COMMENT

Status, Conduct, and Forced Disclosure: What Does *Bowers v. Hardwick* Really Say?

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INTRODUCTION

Citizens of the United States expect a high degree of freedom from governmental intrusion into the intimate details of their personal lives.[1] For example, a married couple regards their sex life as personal and not a matter of government concern.[2] Although the Supreme Court has upheld the right to keep certain personal information private, the United States Constitution does not clearly delineate an individual's right to privacy.[3] As a result, the boundaries of an individual's right to privacy are uncertain.[4]

Despite this confusion, the Supreme Court has determined that a right to privacy is implicit in the Constitution.[5] The Court has framed this

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[1] *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (exploring "the right to be let alone" and characterizing this as "the right most valued by civilized men"); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 99-103 (1949) (discussing importance of liberty and freedom in America); Mark John Kappelhoff, Note, Bowers v. Hardwick*: Is There a Right to Privacy?*, 37 AM. U. L. REV. 487, 487 (1988) (stating that freedom from government intrusion is inherent principle of American society).

[2] *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that states cannot prohibit married couples from using contraceptives in privacy of their home).

[3] *See* Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 495 (1995); Mitchell Lloyd Pearl, Note, *Chipping Away at* Bowers v. Hardwick*: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154, 167 (1988); Melody Torbati, Note, *The Right of Intimate Sexual Relations: Normative and Social Bases For According It "Fundamental Right" Status*, 70 S. CAL. L. REV. 1805, 1816-17 (1997).

[4] *See* Timothy O. Lenz, *"Rights Talk" About Privacy in State Courts*, 60 ALB. L. REV. 1613, 1613-14 (1997) (examining controversy over constitutional right to privacy and role of judges in attempting to clarify extent of these rights); Yao Apasu-Gbotsu et al., Survey on the Law, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 563 (1986) (discussing lack of defined boundaries for right to privacy); Heyward C. Hosch III, Note, *The Interest in Limiting the Disclosure of Personal Information: A Constitutional Analysis*, 36 VAND. L. REV. 139, 145-46 (1983) (critiquing lack of clarity pertaining to extent of individual privacy rights).

[5] *See* Whalen v. Roe, 429 U.S. 589, 600 (1977); *Griswold*, 381 U.S. at 485; Torbati, *supra* note 3, at 1806.

right as fundamental, giving it a heightened degree of constitutional protection.[6] However, determining what is entitled to privacy protection continues to challenge the judiciary.[7] An area of significant dispute is the right to privacy with respect to sexual orientation.[8]

A split of authority between two courts of the United States Courts of Appeals highlights the difficulty in determining whether the right to privacy extends to sexual orientation.[9] Both courts examined the question of whether individuals have the right to keep their sexual orientation private.[10] The Fourth Circuit in *Walls v. City of Petersburg* concluded that there is no right to privacy with respect to sexual orientation.[11] Conversely, the Third Circuit in *Sterling v. Borough of Minersville* determined that an individual's sexual orientation is entitled to privacy protection under the Constitution.[12]

These two courts arrived at contrasting conclusions because of different interpretations of the Supreme Court's decision in *Bowers v. Hardwick*.[13] In *Bowers*, the Court concluded that statutes barring sodomy are constitutional.[14] The Fourth Circuit found that this holding controlled on the issue of privacy protection of sexual orientation.[15] The Third Circuit reached the opposite conclusion.[16]

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[6] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (concluding that personal rights should be deemed fundamental and protected under constitutional guarantee of privacy); Torbati, *supra* note 3, at 1806. *See generally* Herbert v. Louisiana, 272 U.S. 312, 316 (1926) (stating that due process clause requires that state action be consistent with fundamental principles of liberty and justice that lie at heart of our civil and political institutions).

[7] *See* Lenz, *supra* note 4, at 1614 (examining difficulty judiciary faces when interpreting right to privacy); Apasu-Gbotsu, *supra* note 4, at 563 (noting lack of clarity in Supreme Court's direction with respect to right to privacy).

[8] *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 2 (1992) (highlighting confusion left in wake of *Bowers v. Hardwick* on rights regarding sexual privacy); Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2288 (1994) (explaining that Supreme Court has left unanswered issue of privacy with respect to sexual orientation).

[9] *Compare* Sterling v. Borough of Minersville, 232 F.3d 190, 192 (3d Cir. 2000) (holding that sexual orientation is intimate aspect of identity and protected under right to privacy), *with* Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (holding that sexual orientation is not matter that individuals are entitled to keep private).

[10] *Sterling*, 232 F.3d at 192; *Walls*, 895 F.2d at 193.

[11] *Walls*, 895 F.2d at 193.

[12] *Sterling*, 232 F.3d at 192.

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

[14] *Id.* at 196.

[15] *Walls*, 895 F.2d at 193.

[16] *Sterling*, 232 F.3d at 194-95.

This Comment argues that the Third Circuit was correct in finding that the Constitution protects the right to keep sexual orientation private. The constitutionality of statutes criminalizing homosexual sodomy should not dictate this area of the law.[17] Instead, courts must differentiate between an individual's homosexual conduct and an individual's homosexual status.[18] This distinction allows courts to protect status under the right to informational privacy.[19] Although the status/conduct distinction may be blurry at times, courts must strive to treat status and conduct separately.[20] The judiciary's best course is to establish an objective test to facilitate this distinction.

Part I of this Comment summarizes the history of the right to sexual privacy, the right to informational privacy, and the status/conduct distinction. Part II analyzes the Third and Fourth Circuit split over the right to privacy regarding sexual orientation and argues that the Third Circuit's approach is the correct approach. Finally, Part III proposes an objective test for courts to employ in order to determine whether the information concerns status or conduct.

I. BACKGROUND

Although the Constitution does not delineate a specific right to privacy,[21] case law holds that certain fundamental rights exist.[22] These

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[17] *See* G. Sidney Buchanan, *Sexual Orientation Classifications and the Ravages of* Bowers v. Hardwick, 43 WAYNE L. REV. 11, 28 (1996) (asserting that *Bowers* did not address government ability to regulate status); Kappelhoff, *supra* note 1, at 488-90 (examining *Bowers's* impact on right to sexual privacy).

[18] *See* Buchanan, *supra* note 17, at 28-30 (clarifying status/conduct distinction); Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 386 (1994) (arguing for application of status/conduct distinction in arena of sexuality).

[19] *See* Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1436-39 (2001) (examining limits and use of information privacy); Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 145-47 (1991) (discussing right to informational privacy and its application to right to sexual privacy).

[20] *See* Buchanan, *supra* note 17, at 28-30 (clarifying status/conduct distinction); Valdes, *supra* note 18, at 386 (arguing for application of status/conduct distinction in arena of sexuality).

[21] *See* Gostin, *supra* note 3, at 495; Pearl, *supra* note 3, at 167; Torbati, *supra* note 3, at 1816-17.

[22] *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (noting individual interest in avoiding disclosure of personal matters); Roe v. Wade, 410 U.S. 113, 154 (1973) (establishing woman's right to privacy with regard to abortions); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (establishing right to privacy with respect to contraception for unmarried); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (establishing right to

rights have a tradition of protection that long predates the signing of the Constitution.[23] However, the Constitution's silence on the right to privacy left courts struggling to frame this right.[24]

In 1965, the Supreme Court decided *Griswold v. Connecticut*.[25] *Griswold* recognized a right to privacy in the marital bedroom, and in so doing set the stage for the modern debate over the right to privacy.[26] *Griswold*'s progeny extended this right into other areas involving sexual intimacy.[27] However, this line of cases did not define a specific right to informational privacy.[28] The Court first recognized such a right in *Whalen v. Roe*.[29]

Both the right to sexual privacy and the right to informational privacy are at the heart of the debate over forced disclosure of sexual orientation.[30] Also relevant is the Court's distinction between status and conduct in determining the constitutionality of legislation.[31] A careful examination of the above issues reveals an implied right to privacy with regard to sexual orientation.

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privacy within marital relationship); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535-36 (1925) (establishing liberty interest in upbringing and education of children).

[23] *See Griswold*, 381 U.S. at 493-94 (Goldberg, J., concurring) (stating that right to privacy is rooted in tradition and conscience of society); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (summarizing principles underlying constitutional right to privacy).

[24] *See Gostin*, *supra* note 3, at 495 (explaining Constitution's silence on right to privacy); Torbati, *supra* note 3, at 1816-17 (discussing lack of clarity in this area of law due to lack of constitutional guidance).

[25] *Griswold*, 381 U.S. at 479.

[26] *See* Apasu-Gbotsu, *supra* note 4, at 555-58 (asserting that *Griswold* laid foundation for development of right to privacy); Torbati, *supra* note 3, at 1817-18 (framing *Griswold* as first articulation of modern right to privacy).

