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News Media Torn Two Ways in Debate on Privacy

By ALEX S. JONES

It is not easy for the nation's editors to reconcile the twin American passions for both information — including quantities of gossip — and privacy.

On the one hand is an apparent rising tide of advocacy for personal privacy; on the other is a glut of publications and television programs devoted to the most intimate details of people's lives. The public derides the press for revealing the details and yet gives high ratings to the tabloid television shows.

Even among journalists and other strong proponents of First Amendment freedoms, there is no agreement on such matters as USA Today's decision to investigate whether Arthur Ashe, the former tennis star, had AIDS. The disclosure of Mr. Ashe's condition touched off the latest round in the debate over privacy.

While editors at USA Today told Mr. Ashe that the paper would not report that he had AIDS without on-the-record sources, they also said they were pursuing the matter despite his objection. Their position was that a prominent, though retired, sports figure with AIDS was important news.

But many journalists agreed that Mr. Ashe's illness was his secret, not theirs, to tell, and some who were friends of Mr. Ashe, including Bryant Gumbel of the "Today" television program, had kept the secret of his AIDS for years.

Mr. Ashe chose to disclose his illness at a news conference, but said he felt pressured to do so by USA Today's inquiry. His charge prompted a wave of public criticism of news organizations that was joined by some who have normally been among the press's staunchest champions.

Fears for the Future

"My visceral reaction was that this is the kind of thing that's going to get us regulated," said Jane E. Kirtley, executive director of the Reporters Committee for Freedom of the Press, an organization that monitors the sometimes bruising relationship between Government and the press.

> Just when does the right to know become intrusion?

Indeed, Ms. Kirtley and others said they were increasingly concerned that advocates of privacy might seek tighter restrictions on what may be published, and feared that the Supreme Court might support moves to muzzle the press.

And there is a parallel anxiety that the press could alienate the public by continuing to report such marginally relevant information as details of the personal lives of celebrities.

But there are counterveiling concerns among editors.

"You cannot edit in fear of what a court might do," said Michael Gartner, president of NBC News and owner of The Daily Tribune in Ames, Iowa. "The only real thing we have to worry about is that publishers and advertising managers will get into editorial decisions" to assuage public opinion.

But even Mr. Gartner, a near absolutist on press freedom, said he found it difficult to draw lines on what should be published.

He said NBC News had acted properly in identifying the woman who accused William K. Smith of rape because giving her name was fair and germane. But he said he disagreed with The Seattle Times's decision to publish accusations of sexual harassment against Senator Brock Adams, Democrat of Washington, by eight unidentified women because so important a charge should not be made anonymously.

Information Usually Withheld

The privacy issue is riddled with such contradictions.

On the grounds of protecting individual privacy, the Government will often not disclose information that could be valuable to the public, like arrest records and disciplinary actions against doctors and lawyers. And to safeguard corporate privacy, courts routinely seal the records of civil law suits involving damages caused by malfunctioning products. Even some advocates of privacy, like Robert Ellis Smith, publisher of Privacy Journal, a monthly newsletter, said such records should be public.

The law allows news organizations to report the most intimate details of an individual's personal life, provided the information meets the broad standard of being newsworthy.

And the Government sees no invasion of privacy in demanding, for instance, that anyone with a Government-backed mortgage must agree in writing to allow lenders to inspect his property essentially without notice. Those seeking mortgages must also agree that the broker can show all lending documents, including a borrower's income tax returns and credit history, to prospective mortgage buyers.

The Public's Attitude

The Government's attitude toward privacy fluctuates. For instance, Federal agencies often argue that they are acting on behalf of the individual's privacy when they deny information requested under the Freedom of Information Act. Press efforts to gain access to tapes of the final minutes before the Challenger space shuttle exploded were rebuffed to protect the privacy of the families of the dead astronauts.

Perhaps the greatest inconsistency is the public's attitude on privacy. A New York Times/CBS News poll found that 55 percent of registered voters nationwide said the press went too far in disclosing details of Presidential candidates' private lives, but 50 percent said that nothing reported in the current campaign should not have been reported.

The current debate is taking place in an era of staggering exhibitionism, when individuals compete to reveal the most intimate and embarrassing aspects of their lives before an audience of millions on television shows like "Oprah" and "Sally Jessy Raphael." Mainstream newspapers often include a column of celebrity gossip, and tabloid television shows like "A Current Affair" and "Hard Copy" command huge followings.

"A Current Affair," a syndicated show owned by the Fox Broadcasting Company, estimated that 21 million viewers tuned in on Feb. 6 for its interview with Gennifer Flowers, who claimed to have had a lengthy affair with Gov. Bill Clinton of Arkansas.

Impact of More News Outlets

The charges of press intrusiveness also come at a time when many editors say the limits and tone of coverage are being debated in newsrooms as never before. But those internal debates have become increasingly irrelevant.

While editors at major papers, news wire services and network television could once effectively serve as gatekeepers of information, satellite communications and a surge of new and competing news outlets eager to score a reporting coup have made information a commodity impossible to control. Indeed, major news-gathering organizations at first ignored Ms. Flowers's claims as reported in The Star, a supermarket tabloid. Nonetheless, the information was passed, almost instantly, via local television and then word of mouth.

Adding to the confusion is that, in legal terms, privacy falls into two distinct, easily muddled concepts: an individual's right to privacy from the Government and what might be termed neighbor-versus-neighbor privacy.

The Constitution does not specifically mention privacy, but in 1965, in Griswold v. Connecticut, the Supreme Court recognized a constitutional basis for an individual's right to privacy from undue Government interference. Specifically, it overturned a Connecticut law forbidding the sale of contraceptives on the ground that it interferred in the private lives of married couples.

This concept of a constitutional right to privacy from Government was also the basis of the Roe v. Wade decision in 1973, when the Court found that laws forbidding abortion were an intrusion into the privacy of pregnant women.

The law that establishes a right to privacy from one's fellow citizens is very different. It is not a constitutional concept but one based in laws that can vary by state.

This concept ranges from the right to keep nosy neighbors from peeking in windows to the right to prevent a company from selling soap by using one's face or name without permission. But the most difficult, and controversial, aspect of this body of law is the truthful disclosure of private facts, like Mr. Ashe having AIDS.

Setting a Standard

Indeed, the law allows extraordinary leeway to journalists to decide what to print about public figures, and in such cases the inhibiting factor is journalistic standards, not the law.

Should Mr. Ashe or anyone else file a suit charging invasion of privacy by a news organization, courts would be guided by a standard set in 1975, when a surfer sued Sports Illustrated. The surfer had first cooperated with the magazine in its writing a profile of him, but then he changed his mind. When the magazine published an article anyway, which included the surfer's rather bizarre habits, like eating spiders, he sued.

> The titillation industry surges, creating fears of a backlash.

The court found for Sports Illustrated, saying, "The line is to be drawn when publicity ceases to be the giving of information to which the public is entitled and becomes a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public, with decent standards, would say that he had no concern."

It ruled that the magazine was entitled to print the article because it was newsworthy, a vague standard that courts have tended to interpret broadly in subsequent privacy cases.

The standard was underscored in the case of Oliver W. Sipple, who sued The San Francisco Chronicle for invasion of privacy when the newspaper disclosed his homosexuality after he deflected a would-be assassin trying to shoot President Gerald R. Ford in 1975. He had not revealed his sexual orientation to his family, but lost the case because of his inherent newsworthiness.

What Is Newsworthy?

Indeed, few privacy plaintiffs have won. Celebrities and other public figures have had very little success with such suits because of the general view that anything they do is inherently newsworthy.

But while the courts have given near carte blanche in reporting personal information about newsworthy subjects, the decision whether to do so lies with each news organization. At mainstream publications, what is considered legitimate news has expanded in recent years.

Newspapers have always published some information that hurt individuals. For instance, small daily and weekly papers routinely print the names of those arrested for drunken driving, details of real estate transactions and other information that can be embarrassing or worse. Because such information is part of legal records, a news organization has the right to publish it, but it may choose not to do so, often for reasons of fairness. For instance, some newspapers rarely publish divorce records or the names of men arrested for prostitution.

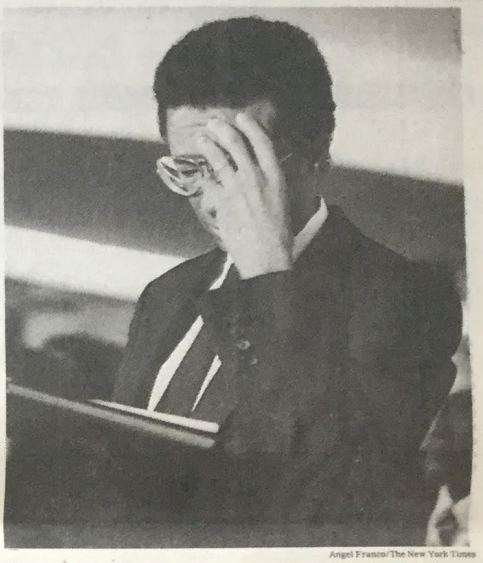
Until relatively recently, sexual and other very personal matters were almost entirely off limits for major news organizations.

Journalists have also been haunted by revelations like President John F. Kennedy's relationship with Judith Exner, who was also the mistress of a prominent crime figure. While the Washington press corps at the time was generally not aware of the President's adultery, neither was it inclined to look for such information.

Some editors said a benchmark was The Miami Herald's report in 1988 that Gary Hart, then a candidate for the Democratic Presidential nomination, had spent the night with a woman who was not his wife.

Mr. Smith, the newletter publisher, said the report was a disaster for advocates of privacy because it was legitimate news but so inherently titillating and sensational that it seemed to declare that anything goes.

More national news appears on page D22.



Angel Franco/The New York Times

Arthur Ashe's disclosure that he has AIDS, prompted by questioning by USA Today, touched off the latest round in the debate over privacy.

Plan to Cut Budget by $5.8 Billion Would Save a Seawolf Submarine

WASHINGTON, April 28 (AP) — The House Appropriations Committee agreed today to slash Federal spending by $5.8 billion, more than matching cuts proposed by President Bush but spinning its axe at some different targets.

Mr. Bush sought to cancel the construction of two Seawolf submarines, saving $3 billion. But the Congressional package would allow one of the submarines to be built, reducing those savings to $2.1 billion.

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Bar on Private Homosexual Acts Upheld

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unheard of in the case of heterosexuals.

The case ruled on today was a civil suit challenging the Georgia sodomy law brought by Michael Hardwick, a homosexual who had been arrested in his Atlanta bedroom while having sexual relations with another man.

The law defines sodomy as "any sexual act involving the sex organs of one person and the mouth or anus of another."

A police officer had gone to his home to serve a warrant because Mr. Hardwick had not paid a fine for public drunkenness. The officer was given permission by someone who answered the door to the enter the house and find Mr. Hardwick.

Was Not Prosecuted in Case

Mr. Hardwick was not prosecuted, but he challenged the law on the ground that it violated his constitutional right to privacy.

Justice White's opinion declined to extend to homosexuals a line of decisions involving heterosexuals — in particular a 1965 decision striking down a Connecticut law against contraception — in which the Court has recognized constitutional rights to sexual privacy. While the court did not specifically refer to homosexual acts between women, its reasoning would apparently apply to such acts.

Justice White stressed the "ancient roots" in English common law of statutes criminalizing homosexual relations, noting that all 50 states outlawed homosexual sodomy until 1961 and that 24 states and the District of Columbia still do.

"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," Justice White said in explaining why it should not create a right to homosexual sodomy.

Justice Blackmun, in his dissent, said, "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."

Justice Stevens, in a separate dissent, said the Court's rationale, like the Georgia statute and the English common law from which it was derived, "applies equally to the prohibited conduct regardless of whether the parties who engage in it are married or unmarried, or of the same or different sexes."

He said that the court's prior decisions indicated the Constitution barred governmental intrusion into private heterosexual relationships, and that the same protections should apply to homosexuals.

One member of the majority, Associate Justice Lewis F. Powell Jr., said in a separate concurrence that while states may criminalize homosexual sodomy, those who commit such acts may enjoy some protection from the Eighth Amendment's ban on "cruel and unusual punishments."

Noting that the Georgia law authorizes prison sentences of one to 20 years for a single homosexual act, he said, "In my view, a prison sentence for such conduct — certainly a sentence of long duration — would create a serious Eighth Amendment issue."

Others joining the majority opinion were Chief Justice Warren E. Burger and Associate Justices William H. Rehnquist and Sandra Day O'Connor.

Associate Justices William J. Brennan Jr., Thurgood Marshall and Stevens joined Justice Blackmun's dissent. The first two also joined Justice Stevens's dissent.

Twenty-six states have decriminalized sodomy, and five of the 24 that still make homosexual sodomy a crime have decriminalized heterosexual sodomy, at least in some contexts.

The New York Court of Appeals, in a 1980 decision apparently in conflict with today's Supreme Court decision, held the state's law barring sodomy unconstitutional. But a state official said the ruling would have no direct bearing on New York law.

"The New York State statute was struck down by our own state court of appeals, and that statute remains unconstitutional," said Timothy Dyner, a spokesman for State Attorney General Robert Abrams. Mr. Gilles said the Supreme Court had declined to rule on the New York case in 1981, letting stand the state court ruling.

New Jersey and Connecticut have decriminalized sodomy by legislation.

Noncommital on Desirability

Justice White stressed today that the case, Bowers v. Hardwick, No. 85-140, "does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable," or about whether states should repeal such laws.

"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," he said.

Justice White said that homosexual activity was not protected by previous decisions that have interpreted the 14th Amendment right not to be deprived of "liberty" without "due process of law" as including various "fundamental rights" not specified in the Constitution. He said these rights were limited to those "deeply rooted in this nation's history or tradition" or "implicit in the concept of ordered liberty."

In light of the law's longstanding condemnation of homosexual conduct, Justice White said, it would be "at best, facetious" to suggest that homosexual conduct qualified as a "fundamental right."

Privacy Argument Rejected

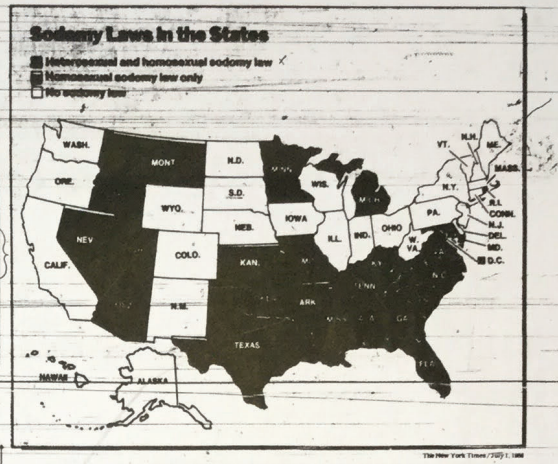
Justice White also rejected the argument that homosexual conduct should be protected at least where it occurs in the privacy of the home. "Otherwise illegal conduct is not always immunized whenever it occurs in the home," he said, citing laws against possession of narcotics and stolen goods as well as "adultery, incest and other sexual crimes."

In response to arguments that the Constitution bars majorities from imposing their view of morality on minorities, he said the law "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."

A Federal appellate court in Atlanta had held that the Georgia law "infringes upon the fundamental constitutional rights of Michael Hardwick" to have private sexual relations, indicating it was likely to strike the law down after further proceedings. The state appealed to the Supreme Court.

Justice White noted that a husband and wife who had challenged the law along with Mr. Hardwick had been held by the lower courts not to have standing to sue because they had never been arrested.

He said: "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."



The New York Times / July 1, 1986

Friend and Foe See Homosexual Defeat

By LARRY ROHTER

The United States Supreme Court decision yesterday upholding Georgia's sodomy law was greeted with dismay by homosexual groups across the nation and with jubilation by a variety of religious and political groups opposing them. Both sides agreed the ruling would slow the advancement of homosexual rights.

"It's a major disaster from our point of view," said Thomas Stoddard, executive director of the Lambda Legal Defense and Education Fund, a leading homosexual advocacy group. "For the gay rights movement, this is our Dred Scott decision," he said referring to the 1857 Supreme Court ruling upholding slavery in which blacks were held not to be citizens.

"I applaud the decision for two reasons," said the Rev. Jerry Falwell, head of Moral Majority. "The highest court has recognized the right of a state to determine its own moral guidelines, and it has issued a clear statement that perverted moral behavior is not accepted practice in this country."

Wide Fears Expressed

Leaders of homosexual organizations and their lawyers said they feared the Supreme Court's decision would make it more difficult for them to achieve other objectives, such as child custody rights for homosexuals, and the elimination of professional licenses that require applicants to demonstrate "a good moral character." They also predicted an upsurge of police harassment against homosexuals as well as dismissals and evictions as a result of the ruling.

"We're already seeing that because of AIDS," said James Kellogg, a New Orleans lawyer who has been seeking to overturn Louisiana's antisodomy law. "This is another step up in the witch hunt."

Many of the same homosexual advocates also expressed concern that the ruling would impede counseling and research into AIDS, acquired immune deficiency syndrome, a fatal disease spread by anal and oral intercourse or exchange of blood, that destroys the body's immune system and has primarily affected homosexual men.

"Last year, the head of the Center for Disease Control said that one of the best ways we can fight AIDS right now is to encourage stable, monogamous relationships among gay men," said Ron Najman, a spokesman for the National Gay and Lesbian Task Force. "How can we encourage those relationships if we outlaw them and threaten to drive gay people underground?"

Homosexual activists said that the focus of their efforts to gain legal protection is now likely to shift from the national level to states and cities. They and civil rights groups supporting their position predicted a variety of legal actions seeking to strike down local antisodomy statutes on either privacy or equal protection grounds.

Thomas Stoddard, executive director of a homosexual advocacy group, said of ruling, "It's a major disaster from our point of view."

The District of Columbia and 24 states, most of them in the South or West, still have legislation that outlaws acts of sodomy. Five of them, Arkansas, Kansas, Montana, Nevada and Texas, criminalize only homosexual acts, while the others prohibit sodomy committed both by heterosexuals and homosexuals.

"We will struggle in state courts, under state constitutions and with State Legislatures," said Norman Dorsen, president of the American Civil Liberties Union. "We will maintain our course of seeking to limit the decision and we will continue to struggle for what we regard as protected liberties under the Constitution."

But Mr. Kellogg said success would be difficult to come by. He said his own case had become a "dead letter" as a result of the Hardwick decision and that a "reassessment" of strategy was in order.

'Best Decision Ever Made'

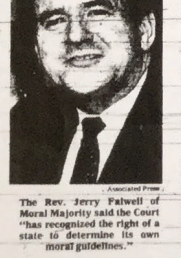
Noach Dear, a New York City Council member who led efforts to defeat a homosexual rights bill passed earlier this year, agreed, but took comfort in the fact.

"No judge likes to be overturned by the Supreme Court, so this decision sends a very strong message to the lower courts," he said. "This is the best decision ever made."

In the New York metropolitan area, which has the largest homosexual population in the country, reaction to the Court decision on the part of government officials was mixed. New York, New Jersey and Connecticut are among the 26 states that do not have antisodomy laws on the books.

"This decision, by a bare 5-4 majority, is a gross invasion of the privacy rights of all Americans," said Attorney General Robert Abrams of New York State. "The Court is allowing states to criminalize conduct engaged in by millions of Americans — married and unmarried, heterosexual and homosexual — even though these adults are engaging in consensual sexual intimacies in the privacy of their own bedroom."

New York City's assistant corporation counsel, Doron Gopstein, who successfully argued the city's case to close homosexual bathhouses on public health grounds last year, said there was "no doubt that the Hardwick decision does reverse a trend that was manifested in decisions in quite a few states." But he said he saw little immediate impact in the city.



Associated Press

The Rev. Jerry Falwell of Moral Majority said the Court "has recognized the right of a state to determine its own moral guidelines."

Privacy Law Expansion Interrupted

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cient roots." The Georgia law at issue dates to 1816. The original 13 states all outlawed homosexual acts, as did all 50 states until 1961. Since then, either legislation or court decisions have made private homosexual acts between consenting adults no longer criminal in 26 states.

Second Basis for Decision

The Court frequently uses history as a guide, although not invariably. For example, it overlooked history in 1967 when it declared unconstitutional a Virginia law that barred interracial marriage. Sixteen states had such laws at the time, and Virginia defended its statute on the ground that it protected "traditional moral values."

But there was a second basis for the decision today that offers an insight into the Court's current mood, extending beyond the constitutional question at hand.

The Court would not seek to "discover new fundamental rights," Justice White said, because "the Court is most vulnerable and comes nearest to illegitimacy" when its decisions are not rooted "in the language or design of the Constitution."

He said this was "painfully demonstrated by the face-off between the Executive and the Court in the 1930's," a reference to President Roosevelt's abortive effort to "pack" a Supreme Court that had invoked the Constitution to block many New Deal programs.

By expanding the list of fundamental rights, Justice White said, "the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority."

The Consensus Factor

This portion of the opinion was an unusually explicit discussion of a factor that is always present when the Court finds itself at the frontiers of constitutional law: the Court's sense of where its judgment fits within the broader social consensus. Historically, many Justices have believed that to place the Court too far ahead of the consensus too often is to hurt the institution, to make it "vulnerable," to use Justice White's word, to attack from the political branches.

In this context, Justice White did not mention the Court's landmark privacy decision, Roe v. Wade, which established abortion as a constitutional right. But he and William H. Rehnquist, the Chief Justice-designate, who also joined today's opinion, were the two dissenters in the 1973 abortion case. They have dissented from all the subsequent decisions expanding on the principles of Roe v. Wade.

The Court is keenly aware that the political furor over Roe v. Wade has yet to die down. The fact that Justices White and Rehnquist garnered a majority for the decision today may indicate that the Court simply has no appetite for venturing once again into uncharted territory. The expected arrival of Antonin Scalia will not change that mood; it is virtually certain, based on his judicial and scholarly writing, that he would have voted with the majority. Chief Justice Warren E. Burger, who is retiring next month, voted in the majority.

Other Challenges Possible

In addressing itself to the issue of homosexual acts, the Court did not foreclose other constitutional challenges to other laws affecting the rights of homosexuals, such as a challenge based on the 14th Amendment's equal protection guarantee, to laws that discriminate against homosexuals in such areas as housing and employment.

Justice Lewis F. Powell Jr., who provided the majority's crucial fifth vote today, suggested in a concurring opinion that the Eighth Amendment's prohibition against cruel and unusual punishment might bar prison sentences for homosexual acts.

The four Justices who dissented, Harry A. Blackmun, John Paul Stevens, William J. Brennan Jr. and Thurgood Marshall, offered a drastically different vision of the right to privacy. Justice Blackmun said the issue was more profound than merely the choice of sexual act, but rather encompassed as well what he called "the fundamental interest all individuals have in controlling the nature of their intimate associations with others."

His dissenting opinion was a strongly worded plea for expanding the zone of privacy to encompass human sexuality in all its forms, traditional or not, approved by society at large or not, as long as the parties involved are consenting adults. That is not an invitation that the Court is likely to accept in the foreseeable future.

Court Voids N. Carolina Plan On Legislative Redistricting

Special to The New York Times

WASHINGTON, June 30 — Rejecting the Reagan Administration's narrow interpretation of the 1982 amendments to the Voting Rights Act, the Supreme Court unanimously struck down four North Carolina election districts as discriminatory against blacks.

Civil rights groups hailed the decision, the first major test of the 1982 amendments, as a key victory.

The Court upheld the legality of a fifth North Carolina legislative district that had been struck down along with the four others by a three-judge Federal District Court in North Carolina.

Administration Reading Spurned

There was no clear majority opinion on several points today. But the overall reasoning adopted by most of the Court's members in four separate opinions was far closer to that of the black voters who had filed suit than that of the Justice Department.

In particular, the Court, like various Republican and Democratic members of Congress, including Bob Dole, the Senate majority leader, rejected the Administration's narrow reading of Congress's purpose in passing the 1982 amendments. They were designed to overrule a 1980 Supreme Court decision and make it clear that proof of discriminatory intent is not required to establish a violation of the voting rights of racial minorities.

Associate Justice William J. Brennan Jr.'s opinion also rejected what he called the position of the Administration "that if a racial minority gains proportional or nearly proportional representation in a single election, that fact alone precludes" finding a violation.

Justice Brennan held that the lower court had erred, however, "in ignoring the significance of the sustained success black voters have experienced" in a number of elections in the fifth district.

Julius LeVonne Chambers, director-counsel of the NAACP Legal Defense and Educational Fund Inc., which brought the case, Thornburg v. Gingles, No. 83-1968, said the decision "gives us a powerful new tool for protecting the equal rights of minorities to register, to vote and to have their votes counted with equal weight."

Assistant Attorney General William Bradford Reynolds said that although "we are disappointed that the Court did not adopt our position wholesale, on the other hand we are extremely pleased that it did not hold that minority voters must be able to elect representatives in proportion to their numbers.

Arrest in Man's Home Began Test of Georgia Law

ATLANTA, June 30 (UPI) — Michael Hardwick, the homosexual man who unsuccessfully challenged Georgia's sodomy law, has shunned publicity since the day a police officer saw him having sex with another man.

Mr. Hardwick has refused to discuss the case with news organizations. "He says this is a case about privacy and that's the way he wants to keep it," his attorney, Kathy Wilde, has said.

The police officer had gone to Mr. Hardwick's house on Aug. 3, 1982, to serve a warrant because he had failed to pay a fine for public drunkenness. The officer asked the man answering the door if Mr. Hardwick was home and the man said he was not sure, but told the officer he could check if he wanted to.

The officer walked down a hall to a bedroom where the door was ajar. He saw Mr. Hardwick, 29 years old, and another man performing oral sex. The officer arrested them both and charged them with sodomy, a felony under Georgia law punishable by up to 20 years in prison.

Challenge to Arrest

Mr. Hardwick challenged the arrest, asserting that the law violated his rights of privacy, due process, freedom of association and freedom of expression. The case was sent to Municipal Court and bound over to the Fulton County Superior Court. But Lewis Slaton, the District Attorney, said he would not submit the charge to a grand jury unless there was further evidence.

"We didn't know what he meant by further evidence," Ms. Wilde said, "but that left Michael in never-never land. The charge of sodomy could be reinstituted at any moment. That was the point at which he decided to challenge the law."

A Federal district judge initially dismissed the case on procedural grounds, but a three-judge panel of the United States Court of Appeals for the 11th Circuit ruled in May 1985 that the antisodomy law was unconstitutional.

"The Constitution prevents the states from unduly interfering in certain individual decisions critical to personal autonomy because those decisions are essentially private and beyond the reach of a civilized society," the ruling said.

Georgia officials decided to appeal the ruling, saying sodomy is an unnatural act and a crime against the laws of God and man. The state also said the law would help reduce the spread of acquired immune deficiency syndrome, a deadly disease that until recently had been associated mostly with homosexuals and intravenous drug users.

Mixed Responses in Georgia

Special to The New York Times

ATLANTA, June 30 — Georgia's Attorney General, Michael Bowers, said at a news conference today that the Supreme Court decision on the state's sodomy law was "appropriate."

But he added, referring to sexual conduct in Georgia: "I don't think it will change that dramatically. We've had sodomy laws on the books in this state since the 1840's."

Mr. Slaton, the District Attorney, said that in all likelihood, the Supreme Court's decision would not prompt prosecution of Michael Hardwick. He said that although the charges against Mr. Hardwick were dropped in 1982, they could be reinstated before the end of August, when they are to expire under the statute of limitations. He said, however, that he had no intention of reviving the case.

Gil Robison, an Atlanta lawyer who is a member of the homosexual lobbying group Atlanta Campaign for Human Rights, said in a telephone interview: "It's quite disappointing, a real step backwards. It's ironic that the conservatives who are interested in getting government off people's backs would applaud this."

Action in Legislature Possible

"I think our next step, probably our only step," Mr. Robison continued, "is to pursue it in the Legislature and try to get the law repealed. Here in the Bible Belt, that will probably be difficult. It's not just what the police will do, the nitty-gritty is this could affect a lot of aspects of people's lives. For instance, contracts between two gays living together. The law says a contract based on an illegal situation is illegal, void. What happens if a gay couple wants to buy a house together and they sign a contract? A court could rule that contract illegal. No one really knows what will happen."

Major J. E. Oliver, head of the Atlanta Police Department's division of crimes against property, which has administrative control over the vice division, said in a telephone interview: "I don't see where enforcement will be stepped up because of the decision. We've been enforcing the law all along."

"I don't see how I'd be in somebody's home, for example," Major Oliver added. "If I walk into somebody's home on some type of warrant and there's sodomy going on, well, we'll charge them. But just to walk into the home and charge someone with sodomy, I don't see where we'll do that."

Bill Gripp, a member of the board of the Atlanta Gay Center, said: "I think the decision is ridiculously inappropriate, very homophobic, very uninformed. The Supreme Court, made its decision based on who brought the suit rather than on the basis of the issue."

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The New York Times

Late Edition

Weather: Partly sunny and mild today, light, variable winds; mostly cloudy tonight. Partly cloudy, humid tomorrow. Temperatures: today 75-80, tonight 67-70; yesterday 61-80. Details, page C9.

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HIGH COURT, 5-4, SAYS STATES HAVE THE RIGHT TO OUTLAW PRIVATE HOMOSEXUAL ACTS

Privacy Law And History

60 Years of Expansion Interrupted by Ruling

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, June 30 — With its decision today that the constitutional right to privacy does not extend to homosexual conduct, the Supreme Court interrupted the expansion of the concept of privacy on which it embarked more than 60 years ago.

News Analysis

The 5-to-4 majority drew a sharp line of demarcation between those choices that are fundamental to heterosexual life — whether and whom to marry, whether to conceive a child, whether to carry a pregnancy to term — and the decision to engage in homosexual acts.

The heterosexual choices fall within the "zone of privacy" that the Court has defined, with greater or lesser clarity, in dozens of cases. The line stretches back to a pair of decisions in the mid-1920's that gave parents the right to make basic choices about their children's education, and more recently includes rulings on contraception and abortion.

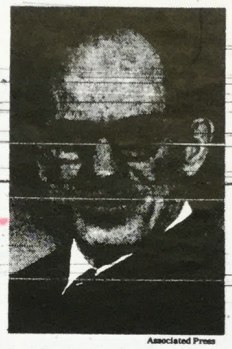
No Resemblance to Precedents

Writing for the majority today, Associate Justice Byron R. White canvassed those precedents and then observed, "We think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."

Arguments to the contrary, Justice White said, were "insupportable" and "facetious."

The Court looked to history for reasons that the constitutional boundary should be so immutable, why the zone of privacy should not extend to intimate relations between people of the same sex. Condemnation of homosexuality, Justice White wrote, has "an-

Continued on Page A19, Column 4



Associated Press

Associate Justice Byron R. White, who wrote the majority opinion.

DIVISION IS BITTER

Dissents Assail Ruling's Refusal to Extend the Privacy Guarantee

By STUART TAYLOR Jr.
Special to The New York Times

WASHINGTON, June 30 — A bitterly divided Supreme Court ruled 5 to 4 today that the Constitution does not protect homosexual relations between consenting adults, even in the privacy of their own homes.

The Court held that a Georgia law that forbids all people to engage in oral or anal sex could be used to prosecute such conduct between homosexuals.

The majority said it would not rule on whether the Constitution protected

Excerpts from opinions, page A18.

married couples and other heterosexuals from prosecution under the same law. Associate Justice John Paul Stevens, however, said in a dissent that such laws were "concededly unconstitutional with respect to heterosexuals" under the reasoning of previous Supreme Court rulings.

Weakens Legal Position

The decision is unlikely to curb the growing visibility of homosexuality as a fact of daily life in America, but it weakens the legal arguments of homosexual activists against various forms of discrimination.

This does not necessarily mean it would allow discrimination against homosexuals in other contexts. However, both homosexual groups and their opponents agreed the ruling would slow the advancement of homosexual rights. [Page A19.]

The announcement of the decision was unusually dramatic, with Associate Justices Byron R. White, author of the majority opinion, and Harry A. Blackmun, author of an impassioned dissent, both reading detailed passages from the bench.

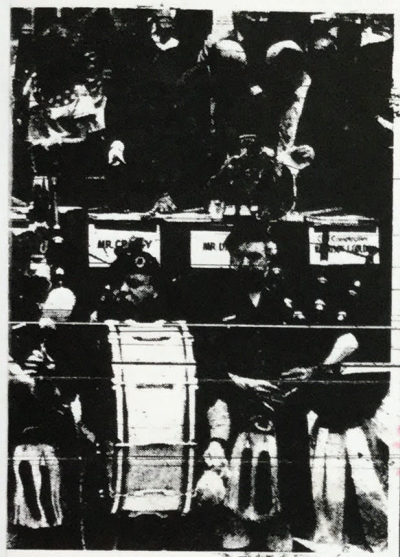
Limits Effect of Past Rulings

The ruling limited past Supreme Court decisions by rejecting what Justice White called the view "that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."

While the Court has previously upheld a vague right of sexual privacy for heterosexuals, it has never specified, and did not say today, whether that right protects oral or anal sex between men and women.

Criminal prosecutions for private sexual conduct between consenting adults are rare in the case of homosexuals, the Court noted today, and almost

Continued on Page A18, Column 1



The New York Times/Neal Boenzi

City's 'Fiscal Independence Day'

...end of the State Fiscal Control Board's power to approve city financial plans, as it has done since the mid-70's fiscal crisis. Guests included Comer S. Coppie, left, the board's executive director, and Governor Cuomo.

African Toll Rises Sharply; Federation Threatens Strike

By ALAN COWELL
Special to The New York Times

BURG, June 30 — The authorities said today ...ks died in violence in ...e weekend in what ap... of the worst episodes ...in the black township ...rnment's declaration of ...rgency.

...he authorities had few ...nce in Soweto, which ex... 10 years ago on June

...s biggest black labor ...nwhile, warned of im... ...spread and spontaneous ...around the country" to ...ntion of top labor lead... emergency decree im... 12.

...of State George P. ...ws conference aboard ...route to Washington, ...of a review of United ...n South Africa was to ...d apartheid and begin ...ks without damaging ...can economy. He said ...ent should not reverse ...olicy called construc... ...nt. Page A9.]

...ised the possibility that ...ould spread from black ...white areas. Since there ... in black areas, blacks ...n white areas, where a ...ect stores, businesses

...ent continued a crack-

down on foreign reporters, expelling a West German television correspondent. He was the fourth journalist ordered to leave South Africa under the emergency.

Plans to Appeal Order

The correspondent, Heinrich Buettgen, who works for the West German ARD channel, was told to leave the country by Thursday, the Government said, because his presence in South Africa was not in the public interest. No further explanation was given.

Mr. Buettgen, 55 years old, has been in South Africa more than three years. He said he would appeal the expulsion.

"I think my reporting was critical

Continued on Page A8, Column 1

Justices Uphold Partisan Lines In Redistricting

Special to The New York Times

WASHINGTON, June 30 — The Supreme Court ruled today for the first time that partisan gerrymandering of election districts violated the Constitution, but only when it was so severe as to "consistently degrade" a political group's influence.

The Court's 6-to-3 ruling is expected to open the door to new challenges to election districts around the nation.

But the Court voted 7 to 2 to uphold the Indiana legislative districts involved in the case, reversing a lower Federal court's decision striking down the state's 1981 redistricting plan. The lower court said Republicans had manipulated district lines to give themselves an advantage over Democrats.

Five other Justices joined Associate Justice Byron R. White in holding that courts could strike down sufficiently extreme partisan gerrymanders. Two of them said the Court should have struck down the Indiana plan.

Justices Are Divided

A different group of six Justices joined Justice White in holding that the lower Federal court had erred in striking down the Indiana plan. Three of these Justices argued that courts had no power ever to intervene in partisan gerrymandering disputes. The three said today's ruling would plunge courts into an unmanageable morass.

Justice White said that even though Indiana's Republican legislative majority had deliberately used the redistricting process to improve its own electoral chances, the gerrymander was not so severe as to violate the Constitution.

Stressing that "the mere lack of pro-

Continued on Page A17, Column 1

...aduates

New Restrictions on Immigration

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UNITED STATES REPORTS

VOLUME 478

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1985

JUNE 30 THROUGH OCTOBER 3, 1986

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1989

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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.

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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*.*

JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute crimi-

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*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*.

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nalizing 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).

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[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. . . ."

[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.

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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]

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[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).

[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).

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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

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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

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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

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[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).

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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

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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).

[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).

[Footnote 6 is continued on p. 194]

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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 repudi-

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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).

[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, ¶¶ 11–2, 11–3 (1983) (repealed 1984)). See American Law Institute, Model Penal Code § 213.2 (Proposed Official Draft 1962).

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ation 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 far 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

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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.

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

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

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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

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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.

[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).

[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.

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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 inti-

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mate 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

[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

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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."

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).

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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 Theatres, 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

[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 suf-

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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 dis-

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ficiently 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).

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tinct, 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

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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

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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 indefeasible right of personal security, personal liberty and private property.'" *California* v. *Ciraolo*, 476 U. S. 207, 226 (1986) (POWELL, J., dis-

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senting), 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

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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 pleadings, 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

[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

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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]

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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.

[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

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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 Theatre 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 scrutiny. 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

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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.

[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

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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 be-

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.

[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

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cause 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

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was, in Sir James Stephen's words, "merely ecclesiastical." 2 J. 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).

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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.

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[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 repugnancy, 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).

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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.

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]

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[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").

[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.

[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

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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,

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(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").

[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").

[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").

[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).

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

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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).

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[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.

[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).

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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

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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

[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*.

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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 the 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 representa-

[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").

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tions 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.

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[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.

[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).

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Richard Laermer, Interview: Michael Hardwick - The Man Behind the Georgia Sodomy Case. The Advocate. pp 38-41+ Sept 2, 1986.

Interview

MICHAEL HARDWICK

The Man Behind the Georgia Sodomy Case

When the U.S. Supreme Court ruled on June 30 that gay people have, in effect, no constitutional right to engage in same-gender sexual relations, no one was more dismayed than Michael Hardwick, the man who had launched the case—*Hardwick* v. *Bowers*—in the first place.

Four years ago, the then-29-year-old Hardwick was arrested for engaging in sex with another consenting adult male in Hardwick's own Georgia bedroom.

Since then Hardwick, who now works as a bartender in Miami, has faced considerable harassment: "I've put my place of residence, my electric bills and my phone bills in other people's names, because I was worried that some psychotic opposed to gay rights might try to track me down."

Throughout his ordeal, Hardwick has largely avoided being interviewed by the

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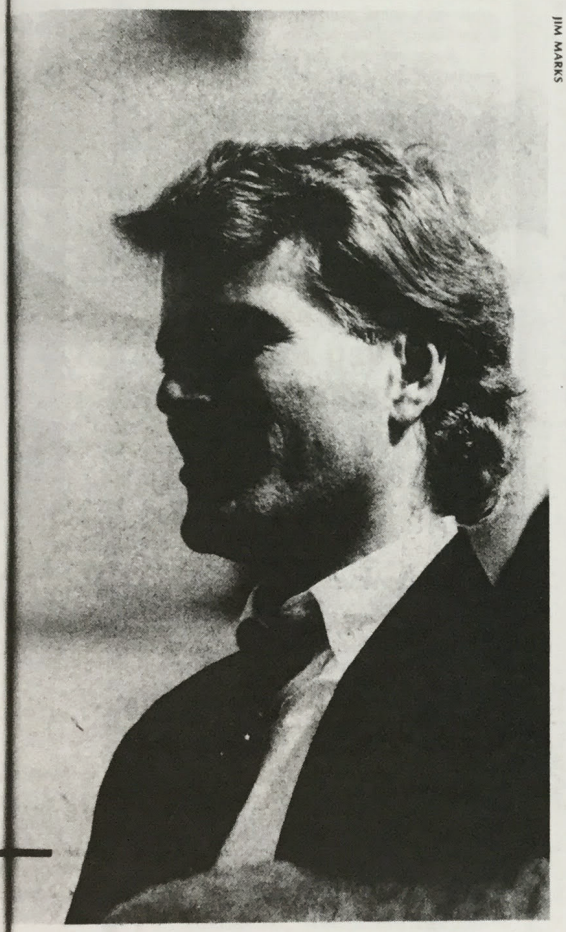

JIM MARKS

media. ("We wanted to make sure that when the case came up, it would be considered on the issue itself, and not on my personality or the private aspects of the situation.") Recently, however, he did speak at length with Richard Laermer, a free-lance writer and frequent *ADVOCATE* contributor, about his arrest, the case and the stunning judicial outcome.

Here is what he had to say:

Were you surprised at the outcome in the Supreme Court?

I never expected it to go this way. When I started the whole thing, I thought the laws were archaic and long overdue to be revised. I thought I was simply going to be the person with the proper situation to sort things out. They [legal activists] had been waiting 10 years for a test case where it was two consenting adults in the privacy of their own bedroom.

How did your arrest for sodomy come about?

The whole thing started because I was putting in a sound system for a gay late-night bar that was getting ready to go disco. The night I was putting in the lighting system, I left the place at six in the morning. On the way out I took a beer and opened the door of the club. I walked out with the beer and saw this cop driving by about 40 feet away. And I immediately dropped my beer into the trash can.

