OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-140

TITLE MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, Petitione
v. MICHAEL HARDWICK, AND JOHN AND MARY DOE

PLACE Washington, D. C.

DATE March 31, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA,

Petitioner

v. No. 85-140

MICHAEL HARDWICK, AND JOHN AND MARY DOE

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Washington, D.C.

Monday, March 31, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MICHAEL E. HOBBS, ESQ., Senior Assistant Attorney General of Georgia, Atlanta, Georgia; on behalf of the Petitioner.

LAURENCE TRIBE, ESQ., Cambridge, Massachusetts; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in Bowers against Hardwick.

Mr. Hobbs, you may proceed whenever you are ready.

ORAL ARGUMENT OF MICHAEL E. HOBBS, ESQ.

ON BEHALF OF THE PETITIONER

MR. HOBBS: Thank you. Mr. Chief Justice, and may it please the Court:

This case presents the question of whether or not there is a fundamental right under the Constitution of the United States to engage in consensual private homosexual sodomy.

In 1982, Michael Hardwick was arrested and charged with the violation of Georgia's anti-sodomy statute for engaging in this conduct with a consenting adult in his home.

The case was never presented to the grand jury of Fulton County and no prosecution of Mr. Hardwick ensued.

However, in 1983, Mr. Hardwick, along with John and Mary Doe, filed a Section 1983 suit seeking injunctive relief and declaratory relief against the enforcement of

Georgia's sodomy statute.

QUESTION: Was there a reason, Mr. Hobbs, that it wasn't presented to the grand jury?

MR. HOBBS: Your Honor, the District Attorney of Fulton County, who would have handled that case --

QUESTION: That is Atlanta, isn't it?

MR. HOBBS: That is correct, Your Honor. -- indicated that it would not be presented the grand jury under further evidence developed. That is the only reason that I know that it was not presented.

QUESTION: Mr. Hobbs?

MR. HOBBS: Yes, Your Honor.

QUESTION: Is the statute enforced in Georgia?

MR. HOBBS: Yes, Your Honor, the statute is enforced in Georgia.

QUESTION: How many prosecutions have there been in the last year or five years?

MR. HOBBS: I could not tell the Court that. I can only say that in our experience the statute is most frequently enforced in situations where the conduct takes place in more public or quasi-public areas.

QUESTION: Well, I should have framed my question more specifically. In the context of the issue presented in this case where the activity took place in a private residence, has it ever been enforced?

MR. HOBBS: It had been enforced. I believe that last case I can recall was back in the 1930's or 40's in the State of Georgia. Appellate decisions.

Obviously, Your Honor, the Fourth Amendment impedes the ability of the State of Georgia to enforce the statute when the conduct takes place in the privacy of the home.

Nevertheless, it is our position that the Fourth Amendment restrictions should not have any bearing on whether or not there is a fundamental right to engage in this conduct.

QUESTION: Did you say the last prosecution was in the 30's or 40's?

MR. HOBBS: The last reported Appellate decision concerning this type of conduct in a private setting.

QUESTION: Has it ever been enforced in a marital situation?

MR. HOBBS: Not to my knowledge. Not in the State of Georgia at least.

QUESTION: But, on its face, the statute would permit such a prosecution, would it not?

MR. HOBBS: That is correct, Your Honor. The statute does not differentiate between married individuals, unmarried heterosexuals or homosexuals.

It is our position that there is no fundamental right to engage in this conduct and that the State of

Georgia should not be required to show a compelling state interest to prohibit this conduct.

There is certainly textual support for this proposition. And, contrary to the views expressed by the Eleventh Circuit Court of Appeals and the Respondent, it is suggested that there is no precedential support in the decision of this Court for the proposition that there is a fundamental right to engage in sexual relationships outside of the bonds of marriage.

This Court in the Carey decision in 1976 made it fairly explicit that its previous decisions relating to contraception and abortion were restricted to state regulations which burden an individual's choice to prevent conception or to terminate pregnancy. And, the Court concluded that it was not holding a state must show a compelling state interest every time sexual freedom is involved.

In Moore versus City of East Cleveland, Justice Powell noted the difficulty this Court has sometimes had in defining fundamental rights under the Due Process Clause of the Fourteenth Amendment and suggested, based upon numerous cases of this Court, that appropriate limits and guidelines for determining whether or not rights are truly fundamental can be found in the tradition, history, and heritage of this nation.

In that particular case, Justice Powell, writing for the plurality, concluded that the Constitution protects the family simply because the family is so rooted in the history and traditions of our nation.

Many of this Court's decisions have followed the history and traditions of our nation in making its determination as to whether or not a particular activity is entitled to constitutional protection as a fundamental right.

Thus far this Court has concluded that the right of privacy includes matters which involve marriage and family, procreation, abortion, child rearing and child education. It has never concluded, and I would suggest to the Court that there is no constitutional warrant to conclude that there should be a fundamental right to engage in homosexual sodomy or any other type of extra-marital sexual relationships.

