JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, ante, at 191, than Stanley v. Georgia, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or Katz v. United States, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. 16-6-2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that 16-6-2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." Ante, at 190. But the fact that the moral judgments expressed by statutes like 16-6-2 may be "`natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'" Roe v. Wade, 410 U.S. 113, 117 (1973), quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that

underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate [478 U.S. 186, 200] aspects of their lives, it must do more than assert that the choice they have made is an "`abominable crime not fit to be named among Christians.'" Herring v. State, 119 Ga. 709, 721, 46 S. E. 876, 882 (1904).

I

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confe[r] a fundamental right upon homosexuals to engage in sodomy," ante, at 190, the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. ante, at 188, n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. 16-6-2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of 16-6-2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity. 1 I therefore see no basis for the [478

U.S. 186, 201] Court's decision to treat this case as an "as applied" challenge to 16-6-2, see ante, at 188, n. 2, or for Georgia's attempt, both in its brief and at oral argument, to defend 16-6-2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. See Tr. of Oral Arg. 4-5; cf. 760 F.2d 1202, 1205-1206 (CA11 1985). But his claim that 16-6-2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether 16-6-2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. Ante, at 196, n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on Griswold v. Connecticut, 381 U.S. 479, 484 (1965), which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. See Brief for Respondent Hardwick 10-12; Tr. of Oral Arg. 33. More importantly, the procedural posture of the case requires that we affirm the Court of Appeals' judgment if there is any ground on which respondent may be entitled to relief. This case is before us on petitioner's motion to dismiss for failure to state a claim, Fed. Rule Civ. Proc. 12(b)(6). See App. 17. It is a well-settled principle of law that "a complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." [478 U.S. 186, 202] Bramlet v. Wilson, 495 F.2d 714, 716 (CA8 1974); see

Parr v. Great Lakes Express Co., 484 F.2d 767, 773 (CA7 1973); Due v. Tallahassee Theaters, Inc., 333 F.2d 630, 631 (CA5 1964); United States v. Howell, 318 F.2d 162, 166 (CA9 1963); 5 C. Wright & A. Miller, Federal Practice and Procedure 1357, pp. 601-602 (1969); see also Conley v. Gibson, 355 U.S. 41, 45 -46 (1957). Thus, even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that 16-6-2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal Protection Clause is so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed. 2 The Court's cramped reading of the [478 U.S. 186, 203] issue before it makes for a short opinion, but it does little to make for a persuasive one.

II

> "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986). In construing the right to privacy, the Court has proceeded along two somewhat distinct, [478 U.S. 186, 204] albeit complementary, lines. First, it has recognized a privacy interest with reference to certain decisions that are properly for the individual to make. E. g., Roe v. Wade, 410 U.S. 113 (1973); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Second, it has recognized a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged. E. g., United States v. Karo, 468 U.S. 705 (1984); Payton v. New York, 445 U.S. 573 (1980); Rios v. United States, 364 U.S. 253 (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." Ante, at 190-191. While it is true that these cases may be characterized by their connection to protection of the family, see Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984), the Court's conclusion that they extend no further than this boundary ignores the warning in Moore v. East Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S., at 777 , n. 5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288-289 (1977). And so we protect the decision whether to [478 U.S. 186, 205] marry precisely because marriage "is an association that promotes

a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Griswold v. Connecticut, 381 U.S., at 486 . We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. Cf. Thornburgh v. American College of Obstetricians & Gynecologists, supra, at 777, n. 6 (STEVENS, J., concurring). And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. Cf. Moore v. East Cleveland, 431 U.S., at 500 -506 (plurality opinion). The Court recognized in Roberts, 468 U.S., at 619 , that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others." Ibid.

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973); see also Carey v. Population Services International, 431 U.S. 678, 685 (1977). The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. See Karst, The Freedom of Intimate Association, 89 Yale L. J. 624, 637 (1980); cf. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Roe v. Wade, 410 U.S., at 153 .

