No. 02-102

IN THE
**Supreme Court of the United States**
OCTOBER TERM, 2002

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

-v-

TEXAS,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

# BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 300,000 members that is dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Texas is one of its state affiliates. This case raises issues of profound importance to the ACLU and its members. The ACLU has long opposed both discrimination based on sexual orientation and government efforts to regulate sexual intimacy between consenting adults within the privacy of the home. In support of these principles, the ACLU has appeared before this Court on numerous occasions, including as counsel for respondent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and as co-counsel for respondents in *Romer v. Evans*, 517 U.S. 620 (1996). Although mindful of the principles of *stare decisis*, the ACLU respectfully submits that *Bowers* was wrongly decided and should now be overruled. This brief therefore focuses on that question.

## STATEMENT OF THE CASE

Responding to a false report of a weapons disturbance, police entered John Lawrence's home and found Lawrence and Tyron Garner being sexually intimate. The police arrested and jailed them for violating Texas Penal Code § 21.06, which criminalizes "deviate sexual intercourse" (defined to include oral or anal sex) for a same-sex couple but not for an opposite-sex couple. Despite Petitioners' argument that § 21.06 violates federal constitutional guarantees of privacy and equal protection, the Texas Court of Appeals affirmed the convictions and the Texas Court of

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Criminal Appeals denied review. Petition for *Certiorari* at App. 1a-4a, 86a-141a, *Lawrence v. Texas*, 71 U.S.L.W. 3116 (filed July 16, 2002) (No. 02-102). This Court granted *certiorari*. 71 U.S.L.W. 3116 (Dec. 2, 2002).

## SUMMARY OF ARGUMENT

The laws of Texas and 12 other states criminalize sexual intimacy between consenting adults in the privacy of the bedroom. The substantive limits on government power inherent our constitutional system mean that the details of such private, consensual sexual intimacy are matters for individuals to decide, not for the state to police. Yet the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), held that the Constitution presented no barrier to this intrusion by the state.

*Bowers* is an anomaly that ill fits this Court's privacy jurisprudence, which places private consensual intimacies squarely within the zone of protected liberty. The *Bowers* decision ignored the principles that shape that zone of liberty and relied on an incomplete and therefore inaccurate understanding of history. A fuller exploration of the nation's history and tradition shows a long-standing practice of not applying sodomy laws to consensual acts between adults in private. This tradition of calculated application reflects the contours of the liberty protected by the Constitution.

Guided by the Court's enduring precedents addressing constitutional privacy, by the "basic values that underlie our society," *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), and by a more accurate understanding of history, *id.*, the Court should overrule *Bowers*. It should hold that the Due Process Clause both protects the liberty of consenting adults to decide what sexual intimacies they will share in private and subjects state regulation of such decisions to strict scrutiny.

Unlike cases where the Court properly adheres to an existing precedent despite its flaws, here there is no reason to shy away from righting a manifest constitutional error. Overruling *Bowers*, a decision that certainly has not become imbedded in the "national culture," *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000), would disturb no reliance interests, but instead would bring coherence to the Court's privacy jurisprudence. *Bowers* is an outlier that can and should be overruled.

## ARGUMENT

### *BOWERS v. HARDWICK* WAS WRONGLY DECIDED AND SHOULD BE OVERRULED

#### A. Private, Consensual Sexual Intimacy Between Adults Falls Within The Zone of Liberty Specially Protected By The Constitution

The assertion by the State of Texas that its police may intrude into a person's bedroom to regulate the details of his most intimate interactions with another adult strikes at the core of the liberty protected by the Due Process Clause of the Fourteenth Amendment. The principles animating the Court's privacy cases, both before and after *Bowers*, easily encompass the liberty of private, consensual sexual intimacy between adults. Indeed, it is only a unifying principle of personal autonomy that serves to limit an otherwise boundless, tyrannical state power over every detail of personal life. And only such a unifying principle renders this Court's privacy decisions a coherent whole, instead of a series of disjointed pin-points of constitutional protection unconnected by principle or logic. Just such a cramped understanding of the principles of autonomy, of the Court's earlier cases, and of our nation's history, lies at the heart of the error in *Bowers v. Hardwick*.

It is by now a commonplace that the precise contours of the liberty protected by the Due Process Clause have never "been reduced to any formula" or "determined by reference to any code," *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting). Nevertheless, the Court is not without guideposts in defining those contours—guideposts that include this Court's existing corpus of privacy decisions, the postulates underlying those rulings, and the history of conscious non-application in private settings of laws ostensibly regulating a range of sexual intimacies. These guideposts provide the proper framework for determining the scope of the liberty at stake in this case and dictate the fate of the sodomy statute challenged here.

1. Protection Of Consensual Sexual Intimacy In The Home Is Compelled By The Court's Privacy Cases

The Court's privacy cases recognize a fundamental right on the part of consenting adults to form and conduct intimate personal relationships within the protective shelter of the home. Thus, the government must provide a compelling justification before it may dictate the content of personal decisions regarding sexual intimacy, including decisions about whether to have sex for procreation or for fulfillment,[2] and whether to have an abortion or carry a pregnancy to term.[3] This associational aspect of the autonomy right also protects the freedom to determine the nature of family and other intimate relationships, including whether and whom to

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[2] *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (protecting liberty interest in sexual intimacy within marriage), *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (protecting liberty interest in sexual intimacy outside of marriage); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977). Another strand of the privacy right recognizes the related right to bodily integrity. *See, e.g.*, *Rochin v. California*, 342 U.S. 165 (1952).

[3] *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833 (1992).

marry,[4] how to raise one's children,[5] and with what family members to share one's home.[6] The Court has recognized a spatial dimension to the privacy right as well—a dimension that specially protects the home, and one's activities there, from unwarranted intrusion by the government.[7]

The liberty that is so sharply invaded by this Texas statute thus stands at the intersection of several distinct axes of this recognized privacy right: it involves sexual intimacy, it affects the ability to form close-knit personal associations according to one's own lights, and it occurs in the home. The right at stake here therefore does not fall outside the outer boundaries of the Fourteenth Amendment, as the Court in *Bowers* suggested, but instead lies near its very center.

a) Liberty Embraces Associational Intimacy

In its cases involving sexual intimacy, the Court has recognized a liberty that cannot be distinguished in a

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[4] *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing liberty interest in marriage); *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1972).

