

Sodomy Laws

Law of the Bedroom

When it Comes to Protecting Sexual Privacy, Why Does America Lag so Far Behind?

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Today, Americans are vigorously debating the degree to which the opposition of the international community should influence our foreign policy. What's less well known is that the United States is out of step with the world when it comes to another matter—the legal protection of sexual privacy.

This Wednesday, the US Supreme Court will hear *Lawrence v. Texas*, a case which raises the question of whether the Court should overrule the 1986 precedent of *Bowers v. Hardwick*. In that case, the Court upheld a Georgia sodomy statute against the argument that it violated the constitutional right of privacy. So long as *Bowers* remains good law, states are free to criminalize consensual acts of sexual intimacy in the home, whether heterosexual or homosexual. (The majority of the 13 states that ban sodomy today do not make any distinction between same-sex and different-sex activity.)

The *Lawrence* case thus presents an opportunity to reflect on our national understanding of the right of privacy—and on how much, in an increasingly interdependent world, we should be influenced by a clear international consensus in favor of more robust protections of sexual privacy than our own.

The “right of privacy” is nowhere enumerated in the US Constitution, but was built out of shadows. In the 1965 case of *Griswold v. Connecticut*, the Supreme Court observed that while the right of privacy was not explicitly guaranteed, it could nonetheless be inferred from “penumbras” around those rights that were enumerated in the Constitution, such as the Fifth Amendment’s right against self-incrimination, the Third Amendment’s restrictions on the quartering of soldiers, and the Fourth Amendment’s prohibition of unreasonable searches and seizures. In short, the Court found that each of these rights implied some protection of individual privacy, casting shadows that overlapped until they coalesced into an independent “right of privacy.”

But what is the content of this right? The "private," after all, carries a diverse set of meanings, including the personal, the concealed, the sequestered, the domestic, and the intimate.

The Court's constitutional privacy jurisprudence can fairly be said to draw on three different conceptions of privacy—"decisional," "relational," and "zonal." Decisional privacy protects independence in making choices central to personhood, such as whether to have a child. Relational privacy protects intimate relationships in an individual's life, such as that between husband and wife. Finally, zonal privacy protects certain spaces, such as the home.

The *Griswold* case emphasized the relational and zonal conceptions of privacy. At issue in the case was whether married couples had the right to use contraceptives. In holding that the right of privacy protected such use, the Court observed the impropriety of permitting police to invade "the sacred precincts of marital bedrooms"—a phrase that captures the relational ("marital") and zonal ("bedroom") aspects of privacy deployed in the case.

Predictably, soon after *Griswold* was decided, an individual sued for the right to use contraceptives outside of marriage. In the 1972 case of *Eisenstadt v. Baird*, the Court also guaranteed that right, rejecting the argument that privacy protections should be limited to the marital relationship. It stated: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." With this statement, the Court added decisional privacy to its prior conceptions of the right. One year later, in *Roe v. Wade*, the Court extended the decisional conception to encompass a woman's right to have an abortion.

In its *Bowers* decision of 1986, however, the Court found same-sex sodomy to be unprotected by any of these conceptions of privacy. The Court's five-member majority did not address the dissenters' contention that decisional privacy protected "the fundamental interest all individuals have in controlling the nature of their intimate associations." The Court also dismissed the applicability of relational privacy, finding that homosexual sodomy occurred outside traditional relationships. Finally, the Court criticized the coherence of zonal privacy, observing that activities such as adultery or incest were not protected even when they occurred in the home.

The *Bowers* decision has increasingly made the United States an outlier among peer nations. While the *Bowers* Court rejected the notion that sexual intimacy could be protected under any conception of privacy, international and foreign courts have implied that it is protected under all three definitions. Moreover, one international tribunal has suggested that US sodomy laws violate the privacy provisions of a treaty to which the United States is party.

In stark contrast to the *Bowers* Court, international and foreign courts have long held that decisional privacy protects adult consensual same-sex sexual activity. In 1981, five years before *Bowers*, the European

Court of Human Rights decided *Dudgeon v. United Kingdom*, which struck down sodomy laws in Northern Ireland. Rendered by the world's most influential international human-rights court, the *Dudgeon* judgment now protects more than 800 million residents of the 44 member states of the Council of Europe.

The *Dudgeon* Court treated as self-evident that an individual's "private life... includes his sexual life" and discussed the privacy right in terms of intimacy and personhood, that is, in terms of decisional privacy. In the 17 years since *Bowers*, the European Court has twice reaffirmed the *Dudgeon* decision.

