

NOTE

Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation?

by ANNE C. HYDORN*

“Our personhood must remain inviolate: that is what privacy protects; that is its principle.”¹

In 1997, Marcus Wayman, a high school football player,² and his 17-year old male friend were found together in a car in a parking lot by Philadelphia police officers, F. Scott Wilinsky and Thomas Hobin.³ After an investigation, it became apparent to the officers that Wayman and his friend had been drinking alcohol.⁴ The young men acted evasively when questioned about what they were doing in the parking lot and upon performing a search, the police officers uncovered two condoms.⁵ Officer Wilinsky asked them whether or not they were in the parking lot with the intention to engage in sexual activity, to which both eventually answered yes.⁶ The officers then arrested both boys for underage drinking and took them to the police station.⁷ At the station, Officer Wilinsky lectured them on the

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1. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 739 (1989).

2. Mary Claire Dale, *Gay Teen's Suicide Leads to Lawsuit Against Police*, CHI. SUN-TIMES, Nov. 6, 2001, at 30.

3. *Sterling v. Borough of Minersville*, 232 F.3d 190, 192 (3d Cir. 2000).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

Bible and homosexuality⁸ and allegedly asked them if they were “queer.”⁹ The officer then told Wayman that if he did not inform his grandfather that he was homosexual, he would disclose it to his grandfather himself.¹⁰ After the officers released the boys from custody, Wayman committed suicide in his home.¹¹ Wayman’s mother then filed suit against the Borough of Minersville, the officers, and others alleging that the officers’ actions violated Wayman’s constitutional right to privacy (among other complaints).¹²

The right to privacy is not enumerated in the United States Constitution. The United States Supreme Court first introduced the substantive privacy doctrine in *Griswold v. Connecticut*.¹³ It was in this case that the Court stated that the right to privacy was found in “penumbras” that are given “life and substance” by the Bill of Rights.¹⁴ The Court declared that the First, Third, Fourth, Fifth and Ninth Amendments combined to form a “zone of privacy.”¹⁵ Later, the Court rooted the right’s location in the Due Process Clause of the Fourteenth Amendment, the position advocated by Justice Harlan in his concurring opinion in *Griswold*.¹⁶ Cases after *Griswold* demonstrate that “two different kinds of [privacy] interests” have emerged.¹⁷ The first privacy interest is one in “avoiding disclosure of personal matters” and the second is one of “independence in making certain kinds of important decisions.”¹⁸ This second interest provides for a limitation on government’s power to substantively regulate conduct.¹⁹ Examples of the latter include marital relationships,²⁰ contraception,²¹ abortion rights,²² and family

8. *Id.* at 192-93

9. Dale, *supra* note 2.

10. *Sterling*, 232 F.3d at 193.

11. *Id.*

12. *Id.*

13. 381 U.S. 479 (1965).

14. *Id.* at 484.

15. *Id.* at 484-85.

16. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1393-94 (1992); see *Griswold*, 381 U.S. at 500 (Harlan, J., concurring).

17. *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977).

18. *Id.* at 599-600.

19. *Id.* at 600 n.26.

20. See *Loving v. Virginia*, 368 U.S. 1 (1967).

21. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

22. See *Roe v. Wade*, 410 U.S. 113 (1973).

relationships.²³ In 1986, the Supreme Court decided *Bowers v. Harwick*, and held that there was nothing in the Constitution that confers a fundamental right upon homosexuals to engage in sodomy.²⁴ The court reasoned that private sexual conduct between consenting adults is not insulated from government proscription and that the right to engage in criminalized consensual sodomy did not fall into any of the rights asserted in the line of privacy cases.²⁵

In *Walls v. City of Petersburg*, the Fourth Circuit expanded the *Bowers* holding by stating that it was controlling on whether or not the right to privacy extends to forced disclosure of private homosexual conduct (a forced “public outing” per se).²⁶ This interpretation of *Bowers* essentially wraps the two types of privacy interests discussed above into one by assuming that, where the right to privacy is concerned, forced disclosure of a particular kind of conduct is equal to the conduct itself. The Third Circuit, in *Sterling v. Borough of Minersville*, disagreed, reasoning that *Bowers* only focused on whether a state could constitutionally prohibit consensual homosexual conduct.²⁷ The Third Circuit held that sexual orientation is an intimate aspect of one’s personality, and thus is entitled to protection from unwarranted disclosure under the

23. See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

24. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986). On March 26, 2003, just prior to publication of this article, the United State Supreme Court heard oral arguments for *Lawrence v. Texas*. 41 S.W.3d 349 (Tex. App. 2001), *cert. granted*, 123 S.Ct. 661 (U.S. Dec. 2, 2002) (No. 02-102). The case involves a constitutional challenge to a Texas statute that makes it a misdemeanor for a person to engage in “deviate sexual intercourse” with another individual of the same sex. *Id.* at 350. In *Bowers*, the similar Georgia statute applied to all individuals, not just those of the same sex. *Bowers*, 478 U.S. at 188. The Court of Appeals of Texas in *Lawrence* found no violation of the right to privacy (federal or state), stating that privacy does not protect homosexual conduct, which “has been a criminal offense for well over a century.” *Lawrence*, 41 S.W.3d at 361. Petitioners have asked the Supreme Court to overrule *Bowers*, arguing in one instance that *Bowers* has not become a case that embodies our national culture, but is an anomalous ruling since “the Nation has continued to reject the extreme intrusion into the realm of personal privacy approved in that case, so that now three-fourths of the States have repealed or invalidated such laws – including the very law upheld by *Bowers*.” U.S. Brief of Petitioners at *30, *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. App. 2001) (No. 02-102). Rather than overruling *Bowers* explicitly through a due process privacy analysis, the Court instead seems poised to overturn the Texas law on equal protection grounds. Linda Greenhouse, *Supreme Court Seems Set to Reverse a Sodomy Law*, N.Y. TIMES, Mar. 27, 2003, at A18. However, if the Court goes so far as to overturn its *Bowers* holding, it would further the argument of this Note. Namely, if the Court finds that homosexual conduct (i.e., sodomy) itself is privacy protected, recognition of a constitutional right of privacy in preventing forced disclosure of such conduct or sexual orientation would likely not be far behind if challenged.

25. *Bowers*, 478 U.S. at 191.

26. *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990).

