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Laws that discriminate against gay people discriminate on the basis of sex. If Lucy may marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is suffering legal disadvantage because of his sex. Moreover, such laws depend on and reinforce the subordination of women. I have argued for years that this is the principal constitutional defect with such laws.[1] I have not, however, said very much about the comparative part of this claim, and instead have emphasized the strengths of the sex discrimination argument.

The conventional wisdom, on the other hand, is that the appropriate starting point for any discussion of the legal rights of gay people is the idea that certain private matters are none of the law's business.[2] Certainly this has been, for a long time, the most commonly made argument for the legal equality of gay people. This argument must contend with the contrary precedent of *Bow-*

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[1] See Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L Rev 519 (2001); Andrew Koppelman, *The Miscegenation Analogy in Europe, or Lisa Grant Meets Adolf Hitler*, in Robert Wintemute and Mads Andenaes, eds, *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart 2001); Andrew Koppelman, *Why Gay Legal History Matters*, 113 Harv L Rev 2035 (2000); Andrew Koppelman, *Three Arguments for Gay Rights*, 95 Mich L Rev 1636, 1661–66 (1997); Andrew Koppelman, *Antidiscrimination Law and Social Equality* 146–76 (Yale 1996); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L Rev 197 (1994); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L J 145 (1988).

[2] This way of putting it dates back to the 1957 report of the Wolfenden Committee, which reconsidered the law of sexual crimes in England. The committee concluded that private consensual homosexual acts should be decriminalized, because "[t]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." Quoted in H.L.A. Hart, *Law, Liberty, and Morality* 14–15 (Stanford 1963).

ers v Hardwick,[3] which held that the constitutional right of privacy does not protect consensual homosexual sex committed within a person's home.[4] This is not an insuperable obstacle, however, because the overwhelming majority of commentators think that *Hardwick* was wrongly decided.[5]

Privacy, however, is a weak constitutional basis for gay rights claims. Gays' privacy claims cannot be deduced from earlier privacy decisions. The privacy doctrine inappropriately requires judges to decide what is important in life. It excessively disables the state from legislating on the basis of morality. Moreover, privacy is a poor characterization of what is at stake in the gay rights debate, which turns primarily on achieving parity of public status rather than private conduct. The argument has great rhetorical power, of course, and has produced notable successes in litigation.[6] It would be foolish for advocates not to deploy it. But its weaknesses suggest that even they should not place too many of their eggs in this basket. And courts can always consider better arguments.

Judge Robert Bork is the most prominent and persistent critic of the right to privacy. I will not here consider his best-known criticism, which is that the right does not exist because it has no basis in the Constitution.[7] Far more devastating is his claim that the right is indeterminate, so that there is no way to know what liberties are or are not protected. As a Court of Appeals judge, Bork observed that the privacy cases "contain little guidance for lower courts."[8] For example, Bork maintained that *Griswold v Connecticut*,[9] which held that married couples had a right to use contraceptives, "did not indicate what other activities might be protected by the new right of privacy and did not pro-

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[3] 478 US 186 (1986).

[4] Id at 189.

[5] For two somewhat overlapping lists of such commentators, see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade 902 n 97 (MacMillan 1994), and Earl M. Maltz, *The Court, the Academy, and the Constitution: A Comment on* Bowers v. Hardwick *and Its Critics*, 1989 BYU L Rev 59, 60 n 4.

[6] See *Powell v State*, 510 SE 2d 18 (Ga 1998); *Gryczan v State*, 942 P2d 112 (Mont 1997); *Campbell v Sundquist*, 926 SW 2d 250 (Tenn App 1996); *Commonwealth v Wasson*, 842 SW 2d 487 (Ky 1992); *Post v State*, 715 P2d 1105 (Okla Crim App 1986); *People v Onofre*, 415 NE 2d 936 (NY 1980); *Commonwealth v Bonadio*, 415 A2d 47 (Pa 1980); *State v Pilcher*, 242 NW 2d 348 (Iowa 1976); *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1998 (12) BCLR 1517 (South Africa Constitutional Court).

[7] See Robert Bork, *The Tempting of America* 95–100 (Free 1990).