The common thread of this Court's --

QUESTION: Let me just ask, what is your position on the application of the statute to a married couple?

MR. HOBBS: If Your Honor please --

QUESTION: Could it be constitutionally applied or not?

MR. HOBBS: I believe in light of Griswold versus Connecticut that application of the statute to a married

couple would make it very problematic for the State of Georgia to --

QUESTION: Do you think they could or could not? Do you think it would be constitutional or unconstitutional to apply it to a married couple?

MR. HOBBS: I believe that it would be unconstitutional.

QUESTION: You think it would be constitutional?

MR. HOBBS: Yes, sir.

QUESTION: And, what is the right that would be protected of the married person in that situation in your view?

MR. HOBBS: The right of marital privacy as identified by the Court in Griswold.

QUESTION: And, this conduct, though it is traditionally frowned upon as I understand your brief, you would nevertheless be constitutionally protected in the marital setting?

MR. HOBBS: Yes, Your Honor, based upon this Court's findings in Griswold versus Connecticut in which Justice Douglas stated the right of marital intimacy is older than our Bill of Right. It harkens back to the heritage of --

QUESTION: He didn't say anything about this kind of conduct.

MR. HOBBS: That is correct, Your Honor.

The Court has previously described fundamental rights, whether they be under the general heading of a right of privacy or other fundamental rights, is those which are so rooted in the conscience of our people as to be truly fundamental.

Principles of liberty and justice which lie at the base of our civil and political institutions, privileges which have long been recognized, a common law as essential to the orderly pursuit of happiness by free men.

The simple fact is that homosexual sodomy, which is what is involved in this case, has never in our heritage held a place --

QUESTION: Is the record clear as to whether the conduct was with a male or a female?

MR. HOBBS: The record, I believe, Your Honor -- The complaint indicated that Mr. Hardwick was arrested for engaging in sodomitic act with another male.

QUESTION: Of course, this isn't a review of any conviction, is it? The only reason you would want to show that is to show there was a danger of prosecution.

MR. HOBBS: That is correct, Your Honor. This is a review of a dismissal of a Section 1983 lawsuit and under that dismissal we are bound by the allegations contained in the complaint.

Our legal history and our social traditions have condemned this conduct uniformly for hundreds and hundreds of years.

As late as 1979 in the Palm versus Hughes case this Court indicated that it is neither illogical nor unjust for society to express its condemnation of irresponsible liaisons outside of the bonds of marriage.

I would submit to the Court that the Respondent and the Eleventh Circuit have posed no reason to distinguish the rationale of that decision.

Nor should the conduct be considered fundamental protected by the Constitution merely because it might take place in the home. The Eleventh Circuit and the Respondents rely heavily upon this decision in Payton versus New York and in Stanley versus Georgia. Of course, Payton was a Fourth Amendment case involving the physical intrusion of individuals of the state into a person's home.

This is not a Fourth Amendment case. The Fourth Amendment does not -- while it does provide a general right of privacy concerning the home, it does not prevent the state from enacting regulations which govern activities in the home.

QUESTION: It might well, as a practical matter, I suppose, prevent the state from enforcing its law with respect to -- Your point is that doesn't make the law

invalid.

MR. HOBBS: That is absolutely correct, Your Honor.

The Four Amendment, as this Court has held, protects two types of expectations, searches and seizures, and those expectations are not involved in the questions presented to the Court today.

Stanley versus Georgia, which is relied on most heavily by the Respondent, is also, I would submit, inapplicable to this situation, for in Stanley this Court found that there was an underlying right, a fundamental right under the First Amendment, to freedom to receive information and ideas and it was that right which was being infringed upon when Georgia attempted to prosecute Mr. Stanley for the private possession of phornographic materials.

This case does not involve any such underlying right.

In order for Stanley to be applicable, I would submit to the Court, this Court must find first that there is a fundamental right to engage in homosexual sodomy.

Moreover, Stanley has been limited to its facts by this Court and United States versus 12 200-Foot Reels of Film, wherein this Court decided that Stanley was a line of demarcation, that the Court would go thus far but

not beyond and limited Stanley strictly to the facts of that particular case.

Concededly there are certain kinds of highly personal relationships which are entitled to heightened sanctuary from the state and intrusion.

The Respondents would urge, and the Eleventh Circuit has concluded, that the relationship involved in this case is entitled to constitutional protection as a fundamental right under the right of intimate association. Only a limited number of associations and relationships have been found by this Court to be entitled to constitutional protection, those that attend marriage, the family, raising children, and cohabitation with one's relatives.

This Court has described those relationships as personal bonds which have played a critical role in the culture and traditions of the nation by cultivating and transmitting shared ideals and beliefs.

QUESTION: Mr. Hobbs, when you say "cohabitation with one's relatives," you mean living in the same house with them?

MR. HOBBS: That is correct, Your Honor.