I got about a block and a half away, and the cop drove by and asked me where the beer bottle was. He also wanted to know why I was leaving the bar at that time of the morning. He knew it was a gay place. I told him I was working there, so I guess he immediately made the assumption that I was gay. He proceeded to tell me that he had seen the beer, and he put me in the back of the car and went to look around the area for the bottle.

I realized I was in trouble — so instead of arguing, I told him to go ahead and give me a ticket for drinking in public. In Atlanta, they write the court date on the ticket. He wrote down a date and noted at the top of the ticket that it was on a Wednesday; as it turned out, it was actually on a Tuesday.

A few weeks later, the date came up. The officer *personally* processed a warrant for my arrest; my understanding is that it was the first time that had happened in 10 years. So he came to my house the same day [when the court appearance was actually supposed to take place; Hardwick missed the appearance because of the mistake on the ticket].

I wasn't at my place when the guy came for me — two hours after my 12 o'clock court date. I got home about 3 o'clock, and my roommate said there had been a cop with a warrant. I went down to the municipal court building immediately, and the county clerk, who saw the mistake on the ticket, brought it before the judge, who said, "OK, as long as he's here, we'll take care of it." I was fined like. . . $50. I paid it. So I thought everything was OK.

Twenty-one days later. . . my mother had come to visit me, and I was using her car and had gotten home at six in the morning. I pulled up in front of my house, in a residential area of Atlanta. When I locked the car there were three straight men with short haircuts standing in front of me. They never said a word. They proceeded to tear the

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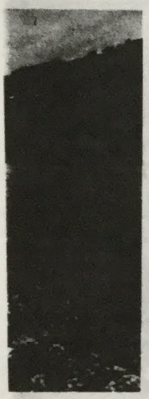

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cartilage out of my nose. They broke my ribs. But they never said a word.

Who were they?

I don't know for sure who they were, but I have a good idea. I don't want to speculate publicly, however. Anyway, I crawled into my house, hoping my mom wouldn't see me. She saw the blood trails and, needless to say, was very upset.

That night I had a friend come in from North Carolina who was applying for a government position in Atlanta. We got home early the following morning—at 6 o'clock. My roommate left for work at 7:30, and a house guest, a friend, was staying on the couch. Just after my roommate left, the same cop [who had arrested me] came into my house with an invalid warrant for my arrest. [The officer was supposed to verify the warrant before serving it, but he had failed to do so.]

"As long as the laws are on the books, gay people are especially in jeopardy."

Did the friend on the couch, the house guest, tell the policeman it was all right to come in?

No. The cop came up to the house while I was in my bedroom and didn't know what was happening. Apparently, when the cop knocked on my door, my house guest, who was asleep and dazed, didn't know what was going on.

The cop said, "Where's Michael Hardwick?" My friend answered, "If he's here, he's back there in his bedroom." So the cop proceeded to walk through the house to my bedroom. The door was ajar.

The cop stood there for like. . . 35 seconds while I was engaged in mutual oral sex [with the man from North Carolina]. When I looked up and realized he was standing there, he *then* identified himself. He said I was under arrest for sodomy.

I said, "What are you doing in my bedroom?"

He said he was acting under good faith, had a warrant for my arrest, and that I was under arrest for sodomy.

But the warrant was invalid.

I told him I had a receipt that said the warrant was invalid, but he said he was acting under good faith. Meaning, regardless of whether or not the warrant was invalid, he was coming to serve it, and I was under arrest for sodomy. He had found something else [besides what was on the warrant].

There's more. I had a quarter of an ounce of marijuana in my bedroom, which was a possession misdemeanor charge. He arrested us both [Hardwick and his friend] and put us in jail. He made sure to bring to the booking guy's attention the fact that I was in there for sodomy. At which point he took us to a holding cell and told all the other guys we were in there for sodomy.

There was somebody to get me out within an hour, but it wound up taking him 12 hours to get me out. The cops kept putting me on different levels of the Atlanta jail. Every time they put me on a different level with different prisoners, they would let them know I was in there for sodomy. They made jokes about putting me in the bullpen [where serious criminals are held]. . . because they said I should have a good time in the bullpen.

I kept thinking I was about to get gangbanged, and I was scared to death. Because they were letting everyone know that. . . here's some fresh meat.

Were you determined to fight the sodomy law from the beginning?

Initially, I could've had the whole thing thrown out because the warrant was invalid. But in order to be a test case, they [the attorneys] pushed me *not* to have the charges thrown out. The ACLU contacted me, and all these lawyers told me I had to have a conviction from the superior-court level in order to be a test case. They did say that the worst thing that could happen was that I'd go to jail for 20 years. My mother freaked; she wanted me to drop the case. Against her words of wisdom, I decided to do it anyway.

It would have been too convenient just to walk away. It would have been a lot *easier*, but I knew that I had to live with myself. My attorneys told me that the circumstances that happened to me would make a perfect test case. They said that if I pursued it, I could possibly change the law. So I said OK. I had no idea how involved it would all get.

Did you think you really might go to prison?

No. From the beginning I never really thought that anything like that would happen.

But the 12 hours you spent in jail. . .

I've had people say to me, "You've got balls doing what you're doing." I want to say to them, "Had you gone through the experience I went through when I was in

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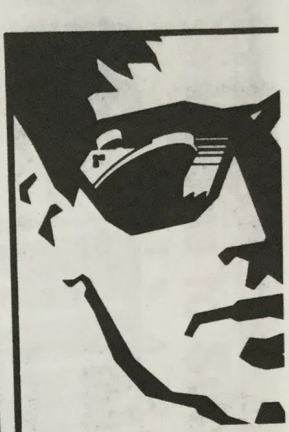

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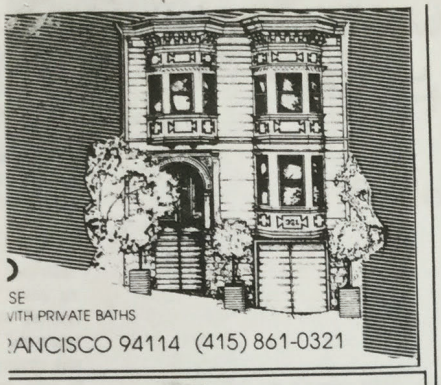

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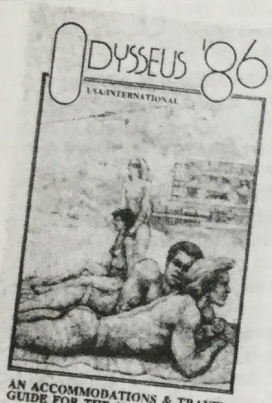

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(CONTINUED FROM PAGE 41)

jail. . ." [he stops] "...if you thought you had a *possibility* of doing anything to prevent that from happening to anyone else, you really wouldn't feel good about yourself if you just walked away from it."

How did you learn of the Supreme Court's ruling?

We had to wait three months for the decision [after the arguments]. The day of the decision, I had gone to work early, and my lawyer didn't call me because she was waiting until my normal work schedule began. A friend of mine learned of the decision on cable [television news], and he came to tell me. He was crying, and I couldn't understand why. When he told me, I couldn't believe it. I thought. . . "God, it was all for nothing!"

"I think my rights as a human being have been violated."

Do you regret the whole thing?

[He chokes up momentarily.] No. I feel very strongly about this country. Otherwise, I wouldn't be pursuing this issue. I think my rights as a human being have been violated. I have the ability to go to the courts and say, "I have rights. They're in the Constitution, and they're being violated."

I've received so much support since the decision. *Newsweek* ran a poll that showed 57% of the nation was opposed to the decision. That gave me encouragement; the straight majority around the country obviously feels there was a major injustice here. I appeared on the *Donahue* show and received an enormous amount of support. And there have been many rallies and telegrams supporting me.

Some gay people think the whole issue would have been better left alone. What do you say to them?

Some gays may think that if they just ignore the situation, it will go away. But the point is, the sodomy laws are on the books. They're *not* just going to go away. The laws enable the police to come into the bedrooms of heterosexual, homosexual, married, nonmarried. . . whatever. . . couples. That's what I think the *Newsweek* poll showed: *All* sorts of people are afraid of the way these laws can be used. As long as the laws are on the books, gay people are especially in jeopardy. If they don't realize it, all I can say is, "Wake up!"

—Richard Laermer

10 Reasons to Subscribe to *The ADVOCATE*:

#6 — IT'S A GAY THING

BY DONELAN

Wit and wisdom from the pen of cartoonist Donelan.

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Robinson, David. "Sodomy and the Supreme Court" Commentary 82 pp 57-61 October 1986

Sodomy and the Supreme Court

David Robinson, Jr.

UNTIL 1961, sodomy—which takes its name from the biblical report of the city of Sodom, destroyed by fire and brimstone because of the wickedness of its men—was a crime in every American state and in the District of Columbia. Nevertheless, the influential American Law Institute had recommended that state legislatures decriminalize what it called "deviate sexual intercourse" between consenting adults, largely on the grounds that such behavior did not appear to harm the secular interests of others. Over the past twenty-five years, about half of the states have followed this suggestion, although a repeal effort in the District of Columbia was overwhelmingly rejected by Congress.

Meanwhile, American society was witnessing a rising openness and assertiveness among homosexuals and groups representing them, accompanied by attempts to gain and use political power. Politicians responded to this newly-visible, articulate, and politically significant group of voters by appearing at meetings and rallies of homosexual organizations and undertaking to support their goals. In its 1980 and 1984 platforms, the Democratic party pledged itself to support homosexual rights. Obvious targets of the efforts of homosexual groups were the sodomy statutes and other similar proscriptions of criminal law. They also mounted a successful campaign against medical stigmatization. Following a number of demonstrations and disruptions at the annual meetings of the American Psychiatric Association, for instance, a majority of the members voted in 1974 to declassify homosexuality as a mental disorder; in the absence of a desire by the individual to become heterosexual, homosexual behavior was henceforth to be regarded as simply a manifestation of a preference, not as mad or bad.

The United States Supreme Court, during this same period of time, had begun to develop a constitutional right of privacy—although that word is not mentioned in the text of the Constitution. The first step was the invalidation of a Connecticut prohibition on the use of contraceptives by married persons. Then the new principle was expanded to strike down limitations on the furnishing of contraceptives to unmarried persons, as well as some qualifications of the right to marry and divorce. Most famously, in 1973, in *Roe* v. *Wade*, the Court extended the new privacy doctrine to invalidate state statutes which prohibited abortions during the first two trimesters of pregnancy.

Once the right of pregnant women to privacy was found to override the interest of a state legislature in protecting fetal life, it seemed to follow that private homosexual acts should also be protected against the largely moral, religious, and aesthetic values which underlay the sodomy laws. Yet in 1976 an effort to declare a Virginia sodomy statute unconstitutional on these grounds was summarily rejected by the United States Supreme Court. In 1980, however, New York's highest court held that a similar statute violated the federal constitutional right to privacy, explaining "there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct."

But while these social, political, and legal processes were taking place, another element entered the picture. In 1981, a group of Los Angeles physicians reported the diagnosis of a rare form of pneumonia in a group of previously healthy homosexual men. Their immune systems had also become weakened. Soon additional reports were received of uncommon infections and cancers among homosexual men, as well as among intravenous drug abusers and recipients of blood transfusions. The diagnostic term AIDS (an acronym for "acquired immune deficiency syndrome") was applied before the infectious agent which was the underlying cause of the illness was discovered.

Much has been learned in the relatively brief period of time since the initial reports. AIDS is now viewed as a terminal stage in a viral infection which initially produces an asymptomatic carrier state (in which the individual is infected and presumptively infectious to others but is not clinically ill); this may then progress to AIDS-related complex (ARC), characterized by non-lethal illness from the infection, and/or to AIDS itself. Currently it is estimated that between one and two million Americans are infected with the

DAVID ROBINSON, JR., here making his first appearance in COMMENTARY, is professor of law at George Washington University.

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virus, a number which may be increasing at the rate of one- to two-thousand people per day. More than 23,000 people have experienced full AIDS, and over half of these have already died. The Public Health Service predicts that by 1991 there will be a cumulative total of 270,000 AIDS cases in the United States and 179,000 deaths. These projections may well be underestimated.

The statistical profile of the infected population in the United States has remained remarkably constant, with homosexual men constituting almost three-fourths of the victims. This appears to be related to relatively common male homosexual practices, particularly anal intercourse and multiple sexual partners. Although heterosexual transmissions are much less common, they too are beginning to rise significantly, and casual sexual contacts between men and women are likely to become increasingly risky.

For a variety of reasons, including the proclivity of the AIDS virus to mutate rapidly and its ability to cross the blood-brain barrier to attack the brain, the prognosis is poor for effective vaccines or therapy in the near future. What will happen over the longer term cannot be predicted with assurance, but the tasks of scientific development and testing are extraordinarily formidable ones. In the meantime, the main hope for curbing AIDS would seem to lie in a reduction of behavior associated with the transfer of the infection.

ALL of this is related to a case, *Bowers* v. *Hardwick*, recently decided by the Supreme Court. The case developed as follows.

On August 3, 1982, an Atlanta, Georgia policeman went to the home of one Michael Hardwick to serve a court warrant for his arrest in connection with a minor liquor offense. A house guest invited the policeman in, whereupon the officer unexpectedly observed Hardwick having sexual relations with a third man. Although sodomy is a crime in Georgia, the District Attorney's office declined to prosecute. Hardwick himself, however, took action: he filed a civil lawsuit in federal court, alleging that he was a "practicing homosexual, who regularly engages in private homosexual acts and would do so in the future," and requesting that the Georgia sodomy statute be declared unconstitutional.

The District Court dismissed the action as inconsistent with United States Supreme Court precedent in the 1976 case referred to above. But the United States Court of Appeals reversed this ruling. The majority held that the constitutional right of privacy did apply to sodomous homosexual behavior, and that, to prevail, the state of Georgia would be required to prove both that it had a compelling interest in regulating such behavior and that the statute was the most narrowly drawn means of doing so. While the Court of Appeals did not explicitly declare the Georgia statute invalid, the burden placed on its defenders was a heavy one. Only rarely has a statute survived such a challenge.

Michael Bowers, the Attorney General of Georgia, petitioned the U.S. Supreme Court to review the decision of the Court of Appeals. Last November his request was granted. At that time I was engaged in a study of what the legal system might do to assist in responding to the AIDS crisis. I felt that this catastrophe provided an extraordinary justification for not extending constitutional protection to sodomous behavior, but I was unsure whether the issue would even be raised in the Hardwick case. To find out, I telephoned Bowers's office and spoke to the Assistant Attorney General who was handling the case, one Michael Hobbs. Hobbs informed me that he did not intend to raise the AIDS issue before the Supreme Court. He also mentioned that Hardwick would be represented by Laurence Tribe. Tribe is the Tyler Professor of Constitutional Law at Harvard Law School, the author of an important book, *American Constitutional Law*, and probably the most celebrated of the advocates who have frequently presented cases before the U.S. Supreme Court in recent years. Michael Hobbs, his prospective adversary, would be making his first appearance before the Supreme Court.

I then wrote to the U.S. Solicitor General, Charles Fried, in part as follows:

> I have noted with great interest that the Supreme Court has decided to review the decision in *Hardwick* v. *Bowers*, placing in question the continued validity of a Georgia sex-neutral sodomy statute. My concern is primarily with the public-health aspects of the decision, which clearly strongly impact on many federal programs such as research efforts of the National Institutes of Health and the Centers for Disease Control, Medicare, Medicaid, military personnel policies, et cetera. Obviously such statutes can be directly enforced not in situations of truly private conduct, but in situations such as sexual activity-facilitating bathhouses and bars where the risk of rapid contagion is at its highest. It would be tragic if public-health measures were impeded by a Supreme Court decision which did not give adequate consideration to the health issues which are inevitably involved. . . . I pray that you will file an *amicus* brief raising the public-health concerns. . . . Every case prevented will save a human life.

Fried responded by letter, stating that as a matter of policy he would await the recommendation of a federal division or agency before filing a brief; he suggested that the Department of Health and Human Services (HHS) might be interested. I telephoned the office of the general counsel of HHS and was informed that they were in the process of changing leadership. While a subordinate of the new general counsel expressed considerable interest in the problem, nothing could be committed. It was apparent that the lim-

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ited time available for filing *amicus* briefs in favor of the petitioner would soon be over. Convinced of the importance of assembling the relevant epidemiological material for the Court's consideration, I decided to file on behalf of myself, which I did. In addition to my own effort, Georgia was supported by several other *amicus* briefs, primarily by religious organizations.

It was now time for supporters of Hardwick to file their briefs. I was surprised to hear that the American Public Health Association (APHA), the nation's largest organization of public-health physicians, nurses, educators, and other health professionals, was likely to join the American Psychological Association (APA) in support of Hardwick. To determine if this was correct I telephoned the APHA and was referred to Katherine McCarter, associate executive director. She confirmed the fact, adding that she felt the Georgia statute was *discriminatory*. (I was later told by physicians that this sort of approach is not atypical of APHA.) Miss McCarter also cited for my information an APHA statement of general policy—which antedated by nine years the first reports of AIDS. She did, however, agree to look at my brief, and I enclosed it in a letter in which I said that although I could understand how an organization dedicated to placing the highest value on civil liberties, irrespective of the cost in terms of health, might well support a constitutional right to engage in sodomous behavior, I could not understand how an organization dedicated to safeguarding the nation's health could do so.

I was unsuccessful. The APHA, in its brief with the American Psychological Association, supported Hardwick. They wrote: "The sexual conduct prohibited by [the Georgia statute] is not pathological; that is, it is not detrimental to the individual's happiness or functioning. . . . Indeed, *repression* of desires for such expression can lead to dysfunction and pathology." And elsewhere (in a portion written by the APA), the brief states: "As noted, oral and anal intercourse are not harmful or pathological. In fact, they substantially benefit many people, both heterosexuals and homosexuals, and many relationships." The two organizations also specifically attacked my brief, stating that "consensual sodomy laws deter at most a negligible amount of overt homosexual behavior. As a result, even with respect to that subset of sexual conduct prohibited by the statute that does pose a risk of spreading AIDS, the statute has no beneficial public-health effect."

In other words, (a) insofar as the Georgia statute discourages some homosexual activity, it jeopardizes health; and (b) the statute is dysfunctional because it does not discourage homosexual activity!

Hardwick was also supported by the Attorneys General of California and New York. California has no sodomy statute. New York's sodomy statute, although declared unconstitutional by the New York Court of Appeals in the 1980 case, has never been repealed; in effect, *Bowers* v. *Hardwick* presented an opportunity for U.S. Supreme Court review of that ruling. Normally, in the Anglo-American adversary system, attorneys consider it their duty to support the position of their clients, rather than volunteer their own judgment as to how a case should be decided. In supporting Hardwick, however, the New York Attorney General, Robert Abrams, in effect gratuitously attacked his client (New York State), whose policy on the issue had been determined by its legislature. (In Texas, too, where a similar sodomy statute was being constitutionally challenged in the federal courts, Jim Mattox, the Attorney General of the state, not only refused to defend the statute before the intermediate appellate court, he also attacked the authority of a district attorney who did successfully defend it.)

In addition to the briefs of the Attorneys General of California and New York, the APA, and the APHA, Hardwick was supported by an army of homosexual and civil-rights organizations, including the Lambda Legal Defense and Educational Fund, Gay and Lesbian Advocates and Defenders, the Bar Association for Human Rights of Greater New York, National Gay Rights Advocates, Lesbian Rights Project, Women's Legal Defense Fund, Bay Area Lawyers for Individual Freedom, Los Angeles Lawyers for Human Rights, the Massachusetts Lesbian and Gay Bar Association, and other groups. Some religious and additional professional organizations also supported Hardwick.

On March 31, 1986 *Bowers* v. *Hardwick* was the first case orally argued before the Supreme Court. Tribe was joined at counsel table by another member of the Harvard law faculty together with an attorney from the American Civil Liberties Union of Georgia. Alongside Michael Hobbs was a more senior Georgia Assistant Attorney General. To an observer it seemed unlikely that Justices William Brennan and Thurgood Marshall—or, on the other side, William Rehnquist and Chief Justice Warren Burger—would have much difficulty with the case. The question was likely to be resolved by the five Justices in the middle.

Michael Hobbs did not use all of his allotted time for argument. He ignored the AIDS problem, and, in response to questions from Justice John Paul Stevens, he unnecessarily conceded that the Georgia statute was unconstitutional in part. (Some members of the Court seek such concessions and sometimes rely upon them in their opinions, although counsel for the states are not authorized to make them even on behalf of their own state, let alone the other states which are affected by the decisions of the Court.) Tribe argued brilliantly, explicitly seeking only a very narrow ruling

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requiring heightened scrutiny of proscriptions against consensual adult sodomy in the privacy of the home. Once established, such a principle could be readily expanded in later cases. Epidemiological concerns were raised only by Justice Sandra Day O'Connor, in a question to Tribe at the end of his presentation. He replied by immediately citing from memory relevant pages of the APA/APHA brief.

It has become a common phenomenon in litigation before the U.S. Supreme Court that publicly-employed attorneys for the states come up against lawyers affiliated with national organizations seeking to mandate social change. Not only are these latter proponents of new constitutional doctrine generally better prepared to present effective briefs and arguments; they can also choose cases with the most "sympathetic" facts, such as an arrest in the bedroom of the client's home. The result of such an imbalance is not simply regettable for those interested in observing a close game. Courts are greatly assisted if the issues to be decided are brought into focus by powerful presentations on both sides. It does not slight Michael Hobbs, who spoke with modesty and sincerity in what was his first Supreme Court presentation, to observe that in *Bowers* v. *Hardwick* this did not occur.

In the same week in which a case is argued before the Supreme Court, the members of the Court confer and tentatively vote their decisions. The contents of that meeting are ordinarily a closely held secret—but not, apparently, in the case of *Bowers* v. *Hardwick*. After the decision was publicly announced, the Washington *Post* reported that the initial vote had been five to four in favor of Hardwick, but Justice Lewis Powell had subsequently changed his mind and joined with the four other Justices who held that the constitutional right to privacy did not prevent Georgia from proscribing homosexual sodomy. The reason for this switch was unknown to the *Post*'s informant. In the St. Louis *Post-Dispatch* a columnist speculated that the statute was sustained because of the AIDS epidemic, but we are unlikely ever to learn whether this was so.

THE majority opinion was written by Justice Byron White. In sustaining the Georgia statute as applied to homosexual sodomy, the situation presented by Hardwick, the opinion relied on the historical ubiquity of sodomy laws, the absence of constitutional text supporting the view that such laws are invalid, and the permissibility of statutes reflecting moral choices. Justice White pointed out that the prior cases involving the issue of constitutional privacy had dealt only with personal decisions relating to marriage, childbearing, child-rearing, and education. His opinion did not resolve other possible constitutional challenges (although it also did not encourage them).

Justice Powell, the Court's leading advocate of the view that criminal punishments must be proportionate to the crime committed, filed a concurring opinion. Noting that the Georgia statute carried a maximum of twenty years' imprisonment, he hinted that any substantial prison sentence would in his view constitute cruel and unusual punishment.

Justice Harry Blackmun, the author of the 1973 abortion decision, wrote a passionate dissent, emphasizing the interests of liberty and the concerns of privacy in an opinion which strikingly invoked the liturgies of autonomous hedonism. In a footnote he referred to the epidemiological issues which I had attempted to raise, but suggested that since they involved disputable facts, they should not be considered by a court prior to trial. This is true as a general rule when the facts in question refer to the particular case being litigated—for example, what was Hardwick doing at the time of his arrest?—but not when the facts are relevant to the constitutional issue before the Court—for example, what would be the effect on the struggle against the AIDS epidemic of a constitutional protection of sodomy? The propriety of presenting and considering factual information of the latter sort has been accepted since 1908, when an attorney by the name of Louis D. Brandeis filed the first "Brandeis brief." Indeed, the very disputability of such facts can form the basis for a decision by a court not to impose a single command upon the nation but to leave a given issue to the other branches of government and to the states for their varying conclusions.

ALTHOUGH some critics of the decision in *Bowers* v. *Hardwick* have reacted as though it signals the end of sexual privacy in the United States, its direct applicability to that concern is not large. Privacy in matters of intimate sexual behavior is already strongly protected by the Fourth Amendment, which specifically defends the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." The Court has rigidly and increasingly restricted police searches of the home. The invitation by Hardwick's house guest to the policeman that he look around the house, at the very time that Hardwick was engaged in a violation of the Georgia statute, was an extraordinary occurrence. Furthermore, the disinclination of the Atlanta prosecutors to proceed with the case reflects the usual practice both in Georgia and elsewhere when there is no violence, exploitation, commercialization, or public display in sexual behavior. These patterns of tolerance are likely to continue.

The decision of the Court is also consistent with democratic values, since it allows the states the freedom, through their elected legislatures, to express varying views with respect to the permissibility of behavior not clearly protected by the language or history of the Constitution.

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True, the decision in *Bowers* v. *Hardwick* did deny advocates of homosexual rights the symbolic message which they were primarily seeking: that homosexual practices are protected by the highest authority in the land, and that those practices are as deserving of respect (and possibly encouragement) as heterosexual practices. But from the epidemiological point of view the denial of that message of approval may also be the case's most useful contribution, as Americans struggle to develop attitudes that will help fight the spread of AIDS.

In their brief in support of Hardwick, the APHA and APA suggested that sodomy statutes "may" interfere with educational and treatment efforts. States which are of that view are of course free to decriminalize. Yet states taking the opposite view are relying less on the (unlikely) prospect of punishment as a deterrent than on the inhibiting power of publicly proclaimed community norms. A number of years ago, in the course of working on another constitutional case before the Court, I reviewed the striking empirical literature correlating alcoholism rates with the moral attitudes of different groups toward drinking to the point of intoxication. To the extent that law encourages such community-wide attitudes and values, there is a hope that voluntary behavior may be affected accordingly. To take an illustration from another realm, civil-rights law enforcement has almost surely influenced how people voluntarily treat their fellow human beings. In this there is a lesson for state officials and legislators seeking ways to reduce through law the alarming transmission of AIDS infection.

Bowers v. *Hardwick* will also be helpful in preserving subsidiary legal strategies, such as closure of sex-facilitating bathhouses and bars, and in attempting to reduce the incidence of prostitution, both homosexual and heterosexual. In San Francisco, defenders of the bathhouses, which provide opportunities for multiple-partner, anonymous sex, presented the same constitutional-privacy arguments as were made in support of Hardwick. In New York, following its 1980 decision constitutionally protecting sodomy, the Court of Appeals, using the same rationale, struck down a statute prohibiting loitering in a public place in order to engage in or solicit sodomy. One hopes that courts and other decision-makers may now be less likely to reject such measures.

True, the level of courage shown by many public officials—including health officers—has thus far been disappointing, but if there is any basis for optimism with regard to future policy, it rests, ironically, in the tragically widening scope of our present epidemiological crisis.

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"Old Rights, New Rights" America 155:41 Ag 2-9, 1986

Editorials

Old Rights, New Rights

In the last week before its summer recess, the U.S. Supreme Court upheld the constitutionality of a Georgia statute forbidding sodomy. The case was initiated by an admitted practicing homosexual whom the Georgia authorities had declined to prosecute. A married couple tried to join as plaintiffs but were excluded because there was no real threat that they would ever be prosecuted under the statute.

By their judgment in this case, five Justices have most deliberately decelerated the evolution of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court did the same thing in 1938 when it stopped using the Due Process Clause to invalidate legislation aimed at economic and social reforms. But in announcing the renewal of its deference to Congress and the state legislatures in those areas, the Court cautioned that it might not be so deferential with legislation touching personal liberties or discriminating against politically powerless minorities.

During the last 40 years, the Court has indeed shown itself vigilant in the protection of minorities and of personal rights. The Court has done its utmost to give reality to the constitutional promise of racial equality. At the same time the Court has turned the Bill of Rights' brief description of long-claimed liberties into an extensive treatise on the personal rights of all Americans.

Some of the most controversial of the Court's more recent decisions have dealt with sex. Like education, sex is not mentioned in the body of the Constitution. Sometimes the Court can find a connection between these topics and something specifically mentioned in the Constitution (religion or race, for example). But when the Court cannot find a specific connection, the Justices must rely on the great generalities of the Due Process and Equal Protection clauses.

In the last 20 years, the Court has broken considerable new ground with these clauses. The promise of equal protection now embraces sexual as well as racial equality. The promise of due process now forbids laws against interracial marriages, against the use of contraceptives and, in most cases, against abortion.

Many have wondered where the Court would stop. Emboldened by the Court's constant expansion of the right of privacy" (another word that does not occur in the Constitution), homosexuals have made repeated attempts to persuade the Court to hold that the Constitution protects their conduct at least in private and between consenting adults.

Ten years ago the Court summarily rejected one of these attempts. Now, in Bowers v. Hardwick, the Court has given full consideration to the arguments and held explicitly that there is no "fundamental right to engage in homosexual sodomy." The Court has also held that majority sentiments about the morality and acceptability of homosexual conduct are an adequate basis for the criminal prohibition of homosexual sodomy.

The Court's opinion sounds no signal of retreat from its earlier decisions concerning sexuality and the law, but the opinion is a clear-cut and emphatic refusal to maintain the momentum that the "right of privacy" had acquired in recent years. Justice Byron R. White's opinion for the Court is brief, even terse in parts, but there is one paragraph that he and the four Justices who joined him obviously uttered with the greatest deliberateness:

> "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 of much of the substantive gloss that the Court had placed on the Due Process Clause 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."

In leaving the criminality of homosexual sodomy to the state and Federal legislatures, the Court has left the question where it has always been. Only 24 states and the District of Columbia still outlaw such conduct when performed in private and between consenting adults. The wisdom of such laws is certainly open to debate. But as the Supreme Court has wisely said on more than one occasion, the ballot box—not the Constitution—is our protection against unwise laws.

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"The Purpose of Privacy" The New Republic 195: 04 July 28, 1986

TRB®

FROM WASHINGTON

THE PURPOSE OF PRIVACY

Free speech is right there in the Constitution. Sodomy is not. Nevertheless, in the Supreme Court term that just ended, liberals cheered the Court for allowing the government to ban certain kinds of advertising, and booed the Court for allowing the government to ban homosexual sodomy. Meanwhile Justice Byron White, whose decision in the sodomy case incorporates a sermonette about the danger of activist judges overturning government policies with "ancient roots," also wrote the decision authorizing judges to overturn extreme partisan gerrymandering—a practice with equally ancient roots in our republic.

Then there's the Reagan administration, which usually can be heard carrying on about federalism and getting the government off people's backs, but now is heard fretting about the Court's repeated refusal to interfere with private and local government affirmative action plans. Finally, on the last day of the term, we have four justices who had joined White's plea against activism in the sodomy case (led by Chief Justice Warren Burger, in his swan song) voting to toss out the most important piece of legislation of the past year, the Gramm-Rudman budget act, because of a never-used technicality in a 65-year-old law about who can fire the comptroller general.

The point isn't that everyone's a hypocrite when it comes to the Constitution, though that's pretty close to being true. The point is that the purpose of having a Constitution in a democracy is to use it from time to time, and using it means judges thwarting the will of the majority. If a majority already supports something, invoking the Constitution is redundant.

A "restrainer" can win the first round of almost any constitutional argument by saying, "show me where it says anything about 'x' "—sodomy, gerrymandering, advertising—"in the Constitution." But this gets tiresome. Even the basic principle of judicial review—the power of judges to throw out laws they find unconstitutional—is not obvious from the plain words of the document itself. It was an initial bold act of interpretation by John Marshall in 1803 that has since evolved into a tradition and an institution, in a process that conservatives especially should feel comfortable with. This isn't a license for judges to do whatever they want under the Constitution. It's simply a recognition that they must do *something*.

Given the need for some amount of literary exegesis in interpreting the Constitution, it's not so farfetched to find a protection of sexual privacy in the Fifth Amendment's magisterial invocation of "liberty," combined with the Fourth Amendment's quite specific assertion of a "right of the people to be secure in their persons [and] houses ... against unreasonable searches and seizures." On the other hand, it may not be impossibly stinting to see these grand phrases as applying only to political freedoms and criminal procedures.

What *is* logically impossible is the law as the Court now leaves it, under which the Constitution protects people's right to practice birth control, miscegenation, abortion, and even perhaps (according to a footnote in the most recent case) heterosexual sodomy, but not homosexual sodomy. Justice White quotes some pretty flowery phrases about why the Constitution applies to one thing and not another. But I would love to hear his explanation of how heterosexual sodomy is "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [it] were sacrificed," whereas homosexual sodomy is not.

Of course you have to draw the line somewhere. But in extending the reach of constitutionally protected sexual privacy, this is a very bad line to draw. Just as in the area of free speech, you don't need the Constitution to protect what's conventional and popular. You need it to protect what's unconventional and unpopular. A constitutional protection that only applies to opinions or sexual practices that aren't offensive to the majority is worthless.

This ruling makes the Court's notorious 1973 abortion decision look even more bizarre. (Maybe that's the idea.) Unlike abortion, sodomy between consenting adults in private involves no even arguable harm to any third party. Justice White doesn't even attempt to explain what legitimate, let alone compelling, interest the state might have in preventing it. The abortion decision plunged the Court into a morass of regulatory detail involving pregnancy trimesters and questions of fetal movement—implausible matters to find in the Constitution. A plain declaration that private sexual practices are no one else's business, by contrast, would have the classic constitutional virtues of clarity and simplicity. Finally, the abortion decision actually did run roughshod over the policies of many states. Sodomy laws, by contrast, are virtually unenforced. Ironically, for all of White's talk about "deeply rooted" taboos, our society has already made its decision about private consensual sodomy.

In his eloquent dissent, Justice Blackmun quotes a famous dissent by Justice Brandeis. This case is not about a right to commit sodomy, he says, but rather about "the right most valued by civilized men, the right to be left alone." That's pretty good. But I think the Court came closer to the real issue in its 1967 decision invalidating state laws against miscegenation (also widespread and "deeply rooted" at the time), when it invoked an even more famous phrase: "the pursuit of happiness." During the Liberty Weekend hoo-ha, I heard two conservative commentators on TV invoking this beautiful phrase as a justification for some of the celebratory excesses. But if the right to pursue happiness only extends as far as celebrating liberty too hard on the Fourth of July, what we're celebrating isn't very meaningful.

The right to pursue happiness is held to be "self-evident." Equally self-evident—as every member of the Supreme Court surely knows from personal experience—is that the pursuit of happiness is not an easy one. It's hard to be happy. That's why if a person, or two people, or three people and a billy goat find a way to be happy that strikes most other people as peculiar, or even revolting, that's hardly reason enough for the government to thwart them. They're only trying to find an answer to the question we're all trying to answer in our own ways.

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G.J. Church. "Knocking on the Bedroom Door" in Time 128:23-4 July 14, 1986

overturn the consent decree. By a 6-to-3 vote, the Justices ruled that lower-court judges do have broad discretion to approve such consent decrees remedying past discrimination.

"This decision," said Cleveland Mayor George Voinovich, "recognizes that the local governmental agencies need the flexibility to settle complex civil rights litigation short of trial when the settlement is in the best interests of both parties." Still, the sailing for the Cleveland Vanguards might not be all that clear. Promptly after the decision, a lawyer for Local 93, Robert A. Dixon, said the union would return to district court and pursue civil rights actions on behalf of individual nonminority fire fighters.

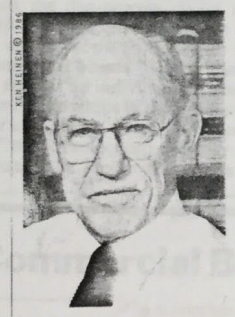
The Supreme Court did not say last week whether whites who have been passed over by affirmative-action programs can successfully challenge them as reverse discrimination. Nor did it suggest that anybody could be forced to hire unqualified workers. Among many unanswered questions, the court declined to indicate exactly what minorities must do to prove past discrimination. Indeed, the Justices may in future cases require a showing that employers have persistently flouted court orders to improve their hiring practices. The court did set up some general ground rules for affirmative-action plans: they should be limited in duration and not "unnecessarily trammel" the rights of white workers. They must be carefully tailored to remedy the precise type of discrimination in each case and avoid rigid quotas. Those guidelines leave room for considerable argument in the lower courts, and no doubt affirmative-action plans will continue to be challenged by whites with the backing of the Reagan Administration.

Despite the continuing battle over affirmative action, many if not most big businesses have opposed the Administration's efforts to gut existing programs. Some employers, however, have undeniably seized on the Reaganauts' rhetoric to go slow on affirmative action. "I think that businesses that didn't want to do anything could use the conservative climate as an excuse," said N.A.A.C.P. Executive Director Benjamin Hooks last week. "But now they have no excuse for not going forward."

While hardly settling every issue, the court's action encourages employers to push ahead with affirmative action to cure past discrimination. "It will give us a feeling of not being out there fighting the battle all alone," says O.J. Silas, director of affirmative action for Hennepin County (Minneapolis). "This is the clearest thing I've heard in a long time that the courts do mean what they said and support the principles of affirmative action."—*By Frank Trippett. Reported by Anne Constable/Washington, with other bureaus*

Knocking on the Bedroom Door

The high court hands a defeat to homosexuals—and privacy rights



Respondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.

—Justice Byron White

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 . . .

—Justice Harry Blackmun

The opinions were occasionally sarcastic as well as blunt. But then, the issue was one that arouses intense emotion among legions of Americans. The basic questions: May a state define some types of activity widely practiced by homosexuals as a crime? Or do the antisodomy laws of 24 states violate the constitutionally protected right to privacy that the court has been expanding in decisions stretching back more than 60 years?

To the dismay of gay-rights activists and many civil libertarians—and to the delight of religious Fundamentalists and other antigays—the Supreme Court ruled 5 to 4 last week that a state may indeed outlaw sodomy among homosexuals, even if it is practiced by consenting adults in the privacy of a home. The ruling has implications far beyond the legal result. By deferring to the state as moral arbiter in this case, the court raises essential questions about its role as the guardian of individual freedoms against the will of the majority.

The case decided last week began in 1982 when Michael Hardwick was late paying a fine for drinking on the streets of Atlanta. A police officer with a warrant entered Hardwick's bedroom and found him engaged in oral sex with another man. The officer arrested both for violating a Georgia statute that prohibits "any sexual act involving the sex organs of one person and the mouth or anus of another" (punishment: 1 to 20 years in prison). Fulton County District Attorney Lewis Slaton declined to prosecute, but Hardwick filed suit anyway, asking for a declaratory judgment that the law is unconstitutional.

Though the Georgia statute was deliberately framed to apply to everyone, Justice Byron White's majority opinion (joined by Chief Justice Warren Burger, his designated successor William Rehnquist, Sandra Day O'Connor and Lewis Powell) was careful to "express no opinion" about sodomy among heterosexuals. Hardwick's suit, said White, did not pose that question. However, Powell suggested in a concurring opinion that actually imprisoning gays for their sexual conduct might violate the Eighth Amendment's ban against "cruel and unusual punishments."

But the majority rejected as "unsupportable" the idea that "any kind of private sexual conduct between consenting adults is constitutionally insulated." True enough, White wrote, the court has recognized a right to privacy in cases involving education, marriage, childbearing and abortion. But these areas, White asserted, have "no connection" with homosexuality. Whether or not they are "wise or desirable," he said, prohibitions against homosexual conduct have "ancient roots." For example, sodomy was "forbidden by the laws of the original 13 states when they ratified the Bill of Rights." White added, "To claim that a right to engage in

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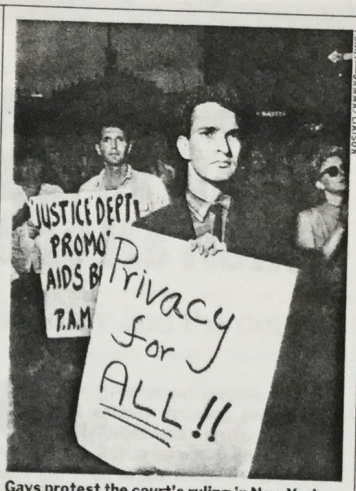
[homosexual sodomy] is 'deeply rooted in this nation's history and tradition' . . . is, at best, facetious."

More generally, the majority insisted that the Supreme Court should display "great resistance" against any attempt "to discover new fundamental rights" not enumerated in the Constitution. "Otherwise," wrote White, "the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." For years conservatives have attacked judges, particularly Supreme Court Justices, for reading their own moral and political views into the Constitution. White's opinion was an unusually explicit acknowledgment of that criticism by a Justice, and it may portend greater deference by the court to the actions of elected officials.

Harry Blackmun's passionate dissent (joined by William Brennan, Thurgood Marshall and John Paul Stevens) asserted that "only the most willful blindness could obscure" the connection between sexuality and the right to privacy. "No matter how uncomfortable a certain group may make the majority of this court," wrote Blackmun, that does not justify denying homosexuals the right to privacy. As for constitutional authority, the dissenters relied on the due-process clause and the Fourth Amendment's guarantee of "the right of the people to be secure in their persons [and] houses." Wrote Blackmun: "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 protection of privacy.