Foreign courts have also protected sexual privacy under a decisional theory. The South African Constitutional Court recognized in 1998 that sexual expression "is at the core" of "a sphere of private intimacy and autonomy." Similarly, in 1996, the Colombian Constitutional Court stated: "The full constitutional protection of the individual... includes in its essential core the process of autonomous assumption and decision regarding one's own sexuality."

An international juridical consensus also suggests that same-sex sodomy can be protected under relational privacy. *Bowers* rejected the relevance of relational privacy by stating that "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."

But while the link between family and homosexual activity may have been murky in 1986, it has since been repeatedly acknowledged by courts sharing our common law tradition. In 1999, the South African Constitutional Court unanimously held that South Africa could not withhold from same-sex couples immigration benefits that were available to different-sex couples.

In so holding, the Court referred to the growing global recognition of the familial dimension of same-sex partnerships, citing British, Israeli, and Canadian authorities. The Court stated that gays and lesbians were capable "of constituting a family, whether nuclear or extended, and of establishing, enjoying, and benefiting from family life." That year, the highest appellate court in the United Kingdom found that a same-sex couple was a family for purposes of a rent-control statute.

Finally, international and foreign courts have challenged *Bowers*'s understanding of zonal privacy. The *Bowers* Court rejected the applicability of the zonal theory of privacy to same-sex sodomy, claiming that it would be hard "except by fiat" to prevent the right from then being applied to "adultery, incest, and other sexual crimes" committed in the home. Yet since *Bowers*, international and foreign courts have negotiated this ostensible slippery slope by using the principles of harm, consent, and commerce.

In 1997, the European Court emphasized the harm principle in declining to extend *Dudgeon* to protect consensual, sadomasochistic sexual activity in the home. Similarly, in *Dudgeon* itself, the Court acknowledged that privacy protections would be withheld where

individuals were not able to give true consent "because they [were] young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence." Finally, the European Commission of Human Rights has withheld privacy protections from commercial sexual conduct, even if it occurs within the home.

These tribunals have thus protected harmless consensual sexual activity under a zonal conception of privacy without committing themselves to protecting the crimes *Bowers* found worrisome—adultery (which, like sadomasochism, would violate the harm principle), incest (which would violate the consent principle, expansively construed), or sexual crimes like prostitution (which would violate the commercial principle).

Of course, the fact that international and foreign tribunals have offered greater privacy protections for sexual intimacy than the US Supreme Court does not necessarily mean that peer nations are more tolerant of homosexuality than the United States. What it does mean is that other courts have taken the idea of sexual privacy more seriously, understanding it to protect practices the general public may abhor.

Given this international juridical consensus against *Bowers's* conception of privacy, what should the US Supreme Court do? Chief Justice Rehnquist stated in 1989 that "now that constitutional law is solidly grounded in so many [foreign] countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." While the practice of looking to peer tribunals was not new even then, it has become increasingly common: Almost all of the current Justices have relied on foreign precedents or practices to support their rulings. Just last year, the Court looked to the opinions of "the world community" in concluding that the execution of persons with mental retardation would offend civilized standards of decency.

The reason for such deference is clear—ignoring such uniform foreign precedent risks conflict with the United States' closest global allies. In filing its brief in the landmark 1954 case of *Brown v. Board of Education*, the Department of Justice quoted then-Secretary of State Dean Acheson to make this point.

Acheson opined that school segregation had been "singled out for hostile foreign comment in the United Nations and elsewhere. Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy.... [R]acial discrimination in the United States remains a source of constant embarrassment to its Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world."

The day is either here or nigh when sodomy statutes will similarly embarrass the United States. In *Toonen v. Australia* (1994), the UN Human Rights Committee construed the privacy protections of the International Covenant on Civil and Political Rights to bar the criminalization of sodomy. The Covenant applies to 149 states with combined populations of at least three billion people, including the

United States, which ratified the Covenant in 1992. In 1995, the Committee expressed its concern "at the serious infringement of private life" represented by US sodomy statutes, which arguably violate *Toonen's* interpretation of the Covenant.

Legal concepts like "equality," "liberty," and "privacy" are not US property, but have global meanings. When the Court hears the Lawrence case this week, it will have to grapple with the irony that the concept of privacy can today be understood only in the most public of contexts—the global sphere.

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