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose [478 U.S. 186, 206] how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." Wisconsin v. Yoder, 406 U.S. 205, 223 -224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

B

The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,'" Katz v. United States, 389 U.S., at 361 (Harlan, J., concurring), "the essence of a Fourth Amendment violation is `not the breaking of [a

person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefensible right of personal security, personal liberty and private property.'" California v. Ciraolo, 476 U.S. 207, 226 (1986) (POWELL, J., dissenting), [478 U.S. 186, 207] quoting Boyd v. United States, 116 U.S. 616, 630 (1886).

The Court's interpretation of the pivotal case of Stanley v. Georgia, 394 U.S. 557 (1969), is entirely unconvincing. Stanley held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, Stanley relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. Ante, at 195. But that is not what Stanley said. Rather, the Stanley Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

> "'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.'
>
> . . . . .
>
> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases -- the right to satisfy his intellectual and emotional needs in the privacy of his own home." 394 U.S., at 564 -565, quoting Olmstead v. United States, 277 U.S., at 478 (Brandeis, J., dissenting).

The central place that Stanley gives Justice Brandeis' dissent in Olmstead, a case raising no First Amendment claim, shows that Stanley rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the Court suggested that reliance on the Fourth [478 U.S. 186, 208] Amendment not only supported the Court's outcome in Stanley but actually was necessary to it: "If obscene material unprotected by the First Amendment in itself carried with it a `penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide Stanley on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that `a man's home is his castle.'" 413 U.S., at 66 . "The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution," ante, at 195. Indeed, 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.

III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for 16-6-2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Brief for Petitioner 37. Inasmuch as this case was dismissed by the District Court on the pleading, it is not surprising that the record before us is barren of any evidence to support petitioner's claim. 3 In light of the state of the record, I see [478 U.S. 186, 209] no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," ante, at 195, to which Stanley refused to extend its protection. 394 U.S., at 568 , n. 11. None of the behavior so mentioned in Stanley can properly be viewed as "[v]ictimless," ante, at 195: drugs and weapons are inherently dangerous, see, e. g., McLaughlin v. United States, 476 U.S. 16 (1986), and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by 16-6-2 to be physically dangerous, either to the persons engaged in it or to others. 4 [478 U.S. 186, 210]

The core of petitioner's defense of 16-6-2, however, is that respondent and others who engage in the conduct prohibited by 16-6-2 interfere with Georgia's exercise of the "`right of the Nation and of the States to maintain a decent society,'" Paris Adult Theater I v. Slaton, 413 U.S., at 59 -60, quoting Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (Warren, C. J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in 16-6-2 "for hundreds of years, if not thousands, have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19; see ante, at 190, 192-194, 196.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's security. See, e. g., Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954). 5 As Justice Jackson wrote so eloquently [478 U.S. 186, 211] for the Court in West Virginia Board of Education v. Barnette, 319 U.S. 624, 641 -642 (1943), "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L. J., at 627. It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for 16-6-2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. See, e. g., McGowan v. Maryland, 366 U.S. 420, 429 -453 (1961); Stone v. Graham, 449 U.S. 39 (1980). Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that 16-6-2 represents a legitimate use of secular coercive power. 6 A State

can no more punish private behavior because [478 U.S. 186, 212] of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433 (1984). No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). See also Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

Nor can 16-6-2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," Paris Adult Theatre I, 413 U.S., at 68 -69. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, Immorality and Treason, reprinted in The Law as Literature 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning [478 U.S. 186, 213] public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals

from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See Paris Adult Theatre I, 413 U.S., at 66 , n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in Griswold v. Connecticut, 381 U.S. 479 (1965)). 7 This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. Diamond v. Charles, 476 U.S. 54, 65 -66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

IV

It took but three years for the Court to see the error in its analysis in Minersville School District v. Gobitis, 310 U.S. [478 U.S. 186, 214] 586 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

[Footnote 1] Until 1968, Georgia defined sodomy as "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Crim.

