U.S. Supreme Court

BOWERS v. HARDWICK, 478 U.S. 186 (1986)

478 U.S. 186

BOWERS, ATTORNEY GENERAL OF GEORGIA v. HARDWICK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-140.

Argued March 31, 1986

Decided June 30, 1986

After being charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home, respondent Hardwick (respondent) brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The court granted the defendants' motion to dismiss for failure to state a claim. The Court of Appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights.

Held:

The Georgia statute is constitutional. Pp. 190-196.

(a) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of private sexual conduct between consenting adults is

constitutionally insulated from state proscription is unsupportable. Pp. 190-191.

(b) Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious. Pp. 191-194.

(c) There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance. Pp. 194-195.

(d) The fact that homosexual conduct occurs in the privacy of the home does not affect the result. Stanley v. Georgia, 394 U.S. 557, distinguished. Pp. 195-196.

(e) Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws. P. 196.

760 F.2d 1202, reversed. [478 U.S. 186, 187]

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., post, p. 196, and POWELL, J., post, p. 197, filed concurring opinions. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, post, p. 199. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 214.

Michael E. Hobbs, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With him on the briefs were Michael J. Bowers, Attorney General, pro se, Marion O. Gordon, First

Assistant Attorney General, and Daryl A. Robinson, Senior Assistant Attorney General.

Laurence H. Tribe argued the cause for respondent Hardwick. With him on the brief were Kathleen M. Sullivan and Kathleen L. Wilde. *

[Footnote *] Briefs of amici curiae urging reversal were filed for the Catholic League for Religious and Civil Rights by Steven Frederick McDowell; for the Rutherford Institute et al. by W. Charles Bundren, Guy O. Farley, Jr., George M. Weaver, William B. Hollberg, Wendell R. Bird, John W Whitehead, Thomas O. Kotouc, and Alfred Lindh; and for David Robinson, Jr., pro se. Briefs of amici curiae urging affirmance were filed for the State of New York et al. by Robert Abrams, Attorney General of New York, Robert Hermann, Solicitor General, Lawrence S. Kahn, Howard L. Zwickel, Charles R. Fraser, and Sanford M. Cohen, Assistant Attorneys General, and John Van de Kamp, Attorney General of California; for the American Jewish Congress by Daniel D. Levenson, David Cohen, and Frederick Mandel; for the American Psychological Association et al. by Margaret Farrell Ewing, Donald N. Bersoff, Anne Simon, Nadine Taub, and Herbert Semmel; for the Association of the Bar of the City of New York by Steven A. Rosen; for the National Organization for Women by John S. L. Katz; and for the Presbyterian Church (U.S. A.) et al. by Jeffrey O. Bramlett. Briefs of amici curiae were filed for the Lesbian Rights Project et al. by Mary C. Dunlap; and for the National Gay Rights Advocates et al. by Edward P Errante, Leonard Graff, and Jay Kohorn.

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing [478 U.S. 186, 188] sodomy 1 by committing that act with another adult male in the

bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. 2 He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on Doe v. Commonwealth's Attorney for the City of Richmond, 403 F. Supp. 1199 (ED Va. 1975), which this Court summarily affirmed, 425 U.S. 901 (1976). [478 U.S. 186, 189]

A divided panel of the Court of Appeals for the Eleventh Circuit reversed. 760 F.2d 1202 (1985). The court first held that, because Doe was distinguishable and in any event had been undermined by later decisions, our summary affirmance in that case did not require affirmance of the District Court. Relying on our decisions in Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); and Roe v. Wade, 410 U.S. 113 (1973), the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

Because other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit in this case, 3 we granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment. 4 [478 U.S. 186, 190]

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. 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. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in Carey v. Population Services International, 431 U.S. 678, 685 (1977). Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923), were described as dealing with child rearing and education; Prince v. Massachusetts, 321 U.S. 158 (1944), with family relationships; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), with procreation; Loving v. Virginia, 388 U.S. 1 (1967), with marriage; Griswold v. Connecticut, supra, and

