

# U.S. v. Fagg: Stretching the Bounds of Privacy

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# COMMENT

## U.S. v. FAGG: STRETCHING THE BOUNDS OF PRIVACY

The scope of liberties protected by the constitutional right of privacy<sup>1</sup> continues to be a source of conflict and debate.<sup>2</sup> Attempts

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<sup>1</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring). See generally Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 673-701 (1973) (explaining privacy right's grounding as interpreted by Court in *Griswold*). The right of privacy is not enumerated in the Constitution. See JOEL B. GROSSMAN & RICHARD S. WELLS, *CONSTITUTIONAL LAW AND JUDICIAL POLICY MAKING* 1315 (1980). However, the Supreme Court has found authority for the right to privacy in the word "liberty" found in the due process clauses of the Fifth and Fourteenth Amendments. See *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring) (quoting *Gitlow v. New York*, 268 U.S. 652, 666 (1925)). This clause has been interpreted by the Court to encompass many of the specific guarantees of the Bill of Rights. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 772-73 (2d ed. 1988) (listing specific guarantees Court has incorporated within Fourteenth Amendment protection). This theory of including the rights enumerated in the Bill of Rights within the protection of the Fourteenth Amendment is known as "incorporation." See *id.* Justice Douglas has stated that from these specific guarantees emanate "penumbras," which give them force and meaning. *Griswold*, 381 U.S. at 483-84. These "penumbras" encompass those fundamental rights "implicit in the concept of ordered liberty" upon which the existence of society depends. See *id.* at 499-500 (Harlan, J., concurring). From these emanations, a "zone of privacy" is created into which the government may not intrude. *Id.* at 484.

<sup>2</sup> See Julia K. Sullens, Comment, *Thus Far and No Further: The Supreme Court Draws the Outer Boundary of the Right to Privacy*, 61 TUL. L. REV. 907, 908-13 (1987).

Prior to Justice Douglas' "penumbras" in *Griswold*, 381 U.S. at 484, the Supreme Court had already recognized various unenumerated rights. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to procreate); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (right to educate one's children in private school); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (right to teach one's children foreign language).

Due to the noninterpretivist parentage of the right of privacy, its nature lies in an undefined *concept* rather than a delimited *conception*. See *Griswold*, 381 U.S. at 484 (describing the nature of privacy right as emanating from specific guarantees); see also RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1977) (distinguishing between "concept" and "conception" in support of construing vague constitutional clauses as appeals to moral "concepts"). Noninterpretivists espouse the idea that our Constitution is a living entity that feeds off of changing political and social values while at the same time receiving fortification

to expand the right of privacy in the area of sexual freedom have been curtailed by judicial deference to traditional views of morality.<sup>3</sup> In particular, the Supreme Court has refused to acknowledge as fundamental the right to engage in homosexual sodomy.<sup>4</sup> The Court, however, has intimated an exception for sodomy between married persons.<sup>5</sup> Although this exception might implicate Four-

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from its historical context. See Larry A. Alexander, *Painting Without Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 448-50 (1983). Interpretivists, on the other hand, argue that proper interpretation of the Constitution lies only in its explicit language and historical context so as to give effect to the true intent of the Framers. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 363-72 (1977); Michael J. Perry, *The Authority of Text, Tradition and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 554-57 (1985).

The right to privacy is comprised of various concepts including spatial privacy, see *United States v. Orito*, 413 U.S. 139, 142 (1973) ("The Constitution extends special safeguards to the privacy of the home."); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (right of private possession of obscene materials within the home), and decisional privacy, see *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 (1977) (acknowledging right of decision in use of contraception); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing right of women to decide whether to abort pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (recognizing right of unmarried persons to decide whether to use contraception). See generally Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976) (listing and explaining spatial and decisional aspects of privacy right).

The right of privacy, in the realm of intimate decision, has been held to include "'activities relating to marriage . . . ; procreation . . . ; contraception . . . ; family relations . . . ; and child rearing and education.'" *Schochet v. State*, 541 A.2d 183, 192 (Md. App. 1988) (citations omitted), *rev'd on other grounds*, 580 A.2d 176 (Md. 1990).

<sup>3</sup> See *Griswold*, 381 U.S. at 498-99 (Goldberg, J., concurring) ("[I]t should be said [that the *Griswold* holding] in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."); *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) ("Adultery, homosexuality and the like are sexual intimacies which the state forbids altogether.").

<sup>4</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). In *Bowers*, a homosexual challenged the constitutionality of a Georgia statute that criminalized the act of sodomy. *Id.* at 188. The Court upheld the statute as applied to plaintiff, stating that homosexuals did not enjoy a fundamental right to engage in sodomy. *Id.* at 192; see also *Woodward v. United States*, 871 F.2d 1068, 1074 (Fed. Cir. 1989) (citing *Bowers* in holding that homosexual conduct is not protected by right of privacy); *Doe v. City of Richmond*, 403 F. Supp. 1199, 1200-02 (E.D. Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976) (pre-*Bowers* decision holding homosexual sodomy not a fundamental right).