(Laughter)

MR. HOBBS: I was referring, of course, to this Court's decision in Moore versus East Cleveland.

This description, I would submit to the Court, does not apply to the conduct which is prescribed by Georgia's sodomy statute.

Respondent and some amici in this case have argued that perhaps the definition of the family should be changed so as to be extended to homosexuals and other types of relationships which have not been recognized in our society thus far so as to accommodate the conduct which is prohibited and elevated to a constitutional status.

QUESTION: General Hobbs, can I ask you one question that is prompted by Justice Rehnquist's notion that there are difficulties of enforcement within the home and earlier you had been asked about the extent to which the statute has been enforced.

In this case, as I read the complaint, the Plaintiff expressly alleged that he did this sort of thing over and over again. And, I take it the state didn't take discovery to find out maybe they could prove that that was, in fact, true and, therefore, could have prosecuted him.

How do you reconcile that with the notion that there is a statute that the state seeks to enforce in a situation which he says exists in this case?

MR. HOBBS: Well, Your Honor, to be quite frank, I do not know what was in the mind of the District Attorney

when he decided not to prosecute this case.

QUESTION: But, what about the state representative to defended this very lawsuit?

MR. HOBBS: In terms of prosecuting Mr. Hardwick?

QUESTION: If they thought there was an important public interest in enforcing the statute, why wouldn't they take his discovery, get him to admit he committed all these acts and then prosecute him?

MR. HOBBS: Because at the time, Your Honor, we relied heavily, almost exclusively on this Court's decision in Doe versus Commonwealth's Attorney. The State of Georgia was in this case by virtue of the declaratory judgment action and it was decided that a motion to dismiss the 1983 lawsuit should be found based upon this Court's decision in Doe versus Commonwealth's Attorney.

QUESTION: I can understand why that would win the lawsuit for you, but I find it puzzling as to how that vindicates the public interest that this statute was supposed to serve to stop this kind of conduct.

MR. HOBBS: Well, I think --

QUESTION: Does the state really have an interest in stopping this kind of conduct? If not, why wouldn't they enforce the statute?

MR. HOBBS: I think that most certainly the state does have an interest in enforcing the statute and in

maintaining the statute on our books.

As I have indicated, the Fourth Amendment makes the enforcement of this statute very difficult, but the statute also --

QUESTION: It would have been very easy in this case, in this instance.

MR. HOBBS: Perhaps so.

QUESTION: Presented with a silver platter and they declined to go forward. It seems to me there is some tension between the obvious ability to convict this gentleman and the supposed interest in general enforcement.

MR. HOBBS: I would agree, Your Honor. We are, however, bound by the record as it is presented to the Court and I am wary of going beyond the record to explain other evidence.

The Respondent, as I was saying, and some amici have urged that the relationship of the family should be redefined and this is one of the interests that the State of Georgia is most concerned about. We are very concerned that there is a potential, should the Eleventh Circuit's decision be upheld, for a reshuffling of our society, for a reordering of our society.

As this Court indicated in Roe versus Wade, the right of privacy is not limited. It is not absolute, pardon me. There must be limits and it is submitted that in finding

these limits we must be wary of creating a regime in the name of a constitutional right which is little more than one of self-gratification and indulgence.

The Constitution must remain a charter of tolerance for individual liberty. We have no quarrel with that. But, it must not become an instrument for a change in the social order.

The Respondents have made a crack-in-the-door argument that if the Eleventh Circuit's decision is affirmed in this case it will not go beyond consensual private homosexual sodomy; that it is submitted that this crack-in-the-door argument is truly a Pandora's box for I believe that if the Eleventh Circuit's decision is affirmed that this Court will quite soon be confronted with questions concerning the legitimacy of statutes which prohibit polygamy, homosexual, same-sex marriage, consensual incest, prostitution, fornication, adultery, and possibly even personal possession in private of illegal drugs.

Moral issues and social issues, it is submitted to the Court, should be decided by the people of this nation. Laws which are written concerning those issues are rescinded concerning those issues should be by the representatives of those people. Otherwise, the natural order of the public debate and the formulation of consensus concerning these issues, it is submitted, would be

interrupted and misshapen.

It is the right of the nation and of the states to maintain a decent society, representing the collective moral aspirations of the people.

The Eleventh Circuit and Respondents in this case, by failing to adhere to the traditions, the history of this nation and the collective conscience of our people, would remove from this area of legitimate state concern, a most important function of government and possibily make each individual a law unto himself.

It is submitted to this Court that this is not the balance that our forefathers intended between individual liberties and legitimate state legislative prerogatives.

Thank you very much, Your Honor.

CHIEF JUSTICE BURGER: Mr. Tribe?