Eisenstadt v. Baird, supra, with contraception; and Roe v. Wade, 410 U.S. 113 (1973), with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. Carey v. Population Services International, supra, at 688-689.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the [478 U.S. 186, 191] claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in Carey twice asserted that the privacy right, which the Griswold line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U.S., at 688 , n. 5, 694, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among

such cases are those recognizing rights that have little or no textual support in the constitutional language. Meyer, Prince, and Pierce fall in this category, as do the privacy cases from Griswold to Carey.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In Palko v. Connecticut, 302 U.S. 319, 325 , 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither [478 U.S. 186, 192] liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." Id., at 503 (POWELL, J.). See also Griswold v. Connecticut, 381 U.S., at 506 .

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. 5 In 1868, when the Fourteenth Amendment was [478 U.S. 186, 193] ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. 6 In fact, until 1961, 7 all 50 States outlawed sodomy, and today, 24 States and the District of Columbia [478 U.S.

186, 194] continue to provide criminal penalties for sodomy performed in private and between consenting adults. See Survey, U. Miami L. Rev., supra, at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The 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. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation [478 U.S. 186, 195] of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls for short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on Stanley v. Georgia, 394 U.S. 557 (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." Id., at 565.

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. Stanley itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. Id., at 568, n. 11. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct [478 U.S. 186, 196] while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree,

and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis. 8

Accordingly, the judgment of the Court of Appeals is

Reversed.

Footnotes

[Footnote 1] Georgia Code Ann. 16-6-2 (1984) provides, in pertinent part, as follows: "(a) 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. . . . "(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . ."

[Footnote 2] John and Mary Doe were also plaintiffs in the action. They alleged that they wished to engage in sexual activity proscribed by 16-6-2 in the privacy of their home, App. 3, and that they had been "chilled and deterred" from engaging in such activity by both the existence of the statute and Hardwick's arrest. Id., at 5. The District Court held, however, that because they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute, they did not have proper standing to maintain the action. Id., at 18. The Court of Appeals affirmed the District Court's judgment dismissing the Does' claim for lack of standing, 760 F.2d 1202, 1206-1207 (CA11 1985), and the Does do not challenge that holding in this Court. The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.

[Footnote 3] See Baker v. Wade, 769 F.2d 289, rehearing denied, 774 F.2d 1285 (CA5 1985) (en banc); Dronenburg v. Zech, 239

U.S. App. D.C. 229, 741 F.2d 1388, rehearing denied, 241 U.S. App. D.C. 262, 746 F.2d 1579 (1984).

[Footnote 4] Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in Doe. We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in Doe. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14 (1976); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 309 , n. 1 (1976); Edelman v. Jordan, 415 U.S. 651, 671 (1974). Cf. Hicks v. Miranda, 422 U.S. 332, 344 (1975).

[Footnote 5] Criminal sodomy laws in effect in 1791: Connecticut: 1 Public Statute Laws of the State of Connecticut, 1808, Title LXVI, ch. 1, 2 (rev. 1672). Delaware: 1 Laws of the State of Delaware, 1797, ch. 22, 5 (passed 1719). Georgia had no criminal sodomy statute until 1816, but sodomy was a crime at common law, and the General Assembly adopted the common law of England as the law of Georgia in 1784. The First Laws of the State of Georgia, pt. 1, p. 290 (1981). Maryland had no criminal sodomy statute in 1791. Maryland's Declaration of Rights, passed in 1776, however, stated that "the inhabitants of Maryland are entitled to the common law of England," and sodomy was a crime at common law. 4 W. Swindler, Sources and Documents of United States Constitutions 372 (1975). Massachusetts: Acts and Laws passed by the General Court of Massachusetts, ch. 14, Act of Mar. 3, 1785. New Hampshire passed its first sodomy statute in 1718. Acts and Laws of New Hampshire 1680-1726, p. 141 (1978). Sodomy was a crime at common law in New Jersey at the time of the ratification of the Bill of Rights. The State enacted its first criminal sodomy law five years later. Acts of the Twentieth General Assembly, Mar. 18, 1796, ch.