[27] *See Whalen*, 429 U.S. at 599-600 (noting individual interest in avoiding disclosure of personal matters); *Roe*, 410 U.S. at 154 (establishing woman's right to privacy with regard to abortions); *Eisenstadt*, 405 U.S. at 453 (establishing right to privacy with respect to contraception for unmarried); *Griswold*, 381 U.S. at 485-86 (establishing right to privacy within marital relationship).

[28] *See* Gostin, *supra* note 3, at 495 (examining beginnings of informational right to privacy).

[29] *Whalen*, 429 U.S. at 599-600.

[30] *See generally* Gostin, *supra* note 3, at 495 (explaining informational right to privacy's relevance to current judicial challenges); Apasu-Gbotsu, *supra* note 4, at 555-610 (delineating history of right to sexual privacy and its application to sexual orientation).

[31] *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (applying status/conduct distinction to determine constitutionality of legislation); Buchanan, *supra* note 17, at 28-30 (clarifying status/conduct distinction); Valdes, *supra* note 18, at 386 (elucidating status/conduct distinction).

A. The Supreme Court's Recognition of a Right to Sexual Privacy

Although the Court has never expressly ruled on the right to privacy pertaining to sexual orientation, examining the Court's holdings on the right to sexual privacy in other areas is useful.[32] The Court has examined the issues of reproduction, pornography, and homosexual sodomy.[33] With few exceptions, the Court has extended the right to sexual privacy.[34] However, the Court has been unwilling to extend protection to the act of homosexual sodomy.[35] Although the Court's holding on homosexual sodomy is most relevant to this discussion, understanding the origins of the right to sexual privacy is critical to comprehending the Court's decision in *Bowers*.

1. Reproduction: *Griswold v. Connecticut*

In *Griswold*, the State of Connecticut convicted the Executive Director of Planned Parenthood League of Connecticut and a physician for prescribing contraceptives to married women in violation of a state statute.[36] The statute prohibited married persons from using contraceptives.[37] The Court determined that the statute was unconstitutional, emphasizing that the statute affected the intimate relationship between husband and wife.[38] The government, according to

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[32] *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 744-50 (1989) (chronicling case law pertaining to right to privacy).

[33] *See* Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (establishing constitutionality of statutes criminalizing homosexual sodomy); Roe v. Wade, 410 U.S. 113, 154 (1973) (establishing woman's right to privacy with regard to abortions); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (establishing right to privacy with respect to contraception for unmarried people); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (establishing right to possess and use pornographic material in private); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (establishing right to privacy within marital relationship).

[34] *See* Kappelhoff, *supra* note 1, at 505-06 (noting Court's consistent broadening of right to privacy). *Compare Bowers*, 478 U.S. at 191 (holding that right to privacy does not include homosexual conduct), *with Roe*, 410 U.S. at 153 (finding that right to privacy prevents state interference with abortion decision), *and Griswold*, 381 U.S. at 485-86 (holding law forbidding use of birth control by married couple as invasion of constitutional right to privacy).

[35] *See Bowers*, 478 U.S at 191 (demonstrating Court's unwillingness to extend privacy protection to homosexual sodomy).

[36] *Griswold*, 381 U.S. at 480.

[37] The Connecticut statute read in part, "[A]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.*

[38] *Id.* at 485-86.

the Court, does not belong in a married couple's bedroom.[39]

Writing for the majority, Justice Douglas concluded that the Bill of Rights establishes a zone of privacy for individuals.[40] Taken collectively, Justice Douglas reasoned that the First, Third, Fourth, Fifth, and Ninth Amendments establish a zone in which an individual's right to privacy is protected.[41] Finding the marital relationship to be within this zone of privacy, the Court struck down the Connecticut statute.[42]

In determining the scope of the right to privacy, the Court considered the history and tradition of protecting such a right.[43] This examination provided insight into the possible intent of the Framers of the Constitution.[44] The Court concluded that the right to privacy within the marital relationship is a right that societies have protected throughout history.[45] For this reason, the right to privacy within a marriage is a fundamental right.[46]

After concluding that a fundamental right to privacy in marriage existed, the Court considered whether any state interests necessitated the statute.[47] The Court determined that Connecticut did not have a legitimate interest to balance against criminalizing contraceptive use.[48] By holding that the statute violated the Fourteenth Amendment, the Court demonstrated an unwillingness to allow state statutes to infringe on the well-established privacy right.[49]

Griswold is narrow in its focus.[50] It established constitutional protections for personal choices made within the context of the traditional family.[51] However, this case signaled the beginning of the Supreme Court's development of the right to sexual privacy.[52] The right

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[39] *See id.*

[40] *Id.* at 484.

[41] *Id.*

[42] *Id.* at 485-86.

[43] *Id.* at 493 (Goldberg, J., concurring).

[44] *See id.* at 494.

[45] *Id.* at 495-96.

[46] *Id.* at 499.

[47] *Id.* at 497-98.

[48] *Id.*

[49] *See id.* at 499.

[50] *See* Apasu-Gbotsu, *supra* note 4, at 555-57 (explaining holding in *Griswold*).

[51] *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 220 (1987) (noting *Griswold*'s extension to rights within traditional family relationships); Apasu-Gbotsu, *supra* note 4, at 567 (noting *Griswold*'s affect on rights within family).

[52] *See* Apasu-Gbotsu, *supra* note 4, at 555 (noting Court's emphasis on effect of statute on intimate relationship between married couple).

to privacy quickly began to expand following *Griswold*.[53] The Supreme Court found a privacy right pertaining to contraception use by unmarried individuals.[54] Also, the Court extended the right to privacy to abortion.[55] Taking these decisions together, the right to privacy appears to protect some forms of private, adult, consensual sexual behavior from governmental intrusion.[56]

2. Pornography: *Stanley v. Georgia*

In *Stanley v. Georgia*, the Supreme Court acknowledged a constitutional right to possess and use pornographic materials in private.[57] The Court stated that this right is protected even when the materials are banned from sale.[58] In essence, the Court prohibited punishment for the private

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[53] Conkle, *supra* note 51, at 220 (noting rapid expansion of right to privacy post-*Griswold*).

[54] The case of *Eisenstadt v. Baird* involved a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons. Eisenstadt v. Baird, 405 U.S. 438, 440-41 (1972). The Supreme Court determined that this statute discriminated against the unmarried and thus was unconstitutional. *Id.* at 453-54. The Court based its decision both on the equal protection clause of the Fourteenth Amendment and the right to privacy. *Id.* at 453-55. The Court reasoned that the right to privacy is an individual's right regardless of marital status. *Id.* at 454. *Eisenstadt* established the right of an individual to be free from governmental intrusion in the decision of whether or not to conceive a child. *Id.* at 453. Essentially, *Eisenstadt* protects unmarried heterosexual individuals in intimate associations. *See* Pearl, *supra* note 3, at 177-79 (explaining protections of *Eisenstadt*). This case is significant because it extended recognition of the right to privacy beyond the marital unit to the individual. *See Eisenstadt*, 405 U.S. at 453-55.

[55] The Court examined the privacy issues that abortion raises in *Roe v. Wade*. Roe v. Wade, 410 U.S. 113, 153-55 (1973). *Roe* presented the difficult problem of weighing the rights of the mother against those of the unborn fetus. *Id.* at 153-64. Two valuable pieces of information should be taken from *Roe*. First, *Roe* established a right to privacy for women and their bodies. *See id.* at 155. A woman's rights pertaining to abortion affect her sexuality and thus are entitled to privacy protection. *See* Apasu-Gbotsu, *supra* note 4, at 586-87 (noting connection between right to abortion and right to sexual privacy). Second, through the advent of the trimester system, the Court built upon the *Stanley* balancing test. *See Roe*, 410 U.S. at 163-64. The Court weighed the rights of the mother against the state health concerns. *See id.* (establishing trimester system in attempt to balance fundamental right of mother against state health concerns). *Roe* symbolizes a continuing trend within the Court to allow people to be free from government intrusion in the personal and intimate spheres of their lives. *See id.* at 155; Kappelhoff, *supra* note 1, at 505 (mentioning Court's consistent broadening of right to privacy).

[56] *See Roe*, 410 U.S. at 155-56 (holding that abortion is fundamental right); *Eisenstadt*, 405 U.S. at 453 (holding that unmarried heterosexual individuals have right to be free from unwanted pregnancies); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that married couples have right to use contraceptives); Apasu-Gbotsu, *supra* note 4, at 586-88 (asserting meaning of *Griswold*, *Eisenstadt*, and *Roe* when examined in conjunction).