27. *Sterling*, 232 F.3d at 195 n.3.

constitutional right to privacy, and that neither *Bowers* nor *Walls* is controlling on the issue.²⁸

This Note will address the split between the Third and Fourth Circuits regarding the holding of *Bowers* and evaluate whether or not *Bowers* impliedly extends to forced disclosure of sexual orientation and private homosexual activity. It will argue that *Bowers* does not extend to forced disclosure of sexual orientation and that the reasoning in *Sterling* is correct. Furthermore, it will survey contexts in which forced disclosure issues most often arise and why it is essential that the right to privacy extends into these areas. It will conclude that, based on right to privacy jurisprudence and despite the holding in *Bowers*, the right of privacy should and does extend to protect the privacy of sexual orientation.

This Note is organized as follows. Part I will discuss the right to privacy jurisprudence and its history. Part II will first analyze the pivotal case of *Bowers v. Hardwick* and its impact on privacy and homosexual conduct. Secondly, Part II will address the circuit split in *Walls* and *Sterling* and discuss how the courts each applied right-to-privacy reasoning to disclosure of sexual orientation. Part III will survey and discuss examples of the various contexts in which forced disclosure of sexual orientation might arise. Finally, Part IV will discuss why the right to privacy must extend to forced disclosure in its various contexts and why the reasoning in *Sterling* is correct.

I. THE RIGHT TO PRIVACY JURISPRUDENCE

A. The Concept of Privacy and its Fundamental Origins

Few agree on the meaning of the right to privacy²⁹ and many acknowledge that the jurisprudence in this area is confusing at best.³⁰ The idea of privacy often connotes several concepts: the right to be let alone,³¹ the right to make personal decisions without

28. *Id.* at 195 n.3, 196.

29. The first notion of a common law right to privacy can be found in the celebrated law review article of Samuel Warren and Louis Brandeis, entitled *The Right to Privacy*, which was published in the *Harvard Law Review* in 1890. Gormley, *supra* note 16, at 1336; see Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

30. See Rubinfeld, *supra* note 1, at 737; see also W.A. Parent, *A New Definition of Privacy for the Law*, in PRIVACY VOLUME I: THE CONCEPT OF PRIVACY 23 (Raymond Wacks ed., 1993) (stating that "privacy jurisprudence is in conceptual shambles").

31. See *Bowers*, 478 U.S. at 199 (Blackman, J., dissenting); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

interference,³² and the right to have personal information remain undisclosed to others unless one provides permission to do otherwise.³³ Because the Supreme Court declared a constitutional right to privacy despite a lack of specific enumeration, definition and parameters of that right remain elusive, even though numerous court opinions and legal scholars have tried to dispel its ambiguity.³⁴ Before the Court was able to establish the right to privacy doctrine, it had to acknowledge that the rights protected by the Constitution are not necessarily limited to those that are specifically enumerated.³⁵ The originating authority for this idea is often found in the Ninth Amendment,³⁶ which states, “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”³⁷ Some history shows that the framers included such language to negate the possible interpretation that the enumeration of certain fundamental rights reflected the intention to exclude those not specifically mentioned.³⁸ It was not until 1965, however, that the Supreme Court announced privacy as a fundamental right protected by the Constitution, irrespective of its lack of enumeration.³⁹ Many cases that followed expanded on the right to privacy doctrine,⁴⁰ though its exact parameters remain ill-defined.

32. See *Bowers*, 478 U.S. at 204-05 (Blackman, J., dissenting); *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

33. See *Sterling*, 232 F.3d at 195; *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000); *Doe v. Southeastern Penn. Transp. Auth.*, 72 F.3d 1133, 1141 (3d Cir. 1995); *Fraternal Order of Police v. City of Phila.*, 812 F.2d 105, 110 (3d Cir. 1987); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

34. See Lois Shepherd, *Looking Forward with the Right of Privacy*, 49 U. KAN. L. REV. 251, 251 (2001) (“if the question seeks an answer to what the right of privacy means today, any answer still hazards a guess”); W.A. Parent, *supra* note 30, at 23 (“privacy jurisprudence is in conceptual shambles”); Jack Hirshleifer, *Privacy: Its Origin, Function, and Future*, in *PRIVACY VOLUME I: THE CONCEPT OF PRIVACY* 649 (Raymond Wacks ed., 1993) (“privacy is a concept that might be described as *autonomy within society*”) (emphasis in original); Rubinfeld, *supra* note 1, at 739 (“At the heart of the right to privacy, there has always been a conceptual vacuum.”); G. Sydney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 OHIO N.U. L. REV. 403, 508 (1989) (defining the right of privacy as a subset of the liberty interests expressly protected by the due process clauses of the Constitution).

35. Buchanan, *supra* note 34, at 404-05.

36. Rubinfeld, *supra* note 1, at 741.

37. U.S. CONST. amend. IX.

38. *Griswold v. Connecticut*, 381 U.S. 479, 488-89 (1965) (Goldberg, J., concurring).

39. *Id.* at 485.

40. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Loving v. Virginia*, 368 U.S. 1 (1967).

B. *Griswold v. Connecticut*

The United States Supreme Court first announced the doctrine of the constitutional right to privacy in *Griswold v. Connecticut*.⁴¹ Griswold was Executive Director of the Planned Parenthood League in Connecticut, which distributed birth control information, advice, and prescriptions to married couples.⁴² Connecticut statutes in effect at the time prohibited any person from using drugs or devices to prevent conception (or be subject to possible fines and imprisonment) and likewise provided the same punishment for any individual who aided or abetted a person in committing such an offense.⁴³ After Griswold was arrested and found guilty under the statute, he challenged it as a violation of his Fourteenth Amendment rights.⁴⁴

The Court noted that the statute at issue “operate[d] directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation,” but recognized that neither the Constitution nor the Bill of Rights directly addressed the privacy of intimate association.⁴⁵ The Court then listed numerous earlier cases where it had acknowledged a variety of rights under the Constitution that were not specifically delineated.⁴⁶ For example, the Court stated, “[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach.”⁴⁷ It then went on to say, “[w]ithout those peripheral rights the specific rights would be less secure.”⁴⁸ The Court reasoned that all of the foregoing cases together

41. *Griswold*, 381 U.S. at 485. It should be noted, however, that *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), were earlier cases in which the Court held that “certain enumerated, non-economic rights are a part of the liberty that the due process clause protects against undue governmental infringement.” Buchanan, *supra* note 34, at 415. In these two cases, the Court established that parental autonomy in child rearing was “protected by the due process clauses against unreasonable governmental regulation.” *Id.* at 416. Thus, the Court provided for rights clearly related to constitutional “privacy” interests as early as the 1920s. *Id.*

42. *Griswold*, 381 U.S. at 480.