[5] *See Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) (protecting parent's right to control child's rearing and education); *Pierce v. Society of the Sisters*, 268 U.S. 510, 534-35 (1925) (same); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing in *dictum* "the private realm of family life which the state cannot enter"); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion) (reaffirming parent's liberty interest in controlling upbringing of children).

[6] *See Moore v. City of E. Cleveland*, 431 U.S. 494, 504-06 (1977) (plurality opinion).

[7] *See Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (protecting right to read even obscene materials unprotected by the First Amendment in the privacy of the home); *Moore*, 431 U.S. at 499-502 (plurality opinion) (protecting right of family members to live together in the home); *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting) ("[I]f the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within.").

principled way from that of private, consensual, adult sexual intimacy, which the Texas statute invades. This Court's repeated invalidation of restrictions on the use of contraceptives, *see Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-86 (1977), involved more than a right to employ a drug or device; it necessarily entailed a more generalized right to engage in sexual intimacy, including that between unmarried persons and for purposes other than procreation.

Although the privacy right originally recognized in *Griswold* was grounded in the marital relationship, it was quickly and explicitly broadened in *Eisenstadt* to cover unmarried individuals. 405 U.S. at 453; *see also Carey*, 431 U.S. at 685. Thus, the sexual intimacy at issue here cannot be carved out of the zone of protected liberty simply because the individuals involved are not married to one another.

Procreation is also not at the core of the right recognized in *Griswold* and *Eisenstadt*. The statute challenged in *Griswold* did not tell the citizens of Connecticut either that they had to procreate or that they must not. Instead, Connecticut told them that they could not have sex unless it was with full risk of procreation. The question for the Court in *Griswold* was whether individuals had a right to engage in sex for pleasure and fulfillment instead of for procreation. The Court of course recognized just that right.

It would be particularly incoherent—indeed, perverse—to limit the right to engage in *non*-procreative sex to couples who *could* procreate if they so chose. Surely an individual's sudden loss of the physical capacity to procreate could not justify the government's insistence that her sexual intimacy must stop. A woman past the age of menopause or one who is already pregnant is capable of *non*-procreative sex only; surely her right to engage in sexual intimacy remains undiminished nevertheless. The same must be true of an infertile heterosexual couple. And, from the perspective of

sexual intimacy unlinked to any prospect of procreation, a same-sex couple is no different. The right that emerges from the contraception cases is a right to engage in private sexual intimacy with another adult, regardless of marriage and regardless of whether the intimacy could otherwise result in procreation. *See Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833, 857 (1992) (plurality opinion) (discussing "the liberty relating to *intimate relationships*, the family, and decisions about whether or not beget or bear a child") (emphasis added); *Carey*, 431 U.S. at 685 (invalidating regulation of a "field that by definition concerns the most intimate of human activities and relationships"—namely, sexual activities and relationships). That is precisely the right Texas has invaded here.[8]

*Bowers* distinguished the Court's prior privacy cases as being limited to situations involving "family, marriage or procreation," with which "homosexual activity" had "no connection." 478 U.S. at 191. The Court's reasoning was simply wrong. First, as explained above, the Court's prior decisions were not limited to either marriage or procreation, but instead protected the right to sexual intimacy even among unmarried individuals who engage in non-procreative sex.

[8] Justice Stevens' concurring opinion in *Carey* suggests that criminalizing the provision of contraceptives offends substantive due process because, whatever its power to outlaw the underlying sex act, a state that threatens someone with pregnancy as the price for engaging in a sex act has acted irrationally. 431 U.S. at 715-16. It detracts not a bit from the wisdom of that insight to say that it contained only a partial explanation of the precedents. The right to use contraceptives is obviously about more than the cruelty of unwanted pregnancy. Among other things, if *Griswold* and its progeny were based only on that reasoning, then the right they announced would apply only to women.

Second, to the extent the Court's other privacy cases focus on family or other intimate associational ties,[9] they apply fully here. Lesbians and gay men, no less than other individuals, center their lives around close-knit emotional bonds.[10] As adults, they form intimate relationships with one another, often have or adopt children, and interact with groups of relatives that make up their extended families.[11] The Court has recently recognized that the "composition of families varies greatly from household to household," making "it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). The Constitution "protects those relationships, including family relationships, that presuppose deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs, but also distinctively personal aspects of one's life." *Board of Directors of Rotary Int'l v.*

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[9] Of course, the Court has recognized substantive due process liberty interests that have no apparent connection to family, marriage, or procreation. *See, e.g.*, *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing liberty interest in refusing medical treatment); *Washington v. Harper*, 494 U.S. 210, 221-222 (1990) (recognizing liberty interest of prisoners in avoiding the unwanted administration of antipsychotic drugs).

[10] *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 63 (1973) (recognizing that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality"); *Eisenstadt*, 405 U.S. at 453; *Griswold*, 381 U.S. at 485-86.

[11] The 2000 Census figures, which document over 600,000 households of unmarried same-sex partners in the United States, living in 99.3% of American counties, illustrate the prevalence of same-sex couples in America today. David M. Smith and Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households* at 1-2 and Tables 1, 4 (Aug. 21, 2001), *available at* www.hrc.org/familynet/documents/L%census.pdf.

*Rotary Club*, 481 U.S. 537, 545-46 (1987) (internal quotations marks omitted).