Code 26-5901 (1933). In Thompson v. Aldredge, 187 Ga. 467, 200 S. E. 799 (1939), the Georgia Supreme Court held that 26-5901 did not prohibit lesbian activity. And in Riley v. Garrett, 219 Ga. 345, 133 S. E. 2d 367 (1963), the Georgia [478 U.S. 186, 201] Supreme Court held that 26-5901 did not prohibit heterosexual cunnilingus. Georgia passed the act-specific statute currently in force "perhaps in response to the restrictive court decisions such as Riley," Note, The Crimes Against Nature, 16 J. Pub. L. 159, 167, n. 47 (1967). [Footnote 2] In Robinson v. California, 370 U.S. 660 (1962), the Court held that the Eighth Amendment barred convicting a defendant due to his "status" as a narcotics addict, since that condition was "apparently an illness which may be contracted innocently or involuntarily." Id., at 667. In Powell v. Texas, 392 U.S. 514 (1968), where the Court refused to extend Robinson to punishment of public drunkenness by a chronic alcoholic, one of the factors relied on by JUSTICE MARSHALL, in writing the plurality opinion, was that Texas had not "attempted to regulate appellant's behavior in the privacy of his own home." Id., at 532. JUSTICE WHITE wrote separately: "Analysis of this difficult case is not advanced by preoccupation with the label `condition.' In Robinson the Court dealt with `a statute which makes the "status" of narcotic addiction a criminal offense . . . .' 370 U.S., at 666 . By precluding criminal conviction for such a `status' the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values . . . . If it were necessary to distinguish between 'acts' and 'conditions' for purposes of the Eighth Amendment, I would adhere to the concept of `condition' implicit in the opinion in Robinson . . . .

The proper subject of inquiry is whether volitional acts brought about the `condition' and whether those acts are [478 U.S. 186, 203] sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the `condition.'" Id., at 550-551, n. 2. Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a "disease" or disorder. See Brief for American Psychological Association and American Public Health Association as Amici Curiae 8-11. But, obviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual's personality. Consequently, under JUSTICE WHITE's analysis in Powell, the Eighth Amendment may pose a constitutional barrier to sending an individual to prison for acting on that attraction regardless of the circumstances. An individual's ability to make constitutionally protected "decisions concerning sexual relations," Carey v. Population Services International, 431 U.S. 678, 711 (1977) (POWELL, J., concurring in part and concurring in judgment), is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy. With respect to the Equal Protection Clause's applicability to 16-6-2, I note that Georgia's exclusive stress before this Court on its interest in prosecuting homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement, questions that cannot be disposed of before this Court on a motion to dismiss. See Yick Wo v. Hopkins, 118 U.S. 356, 373 -374 (1886). The legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend 16-6-2 on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection

Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class. See, e. g., Rowland v. Mad River Local School District, 470 U.S. 1009 (1985) (BRENNAN, J., dissenting from denial of certiorari); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv. L. Rev. 1285 (1985).

[Footnote 3] Even if a court faced with a challenge to 16-6-2 were to apply simple rational-basis scrutiny to the statute, Georgia would be required to show [478 U.S. 186, 209] an actual connection between the forbidden acts and the ill effects it seeks to prevent. The connection between the acts prohibited by 16-6-2 and the harms identified by petitioner in his brief before this Court is a subject of hot dispute, hardly amenable to dismissal under Federal Rule of Civil Procedure 12(b)(6). Compare, e. g., Brief for Petitioner 36-37 and Brief for David Robinson, Jr., as Amicus Curiae 23-28, on the one hand, with People v. Onofre, 51 N. Y. 2d 476, 489, 415 N. E. 2d 936, 941 (1980); Brief for the Attorney General of the State of New York, joined by the Attorney General of the State of California, as Amici Curiae 11-14; and Brief for the American Psychological Association and American Public Health Association as Amici Curiae 19-27, on the other.