<sup>5</sup> See *Bowers*, 478 U.S. at 188 n.2 ("We express no opinion on the constitutionality of [anti-sodomy statutes] as applied to other acts of sodomy."); see also *id.* at 218 (Stevens, J., dissenting) (precedent suggests that prohibiting sodomy between unmarried heterosexuals or homosexuals would be unconstitutional). According to Justice Stevens, "prior cases . . . establish that a State may not prohibit sodomy within 'the sacred precincts of marital bedrooms.'" *Id.* (citing *Griswold*, 381 U.S. at 485); *Carey*, 431 U.S. at 694 n.17 (Court has not yet defined extent to which states may constitutionally regulate private consensual adult sexual behavior).

teenth Amendment considerations of equal protection,<sup>6</sup> such an inquiry has yet to be specifically addressed. Recently, in *United States v. Fagg*,<sup>7</sup> the United States Court of Military Review, while acknowledging the Supreme Court's refusal to accord protected status to homosexual sodomy, held that consenting heterosexual adults enjoy a fundamental right to engage in sodomy.<sup>8</sup>

In *Fagg*, Airman Scott P. Fagg of the United States Air Force

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<sup>6</sup> See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection* of the laws." *Id.* (emphasis added) This amendment has been employed by the Court to strike down various statutes and regulations which unjustly discriminated against certain sectors of society. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (striking down "separate but equal" treatment of African-Americans in education). Such unjustified classification usually results from invidious discrimination against a "suspect class." Suspect classes have been held to be those based on race, national origin, or alienage. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (national origin); *Yick Wo v. Hopkins*, 118 U.S. 356, 379 (1886) (race).

When confronted with such classifications, the Court must apply strict scrutiny. See *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting). Strict scrutiny requires that the state's interest in the classification be compelling and that such classification is the best and least restrictive means to effect that interest. See *id.* This heightened judicial scrutiny find its roots in a famous footnote which stated that "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

Strict scrutiny has also been applied to classifications which impinge on fundamental rights of individuals. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (right to procreate). Classifications based on gender, however, are subject to the lesser standard of "intermediate scrutiny," which requires that the means chosen to effectuate an important interest of the state be substantially related to that end. See e.g., *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (striking down statute conferring "dependent" status only to spouses of male members of armed forces); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (voiding provision of probate code giving preference to males in appointing administrators). All other classifications need only pass minimum rational scrutiny, which requires that the classification be rationally related to a legitimate state interest. See, e.g., *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (striking down "arbitrary" state corporate tax law). See generally Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) (explaining levels of scrutiny in equal protection analysis); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949) (same).

The Ninth Circuit has come close to granting homosexuals protection as a suspect class. See *Watkins v. U.S. Army*, 847 F.2d 1329, 1352-53 (9th Cir. 1988), *opinion withdrawn on reh'g*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 384 (1990). But see *High Tech Gays v. Defense Ind. Sec. Clearance Off.*, 895 F.2d 563, 573 (9th Cir. 1990) (stating that homosexuals do not comprise a "suspect" class); *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987) (upholding mandatory Naval discharge for homosexuals); *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991) (same).

<sup>7</sup> 33 M.J. 618 (A.F.C.M.R. 1991).

<sup>8</sup> *Id.* at 620.

was accused of engaging in certain sexual acts with females<sup>9</sup> that were in violation of article 125 of the Uniform Code of Military Justice.<sup>10</sup> At his general court-martial, Airman Fagg plead guilty to acts of sodomy with a sixteen-year-old female.<sup>11</sup> On appeal, Fagg contended that his conviction under article 125 violated his constitutional right to privacy.<sup>12</sup> Judge Rives, writing for the United States Air Force Court of Military Review, agreed<sup>13</sup> and pronounced: "Today we recognize a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults."<sup>14</sup>

Judge Rives embraced an expansive reading of the right to privacy in stating that "the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized man."<sup>15</sup> Judge Rives reasoned that the right to privacy was not limited to "matters of procreative choice."<sup>16</sup> He also noted that the Supreme Court has expressly recognized a constitutional zone of privacy within "the sacred precincts of the marital bedroom,"<sup>17</sup> but has yet to speak on the ability of government to prohibit heterosexual sod-

<sup>9</sup> *Id.* at 619.

<sup>10</sup> 10 U.S.C. § 925. This statute, entitled "Art. 125. Sodomy," provides that:

(a) Any person subject to this chapter [armed forces personnel] who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

*Id.*

The phrase "unnatural carnal copulation" has withstood constitutional attacks for vagueness, *see* *United States v. Soby*, 5 M.J. 160 (C.M.A. 1978), and has been interpreted to include the acts of fellatio, *id.*, and cunnilingus, *see* *United States v. Harris*, 8 M.J. 52 (C.M.A. 1979).