Protecting such "highly personal," intimate relationships from "unjustified interference by the State" is one means of "foster[ing] diversity," nurturing the autonomous development of values and ideals, and providing a "critical buffer[] between the individual and the power of the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 619 (1984) (recognizing the vital importance of this protection because "individuals draw much of their emotional enrichment from close ties with others"); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (protecting "freedom of personal choice in matters of . . . family life" as one of the constitutionally protected "liberties"). Preventing government intrusion into the foundations of such core relationships is therefore central to an "Anglo-American regime of ordered liberty." *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968); *see also Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

b) Liberty Is Especially Protected In The Home

That the sexual intimacy that made John Lawrence a criminal in Texas occurred within his home brings the interest at stake here under a separate and equally compelling aspect of the Court's privacy cases. "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights." *United States v. Orito*, 413 U.S. 139, 142 (1973); *see Griswold*, 381 U.S. at 484 (the Fourth and Fifth Amendments protect against "governmental invasions of the sanctity of a man's home and the privacies of life.") (internal quotations omitted). Allowing the government to send its officers into people's bedrooms, in the "innermost sanctum of the home," to police the details of private consensual sexual intimacy invades a realm of "privacy that is implicit in a free society." *Poe v. Ullman*, 367 U.S. 497, 520-21 (1961) (Douglas, J.,

dissenting); *see also Griswold*, 381 U.S. at 485-86 (search of private bedroom for "telltale signs" of contraceptive use would violate right to privacy). When a state wishes to reach into the home, whether to search its contents or to regiment the details of what goes on within, it invades a protected realm and must provide significant justification.

The home protects us from unwarranted government surveillance in significant part to "provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from governmental interference." *Oliver v. United States*, 466 U.S. 170, 179 (1984); *see Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.") (emphasis in original). This Court has thus held that the state cannot criminalize the private possession of obscene materials in the home, even when those materials are unprotected by the First Amendment and the state could penalize their public dissemination or acquisition. *Stanley v. Georgia*, 394 U.S. 557, 559 (1969). As this Court has repeatedly held, rights protected by other provisions of the Constitution "take[] on an added dimension" in the privacy of the home, given the "fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions" into that sanctum. *Id.* at 564.

It would be ironic indeed if government were constitutionally barred from entering a man's home to stop him from obtaining sexual gratification by viewing an obscene film—but were free, without any burden of special justification, to enter the same dwelling to interrupt his sexual intimacy with a willing adult partner. Given the importance of intimate relationships to all our lives, they certainly deserve at least as much protection from government interference as that recognized in *Stanley*.

The *Bowers* Court erred when it "close[d] [its] eyes to the *basic reasons why* certain rights . . . have been accorded shelter under the Fourteenth Amendment's Due Process Clause," *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion) (emphasis added)—namely, that certain aspects of human relationships, including sexual intimacy, are so personal, fundamental, and private that government has no business usurping them. The line that already appears in the Court's autonomy cases—allocating decisionmaking about consensual adult sexual intimacy in the home to the individual rather than the state—preserves and reflects that common understanding of the proper spheres for government and for individual decisionmaking. Reliance on this common understanding provides the kind of "objective considerations," *County of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998) (Kennedy, J., joined by O'Connor, J., concurring), that exemplify a principled approach to the Due Process Clause.

2. History And Tradition Show That Americans Have A Fundamental Right To Be Free From Government Regulation Of Consensual Sexual Conduct In The Home

The Due Process Clause specially protects those freedoms that are "deeply rooted in this Nation's history and tradition," *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion), or that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

History and tradition are neither the sole nor necessarily the dispositive factor in due process analysis.[12] But in this

[12] As Justice Kennedy has observed, "history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry." *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., joined by O'Connor, J., concurring); *see also*

case, a thorough review of American history shows that, at least since the Revolution, Americans have believed that government has no place in the bedrooms of consenting adults. A crucial error in the *Bowers* decision was the majority's flawed reconstruction of that history. *See* 478 U.S. at 192-94; *id.* at 196-97 (Burger, C.J., concurring).

Laws banning sodomy have indeed existed for centuries. But until quite recently, American sodomy laws were not aimed at lesbians and gay men at all. Instead, they prohibited all sodomy, regardless of the sex of the participants,[13] because sodomy was considered a sin against *procreation*, not an offense against *heterosexuality*.[14]

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*Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833, 848 (1992) (plurality opinion) (stating that "[n]either the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects," and citing the "rational continuum" language from Justice Harlan's dissent in *Poe v. Ullman*).

[13] William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. Ill. L. Rev. 631, 643-46 (1999) (discussing early definitions of sodomy in America); John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 30 (1988). It was not until 1969 that any state singled out same-sex sexual activity for criminal prohibition, and only nine states ever did so. *Id.* at 664-65; *see infra* note 48.

[14] Nan Hunter, *Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 533 (1992) ("The crime of sodomy originated in ecclesiastical regulation of a range of nonmarital, nonprocreative sexual practices. Nonprocreation was the central offense and the core of the crime."); Eskridge, *Historiography*, *supra* note 13, at 647; D'Emilio & Freedman, *supra* note 13, at 30. Thus, the long-standing criminalization of "homosexual sodomy" relied upon by the *Bowers* majority, 478 U.S. at 192-94, was in fact not a special legal condemnation of gay sex at all, but a condemnation of non-procreative sex in general. Proper recognition of this fact in *Bowers* should have revealed at once the great difficulty of reconciling the right to have sex while using contraceptives with the ban on sodomy. *See supra* Point A.1.a.

More critically, sodomy laws have almost always been applied in cases involving children, the use of force, public sex, or prostitution. From as early as the post-Revolutionary period, states have very rarely applied laws banning sodomy, fornication, or adultery to consenting adults in private. This history of non-enforcement in private contexts affirmatively shows that American society has long respected the individual's freedom to engage in consensual adult sexual intimacy in private, even while the law has *nominally* covered such intimacy.

The State of Texas, for example, admitted as recently as 1994 that it had never prosecuted consenting adults for sodomy in private,[15] and several other states have made similar concessions.[16] A review of reported appellate decisions confirms that there have been no prosecutions by the State of Texas that were plainly based on private,

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[15] *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994) (reporting position of Texas Attorney General that "there is no record of even a single instance in which the sodomy statute has been prosecuted against [private consensual] conduct [between adults].").