[Footnote 4] Although I do not think it necessary to decide today issues that are not even remotely before us, it does seem to me that a court could find simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific "sexual crimes" to which the majority points, ante, at 196), on the other. For example, marriage, in addition to its spiritual aspects, is a civil contract that entitles the contracting parties to a variety of

governmentally provided benefits. A State might define the contractual commitment necessary to become eligible for these benefits to include a commitment of fidelity and then punish individuals for breaching that contract. Moreover, a State might conclude that adultery is likely to injure third persons, in particular, spouses and children of persons who engage in extramarital affairs. With respect to incest, a court might well agree with respondent that the nature of familial relationships renders true consent to incestuous activity sufficiently problematical that a blanket prohibition of such activity [478 U.S. 186, 210] is warranted. See Tr. of Oral Arg. 21-22. Notably, the Court makes no effort to explain why it has chosen to group private, consensual homosexual activity with adultery and incest rather than with private, consensual heterosexual activity by unmarried persons or, indeed, with oral or anal sex within marriage.

[Footnote 5] The parallel between Loving and this case is almost uncanny. There, too, the State relied on a religious justification for its law. Compare 388 U.S., at 3 (quoting trial court's statement that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix"), with Brief for Petitioner 20-21 (relying on the Old and New Testaments and the writings of St. Thomas Aquinas to show that "traditional Judeo-Christian values proscribe such conduct"). There, too, defenders of the challenged statute relied heavily on the fact that when the Fourteenth Amendment was ratified, most of the States had similar prohibitions. Compare Brief for Appellee in Loving v. Virginia, O. T. 1966, No. 395, pp. 28-29, with ante, at 192-194, and n. 6. There, too, at the time the case came before the Court, many of the States still had criminal statutes concerning the

conduct at issue. Compare 388 U.S., at 6 , n. 5 (noting that 16 States still outlawed interracial marriage), with ante, at 193-194 (noting that 24 States and the District of Columbia have sodomy [478 U.S. 186, 211] statutes). Yet the Court held, not only that the invidious racism of Virginia's law violated the Equal Protection Clause, see 388 U.S., at 7 -12, but also that the law deprived the Lovings of due process by denying them the "freedom of choice to marry" that had "long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Id., at 12.

[Footnote 6] The theological nature of the origin of Anglo-American antisodomy statutes is patent. It was not until 1533 that sodomy was made a secular offense in England. 25 Hen. VIII, ch. 6. Until that time, the offense [478 U.S. 186, 212] was, in Sir James Stephen's words, "merely ecclesiastical." 2J. Stephen, A History of the Criminal Law of England 429-430 (1883). Pollock and Maitland similarly observed that "[t]he crime against nature . . . was so closely connected with heresy that the vulgar had but one name for both." 2 F. Pollock & F. Maitland, The History of English Law 554 (1895). The transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved. Cf. 6 E. Coke, Institutes, ch. 10 (4th ed. 1797).

[Footnote 7] At oral argument a suggestion appeared that, while the Fourth Amendment's special protection of the home might prevent the State from enforcing 16-6-2 against individuals who engage in consensual sexual activity there, that protection would not make the statute invalid. See Tr. of Oral Arg. 10-11. The

suggestion misses the point entirely. If the law is not invalid, then the police can invade the home to enforce it, provided, of course, that they obtain a determination of probable cause from a neutral magistrate. One of the reasons for the Court's holding in Griswold v. Connecticut, 381 U.S. 479 (1965), was precisely the possibility, and repugnance, of permitting searches to obtain evidence regarding the use of contraceptives. Id., at 485-486. Permitting the kinds of searches that might be necessary to obtain evidence of the sexual activity banned by 16-6-2 seems no less intrusive, or repugnant. Cf. Winston v. Lee, 470 U.S. 753 (1985); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1274 (CA7 1983).

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Like the statute that is challenged in this case, 1 the rationale of the Court's opinion applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or are of the same or different sexes. 2 Sodomy was condemned as an odious and sinful type of behavior during the formative period of the common law. 3 [478 U.S. 186, 215] That condemnation was equally damning for heterosexual and homosexual sodomy. 4 Moreover, it provided no special exemption for married couples. 5 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."