<sup>11</sup> *Fagg*, 33 M.J. at 619. More specifically, Fagg admitted to numerous acts of both cunnilingus and fellatio with the sixteen-year-old. *Id.* The court decided to treat the sixteen-year-old as an adult for purposes of this section of the Code. *Id.* Airman Fagg was eighteen years of age at the time of the occurrences. *Id.* Fagg's trial by military judge resulted in, *inter alia*, a bad conduct discharge and seven months confinement. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 621.

<sup>14</sup> *Id.* at 619.

<sup>15</sup> *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

<sup>16</sup> *Fagg*, 33 M.J. at 620 (allowing possession of constitutionally unprotected obscene material in privacy of one's home) (citing *Stanley v. Georgia*, 394 U.S. 557, 568 (1969)). Judge Rives also noted that "the outer limits' of the right to privacy 'have not been marked.'" *Id.* (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977)).

<sup>17</sup> *Fagg*, 33 M.J. at 620 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 188 n.2 (1986)).

omy.<sup>18</sup> The *Fagg* court then held that the consensual sexual activities of unmarried heterosexuals fall within the ambit of this “zone of privacy” into which the government may not intrude.<sup>19</sup> In extending these privacy protections to unmarried heterosexuals, the court relied on *Eisenstadt v. Baird*<sup>20</sup> in which the Supreme Court invalidated a statute limiting access to contraceptives to unmarried persons because such a restriction violates the Equal Protection Clause.<sup>21</sup> Finally, Judge Rives noted that only a compelling governmental interest will justify the infringement of this fundamental right.<sup>22</sup> Since the government recognizes no interest in the private moral conduct of its servicemen,<sup>23</sup> the court reasoned that Airman Fagg’s exercise of his right to privacy in this instance could not be constitutionally proscribed.<sup>24</sup>

Judge James dissented, arguing that this attempted extension of the right to privacy was wholly lacking in constitutional authority.<sup>25</sup> He pointed to the decision in *Schochet v. State*<sup>26</sup> in which the Court of Special Appeals of Maryland was faced with the identical issue.<sup>27</sup> The *Schochet* court reasoned that the right to privacy is grounded in conventional notions of marriage, the home, and the family.<sup>28</sup> Based on this narrow interpretation, the *Schochet* court

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<sup>18</sup> *Fagg*, 33 M.J. at 620 (citing *Bowers*, 478 U.S. at 190, 196).

<sup>19</sup> *Fagg*, 33 M.J. at 620.

<sup>20</sup> 405 U.S. 438 (1972).

<sup>21</sup> *Id.* at 440-41, 446-47.

<sup>22</sup> *Fagg*, 33 M.J. at 620.

<sup>23</sup> *Id.* (citing *United States v. Snyder*, 4 C.M.R. 15, 19 (1952)). Judge Rives did recognize, however, that a serviceman’s “right to engage in certain sexual activities . . . is not without limits.” *Id.* He specifically noted that aggravating circumstances, such as violating a supervisor-subordinate duty relationship, justifies prosecution when the underlying act is fornication. *Id.* (citing *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R. 1990), *aff’d*, 34 M.J. 112 (C.M.A. Mar. 6, 1992)).

<sup>24</sup> *Id.* at 621.

<sup>25</sup> *Id.* (James, J., dissenting).

<sup>26</sup> 541 A.2d 183 (Md. Ct. Spec. App.), *rev’d*, 580 A.2d 176 (Md. 1988).

<sup>27</sup> *Fagg*, 33 M.J. at 622 (James, J., dissenting). Judge James stated that although *Schochet* was overruled by the state supreme court, the analysis of the intermediate court was reliably sound. *Id.* at 622 n.2 (James, J., dissenting).

<sup>28</sup> *Schochet*, 541 A.2d at 189 (citing *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973)). The importance of the home, marriage, and family life in the underpinnings of the right to privacy was most eloquently stated by Justice Harlan:

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . .

Of this whole ‘private realm of family life’ it is difficult to imagine what is

held that there exists no fundamental right to noncommercial, heterosexual sodomy between consenting, unmarried adults because they lack the necessary marital union that inheres in the traditional conception of the right of privacy as formulated by the Supreme Court.<sup>29</sup>

The *Fagg* decision brings to light the tension created by the Supreme Court's moralistic grounding of the right to privacy found in *Griswold v. Connecticut*.<sup>30</sup> In *Griswold*, the Supreme Court viewed traditional values and considerations attendant to the institution of marriage as the touchstones for application of the right to privacy.<sup>31</sup> Subsequent decisions of the Court, however, seem to indicate that a more expansive principle of personal autonomy is the more appropriate focus in determining the parameters of "privacy."<sup>32</sup>

The *Fagg* holding would lie perfectly consistent with the Supreme Court's previous application of the right to privacy, excepting the Court's landmark decision in *Bowers v. Hardwick*.<sup>33</sup> In *Bowers*, the Supreme Court refused to recognize a fundamental right of consenting adults to engage in homosexual sodomy.<sup>34</sup>

more private or more intimate than a husband and wife's marital relations.

