Religious dogma prevails in sodomy case

by A.T. Torney

On June 30, 1986, the United States Supreme Court, in a 5 to 4 decision, ruled that the United States Constitution does not confer a fundamental right upon consenting adult homosexuals to engage in sodomy in the privacy of a bedroom. Justice Byron White, a Nixon appointee, wrote the majority opinion in *Bowers v. Hardwick* in which Justices Rehnquist, Burger, Powell, and O'Connor joined. Justice Harry Blackmun, also a Nixon appointee, wrote a vigorous dissent, joined by Justices Marshall, Brennan, and Stevens. Justices Burger and Powell each authored concurring opinions; Justice Stevens wrote a separate dissenting opinion.

The facts of the case are as follows. On August 3, 1982, Atlanta police knocked on the door of Michael Hardwick. Hardwick's roommate allowed the police, who were there to serve a warrant on Hardwick for public drunkenness, free entry into the home. The police entered Hardwick's bedroom and found him engaged in oral sex with another man. He was arrested and charged with violation of Georgia's sodomy statute. Under Georgia law, "a person," homosexual or heterosexual, married or single, "commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." A person convicted of this crime is subject to a maximum of twenty years in prison. The District Attorney decided not to prosecute Hardwick unless further evidence developed, however, Hardwick remained under that threat.

Hardwick filed a civil action in federal court in Georgia challenging the constitutionality of the Georgia sodomy statute. His complaint was dismissed on a pretrial motion in the trial court, but he achieved partial victory in the Eleventh Circuit Court of Appeals. Relying on previous Supreme Court cases, the court of appeals found that the constitutional right of privacy "prevents the States from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the legitimate reach of a civilized society." Hardwick's desire to engage privately in sexual activity with another consenting adult "lies at the heart of an intimate association beyond the proper reach of state regulation." The court of appeals did *not* invalidate the Georgia sodomy statute. However, because the court had found that the sodomy statute implicated Hardwick's fundamental constitutional rights, the court ordered that the case be sent back to the trial court where Georgia would have to demonstrate that it had "a compelling interest in restricting this right" and also show "that the sodomy statute is a properly restrained method of safeguarding its interests." If fundamental constitutional rights are not implicated, states need only show that their laws are rationally related to the state's regulatory interest, a far easier test to satisfy than the "compelling interest" test. To avoid being saddled with this more difficult test, Georgia sought review in the Supreme Court before the case had a chance to go back to the trial court.

The Supreme Court framed the issue as whether the Constitution conferred a fundamental right upon homosexuals to engage in sodomy and concluded that it did not. The Court went on to conclude that the presumed belief of a majority of the electorate of Georgia that homosexual sodomy is immoral and unacceptable provided an adequate rationale to meet the less stringent rational relationship test.

At the outset of its opinion the Court made clear that its decision dealt exclusively with homosexual sodomy despite the inescapable fact that the Georgia statute under attack applied equally to all persons whatever their sexual preference and whatever their marital status. "The only claim properly before the Court . . . is Hardwick's challenge to the Georgia statute as applied to consensual homosexual activity."

The Court distinguished previous cases involving child rearing and education, family relationships, procreation, marriage, contraception, and abortion, in which limits were placed on a state's ability to interfere. Justice White wrote that "none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." The Court was unwilling to extend the rationale of those cases to what it termed the "fundamental right to engage in homosexual sodomy." Historical abhorrence of homosexuality provided the basic reason for the Court's refusal to recognize a new fundamental right. The Court also expressed a reluctance to find new fundamental rights where firm textual support in the Constitution is lacking. Finally, the Court rejected the argument that the result should be different because the activity occurred in the bedroom of a home.

Retiring Chief Justice Burger in a three paragraph concurring opinion reiterated in a more sanctimonious tone that recognition of the act of homosexual sodomy as a fundamental right would be "to cast aside millenia of moral teaching."

