

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-140

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

PLACE Washington, D. C.

DATE March 31, 1986

PAGES 1 thru 42

AR
ALDERSON REPORTING

(202) 628-9300
20 F STREET, N.W.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

----- x
:
MICHAEL J. BOWERS, ATTORNEY :
GENERAL OF GEORGIA, :
:
Petitioner :
:
v. :
:
MICHAEL HARDWICK, AND JOHN :
AND MARY DOE :
:
----- x

No. 85-140

Washington, D.C.

Monday, March 31, 1986

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

APPEARANCES:

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

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

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT OF

PAGE

MICHAEL E. HOBBS, ESQ., 3
on behalf of the Petitioner

LAURENCE TRIBE, ESQ., 17
on behalf of the Respondents

MICHAEL E. HOBBS, ESQ., 41
on behalf of the Petitioner -- rebuttal

1 Georgia's sodomy statute.

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

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

6 (BLACKMUN) QUESTION: That is Atlanta, isn't it?

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

8 -- indicated that it would not be presented the grand jury
9 under further evidence developed. That is the only reason
10 that I know that it was not presented.

11 (Powell) QUESTION: Mr. Hobbs?

12 MR. HOBBS: Yes, Your Honor.

13 (Powell) QUESTION: Is the statute enforced in Georgia?

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

16 (Powell) QUESTION: How many prosecutions have there been
17 in the last year or five years?

18 MR. HOBBS: I could not tell the Court that.

19 I can only say that in our experience the statute is most
20 frequently enforced in situations where the conduct takes
21 place in more public or quasi-public areas.

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

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

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

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

11 (BLACKMAN) QUESTION: Did you say the last prosecution was
12 in the 30's or 40's?

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

15 (BLACKMAN) QUESTION: Has it ever been enforced in a marital
16 situation?

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

19 (O'CONNOR) QUESTION: But, on its face, the statute would
20 permit such a prosecution, would it not?

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

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

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

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

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

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

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

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

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

18 The common thread of this Court's --

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

21 MR. HOBBS: If Your Honor please --

22 (Stevens) QUESTION: Could it be constitutionally applied
23 or not?

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

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

3 (Stevens) QUESTION: Do you think they could or could not?
4 Do you think it would be constitutional or unconstitutional
5 to apply it to a married couple?

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

8 (Stevens) QUESTION: You think it would be constitutional?

9 MR. HOBBS: Yes, sir.

10 (Stevens) QUESTION: And, what is the right that would
11 be protected of the married person in that situation in
12 your view?

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

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

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

24 (Stevens) QUESTION: He didn't say anything about this
25 kind of conduct.

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

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

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

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

14 (BLAUMUN) QUESTION: Is the record clear as to whether
15 the conduct was with a male or a female?

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

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

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

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

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

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

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

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

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

1 invalid.

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

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

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

17 This case does not involve any such underlying
18 right.

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

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

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

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

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

15 This Court has described those relationships
16 as personal bonds which have played a critical role in
17 the culture and traditions of the nation by cultivating
18 and transmitting shared ideals and beliefs.
19 (Rehnquist) QUESTION: Mr. Hobbs, when you say "cohabitation
20 with one's relatives," you mean living in the same house
21 with them?

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

23 (Laughter)

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

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

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

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

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

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

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

1 when he decided not to prosecute this case.

2 (Stevens) QUESTION: But, what about the state representa-
3 tive ^{who} ~~to~~ defended this very lawsuit?

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

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

9 MR. HOBBS: Because at the time, Your Honor,
10 we relied heavily, almost exclusively on this Court's decision
11 in Doe versus Commonwealth's Attorney. The State of Georgia
12 was in this case by virtue of the declaratory judgment
13 action and it was decided that a motion to dismiss the
14 1983 lawsuit should be found based upon this Court's decision
15 in Doe versus Commonwealth's Attorney.

16 (Stevens) QUESTION: I can understand why that would win
17 the lawsuit for you, but I find it puzzling as to how that
18 vindicates the public interest that this statute was suppose
19 to serve to stop this kind of conduct.

20 MR. HOBBS: Well, I think --

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

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

1 maintaining the statute on our books.

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

5 (Sterns) QUESTION: It would have been very easy in this
6 case, in this instance.

7 MR. HOBBS: Perhaps so.

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

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

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

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

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

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

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

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

1 interrupted and misshapen.

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

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

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

15 Thank you very much, Your Honor.

16 CHIEF JUSTICE BURGER: Mr. Tribe?

17 ORAL ARGUMENT OF LAURENCE TRIBE, ESQ.

18 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

17 MR. TRIBE: Yes.

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

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

25 QUESTION: To the place?

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

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

11 (Powell) QUESTION: What about incest in the private
12 home?

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

20 (Powell) QUESTION: So, the limiting principle is limited
21 to sodomy. Is that a principle?

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

1 non-commercial in the privacy of the home.

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

10 Now, in their theory, even if this occurs in
11 the home, under their theory as long as the state says
12 the majority of our legislators disapprove of this conduct
13 and, indeed, there is a long history of disapproving things¹
14 that might lead to greater intimacies among unmarried people
15 we can outlaw it, not just outlaw it, but we can resist
16 a request for more particularized explanation of why.

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

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

1 some form of ^{hei} heightened scrutiny.