ORAL ARGUMENT OF LAURENCE TRIBE, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. TRIBE: Mr. Chief Justice, and may it please the Court:

This case is about the limits of governmental power. The power that the State of Georgia invoked to arrest Michael Hardwick in the bedroom of his own home is not a power to preserve public decorum. It is not a power to protect children in public or in private. It

is not a power to control commerce or to outlaw the infliction of physical harm or to forbid a breach in a state sanctioned relationship such as marriage or, indeed, to regulate the term of a state sanctioned relationship through laws against polygamy or bigamy or incest.

The power invoked here, and I think we must be clear about it, is the power to dictate in the most initimate and, indeed, I must say, embarrassing detail how every adult, married or unmarried, in every bedroom in Georgia will behave in the closest and most intimate personal association with another adult.

QUESTION: Professor Tribe, is there a limiting principle to your argument? You commented, but I don't think responded, to the suggestion that how do you draw the line between bigamy involving private homes or incest or prostitution and you move on to the place.

MR. TRIBE: Yes.

QUESTION: You emphasize the home and so would I if I were arguing this case, but what about -- Take an easier one, a motel room or the back of an automobile or toilet or wherever. What are the limiting principles?

MR. TRIBE: Justice Powell, I think there are two kinds of limiting principles. The first relates to the place.

QUESTION: To the place?

MR. TRIBE: The place where the acts occur. In Stanley versus Georgia, this Court suggested that the mere possession and enjoyment of obscenity at home is quite different from other supposedly private places.

And, in the Fourth Amendment area, the Court has faced the problem of defining what is a home. It said, for example, a mobile home may not qualify. We think that wherever that line is drawn that a private home such as this represents the repository of constitutional traditions under the Third and Fourth Amendments.

QUESTION: What about incest in the private home?

MR. TRIBE: It seems to us that the private home does not shield anything that one might do there. It seems to us that the state's power to regulate the terms of relationships, just as it regulates the terms of contracts, includes the power to punish a breach of contract in a home, it can certainly punish adultery, wherever it occurs, without --

QUESTION: So, the limiting principle is limited to sodomy. Is that a principle?

MR. TRIBE: No, not quite. I think it is somewhat broader to be candid, Justice Powell. I think it includes all physical, sexual intimacies of a kind that are not demonstrably physically harmful that are consensual and

non-commercial in the privacy of the home.

Indeed, Mr. Hobbs said that under his theory state should be able, without providing a compelling justification, to punish -- his words were "irresponsible liaison" outside the bonds of marriage. So, imagine for a moment an ordinance or a statute that says unmarried couples may hold hands and they may perhaps embrace lightly, but extended caresses or kissing with the mouth is forbidden.

Now, in their theory, even if this occurs in the home, under their theory as long as the state says the majority of our legislators disapprove of this conduct and, indeed, there is a long history of disapproving things that might lead to greater intimacies among unmarried people, we can outlaw it, not just outlaw it, but we can resist a request for more particularized explanation of why.

When Justice Stevens asked, what is the public interest after all, why is it to so great, you don't even want to prosecute him in this clear case of violation, I think you will notice that Mr. Hobbs retreated to generalities.

What we suggest is that when the state asserts the power to dictate the details of intimacies in what they call irresponsible liaison, even in the privacy of the home, that it has a burden to justify its law through

some form of tightened scrutiny.

In your concurring opinion, Justice Powell, in Kelly versus Johnson when you suggested that a regulation on the length of hair if applied across the board to all citizens, unlike that case which was just the police, would involve an important personal liberty interest, would require a balancing of state interest against personal interest, and cited the Harlan dissent in Poe v. Ullman, I think what you recognized in that case and what I would stress here is that when a state's assertion of power over liberty occurs at the intersection of intimate personal association, which this Court has recognized in a half-century of cases, and the privacy of the home in the clearest possible sense, then there must be at least heightened scrutiny rather than the unquestioning deference that the State of Georgia would request.

QUESTION: I am not sure that you have answered Justic Powell's question about incest in the privacy of the home?

MR. TRIBE: Yes. Mr. Chief Justice, as to incest, it seems to me quite apart from problems about offspring and whatever genetic evidence there might be. But, the state's power to define the terms of relationships and to limit potential exploitation surely includes the power in the employee/employer context to say that a parent consents to sex is not real. In a parent/child context

to say that a --

QUESTION: Suppose it is parent and adult child. Those are two consenting adults then perhaps.

MR. TRIBE: I doubt, Mr. Chief Justice, that the state would have to assume that just because a woman is over 21, that if her father induces her to have sex, that that has got to be consensual.

We think a state can assume that there are certain relationships in the context of which, even if both people are adults, in the context of which consent, because of the power structure of the relationship, may just be an illusion, but there is nothing about this law that limits it to cases where consent is questionable or where there is some other relationship between the parties that makes this other than completely consensual intimacy.

QUESTION: Mr. Tribe, your line of reasoning would make the Edmonds Act unconstitutional, would it not?

MR. TRIBE: The Edmonds Act --

QUESTION: The Edmonds Act forbade the -- the Moral Act forbade polygamy and the Edmonds Act forbade cohabitation by one who is already married.