*Poe v. Ullman*, 367 U.S. 497, 551-52 (1960) (Harlan, J., dissenting).

<sup>29</sup> See *Schochet*, 541 A.2d at 186-95. Judge Moylan commenced his analysis by noting that *Griswold* and *Ullman* had grounded the right to privacy in the "institution of marriage." *Id.* at 187. Next, the court argued that *Eisenstadt*, primarily an equal protection case, could not be used to broaden the scope of the right to privacy beyond its grounding in traditional notions of marriage. *Id.* at 191-92. Rather, the court characterized the interests protected by the right of privacy as "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.* at 192 (citing *Roe v. Wade*, 410 U.S. 113, 152 (1973)). Given this, Judge Moylan reasoned that autonomy in sexual behavior was not fundamental. *Id.* Finally, the court called upon *Doe v. City of Richmond*, 403 F. Supp. 1199 (1975), *aff'd without opinion*, 425 U.S. 901 (1976), and *Bowers v. Hardwick*, 478 U.S. 186 (1986), as support for their finding that homosexual and pre-marital sex played no part in marriage, family or the home, leaving such practices beyond the realm of constitutional protection, *id.* at 192-95.

<sup>30</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (Goldberg, J., concurring).

<sup>31</sup> *Id.*, at 495.

<sup>32</sup> See, e.g., *Carey*, 431 U.S. at 687 ("[S]ubsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on [marital status]."); *Eisenstadt*, 405 U.S. at 453 ("privacy means . . . the right of the individual, married or single, to be free from unwarranted governmental intrusion"); see also Jane Aline Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 365-67 (1979) (discussing the distinctions between autonomy based right to privacy and right based on majoritarian sentiment).

<sup>33</sup> 478 U.S. 176 (1986)

<sup>34</sup> See *Bowers*, 478 U.S. at 192.

When Fourteenth Amendment considerations of Equal Protection are taken into account, the *Fagg* decision, arguably, calls into question the validity of *Bowers* by recognizing a right of heterosexual sodomy.<sup>35</sup> It is not at all clear that the Supreme Court would be willing to raise the same question.

This Comment will present a Constitutional analysis based on a hypothetical situation that presumes that the Supreme Court has just granted certiorari to *U.S. v. Fagg* and is about to render its decision based on existing precedent. Part One will discuss the two competing bases upon which the right to privacy has been grounded: first, the right to privacy as a function of marital status; and second, the much broader right of privacy based on the principle of personal autonomy. The conduct of Airman Fagg will then be evaluated in terms of each of these concepts. Part Two points out possible equal protection problems that would result from the Supreme Court's adoption of the *Fagg* decision. Various moral considerations will be noted and used to conclude that perhaps the *Fagg* court reached a decision compatible with the intent of the Framers, but lacked the authority to effectuate this intent considering the previous constitutional interpretations by the Supreme Court in similar issues.

## I. THE RIGHT OF PRIVACY: SCOPE AND APPLICATION

### A. Marital Status

As first recognized by the Supreme Court in *Griswold v. Connecticut*,<sup>36</sup> the right to privacy was founded on respect for the privacies inherent in marriage.<sup>37</sup> This foundation echoed the concerns of Justice Harlan, dissenting in *Poe v. Ullman*,<sup>38</sup> which called

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<sup>35</sup> See *Fagg*, 33 M.J. at 620. The court first looked to *Bowers* to note that the Supreme Court had left open the issue of the status of acts of sodomy between heterosexuals. *Id.* Seeing that the Supreme Court intimates an almost absolute immunity to "the sacred precincts of marital bedrooms," the court concluded that sodomy between married couples could not be prohibited. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)). Applying *Eisenstadt*, the court then concluded that a fundamental right to sodomy would exist between unmarried heterosexuals. *Id.* By narrowing the class of unmarried persons to heterosexuals, the court seems to have effectively eluded direct conflict with the *Bowers* decision. It is submitted, however, that the court failed to then continue its equal protection analysis as applied to homosexuals, leaving the analysis incomplete.

<sup>36</sup> 381 U.S. 479 (1965).

<sup>37</sup> See *id.* at 485-86.