Essentially, the decision leaves it up to each state whether to tolerate or forbid homosexual sodomy. Though all 50 states had antisodomy laws as late as 1961, those statutes have since been repealed or struck down by courts in 26 states; the Supreme Court's ruling will have little immediate effect there. Even the laws still on the books in 24 states—19 states and the District of Columbia criminalize all sodomy; five have laws that apply only to homosexual conduct*—are rarely enforced. Generally, authorities expect no sudden wave of prosecutions.



FEARY—GAMMA/LIAISON

Gays protest the court's ruling in New York

"They want us to go back into the closet."

*The 19: Ala., Ariz., Fla., Ga., Idaho, Ky., La., Md., Mich., Minn., Miss., Mo., N.C., Okla., R.I., S.C., Tenn., Utah, Va. The five: Ark., Kans., Mont., Nev., Texas.

But gay leaders fear that the decision will nonetheless be a devastating blow to the efforts of homosexuals to win social toleration. They have been on the defensive anyway against a public backlash spurred partly by terror over the spread of AIDS. Homophobes "want us to go back into the closet," says Jean O'Leary, executive director of National Gay Rights Advocates. "Now the Supreme Court has even made the closet unsafe."

The antigay backlash is for the most part a peculiarly American phenomenon. Britain, West Germany and the Scandinavian countries repealed antihomosexual laws years ago, and France and Japan never had any. There has been no discernible change in attitudes since AIDS came to public attention. Homosexuality is illegal throughout the Islamic world and in the Soviet Union and India, but even there, legal punishment is infrequent. It is more common in Latin America, where gays sometimes face extralegal violence as well. An extreme example: self-appointed vigilantes have gunned down 65 suspected homosexuals on the streets of Cali, Colombia, in the past year.

Nothing remotely that sensational is likely in the U.S., but gays still underlined their fears by staging protest demonstrations around the country. They are afraid that lower courts may refuse to grant gays and lesbians custody of children on the ground that homosexuals are engaging in criminal activity. For the same reason, they fear that judges will uphold refusals by employers to hire gays and by landlords to rent to them. Eleanor Smeal, president of the National Organization for Women, expresses an additional concern: White's opinion may eventually give a Supreme Court majority a rationale for overturning *Roe vs. Wade*, the landmark 1973 decision that established a woman's right to choose abortion. Says Smeal: "If *Roe* is ever reversed, this is exactly the way [the decision] will be written."

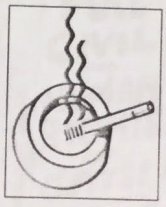
The reaction of the Rev. Jerry Falwell, head of the Liberty Federation, indicates that convinced conservatives will take the sodomy ruling as a signal to step up efforts to write a stern morality into state laws. Falwell praised the decision partly because the "court upheld the right of a state to decide its own moral guidelines." Anticipating the report of the Attorney General's Commission on Pornography, scheduled for release this week, Falwell went further, claiming that the Reagan Administration is saying a "big loud amen" to his efforts "to improve moral values in our country." He may be overconfident: there will still be strong resistance to the kind of morality advocated by Falwell and his allies. But last week's Supreme Court decision does signal that, in a way never forecast by Bob Dylan, the times they are achangin'. —*By George J. Church. Reported by Anne Constable/Washington, with other bureaus*

Commercial Break

In another major decision last week, the Supreme Court directed a chilly breeze down Madison Avenue's way. By a vote of 5 to 4, the court ruled that even truthful ads for lawful goods and services may be restricted by the state to protect the "health, safety and welfare" of its citizens.

The court's pronouncement grew out of a case from Puerto Rico, where the former owners of the Condado Plaza Hotel and Casino had invoked the First Amendment guarantee of free speech to challenge a local ban on advertising by gambling casinos. Because of the crime and corruption that gambling could attract, Puerto Rico could have outlawed betting altogether, stated Justice William Rehnquist for the court, and the "greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." More ominously for other advertisers, Rehnquist suggested that the same logic could be used to justify governmental restrictions on other "products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution."

Antismoking champions cheered the ruling. Oklahoma Congressman Mike Synar last month introduced legislation that would strictly prohibit any tobacco ads. Such a ban could seriously hurt the financial health of many newspapers and magazines that rely heavily on their share of the nearly $3 billion a year spent by the tobacco industry on advertising and promotion. The ruling could spur a similar push to bar liquor ads. With the constitutional obstacles now largely out of the way, the tugging and pulling of lobbyists and lawmakers will decide whose commercial message is interrupted.



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Press, Aric with McDaniel Ann. "A Law that dares not say its name." Newsweek, 107: 74 Ap 7, 1986.

est-pressed bird colonies: the remaining 148 pairs of reddish egrets, the 500 pairs of roseate spoonbills and the 2,000 pairs of great white herons.

The Everglades species most in danger is the Florida panther. Only 30 are believed to be holding out in the Everglades and neighboring Big Cypress National Preserve. Like the birds, the big cat is threatened by habitat destruction and lack of food. South Florida development is crowding it out: just north of Big Cypress, citrus groves are being planted on freshly cleared land that was once prime panther habitat. Telemetric studies reveal each panther needs about 300 square miles of wood and grasslands in which to roam and hunt. The lack of running room is dramatized by the fact that the highway death rate of the panther exceeds its rate of reproduction. Worse, it is competing for food with south Florida hunters. "Hunters are not responsible for the big cat's decline," says ecologist Franklin Adams, "but they are competing for the same deer and wild hogs the panthers hunt." Hunting is prohibited in Everglades National Park but not in Big Cypress, something panther lovers would like to correct. But hunters form a powerful lobby. Experts say long-term prospects for the cat are bleak. "Their survival is a very chancy situation," says park biologist Robertson. And while the cat's final demise would not mean the end of the Everglades, it would, Adams says, "greatly diminish the wildlife experience." "I may never see a cat in the wilds, but I like to know he's there," he says. "His extinction would be a negative statement on our society."

Money problems: For Governor Graham, too, time is short. While he has made some gains with Save Our Everglades—and reaped valuable publicity for his Senate race this year against incumbent Republican Paula Hawkins—his departure from Tallahassee next January will deprive the state of its highest-ranking environmentalist. Will his successor be like-minded? There are important interests that remain skeptical of environmentalism in the Everglades, notably the agribusinesses just north of the park. Then there are money problems in a time of dwindling federal help. "To date, we have sort of dragged the federal agencies with us," Graham says. "I'd like to see Washington move from a passive and reluctant partner to a full and enthusiastic one."

At least one notable observer is hopeful. Marjory Stoneman Douglas, 95 and the author of the 1947 classic "The Everglades: River of Grass," says that Florida has "made good headway. I'm not optimistic or pessimistic. Saving the Everglades is just something that has to be done for the survival of everyone—birds, panthers *and* people—in south Florida."

RON MOREAU *in the Everglades*

JUSTICE

A Law That Dares Not Say Its Name

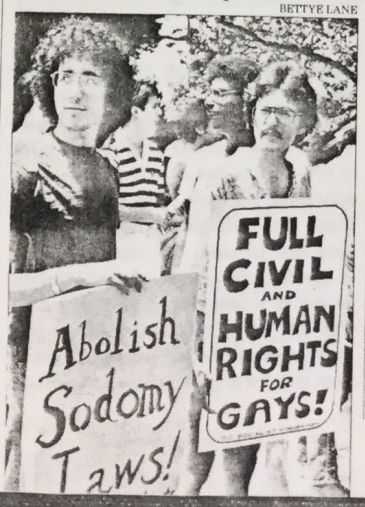
Sodomy and the court

Can the government control private sexual activity between consenting adults? Twenty-four states still outlaw sodomy, but in recent years enforcement has been so lax it hardly mattered what the statute books said. Now, however, with the advent of AIDS as a public-health issue, these provisions have fresh currency: if the first wave of concern led to padlocked bathhouses, will a fully realized epidemic unleash the criminal law? A federal appeals court in August has already upheld an anti-sodomy law in Texas. And this week the United States Supreme Court takes up the problem, in a case whose outcome may depend on how it is perceived: a matter of privacy, or the court's latest struggle with gay-rights issues.

The case began in Atlanta as an attempt by a policeman to serve on Michael Hardwick, then 29, a warrant for publicly carrying an open container of alcohol. A houseguest told the cop that Hardwick could be found in his bedroom; when the officer peered through the slightly open door he saw Hardwick and another man engaged in oral sex. The facts are not in dispute; as Hardwick later told a gay magazine, "All of a sudden I looked up and there [the officer] was." The cop arrested him under a Georgia law that makes consensual sodomy—even between heterosexuals—a felony punishable by up to 20 years in prison.

A public-health issue? *D.C. protest*

BETTYE LANE



Georgia later dropped the criminal charges but Hardwick challenged the law in federal court anyway. As his strategists quickly realized, Hardwick's sodomy arrest occured in the most favorable setting they could imagine: no minors, no prostitutes and at home. Last May an appeals court equated oral sex between homosexuals with sexual activity in marriages and declared that the law could stand only if Georgia could show a "compelling state interest" to proscribe sodomy. Instead, Georgia appealed to the high court.

Moral view: At that level, the issue will turn on which legal formulation a majority of the justices adopt. If the court finds that private acts of sodomy are constitutionally protected, then states can forbid them only for "compelling" reasons—a test that states seldom can meet. However, if the justices declare sodomy a less exalted activity, a state can bar it on merely "rational" grounds, as Georgia is attempting to do. Senior Assistant State Attorney General Michael E. Hobbs argues that the Supreme Court never intended the right of privacy to cover "an activity which for hundreds of years, if not thousands, has been uniformly condemned as immoral . . . No basis exists for adding the crime of sodomy to the list of fundamental rights . . ."

The traditional moral view of sodomy is irrelevant, according to Hardwick's counsel, Harvard law Prof. Laurence Tribe. He prefers the view of the lower court which held that sexual activity "is quintessentially private and lies at the heart of the intimate association beyond proper reach of state regulation." Over the past 20 years the Supreme Court has found in the Constitution a right to privacy applicable to contraception, abortion and the possession of obscene films—even those depicting sodomy. Tribe says the court should now be consistent: "The home surely protects more than our fantasies alone."

But does that protection extend to the transfer of contagious disease? The Hardwick case began before the AIDS scare reached full cry, but now there is no keeping it out of the debate. Representing himself as an interested legal scholar, David Robinson Jr. of George Washington Law School has urged the court to let Georgia outlaw "potentially lethal" sexual behavior. "We must do what we can, for every AIDS case prevented will save a human life," he says. In response, Tribe cites the iron law of unintended consequences, arguing that "the threat of prosecution [for sodomy] actually harms the public-health effort by driving the disease underground." The court's decision is expected by July.

ARIC PRESS *with* ANN MCDANIEL *in Washington*

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"Leviathan at Large" David R Carlin, Jr.
Commonweal 113:456-7 Sept 12 1986

in *Commonweal*, last June 6:

> In their working lives, the laity find themselves less beyond or outside the church than simply detached from it. This detachment results no more from their ignoring the church than from the church ignoring them. Until church leaders learn — or care to learn — to affirm the secular lives of the laity, until they take seriously the idea . . . that the lay person in the world is there as church, as much church as the deacon or lay minister working within the community itself, the church will not assist the political culture to face matters of war, abortion, and injustice, nor contribute anything more to the nation than resounding "no's."

The key word is *seriousness*. Virginia Finn sees a lack of seriousness in the pontifical committee's failure to go beyond rhetoric. O'Brien sees it in the failure to recognize that the lay person *is* church, not simply a messenger from church to the world. Other aspects of the difficulty can easily be gleaned by listening to those who have participated in discussions on the vocation of the laity in recent years.

These laymen and women see a lack of respect for the knowledge and expertise they possess from their education and the experience of their callings. Councilman John Erb of Rochester, New York, wrote in *Initiatives*, March-April 1984:

> As a Catholic involved in electoral politics, I, personally, have found little or no understanding among church leadership of the moral dilemmas faced by those in politics and government. I am not speaking here about moral values such as honesty, but of the more complicated decision that may involve a choice between several goods. There is really no understanding of political complexities on the part of church leadership.

In the 1982 symposium mentioned earlier, lawyer-professor (and now federal judge) John Noonan expressed the frustration he felt when two different archbishops rejected a plan advanced by him and some of his academic colleagues — a plan which would have enhanced the influence of the church in secular higher education — because of these archbishops' complete lack of knowledge of higher education. To one, he says, it was a mystery. To the other it was "beyond his grasp." Neither was inclined to accept advice from people actually involved (and with distinction) in secular higher education, devoted Catholics though they might be. How, asks Noonan, can you communicate with church leaders who lack a given professional experience when there is a new proposal to be made, a new venture to be tried "so that they can conscientiously respond?" It is a question, evidently, still awaiting an answer.

Even worse than the lack of respect for professional information is what seems to be the preference for the outsider and the amateur as model of social action. This preference was pointed out by the Chicago "Declaration of Christian Concern" which noted "a depreciation" of the ordinary social roles through which the laity serve and act upon the world. The activist, for example, who buys a few shares of stock so that he or she can confront the corporate board is thought to be more "church" than is the corporate executive who struggles to integrate his or her religion and calling.

Nor does the increase in lay ministry and lay professionals help the situation. It may worsen it. Dr. David Byers remarked that when he was with the Office of Domestic Social Development of the Bishops Conference he was often bothered by the "almost unconscious contempt" demonstrated by lay professionals in the peace and justice movement for the non-church-professional laity, particularly those in the business community (cf. *The Catholic Laity Today*, 1982). The attitude, he said, was clerical.

All these *caveats* would make it seem that there is too much for the synod to do, too much to undo, too much change to effect and absorb — and yet the synod can make a beginning. We can take courage from the secretariat which anticipated with its own questionnaire from Rome (which will no doubt be practically late) and thus set consultation going. We can also take courage from participants in the lay consultations who took the initiative in offering their reflections and insights to the synod. Recalling the faltering start of Vatican II and heartening results, we dare to hope that the synod will yet mark the beginning of the end of clericalism and the affirmation of the lay vocation.

ABIGAIL McCAR

Of several minds: *David R. Carlin, Jr.*

LEVIATHAN AT LARGE

THE COURT & THE RIGHT OF PRIVACY

IT IS unlikely, despite recent alarmist prophecies to the contrary, that the U S. Supreme Court decision in late June upholding a Georgia anti-sodomy statute will lead to an anti-gay crusade in America. To judge from the somewhat hysterical reaction that followed, you'd think the court had declared that anti-sodomy legislation is a good thing. It didn't. It simply said that it is not an unconstitutional thing. In the last twenty-five years half the states have repealed their anti-sodomy laws, and there is no reason to believe this process of decriminalization — which is little more than removing dead letters from the statute books — will not continue. And so it should, since no useful social purpose is served nowadays by making such conduct between consenting adults a criminal offense.

The real long-term importance of the Georgia decision lies in its revision — almost said its repeal — of the court's longstanding doctrine of privacy. In *Griswold* (1965), which declared uncon-

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...tional laws banning the sale and use ...contraceptives, Justice Douglas, writ... for the majority, discovered the right ... privacy in the "penumbra" of the ...S. Constitution. In *Roe v. Wade* ...73) this right was extended to cover ...ortion.

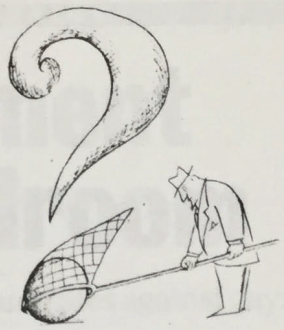
My legal education being imperfect, I ...d long been curious as to where this ...umbra might be located. But after ...s of experimentation I discovered ...t if I hold my copy of the Constitution ...p to a certain slant of light on winter ...noons I can detect a slight penumbra ...the floor, where the shadow falls. To ...e, however, despite the help of a mag...ing glass, I have been unable to dis... any text within this penumbra, let ...e a text referring to privacy. Justice ...uglas must have had extraordinary ...sight.

...s not that I doubt the value of pri... Far from it. Few things are more ...able. But I have a sufficient preju... in favor of the old-fashioned notion ...the people and their legislatures ...t to be the principal sources of law. ...get nervous when judges construe ...Constitution not just liberally (that's ...but with the aid of a light that never ...on sea or land.

...theless, on the principle that you ...dn't kick either a man or a doctrine ...he/it is down, let me say a word or ...on behalf of this now faltering doc... of privacy.

...of the safest political gener...ns made about the last few cen...s that there has been a world-wide ...in the direction of omnicompetent ...ment. Totalitarian regimes, espe... those in China and Russia, repre... a kind of logical development of ...au's *Social Contract* theory, ... holds that the individual re...s, in the act of becoming a ...of society, all natural rights and ...s, exchanging them instead for the ...m of the citizen, something that is ...d to the degree the individual can ...his or her own will into accord with ...'s general will. Modern liberal ...racies give Rousseau a more be... exegesis, but they, too, drift in the ...on of omnicompetence.

...is not simply a matter of theoreti...



cal evolution. Nearly every practical development for the past few centuries in certain key fields — industry, banking, science, medicine, communications — has increased government's capacity for doing things. The central government of the fully modernized state is perhaps the most extraordinary instrument ever invented for ameliorating the human condition. Little wonder that generations of world-betterers have tried to get their hands on it and to strengthen it still further.

But the United States stands in a different theoretical tradition from the one terminating in Lenin and Mao. Not Bodin and Rousseau but Coke and Locke are the fathers of our political church. There is something not fully modern, something just a bit medieval in fact, about the American constitutional tradition. Not even as a matter of abstract principle is the state all-powerful. Instead, individuals and even corporations have rights and liberties that the state is constitutionally incapable of interfering with.

Yet the practical factors contributing to the growth of the omnicompetent state are just as present in the United States as elsewhere. Here, too, it is demanded that the central government use the vast powers potentially available to it to improve the lives of its citizens. Thus a government originally conceived to have very limited federal powers has grown over a period of 200 years to the point where it holds chief responsibility for the prosperity, health, safety, and general well-being of its citizens.

Now, the more the competence of government expands in the U.S., the more necessary it becomes — if we are to preserve our tradition of limited government and inviolable rights — to delineate those rights with every greater specificity. It even becomes necessary, as a kind of compensatory move for the expansion of government, to expand those rights. As the no man's land between state and individual gradually disappears, we find ourselves bargaining informally: we will permit government to enlarge its sphere of action if it permits us to enlarge our smaller spheres of immunity.

This compensatory elaboration of individual rights has occurred chiefly under two heads — privacy and due process. In certain activities (abortion and contraception, for instance) the law simply cannot touch us. In others, the law may be able to touch us, but only after having observed the protocols of an elaborate procedural code. Thus we have managed to go to bed with the Leviathan without being crushed.

At first glance it may seem a bit illogical that American liberals, who have been big government's most important supporters in the U.S., have also been the firmest backers of restrictions on government power by means of due process and privacy rights. But granting the principle of compensation just mentioned, there is nothing illogical about this. For unless one is prepared to scrap the traditional American notion of freedom — that is, the more or less Lockean concept of freedom — one has little choice but to balance every push for the expansion of government by an opposing push for the expansion of individual rights to privacy and due process.

There may be those who join me in rejoicing that a blow has been struck against the theoretically dubious doctrine of privacy. But we should keep in mind that in the course of human history, questionable theories have more than once served morally and politically valuable purposes. If the conventional doctrine of privacy is false, by all means let's get rid of it. But if this doctrine, though false, has helped to keep us free in a world in which freedom is a relatively scarce commodity, then we had better hurry and find a true doctrine of privacy to replace the exploded one.

DAVID R. CARLIN, JR.

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NATIONAL AFFAIRS

A Government in the Bedroom

In a sodomy case, the high court rules against gays

In just four more years Americans can celebrate another centennial of liberty: the 100th anniversary of a seminal article by two Boston lawyers, the legendary Louis Brandeis and his partner Samuel Warren. There they became the first to urge recognition of a legal right of privacy. Now regarded as one of our fundamental birthrights, privacy was in 1890 an idea whose time was still to come. In language that rings out from the dusty pages of the then infant Harvard Law Review, they wrote that as the law developed, "there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone."

Over the last 60 years the U.S. Supreme Court, by relying on the "penumbras" of the Bill of Rights, has expanded that vision from a concern with the sensationalistic press to one that limits state encroachment on individual privacy. But last week that constitutional evolution came to an abrupt halt. In a sharply disputed 5-4 decision, the Supreme Court upheld a Georgia law that makes it a felony, punishable by 20 years in prison, for consenting adults to commit sodomy—oral or anal sexual relations. While the statute in question applies to heterosexuals, the majority opinion only discussed homosexual acts. Writing for the court, Justice Byron White declared that "... to claim that a right to engage in such conduct is ... 'implicit in the concept of ordered liberty' is, at best, facetious."

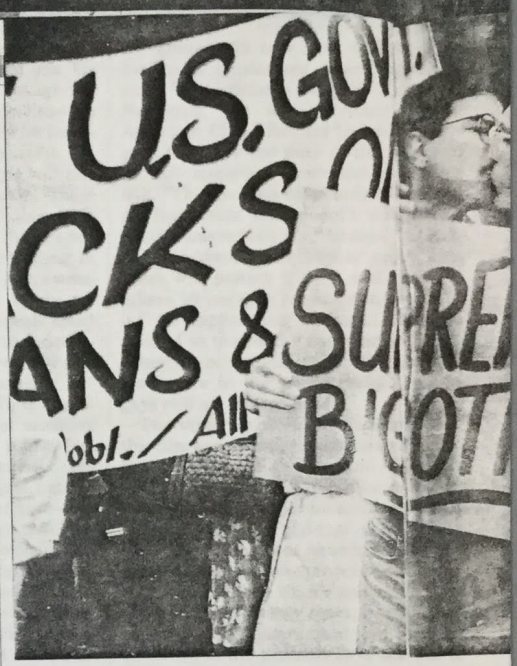
The decision infuriated gay-rights groups. Gays feared that the high court had put its imprimatur on government homophobia, including the denial of employment, housing or custody rights to out-of-the-closet homosexuals. As it happened, the decision was announced one day after the annual gay-pride marches were held around the country and protests were hurriedly organized in gay communities from Greenwich Village to San Francisco. "We believed in the Constitution," cried Pat Norman, a California lesbian activist. "Guess what? It doesn't mean us."

The decision may ultimately chill the existing law of privacy. Most of that jurisprudence since 1965 has focused on family relations—striking down, for example, laws banning interracial marriage and the distribution of contraceptives. That line of cases led in 1973 to the creation of a right of a woman to choose an abortion. These are decisions which, while enjoying broad popular support, have been read into the Constitution by activist judges. Did last week's decision merely mark a stopping point or was it the first step toward reversals?

Long history: The answer was not clear, but the decision could be read narrowly. White declared that the holding was grounded in both the long history of Western legal prohibition against homosexual acts and the power of states to promote morality through legislation. The law, he wrote, "... is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated ... the courts will be very busy indeed."

In a stinging dissent, Justice Harry Blackmun rejected the majority's reasoning. "Like Justice Holmes," he writes, "I believe that 'it 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'." And he goes on to argue that the majority has not properly understood the high court's own privacy precedents. "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," he declared. "[W]hat the court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations."

But if the gay community lost in court, it may have already won an important victory in the court of public opinion. Half the states have decriminalized consensual sodomy (chart, page 37). And a NEWSWEEK Poll conducted last week by The Gallup Organization reported that 57 percent of those surveyed thought that states should not prohibit private sexual practices between consenting adult homosexuals, and 74 percent said that states should not prohibit heterosexual activity either (page 38). Also, law-enforcement officials insisted that they had little interest in applying the existing sodomy bans. "As a practical matter how are you going to enforce it?" says Harris County (Houston) District Attorney John B. Holmes. All the Texas law does,



'The Constitution doesn't mean us': *A gay-rig[illegible] demonstr[illegible]*

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'The law is based on morality': *Byron White*

Press, Aric. "A Government in the Bedroom" in Newsweek 108: 36-8 July 14, 1986.

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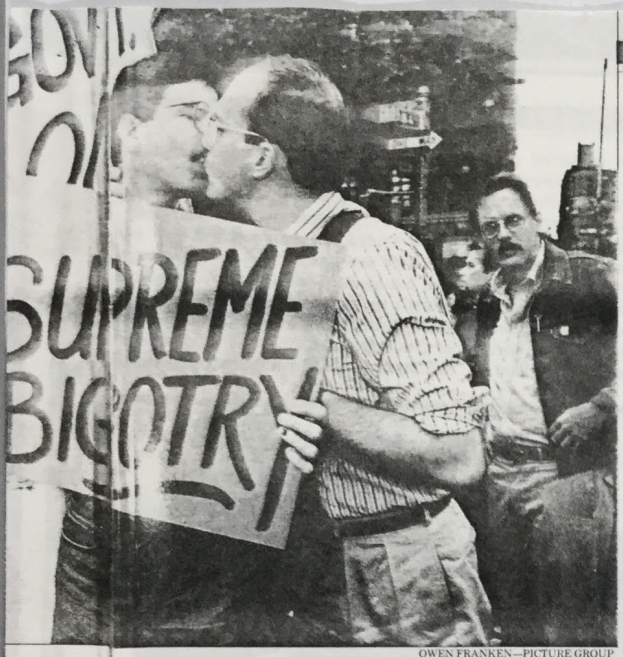


OWEN FRANKEN—PICTURE GROUP

demonstration in New York

...ay-rights ...ent of ...hould ...es be- ...s, and ...t pro- ...ge 38). ...sisted ...ng the ...l mat- ...' says ...orney ... does,

he declares, is "pay lip service to the strong Baptist influence" in the state.

Still, these cases have a way of finding their way into court, at least in Georgia. The issue that reached the U.S. Supreme Court began as an attempt by an Atlanta policeman to serve on one Michael Hardwick a warrant for publicly carrying an open container of alcohol. When the cop reached his apartment, a houseguest said that Hardwick could be found in his bedroom; the officer peered inside and found Hardwick and another man engaged in oral sex. He busted them—and though the local prosecutor declined to press charges, Hardwick insisted on making an issue of it. Another case in Georgia will test the sodomy law again. There the jury acquitted James E. Stover Jr. on rape charges but convicted him of engaging in consensual sodomy with a woman, an act Stover freely admitted. Now an appeals court will have to decide the constitutionality of the sodomy law as it applies to heterosexuals.

Judicial restraint: White's opinion touched several sensitive nerves in the body politic. Not only did it circumscribe the right to privacy—just outside the bedroom door of gays—but it also represented the high court's latest epistle on its own role in the American democracy. This decision was about power and who should wield it. The majority did not itself condemn sodomy; it said that was a subject more properly left to state legislatures. This may be a lawyer's distinction, but it is important because it lies at the heart of the continuing debate over judicial restraint. As White wrote, "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 . . . Constitution."

Last week's ruling was the most vivid example of the fruits of a self-restrained court; the practical result is that homosexual groups will now have to fight their battles in legislatures where majorities rule. That disturbs lawyers like Burt Neuborne, the legal director of the American Civil Liberties Union, who argues that it is the duty of the courts to protect minorities from the majority's will. "This decision could only come from an institution that doesn't understand what it means to be gay," he says. "As long as it's a mainstream idea or group, this court will protect it very well. For the others, its motto is: cowardly and proud of it." To support his analysis, Neuborne pointed to the court's endorsement of affirmative action last week; the goals of blacks are in the mainstream, those of gays still are not (page 74).

Two other issues in the background of this case were conspicuous by their absence from the opinions: abortion and AIDS. The original abortion decision, *Roe v. Wade,* was written by Blackmun and rested on a woman's qualified right of privacy, the same right that was at issue in the sodomy case. Blackmun never pinpointed the precise constitutional source and instead relied on earlier privacy cases, which themselves rested on guarantees that could be discerned in the penumbras of the Bill of Rights. White dissented in *Roe* and has remained a steadfast opponent of court-permitted abortion ever since. In the latest abortion case, decided four weeks ago, five justices including Blackmun upheld *Roe* while four, including White, objected. In the sodomy case there was the same split, except this time Justice Lewis F. Powell Jr. switched sides to vote with White. Why? Powell doesn't say. The only way to understand this anomaly, argues University of Chicago law Prof. Michael McConnell, is to

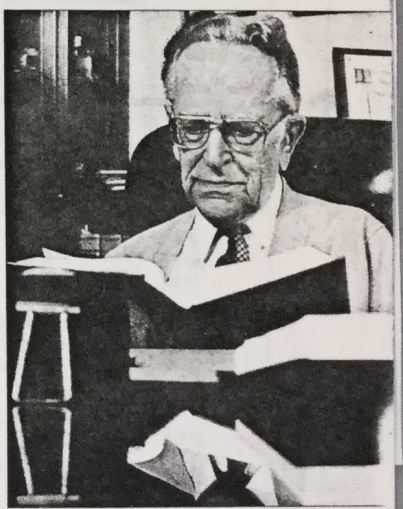
...HEINEN

How the States Regulate Sex

A movement to decriminalize sodomy began in 1961, joined eventually by 26 states. Two dozen states, mostly in the South and West, still restrict such behavior.

STATES WITH SODOMY LAWS	MAXIMUM JAIL SENTENCES FOR SODOMY	STATES WITH SODOMY LAWS	MAXIMUM JAIL SENTENCES FOR SODOMY
Alabama	1 year	Mississippi	10 years
Arizona	30 days	Missouri	1 year
Arkansas	1 year*	Montana	10 years*
Florida	60 days	Nevada	6 years*
Georgia	20 years	North Carolina	10 years
Idaho	5-year minimum	Oklahoma	10 years
Kansas	6 months*	Rhode Island	20 years
Kentucky	12 months	South Carolina	5 years
Louisiana	5 years	Tennessee	15 years
Maryland	10 years	Texas	$200 fine*
Michigan	15 years (anal sex), 5 years (oral sex)	Utah	6 months
Minnesota	1 year	Virginia	5 years
		D.C.	10 years

*FOR HOMOSEXUAL SODOMY ONLY.



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'The right to be let alone': *Blackmun*

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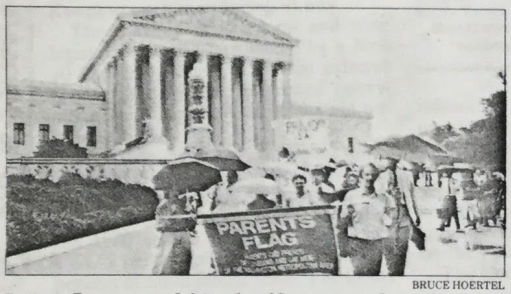
accept that the court has an "abortion exception to the Constitution." Or, looking from the other side, a sodomy exception.

But if the court's failure to grapple with *Roe* was disingenuous, its failure to acknowledge the AIDS scare was standard procedure. After all, the justices are only supposed to decide issues before them—and to ignore the news, such as frightening reports about a deadly disease that may be transmitted by sodomy. Still, the court may soon be asked to rule on public-health measures aimed at AIDS control. Can it then declare that the Constitution protects what may be the principal means of transmission, anal intercourse? Not this time.

No shelter: In the end, the ruling's impact goes far beyond the law. Beneath the gay community's public anger lies a profound sadness. San Francisco psychologist Stephen Morin says that "a major goal of the whole gay movement has been the removal of the emotional baggage gays carry... The primary problem with the [court's] decision is the psychological damage it does. It is not good for people to be told they're bad, especially when they're not." Another court, in another day, may deliver another message. Until then, homosexuals have no shelter in the Constitution.

ARIC PRESS *with* ANN MCDANIEL *in Washington,* GEORGE RAINE *in San Francisco and* GINNY CARROLL *in Atlanta*



BRUCE HOERTEL

Protest: *Parents and friends of homosexuals at the court*

A Newsweek Poll: Sex Laws

Disapproval of last week's Supreme Court decision on state sodomy laws runs higher among middle-aged Americans (54 percent) than in any other age group, according to a new NEWSWEEK Poll, but there is little difference between the views of men and women. Support for the court's ruling runs significantly higher among those over the age of 50 (48 percent), those who did not finish high school (47 percent) and Republicans (52 percent).

Clear majorities of all demographic groups agree in principle that states should not have the right to prohibit homosexuals' private sex practices—although it was a close call among Southerners (49 to 43 percent). Overall, this balance of opinion suggests that disapproval of the court's ruling could grow as its implications are better understood.

Opposition to state prohibitions involving the same sex practices when engaged in by consenting heterosexual adults was even more overwhelming—despite significant disagreement over the prevalence of oral and anal sex. Majorities or near majorities of men (48 percent), nonwhites (58 percent) and those under 50 (47-54 percent) said they thought those forms of sex were commonplace. Far fewer women (36 percent), Republicans (38 percent) and those least educated (32 percent) acknowledged an awareness of such practices. Americans on both coasts also were more likely to think these activities commonplace than those living in the South or Midwest.

The increased tendency of Americans to avoid known or suspected homosexuals because of AIDS is much more pronounced among men (32 percent) than women (19 percent), the NEWSWEEK Poll found. And women are more likely than men to have homosexual friends and think of homosexuality as an acceptable alternative lifestyle.

DAVID M. ALPERN

Doubts About the Court's Ruling on Sex Laws

Do you approve or disapprove of the Supreme Court decision upholding a state law against certain sexual practices engaged in privately by consenting adult homosexuals?*

47% Disapprove
41% Approve

There is now some question as to the legality of state laws against the same sexual practices when engaged in privately by *heterosexuals.* Thinking about people you know and your community, do you think those sexual practices between men and women are commonplace or not?*

42% Commonplace
33% Not commonplace
25% Don't know

*ASKED OF THE 73% WHO KNEW ABOUT THE SUPREME COURT DECISION.

Opposition to Prohibition

In general, do you think that states should have the right to prohibit particular sexual practices conducted in private between consenting adult homosexuals?

57% No
34% Yes

In general, do you think that states should have the right to prohibit particular sexual practices conducted in private between consenting adult men and women?

74% No
18% Yes

Homosexual Friends

Do you happen to have any friends or acquaintances who are homosexual?

	Current	August 1985
Yes	29%	22%
No	67%	77%

Accepting, Avoiding

Do you think homosexuality has become an accepted alternative lifestyle or not?

	Current	July 1983	June 1982
Yes	32%	32%	34%
No	61%	58%	51%
Don't know	7%	10%	15%

Have you personally, or have people you know, taken any of the following precautions to try to reduce the chances of contracting AIDS? (Percent saying Yes)

	Current	August 1985
Avoiding people you know or suspect to be homosexual	25%	13%
Avoiding certain places where homosexuals may be present	44%	28%

For this NEWSWEEK Poll, The Gallup Organization interviewed a representative national sample of 611 adults by telephone July 1 and 2. The margin of error is plus or minus 5 percentage points. Some "Don't know" answers omitted. The NEWSWEEK Poll © 1986 by NEWSWEEK, Inc.

Alpern, David. "A Newsweek Poll: Sex Laws" in Newsweek. 108: p 38 July 14, 1986

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"Dark Day in Court for Homosexuals" il US News & World Report 101, #18 July 14 1986

crimination" against Hispanics, American Indians and other minorities. "The Court rulings strengthen our case for a statistical remedy," said union general manager Phil Giarrizzo.

Despite the Court's approval of strong remedies in "egregious" cases, quotas remain banned when layoffs occur. The Justices made that clear in a May case overturning the ouster of white Michigan teachers while blacks with less seniority stayed on.

Disputes over the Court's wording are inevitable. "The next battleground will be over what constitutes 'egregious' discrimination," predicted Chicago lawyer Janet Goldberg.

Keeping gerrymandering at bay

The makeup of Congress and state legislatures could be affected by a June 30 Supreme Court ruling that extreme forms of the age-old practice of "gerrymandering" legislative districts are unconstitutional.

The case arose in Indiana, where Democrats said Republican lawmakers had acted in an illegally partisan manner when they redrew boundaries after the 1980 census. In 1982, Democrats won 52 percent of the votes but only 43 percent of State House seats. The Court refused to alter the Indiana lines, saying that "relying on a single election to prove unconstitutional discrimination is unsatisfactory." But Justice Byron White said the Court could declare unconstitutional districts that "will consistently degrade . . . voters' influence on the political process."

Massachusetts Governor Gerry's 1812 "salamander" map coined a name

The Court gave no formula for determining when district boundaries are invalid, leaving the way open for a spate of new suits around the nation.

Leaders of both major parties claimed victory. Because Democrats hold sway in most state legislatures, they had feared the Court would make it easy for the GOP to contest boundaries. "The Republicans were hoping for a quick fix from the Supreme Court, and they lost," said Democratic National Chairman Paul Kirk.

As the underdogs in most redistricting battles, Republicans contended that they would prevail in many areas by proving that they were being consistently gerrymandered out of office. California may be the site of the next major fight. Republicans are challenging districts that have given Democrats 27 of the state's 45 seats in Congress.

In another reapportionment dispute, the High Court rejected a Reagan argument and liberally interpreted a 1982 federal voting-rights law. The Justices voided as discriminatory against blacks a North Carolina plan for electing several legislators from voting districts with white majorities. ■

by Ted Gest with the magazine's domestic bureaus

SODOMY RULING

Dark day in court for homosexuals

Slowing its expansion of privacy rights, the Supreme Court upheld state laws that prohibit oral or anal sexual contact. The 5-to-4 ruling on June 30 was a bitter disappointment to homosexuals, who had hoped the case would boost their drive to reduce bias against them.

The appeal was filed by Michael Hardwick, a Georgia man arrested on a sodomy charge in his own bedroom by a police officer who had entered his house to serve a warrant. Hardwick argued that antisodomy laws should be struck down as invasions of privacy, as the Court has done in recent decades in cases involving contraceptives and abortion.

But a majority of Justices disagreed. Noting that states have barred some forms of private sexual conduct since colonial days, Justice Byron White said the Constitution implies no "fundamental right to engage in homosexual sodomy." White said there was no good reason for courts to single out homosexual rights for protection "while leaving exposed to prosecution adultery, incest and other sexual crimes even though they are committed in the home."

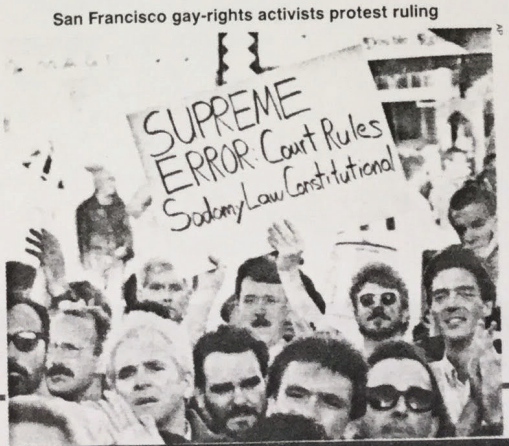
In dissent, Justice Harry Blackmun declared that the Court should not allow "invading the houses, hearts and minds of citizens who choose to live their lives differently." Blackmun said the majority's "almost obsessive focus on homosexual activity" ignored the fact that most of the sodomy laws in 25 states—including Georgia's—also can be invoked against heterosexual couples.

The American Civil Liberties Union said the ruling "allows Big Brother to police the bedrooms of millions," but police officials said there would be no campaign to invade homes to enforce sex laws.

More likely is that the decision will fuel antihomosexual bias—already evident against victims of acquired-immune-deficiency syndrome—in employment, housing and child-custody cases. "It reinforces all the feelings of repression that many feel," said Jeff Levi of the Washington-based National Gay and Lesbian Task Force. He reported receiving a panicky call from a homosexual who feared that his wife would bring charges of sodomy against him in an effort to win a custody battle.

While homosexuals assailed the ruling, others applauded it. Rebecca Hagelin of Concerned Women for America, a Washington-based "family rights" group, said that "if we begin to condone homosexual acts we get too far away from traditional American values."

San Francisco gay-rights activists protest ruling



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EDITORIALS.

The Final Days

The last days of the Burger Court seemed to summarize the course of its sixteen-year tenure: contentious, contradictory, at once reckless and cautious, deeply divided and always unpredictable. Both its recent past as a guarantor of civil rights and personal liberties and its likely future as an advocate for state authority were contained in its present. If this Supreme Court did not direct public policy according to a shared vision of social progress, as its predecessor did, it accurately reflected the dilemmas of American society in the final quarter of the century: the unresolved arguments, the unallayed fears, the unfinished business. We cannot know now for certain, but it appears that we have passed through a period of transition rather than a moment of movement.

In its final decisions before reorganization under a new Chief Justice, the Court embroiled itself in political controversy to a dizzying degree. It threw out important sections of Gramm-Rudman-Hollings; it poked into local gerrymandering practices; and it checked out compliance with the Voting Rights Act and its most recent amendments. It narrowly upheld affirmative action plans in New York and Cleveland, and by implication rejected the Reagan Administration's theory that such strategies for reversing discriminatory be-

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havior are themselves examples of "reverse discrimination."

But what got the biggest headlines and may well come to symbolize the final phase of the Burger regime was the decision in a case involving a homosexual in Georgia arrested for having sex with a consenting partner in his own bedroom. For three decades the American judicial system, with the Supreme Court at the head, has been extending the right of privacy under the Constitution to include noninjurious consensual behavior previously proscribed because of religious or moralistic scruples. Sexual matters, in particular, have been given a healthy airing out of the puritanical closet. In landmark decisions, courts have struck down laws against contraception, interracial marriage, and have affirmed a woman's right to an abortion.