[16] *See Sanchez v. Secretario de Justicia*, __ D.P.R. __, No. AC-2000-63, 2002 WL 1581480 (P.R. June 28, 2002) (noting that sodomy law has not been enforced against private consensual sodomy between adults in its more than 100 years of existence); *Jegley v. Picado*, 80 S.W.3d 332, 337 (Ark. 2002) (state "points out that no reported Arkansas case in the past '50+ years' reveals a prosecution under the sodomy statute for private, consensual conduct violating the statute."); *Gryczan v. State*, 942 P.2d 112, 118 (Mont. 1997) ("[T]he statute has never been enforced against consenting adults."); *Williams v. Glendening*, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998) (state did not prosecute individuals for private, consensual sodomy between adults). In 1996, the Tennessee Attorney General asserted that there had been no showing "that there have been any arrests for purely private, consensual, adult, sexual activity" under Tennessee's sodomy law. *Campbell v. Sundquist*, 926 S.W.2d 250, 255 (Tenn. 1996) (noting that all recorded arrests for violation of the sodomy law involved "public activity" or a "juvenile," or their public vs. private nature was "unknown.").

consensual adult sodomy in the home other than this one.[17] Reported decisions in other jurisdictions show that prosecutions for private consensual intimacy have been exceedingly rare.[18] Likewise, scholars find almost no such

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[17] We found 191 reported appellate decisions in Texas involving charges of non-aggravated sodomy (using various terminology), ranging from 1867 to 1992. Of these, 55 involved children, 37 were assaults, 12 involved sex in public, 14 involved bestiality, and 73 were "unclear" cases where the opinion did not reveal the circumstances of the crime, including whether the offending conduct occurred in public or private, was consensual or forced, or was with an adult or a minor. The unclear cases are mostly older, when opinions typically provided little or no detail.

[18] Reviewing reported appellate decisions involving prosecutions for non-aggravated sodomy in the original thirteen states, we found the same pattern of non-enforcement in private, consensual contexts: In Massachusetts, we found 75 prosecutions from 1869 to 2002, of which seven were unclear and none involved consensual sex between adults in private. In New Hampshire, we found five prosecutions, from 1941 to 1975, two of which were unclear and none of which involved private, consensual conduct. In Rhode Island, we found 12 prosecutions from 1970 to 1999, one of which was unclear and the rest involved children, assault, or public sex. In Connecticut, we found five prosecutions, from 1967 to 1976, all of which involved assaults. In New York, we found 216 prosecutions from 1893 to 1980 (when New York struck down its consensual sodomy law, *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980)), of which 36 were unclear and only *Onofre* involved private consensual conduct. In New Jersey, we found 11 prosecutions, from 1923 to 1979, seven of which involved assaults and four of which involved children. In Pennsylvania, we found 39 prosecutions, from 1916 to 1992, four of which were unclear and none of which involved private, consensual conduct. In Delaware, we found four prosecutions, from 1915 to 1962, one of which involved public sex and three of which were unclear. In Maryland, we found 99 prosecutions, from 1810 to 2000, of which five were unclear and none involved private, consensual conduct. In Virginia, we found 21 prosecutions, from 1812 to 2001, none of which were plainly private and consensual and three of which were unclear. In North Carolina, we found 48 prosecutions, from 1901 to 2002, eight of which were unclear and only one of which appears to involve private, consensual conduct. *State v. O'Keefe*, 138 S.E.2d 767 (N.C. 1964). In South Carolina, we found two prosecutions, one in 1955 that involved a

prosecutions in the 19th century,[19] and, as Judge Posner has observed, "no nation in modern times—not even Nazi Germany or communist Cuba—has made systematic efforts to discover and punish [sodomy] when conducted in private."[20] Laws criminalizing fornication have also not been applied in private contexts.[21]

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child and one in 1996 that involved an assault. In Georgia, we found 76 prosecutions for non-aggravated sodomy, ranging from 1884 through 2002, of which 10 were unclear. At the time it was decided, *Bowers* was the first reported case in Georgia involving an arrest for private, consensual sodomy. Of course, the State of Georgia did *not* prosecute Michael Hardwick, instead choosing not to present the matter to a grand jury. *Bowers*, 478 U.S. at 189; *id.* at 198 (Powell, J., concurring). Since then, one reported case involved an arrest based on an invitation to commit sodomy in private. *Christensen v. State*, 468 S.E.2d 188 (Ga. 1996).

[19] *See* William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1015 (1997) (finding no reported cases involving convictions for private, consensual sodomy in the 19th century before 1880); Drew Page, *Cruel and Unusual Punishment and Sodomy Statutes: The Breakdown of the* Solem *v.* Helm *Test*, 56 U. Chi. L. Rev. 367, 390 (1989) ("[A]lmost all the reported cases involving sentences for sodomy also involve punishment for other crimes like rape, forcible sodomy, or public indecency."); George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940, 140 (1994) (noting that New York State "had done little to enforce the sodomy law in the first century of independence," and that there were only 22 reported prosecutions for sodomy in New York City in the nearly eight decades from 1796-1873, the details of which (private vs. public, consensual vs. forced, adult vs. child) are not discussed).

[20] Richard A. Posner, Sex and Reason 207 (1992); *see also* Richard A. Posner and Katharine B. Silbaugh, A Guide to America's Sex Laws 66 (1998) ("Prosecutions for sodomy today are almost entirely limited to either sexual conduct in a public place . . . or sexual conduct involving force or lack of consent where a sexual assault charge would be difficult to prove.").

[21] For example, Virginia has not prosecuted anyone for fornication since 1849. *Doe v. Durling*, 782 F.2d 1202, 1206 (4th Cir. 1986).

A very different picture emerges in the Colonial period, roughly 1600 to 1776, when the state was intimately involved in policing private behavior. Colonial law was essentially religious law, and "all crime was . . . synonymous with sin."[22] Colonial Protestants emphasized the importance of sexuality within marriage but condemned all sex that "occurred outside of marriage and for purposes other than reproduction."[23] Colonial law in both New England and the Chesapeake outlawed fornication, adultery, and sodomy,[24] sometimes with a penalty of death.[25]

The Colonial period's regulation of private, non-marital sexual acts

> depended upon the extensive involvement of community members in each others' lives. Intrusiveness [so] characterized the attitude toward

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There are only two reported convictions for fornication in Minnesota, the last one in 1927. *Cooper v. French*, 460 N.W.2d 2, 19 (Minn. 1990). The most recent Illinois appellate court record of a successful fornication prosecution was in 1916. *Mister v. A.R.K. Partnership*, 553 N.E.2d 1152 (Ill. App. 1990) (citing *People v. Green*, 114 N.E. 518 (Ill. 1916)).

