PRIVATE CONSENSUAL SODOMY SHOULD BE CONSTITUTIONALLY PROTECTED IN THE MILITARY BY THE RIGHT TO PRIVACY

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I. Introduction

United States service members cannot engage in any type of sodomy without breaking the law.[2] This broad restriction makes no distinction based on the service member's status. Article 125, Uniform Code of Military Justice (UCMJ), applies whether an individual is married or unmarried, heterosexual or homosexual.[3] The restriction also applies whether the sodomy is consensual or nonconsensual.[4] In fact, the only difference between consensual and forcible sodomy is the authorized punishment.[5] It is irrelevant whether the sodomy is committed in public or in the privacy of a service member's off-post bedroom.[6] Thus, under the UCMJ, married service members commit criminal offenses if they engage in consensual oral or anal sodomy in the privacy of their own bedroom with their own spouse.

The prohibition against private consensual sodomy still exists for two reasons. First, when Congress created the UCMJ fifty years ago, it intended to criminalize sodomy. Second, the courts are unwilling to hold conclusively that Article 125 unconstitutionally interferes with a married service member's right to privacy. For these two reasons, service members

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may be prosecuted under Article 125 for engaging in consensual sodomy. This remains the case despite a finding by the United States Navy-Marine Court of Criminal Appeals that "it seems clear to us that Congress and our superior courts never intended that we disregard the mantle of privacy and protection traditionally afforded to the marital relationship."[7]

The Court of Appeals for the Armed Forces[8] refuses, absent direction from the Supreme Court, to identify a constitutional right to privacy allowing service members to commit sodomy.[9] The court recognizes that con-

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2. Uniform Code of Military Justice (UCMJ) Article 125 states:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

UCMJ art. 125 (2000). The elements of the offense of sodomy are:

> (1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.
>
> (Note: Add either or both of the following elements, if applicable)
>
> (2) That the act was done with a child under the age of 16.
>
> (3) That the act was done by force and without the consent of the other person.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 51b (2000) [hereinafter MCM].

3. *See* UCMJ art. 125; MCM, *supra* note 2, app. A23-14, ¶ 51 (Analysis of Punitive Articles).

4. *See* MCM, *supra* note 2, pt. IV, ¶¶ 51b(1), b(3).

5. *Id.* pt. IV, ¶ 51e. The President added the distinction between the punishments in order to enhance the punishment for committing the more severe offense of forcible sodomy. "The maximum punishment for forcible sodomy was raised in recognition of the severity of the offense which is similar to rape in its violation of personal privacy and dignity." *Id.* app. A23-14, ¶ 51e.

6. *See* UCMJ art. 125; United States v. Scoby, 5 M.J. 160, 163 (C.M.A. 1978).

7. United States v. Kulow, No. NMCM 96 01253, 1997 CCA LEXIS 484, at *10 (N-M. Ct. Crim. App. Aug. 29, 1997) (unpublished).

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9. United States v. Fagg, 34 M.J. 179, 180 (C.M.A. 1992); United States v. Henderson, 34 M.J. 174, 178 (C.M.A. 1992). *See also* United States v. Jones, 14 M.J. 1008, 1011 (A.C.M.R. 1982).

victing a service member for committing consensual sodomy may not be the best decision as a matter of policy.[10] The court, however, can only determine whether a statute is constitutional, not whether the statute is erroneous as a matter of policy.[11] Recognizing this, the court has commented that Congress could alter Article 125 or convening authorities could decide not to prosecute consensual sodomy cases.[12]

Consensual sodomy, committed in private, should not be prohibited under the UCMJ. Service members have a constitutional right to privacy, and within that right is the ability to make decisions and engage in activities free from governmental intrusion. Numerous state courts have recognized that one of the most fundamental and important decisions an individual can make is whether to engage in private sexual intimacies. These courts have held unconstitutional state statutes prohibiting sodomy because they improperly intruded upon individuals' right to privacy.[13] That same logic should apply to the military where service courts fail to recognize a right of privacy pertaining to any act of sodomy committed under any circumstances.[14]

Military courts have erred by not holding that Article 125 is unconstitutional, insofar as it prohibits consensual oral and anal sodomy committed in private. This article asserts that Article 125's prohibition causes an unconstitutional infringement upon service members' right to privacy. First, it discusses the history behind criminal sodomy provisions. Second, it discusses the right to privacy in general terms. Third, it evaluates *Bowers v. Hardwick*,[15] a Supreme Court case that considered whether homosexual sodomy is constitutionally protected under the right to privacy.