The 5-to-4 decision in the Georgia "sodomy" case retreated from that progressive history. With the perverse passion of a medieval monk, Justice Byron White insisted that homosexual relations have no better claim on constitutional protection than "adultery, incest and other sexual crimes," or "the possession in the homes of drugs, firearms or stolen goods." Chief Justice Burger caught the Whizzer's pass and brought it over the line, concurring with eighteenth-century authorities that homosexuality is "the infamous crime against nature," an offense of "deeper malignity" than rape and, that old chestnut, "a crime not fit to be named."

The theoretical issue in the Georgia case was essentially the same as that in the Court's 1972 decision on abortion, *Roe v. Wade*. Privacy then was extended to include a woman's reproductive function. This time—perhaps in reaction to the uproar from the religious right wing over *Roe*—a bare majority excluded sexual behavior that is not sanctioned by the Bible from the protection of the Constitution. Justice Harry Blackmun wrote a forceful dissent for the minority, but for the foreseeable future the issue of privacy rights for sexual minorities is closed at the judicial level.

It is perhaps unfair to make sweeping judgments about society from individual decisions of the Supreme Court, especially ones that are decided as narrowly as the Georgia case. But it's clear that the sexual panic that seems to grip America in the 1980s has reached the highest bench. Anyone who doubts the extent of that panic should consider the Court's upholding of the suspension of a high-school student who used sexual innuendo in a speech at an assembly. Social psychologists have a lot of work to do on this bizarre national neurosis. Pornography, abortion, child molestation, incest, fertility, gender, women's rights, sexually transmitted diseases— every topic that touches sexual thought or action has become a public issue. Warren Burger sounds as freaked out as a suburban dad confronted by an androgynous son or a liberated daughter. His reaction is unfortunately typical: retreat to the eighteenth century and a self-serving interpretation of the law. But unlike Dad, Burger is the law. Or was.

The Court did better on race than on sex, possibly because the days of acute racial panic are over, at least for the time being. Chronic racial conflict persists, but it is easier to make sensible statements in this atmosphere than in one of high tension. The Court rather bravely upheld the affirmative action proposition that minorities as a class have suffered from discrimination and that the remedies due them should be awarded to them as a class. Attorney General Meese, who would rather skimp on the remedies, has been holding out for individual awards. Thus, a contractor and a union that discriminate against blacks would be required to hire only that black person who tries and fails to get a job. The next applicant would have to go through the same process, perhaps right up to the Rehnquist Court for relief. Maybe because the issue of racial equality did not arise during the English Reformation, Chief Justice Burger's touchstone era for judicial reference, he voted with the majority on this one. Now it's on to the Constitution's two-hundredth birthday celebration for him, and he may have the opportunity to notice how things have changed in the world since quill was put to parchment.

SUMMER SCHEDULE

With the issue of July 5/12, *The Nation* began the biweekly summer schedule. Weekly publication will resume with the issue of August 30.

Free Namibia

If it's true that the Reagan Administration is deliberately altering its course, if not abruptly changing its direction, on South Africa, this may be the opportune time to move toward independence for neighboring Namibia. The framework for a solution could be the special U.N. conference on Namibia, which opened last week in Vienna with the purpose of mobilizing South Africa's Western trading partners to pressure Pretoria to end its military occupation of the territory. Successive U.N. resolutions, going back twenty years, have called for South Africa's withdrawal, and Security Council Resolution 435, which the United States and other Western nations support, mandates free elections supervised by the international organization. But the South African government continues to flout world demands while it implements a deceptive diplomatic strategy to bolster its repressive colonial policy.

During the past several months, however, several factors in the brutal equation of southern African power have changed. The racial crisis in South Africa has focused attention on the inequities of white minority rule throughout the region, and at the same time it has given Pretoria new reason for cutting the mounting costs of maintaining extended military positions. The United States, which was dragged into the Namibian problem for no good reason beyond South Africa's insistence that it was an arena of East-West conflict, has its own interests in political

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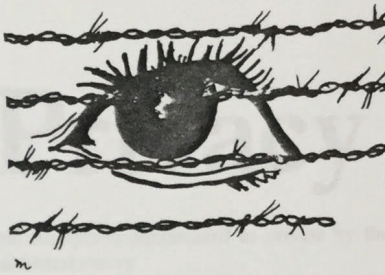
David R Carlin Jr. "Two doctrines of privacy" America v155 pp50-51 August 2-9 1986



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When the U.S. Supreme Court ruled 5 to 4 on June 30 of this year that a Georgia antisodomy law was not banned by the U.S. Constitution, much weeping and gnashing of teeth were heard across the land.

The decision, we are told, is a great setback for the gay rights movement. True—but only if a failure to take a giant forward step is equivalent to a setback. Had the Court ruled the other way, a great leap forward would have been achieved by the gay rights movement. If the history of abortion in the United States is a reliable precedent, a Supreme Court declaration that homosexual acts (a subclass of sodomistic acts) are constitutionally protected would have enhanced, not just the legal, but also the moral legitimacy of such conduct. Rightly or wrongly, the public believes constitutional rights are grounded on moral rights; so when the Court defines a new constitutional right, the public infers it to be declaring a moral right as well.

But to say, as the Court did in its Georgia decision, that the states have the right to restrict homosexual conduct is not the same thing as to say that it would be right or wise to do so. States having antisodomy statutes on their books are still free to repeal them. And they should. In this nation and at this hour, all parties—ranging from those who hold homosexual acts to be rank in the nostrils of God and nature to those who hold such acts to be as innocent and healthy as drinking a glass of freshly squeezed orange juice—ought to be able to agree that homosexual activity among consenting adults should be of no concern to the criminal law. Such laws are either not enforced at all or are enforced in an excessively selective manner, thus providing opportunity for private blackmail and police oppression.

The critics also tell us that the Georgia decision constitutes a retreat on the Court's doctrine of privacy, being inconsistent with the 1965 Griswold ruling (invalidating laws banning the sale and use of contraceptives) and the 1973 Roe v. Wade ruling (overthrowing virtually all laws restricting abortion). The critics are correct. And that is why the truly significant impact of this decision is likely to be felt, not so much in the gay-rights realm, but in the realm of abortion rights. Logic may not be the life of the law, as Justice Oliver Wendell Holmes long ago reminded us, but even the U.S. Supreme Court is bound to feel the pinch of this logical inconsistency; and the Georgia decision, with its about-face on the privacy doctrine, portends, unless I miss my guess, at least a partial reversal of Roe v. Wade. The anti-abortion folks, it seems, are on the verge of a great victory.

The classic formulation of the doctrine of privacy was given by Justice William O. Douglas in his majority opinion in Griswold. Acknowledging that the right of privacy is not to be found in the letter of the Constitution, he argued that it can be found instead in the Constitution's "penumbra." Now, when so liberal a construer of the U.S Constitution as Justice Douglas can claim no more for the right of privacy than its being found in that document's penumbra—not even the umbra, mind you, but only the penumbra—then we know we are dealing with a patent, not to say blatant, instance of judge-made law. One need not be a member of the Ed Meese school of jurisprudence which holds that if the Founding Fathers did not expressly intend to put something into the Constitution then it just is not there, to feel uncomfortable with so imaginative a piece of constitutional exegesis. Aristotle, in a passage St. Thomas Aquinas loved to quote, says that a small error in the beginning produces much greater errors farther down the road. Griswold's strange privacy doctrine, which caused only slight concern at the time of its invention, later produced the legal, moral and social catastrophe of Roe v. Wade. The Georgia decision is a long overdue mid-course correction.

The right of privacy that was recognized from Griswold till just the other day suits well with what may be called, for want of a better name, the conventional liberal theory of individual freedom. (I stress the adjective "conventional," for it is entirely possible, I believe, to find another and better liberal theory of individual freedom.) According to this conventional theory, there is a certain sphere of life that is none of the state's business. Within this sphere are to be found an individual's friendships, religious preferences, sexual practices, medical choices, etc. Provided the individual in question is an adult of sound mind, the state has a strict duty to keep its hands off his activities in this private sphere.

As a war cry against oppression, this theory works fairly well, and I would like to reserve my own right to use it in certain circumstances. But as a sober theory of privacy and freedom, of state power and individual right, it will not do.

First of all, no government can afford to renounce absolutely and as a matter of principle its interest in the private lives of its citizens. So far from the private lives of those citizens being the last and least thing the state has to concern itself with, it is in a certain sense the first of the state's

«David R. Carlin Jr., *a state senator in Rhode Island, is a frequent contributor.*»

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DAVID R. CARLIN JR.

Doctrines of Privacy

concerns. Upon the quality of the private life of its average member, after all, depends the well-being of society at large; and if government is required to worry about the well-being of society as it is, then it must equally worry about the quality of the private lives of its citizens.

And of course, contrary to the conventional liberal theory, local governments in the United States do in fact concern themselves with the quality of private lives; indeed holders of the conventional liberal theory concern themselves with this, though it may be inconsistent of them to do so. What else, in the last analysis, are government programs such as education, public health, scientific research, the promotion of economic development, to name only a few, but attempts to bring about high-quality private lives?

The criminal law, of course, is an exceedingly blunt instrument to use in attempts to improve the quality of private lives. A government may have an interest, for instance, in promoting sobriety and good manners among its citizens, but it would be unwise to attempt this by making rudeness or the sale of alcohol criminal offenses. Further, the value both to society and to its members of having those members lead their adult lives in a self-reliant manner, free from tutelage and paternalism, is so great that the law, both criminal and noncriminal, ought to leave them free to make their own choices whenever this practically can be done, no matter how foolish these choices may often be. But sometimes it is not practical for the law to maintain a hands-off policy. The criminal law may be able to overlook homosexual conduct, but it will probably be a long time before it can afford to overlook cocaine-using conduct, even though the snorting in question takes place within the sphere demarcated as private by the conventional liberal theory.

Freedom is not an absolute and self contained end, but an end ordered to further ends, above all to the end of a good human life.

Second, to define individual freedom in terms of the right to be left alone is to forget that freedom can also be hindered by poverty, ill health, lack of education, etc. It is to forget, in other words, that negative freedom is not the only kind; there is such a thing as positive freedom as well. Isaiah Berlin once wrote a marvelous essay, "Two Concepts of Liberty," pointing out how dangerous the concept of positive freedom has been historically, in that it has provided theorists of totalitarianism from Rousseau to Mao with an excuse for repressing negative freedom, that is, freedom in its plain, common-sense signification. With all due respect to Berlin (it is a wonderful essay) and in full awareness that the enemies of freedom will seize anything, even freedom itself, with which to strike their blows, nonetheless it cannot be denied that to empower people to lead richer and more creative lives is to enhance, in some very intelligible sense of that word, their freedom.

In regarding individual liberty as an absolute, though limited right, one which can be neither justified nor restricted by any end beyond itself, the conventional liberal theory of freedom remains faithful to the spirit, indeed to the letter, of John Locke's 300-year-old theory of inalienable rights. We could do much worse than to have John Locke as our ideological father; indeed most nations have done much worse. But, after all this time, it ought to be possible to make a few small improvements on our heritage. A more adequate theory of individual freedom—and hence of its subcategory, privacy—would treat freedom not as an absolute and self-contained end, but as an end ordered to further ends, above all to the end of a good human life.

The conventional theory regards privacy as a kind of idol. But it is not an idol. Rather it is an essential condition for the full, rich and creative development of human personality. And while the recent Georgia decision tends to undermine the idolistic notion of privacy, there is no reason that it should injure the more adequate notion. ■

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GayCommunityNews

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Supreme Court Rules States Can Ban Sodomy

By Denice Sudell

WASHINGTON, DC—Lesbian and gay activists vow that the fight to repeal state laws banning same-sex sexual activity will continue, despite this week's Supreme Court decision holding that such laws are constitutional.

The Court, by a 5-4 vote, held in *Bowers v. Hardwick* that the fundamental constitutional right to privacy and intimate association does not extend to lesbian and gay sexual activity. In a decision written by Justice Byron White, the Court upheld a Georgia law which declares "any sexual act involving the sex organs of one person and the mouth or anus of another" to be a felony punishable by up to twenty years' imprisonment.

Chief Justice Warren Burger wrote a separate, concurring opinion "to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy....[To hold otherwise] would be to cast aside millennia of moral teachings."

In an impassioned defense joined by three other justices, Justice Harry Blackmun declared that "depriving individuals of the right to choose for themselves poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do....[T]he Court today betrays those values." Blackmun read major portions of the dissent from the bench, an unusual move which indicates the depth of division on the Court over this case.

Justice Lewis Powell, who was widely viewed as the deciding vote on the Court, joined the majority, but also wrote a separate opinion, suggesting that imprisonment of persons who violated the statute might constitute "cruel and unusual punishment" in violation of the Constitution's Eighth Amendment. The Court could not decide this issue because it had not been raised in the lower court, Powell said. (For more extensive excerpts from the Court's opinions, see box this page.)

The case began in 1982 when a police officer arrested Michael Hardwick, an Atlanta gay man, in Hardwick's own bedroom and charged him with violating the Georgia law. The police officer had come to Hardwick's home with a warrant to arrest him for traffic violations. Let into the house by Hardwick's roommate, the officer found Hardwick in the bedroom engaging in oral sex with another man.

Although the charges against him were later dropped, Hardwick sued the state attorney general Michael Bowers, claiming that his constitutional right to privacy had been violated. A district court threw out the suit, but the Federal Appeals Court for the Eleventh Circuit reversed that decision and ruled that the right to privacy did encompass lesbian and gay sexual activity. The state appealed to the Supreme Court, which overturned the appeals court decision.

"It's a devastating setback, but it's not the end of the ball game," Abby Rubenfeld, legal director of Lambda Legal Defense and Education Fund in New York City told *GCN*. "It means we move out of the federal courts and into the state legislatures and courts." Rubenfeld pointed out that the decision gave considerable deference to the right of state legislatures to pass or repeal sodomy laws. Such laws, banning varying forms of sexual activity, remain on the books in twenty-four states, including Massachusetts, and in the District of Columbia. Both Lambda and the National Gay and Lesbian Task Force (NGLTF) will target these laws for challenge.

Leonard Graff, legal director of National Gay Rights Advocates (NGRA) in San Francisco, agreed that the states are the next logical battleground. He noted that NGRA had already filed suit in Nevada, claiming that the sodomy law in that state violates the privacy clause contained in the Nevada constitution. "We're also claiming that it violates the equal protection clause [of the state constitution], since it [the law] only applies to [sex between] people of the same gender," Graff told *GCN*.

Mauro Montoya, legal services coordinator of the Whitman-Walker Clinic in Washington, DC, which serves the lesbian and gay

Choice Words from the High Court

From the Court's majority opinion, written by Justice White:

[W]e think it evident that none of the rights announced in [earlier privacy] cases bears any resemblance to the claimed consititutional 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 hand has been demonstrated, either by the Court of Appeals or by respondent [Hardwick]. 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....

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...Proscriptions against that conduct have ancient roots...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....

Respondent, however, asserts that the results should be different where the homosexual conduct occurs in the privacy of their home...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...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 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....

From Chief Justice Burger's concurring opinion:

I join the Court's opinion, but I write separately to

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ing traffic for 3½ hours until the last remaining demonstrators dispersed at 12:30 a.m.

It was during the sit-in that some participants called for a demonstration to "disrupt" the July 4th celebration, which was to be attended by President Reagan and Chief Justice Warren Burger. Even while the sit-in was taking place, a flyer was mimeographed that called for gays to "show our rage" by snarling subways and disrupting traffic.

On July 4, 6,000 chanting, singing, placard-carrying people marched from

when Darrell Yates Rist, an activist with the Gay and Lesbian Alliance Against Discrimination (GLAAD), told police that the protesters would go "one by one and two by two" to Battery Park rather than as a group. Many marchers then circumvented the barricades and proceeded downtown to Battery Park—holding aloft such signs as "Miss Liberty? You Bet I Do," "Lady Liberty, Light the Torch for Us Too" and "Privacy: A Basic American Right."

"We have a message for Burger, we have a message for Falwell, we have a

particularly as it was handed down on the eve of the Liberty Weekend extravaganza extolling the rights and freedoms supposedly enjoyed by all Americans.

Nor was the gay community's anger mollified by the news, disclosed on July 3 and publicized at the rally the next day, that right-wing homophobes had failed to gather enough signatures to put the recently enacted New York City gay rights law on the November ballot for a referendum vote.

The fury of the participants, some of

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Court today betrays those values." Blackmun read major portions of the dissent from the

Gay's the Word Charges Dropped

By Donald Stone and Stephanie Poggi

LONDON — On June 27, Her Majesty's Customs unexpectedly announced it had dropped all charges against Gay's the Word Bookshop and its nine directors.

England's only lesbian and gay bookstore had been charged with importation of "indecent or obscene" materials, after Customs carried out a series of raids on the store and the homes of some of its directors in 1984. At that time, over 800 volumes were seized, most of which had been shipped from Giovanni's Room, a Philadelphia bookstore. The directors were to stand trial at the Old Bailey on October 6 of this year.

Customs' turnaround is not the result of enlightenment, according to Paud Hegarty, one of the nine directors. Rather, Customs decided to drop the charges after a decision was made by the European Court in a related case. The case involved British Customs' seizure of inflatible sex dolls imported from a German company. After working its way through the English legal system with rulings for Customs at every juncture, the doll case was then heard by the European Court. That body ruled that Customs' seizure of the dolls violated free trade agreements between European countries and that England could not set one standard for materials produced within its border and another for imported materials.

Given the ruling, "Customs thought they would have a hard time," proving their case in court, said Hegarty. Some of the same books seized by Customs when shipped from the U.S. have been reprinted by British presses. Under British law, the British versions can be legally distributed.

Customs' decision to drop the charges does not signal an end to censorship of gay and lesbian books, said Hegarty. It does, however, mean an end to arbitrary seizures based on a "secret list" of banned materials. Customs has informed Gay's the Word that in the future it will review sexually explicit books for import to the country on a book-by-book basis. Gay's the Word is charged with informing Customs when it intends to import a book that might be considered "obscene."

According to Ed Hermance, coowner of Giovanni's Room and a named co-conspirator in the charges brought by Customs, "now there are rules, so we're on firmer ground. But we're still going to have problems." Hermance added that he would call the decision to drop the charges a "victory," "but what we've really done is avoided disaster."

Customs has returned to Gay's the Word the majority of books it had impounded, including *The Joy of Lesbian Sex* and *The Joy of Gay Sex*. They kept only 19 titles, "to save some face," according to Hegarty.

Gay's the Word now intends to begin importation of the large number of lesbian/gay books published in the U.S. since 1984, previously unavailable because of the threat of further seizures.

— filed from Boston

Appeals Court for the Eleventh Circuit reversed that decision and ruled that the right to privacy did the same gender," Graff told *GCN*.

Mauro Montoya, legal services coordinator of the Whitman-Walker Clinic in Washington, DC, which serves the lesbian and gay community here, pointed out that the decision "will make it easier for a state to base its sodomy laws on public health concerns." Montoya warned that the decision may encourage some states which have repealed their sodomy laws to recriminalize gay and lesbian sexual activity out of a fear of AIDS. "One state—New Mexico—which had repealed theirs has introduced a bill to reinstate it," Montoya told *GCN*. "It's an hysterical measure." Jeff Levi, executive director of NGLTF here in Washington, was also concerned with the decision's impact on AIDS. "It [the decision] will drive people underground, making them less willing to participate in research and treatment [of AIDS]," Levi told *GCN*.

Kevin Cathcart executive director of Gay and Lesbian Advocates and Defenders (GLAD) in Boston, noted that in Massachusetts, where laws banning sodomy and other "unnatural and lascivious conduct" remain on the books, "enforcement is not a live issue." The state Supreme Judicial Court held in 1974 that the "lascivious conduct" law could not be applied to private consensual activity.

However, "people seem to have trouble making a distinction between criminal statutes which make certain sexual *acts* illegal and the status of a class of people," Cathcart told *GCN*. "Many people think it is illegal to be a lesbian or gay. Nowhere in the United States is that true—not in Massachusetts, not in Georgia, not before the Supreme Court decision, not after the Supreme Court decision."

Cathcart said that "the homophobia of some people in the legal system," including some attorneys and judges, "blinds them to the actual working of the law." For this reason, Cathcart said, the

Continued on page 7

From Chief Justice Burger's concurring opinion:

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...

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 Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law...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."...In 1816 the Georgia Legislature passed 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 millenia of moral teaching.

From the dissenting opinion written by Justice Blackmun:

...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 has vanished long since, and the rule simply persists from blind imitation of the past."

...Homosexual orientation may well form part of the very fiber of an individual's personality...an individual's ability to make constitutionally protected "decisions concerning sexual relations,"...is rendered empty indeed if he or she is given no real choice but a life without any physical intimacy...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...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....

As Justice Jackson wrote so eloquently..."[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."

...The assertion that "traditional Judeo-Christian values proscribe" the conduct involved...cannot provide an adequate justification for [the Georgia law]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgement on the entire citizenry....

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.

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Supreme Court on Sodomy

Continued from page 1

decision, and the existence of sodomy laws in any state, will be used to justify discrimination against lesbians and gay men in such areas as child custody, housing, and employment, even when there is no evidence that the persons discriminated against are actually engaging in any illegal acts.

Both NGRA's Graff and Lambda's Rubenfeld called the decision a political one. "It's clearly a case of deciding the result and making the decision fit the result," Graff said. He described the majority opinion as "really perfunctory—lacking the detailed analysis we'd expect from the Supreme Court on an issue as important as the right to privacy." Blackmun's carefully-reasoned dissent underscores the lack of legal foundation for the majority opinion and makes the political nature of that opinion more obvious, Graff said.

Rubenfeld called the decision "the first decision from the Rehnquist Court." Ultra-conservative Justice William Rehnquist, who joined White's opinion along with Chief Justice Burger and Justices Powell and Sandra Day O'Connor, was recently nominated by President Reagan to head the Court when Burger retires at the end of his term. Most observers believe that Rehnquist's nomination, together with the nomination of conservative Judge Antonin Scalia for the opening of the Court, signals that the recent rightward swing of the Court will continue for many years to come.

Despite this prospect, both Rubenfeld and Graff emphasize that, as Graff put it," the final word has not been written" by the Court about lesbian and gay civil rights.

Graff pointed out that the Court has not yet decided whether to hear *Baker v. Wade*, a case challenging the Texas sodomy law. Graff said that that case "squarely presents" the argument that the law, enforced only against lesbian and gay sexual activity, violates the Equal Protection Clause of the Constitution. The Court avoided addressing this issue in *Hardwick*.

Rubenfeld compared the *Hardwick* decision to the Court's decision in the case of *Plessy v. Ferguson*, which upheld racial segregation in education. She pointed out that "it wasn't that long afterwards that the Supreme Court reversed itself" and held in *Brown v. Board of Education* that such discrimination was unconstitutional. "*Plessy* wasn't the end of the Black [civil rights] movement. The struggle continues, this is not the end of the gay rights movement, and I hope that soon we have our own *Brown v. Board of Education*."

Graff drew an analogy to the Court's earlier decision in the *Dred Scott* case, which held that Blacks were not citizens, as well as to *Plessy*. After those decisions, Graff said, "the Black community became stronger, they were galvanized, and they persevered....[the *Hardwick* decision] will have a psychological impact on the gay community that'll be tough to overcome—but it will be."

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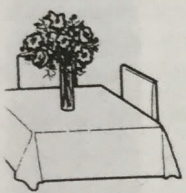

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Freiberg, Peter.
"Supreme Court Decision Sparks Protests" The Advocate pp 12-13
August 5, 1986

Supreme Court Decision Sparks Protests

"New Militancy" Seen in Angry Demonstrations

by Peter Freiberg

Enraged by the U.S. Supreme Court decision upholding the right of states to ban private, consensual gay sex, thousands of New York City gays took to the streets for two angry, militant demonstrations: a traffic-stopping Greenwich Village sit-in, followed three days later by a massive protest march during the July 4th Liberty Weekend celebration.

The demonstrations—the biggest by New York gays since the 1970s and the largest of several held around the country in opposition to the Supreme Court ruling—began with an evening rally by more than 1,000 people July 1 at Sheridan Square in Greenwich Village—a location that only two days before had been thronged by thousands of exuberant participants in the Gay Pride Parade and Christopher Street Festival. After 90 minutes of speeches denouncing the decision, activist Buddy Noro told the crowd to sit down in the middle of Seventh Avenue South and stop traffic.

The protesters obliged, with police detouring traffic during the sit-in. But when organizers attempted to end the sit-in after almost a half hour, the crowd refused, instead surging east along Christopher Street to Sixth Avenue. Chanting "1-2-3-4, civil rights or civil war" and singing "We Shall Overcome," the protesters moved to the intersection of Sixth Avenue, 8th Street and Greenwich Avenue. There the sit-in resumed, blocking traffic for 3½ hours until the last remaining demonstrators dispersed at 12:30 a.m.

It was during the sit-in that some participants called for a demonstration to "disrupt" the July 4th celebration, which was to be attended by President Reagan and Chief Justice Warren Burger. Even while the sit-in was taking place, a flyer was mimeographed that called for gays to "show our rage" by snarling subways and disrupting traffic.

On July 4, 6,000 chanting, singing, placard-carrying people marched from Greenwich Village to the federal courthouse downtown to Battery Park at the tip of Lower Manhattan, where hundreds of thousands of people were enjoying the Liberty Weekend festivities.

At one point, the July 4 march came close to exploding into violence when protesters were met at Wall Street by helmeted police officers carrying nightsticks and standing behind hastily erected wooden barricades. The marchers were told that they could not proceed en masse to Battery Park, where they wanted to hold a rally.

While some in the crowd shouted "To Battery Park" and "Civil rights or civil war," Gina Alvarez, an activist with the Coalition for Lesbian and Gay Rights (CLGR), urged the marchers to sit down in the street (which was closed to traffic) and to avoid a confrontation with police.

"Do you want to see your brothers and sisters hurt?" she shouted through a bullhorn. "We don't want a riot. Liberty, not blood."

Any possible violence was averted when Darrell Yates Rist, an activist with the Gay and Lesbian Alliance Against Discrimination (GLAAD), told police that the protesters would go "one by one and two by two" to Battery Park rather than as a group. Many marchers then circumvented the barricades and proceeded downtown to Battery Park—holding aloft such signs as "Miss Liberty? You Bet I Do," "Lady Liberty, Light the Torch for Us Too" and "Privacy: A Basic American Right."

"We have a message for Burger, we have a message for Falwell, we have a message for Reagan," shouted Rist when the crowd regrouped in Battery Park. "The message is, 'We've had enough and we're not going to take it any more.' "

With the Statue of Liberty in view, gays pointed their fingers and shook their fists in the statue's direction as they repeated the angry chant they had used earlier when they massed at the steps of the federal courthouse in Foley Square: "Shame, shame, shame, shame . . ."

Both the July 4 rally and the traffic-stopping demonstration by more than 1,000 people the night of July 1 made it apparent that the Supreme Court decision infuriated many New York gays more than has anything else in recent years—particularly as it was handed down on the eve of the Liberty Weekend extravaganza extolling the rights and freedoms supposedly enjoyed by all Americans.

Nor was the gay community's anger mollified by the news, disclosed on July 3 and publicized at the rally the next day, that right-wing homophobes had failed to gather enough signatures to put the recently enacted New York City gay rights law on the November ballot for a referendum vote.

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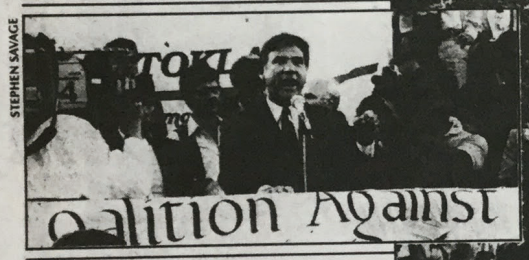

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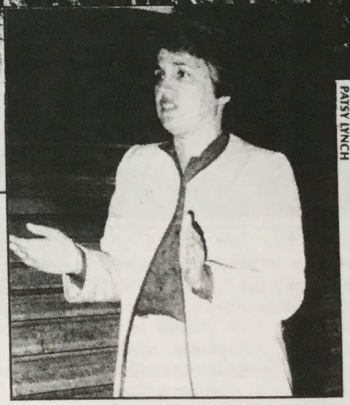
PATSY LYNCH

John Molinari, president of the Board of Supervisors, spoke at San Francisco's protest (*upper left*); Eleanor Smeal, president of NOW, addressed the Washington, D.C., rally (*right*).

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whom had never before been involved in gay organizations or protests, led one long-time activist to predict a resurgence of grassroots organizing.

"What I've seen," said Jim Owles, a founder of the defunct Gay Activists Alliance in New York, "makes me feel more than ever that there's a time again for a new militancy in the gay and lesbian community."

CLGR activist Andy Humm said, "We have to create the atmosphere in our community that encourages people to come out rather than [one that] tells people to stay in the closet and enjoy it." Humm added that he hoped the protests, aside from allowing gays to vent their anger, would show the marchers that "if they can go down to Battery park in front of thousands of people, they can certainly come out to their families and office [workers], and that's where it's at."

While the demonstrations in New York City drew the largest crowds, protests held in other cities were equally spirited:

- In Washington, D.C., 175 gays and their supporters marched July 2 in a circle in front of the Supreme Court, where they heard National Organization for Women President Eleanor Smeal portray the decision as an act of "neo-fascism."
- In San Francisco, the Associated Press (AP) reported that 600 gays gathered on June 30, just hours after the decision was announced, to protest what gay lawyer John Wahl called "the day that will live in infamy."

Pat Norman, a lesbian city official who is running for the Board of Supervisors, said, "Today, all rights to privacy have been revoked by the U.S. Supreme Court. I am outraged."

- In Cincinnati, the AP quoted gay rights activist Rick Buchanan as telling 200 cheering, applauding gay people gathered at City Hall, "We are a gentle, angry, loving people and we are not going to give up our rights. We will not go back into the closet."

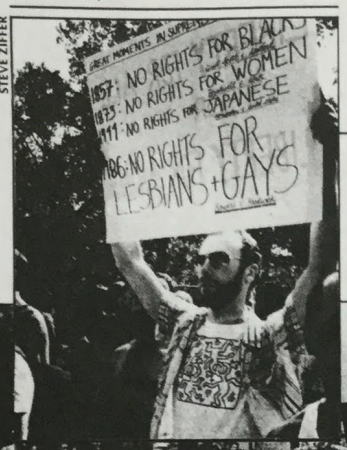
Activist Ted Good called for volunteers to participate in lobbying campaigns aimed at getting legislators in Kentucky to repeal that state's sodomy law and to make sure that Ohio, which repealed its sodomy law in 1974, does not reenact one.

- In Dallas, some 500 supporters of the Dallas Gay Alliance rallied near city hall. After expressing opposition to the Supreme Court decision, they marched to the Lone Star Gas Company to protest what they charged was the company's discriminatory hiring policies against people with AIDS.

The July 4 march in New York was seen by thousands of people, some of whom made clear their antigay feelings. One gay man was attacked while the march was still in Greenwich Village—he suffered a broken cheekbone, while two gay men were reportedly slightly injured in scuffles.

At Battery Park and elsewhere in Lower Manhattan, some spectators booed and screamed, "Fuck gay rights." But the majority of people watched the march bemusedly, and some bystanders cheered and applauded. "I think it's great," said Valerie Bambushew. "My sister's a lesbian, and I support her. My whole family's very supportive."

One speaker at the July 4th rally, Mark Green, who is seeking the Democratic nomination in New York for the U.S. Senate, warned the crowd that gays would not be able to negate the impact of the Supreme Court decision by themselves, just as blacks needed white support to get civil rights legislation in the 1960s. "Get allies, get allies," he urged. ●



STEVE ZIFFER

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Protesters at New York's massive demonstration used placards as reminders of previous antirights Supreme Court decisions (*left*) and marched down Broadway (*below*); Darrell Yates Rist confronts police at the federal courthouse (*lower right*).

STEVE ZIFFER

PATSY LYNCH

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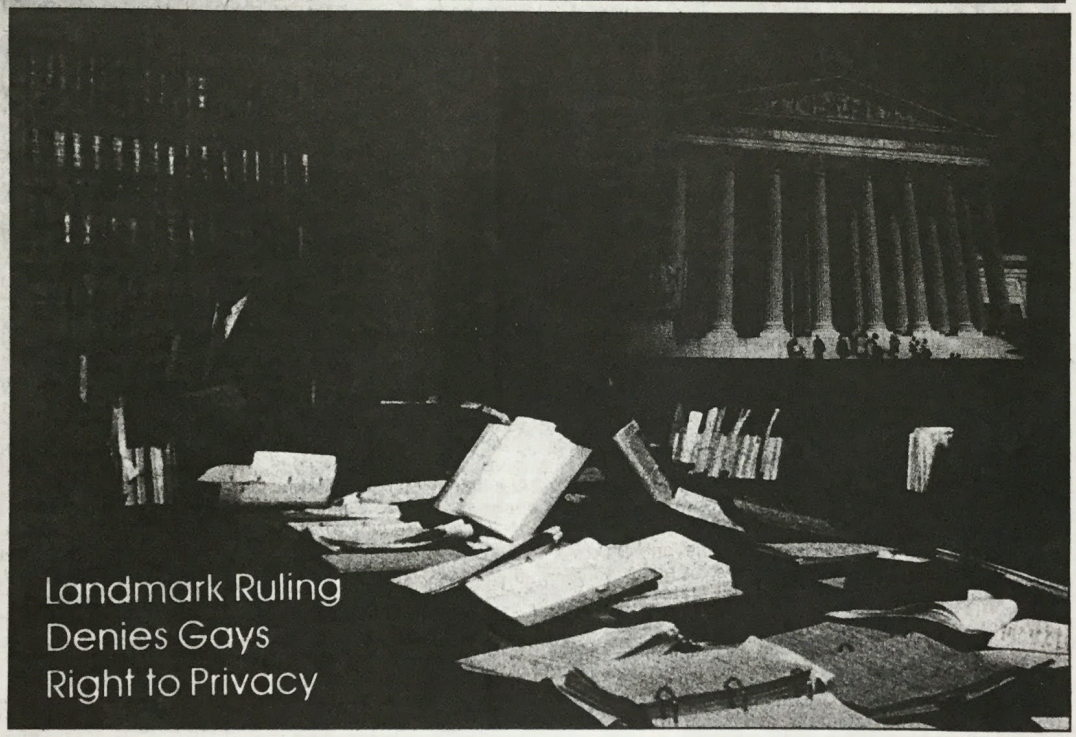

Landmark Ruling Denies Gays Right to Privacy

IN DEPTH:

High Court Upholds Sodomy Law

by Dave Walter

When the Supreme Court effectively ruled that gay people have no constitutional right to engage in same-gender sexual relations, the gay legal activists who had kept a close watch on *Hardwick* v. *Bowers* reacted with shock, and then outrage. But it was not the ruling itself that angered them so; rather, it was the blatantly homophobic opinion that accompanied the decision.

The high court's 5-4 ruling on June 30 upheld Georgia's sodomy law and stated that there is no fundamental right to engage in homosexual sodomy. But the justices in the majority went even further, comparing gay sex to "adultery, incest, and other sexual crimes" and pointing out that society's prohibitions against gays have "ancient roots."

"I was really stunned by the opinion," said Joe Tom Easley, an attorney, legal scholar and cochair of the Lambda Legal Defense and Education Fund (LLDEF). "I thought there was a 60/40 chance we would win. But what I was absolutely astounded at was the vehemence of the majority's opinion and the transparent hostility and bitterness toward gay people that the opinion represents. I cannot think of any opinion in the history of the Supreme Court that I can remember reading, where the court has been as vitriolic and hostile toward any segment of the American public."

"It's clear they went beyond the issues in the case," said Abby Rubenfeld, LLDEF's legal director. "This purported use of history, that's an interesting way of interpreting the Constitution—to say that discrimination that existed for centuries justifies continued discrimination."

Gay leaders predict that the Supreme Court decision will directly result in increased expressions of homophobia. "It has the ability to generate a great deal of discrimination—even violence—against gay people all across the country," said Easley. "It puts the stamp of legitimacy on homophobia and comes from one of the most powerful and venerable institutions in American life."

Acknowledging the high court ruling as

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Freiberg, Peter "Poll Shows Americans Disapprove of Ruling" The Advocate pll Aug 5, 1986

the worst defeat ever for the gay rights movement, gay leaders say they are both worried and hopeful about the impact the decision will have on the gay community itself. On the down side is the crushing blow the decision represents for gay people in general and the likelihood that many gays will prefer the safety—or convenience—of the closet. "The atmosphere it creates for gay men and lesbians is terrible and terrifying," said Rubenfeld. "It certainly doesn't encourage people to come out. It really shows how powerless we are as a community."

Nan Hunter, director of the Lesbian and Gay Rights Project of the American Civil Liberties Union, observed that the court ruling comes during an "era of backlash" against gays and others. It appears as the New Right continues its ascendancy, as the federal courts become more filled with conservative judges, and as the gay community continues to reel from the AIDS crisis. In fact, the decision was handed down only one week after the Justice Department said that people who are perceived to be contagious for the HIV virus can be fired from their jobs. "It's enormously damaging to us, absolutely, there's no question about it," said Hunter. "But I also think there will be a political response to it that will prove to be one of our major sources of energy in years to come."

"At its worst, the *Hardwick* case could represent the turning point that would be the end of the high-water mark of the gay rights movement," said Easley. "But it could be the Stonewall of the '80s that will energize gays, that will cause us to get out there and say, 'No, we're not going to take it anymore,' and mobilize us to fight. It could be a watershed either way. We could turn down a bad road—or a good road."

Gay leaders say that because the Supreme Court decision is so offensive, it will have the effect of spurring into action gay people who have until now not become involved in gay rights efforts. "This is like hitting people over the head with a hammer and saying, 'It's time to get serious about our lives,' " said Vic Basile, executive director of the Human Rights Campaign Fund (HRCF). Gay rights organizations have received a flurry of calls from angry gays asking what they can do to help out in light of the ruling.

Furthermore, many nongays are also upset by the high court's ruling. "I think there will be greater sympathy as a result of this decision," said Hunter. "The decision in a sense brings out into the open the degree of contempt that exists for our community. And that kind of official expression of contempt is something many people feel uncomfortable with." That Justice Harry Blackmun was so eloquent and forceful in his dissent from the majority, Hunter added, will not be lost on the public at large.

Basile predicted that widespread disgust at the Supreme Court's action will result in new support for gay rights efforts from outside the movement: "It will help to do for us what we thus far have been unable to do for ourselves, which is to form a broader coalition with people—whether gay or straight, black or white—who can't help [but] see the egregiousness of this decision. I think we will find support from people who we didn't expect to find support from."

Basile hopes some of that support will come from the U.S. Senate, which reviews nominations of federal judges. He said HRCF will increase its focus on judicial appointments and will seek to help elect to the Senate candidates supportive of liberal judges.

The National Gay and Lesbian Task Force (NGLTF), meanwhile, plans its own political response to the Supreme Court ruling. According to Jeff Levi, NGLTF's executive director, the organization will work with state groups to develop strategies for repealing sodomy laws in the District of Columbia and the 24 states that still have such laws on the books. "It will require more resources and it will be a challenge," Levi remarked, "but the court has thrown down the gauntlet and we have to respond."

Gay legal activists agree that challenging sodomy laws through the political system is urgently needed because *Hardwick* will result in the continued, and possibly increased, use of sodomy laws to justify antigay court decisions—even in nonsodomy-related cases. Sodomy laws have, for example, been cited frequently as a basis on which to deny custody of children to gay parents. "They are used to support the argument that gay people are habitual lawbreakers," commented Hunter. "The sodomy laws are really the last refuge of homophobes."

Currently, there are federal challenges of state sodomy laws in Arizona, Louisiana and Minnesota; challenges have been filed in state courts in Missouri and Nevada.

The Ad Hoc Task Force to Challenge

(CONTINUED ON PAGE 22)

Poll Shows Americans Disapprove of Ruling

According to a poll taken by The Gallup Organization for *Newsweek* magazine, of the 73% of Americans aware of the Supreme Court ruling that upheld Georgia's sodomy law banning private, consensual gay sex, 47% disapproved, compared with 41% who approved.

When the question was phrased more generally—"Do you think that states should have the right to prohibit sexual practices conducted in private between consenting adult homosexuals?"—a resounding 57% answered no, while only 34% answered yes. However, an overwhelming 74% thought states should not have the right to ban private heterosexual activities.

Asked whether they think "homosexuality has become an accepted alternative lifestyle or not," 61% replied no (a 3% rise from two years ago), while 32% said yes and 7% didn't know.

According to an analysis by *Newsweek*, there was greater disapproval of the Supreme Court decision among middle-aged Americans (54%) than among any other age group, but there was virtually no difference between the opinions of men and women.

Among the other results of the poll were the following:

- Fully 25% of the respondents said that either they personally or their acquaintances were avoiding people they knew to be homosexual or suspected of being homosexual—because of AIDS; this was more than double the 13% figure in August 1985.

