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# Some Thoughts on Autonomy and Equality in Relation to Justice Blackmun

by PAMELA S. KARLAN\*

John Irving's epic novel *The Cider House Rules*<sup>1</sup> is a study of rule givers, rule breakers, and abortion before *Roe v. Wade*.<sup>2</sup> A key passage in the book concerns a letter that Dr. Wilbur Larch writes to his young protégé, Homer Wells, explaining why Homer must, despite his personal scruples, return to St. Cloud's orphanage to perform abortions for poor women in backwoods Maine:

How can you allow yourself a choice in the matter when there are so many women who haven't the freedom to make the choice themselves? The women have no choice. . . . How can you feel free to choose not to help people who are not free to get other help?<sup>3</sup>

*The Cider House Rules* was a best seller the year I clerked for the Justice; I read it the summer after my clerkship, while studying for the bar. Perhaps I would have seen Justice Blackmun in *anything* I read that summer; it takes a long time to decompress from the intensity of a year at the Supreme Court (and some former clerks unfortunately never do). Yet when I read *The Cider House Rules* again this past fall, I realized how the distance of a dozen years had only sharpened my appreciation of the connection between Justice Blackmun's overwhelming sense of professional obligation and his passionate commitment to other people's freedom. Like Dr. Larch and Homer Wells, Justice Blackmun found his own choices constrained by the importance of ensuring others' choices.<sup>4</sup>

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\* Professor of Law, Stanford Law School. Law clerk to Justice Blackmun, October Term 1985. I thank Kathleen Sullivan and Tommy Goldstein for many helpful suggestions. Katayoon Majd provided superb research assistance.

1. JOHN IRVING, *THE CIDER HOUSE RULES* (1985).

2. 410 U.S. 113 (1973).

3. IRVING, *supra* note 1, at 518.

4. As Harold Koh once noted, it is ironic that because the Justice "authored decisions protecting a constitutional zone of privacy for others, he and his wife have been forced to sacrifice much of their own jealously guarded private life." Harold Hongju Koh, *Rebalanc-*

This time through *The Cider House Rules*, though, I was equally struck by another passage in the book—one not directly tied to abortion rights—that seemed to reflect more generally the essence of Justice Blackmun's time on the Court. Each night as a boy, and then again on the night he performed his first abortion, Homer repeated to himself the opening passage of *David Copperfield*: "Whether I shall turn out to be the hero of my own life, or whether that station will be held by anybody else, these pages must show."<sup>5</sup> That, really, is what the pages of the *United States Reports* show about Justice Blackmun: the Constitution gives each person the capacity to be the hero of his own life; indeed, that is the essence of liberty. In perhaps his most lyrical expression of this vision, the Justice wrote:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.<sup>6</sup>

You may wonder why I have begun an essay about Justice Blackmun's contribution to the jurisprudence of sexual orientation with a discussion of abortion. Again, perhaps, it is primarily temporal fortuity, but at least at the time everyone understood the link. Earlier in the 1985 Term, Justice Blackmun had once again reaffirmed *Roe* in an opinion for the Court. *Thornburgh v. American College of Obstetricians and Gynecologists*, his last majority opinion involving abortion, marked the highwater mark of reproductive choice. Justice White, a longtime opponent of abortion rights, had written a bitter dissent, perhaps made all the more caustic by his sense that victory was near; Chief Justice Burger had switched sides in *ACOG*, and left *Roe* with only a razor-thin majority of five supporters. Justice White's opinion for the Court shortly thereafter in *Bowers v. Hardwick*,<sup>7</sup> the Georgia

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ing *The Medical Triad: Justice Blackmun's Contributions To Law And Medicine*, 13 AM. J.L. & MED. 315, 333 (1987).

