexual sodomy with the right to privacy. We can only wonder what the Court would have done had the original declaration of the right to privacy offered more substance. Certainly, it would not have been as easy to dismiss Hardwick's claims if a Fourth Amendment-style boundary between home and state were present.

To this claim that an early philosophical stance accounted for the different results in *Bowers* on one hand, and *Wasson*, *Powell*, and *Campbell* on the other, one might reply that the decisions were handed down at different times<sup>153</sup> and, therefore, are a result of a shift in public opinion that has occurred on the question of homosexuality in recent years. This response, although understandable, is ultimately unpersuasive. In 1986, the year *Bowers* was handed down, 54% of Americans said that homosexual relations between consenting adults should not be legal, and 51% of Americans said they approved of *Bowers*.<sup>154</sup> In 1992, the year Kentucky's supreme court decided *Wasson*, 49% of respondents in the South opposed decriminalization of sodomy<sup>155</sup> and 61% said it was not an acceptable alternative lifestyle,<sup>156</sup> hardly a progressive sea change from 1986. The Gallup organization stopped asking about sodomy laws in 1996, but in that year 52% of those in the South said they opposed decriminalization of

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152. Elizabeth A. Leveno, Comment, *New Hope for the New Federalism: State Constitutional Challenges to Sodomy Statutes*, 62 U. CIN. L. REV. 1029, 1043 (1994). This comment provides a useful comparison of *Bowers* and several state decisions. Primarily, however, the author argues that *Bowers* got the right to privacy wrong by failing to recognize how broad the federal right to privacy really is. In contrast, this Note argues that the federal right really is not broader than *Bowers* concluded. Further, this Note focuses on the evolution of the right to privacy in state jurisdictions, something the comment does not consider.

153. 1986, 1992, 1998, and 1996, respectively.

154. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1986, at 213-14 (1987).

155. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1992, at 101 (1993).

156. *Id.* at 100.

homosexual relations between consenting adults, and only 39% favored.<sup>157</sup> In 1998, when *Powell* was decided, 66% of people in the South, and 59% of people across America, said they thought homosexual behavior was morally wrong.<sup>158</sup>

In other words, at the time the U.S. Supreme Court denied privacy rights to homosexuals, not much more of the national population agreed with it than did the constituency of the supreme courts in Kentucky, Georgia, and Tennessee, which appeared to act against public opinion. It is too facile a response to say that time and public tolerance account for the difference in the opinions.

#### E. *Other Decisions*

Leaving aside the claim of causation, there is no question that most courts rely on a definition of privacy that is spatial, as opposed to act-based, when invalidating sodomy laws. Because there is value in appreciating the different ways courts approach the question of privacy in the context of sodomy laws, I review here three decisions by state courts that for some reason are inappropriate for discussion above with Georgia, Kentucky, and Tennessee, but nevertheless deserve some attention. They are worth exploring quickly, for they share with *Powell*, *Wasson*, and *Campbell* a decision not to evaluate the underlying act in deciding the boundaries of privacy, choosing instead to rely on a content-neutral boundary between the state and the individual.

In a decision later overruled for want of jurisdiction, a Texas appellate court struck down the state's sodomy law in 1992, basing its decision on the state's implied constitutional right of privacy.<sup>159</sup> The very first sentence of the opinion is a clarion call for the spatial approach to privacy: "This

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157. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1996, at 158 (1997).

158. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1998, at 213-14 (1999).