<sup>38</sup> 367 U.S. 497 (1961).

for an expansive interpretation of "liberty" in the Fourteenth Amendment to extend protection to unenumerated, non-economic,<sup>39</sup> fundamental rights.<sup>40</sup> The *Griswold* Court adopted this expansive approach in holding that a Connecticut statute<sup>41</sup> that criminalized the use of contraceptives by married couples was an unconstitutional interference with a fundamental right of privacy under the Fourteenth Amendment.<sup>42</sup> The Court stressed its aversion to possible unwarranted searches and seizures of the "marital precincts" that would inevitably result from the enforcement of such a statute.<sup>43</sup>

The judicial deference given to sexual decisions made within the marital relationship are inapplicable to Airman Fagg due to the simple fact that he committed an act of sodomy with someone other than his wife.<sup>44</sup> Thus, recognition of a right to privacy based

<sup>39</sup> Cf. *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("fundamental" economic rights were once read into the word "liberty" of Fourteenth Amendment). In *Lochner*, the Court struck down a New York statute limiting the amount of hours bakery workers could work each day and each week. *Id.* at 45 n.1, 57. The Court accomplished this by holding that such a statute interfered with employers' and employees' fundamental right to contract protected by the Fourteenth Amendment. *Id.* at 57.

This type of use of the Fourteenth Amendment is known as "substantive due process." See Brett J. Williamson, Note, *The Constitutional Privacy Doctrine After Bowers v. Hardwick: Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297, 1297 n.2 (1989). Substantive due process refers to the method by which an activist Court creates substantive rights from the Due Process clauses of the Fifth and Fourteenth Amendments, which on their face refer only to procedural fairness. See *id.* More specifically, in the area of economic rights, this method of judicial activism became disparagingly known as "Lochnerizing." See TRIBE, *supra* note 1, at 567. By the 1930's, this concept had breached the limits of both social and political tolerance due to its use by the Court in striking down every attempt by President Roosevelt to enact ameliorative economic legislation. See *id.* at 578-81. After threats of court-packing, see *id.* at 580, this view of "liberty" was finally extinguished in 1937 with the Court's about-face decision in *West Coast Hotel v. Parrish*, 300 U.S. 379, 398-99 (1937) (upholding minimum wage legislation identical to that struck down one year earlier). This method of substantive due process, however, lives on, but is employed to protect non-economic rather than merely economic rights of the individual. See *Griswold*, 381 U.S. at 485.

<sup>40</sup> See *Ullman*, 367 U.S. at 543 (Harlan, J., dissenting); *supra* note 1.

<sup>41</sup> See CONN. GEN. STAT. REV. § 53-32 (1958) (repealed 1969). The Connecticut statute provided:

*Use of drugs or instruments to prevent conception.* Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

*Id.*

<sup>42</sup> See *Griswold*, 381 U.S. at 485-86.

<sup>43</sup> See *id.*

<sup>44</sup> See *Fagg*, 33 M.J. at 619.

solely on marital status necessarily precludes the recognition of a fundamental right to engage in non-marital sodomy.<sup>45</sup> A right to non-marital sodomy, therefore, must derive elsewhere.

### B. Personal Autonomy

Although the *Griswold* Court premised the right of privacy on marriage and the home,<sup>46</sup> subsequent decisions such as *Eisenstadt v. Baird*,<sup>47</sup> *Roe v. Wade*,<sup>48</sup> and *Planned Parenthood v. Danforth*<sup>49</sup> resonate with autonomic rather than marital concerns, recognizing privacy rights in the individual regardless of marital status.<sup>50</sup>

The principle of personal autonomy dictates that the individual enjoy broad discretion in making decisions that are inherently personal.<sup>51</sup> This would seem to encompass virtually complete sexual freedom, provided the acts in question were conducted in private quarters between consenting adults.<sup>52</sup> Such conduct is deemed to have no measurable effect on society<sup>53</sup> and should therefore lie beyond the scope of government regulation. The *Fagg* decision adopted this approach and held that Airman Fagg's conduct was constitutionally protected.<sup>54</sup>

Conversely, the *Bowers* decision<sup>55</sup> strongly evidences the Supreme Court's reluctance to use an autonomy-based rationale to expand the right of privacy to adult consensual homosexual sodomy.<sup>56</sup> Equally as troubling is a footnote in the *Carey v. Popula-*

<sup>45</sup> See *Schochet v. State*, 541 A.2d 183, 194 (Md. Ct. Spec. App. 1988).

<sup>46</sup> See *Griswold*, 381 U.S. at 485-86 (emphasizing importance of marriage in striking down statute criminalizing use of contraceptives by married persons).

<sup>47</sup> 405 U.S. 438 (1972).

<sup>48</sup> 410 U.S. 113 (1973).

<sup>49</sup> 428 U.S. 52 (1976).

<sup>50</sup> See *Eisenstadt*, 405 U.S. at 453 (extending right of privacy's foundation from marriage to fundamental concerns of individuals by extending right recognized in *Griswold* to unmarried persons); *Roe*, 410 U.S. at 152-53 (recognizing unmarried woman's fundamental right to terminate pregnancy); *Danforth*, 428 U.S. at 74 (striking down statute requiring parental consent for abortion performed on unmarried minor).

