

*POWELL V. STATE: AN AUSPICIOUS DECISION IN A
CULTURE OF AFFECTIONAL/SEXUAL
ORIENTATION DISCRIMINATION*

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I. INTRODUCTION

To most Americans, children, marriage, adoption, and secure employment are mundane concepts—simply a part of life. For Betty Doe, however, these concepts remain unattainable. Betty, a law-abiding citizen, has been denied access to each of these American institutions. When her employer found out that she was getting married, she was fired. When she and her spouse tried to adopt a child, the state assumed that they engaged in conjugal relations and accordingly denied the adoption. Upon her spouse's death, intestate, Betty was disallowed access to her spouse's estate. At first glance, Betty's scenario likely appears illogical, irrational, and illegal; however, if Betty Doe is a lesbian, these denials are commonplace and expected.

The United States Supreme Court has condoned restrictions on life activities for lesbians and gays. Recent years have witnessed a slowly developing trend away from affectional/sexual orientation discrimination. Nevertheless, as a lesbian, Betty still faces many legal obstacles.

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Recently, Georgia's 165-year-old statute proscribing consensual sodomy was stricken as a violation of the right to privacy under that state's constitution.¹ The six-to-one Georgia Supreme Court decision will work either to continue the trend away from affectional/sexual orientation discrimination or to reinforce the negative stereotyping of lesbians and gays that has led to and allowed legal discrimination.

The U.S. Supreme Court decision in *Bowers v. Hardwick*² legalized the stereotyping of gays and lesbians, making gay identity synonymous with sodomy.³ Legislation banning sodomy has subsequently been interpreted to criminalize homosexuality altogether.⁴ Under this stereotype, criminal culpability of lesbians and gays is presumed, regardless of an individual's actual conduct.

As a result, gay rights advocates applaud any invalidation of consensual sodomy statutes, much to the chagrin of gay rights foes. However, decisions invalidating sodomy statutes have not come without a price to gay rights advocates. Gay opposition to sodomy statutes inadvertently reinforces negative stereotypes of gays as immoral sexual deviants and predators. Accordingly, gay rights advocates pay a high social price for their stance. Despite these high costs, this comment argues that *Powell* is a step forward in the fight to prohibit discrimination on the basis of affectional/sexual orientation.⁵

1. See *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

2. 478 U.S. 186 (1986).

3. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1726 (1993).

4. Anti-sodomy statutes are not the only types of laws used to harass and discriminate against lesbians and gays, but they are the most frequently cited authority for legal discrimination against the gay community. Other laws used to discriminate against gays and lesbians are loitering, lewd and lascivious behavior, and indecent exposure. See, e.g., *Elmore v. Atlantic Zayre*, 341 S.E.2d 905, 906 (Ga. App. 1986) (holding that a plaintiff could not claim an invasion of privacy when store clerks surveyed his behavior from above a closed toilet stall based on suspicion of homosexual conduct). The California Supreme Court noted:

[H]arassment is used against suspected homosexuals in parks, in areas contiguous to public restrooms, and in homosexual bars. If a [police] decoy operating in a park or restroom fails to obtain a solicitation, he may order the suspect to leave the area and threaten to arrest him if he returns. Harassment is practiced by the smaller jurisdictions which have no interest in making arrests and are concerned only with getting the homosexual out of town.

People v. Superior Court, 758 P.2d 1046, 1057 n.10 (Cal. 1988) (quoting Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643, 718-19 (1966).

5. It is difficult to identify the correct term to use when discussing lesbians, gays, bisexuals, and transgendered people as a class. The terms "Lesbians" and "gays" in this Comment are meant to include all people considered to be a part of the gay community, including bisexuals and transgendered people. Also, this Comment will address what others call "sexual preference" or "sexual orientation" as affectional/sexual orientation. This is in response to the assumption that being lesbian or gay is necessarily being sexually active. One's proclivities towards a member of the same gender is not dispositive of her sexual

Part II of this Comment discusses the role *Bowers v. Hardwick* played in framing the debate and how, in light of the impact of *Bowers*, the *Powell* decision is significant for gay civil rights. Part II looks at *Bowers*' equation of gay identity with the act of sodomy.⁶ Even though sodomy is common sexual conduct for both gay and heterosexual people, it has taken on the identity of conduct specific to gays and lesbians, reinforcing discriminatory measures against gays and lesbians in American jurisprudence.⁷ Part II further analyzes the extent to which gays and lesbians are legally precluded from enjoying a normal life by the stereotyping of sodomy as gayness. Part II demonstrates that the *Bowers* bias underlies the denial of adoption rights, child custody rights, and marriage rights to gays and lesbians and accounts for the adverse employment consequences suffered by gays and lesbians. As a result, overturning consensual sodomy statutes, either by legislative repeal⁸ or judicial decision,⁹ undermines the weapon that has been utilized by the government to rationalize legal discrimination against lesbians and gays.

Part III analyzes the *Powell* decision and discusses how the Georgia Supreme Court distinguished *Powell* from its 1996 decision in *Christensen v. State*.¹⁰ Just two years prior to *Powell*, *Christensen*

conduct, despite the assumption by the legal system under which gay identity is equated with the conduct of sodomy. One who is lesbian, gay, bisexual or transgendered is not necessarily sexually active and may prefer to focus on the love felt for a particular kind of person, not merely the sexual dynamics of a relationship.

6. See *Bowers*, 478 U.S. at 190.

7. This equation of status to conduct is not unique to gays and sodomy in the United States. The Japanese concentration camps in California resulted from this notion of status as conduct. Thus, the Court held that an inference of disloyalty was a legally permissible justification for imprisoning Japanese Americans and their descendants solely because of their national origin. See *Korematsu v. United States*, 323 U.S. 214, 219 (1944). Yet, as Justice Blackmun pointed out in his dissent in *Bowers*, status alone is not proscribable. See *Bowers*, 478 U.S. at 202 n.2 (Blackmun, J., dissenting) (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)). The *Robinson* court found that status alone is not enough to convict someone without additional proof of illegal conduct. See *Robinson*, 370 U.S. at 667 (1962). The legal discrimination of homosexuality is illogical in light of the *Robinson* decision; it is status alone that disadvantages lesbians and gays and the Supreme Court clearly held that discriminating against someone due to their status is impermissible.

8. See, e.g., Act effective July 1976, ch. 71, § 1, 1975 Cal. Stat.; Act effective Apr. 1, 1973, ch. 497, § 1, 58 Del. Laws; Act effective July 1, 1977, Pub. L. No. 148, 1976 Ind. Acts; Act effective Sept. 1, 1979, ch. 95, § 2C:98-2, 1978 N.J. Laws; Act effective June 1, 1976, ch. 43, 1976 W. Va. Acts. In 1961, every state had a statute prohibiting consensual sodomy; most covered both homosexual and heterosexual conduct. A majority of those states that repealed their sodomy statutes did so by adopting the Model Penal Code, which was drafted in the late 1950s by an influential institute of lawyers and law professors. The Model Penal Code proposed legalizing private, consensual, adult sexual behavior, including that of homosexuals.

9. See *Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980); *Com. v. Bonadio*, 415 A.2d 47 (Pa. 1980); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996).

10. 468 S.E.2d 188 (Ga. 1996).

had upheld the very same sodomy statute as a constitutional use of legislative power under both the Federal and State Constitutions.

Part IV weighs *Powell's* implications for the future of affectional/sexual orientation discrimination, arguing that a broad reading of *Powell* undermines the U.S. Supreme Court's stance under *Bowers* towards the gay community and that the broad reading is thus preferable. Part IV also notes that only the facts can distinguish *Powell* from *Christensen*, because the Georgia Supreme Court's composition had not changed. Significantly, the primary difference between the two decisions is that the *Christensen* case involved homosexual conduct, while the *Powell* decision involved heterosexual conduct. Part IV thus argues that this distinction may very well exhibit the Court's bias against the lesbian and gay community, a bias that could lead to the judicial advocacy of future legislation targeted at lesbian and gay sexual conduct.

This Comment finally discusses the ramifications of the *Powell* decision on a macro level, particularly focusing on the *Romer v. Evans*¹¹ decision. In conclusion, this Comment argues that despite the possible setbacks of the decision, *Powell* provides constitutional analysis and logic valuable for furthering the goal of equality for gays and lesbians.

II. *BOWERS*: THE JUDICIAL BIRTH OF SODOMY-AS-GAY-IDENTITY

It is not uncommon in the law for yesterday's dissent to be tomorrow's majority opinion.

—Michael Bowers, former Georgia Attorney General¹²

In 1986, the U.S. Supreme Court decided *Bowers v. Hardwick*,¹³ which proved to be devastating to gay rights in various realms beyond sexual intimacy.¹⁴ *Bowers* involved a federal constitutional challenge to section 16-2-2(a) of the Georgia Code, which states, “[a] per-

11. 517 U.S. 620 (1996).

12. Editorial, *Peeking into Bedrooms*, ATLANTA J. & CONST., Apr. 18, 1996, at A17. It was Michael Bowers, then Georgia State Attorney General, who prosecuted Michael Hardwick in the infamous 1986 case. The quote reproduced here is from Bowers' argument on a free speech issue involving a school newspaper; however, it seems to have come true in the case of *Powell*, whose majority opinion is not unlike the dissent in *Christensen*.