[8] *Dronenburg v Zech*, 741 F2d 1388, 1392 (D C Cir 1984) (Bork) (upholding Navy's policy of mandatory discharge for homosexual conduct).

[9] 381 US 479 (1965).

vide any guidance for reasoning about future claims laid under that right."[10] The same critique applies to explicit privacy protections in state constitutions: What do they mean?

Some constitutional interpreters have argued that the solution to this indeterminacy problem is to define privacy rights as broadly as possible.[11] Bork has, however, correctly observed that one cannot, as a practical matter, abstract all the way to a general right to freedom, since some legal constraints on freedom must exist.[12]

John Stuart Mill provided an obvious candidate for a limiting principle with his dictum that

> the 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.[13]

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[10] Id.

[11] See, for example, Bruce Ackerman, *Liberating Abstraction*, 59 U Chi L Rev 317 (1992).

[12] Robert Bork, *The Tempting of America* 99–100. (cited in note 7). Laurence Tribe and Michael Dorf concede that the choice of the level of abstraction at which to read the Constitution's liberty clauses is "a choice that neither the Constitution's text nor its structure nor its history can make for us." Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 116 (Harvard 1991). But then, none of these sources prevent the Court from reaching the result that it does in *Hardwick*. At one point, Tribe and Dorf's treatment of the privacy issue attempts to cut through this knot by entertaining the possibility of maximal abstraction:

> [N]othing in the Constitution's text remotely forecloses the argument that unconventional sexual behavior is a fundamental right.
>
> If we are to take seriously the Ninth Amendment's requirement that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," at a minimum we must consider the possibility that rights which are *consistent* with the enumerated rights—as a right to choose unconventional sexual behavior is, and as a "right" to engage in theft surely is not—may be *required* by the Constitution.

Id at 110. This argument would appear to leave little for a legislature to do, since once it had prohibited conduct violative of constitutional rights such as the right to property, it would not be permitted to prohibit any other conduct. The set of constitutionally protected activities would be pretty large; examples that come to mind include the right to grow wheat on your farm without federal interference, the right to discharge pollutants into the atmosphere, and the right to fornicate and defecate in public. None of these rights seems inconsistent with any of the enumerated rights.

[13] John Stuart Mill, *On Liberty* 68 (Penguin 1974) (Gertrude Himmelfarb, ed).

Mill's principle has been cited by some state courts when interpreting their constitutions to vindicate claims like Hardwick's.[14] Mill's essay is a great work of political theory, and it has always been appealing to those friendly to gay rights, but his line would secure liberty for gays at far too high a price. Social Security would have to be abolished; prescriptions could no longer be required for powerful drugs; cocaine would have to be legalized, and the formidable persuasive resources of modern advertising permitted to be mobilized on that substance's behalf. (Imagine what Joe Camel could do with those enormous nostrils.)[15]

Mill's principle would also constitutionalize a highly controversial theory of the meaning of life, one that holds that the most fundamental task of a human being is that of self-definition. It is doubtful whether it is appropriate for the Court to read such a culturally specific philosophy into the Constitution.

And, once again, look at how little Mill's principle accomplishes. Even if private sex acts between consenting adults are not properly within the reach of the criminal law, this falls far short of equality for gays. The principle is entirely consistent with pervasive discrimination. One can coherently think that certain sexual conduct is immoral and that the state should denounce citizens who engage in it, even though such conduct, when private and between consenting adults, is outside the state's legitimate criminal jurisdiction.[16] (And even this defense of privacy is a fragile one, since it is doubtful whether there can be a fundamental right to do wrong.)[17]

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[14] See *Commonwealth v Bonadio*, 415 A2d 47, 50 (Pa 1980) (holding regulation of private conduct by consenting adults unconstitutional); *Commonwealth v Wasson*, 842 SW 2d 487, 496 (Ky 1992) (holding statute prohibiting deviate sexual intercourse to violate state constitution's guarantee of privacy).

[15] This is not to dismiss the very powerful arguments that have been made against the present regime of drug prohibition. See, for example, Ethan A. Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition*, 121 Daedalus 85 (Summer 1992); Steven B. Duke and Albert C. Gross, *America's Longest War: Rethinking Our Tragic Crusade Against Drugs* (Putnam 1993). It is simply to note that those arguments, to the extent that they are persuasive, are not simple applications of Mill's principle. It may be that drug prohibition is not worth its social costs, but that is not the same as saying that cocaine dealers have a fundamental right to purvey (or consumers a fundamental right to purchase) their wares, whatever the consequences.