[57] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[58] *See id.* at 567-68.

possession of pornographic materials at home.[59] The Court based its decision on the First Amendment and the right to privacy.[60] With respect to the First Amendment, the Court concluded that the government has no right to dictate what people read or watch in their homes.[61] With respect to the right to privacy, the Court determined that the right to privacy protects against government scrutiny of an individual's activities in the home.[62]

The Court in *Stanley* also articulated a balancing test that is relevant today.[63] This test precludes a state from banning obscenity unless the state interest outweighs the intrusion on the individual's right to privacy.[64] The right in *Stanley* was the right to possess and use pornography in private.[65] The Court characterized the state interest in *Stanley* as weak when compared to the strong right to be free from government scrutiny.[66] *Stanley* sets a high burden that the government must overcome if it is going to intrude into the personal lives of individuals.[67]

3. Sodomy: *Bowers v. Hardwick*

The Court's willingness to broaden the right to privacy came to an abrupt end in 1986 when it addressed the issue of homosexual sodomy.[68] *Bowers v. Hardwick* involved the constitutionality of a Georgia statute that criminalized the act of sodomy.[69] Police arrested the respondent for committing the crime of homosexual sodomy in the bedroom of his home.[70] Although the district attorney chose not to present the matter to the grand jury, the respondent challenged the constitutionality of the Georgia statute.[71]

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[59] *See* Kappelhoff, *supra* note 1, at 498 (discussing limits *Stanley v. Georgia* imposed on punishing possession of pornography).

[60] *Stanley*, 394 U.S. at 564-65.

[61] *Id.* at 565.

[62] *Id.* at 564.

[63] *See* Apasu-Gbotsu, *supra* note 4, at 583 (highlighting balancing test that Court established).

[64] *See id.*

[65] *See id.*

[66] *Stanley*, 394 U.S. at 565.

[67] *See id.* at 565-66; Apasu-Gbotsu, *supra* note 4, at 583 (clarifying *Stanley* balancing test and elaborating on hurdles it created).

[68] *See* Bowers v. Hardwick, 478 U.S. 186, 188 (1986).

[69] *See id.*

[70] *See id.*

[71] *Id.*

The district court granted the defendant's motion to dismiss, asserting that the plaintiff had failed to state a claim.[72] The court of appeals concluded that the statute violated the plaintiff's fundamental rights and reversed the district court's grant of summary judgment.[73] According to the Eleventh Circuit, this fundamental right exceeded the scope of state regulation due to its private and intimate nature.[74] The Supreme Court addressed the issue of whether the Constitution confers a fundamental right on an individual to engage in sodomy.[75] The Court reversed the judgment of the court of appeals.[76]

The Court concluded that the Georgia statute was constitutionally valid.[77] The Court reasoned that sodomy is not a fundamental right that the Constitution protects.[78] Through an examination of historical tradition, the Court determined that this was not the type of right that the Founding Fathers intended to ensure.[79] The Court examined the privacy rights that it had considered in the past and distinguished the present issue.[80] The Court noted the potentially dangerous slippery slope it could find itself on if it began creating new fundamental rights.[81] For these reasons, the Court did not apply the compelling state interest test that it had used in earlier right to privacy cases.[82] Instead, the Court applied a lower standard of review and upheld the Georgia statute.[83]

Interpreting the meaning of the holding in *Bowers* is at the heart of the current circuit court split.[84] *Bowers* stands for the proposition that a state may criminalize sodomy.[85] However, the Court did not clarify whether its decision not to protect the act of homosexual sodomy means that it is

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[72] *Id.*

[73] *Id.* at 189.

[74] *Id.*

[75] *Id.* at 190.

[76] *Id.*

[77] *Id.* at 189.

[78] *Id.* at 189, 191, 196.

[79] *Id.* at 192-93.

[80] *Id.* at 190-91.

[81] *Id.* at 191.

[82] *See* Kappelhoff, *supra* note 1, at 501-03 (clarifying standard that Court applied in *Bowers v. Hardwick*).

[83] *Bowers*, 478 U.S. at 196.

[84] At present, a split exists between the Third and Fourth Circuits of the United States Courts of Appeals. *See* Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000); Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990).

[85] *See* Joseph Robert Thornton, Note, Bowers v. Hardwick: *An Incomplete Constitutional Analysis*, 65 N.C. L. REV. 1100, 1102, 1123 (1987) (explaining holding in *Bowers* and arguing that decision failed with respect to constitutional analysis).

unwilling to extend any protection to homosexuality.[86] In the area of pornography, for example, the Court protected a right of possession despite the illegality of the material.[87] Arguably, sexual orientation is analogous and an individual may retain a right to privacy pertaining to disclosure.[88] Framing the Court's decision in *Bowers* as an attack on the act of sodomy leaves open the possibility of protecting an individual's sexual orientation.[89] This type of protection would qualify as a right to informational privacy, in other words, a right to keep highly personal information private.[90]

B. The Supreme Court's Recognition of a Right to Informational Privacy

The right to informational privacy is rooted in substantive due process analysis.[91] It stems from Griswold and its progeny.[92] The watershed event in this area was the Supreme Court's decision in *Whalen v. Roe*.[93]

1. Protection Against Collection: *Whalen v. Roe*

Whalen explicitly addressed the compelled disclosure of intimate information to the government.[94] In *Whalen*, the Court examined the New York State Controlled Substance Act of 1972.[95] This Act required the collection of personal information on all prescription holders of

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[86] *See id.* at 1122.

[87] Stanley v. Georgia, 394 U.S. 557, 568 (1969) (holding that First and Fourteenth Amendments prohibit criminalizing private possession of illegal, obscene material).

[88] *See* Thornton, *supra* note 85, at 1108 (drawing connection between issue in *Bowers* and pornography issue in *Stanley*).

[89] *See* Buchanan, *supra* note 17, at 28-30 (understanding sodomy as conduct leaves open possibility of protecting status); Valdes, *supra* note 18, at 386 (examining status/conduct distinction).

[90] *See* Gostin, *supra* note 3, at 495 (articulating informational right to privacy); Solove, *supra* note 19, at 1430-32 (defining right to information privacy); Richard C. Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. ILL. U. L. REV. 479, 480-81 (1990) (discussing history of right to informational privacy in determining its definition).

[91] *See* Turkington, *supra* note 90, at 495-96 (noting roots of informational privacy in substantive due process analysis); Chlapowski, *supra* note 19, at 135 (explaining that substantive due process analysis is source of informational privacy). Substantive due process is "the doctrine that the Due Process Clauses of the 5th and 14th Amendment require legislation to be fair and reasonable in content and to further legitimate governmental objective." BLACK'S LAW DICTIONARY 517 (7th ed. 1999).

[92] *See* Turkington, *supra* note 90, at 496; Chlapowski, *supra* note 19, at 139-41.

[93] Whalen v. Roe, 429 U.S. 589, 600-01 (1977).

[94] *See id.* at 591.

[95] *Id.*

controlled substances and mandated a centralized filing system for prescription drugs.[96] Doctors and patients objected to the law because of its invasive nature.[97] The law forced public disclosure of patient information and prescription drug use.[98] The Court applied a balancing test and concluded that the state health interest outweighed the individual privacy interest at stake.[99] New York was combating distribution of prescription drugs on the black market.[100]

Nevertheless, in making this determination, the Court asserted that the Constitution implicitly protects certain zones of privacy.[101] These zones encompass an individual's right to avoid disclosure of personal matters.[102] Although the Court concluded that this particular Act did not substantially violate any rights, its decision highlights an important right.[103] The Court addressed the issue of an individual's right to preclude the government from gathering or releasing certain private information.[104] Arguably, this conclusion is controlling on the issue of forced disclosure of sexual orientation.[105]

2. Protection Against Dissemination: *Nixon v. Administrator of General Services*

In *Nixon v. Administrator of General Services*, decided just four months after *Whalen*, the Court acknowledged a complimentary right to privacy with respect to dissemination of personal information.[106] Not long after former President Richard Nixon's resignation, former President Gerald Ford signed into law a statute that required Nixon's presidential materials to undergo a screening process.[107] The statute called for a

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[96] *Id.* at 591, 593-95.

[97] *Id.* at 595.

[98] *See id.* at 601-02.

[99] *See id.* at 599-600 (noting balance of interests in previous cases).

[100] *Id.* at 591-92.

[101] *See id.* at 605.

[102] *See id.* at 605-06.

[103] *See* Gostin, *supra* note 3, at 495-96 (recognizing importance of *Whalen* in body of case law that establishes right to informational privacy).

[104] *See Whalen*, 429 U.S at 600.