Bowers' stance on state regulation became well-known after his ardent litigation in the *Hardwick* case and the later withdrawal of an employment offer to a lesbian attorney for “violating the law.” Ironically, he later admitted to a 15-year adulterous affair, see Press Release from National Gay & Lesbian Task Force, *Former Georgia Attorney General Bowers Admits to Adulterous Affair*, available at <<http://www.nglftf.org/news>> (last visited June 23, 2000), which also violates Georgia law, see GA. CODE ANN. § 16-6-19 (1998).

13. 478 U.S. 186 (1986).

14. Tracey Rich, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773, 774 (1988).

son commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.”¹⁵ In reaction to having been arrested for sodomy, Michael Hardwick, a gay male, brought a civil action against Georgia’s attorney general, Michael Bowers, seeking an injunction prohibiting the enforcement of the section. Hardwick was joined by a heterosexual couple, Jane and John Doe, whom the district court deemed to lack standing since there was no real risk of the statute being enforced against them.¹⁶ The decision, therefore, suggests that only homosexuals engage in true sodomy. Jane and John Doe’s denial of standing on this issue was the first step in legally identifying sodomy as “gay conduct,” despite the common practice of sodomy among heterosexuals.¹⁷

Moreover, the way the U.S. Supreme Court framed the issue further fashioned sodomy as equivalent to gay conduct. In the majority opinion, Justice White stated the issue to be “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”¹⁸ White’s formulation of the issue constitutes a narrow legal identification of lesbians, gays, or bisexuals with sodomy, narrowing gay identity to sexual acts that are not, in fact, exclusive to homosexuals.¹⁹

15. GA. CODE ANN. § 16-2-2(a) (1998). Section 16-6-2 also states, “a person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years.” *See id.* § 16-2-2(b).

16. John and Mary Doe “alleged that they wished to engage in sexual activity proscribed by § 16-6-2 in the privacy of their home . . . and that they had been ‘chilled and deterred’ from engaging in such activity by both the existence of the statute and Hardwick’s arrest.” *Bowers*, 478 U.S. at 188 n.2. However, the District Court had found that neither Jane nor John Doe sustained, or were in immediate danger of sustaining, any direct injury from the enforcement of the sodomy statute, since they were a heterosexual couple. They were subsequently dismissed for lack of standing and this determination was affirmed by the Eleventh Circuit Court of Appeals. *See Hardwick v. Bowers*, 760 F.2d 1202, 1206-07 (11th Cir. 1985).

In addition, before the Supreme Court, counsel for the State of Georgia testified during oral argument that the statute was only going to be enforced against homosexuals. *See Bowers*, 486 U.S. at 218 n.10 (“Indeed, the Georgia Attorney General concedes that Georgia’s statute would be unconstitutional if applied to a married couple.”).

17. Even those who discriminate against gays based on sodomy statutes rarely dispute the practice of sodomy in the heterosexual community. For instance, in an interview with Ted Coppel, former Army Captain Michael Gary pointed out that the Uniform Code of Military Justice is not “homosexual-specific” and that sodomy of or by male heterosexual soldiers happens “on a daily basis.” *See Nightline* (ABC television broadcast, Jan. 28, 1993) (Ted Koppel moderating an exchange between Michael Gar, chair of the Service Academy Gay and Lesbian Alumni Association; Harik Carde, retired Navy Commander; and Larry Rivers, Executive Director of Veterans of Foreign Wars).

18. *Bowers*, 478 U.S. at 190.

19. Before the case reached the Supreme Court, Hardwick’s first legal team attempted to frame the question as one involving his sexual orientation, attempting to draw attention away from the sexual act itself. *See Halley, supra* note 3, at 1744.

The Court “essentializes” lesbians and gays into purely sexual beings without regard to the gay culture and without regard to the love between gays that is not unlike heterosexual love.²⁰ With the phrasing of this legal issue, lesbians and gays were labeled as the only people that “criminally” practice the conduct of sodomy, making it “gay” conduct. Under *Bowers*, “[h]omosexual sodomy . . . not only becomes the totality of sodomy, it also becomes the totality of homosexuality.”²¹ The *Bowers* opinion, through “persistent, implicit invocations,” unified the “bad” act of sodomy and gay identity.²² Courts and legislatures interpreted the negative answer to the issue in *Bowers* to prohibit “homosexuality” altogether, despite the presence of a broad statute targeting sodomy without regard to the affectional/sexual orientation of the participants.²³

Janet Halley argues that, legally speaking, “sodomy and homosexual identity are identical . . . sodomy is to homosexual identity as burglary is to burglars.”²⁴ Halley supports the proposition by reviewing federal court opinions that identify the proscription of sodomy as the criminalization of gayness.²⁵ Consequently, courts disallow lesbians and gays heightened equal-protection scrutiny of discriminatory laws “on the ground that sodomy is the ‘behavior that defines the class’ of homosexuals.”²⁶ Additionally, there is the automatic labeling

20. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 547-50 (1992).

21. Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 543 (1992).

22. See Halley, *supra* note 3, at 1748.

23. For instance, the Alabama legislature banned funding for any school group that “fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws.” ALA. CODE § 16-1-28 (1995). This ban was based on Alabama’s Attorney General’s opinion that the Alabama sodomy statute prohibiting “oral/genital and genital/anal contact between any unmarried persons—constitutionally prohibit[ed] homosexuality.” Halley, *supra* note 3, at 1736. In 1997, however, the Eleventh Circuit Court of Appeals held that section 16-1-28 unconstitutionally discriminated on the basis of viewpoint under the first amendment. See *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1545-46 (11th Cir. 1997).

24. Halley, *supra* note 3, at 1734.

25. See *id.*

26. See *id.* (quoting *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987)). There are generally two standards of review which courts will apply in determining whether particular state action violates the Federal Constitution under the Due Process Clause. The lowest level of scrutiny is rational basis review, under which the government need only show that the legislation in question has a rational relationship to serving a legitimate state interest. The most arduous standard of review is strict scrutiny, under which the legislation will only pass muster if it serves a compelling state interest in society and it is a necessary means for achieving that compelling end. Under equal protection doctrine, there is a third, intermediate standard of review, that of heightened scrutiny. Strict scrutiny is generally applied to protected classes (race, national origin) and heightened scrutiny is applied to quasi-suspect classes (gender). All others fall into the non-suspect class, which is the easiest standard for the states to satisfy.

Gays and lesbians have been often denied heightened or strict scrutiny, leading to the loss of jobs and children and a myriad of other social difficulties. In 1996, the Supreme

of gays and lesbians as criminals,²⁷ which is useful in opposing the gay community in both civil and criminal cases. This concept of sodomy as gay identity is further bolstered in cases involving challenges to the disallowance of gays in the military, where specific sexual conduct is presumed to accompany lesbian or gay status—an assumption that is rarely challenged.²⁸ As a result, *Bowers* has been consistently used to disadvantage gays and lesbians generally, apart from the narrow question of actual sexual conduct.

Courts have subsequently failed to distinguish between sodomy and gay identity. The conflation of sexual behavior and status has been utilized to perpetuate the legal detriment to lesbians and gays. The logic of *Bowers* condemns the normal participation of lesbians and gays in society. It justifies the denial of employment,²⁹ child custody,³⁰ adoption,³¹ marriage,³² and student activity funds.³³

Court for the first time struck down legislation as discriminatory against lesbians and gays under rational relation review. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down a state amendment because the motive of the legislation was pure animus). This sharply contrasts with *Bowers*. In *Bowers*, the two bases for the majority's opinion were that homosexual sodomy has historically been banned in this nation's history and that the law was legitimately based on morality. See *Bowers v. Hardwick*, 478 U.S. 186, 191-96 (1985). The validity of these bases are hotly contested, particularly the notion that homosexual sodomy has been proscribed since the birth of the United States in the 18th century. See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1077 (1988) (noting that there are no ancient roots in proscribing only homosexual sodomy, as the *Bowers* majority claimed, since "sodomy applied historically to married and unmarried participants, of the same and of different sexes").

27. See, e.g., *In re R.E.W.*, 472 S.E.2d 295 (Ga. 1996) (Carley, J., dissenting the denial of certiorari) (arguing that a gay father's assumed sexual activity is illegal in Georgia, making him a criminal despite the lack of conviction or arrest for the alleged activity); see also *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999).

28. See 10 U.S.C. § 654 (1994); Department of Defense Directive 1332.14, 32 C.F.R. § 41 app. A (1992). The Directive states, "A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the Service member engages in homosexual acts or has a propensity or intent to do so." 32 C.F.R. § 41 app. A. This presumption could be raised just by hand-holding in private or "hanging out in a lesbian bar." Overcoming the presumption requires affirmative evidence other than testimony of the accused that she/he does not actually engage in homosexual activity. See 32 C.F.R. § 41 app. A; see also *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc) (finding that plaintiff had failed to rebut the presumption that, since he was a gay man, he engaged in homosexual acts).

