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Court Case Number 15: Bowers v. Hardwick (June 30, 1986)

In August of 1982, Michael Hardwick was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of Hardwick's home. Hardwick then brought suit in the Federal District Court, therefore challenging the constitutionality of the statute as it criminalized sodomy. Hardwick asserted that he was a practicing homosexual, that the Georgia statute, as administered by the defendants, placed him in imminent danger of arrest and that the statute for several reasons violates the Federal Constitution.

I oppose the Court of Appeals decision that Michael Hardwick's complaint was dismissed by evidence seen through rights readily identifiable in the Constitution's text involved much more that the imposition of the Justices' own choice of values on the States and the Federal Government, the Court sought to identify the nature of rights for heightened judicial protection. Such landmark court decisions as Palko v. Connecticut stated this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if any fundamental liberties were sacrificed." In Moore v. East Cleveland, fundamental liberties are characterized as those liberties that are "deeply rooted in this Nation's history and tradition."

Proscriptions against a fundamental right to homosexuals to engage in acts of consensual sodomy have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but five of the thirty-seven States in the Union had criminal sodomy laws. In fact, until 1961, all fifty States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.

As his honorable Justice John Paul Stevens opinion stated, sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law. That condemnation was equally damning for heterosexual and homosexual sodomy. Moreover, it provided no special exemption for married couples. The license to cohabit and to produce legitimate offspring simply did not include any permission to engage in sexual conduct that was considered a "crime against nature."

One the more prominent features of Bowers v. Hardwick involved the Georgia statute, "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." The Georgia electorate enacted a law that presumably reflects the belief that all sodomy is immoral and unacceptable. Unless the Court is prepared to conclude that such a law is constitutional, it may not rely on the work product of the Georgia Legislature to support its holding decision. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

I strongly believe that according to the Bill of Rights and the Georgia statute, they both state in similar contexts that homosexuals and heterosexuals are treated both equally and that as long as the Bill of Rights states that sodomy is a criminal offense at common law and the Georgia statute reiterates the theme that all sodomy; whether committed by a heterosexual or homosexual couple, is immoral and unacceptable, my opinion shall stand against the final decision made by Justice John Paul Stevens, Justices' Brennan, and Marshall.

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