159. *State v. Morales*, 826 S.W.2d 201 (Tex. App. 1992), *rev'd*, 869 S.W.2d 941 (Tex. 1994). Lesbians and gay men brought a civil suit to enjoin the state from enforcing the sodomy law. Avoiding the merits entirely, the Texas Supreme Court concluded the courts lacked equity jurisdiction to grant such prospective relief where prosecution is not imminent. Last year an intermediate state appellate court again invalidated the law, which applies only to same-sex sodomy, in an appeal by two homosexual men convicted of having sex with each other in the privacy of their own home. This time the ground was sex discrimination in violation of the state's Equal Rights Amendment. *Lawrence v. State*, Nos. 14-99-00109-CR, 14-99-00111-CR (Tex. Ct. App. June 8, 2000), <http://www.lambdalegal.org/sections/library/decisions/lawrence.pdf>. The court specifically avoided the privacy issue, and the decision came with a political price for the judge who authored the opinion. See Alan Bernstein, *Republicans Target One of Their Own*, HOUSTON CHRON., July 4, 2000, at A1. Then, last spring, the court of appeals heard the case en banc and vacated the opinion. *Lawrence v. State*, 41 S.W.3d 349 (Tex. Ct. App. 2001), *petition for discretionary review filed*, No. 0873-01 (Tex. Crim. App. May 18, 2001). That court rejected both the equal protection and the privacy claims advanced by the defendants with analysis that mirrored the Supreme Court's in *Bowers*, relying on history and tradition and doing nothing to distinguish the state and federal rights at issue. See *id.* at 360-62.

appeal involves the limits on the government's right to intrude into an individual's private life, and the extent of an individual's right to be let alone."<sup>160</sup> As do the three state decisions above, this one relied on an older state precedent setting forth the right to privacy in content-neutral terms. "[The] right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling governmental objective that can be achieved by no less intrusive, more reasonable means."<sup>161</sup> A line in space exists between the state and the individual, and the former must justify transgressions of that line into private space. Of course, this only begs the question, What is private? To this the *Morales* court merely asserted, "We can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private."<sup>162</sup> The court in that formula limited the inquiry to the invisible and the consensual, leaving only the question of third-party harms. To the state's justification that the law advances public morality, the court replied that the state did not provide sufficient evidence to that effect.<sup>163</sup>

What is telling about the disposition of this case, from the standpoint of this Note, is that the state supreme court reversed on other grounds. If we cynically assume that it did so because it disagreed with the lower court's result, we must confront the fact that the court did not reverse on the merits. In other words, it could not get around (or would not admit to circumventing) the precedent of *Employees Union*, which articulated a spatial approach to privacy. This is the strongest evidence available for the claim advanced by this Note that the way a jurisdiction first approaches the question of privacy influences how it decides controversial cases later. The Texas Supreme Court could not have written a *Bowers* because as long as it followed precedent, it was required to consider the question of sodomy from the standpoint of third-party harms and visibility. The intrusion that sodomy laws present would have to be justified based on third-party harms that create a "compelling state interest." From that perspective, it would have been much harder to make this liberal result just disappear. Enter the doctrine of standing, an easy way to make it all go away without ignoring *stare decisis*.<sup>164</sup> And so although Texas reveals that a helpful precedent does

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160. *Morales*, 826 S.W.2d at 202.

161. *Tex. State Employees Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) (recognizing a right to privacy under the state constitution and striking down a defendant's policy of requiring employees to take an intrusive polygraph test).

162. *Morales*, 826 S.W.2d at 204.

163. *See id.* at 205.

164. It remains to be seen whether a more recent intermediate court of appeals opinion doing just that—applying *Bowers*-type reasoning to uphold the state's sodomy law—will withstand scrutiny. *See supra* note 159. Even if it does, the tortured history of challenges to sodomy laws in Texas suggests that a content-neutral privacy opinion can do a lot to complicate the question of privacy in a jurisdiction.

not guarantee the “right” result, it does suggest that a “wrong” result—one that relies only on the judge’s reactions to what he considers icky—is more difficult.

A New Jersey appellate court in 1978 overturned a conviction under that state’s sodomy law,<sup>165</sup> relying heavily on a prior state supreme court precedent that struck down the state’s law against heterosexual fornication.<sup>166</sup> It did so in spite of an earlier state supreme court precedent rejecting a federal privacy challenge to the same state sodomy law.<sup>167</sup> Certainly, the facts at bar were not sympathetic ones: A man who performed fellatio on a sixteen-year-old boy was accused of assault with intent to commit sodomy. Regardless of consent (a fact that was disputed), this was not a defendant likely to find many allies in the judiciary. Nevertheless, the court was clear that “the individual’s right of personal privacy and autonomy prevail[s] over the state’s right to regulate private sexual conduct.”<sup>168</sup> It concluded that the *Saunders* decision, overturning the fornication statute, contained a rationale of personal autonomy that could not be narrowed to exclude homosexual sex:

“To the extent that [the fornication statute] serves as an official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs, it is not an appropriate exercise of the police power.

Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate ‘remedy’ for such conduct cannot come from legislative fiat. Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right of personal autonomy is fundamental to a free society. . . . [T]he liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy.”<sup>169</sup>

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165. *State v. Ciuffini*, 395 A.2d 904 (N.J. Super. Ct. App. Div. 1978). The legislature had repealed the sodomy law prior to this court’s judgment, but the change would not take effect until 1979. See N.J. STAT. ANN. § 2C:98-2 (West 1995) (repealing N.J. STAT. ANN. § 2A:143-1 (West 1985)). The court took judicial notice of this fact but did not treat it as dispositive.

166. *State v. Saunders*, 381 A.2d 333, 339 (N.J. 1977) (“Although persons may differ as to the propriety and morality of such conduct . . . such a decision [to fornicate or not] is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard.”). The *Saunders* court specifically relied on the state constitution in light of the U.S. Supreme Court’s summary affirmance in *Doe v. Commonwealth*, 425 U.S. 901 (1976), which upheld Virginia’s sodomy statute as applied to gay men.

167. *State v. Lair*, 301 A.2d 748 (N.J. 1973) (holding that the state’s sodomy statute could not be applied to married couples after *Griswold*, but that its application to unmarried persons, gay or straight, was permissible).

168. *Ciuffini*, 395 A.2d at 907 (citing *Saunders*, 381 A.2d at 342 n.8).

169. *Id.* at 908 (quoting *Saunders*, 381 A.2d at 342-43).

Because the legislature repealed the state's sodomy law during the *Ciuffini* case, no judicial attention was ever paid to the issue again, but it is notable that this particular court relied on a heterosexual state privacy precedent emphasizing autonomy to overturn a homosexual sodomy conviction. In line with the thesis of this Note, a privacy precedent grounded in autonomy can make the difference when it comes to judicial decisions about unpopular but private activity.

Pennsylvania's supreme court struck down the state's Voluntary Deviate Sexual Intercourse Statute in 1980 when two erotic dancers who performed oral sex on bar patrons challenged the law.<sup>170</sup> Technically the decision did not involve the right to privacy, because the court reached only the Equal Protection Clauses of both the state and federal constitutions.<sup>171</sup> But although the court assumed away the privacy question, there is much language in the opinion delimiting the police powers of the state.<sup>172</sup> The opinion quoted heavily from Mill for the proposition that public morality is not a valid state objective. "Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals."<sup>173</sup> Again we see an emphasis on the line between public and private, rendering state regulation of morality presumptively invalid.

#### F. *The Benefits of a Spatial Approach*

Even if you remain unconvinced that prior privacy precedents account for the outcomes of later sodomy cases (the strong claim of this Note), there is still value in a spatial approach to privacy. In this Section, I explain why the spatial approach to privacy, and its implicit reliance on the harm principle, is not only viable but also better than the act-based approach currently in place.

Earlier I defined spatial privacy as a right delineated by content-neutral boundaries drawn in space: Any acts, regardless of their character, occurring within those boundaries are protected as private. Of course, no one would support an absolute right to spatial privacy, for that would protect heinous crimes as long as they occurred indoors, and so advocates temper this standard by requiring that a valid legislative objective be met

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170. *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980).

171. *Id.* at 51 ("Assuming, without deciding, that no fundamental interest is at stake (i.e., the right of privacy), so that strict scrutiny of the classification is not required, the classification still denies equal protection . . .").

172. *See id.* at 50 (finding that the sole purpose of the statute was "to regulate the private conduct of consenting adults," a purpose "not properly in the realm of the temporal police power").