MR. TRIBE: No, I think, Justice Rehnquist, that cohabitation by one already married could be punished by the state as a breach of a state sanctioned relationship. If the state can punish inducement of breach of contract

in other cases, if the state can say that when people have made a solemn bond, a bond of status as well as contract, that it cannot be broken, I would think that laws against cohabitation and bigamy, wherever practiced, at least raise a different and far more difficult question than that here, because here the state is not saying that Mr. Hardwick was violating some relationship. The complaint, indeed, said nothing about the relationship between Mr. Hardwick and the other person, male or female. It just says that because the majority of us disapprove morally, we have the power, we, the State of Georgia, have the power to punish it and make it a crime.

QUESTION: Well, Mr. Tribe, how do you propose that these other situations be analyzed, by some sort of heightened scrutiny as well, and are you suggesting that there is a more compelling state interest or what is it you are saying?

MR. TRIBE: I think, Justice O'Connor, there are two approaches, either of which would lead to the same result.

One is that the recognized power of the state to protect children and to protect relationships and to prevent harmful conduct is such that it would be pointless to require heightened scrutiny any more than this Court does of the minimum wage laws or other laws regulating

special relationships, therefore, minimum rationality would suffice.

The other approach would be to say that if it is in the privacy of the home, scrutiny should be somewhat heightened, but it seems to me that it would be very easy for the state to show compelling justification and a compelling interest.

It seems to me that in either event the holding of the Eleventh Circuit, which is that in cases of this kind where a law reaches sweepingly to all consensual intimacy in the privacy of the home, without drawing any of the lines that a legislature might draw to deal with these problems --

QUESTION: Professor Tribe, let's come back to the privacy of the home and part of the question that I asked you and I don't think I gave you an opportunity to answer, would you distinguish the home between the back of an automobile?

MR. TRIBE: Certainly, Justice Powell.

QUESTION: And, a public toilet, of course?

MR. TRIBE: Certainly. We would say that in --

QUESTION: What about a hotel room overnight?

MR. TRIBE: We think that a hotel overnight is not entitled to the same degree of protection, but, frankly, I do not know precisely where the line would be drawn.

For Fourth Amendment purposes, hotel room overnight gets full protection.

But, when this Court decided in Payton that one needs a warrant to enter a private home even with probable cause, it is not clear to me that that decision which reflected, as your concurring opinion in Rakas did, the sense that there is something special about a home, would automatically extend to a hotel room.

QUESTION: I mentioned something special about a home in Moore also against East Cleveland. You mentioned Poe against Ullman, but doesn't Justice Harlan in his dissenting opinion exclude sodomy when he was talking about the history of relationships?

MR. TRIBE: Justice Powell, I have been troubled by parts of the Harlan dissent in Moore which rather casually mentioned homosexuality, and for that matter abortion, in much the same breath.

The actual language that I think is operative at page 552 of the Harlan dissent is that he would not suggest -- He says that "adultery, homosexuality, fornication and incest are immune from criminal inquiry however privately practiced."

We are not arguing for absolute immunity. We are arguing for heightened scrutiny. The Eleventh Circuit only held that when a law of this kind is challenged because

of its intrusive invasion of personal liberty at the intersection of intimate association, on the one hand, and the privacy of the home on the other, the state must do more than appeal to the tautology that a majority of its legislators has approved.

QUESTION: Mr. Tribe, can I ask you a little more about your second limiting principle. Your first is the place. The second, as I understand it, is that if the justification is to protect some state-sanctioned relationship it may be permissible. Would it be permissible under your view for the state to prohibit conduct between -- heterosexual conduct between males and females who are not married to one another and not married to anybody else in order to discourage that kind of conduct and sort of foster the marriage institution?

MR. TRIBE: I would think, Justice Stevens, first, that if they did that, strict or substantially heightened scrutiny would be required.

Second, I think that when the state makes the argument that it is necessary to illegalize extra-marital, completely non-marital sexual relations in order to put marriage on a pedestal, that under heightened scrutiny that argument would emerge rather dubious, the cause/effect relationship extremely dubious, as in Carey and as in Griswold when the argument was we want to outlaw

contraceptives because indirectly that will make --

QUESTION: What you are saying is that it would implicate your second limiting principle, but not carry the day.

MR. TRIBE: Exactly, Justice Stevens.

QUESTION: But, you say there is a parallel between that problem and the one we have before us today.

MR. TRIBE: I would say --

QUESTION: One could argue that the reason for discouraging it is to encourage marriage.

MR. TRIBE: If that argument were made on remand, but if the Court were to agree that heightened scrutiny is appropriate, it would certainly be a legitimate argument for the state to advance, unlike the tautology it advances here, we outlaw it because we don't like it, we think it is immoral. It would be a legitimate argument, that this is a properly tailored means of encouraging marriage.