29. See *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). In *Padula*, a lesbian had been denied employment with the Federal Bureau of Investigation due to her homosexuality. See *id.* at 102-03. The court relied on *Bowers* in holding that discrimination against lesbians and gays is legally condoned and refused to extend to the plaintiff the protection provided by the Constitution to suspect or quasi-suspect classes. See *id.* The court stated: "It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving strict scrutiny under the equal protection clause." *Id.* at 103; see also *Shahar v. Bowers*, 836 F. Supp. 859, 866 (N.D. Ga. 1993) (involving discrimination against a lesbian whose offer for employment was revoked solely due to her affectional/sexual orientation).

30. In Florida, a court denied a lesbian custody of her child, choosing instead to entrust the child to the father—who had been convicted for killing his former wife. See *Ward*

III. POWELL: SODOMY IN PERSPECTIVE

In *Powell v. State*, the Georgia Supreme Court struck down the state's sodomy statute as unconstitutional, citing both federal and state constitutional rights to privacy and acknowledging the fallacy of exclusive identification of sodomy with only gays and lesbians.

A. *The Facts*

Powell focused on the acts of Anthony San Juan Powell, a 29-year-old male who had been married for four years.³⁴ While his pregnant wife, Gloria Powell, was sleeping in the next room, Anthony approached his 17-year-old niece Quashana Roland, who was watching television on a couch.³⁵ He began to massage her and unclot her while Quashana kept silent due to fear.³⁶ As Quashana covered her face and began to cry quietly, Anthony performed oral sex on her and then proceeded to have intercourse with her.³⁷ He then performed oral sex on her again, cleaned her off with a paper towel, apologized, and then retired to bed with his wife.³⁸ Powell believed that the sexual acts, including the act of sodomy, were consensual since Quashana never said no.³⁹ She complained to a family friend, and within hours she went to the hospital while her mother called the po-

v. Ward, 742 So. 2d 250 (Fla. 1st DCA 1996); *see also Weigand*, 730 So. 2d at 581 (affirming a custody order, which denied a gay father custody solely due to his affectional/sexual orientation); *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987) (denying custody to lesbian mother because children would face teasing and ostracism); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981) (awarding custody to father because mother lived with her lesbian lover, which would cause social disapproval adversely affecting child). With regard to visitation, in most states lesbian and gay parents may only visit their children outside the presence of the parent's homosexual partner; the assumption is that lesbians and gays engage in the "homosexual" conduct of sodomy, a criminal behavior. *See In re R.E.W.* 472 S.E.2d 295 (Ga. 1996) (Carley, J., dissenting) (quoting *White v. Thompson*, 569 So. 2d 1181, 1185 (Miss. 1990)).

31. In 1987, the New Hampshire Supreme Court was asked to give an opinion on whether a proposed statute which would prohibit lesbians and gays from adopting children was a violation of either the State or Federal Constitution. *See In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987). The court found that the statute would be valid, its primary rationalization being that under *Bowers* homosexuals do not have the right to commit sodomy. *See id.* at 24. The court reasoned that because of *Bowers*, restrictions on adoption would be permissible. The underlying assumption is that status as lesbian or gay is enough to infer sexual conduct. *See id.* The court applied only minimal scrutiny—rational relationship review—under which the state was virtually guaranteed to meet its burden. *See id.*

32. *See Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

33. *See Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc).

34. *See Appellee's Brief* at 1, *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (No. 598A0755).

35. *See id.* at 2.

36. *See id.*

37. *See id.*

38. *See id.* at 2-3.

39. *See id.* at 3.

lice.⁴⁰ Powell was charged with aggravated sodomy and sexual assault, but the judge additionally instructed the jury that he could be convicted under the consensual sodomy statute, under which he was so held liable.⁴¹ It is the conviction of consensual sodomy that Powell appealed up to the Georgia Supreme Court.

B. Powell's Holding

The Georgia Supreme Court declared Georgia's sodomy statute unconstitutional as a violation of the State of Georgia's right of privacy.⁴² Once the court affirmed the issues of the case that did not necessitate constitutional adjudication, it focused on the right to privacy as interpreted in the State of Georgia.⁴³ The court proudly declared that it was the first high court to develop the right to privacy in the nation⁴⁴ in the 1905 case of *Pavesich v. New England Life Insurance Co.*⁴⁵ With *Pavesich*, Georgia first recognized the right of privacy, characterizing it as an ancient law with "foundation in the instincts of nature," derived from the Romans' conception of justice and natural law.⁴⁶ This grandiose language describing the history of Georgia's privacy right resonated throughout the *Powell* opinion⁴⁷ and was not unlike Justice Sears' dissenting opinion in *Christensen* two years earlier.⁴⁸ The court favorably distinguished the privacy interest protected by the Georgia Constitution ("the right to be let alone")⁴⁹ from that protected by the U.S. Constitution (encompassing "only those matters deeply rooted in this Nation's history and tradition or which are implicit in the concept of ordered liberty").⁵⁰ The Georgia court explained that the wider scope accorded in Georgia is grounded in Georgia's general desire to grant citizens greater protec-

40. *See id.*

41. *See Powell v. State*, 510 S.E.2d 18, 20 (Ga. 1998).

42. *See id.* at 26.

43. *See id.* at 21. The other constitutional challenge was whether the trial judge had discretion to introduce a lesser charge of a crime to a jury during jury instructions. The court decided in the State's favor under the precedent of *Stonaker v. State*, 222 S.E.2d 354 (Ga. 1976), which provided, "The trial judge also may, of his own volition and in his discretion, charge on a lesser crime of that included in the indictment or accusation," *Stonaker*, 222 S.E.2d at 356. *See Powell*, 510 S.E.2d at 21.

44. *See Powell*, 510 S.E.2d at 21.

45. 50 S.E. 68 (Ga. 1908); *see also Powell*, 510 S.E.2d at 21 (citing *Bodrey v. Cape*, 172 S.E.2d 643, 647 (Ga. Ct. App. 1969), for the proposition that *Pavesich* made the Georgia Supreme Court "a pioneer in the realm of the right of privacy.").

46. *See Pavesich*, 50 S.E. at 69-70.

47. *See Powell*, 510 S.E.2d at 21.

48. "We are privileged to live in a State that, as one of the original thirteen colonies, was founded upon the most inspired fundamental, and essential constitutional principles in the history of civilization . . . [a]mong these protections is an absolute and immutable right of privacy." *Christensen v. State*, 468 S.E.2d 188, 191 (Ga. 1996) (Sears, J., dissenting).

49. *Powell*, 510 S.E.2d at 22.

50. *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986)).

tion of their rights to autonomy than that granted by the U.S. Constitution.⁵¹

The court recognized that there are indeed limits to the protection of this privacy right,⁵² but that “unforced sexual behavior conducted in private between adults” is protected under the standard expounded in *Pavesich*.⁵³ The definition of privacy interests delineated in *Pavesich* extends to “behavior between adults in private,”⁵⁴ where the behavior “is recognized as a private matter by [a]ny person whose intellect is in a normal condition.”⁵⁵ Applying the standard to the facts of the *Powell* case, the court held that “[w]e cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity.”⁵⁶

The State of Georgia had the burden of proving that the limitation served a compelling state interest; that is, the Court subjected the limitation to strict scrutiny.⁵⁷ In order to satisfy this tough standard of scrutiny, *Powell* held that the State must first show that “the interests of the public generally . . . require such interference, and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.”⁵⁸

The court decided that due to the existence of statutes that proscribe nonconsensual sexual conduct, commercial sexual conduct, and public sexual conduct, the only type of conduct that is covered by section 16-2-2(a) is consensual, noncommercial, private sexual conduct by adults.⁵⁹ This conduct, according to Chief Justice Benham, is

51. See *id.* at 22. The Georgia Supreme Court also made this claim in the *Christensen* decision. See *Christensen*, 486 S.E.2d at 189. However, in 1996, this was not the rule of law regarding the behavior of sodomy. In *Post v. Oklahoma*, 717 P.2d 1151 (Okla. Crim. App. 1986), an Oklahoma appellate court found that a statute prohibiting consensual heterosexual sodomy was unconstitutional under the Federal Constitution and the petition for certiorari was subsequently denied by the U.S. Supreme Court. This, of course, would have strongly suggested that the Court thought the case correctly decided. Thus, the prohibition of heterosexual, consensual sodomy is presumably not allowable under the U.S. Constitution. However the *Christensen* court upheld the consensual sodomy statute, even though it also applied to heterosexual conduct. See *Christensen*, 468 S.E.2d at 190.

52. See *Powell*, 510 S.E.2d at 23. Behaviors not covered by the Georgia right to privacy are acts committed in a public place, acts committed in exchange for money, acts committed with persons legally incapable of consenting to sexual acts, and acts committed when the privacy right is waived or the contested material is a matter of public record. See *id.*

53. *Id.* at 24.

54. *Id.*

55. *Id.* (quoting *Pavesich*, 50 S.E. at 69).

56. *Powell*, 510 S.E.2d at 24.