<sup>51</sup> See Joel Feinberg, *Autonomy, Sovereignty, and Privacy*, 58 NOTRE DAME L. REV. 445, 457-58 (1983).

<sup>52</sup> See *id.* at 454.

<sup>53</sup> See JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 75 (1980).

<sup>54</sup> See *Fagg*, 33 M.J. at 621.

<sup>55</sup> See *supra* notes 31-34 and accompanying text (discussion of *Bowers*).

<sup>56</sup> See Eichbaum, *supra* note 32, at 379-81; see also *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 65 (1973) (limiting right of privacy to "personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing") (citations omitted); *United States v. Orito*, 413 U.S. 139, 143-44 (1973) (upholding law prohibiting transport of pornographic

tion Services<sup>57</sup> decision that seems to indicate that the Court is unwilling to grant sexual autonomy to minors.<sup>58</sup> Nevertheless, many commentators view the autonomy-based model of the right to privacy as the only viable constitutional framework from which the right may be expanded.<sup>59</sup> The crux of their argument lies in a recognition of "the moral fact that a person belongs to himself and not to others nor to society as a whole."<sup>60</sup> They view the "core

materials for transporter's own use).

<sup>57</sup> See *Carey*, 431 U.S. at 694 n.17.

<sup>58</sup> *Id.*

<sup>59</sup> See Eichbaum, *supra* note 32, at 365-67; Feinberg, *supra* note 51, at 446; Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974).

<sup>60</sup> See Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288 (1977). The propriety of the legislation of morality has been hotly debated within academic circles. See Rolf E. Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891, 900-910 (1972) (arguing in favor of utilitarian viewpoint); see also Robert H. Bork, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW*, 111-126 (Touchstone Books 1990) (arguing that much legislation is based purely on moral grounds).

John Stuart Mill's essay *On Liberty*, first published in 1859, resurfaced among scholarly debate in 1957 with the release of a report by the British Wolfenden Committee on Homosexual Offenses and Prostitution. See Yao Apasu-Cbotsu, et al., Note, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 613 (1986) [hereinafter *Survey*]. This report adopted the Millian view that private morality lies beyond the control of the government. See *id.* John Stuart Mill specifically stated:

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.

JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859) (emphasis added).

This constitutes the paradigm argument against what is known as moral paternalism, which imposes the public morality upon the private individual for the reason that it is for that individual's "own good." See Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 484-87 (1989). Paternalism is a weak force in the area of criminal law, and for that reason scholars have proffered the "disintegration thesis" as an alternative basis for the legislation of morality, which argues that morality acts like a kind of "social adhesive" without which society would fall into decay. See H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 2-4 (1967). The disintegration thesis espouses the idea that the sharing of common moral values is an absolute necessity for a stable and functional community. See *id.* The thesis applies the Millian harm principle to what it sees as the building blocks of society. The harm imagined here is of a more intangible and elusive sort, in that it is supposed to damage the palpable common belief of a polity that their ways are correct. See *id.* It is argued that insecurity in this belief will lead to insecurity in social action, which in turn will lead to instability in social relations, resulting in a slow disintegration of the social infrastructure. See *id.* Besides the problems of proving such remote causation, this argument fails due to its *a priori* assumption that morality is a determinative factor in social stability. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 50 (1963). Moreover, even if it is assumed that morality constitutes such a factor, how do we measure the

function of constitutional guarantees [as vindicating] minority rights."<sup>61</sup> Accepting this approach, legislation which impinges on the conduct of fringe elements of society and is enacted solely in furtherance of majoritarian moral concerns would be invalid.<sup>62</sup>

## II. UNEQUAL PROTECTION OF THE LAWS

Given the Supreme Court's refusal to extend the right of privacy to encompass acts of homosexual sodomy,<sup>63</sup> issues of equal protection arise if such conduct is viewed as a fundamental right in heterosexuals. In *Bowers*, the Supreme Court expressly declined to resolve the issue of heterosexual sodomy and intentionally "left the door open" for later resolution.<sup>64</sup> The Court, however, did make clear that protection does not extend to homosexual sodomy because of society's long-standing statutory prohibitions against it.<sup>65</sup> The Court stated further that such activity was not "deeply rooted in [our] Nation's history," and any argument to the contrary was, at best, "facetious."<sup>66</sup>

The *Bowers* Court's deference to traditional values and public sentiment in upholding a statute prohibiting homosexual sodomy makes it difficult to speculate as to how the Court would respond to a challenge to a similar statute brought by a heterosexual couple. It is submitted that any distinction made based on sexual

amount of immorality the social structure can withstand? See Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 *YALE L.J.* 986, 991 (1966).