[16] See, for example, *Romer v Evans*, 517 US 620, 644–45 (1996) (Scalia dissenting); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L Rev 1, 58–62; John Finnis, *Liberalism and Natural Law Theory*, 45 Mercer L Rev 687, 697–98 (1994).

[17] See Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* 110–28 (Oxford 1993).

Critics of *Hardwick* have tried to identify the more abstract interests at stake in that case. Kendall Thomas has noted three broad conceptions of the constitutional right to privacy in the case law and commentary: zonal, relational, and decisional.[18]

The zonal paradigm focuses on the constitutional significance of the home, recognized in the text of the Third and Fourth Amendments and in a number of the Court's decisions.[19] "The behavior for which Hardwick faces prosecution," Justice Blackmun noted in his dissent, "occurred in his own home."[20] This implicated the Fourth Amendment's protection of "the right of the people to be secure in their . . . houses." Blackmun concluded that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."[21]

The scope of the zonal claim is unclear, however. Blackmun plainly did not mean to say that any conduct engaged in at home is protected. "The Court," Bork observes, "we may confidently predict[,] . . . is not going to throw constitutional protection around heroin use or sexual acts with a consenting minor."[22] Blackmun did not explain how to distinguish protected from unprotected conduct. Moreover, even if Blackmun had prevailed on this issue, the result would be a very modest victory for gays. Much of what is at stake in the gay rights issue is public equality and recognition, not simply a right to conduct secret liaisons undisturbed by the law.[23] Kendall Thomas notes that "'the closet' is less a refuge than a prisonhouse."[24]

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[18] Kendall Thomas, *Beyond the Privacy Principle*, 92 Colum L Rev 1431, 1443–48 (1992).

[19] US Const, Amend III ("No soldier shall, in time of peace be quartered in any *house*, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.") (emphasis added); US Constitution Amendment IV ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . .").

[20] *Hardwick*, 478 US at 206 (Blackmun dissenting).

[21] Id.

[22] Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 7 (1971). For this reason, Gerard Bradley concludes that the zonal argument is a placeholder for the decisional one. See Gerard V. Bradley, *Remaking the Constitution: A Critical Reexamination of the* Bowers v. Hardwick *Dissent*, 25 Wake Forest L Rev 501, 512–16 (1990).

[23] See Carol Steiker, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv L Rev 1285, 1288–92 (1985).

[24] Thomas, 92 Colum L Rev at 1455 (cited in note 18).

In contrast to the zonal paradigm, the relational paradigm "focuses on persons rather than places."[25] It holds that certain associations are specially protected from state interference, because of "the fundamental interest all individuals have in controlling the nature of their intimate associations with others."[26] Here, too, the boundaries of the relational paradigm are unclear. If *all* associations were protected, then the prohibition of criminal conspiracy and solicitation would be unconstitutional. Evidently there is some distinction between protected and unprotected associations, but the doctrine does not make it clear where the boundary lies. Hardwick was not arrested because he was associating with another person; he was arrested because he and another person were collaborating in conduct that was made criminal by the laws of Georgia.[27]

The decisional paradigm, which is the most important of the three, holds that individuals are entitled to "freedom to choose how to conduct their lives."[28] Certain rights are protected, Blackmun observes, "because they form so central a part of an individual's life."[29] It is possible to derive, from "the freedom an individual has to *choose* the form and nature of these intensely personal bonds,"[30] a right not to be discriminated against on the basis of that protected choice.

The fact that a choice is important does not, however, mean that it is protected. Otherwise there would be a constitutional right to suicide, not just for terminally ill patients, but in all circumstances. The general right to autonomy in important decisions does not necessarily entail a right to any particular option.

The common response to this argument is that gay relationships *are* acceptable and valuable. When the law tries to interfere or assign second-class status to gay people's sexual relationships, it is harming those people for engaging in conduct that is innocuous or even praiseworthy. Such laws are perverse and wrong. Thus David Richards writes that "[t]o deny the acceptability of

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[25] Id at 1446.