[22] William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society: 1760-1830, 39 (1975). Sins that were also crimes ranged from breaching the Sabbath by missing church or working on Sunday to engaging in premarital or extra-marital sexual behavior. *Id.* at 37-38.

[23] D'Emilio & Freedman, *supra* note 13, at 4.

[24] *Id.* at 18. However, in this period most colonies had no laws regulating sex between two women, mutual masturbation, or oral sex. Eskridge, *Historiography*, *supra* note 13, at 644-45.

[25] Sodomy, and adultery in some colonies, carried the death penalty in the early Colonial period, *see* D'Emilio & Freedman, *supra* note 13, at 30; Cornelia Hughes Dayton, Women Before the Bar: Gender, Law and Society in Connecticut 1639-1789, 163 (1995), but by the 1700s most states had eliminated the death penalty for both crimes, D'Emilio & Freedman, *supra* note 13, at 30; Eskridge, *Historiography*, *supra* note 13, at 645.

> sexuality . . . [that] individuals could not easily engage in illicit sexual activities without being noticed. Among Puritans, each community member had responsibility for upholding the morality of all lest God punish the group as a whole. . . . So clear was the responsibility of family and neighbors to help regulate sexuality that a New England father who allowed his son to live with an unmarried woman was charged as an 'accessory to fornication.'[26]

Colonists even testified about the sexual activities of their neighbors, "illustrating an acceptance of intrusiveness in what would later come to be considered purely private matters."[27]

Starting about the time of the American Revolution, state governments began taking a much more hands-off attitude toward regulation of private sexuality, leaving "the task of sexual regulation . . . largely to the family."[28] Whether because the society became more focused on "property rather than morals offenses,"[29] or as a facet of the separation of church and state,[30] it is clear that courts and legislatures largely "abandon[ed] . . . the prerevolutionary notion that government should act to enforce morality."[31] While "sexual

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[26] D'Emilio & Freedman, *supra* note 13, at 29 (footnotes omitted).

[27] *Id.*; *see also id.* at 27 ("Church and court records reveal the extensive efforts colonists made to identify, outlaw, and punish" "adultery, sodomy, incest, or rape.").

[28] *Id.* at 66-67.

[29] *Id.* at 67.

[30] *Id.* (discussing increasing secularization of government as well as the shift in control of sexuality from clergy to doctors).

[31] Nelson, *supra* note 22, at 111; *see also* Dayton, *supra* note 25, at 159-60 ("By midcentury [1750], new attitudes . . . had pushed aside the Puritan obsession with pressuring all sinners to acknowledge immoral behavior in the most public setting possible. Gradually, the regulation of

offenses still violated religious and familial codes, . . . they were not viewed, as they had been earlier, as challenges to the stability and survival of the state. The family, in other words, had acquired more privacy."[32]

The late 18th century shift away from government regulation of private intimacy resulted in a sharp decline in the enforcement of morals offenses, including laws proscribing consensual sexual acts such as fornication and adultery.[33] For example, during the 15 years prior to the Revolution, Massachusetts prosecuted an average of 72 sexual offenses a year, nearly all for fornication. After 1790, there are only four such prosecutions ever reported in the entire Commonwealth.[34] Similar changes occurred in Connecticut: the New Haven County Court heard 112 prosecutions for fornication—its largest number—from 1730-39, but that number dropped to three for the period 1780-89.[35]

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moral behavior was withdrawn from the purview of the community-embodied-in-the-court and lodged in the more informal and amorphous setting of family and neighborhood.").

[32] Mary Beth Norton, *The Evolution of White Women's Experiences in Early America*, 89 Am. Hist. Rev. 593, 612 (1984).

[33] Nelson, *supra* note 22, at 110; *see also* D'Emilio and Freedman, *supra* note 13, at 38. No analogous change in the frequency of sodomy prosecutions is apparent because there was never a large volume of such prosecutions, even during the Colonial period. Eskridge, *Historiography*, *supra* note 13, at 645 ("Altogether there are records for perhaps as many as twenty sodomy prosecutions and four executions during the colonial period.").

[34] Nelson, *supra* note 22, at 110.

[35] Dayton, *supra* note 25, Tables 7, 8, at 182-83. By the end of the 18th century, fornication cases ceased to be matters of criminal prosecution; instead, unmarried pregnant women were treated not as criminals but as complainants in paternity suits. *Id.* at 161.

The removal of government from regulation of private intimacy in the home endured throughout the 19th and 20th Centuries and is evident in the almost complete lack of prosecutions for sodomy, fornication, or adultery in private settings after the late 1700s.[36] While the American public of course continued to debate moral issues,[37] with few exceptions its concern with morals did not manifest itself in prosecutions for private consensual sexual intimacy.[38] Even

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[36] *See supra* notes 15-20.

[37] For example, so-called "Comstock Laws," which prohibited the mailing of "obscene literature," *see, e.g.*, Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873), were enacted in Congress and in many states starting in 1873. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 748-51 (1992). By their very terms, however, those laws did not address sexual acts, such as sodomy, fornication, or adultery, and resulted in no prosecutions for such private activity in the home.

With the increasing urbanization of America in the late 1800s, prostitution became more widespread, as did efforts to combat it, including through regulation of "bawdy houses." Eskridge, *Historiography*, *supra* note 13, at 650. Notably, prosecutions under these laws also would not have addressed sodomy, fornication, or adultery in private, non-commercial settings.