57. See *id.*

58. *Id.* at 25 (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

59. See *Powell*, 510 S.E.2d at 24-25. The statutes listed by the *Powell* court that already address sex for money, nonconsensual sex, and sex with minors are sections 16-6-1, Georgia Code Annotated (1999) (rape), 16-6-2(a) (aggravated sodomy), 16-6-3 (statutory rape), 16-6-4 (child molestation and aggravated child molestation), 16-6-5 (enticing a child

“beyond the bounds of government regulation.”⁶⁰ Therefore, there can be no public gain or benefit from such a statute, making individuals in Georgia unduly oppressed by its existence.⁶¹

Despite *Powell's* insistence “that few members of the bench and bar, much less the public as a whole, would be able to state under oath that within the privacy of their own residence they had not committed consensual sodomy,”⁶² the court declared that it would not condone the sexual conduct proscribed in section 16-2-2(a).⁶³ However, the court pledged adherence to its judicial duty to scrutinize “legislative enactment when it is alleged to impinge upon the freedoms and guarantees contained in the Georgia Bill of Rights and the U.S. Constitution.”⁶⁴ The court then looked to other states that judicially invalidated their consensual sodomy statutes and held that “social morality” is not a compelling state interest.⁶⁵ Consequently, without a compelling state interest, the Supreme Court of Georgia had no choice but to strike down the sodomy statute.

C. Christensen “Distinguished”

When *Christensen v. State*⁶⁶ was litigated in 1996, it was seen as an opportunity for gay rights advocates to secure judicial invalidation of Georgia’s consensual sodomy statute. *Christensen* involved a criminal defendant alleged to have solicited sodomy from an undercover police officer at a public rest area off of an interstate highway in Georgia.⁶⁷ The defendant was charged under two Georgia statutes, one prohibiting sodomy and the other the solicitation of sodomy.⁶⁸ However, the opportunity to invalidate the statute did not materialize.

Instead, the Georgia Supreme Court upheld the statute as constitutional under both the Georgia and the U.S. Constitutions.⁶⁹ Citing *Blincoe v. State*,⁷⁰ the *Christensen* court proposed that where a case involves privacy interests in Georgia, the State need only show “that

for immoral purposes), 16-6-5.1 (sexual assault of prisoners, the institutionalized and the patients of psychotherapists), 16-6-6 (bestiality), 16-6-7 (sexual assault of a dead human being), 16-6-8 (public indecency), 16-6-9 to -12 (prostitution, pimping, pandering), section 16-6-16 (masturbation for hire), 16-6-22 (incest), and 16-6-22.2 (sexual battery and aggravated sexual battery). *See id.* at 24.

60. *Id.* at 25.

61. *See id.*

62. Appellant’s Brief at 5-6, *Powell* (No. S98A0755).

63. *See Powell*, 510 S.E.2d at 25.

64. *Id.* at 25-26.

65. *Id.* at 26.

66. 468 S.E.2d 188 (Ga. 1996).

67. *See id.* at 189.

68. *See id.*

69. *See id.* at 190.

70. 204 S.E.2d 597 (Ga. 1974).

the legislation has a reasonable relation to a legitimate state purpose."⁷¹ The state's interest in the protection of the "moral welfare of the public" justified criminalizing sodomy.⁷²

The *Powell* court supposedly did not overrule *Christensen*, but rather distinguished it. *Powell* noted⁷³ that the activity in *Christensen* was public (since it was solicited at a traffic stop and not in a home) and that it was a matter of commercial sodomy (asking strangers for oral sex rather than familiar intimates).⁷⁴ Nevertheless, it can be argued that *Powell* effectively overruled *Christensen*, since the Court invalidated section 16-2-2 altogether. It did not uphold the constitutionality of the statute as applied to "commercial" or "public" sex.

IV. POWELL'S IMPLICATIONS

Although not ideal, *Powell* provides a new legal rationale and precedent that can be used to combat discrimination against gays, lesbians, and bisexuals made legal by *Bowers*' legal, historical, and logical fallacy. A broad reading of *Powell* provides a welcome tool for gay rights advocates to combat this legalized affectional/sexual orientation discrimination. Not only is Georgia another state removed from the list of sodomy-statute states,⁷⁵ it is the same state from

71. *Christensen*, 468 S.E.2d at 190 (quoting *Blincoe*, 204 S.E.2d at 598). The court in *Christensen* stated, "[The] state has the right to enact laws to promote the public health, safety, morals, and welfare of its citizens." *Id.*

72. *Id.*

73. *See Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998).

74. *See id.*

75. Arkansas, Kansas, Missouri, Oklahoma, and Texas all have sodomy statutes that only apply to homosexuals. *See* ARK. CODE ANN. § 5-14-122 (Michie 1997) (punishable as a misdemeanor); KAN. STAT. ANN. § 21-3505 (1995) (punishable as a misdemeanor; does not cover cunnilingus, *see State v. Crawford*, 795 P.2d 401 (Kan. 1990)); MO. REV. STAT. § 566.090 (1999) (punishable as a misdemeanor); OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 2000) (punishable by up to 10 years imprisonment); TEX. PENAL CODE ANN. § 21.06 (West 1994) (punishable as a misdemeanor).

States with sodomy statutes that apply to both heterosexuals and homosexuals include Alabama, Arizona, Florida, Idaho, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, North Carolina, South Carolina, Utah, and Virginia. *See* ALA. CODE § 13A-6-65(a)(3) (1994) (punishable as a misdemeanor); ARIZ. REV. STAT. ANN. § 13-1411 (West 1989) (punishable as a misdemeanor); FLA. STAT. § 800.02 (1999) (punishable as a misdemeanor); IDAHO CODE § 18-6605 (1997) (punishable by no less than five years' imprisonment); LA. REV. STAT. ANN. § 14.89 (West 1986) (punishable by five years' imprisonment and/or \$2000); MASS. GEN. LAWS ch. 272, § 34 (1990) (punishable by up to twenty years' imprisonment); MICH. COMP. LAWS § 750.158 (1991) (punishable by up to fifteen years imprisonment); MINN. STAT. ANN. § 609.293 (West 1987) (punishable by up to one year imprisonment and/or \$3000); MISS. CODE ANN. § 97-29-59 (1999) (punishable by 10 years imprisonment); N.C. GEN. STAT. § 14-177 (1999) (punishable as a felony); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985) (punishable by five years' imprisonment and/or \$500); UTAH CODE ANN. § 76-5-403 (1999) (punishable as a misdemeanor); VA. CODE § 18.2-361 (Michie 1996) (punishable as a felony). Louisiana's law has recently been challenged successfully in the Louisiana Court of Appeals. *See Pamela Coyle, Court Strikes Down State's Sodomy Law*, THE NEW ORLEANS TIMES-PICAYUNE, Feb. 13, 1999, at A1.

which the federal monster that legalized discrimination against the gay community originated.

A. Powell's *Undermining of Bowers*

Bowers was based on the premises that (1) homosexual sodomy is not essential for ordered liberty, and social morality is in fact a legitimate use of the legislature's police power,⁷⁶ and (2) homosexual conduct is not deeply rooted in this Nation's history and tradition, as exhibited by the fact that most states have sodomy statutes, some of which originated during colonial times.⁷⁷ *Powell* undermined both of these premises.

1. *Essential Link in the Bowers Rationale Challenged*

The fact that the court in *Powell* overthrew the sodomy statute is significant in refuting *Bowers*' premise that most of the States proscribe sodomy, illegitimizing prong two of the court's basis for the holding. Sodomy statutes are no longer prevalent in the United States, and *Powell* further decreases the strength of Justice White's "prevalence" argument in the *Bowers* opinion. *Powell* continued the trend of states invalidating their consensual sodomy statutes. Since the *Bowers* decision, five states have invalidated their statutes, either by legislative repeal or judicial order.⁷⁸ Especially since the *Bowers* decision originated in Georgia, it is only rational for other states to look to Georgia as a model for constructing valid prohibitions on consensual sodomy. When Georgia itself overthrew its sodomy law, it pulled the carpet out from under the Supreme Court's reasoning. After *Powell*, only eighteen states with sodomy proscriptions remain,⁷⁹ further undermining Justice White's arguments based on the antiquity and prevalence of prohibitions against homosexual sodomy. The modern trend of invalidating sodomy statutes, which continued with *Powell*, may lead to the termination of all sodomy statutes across the country.

76. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

77. See *id.* at 192.

78. Nevada, Kentucky, Maryland, Montana, and Tennessee have all repealed or invalidate their sodomy statutes since *Bowers*. See sources cited *supra* note 9. Since the *Powell* decision, a Louisiana court has struck down that state's sodomy law, continuing the current trend among the states rejecting prohibition of sexual conduct between consenting adults. See Coyle, *supra* note 75, at A1. In addition, Puerto Rico's sodomy statute, which only applies to same-sex sodomy, is currently being challenged; the court has already conferred standing to the plaintiffs. See *Citing "Chilling Effect" of Puerto Rico's Sodomy Law, Judge Says ACLU Challenge Must Go Forward*, <<http://www.aclu.org/news/1999/n030899c.html>> (last modified Mar. 8, 1999).