[26] *Hardwick*, 478 US at 206 (Blackmun dissenting).

[27] Richard Epstein would distinguish the conspiracy case by noting that conspiracies have negative externalities. See Richard Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U Chi Legal F 73, 98. This objection presupposes, however, that negative externalities are the only possible justification for legal regulation. Epstein can believe that, but as I shall argue below, that is not the classical position of Anglo-American law.

[28] *Hardwick*, 478 US at 205–06.

[29] Id at 204.

[30] Id at 205.

such acts is itself a human evil, a denial of the distinctive human capacities for loving and sensual experience without ulterior procreative motives—in a plausible sense, itself unnatural."[31] Richards articulates the ultimate wellspring of the privacy argument, denouncing laws that attempt to regulate homosexual sex as pernicious obstacles to human happiness.

As a moral argument, then, the autonomy argument is sound. The trouble with this argument, when it is presented as a *constitutional* argument, is the core difficulty with the privacy doctrine: it requires judges to decide, with no apparent guidance from any legal authority, what parts of an individual's life are so central as to warrant protection. In another context, the Court acknowledged that the question of what a person's "ultimate concerns" are is basically a religious question.[32] The courts have no superior competence in answering such questions, which are really not questions of law at all. The Court should not be making pronouncements on such matters.

In short, because it is hard to determine the boundaries of the right to privacy, it is hard to determine whether homosexual sex is protected by that right. And so long as that is the case, gays' constitutional privacy claims must be doubtful.

What then is one to think of the *Hardwick* decision? Many commentators have suggested that Hardwick's claim cannot be distinguished from those in earlier privacy cases.[33] Professor Cass Sunstein, in a nicely nuanced treatment, notes the difficulty of the levels of generality problem, but suggests that it can be resolved by reference to precedent: "At the level of generality that best explains such decisions as *Roe* and *Griswold*, the governing tradition would require far stronger justifications than did the *Hardwick* Court for criminal bans on sexual activity between consenting adults."[34]

A close reading of the privacy cases indicates, however, that they are less concerned with promoting sexual liberty than with promoting social cohesion and deference to traditional institu-

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[31] David A. J. Richards, *Sex, Drugs, Death, and the Law* 41 (Rowman and Littlefield 1982).

[32] *United States v Seeger*, 380 US 163, 180–187 (1965).

[33] See, for example, William N. Eskridge, Jr, *Gaylaw: Challenging the Apartheid of the Closet* 152–56 (Harvard 1999); Laurence Tribe, *American Constitutional Law* § 15–21, at 1421–35 (Foundation 2d ed 1988); Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U Chi L Rev 648 (1987).

[34] Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U Chi L Rev 1161, 1173–74 (1988).

tions. The decisions preceding *Hardwick* are not purely libertarian in their tendency. The Court has rejected at least as often as it has sustained privacy claims involving private conduct between consenting adults. The majority in *Griswold* relied heavily on the traditionally high status of marriage, and the concurring opinions likewise embraced that tradition while rejecting sexual libertarianism.[35] *Eisenstadt v Baird*[36] extended the right of contraception to unmarried couples while reaffirming that the state had a legitimate interest in preventing fornication.[37] *Roe* specifically rejected the proposition "that one has an unlimited right to do with one's body as one pleases."[38]

A particularly striking illustration is a pair of cases, only three years apart, in which the Court protected traditional families from zoning laws, while withholding similar protection from households made up of unrelated persons.[39] In short, the line of cases preceding *Hardwick* suggested that sexual morals legislation was constitutionally legitimate, too many times for *Hardwick* plausibly to be characterized as an anomaly in an otherwise libertarian jurisprudence. Even the contraception and abortion cases can be understood as concerned with social stability, which is threatened by single-parent families, irresponsible youthful parents, and neglected children.[40]

The principle of the privacy cases may simply be that in the area of sexual conduct, regulations will be subject to heightened scrutiny if they infringe on interests that *judges* deem to be im-

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[35] The concurring Justices indicated that the right to privacy did not cover such things as adultery and homosexuality. See *Griswold v Connecticut*, 381 US 479, 498–99 (1965) (Goldberg concurring) (citing *Poe v Ullman*, 367 US 497, 553 (1961) (Harlan dissenting)); Id at 500 (Harlan concurring in the judgment) (citing his own dissent in *Poe*).