[105] *See* Jeffrey P. Donohue, Note and Comment, *Developing Issues Under the Massachusetts 'Physician Profile' Act*, 23 AM. J.L. & MED. 115, 140-42 (1997) (considering lower courts' interpretation of *Whalen*). *See generally* Gostin, *supra* note 3, at 489-92 (discussing unwanted disclosure of sensitive information, specifically sexual orientation, and right to informational privacy).

[106] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 459-60 (1977).

[107] *Id.* at 432-33.

federal archivist to perform the screening.[108]

The Court upheld the statute for two reasons.[109] First, the screening process was relatively unobtrusive.[110] Second, Nixon had a low expectation of privacy due to his high public profile.[111] However, this case is noteworthy because the Court acknowledged an important right to exclude certain personal information from dissemination.[112] Nixon maintained a right to privacy with respect to his personal communications.[113] The Court placed a high degree of importance on the private nature of the screening process.[114] Only because the statute took into account Nixon's privacy interest did it pass constitutional muster.[115] Taken together, *Whalen* and *Nixon* establish a solid foundation for the right to informational privacy.[116]

3. Further Protections: Medical Records, Criminal Records, Financial Information, Mental Illness, and AIDS

The designation of the late twentieth century as the Information Age highlights the extreme relevance of the right to informational privacy.[117] Information is now a business and, as a result, the protections of *Whalen* and *Nixon* have extended to various arenas.[118] Following *Whalen*, courts have continued to expand the protection of personal medical records, solidifying a constitutional right to privacy of medical records.[119] A

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[108] *See id.* at 433-34

[109] *See id.* at 453-54, 462.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 465; *see* Gostin, *supra* note 3, at 496-97 (arguing that lower courts have read that *Nixon* affords tightly circumscribed right to informational privacy).

[113] *Nixon*, 433 U.S. at 466.

[114] *See id.* at 465 n.28.

[115] *Id.* at 466.

[116] *See id.*; Whalen v. Roe, 429 U.S. 589, 600-01 (1977); Gostin, *supra* note 3, at 497 (explaining *Whalen* and *Nixon's* creation of right to informational privacy).

[117] *See* Chlapowski, *supra* note 19, at 150 (describing advent of Information Age); *see also* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 3-4 (1991) (analyzing effect of technology on right to informational privacy).

[118] *See* Chlapowski, *supra* note 19, at 133.

[119] *See* Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1134, 1143 (3d Cir. 1995) (extending right to privacy to prescription drug records); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577-80 (3d Cir. 1980) (establishing proper boundaries for company when requesting employee medical information based upon employee's right to informational privacy).

limited right to privacy with respect to arrest records also exists.[120] For example, one court determined that the Federal Bureau of Investigation is not free to disseminate arrest records outside the federal government for employment, licensing, or related purposes.[121] Courts have reached similar decisions with respect to disclosure of personal financial information and disclosure of psychiatric records.[122]

A more illuminating development is one court's recent protection of information concerning AIDS status.[123] In *Doe v. Borough of Barrington*, an individual voluntarily disclosed that he was infected with the AIDS virus to the police.[124] The district court held that the police violated the individual's right to privacy when they subsequently disseminated the information.[125] The court based its holding in part on society's stigmatization of people diagnosed with the AIDS virus.[126] Homosexuals, a disfavored minority, face analogous societal condemnation.[127] Arguably, a heightened degree of privacy protection is required when evaluating privacy with regard to sexual orientation.[128] AIDS raises the important distinction between status and conduct.[129] This status/conduct distinction is at the heart of the split between the

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[120] *See* Utz v. Cullinane, 520 F.2d 467, 481-83 (D.C. Cir. 1975) (holding that FBI is not free to disseminate preconviction or post-exoneration arrest records); Menard v. Mitchell, 328 F. Supp. 718, 727-28 (D.D.C. 1971) (holding that arrest record cannot be released to prospective employers).

[121] *Menard*, 328 F. Supp. at 727.

[122] *See* Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983) (applying right to informational privacy to financial information); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1043 (D. Haw. 1979) (holding that psychiatric records qualify under right to informational privacy); *see also Southeastern Pa. Transp. Auth.*, 72 F.3d at 1138 (holding that right to privacy extends to prescription drug records, however, right is not absolute).

[123] *See* Doe v. Borough of Barrington, 729 F. Supp. 376, 382 (D.N.J. 1990) (holding that Constitution protects individuals as well as family from government disclosure of AIDS status).

[124] *Id.* at 378.

[125] *Id.* at 384-85.

[126] *See id.*

[127] *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1468-70 (1992) (articulating homosexuals' place outside mainstream society through analysis of violence against homosexuals); Chlapowski, *supra* note 19, at 156 (stating that homosexuals are disfavored group in American society).

[128] *See* Thomas, *supra* note 127, at 1469-76 (asserting that Eight Amendment should be used to render laws against homosexual sodomy constitutionally suspect); Chlapowski, *supra* note 19, at 156-57.

[129] *See* Buchanan, *supra* note 17, at 28-30 (understanding sodomy as conduct leaves open possibility of protecting status); Valdes, *supra* note 18, at 386 (examining status/conduct distinction).

Third and Fourth Circuits.[130]

C. The Status/Conduct Distinction

Homosexuality involves the status of being a homosexual and, possibly, the act of homosexual sodomy.[131] However, these two components, status and conduct, are distinct.[132] Punishing an individual for specific behavior seems just.[133] Conversely, punishing an individual for a presumably immutable characteristic seems unfair.[134] Although the Supreme Court has not acknowledged the status/conduct distinction with respect to homosexuality, exploring this distinction in other areas of the law is valuable.[135] Moreover, it lends insight into understanding the Third and Fourth Circuits' interpretation of *Bowers*.[136]

The seminal case on this issue is *Robinson v. California*.[137] *Robinson* established that a state cannot punish an individual for being addicted to narcotics.[138] A California statute had criminalized drug addiction.[139] Pursuant to the statute, the police arrested the defendant for having needle marks and scars on his arm.[140] The officers based this arrest on

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[130] *Compare* Sterling v. Borough of Minersville, 232 F.3d 190, 194-95 (3d Cir. 2000) (refusing to limit privacy protection regarding sexual orientation), *with* Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (limiting privacy right by allowing police background questionnaire to inquire about applicant's same-sex relations).

[131] *See* Watkins v. United States Army, 875 F.2d 699, 712 n.3 (9th Cir. 1989) (distinguishing between homosexual orientation and homosexual conduct); Buchanan, *supra* note 17, at 28-30 (analyzing distinction between status and conduct); Valdes, *supra* note 18, at 386 (examining status/conduct distinction).

[132] *See supra* note 131 and accompanying text.

[133] *Compare* Powell v. Texas, 392 U.S. 514, 532-34 (1968) (holding statute criminalizing public drunkenness as constitutional because it punished conduct not status), *with* Robinson v. California, 370 U.S. 660, 666-67 (1962) (holding statute that punished status of being drug addict unconstitutional).

[134] *See Robinson*, 370 U.S. at 666 (holding that law criminalizing status violates Eighth and Fourteenth Amendments); Francis v. Resweber, 329 U.S. 459, 464-65 (1947) (examining cruel and unusual punishment with respect to issuance of new death warrant when first execution failed due to mechanical difficulties).

[135] *See infra* notes 274-76 and accompanying text.

[136] *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (holding statutes criminalizing homosexual sodomy constitutional); Sterling v. Borough of Minersville, 232 F.3d 190, 194-95 (3d Cir. 2000) (determining that *Bowers* does not control right to privacy with respect to sexual orientation); Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (finding *Bowers* is controlling on right to privacy with respect to sexual orientation).

[137] *Robinson*, 370 U.S. 660 (1962); *see also* Valdes, *supra* note 18, at 391 (heralding *Robinson* as seminal case on status/conduct distinction).

[138] *Robinson*, 370 U.S. at 666-67.

[139] *Id.* at 661.

[140] *Id.* at 661-62.

the defendant's presumed status as a drug user, not on actual conduct.[141] At trial, the judge instructed the jury that the defendant could be convicted if he was of the "status" of a drug addict.[142] The jury found the defendant guilty.[143] The Supreme Court reversed, stating that the statute inflicts cruel and unusual punishment in violation of the Constitution.[144] The Court concluded that it was unconstitutional to punish status alone.[145] The Court's decision in *Robinson* obligates lower courts to distinguish between status and conduct.[146]

The Court decided *Bowers* twenty-four years after deciding *Robinson*.[147] Arguably, the existence of *Robinson* mandates a specific interpretation of *Bowers*.[148] It is this issue of interpretation that has caused division among the circuits.[149]

II. THE THIRD AND FOURTH CIRCUIT COURT SPLIT

At present, a split exists between the Third and Fourth Circuits concerning the right to privacy regarding sexual orientation.[150] Specifically, the debate hinges upon whether the government can force individuals to disclose their sexual orientation.[151] The cases at odds are

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[141] *Id.*

[142] *Id.* at 663.