43. *Id.*

44. *Id.*

45. *Id.* at 482.

46. *Id.* at 482-84.

47. *Id.* at 482.

48. *Id.* at 482-83.

“suggest[ed] that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help them give life and substance.”⁴⁹ Finally, it concluded that the First, Third, Fourth, Fifth and Ninth Amendments combined to form a “zone of privacy” in which the marriage relationship exists and is thus protected from state regulation that sweeps too broadly.⁵⁰

Justice Goldberg, in his concurrence, elaborated on the majority’s holding that fundamental rights exist in the Constitution that are not enumerated or explicitly guaranteed in the Bill of Rights.⁵¹ He determined that the Ninth Amendment protects a fundamental right of privacy.⁵² He stated:

The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we were sworn to uphold. To hold that a right so basic and fundamental and so deeprooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.⁵³

Justice Goldberg emphasized that the framers did not intend the first eight amendments to be exhaustive of individual liberties, and that the Court should determine fundamental rights through analysis of tradition and the collective conscience of the people, and then determine whether a particular principle is so firmly rooted in society that it should be deemed “fundamental.”⁵⁴ Using an intent-based argument, Justice Goldberg argued that the framers put forth the Ninth Amendment to quiet the fears that “specific mention of certain rights [in the other amendments] would be interpreted as a denial that others were protected.”⁵⁵

C. The *Griswold* Line of Cases

After the Court decided *Griswold*, many cases that followed expanded the scope of the right to privacy. For example, two years

49. *Id.* at 484.

50. *Id.* at 484-86.

51. *Id.* at 491 (Goldberg, J., concurring); see also David Helscher, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, 15 N. ILL. U. L. REV. 33, 37 (1994).

52. Helscher, *supra* note 51, at 37.

53. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).

54. *Id.* at 492-93 (Goldberg, J., concurring).

55. *Id.* at 489 (Goldberg, J., concurring).

after *Griswold*, the Court heard and decided *Loving v. Virginia*⁵⁶ wherein the Court addressed whether or not the state has a right to infringe upon a person's right to marry the person of his or her choice.⁵⁷ After an interracial couple was married in Virginia and subsequently indicted under a Virginia statute banning interracial marriage, they challenged the statute as a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁵⁸ The Court held that the statute violated the Constitution and that the state may not infringe on a person's freedom to marry a person of another race.⁵⁹ Furthermore, the Court declared that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and "marriage is one of the 'basic civil rights of man.'"⁶⁰

In subsequent cases, the Court expanded the doctrine of privacy beyond the institution of marriage.⁶¹ In *Stanley v. Georgia*, the Court held that a man could not be lawfully convicted for mere possession of obscene material in his home. The Court reasoned that an individual's right to read or observe what he pleases is fundamental to one's individual liberty and the state may not regulate such activity in the privacy of one's home.⁶² Elaborating, the Court stated:

Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.⁶³

The Court also reaffirmed that freedom from governmental

56. 368 U.S. 1 (1967).

57. *Id.* at 2.

58. *Id.*

59. *Id.* at 12.

60. *Id.*

61. See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (extending the right to privacy to cover personal choices in matters of family life); *Roe v. Wade*, 410 U.S. 113 (1973) (ascribing a qualified right of privacy to a woman's decision to terminate her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (protecting equal right of single persons to access contraception as is afforded married persons); *Stanley v. Georgia*, 394 U.S. 557 (1969) (protecting in-home possession of obscene material).

62. *Stanley*, 394 U.S. at 568.

63. *Id.* at 565.

intrusion into personal privacy was a fundamental right.⁶⁴

Likewise, in *Eisenstadt v. Baird*, the Court moved beyond the realm of privacy in marriage to hold that a statute prohibiting the distribution of contraception to single persons violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁵ There, the Court found *Griswold* to apply equally to unmarried persons.⁶⁶ The Court stated that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion to matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁶⁷

The well-known case of *Roe v. Wade* extended the constitutional right of privacy to a woman’s decision to terminate her pregnancy.⁶⁸ In its reasoning, the Court noted the harm that could be caused to women who are denied such a choice: distress, psychological harm, mental and physical difficulties as a result of child care, and the social stigma of being an unwed mother.⁶⁹ The Court did not extend its decision, however, to include the broad statement that an individual has a right to do whatever he pleases with his own body, concluding that it did not consider the privacy right of abortion to be absolute.⁷⁰ In *Roe*, the Court firmly established that the right to privacy is located in the Fourteenth Amendment.⁷¹

Finally, in *Moore v. City of East Cleveland*, the Court extended the right of privacy to encompass personal choices in matters of family life.⁷² In *Moore*, Inez Moore lived in her home with her son and two grandsons who were first cousins.⁷³ A local housing ordinance limited occupancy of a dwelling unit to single families, but then defined family in a way that disqualified Moore’s family.⁷⁴ As a result, Moore was convicted of criminally violating the ordinance.⁷⁵ In overturning Moore’s conviction, the Court stated:

64. *Id.* at 564.

65. *Eisenstadt*, 405 U.S. at 443.

66. *Id.* at 453; see *Griswold*, 381 U.S. at 484-86 (creating a “zone of privacy” surrounding the marital relationship which is to remain free from unwarranted governmental intrusion).

67. *Id.*

68. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

69. *Id.*

70. *Id.* at 154.

71. *Id.* at 153.

72. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977).

73. *Id.* at 494.