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10. *See Fagg*, 34 M.J. at 180 ("[W]e may sympathize with the accused regarding this particular conviction for what was unquestionably consensual conduct."); *see also Kulow*, 1997 CCA LEXIS 484, at *36 (Clark, S.J., concurring) ("Had this offense been charged as consensual sodomy I would find it more troubling than I do in its present context—a lesser included offense of the charged forcible sodomy.").

11. *Henderson*, 34 M.J. at 178.

12. *Id.*; *see also Kulow*, 1997 CCA LEXIS 484, at *29-30 ("Of course, the Congress is free to modify the codal provision outlawing sodomy if it chooses.").

13. *See, e.g.*, State of Idaho v. Holden, 890 P.2d 341, 347 (Idaho Ct. App. 1995) (finding statute that prohibited private consensual oral sodomy between married persons to be unconstitutional, because it infringed upon the constitutional right of privacy). *See infra* note 174.

14. United States v. Davis, No. ACM 29681, 1993 CMR LEXIS 187, at *2 (A.F.C.M.R. Apr. 28, 1993) ("Military jurisprudence does not now recognize a right of privacy extending to sodomy under any circumstances.").

15. 478 U.S. 186 (1986).

Fourth, it explores the rationale used by courts that determined state sodomy statutes were unconstitutional. Fifth, it discusses Article 125 as it currently applies to married service members. Sixth, it proffers that all service members enjoy a constitutional right to privacy to engage in consensual oral or anal sodomy. Seventh, it demonstrates that government intrusion into this right to privacy serves no compelling governmental interest. Finally, the article proposes a change to Article 125 that would uphold service members' constitutional right to privacy.

II. History

The crime of sodomy has ancient historical roots.[16] Originally appearing in Hebraic law,[17] sodomy prohibitions historically pertained to male homosexual activity.[18] In addition, oral sex historically has been defined as "unnatural or deviant" conduct.[19] Sodomy is not a new offense in the military. The Court of Military Appeals wrote that military law has criminalized oral sodomy "since time immemorial."[20] Prior to 1920, sodomy was considered a criminal offense under Article of War 96, although this general article did not specifically list sodomy as an offense.[21] Under military jurisprudence, however, oral sex was considered a crime.[22] From 1920-1949, sodomy was prosecuted as a violation of Article of War 93, which specifically stated that sodomy was an offense, but did not define it.[23] The *1949 Manuals for Courts-Martial* for the Army and the Air Force later defined the crime of sodomy as "taking into . . . [the] mouth or anus .

16. *See id.* at 192.

17. Harris v. State of Alaska, 457 P.2d 638, 648 & n.37 (Alaska 1969) (citing *Genesis* 19:24; *Ezekiel* 16:49) ("Sodomy appears originally as part of the Hebraic law, taking its name from the practices reputedly indulged in by the inhabitants of Sodom and Gomorrah.").

18. *See id.* at 649; United States v. Henderson, 34 M.J. 174, 176 (C.M.A. 1992).

19. United States v. Jones, 14 M.J. 1008, 1010 (A.C.M.R. 1982) (citing *Leviticus* 18:22-23; *Deuteronomy* 23:17).

20. *Henderson*, 34 M.J. at 176.

21. United States v. Harris, 8 M.J. 52, 53 (C.M.A. 1979) (detailing the legislative history as to whether cunnilingus was intended to be a crime).

22. *See* United States v. Scoby, 5 M.J. 160, 166 (C.M.A. 1978); *Harris*, 8 M.J. at 53.

23. MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ¶ 443 (1921) (Article of War 93).

. . the sexual organ of any other person or animal or placing his or her sexual organ in the mouth or anus of any other person or animal."[24]

Article 125 is a direct descendant of these "preexisting sexual proscriptions in the land and naval forces of the United States."[25] Congress did not intend Article 125 to change significantly the prohibitions against sodomy then in existence.[26] Article 125, however, provided a far more refined definition of sodomy.[27] Although the origin of the term sodomy suggests that it applies only to homosexual conduct, it is clear from the language of Article 125 that Congress intended the prohibition to apply to heterosexual sodomy as well.[28]

The United States Court of Appeals for the Armed Forces has often interpreted Congress's legislative intent in creating Article 125.[29] In reviewing the legislative history, the court found that Congress did not determine whether there are any harmful consequences to the military community resulting from sodomy committed in private.[30] The court found, however, that Congress intended the UCMJ to include oral sodomy as an offense under Article 125.[31] After evaluating prior court decisions and "other authorities," the court concluded that Congress clearly intended that Article 125 encompass "consensual, noncommercial, heterosexual fellatio . . . performed in private between two unmarried adults."[32] Mili-

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24. MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ¶ 180*j* (1949); MANUAL FOR COURTS-MARTIAL, UNITED STATES AIR FORCE ¶ 180*j* (1949).

25. *Henderson*, 34 M.J. at 176.

26. *Id.* at 176. *See also* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, 1950, at 1233 (1985) [hereinafter INDEX AND LEGISLATIVE HISTORY].

27. *See Harris*, 8 M.J. at 54.

28. *Id.* ("Thus, it would appear that the purpose of the change in language was to express a legislative intention to define sodomy as including acts other than those within the scope of its common-law definition."). *See also Henderson*, 34 M.J. at 175-76 ("The language of the Article makes it clear that, under the rubric 'sodomy,' Congress intended to proscribe a more general range of conduct than the origin of the term might suggest.") (citation omitted).

29. *See Harris*, 8 M.J. at 53-59; *Henderson*, 34 M.J. at 176; United States v. Scoby, 5 M.J. 160, 165-66 (C.M.A. 1978).

30. *Scoby*, 5 M.J. at 165 ("The background material on the adoption of the UCMJ indicates Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military community.").

31. *Id.* at 166 (finding that fellatio, or oral sodomy, is forbidden conduct under Article 125).

32. United States v. Gates, 40 M.J. 354, 355 (C.M.A. 1994).

tary courts have not found corresponding congressional intent to apply Article 125 to married couples' sexual conduct.[33]

Congress clearly intended to include in Article 125 the conduct that earlier military law prohibited.[34] Simply put, the offense of consensual sodomy exists in military law because Congress chose to incorporate the common law offense of sodomy into the UCMJ.[35] The military courts' interpretation of the legislative history[36] indicates no unique rationale for Congress to criminalize sodomy in the military other than this desire to legislate the common law offense of sodomy.[37] The courts provide no insight into possible compelling interests that Congress considered when creating the prohibition against sodomy.[38] The Court of Appeals for the Armed Forces even commented that Congress did not make any determination of possible harm that could arise if service members engaged in private consensual sodomy.[39] The only certainty is that Congress criminalized consensual oral sodomy out of deference for the common law's premise that sodomy was unnatural or deviant sexual behavior.[40]

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33. *See* United States v. Kulow, No. NMCM 96 02153, 1997 CCA LEXIS 484, at *35 (N-M. Ct. Crim. App. Aug. 29, 1997) (Clark, S.J., concurring). Senior Judge Clark's concurring opinion discussed the implied elements of proving a sodomy case against a married service member. He wrote that there is an "apparent absence of a clear congressional intent that the military justice system intrude into the marital bedroom and regulate consensual sexual relations between husband and wife." *Id.*

34. *Henderson*, 34 M.J. at 176.

35. United States v. Morgan, 24 C.M.R. 151, 154 (C.M.A. 1957).

36. *See generally* INDEX AND LEGISLATIVE HISTORY, *supra* note 26, at 1233.