[143] *Id.* at 661.

[144] *Id.* at 667.

[145] *See id.*

[146] *See* Watkins v. United States Army, 875 F.2d 699, 725 (9th Cir. 1989) (stating that sexual orientation, status, cannot be criminalized as result of *Robinson*); Valdes, *supra* note 18, at 395 (stating that Supreme Court's interpretation of Constitution makes distinguishing between status and conduct obligatory). The Court affirmed this point in its analysis of a conviction under a Texas statute that criminalized public drunkenness. Powell v. Texas, 392 U.S. 514, 532-34 (1968). The Court upheld the defendant's conviction because the statute criminalized public behavior not status. *Id.* at 534-35. The Court applied the status/conduct distinctions established by *Robinson* to reach its conclusion. *See id.*; David Robinson, Jr., Powell v. Texas: *The Case of the Intoxicated Shoeshine Man Some Reflections a Generation Later By a Participant*, 26 AM. J. CRIM. L. 401, 402-03, 429 (1999) (examining application of *Robinson* to *Powell*).

[147] *See* Bowers v. Hardwick, 478 U.S. 186, 186 (1986); *Robinson*, 370 U.S. at 660.

[148] *See Watkins*, 875 F.2d at 725 (stating that sexual orientation, status, cannot be criminalized as result of *Robinson*); Valdes, *supra* note 18, at 395 (stating that Supreme Court's interpretation of Constitution makes distinguishing between status and conduct obligatory).

[149] In this instance, division refers to the circuit court split involving the Third and Fourth Circuits. *See* Sterling v. Borough of Minersville, 232 F.3d 190, 194-95 (3d Cir. 2000); Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990).

[150] *See Sterling*, 232 F.3d at 194-95; *Walls*, 895 F.2d at 193.

[151] *See Sterling*, 232 F.3d at 194-95; *Walls*, 895 F.2d at 193.

Walls v. City of Petersburg and *Sterling v. Borough of Minersville.*[152]

A. The Fourth Circuit's Position

In *Walls*, the Fourth Circuit relied on *Bowers* to determine the right to privacy regarding forced disclosure of sexual orientation.[153] The appellant, Teyonda N. Walls, sued her employer, alleging a violation of 42 U.S.C. § 1983.[154] Walls claimed that her superiors dismissed her from her job in violation of her constitutionally protected right to privacy.[155]

In 1985, Walls began employment as the administrator of the City of Petersburg's Community Diversion Incentive Program (CDI).[156] The CDI provided alternative sentencing for non-violent criminals.[157] The following year, the local government transferred the CDI from the City Manager's Office to the City's Bureau of Police.[158] As a condition of the transfer, the Bureau of Police required all CDI employees to undergo standard background checks.[159] This condition applied to all employees at the Bureau of Police.[160]

In March of 1988, the Bureau of Police discovered that Walls had not completed her background questionnaire.[161] Walls' supervisors, Project Administrator Lawrence R. Norway and Captain William A. Vaughan, notified her that she must complete the questionnaire.[162] Walls objected to four specific questions on the form.[163] The relevant question to this discussion is question forty. It stated, "[H]ave you ever had sexual relations with a person of the same sex?"[164] Walls' supervisors suspended her without pay as a result of her refusal to complete the questionnaire.[165] Norway recommended to the City Manager, Richard M. Brown, that he fire Walls.[166]

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[152] *Sterling*, 232 F.3d 190; *Walls*, 895 F.2d 188.
[153] *See Walls*, 895 F.2d at 193.
[154] *Id.* at 189.
[155] *Id.*
[156] *Id.* at 190.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*

Brown later concluded that the current policy requiring background checks did not apply to Walls.[167] He had Walls reinstated with back pay.[168] However, Brown established a new policy requiring employees in Walls's position to fill out the questionnaire.[169] Again, Walls refused to complete the questionnaire.[170] Brown then fired Walls for failing to answer all of the questions on the questionnaire.[171]

The district court granted summary judgment for the municipality and its officials.[172] The Fourth Circuit affirmed.[173] With respect to question forty, the court concluded that *Bowers* controlled.[174] The Fourth Circuit reasoned that the Supreme Court's determination regarding homosexual sodomy dictated privacy rights relating to sexual orientation.[175] In other words, *Bowers* mandates that the constitutional right to privacy not extend to homosexual sodomy.[176]

The court dismissed Walls's argument that her sexual orientation was within her zone of privacy.[177] Although the court acknowledged that this type of personal information might not be relevant to Walls's employment, it was not, in the court's opinion, information that Walls had a right to keep private.[178] Using *Bowers* as the paradigm, the court determined that the Constitution does not protect Walls' sexual orientation.[179] This decision is at odds with the Third Circuit's conclusion that one has a right to privacy with regard to sexual orientation.[180]

B. The Third Circuit's Position

In *Sterling*, the Third Circuit examined the right to privacy regarding sexual orientation.[181] The relevant issue was whether a police officer's

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[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at 190, 195.
[174] *Id.* at 193.
[175] See *id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *See* Sterling v. Borough of Minersville, 232 F.3d 190, 192 (3d Cir. 2000).
[181] *Id.*

threat to disclose the sexual orientation of an arrestee to his family violated the arrestee's constitutional right to privacy.[182] The court determined that it did.[183]

In *Sterling*, Marcus Wayman, an eighteen-year-old man, was parked in a parking lot adjacent to a beer distribution company with a seventeen-year-old male friend.[184] The beer distribution company had been the site of previous burglaries.[185] Officer Scott Wilinsky, a police officer for the Borough of Minersville, spotted Wayman's car and became suspicious because the vehicle's headlights were off.[186] He called for back up.[187] The officers, Wilinsky and Thomas Hoban, found no evidence of a burglary.[188] However, it became evident to the police that the young men had been drinking.[189] They were also evasive when asked about their reason for being in the parking lot.[190] The officers searched the vehicle and found two condoms.[191] Wilinsky testified that both Wayman and his male friend acknowledged that they were homosexuals and were in the parking lot to engage in consensual sex.[192] Wilinsky and Hoban arrested the two men for underage drinking and took them to the Minersville police station.[193]

While at the police station, Wilinsky lectured the men on the Bible and discouraged their engagement in homosexual behavior.[194] He then informed Wayman that he was going to disclose Wayman's sexual orientation to his family if Wayman did not.[195] Distraught, Wayman notified his friend that he was going to kill himself.[196] After being released, Wayman committed suicide in his home.[197]

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[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at 192-93.
[187] *Id.* at 192.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.* at 192-93.
[195] *Id.* at 193.
[196] *Id.*
[197] *Id.*

Following her son's suicide, Wayman's mother filed suit as executrix of her son's estate under 42 U.S.C. § 1983.[198] She sued the Borough of Minersville, Officers Wilinsky and Hoban, and the Minersville Chief of Police.[199] After discovery, the defendants filed for summary judgment.[200] With respect to the right to privacy, the district court denied summary judgment.[201] Also, the district court held that Wilinsky and Hoban were not entitled to qualified immunity[202] because their conduct violated Wayman's established right to privacy.[203] Officers Wilinsky and Hoban appealed on the issue of qualified immunity.[204] The Third Circuit affirmed the order of the district court.[205]

Within this context, the Third Circuit examined the relevant right to privacy issue.[206] In examining the issue of qualified immunity, the court applied the Supreme Court's qualified immunity standard.[207] This standard looks at whether the officer's conduct violated clearly established constitutional rights of which a reasonable officer would have known.[208] The court concluded that Wayman had a protected privacy interest with respect to his sexual orientation.[209] Wilinsky violated that interest when he threatened to disclose Wayman's sexual orientation.[210] This privacy interest was clearly established at the time of Wilinsky's violation.[211] Moreover, Wilinsky's own actions following the arrest demonstrated his sensibility about the private nature of an

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[198] *Id.*

[199] *Id.* This examination will focus exclusively on Wayman's Fourteenth Amendment right to privacy, however, Wayman's mother's suit alleged multiple constitutional violations. *See id.* Wayman's mother asserted that Wilinsky and Hoban illegally arrested Wayman. *Id.* Furthermore, she alleged that the police violated Wayman's right to equal protection. *Id.*

[200] *Id.*

[201] *Id.*

[202] Qualified immunity is civil liability immunity for public officials who are carrying out discretionary functions. Immunity exists as long as the conduct involved does not violate clearly established constitutional or statutory rights. BLACK'S LAW DICTIONARY 753 (7th ed. 1999).