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

17 (Burger) QUESTION: I am not sure that you have answered Jus
18 Powell's question about incest in the privacy of the home?

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

1 to say that a --
2 (Burger) QUESTION: Suppose it is parent and adult child.
3 Those are two consenting adults then perhaps.

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

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

16 (Rehnquist) QUESTION: Mr. Tribe, your line of reasoning
17 would make the Edmonds Act unconstitutional, would it not?

18 MR. TRIBE: The Edmonds Act --

19 (Rehnquist) QUESTION: The Edmonds Act forbade the -- the
20 Moral Act forbade polygamy and the Edmonds Act forbade
21 cohabitation by one who is already married.

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

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

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

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

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

1 special relationships, therefore, minimum rationality would
2 suffice.

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

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

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

19 MR. TRIBE: Certainly, Justice Powell.

20 QUESTION: And, a public toilet, of course?

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

22 QUESTION: What about a hotel room overnight?

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

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

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

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

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

18 The actual language that I think is operative
19 at page 552 of the Harlan dissent is that he would not
20 suggest -- He says that "adultery, homosexuality, fornica-
21 tion and incest are^{NOT} immune from criminal inquiry however
22 privately practiced."

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

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

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

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

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

1 contraceptives because indirectly that will make --
2 (Stevens) QUESTION: What you are saying is that it would
3 implicate your second limiting principle, but not carry
4 the day.

5 MR. TRIBE: Exactly, Justice Stevens.

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

8 MR. TRIBE: I would say --

9 (Stevens) QUESTION: One could argue that the reason for
10 discouraging it is to encourage marriage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 (*Rehnquist*) QUESTION: Then he just wrote that part of his
14 dissent in a fit of absent-mindedness?

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

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

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

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

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

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

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

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

1 unconstitutional and --

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

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

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

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

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

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

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

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

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

4 (White) QUESTION: Professor, what provision of the
5 Constitution do you rely on or we should rely on to strike
6 down this statute?

7 MR. TRIBE: The Liberty Clause of the Fourteenth
8 Amendment, Justice White, as given further meaning and
9 content by a ^{course} ~~series~~ of decisions over half a century.

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

12 (White) QUESTION: Which cases do you particularly rely
13 on?

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

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

25 And, with respect to both, we rely on the

1 fundamental principle recognized in the concurring opinion
2 in Kelly v. Johnson that important intrusions upon liberty
3 are not to be upheld on a form of review so ^{ef} differential
4 ^{at} though it might be appropriate in ^a regimented context such
5 as the polic^e or military. This Court has never held it
6 appropriate in dealing with all citizens in the privacy
7 of their home.

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

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

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

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

7 If the entire line of decisions is not to be
8 repudiated root and branch, it has to stand for some
9 generalizable principle of the kind that the majority
10 opinion in the Jaycees case endorsed where the Court
11 expressly rejected the idea of a methodology that would
12 proceed by specific categories unmentioned in the
13 Constitution like marriage and family and in favor of the
14 more functional approach that would look to the distinctivel
15 personal aspects of life that are being regulated in setting
16 distinguished, as the Court put it, by ^{Smallness,} ~~solace,~~ selectivity
17 and seclusion.

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

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

1 of big brother⁺_^ dictate every detail of intimate life in
2 the home.

3 What sense would it make to say that the govern-
4 ment cannot order its regiments in the home, if it could
5 regiment every detail of life in the home? What sense
6 does it make to use the apparatus of the Fourth Amendment
7 with the controversial exclusionary rule to protect the
8 privacy of the home if the Constitution is insensitive
9 to the substantive privacies of the life within the home?

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

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

23 We are saying that there is a fundamental right
24 to restrict government's intimate regulation of the privacie
25 of association^{al}, ^{life} like in the home. The principle that we

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

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

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

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

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

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

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

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

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

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

1 it is an irresponsible liaison.

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

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

12 MR. TRIBE: That is right.

13 (Stevens) QUESTION: What is your understanding of the
14 purpose or utility of the law of the state in this case?

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

1 required.

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

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

18 MR. TRIBE: Yes.

19 (O'Connor) QUESTION: Now, what suffices here?

20 MR. TRIBE: As to the first, if the State of
21 Georgia were simply defending -- Might I finish the answer
22 to this question, Mr. Chief Justice? (Red light on here)

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

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

4 As to avoiding the spread of communicable
5 diseases, the American Public Health Association, at page
6 27 of the amicus brief, they think that this law and laws
7 like it would be counter-productive to that end, but you
8 don't even reach that issue until you have some kind of
9 meaningful inquiry.

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

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

16 Thank you.

17 CHIEF JUSTICE BURGER: Do you have anything furthe
18 Mr. Hobbs?

19 ORAL ARGUMENT OF MICHAEL E. HOBBS, ESQ.

20 ON BEHALF OF THE PETITIONER --REBUTTAL

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

25 Certainly, it cannot invade the privacy of the

1 home and regulate each intimate activity which takes place
2 there.

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

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

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

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

21 Thank you very much, Mr. Chief Justice.

22 CHIEF JUSTICE BURGER: Thank you, gentlemen.

23 The case is submitted.

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

CERTIFICATION

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

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

v. MICHAEL HARDWICK, AND JOHN AND MARY DOE

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

BY Paul A. Richardson

(REPORTER)