173. *Id.*



before private acts can be regulated.<sup>174</sup> This Note (and the spatial privacy cases it cites) has assumed that spatial privacy is limited only by third-party harms. This is a large assumption on which there is no consensus. For some authors government is responsible for more than just the prevention of harm.<sup>175</sup> Instead of remaining neutral on questions of the good life,<sup>176</sup> the state exists in part to reflect (and perhaps to define) our conceptions of the good. And even if we accept the harm principle as the boundary of privacy, it is not at all clear what counts as a third-party harm.<sup>177</sup> But justifying modern liberalism is beyond the scope of this Note. Suffice it to say that the substantive right to privacy requires limits on the state's power to validate value choices. Once you accept the right, you must adopt the harm principle to some degree. As for what counts as harm, there must be some judicially cognizable boundary between the harm caused by, say, rape, which the right to privacy ought not sustain, and the sense of rejection that arises from not being able to codify one's values.<sup>178</sup>

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174. Indeed, the right to privacy has been criticized for its tendency to protect private harms, especially the subordination of women. See CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191, 194 (1989) ("This right to privacy is a right of men 'to be let alone' to oppress women one at a time. . . . Privacy law keeps some men out of the bedrooms of other men."); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2152 (1996) (documenting the reluctance of courts to punish wife beaters, citing the need to shield the private institution of marriage from the gaze of the law). This is a problem not so much with the spatial approach or the right to privacy, however, as it is with the court's understanding of what counts as harm. The approach to privacy proposed here would give no quarter to private harms merely because of their privacy.

175. See, e.g., PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 7-10, 12-22 (1968) (arguing for a public morality on the ground that a community, in order to have any meaning as such, requires a common moral language, a set of shared ideas). "The bondage [of public morality] is part of the price of society; and mankind, which needs society, must pay its price. . . . No society can do without intolerance, indignation, and disgust." *Id.* at 10, 17; see also J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997) (arguing that politics is a contest of shifting "status hierarchies"); Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) (arguing that the criminal law exists in part to express our contempt for certain actions and people, codifying our values and way of life).

176. See JOHN RAWLS, POLITICAL LIBERALISM (1993).

177. See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing that certain acts, even private ones, hurt all of us by undermining basic notions of human dignity and defending laws against prostitution on that basis); Rubinfeld, *supra* note 8, at 765 (arguing that a limit on the community's right to define itself can be construed as a third-party harm). See generally Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 113 (1999) (tracing the appropriation of the harm principle by legal moralists and noting that "[c]laims of harm have become so pervasive that the harm principle has become meaningless"). Harcourt notes that arguments over the regulation of homosexual conduct have shifted from *Bowers* to the present, from legal moralism to harm, particularly anxiety over AIDS. See Harcourt, *supra*, at 161-67.

178. Certainly, this line exists in tort law. In adapting it to constitutional law we must start by rejecting the claim, which draws strength from Balkin, *supra* note 175, Kahan, *supra* note 175, and Rubinfeld, *supra* note 8, that the law's rejection of a certain set of norms counts as a judicially cognizable harm. Of course, this leaves the nontrivial arguments that certain private acts, like viewing pornography and prostitution, involve third-party harms, and these arguments are not easily dismissed. See Harcourt, *supra* note 177, at 183-86. My point here, however, is not

Progressives who favor individual rights and negative liberty should favor a spatial approach to privacy and the harm principle because they are more likely to produce the results they want.<sup>179</sup> If the burden is placed on the state to justify regulation that intrudes beyond a certain boundary, it becomes more difficult to use the criminal law as a tool to subordinate certain groups and values, and a trove of laws are weakened. Take laws against interracial sex acts and adultery as two examples. There should be no question that these laws aim to subordinate two groups, racial minorities and women.<sup>180</sup> Imagine each group brings suit, challenging the laws. Because the laws regulate actions that happen outside the view of others, and between consenting adults, the plaintiffs will easily make out their prima facie cases that there is a violation of their right to privacy. The burden will then shift to the state to prove one of two things: Either the act involves harm to one of the participants, or the act has externalities that harm society in a judicially cognizable way. Because the adults consent (and are bringing suit), it would be very difficult to win on the first claim. As to the second, the plaintiffs have a good chance because it will be more difficult for the state to show that the acts cause harm (and not merely offense or speculative damages). Even if the plaintiffs do not ultimately prevail, they have an easier case. The elements of the right to privacy take the weight off tradition, benefiting any progressive agenda, which by definition opposes the past.<sup>181</sup> And spatial privacy puts the judge on notice that personal values are not as relevant. He can disregard that notice, but to the extent that you believe judges make a good faith effort to follow the law, a doctrine that explicitly removes the expressive, moralistic character of judgments about privacy is less likely to produce subjective results.<sup>182</sup>

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that the harm principle dissolves the difficult question of what counts as private, but that it produces a more productive discussion than one rooted in history and tradition.