The history of the Georgia statute before us clearly reveals this traditional prohibition of heterosexual, as well as homosexual, sodomy. 6 Indeed, at one point in the 20th century, Georgia's law was construed to permit certain sexual conduct between homosexual women even though such conduct was prohibited

between heterosexuals. 7 The history of the statutes cited by the majority as proof for the proposition that sodomy is not constitutionally protected, ante, at 192-194, [478 U.S. 186, 216] and nn. 5 and 6, similarly reveals a prohibition on heterosexual, as well as homosexual, sodomy. 8

Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality requires consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

I

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. 9 Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Griswold v. Connecticut, 381 U.S. 479 (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. Carey v. Population Services International, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972). [478 U.S. 186, 217]

In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated by an even more fundamental concern. As I wrote some years ago:

> "These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's destiny. The Court has referred to such decisions as implicating `basic values,' as being `fundamental,' and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom - the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases." Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 719-720 (CA7 1975) (footnotes omitted), cert. denied, 425 U.S. 916 (1976).

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and

disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them - not the [478 U.S. 186, 218] State - to decide. 10 The essential "liberty" that animated the development of the law in cases like Griswold, Eisenstadt, and Carey surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Paradoxical as it may seem, our prior cases thus establish that a State may not prohibit sodomy within "the sacred precincts of marital bedrooms," Griswold, 381 U.S., at 485 , or, indeed, between unmarried heterosexual adults. Eisenstadt, 405 U.S., at 453 . In all events, it is perfectly clear that the State of Georgia may not totally prohibit the conduct proscribed by 16-6-2 of the Georgia Criminal Code.

II

If the Georgia statute cannot be enforced as it is written - if the conduct it seeks to prohibit is a protected form of liberty for the vast majority of Georgia's citizens - the State must assume the burden of justifying a selective application of its law. Either the persons to whom Georgia seeks to apply its statute do not have the same interest in "liberty" that others have, or there must be a reason why the State may be permitted to apply a generally applicable law to certain persons that it does not apply to others.

The first possibility is plainly unacceptable. Although the meaning of the principle that "all men are created equal" is not always clear, it surely must mean that every free citizen has the same interest in "liberty" that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and,

more narrowly, how he will conduct himself in his personal and voluntary [478 U.S. 186, 219] associations with his companions. State intrusion into the private conduct of either is equally burdensome. The second possibility is similarly unacceptable. A policy of selective application must be supported by a neutral and legitimate interest - something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case. The Court has posited as a justification for the Georgia statute "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." Ante, at 196. But the Georgia electorate has expressed no such belief - instead, its representatives 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. For the Georgia statute does not single out homosexuals as a separate class meriting special disfavored treatment.

Nor, indeed, does not Georgia prosecutor even believe that all homosexuals who violate this statute should be punished. This conclusion is evident from the fact that the respondent in this very case has formally acknowledged in his complaint and in court that he has engaged, and intends to continue to engage, in the prohibited conduct, yet the State has elected not to process criminal charges against him. As JUSTICE POWELL points out, moreover, Georgia's prohibition on private, consensual sodomy has not been enforced for decades. 11 The record of nonenforcement, in this case and in the last several decades, belies the Attorney General's representations [478 U.S. 186, 220] about the importance

of the State's selective application of its generally applicable law. 12

Both the Georgia statute and the Georgia prosecutor thus completely fail to provide the Court with any support for the conclusion that homosexual sodomy, simpliciter, is considered unacceptable conduct in that State, and that the burden of justifying a selective application of the generally applicable law has been met.

III

The Court orders the dismissal of respondent's complaint even though the State's statute prohibits all sodomy; even though that prohibition is concededly unconstitutional with respect to heterosexuals; and even though the State's post hoc explanations for selective application are belied by the State's own actions. At the very least, I think it clear at this early stage of the litigation that respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss. 13

I respectfully dissent.