DC, 7. New York: Laws of New York, ch. 21 (passed 1787). [478 U.S. 186, 193] At the time of ratification of the Bill of Rights, North Carolina had adopted the English statute of Henry VIII outlawing sodomy. See Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina, ch. 17, p. 314 (Martin ed. 1792). Pennsylvania: Laws of the Fourteenth General Assembly of the Commonwealth of Pennsylvania, ch. CLIV, 2 (passed 1790). Rhode Island passed its first sodomy law in 1662. The Earliest Acts and Laws of the Colony of Rhode Island and Providence Plantations 1647-1719, p. 142 (1977). South Carolina: Public Laws of the State of South Carolina, p. 49 (1790). At the time of the ratification of the Bill of Rights, Virginia had no specific statute outlawing sodomy, but had adopted the English common law. 9 Hening's Laws of Virginia, ch. 5, 6, p. 127 (1821) (passed 1776).

[Footnote 6] Criminal sodomy statutes in effect in 1868: Alabama: Ala. Rev. Code 3604 (1867). Arizona (Terr.): Howell Code, ch. 10, 48 (1865). Arkansas: Ark. Stat., ch. 51, Art. IV, 5 (1858). California: 1 Cal. Gen. Laws, ☐ 1450, 48 (1865). Colorado (Terr.): Colo. Rev. Stat., ch. 22, 45, 46 (1868). Connecticut: Conn. Gen. Stat., Tit. 122, ch. 7, 124 (1866). Delaware: Del. Rev. Stat., ch. 131, 7 (1893). Florida: Fla. Rev. Stat., div. 5, 2614 (passed 1868) (1892). Georgia: Ga. Code 4286, 4287, 4290 (1867). Kingdom of Hawaii: Haw. Penal Code, ch. 13, 11 (1869). Illinois: Ill. Rev. Stat., div. 5, 49, 50 (1845). Kansas (Terr.): Kan. Stat., ch. 53, 7 (1855). Kentucky: 1 Ky. Rev. Stat., ch. 28, Art. IV, 11 (1860). Louisiana: La. Rev. Stat., Crimes and Offences, 5 (1856). Maine: Me. Rev. Stat., Tit. XII, ch. 160, 4 (1840). Maryland: 1 Md. Code, Art. 30, 201 (1860). Massachusetts: Mass. Gen. Stat., ch. 165, 18 (1860). Michigan: Mich. Rev. Stat., Tit. 30, ch. 158, 16 (1846). Minnesota: Minn. Stat.,

ch. 96, 13 (1859). Mississippi: Miss. Rev. Code, ch. 64, LII, Art. 238 (1857). Missouri: 1 Mo. Rev. Stat., ch. 50, Art. VIII, 7 (1856). Montana (Terr.): Mont. Acts, Resolutions, Memorials, Criminal Practice Acts, ch. IV, 44 (1866). Nebraska (Terr.): Neb. Rev. Stat., Crim. Code, ch. 4, 47 (1866). [478 U.S. 186, 194] Nevada (Terr.): Nev. Comp. Laws, 1861-1900, Crimes and Punishments, 45. New Hampshire: N. H. Laws, Act. of June 19, 1812, 5 (1815). New Jersey: N. J. Rev. Stat., Tit. 8, ch. 1, 9 (1847). New York: 3 N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 5, 20 (5th ed. 1859). North Carolina: N.C. Rev. Code, ch. 34, 6 (1855). Oregon: Laws of Ore., Crimes - Against Morality, etc., ch. 7, 655 (1874). Pennsylvania: Act of Mar. 31, 1860, 32, Pub. L. 392, in 1 Digest of Statute Law of Pa. 1700-1903, p. 1011 (Purdon 1905). Rhode Island: R. I. Gen. Stat., ch. 232, 12 (1872). South Carolina: Act of 1712, in 2 Stat. at Large of S. C. 1682-1716, p. 493 (1837). Tennessee: Tenn. Code, ch. 8, Art. 1, 4843 (1858). Texas: Tex. Rev. Stat., Tit. 10, ch. 5, Art. 342 (1887) (passed 1860). Vermont: Acts and Laws of the State of Vt. (1779). Virginia: Va. Code, ch. 149, 12 (1868). West Virginia: W. Va. Code, ch. 149, 12 (1868). Wisconsin (Terr.): Wis. Stat. 14, p. 367 (1839).