[203] *Sterling*, 232 F.3d at 193.

[204] *Id.*

[205] *Id.* at 198.

[206] *Id.* at 193.

[207] *See* Saucier v. Katz, 533 U.S. 194, 200-07 (2001) (clarifying Supreme Court's qualified immunity analysis).

[208] *Id.* at 201-02.

[209] *Sterling*, 232 F.3d at 196. *But see id.* at 198 (Stapleton, J., dissenting) (finding that there was no clearly established law warranting denial of qualified immunity).

[210] *Id.* at 197.

[211] *Id.* at 198.

individual's sexual orientation.[212] Wilinsky chose not to include the suspicion of homosexual activity in his police report due to the intrinsically personal and private nature of the information.[213]

The court's analysis systematically considered the case law pertaining to right to privacy issues.[214] In reviewing cases such as *Griswold*, *Whalen*, *Nixon*, and *Bowers*, the court noted the unclear boundaries attributed to an individual's right to privacy.[215] However, the court concluded that Wayman's sexual orientation was entitled to privacy protection in this instance.[216]

The court based its conclusion primarily on *Whalen*.[217] The Third Circuit determined that Wayman's sexual orientation was an intimate aspect of his personality.[218] In this context, the Constitution entitled Wayman to privacy protection that he did not receive.[219] Also, the government did not have a substantial interest in the disclosure of this information.[220] There was no viable state interest against which to balance the forced disclosure of Wayman's sexual orientation.[221] Wilinsky based his decision to threaten disclosure on a moral duty that he believed he owed the community.[222] The court ruled that this did not qualify as a credible state interest.[223]

The court's decision to find a right to privacy with respect to sexual orientation hinged upon its conclusions regarding *Bowers*.[224] In fact, the

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[212] *Id.* at 197-98.

[213] *Id.*

[214] *Id.* at 193-98.

[215] *Id.*; *see* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 455-65 (1977) (establishing right to informational privacy by examining rights of former President Nixon with respect to his personal communications while in White House); Whalen v. Roe, 429 U.S. 589, 598-600 (1977) (establishing individual right to avoid disclosure of personal information); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (establishing right to privacy within marital relationship). *See generally* Roe v. Wade, 410 U.S. 113, 153-54 (1973) (establishing woman's right to privacy with regard to abortions); Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972) (establishing right to privacy with respect to contraception for unmarried people).

[216] *Sterling*, 232 F.3d at 197.

[217] *See id.* at 196.

[218] *Id.* at 198 (stating sexual orientation is intrinsically personal); *see* Thomas, *supra* note 127, at 1445-46 (asserting that freedom with respect to intimacy and association is critical to formation of relations and affects personality and health).

[219] *Sterling*, 232 F.3d at 196.

[220] *Id.* at 198.

[221] *Id.*

[222] *See id.* & n.7.

[223] *Id.* at 196.

[224] *Id.* at 194.

court admitted that *Bowers*, "gives us pause."[225] Ultimately, the court determined that *Bowers* did not resolve whether a state actor could force an individual to disclose his sexual orientation.[226] The Third Circuit, unlike the Fourth Circuit, determined that *Bowers* did not control on this issue.[227] The court relied on the status/conduct distinction clarified in *Robinson* to distinguish *Bowers*.[228] This distinction allowed the court to find a right to privacy with regard to sexual orientation, putting the Third and Fourth Circuits in conflict.[229]

C. Analysis

The critical distinction between the Third and Fourth Circuit holdings derives from the proper interpretation of *Bowers*.[230] Interpretation of this judicial decision dictated the direction of the courts.[231] Although both courts looked to *Bowers* for guidance, the Fourth Circuit applied *Bowers* too broadly.[232] Moreover, unlike the Third Circuit, the Fourth Circuit failed to consider other Supreme Court decisions illuminating this area of the law.[233] For these reasons, the Third Circuit's decision is more persuasive.

1. The Fourth Circuit's Improper Use of *Bowers v. Hardwick*

The Supreme Court has yet to clarify its holding or rationale in *Bowers*.[234] The Court has left the lower courts with the challenge of

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[225] *Id.*

[226] *Id.* at 194-95.

[227] *Id.*

[228] *Id.*

[229] *Id.* at 195 & n.3.

[230] *See* Bowers v. Hardwick, 478 U.S. 186, 190-92 (1986); *Sterling*, 232 F.3d at 194-95 (weighing *Bowers*); Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (applying *Bowers*).

[231] *See Sterling*, 232 F.3d at 194-95; *Walls*, 895 F.2d at 193.

[232] The court's application was too broad because the court failed to distinguish between status and conduct. *See* Buchanan, *supra* note 17, at 28-30 (analyzing distinction between status and conduct); Valdes, *supra* note 18, at 386 (examining status/conduct distinction).

[233] *See* Whalen v. Roe, 429 U.S. 589, 602-03 (1977) (citing decisions where certain medications were denied because of listing as controlled substance with potential for abuse); Robinson v. California, 370 U.S. 660, 661, 665-67 (1962) (holding that state cannot punish individuals based on status alone); *Sterling*, 232 F.3d at 194-95 (applying relevant Supreme Court holdings in *Whalen* and *Robinson* to Wayman's sexual orientation).

[234] *See* Romer v. Evans, 517 U.S. 620, 635-36 (1996) (ignoring *Bowers v. Hardwick* decision when deciding case addressing rights of homosexuals); Buchanan, *supra* note 17, at 39 (asserting that Supreme Court must clarify *Bowers v. Hardwick*); Norman Vieira, Hardwick

application.[235] Faced with the right to privacy regarding disclosure of sexual orientation, both the Third and Fourth Circuits looked to *Bowers*.[236]

The Supreme Court in *Bowers* decided not to extend fundamental right protection to the physical act of homosexual sodomy.[237] However, this does not necessarily preclude protection of personal information regarding sexual orientation.[238] An individual's decision to engage in homosexual sodomy does not mean that he must forsake all of his rights regarding his homosexuality.[239] Even criminals have rights in the American justice system.[240]

The two circuits diverged because the court in *Walls* failed to distinguish between the protection of sexually oriented conduct and the protection of sexual orientation.[241] In essence, the court lumped status and conduct together.[242] When the Fourth Circuit applied *Bowers*, it treated status and conduct alike.[243] However, *Bowers* does not control the right to privacy with regard to sexual orientation.[244] *Robinson* dictates that courts address status and conduct separately.[245] Therefore, the

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and the Right to Privacy, 55 U. CHI. L. REV. 1181, 1185-87 (1988) (exploring uncertainty regarding Court's meaning in *Bowers*); Tuchman, *supra* note 8, at 2288 (explaining that Supreme Court has left unanswered issue of privacy with respect to sexual orientation).

[235] *See* Buchanan, *supra* note 17, at 39; Vieira, *supra* note 234, at 1182; Tuchman, *supra* note 8, at 2288.

[236] *See Sterling*, 232 F.3d at 194-95; *Walls*, 895 F.2d at 193.

[237] *See Bowers*, 478 U.S. at 191.

[238] *See* Buchanan, *supra* note 17, at 28-30 (distinguishing between status and conduct allows for protection of status); Valdes, *supra* note 18, at 386 (highlighting relevant status/conduct distinction).

[239] *See* Stanley v. Georgia, 394 U.S. 557, 567-68 (1969) (allowing for right to privacy despite fact that individuals engaged in criminal acts); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667-72 (1970) (examining protection of rights and interests under Fourth Amendment).

[240] *See generally Stanley*, 394 U.S. at 557.

[241] *See Walls*, 895 F.2d at 193 (applying *Bowers* to both status and conduct alike); Buchanan, *supra* note 17, at 28-30 (distinguishing between status and conduct allows for protection of status); Valdes, *supra* note 18, at 386 (highlighting relevant status/conduct distinction).

[242] *See Walls*, 895 F.2d at 193 (failing to address status and conduct independently).

[243] *See id.*

[244] *See* Sterling v. Borough of Minersville, 232 F.3d 190, 195 (3d Cir. 2000) (determining that *Bowers* does not control right to privacy with regard to sexual orientation); Kappelhoff, *supra* note 1, at 512 (noting *Bowers* application to conduct not status); Tuchman, *supra* note 8, at 2288 (explaining that Supreme Court has left unanswered issue of privacy with respect to sexual orientation).