I would then submit that one would have responses along the line of Boddie v. Connecticut, the right not to be married. It would then be a more finely tuned inquiry into whether the state's intrusion into so personal and intimate and private a realm was really a rationally, reasonably tailored means of achieving that end and I frankly doubt that it could be sustained. But, at least the state would not be asking for the utterly opaque and

unquestioned deference that it seeks in a case of this kind where it says that because the majority for a long time has disapproved of this conduct, we can make it a triumph.

If history alone were the guide -- Surely, I have to conceded that the framers of the Fourteenth Amendment and perhaps Justice Harlan 25 years ago would have been prepared to assume that the kinds of sexual intimacies involved in this case would be outlawed. But, then the framers of the Fourteenth Amendment assumed that the kinds of sexual -- given the constitutional protection in Reed v. Reed and in Frantiero and in Stanton versus Stanton and in Hogan v. Mississippi University for Women also could be outlawed. The law that they assumed would apply is the law that kept Myra Bradwell from being a lawyer.

But, as this Court recognized in Loving against Virginia, where also a majority of the people of Virginia believed that interracial liaisons were inherently immoral and where for a long time a lot of people had believed that, this Court did not think that the Constitution's mission was to freeze that historical vision into place.

Justice Harlan's dissenting opinion in Poe v. Ullman recognized the evolutionary character of the definition of those intimacies that are protected.

And, it seems to me that it would hardly be a

suitable role for any court to decide its own catalogue of protected intimacies.

QUESTION: Mr. Tribe, if this evolution is taking place, as you suggest, and you may well be right, why isn't it more proper for this Court to let it be reflected in the majority rule where, you know, states have repealed these statutes.

MR. TRIBE: Justice Rehnquist, we do think that that trend is at least relevant for the question of whether this is self-evidently evil. But, this Court has never before held that when a personal right protected by the Constitution, just because those persons might be able to obtain political redress, the right no longer deserves judicial protection.

Indeed, in Justice Powell's dissent in Garcia, the suggestion was made that surely this Court would never say as to individual rights that the ability of individuals to possibly persuade a legislature to protect them is enough.

In Stanley v. Georgia, another case where Georgia wanted to impose its morality on the privacy of the home, the argument could have also been made most states have legalized private possession of pornography.

QUESTION: But, I thought your argument suggested that 25 years ago, if that is the right time that Justice Harlan wrote his dissent in Poe against Ullman, perhaps

these rights wouldn't have -- the right that you are arguing for here, the right to commit sodomy, would not have been constitutionally protected, but now they are. What has happened in 25 years? .

MR. TRIBE: I do not think that if this case had been squarely presented before Justice Harlan that he would have decided to draw the line based on which body parts come into contact. I think he would have recognized that the power of the state in a case properly presented, the power of the state to have its own catalogue of how you can touch someone else in the privacy of the home is limited.

QUESTION: Then he just wrote that part of his dissent in a fit of absent-mindedness?

MR. TRIBE: No, I don't think Justice Harlan was capable of fits of absent-mindedness. But, this Court's doctrine about advisory opinions recognizes that even the best justices are at their best when they have a genuine case or controversy before them. And, I do think that we have one here.

I want to make some comment about the suggestion implicit in some of the questions, that the absence of frequent prosecution in cases like this, apart from how strongly it suggests the State of Georgia hardly has a compelling or important interest in vindicating this law,

might also provide an avenue for avoiding a decision much as the Court found one in Poe versus Ullman.

It does not seem to me that that avenue is a plausible one here for several reasons. After all, Mr. Hartwick was arrested. Under this very arrest, he could still be prosecuted. Under this arrest, he is subject to considerable restraint. And, the state's undisputed resolve to enforce this law, at least in some instances, according to their own catalogue of where they think it is appropriate to enforce it if evidence comes to their attention. That resolve is undiminished, especially since this is a facial attack on the law.

It seems to us that the nature of the harm that Mr. Hardwick suffers from having been arrested and being told he is a criminal and might be arrested again makes it very difficult to avoid decisions.

QUESTION: You say it is a facial attack, Mr. Tribe. I had thought it was only as applied in the home.

MR. TRIBE: Well, I suppose with every facial attack, Justice Rehnquist, there is some definition of the relevant universe. There is no suggestion, for instance, that the part of this law which involves aggrevated sodomy is under attack.

The argument, however, is that this law in its sweeping definition of intimacies in the home is

unconstitutional and --

QUESTION: But, you are saying when applied in the home. I thought your response to Justice Powell was that a hotel room, back seat of a car, no.

MR. TRIBE: That is correct. We don't rely on peculiarities of the facts here, but we do say that it is only in the context of the home that the very powerful confluence of rights represented by the home and intimacy are involved.

QUESTION: Well, then it is really not a facial attack on the statute I don't think.

MR. TRIBE: If you want to call it something else, that is not a problem.