When asked whether they or acquaintances were avoiding places where homosexuals may be present, 44% responded yes, a sizable jump from the 28% who answered yes in August 1985.

- Asked whether they had any friends or acquaintances who are homosexuals, 29% said yes and 67% answered no.
- Questioned about the extent to which heterosexuals engage in oral or anal sex, 42% said it was commonplace, 33% said it was not commonplace and 25% didn't know.
- Women, *Newsweek* said in its analysis, are more likely than men to have homosexual friends and to think of homosexuality as an acceptable alternative lifestyle. Women also are much less likely (19%) than men (32%) to avoid known or suspected homosexuals.

—Peter Freiberg

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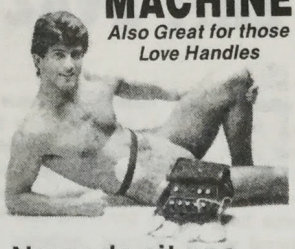

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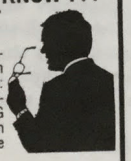

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(CONTINUED FROM PAGE 11)

Sodomy Laws, a national organization made up of individual attorneys and various legal groups, was scheduled to meet in mid-July to reevaluate the current court challenges and to map strategy for the future. Rubenfeld predicted there will be a shift from federal to state court suits. "Traditionally the federal courts have been the forum to which minority groups go to have their rights protected," she observed. "It is so ironic that this Supreme Court has basically cut us off from federal courts. So we're left to going into state courts to protect our rights."

Legal activists anticipate the Supreme Court decision will have a mixed impact on state courts, which decide cases on state—not federal—constitutional grounds. Some courts, they say, will exercise their independence from the high court and ignore the federal ruling; others will find the Supreme Court opinion persuasive and use it in reaching decisions.

Hunter insisted that the federal courts, meanwhile, will not be abandoned. "We're not going to cede that route to the other side, not without a lot more fighting," she commented. "As bitter as this blow is, there are still a lot of cases to be fought and won in the federal court system."

Some legal activists said there would be little point in taking another gay-related case to the Supreme Court, given the *Hardwick* decision. But Leonard Graff, legal director of National Gay Rights Advocates, disagreed: "I can understand why people are not too anxious to go back to the Supreme Court. But there is a certain statement in going forward, which is to say, 'We're not going to cower in the corner for 20 years until we have a new court. We're going to keep on filing new suits. We're going to still be there battling away.' Eventually we will prevail."

"I think our movement will continue and we will regroup and move forward," said Rubenfeld. "There *is* a right to privacy and it *does* encompass private consensual sex [among gays]. This was a political decision. It's important for them to know politically that we're not going to go away."

Gay leaders concede that rights victories are going to be won only with great difficulty and, in some cases, after many years. But they vow that the homophobes ultimately will be defeated. "We have to remember that they don't understand us as well as we understand them," NGLTF's Levi told a rally outside the Supreme Court. "And every time they knock us down, whether it's the Justice Department or the Supreme Court or Anita Bryant in the '70s—we come up stronger than ever before." •

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PILGRIM / RICHARD JOHN NEUHAUS

GOD SAVE THIS VULNERABLE COURT

PUT ASIDE FOR the moment the question of whether there should be state laws against sodomy. Dr. Jerry Falwell is surely wrong when he says the Supreme Court "has issued a clear statement that perverted moral behavior is not accepted practice in this country." Among millions of Americans the culture of buggery is not only accepted but championed. What the Court said is that the text and structure of the Constitution do not establish the practice of sodomy as a "fundamental right."

The Court said other things that needed saying. In upholding the Georgia sodomy law, it said that in this Republic the people have a fundamental right to make their own laws, within the limits specified by the Constitution. In making such laws, the Court further said, the people may properly be influenced by tradition, custom, and religious belief. When judges try to override this democratic process by imposing their own values, they are themselves acting unconstitutionally. In the words of the majority opinion by Justice Byron White: "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."

Divorce Proceedings

Whether or not there should be a law against sodomy is for the representatives of the people to debate and decide. Either way, it is a question of moral judgment. As Justice White says, "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . , the courts will be very busy indeed." Furthermore, the courts would be busily putting themselves out of business, for a democratic people would not long countenance a legal system that formally divorced law from moral judgment. Admittedly, law and moral judgment have too frequently been separated in recent decades. But a final divorce decree has not come through, and now, at long last, the Court may be favoring a reconciliation.

Justice Harry Blackmun, in bitter dissent, unfurled the tattered banner of unbridled individualism. Two centuries of American jurisprudence may be described as a descent from Providence to privacy, but Justice Blackmun thinks it's progress all the way. With remarkable candor Blackmun argues that the Court's only reason for interest in questions of marriage, family, childhood, and sexuality is that they bear upon the freedom of the individual. Seldom has the classical concern for the "common good" been rejected so explicitly. Blackmun writes: "We protect [such] 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 life." It is a revealing glimpse into the mind of the author of the *Roe* v. *Wade* decision on abortion.

Consistent with his libertarian premise, Blackmun would employ judicial coercion to liberate the individual by destroying the bonds of community and tradition, even when such bonds are legitimated by democratic consent. He cites the infamous statement of Justice Holmes: "It 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." Yet more revolting is the hubris of judges who declare the people's wise affirmation to be blind imitation, and who conform the law to "current values" as defined, of course, by themselves.

But the full force of Blackmun's animus is saved for religion. I do not know whether he is against religio such, but he is certainly against reli that is so impertinent as to imp upon the *res publica*. In the pre case he detects religion breaking from the sphere of privacy to whic is properly consigned. Blackmun he is not impressed by the "inv tion" of Leviticus, Romans, and Thomas Aquinas to the effect sodomy is gravely wrong. "The le macy of secular legislation," he arg "depends . . . on whether the state advance some justification for its beyond its conformity to religious trine." Surely he is right in that. H ever, he overlooks the fact that Geo and other states do advance justif tions beyond religious doctrine. S justifications have to do with the c mon good, but we have seen w Justice Blackmun thinks of the c mon good.

Public Nuisan

Blackmun, it is to be feared, d not want justifications "beyond" r gion; he wants justifications that *clude* religion. In this view, the inc sion of religion or religiously ba morality lethally taints the law. S Blackmun, "A state can no more p ish private behavior because of r gious intolerance than it can pun such behavior because of racial a mus." Religion, when it impinges up the public arena, is by definition r gious intolerance. Legal historians n that in the last four decades there been scarcely a Supreme Court ref ence to public religion that is strongly pejorative. Providence is p tected by the privacy doctrine, so lo as it doesn't make a nuisance of its in public. Such is the perversity mind that has made the Court so v nerable to challenge by democra theory and practice. That is the important perversity addressed by tice White's majority opinion.

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peals bond—a sort of bail pending the outcome of the appeal—which would, of course, be most necessary when the sentence includes some time in custody. Local rules and practices must be known by the attorney.

§11.06 Constitutional Litigation: Challenging the Validity of Criminal Statutes

[1] Sodomy Law Reform[83.1]

[a] Caveat

No constitutional challenge should be attempted by the novice; such an action is difficult enough for an experienced litigator. This does not necessarily mean that constitutional attacks should be avoided. On the contrary, an attorney inexperienced in such matters may, nevertheless, have an ethical duty to launch such an attack. But it is critical that those with greater experience be consulted and involved in the case at the very earliest stages. Lack of such consultation and involvement can spell disaster, particularly now that *Hardwick* has made challenges based on federal law virtually impossible and reliance must be placed on state constitutional grounds.[84]

[b] Legal Theories

[i] Privacy: Protection of Same-Gender Intimacy—*Bowers v. Hardwick*

After years of silence on the subject by the United States Supreme Court and years of preparation by proponents of "Equal Justice Under Law," the issue of whether the United States Constitution—particularly the federal right of privacy—prohibits the states from criminalizing private consenting adult same-gender sexual activity has recently been addressed by the High Court. The impact of this decision will be felt on many areas of law, from future

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[83.1] This section has been updated to reflect the Supreme Court's important decision in Bowers v. Hardwick, *infra* note 84.

[84] Bowers v. Hardwick, — U.S. —, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *summarily aff'd without opinion*, 425 U.S. 901 (1976). For detailed discussion of *Hardwick*, *see infra* §11.06[1][b][i].

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sodomy law challenges to criminal prosecutions for private *and* public sexual behavior to all the types of discrimination cases considered elsewhere throughout this book.

In the opinion, Justice White, writing for the majority, issued an indictment of homosexuality far beyond what was necessary for the negative holding:[85]

> Proscriptions against [consensual sodomy by homosexuals] 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 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. . . . 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.[86]

Chief Justice Burger's concurring opinion is even harsher:

> 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 Judaeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. . . .
>
> Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, an heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millenia of moral teaching.[87]

The context for this tirade was not some outrageous or publicly blatant fact situation; an officer in Georgia, serving a warrant for

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[85] Bowers v. Hardwick, *supra* note 84.

[86] *Id.*, 106 S. Ct. at 2844–45.

[87] *Id.* at 2847. Justice White's and Chief Justice Burger's historical analysis is by no means complete; a more circumspect exposition of the history of secular and ecclesiastical treatment of homosexuality is not possible here but should be one focus of future arguments relating to any analysis of the constitutionality of such sexual prohibitions.

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allegedly unpaid traffic tickets, gained entrance to a home and entered a bedroom in which he saw the man whose home it was, Mr. Hardwick, engaged in an act of oral sex with another man. An arrest was made, but ultimately the prosecution decided, without prejudicing its right to later change its mind, not to go forward with the trial.

Mr. Hardwick did not want to wait passively to be prosecuted, so he brought a civil action for a determination that the sodomy law of the state of Georgia was unconstitutional. The case was filed in federal court. The United States District Court granted a defendants' motion to dismiss for failure to state a cause of action. The federal court of appeals reversed and held (1) that Hardwick had standing to challenge the constitutionality of the statute; (2) that a heterosexual married couple who had joined in the suit lacked standing, since fear of prosecution was not alleged on the couple's behalf; and (3) that the sodomy law infringed on the plaintiff's fundamental constitutional right of privacy such that the state had to show, first, that there was a compelling state interest in intruding on that right and, second, that the law was narrowly drawn to afford the least restrictive means possible of furthering that interest.[87.1] The court of appeals remanded the case for trial on the issue of the state interest.

The Attorney General of the State of Georgia petitioned the United States Supreme Court for a writ of certiorari, asserting that there was no fundamental right of privacy involved and that the state could criminalize the subject conduct on the basis of morality. The Supreme Court agreed notwithstanding that the plaintiff's case was grounded on a confluence of the territorial privacy and sanctity of the home *and* the decisional privacy and autonomy involved in making fundamental choices about one's personality and one's relationships.

The Supreme Court instead adopted the point of view so articulately and exhaustively set forth in a law review article by Brigham

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87.1 Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985). The Georgia sodomy statute is of the broadest nature, affecting homosexuals, heterosexuals, and married and unmarried persons. It makes oral- and anal-genital contact a crime punishable by up to 20 years in prison no matter where the act occurs, including in the private bedroom of the home.

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Young University law professor Bruce C. Hafen.[87.2] This article provides the philosophical model for the Supreme Court's primary objectives regarding sexual privacy, the family, and the role of the court in expanding (or not expanding) the application of constitutional principles for the rest of this decade and, perhaps, for the rest of the century.

Rather than the indictments quoted above, the Court should simply have stopped after noting that a substantial evolution of legal thought had resulted in the decriminalization of homosexual behavior in just half the states; when and if that evolution were to continue to the extent that a consensus were to emerge in the states, then, perhaps, the Court might consider recognizing that territorial and decisional privacy principles had application to same-gender sexual activity. This would have been preferable to the mean-spirited and potentially damaging opinion which emerged in which the Court ignored the privacy principles and instead looked at the results of decriminalization of the specified sex acts from the point of view of majoritarian religious morality and only in the context of homosexuality.

It is painfully obvious, if not ironic, that the conservative majority on the United States Supreme Court has not, in the context of personal intimacy, embraced the conservative principle of limited government articulated by John Stuart Mill.[87.3]

In addition, the majority has not recognized the distinction between public and private morality. That distinction was, however, recognized by Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, in as strong a dissent as this author has seen. Justice Blackmun noted the unprincipled approach of the majority and wrote his dissenting opinion as a textbook of the principles and precedents which, he asserts, should have led the Court to a contrary ruling. Finally Justice Blackmun notes:[87.4]

> Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in [the sodomy law] "for hundreds of years, if not

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87.2 B.C. Hafer, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463 (1983).

87.3 *See supra* note 1; *see also* discussion below.

87.4 106 S. Ct. at 2854–55.

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> thousands, have been uniformly condemned as immoral" is sufficient reason to permit a State to ban them today.
>
> 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 scrutiny. *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). . . .
>
> A State can no more punish private behavior because 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. . . ." [Citation omitted.]

And Justice Blackmun concludes the dissent with the

> . . . hope that . . . 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. . . .[87.5]

For a discussion of other aspects of *Bowers v. Hardwick, see infra* §11.06[1][b][iv], Equal Protection, and §11.06[1][b][v], Cruel and Unusual Punishment.

[ii] Privacy Generally[87.6]

One of the basic philosophical underpinnings of the right of privacy is found in John Stuart Mill's treatise *On Liberty.*[88] This work is infinitely quotable and is often cited in appellate briefs and court opinions. It describes the limitations on legitimate interference by society in the life of the individual. It speaks of

> . . . liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological . . . liberty of tastes and pursuits . . . so long as what we do does

---

87.5 *Id.* at 2841.

87.6 All of the law review articles of Professor David Richards are of great value; his work should be an important resource for anyone contemplating a constitutional attack. Especially significant, regarding privacy, is his article *Homosexuality and the Constitutional Right to Privacy,* 3 Review of Law & Social Change 311 (1978-79).

88 J.S. Mill, On Liberty (George Rutledge, 1905).

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[v] Cruel and Unusual Punishment

In his separate concurrence in *Bowers v. Hardwick*,[121.1] Justice Powell indicated that he might have considered it cruel and unusual punishment had Hardwick received even a minimal jail sentence. Thus, Justice Powell is at least suggesting that in the right context, a majority of the Supreme Court might invalidate sodomy statutes on the basis of the Eighth Amendment. Justice Powell, clearly the critical "swing" vote in *Hardwick*, actually changed his mind after first voting with Justice Blackmun. Later, in an extrajudicial comment in the press,[121.2] he let the nation know he did not approve of sodomy laws and hoped state legislatures would do the job the Court refused to do.

[c] Strategic Considerations

The following listing is not exhaustive; the considerations which must be examined *before* an appeal is brought could be the subject of an entire volume. However, the following issues have been found to be of fundamental importance to attorneys launching such litigation contests in the past. A very brief description of each issue is intended only to assist the attorney in defining the issue for purposes of doing his or her own research.

[i] Choice of Statute to Attack

Sometimes a jurisdiction has a sodomy law, a fornication law, a solicitation statute, a loitering statute, as well as a penal proscription on any public sexual conduct. Certainly, the chance of a sodomy law challenge failing is much greater in a state which still criminalizes consenting adult sexual conduct for heterosexuals using the most traditional positions, than in a state which has already decriminalized such conduct. Thus, whenever possible, as part of a long-term project to eradicate the sodomy law, the attorney should first attack any existing fornication statute.

(*Text continued on page 11-121*)

121.1 *Supra* note 84.

121.2 Washington Post, July 13, 1986, at 1, col. 3.

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SEXUAL ORIENTATION AND THE LAW

by National Lawyers Guild
Anti-Sexism Committee of
San Francisco Bay Area Chapter

Roberta Achtenberg
Editor

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themes of late-1980s and early-1990s art, and the seven installations are conventional run-throughs of these themes, presented in the minimalist or happening styles that were first seen in the 1960s and 1970s and have now become new versions of retro style. (It should be noted that many of the artists included in this show are not young, and actually first came to prominence in the 1960s and 1970s. As for Louise Bourgeois, the beginnings of her career date back to the 1930s.) David Hammons's installation, with a photographic mock-up of an equestrian statue of Theodore Roosevelt surrounded by sandbags, a machine gun, and a lot of other stuff, is an Allan Kaprow retread; Adrian Piper's white room with a video of a black man saying, "I'm not sneaky, I'm not scary . . ." is politicized Minimalism, as is Chris Burden's *Other Vietnam Memorial*, a giant copper Rolodex engraved with Vietnamese names; Ilya Kabakov's wrecked meeting room is more Allan Kaprow stuff; and Louise Bourgeois's kinetic phallic gas tanks are more Sixties brutalism. I'm emphasizing style over content, because it's mostly the artists' stylistic choices that make an impression at "*Dis*locations." Going through the show, I didn't find myself thinking very much about sex or race or class. I find that the politics that dominates "*Dis*locations" is art-world politics—the politics of who will shape the Museum of Modern Art. Race, gender, imperialism are merely the ordinary topics of contemporary art, in this sense no more or less worthy than the ordinary topics of the art of a hundred years ago, which were, come to think of it, not that different: orientalism, motherhood, imperialism (seen then from the victor's point of view).

At the heart of "*Dis*locations" is an utterly weird phenomenon: the institution that's being dislocated is giving dignity to the dislocators. This is the most significant political transaction that is going on here; and to the pro-"*Dis*locations" crowd that says the exhibition is a triumph for progressive social politics, I say that the whole enterprise is cynical, that legitimate social issues are being used as a smoke screen for what is basically art-world politics. Kirk Varnedoe, who hired Storr, is a man who desperately wants to turn the Museum of Modern Art into the hot museum of contemporary art. He needs to do this, because contemporary art is where the money and the glamour are. So Robert Storr has brought in seven artists to dis the Museum of Modern Art. The Modern becomes hip. And in exchange the Modern bestows upon the artists the very dignity they are there to dis. And everybody's happy.

Installation art has always been about takeovers, about radical transformations. Claes Oldenburg's *Store*, Gordon Matta-Clark's split houses, Walter de Maria's *New York Earth Room*: these are about something dramatic that is done to an environment. I think that these gestures, even when they are amusing or provocative, are so broad as to defy sustained attention. Nonetheless, I think that installations can have the impact of diverting theatrical events, and as such add something to the sum of our experience. But when the image of the museum becomes the thing that is being taken over or transformed, we have to ask ourselves exactly what is being lost and what is being gained. Adrian Piper's video installation makes a legitimate point about black rage and white racism; yes, many people would look at the black man in this video and think, simply because he is black, that he's sneaky, he's scary . . . But Piper's point could be made as easily—and would reach more people—on a series of posters in the subway. Taking up an entire room at the Modern, Piper's installation isn't so much a statement against racism as a statement against the complex self-contained world that is the work of art—any work of art. Judged as art, the Piper—and all the rest of the stuff in this show—is, even if we give it the benefit of the doubt, just too slight and overblown to deserve this exposure. And the shock value that political art can sometimes have is diminished in the museum context. What the artists in "*Dis*locations" are really

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ng is aestheticizing politics, and then
ng this aestheticized politics as a batter-
ram with which to gain access to the
seum. With Storr in charge, the museum
ing down and playing dead for these art-

Museums rarely have known what to do
n contemporary art. William Rubin's
eral attempts to present Frank Stella as
heir to MOMA's traditions were far-
hed, contrived, deeply academic. The
seum of Modern Art was invented, in
ne sense, as a retrospective adventure,
its finest moments have always been in
spirit. The many newer museums that
e arisen in the Modern's long shadow are
ttempts to deal with the problem of how
mission of the museum, which is essen-
y one of preservation, can be reconciled
a lively interest in the art of the present.
re are things that will never be comfort-
in a museum. Don Judd's work, for in-
ce, which comes out of an installation
sibility, only looks effective when the art-
has total control—as he does when he has
ne-man show in a gallery. How art ends
in the museums is an imperfect process
est; but in spite of all the violence done
he name of making museums more con-
porary, I would not say that they should
ore the art of the present. Every once in
hile something important and contem-
ary gets into a museum, and those occa-
s, however infrequent, when the tradi-
connects with the present, must remain
sibilities.

For all I know, Robert Storr will next
sent us with a MOMA show of paintings
canvas, of sculptures on pedestals. I
uld not put it past him to turn around
present himself as a defender of tradi-
n. A painter I know remarked, on hearing
ut the plans for "*Dis*locations," "Oh,
mean to say that the Modern has a new
ator of painting and sculpture and his
show isn't painting and isn't sculpture."
rr is a man who is clever enough to have
en that complaint into consideration.
*is*locations" is the essential dramatic
ning career move; beyond this, I expect
that Storr has all the bases covered. He likes to make contributions to symposia and magazines in defense of the artist's freedom of speech. (This is perfectly fine, and takes about as much courage as defending apple pie in Middle America.) He's also a formalist who is eager to explicate a contemporary concept of a late style, with examples gleaned from the work of Philip Guston and Willem de Kooning. Storr will probably have a long and successful career at the Museum of Modern Art. He couldn't have had a better start than "*Dis*locations," for here he has delivered to his director and his trustees the show they've longed for: an exhibition that at last makes MOMA a leader on the contemporary scene. Move over Whitney, the Modern has arrived. And when the Modern goes contemporary, it does so with an élan, a kind of money, an aura of independence that's way beyond the Whitney.

With the Modern coming down with what may be a chronic case of hipness, we can only thank our lucky stars that Alfred H. Barr, Jr., William Rubin, and the rest of the people who have made the museum what it is had such a rock-solid idea of what they were about. Their modernist orthodoxy is anything but the full story of modern art, and I for one do not think that they should ever be forgiven their acceptance of Pop Art, their glorification of the Abstract Expressionists, their trivializing and fashion-following. This museum, in spite of all its white rooms, has never been lily white. But whatever the complicated transactions that have gone on between the Modern and the wider art scene, the people who were in charge at MOMA for half a century managed to build a great orthodox institution: the Museum of Modern Art provides us with a way of making sense of art. We may rebel against the orthodoxy, but we can never forget it, because it is rooted in that extraordinary permanent collection that we go away from and come back to and measure ourselves and our knowledge against for as long as we care about modern art. I'd seen "*Dis*locations" on opening night, when the whole world was there. I went back late on a Monday afternoon, when the
crowded at all. Some pe
come that Monday aftern
locations," but I think tha
were there to see the perm
to see the Picassos and M
drians and Klees. Chance
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lection will remain, desp

Forthcoming i

Stuart Davis at the M
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Calder at the Whitne
Anthony Trollope *by*
"Circa 1492" *by Creig*
Fiction chronicle *by*
The Morgan Beatus
Mordecai Richler's

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The New Criterion

December 1991

A monthly review *edited by Hilton Kramer*

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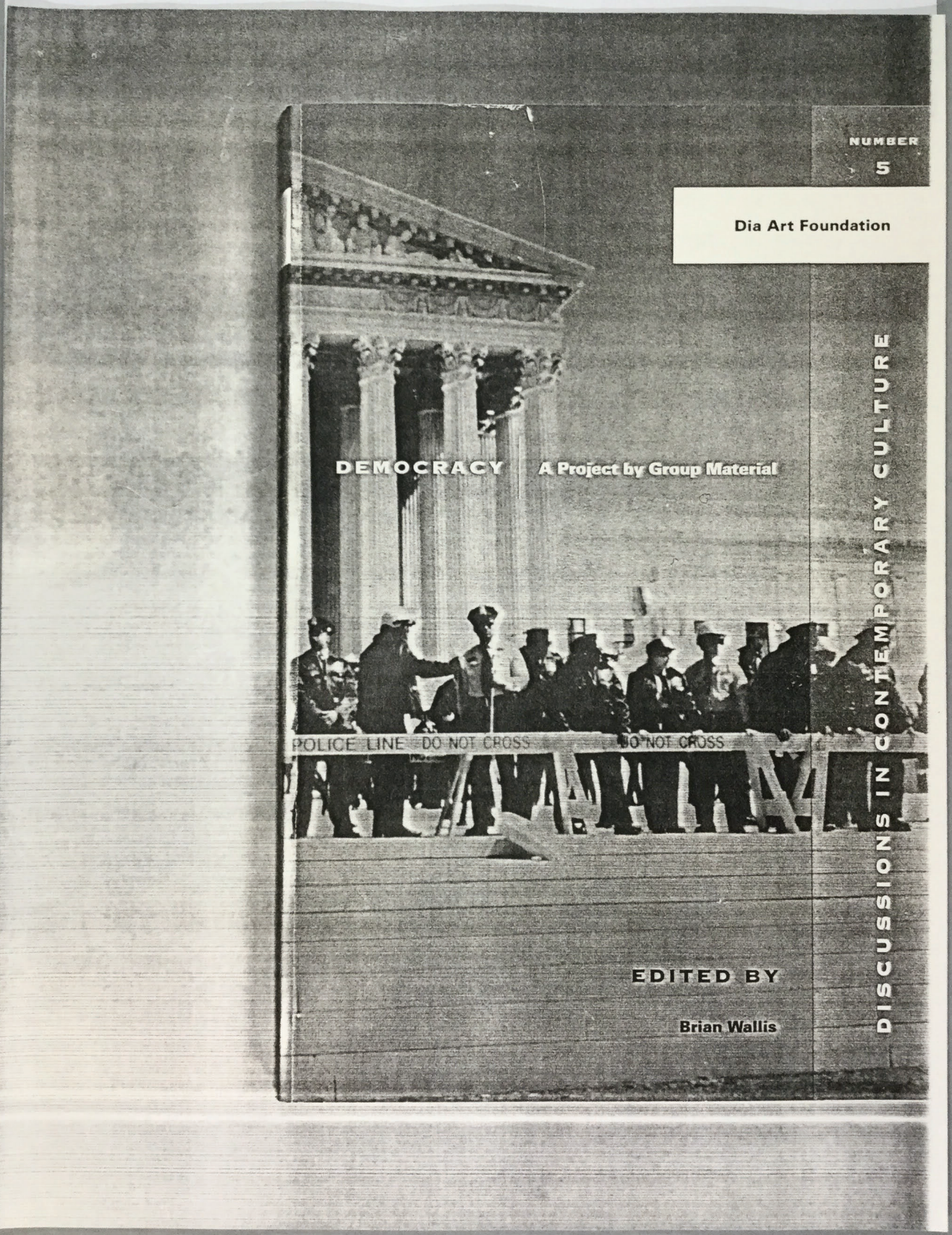

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Group Material

ON DEMOCRACY

Participating in the system doesn't mean that we must identify with it, stop criticizing it, or stop improving the little piece of turf on which we operate.

—Judge Bruce Wright, Justice,
New York State Supreme Court

Ideally, democracy is a system in which political power rests with the people: all citizens actively participate in the process of self-representation and self-governing, an ongoing discussion in which a multitude of diverse voices converge. But in 1987, after almost two terms of the Reagan presidency and with another election year at hand, it was clear that the state of American democracy was in no way ideal. Access to political power was obstructed in complex ways, participation in politics had degenerated into passive and symbolic involvement, and the current of "official" politics precluded a diversity of viewpoints. When the Dia Art Foundation approached us with the idea of doing a project, it was immediately apparent to us that democracy should serve as the theme.

The subject of democracy not only became our content, but influenced our method of working. This theme prompted a greater awareness of our own process. One of the first questions we asked was: "Why are they asking us?" To us, the Dia Art Foundation signified "exclusive," "white," "esoteric," and "male," whereas we had always attempted to redefine culture around an opposing set of terms: "inclusive," "multicultural," "nonsexist," and "socially relevant." In general, we see ourselves as the outspoken distant relative at the annual reunion who can be counted on to bring up the one subject no one wants to talk about.

The subject that no one in the art world wants to talk about is usually politics. Yet, because every social or cultural relationship is a political one, we regard an understanding of the link between politics and culture as essential. "Politics" cannot be restricted to those arenas stipulated as such by professional politicians. Indeed, it is fundamental to our methodology to question every aspect of our cultural situation from a political point of view, to ask, "What politics inform accepted understandings of art and culture? Whose interests are served by such cultural conventions? How is culture made, and for whom is it made?"

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In conceptualizing this project, therefore, we proposed a structure that differed from the conventional art exhibitions, lectures, and panels that Dia had previously sponsored. We identified four significant areas of the crisis in democracy: education, electoral politics, cultural participation, and AIDS. For each topic, we collaboratively organized a roundtable discussion, an exhibition, and a town meeting. For each roundtable we invited individual speakers from diverse professions and perspectives to participate in an informal conversation. These discussions helped us to prepare the installations and provided important information for planning the agendas for the town meetings.

Each of the four exhibitions that we installed at 77 Wooster Street reiterated the interrelatedness of our subjects and the necessity of our collaborative process. Our working method might best be described as painfully democratic, because so much of our process depends on the review, selection, and critical juxtaposition of innumerable cultural objects, adhering to a collective process is extremely time-consuming and difficult. However, the shared learning and ideas produce results that are often inaccessible to those who work alone.

Our exhibitions and projects are intended to be forums in which multiple points of view are represented in a variety of styles and methods. We believe, as the feminist writer bell hooks has said, that "we must focus on a policy of inclusion so as not to mirror oppressive structures." As a result, each exhibition is a veritable model of democracy. Mirroring the various forms of representation that structure our understanding of culture, our exhibitions bring together so-called fine art with products from supermarkets, mass-cultural artifacts with historical objects, factual documentation with homemade projects. We are not interested in making definitive evaluations or declarative statements, but in creating situations that offer our chosen subject as a complex and open-ended issue. We encourage greater audience participation through interpretation.

One form of participation was the town meeting held for each exhibition. These meetings were well publicized and were open to the public at large. In selecting the town meeting format, we meant not only to allude to the prototypical democratic experience but also to eliminate the demarcation between experts and the public so evident at most public lectures. For the town meetings all audience members were potential participants. Beyond the desire to erode such traditional categories, our expectations for these discussions were somewhat undefined. In the end, each town meeting had a life of its own, determined not only by the moderator, but by who was in the audience and who among them had the courage to speak up. Much of the public discussion built on issues raised in the roundtable meetings, and it was gratifying to hear different people discussing their relation to those issues.

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The final part of "Democracy," and perhaps the most important, is this book. Through this book we tried to encapsulate many of the ideas that went into and came out of the Democracy Project in order to make them available to a far wider public than could attend the events. We organized this publication very much as we organize our exhibitions, bringing together a variety of voices and points of view to address the issues. In this case, we hope that the results provide a strong analysis of the current situation of democracy in America and suggest possible means for responding to its challenges.

This project and publication required the efforts of many people. We sincerely thank the artists, discussion participants, and contributors who are all listed elsewhere in this book. We are grateful to the galleries and lenders to the exhibitions and all the people who facilitated those loans.

It has been an extraordinary pleasure to work with the staff at Dia. Charles Wright was supportive from the beginning; Gary Garrels oversaw the project and consistently offered invaluable input; Karen Ramspacher's enthusiastic participation during the project led to her joining Group Material and we look forward to continued collaboration; Joan Duddy was always there for us, day and night; Karen Kelly devoted herself tirelessly to producing this book. We are grateful to the following people for their special assistance: Margaret Thatcher, Laura Fields, Isabel Stude, Camilla Fallon, Jim Schaeufele, Susan Walker, Fernanda Arujao, Deborah Meehan, Alexis Summer, Deborah Garwood, Eva Otterbeck, Sarah Rees, and Nancy Shaver.

The following people contributed in a number of ways: Eric Bemisderfer, Bill Dillworth, Hunter Reynolds, John Lindell, John Sprague, and David Nyzio installed the exhibitions; Rob Constantine and John Shuman creatively catered the opening receptions; Greg Davidek, Herb Perr, Mary Sabatino, Martha Rosler, Tom Klocke and Elizabeth Marks from Hospital Audiences, Rachel Romero, Materials for the Arts, and Kirsten Mosher generously gave varied assistance and support. We are indebted to Phil Mariani for her wise suggestions and helping hand. As individuals we are deeply appreciative of personal support from Ross Laycock, Sarah Safford, and Andres Serrano.

We gratefully acknowledge Tim Rollins, who was a member of Group Material until the fall of 1987. Tim was involved in the proposal stage of "Democracy." Because this project developed from the group's history of interests, Tim's ideas were present throughout, as were those of Mundy McLaughlin who left the group in 1986.

Doug Ashford, Julie Ault, Felix Gonzalez-Torres (Group Material)

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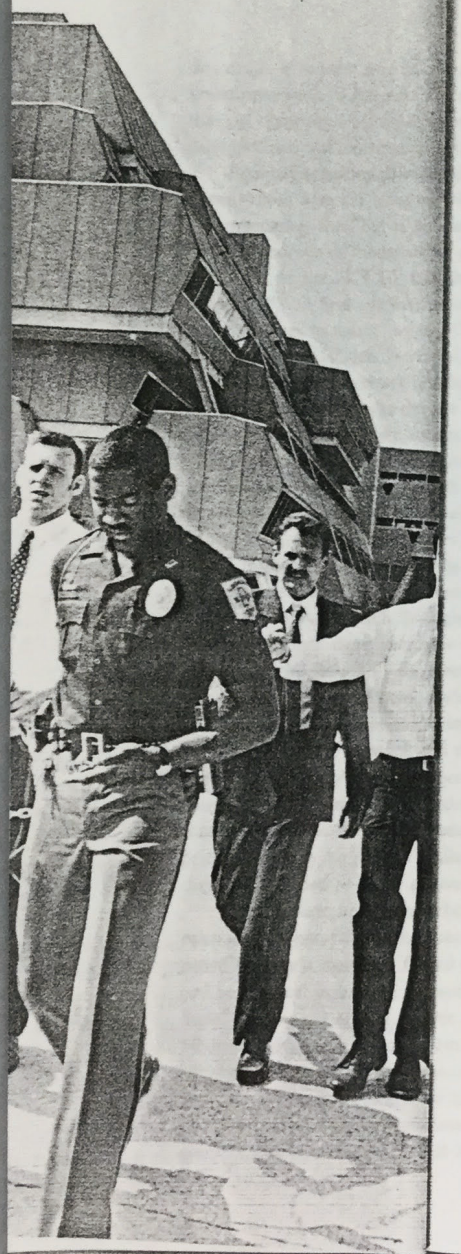

David Deitcher

SOCIAL AESTHETICS

New York, September 14, 1989—Early this morning five members of ACT UP, an AIDS activist group, entered the New York Stock Exchange under cover of dark suits, crimson ties, and fake Bear, Stearns & Co. identification cards. They went up to the balcony and, just before the 9:30 a.m. opening bell, disrupted the start of trading for nearly five minutes by blasting horns and throwing a flurry of hundred-dollar bills to the trading room floor. This was not simply a belated tribute to the memory of Abbie Hoffman, who twenty years ago caused a near riot at the same location by tossing money to the bulls, the bears, and the pigs. ACT UP's C-notes, unlike Hoffman's dollars, were fake and were inscribed on the verso, "PEOPLE ARE DYING WHILE YOU PLAY BUSINESS." After chaining themselves to the balustrade, today's demonstrators also unfurled a banner from the balcony; it read "SELL WELLCOME."

At high noon, several hours after these demonstrators were carted off to police headquarters, several hundred other AIDS activists took to the intersection of Wall and Broad Streets. They formed a continuous circle of men and women more than two blocks long. Before the bolted doors of the Stock Exchange, and in the face of hundreds of cops, they raised a deafening clamor, blaring horns, drumming on cow bells, whistling, and raising their voices with chants to alert those who daily trade in the shares of Wellcome P.L.C. that they are profiting from blood money.

Wellcome P.L.C. is the British parent of the American company Burroughs Wellcome, which still charges ruinous sums for the drug Azidothymidine (AZT). Today it costs roughly $8,000 annually for a person with AIDS to slow the replication of the Human Immunodeficiency Virus (HIV) in his or her system by taking this drug. Of all drugs requiring daily dosage, AZT is the most expensive in history. This is true even though AZT was actually discovered as a possible anti-cancer agent in 1964 by Jerome Horwitz, a scientist at the federally funded Michigan Cancer Foundation, and despite the fact that the National Cancer Institute supplied Burroughs Wellcome with the raw ingredient required to make the first supplies of AZT. While Burroughs Wellcome has spent about $80 million to develop

Four members of ACT UP (AIDS Coalition To Unleash Power) arrested by deputies at the Burroughs Wellcome Co. offices in Research Triangle Park, Durham, North Carolina, 1989.

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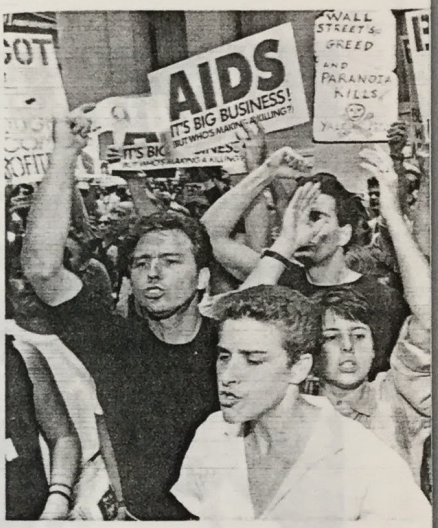
this drug—a modest sum by industry standards—an analyst with the British investment bank of Barclays Dezoete Wedd, Inc., in New York has estimated that the company's before-tax profit in 1989 was $100 million (on gross sales of $220 million to some 45,000 people with AIDS).

Recently scientists released data supporting the idea that AZT would benefit those who are infected with HIV, but who do not yet have AIDS. As a consequence, the FDA is on the verge of recommending that AZT be taken by the hundreds of thousands of people who fit that description in this country alone. As the ACT UP fact sheet accompanying today's demonstration asserted, "Wall Street is betting on AZT being the next drug to reach one billion dollars in annual sales." Over the past three weeks the price of stock in Wellcome P.L.C. has increased by over 40 percent.

Neither Wall Streeters nor Burroughs Wellcome are unfamiliar with ACT UP. Wall Street was the site of the AIDS activists' very first demonstration. On March 24, 1987, scores of protesters sat down in the middle of Wall Street while others distributed literature on AIDS and on how governmental indifference toward AIDS and corporate greed had turned the epidemic into a full-fledged health emergency. Two years later, on the morning of April 25, 1989, four members of ACT UP (two of whom were also arrested in today's action inside the Stock Exchange) donned business suits and briefcases and slipped by security personnel at Burroughs Wellcome's headquarters at Research Triangle Park outside Durham, North Carolina. Having equipped their briefcases with drills, bolts, a small TV, and enough food and drink to get by for three days, they sealed themselves inside a third-floor office in the company's South building. Then they telephoned local newspersons and national wire services to inform them—and the company—of their presence and their demands: that Burroughs Wellcome lower the price of AZT by 25 percent and that the company provide the drug to a federal program that distributes it to those who can't afford to buy it. Burroughs Wellcome promptly announced their intention to lower the price of AZT by 25 percent while claiming, no doubt disingenuously, that they had intended to do so anyway.

Among those Americans whose lives depend upon AZT and who were once solvent, many have since been forced into penury. This has not happened because a disability forced them to give up their jobs or because they had no medical insurance; but simply because their relative solvency (in New York, an after-tax annual income above $5,508) made them ineligible for Medicaid coverage and gave them no choice but to "choose" financial ruin. For these people—whose insurance coverage is inadequate or nonexistent, and who are not yet sufficiently destitute to qualify for Medicaid—the federal government begrudgingly instituted an AIDS drug reimbursement program as part of its Supplemental Appropriations Act for fiscal 1988. The



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number of people enrolled in this program so far has averaged between seven and eight thousand. Funding for the program initially included $10 million that actually were redirected from elsewhere in the federal AIDS budget and $5 million from the always beneficent Burroughs Wellcome. Last March, when the funds were depleted, the federal government kicked in an additional $5 million. Now the time has come to renew this fund. Evidently fearing congressional opposition this time around, Senator Edward Kennedy has proposed that the program be restructured so that the federal government would henceforth disburse grants requiring matching state funds. Some states, no doubt, will be less than forthcoming with their halves, thus creating the preconditions for an exodus that will add an additional burden to states that already have a disproportionately high incidence of HIV infection.

New York, September 18, 1989—In a press release filled with obfuscation, self-justification, and feigned magnanimity, Burroughs Wellcome announced today that it would cut the price of AZT by 20 percent. On National Public Radio, a spokesperson for the company claimed that pressure from the international AIDS activists community had nothing whatsoever to do with their decision.

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David Deitcher

The AIDS epidemic has struck gay men, African-Americans, Hispanics, and the poor disproportionately. As a result, one's view of this health care emergency is forced to dilate and encompass racial, sexual, and economic privilege, issues from which the AIDS crisis is, after all, inseparable. Perhaps only the matter of reproductive rights shares with the AIDS crisis this capacity to prompt so multifaceted and broad-based a reflection on American social conditions today. Of all the developed nations in the West, only South Africa and the United States have no system of national health care. The costs of medical assistance in this country are notorious; the overcrowded public health facilities are inhumane, even lethal. These conditions of health care in America attest to the failure of our democracy to live up to its most basic principle: that it be government for the people, by the people.