74. *Id.*

75. *Id.*

'liberty is not a series of isolated points pricked out in [specific Constitutional] terms . . . [but] a rational continuum . . . [that] includes a freedom from all substantial arbitrary impositions . . . and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.'⁷⁶

On the basis of those interests, the Court held that East Cleveland's housing ordinance could not impose limits on the types of groups or family members that could occupy a single dwelling unit.⁷⁷

In sum, while *Griswold* and the cases that followed set forth the constitutional right of privacy and defined some of its contours and parameters, much has been left open and unanswered.⁷⁸ Many commentators continue to ask what exactly the right to privacy entails and how much is encompassed in its doctrine.⁷⁹ In reviewing the main line of privacy cases, the Court has furthered the doctrine in response to specific fact scenarios, but has not delineated any steps or tests to determine the parameters of the privacy line. Justice Goldberg in his *Griswold* concurrence argued that courts must analyze tradition and look to the collective conscience of the people to determine which principles are so deeply rooted in our society that they are rendered fundamental.⁸⁰ However, is such a line of analysis really practical in application? How easy would it be to determine what our "collective conscience" is without subconsciously imposing our own ideas of morality and rightness? When reviewing the constitutional right to privacy in the realm of homosexuality, most would likely agree that our collective conscience has not historically embraced homosexual conduct. Yet, would those same people embrace the idea that personal information about their own sexuality is fair game for public disclosure, homosexual or not? Defining the parameters of privacy in this area has proven difficult.

76. *Id.* at 502.

77. *Id.* at 506.

78. Rubinfeld, *supra* note 1, at 750-51.

79. For examples of the broad range of answers to this question, see the following sources: Shepherd, *supra* note 34, at 251 (commenting that any attempt at answering such a question "still hazards a guess"); Jack Hirshleifer, *Privacy: Its Origin, Function, and Future*, in *PRIVACY VOLUME I: THE CONCEPT OF PRIVACY*, *supra* note 34, at 649 (stating that privacy is "a concept that might be described as *autonomy within society*") (emphasis in original); Buchanan, *supra* note 34, at 508 (defining the right of privacy as a subset of the liberty interests expressly protected by the due process clauses of the Constitution).

80. *Griswold v. Connecticut*, 381 U.S. 479, 492-493 (1965) (Goldberg, J., concurring).

II. PRIVACY AND HOMOSEXUALITY

A. An Analysis of *Bowers v. Hardwick*

In *Bowers v. Hardwick*,⁸¹ the Court narrowed the doctrine of privacy and confronted the issue for the first time in the context of homosexual behavior. In *Bowers*, an Atlanta police officer first encountered Hardwick outside a gay bar where he watched Bowers throw a beer bottle into a trashcan.⁸² The officer confronted Hardwick, asking him what he was doing and Hardwick told him he worked at the bar, thereby revealing to the officer that he was homosexual.⁸³ The officer then issued him a ticket for drinking in public.⁸⁴ Hardwick later failed to appear in court due to confusion over his appearance date and within two hours the officer that issued the ticket showed up at Bowers' home with a warrant for his arrest.⁸⁵ Although not home at the time the officer showed up, after learning about the officer's visit to his home, Hardwick promptly paid the fine for his ticket.⁸⁶ Three weeks later, three straight men severely beat Hardwick outside his home.⁸⁷ A few days after the beating, the officer again showed up at Hardwick's home claiming to have a warrant for his arrest, at which time he found Hardwick in his bedroom having sex with another man.⁸⁸ The officer arrested both men, charging them with violating a Georgia statute that criminalized sodomy.⁸⁹ Afterward, Hardwick challenged the constitutionality of the statute.⁹⁰ The Eleventh Circuit held that the statute violated Hardwick's fundamental rights because "homosexual activity is a private and intimate association" protected by the Constitution.⁹¹ Due to a circuit split on the issue, the Supreme Court granted certiorari.⁹²

81. 478 U.S. 186 (1986).

82. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1437-38 (1992).

83. *Id.* at 1438.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Bowers*, 478 U.S. at 187-88.

90. *Id.* at 188.

91. *Id.* at 189 (citing *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985)).

92. *Id.*

The Court was clear from the outset that its opinion had nothing to do with whether or not laws against sodomy were wise or desirable.⁹³ Rather, the Court intended to resolve the issue of whether the Constitution protected such activity and, if so, would thereby invalidate all state laws that made sodomy a criminal behavior.⁹⁴ The Court disagreed with the Eleventh Circuit's conclusion that the prior cases establishing the scope of the right to privacy doctrine extended to protect the right of homosexuals to engage in acts of sodomy.⁹⁵ The Court reasoned that none of the cases regarding marriage and procreation stood for "the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."⁹⁶ Writing for the majority, Justice White then went on to demonstrate how laws against sodomy are deeply rooted in our history, criticizing the notion that individuals have an anciently rooted, traditional and fundamental right to engage in such behavior and stating that such an argument would be "at best" tongue-in-cheek, so to speak.⁹⁷ In response to Bowers' reliance on *Stanley*, the Court emphasized that illegal conduct in the home is not protected just because it occurs in the privacy of one's home.⁹⁸ Along that line, the Court expressed concern over a slippery slope—in other words, if homosexual conduct is criminal, yet protected in the home, that could be interpreted to mean that the same would hold true for adultery, incest and other similar crimes.⁹⁹ The Court finally reasoned that because moral sentiments underlie all kinds of laws, Hardwick's argument that the electorate fashioned the law on its belief that homosexual sodomy is "immoral and unacceptable" was not, under rational basis review, enough to declare all state laws criminalizing sodomy invalid.¹⁰⁰

Justice Blackmun, joined by three other Justices, sharply dissented, disagreeing with the majority about what the fundamental right at issue was.¹⁰¹ According to Blackmun, the fundamental right

93. *Id.* at 190.

94. *Id.* at 190-91.

95. *Id.* at 191.

96. *Id.*

97. *Id.* at 192-94.

98. *Id.* at 195.

99. *Id.* at 195-96.

100. *Id.* at 196.