And the Mann Act, 18 U.S.C. § 2421 (1948), known as the White Slave Traffic Act, made it a federal crime to transport women in interstate commerce for prostitution or any "immoral" acts. During a brief period, the Mann Act was enforced against men who transported women across state lines for non-commercial "immoral" acts. David J. Langum, Crossing Over the Line: Legislating Morality and the Mann Act 161 (1996). But at the time, these were not considered consensual sexual acts, as the Act, which applied only to men, paternalistically presumed that the women were unwitting participants, manipulated by men. *Id.* at 10. By the end of the 1920's, the non-commercial prosecutions had ceased, except for occasional selective use against unpopular groups, including gangsters, African-American men who were found with white women, and people with politically unpopular views. *Id.* at 161-97.

[38] *See supra* notes 15-20.

when the number of overall sodomy prosecutions increased, such as during the "purity crusades" of the late 1800s, and during the post-World War II McCarthy period, during which police vice squads sought to stamp out "immoral" sexual activity, prosecutions for sodomy focused on forcible sex, sex for hire, or sex in public, rather than consensual sex in the privacy of the home.[39]

The Colonial experience shows that the later lack of enforcement in private does not result from any inability of police or prosecutors to discover the illegal conduct. People have long been aware that their neighbors, friends, and family engaged in consensual sexual intimacies in private, in undoubted violation of various sodomy, fornication, and/or adultery laws. And people who love members of the same sex have hardly been invisible, in either 19th century, 20th century, or contemporary America.[40] The very fact that people do not report the sexual activities of their neighbors and acquaintances and have not done so for a very long time underscores the degree to which our national culture has

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[39] *See* Eskridge, *Historiography*, *supra* note 13, at 650-54 (discussing general concern in 1880s with immorality and consequent rise in prosecution for sodomy, almost all of which occurred in public, involved children, or was prostitution); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet*, 1946-61, 24 Fla. St. U. L. Rev. 703, 717-20 (1997) (discussing McCarthy-era dragnets). Most arrests in these dragnets were not for sodomy, but rather for indecency, public lewdness, or loitering. Of the arrests for sodomy, Eskridge estimates that most involved commercial or coerced sex acts, with only about 20-25% involving consensual sex. Eskridge, *Privacy Jurisprudence*, at 725. And the arrests for consensual sodomy generally involved sex, or solicitations for sex, in public places such as bars, theaters, steam baths and public restrooms. *Id.* at 717-20. Furthermore, the few prosecutions that are recorded were almost invariably triggered by conduct that was flagrant or notorious, bringing the offense to public attention and therefore not involving truly private conduct.

[40] *See generally* Chauncey, *supra* note 19 (discussing high degree of visibility of gay men in cities starting in the late 1800s).

broadly embraced the belief that private consensual acts are ordinarily none of the government's business.[41]

Consistent with this view, the long-standing practice of not enforcing sodomy laws against private consensual conduct was transformed in the 20th century into a formal recognition that regulation of private sexual conduct simply was not a proper role for government. Thus, in 1955, when the American Law Institute approved its Model Penal Code, it contained "no criminal penalties for consensual sexual relations conducted in private." American Law Institute, Model Penal Code § 213.2 cmt. 2, at 372 (1980).

In the wake of the Model Penal Code, many states brought the text of their sodomy laws into compliance with their practice of non-enforcement. In 1961, Illinois became the first state to revise its criminal laws in accordance with the Code, including the elimination of the crime of consensual sodomy.[42] Since then, 36 additional states have repudiated their laws against consensual sodomy, either by

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[41] In *Fort v. Fort*, 425 N.E.2d 754, 758 (Mass. App. 1981), the court recognized the same phenomenon in the context of fornication and adultery:

> We are not speaking here of a condition of merely sporadic enforcement, explainable, perhaps, by limited police resources or difficulties in securing evidence. . . . Except for traffic offenses, it is difficult to think of any crimes of which evidence comes to the attention of law enforcement officials with greater regularity, whether through divorce actions which are based on, or otherwise concern, marital infidelities; paternity suits; . . . public assistance programs which aid unmarried mothers; publicly administered child protection and adoption programs; publicly funded abortions . . . . Despite widespread official knowledge of such violations, prosecutions by law enforcement officials are essentially non-existent.

[42] Eskridge, *Historiography*, *supra* note 13, at 662.

legislative repeal or by judicial invalidation.[43] *See Washington v. Glucksberg*, 521 U.S. 702, 716-719 (1997) (analyzing contemporary, as well as historical, attitudes toward conduct claimed to be protected as a liberty interest).

Recent state court decisions striking down sodomy laws reflect the social consensus that the state should not intrude into the most intimate of personal decisions in the home. *See, e.g.*, *Jegley v. Picado*, 80 S.W.3d 332, 354 (Ark. 2002) (Brown, J., concurring) ("If anything has been sacrosanct over the past hundred and fifty years . . ., it is the principle that a person's home is his castle. . . . If such is true of the home, how much more so of the bedroom?"); *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998) ("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"); *Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997) ("[W]hile society may not approve of the sexual practices of homosexuals, . . . that is not to say that society is unwilling to recognize that all adults . . . at least have a reasonable expectation that their sexual activities will remain

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[43] *See Bowers*, 478 U.S. at 193-194 (as of 1986, 26 states had no sodomy law); *see also infra* note 51 (detailing changes since *Bowers*). Furthermore, only 13 states retain criminal laws against fornication. Posner and Silbaugh, *supra* note 20, at 98-110; Ga. Code § 16-6-18 struck down by Georgia Supreme Court in *In re J.M.*, No. SO2A1432 (Ga. Jan. 13, 2003); N.M. Stat. § 30-10-2 repealed by Laws 2001, ch. 32 § 1. The remaining laws likely still exist because few people have had a reason to lobby for the repeal of laws that are commonly understood not to be enforced, while many lawmakers have doubtless feared that a vote to repeal the laws would be viewed as approval of immoral conduct. Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. Fam. L. 45 (1991-92); Elizabeth Kolbert, *No Cheating Zone: Old Fashioned Ban on Adultery Is Back In Style in Connecticut*, Austin American-Statesman, Sept. 27, 1990, at A1 ("[L]egislators said it wasn't worth the effort [to repeal the state law against adultery] since the law was never enforced.").

personal and private."); *Campbell v. Sundquist*, 926 S.W.2d 250, 262 (Tenn. 1996) ("[A]n adult's right to engage in consensual and noncommercial sexual activities in the privacy of [the] home . . . is at the heart of Tennessee's protection of the right to privacy."); *Commonwealth v. Wasson*, 842 S.W.2d 487, 494-95 (Ky. 1992) ("[I]t 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, or to prohibit him any liberty the exercise of which will not directly injure society.").