5. CHARLES DICKENS, *DAVID COPPERFIELD* 1 (1850). See IRVING, *supra* note 1, at 71, 562.

6. *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

7. 478 U.S. 186 (1986).

sodomy case, was as much a continuation of the arguments about substantive due process in *ACOG* as it was a rejection of Michael Hardwick's claim. And Justice Blackmun's dissent—the only opinion he wrote about gay rights—similarly drew on an understanding of liberty interests deeply rooted in the debate over abortion.<sup>8</sup>

The same year that John Irving published *The Cider House Rules*, then-Court of Appeals Judge Ruth Bader Ginsburg approached the question of abortion from a very different perspective. In an essay entitled *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*,<sup>9</sup> Judge Ginsburg contrasted the Burger Court's relatively well-accepted equal protection jurisprudence regarding sex-based classifications with its controversial substantive due process approach to reproductive autonomy in *Roe* and its progeny. She suggested the Court would have done better to take an equal protection perspective towards abortion rights.<sup>10</sup> She further posited that the Court's failure to provide all women with a meaningful opportunity to exercise that right stemmed from its neglect of an equality principle that recognized the centrality of reproductive control to full participation in economic and civic life.

That general argument—that reproductive autonomy claims in particular, and sexual autonomy claims more generally, are better protected under the equal protection clause than under the due process clause—is widely fashionable today.<sup>11</sup> Yet a careful lawyer—and Justice Blackmun was preeminently that—would recognize that whatever its potential merits, such an approach was unavailable in *Bowers v. Hardwick* itself. *Hardwick* involved a facial challenge to a formally neutral statute and was decided on a Rule 12(b)(6) motion to dismiss for failure to state a claim. Thus, there was no record to show a pattern of discriminatory enforcement and, until the state conceded at

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8. See, e.g., *id.* at 203-04 (Blackmun, J., dissenting) (quoting the passage from *Thornburgh*).

9. 63 N.C.L. REV. 375 (1985).

10. This is not the place to debate Justice Ginsburg's claim that *Roe* was somehow either unnecessary or counterproductive to the cause of reproductive freedom. For a thorough discussion of this issue, see DAVID J. GARROW, *LIBERTY & SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF Roe v. Wade* 495-96, 538-39, 616 (1994).

11. See, e.g., Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1642-45 (1987); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

oral argument in the Supreme Court that the statute would be unenforceable against straight couples,<sup>12</sup> no sufficient basis for interpreting the statute as distinguishing between homosexual and heterosexual behavior.<sup>13</sup> Still, the result in *Bowers v. Hardwick* reinforced the trend towards making equality arguments. In later cases, gay rights litigators sought to circumvent *Hardwick* by claiming that nothing in the case foreclosed an equal protection challenge to discrimination against gays or lesbians. They argued either that discrimination on the basis of sexual orientation involved a suspect classification or that such discrimination was so irrational that it could not survive even rationality review.<sup>14</sup> The Supreme Court's recent opinion in *Romer v. Evans*,<sup>15</sup> striking down a Colorado constitutional amendment that barred state actors from adopting or enforcing measures that prohibited discrimination against gays, lesbians, or bisexuals, might perhaps be seen as confirmation of this equal protection strategy.

Ultimately, though, I am a little skeptical that the equal protection clause somehow avoids the difficulties that the autonomy-based approach faced. For example, I wonder whether Justice Ginsburg had the causal arrows running in the wrong direction; maybe the reason the Burger Court's sex discrimination jurisprudence occasioned so little backlash is not because it relied on the equal protection clause instead of the due process clause, but rather because the initial cases involved relatively low-visibility issues like administration of decedents' estates,<sup>16</sup> dependents' benefits,<sup>17</sup> survivors' benefits,<sup>18</sup> social security<sup>19</sup> and workers' compensation.<sup>20</sup> It is hard to believe, especially given the deep division among women over the morality of abortion, that the argument that abortion was a matter of women's equality

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12. Tr. of Oral Arg. 4-5, *Bowers v. Hardwick*, 478 U.S. 113 (1986).

13. *Hardwick*, 478 U.S. at 201 (Blackmun, J., dissenting).

14. For examples of cases raising equal protection claims, see, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995). For examples of scholarship advancing the equal protection argument, see, e.g., Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L.L. REV. 531 (1992); Courtney G. Joslin, *Equal Protection and Anti-Gay Legislation: Dismantling the Legacy of Bowers v. Hardwick*, 32 HARV. C.R.-C.L.L. REV. 225 (1997); Sunstein, *supra* note 11.