"AIDS and Democracy: A Case Study," an exhibition organized by the artists' collective Group Material for the Dia Art Foundation in 1989, presupposed the capacity of the AIDS crisis to serve as a litmus test for democratic processes in the U.S. today. The failure of those processes to represent the interests of all Americans was symbolized in the rendering of the American flag that presided over the installation at Dia's Wooster Street space. Michael Jenkins's *June 30, 1986* resembles an inverted Old Glory, one that consists, however, entirely of stripes. The date used in the title of this work, and the use of nine rather than thirteen stripes in this flag, suggests Jenkins's concern with the nine Supreme Court justices who ruled (5-4) on June 30, 1986, that police had the right to invade a man's privacy in his home and jail him under a state antisodomy law. Where the blue field of white stars that symbolize the states of the union should be, Jenkins simply cut into his "flag." With the piece pinned to the wall—stripes down, the rectangular void at lower right—this flag seemed frozen in the midst of a continuous fall, as if the negative weight of those absent stars were just dragging it down.

"AIDS and Democracy" contained a considerable amount of educational and agitational printed matter. This was the result of Group Material's engagement with AIDS activists throughout the process of conceiving and organizing their installation. This material, most of which was contributed by ACT UP (New York), was piled neatly in roughly forty stacks on a very long table that bisected the room diagonally. At the opposite ends of these tables, large TV monitors faced clusters of folding chairs. These monitors showed a continuous program of eleven videotapes comprising a cross-section of the rapidly growing library of works in video by AIDS activists, video artists, and filmmakers. Produced over the past four or five years, these activist videos counter the repressive and ineffective educational material put out by federal, state, and city agencies, and refute the chronic misrepresentation by the mass media of AIDS, its modes of transmission, and the people who have it.

In this installation these videos and the
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In this installation these videos and the graphics that constitute the ephemera of direct political activism (i.e., Gran Fury's posters, *READ MY LIPS* and *ALL PEOPLE WITH AIDS ARE INNOCENT*) were juxtaposed with works of "high" art. In many cases these art works could be understood to bear upon the AIDS crisis only within this context. For instance, Jannis Kounellis's untitled work (1975) consisted simply of an engraving of Jacques-Louis David's *Death of Marat* with a (real) black butterfly fixed to its surface. Andres Serrano's *Winged Victory*, a *Nike of Samothrace* photographed in piss, presided over the interior as the most luminous lament on display. Under more neutral circumstances it would have revitalized spiritual imagery that has been debased by organized religion by confronting the spectator with his or her anxiety about the body. Louise Lawler's *Them*, which targets the paucity of government spending on health research relative to defense spending in the U.S. and Europe, seemed tailor-made for the installation, but is a work that dates from 1986. Meanwhile, Don Moffett's illuminated box, *1988*, expressed a popular sentiment among visitors to the installation with its photograph of Reagan's departure, captioned in pink script, "So Long, Farewell, Auf Wiedersehen, Goodbye."

These heterogeneous juxtapositions took place in the midst of what had become a polarized situation among some artists and AIDS activists. By late 1988 this became evident in a contentious debate about what, if anything short of collective direct political action, constitutes a significant cultural response to the AIDS crisis.[1] In retrospect, "AIDS and Democracy" was more valuable as an opportunity to investigate the terms of this conflict than as an attempt to reconcile the two sides of the argument. By providing a forum in which fairly poetic individual art works shared space with a broad range of educational and political artifacts, the installation gave visitors a chance to decide for themselves what significance, if any, each work might have in dealing with this political, social, and personal crisis. It clarified, moreover, that in a situation where the lines are so clearly drawn between those who want to stop the dying and others who continue to exploit it to further a conservative political agenda, the Enemy is not to be found among those who created these works of art.

Finally, there were emotional reasons for joining together art that reflects on death and loss, that questions institutional authority, and that militates for political change. This deep emotional purpose was stated upfront in a statement that Group Material displayed near the entrance. This statement, which outlined the rationale behind this installation in terms of the motivation for AIDS activism itself, dedicated "Democracy" in its entirety to Bill Olander, who, though gravely ill at the time, attended the opening. No less moving, however, were the little touches: the presence of a ramp that the artists procured for placement outside the door to the gallery to guarantee smooth entry for all visitors, including those using wheelchairs.

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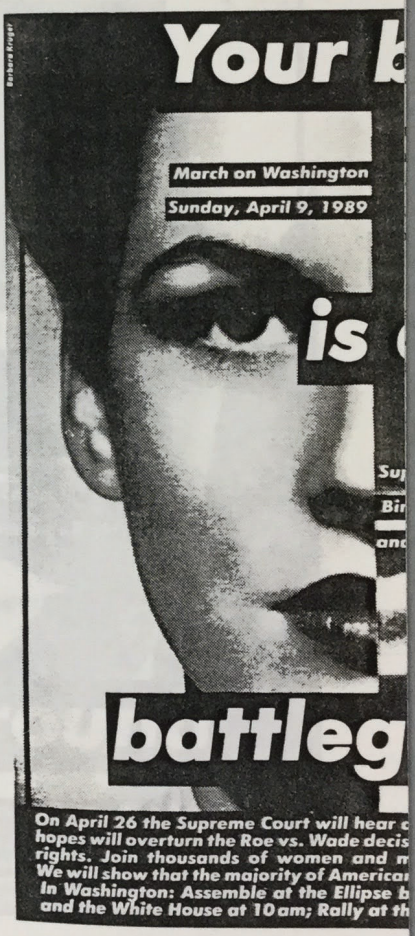
The title "Social Aesthetics" is not mine. My friend Bill Olander coined it back in 1982 as the title of his essay in the catalogue for "Art and Social Change," an exhibition he organized for the Allen Memorial Art Museum at Oberlin College. Bill was supposed to have written the essay that I am now writing, but on March 18, 1989, he died of AIDS. I borrow his title for two reasons: first, to emphasize the loss that I and the members of Group Material feel in his absence; and second, because the concept of a socially based aesthetic corresponds with the terms of a "cultural activism" that can encompass both the radical militancy of ACT UP and other activists and the work of artists who, like Group Material, use the symbolic sphere of culture to effect social and political change.

It is now almost a decade since the twelve original members of Group Material decided to reject the conventional options open to them as artists just out of school, to work outside the art marketplace, and to adopt a collective identity. Intent on developing an art that could deal critically with cultural, political, and social issues, Group Material decided to use collaborative methods and to engage, whenever possible, with other community-based and activist groups. This allowed them to extend their encounter with political and social issues well beyond the traditional limits of aesthetic form and content.

During the 1980s, the term "cultural activist" has been applied—sometimes generously, sometimes exclusively—to a variety of cultural practices that criticize mainstream culture and the institutions that regulate it, often embodying the cultural expressions of nonmainstream communities. A conjunction of theoretical, cultural, and historical circumstances made this reclassification of oppositional culture into cultural activism possible. On a theoretical level, this shift was in part a result of debates about the Marxist theory of ideology which took place in France in the late 1960s. The political theorist Louis Althusser was central to this critical reformulation.

In his essay "Ideology and Ideological State Apparatuses," Althusser reiterated the traditional Marxist understanding that the ruling ideology, which is manifest in cultural production, facilitates the perpetuation of existing dispositions of power and privilege in society. But departing from more parochial Marxists, Althusser insisted that the dominant ideology is not simply a passive, "superstructural" reflection of social relations determined by the economic "base" of material production; rather, he emphasized, ideology and the social relations of production are joined together by a complex, reciprocal action of mutual determination. What is more, Althusser envisioned the cultural sites of ideological production and reproduction as zones of symbolic contestation, not only emblematic of, but crucial to, class struggle. Oppositional or critical cultural practices, he argued, have the power to destabilize and hinder the reproductive powers of the dominant ideology. Al-



Barbara Kruger, poster for the March for Women's
in Washington, D.C., April 9, 1989.

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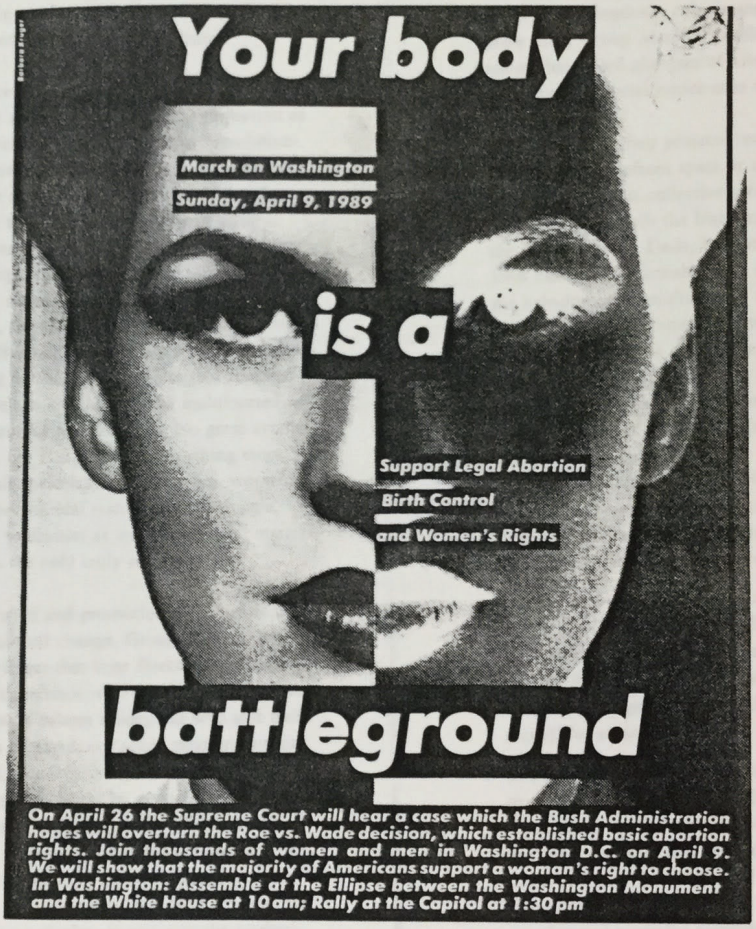

Barbara Kruger, poster for the March for Women's Lives (march for reproductive freedom) in Washington, D.C., April 9, 1989.

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thusser's acknowledgment that cultural practices can possess critical powers, and that these are of direct consequence to class struggle, provided the theoretical precondition for conferring "activist" status onto cultural production.[2]

Since Althusser's day, issues of race and sexual difference have been recognized by many (though not, alas, by all) on the left to be as important as class is in any social transformation that is worthy of the term "revolutionary." The anticolonial uprisings in North Africa, Southeast Asia, and elsewhere from the 1950s on, and the rise of a massive American civil rights movement during the 1960s expanded the basis for a critique of Euro-American culture to include institutionalized racism that colonizes, distorts, and in other ways renders invisible people of color and their forms of cultural expression. From the mid to late sixties, the rise of the feminist movement, and, from the end of the sixties, the struggle for lesbian and gay rights forceably added the issue of sexual difference to the critique of Western "humanist" culture. Thus critiques arising out of these struggles that centered on the issues of race and gender, as well as class, led to the multifaceted assault on modernist culture that emerged during the 1960s. No great synthesis between these issues ever emerged, nor is it likely that anything more synthetic than a coalition is theoretically practicable. To this day, women, gays, and lesbians have to argue for the political status of their struggle, which many men on the left continue to dismiss as mere "personal" matters, which detract from what they insist is the only truly revolutionary concern—class struggle.

Intent upon the creation, organization and promotion of an art dedicated to social communication and political change, Group Material has used a variety of strategies to explore issues that bear directly or indirectly upon class, race, and gender, and their interface with culture. When the collective inquires, as it often does, "How is culture made, and who is it for?" it presumes the ideological inscription of oppressive social relations within the dominant culture. Group Material proceeds from the assumption that conventional definitions of culture can and should be exposed as conservative instruments of social reproduction. The idealist view of history and aesthetics, which has determined the organizational and discursive practices of museum culture since its formation, highlights the transhistorical over the concretely historical, the eternal over the contingent, and the apolitical over the political in whatever museums put on display. In this way the aestheticism of the museum corresponds with the interests of the ruling elite that supports these institutions while they, in turn, legitimate the power of that elite.

Most of Group Material's projects can be understood as attempts to endow the question, "How is culture made, and who is it for?" with a seduc-

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tive physical dimension that prompts the spectator to interrogate the relation between the dominant culture and specific social and political issues. At the same time, Group Material's collaborative, heterodox method results in situations that afford glimpses of a very different "culture," one that privileges pluralism and social justice over the maintenance of canonical laws and social privilege.

Most often their projects result in installations, as the ones they initiated in their storefront space at 244 East 13th Street in September 1980. From the start this collective used the art of exhibition as a form of montage, one that recalls the historical avant-gardist tradition. If their art evokes the spirit of Berlin Dada, however, it is not so much individual works by John Heartfield, Hannah Höch, and Raoul Haussmann that it summons, as the kaleidoscopic installation of the 1920 International Dada Fair in Berlin. In the manner of montage, Group Material's installations create a friction between elements—a productive, discursive friction that sparks improbable insights into a given theme. Yet unlike the 1920 Dada Fair, Group Material's installations always proceed from the choice of a socially significant theme to the selection of cultural artifacts that will, ideally, illuminate that theme and provoke debate.

Thus, in December 1980, Group Material analyzed "alienation" from a Marxist perspective, with an installation of works that helped not only to "express" this ubiquitous malaise but to reveal its dependence upon capitalist social relations. As the announcement for *Alienation* put it:

[We get up in the morning][But the morning isn't ours][We get ready for work][But the work isn't ours][We go to the workplace][But the workplace isn't ours][We work all day][But the day isn't ours][We produce a lot of wealth][But the wealth isn't ours][We get paid some money][But the money isn't ours][We go back home][But the home isn't ours][We would like to be social][But society isn't ours]

In addition to the art installation, Group Material also staged an "Alienation Film Festival," which included premieres of works by local independent filmmakers, and a screening of James Whale's 1931 classic, *Frankenstein*. As part of the project they invited Bertell Ollman, a professor of politics at New York University and author of a book on alienation, to speak before an audience at the Group Material storefront about alienation and its significance in advanced capitalist societies.

Staging this film festival, and inviting a teacher to speak at their space suggest the special role that social interaction has played within Group Material's collaborative method. Whereas modern artists have an especially high regard for works of art that seem to be the organic embodiment of their interactive material processes, Group Material engages in interactive cultural

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processes in order to effect social communication in the hopes of facilitating social and political change. Thus, when Group Material decided to rent their storefront space, they intended their gallery to become part of the social fabric of the existing neighborhood. This was evident not only in the film screenings, parties, and discussions that they held there from time to time, but in the strong populist element that their installations possessed. The most striking manifestation of this populist impulse—and of the desire to identify with their neighbors and their concerns—was the exhibition "The People's Choice" (later renamed "Arroz con Mango").

The first part of "Arroz con Mango" consisted of a letter that Group Material distributed among their "friends and neighbors of 13th Street." Dated December 22, 1980, the letter began, "Group Material is the gallery that opened this October at 244 East 13th Street. We are a group of young people who have been organizing different kinds of events in our storefront. We've had parties, art shows, movies and art classes for the kids who are always rushing in and out." After breaking the ice they came right to the point. They were interested in showing "things that might not usually find their way into an art gallery: the things that you personally find beautiful, the objects that you keep for your own pleasure, the objects that have meaning for you, your family and your friends." The resulting installation included religious imagery, dolls in fancy dresses, family photos, amateur paintings, and clay bowls; it featured a knitted bag from Guatemala, a collection of PEZ candy dispensers, a Rembrandt reproduction, and a poster of Robert Morris, oiled up and posing with chains as a crypto-fascist, S&M dreamboat. Notwithstanding its anarchic potential, everything was exhibited with that deference to order and clarity that are the *ne plus ultra* of aesthetic display—and of the much more heterodox displays of Group Material as well.

At best, the populist impulse reveals a determination to open the domain of "culture" to forms of expression that belong to culturally and economically marginalized groups. It can also effect transformations of the cultural site in a somewhat different sense. Group Material created art for spaces that, in an era of wholesale privatization, are in few ways worthy of the designation "public." In projects like "DA ZI BAOS" (March 1982) and "Subculture" (September 1983) Group Material attempted to restore the public dimension to such spaces by temporarily transforming the terms of the discourse that usually takes place there.

"DA ZI BAOS" consisted of alternating red and yellow monochromatic posters that were illegally wheatpasted to the facade of the defunct S. Klein's department store on Union Square. The posters featured statements solicited by Group Material from people in the area around Union Square—a public space whose ethnic and economic diversity and rich history of political struggle were being threatened with eradication at the time by aggressive private

Group Material, *DA ZI BAOS*, 1982. Union Square

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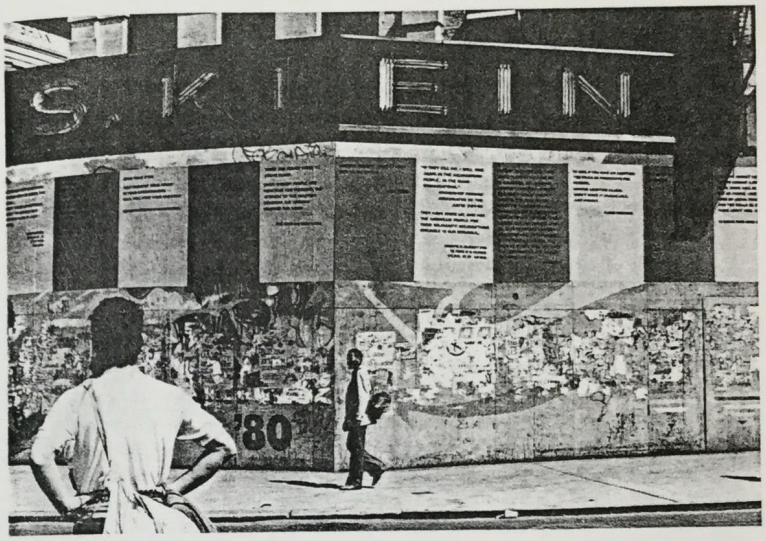

Group Material, *DA ZI BAOS*, 1982. Union Square, New York City.

"development." Group Material also collected statements from six political and service organizations. CISPES (Committee in Solidarity with the People of El Salvador) contributed the following: "'If they kill me I will rise again in the Salvadoran people, in the mass organizations.'—Archbishop Romero, assassinated by the junta 3/24/80. 'They have risen up and asked the American people for their solidarity because their struggle is our struggle.'"

"Subculture" consisted of sometimes trenchant, often amusing, artist-designed posters which Group Material commissioned to provide temporary relief from the advertising one commonly encounters in the ad space above the windows of New York subway cars. The artist Vanalyne Green, who was then working as a secretary, contributed a poster showing grimy coffee cups photographed from above, to which she added the following narrative caption: "Sometimes when he asks me to bring him a cup of coffee I do so. But I pour the coffee in a dirty cup that has a ring of dried coffee around the inside of the cup. And I smile as I hand it to him."

The members of Group Material dealt with the issue of American racism when, in June 1981 they staged "Atlanta: An Emergency Exhibition." This show explored the social ramifications of the murder in Atlanta of twenty-eight black children over a period of two years. The collective intended, in the words of the press release, to go "beyond the shock, beyond the sensationalism, beyond the anger, the guilt and the ribbons," to find the

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"history" and the "sense" behind the killings.[3] Among the powerful works that were lent to this show were those by Faith Ringgold, Candace Hill-Montgomery, Jerry Kearns, and the Madame Binh Graphics Collective. That part of Group Material's process that entails interaction with communities of interest was especially strong in this instance. Fifty local schoolchildren who were enrolled in a program called "Arts and Education: Learning to Read through the Arts," in which Tim Rollins (then a member of Group Material) taught, created paintings in response to the question, "Who's Killing the Kids?" Those paintings, which in many cases went beyond the crime to consider its social context, were a focal point of the installation.

In 1984 Group Material installed "Timeline: A Chronicle of U.S. Intervention in Central and Latin America" at P.S.1 in Queens. Three years after they abandoned their attempt to interact with a specific working-class community by giving up their storefront space on East 13th Street, they still interacted with groups, such as those who were militating against U.S. interference in Central and Latin America.[4] "Timeline" was their contribution to "Artists Call," a community-wide artists' response to American intervention in El Salvador and Nicaragua. CISPES provided Group Material with a list of American interventions, which the artists translated into characteristically striking pictorial and sculptural terms. Among these, a pile of ground coffee, a bunch of bananas, and copper plates suggested the nature of American "interests" in the region. One year later, Group Material joined with the art community again, but in an altogether different sense. They were invited to participate in the Whitney Biennial. The immediate result was *Americana*, a radically eclectic blend of appliances, commercial designs, art, and other forms of decor. Isolated from the rest of the Biennial in the Whitney's ground floor gallery, it commented wryly on the strictly retail biennial survey of American art by offering a self-contained alternative to it. The long-term result of the Whitney invitation was that, as the decade proceeded, Group Material, like so many other activist-artists, became part of the international contemporary art circuit, for which they were asked to devise works in situations that are as far removed from the realm of community-based and grass-roots political activism as the concept of "arts and leisure" suggests. Such a transformation of the institutional circumstances that frame their project threatened to trivialize and neutralize it.

In this sense, the Dia Art Foundation—once better known for its commitment to the abstract and spiritual in art—presented Group Material with a considerable challenge when it invited the collective to organize an ambitious project. How could the collective—then consisting of Doug Ashford, Julie Ault, and Felix Gonzalez-Torres—maintain the edge to their cultural critique? How could they preserve the emancipatory intent and meaningful community interaction that had typified their original project while moving

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at the behest of a rich cultural foundation to the very heart of Soho, the torpid and trendy shopping district in lower Manhattan? How, under these conditions, could they ensure that their characteristic engagement with groups involved in potentially life-and-death struggles would not degenerate into a form of cultural colonization and exploitation? How, indeed.

Group Material responded to this challenge by relying upon collaborative processes as they had all along. First they selected the theme of democracy in America and divided it into smaller topics from which this unwieldy object of investigation might be interrogated. For reasons that have as much if not more to do with the artists' lived experience as they do with expertise and study, the collective decided upon the following four topics: "Education and Democracy," "Politics and Election," "Cultural Participation," and "AIDS and Democracy: A Case Study."

The first manifestations of "Democracy" were the roundtable discussions, in which Group Material invited people from pertinent communities of interest to gather at Dia for an informal discussion; one roundtable discussion was held for each of the four subtopics. These were opportunities for the collective to reach out to representatives of particular interest groups, while engaging them as participants in and coproducers of Group Material's cultural process. As the transcripts from the roundtable discussions reveal, the artists listened far more than they spoke. This is entirely consistent with their ongoing desire to learn about the central issues of, say, the public school system from those who are engaged in the day-to-day struggles of trying to educate.[5] In this way the artists came away from the discussions with insights into how best to proceed with the job of organizing the second manifestation of "Democracy," the installations.

The roundtable discussions also helped Group Material to map out the third part of "Democracy," the town meetings. Like the roundtable discussions, one town meeting was scheduled to coincide with each of the four installations. As befits the designation, these meetings were open fora for public discussion. Envisioning the town meetings from the beginning as indispensable parts of "Democracy," Group Material ensured that the installations would not be taken for the whole of their project, and that their project, moreover, would not be construed as an extended diagnostic session during which three participants in an artists' collective take the national pulse in four ways and find it erratic. As it turns out, however, there was never any great danger that the installations, even taken on their own, would have led to this conclusion.

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Group Material responded to this challenge by relying upon collaborative processes as they had all along. First they selected the theme of democracy in America and divided it into smaller topics from which this unwieldy object of investigation might be interrogated. For reasons that have as much if not more to do with the artists' lived experience as they do with expertise and study, the collective decided upon the following four topics: "Education and Democracy," "Politics and Election," "Cultural Participation," and "AIDS and Democracy: A Case Study."

The first manifestations of "Democracy" were the roundtable discussions, in which Group Material invited people from pertinent communities of interest to gather at Dia for an informal discussion; one roundtable discussion was held for each of the four subtopics. These were opportunities for the collective to reach out to representatives of particular interest groups, while engaging them as participants in and coproducers of Group Material's cultural process. As the transcripts from the roundtable discussions reveal, the artists listened far more than they spoke. This is entirely consistent with their ongoing desire to learn about the central issues of, say, the public school system from those who are engaged in the day-to-day struggles of trying to educate.[5] In this way the artists came away from the discussions with insights into how best to proceed with the job of organizing the second manifestation of "Democracy," the installations.

The roundtable discussions also helped Group Material to map out the third part of "Democracy," the town meetings. Like the roundtable discussions, one town meeting was scheduled to coincide with each of the four installations. As befits the designation, these meetings were open fora for public discussion. Envisioning the town meetings from the beginning as indispensable parts of "Democracy," Group Material ensured that the installations would not be taken for the whole of their project, and that their project, moreover, would not be construed as an extended diagnostic session during which three participants in an artists' collective take the national pulse in four ways and find it erratic. As it turns out, however, there was never any great danger that the installations, even taken on their own, would have led to this conclusion.

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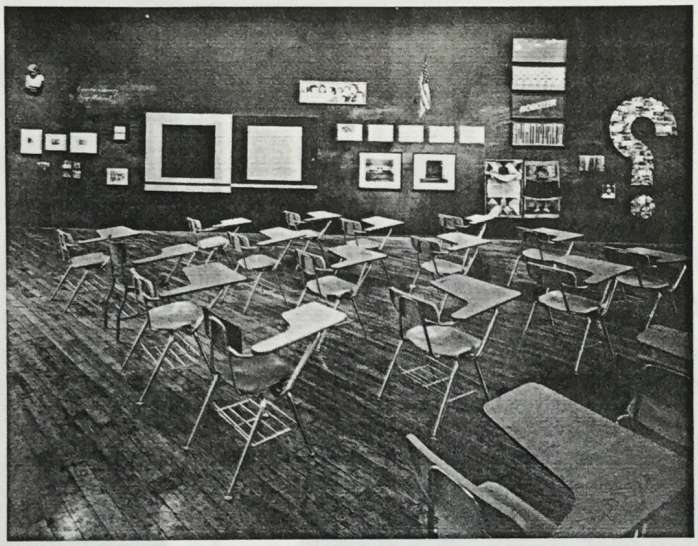
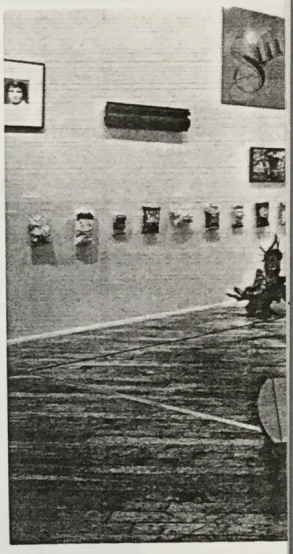


Group Material installation at the Dia Art Foundation, New York, *Education and Democracy*, September 14–October 8, 1988.



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Group Material installation at the Dia Art Foundation, New York, *Politics and Election*, October 15–November 12, 1988.

Group Material installation at the Dia A
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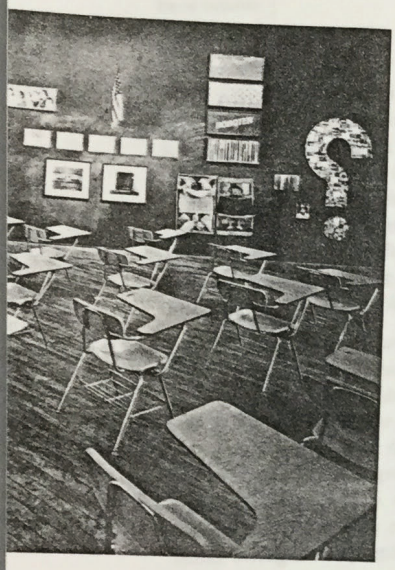

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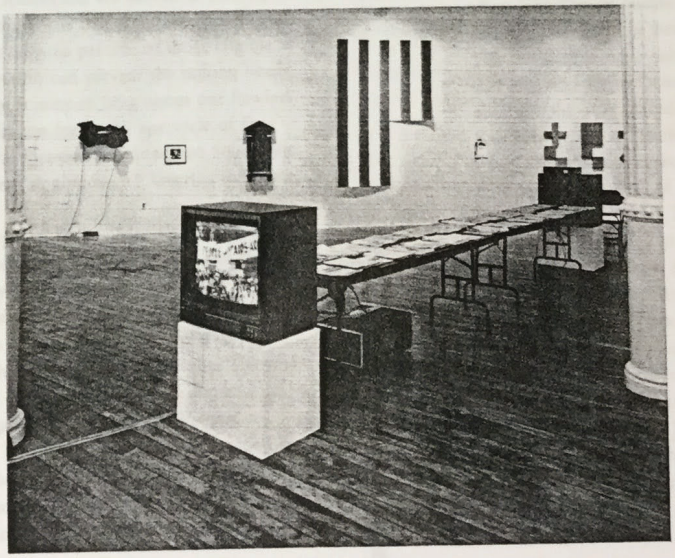
Group Material installation at the Dia Art Foundation, New York, *Cultural Participation,* November 19–December 10, 1988.



Group Material installation at the Dia Art Foundation, New York, *AIDS & Democracy: A Case Study,* December 17, 1988–January 14, 1989.

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Public education in America today—especially in our inner cities—is best known for gross inequities in the quality of education, for functionally illiterate high school graduates, for truancy, for wholesale physical deterioration of schools, for the violence in and around schools, and for its Byzantine administrative structures. Under these conditions it seems certain that a considerable proportion of tomorrow's electorate—like today's—will be ill-equipped to protect what democratic freedoms it has. The press release for "Education and Democracy," the first installment of Group Material's "Democracy," contained the following quotation from Thomas Jefferson:

In every government on earth is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover, and wickedness insensibly open, cultivate and improve. Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree. This indeed is not all that is necessary, though it be essentially necessary. An amendment of our constitution must here come in aid of the public education. The influence over government must be shared among all the people.

To take Jefferson at his word is to conclude that democracy in America is in jeopardy, and has been for some time. Of course, education alone cannot be held accountable for the fact that so few Americans are moved to participate in the electoral process. But neither the consensus that American public education today is in crisis, nor the fact that only 20 percent of those eligible to vote in this country did so in the last election can prevent the talking heads of the mass media from taking every opportunity to brag about our flawless system of government. Who, for example, can forget the spectacle of Dan Rather, beaming from among the youthful throngs in Tiananmen Square last June, as if the song the demonstrators were singing were "America the Beautiful" and not "The Internationale"?

Despite their decidedly critical viewpoint, Group Material managed to avoid the pitfall of assuming the smug posture of condemnation and superiority that has proven irresistible to many on the embattled left. The installation of "Education and Democracy" was a case in point. The room contained four rows of classroom chairs arranged on a bias, as if in perpetual salute to the American flag that hung from the wall nearby. The walls were painted black, with the title of the show written directly on the wall in a well-rounded chalk script. Other samples of writing in chalk—and erasure—added to the scholastic decor. This pedagogical theater avoided didacticism in part through the playfulness of the installation, and in part through the inclusion of largely ambiguous artworks by Peter Halley, Mitchell Syrop, John Ahearn, Lorna Simpson, and Andy Warhol, among others. Mixing school and art-gallery prop
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others. Mixing school and art-gallery props removed the possibility that the installation would be dominated either by argument or irony. This cut both ways: the thematic context and the presence of numerous objects that are not conventionally classified as art imposed decidedly unorthodox readings on the "Art." At the same time, many of the objects that were conceived and executed by students and teachers conveyed their message in bold and expressive forms. Take, for example, *Question Mark(s)* by Meryl Meisler and the Drop Ins of Roland Hays Intermediary School. This collaborative work framed the southwest corner of the space with two giant question marks: one backwards, the other upside-down. The surfaces of the question marks consisted of a continuous layer of photographic testimony, produced by the students, that literally underscored in red the school's ongoing physical deterioration. This collaboration between students and teachers—only one among many collaborations in the show—confirmed the presence within the school system of innovative teaching methods, methods that go well beyond the limits of colorful children's drawings.

"Education and Democracy" also provided a historical framework, pointing to some of the social conditions that spurred the progressive movement in American teaching that flourished from the 1930s until the Cold War. Three Lewis Hine photographs in the show documented the living conditions for uneducated working-class children during the second decade of this century. By no coincidence, this was precisely the historical moment when John Dewey outlined the basis for modern American progressive education in the book he titled, significantly, *Democracy and Education* (1916). The social conditions substantiated by Hine's photographs were among those that lent urgency to Dewey's project. In Group Material's installation, these photographs were placed near four small paintings by students in Keith Rambert's class at Brooklyn's Boys and Girls High School. The point of these paintings was clear from the words inscribed across their surfaces: "School gives a sense of direction. (Study! Study!)," "Class is long," and "LEARN TO EARN." The juxtaposition of Hine's photographs and Rambert's small paintings brought to mind one underlying, yet fundamental and recurring aspect of the discourse on education: the degree to which public education is governed by a productive imperative that will dominate people's lives long after they graduate school.

Thomas Jefferson understood—as did many Enlightenment thinkers—that any public instruction that hoped to protect democracy would have to balance practical training with other forms of edification and stimulation. Nearly a century later John Dewey sought to recast this more or less "organic" concept of education. Regarding democracy as a "mode of associated living, of conjoint communicated experience," Dewey argued that the more numerous and socially diverse the citizens of a nation are, the more worthy

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of the name "democracy" that nation becomes. Democracy, for Dewey, was a dynamic social process that could, indeed must, be advanced by continuously "breaking down . . . those barriers of class, race, and national territory which [keep] men from perceiving the full import of their activity."[6]

During the second half of the nineteenth century—that is, between Jefferson and Dewey—popular education really emerged in the industrialized nations of the West. From the start, it was the site of a discursive conflict. To one side were those for whom education simply meant the preparation of an entire class of people for efficient and docile labor. On the other side were reformers, who saw education as a means of helping people to rise from the class into which they were born, and as a means of combating the increasing atomization of individual life in an era of massive industrialization. Latter-day pragmatist that he was, Dewey claimed to reject the "organic" Rousseauean (or Jeffersonian) model and set out to redefine instrumental logic more radically than had previous reformers. Henceforth, he hoped, the meaning of "efficiency" would no longer be divorced from broader social and personal considerations.

When social efficiency as measured by product or output is urged as an ideal in a would-be democratic society, it means that the depreciatory estimate of the masses characteristic of an aristocratic community is accepted and carried over. But if democracy has a moral and ideal meaning, it is that a social return be demanded from all and that opportunity for development of distinctive capacities be afforded all. The separation of the two aims in education is fatal to democracy; the adoption of the narrower meaning of efficiency deprives it of its essential justification.[7]

During the Reagan era conservative ideologues in Washington sought to restore the means-ends logic that Dewey decried—and the authoritarian methods that correspond with it—in order to "reform" the American public school system. Former secretary of education William Bennett couched his assault on the existing approaches to public education in the sort of devious language that became a hallmark of Reagan appointees. "Anti-determinism" and "anti-relativism" were the names he used to describe the practice he advocated—no longer making allowances for childrens' socioeconomic, ethnic, or racial background, whether in the material used to teach them or in the standards applied to determine their success and failure. Teaching was going to get tough.[8]

Content, character, and choice—Mr. Bennett's "three C's"—identified his formula for successful schools. "Content" designated an insistence on materials that derive from our "common" (read: Western, white, and largely male) cultural heritage. "Character" denoted Mr. Bennett's plan to infuse our schools with patriarchal, Judeo-Christian family values, and the kind of

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discipline epitomized by one of the education secretary's favorite role models, Joe Clark.[9] "Choice," in this case, should not be confused with reproductive rights, since Mr. Bennett intended that sex education become moral education, in which lessons in sexual abstinence are taught with a liberal sprinkling of such words as "modesty" and "chastity."[10] By "choice," Mr. Bennett referred to the parents' (the plural, Bennett's own, denotes his disapproval of single-parent families) ability to decide which school their children should attend; a laudable idea in theory which, in the absence of massive infusions of funds for the redevelopment of inner-city schools, would condemn certain children to very long rides in buses, assuming that there would be room for them in school at the other end.

Other considerations that have fueled the conservative educational agenda were also alluded to in Group Material's installation. The struggle over bilingual teaching was mapped out in a diagrammatic, visually striking work called *U.S. English No Pasara*, which was created by Ed Morales, Tom McGlynn, Diana Caballero, Elaine Ruiz, and the Committee for a Multilingual New York. Consisting of strategically aligned quotations from those involved, as well as their names and political affiliations, *U.S. English No Pasara* delineated a startling genealogy of contemporary American xenophobia. It exposed the ideological basis for "U.S. English," a nonprofit organization that seeks to ensure monolingual education in America. Among those quoted are Phyllis Schlafly, Norman Podhoretz, the members of the Council for Inter-American Security (i.e., John Singlaub, Adolfo Calero, and other belligerent patriots), and—always my personal favorite—the congenitally macho former secretary of education, chain smoker, and current drug czar, William Bennett. Bennett's testimony consisted of the following: "The evidence has become increasingly clear that bilingual education is doing very little to help students learn English." If ideology can be defined as that which passes unnoticed as common sense, then this nugget is ideology in its crystalline form.[11]

Group Material's education installation was a model of its kind. Its juxtapositions prompted a broad range of insights into its theme, foregrounding the relationship between education and social destiny, while offering proof of imaginative approaches to teaching in a climate of political torpor and bureaucratic intransigence. It also fulfilled that aspect of the group's mandate that concerns the definition of culture and its consequences. By placing art works by well-known artists in these circumstances—and thereby extracting new meanings from them—Group Material revealed once again how contingent meaning is upon the circumstances of display. Finally, the installation

Ed Morales with Tom McGlynn, Diana Caballero, Elaine Ruiz and the Committee for a ▶
Multilingual New York, and Victory Arts, *U.S. English No Pasara*, 1988.