179. *But see* Michelman, *supra* note 14, at 1532-37 (arguing that privacy rights do not diminish public stigma against minorities like gays, and concluding that only a republican conception of privacy that recognizes its public significance as a political right can prevent that); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989) (arguing that an approach to gay rights that does not validate same-sex intimacy as morally equivalent is bound to fail because the law must be concerned with the morality or immorality of the substantive act).

180. Adultery laws, to the extent they are traditionally enforced only against women, are a staple of the state's control over women's sexual agency. *See* Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 45-46 (1998).

181. *See* Robert Post, *Tradition, the Self, and Substantive Due Process: A Comment on Michael Sandel*, 77 CAL. L. REV. 553, 556 (1989) (noting that substantive due process moved away from history and tradition to autonomy and choice as the Court found it impossible to justify the right to privacy in the realm of nonmarital sex).

182. Consider also Dan Kahan's observation that "[l]iberal political culture stigmatizes public appeals to contested moral values." Kahan, *supra* note 175, at 445. An argument against sodomy that relies on social cataclysm is a bold statement of moral values that would be unpopular. For an example, see Kahan's discussion of the backlash endured by a judge who openly justified mitigating the sentence of a husband who killed his unfaithful wife. *Id.* at 490-91.

Of course, you can imagine an opinion upholding sodomy or other morality laws on the basis of cognizable harms to society.<sup>183</sup> But even though spatial privacy does not guarantee the “right” result, it is still preferable to the act-based approach. In the examples above, it would certainly be plausible to imagine a judge finding judicially cognizable harm in permitting adultery.<sup>184</sup> He could write an opinion justifying laws against adultery on the ground that children are harmed by infidelity, and the state has an interest in preventing such harm. Or he could attempt to find harm, not merely offense, to society in the cataclysmic breakdown of the family and social order that would presumably result from increased infidelity. He would, in short, be making empirical findings of fact as to the extent that adultery harms other people, and they might justify the status quo. This would be a better opinion than one that relies on the longstanding tradition of laws against adultery for three reasons.

First, we would be having an open debate about what really matters, the present-day norms and empirical assumptions that support a particular law, and not history and tradition. As Holmes wrote:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>185</sup>

What matters is whether the law is a good law, that is, whether it accomplishes the legitimate ends of government. A debate about whether a certain act should be stigmatized through criminalization because of its negative effects on society is far more consistent with that goal than a debate about tradition. Second, this debate, over harm instead of status, is the discussion we want to encourage in a deliberative democracy. Instead of

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183. See, e.g., *Christensen v. State*, 468 S.E.2d 188, 190 (Ga. 1996) (citing the breakdown of morality and eventual erosion of societal order). Even more plausible is an opinion justifying laws against abortion on the basis of third-party harm to the fetus. See, e.g., *State v. Munson*, 201 N.W.2d 123 (S.D. 1972) (upholding an abortion statute because of the fetus’s interest in life); *Thompson v. State*, 493 S.W.2d 913 (Tex. Crim. App. 1971) (same). This analysis satisfies the spatial privacy approach because it focuses on a balancing of privacy interests and harm. Of course, this makes the status of the fetus primary, but that question is at the root of the debate over abortion anyway. Courts should therefore state their position plainly, instead of pretending, as did the Court in *Roe*, that there is a way to resolve challenges to abortion laws without taking a position on whether the fetus is human. See *Roe v. Wade*, 410 U.S. 113, 159 (1973) (“We need not resolve the difficult question of when life begins.”).

184. The claim that miscegenation is destructive to society would be harder to make in today’s political climate, but in some regions I do not doubt its emotional appeal. Certainly, it was viable just a few decades ago in the same way the adultery argument is today. Note also that judges in the spatial privacy states uphold drug laws, laws against prostitution, and even sodomy laws, justifying the laws based on harm, not tradition. Spatial privacy is not a formula for absolute negative liberty.

185. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

debating whether adultery and adulterers are good or bad people, the language of the debate—as framed by the doctrine of the courts—would be over harm. To the extent that the public debates issues using the vocabulary provided by elites, a judicial opinion that discusses harm (instead of moral status) would diminish (but not eliminate) the element of status in the public discourse. Third, to the extent that a discussion of harm requires a more candid discussion of the moral norms underlying criminal laws, an open debate about harm is a predicate to challenging the law. As Dan Kahan has argued, an open debate about public meanings makes it easier to challenge those meanings.<sup>186</sup> If privacy jurisprudence relies on history, instead of demanding that judges candidly discuss the harm that homosexuals allegedly cause today, it will be difficult to refute the argument that really underlies the opinion. So even in the situations where spatial privacy does not compel a certain result, debates framed by the harm principle are more consistent with certain democratic values that progressives (as well as others) favor.

Of course, the spatial approach to privacy is not new. It was the conventional way of understanding the limits of state power under the Fourth Amendment for the better part of its history.<sup>187</sup> The Court abandoned this approach, however, finding that it relied on an unacceptable premise that “property interests control the right of the Government to search and seize.”<sup>188</sup> That shift was well received by commentators concerned with the right to privacy,<sup>189</sup> and to the extent this evolution recognizes that privacy

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186. Kahan, *supra* note 175, at 418 (“Not talking about these meanings in a public way doesn’t render them inert; if anything, norms that discourage divisive public discourse extend the life of these meanings by making it harder for their critics to expose them and easier for their beneficiaries to disclaim their significance . . .”).

187. See *Olmstead v. United States*, 277 U.S. 438 (1928). The Court found that without “entry,” *id.* at 464, or “invasion,” *id.* at 466, of private space by law enforcement, there was no search or seizure sufficient to implicate Fourth Amendment concerns. See also *Katz v. United States*, 389 U.S. 347, 352 (1967) (confirming that “the absence of . . . [physical] penetration was at one time thought to foreclose further Fourth Amendment inquiry”). I have studiously avoided discussing the Fourth Amendment because the right to privacy it protects is not substantive: It limits the government’s access to information about you, but it provides no negative liberty, no increased freedom to make choices. Therefore, it has little to say about the merits of sodomy legislation.

188. *Katz*, 389 U.S. at 353 (internal quotation marks omitted). “[O]nce it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” *Id.*; see also *Berger v. New York*, 388 U.S. 41, 64 (1967) (Douglas, J., concurring) (“A discreet selective wiretap or electronic ‘bugging’ is of course not rummaging around, collecting everything in the particular time and space zone. But even though it is limited in time, it is the greatest of all invasions of privacy.”). It is worth noting that the Court abandoned this spatial approach in the same year that it announced the general right to privacy in *Griswold*. Perhaps this explains *Griswold*’s reliance on history, instead of space.

189. See, e.g., Charles Fried, *Privacy*, 77 YALE L.J. 475, 489-93 (1968) (discussing how monitoring, like wiretapping, implicates fundamental human values protected by the right to privacy); Harry L. Strayhan, Case Note, 14 LOY. L. REV. 370, 375-77 (1967-1968) (outlining the

can be invaded without physical intrusion, it is a victory for a more robust conception of the right. But certain spaces *are* more important, and therefore we must not abandon the spatial approach entirely. In fact, the Court's own decisions bear this out, for they continue to emphasize the unique nature of the home as a site of particular protection.<sup>190</sup> A lesson of the Fourth Amendment, therefore, is that the remainder of the Supreme Court's privacy doctrine, the portion that guarantees substantial freedoms, must return to an understanding of privacy rooted in space.