15. 517 U.S. 620 (1996).

16. *Reed v. Reed*, 404 U.S. 71 (1971).

17. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

18. *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

19. *Califano v. Goldfarb*, 430 U.S. 199 (1977).

20. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980).

rather than women's choice would have appeased anti-abortion forces.<sup>21</sup>

Moreover, I think that many scholars may be overstating the sharpness of the line drawn between substantive due process claims and equal protection claims.<sup>22</sup> In *Railway Express Agency v. New York*,<sup>23</sup> Justice Jackson recognized a key relationship between the due process and equal protection clauses: the requirement that laws be applied equally served to cabin their infringement on liberty.

[E]quality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>24</sup>

My thesis here is that just as equality can "backstop" liberty, so too liberty can serve to backstop equality. That is, liberty arguments can explain *why* two classes of individuals cannot be treated unequally.

Justice Ginsburg's own recent opinion for the Court in *M.L.B. v. S.L.J.*<sup>25</sup> powerfully corroborates this relationship between liberty and equality. In *M.L.B.*, the Court held that Mississippi's failure to allow indigent persons to appeal the termination of their parental rights without prepaying substantial fees for transcript preparation violated the Fourteenth Amendment. The Court located the problem at the intersection of the due process and equal protection clauses: it was precisely because parental rights were so fundamental (i.e., were pro-

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21. Indeed, Justice Ginsburg herself recognizes this problem. See Ginsburg, *supra* note 9, at 383 ("I do not pretend that, if the Court had added a distinct sex discrimination theme to its medically oriented opinion, the storm *Roe* generated would have been less furious."). Moreover, "[t]hose who would treat the abortion issue as one of political unresponsiveness to women's concerns," because women are a suspect class, face the need to "explain public opinion polls over the past two decades that consistently reveal slightly higher support for free abortion access among men than women." Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 760 n.63 (1991).

22. See, e.g., Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979) (arguing for maintaining a clear distinction between the egalitarian and libertarian dimensions of the Fourteenth Amendment).

23. 336 U.S. 106 (1949).

24. *Id.* at 112-13 (Jackson, J., concurring).

25. 519 U.S. 102 (1996).

ted by substantive due process) that the differential treatment of indigents denied them equal protection. Nothing in the Court's opinion suggests that indigents would be entitled to the state's affirmative financial assistance in the litigation of less weighty issues. So, too, with abortion: If the right to control one's reproductive capacity were not already understood to be fundamental, the state would hardly be denying equal protection by failing to fund the exercise of that right. *Roe* helped to make women more equal by giving them the kind of "control over [their] reproductive lives" necessary for them to "participate equally in the economic and social life of the Nation."<sup>26</sup> Moreover, without some recognition of the importance of the autonomy interest involved, even an equal protection-driven analysis would not have generated a different outcome in the abortion-funding decisions, the area where critics argue that the privacy-driven analysis fails to fully protect women.<sup>27</sup>

Similarly, in the area of gay rights, liberty arguments can provide the foundation for equality arguments. In a previous article discussing the Supreme Court's opinion in *Romer v. Evans*,<sup>28</sup> I advanced a notion of "double-barrelled" judicial review: some laws "spar[k] judicial skepticism under both the suspect-classification and the fundamental-rights strands of strict scrutiny."<sup>29</sup> I suggested that because double-barrelled cases lie at the intersection of alternative lines of precedent, "they can represent budding doctrinal movement."<sup>30</sup> Particularly in the area in which I specialize—voting rights—equal protection and due process are synergistic. The suspect-classification arguments of early Warren Court voting rights cases "contributed to the Court's adoption of a fundamental rights perspective [in later voting rights cases]—the importance of protecting the right to vote was driven home by the invidiousness of the distinction that kept some citizens from the polls."<sup>31</sup>

Justice Blackmun's approach to sexual autonomy and gay rights, with its reliance on the fundamental rights/due process cases, may have a similar double-barreled effect: it may actually hasten the day when the equal protection clause gives meaningful protection to gays

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26. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (opinion of O'Connor, Kennedy and Souter, JJ.).