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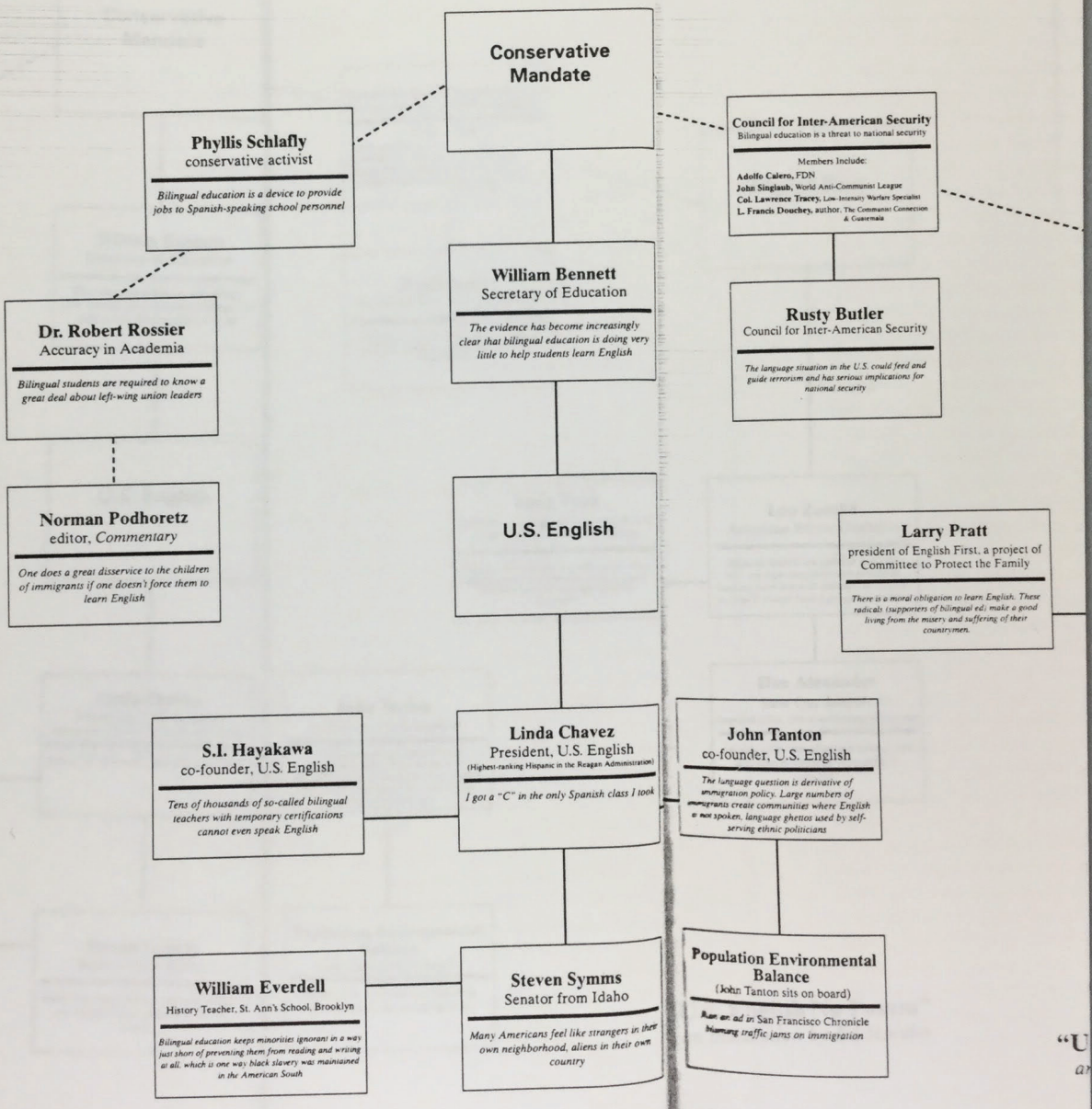

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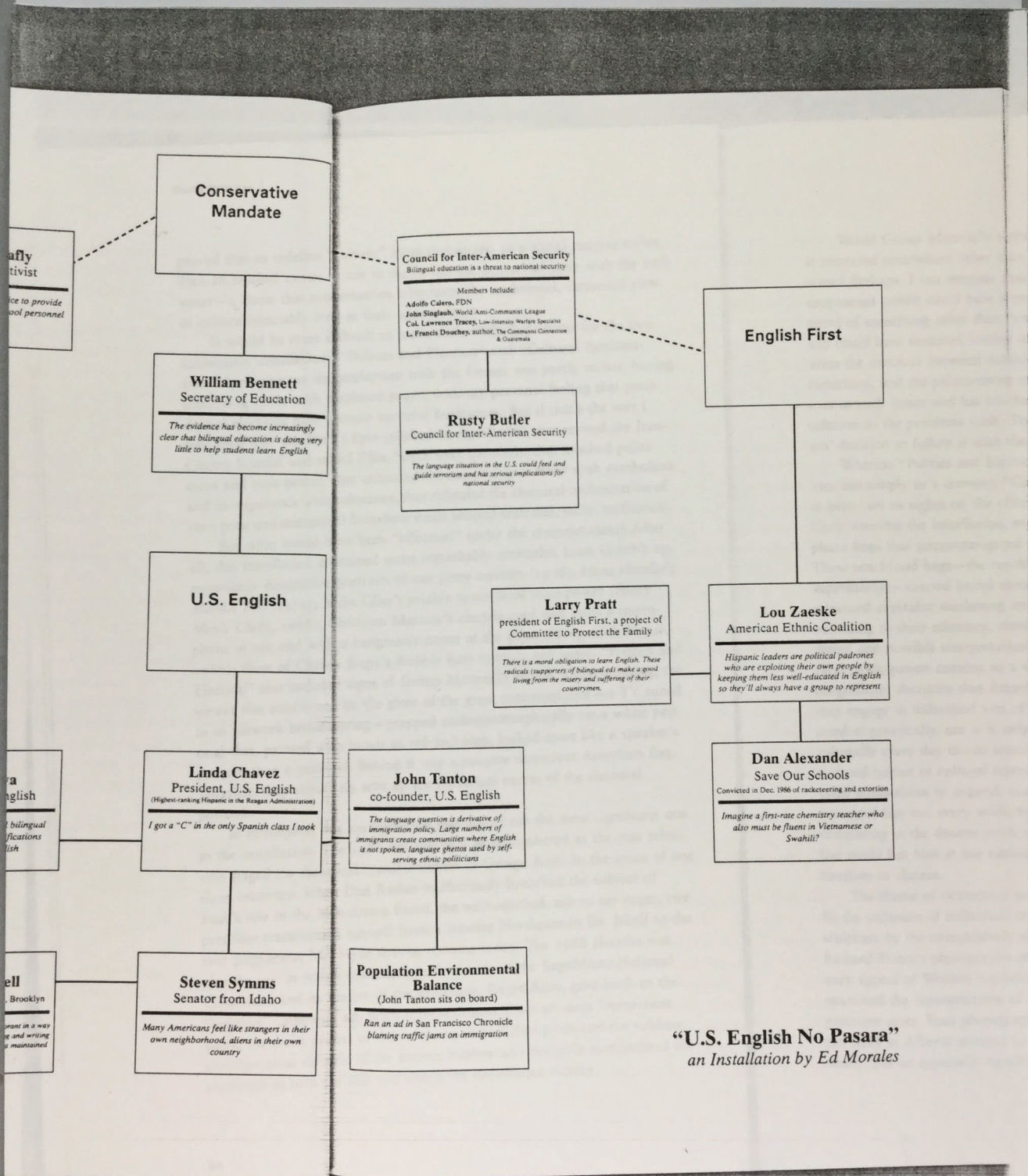

"U.S. English No Pasara"
an Installation by Ed Morales

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proved that to redefine "culture" more inclusively, as a social process rather than an ossified canon, is not to throw out the proverbial baby with the bath water—a claim that conservatives who favor the traditional, canonical view of culture invariably level at their opponents.[12]

It would be more difficult to make such undivided claims for the two subsequent installations, "Politics and Election" and "Cultural Participation." I imagine my dissatisfaction with the former was partly unfair, having something to do with displaced anger, with my personal feeling that presidential elections have become wasteful burlesques. But if that's the way I feel, then why wouldn't I have relished an installation that revived the Iran-Contra Scandal and raked Ollie North over the coals, that mocked politicians and state power, that criticized the national love affair with symbolism and its impatience with substance, that ridiculed the electoral orchestration of corn pone and sentiment? Somehow it just seemed arch and, sadly, ineffectual.

But what would have been "effectual" under the circumstances? After all, this installation contained some remarkable artworks: Leon Golub's appropriately diminutive portraits of our petty masters (1976); Hans Haacke's *MoMA Poll* (1970); Mike Glier's prickly symbols of male power (*Fancy Men's Clubs*, 1988); Christian Marclay's electric cord that joins a microphone at one end with a hangman's noose at the other (*Hangman's Noose*, 1987); three of Christy Rupp's *Rubble Rats* (1979); and more. "Politics and Election" also included signs of Group Material's finesse. Upon entering, the viewer was confronted by the glow of the great communicator—a TV tuned in to network broadcasting—propped anthropomorphically on a white pedestal that, painted with bands of red and blue, looked more like a speaker's podium than a pedestal. Behind it was a massive forty-foot American flag. Together, they effectively sent up the rhetorical excess of the electoral potlatch.

In retrospect, this juxtaposition may have been the most significant one in the installation. The 1988 election will be remembered as the year television staged the theatrical transformation of George Bush. In the space of one short interview, when Dan Rather ineffectually broached the subject of Bush's role in the Iran-contra fiasco, the well-coached, not to say eager, vice president transformed himself from a reticent Northeastern Dr. Jekyll to the ever pugnacious Mr. Hyde that he remains today. The 1988 election was also the one in which television, in the hands of the Republican National Committee and its master of the grotesque, Roger Ailes, gave birth to the "negative" campaign ad. With little resistance from an inept Democratic party, the racist appeal of the revolving-door-justice pitch and the sublime environmental rhetoric of the Boston Harbor ad effectively manipulated the electorate to turn the tide and clinch the Republican victory.

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Would Group Material's installation have seemed more "effectual" had it appeared somewhere other than at the epicenter of the downtown art scene? Perhaps. I can imagine that if it had been located where a more heterogeneous public could have seen it, the visitors' responses would have consisted of something other than heads bobbing in assent. Even so, the show still could have ventured further afield. There are, for example, ways to address the interface between American consumer culture, the construction of consensus, and the procurement of consent. Group Material is hardly oblivious to such issues and has touched on them in other circumstances. One solution to the problems with "Politics and Election" was implicit in the artists' decision to follow it with the one called "Cultural Participation."

Whereas "Politics and Election" represented the American electoral politics too simply as a travesty, "Cultural Participation"—an ambiguous name at best—set its sights on the effects of consumer culture on American life. Upon entering the installation, my eyes fixed upon a long line of little cellophane bags that circumnavigated much of the interior like a dado from hell. These snackfood bags—the result of Group Material's visit to a single supermarket—carried brand names and bore designs that, consistent with advanced capitalist marketing strategies, target consumers, identifying them according to their ethnicity, class, and age. The display of snack foods suggested one possible interpretation of the title, "Cultural Participation." Cultural participation consists to a very great extent in the seemingly insignificant decisions that Americans make by the score every day when they engage in individual acts of consumerism. Cultural identity is not arrived at genetically, nor is it only the result of learning. We define ourselves culturally every day in our seemingly involuntary and intuitive responses to a closed circuit of cultural representations. Fueled by an economically motivated compulsion to expand, consumer industries tap our desire and offer to accommodate our every wish; but first, they create those wishes. Though numbering in the dozens (with no two bags alike), this decorative product line could but hint at our national good fortune, at the abundance of our freedom to choose.

The theme of democracy as a tainted cornucopia was elaborated further by the inclusion of individual art works. Thus there was a product-line sculpture by the compulsively shopping formalist Haim Steinbach. One of Richard Prince's photographs of Marlboro men suggested the lasting imaginary appeal of Western mythology. Six color photographs by Lance Carlson examined the representation of classy consumer goods by a local upscale department store. Four photographs by Vikky Alexander of the West Edmonton Mall in Alberta attested to the horror that is the world's largest shopping center. But an especially significant presence in "Cultural Participation," one

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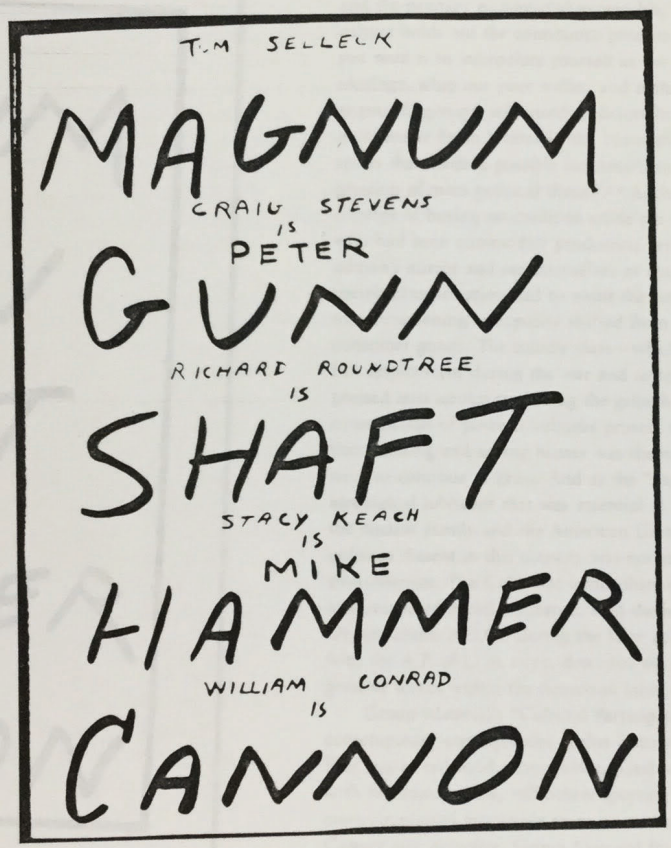

Jessica Diamond, *5 Dicks*, 1988-89.

which indicated the pertinence of consumer culture to democracy and to electoral politics, was a film that Group Material screened continuously throughout the exhibition. That film was George Romero's 1979 paean to the suburban shopping mall and its implicit effects on people, *Dawn of the Dead*.

The myriad seductions of this consumer culture tend to level difference and discourage dissent. With television as its principal conveyor of messages

and the primary purveyor of acceptable, func
culture holds out the continuous promise of
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Group Material's "Cultural Participatio
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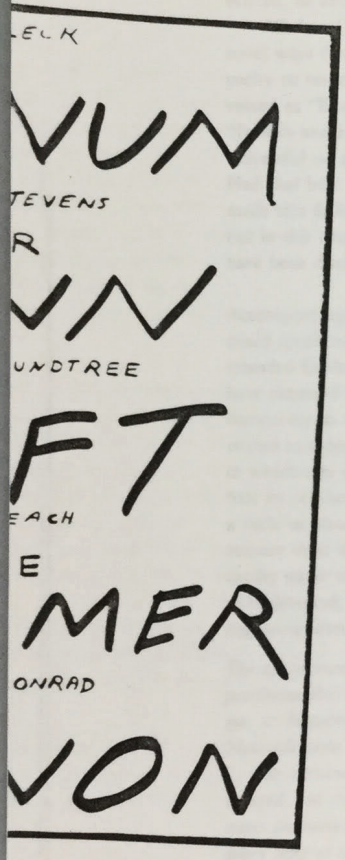

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and the primary purveyor of acceptable, functional social types, consumer culture holds out the continuous promise of fulfillment. To enter paradise all you need is to interpolate yourself as the voluntary subject of the dominant ideology, whip out your wallet, and make another purchase. With such bliss at your fingertips, who needs politics? In his book *Captains of Consciousness*, Stuart Ewen locates in the 1920s the emergence of the historical processes that made it possible for American consumer culture to inhibit the expression of mass political dissent.[13] At that time advertising joined with the concept of buying on credit to erode the collective social identity of those who had been commodity producers; henceforth they would gaze into the adman's mirror and see themselves as consumers. But the realization of this social transformation had to await the postwar era, when a wartime economy functioning at capacity shifted from arms production to production of consumer goods. The middle class—which had expanded considerably with full employment during the war and savings compelled by rationing—was pressed into service sustaining the growth of the consumer economy. As the construction of postwar suburbs proved, the captains of industry understood that building and selling homes was the most crucial element if the economy were to continue to grow. And as the "captains of consciousness" knew, the ideological lubricant that was essential to this machinery was a compound of the nuclear family and the American Dream. To be sure, the suppression of political dissent in this country was not exclusively the product of the new consumerism. The Cold War atmosphere of fear and rabid anticommunism also restricted social resistance. And the history of the Congress of Industrial Organizations (C.I.O.) during the later 1940s, culminating in its reunion with the A.F. of L. in 1955, describes the often brutal suppression of progressive forces within the American labor movement.[14]

Group Material's "Cultural Participation" tended to outline only the contemporary consequences of this history. The gallery was appointed with four sets of redwood picnic tables, piled with magazines, others appointed with fast-food menus, still others sporting air fresheners. Amidst the piles of mass-circulation magazines there were also some deviant titles like *Anarchy Comics* and *Artpolice*. Group Material found other ways to make sure that recreation and the quick fix did not dominate the space unimpeded. A color photograph by Tina Barney of indolent rich kids lounging in a tony interior was given edge, if not substance, by its installation across the room from five altogether more modest black and white shots of old buildings in ruinous states marked, "DEMOLISHED BY NEGLECT." The latter were taken by members of Detroit's Urban Center for Photography as part of their collaborative work intended to stop such "neglect." The project was initiated when a local photographer, Keith Piascezny, tried to deliver a picture of a woman and her baby to her at home where he shot it. Discovering that she had been

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evicted, he decided to fix the large print to the facade of the building.

"Cultural Participation," like "Politics and Election" before it, found novel ways to articulate its theme. Yet both shows ultimately lacked the capacity to resonate historically; or to reveal the complexity of the issues involved as "Education and Democracy" had. My point can be stated simply: "Politics and Election" and "Cultural Participation" may each have been less successful on its own than had they been reconceived as a single installation. Had that been possible—and more than scheduling problems would have made this difficult—the interdependence between the failure of electoral politics in this country and the history of American consumer culture could have been disclosed.

Accompanying each of these exhibitions was an open forum where anyone could speak out on the designated subject. What could Group Material have intended by these "town meetings"? Was there irony in that title? Would it have mattered if there was? While organizing a multifaceted examination of democracy in America, it must have seemed important to artists as committed as these to extending the limits of cultural discourse to offer a forum in which real discussion could take place. Since panel discussions inhibit debate by reinforcing the separation between those who speak from one side of a table to those who listen on the other, the idea of an open forum for discussion must have been appealing. And after all, isn't "Town Meeting" just a catchy name to give it? Well, no. As Group Material has helped many people to understand, for everything there is a context, one that determines meaning, sometimes overwhelmingly.

The townsmen's words were heard and weighed, for all knew that it was a petitioner that could not be slighted; it was the river, or the winter, or famine, or Pequots, that spoke through them to the Governor and Council of Massachusetts Bay.

In a town meeting the roots of society were reached. Here the rich gave council, but the poor also; and moreover, the just and the unjust. In this open democracy every opinion had utterance; every objection, every fact, every acre of land, every bushel of rye, its entire weight. The moderator was the passive mouthpiece, and the vote of the town, like the vane on the turret overhead, free for every wind to turn, and always turned by the last and strongest breath."[15]

Written over a century ago by Ralph Waldo Emerson, this idyll to the town meeting is already steeped in nostalgia. This sentiment is apparent in the notion of a method of government that is the perfect and inescapable product of natural forces—of rivers overflowing their banks and harsh New England winters; and of human forces that are, in Emerson's writing, tantamount to

Freedom

Norman Rockwell, *Freedom of Speech*, 1943.

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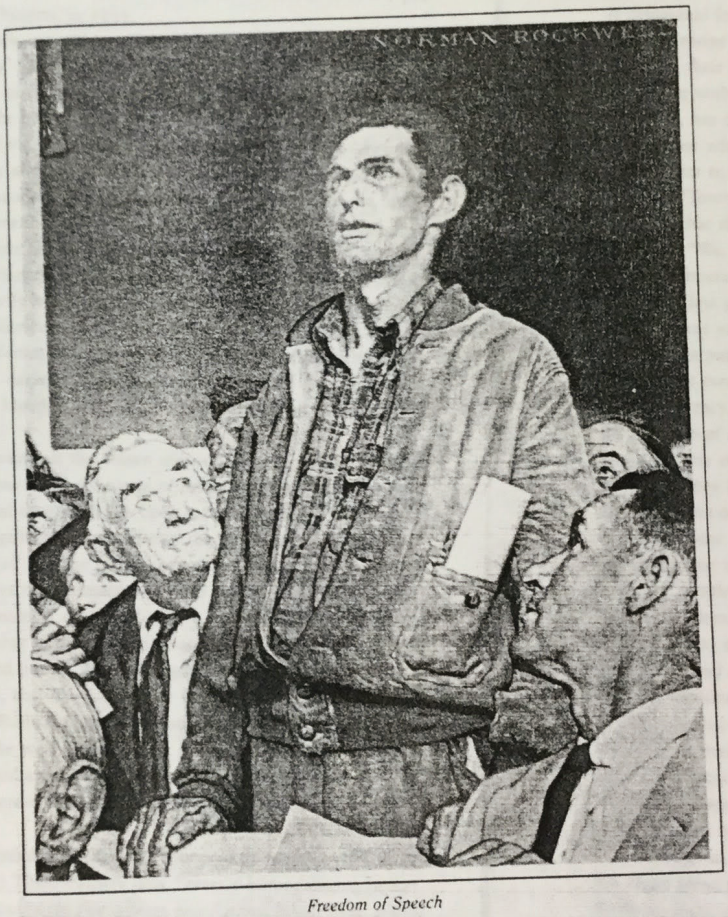

Freedom of Speech

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natural ones at their most uncontrollable: those native Americans that he casts as aggressors. Emerson's enthusiasm for the town meeting echoed the sentiments of Alexis de Tocqueville and Thomas Jefferson, whose comments are excerpted in the published version of the address he delivered to the people of Concord, Massachusetts, in 1835.

Nostalgia for simpler, arguably more innocent times has lost none of its appeal. "Town meetings" are in vogue today, like many other manifestations of American vernacular taste that now possess the auratic appeal of the vaguely historical and the historically vague. Ted Koppel now stages "town meetings" for the global village on ABC television, most famously when he brought together Israelis and Palestinians in the Holy City to partake of New England's governmental legacy to the world. Frequently with the financial assistance of the Annenberg CPB Project, Fred Friendly has produced ten thirteen-part programs on a variety of topics including the constitution, ethics in America, terrorism, AIDS, and health care. As broadcast on NET, these shows partake heavily in the code of the town meeting. (The Annenberg CPB Project also distributes them as complete college courses.) Nor is the current electronic infatuation with the town meeting unprecedented. Starting in 1935, a man named George V. Denny conducted a radio show called "America's Town Meeting of the Air," which stayed on the air until ABC dropped it in 1956.

Is it only a coincidence that the "town meeting"—such as it is—should undergo a revival at a time when the range of political debate has been narrowed, and when political discussion has been sacrificed in favor of telegenic sloganeering? Ben H. Bagdikian has noted that the "lords of the global village" today are but a small fraction of the corporate and state-run entities that controlled our sources of information as little as six years ago. He has argued that satellite technology, combined with a tendency among conservative world leaders to further privatize the airwaves, has endowed these companies with unprecedented power. And yet Bagdikian claims that it is not "free enterprise," as such, that is incompatible with the purposes of public information and debate. Rather, as he points out, "It was assumed that once governments got out of the way, the 'free flow of information' and power of the public 'to ascertain and appraise events' would be made possible by free-enterprise media. They were correct. The problem today is not free enterprise but the lack of it."

In other words, the problem is that the monopolistic practices of the Murdochs, Maxwells, and Time/Warners now "exert a homogenizing power over ideas, culture, and commerce that affects populations larger than any in history." These media giants, Bagdikian continues, have two sources of enormous leverage: "They control the public image of national leaders who, as a result, fear and favor the media magnates' political agendas; and they control

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the information and entertainment that help establish the social, political and cultural attitudes of increasingly larger populations."[16]

This is the context that dictates the mythic function and fetishistic character of the town meeting's renascence. Still, I do not mean to claim that it is delusional for people to assemble in groups to oppose government policies and oppressive social attitudes, or to try to seize control over some crucial aspect of their lives. Clearly, the recent history of AIDS activist groups, from the People with AIDS Coalition to ACT UP and the Community Research Initiative, has disproven that bit of sophistry. But despite the best of intentions, those who traffic in a highly mythologized language are bound to some extent to become the instruments of its use. By calling these open discussions "Town Meetings," Group Material opened themselves up to the criticism that they risked playing into the hands of people who harp on the idea that, "We, at least have such open discussions in this country." And "that's democracy, and that's all there is to it."

On a less parochial note, what seemed most striking about the town meetings was just how disconcerting and contradictory they were. This was due in large part to the fact that they were understood from the beginning as symbolic events: as manifestations of the vanguard world of art. "AIDS and Democracy," which one might have expected to be a vital forum given the presence of a large and successful local activist movement, was no more vital than any other. In fact, perhaps because ACT UP holds its own public meetings every Monday at 7:30 p.m. to deal with the AIDS crisis, this town meeting contained fewer illuminating moments than others. A good deal was said about how individuals can make a difference in the face of this devastating crisis, how important and difficult it is to persevere in forging coalitions when the people you are rallying to the assistance of are considered expendable by the dominant culture. To those AIDS activists who came that night hoping to hear new voices, to learn new strategies to combat government intractability and corporate greed, or to reach new constituencies, however, the meeting was clearly a disappointment. The town meetings stopped well short of effecting that widespread sense of "empowerment" that many people in attendance considered to be their goal. And then there were individuals on hand who complained about the inappropriateness of the "art context." At "AIDS and Democracy" this took place for the fourth time in as many town meetings, thus turning it into something more like the town crier's refrain.

Through it all, the wheels of the tape recorders kept turning, provoking the vague sensation that these not-quite-public proceedings were taking place inside an institutional bubble; that at any moment, as in the great dinner party scene that concludes Luis Buñuel's *The Discreet Charm of the Bourgeoisie*, the massive garage door to the Dia space might suddenly and unceremoniously rise, revealing Mercer Street, the audience for whose benefit

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all of this was taking place, and the absurdity of our gesture.

Given these circumstances it was hard not to think of Jean Baudrillard, whose theory of the simulacrum (as is all too widely known in the New York art community) implicitly argues against the logical viability of political activism today. It would be hard to refute its relevance to this situation.[17] Finally, the sense of participating in something token, in something staged and recorded, of partaking in a process that, for most of those present, plays little or no part in their daily lives, foregrounded that nostalgic and mythic aspect of the "town meeting's" currency. In this way Group Material's town meetings demonstrated the danger of staging such assemblies from above, as it were. They proved, once again, how intractable are the obstacles in this society to widening the range of political debate, to opening lines of communication between constituencies with divergent interests, and, finally, to effecting a sense of urgency in the midst of a culture that militates in so many sophisticated ways against change.

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1. When Dennis Cooper and Richard Hawkins organized the exhibition "Against Nature: A Group Show of Work by Homosexual Men" for Los Angeles Contemporary Exhibitions (Jan. 6–Feb. 12, 1988) pressure was applied by some AIDS activists, who regarded the show as irresponsible and retrograde, to prevent individuals from participating in it. A panel discussion that coincided with the exhibition "AIDS: The Artists' Response," organized by Jan Zita Grover for the Hoyt L. Sherman Gallery at Ohio State University was marked by heated debate about what constitutes a legitimate response to the AIDS crisis. In November, Gran Fury executed a piece for The Kitchen in New York that stated, "WITH 42,000 DEAD OF AIDS ART IS NOT ENOUGH." They produced variations of this piece in the window of Printed Matter in New York, in the catalogue to the Ohio State University exhibition, and in the pages of the *Village Voice*—with the mortality figures increasing with every reappearance. For a discussion of this work, see my interview with Gran Fury in Russell Ferguson et al., eds., *Discourses: Conversations in Postmodern Art and Culture* (Cambridge, Mass.: MIT Press, 1990). For a more playful analysis of the entire debate, see John Greyson, "Parma Violets: A Video Script," in Dennis Cooper and Richard Hawkins, eds., *Against Nature: A Show By Homosexual Men*, exhibition catalogue (Los Angeles: Los Angeles Contemporary Exhibitions, 1988), pp. 10-15; also see my "Ideas and Emotions," *Artforum* 27, no. 29 (May 1989), pp. 122-27.

2. "In fact, the class struggle in the ISAs (Ideological State Apparatuses) is indeed an aspect of the class struggle, sometimes an important and symptomatic one: e.g. the antireligious struggle in the eighteenth century, or the 'crisis' of the educational ISA in every capitalist country today." See Louis Althusser, "Ideology and Ideological State Apparatuses (Notes Towards an Investigation)," in Louis Althusser, *Lenin and Philosophy and Other Essays*, trans. Ben Brewster (New York: Monthly Review Press, 1971), p. 185.

3. I want to thank Julie Ault for providing me with access to this press release, as well as to other Group Material documents that made it possible for me to write this essay. This documentation has recently been donated to the Museum of Modern Art library, where it can be found within the archive of Political Art Documentation/Distribution (PAD/D).

4. Affiliation with the Latino community associated with the Taller Latinamericano, for example, was crucial to the success of the June 1982 show "Luchar! An exhibition for the People of Central America . . ." See William Olander, "Material World," *Art In America* 77, no. 1 (January 1989), p. 127.

5. Sometimes there is overlap. Doug Ashford of Group M
City school system and therefore has firsthand knowledge
6. John Dewey, *Democracy and Education* (New York: M
Press Paperback Edition, 1966), p. 87.
7. Ibid., p. 122.
8. See William J. Bennett, "Educating Disadvantaged Chi
Country: Improving America's Schools and Affirming the
& Schuster, 1988), esp. pp. 32-33.
9. See Mr. Bennett's tribute to the principal with the base
Now Praise Good Schools," a title whose evocation of Jar
Depression-era tribute to the rural poor, *Let Us Now Pra*
ample of conservative appropriations of liberal and left sig
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10. See Bennett, "Sex and the Education of Our Children,
11. Bennett has also written, "In the last two decades cor
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12. Mr. Bennett opposes tampering with the Western cult
"What Culture Should Mean," *Nation* 249, no. 9 (Septem
13. Stuart Ewen, *Captains of Consciousness: Advertising*
Culture (New York: McGraw-Hill Book Company, 1976).
14. See William H. Chafe, *The Unfinished Journey: Amer*
Oxford University Press, 1986), p. 105ff.
15. Ralph Waldo Emerson, "The Town Meeting," in Ralp
Old South Leaflets, first series, no. 4 (1883), pp. 1-2.
16. Ben H. Bagdikian, "The Lords of the Global Village,"
pp. 820, 807, 811.
17. In January 1987 Group Material organized a show th
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7. Ibid., p. 122.
8. See William J. Bennett, "Educating Disadvantaged Children," in *Our Children and Our Country: Improving America's Schools and Affirming the Common Culture* (New York: Simon & Schuster, 1988), esp. pp. 32-33.
9. See Mr. Bennett's tribute to the principal with the baseball bat and the bullhorn in "Let Us Now Praise Good Schools," a title whose evocation of James Agee and Walker Evans's Depression-era tribute to the rural poor, *Let Us Now Praise Famous Men* is an interesting example of conservative appropriations of liberal and left signifiers to suit their diametrically opposed social agenda. Ibid., pp. 37-45.
10. See Bennett, "Sex and the Education of Our Children," in ibid., pp. 98-101.
11. Bennett has also written, "In the last two decades common sense had been beaten, shoved, and kicked around." See "Let Us Now Praise Good Schools," p. 40.
12. Mr. Bennett opposes tampering with the Western cultural canon. See Lillian S. Robinson, "What Culture Should Mean," *Nation* 249, no. 9 (September 25, 1989), pp. 319-21.
13. Stuart Ewen, *Captains of Consciousness: Advertising and the Social Roots of the Consumer Culture* (New York: McGraw-Hill Book Company, 1976).
14. See William H. Chafe, *The Unfinished Journey: America Since World War II* (New York: Oxford University Press, 1986), p. 105ff.
15. Ralph Waldo Emerson, "The Town Meeting," in Ralph Waldo Emerson's Concord Address, *Old South Leaflets*, first series, no. 4 (1883), pp. 1-2.
16. Ben H. Bagdikian, "The Lords of the Global Village," *Nation* 248, no. 23 (June 12, 1989), pp. 820, 807, 811.
17. In January 1987 Group Material organized a show that was critical of this implication in Baudrillard's work, entitled "Resistance, Anti-Baudrillard," at White Columns in New York. The pertinent texts by Baudrillard are: *Simulations*, trans. Paul Foss et al. (New York: Semiotext(e), Inc., 1983), and *In the Shadow of the Silent Majorities*, trans. Paul Foss et al. (New York: Semiotext(e), Inc., 1983).

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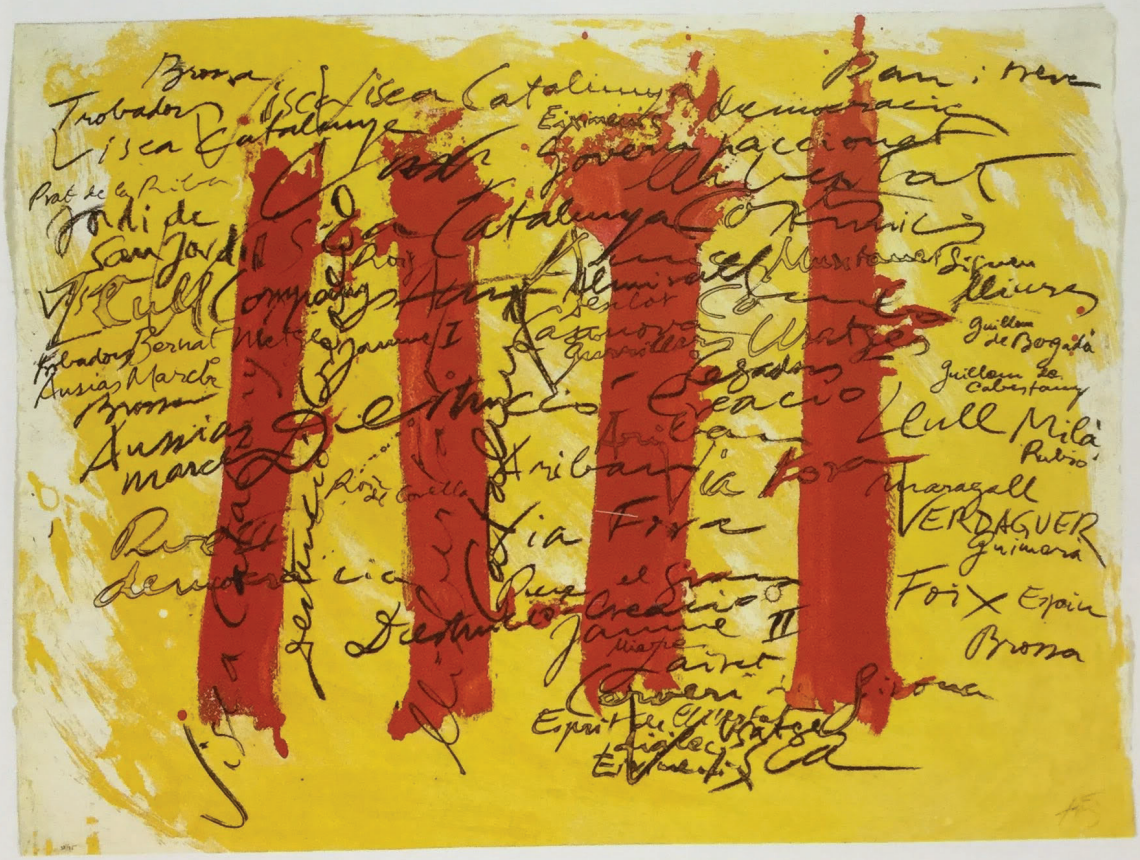

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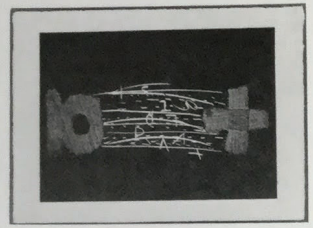

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Projects: Felix Gonzalez-Torres

For his **Projects** exhibition, on view through June 30, Felix Gonzalez-Torres displays an enlarged black-and-white photograph of an empty double bed (reproduced here on pages 12 and 13) on twenty-four billboards throughout New York City; in the Garden Hall Gallery, one billboard-sized photograph of the same image is installed. Instead of the aggressive advertisements typically associated with billboards, Gonzalez-Torres presents an image without words, where absence, rather than presence, leaves an impression.

Projects: Felix Gonzalez-Torres was organized by Anne Umland, Curatorial Assistant, Department of Painting and Sculpture. The ongoing **Projects** series is made possible by generous grants from The Bohen Foundation, The Contemporary Arts Council of The Museum of Modern Art, and the National Endowment for the Arts. The Contemporary Arts Council provided additional support for this exhibition.

Above: Antoni Tàpies. *Esperit Català I (Catalan Spirit)*. 1974. Intaglio and collagraph, printed in color. 21 1/8 × 30 1/4". Collection Galeria Joan Prats, New York.

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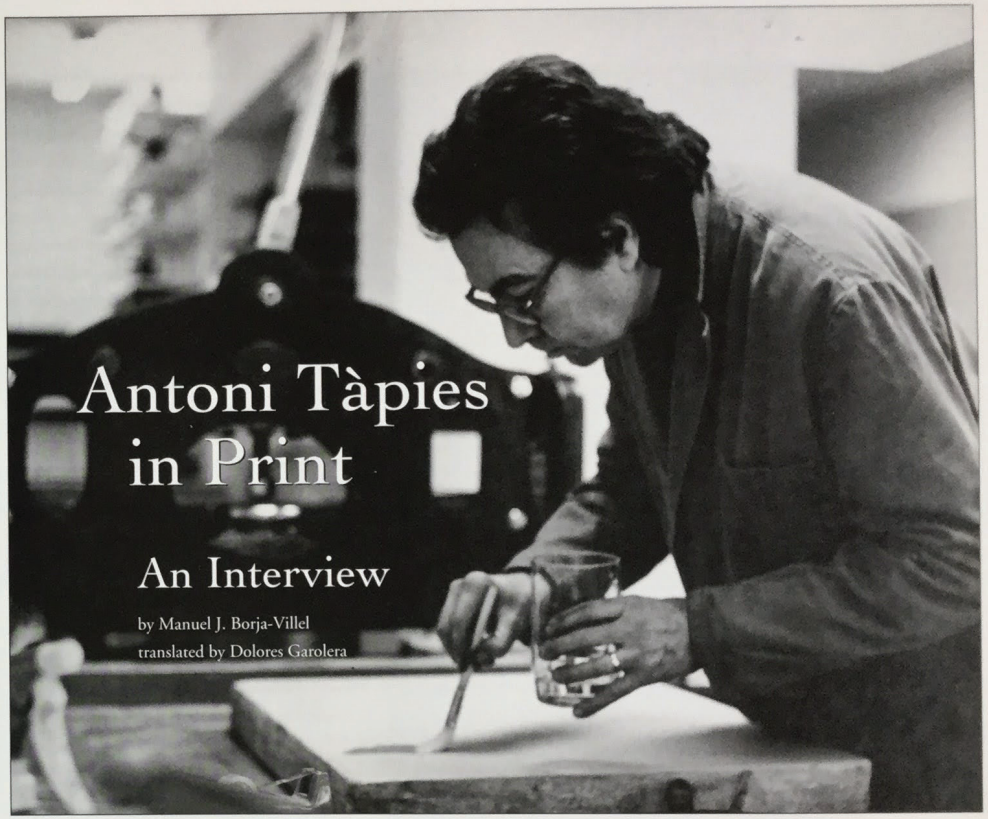
On the cover: Antoni Tàpies. Untitled (Plate I from *Suite Catalana*). 1972. Intaglio, printed in color. 29 1/8 × 39 11/16" (irreg.). Collection David Anderson Gallery, Buffalo, New York. Photo: Mali Olatunji.



Antoni Tàpies in Print

An Interview

by Manuel J. Borja-Villel
translated by Dolores Garolera

Antoni Tàpies in Print (through August 9) surveys the printed work of Spain's most prominent living artist (see page 3). He was interviewed for this issue of *MoMA* by Manuel J. Borja-Villel, Director, Museum of the Fundació Tàpies, Barcelona.

Manuel Borja-Villel: *How did you start doing printed work?*

Antoni Tàpies: The initial stimulus was from several print publishers—Sala Gaspar, Polígrafa, and others. Very soon I became aware of the possibilities that this medium offered me to experiment with new techniques and materials. I have always been very interested in the material aspect of works of art, so much so that it is a central element of my work. The print, in this sense, opened to me an enormous range of expressive possibilities.

MB: *The processes of lithography or etching are different from those of painting or sculpture in that other persons intervene in the production of a printed work. How do you differentiate the conceptual process of a lithograph or etching from that of a painting or an object?*

AT: The spirit in which I do a painting or an etching is exactly the same. I work with the same intensity on a little piece of paper as when I'm in front of a six-meter picture. But the printed work presents some different technical problems. In the beginning, when I had little experience, I made a preliminary drawing and then tried to reproduce it on the plate or the lithographic stone. Later, as I increasingly mastered the technique, I worked directly on the copper, zinc, or stone. Nevertheless, I always like to have a printer nearby.

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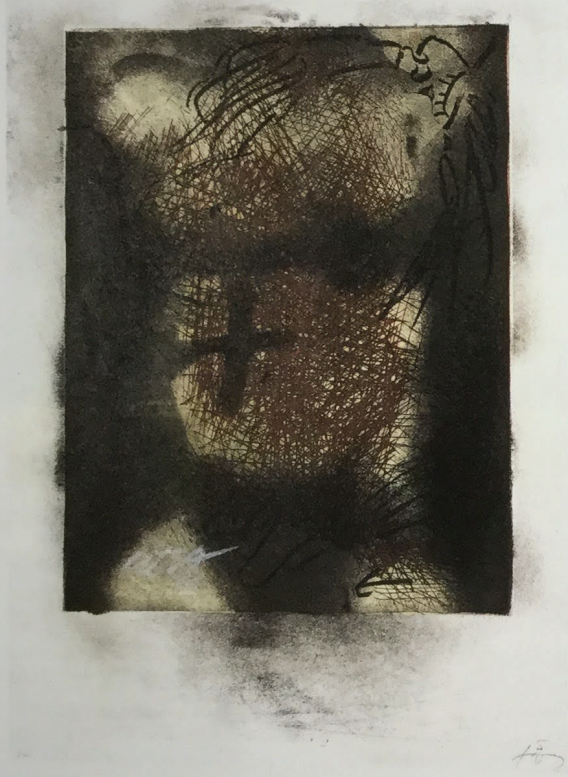
MB: *Your printed work not infrequently appears in series, which is very unusual in the case of your paintings and sculpture. Does this fact influence your conception of the print or the book?*

AT: Just as you say, on many occasions I have conceived a group of prints as a series, where all the plates are related; I try to establish a common link, which is not a narrative one, but of a plastic character. Thus, if the first lithograph is very agitated in appearance, I may try to make the second one more calm. In most cases, the sequence works in an intuitive way. In a strict sense, we can't speak of a series, but rather of variations on the same subject. My series concept doesn't differentiate my printed work from the rest of my production—just the opposite. Thus, in my painting and in my whole artistic career we can find a set of motifs or elements, like the cross, the foot, handwriting, and others, which are repeated lots of times in different ways and with different meanings, but one never finds a subject or subjects that behave in a narrative way, that is to say, with a beginning, a development, and an end, because my motifs and shapes have, as I say, the character of variations on the same subject.



Tors (Toris). 1988. Intaglio, printed in color. 35 5/8 × 24 13/16" (irreg.). Collection Grafos Verlag, Vaduz. Photo: Kate Keller.