37. *See* United States v. Harris, 8 M.J. 52, 55-58 (C.M.A. 1979). Congress looked to Maryland and District of Columbia statutes for definitions when drafting the UCMJ. In 1920, however, when sodomy was first specifically mentioned as violation of the Articles of War, the military courts looked to common law to define the crime. *Id*. at 56. Article 125, UCMJ, was based on the District of Columbia's sodomy law, which was derived from Maryland's sodomy law. *Id*. at 57.

38. Since the right to privacy was not recognized as pertaining to sodomy at the time the statute was formed, no compelling government interest had to be shown. Thus, it is not surprising to see only the interest of formally criminalizing what was traditionally a crime at common law.

39. United States v. Scoby, 5 M.J. 160, 165 (C.M.A. 1978); *see supra* note 30.

40. *See* United States v. Henderson, 34 M.J. 174, 176 (C.M.A. 1992).

III. Constitutional Analysis

A. Right to Privacy

"[T]he right to be let alone [by the Government is] the most comprehensive of rights and the right most valued by civilized men."[41] Although the Constitution does not expressly grant a right to privacy,[42] the Supreme Court first articulated this right in 1891.[43] Thus, the right has arisen from case law and the Court's interpretation of the Bill of Rights—specifically the First, Fourth, Fifth,[44] and Ninth Amendments—and both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[45] After reviewing prior case law involving the right to privacy, the Court determined that the "guarantee of personal privacy" only applies if the action in question is "fundamental" or "implicit in the concept of ordered liberty."[46] The Court explained, however, that the right to privacy has its true basis in the Fourteenth Amendment.[47] The right to privacy may even protect practices that were uncommon when the Fourteenth Amendment was adopted.[48] The Court is supposed to exercise reasoned judgment to define the appropriate "sphere of liberty" when adjudicating each substantive due process claim.[49]

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41. Olmstead v. United States, 277 US 438, 478 (1928) (Brandeis, J., dissenting).

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id.

42. *See* U.S. CONST; Roe v. Wade, 410 U.S. 113, 152 (1973); *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting). *See generally* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (finding a right to privacy in the penumbra of guarantees afforded by the Bill of Rights).

43. In *Union Pacific Railway v. Botsford*, 141 U.S. 250, 251 (1891), the Court wrote: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Interpreting the right to privacy is not an easy task. It does not guarantee citizens the right to do things in private, but rather guarantees them the right to engage in certain personal acts[50] or decisions.[51] It is important to understand this distinction. Otherwise, one could argue that the right to privacy protects someone who commits a murder in private. Limited in scope to certain fundamental rights, the right to privacy does not protect citizens' every act.

In *United States v. Griswold*,[52] the Supreme Court found unconstitutional a ban on the distribution of contraceptives to married people. The Court held that there is a constitutional right to privacy, which protects a married couple from state intrusion into their intimate affairs.[53] Justice Douglas, writing for the majority, wrote:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The

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44. In a case in which the Supreme Court ruled that evidence inadmissibly obtained could not be used against the defendant, the Court stated:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes (sic) of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,--it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

Boyd v. United States, 116 U.S. 616, 630 (1886).

45. *Roe*, 410 U.S. at 152; *Griswold*, 381 U.S. at 484-85.

46. *Roe*, 410 U.S. at 152. However, the rights must be "deeply rooted in this Nation's history and tradition" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations omitted).

47. *See Roe*, 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . ."); Carey v. Population Srvs. Int'l, 431 U.S. 678, 684 (1977).

48. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 848 (1992) (reaffirming a woman's right to choose whether to have an abortion) ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.").

very idea is repulsive to the notions of privacy surrounding the marriage relationship.

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49. *Id.* at 849-50.