Justice Powell provided the crucial swing vote. In agreement with the majority, he could not accept that "conduct condemned for hundreds of years has now become a fundamental right." However, he noted that the nonenforcement of laws criminalizing private consensual sexual conduct suggested the "moribund character" of such laws. He also stated that any prison sentence for violation of sodomy statutes would probably constitute cruel and unusual punishment prohibited by the eighth amendment.

Justice Blackmun read portions of his dissent from the bench, a practice rarely exercised by justices in the minority and commonly believed to be reserved for those cases in which convictions are firmly held. He accused the majority of distorting the issue. In his view, the issue was not about "a fundamental right to engage in homosexual sodomy," but rather about "the right to be let alone."

Justice Blackmun took particular issue with the majority's "almost excessive focus on homosexual activity." He saw no basis for the Court to focus exclusively on the statute as applied to homosexual activity. "Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if [applied exclusively to heterosexuals]." Georgia's Attorney General conceded at oral argument last spring that the statute would be unconstitutional as applied to married heterosexuals in general and married couples in particular.

The majority, according to Blackmun, refused to consider the broad principles that had informed the Court's previous treatment of privacy in specific cases. The court's prior privacy cases have two distinct, but complementary rationales according to Blackmun. First, some cases make reference to certain decisions that are proper for the individual to make. Second, other cases make reference to the place in which such activity takes place. Hardwick's challenge implicated both "the decisional and spatial aspects of the right to privacy."

As to the decisional aspect, Blackmun wrote that the Court's prior cases were meant to protect the individual's right to choose the form and nature of intensely personal bonds. "We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."

As to the spatial aspect, Blackmun wrote that the fourth amendment attaches special significance to the home. Blackmun disagreed with the majority's conclusion that the right Hardwick sought to have recognized had no textual support in the Constitution. Blackmun wrote that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."

The dissent also rejected the majority view that history and morality provided an adequate basis to provide a rational basis for a legitimate regulatory interest. The dissenting justices clearly rejected the notion that history and religious conviction of a majority of the electorate can provide a sufficident reason to satisfy the rational relationship test. In strongly worded passages clearly directed to fundamentalist Christians, Blackmun wrote that the assertion that traditional Judeo-Christian values proscribe the conduct involved cannot provide an adequate justification for a sodomy statute. "That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. . . . Thus, far from buttressing [its] case, [Georgia's] invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the sodomy statute] represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."

Blackmun also concluded that the sodomy statute could not be justified as a morally neutral exercise of Georgia's power to "protect the public environment." Contrasting laws which ban public sexual activity, in which the public is protected from unwilling exposure of the sexual activities of others, Blackmun stated that Hardwick's case involved no real interference with the rights of others. The "mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest," let alone an interest "that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently."

(Ed. note: A.T. Torney is a pseudonym. The author of this piece, an attorney, requested anonymity.)

The Day Before the Fourth of July, 1986

Michael Hardwick was in love and in his
own bedroom was making love with a
man, his chosen lover.
A cop came to serve a warrant for a traffic
violation,
Came into the bedroom with the warrant,
Wrote him another ticket for making love
with his chosen lover,
A man.
1982. Georgia.
1983 Michael sued Georgia and won.
1986 Reagan Court, Supreme Court of the
Statue of Liberty Centennial knee-jerk
celebrants, overruled Michael and
declared:
"The proposition that any kind of
private sexual conduct between
consenting adults is constitutionally
insulated from state proscription is
insupportable,"
quoth Justice Byron R. White
"Consensual homosexual sodomy" was
targeted by the court.

America serves as hypocrite-honcho for its
world dominions.
America ignores the World Court and
continues its war with Nicaragua.
America supports apartheid by investing in
South Africa and fails to condemn the
Botha regime.
America will go delirious tomorrow
celebrating freedom.
I am ashamed.
I am livid with anger.
I will kill any cop entering my bedroom with a
traffic warrant.

Kevin Shay Johnson

Kevin Shay Johnson, a political singer-songwriter, will be appearing at the World Music Festival, August 23 at the University of Portland. See Out About Town for particulars.