It is proposed that this lack of empirical evidence of the harm suffered by society through the moral transgressions of the individual should compel government to err on the side of personal liberty in framing its penal codes. More specifically, in regard to the Supreme Court's use of the institution of marriage as the touchstone for the right of privacy, an argument by Joel Feinberg seems to provide substantial criticism:

The socially useful institutions of marriage and the family can be weakened, and the chaste life made more difficult. [The supposed harmful consequences of which] are highly speculative, and there is no hard evidence that the penal laws would prevent [such consequences] in any case.

FEINBERG, *supra* note 53, at 75.

<sup>61</sup> Eichbaum, *supra* note 32, at 366. A family-based right of privacy fits "harmoniously" and necessarily within the majoritarian political process, and therefore is useless, "in curbing 'prejudice against discrete and insular minorities.'" *Id.* (citation omitted).

<sup>62</sup> See *id.* at 366-67; H.L. Wilkinson III & G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 *CORNELL L. REV.* 563, 613 (1977).

<sup>63</sup> See *supra* notes 33-34 and accompanying text.

<sup>64</sup> See *Bowers*, 478 U.S. at 188 n.2; see also *Carey*, 431 U.S. at 694 n.17 (noting that the Supreme Court has not yet decided the extent of valid state regulation of adult, consensual, sexual relations).

<sup>65</sup> See *Bowers*, 478 U.S. at 191-94.

<sup>66</sup> *Id.* at 194.

preference would not withstand scrutiny under the Equal Protection Clause.<sup>67</sup> Thus, if the Supreme Court were to recognize a fundamental right of heterosexual sodomy, as the *Fagg* court did, it would by implication undermine the validity of the *Bowers* decision.

The Supreme Court has stated that legislation limiting fundamental rights may be justified only by showing both that a compelling governmental interest exists in regulating the particular conduct and that the statute is narrowly tailored to be the least restrictive means of effectuating that interest.<sup>68</sup> This standard of judicial review is known as "strict scrutiny."<sup>69</sup> If, as in *Fagg*, the Court decides that a statute prohibiting sodomy violates a heterosexual's constitutional right of privacy on the grounds that heterosexuals have a fundamental right to engage in sodomy, strict scrutiny must be applied in denying this right to homosexuals.<sup>70</sup>

The legislative history behind the criminalization of sodomy in the Uniform Code of Military Justice is based on common law,<sup>71</sup> which prohibited sodomy on the grounds of health and moral concerns.<sup>72</sup> In light of today's health concerns about the rise in sexually transmitted diseases, it seems clear that there may be a compelling governmental interest in proscribing sodomy outside the precincts of marriage. Once this right is extended to unmarried adults, however, this human health justification for the prohibition becomes less tenable as pertaining to homosexual sodomy.<sup>73</sup> This leaves the state in a position of justifying a statute proscribing ho-

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<sup>67</sup> See *supra* note 6 (language of Equal Protection Clause).

<sup>68</sup> *Roe*, 410 U.S. at 155; *Griswold*, 381 U.S. at 485; see also *TRIBE*, *supra* note 1, § 16-6 (discussion of strict scrutiny as applied to equal protection); *supra* note 6 and accompanying text (discussion of case law interpretations of Equal Protection Clause).

<sup>69</sup> See *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898, 904 (1986); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *Pylar v. Doe*, 457 U.S. 202, 216-17 & n.15 (1982); see also *supra* note 6 and accompanying text (discussion of strict scrutiny applied in context of equal protection claims).

<sup>70</sup> See *supra* note 6 and accompanying text. Some courts have struck down such statutes even before considering the nature of the right being infringed. See *Commonwealth v. Bonadio*, 415 A.2d 47, 49 n.1, 50-52 (Pa. 1980) (holding such legislation to be invalid exercise of state police power).

<sup>71</sup> See S. REP. NO. 486, 81st Cong., 2d Sess. 32 (1949), reprinted in 1950 U.S.C.C.A.N. 2222, 2258.

<sup>72</sup> See *Bowers*, 478 U.S. at 192. A number of states have prohibited sodomy since as far back as the eighteenth century. *Id.* at 192-93 nn.5-6.

<sup>73</sup> See *Eisenstadt*, 405 U.S. at 451 (if statute "were a health measure, it would not only discriminate against the unmarried, but also be overbroad with respect to the married"); *infra* note 74.

mosexual sodomy solely on moral grounds.<sup>74</sup> Although legislation based solely on moral grounds has endured minimum rational scrutiny,<sup>75</sup> it seems that such an interest would not fare as well under the strictest judicial scrutiny.<sup>76</sup>

If the Supreme Court were to affirm a decision such as *Fagg* and create a fundamental right in unmarried couples to engage in heterosexual sodomy, it could not, consistent with Equal Protection, continue to deny this right to homosexuals. Given the current conservatism of the Court and its affinity for federalism,<sup>77</sup> however, it is unlikely that the Court will be willing to venture into such extensions of the right of privacy and take this first step toward a fundamental right to homosexual sodomy.