In any event, it is important, I think, to recognize that he is not identifying something about his situation relevantly different from that of a married couple that might be prosecuted and saying that the law perhaps protects them but not me, but I am invoking their rights.

The argument he makes is that regulation of sexual intimacy in the privacy of the home by a law this sweeping is subject to heightened scrutiny and there is no severability clause in this law as there wasn't in Carey or Zablocki.

This is not, for example, one of the five states that outlaws sodomy only between people of the same sex.

So, it seems to us that what is before the Court

quite clearly is the power of Georgia asserted through this statute to criminalize without explanation beyond the tautological invocation of the majority morality.

QUESTION: Professor, what provision of the Constitution do you rely on or we should rely on to strike down this statute?

MR. TRIBE: The Liberty Clause of the Fourteenth Amendment, Justice White, as given further meaning an content by a force of decisions over half a century.

We think that as to the home the Third and Fourth Amendment --

QUESTION: Which cases do you particularly rely on?

MR. TRIBE: Well, we think with respect to the home dimension we rely heavily on Stanley, where the idea that it was a First Amendment right surely will not wash because, as the Court held, and, indeed, the very case they cite, 12 200-Foot Reels, there is no right to buy the material, no right to sell it, no right to show it to consenting adults in public, only a right to enjoy it in private.

With respect to the intimacy dimension, we rely heavily on Griswold and on Eisenstadt to show that Griswold cannot be limited to married couples.

And, with respect to both, we rely on the

fundamental principle recognized in the concurring opinion in Kelly v. Johnson that important intrusions upon liberty are not to be upheld on a form of review so differential though it might be appropriate in regimented context such as the policy or military. This Court has never held it appropriate in dealing with all citizens in the privacy of their home.

QUESTION: How do you articulate this right or this process of declaring a -- you say it is a fundamental right or is it a -- how should we go about identifying some new right that should give protection?

MR. TRIBE: Well, Justice White, I think that the method that this Court used in both Griswold and in Roe of looking to tradition in terms of the protection of the place where an act occurs and of looking to a tradition in terms of recognizing autonomous personal control over intimacy is an appropriate process to employ.

It seems to us that it is easier using that process to conclude that this case implicates a fundamental right and even to conclude it in Moore v. East Cleveland, because as the tradition of family is -- In your dissenting opinion in Moore, I think it was an important point that it was not necessarily so crucial a matter for the society to ensure the right of grandmothers to choose exactly which grandchildren to live with.

Now, I think myself the majority was right in that case. But, whatever you think about Moore, the long line of opinions cannot in any principled way be cut off at the particular triangle of rights in which the State of Georgia would try to encase this Court's precedents, marriage, family, and procreation.

If the entire line of decisions is not to be repudiated root and branch, it has to stand for some generalizable principle of the kind that the majority opinion in the Jaycees case endorsed where the Court expressly rejected the idea of a methodology that would proceed by specific categories unmentioned in the Constitution like marriage and family and in favor of the more functional approach that would look to the distinctively personal aspects of life that are being regulated in settings distinguished, as the Court put it, by solace, selectivity and seclusion.

Now, if liberty means anything in our Constitution, especially given the Ninth Amendment's proposition that it is not all expressly enumerated, if liberty means anything it means that the power of government is limited in a way that requires an articulated rationale by government for an intrusion on freedom as personal as this.

It is not a characteristic of governments devoted to liberty that they proclaim the unquestioned authority

of big brother dictate every detail of intimate life in the home.

What sense would it make to say that the government cannot order its regiments in the home, if it could regiment every detail of life in the home. What sense does it make to use the apparatus of the Fourth Amendment with the controversial exclusionary rule to protect the privacy of the home if the Constitution is insensitive to the substantive privacies of the life within the home?

It seems to us that if the protections of the Third and Fourth Amendments are not to be reduced to error and empty formalisms, that they have to reflect an underlying principle, a principle not unlike that which this Court recognized in decisions like Meyer and Pierce and more recently in Moore v. East Cleveland.

Those underlying principles, I think it is important to stress, do not place on a constitutional pedestal as though receiving this Court's particular approval, the particular acts involved in a case like this. I think in that sense it is misleading to say that we are championing a fundamental right to commit a particular sexual act.

We are saying that there is a fundamental right to restrict government's intimate regulation of the privacies of association like in the home. The principle that we

champion is a principle of limited government, it is not a principle of a special catalogue of rights.

Robert Frost once said that home is the place, where when you go there they have to take you in.

I think constitutionally home is the place where when the government would tell you in intimate detail what you must do there and how to behave there, they have to give you a better reason why than simply an invocation of the majority's morality which tautologically would vindicate without any scrutiny by this Court literally every intimate regulation of everything one can do in the home.

It doesn't denigrate the special place of family and parenthood and marriage in our society to recognize the principle of limited government. On the contrary, if there is something special and unique about parental authority it is that we do not cede to big brother the same unquestioned deference that children are perhaps supposed to give to their parents.