[36] 405 US at 450.

[37] See id at 448.

[38] *Roe*, 410 US at 154.

[39] Compare *Moore v City of East Cleveland*, 431 US 494, 505–06 (1977) (finding unconstitutional an ordinance that prohibited a woman from residing with her two grandsons, who were first cousins rather than siblings), with *Village of Belle Terre v Boraas*, 416 US 1, 9 (1974) (upholding an ordinance that prohibited persons unrelated by blood, marriage, or adoption from living together).

[40] See Thomas C. Grey, *Eros, Civilization, and the Burger Court*, 43 L & Contemp Probs 83, 90 (Summer 1980). See also Robert A. Burt, *The Constitution of the Family*, 1979 S Ct Rev 329. (I have not cited all the evidence that these writers compile, so the skeptical reader should consult them.) The right to an abortion may also be derivable from a right to bodily integrity, which may entail a right not to have one's body conscripted for the state's purposes. See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw U L Rev 480 (1990). A prohibition on conduct does not violate that right when the prohibition does not itself imply a command to do anything in particular.

portant. Once the judges decided that they had a low opinion of "homosexual sodomy," that was the end of the matter. *Hardwick* can, in short, be understood not as a constitutional anomaly, but rather as a reflection of an authoritarian tendency that was present in the privacy cases from the beginning. One can condemn that tendency, as I do, but one cannot say that the result in *Hardwick* is inconsistent with the preceding privacy case law.

The moralistic tendency of earlier case law is also the principal stumbling block to Professor Richard Epstein's approach to the privacy cases, which starts from a premise that the constitution is libertarian[41] and then immediately collides with the well-known nineteenth century rule that the police power includes the power to protect public morals.[42] Epstein claims that "[m]uch of earlier morality on fornication, prostitution and homosexual action was stirred by the inchoate fear that high levels of sexual contact produced strongly negative social consequences—syphilis and worse."[43] But he later concedes that a "traditional lawyer" would find relevant "the mere fact that homosexual conduct was condemned in the Bible, and was widely regarded as an unnatural abomination."[44] The prohibition of sodomy long precedes the germ theory of disease, and I am aware of no evidence that anyone before the late 20th century tried to justify the prohibition of homosexual conduct on the basis of the kinds of externalities to which Epstein would give weight.[45] Equally dubious is Epstein's

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[41] A very dubious premise, since Epstein's conclusions are, as he admits, so widely at variance with existing case law. Even if Epstein's reading of the Constitution's text were plausible, modern constitutional law consists of more than just the document; it also includes the precedent that has developed around that document, which is why all modern courses in constitutional law spend much more time on the doctrine than they do on the document. See David Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877 (1996); Richard H. Fallon, Jr, *Implementing the Constitution* 111–26 (Harvard 2001). Proposals to scrap large chunks of that case law therefore have a heavy burden of proof, which Epstein has not attempted to meet, at least in his contribution to this symposium.

[42] Epstein, 2002 U Chi Legal F at 73-74 (cited in note 27).

[43] Id at 72.

[44] Id at 101.

[45] Nor can Epstein's externalities justify the prohibition of recreational drugs. Responding to the zonal prong of the privacy argument, Epstein notes that "[t]he dangers of heroin use stem from the effects that it has on the user, not on the place where it is used." Id at 97. But those dangers are primarily dangers to the user, not to third parties. Unlike, say, alcohol, heroin does not make its users more likely to be violent or otherwise to violate the rights of others. See Mark Kleiman, *Against Excess: Drug Policy for Results* 220, 362–63 (Basic 1992). Some heroin addicts steal to support their habits, but the high price of heroin is entirely an artifact of illegality. The most cogent defenders of the prohibition are frankly paternalistic. See James Q. Wilson, *Against the Legalization of Drugs*, Commentary 21–28 (Feb 1990) (claiming that legalization will yield "a sharp increase in

claim that changing knowledge of the mechanisms of disease transmission is the reason "both social attitudes and legal norms" concerning gays have changed.[46] The changing status of gays seems to have much more to do with the modern industrial division of labor, which has made it possible to separate sexuality from the imperative to procreate.[47] Nineteenth century morals law had little if anything to do with the containment of venereal disease; it prohibited fornication and prostitution, but also drunkenness, gambling, profanity, blasphemy, Sabbath-breaking, public nudity, the hours of pubs, and many other things.[48] Epstein's characteristic method is first to figure out how the world logically must be and then to look for evidence that it is that way. Here, though, he seems to have skipped the second step.[49]