To recognize that sodomy laws have not been used to prosecute consensual sex in private is not to deny that America has a long, sorry history of discrimination against those who love members of the same sex. Gay people have been denied jobs as everything from telephone operators to librarians to budget analysts to teachers to police officers to mail room clerks.[44] Gay people have lost their homes (as have heterosexuals who lived with gay people), and been told not to dance with each other, not to eat together in booths, not to go to bars or clubs together.[45] Gay people have had their families torn apart and their children left in

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[44] *See, e.g.*, *DeSantis v. Pacific Tel.*, 608 F.2d 327 (9th Cir. 1979)*; Smith v. Liberty Mut. Ins.*, 569 F.2d 325 (5th Cir. 1978); *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1977); *Burton v. Cascade Sch. Dist. Union High Sch.*, 512 F.2d 850 (9th Cir. 1975); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969)*; Glover v. Williamsburg Local Sch. Dist.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd*, 669 F.2d 732 (5th Cir. 1982).

[45] *See, e.g.*, *One Eleven Wines and Liquors Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12 (N.J. 1967); *Rolon v. Kulwitzky*, 200 Cal. Rptr. 217 (Ct. App. 2d Dist. 1984); *Morell v. Dep't of Alcoholic Beverage Control*, 22 Cal. Rptr. 405 (Ct. App.1st Dist. 1962); *420 E.80th v. Chin*, 445 N.Y.S.2d 42 (N.Y. App. Term. 1st Dep't 1982), *aff'd*, 468 N.Y.S.2d 9 (N.Y. App. Div. 1st Dep't 1983); *Hubert v. Williams*, 184 Cal. Rptr. 161 (App. Dep't, Super. Ct., L.A. County 1982).

peril.[46] They have been subjected to unspeakable violence for being gay. [47]

What lesbians and gay men have *not* been subject to is punishment for violation of criminal laws against private, consensual sodomy. That is, until recently. For starting in the late 1960s, as the social condemnation of being gay began to weaken, some states recast their sodomy laws, either explicitly or in practice, as laws aimed at gay people.[48] They then invoked those laws collaterally as justification for taking various discriminatory actions against gay people, from disrupting or destroying relationships between gay people and their children, to denying gay people employment, to discrediting them in public discourse.[49]

This new and selective targeting of lesbians and gay men, which highlights the equal protection problems described by Petitioners, underscores the larger reality that sodomy laws have long gone unenforced against private consensual sexual intimacy. This recent consciously

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[46] *See, e.g., Weigand v. Houghton*, 730 So. 2d 581, 588 (Miss. 1999) (McRae, J., dissenting) (placing child in home with convicted felon and wife abuser because father was gay); *S.A.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. App. 1987) (denying mother custody in favor of alcoholic father because mother was a lesbian).

[47] *See, e.g., Naboszny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir.1997); *Coon v. Joseph*, 237 Cal. Rptr. 873 (Ct. App. 1st Dist. 1987).

[48] Some states responded to the repeal of their general sodomy laws with enactment of sodomy laws applied only to same-sex activity. Eskridge, *Historiography*, *supra* note 13, at 660, 664-65. Kansas was the first, in 1969, *see* 1969 Kan. Sess. Laws 457; Kan. Stat. Ann. § 21-3505(a)(1) (1970), followed in the 1970s by Arkansas, Kentucky, Missouri, Montana, Nevada, Tennessee, and Texas. Eskridge, *Historiography*, *supra* note 13, at 664.

[49] *See generally* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

selective use of sodomy laws furnishes no basis to narrow the scope of the traditional American right of all adults to be free of government interference in the bedroom. Instead, it echoes Connecticut's sudden decision in the 1960s to enforce its ban on contraceptives, despite its failure to do so for close to a century prior,[50] a decision that did not constrict the right to private sexual intimacy ultimately recognized in *Griswold*.

Our nation's history and tradition thus show not what the *Bowers* majority seems to have assumed, but instead a long-standing, virtually universal refusal to apply sodomy laws to private, consensual conduct by adults—a deliberate policy that reflects a deeply rooted, widely shared, and increasingly voiced conviction that government has no business dictating to consenting adults what sexual intimacies they may have in private. As this Court said in a different context, "[t]he undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. . . . 'Deeply embedded traditional ways of carrying out state policy * * *'—or not carrying it out—'are often tougher and truer law than the dead words of the written text.'" *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (Harlan, J., dissenting) (quoting *Nashville, C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940)).

Americans have a fundamental—and cherished—right to be intimate in their homes and to be "let alone" in that intimacy. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

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[50] *See Poe v. Ullman*, 367 U.S. 497, 501, 502, 512, 530 (1961) (law banning use of contraceptives had been on the books since 1879 and had been re-enacted twice since 1940, but the Court noted that the law had not actually been enforced for decades, despite the widespread use and sale of contraceptives in the state).

### B. Texas's View Of Morality Does Not Justify This Denial Of Liberty

All Texas offers to justify its profound intrusion into the private sexual lives of Texans is the state's own, "because-we-say-it's-wrong" view of morality. Texas cannot find the required "compelling interest" that would justify invasion of a fundamental liberty by mere conclusory resort to the "controversial realm of morals." *Poe v. Ullman*, 367 U.S. at 545 (Harlan, J., dissenting); *cf. Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring) (disagreeing that "society's moral views" could suffice to satisfy even intermediate *O'Brien* scrutiny). Many people questioned, and still question, the morality of abortion, inter-racial marriage, and the use of contraceptives within or outside of marriage. Indeed, state laws prohibiting all those practices were unquestionably based, at least in part, on the state's moral view of the matter. *See, e.g.*, *Planned Parenthood of S.E. Pa., Inc. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion) ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy."); *Loving v. Virginia*, 388 U.S. 1, 7-12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring). Yet no state's asserted interest in morality sufficed to justify overriding the fundamental liberties that those criminal statutes compromised. The same must be true here.