[Footnote 1] See Ga. Code Ann. 16-6-2(a) (1984) ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another").

[Footnote 2] The Court states that the "issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." Ante, at 190. In reality, however, it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present "for a very long time." See nn. 3, 4, and 5, infra. Moreover, the reasoning the Court employs would

provide the same support for the statute as it is written as it does for the statute as it is narrowly construed by the Court.

[Footnote 3] See, e. g., 1 W. Hawkins, Pleas of the Crown 9 (6th ed. 1787) ("All unnatural carnal copulations, whether with man or beast, seem to come under the notion of sodomy, which was felony by the antient common law, and punished, according to some authors, with burning; according to others, with burying alive"); 4 W. Blackstone, Commentaries *215 [478 U.S. 186, 215] (discussing "the infamous crime against nature, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished").

[Footnote 4] See 1 E. East, Pleas of the Crown 480 (1803) ("This offence, concerning which the least notice is the best, consists in a carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast"); J. Hawley & M. McGregor, The Criminal Law 287 (3d ed. 1899) ("Sodomy is the carnal knowledge against the order of nature by two persons with each other, or of a human being with a beast. . . . The offense may be committed between a man and a woman, or between two male persons, or between a man or a woman and a beast").

[Footnote 5] See J. May, The Law of Crimes 203 (2d ed. 1893) ("Sodomy, otherwise called buggery, bestiality, and the crime against nature, is the unnatural copulation of two persons with each other, or of a human being with a beast. . . . It may be committed by a man with a man, by a man with a beast, or by a woman with a beast, or by a man with a woman - his wife, in which case, if she consent, she is an accomplice").

[Footnote 6] The predecessor of the current Georgia statute provided: "Sodomy is the carnal knowledge and connection against

the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Code, Tit. 1, Pt. 4, 4251 (1861). This prohibition of heterosexual sodomy was not purely hortatory. See, e. g., Comer v. State, 21 Ga. App. 306, 94 S. E. 314 (1917) (affirming prosecution for consensual heterosexual sodomy).

[Footnote 7] See Thompson v. Aldredge, 187 Ga. 467, 200 S. E. 799 (1939).

[Footnote 8] A review of the statutes cited by the majority discloses that, in 1791, in 1868, and today, the vast majority of sodomy statutes do not differentiate between homosexual and heterosexual sodomy.

[Footnote 9] See Loving v. Virginia, 388 U.S. 1 (1967). Interestingly, miscegenation was once treated as a crime similar to sodomy. See Hawley & McGregor, The Criminal Law, at 287 (discussing crime of sodomy); id., at 288 (discussing crime of miscegenation).

[Footnote 10] Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple. See Tr. of Oral Arg. 8 (stating that application of the statute to a married couple "would be unconstitutional" because of the "right of marital privacy as identified by the Court in Griswold"). Significantly, Georgia passed the current statute three years after the Court's decision in Griswold.

[Footnote 11] Ante, at 198, n. 2 (POWELL, J., concurring). See also Tr. of Oral Arg. 4-5 (argument of Georgia Attorney General) (noting, in response to question about prosecution "where the activity took place in a private residence," the "last case I can recall was back in the 1930's or 40's").

[Footnote 12] It is, of course, possible to argue that a statute has a purely symbolic role. Cf. Carey v. Population Services International,

431 U.S. 678, 715 , n. 3 (1977) (STEVENS, J., concurring in part and concurring in judgment) ("The fact that the State admittedly has never brought a prosecution under the statute . . . is consistent with appellants' position that the purpose of the statute is merely symbolic"). Since the Georgia Attorney General does not even defend the statute as written, however, see n. 10, supra, the State cannot possibly rest on the notion that the statute may be defended for its symbolic message.

[Footnote 13] Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraces all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed either in the record of this case or in the text of the statute. If that is true, although the text of the statute is clear enough, its true meaning may be "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." Marks v. United States, 430 U.S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part). [478 U.S. 186, 221]