79. See Coyle, *supra* note 75, at A1.

2. *Legitimization for Raising the Standard of Review*

As described above, the *Powell* court applied the highest standard of review, that of strict scrutiny, when presented with a constitutional challenge to section 16-2-2(a).⁸⁰ This stands in sharp contrast to *Bowers*, which applied “rational basis” review—the lowest standard of review in Constitutional jurisprudence.⁸¹ It was this difference that led to opposite outcomes regarding the constitutionality of the same sodomy statute.

In *Bowers*, the Court refused to subject the sodomy statute to strict scrutiny,⁸² characterizing the issue as the plaintiff’s request for the extension of “a fundamental right to homosexuals to engage in acts of consensual sodomy.”⁸³ The Court proclaimed that the right to privacy is limited to only those cases involving family, procreation, abortion, or marriage⁸⁴—quite unlike *Powell*, in which the Georgia Supreme Court recognized the existence of a fundamental right “to be let alone.”⁸⁵ Contrary to the implication of *Bowers*, the right to privacy has not historically been limited to familial activities.⁸⁶ The *Powell* court, for example, did not make this distinction between “family” rights and privacy rights under the Georgia Constitution.⁸⁷

Without a fundamental right at stake, the *Bowers* court was free to require merely a rational relation between the state interest and the proscription of the behavior, a test that rarely produces a decision against the government.⁸⁸ Accordingly, Georgia’s sodomy statute easily passed the test relying on social morality as a legitimate state interest. However, the idea that social morality is *not* a legitimate state interest is not foreign to Supreme Court jurisprudence. Not only has that justification been rejected in various other cases involving procreative activities,⁸⁹ but it has even been rejected in cases in-

80. See *Powell v. State*, 501 S.E.2d 18, 24 (Ga. 1998).

81. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

82. See *id.* at 191. For possible equal protection violations that affect fundamental rights, including the right to privacy, courts should apply strict scrutiny when analyzing the constitutionality of a state action. The Georgia Court in *Powell* did not make this distinction when determining whether the right to privacy under Georgia law had been violated.

83. *Id.* at 192.

84. See *Bowers*, 478 U.S. at 190.

85. *Powell*, 510 S.E.2d at 22.

86. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (recognizing the right to have pornographic material in the home under both the First Amendment and the Fourteenth Amendment’s right to privacy).

87. See *Powell*, 510 S.E.2d at 22.

88. See *Bowers*, 478 U.S. at 196.

89. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685, 697 (1977) (holding that a statute prohibiting minors from acquiring contraceptives violated the minors’ right to privacy); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (finding that the 14th amendment right to privacy includes a woman’s right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding a law that prohibited unmarried couples from having contraceptives vio-

volving legislative proscriptions of heterosexual sodomy.⁹⁰ It was therefore quite paradoxical for the *Bowers* court to claim that the privacy right was limited to “family”-related activities when it has previously protected rights such as the right to possess pornography in the home,⁹¹ the right to abortion,⁹² and the right to use contraception.⁹³ Arguably, these are rights not necessarily associated with the promotion of “family.”

Prior to handing down the *Bowers* decision, the Supreme Court denied certiorari for a heterosexual sodomy case, *Post v. Oklahoma*.⁹⁴ It could be inferred from the U.S. Supreme Court’s denial of petition for certiorari in the case of *Post* that it is beyond the state’s reach to proscribe consensual sodomy between heterosexuals. The Oklahoma court had recognized that there is no rational relationship between the state interest and the proscribed activity sufficient to support the regulation of consensual, noncommercial, heterosexual acts between adults.⁹⁵ The state interest in social morality was not substantial enough in the heterosexual context to pass constitutional muster. Therefore, it can be inferred that the Supreme Court finds consensual sodomy between adults neither worthy of judicial review nor within the legislature’s reach.⁹⁶

The only other justification for *Bowers*’ upholding proscriptions of homosexual consensual sodomy is that homosexual sodomy has been proscribed from the beginning of the nation’s history and that many states still proscribe it.⁹⁷ However, as noted above, this basis for the *Bowers* opinion is thrown into question by the *Powell* decision.

3. Acknowledgement of Heterosexual Sodomy

In addition, *Powell* undermined *Bowers* by declining to follow *Bowers* in characterizing Georgia’s sodomy statute as strictly prohibiting homosexual sodomy. The high court of a State is usually best at determining the meanings of the laws of its own State—and the *Powell* court declined to interpret Georgia’s consensual sodomy statute as applying only to homosexual sexual activity. Indeed, if the statute

lates their right of privacy); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (invalidating a statute that forbade the use of contraceptives by married couples); *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (holding that a statute providing for sterilization of habitual criminals violated their rights under the 14th amendment).

90. See *Post v. Oklahoma*, 715 P.2d 1105, 1107 (Okla. Crim. App. 1986) (holding it beyond the states reach to proscribe consensual sodomy between heterosexuals), *cert. denied* 479 U.S. 890 (1986).

91. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

92. See *Roe*, 410 U.S. at 154.

93. See *Griswold*, 381 U.S. at 485.

94. See *Post*, 715 P.2d at 1107.

95. See *id.* at 1109.

96. See *id.*

97. See *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

were only applicable to gays and lesbians—as the *Bowers* court construed the statute—then Anthony Powell, a heterosexual male, would not have been convicted under section 16-2-2(a).

The refusal by the *Powell* court to classify sodomy as homosexual conduct undermined the notion that sodomy is only “gay” conduct. This outcome forces a direct confrontation with the myth that lesbian and gay identity is synonymous with sodomy—a myth which the *Bowers* fosters and which is at the core of homophobic sentiments. The *Powell* court, in rejecting this myth, chipped away at the foundation of affectional/sexual orientation discrimination. This action may take on even greater significance because it comes from Georgia—a state that in fact once viewed sodomy as exclusively homosexual sexual conduct.⁹⁸

4. *The Effects of Powell Under a Broad Reading*

Powell's declaration that proscribing consensual sodomy is unconstitutional in Georgia invalidated what is the key determinant for discrimination of lesbians and gays in numerous contexts. Its rejection of the syllogism that gay identity equals sodomy is made significant when one examines how this logic forms the core of other opinions that have undermined gay civil rights. Thus, cases in Georgia, and possibly across the United States, can no longer rely on sodomy statutes to discriminate against lesbians and gays. This might have changed the outcome in the Georgia case of *Shahar v. Bowers*, for example, in which Michael Bowers had withdrawn an employment offer from a new attorney after finding out she would be having a commitment ceremony with her lesbian partner.⁹⁹ He was able to rationalize his decision by claiming that it was inappropriate for an attorney who participates in criminal activity to execute the laws of the state, and the Eleventh Circuit upheld the reasonableness of the termination. Since the *Powell* decision, a similar case would require the reconsideration of *Shahar*. Now that “gay” conduct is not outlawed in Georgia via the sodomy statute, it cannot be assumed that *being* lesbian or gay is criminal.

Powell affects not only the employment context, but other areas as well, including child custody. A particularly vivid example of the significance of invalidating sodomy statutes for gays and lesbians across the country is the Mississippi case of *Weigand v. Houghton*. In *Weigand*, custody of a minor son was given to his mother, who lived with an abusive husband, the child's stepfather.¹⁰⁰ The stepfather was a felon convicted of domestic violence who constantly engaged in physi-

98. See *id.* at 209-10 n.4 (Blackmun, J. dissenting).

99. See *Shahar v. Bowers*, 836 F. Supp. 859, 866 (N.D. Ga. 1993).

100. See *Weigand v. Houghton*, 730 So. 2d 581, 583 (Miss. 1999).

cal intimidation of the child; in addition, he committed adultery on a regular basis to the knowledge of the child.¹⁰¹ The child's father was loving, according to the dissenting opinion, and lived in a stable, nonviolent home.¹⁰² Yet custody remained with the mother because the majority focused on the father's supposed criminality due to his gay identity.¹⁰³ The father was presumed guilty of a crime he was never accused of—even though he lived in a state without a sodomy law.¹⁰⁴ The court ignored the *actual* convictions of the stepfather for felony assault and theft, simple assault, public drunkenness and malice mischief, instead focusing on nonexistent, assumed criminal conduct by a father trying to save his child from an explosive, unstable atmosphere.¹⁰⁵

In the absence of a sodomy statute in *Weigand*, the court would have had no reason to disallow the gay father custody of his minor son. This fact was recognized in the dissenting opinion in *Weigand*: “it is unfortunate that David [the child's gay father] could not bring this case in California, where consensual oral copulation and sodomy behind closed doors are legal. If the case had been so brought, David would have avoided the unfortunate and unnecessary behavior of chancery court.”¹⁰⁶ Oddly, even though this decision took place after the *Powell* decision, the court seemed unaware of the recent decision in Georgia, which the dissent described as a model sodomy-prohibiting state.¹⁰⁷

Powell may still have the power to decriminalize “gay and lesbian” conduct in Mississippi and other states across the country by undermining the logic underpinning unjust decisions like *Weigand*. Since the *Powell* court created this threat to the *Bowers* logic, legislative

101. *See id.* at 584.

102. *See id.* at 586.

103. *Id.* at 590 (McRae, J., dissenting). The chancellor's opinion, which was upheld by the Mississippi Supreme Court, stated,

The conscious of this Court is shocked by the audacity and brashness of an individual to come into court, openly and freely admit to engaging in felonious conduct on a regular basis and expect the court to find such conduct acceptable, particularly with regards to the custody of a minor child.