27. *See, e.g.*, Ginsburg, *supra* note 9, at 384-85.

28. 517 U.S. 620 (1996).

29. Pamela S. Karlan, *Just Politics?: Five Not So Easy Pieces of the 1995 Term*, 34 *Hous. L. Rev.* 289, 297 (1997).

30. *Id.* at 299.

31. *Id.*

and lesbians.<sup>32</sup> The Court's recognition that the individual's "ability independently to define [his or her] identity . . . is central to any concept of liberty"<sup>33</sup> may drive home the invidiousness of making other distinctions on the basis of those choices.

The dissent in *Hardwick* provides a strong basis for recognizing the fundamental equality of gays and lesbians. As Justice Blackmun explained, "a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."<sup>34</sup> It is precisely because the liberty involved in making those choices is so fundamental that making distinctions on the basis of how people decide is so invidious.<sup>35</sup> As the Justice explained, "[t]he fact that individuals define

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32. I am somewhat pessimistic that *Romer* does much to establish the general principle. The Court's opinion seemed largely driven by the unprecedented breadth of the Colorado amendment. See *Romer*, 517 U.S. at 632 ("Amendment 2 fails, indeed defies, [the] conventional [equal protection] inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."); *id.* at 633 ("The absence of precedent for Amendment 2 is itself instructive; "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.") (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). And while it is risky to read very much into denials of petitions for certiorari, the Supreme Court recently refused to hear a case challenging Cincinnati's adoption of a city charter ordinance that forbids "enact[ing], adopt[ing], enforc[ing] or administer[ing] any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment." See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 291 (6th Cir. 1997) (quoting the charter provision), *cert. denied*, 119 S.Ct. 365 (1998). The Supreme Court's refusal to review the Sixth Circuit's opinion, which did a remarkably unpersuasive job of distinguishing *Romer*, suggests that the Court is not at all eager to enforce a general antidiscrimination regime on behalf of gays and lesbians.

33. *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)).

34. *Id.* at 205-06 (Blackmun, J., dissenting).

35. Elsewhere, I have explained why "although the Court's autonomy language does not lead to the fullest possible constitutional right or entitlement to abortion, it is clear that without reliance on the value of autonomy embodied in the Fourteenth Amendment's liberty interest, it is virtually impossible to derive a constitutional limit on the states' power to regulate the abortion decision." Pamela S. Karlan and Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 Nw. U. L. Rev. 858, 879-80 (1993). Thus, for example, Donald Regan identifies an equal protection clause-driven right in the unfairness of imposing on pregnant women a Good Samaritan obligation that is not imposed on any analogous class. Regan, *supra* note 11, at 1630-39. But "the explanation for why we do not find such Good Samaritan obligations is surely driven by [the idea that it] would constrict our individual freedom too much to place such

themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds."<sup>36</sup> If that choice is hedged about by state-sponsored discrimination, then gays and lesbians cannot make their choices freely. This creates an unconstitutional condition; the state cannot demand that a person sacrifice the constitutionally protected freedom "to choose the form and nature of the intensely personal bonds"<sup>37</sup> that "mak[e] individuals what they are"<sup>38</sup> in order to enjoy "protections taken for granted by most people . . . against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."<sup>39</sup>

Justice Blackmun ended his dissent in *Bowers v. Hardwick* with the hope that the Court's mean-spirited denial of equal respect for gays' and lesbians' fundamental personal choices would not be its last word:

It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.<sup>40</sup>

As I suggested on the occasion of the Justice's retirement, "Justice Blackmun understood, in a way that many of his colleagues do not, that the Court's decisions are part of a process of *conversation*, not primarily within the judicial system and certainly not mostly with law professors, but with the American people. . . . Like *Roe*, *Hardwick* marked only the beginning of a national conversation, this time

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burdens on unwilling individuals. This notion of freedom is, of course, the notion that the liberty aspect of substantive due process embraces." Karlan & Ortiz, *supra*, at 880.

36. *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting).

37. *Id.* at 205 (Blackmun, J., dissenting).

38. *Id.* at 210 (Blackmun, J., dissenting).

39. *Romer*, 517 U.S. at 631.