101. *Id.* at 199 (Blackmun, J., dissenting).

at the heart of this case was the “right to be let alone.”¹⁰² Blackmun also took issue with the majority’s seemingly archaic notion that, just because the laws have existed since the dawn of time, they should continue to exist, regardless of whether or not they conflict with the Constitution.¹⁰³ In his dissent, Blackmun states “[w]e protect . . . [certain] rights . . . because they form so central a part of an individual’s life.”¹⁰⁴ He later emphasized that while the Court claims to only refuse to recognize a fundamental right to engage in homosexual sodomy, it “really has refused to recognize . . . the fundamental interest all individuals have in controlling the nature of their intimate associations with others.”¹⁰⁵ Blackmun asserted that because of this, the Court’s decision betrayed values deeply rooted in American history.¹⁰⁶

B. *Walls v. City of Petersburg* and *Sterling v. Borough of Minersville*: The Circuit Split over *Bowers*’ Application to Forced Disclosure of Sexual Orientation

Although the majority in *Bowers* did not address the issue of forced disclosure of sexual orientation, the Fourth Circuit nonetheless found *Bowers* controlled in that context.¹⁰⁷ In *Walls v. City of Petersburg*, Walls, a black city police department employee, was required to undergo a background check (along with other similarly situated employees) after the program she administered was transferred to a new city department.¹⁰⁸ She refused to fill out the background questionnaire because of four particular questions to which she specifically objected, one being whether or not she ever had sexual relations with a person of the same sex.¹⁰⁹ Because of her refusal, the Project Administrator suspended her without pay and recommended that she be terminated.¹¹⁰ Although the department later decided that the policy of completing background checks did not apply to Walls, they instituted a new policy stating that all

102. *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting)).

103. *Id.*

104. *Id.* at 204.

105. *Id.* at 206.

106. *Id.* at 214.

107. *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990).

108. *Id.* at 190.

109. *Id.*

110. *Id.*

employees in her position still had to complete the questionnaire.¹¹¹ Again, she refused, but this time the City Manager terminated her.¹¹² In a Section 1983¹¹³ claim against the city, Walls alleged that her discharge was in violation of her constitutional right to privacy, freedom of association, and due process of law.¹¹⁴

In its decision, the Fourth Circuit put forth the two recognized types of privacy interests as previously enunciated by the Supreme Court in *Whalen v. Roe*:¹¹⁵ 1) an individual's interest in avoiding disclosure of personal matters, and 2) an interest in independently being able to make certain important kinds of decisions.¹¹⁶ The court put forth the first step to defining the coverage of the constitutional right of privacy as looking to whether or not the information is within "an individual's reasonable expectations of confidentiality."¹¹⁷ If it is, privacy protection applies (noting, however, that a compelling state interest can still outweigh the protection).¹¹⁸ One might ask, then, if the government (in this case, the City of Petersburg) has a compelling interest in knowing its employees' sexual preferences or orientation. How does an administrative employee's sexual orientation impact or relate to his or her job duties and performance? Walls, of course, argued that questions regarding one's sexual activities were an "unwarranted government intrusion" and that such activities are within the zone of privacy, established earlier in *Griswold*.¹¹⁹ Yet, without more than one four-sentence paragraph, the Fourth Circuit ignored its own test regarding expectations of confidentiality and found *Bowers* controlling, stating that *Bowers* rejected the idea that private sexual conduct between consenting adults is constitutionally protected from state proscription.¹²⁰ Without further explanation, the court moved on to the other three background questions that were the subject of

111. *Id.*

112. *Id.*

113. Federal section 1983 provides a civil remedy to those whose rights have been violated under color of state law. *Walls*, 895 F.2d at 191-92; see 42 U.S.C. § 1983 (2003).

114. *Walls*, 895 F.2d at 189.

115. 429 U.S. 589 (1977).

116. *Walls*, 895 F.2d at 192 (quoting *Whalen*, 429 U.S. at 599-600).

117. *Walls*, 895 F.2d at 192.

118. *Id.*

119. *Id.* at 193.

120. *Id.*

Walls' objections.¹²¹ It is unclear how the court made the leap from a holding about the validity of criminalizing private sexual conduct (sodomy) to its application on forced disclosure of any homosexual activity, which by its very nature forcibly discloses the nature of one's sexual orientation.

Are we to understand from the court's ruling that public disclosure of one's sexual behavior is not within a class of information guarded by reasonable expectations of confidentiality, such that the test the Fourth Circuit enunciated does not even warrant discussion of the matter? Despite the fact that the statute at issue in *Bowers* did not differentiate between individuals based on sexual orientation (i.e., the law against sodomy applied to both homosexuals and heterosexuals), like the Fourth Circuit, many courts and commentators have interpreted the case to be a general holding about homosexuality.¹²² The *Sterling* facts, as disconcerting as they are, warrant a closer look at whether the courts may correctly extend *Bowers* to forced disclosure of sexual orientation, and whether sexual orientation falls under the constitutional right to privacy.

In *Sterling*, the Third Circuit expressly disagreed with the Fourth Circuit's implication that the applicability of *Bowers* to disclosure of sexual orientation was so clear that it could effectively eliminate any real discussion on the matter.¹²³ On the contrary, the Third Circuit gave the issue due consideration.¹²⁴ The Third Circuit was clear in stating that *Bowers*' ruling focused on "the practice of homosexual sodomy and is not determinative of whether the right to privacy protects an individual from being forced to disclose his sexual orientation."¹²⁵ Punishing homosexual *status* is outside *Bowers*' scope.¹²⁶ The Third Circuit furthered its analysis stating that sexual preference is an "intensely personal decision" and that the more intimate the information "the more justified is the expectation that it will not be subject to scrutiny."¹²⁷ The Third Circuit concluded that sexual orientation is an "intimate aspect" of one's

121. *See id.*

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

123. *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 n.3 (3d Cir. 2000); *see Walls*, 895 F.2d at 193.

124. *See Sterling*, 232 F.3d at 194-96.

125. *Id.* at 194-95 (citing the Supreme Court's holding in *Robinson v. California*, 370 U.S. 660, 667 (1962), that the Eighth and Fourteenth Amendments forbid punishment of status as opposed to conduct).

126. *Sterling*, 232 F.3d at 195.

127. *Id.*

personality and is constitutionally protected,¹²⁸ mirroring much of the sentiment in the *Bowers* dissent.¹²⁹ To hold otherwise would have far-reaching implications on those that would be affected by a contrary ruling as evidenced by surveying some of the contexts in which forced disclosure might arise.

III. FORCED DISCLOSURE OF SEXUAL ORIENTATION IN CONTEXT

A. Forced Disclosure Generally

A forced “outing” can be described as “the forced exposure of a person’s same-sex orientation.”¹³⁰ Not all may realize how emotionally intense the decision can be to voluntarily disclose homosexual orientation. When such disclosure occurs without permission, it can cause “real harm on real people” and severely affect personal “dignity, privacy and autonomy.”¹³¹ A person who chooses to “stay in the closet” might do so to feel safe, to preserve his privacy,¹³² or because he fears the “legal and societal consequences of exposure.”¹³³ The disclosure of one’s homosexual orientation, be it voluntary or involuntary, may result in a variety of negative outcomes, including “personal rejection and isolation, employment discrimination, loss of child custody, harassment and violence.”¹³⁴ Because of the potential psychological effects of disclosure of sexual orientation, it should ultimately be left to the individual to determine when and how to disclose such private information. To allow forced disclosure would be to invade personal autonomy and to take away the control each of us has over our own life.¹³⁵ After all, as one commentator said, “[s]exuality is at the very core of a person’s identity.”¹³⁶

128. *Id.* at 196.