[Footnote 7] In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. Criminal Code of 1961, 11-2, 11-3, 1961 Ill. Laws, pp. 1985, 2006 (codified as amended at Ill. Rev. Stat., ch. 38, Sections 11-2, 11-3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code 213.2 (Proposed Official Draft 1962).

[Footnote 8] Respondent does not defend the judgment below based on the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy.

As the Court notes, ante, at 192, the proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, Homosexuality [478 U.S. 186, 197] and the Western Christian Tradition 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." 4 W. Blackstone, Commentaries *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.

JUSTICE POWELL, concurring.

I join the opinion of the Court. I agree with the Court that there is no fundamental right - i. e., no substantive right under the Due Process Clause - such as that claimed by respondent Hardwick, and found to exist by the Court of Appeals. This is not to suggest, however, that respondent may not be protected by the Eighth Amendment of the Constitution. The Georgia statute at issue in this case, Ga. Code Ann. 16-6-2 (1984), authorizes a court to imprison a person for up to 20 years for a single private, consensual act of sodomy. In my view, a prison sentence for such conduct - certainly a sentence of long duration - would create a serious Eighth Amendment issue. Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a [478 U.S. 186, 198] felony comparable in terms of the possible sentence imposed to serious felonies such as aggravated battery, 16-5-24, first-degree arson, 16-7-60, and robbery, 16-8-40. 1

In this case, however, respondent has not been tried, much less convicted and sentenced. 2 Moreover, respondent has not raised the Eighth Amendment issue below. For these reasons this constitutional argument is not before us.

[Footnote 1] Among those States that continue to make sodomy a crime, Georgia authorizes one of the longest possible sentences. See Ala. Code 13A-6-65(a)(3) (1982) (1-year maximum); Ariz. Rev. Stat. Ann. 13-1411, 13-1412 (West Supp. 1985) (30 days); Ark. Stat. Ann. 41-1813 (1977) (1-year maximum); D.C. Code 22-3502 (1981) (10-year maximum); Fla. Stat. 800.02 (1985) (60-day maximum); Ga. Code Ann. 16-6-2 (1984) (1 to 20 years); Idaho Code 18-6605 (1979) (5-year minimum); Kan. Stat. Ann. 21-3505 (Supp. 1985) (6-month maximum); Ky. Rev. Stat. 510.100 (1985) (90 days to 12 months); La. Rev. Stat. Ann. 14:89 (West 1986) (5-

year maximum); Md. Ann. Code, Art. 27, 553-554 (1982) (10-year maximum); Mich. Comp. Laws 750.158 (1968) (15-year maximum); Minn. Stat. 609.293 (1984) (1-year maximum); Miss. Code Ann. 97-29-59 (1973) (10-year maximum); Mo. Rev. Stat. 566.090 (Supp. 1984) (1-year maximum); Mont. Code Ann. 45-5-505 (1985) (10-year maximum); Nev. Rev. Stat. 201.190 (1985) (6-year maximum); N.C. Gen. Stat. 14-177 (1981) (10-year maximum); Okla. Stat., Tit. 21, 886 (1981) (10-year maximum); R. I. Gen. Laws 11-10-1 (1981) (7 to 20 years); S. C. Code 16-15-120 (1985) (5-year maximum); Tenn. Code Ann. 39-2-612 (1982) (5 to 15 years); Tex. Penal Code Ann. 21.06 (1974) ($200 maximum fine); Utah Code Ann. 76-5-403 (1978) (6-month maximum); Va. Code 18.2-361 (1982) (5-year maximum).

[Footnote 2] It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades. See Thompson v. Aldredge, 187 Ga. 467, 200 S. E. 799 (1939). Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury, and this is a suit for declaratory judgment brought by respondents challenging the validity of the statute. The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the Georgia statute was put in issue by respondents, and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right. [478 U.S. 186, 199]