[245] Robinson v. California, 370 U.S. 660, 666-67 (1962) (mandating that courts treat status and conduct separately); *see* Buchanan, *supra* note 17, at 28-30 (distinguishing between status and conduct allows for protection of status); Valdes, *supra* note 18, at 386

Fourth Circuit's application of *Bowers* to status, as well as conduct, was improper.[246]

2. The Third Circuit's Proper Use of *Robinson v. California* and *Whalen v. Roe*

The Fourth Circuit further erred when it failed to consider all the Supreme Court decisions pertinent to the right to privacy regarding sexual orientation.[247] Although relevant, *Bowers* is not controlling when dealing with status alone.[248] For this reason, analysis cannot stop at *Bowers*.[249] The Third Circuit's decision to analyze *Bowers* in conjunction with *Robinson* and *Whalen* is the more appropriate approach.[250]

Robinson is critical to an examination of the right to privacy regarding sexual orientation.[251] In *Sterling*, the Third Circuit properly noted that *Bowers* did not intend to punish homosexual status.[252] Punishing status runs contrary to the Court's earlier decision in *Robinson*, which the Court did not purport to overrule.[253] *Robinson* specifically held that punishing status alone was unconstitutional.[254] While the issue in *Bowers* involves conduct,[255] *Robinson* deals with status.[256] The right to privacy regarding sexual orientation is about protecting the status of homosexuals not their conduct.[257] Thus, the Third Circuit's consideration of *Robinson* was necessary, and it compelled the correct interpretation of *Bowers*.[258]

(highlighting relevant status/conduct distinction).

[246] *See Walls*, 895 F.2d at 193.

[247] *Compare Sterling*, 232 F.3d at 194-95 (considering all relevant court authority on issue of right to privacy regarding sexual orientation), *with Walls*, 895 F.2d at 192-93 (lacking in discussion of related Supreme Court authority).

[248] *See Bowers*, 478 U.S. at 186; Tuchman, *supra* note 8, at 2288 (explaining that *Bowers* does not apply to privacy with respect to sexual orientation).

[249] *See Bowers*, 478 U.S. at 186; *Sterling*, 232 F.3d at 193-95 (applying *Bowers* in conjunction with other case law).

[250] *See Bowers*, 478 U.S. at 186; Whalen v. Roe, 429 U.S. 589, 603 (1977); *Robinson*, 370 U.S. at 667; *Sterling*, 232 F.3d at 194-95.

[251] *See Robinson*, 370 U.S. at 660; *Sterling*, 232 F.3d at 194-95.

[252] *See Sterling*, 232 F.3d at 195.

[253] *See Robinson*, 370 U.S. at 666-67; *Sterling*, 232 F.3d at 195.

[254] *See Robinson*, 370 U.S. at 666-67.

[255] *See Bowers*, 478 U.S. at 190.

[256] *See Robinson*, 370 U.S. at 660-61.

[257] *See supra* Part I.C (discussing that it is fair to punish one for one's specific behavior but not for one's immutable characteristics).

[258] *See Sterling*, 232 F.3d at 194-95.

Similar to *Robinson*, *Whalen* is another necessary component to an examination of the right to privacy pertaining to sexual orientation.[259] *Whalen* and its progeny established protections for personal information.[260] The Third Circuit applied *Whalen* when it examined the right to privacy with regard to sexual orientation.[261] *Whalen* speaks directly to the issue of informational privacy.[262] *Whalen* protects the private and intimate details of one's life.[263] Sexual orientation is an inherently private piece of information.[264] Arguably, *Whalen* is controlling law.[265] The Third Circuit in *Sterling* applied *Whalen* when it examined the right to privacy with regard to sexual orientation.[266] The court's analysis is appropriate because, as the court found, *Bowers*'s reach in this area of law is limited.[267] *Bowers*, correctly applied, does not serve as a hurdle to establishing a right to privacy with regard to sexual orientation.[268] The Third Circuit's proper interpretation of *Bowers*, coupled with its reliance on *Robinson* and *Whalen*, led to the logical

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[259] *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977) (implying that forcible disclosure of certain personal information could be unconstitutional violation of right to privacy).

[260] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 458-59 (1977) (holding that right to privacy regarding dissemination of private information exists); *Whalen*, 429 U.S at 599-600, 605 (finding that right to informational privacy exists); Doe v. Southeastern Pa. Transp. Auth., 72 F.3d 1133, 1137-38 (3d Cir. 1995) (holding that right to privacy extends to prescription drug records, however, right is not absolute); Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983) (holding that right to informational privacy applies to financial information); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577-80 (3d Cir. 1980) (establishing proper boundaries for company when requesting employee medical information based upon employees right to informational privacy); Utz v. Cullinane, 520 F.2d 467, 477-80 (D.C. Cir. 1975) (holding that FBI is not free to disseminate preconviction or post-exoneration arrest records); Doe v. Borough of Barrington, 729 F. Supp. 376, 384 (D.N.J. 1990) (holding that Constitution protects individuals as well as family from government disclosure of AIDS status); Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F. Supp. 1028, 1043 (D. Haw. 1979) (holding that psychiatric records qualify under right to informational privacy); Menard v. Mitchell, 328 F. Supp. 718, 727-28 (D.D.C. 1971) (holding that arrest record cannot be released to prospective employers).

[261] *See Sterling*, 232 F.3d at 194.

[262] *See Whalen*, 429 U.S. at 599-600.

[263] *Id.*

[264] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 257 (1994) (examining secret identities and intimate aspects of personality); Chlapowski, *supra* note 19, at 150-56 (describing intimate nature of information and how it relates to personhood).

[265] *See Sterling*, 232 F.3d at 194 (discussing *Whalen*'s importance to right to privacy regarding sexual orientation).

[266] *See Sterling*, 232 F.3d at 194-95.

[267] *See supra* note 244 and accompanying text (discussing *Bowers*'s limits).

[268] *See* Bowers v. Hardwick, 478 U.S. 186, 190 (1986); Tuchman, *supra* note 8, at 2288 (explaining that *Bowers* does not apply to privacy with respect to sexual orientation).

conclusion that sexual orientation is entitled to privacy protection.[269] Sexual orientation is information and the judiciary must not lose sight of this when applying case law.[270]

III. An Objective Approach to Evaluating the Validity of Forced Disclosure of Sexual Orientation

The current split between the Third and Fourth Circuits highlights an unsettled area of the law.[271] Although a Supreme Court decision on forced disclosure of sexual orientation would provide instant clarity, such a decision does not seem imminent.[272] For this reason, lower courts must attempt to carve out a rule of law. Specifically, courts must form a cohesive rule that integrates the right to sexual privacy, the right to informational privacy, and the status/conduct distinction.[273]

If we accept the proposition that status is protected while conduct is not, we are left with a dilemma.[274] Modern culture generally considers that homosexual acts define individuals as homosexuals.[275] Under this calculus, knowledge of the one is at least a presumption of the other. How are the courts to determine when a state actor is seeking information about conduct versus information about status?

The best approach for the judiciary is to establish an objective test based upon the status/conduct distinction that *Robinson* elucidates.[276] This test would ask whether a reasonable state actor would be seeking information regarding sexual orientation to determine status or conduct.

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[269] *See Sterling*, 232 F.3d at 194-95.

[270] *See supra* note 264 and accompanying text.

[271] *See Sterling*, 232 F.3d at 194 & n.3, 195; Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990).

[272] The Supreme Court has decided not to answer the questions left open by *Bowers*. *Bowers*, 478 U.S. at 202 (Blackmun, J., dissenting). The closest the Supreme Court has come to looking at an issue resembling *Bowers* was in *Romer v. Evans*. Romer v. Evans, 517 U.S. 620 (1996). *Romer* is worth mentioning not because of how it addressed *Bowers* type issues, but because the majority does not mention *Bowers* at all. *Id.* at 640 (Scalia, J., dissenting). This silence is relevant, however, unrevealing. Perhaps it indicates a dislike of *Bowers*. Or, perhaps the Court felt that the equal protection challenge was too far removed from *Bowers* and its due process roots. We do not know. However, the Supreme Court had a chance to comment on *Bowers* and it chose not to. *See Bowers*, 478 U.S. at 186.

[273] *See Sterling*, 232 F.3d at 194-95 (blending various areas of law to determine right to privacy with regard to sexual orientation).

[274] *See* Robinson v. California, 370 U.S. 660, 667 (1962) (establishing different levels of protection for status and conduct).

[275] John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747, 771 (1992) (distinguishing sexual orientation and sexual conduct).

[276] *See Robinson*, 370 U.S. at 667.