### C. *Bowers v. Hardwick* Can And Should Be Overruled

The simple fact that *Bowers* was wrongly decided provides a powerful reason for overruling it. Adherence to a previous ruling is unwarranted when it "involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

Because *Bowers*, which was a "solitary departure" from the rest of the Court's privacy jurisprudence, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (citation omitted), stands as "a positive detriment to coherence and consistency" in privacy law, *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989), and was based on a "'less than accurate' historical analysis," *United States v. Dixon*, 509 U.S. 688, 711 (1993) (quoting *Solorio v. United States*, 483 U.S. 435, 442 (1987)), this Court should overrule that decision. To do so would not be to "depart from the fabric of the law; [it would be to] restore it." *Adarand*, 515 U.S. at 234.

After all, *stare decisis* is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 283 U.S. 393, (1932) (Brandeis, J., dissenting), nor is it "rigidly required in constitutional cases," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The Court has greater freedom to overrule prior cases where, as here, the scope of the Due Process Clause is at issue, *Burnet*, 283 U.S. at 410, and the case involves no "property" or "contract rights where reliance interests" are at their peak, *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citations omitted).

In addition, significant changes have occurred since the *Bowers* decision. *See Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 2249 (2002). The trend of repealing or invalidating sodomy laws has continued; what started in 1961 with the repeal of the Illinois sodomy law has now spread to 37 states. Half the states that still had sodomy laws at the time *Bowers* was decided, including Georgia itself, now have no such law.[51] And only four states now have

[51] Repeal or invalidation of same-sex-only sodomy laws since *Bowers*: 1993 Nev. Stat. 236 (repealing Nev. Rev. Stat. § 201.193); *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont.

laws like the one in Texas, which is focused solely on same-sex couples.[52] As in *Atkins*, the "consistency of the direction of change" is itself instructive. *Atkins*, 122 S. Ct. at 2249.

These changes in state law also demonstrate that the principle announced in *Bowers*—that government may freely intrude into the nation's bedrooms to police the details of consensual adult sexuality—has not become imbedded in our "national culture." *Cf. Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (declining to overrule *Miranda v. Arizona*, which *had* become so imbedded). Quite to the contrary, the unidirectional vector of repeal and invalidation of state sodomy laws shows the degree to which a cultural consensus has emerged that government does not belong in the bedroom. *See Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring, joined by O'Connor, J., and Kennedy, J.) (noting that prior precedent is more vulnerable where it "conflicts with a public sense of justice").

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1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996), *appeal denied* (Tenn. June 10, 1996 and Sept. 9, 1996).

Repeal or invalidation of general sodomy laws since *Bowers*: 2001 Ariz. Legis. Serv. 382 (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Laws 10-14 (amending D.C. Stat. § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Williams v. Glendening*, No. 98036031/CL-1059 (Md. Balt. City Cir. Ct. Oct. 15, 1998); *Michigan Org. for Hum. Rights v. Kelley*, No. 88-815820CZ (Mich. Cir. Ct. Wayne County July 9, 1990); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. 4th Dist. May 15, 2001). In Maryland, Michigan, and Minnesota, trial court decisions striking down the laws became final when the states did not appeal.

[52] Kan. Stat. Ann. § 21-3505(a)(1); Mo. Rev. Stat. § 566.090 (*but see State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App., W. Div. 1999) (interpreting statute to apply only to non-consensual activity); Okla. Stat. tit. 21, § 886 (generally applicable statute construed by *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986) not to cover heterosexual consensual behavior); Texas Penal Code § 21.06.

*Bowers* has also been undermined by the Court's intervening recognition in *Romer v. Evans*, 517 U.S. 620 (1996), that lesbians and gay men are entitled to equal protection under the law, regardless of the moral views a majority in any state may hold about them. *See also id.* at 641 (Scalia, J., dissenting). The *Bowers* decision has also led to "confusion," *United States v. Dixon*, 509 U.S. 688, 711 (1993), because lower courts, relying on the language in *Bowers* that there is no "fundamental right to engage in *homosexual* sodomy," *Bowers*, 478 U.S. at 191 (emphasis added), have disagreed, despite the Court's equal protection holding in *Romer*, about the legitimacy of singling out gay people for legal disadvantage when they engage in conduct for which heterosexuals are punished less severely or not at all.[53]

[53] *Compare Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997) ("It is inconceivable that *Bowers* stands for the proposition that the State may discriminate against individuals on the basis of their sexual orientation solely out of animus."); *and Gryczan v. State*, 942 P.2d 112, 127 (Mont. 1997) (Turnage, C.J., concurring) (concluding same-sex-only sodomy law violated federal equal protection principles); *with Shahar v. Bowers*, 114 F.3d 1097, 1110 (11th Cir. 1997) (holding Attorney General could revoke offer of employment based on future staff attorney's same-sex wedding ceremony because "*Romer* is about people's condition; this case is about a person's conduct" and "in deciding *Romer*, the Court did not overrule or disapprove (or even mention) *Bowers* . . . , which was similarly about conduct"); *and State v. Limon*, No. 85,898, slip op. at 6 (Kan. Ct. App. Feb. 1, 2002) (upholding greater penalties for same-sex as opposed to different-sex sodomy based on *Bowers*), *rev. denied* No. 00-85898-A (Kan. June 13, 2002), *petition for cert. filed sub nom. Limon v. Kansas*, 71 U.S.L.W. 3319 (Oct. 10, 2002) (No. 02-583).

## CONCLUSION

*Amici* respectfully submit that the Court should overrule *Bowers v. Hardwick* and declare that the liberty protected by the Due Process Clause encompasses consensual sexual intimacy between adults in private.

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