129. *Id.*; see *Bowers*, 478 U.S. at 206-20.

130. Katherleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1531 (1995).

131. *Id.* at 1532.

132. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994).

133. Guzman, *supra* note 130, at 1548.

134. Gregory M. Herek, *Why Tell If You’re Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals’ Attitudes Toward Lesbians and Gay Men*, in *OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY* 204 (Gregory M. Herek et al. eds., 1996).

135. Guzman, *supra* note 130, at 1548.

136. Barbara Moretti, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J.

B. Adolescent Homosexuality

The issues surrounding forced disclosure of sexual orientation are especially clear in the context of adolescent homosexuality. Nowhere are the potential effects of such disclosure clearer than in the *Sterling* facts themselves. Pediatrician Susanne M. Stronski Huwiler, and Associate Professor of Pediatrics, Gary Remafedi, describe the 'coming out' process as a progression that occurs in four main stages.¹³⁷ The first stage comes in the form of sensitization, whereby in childhood or early adolescence a homosexual individual will experience a vague feeling of being different from their peers, but may not identify themselves as "sexually different."¹³⁸ The second stage, generally occurring in early or middle adolescence, involves a perception of being sexually different and an awareness of same-sex arousal.¹³⁹ During this time, significant inner turmoil and anxiety are likely because of confusion, stemming from stigma, ignorance and misinformation about homosexuality.¹⁴⁰ In the third stage, called "identity assumption," the individual begins to accept his or her orientation and volitional disclosure may occur.¹⁴¹ During the fourth and final stage, homosexual individuals integrate their homosexuality into their lives through intimate same-sex relationships and find feelings of satisfaction as they disclose their orientation to more and more people.¹⁴² Drs. Huwiler and Remafedi note that premature disclosure during the third stage can create extreme emotional stress and that "careful decisions and timing are critical to the outcome."¹⁴³

Because peers critically affect adolescent development, homosexual adolescents may suffer from the psychosocial effects of homophobia exhibited in the form of rejection, verbal abuse, and physical assaults, all during a time when teens already face normal feelings of vulnerability.¹⁴⁴ The psychosocial effects may include "increased rates of depression and suicide, school problems,

857, 865 (1993).

137. Susanne M. Stronski Huwiler and Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U.I.P.R. 151, 160-61 (1999).

138. *Id.* at 160.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 161.

143. *Id.* at 160.

144. *Id.* at 163.

substance abuse, running away, eating disorders, high-risk sexual behavior, and illegal conduct.”¹⁴⁵ These potential effects demonstrate the delicacy of handling adolescent homosexuality properly. As was the case with Marcus Wayman, suicide may well result from invading the privacy of a young person by “outing” them to friends or family, particularly where such “outing” fails to give consideration to the delicate stage adolescents may be in regarding their sexual orientation. This is especially true in light of the fact that homosexual adolescents already have a higher rate of suicide than the general adolescent.¹⁴⁶ Sexual orientation is a private matter, and, particularly where the ramifications of involuntary disclosure are extremely high, the need for constitutional protection of this private information takes on an even greater importance.

C. Sexual Orientation in the Military

The United States military provides another example of where forced disclosure of sexual orientation might have devastating effects. Prior to 1993, the United States had a long-standing policy that homosexual individuals may not serve in the military.¹⁴⁷ There was no differentiation between homosexual orientation and homosexual conduct.¹⁴⁸ Today, Congress has adopted a policy known as “Don’t Ask, Don’t Tell, Don’t Pursue.”¹⁴⁹ Under this new policy, sexual orientation alone is not grounds for discharge from the military, though homosexual conduct or public reference to one’s homosexuality is still a dischargeable offense.¹⁵⁰ Under the policy, if a person presents credible information about another’s sexual orientation or if a person states directly that he or she is homosexual, it creates a rebuttable presumption of homosexual conduct, which is grounds for discharge from the military.¹⁵¹ The presumption would be nearly impossible to rebut given the difficulty of proving that one

145. *Id.*

146. Studies show that attempted suicide rates of homosexual adolescents range from 20% to 42%. *Id.*

147. Christopher B. Turcotte, Comment, *When “Coming out of the Closet” Means Being Tossed Out of the Military: Homosexual Discrimination in the Armed Forces*, 2 SETON HALL CONST. L.J. 805, 806 (1992).

148. Peter D. Jacobson, *Sexual Orientation and the Military: Some Legal Considerations*, in OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 39 (Gregory M. Herek et al. eds., 1996).

149. See 10 U.S.C. § 644 (2000).

150. Jacobson, *supra* note 148, at 39.

151. *Id.* at 40.

does not engage in any form of homosexual activity, thus rendering the rebuttable presumption "illusory" and "insurmountable."¹⁵²

Once someone has been identified as homosexual, or when forced disclosure occurs, heterosexuals often begin to make assumptions about that person, generally thinking of them in sexual terms, which is evidenced by the military's policy of essentially equating homosexual orientation with homosexual conduct.¹⁵³ Thus, self-disclosing one's sexual orientation, if homosexual, has serious implications in the military that go much further than mere social stigma or isolation from one's peers. Self-disclosure, at least, is accomplished with the person's awareness of the potential implications and an obvious acceptance of the consequences that may follow. On the other hand, forced disclosure of homosexual orientation in the military imposes those potential consequences on the person without his or her permission and takes away the autonomy that goes with making that very personal decision for oneself. Thus, on one end of the spectrum, a person could actually lose his military career simply because he believes himself to be a homosexual and someone else exposes that belief. At a minimum, to protect his career, he would have to prove that he did not act on that belief in any way by engaging in associated homosexual conduct.