Id. (McRae, J., dissenting). The dissent pointed out that not only does the statute apply to both homosexual and heterosexual conduct, but the court directly asked the father about his sexual activities—and not the other parties. *Id.* at 591 (McRae, J., dissenting).

104. *See id.* at 586.

105. Even though the minor's biological father was deemed to have the more stable home, the minor's church attendance with his mother and promise from the mother that the incidents of intrafamily violence were isolated were enough to override the minor's interest in living with his nonviolent father, due to the father's lack of “moral fitness” as a gay man. His morals were considered lacking due to his potential criminality if he were to live with his partner in Mississippi instead of California. *See id.* at 590 (McRae, J., dissenting).

106. *Id.* at 591 (McRae, J., dissenting) (citation omitted).

107. *See id.* at 593 (McRae, J., dissenting) (“This is not *Bowers*—unlike Georgia, in California . . . consensual sodomy amongst adults is legal.”).

repeal is likely to continue the trend away from prohibitions of consensual sodomy.

If the issue presents itself again to the U.S. Supreme Court, it seems probable that the Court will overrule such a statute. The prevalence and antiquity of sodomy statutes across the country are decreasing, to the point where the major basis for allowing police power to extend into the bedrooms of gays and lesbians will become unmerited. Indeed, ten states have prohibited any presumption by courts that child custody should be disallowed based on affectional/sexual orientation.¹⁰⁸ As the *Weigand* dissent noted, the repeal of sodomy statutes may further this trend towards the ideal custody situation, where parents are not penalized for their affectional/sexual orientation and the case is determined by “concrete evidence of the child’s current health and stability.”¹⁰⁹ This concept extends beyond custody cases. *Powell*’s eradication of Georgia’s sodomy statute, together with the repeal and invalidation of such statutes in other states, will force states to evaluate the material issues of their cases and not dwell on impertinent assumptions about the litigants’ sexual conduct.

*B. A Narrow Reading of Powell: The Danger of Reinforcing
Affectional/Sexual Orientation Discrimination*

In addition to the importance of the *Powell* decision as a building block for equal treatment for lesbians and gays under the law, there are several negative implications of the decision. First, it is quite probable that had the facts in *Powell* been raised in a lesbian and gay context, the court would not have ruled as it did. Therefore, the court may very well uphold any future legislation proscribing homosexual behavior. Indeed, Georgian legislators have already begun planning for new legislation targeting homosexual sexual conduct. Significantly, the court has already demonstrated its reluctance to allow lesbians and gays the same level of scrutiny for matters relating to *Pavesich*-based privacy rights.

The composition of the Georgia Supreme Court has not changed since 1995 when *Christensen* was handed down, meaning that the same Justices voted twice on the same issue (the validity of the sodomy statute), but produced two different rules. This section will argue that it was the heterosexual context of the *Powell* case that made the difference. In this light, *Powell* also has the effect of perpetuating the stereotype of lesbians and gays as sexual predators and child mo-

108. See Courtney R. Baggett in *Sexual Orientation: Should It Affect Child Custody Rulings*, 16 LAW & PSYCHOL. REV. 189, 193 & n.28 (1992) (citing cases from Alaska, California, Indiana, New Jersey, New Mexico, New York, Vermont, Washington, West Virginia, and New Mexico).

109. *Weigand*, at 592 (Miss. 1999).

lesters. Historically, this detrimental stereotype has politically and socially disadvantaged the legal rights of lesbians and gays in the United States and this decision, when taken together with the decision in *Christensen*, may only further reinforce the label of the gay community across the country as a threat to children.

1. *The Problem of the Heterosexual Context*

As noted above, *Christensen* upheld the constitutionality of Georgia's consensual sodomy statute only two years prior to *Powell*. The level of constitutional scrutiny applied was the determining factor. In *Christensen*, the court utilized the *Blincoe* standard that required only that proscribing consensual sodomy be rationally related to promoting a government interest.¹¹⁰ The *Powell* court was much more demanding, applying strict scrutiny to the statute to find that the statute was unduly oppressing individuals in Georgia.¹¹¹ Both challenges were presumably facial challenges to the statute; however, the only logical explanation for the change in majority view is the difference in the facts of the two cases.

The composition of the two courts was the same in both cases.¹¹² The only dissenters in *Christensen*, Justices Hunstein and Sears, voted to invalidate the statute in both cases.¹¹³ Justice Carley also voted consistently in both cases—to uphold the statute.¹¹⁴ Thus, four Justices—Fletcher, Thompson, Hines, and Benham—changed their votes, voting with the majorities in both *Christensen* and *Powell*.¹¹⁵ What could have changed the minds of four judges in two years' time? The only difference that could have led to this mass exodus from a supportive view of the consensual sodomy statute to a strong belief in the unconstitutionality of the same statute was that *Christensen* involved sodomy in the gay male context, while *Powell* involved heterosexual sodomy.

110. See *Christensen v. State*, 468 S.E.2d 188, 190 (Ga. 1996).

111. See *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998).

112. In both years the members of the court were Robert Benham (Chief Justice), Norman S. Fletcher, Leah J. Sears, Carol W. Hunstein, George H. Carley, Hugh P. Thompson, and P. Harris Hines. See *Supreme Court Overview*, <<http://www2.state.ga.us/Courts/Supreme/scbroch.htm>> (visited Oct. 29, 2000).

113. See *Powell*, 510 S.E.2d at 19; *Christensen*, 468 S.E.2d at 191, 199 (dissenting opinions of Sears and Hunstein, JJ., respectively). Although Justice Sears found the conduct involved in *Christensen* personally offensive, see *Christensen*, 468 S.E.2d at 192, she nonetheless believed the statute was an unconstitutional violation of privacy. See *id.* at 199. Interestingly, Justices Sears and Hunstein were the only women on the court. See *Supreme Court Overview*, *supra* note 112.

114. See *Powell*, 510 S.E.2d at 26 (Carley, J., dissenting); *Christensen*, 468 S.E.2d at 190.

115. In fact, Chief Justice Benham wrote the majority opinion in *Powell*. See *Powell*, 510 S.E.2d at 19. Justice Thompson wrote the majority opinion in *Christensen*. See *Christensen*, 468 S.E.2d at 190. Justice Hines concurred in the judgment only; Justice Fletcher concurred specially. See *id.*

The attorneys for the appellant in the *Powell* case suggested that the Court distinguish the *Christensen* opinion by characterizing the latter as holding only that it is constitutional in Georgia to forbid public sexual conduct and not private sexual conduct,¹¹⁶ and the court adopted their characterization.¹¹⁷ However, as the District Attorney for Gwinnett County pointed out, the situation in *Powell* was no more private than the situation in *Christensen*.¹¹⁸ In *Powell*, the sexual acts took place in the common area of the apartment, unconcealed on the couch and within earshot of the defendant's wife and family friend in adjoining rooms.¹¹⁹ In fact, it can be argued that this situation was even more public than the *Christensen* situation, since in *Christensen*, although the defendant inquired in a public place about sodomy, he intended to carry out the request in the privacy of a motel room.¹²⁰ Basically, in *Christensen* the solicitation of sodomy was public, but the act of sodomy was to be in private; while in *Powell*, the acts were merely semi-private, if not public.

Additionally, between the two fact situations of *Christensen* and *Powell*, it seems that in *Powell*—where the sodomy involved was victimizing and nonconsensual—the statute should have been, as a matter of justice, more likely to pass constitutional muster, in order to uphold the defendant's conviction. Consent was never at issue in the *Christensen* decision, while in *Powell* the defendant relied on a “mistake in fact” defense under section 16-3-5 of the Georgia code, arguing that although his minor niece may not have consented, he did not know this fact.¹²¹ In judging the constitutionality of a statute, with rape of a minor on one hand and sexual conduct between two consenting adults on the other, one would assume that the rape incident would weigh more heavily toward upholding a conviction. However, that was not the case. The only logical conclusion, then, is that the difference between the decisions resulted from the different affectional/sexual orientations of the defendants.

116. In *Christensen*, Justice Fletcher specially concurred, saying that privacy “rights do not protect solicitation of explicit sexual acts from total strangers in public rest areas.” *Christensen*, 468 S.E.2d at 190. It is presumed to be the holding in *Christensen* since it was a plurality opinion. See Amicus Curiae Brief of LAMBDA Legal Defense and Education Fund, et. al. at 12, *Powell* (No. S98A0755) (quoting *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (“When a majority of an appellate court fails to agree on reasoning supporting its judgment, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”)).

117. See *Powell*, 510 S.E.2d at 25.

118. See Appellee's Brief at 6, *Powell* (No. S98A0755).

119. *Id.* at 6-7.

120. After successfully soliciting sodomy from the undercover officer, *Christensen* agreed to the officer's request of driving to a nearby motel to carry out the act when *Christensen* was pulled over and charged for sodomy and solicitation of sodomy. See *Christensen*, 468 S.E.2d at 189.