Should the Court deny to all a fundamental right to sodomy, justification for sodomy statutes becomes a more simple matter. Absent any implication of fundamental rights or invidious discrimination based on race, alienage, or gender, the states may create classifications that need only be supported by a legitimate state interest.<sup>78</sup> Since courts have considered morality as serving a legiti-

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<sup>74</sup> See *Barbier v. Connolly*, 113 U.S. 27, 31 (1884). Every state has the police power to promulgate "regulations [that] promote the *health*, peace, *morals*, education, or good order of the people." *Id.* (emphasis added). Generally, there are two interests that states assert in criminalizing the act of sodomy: moral concerns and health concerns. See *Survey*, *supra* note 60, at 639-57 (appendix cataloguing state legislative histories of sodomy statutes). While valid health concerns, such as stemming the spread of disease, are a legitimate state interest, regulations are valid only if the statute is applicable to all persons. See *id.* at 623-25. Thus, once a statute is made applicable only to certain classes of citizens, the only remaining state interest that would validate the statute would be the maintenance of morality. See *id.* at 612-22; see also *Bowers*, 478 U.S. at 196 (recognizing propriety of legislation based on moral grounds).

<sup>75</sup> See *Eisenstadt*, 405 U.S. at 446-47, 452. Minimum rational scrutiny requires that the state regulation be reasonably related to a legitimate interest. See *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *TRIBE*, *supra* note 1, § 16-2.

<sup>76</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 913 n.10 (1990) (Blackmun, J., dissenting); G. SIDNEY BUCHANAN, *MORALITY, SEX, AND THE CONSTITUTION* 33-41 (1985). Indeed, in the area of anti-sodomy legislation, some courts have held that moral concerns behind prohibiting unmarried sodomy will not even pass minimum rational scrutiny. See *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980), *cert. denied*, 451 U.S. 987 (1981). The *Bowers* Court disagreed with the notion that "majority sentiments about the morality of homosexuality should be declared inadequate." See *Bowers*, 478 U.S. at 196 ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated the courts will be very busy indeed.").

<sup>77</sup> See, e.g., *Smith*, 494 U.S. at 890 (suggesting that minority Indigenous Americans petition their state legislature if they wish to change generally applicable law regarding the use of Peyote for religious purposes).

<sup>78</sup> See, e.g., *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456-62 (1988); *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

mate state interest,<sup>79</sup> the states would then be free to legislate the popular morality in full accordance with the Constitution. This leaves a dissident's only recourse in legislative action,<sup>80</sup> which invariably equates to no remedy at all.<sup>81</sup>

#### CONCLUSION

The right of privacy must be applied consistently if it is to enjoy any validity. The Supreme Court, in relying on society's deep respect for the marital union, has fashioned an unnecessarily narrow foundation upon which the right of privacy may operate. The United States Air Force Court of Military Review, in its decision in *United States v. Fagg*, realized the error in this truncated view of privacy and sought to give full life to the autonomic concerns inherent in a broader concept of privacy. Unfortunately, these laudable intentions amount to naught when equal protection analysis is applied to its decision in light of the Supreme Court's decision in *Bowers v. Hardwick*. Put simply, if the Constitution were to recognize a fundamental right in married persons and unmarried heterosexuals to engage in sodomy, as the *Fagg* court would have it, there must be a compelling interest in denying this right to homosexuals, per the *Bowers* decision. This compelling interest does not exist. When the Supreme Court is faced with a case that questions the right to engage in non-marital heterosexual sodomy, and then realizes the importance of freedom of intimate expression, as well as the importance of a general right of personal autonomy, it will necessarily have to reconsider decisions denying the same rights to

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<sup>79</sup> See *Ullman*, 367 U.S. at 546 (Harlan, J., dissenting). Justice Harlan felt that "laws forbidding adultery, fornication and homosexual practices . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine [in the area of privacy] must build upon that basis." *Id.*; see also *Carter v. State*, 500 S.W.2d 368, 372 (Ark. 1973) (declaring sodomy proscription as legitimate exercise of state police power), *cert. denied*, 416 U.S. 905 (1974).

<sup>80</sup> See *Smith*, 494 U.S. at 890; *Doe v. Richmond*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd without opinion*, 425 U.S. 901 (1976).

<sup>81</sup> See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 732-33 (1985) (arguing that homosexuals are unable to effectively participate in political process due to lack of ability in others to accept them); Denise Dunnigan, Note, *Constitutional Law: A New Suspect Class: A Final Reprieve for Homosexuals in the Military?*, 42 OKLA. L. REV. 273, 285 (1989) (noting the "impossible position in which homosexuals find themselves when trying to participate in the political process").

homosexuals. Until then, decisions such as *Fagg* will remain constitutional "glimmers of hope."

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