While *Bowers* certainly held that it was permissible for states to criminalize homosexual conduct, it did not go so far as to say that there is "no fundamental right to believe that one is homosexual."¹⁵⁴ In the right to privacy doctrine cases, the Court protected the right to hold certain beliefs and to be free from government intrusion into matters that fundamentally affect personhood.¹⁵⁵ It does not take a far stretch of the imagination to properly place one's beliefs about their own sexuality and preferences for intimate associations into the "zone of privacy" established in *Griswold*. Yet, under the military policy now in place, a third party can violate such privacy with the result being not only the loss of personal dignity, but the loss of many years of building a military career and the political right to serve one's country.

152. Debra A. Luker, Comment, *The Homosexual Law and Policy in the Military: "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" . . . Don't Be Absurd!*, 3 SCHOLAR 267, 300 (2001).

153. Herek, *supra* note 134, at 207.

154. Phyllis E. Mann, Comment, "*If the Right of Privacy Means Anything*": Exclusion from the United States Military on the Basis of Sexual Orientation, 46 SMU L. REV. 85, 116 (1992).

155. *Id.*

D. Sexual Orientation in the Workplace

Many of the sentiments expressed above are also applicable to forced disclosure of sexual orientation in the workplace. The employment relationship is one of the most important relationships in a person's life with its success being founded on mutual trust, loyalty, respect and good faith.¹⁵⁶ The success of the relationship can be destroyed when a person's private information is disclosed to others, especially such intensely private, personal information as one's sexual orientation.

Employment discrimination is one very common result of disclosing sexual orientation in the workplace.¹⁵⁷ Employment discrimination on the basis of sexual orientation is arguably harmful both economically and psychologically.¹⁵⁸ Similar to the military environment, a worker is aware of the culture within which he exists and works. If he chooses to disclose his homosexual orientation voluntarily, he is likely to be aware of how he might be received and accordingly treated. For those same reasons, he may choose not to disclose his orientation. Yet, this choice does not prevent that information from being disclosed to others in the workplace without one's permission. There are a variety of sources from which such information may be either found out or inferred: "military discharge records, arrests or convictions, marital status, residential neighborhood, silences in conversations, and so on."¹⁵⁹ A variety of negative consequences might occur from such disclosure.¹⁶⁰ Some of these include harassment by coworkers and bosses, termination, and refusals to promote.¹⁶¹ In turn, the consequences of a forced revelation (or even voluntary disclosure) of one's sexuality can result in lost productivity, income, and future advancement.¹⁶² Thus, the consequences for homosexual individuals in the workplace are real. In a survey of 191 employers in Anchorage, Alaska, 18% would fire homosexuals, 27% would not hire them at all if aware of their status, and 26% would not promote them.¹⁶³ Unfortunately, there are few

156. JOHN D. R. CRAIG, *PRIVACY AND EMPLOYMENT LAW* 24 (1999).

157. M. V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 *INDUS. & LAB. REL. REV.* 726, 727 (1995).

158. *Id.* at 726.

159. *Id.* at 728.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

laws that protect homosexual individuals from such discrimination in public sector employment.¹⁶⁴

Again, the disclosure of such private information may carry negative consequences, and it must be up to the individual, being aware of this possibility, to choose to face those consequences. When forced disclosure occurs, an individual is subjected to potentially life-altering consequences over which he has no control. Just as the right of privacy protects certain sexually related medical conditions,¹⁶⁵ so it should protect the private nature of one's sexual orientation. Unwarranted exposure of either could result in "discrimination and intolerance."¹⁶⁶ The constitutional right to privacy should be extended to protection from forced disclosure of sexual orientation so as to allow individuals to choose for themselves how and when such information is disseminated. To do otherwise violates the fundamental right of privacy established long ago by the United States Supreme Court.

IV. EXTENDING THE RIGHT TO PRIVACY TO FORCED DISCLOSURE OF SEXUAL ORIENTATION

Most individuals who read the facts of *Sterling* would agree that the circumstances of Marcus Wayman's suicide were disturbing. The disposal of his life seems wasteful and shameful, and more importantly, possibly preventable. One might wonder if the outcome would have been the same had the constitutional parameters of the privacy doctrine been better defined so as to protect such disclosure. Quite possibly, Officer Wilinsky might have acted more prudently had the police department been required to comply with a stricter and more established constitutional privacy doctrine. The only answer now is to attempt to clarify the privacy doctrine's definition in the realm of sexual orientation disclosure. The Third Circuit's opinion in *Sterling*, the test put forth in *Walls*, and Blackmun's dissenting opinion in *Bowers* act together to help accomplish this.

164. Susan J. Becker, *The Immorality of Publicly Outing Private People*, 73 OR. L. REV. 159, 181 (1994).

165. See, e.g. *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) (holding that "individuals who are transsexuals are among those that possess a constitutional right to maintain medical confidentiality" and stating "[t]he excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate").

166. See *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994).

A. The Correctness of *Sterling v. Borough of Minersville*

The Third Circuit recognized that the boundaries of the constitutional right to privacy have not been clearly defined.¹⁶⁷ After shedding some light on the history of the doctrine, the Third Circuit pointed out that the Supreme Court many years ago held that “the constitutional right to privacy respects not only an individual’s autonomy in intimate matters, but also an individual’s interest in avoiding divulgence of highly personal information.”¹⁶⁸ This would seem to apply directly to the kind of information that would be disclosed when dealing with the confidentiality of sexual orientation. However, the Third Circuit acknowledged that the Supreme Court has never “definitively” extended the right to privacy in this area.¹⁶⁹

In doing so, the Third Circuit dealt squarely with the holding in *Bowers* and determined that *Bowers* is not determinative of this issue because it did not deal with homosexual status, but rather dealt with homosexual conduct and more particularly, sodomy.¹⁷⁰ In other words, *Bowers* did not comment on whether privacy protection extends to the “personal decision of sexual preference.”¹⁷¹ The holding in *Bowers* was limited to criminalized sexual conduct.

The Third Circuit, however, then went on to describe some of its own holdings, concluding that together they demonstrated an “encompassing view of information entitled to a protected right of privacy.”¹⁷² The court evaluated the following areas of information: 1) private medical information—determining it was protected because it contains intimate personal facts;¹⁷³ 2) answers to questions about medical, financial and behavioral information—concluding that the inquiries themselves did not invade privacy, but that such information had to be protected from disclosure due to its private nature;¹⁷⁴ 3) disclosure of an employee’s HIV status through employee health plan records—allowing the disclosure only after establishing that the government had a genuine and compelling

167. *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000).