121. See Appellee's Brief at 5, *Powell* (No. S98A0755).

What makes this a particular problem for the eradication of lesbian and gay discrimination is that lawmakers in the Georgia House of Representatives and Senate have already declared their dedication to passing legislation to recriminalize lesbian and gay sexual conduct, thereby giving Georgia a new instrument to use towards the impairment of lesbian and gay civil rights. For instance, Senator Eric Johnson, a Republican from Savannah, Georgia, recently said in reaction to the *Powell* decision, "To the extent that people's religious faith teaches that homosexuality is wrong, the state should support those beliefs."¹²² If such legislation is passed, there is no guarantee that the court would strike it down as unconstitutional, inasmuch as it has already shown its bias against gay petitioners in *Christensen*.¹²³

Nevertheless, it has been suggested that the Georgia Supreme Court is moving "if not to the left, at least more toward the center."¹²⁴ If this is accurate, there is a strong chance that the court would also find a sodomy statute proscribing strictly homosexual sodomy to be unconstitutional. This present court issued other surprising opinions in its recent session, opinions that startled conservatives and relieved liberal advocates.¹²⁵ If the last court session is not just an anecdotal example of a liberal attitude,¹²⁶ there is a greater likelihood that the court will strike down legislation criminalizing homosexual behavior.

2. *Perpetuation of the Sodomy-as-Gay-Identity Myth*

Two of the actors in the *Powell* lawsuit were gay rights advocates—the LAMBDA Legal Defense Fund and the ACLU—who assisted in the criminal defense of Anthony Powell by submitting amicus curiae briefs, which is representative of national lesbian and gay rights advocacy. In fact, these were the only unsolicited amicus curiae briefs in the case. The arguments used by the court to invali-

122. Editorials, *ATLANTA J. & CONST.*, December 4, 1998, at A26.

123. This is only if the legislation is in the form of a bill. If the recriminalization of lesbian and gay sexual conduct is by way of amendment to the constitution, then the Court would have no right to adjudicate the matter.

124. See Bill Rankin, *Georgia Supreme Court A Shift in Philosophy*, *ATLANTA J. & CONST.*, December 20, 1998, at A1.

125. See *id.* District Attorney Danny Porter is quoted as having said, "They've made some pretty startling decisions, not only on sodomy but in death-penalty cases. I think what we're seeing here is that the personal beliefs of the individual justices are overcoming the rule of law." *Id.* Others see the trend in a different light. Cobb County Assistant District Attorney Nancy Jordan remarked, "It just goes to show there are a lot of strong personalities on that court and the justices in the minority are not afraid to defend their positions." *Id.*

126. The Court has made several decisions of some notoriety, including one requiring probable cause before police can pull over a vehicle and several reversing high-profile death penalty cases. See *id.*

date section 16-2-2(a) seemed to be directly derived from the briefs of LAMDBA and the ACLU. Only these briefs suggested raising the constitutional standard to strict scrutiny, requiring the State to demonstrate a compelling interest in proscribing the particular behavior, from the rational relation standard that was used in *Christensen*.¹²⁷ Pro-gay and lesbian civil rights activists supplied the court with the needed legal arguments to defeat *Christensen*.

It is possible that this type of presence and active participation by gay right advocates in the *Powell* case will aggravate their cause. One might argue that it will further the perception that there is a unity between gay identity and the conduct of sodomy. It could also be argued that the gay community could only devote much time and patience to the cause of sodomy because it has a stake in the allowance of this particular sexual conduct. However, even if the gay community seeks legalization of this conduct for reasons of personal pleasure, consensual sexual behavior of sodomy is not, after all, *unique* to the gay community. Thus, while there may be some personal interest on the part of gay right advocates in legalizing sodomy, it is more likely that other, concomitant factors are at work here.

Gay and lesbian rights advocates recognize that sodomy statutes provide a primary tool for defeating the legal rights of the gay community; it is this recognition that elicits their unequivocal support for invalidating these statutes. Gay rights advocates understand the negative implications of sodomy statutes for the gay community. They understand how lives are influenced and ruined by the interpretation of these statutes as outlawing homosexuality altogether. Submitting an amicus curiae brief in *Powell* was a pragmatic approach in the fight for gay rights, not a normative one. Basically, the game was defined by the court, and gay rights advocates are just playing by the rules.

3. *Powell as Reinforcing Negative Stereotypes of Lesbians and Gays to Their Political and Social Disadvantage*

As discussed above, gay identity has been defined through sodomy. More detrimental, however, is the way in which some have associated gay identity with pedophilia and immoral sexual deviation from societal norms, as well as the overall corruption of children.¹²⁸ A particularly vivid example of this is Anita Bryant's crusade in 1980

127. See Amicus Curiae Brief of LAMBDA Legal Defense and Education Fund et. al. at 13, *Powell* (No. S98A0755) (arguing that the state may not infringe on the right to privacy absent a "compelling state interest."). It has long been settled that government action violating a fundamental right can be sustained only if narrowly tailored to serve a compelling state interest. See *id.*.

128. ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY 87-88 (1977).

to overturn a city ordinance that disallowed discrimination based on affectional/sexual orientation.¹²⁹ Her campaign, called “Save Our Children,” had as its basic premise that the moral development of children would be thwarted by any equal treatment of gays and lesbians, and that these “sexual predators” could not be allowed to prey on innocent children.¹³⁰ This was a successful campaign that led to the repealing of the ordinance by citizen referendum.¹³¹ This same fallacy underlies the inclusion in sexual predator notification laws of consensual homosexual conduct in the same category as child molesters and rapists.¹³² These justifications for discrimination ring in the ears of concerned parents and help fuel the fire towards anti-gay measures.

This negative stereotype of lesbians and gays as immoral sodomites is perpetuated by the fact that charges against child molesters and nonconsensual sexual predators often include sodomy.¹³³ The anti-gay argument presumes that overturning consensual sodomy laws would allow gays to molest children legally. For example, Steve Schwalm of the Family Research Council in Washington stated in reaction to the *Powell* decision, “[sodomy laws] protect children by preventing bizarre sex-education curricula and homosexual propaganda in schools, and they prevent homosexual ‘couples’ from acquiring children on an equal basis with married couples.”¹³⁴ In *Powell*, Justice Carley’s dissent also resounded the “harms” of invalidating the sodomy statute, including the risk of legalizing “incest,” “fornication,” or “adultery,”¹³⁵ and characterized the Court’s actions as simply “anarchy.”¹³⁶

129. *Id.* at 88.

130. Bryant asserted there was a threat in granting equal rights, in this context rights to acquire housing, claiming that equal treatment would, “usurp [parents’] rights and lifelong effort to raise spiritually sound God-fearing, heterosexual children and provide homosexuals a green light to recruit and molest their kinds in schools, public bathrooms, and elsewhere, and force religious schools, churches and synagogues to hire individuals who partake in activities that they deem ‘as unnatural and deviant.’” *Id.* at 88-91.

131. *Id.* at 88.

132. Massachusetts and California only recently removed homosexual behavior from their sexual-predator notification statutes. See *States Ease Registration Laws That Swept Up Gays*, WASH. BLADE, Nov. 26, 1997, available at <http://www.aclu.org/news/w112697c.html>.

133. See *King v. State*, 458 S.E.2d 98 (Ga. 1995) (convicting stepfather of sodomy and child molestation after forcing stepdaughters to perform fellatio on him); *Simpson v. State*, 876 P.2d 690 (Okla. Crim. App. 1994) (convicting defendant of sodomy, rape, lewd molestation, and exhibition of pornography for continually sexually assaulting daughter for three years); *Ray v. State*, 389 S.E.2d 326 (Ga. 1990) (convicting defendant of sodomy and child molestation); *Gray v. State*, 375 So. 2d 994 (Miss. 1979) (convicting defendant of murder, child molestation, and sodomy).

134. Editorial, ATLANTA J. & CONST., Dec. 16, 1998, at A22.

135. *Powell v. State*, 510 S.E.2d 18, 30 (Ga. 1998) (Carley, J., dissenting).

136. *Id.* at 29 (Carley, J., dissenting).

As the *Powell* majority pointed out, this argument is fallacious because, among other reasons, child molestation is already proscribed in every state.¹³⁷ Thus, consensual sodomy statutes are not the only means by which pedophiles can be punished, deterred, and rehabilitated under the law.¹³⁸ Section 16-2-2, moreover, includes provisions prohibiting consensual homosexual sodomy, as well as any manner of forced sexual relations. Therefore, ridding states of consensual sodomy statutes would *not* lead to legally condoned child molestation. Despite this fact, however, the fact that many cases involving child molestation also include charges of sodomy has led the two to become synonymous in the minds of many traveling in certain politically advantaged circles.¹³⁹

The stereotypical nature of the link between sodomy and child molestation was recognized by the *Powell* majority, which listed the statutes that already proscribed nonconsensual, commercial, and public sexual behavior and limited the invalidation of the sodomy statute to noncommercial, consensual behavior between adults.¹⁴⁰ As such, the court undermines the notion that those who commit sodomy are all child molesters and sexual predators; otherwise, the court would have found the state to have a compelling interest to proscribe the behavior.