MB: *What would you emphasize in your printed work?*

AT: Perhaps I would emphasize the expressiveness I try to convey by way of the support, the sheet. Obviously, it is very different to work with a satiny white sheet, without anything "accidental," than to work with a sheet with accidents, stains, and strong textures. This second kind of support is what always interested me. I can assure you that, from the traditional point of view, I've treated the support with very little respect. I have always tried to transform the paper, to give it dimensional relief, to add external elements, or to tear it. Just as I have done very little pictorial painting, I have created a body of printed work that uses elements antithetical to the pictorial. And I have had the chance to rely on printers who didn't fear the problems I presented. However, what I've never done is seek variety of material or technique for its own sake. My interest in the expressive value of these novel techniques has to do with their implications for philosophy and for conveying the experience of life.

MB: *Was it also your publishers who led you to create* libros de bibliófilo*—illustrated books?*

AT: Yes, but I had been attracted to the book as an object since I was very young. I was always surrounded by books. Since the middle of the last century my great-grandfather and grandfather had a bookshop and a publishing house in Barcelona. My father also worked in publishing. So I have been directly in touch with books—physically, I would say—from my childhood. In fact, I didn't read many of them, but I looked at and touched them. I liked feeling them in my hands. The smell of books made a deep impression on me. A book, in its material aspect, communicates a great deal of the aesthetic and the history of an epoch. It isn't made casually; there is a definite decision to choose a kind of paper, a style of type, and a particular format.

Empreinte (Imprint). 1984. Intaglio and carborundum, printed in color with collage. 24 13/16 × 35 13/16". Collection Galerie Lelong, New York. Photo: Michel N'Guyen.

MB: *You have collaborated on various illustrated books with many poets—Jacques Dupin, Edmond Jabès, Octavio Paz, José Miguel Ullán, and others. How do you see this work? As a dialogue? As illustration?*

AT: Fundamentally, there always has to be a dialogue and a shared feeling, although these are givens. Naturally, I would never do a book with a poet whose work I didn't know or wasn't interested in. When I work with a text I try to penetrate it, catch the general "atmosphere," and reflect it in my prints. What I want is for my prints to act as a kind of background music, a visual accompaniment creating a climate that helps the reader grasp with more intensity a particular poem or literary text. What I never do is "illustrate" a text; I can adapt to the text but I never illustrate it.

The Spanish artist Antoni Tàpies has created an extensive printed oeuvre that complements his work in painting, assemblage, and sculpture. *Antoni Tàpies in Print*, organized by Deborah Wye, Curator, Department of Prints and Illustrated Books, brings together more than one hundred prints and illustrated books dating from the 1940s to the present. In them, Tàpies achieves an unusual degree of tactility through such techniques as collagraph (a specialized form of embossing), collage, flocking, tearing, folding, and cutting, recreating in paper and ink the scarred, layered, and weathered appearance of his paintings.

Born in Barcelona in 1923, Tàpies experienced the Spanish Civil War as a teenager, and witnessed the subsequent suppression by Francisco Franco of the culture of Catalonia, which had strongly resisted his troops. Catalan culture and language, whose beginnings are associated with the thirteenth-century philosopher and poet Ramon Llull, would become central to the art of Tàpies. Abandoning the study of law in 1946, Tàpies turned to art, and soon became part of a small group of artists and intellectuals in Barcelona who reacted against the city's conservative culture and embraced Surrealism.

Joan Brossa (b. 1919), a Surrealist poet and dramatist, was at the center of a group that in 1948 founded *Dau al set*, an underground journal of art and poetry. Deborah Wye has noted that Tàpies's involvement with Surrealism led him to a "deeply Romantic view of art," a belief in its "transformative nature and thus its importance in the world." Surrealist automatism became central to his work, which he conceived as a vehicle for unconscious thoughts and feelings. In the 1950s, he combined his intuitive method with novel materials and unorthodox techniques to create an art of intense physicality. Tàpies's work of the 1960s gave new attention to human presence. He developed a personal language of images—including representations of everyday objects (such as clothing and furnishings), fragments of the body, isolated letters (often his initials "a" and "t"), and a scriptlike "writing" that he uses structurally—as a means to express his basic artistic purpose: exploring the link between human beings, their surroundings, and the spiritual world.

The exhibition and accompanying catalogue were made possible by generous grants from the Generalitat de Catalunya (autonomous government of Catalonia) and the Institute of North American Studies, Barcelona. Additional support was provided by the National Endowment for the Arts.

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Cadira (Chair). 1990. Intaglio, printed in brown black on monotype. 76 7/8 x 37 7/8". Collection Fundació Antoni Tàpies, Barcelona. Photo: Mali Olatunji.

MB: ***With what literary figure has this dialogue been most intense?***

AT: I have felt the greatest mutual understanding with the poets closest to me, especially Joan Brossa and J. V. Foix. Nevertheless, I have a special memory of one book I did with José Miguel Ullán. I don't know if it is the best of my illustrated books, but it is the one I feel most satisfied with, in terms of plastic values. This book has a kind of accordion shape in which the beginning and the end come together and disappear into one another. Though I hardly had any discussion with Ullán, I found his poetry highly suggestive and it led me to do something distinctive.

MB: ***How did you come to know J. V. Foix's poetic work?***

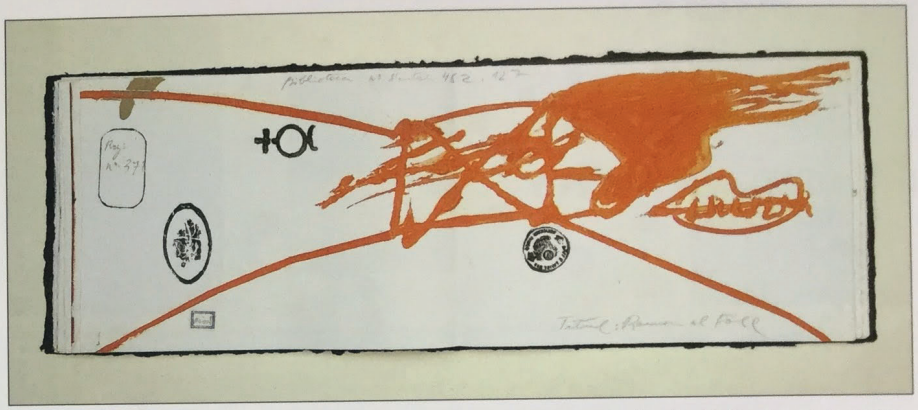
AT: It constituted a very important discovery, a true support during my formative years. During the *Dau al set* period, I illustrated one of his poems for the journal. Later, at his suggestion, I collaborated with him on one of the *Nadales* [Christmas Songs] that he did every year, and also on *On he deixat les claus* [Where I left the keys]. Familiarity with the work of Foix entailed getting to know some of the more avant-garde journals and reviews from this period, such as *Quaderns de poesia, Revista de Catalunya, El monitor,* or *L'Amie de les arts.* I often read his books and I am still reading them. His ideas about art and his conception of the avant-garde helped me very much in solving problems that many artists confronted during the Franco period, especially having to do with the relationship between political engagement and artistic radicality.

MB: ***Foix's first-hand knowledge of Surrealism also influenced you.***

AT: That's right, Surrealism represented to me and to other artists of the postwar Franco period a model of the artistic avant-garde, progress, and modernity. Joan Brossa's understanding of Surrealism and his friendship with Joan Miró were very important to the development of my artistic sensibility, especially during the *Dau al set* years. At that time Brossa encouraged me, and my art took on a more and more surrealistic look while at the same time becoming more literary. But I quickly realized that what I was looking for was the expressivity of the pictorial elements per se, and not the narrative aspect of the image, so I soon tried to evade the influence of Brossa so far as art was concerned.

MB: ***Besides the strong personal relationship that has lasted between you and Joan Brossa for the last forty years, you have often collaborated with this poet. What has been significant about these collaborations?***

AT: I've collaborated with Brossa on many illustrated books, but *El pà a la barca* and *Novel.la* are particularly important, since we worked on them with special intensity. I remember that for *El pà a la barca* we created and organized the text sequence and drawings at the same time. I consider this book one of my best contributions in this field. This type of book is ordinarily treated as a precious object; in contrast, I had no trouble doing just the opposite: tearing a page, for example, pasting pieces of paper on it, or even staining the paper. *Novel.la* was also an intimate collaboration, but in another sense. We agreed not to tell each other what we were going to do. Each of us invented his own "novel." I have since done other books with Brossa, such as *El rei de la magia.* But those had more to do with circumstantial matters. We did them mostly from a civic impulse, to aid social or political causes.

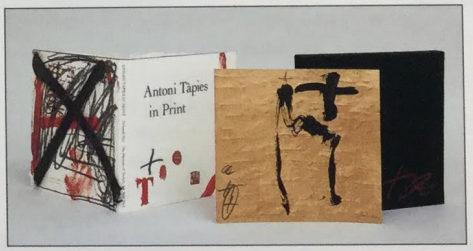


Llull-Tàpies. Texts by Ramon Llull and contributions by Miquel Batllori and Pere Gimferrer. 1985. Twenty-four intaglios (most with carborundum, collagraph, flocking, collage, and/or die cut) and one collagraph, carborundum, and intaglio, printed in color; and one collagraph (wrapper) housed in a burlap box with design by the artist. Page: 14 3/16 × 19 11/16". The Museum of Modern Art, New York. Gift of Galerie Lelong, New York. Photo: Mali Olatunji.

MB: ***Among those with whom you have not worked, who would you most like to collaborate with?***

AT: I would like to work with some American poets from my generation, especially those called city poets, the poets of the

(continued on page 17)



Limited Edition of *Antoni Tàpies in Print*

Shown here are the front and back covers of the catalog, which were designed by the artist, the original color lithograph, and the cloth slipcase with the artist's monogram. The catalog also features endpapers and marginal annotations by the artist.

A special edition of 150 copies of the exhibition catalog *Antoni Tàpies in Print* is available. Included in each volume is an original color lithograph signed and numbered by Antoni Tàpies. The book is housed in a cloth slipcase, blind stamped with a monogram by the artist. This special edition is only available with a contribution of $500 to the Museum's Endowment for the Purchase of Prints. To order, please send a check for $500, plus $10 for registered mail and insurance, payable to The Museum of Modern Art, and delivery instructions, to the Department of Prints and Illustrated Books, The Museum of Modern Art, 11 West 53 Street, New York, NY 10019. For further information, please call 212–708–9561. (This contribution is not tax-deductible.)

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MORE THAN ONE PHOTOGRAPHY

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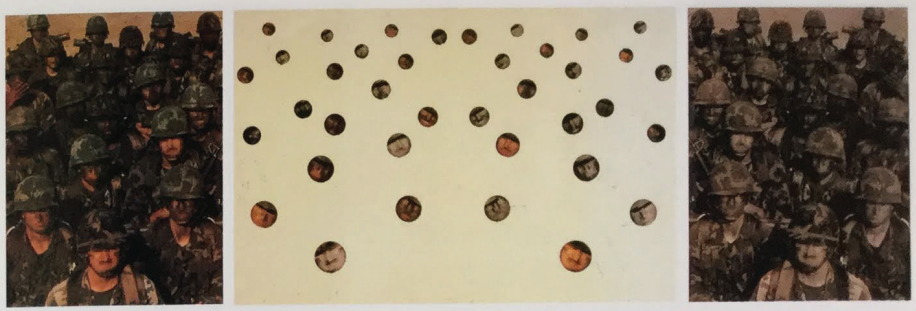
Works since 1980

from the Collection

by Peter Galassi

John Baldessari. *High Flight.* 1986. Black and white photograph, oil tint, and acrylic. 103 1/4 × 64 1/2".
The Museum of Modern Art, New York. The Sid R. Bass Fund. Photo courtesy Margo Leavin Gallery, Los Angeles.



Annette Lemieux. *Stolen Faces.* 1991. Lithograph in three sections. 33 7/8 × 100 1/2 × 1 5/8" overall. The Museum of Modern Art, New York.
Purchased with funds given by Howard B. Johnson. Photo: Ellen Page Wilson.

The first two works by Robert Rauschenberg to enter the collection of The Museum of Modern Art, in 1952, are not the sort of works for which the artist is best known. They are photographs, which were purchased by, and reside in, the Department of Photography. Other Rauschenberg works, including ones that incorporate photography, have been acquired by the Departments of Painting and Sculpture; Drawings; and Prints and Illustrated Books. The curatorial structure of the Museum also includes Departments of Film and of Architecture and Design. All six departments and the Library (which houses many artist's books) collect works that are photographic in one way or another. If this arrangement has the disadvantage of dividing what might be considered a whole, it has the greater advantage of meeting the challenge of photography's diversity with a variety of points of view and areas of expertise. *More than One Photography,* on view through August 9, brings together photographic works from all of the Museum's curatorial departments and from the Library. For lack of space it includes only works made since 1980. Lamentably, for practical reasons, it excludes film.

When Rauschenberg and Andy Warhol dragged photography into the artist's studio some three decades ago, they did so precisely because of the medium's stubborn attachment to the world outside. The pictures they used—from newspapers, magazines, and other mundane sources—carried with them the messiness and vitality of modern life and of photography's ubiquitous presence in it. There was also the attraction of the medium's chameleon versatility: its easy ability to mimic, record, enlarge, reduce, combine, reproduce, and assimilate. Both as raw material and as a tool, photography has continued to prove useful to artists.

Since 1980 it has seemed increasingly indispensable. Artists such as John Baldessari and Annette Lemieux have assembled much of their art from photography's vast image bank without ever needing to pick up a camera. Others, such as Cindy Sherman and Laurie Simmons, have remade and revised the seductive fictions of movies and advertisements without ever leaving the studio. In the work of all of these artists, the world is the world already photographed, and photography's appeal is inseparable from its duplicity.

This vein of recent art may have completed the complex project of dismantling the presumption of photography's authenticity. Nevertheless, the final erosion of the medium's special claim on the truth seems only to have nourished its capacity to embody a diversity of truths, not all of them mutually compatible.

A hint of this diversity is suggested by current approaches to the simple portrait. The imposing

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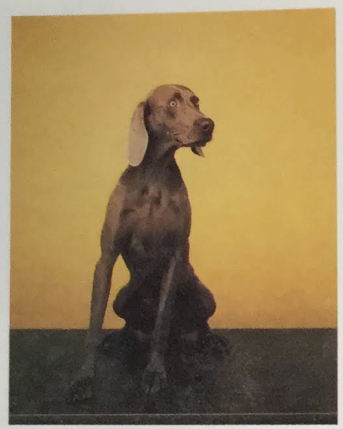
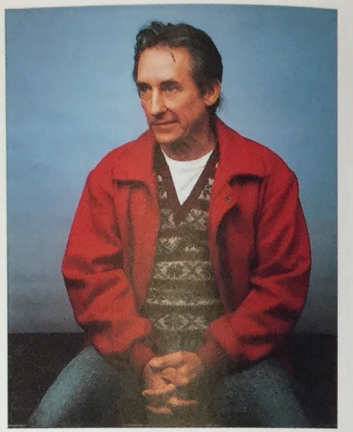




blankness of Thomas Ruff's larger-than-life portraits severs the old tie between physical description and psychological interpretation, proving that photographs can show everything and reveal nothing. Where Ruff sees blankness, however, William Wegman sees an open playground for wit; his implausible studio portraits are at once elegant, comic, and touching. Other artists, such as Christian Boltanski and Esther Parada, have turned to the resource of old school albums or family portraits, distilling photography's power as an agent of memory. And for Judith Joy Ross, photography remarkably remains an eloquent means of approaching and discovering a person. When she embarked on a series of portraits of members of Congress, she knew that they had been photographed over and over again. But she needed to make her own pictures, and indeed they are her own.

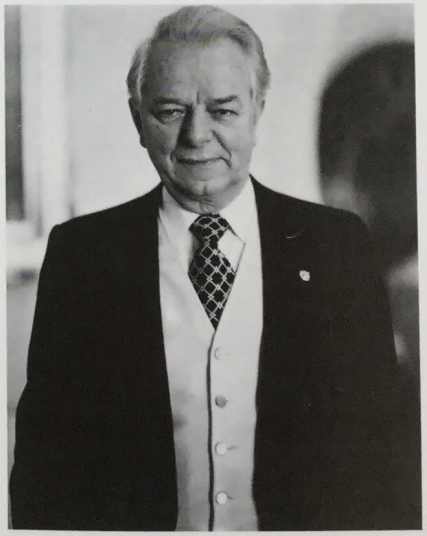
The photographic propositions of Ruff and Ross are mutually exclusive. That both approaches—and dozens of others—can lead to persuasive pictures is the most challenging feature of current

opposite page, top:
William Wegman, *Fay/Ruscha*. 1987.
Two color instant prints (Polaroid). Each 24 1/4 × 21".
The Museum of Modern Art, New York. Gift of
The Contemporary Arts Council in honor of
Mrs. Ronald S. Lauder.

opposite page, bottom:
Thomas Ruff. *Portrait*. 1989.
Chromogenic color print (Ektacolor). 47 1/4 × 22 10/16".
The Museum of Modern Art, New York.
The Fellows of Photography Fund.

this page, top:
Esther Parada. *Memory Warp I*. 1980.
Gelatin-silver print. 32 × 32".
The Museum of Modern Art, New York. Purchase.

this page, bottom:
Judith Joy Ross. *Senator Robert C. Byrd, Democrat, West Virginia*. 1987.
Gelatin-silver print. 9 3/4 × 7 5/8".
The Museum of Modern Art, New York.
Purchased as the gift of Shirley C. Burden.



photographic work. But in fact there always has been more than one photography. While an endless argument raged over what photography was for, millions of people put it to use in increasingly various ways. It is this chaotic diversity that has bedeviled the question of when photography is an art and when not. Although troubling to theorists, the impossibility of answering the question in the abstract has been a concrete advantage to those who make photographs, whether they are called photographers or artists.

●

Peter Galassi, Director, Department of Photography, organized the exhibition More than One Photography: Works since 1980 from the Collection. *The exhibition is made possible by grants from The Bohen Foundation, The Junior Associates of The Museum of Modern Art, and The Contemporary Arts Council of The Museum of Modern Art.*

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Gertrude Käsebier

Photographer

by Barbara L. Michaels

From the turn of the century until World War I, Gertrude Käsebier (1852–1934) was the most eminent woman photographer in the United States, if not the world. Along with Alfred Stieglitz, Edward Steichen, and Clarence H. White, she played a role in gaining public acceptance for photography as a fine art.

A. K. Boursault. *Under the Skylight (Gertrude Käsebier photographing Harriet Hibbard, her studio assistant)*. c. 1903. Proof print for reproduction in *The Photographer*. 4 3/4 × 5 1/2". The Museum of Modern Art, New York. Gift of Miss Mina Turner.

Against her husband's wishes, she began a photographic career when their three children were in their teens, and achieved success in her portrait studio on Fifth Avenue in New York City. The range of likenesses seen in the exhibition *Gertrude Käsebier, Photographer* (through July 14)—from those of artists, including her photographer colleagues, to showgirls and even Sioux who were performing in New York with Buffalo Bill's Wild West show—suggests Käsebier's sympathy with a variety of people. Käsebier also used photography to express her own slant on aspects of women's lives, especially motherhood and marriage, sometimes enhancing a photograph with drawing to intensify its emotional impact.

Most of the photographs in the exhibition were donated to The Museum of Modern Art by Käsebier's daughter, Hermine M. Turner, and her granddaughter, Mina Turner, whose own photographic careers gave them privileged perspectives on Käsebier's achievement. Hermine assisted her mother for many years, finally taking over her portrait practice in the 1920s. Mina made a specialty of photographing theatrical personalities during the twenties and thirties, but relinquished the camera to serve with the Office of War Information during World War II. She subsequently managed the subsidiary rights department of Doubleday and Company, and once recalled that when reading Vladimir Nabokov's novel *Pnin*, in the course of her work, she was pleasantly surprised to find that the author had adorned a fictional artist's studio with one of Käsebier's early mother-and-child scenes, which he called a photographic masterpiece. With typical generosity, she offered the novelist a print, only to learn that he did not accept gifts.

Between retirement and her death in 1975, Mina devoted much time to ensuring that her grandmother's work was not forgotten. With the thought of writing a book about her, she interviewed Käsebier's old friends, including Steichen, and also wrote down her own recollections, but flagging energy forced her to abandon the project. In response to my growing interest in Käsebier, Mina put manuscripts at my disposal and spoke at length about her grandmother's life and work. I discovered that Mina, like her grandmother, had the ability to make friends almost instantly.

Most significantly, Mina arranged to donate her Käsebier prints, and those belonging to her elderly mother, to museums throughout the United States. Because Steichen, a former director of the Department of Photography of The Museum of Modern Art, had been a close friend of Käsebier, and because the Museum was the first in this country to establish such a department, it was given first choice of the Turner holdings. As a result, it has been possible to assemble the current Käsebier exhibition almost entirely from the Museum's collection.

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Barbara L. Michaels is guest curator of Gertrude Käsebier, Photographer, *and author of* Gertrude Käsebier: The Photographer and Her Photographs, *published by Harry N. Abrams, Inc., New York.*

Lolly Pops. 1910. Platinum print, 11 1/4 × 8 3/8". The Museum of Modern Art, New York. Gift of Mrs. Hermine M. Turner. Mina Turner (right) and her cousin Elizabeth O'Malley are seated; Hermine M. Turner stands in the background.

I can't remember the time when Granny wasn't a photographer. She used to sneak up . . . when we were playing in the sand pile, or having a story read to us . . . or just sitting on the stairs sucking lollypops. Suddenly a voice would say: "Don't move! Stay just where you are!" and it would be Granny behind her camera. The front leg of the tripod which held the camera would wave around jabbing the floor, the rug, the ground, for a good grip and the right angle, as if it had a life of its own. Then the bellows would move in and out, and Granny would emerge from under the focusing cloth and say: "Now—still." . . . We were neither bored nor excited by the picture taking; it was just one of the things that happened, like sneezing or brushing your teeth: a minor annoyance to be got over with as quickly as possible, and the quickest way was to sit still.

—Mina Turner, Gertrude Käsebier's granddaughter

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SCHOOLING THE EYE

MUSEUM INTRODUCES INNOVATIVE SCHOOL ART PROGRAM

by Christopher Lyon

Students from P. S. 20 visiting the Museum. Photo: David Dapogny.

What's going on in this picture?
What do you see that makes you say that?
What else can you tell me?
Is that something you see in the picture or think you see?

This year, these have become familar questions to fourth-graders in New York City elementary schools who are participating in a newly-established program of the Museum's Department of Education. Called the Visual Thinking Curriculum (VTC), it is an innovative approach to teaching children how to begin looking at and thinking about art. It is also an ambitious attempt to make learning about art an essential component of primary education.

At P.S. 11 in Bedford-Stuyvesant, P.S. 20 in Lower East Side Manhattan, and P.S. 56 and 165, both in Queens, students are coming to the end of the first year of the project, which began last fall. Their curriculum consists of ten sequential lessons, all designed to enhance the students' critical thinking skills. The project is to extend over three years, so the fourth-graders now participating will experience two more years of lessons during the fifth and sixth grades. A new group of fourth-graders is to be introduced next year and the year after. After three years, the pilot program will hopefully have become a model of teacher training and in-school teaching that can be introduced throughout the school system.

Philip Yenawine, Director, Department of Education, explained recently that the project originated in an attempt, beginning in the mid-1980s, "to find out what people knew" about art. It soon became apparent that being able to respond to art was not only a matter of knowledge and skill but also of having a sympathetic understanding of the principles underlying modern art. "People instinctively find challenging much of the work on the Museum's walls," Yenawine said. Viewers may consider values of invention and change appropriate to technology, for example, or they may read literature with an awareness of its many resources for conveying meaning, but they may be unaware of or resistant to the possibility of engaging visual art on such terms.

This is especially critical in the area of modern art, much of which is essentially idea-based, but art of the past also is more completely grasped when its capacity to convey thought is understood. Seeing seems to be instinctual, but in fact, Yenawine believes, learning to look has stages comparable to those of learning to read. If someone wants to enjoy a work of serious literature, he points out, basic reading skills are a requirement. There is no comparable initiation into the visual arts, so the department has focused its extensive instructional programs on development of the skills and concepts needed to attain "visual literacy." These programs, designed for diverse audiences from the very young to adults, include middle school and high school components and the Lincoln Center Institute, an intensive teacher training program conducted each summer. The effort to develop visual literacy has relied in large measure on the empirically-derived "aesthetic stage theory" of Abigail Housen, a professor at Massachusetts College of Art who has been working with the Museum's Department of Education since 1988. The successive stages described by her theory help to explain how art viewers look, think, and talk about visual art as they gain increasing experience of it.

In the classroom, the theory translates into a structured approach, which has four essential stages: learning to observe, to describe, to interpret (to find meanings on one's own), and to discuss with others the information attained in these ways. "All of this adds up to learning both to think and to articulate," Yenawine remarked. Art objects, because they provide a certain amount of concrete data and a lot of room for interpretation, can be used with particular effectiveness to teach such skills. More generally, part of art's usefulness in education stems from its capacity to stimulate thought as students respond to visual information. The intellectual, emotional, and spiritual content in art can lead children to think and feel simultaneously; it can open their eyes to the new while giving greater depth of meaning to the familiar; and its richness can sustain their interest over time.

In the fourth grade, the program focuses on the development of observation, description, and subjective interpretation. Students are asked to describe what they see and explain what they think it means, using detective work as an analogy. They are first introduced to "grounded storytelling," finding a story in a picture while being encouraged to ground the narrative in things they actually see. They soon begin to understand some implicit "rules"—they have to talk about what is there, for example—and Museum educators have observed a pattern in students' developing awareness. "At first they don't have any questions," Teaching Specialist and Program Designer Amelia Arenas explained. "But by the third or fourth session, they are beginning to qualify their stories with 'maybe' and 'perhaps.' And then they begin to ask questions." Arenas recalled a boy who joined a class that already had had several lessons. "He was very enthusiastic, but he was less experienced than his classmates, so he made up all kinds of things. The other kids grilled him: 'Where do you see that in the picture? What are you talking about?'"

In the fifth grade, the curriculum will build on the fourth grade experience and introduce a system for analyzing pictures that moves beyond narrative to abstract issues and uses objects from cultures less familiar to students. "We will spend a long time with pictures that satisfy the students' limited definition of what art is, and then gradually expand their terms for accepting something as having decipherable content," Yenawine explained. By probing what students think the artist might have intended, the program will begin building a sense of a work's origin—a way of piquing students' interest in historical and biographical information.

In the sixth grade, an attempt will be made to refine and extend students' understanding of an art object in relation to its context—the ways in which an object may reflect the individual and the culture from which it came. The children will be introduced to the work and short biographies of such twentieth-century artists as Picasso, Matisse, Georgia O'Keeffe, Romare Bearden, Diego Rivera, Frida Kahlo, Jackson Pollock, and Nam June Paik.

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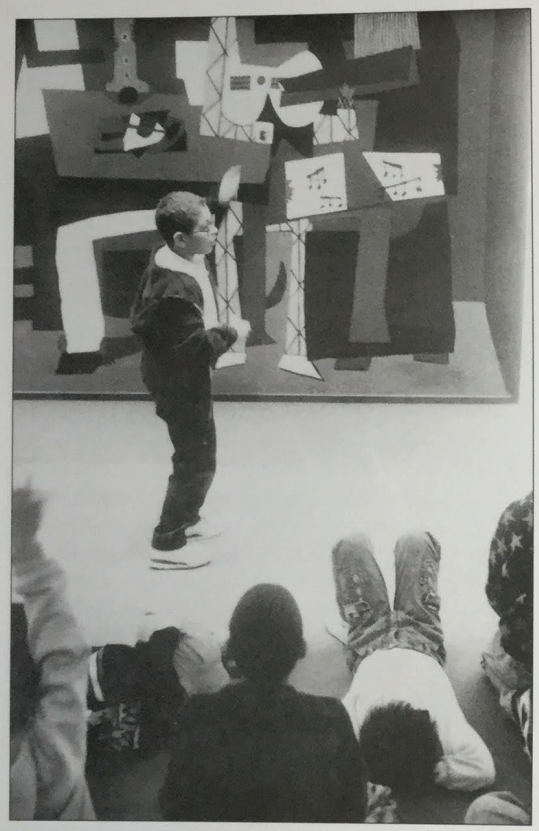

Students from P. S. 20 at the Museum. Photo: David Dapogny.

Students will be assigned research projects about these artists and others they may have become familiar with.

The Visual Thinking Curriculum begins in the fourth grade because it is based on verbal skills that a group in a lower grade may not have mastered. The staff wants students who are able not only to articulate their own ideas but also to listen to one another. The Museum educators have noticed that in these classes, "the 'good' students don't necessarily do better than the 'bad' ones," as Arenas put it. Teachers observe, said Yenawine, that while twenty-five percent of the students will ordinarily do most of the talking, a much greater proportion will take part in VTC sessions.

One reason for this may be that the program uses the students' regular teacher to introduce art in the classroom and to lead discussion. "One of the most exciting things we have found is that teachers can do a better job than we can," Yenawine remarked. "Teachers may have greater rapport, and they are in command of what works with their kids. Most important, their experience of art is often comparable to that of their students. They're supporting the children where they are." This changes the dynamic of the classroom, as the teacher not only provides information but also participates in discussion. Teacher training is conducted at the Museum and includes approximately forty carefully structured hours of workshops. Teachers are also provided with easily understood lesson plans, and a system of mentoring has been established by which a member of the Museum's education staff acts as a consultant to a teacher both in the classroom and during visits by the children to the museum.

Beyond enhancing understanding of art per se, the program aims to develop abilities that have a broad application. The VTC is based in part on the observation that art education can become a crucial part of education in general. That realization frees art from being a supplement to other areas of study, explained Cynthia Nachmani, Associate Museum Educator and coordinator of the Department's School Programs. "In the curriculum we've developed, art is not ancillary, not used to 'illustrate' culture; it is itself the subject." This approach has broad implications, since many of our educational systems are impoverished by the practice of relegating the arts to a secondary role in education. As a result, whole segments of our society are excluded from a vast array of cultural and historical information and ideas. The Visual Thinking Curriculum may prove a model response to the challenge of bringing that rich heritage back into the schools.

(*continued from page 5*)

beat generation, and particularly Allen Ginsberg. On a few occasions, this collaboration reached the point of happening, but it has never been possible to bring it off.

MB: ***A lot of your books have a mysterious character, like a secret that is hidden or one that is revealed through a certain reading. Has this magical aspect something to do with your interest in books?***

AT: The emotion of opening a book, of discovering little by little what is inside, has something of ritual, of magic, which without any doubt is part of my work. Illustrated books are directly connected to my wish to create magical objects, authentic talismans that communicate ideas and have an affect on the viewer. We cannot forget that "the book" has been in many civilizations one of the most important means of communicating with the sacred. And I want this communication to take place through the physicality of the book, through the "objectness" of it, not only by way of its contents. The illustrated book is a clear example of where the support and the contents coincide, or at least that is the way I see it.

MB: ***The philosophies of many of the thinkers to whom you seem most connected are strongly imbued with this magical aspect. I refer particularly to Ramon Llull. When and how did you become interested in this Catalan mystic?***

AT: I felt a special interest in Ramon Llull at a very early age. I remember having a look at his writings in a book collection that my father had, titled *Els nostres clàssics* [Our Classics]. The fact that Llull was one of the international figures of Catalan thought drew me to his writings very early on. This interest became stronger afterwards, mostly when I realized that the Surrealists quoted him, too. J. V. Foix was very interested in Llull, and he motivated me as well. Foix had the complete works of Llull, and I remember having discussed them with him at his house. Finally, I myself collected books by Llull; I have some first editions. I always try to acquire illustrated ones. Many of Llull's books include diagrams, whose plastic values immediately attracted me, and may be reflected in my art works. When I delved into his writings a little more, one of the aspects of Llull that impressed me most deeply was his character, that of the complete humanist in whom science, mysticism, and poetry come together. Furthermore, Llull wasn't only a thinker, but also a man of affairs. His embrace of life became for me a model to follow. Later I discovered that his opinions about painting were extremely interesting and similar to a lot of my intuitions.

At the same time time I was attracted to medieval Catalan philosophy, I was interested in the thought of my contemporaries. I was a particularly avid reader of those scientists who wrote for the public. Their theories opened to me new perspectives on the study of ourselves: Who are we? What is the secret of human existence? What is the essence of things? Many of these books I inherited from my father, especially the writings of Werner Heisenberg, Niels Bohr, and Robert Oppenheimer. It was these scientific writings that led to my interest in Far Eastern philosophies, those of India and Japan. Bohr, specifically, said that modern science faced problems that were posed by Lao Tse and Buddha. There is a correspondence between modern scientific discoveries, especially in physics, and oriental ideas, an example being the problem of our role as observers of a reality in which we are simultaneously actors.

MB: ***You have sometimes mentioned the fact that printed art allows your work to reach a wider audience, which has been very important to you. How has this social impulse affected your work?***

AT: The fact that my work can be multiplied and have a wider diffusion in society has been very important to me. All my art clearly has a social aspect, if only in the sense that I intend it to be broadly distributed. This social dimension has never led me to treat themes with explicit content or to feel obligated to use an academic visual language. I have always sought to develop a personal artistic language and to reach the widest possible audience without altering my style. As you know, the problem of having to choose between an art of the artistic avant-garde and an art of the political vanguard was one of the great questions in Europe during the 1950s, a dilemma that I especially suffered. Although I always considered myself a person deeply committed to my time, I nevertheless chose to make an avant-garde art. And yet, since they affected me personally, a lot of the social and political problems of my time have influenced me and, indirectly, my work. A lot of my ideas and political experiences can be inferred from my painting, even though they are concealed and haven't been expressed in an obvious way through an immediately recognizable visual code.

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MEMBERS

Bernice Rose, Senior Curator, Department of Drawings, leading a discussion of the exhibition *Allegories of Modernism.* Photo: Christopher Lyon

On March 9, Bernice Rose, Senior Curator, Department of Drawings, accompanied Contributing Members through **Allegories of Modernism: Contemporary Drawing,** which she organized. She explained how the exhibition took advantage of different kinds of space within the Museum to contrast intimate works with the large-scale artistic statements that artists have made with drawing since the 1970s. Stopping to focus on key works, she discussed the concepts and techniques that have made possible the emergence of drawing as a major medium. The lively discussion moved from the galleries to the Garden Hall during a reception that followed.

Among the many other special events and programs designed especially for Contributing Members is an ongoing series of talks by contemporary artists represented in a current Museum exhibition. The series is co-sponsored by The Contemporary Arts Council of The Museum of Modern Art. On January 6, Benefactor and Patron Members attended a multi-media presentation by Adrian Piper, held in conjunction with the exhibition ***DIS*LOCATIONS**, for which she had created an installation in a gallery of the Museum. On March 23, Richard Serra spoke in the Museum's Trustees Room on his **Afangar Icelandic Series** of etchings, and on the recent sculptural project in Iceland that inspired its visual vocabulary. Contributing Members were also invited to join a series of behind-the-scenes evenings in April, which illuminated the collections and programs of the Departments of Painting and Sculpture, Film, and Architecture and Design.

For more information on current programs and on the many benefits of Contributing Membership, please contact the Department of Membership at 212–708–9687.

Adrian Piper. Photo: Peter Moore

SUMMER 1992

SAVE THESE DATES! As a member of The Museum of Modern Art, you are invited to participate in a variety of tours and events this summer. To register or to obtain further information, please contact the Department of Membership at 212–708–9695.

MEMBERS STUDY TOURS

Noguchi Museum and Socrates Sculpture Park

This afternoon study tour begins at The Museum of Modern Art with a slide-illustrated introduction to the life and art of the distinguished twentieth-century Japanese-American sculptor Isamu Noguchi. After a buffet luncheon in the Trustees Room, members tour the Isamu Noguchi Garden Museum in Long Island City—an institution devoted entirely to the artist's work, which is displayed in twelve galleries and an adjacent sculpture garden. Socrates Sculpture Park, New York's first outdoor space devoted to large-scale sculpture, provides the setting for a discussion of work by contemporary American sculptors.

Code 80: **Saturday, May 30**
12:00 p.m. to 6:30 p.m.
Fee (includes transportation, admission fees, lunch, and light refreshments): members $70; nonmembers $85.

MoMA Family Picnic at PepsiCo Sculpture Gardens

Enjoy a Sunday *alfresco* with The Museum of Modern Art family at The PepsiCo Sculpture Gardens in Purchase, New York, where 144 acres of formal gardens and landscaped vistas provide a delightful environment for a comprehensive collection of twentieth-century sculpture. Lively discussions are conducted throughout the day by lecturers from the Museum's Department of Education on works by Calder, Giacometti, Miró, Nevelson, Noguchi, Rodin, and David Smith. Picnic on a shaded terrace or under the trees. Buses leave from and return to The Museum of Modern Art.

Code 81: **Sunday, June 7**
10:00 a.m. to 4:00 p.m.
Fee (**including transportation**, picnic lunch, and light refreshments): members $40; children under 12, $20; nonmember guests over 12, $50.
Fee (**excluding transportation**): members $30; children under 12, $15; nonmember guests over 12, $40.

PROGRAMS

Picasso and Kahn in Philadelphia

Held in conjunction with the Museum exhibition **Louis I. Kahn: In the Realm of Architecture** (opening June 14), this day-long trip to Philadelphia features a behind-the-scenes tour of the University of Pennsylvania's Louis I. Kahn Study Center and a visit to **Picasso and Things: The Still Lifes of Picasso** at the Philadelphia Museum of Art. This is the only East Coast venue of the first exhibition ever devoted to Picasso's still life paintings; over one hundred works are on view, spanning every period of his career. At the Architectural Archives of the University of Pennsylvania, Director Julia Moore Converse welcomes members for a private viewing of the Kahn Collection. A visit to a private residence designed by Kahn completes the day's activities.

Code 82: **Saturday, June 20**
9:00 a.m. to 6:00 p.m.
Fee (includes transportation, admission fees, lunch, and refreshments): members $95; nonmembers $120.

Annual Members Summer Cruise

Join us for a festive evening aboard a chartered Circle Line boat during the Museum's annual cruise around New York Harbor. Against the backdrop of Manhattan's changing skyline, architectural historians Sam Gruber and Judy Meighan explain how the city's development has been shaped by its surrounding waters. The skyscrapers of Wall Street and midtown and such large-scale civic projects as the Brooklyn Bridge are discussed. Bring aboard a picnic dinner and dance to the music of a popular jazz band under the stars.

Code 83: **Thursday, July 23**
7:00 p.m. to 10:00 p.m.
Fee: members $25; nonmembers $40.

CONTRIBUTING MEMBERS ART TOURS

Registration for the following tours is open only to Contributing Members of The Museum of Modern Art. For information about the benefits of Contributing Membership, please call 212–708–9687.

Artists of the Hamptons

Three generations of artists who have lived and worked on Eastern Long Island are celebrated during this special day. The morning begins with coffee and a slide-illustrated lecture in the Museum's Edward John Noble Education Center, followed by a private viewing and discussion in the newly installed gallery of paintings by Jackson Pollock. Members then travel to the Pollock-Krasner House and Study Center in East Hampton for a private tour of its farmhouse and converted barn/studio, where Pollock painted his characteristic "drip-style" canvases and where his wife Lee Krasner continued to work after his death in 1956. Following a picnic lunch on the property, Contributing Members continue on to East Hampton's Guild Hall to view an invitational exhibition highlighting the work of ten contemporary East End artists. The afternoon includes visits to the Dia Center for the Arts in Bridgehampton and to the studio of Larry Rivers. The bus leaves from and returns to The Museum of Modern Art.

Date: **Sunday, June 14**
9:00 a.m. to 8:30 p.m.
Fee (includes transportation, admission fees, luncheon, and refreshments): $130

Seattle

The Emerald City of the Pacific Northwest provides the setting for this exciting five-day trip. Patterson Sims, Curator of Modern Art at The Seattle Art Museum, introduces Contributing Members to its extensive collections of Asian, Northwest Coast, and modern art. Other highlights of the trip include visits, featuring cocktail receptions or dinners, with five major Seattle-area collectors of modern and contemporary art; a trip to the studio of renowned glass artist Dale Chihuly; visits to the University of Washington's Henry Art Gallery, the Pike Place Market (overlooking Puget Sound), and the art galleries and shops of Pioneer Square; a tour of the city's extensive public art collection; and an afternoon of sailing on Seattle Harbor. The elegant Four Seasons Olympic Hotel provides deluxe accommodations throughout the stay. For a complete description of the trip, please contact the Department of Membership at 212–708–9849.

Date: **Thursday, June 18, 9:00 a.m. to Monday, June 22, 7:30 p.m.**
Fee (includes double-occupancy deluxe hotel accommodations, all meals, receptions, land transportation, and admission fees): $1,100. Single-room suppement for four-night stay: $355. Airfare is additional. Flights may be booked through Williams World Travel at 212–752–3525.

John Seiger and the Three Notes perform again during this year's Summer Cruise. Photo: David Dapogny

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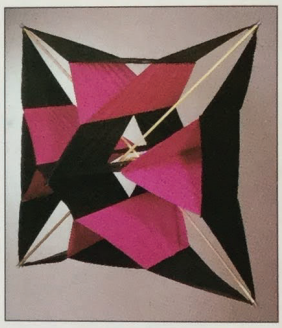

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