When the government would tell people in this much detail how to conduct their intimate lives and doesn't apparently have a good enough reason to keep Mr. Hardwich in something other than a limbo in which he could be prosecuted any time until August under this extraordinarily sweeping law, when it does that, it seems to us that it

is fully respectful of history and tradition for the Eleventh Circuit to have said you owe Mr. Hardwick a better reason and you owe the people of the United States a better reason than simply unquestioned deference.

And, I think Justice Harlan, if the issue had been properly posed in Poe v. Ullman which, of course, didn't involve this, would have recognized that requirement of meaningful justification. Even if you only call it rationality review, it is rationality review with meaningful content of the kind this Court recognized in the Cleburne case.

QUESTION: Mr. Tribe, I am curious to know, you have referred to Justice White's opinion in Moore v. Cleveland. Do you think that opinion helps you or hurts you?

MR. TRIBE: Oh, it certainly hurts more than it helps. I was suggesting, however, that even that opinion -- that even in that opinion there is room for some hope.

Your opinion in Moore v. East Cleveland is considerably more helpful, because in that opinion you talk about the meaning of private property which is also involved in this case. What does it mean to say one's home is a private place if every detail of what one does there can be regulated by the state because they think

it is an irresponsible liaison.

It seems to us that the very meaning of home is denigrated if that can be done. It seems to us it is only a principle of limited government that makes it important to affirm the Eleventh Circuit's decision that heightened scrutiny is required in such a case.

QUESTION: Let me ask you one other question which is really about Justice White's opinion which seems to assume that a law that has some impact on liberty must have some utility or -- his exact line which is must have a purpose or utility.

MR. TRIBE: That is right.

QUESTION: What is your understanding of the purpose or utility of the law of the state in this case?

MR. TRIBE: My understanding is that Georgia refuses to tell us other than to say that the acts involved we say are immoral. Three times they say they are the definition of evil, although half the states have decriminalized them. They refuse to advance a purpose or utility. It is in that respect that even the form of review endorsed by Justice White's dissent in Moore which requires some meaningful explanation of how this law would function to advance the public welfare, why it wouldn't be counter-productive, why it wouldn't cause more contempt for law than respect for families. Some explanation is

required.

And, if one reverses the Eleventh Circuit's decision and allows the flat and unexplained dismissal of the district court to stand, the message of that is the state need not offer any explanation, no utility, no function. It is enough to say we passed it, that means most of us thinks it is wrong and a lot of people have thought it was wrong for a long time, therefore, ask us no further questions.

QUESTION: Well, Mr. Tribe, under your analysis what sort of explanation would be required? You suggested that if the state were to assert its desire to promote traditional families instead of homosexual relationships would not suffice in your view and yet that is an articulate -- potentially articulate reason. Perhaps the state can say its desire to deter the spread of a communicable disease or something of that sort.

MR. TRIBE: Yes.

QUESTION: Now, what suffices here?

MR. TRIBE: As to the first, if the State of Georgia were simply defending -- Might I finish the answer to this question, Mr. Chief Justice?

If the State of Georgia were defending its refusal to sanction homosexual marriage, there would be a close connection between that and the first rationale.

The connection, however, would be so weak between this sweeping law and the rationale of endorsing or helping marriage that I doubt that would work.

As to avoiding the spread of communicable diseases, the American Public Health Association, at page 27 of the amicus brief, they think that this law and laws like it would be counter-productive to that end, but you don't even reach that issue until you have some kind of meaningful inquiry.

Surely, if a narrowly tailored law could be shown necessary to protect the public health, that would be a compelling justification, but Georgia offers no such justification here.

Limited government, we think, makes the Eleventh Circuit's decision correct.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Hobbs?

ORAL ARGUMENT OF MICHAEL E. HOBBS, ESQ.

ON BEHALF OF THE PETITIONER --REBUTTAL

MR. HOBBS: The State of Georgia is not acting as big brother in this particular case. It is adhering to centuries-old tradition and the conventional morality of its people.

Certainly, it cannot invade the privacy of the

home and regulate each intimate activity which takes place there.

Each statute enacted by any state must be rationally related to a legitimate government purpose and it is submitted most respectfully to Mr. Tribe that this statute is related to the legitimate purpose of maintaining a decent and moral society. It is inherently intertwined with the state's concern with the moral soundness of its people.

Just a couple of comments. The State of Georgia in its official code does have a general severability statute and that should bear on the issue here before the Court.

In summary, the liberty that exists under our Constitution is not unrestrained. It is ordered liberty, it is not licentiousness.

If the Eleventh Circuit's decision is affirmed in this case, the State of Georgia and other states will be impeded for making those distinctions between true liberty, ordered liberty, and licentiousness.

Thank you very much, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:56 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-140 - MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, Petitioner

v. MICHAEL HARDWICK, AND JOHN AND MARY DOE

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)