#### CONCLUSION

The Supreme Court has declared a right to privacy, but its formulation of this right is senseless, protecting certain sexual acts but not others, solely on the basis of personal approval or dislike. In contrast, every state court that has struck down sodomy laws on state privacy grounds has used a different method, a different way of framing the question. These decisions have three things in common. First, they take the weight off the merits of the act in question. They emphasize either the limits of state power or the location of the act. Second, they all balance the homosexuals' claims against third-party *harm*, not merely dislike. And third, all have their roots in the first privacy cases in their jurisdictions. From this difference between the state and federal lines of cases, I propose a new way of understanding the right to privacy.

This Note has advanced two claims, one descriptive, the other normative. The first claim is causal. In jurisdictions where initial privacy precedents created a content-neutral line between the government and the state, it is more likely that a challenge to the jurisdiction's sodomy law will be successful, because of how the jurisdiction first framed the question. Meanwhile, in a jurisdiction where privacy protection is defined by tradition, there is little chance that nontraditional behavior will be protected—no matter how private, in the sense of being invisible, unnoticeable, harmless, and important to an individual. The second claim is

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evolution from places to persons as the touchstone of the Fourth Amendment and calling *Katz* the "correct interpretation"). Of course, the "expectation of privacy" test that replaced the spatial approach has been the target of searing criticism. See, e.g., Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988). Often, this criticism targets apparent inconsistencies and the formalism that creates them. See *id.* at 22-28. In this way, the modern Fourth Amendment has something in common with the substantive right to privacy born in *Griswold*.

190. See *Kyllo v. United States*, 121 S. Ct. 2038, 2045 (2001) (holding the warrantless use of thermal imaging unconstitutional because, "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes"); *Minnesota v. Olson*, 495 U.S. 91 (1990) (holding that an overnight guest has a sufficient expectation of privacy in his host's home that a warrant is required for the guest's arrest); *Payton v. New York*, 445 U.S. 573 (1980) (requiring a warrant to arrest a person in his own home, but not in public).

that this spatial approach to privacy is a better approach to the right to privacy for two main reasons. First, it is a more meaningful right. It downplays a judge's moral opinions and majoritarian impulses, exactly what the right to privacy is supposed to do. Second, even if it does not guarantee the legalization of certain acts, it yields a better debate. By forcing judges to be up-front about what matters today (third-party harms, instead of tradition), underlying attitudes that obstruct progressive legalization are exposed, and that, at the very least, is more consistent with norms of the law and democracy. Finally, this Note suggests that there is, indeed, merit to the old saw that federalism makes laboratories of the states,<sup>191</sup> allowing for experimentation with different policies so that the best might win out.<sup>192</sup>

Perhaps you do not think the judiciary should be making judgments about harm. Perhaps you think it is a legislative decision, that drug use or prostitution in private causes harm. This point is well taken, but I argue here only for a better way of understanding the right to privacy. This critique proves too much, in that it ultimately challenges such a right (and probably all judicially protected rights). We can argue over whether certain actions, including sodomy, drug use, and prostitution, cause third-party harms, but that is a far more productive discussion than one about our traditional preferences. On the other hand, perhaps you are more of a legal realist. You might not think it matters very much whether a court five or fifty years ago had a certain approach to privacy, because when it comes to hot-button issues like homosexuality, or novel rights like privacy, popular opinion and instinct will influence judges more than any other factors.<sup>193</sup> This might be so, but this Note suggests that a philosophically robust precedent would make a more expansive decision easier for the wavering judge like Justice Powell. In other words, homophobes or originalists might decide *Bowers* the same way regardless of what precedent said, but it certainly would be more difficult and more obvious. And this cannot be anything but good, because whatever you may think of their bedrooms, surely judges have no right to keep their rationales private.

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191. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

192. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (urging states to pick up the banner that the Supreme Court let fall and expand the scope of individual liberties under state constitutions); see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (same); Nan Feyler, Note, *The Use of the State Constitutional Right to Privacy To Defeat Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986) (urging states with constitutional rights to privacy to strike down their sodomy laws); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982) (surveying state expansions of rights beyond the federal guarantees). *But see* Recent Case, 106 HARV. L. REV. 1370 (1993) (suggesting state courts that deviate from federal understandings of fundamental rights are sincere eccentrics).

193. Certainly, many a practitioner carefully counts the noses on the bench in deciding when and where to challenge the state. Rawls, *supra* note 4.