In this regard, *Powell* might be particularly helpful to the gay community in the area of adoption and child custody. Several courts have found that merely having lesbian or gay status involves not only sexual conduct, but harmful sexual conduct that could disrupt the moral and emotional development of a child. One court even found a mother openly holding her partner's hand to be a type of unnatural behavior that children should not be exposed to, suggesting that it might lure children into inappropriate behaviors that are not common to that of the parent-child relationship.¹⁴¹

However, basing child custody and adoption decisions on unsupported assumptions that homosexuality is inherently immoral or dangerous is highly problematic; apart from sodomy statutes, there is no basis in the law for such assumptions. In this regard it is significant that the constitutional challenge in *Powell* as well as *Chris-*

137. See *id.* at 24.

138. See *id.*

139. In Anita Bryant's crusade to rid of a gay civil rights statute in Miami, she listed the following headlines to prove that all gays and lesbians are child molesters: *Teacher Accused of Sex Acts with Boy Students*, *Police Find Sexually Abused Children*, *R.I. Sex Club Lured Juveniles with Gifts*, *OC Teacher Held on Sex Charges*, *Homosexuals Used Scout Troop*, *Teacher Faces Abuse Rap*, *Ex-Teachers Indicted for Lewd Acts with Boys*, *4 Men Accused of Abusing Boys*, *Senate Shown Movie of Child Porn*, and *Former Scoutmaster Convicted of Homosexual Acts with Boys*. See BRYANT, *supra* note 128 at 98.

140. *Powell v. State*, 501 S.E.2d 18, 24 (Ga. 1998).

141. See *Ward v. Ward*, 742 So. 2d 250 (Fla. 1st DCA 1996).

tensen was of the statute as written, not as applied in the particular case: *Powell* struck down the sodomy statute *in toto*, rendering it inapplicable to homosexuals as well as heterosexuals.

This is so despite the defendant's attempts, in his appellate brief, to distinguish his case by presenting cases dealing with homosexual sodomy; it is significant that he relied mainly on cases involving non-consensual acts of pedophilia.¹⁴² Again, lesbians and gays are grouped with child molesters, which reinforces the idea that gays and lesbians are harmful to children. Of course, that is not to say that no lesbian or gay parents are ever guilty of molesting their children, but, generally, sex offenders who harm children are more frequently heterosexual than lesbian or gay.¹⁴³

It is significant that the facts in *Powell* involved rape. Despite the unsavory facts of the *Powell* case, two gay rights advocates submitted amicus curiae briefs in support of Powell. Neither of their briefs dwelled on the facts of the case, but rather focused on the legal ramifications of allowing the sodomy statute to be upheld. The ACLU's brief went into great detail about the ramifications to gay and lesbian civil rights if the validity of the statute were upheld. The brief also argued that if the court found that prohibiting heterosexual sodomy was unconstitutional, the court should not sustain the validity of the statute as applied to homosexual conduct, either.¹⁴⁴

Supporting the overturning of sodomy convictions seems to pose a similar dilemma for gay and lesbian rights advocates, because it reinforces the idea of gay and lesbian identity as strictly sexual conduct. The same justification exists for the reinforcement of negative stereotypes of lesbians and gays as sexual predators, namely, that the rules are produced by the court and advocates have to play by these rules to overcome the statute. No perfect case will present itself for overturning sodomy statutes,¹⁴⁵ and so the cases that do become available must be utilized to further gay rights. The ACLU and Lambda do not want people to be assaulted or raped without conse-

142. See *Ray v. State*, 389 S.E.2d 326 (Ga. 1990) (male defendant convicted of solicitation of sodomy of a fourteen year old boy not legally able to consent to sexual relations); See *King v. State*, 458 S.E.2d 98 (Ga. 1995) (convicting defendant of child molestation and sodomy of his stepdaughters).

143. "95 percent of molestation of little girls is done by heterosexual men." URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 67 (Anchor Books 1995). "The vast majority of child molestation and sexual abuse is done by self-identified heterosexual men, but this fact does not result in calls to bar all heterosexual men from becoming parents, teachers, Boy Scout troop leaders, or day care workers." *Id.* at 324.

144. This is a valid concern, as the state of Oklahoma limited the constitutionality of sodomy statutes as applied to homosexual sexual conduct only. Section 21-886, Oklahoma Statutes, was limited to homosexual conduct by *Post v. Oklahoma*, 717 P.2d 1151 (1986), cert. denied 479 U.S. 890 (1986).

145. This argument is similar to that of Appellant. See Appellant's Brief at 6, *Powell v. State*, 510 S.E.2d 18, 27 (Ga. 1998) (No. S98A0755).

quence of the law, but they do not want people to be convicted under discriminatory legislation. It is this focus on the law as an unconstitutional device for discrimination by the legal system that prevails in the difficult representation of defendants like Anthony Powell, whose behavior poses the risk of distracting larger issues at stake in litigation and reinforcing negative stereotypes.

V. CONCLUSION

As explained above, there are possible negative ramifications of the *Powell* decision, including the reinforcement of gay identity with sexual conduct, the reinforcement of the perception of lesbians and gays as sexual predators, and the possibility that the court might yet be confronted with a sodomy statute explicitly targeted to gays and lesbians. However, the *Powell* decision was ultimately a triumph for the lesbian and gay community. First and foremost, the decision undermined the *Bowers v. Hardwick* decision, which was the bedrock for lesbian and gay discrimination across the United States. It declared that majoritarian sexual morality is not a compelling state interest and that this type of law is continuing to disappear, undermining the “antiquity and prevalence” rationale.

The implications of this decision are not difficult to delineate. Even the court was aware of its bold move, which would bring change and criticism to Georgian jurisprudence. Justice Sears was cognizant that people, upon hearing the *Powell* decision, would “demonize some members of this Court for their legal analysis.”¹⁴⁶ Justice Sears seemed to be directly addressing the radical right when she said, “[t]o allow the moral indignation of a majority (or, even worse, a loud and/or radical minority) to justify criminalizing private consensual conduct would be a strike against freedoms paid for and preserved by our forefathers.”¹⁴⁷

Language like this seems to say that the court is aware of the living world around it. Sears stresses that the court is aware of those who seek to condemn a particular section of Georgia’s citizenry, alluding to the lesbian and gay community, and that sodomy laws are an exercise of this overbearing and discriminatory position. Justice Sears’ concurrence hailed the invalidation of section 16-2-2(a) as a victory for personal freedom—the freedom of the entire citizenry of Georgia, including those politically disadvantaged minority groups against whom the section was used to discriminate: lesbians and gays. Justice Sears’ opinion is a bold, certain, and positive nod to the gay and lesbian community; senseless discrimination via sexual con-

146. See *Powell v. State*, 510 S.E.2d 18, 27 (Ga. 1998) (Sears, J., concurring).

147. *Id.*

duct statutes will no longer be tolerated by the Georgia Supreme Court.

This is a profound recognition by the concurrence. *Powell* arrived in the wake of the *Romer* decision and continues a move in the right direction—away from one of the last remaining legitimate means of discrimination. Under *Romer*, pure discrimination is not allowed—even under rational review—and social morality has been invalidated as a legitimate state interest.¹⁴⁸ Coupled with the *Powell* decision, the Supreme Court will have an arduous time should it try to uphold a statute similar to section 16-6-2 in the future.

Under the *Romer* decision, social majorities may not dictate to the politically underrepresented gay and lesbian community.¹⁴⁹ Even in the absence of strict or heightened scrutiny, *Romer* taught that social morality alone is not enough to pass constitutional muster since it is “social morality” that precipitated the amendment in question.¹⁵⁰

The two major bases for the *Bowers* decision were then further shattered by *Powell*. *Powell* decreased the list of states prohibiting consensual sodomy as well as declining to limit privacy rights to “family” rights. The next step will be for other states to look to Georgia as a model and raise their level of scrutiny when analyzing the constitutionality of sodomy statutes.¹⁵¹

There are several costs of the *Powell* decision, the worst being the reinforcement of negative stereotypes of the lesbian and gay community and the possibility that the Georgia court will uphold any future legislation targeting lesbian and gay consensual sexual conduct between adults. Ultimately, however, the *Powell* decision will prove to be a positive force in the conquering of affectional/sexual orientation discrimination in the law. *Powell*, coupled with *Romer*, makes a powerful combination of anti-discriminatory precedent when dealing with the lesbian and gay community, opening the door to overruling *Bowers v. Hardwick*, the precursor for incalculable affectional/sexual orientation discrimination.

148. See *Romer v. Evans*, 517 U.S. 620, 632 (1996). *Romer* was a constitutional challenge to Colorado Amendment II which nullified specific legal protections to lesbians and gays in housing, sale of real estate, insurance, health and welfare services, private education, and employment. The U.S. Supreme Court struck down the amendment in a 6-3 decision. See *id.*

149. See *id.* at 634 (“If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

150. See *Romer*, 517 U.S. at 632.

151. “Instead of being considered sort of the backwater of the nation’s appellate courts, it is now considered one of the leading supreme courts in the country. People now look to the Georgia Supreme Court for leadership, which has not always been so in the past.” Rankin, *supra* note 124 (quoting Atlanta lawyer Jack Martin).