None of these observations can absolve the Court's opinion in *Hardwick*, which is a disastrously bad piece of judicial craftsmanship. Part of the problem may be that the task the Court set itself is insoluble; there seems to be no principled way to draw the boundaries of the privacy doctrine, so that one can have no more confidence in the conclusion that Hardwick's conduct was *not* protected by the privacy right than that his conduct *was* protected. Justice White worried that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[50] The problem with this way of putting matters, Rubenfeld observes, is that "the Court in *Hardwick* necessarily drew a line: the right to privacy stops *here*. That act

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use, a more widespread degradation of the human personality, and a greater rate of accidents and violence").

[46] Epstein, 2002 U Chi Legal F at 94 (cited in note 27).

[47] See John D'Emilio, *Capitalism and Gay Identity*, in Ann Snitow, ed, *Powers of Desire* 100 (Monthly Review 1983).

[48] See generally William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* 149–189 (North Carolina 1996). Epstein appears to be trying to read the "morals" head out of the police power altogether, salvaging some exercises of it under the heads of "health" and "safety."

[49] I have said this before in the pages of this very journal, with specific reference to Professor Epstein:

> It is not inappropriate for a scholar to reason out the way the world must be and then look for evidence showing that it is that way; it is hard to imagine how else one can devise hypotheses and thus advance knowledge. Sooner or later, though, one needs to test those hypotheses against evidence.

Andrew Koppelman, *Feminism and Libertarianism: A Response to Epstein*, 1999 U Chi Legal F 115, 120.

[50] *Hardwick*, 478 US at 194.

of line-drawing was a quintessentially normative judgment."[51] That sort of judgment is, of course, the very kind of "imposition of the Justices' own choice of values"[52] that Justice White sought to avoid.

Moreover, the values on which the Court relies in *Hardwick* are decidedly unappetizing. The central defect of the opinion is what Blackmun called its "almost obsessive focus on homosexual activity."[53] The statute upheld in *Hardwick* defined sodomy as "any sexual act involving the sex organs of one person and the mouth or anus of another."[54] The category of homosexuality did not appear in the statute. The record in the case did not even disclose the gender of Hardwick's partner.[55] The Court's declaration that "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy"[56] was thus about as strange as if it had said that the issue presented was whether persons with the initials M. H. had such a right. Whatever the rational basis of the statute was, it could not have been, as the Court claimed, the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[57] Moreover, when the Court tried to apply its test of whether the asserted liberty was "deeply rooted in this Nation's history and tradition,"[58] it looked to the traditional common law prohibition of sodomy, not noticing that this definition did not differentiate between homosexual and heterosexual sodomy, nor that the particular conduct with which Hardwick was charged, fellatio, was not part of the common law definition of sodomy.[59] The Court anachronistically assumed that the category of "homosexual" was part of the ancient prohibition. Thus, the Court forcibly imposed the category of "homosexual" on the statute it was construing, the rationale for that statute, and the scope of the constitutional privacy right.

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[51] Jed Rubenfeld, *The Right of Privacy*, 102 Harv L Rev 737, 747 (1988).

[52] *Hardwick*, 478 US at 191.

[53] Id at 200 (Blackmun dissenting).

[54] Quoted in id at 188 n 1 (opinion of the Court).

[55] See Garrow, *Liberty and Sexuality* at 667 (cited in note 5).

[56] *Hardwick*, 478 US at 190.

[57] Id at 196.

[58] Id at 194.

[59] See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 Yale L J 1073, 1082–86 (1988). The Court's bad history does not, however, itself demonstrate that *Hardwick* was wrongly decided. An activity need not have been criminalized in the reign of Henry VIII, or in 1866, in order for the legislature to have discretion to criminalize it today.