The focus of this test is purpose. If a state actor is obtaining conduct information, the information could be obtained and the state actor would address the conduct within the confines of the law. If a state actor is obtaining status information, the court must implement a balancing test to determine if the state interest in the information outweighs the individual's privacy interest.[277] *Whalen* demonstrates that this is a significant hurdle.[278] This approach would afford protection to individuals, but still allow the state access to the information when it is deemed necessary.[279]

For example, the question pertaining to sexual orientation in *Walls* appears to be a state attempt to obtain status information.[280] The Bureau of Police was attempting to determine whether there were homosexuals in the department.[281] Due to the administrative nature of Walls's job, the state interest was relatively low.[282] Thus, Walls should have received privacy protection in this instance.[283] Under an objective test, the court would have granted Walls protection. An objective test would have provided similar results in *Sterling*.[284] Wilinsky threatened disclosure of Wayman's status as a homosexual.[285] Wilinksky's assumed moral duty was not a credible state interest.[286] Wayman, like Walls, was entitled to privacy protection.[287]

An objective test, coupled with the relevant balancing test, reconciles the discrepancy in the law.[288] Furthermore, it provides a fair approach by taking into account the rights of the individual and the needs of the state.

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[277] *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980) (establishing balancing test consisting of five factors for courts to balance when determining scope of constitutional right to informational privacy). The five factors are: 1) type of record and information it contains; 2) potential for harm in any unauthorized disclosure; 3) injury from disclosure to relationship in which record was generated; 4) adequacy of safeguards to prevent nonconsensual disclosure; and 5) degree of need for access. *See id.*

[278] *See* Whalen v. Roe, 429 U.S. 589, 607 (1977) (Brennan, J., concurring).

[279] Examples of necessity would be national security, jobs with exorbitantly high risks of blackmail and state health concerns.

[280] *See* Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (explicitly inquiring about engagement in homosexual relations).

[281] *Id.*

[282] *Id.* at 190.

[283] *See* Sterling v. Borough of Minersville, 232 F.3d 190, 194-96 (3d Cir. 2000) (applying privacy protection properly).

[284] *Id.* at 190.

[285] *Id.* at 193.

[286] *Id.* at 198 n.7.

[287] *Id.* at 196.

[288] *See id.* at 194-95; Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990).

However, this approach is not without its own shortcomings. The suggested objective test relies on the differentiation between status and conduct.[289] Arguably, the judiciary cannot separate status and conduct.[290] Status is a consequence of conduct and, as a result, the two are inextricably linked.[291] If the judiciary cannot distinguish between the two, the proposed objective test will fail.

Although at times the line between status and conduct is murky, more often than not a clear distinction exists.[292] For example, young homosexuals are often labeled as such by their peer group prior to any homosexual conduct.[293] Moreover, as scientific evidence points towards a genetic marker for homosexuality, the possibility of status without conduct is real.[294] Even in the presence of conduct, status is generally separable.[295] For example, an individual may consider himself a homosexual even though he is a practicing celibate at present.[296] This level of distinguishability suggests a successful application of an objective test based upon a status/conduct distinction.[297]

Another possible flaw with this objective test exists outside the scope of the status/conduct distinction.[298] It is a broader problem. Specifically, protecting the status of homosexuals arguably confers preferential treatment upon this group.[299] Although private sexual heterosexual

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[289] *See* Robinson v. California, 370 U.S. 660, 665-67 (1962) (mandating that courts treat status and conduct separately); Buchanan, *supra* note 17, at 28-31 (distinguishing between status and conduct allows for protection of status); Valdes, *supra* note 18, at 386 (highlighting relevant status/conduct distinction).

[290] *See* Valdes, *supra* note 18, at 395 (discussing slippery situation that can arise when separating status and conduct).

[291] *See id.* (noting that status and conduct are distinguishable even though they are interrelated).

[292] *See* Buchanan, *supra* note 17, at 29-34 (distinguishing between status and conduct is viable); Valdes, *supra* note 18, at 395 (highlighting status/conduct distinction); Elwood, *supra* note 275, at 771.

[293] *Cf.* Elwood, *supra* note 275, at 776 (discussing outward displays of sexual orientation).

[294] *See* Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (stating that sexual orientation has scientific underpinnings and is out of individual's control); Buchanan, *supra* note 17, at 33-35 (discussing scientific theories pertaining to sexual orientation).

[295] *See supra* note 292 and accompanying text (stating potential to separate conduct and status).

[296] *See* Rubenfeld, *supra* note 32, at 800-01 (saying that celibacy does not do away with homosexual status).

[297] *See supra* note 292 and accompanying text (asserting that applying status/conduct distinction is possible).

[298] *Id.*

[299] *See* Romer v. Evans, 517 U.S. 620, 636-37 (1996) (Scalia, J., dissenting) (discussing

conduct receives privacy protection, heterosexual status does not.[300] Unfairness exists in the idea that an individual's sex status will receive a different degree of privacy protection depending upon sexual orientation.

However, heterosexuals are a favored majority in the United States.[301] Homosexuals are a group that have historically suffered discrimination and stigmatization.[302] As a result, homosexuals are entitled to a higher degree of privacy protection with respect to this intimate detail of their personal lives.[303] Forced disclosure of sexual orientation is potentially damaging for a homosexual.[304] The reverse is seldom true for a heterosexual.[305]

CONCLUSION

The disclosure of highly personal, intimate information is entitled to protection under the Constitution.[306] Although the Supreme Court may be unwilling to protect the act of homosexual sodomy, this does not necessitate the finding that no right to privacy with respect to sexual orientation exists.[307] The two issues are distinct.[308] They are distinguishable on their facts and their constitutional underpinnings.[309] For this reason, the judiciary should examine each separately as the Third Circuit demonstrated in *Sterling*.[310] To do otherwise screams of an

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possible preferential treatment that homosexuals receive if singled out by laws).

[300] *Id.*

[301] *See* Chlapowski, *supra* note 19, at 156 (citing homosexuals as disfavored minority).

[302] *See id.*; Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1286 (1985) [hereinafter *Suspect Classification*] (discussing pervasive discrimination that homosexuals face).

[303] *See Suspect Classification*, *supra* note 302, at 1285-87, 1285 n.3 (noting violence and discrimination inflicted upon homosexuals because of their sexual orientation and advocating court recognition of homosexuals as a suspect class).

[304] *See* Thomas, *supra* note 127, at 1514-16 (elaborating on homophobia and damaging results of this practice extending into all areas of individual's life).

[305] *Cf. id.* (finding that heterosexuals are often perceived as "law-abiding").

[306] *See* Whalen v. Roe, 429 U.S. 589 (1977); Robinson v. California, 370 U.S. 660 (1962).

[307] *See* Bowers v. Hardwick, 478 U.S 186, 189 (1986) (reversing lower court decision that held that Georgia statute barring sodomy violated Ninth and Fourteenth Amendments); Tuchman, *supra* note 8, at 2288 (explaining that *Bowers* does not apply to privacy with respect to sexual orientation).

[308] *See* Buchanan, *supra* note 17, at 28-30 (distinguishing between status and conduct); Valdes, *supra* note 18, at 395 (highlighting status/conduct distinction); Tuchman, *supra* note 8, at 2288 (noting non-binding effect of *Bowers* on right to privacy regarding sexual orientation).

[309] *See* Tuchman, *supra* note 8, at 2288.

[310] *See* Sterling v. Borough of Minersville, 232 F.3d 190, 194 (3d Cir. 2000).

invasion into the most personal and intimate details of an individual's life.

Sexuality is at the core of a person's identity.[311] Those whose sexual orientation deviates from the normal majority heterosexual behavior often endure discrimination.[312] In many aspects of American life and many geographic regions of the United States, there are potentially serious financial and social penalties, sometimes even physical dangers, for these individuals.[313] While many have stepped out of the shadows, others, for reasons of their own, have not done so.[314] There is seldom legitimate justification for the government to force these acts of disclosure.[315] Under the protection of the Constitution, the individual has the right to decide.[316]

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[311] *See* Thomas, *supra* note 127, at 1445-46 (asserting that sexual orientation lies at heart of personal identity); *Suspect Classification*, *supra* note 302, at 1288-89 (noting fundamental importance of sexuality to individual).

[312] *See Suspect Classification*, *supra* note 302, at 1285-87 (noting different types of discrimination inflicted upon homosexuals because of sexual orientation); *see also* Watkins v. United States Army, 875 F.2d 699, 709 (9th Cir. 1989) (discussing discrimination against homosexual plaintiff that resulted in loss of career).

[313] *See* Elwood, *supra* note 275, at 747-50 (discussing disclosure of homosexuality and its ramifications); *Suspect Classification*, *supra* note 302, at 1286 (providing examples of particular types of societal pressures placed on homosexual individuals).

[314] *See* Elwood, *supra* note 275, at 748 (explaining "outing" and decision of individuals to come out of closet).

[315] *See supra* notes 262-66 and accompanying text (discussing *Whalen*'s protection of informational privacy).

[316] *See* Sterling v. Borough of Minersville, 232 F.3d 190, 196-97 (3d Cir. 2000).