168. *Id.* at 194 (citing *Whalen*, 429 U.S. 589, 599-600 (1977)).

169. *Sterling*, 232 F.3d at 194.

170. *Id.* at 194-95. It was here that the court disagreed with the Fourth Circuit in *Walls*.

171. *Id.*

172. *Id.*

173. *Id.* at 195; see *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

174. *Sterling*, 232 F.3d at 195; see *Fraternal Order of Police v. City of Phila.*, 812 F.2d 105, 110 (3d Cir. 1987).

interest to gather the information;¹⁷⁵ and 4) a coach's requirement that a student athlete take a pregnancy test—concluding that compelling the test coupled with failure to protect the results from disclosure was an infringement on the constitutional right to privacy.¹⁷⁶ The Third Circuit concluded that these holdings, taken together, demonstrate the care with which the court guards privacy, and that it would be hard to imagine a subject more private in nature than one's sexuality.¹⁷⁷ Moreover, the court determined that merely threatening disclosure was enough to invade one's privacy interests.¹⁷⁸

The reasoning in *Sterling* comports with the underlying philosophy and meaning of a fundamental right to privacy. The concept is somewhat nebulous, yet the Third Circuit's prior holdings and reasoning in this case demonstrate that autonomy in private, intimate matters is at the core of the doctrine. Sexual orientation surely falls into this arena, and individuals have a right to be free from forced disclosure and interference with such personal aspects of their life.

B. The Privacy Test in *Walls v. City of Petersburg*

Despite the Fourth Circuit's failure to follow its own test for determining what belongs in the "zone of privacy," the test itself adds further clarification of the kinds of matters that the doctrine of privacy covers. The court put forth its test clearly:

As the first step in determining whether the information sought is entitled to privacy protection, courts have looked at whether it is within an individual's reasonable expectations of confidentiality. The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.¹⁷⁹

As indicated by the Third Circuit, it is difficult to imagine more personal and intimate information than the nature of one's sexuality.¹⁸⁰ Because it is so personal, most people would expect that such information is not open for public disclosure or state interference without a compelling interest, and thus the expectation of confidentiality is high. The Fourth Circuit did not utilize its own

175. *Sterling*, 232 F.3d at 195; see *Doe v. Southeastern Penn. Transp. Auth.*, 72 F.3d 1133, 1141 (3d Cir. 1995).

176. *Sterling*, 232 F.3d at 196; see *Gruenke v. Seip*, 225 F.3d 290, 303 (3d Cir. 2000).

177. *Sterling*, 232 F.3d at 196.

178. *Id.* at 197.

179. *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990).

180. *Sterling*, 232 F.3d at 196.

test when determining whether the police department invaded Walls' zone of privacy by asking her whether she had engaged in homosexual relations (thereby forcing her to disclose the nature of her sexual orientation), but instead went straight to the conclusory statement that *Bowers* was controlling.¹⁸¹ Had the Fourth Circuit applied this analytical step to the facts in *Walls*, it is likely that its own holding would have been different.

C. Justice Blackmun's Dissent in *Bowers*

While not the rule of law, Justice Blackmun's dissent adds valuable perspective to what the right to privacy entails. Blackmun points out two lines of privacy that the Court has acknowledged: 1) the recognition of a "privacy interest with reference to certain *decisions* that are properly for the individual to make" and 2) the recognition of a "privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged."¹⁸² Making a personal decision to disclose the nature of one's sexual orientation would fall in the first line of recognition. Blackmun pointed out that the majority was misguided in proliferating the idea that its holding amounted only to a refusal to recognize a fundamental right to engage in sodomy.¹⁸³ Rather, he stated, "what the Court has really refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."¹⁸⁴ Individuals have a right to be free from interference with the disclosure of personal details about their personhood. As Justice Blackmun stated, "[o]nly the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.'"¹⁸⁵ The nature of one's sexual orientation is just as intimate and private, and no person should have the broad right to forcibly disclose that information about another. Forced disclosure has potentially severe implications, and the nature of one's sexual orientation is just the kind of private information that the constitutional right of privacy is put forth to protect. It is certainly separable from the right to engage in criminal activities, as sodomy

181. See *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986); *Sterling*, 232 F.3d at 195 n.3.

182. *Bowers*, 478 U.S. at 204-05 (Blackmun, J., dissenting) (emphasis in original).

183. *Id.* at 206.

184. *Id.*

185. *Id.* at 205 (quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973)).

is in some states.

V. CONCLUSION

While the doctrine of constitutional privacy is not precisely defined, one can reason that the zone of privacy includes one's sexual orientation. The *Griswold* line of cases protected intimacy in marriage, contraception outside of the context of marriage, the right to marry the person of one's choice, the right to terminate a pregnancy, and the right to be free from interference with the constitution of one's family. All of these rights demonstrate the Court's desire to protect individuals from undue interference with the most personal and fundamentally private aspects of their lives. This does not mean, however, that the government never has a right to interfere with these aspects, just that the government must show a genuine and compelling interest to do so.

Forced disclosure of sexual orientation may have the same devastating effects on an individual as would denying women the right to choose whether to terminate a pregnancy. These effects include distress, psychological harm, mental and physical difficulties and social stigma—the Court noted all of these effects in *Roe v. Wade* when it decided to protect a woman's right to choose to terminate a pregnancy (an inherently private matter). To reason that these effects are less important to an individual in the context of disclosing the private nature of one's sexuality defies common sense. Sexual orientation deserves the same protection. Such protection can be achieved without undermining the holding in *Bowers*, as *Bowers* deals only with a state's right to criminalize sexual conduct such as sodomy. That case does not extend so far as to say that a state can disclose or require disclosure of sexual orientation or sexual activity that by its very nature forces sexual orientation to be known.

The Third Circuit in *Sterling* captured the essence of the privacy doctrine in its ruling, as did the dissenting opinion in *Bowers*. Our Constitution protects our right to "be let alone" and preserves expected matters of confidentiality from unwarranted government intrusion. Individuals have the right to expect that certain private matters are beyond the unfettered reach of the state. Permitting forced disclosure of sexual orientation offends our privacy jurisprudence. Any holding or rule stating otherwise improperly affects real people, real lives and has real consequences. Just ask Marcus Wayman's mother.

* * *