This would be poor craftsmanship under any circumstances, but it was particularly disastrous where, as the Court well knew,[60] there was an unsettled question about the status of anti-gay discrimination under the Equal Protection Clause—a question that the Court declared that it was not reaching. The Court's blithe use of a category whose suspect character had not yet been adjudicated is so disastrously inappropriate as to cast a pall on Byron White's entire judicial career. It is roughly analogous to a (thankfully imaginary) case in which a pre-*Brown v Board of Education* court, upholding a conviction of an African-American defendant for some crime of which race was no element, added in dicta that it expressed no opinion as to whether the result would be different if the defendant were white.

In sum, the privacy claim, often taken to be central to the question of gays' constitutional status, is actually peripheral to that question. A defense of constitutional protection for gays must look elsewhere.

I will end by returning to the comparative question: Is the sex discrimination argument, stated at the beginning of this article, stronger or weaker than the privacy argument? As Epstein observes, the sex discrimination argument is not free from indeterminacy.[61] With any presumptively unconstitutional law, the question inevitably arises whether the state can offer an adequate justification. Then courts must balance the interests involved, which will unavoidably leave some room for judicial discretion. In the case of the sex discrimination argument, it is uncertain what distinguishes sex discrimination in marriage from similarly separate-but-equal discrimination in restrooms.[62] On the other hand, with the sex discrimination argument, the prima facie case has been made, and the burden is on the state to get out from under it. The Court has held that "the party seeking to up-

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[60] See *Rowland v Mad River School District*, 470 US 1009 (1985) (Brennan, joined by Marshall, dissenting from denial of certiorari).

[61] Epstein, 2002 U Chi Legal F at 101-04 (cited in note 27).

[62] For one attempt to explain what the distinction is, see Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* 57–59 (Chicago 2002). Epstein's treatment of the marriage question is perhaps the strangest part of his article. He suggests that states appropriately refuse to call same-sex relationships "marriages," because doing this produces confusion analogous to that in trademark. See Epstein, 2002 U Chi Legal F at 101 (cited in note 27). He does not explain what the confusion is. Unless the state is entitled to decide that same-sex relationships are lower in quality or otherwise different in kind than heterosexual relationships—and it is mysterious how, in his libertarian universe, the state could possibly be entitled to decide that—then this argument is not intelligible.

hold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification"[63] and that "[t]he burden of justification is demanding and it rests entirely on the State."[64] The indeterminacy works, to that extent, to the advantage of the person challenging the law.[65]

With privacy, on the other hand, the indeterminacy plagues the plaintiff at the level of his prima facie case. The law's inertia is in favor of validation. In short, it matters a lot at what stage of the argument the indeterminacy comes in.[66] By the time the indeterminacy of the sex discrimination argument comes into play, the law is already presumptively unconstitutional. The privacy argument is so indeterminate that it can barely get started.[67]

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[63] *Mississippi University for Women v Hogan*, 458 US 718, 724 (1982); see also *United States v Virginia*, 518 US 515, 531 (1996).

[64] 518 US at 533.

[65] The required shift in the burden of proof may, on the other hand, be troubling for judges, who may have good political reasons for hesitating to impose full equality for gay people with respect to such controversial rights as marriage. The comparative advantage of the privacy right is that, because it is so unprincipled and ad hoc, judges may easily shape it to suit their policy preferences or their political constraints.

[66] This point was clarified in conversation with Professors Douglas Baird and Eric Posner.

[67] This claim only applies to the doctrine that has been crafted by the U.S. Supreme Court and is the law in the contemporary United States. If the courts were to start over from scratch and adopt what Epstein concedes is his "quirky, functional, non-traditional view of the nature and the limits of the police power," Epstein, 2002 U Chi Legal F at 95 (cited in note 27), then neither the privacy nor the equal protection doctrine would be indeterminate, and both would lead to a libertarian, "night-watchman state." Id at 77. This is not, however, the world we actually inhabit. Epstein pays so little attention to existing positive law that he never deigns to notice that sex discrimination is subject to heightened scrutiny, and he therefore mistakenly thinks that gays' equal protection claim is "rudderless." Id at 102.