40. *Hardwick*, 478 U.S. at 213-14 (Blackmun, J., dissenting).

about the rights of gay men and lesbians, and once again, Justice Blackmun was on the right side.”<sup>41</sup> Unfortunately, the members of the current United States Supreme Court seem loath to continue that conversation. Their one further utterance, *Romer v. Evans*,<sup>42</sup> while it reached the right result, did little to advance the general discussion of equality for gays and lesbians. In describing the Colorado provision as “def[y]ing . . . conventional inquiry” and “confound[ing] [the] normal process of judicial review,”<sup>43</sup> the Court implicitly refused to view its opinion as a template for future challenges to less unconventional forms of discrimination against gays and lesbians.<sup>44</sup>

We must therefore look elsewhere for a full articulation of Justice Blackmun’s integrated understanding of liberty and equality for gays and lesbians. The South African Constitutional Court’s recent decision in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*<sup>45</sup> offers a powerful illustration of the way in which ideas of liberty can inform ideas of equality.

In some ways, the South African Constitutional Court had an easier job of it. First, the provisions at issue in *National Coalition for Gay and Lesbian Equality* criminalized only sexual activity between men, omitting any coverage of either heterosexual or lesbian activity. Second, the South African Constitution contains a provision, in addition to its equal protection clause,<sup>46</sup> specifically forbidding discrimination on the basis of sex and sexual orientation.<sup>47</sup> Thus, the Constitutional Court could have rested its decision solely on equality grounds, finding either impermissible discrimination on the basis of sex or impermissible discrimination on the basis of sexual orientation.<sup>48</sup> Nonetheless, the Constitutional Court went beyond the equality

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41. Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 13, 14, 17 (1994).

42. 517 U.S. 620 (1996).

43. *Id.* at 632, 633.

44. See also *supra* note 32.

45. 1998 \_\_\_ S.A.L.R. \_\_\_ (CC Oct. 9, 1998) (No. 11/98) (visited Mar. 26, 1999) <<http://www.law.wits.ac.za/judgements/1998/gayles.html>> [hereinafter cited as *National Coalition for Gay and Lesbian Equality*, slip op. ¶ \_\_\_].

46. Section 9(1) of South Africa’s 1996 Constitution provides: “Everyone is equal before the law and has the right to equal protection and benefit of the law.”

47. Section 9(3) of the 1996 Constitution provides that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth,” and section 9(5) provides that “[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

48. See *National Coalition for Gay and Lesbian Equality*, slip op. ¶¶ 15-27.

clauses of the South African Constitution to find that “the common-law crime of sodomy also constitutes an infringement of the right to dignity which is enshrined in section 10 of our Constitution.”<sup>49</sup> In making this finding, the Constitutional Court rejected the idea that the right to privacy (protected by section 14 of the South African Constitution) was in any way “detrimental” to achieving full equality for gays and lesbians.<sup>50</sup> To the contrary, the claim raised in *National Coalition for Gay and Lesbian Equality* “illustrates how, in particular circumstances, the rights of equality and dignity are closely related, as are the rights of dignity and privacy.”<sup>51</sup>

This, in essence, is what Justice Blackmun had recognized:

Only the most willful blindness could obscure the fact that sexual intimacy is a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.<sup>52</sup>

In similar language, the Constitutional Court declared that:

Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. . . . We should not deny the importance of a right to privacy in our new constitutional order, even while we acknowledge the importance of equality. In fact, emphasizing the breach of both these rights in the present case highlights just how egregious the invasion of the constitutional rights of gay persons has been. The offence which lies at the heart of the discrimination in this case constitutes at the same time and independently a breach of the rights of privacy and dignity which, without doubt, strengthens the conclusion that the discrimination is unfair.<sup>53</sup>

The concurrence filed by Justice Albie Sachs contains further echoes of Justice Blackmun’s *Hardwick* language. Justice Blackmun

49. *Id.* ¶ 28. Section 10 of the South African Constitution provides that “Everyone has inherent dignity and the right to have their dignity respected and protected.”

50. *Id.* ¶ 29.

51. *Id.* ¶ 30.

52. *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting) (internal quotation marks and citations omitted).

53. *National Coalition for Gay and Lesbian Equality*, slip op. & 32.

began his dissent by claiming that “[t]his case is no more about ‘a fundamental right to engage in homosexual sodomy,’ as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”<sup>54</sup> Similarly, Justice Sachs opened his opinion with the observation that “[o]nly in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.”<sup>55</sup>

More importantly, Justice Sachs elaborated on the insight I have identified in Justice Blackmun’s jurisprudence about the connections among privacy, liberty and equality. Justice Sachs forcefully rejected the view that the right to privacy should be treated “as a poor second prize to be offered and received only in the event of the Court declining to invalidate the laws because of a breach of equality.”<sup>56</sup>

The fact is that both from the point of view of the persons affected, as well as from that of society as a whole, equality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws. In the present matter, such laws deny equal respect for difference, which lies at the heart of equality, and become the basis for the invasion of privacy. At the same time, the negation by the state of different forms of intimate personal behavior becomes the foundation for the repudiation of equality. Human rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centered rather than a formula-based position, and analyzing them contextually rather than abstractly.<sup>57</sup>

Justice Sachs in fact even relied directly on Justice Blackmun for his expansive vision of privacy as autonomy:

There is no good reason why the concept of privacy should, as was suggested, be restricted simply to sealing off from state control what happens in the bedroom, with the doleful sub-text that

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54. *Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting) (internal citations omitted).

55. *National Coalition for Gay and Lesbian Equality*, slip op. & 107 (Sachs, J., concurring).

56. *Id.* ¶ 110 (Sachs, J., concurring).

57. *Id.* ¶ 112 (Sachs, J., concurring).

you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private. It has become a judicial cliché to say that privacy protects people, not places. Blackmun J in *Bowers*, *Attorney General of Georgia v. Hardwick et al* made it clear that the much-quoted “right to be left alone” should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation.<sup>58</sup>

At bottom, for Justice Sachs as for Justice Blackmun, “the motif which links and unites equality and privacy, and which, indeed, runs right through the protections offered by the Bill of Rights, is dignity.”<sup>59</sup> In *Jackson v. Bishop*,<sup>60</sup> the opinion Justice Blackmun once identified as the one of which he was proudest, he explained that “broad and idealistic concepts of dignity, civilized standards, humanity and decency are useful and usable” in interpreting specific constitutional provisions,<sup>61</sup> from the Eighth Amendment’s prohibition on cruel and unusual punishment—the provision at issue in *Jackson*—to the Fourteenth Amendment’s protections of liberty and equality.<sup>62</sup>

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Once you get outside the pages of the law reviews, the greatness of an opinion rests not in how finely wrought its analysis, or adroit its manipulation of doctrinal categories, but rather in how it contributes to the national conversation about what justice means and about “things that touch the heart of the existing order.”<sup>63</sup> Nowhere were Justice Blackmun’s imaginative empathy and his understanding of matters that touch the heart more powerfully at work than in his dissent in *Bowers v. Hardwick*. And while Justice Blackmun may not yet have succeeded in persuading a majority of the United States Supreme Court that our Constitution requires us to give gays and lesbians the same rights all other Americans enjoy to define themselves through their intimate relationships, he certainly is not a prophet with-

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58. *Id.* ¶ 116 (Sachs, J., concurring). In a footnote to this passage, Justice Sachs quoted extensively from Justice Blackmun’s dissent; I do not include those passages here because they are precisely the ones on which I earlier relied to explain Justice Blackmun’s integrated approach to privacy, dignity, and equality.

59. *Id.* ¶ 120 (Sachs, J., concurring).

60. 404 F.2d 571 (8th Cir. 1968).

61. *Id.* at 579.

62. See *Planned Parenthood v. Casey*, 505 U.S. 833, 920 (1992) (Blackmun, J., concurring in part and dissenting in part) (“Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled.”).

63. *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 641-42 (1943)).

out honor, even in his own land. Not only do the pages of the *United States Reports* show Justice Blackmun to be the hero of his own life, but they show his fierce commitment to enabling others to become heroes of their own lives as well.