> The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts have always exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:
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> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Id. (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

50. Lovisi v. Slayton, 363 F.Supp 620, 625-26 (E.D. Va. 1973), *aff'd*, 539 F.2d 349 (4th Cir. 1976).

> The phrase "right to privacy" may, unless carefully defined, be misconstrued. This is because privacy can refer either to seclusion or to that which is personal. To describe an act as private may mean that it is performed behind closed doors. It may also mean that the doing of that act is a decision personal to the one performing it and having no effect on others. In the constitutional context, the meaning of privacy is doubtless closer to the latter than the former definition. This does not mean, however, that the United States Constitution guarantees to an individual the right to perform any act which he may choose to do so long as the performance of that act has no meaningful effect on others. Rather, the right to privacy extends to the performance of personal acts or decisions only within certain contexts.

Id. This was a case dealing with "swingers" who engaged in consensual sodomy in public. Their children took pictures and brought them to school. The court found that, because the acts were done in public, there was no right to privacy. *Id.*

> We deal with a right of privacy older than the Bill of Rights—older than political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[54]

In *Eisenstadt v. Baird*,[55] the Court faced facts similar to *Griswold*, but the issue was whether contraceptives could be provided to unmarried individuals.[56] The Court determined that the Equal Protection Clause of the Fourteenth Amendment prohibited states from creating legislation treating certain groups of individuals differently based on criteria unrelated to the statute's purpose.[57] Because married people were entitled to contraceptives, the Court held that unmarried people must enjoy the same unfettered access.[58] In explaining why unmarried and married individuals share the same rights, the Court wrote:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamen-

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51. *Planned Parenthood*, 505 U.S. at 851.

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.

Id.

52. 381 U.S. 479 (1965).
53. *Id.* at 485-86.
54. *Id.*
55. 405 U.S. 438 (1973).
56. *Id.* at 454-55.
57. *Id.* at 447. *See also* Carey v. Population Srvs. Int'l, 431 U.S. 678, 686-87 (1977).
58. *Eisenstadt*, 405 U.S. at 453.

> tally affecting a person as the decision whether to bear or beget a child.[59]

The Supreme Court has not expressly stated whether the right to privacy allows every adult to engage in private consensual sodomy.[60] To determine whether the right to privacy protects such conduct, a court must employ a three-part test. First, the court must recognize that the right to privacy protects individuals' ability to engage in private consensual sodomy.[61] Because the right to privacy is not an absolute right, however, it may be regulated by the states.[62] Second, assuming the right to privacy exists, the court must evaluate whether a compelling governmental interest justifies regulation of or intrusion into the right to privacy.[63] Third, if a compelling governmental interest exists, the court must evaluate whether a statute is drawn narrowly enough to protect that interest.[64]

B. Bowers v. Hardwick

Bowers v. Hardwick[65] is the seminal case that addresses whether the U.S. Constitution protects acts of sodomy. The 1986 case involves homosexual sodomy between two men.[66] The Court was sharply divided and

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59. *Id.* (citations omitted).

60. The Court has held that the right to privacy does not grant individuals the right to engage in homosexual sodomy. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

61. *See* Roe v. Wade, 410 U.S. 113,152 (1973); United States v. Allen, No. ACM 32727, 1999 CCA LEXIS 116, at *6 (A.F. Ct. Crim. App. Apr. 22, 1999), *aff'd*, 53 M.J. 402 (2000).

62. *Roe*, 410 U.S. at 154.

63. Washington v. Glucksberg, 521 U.S. 702,721 (1997); Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); *Roe*, 410 U.S. at 155; Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). The Court of Appeals for the Armed Forces, when asked to recognize a fundamental constitutional right that a superior court has yet to recognize, evaluates the governmental interests against allowing that right before deciding whether the right exists. *See also* United States v. Bygrave, 46 M.J. 491, 495 (1997).

64. *Carey*, 431 U.S. at 686; *Roe*, 410 U.S. at 155; *see* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *Bygrave*, 46 M.J. at 496.

65. 478 U.S. 186 (1986).

66. *Id. See also* Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976) (summary affirmance) (similar fact pattern).

voted 5-4 to hold that the respondent did not have a constitutional right to engage in homosexual sodomitical acts.[67]

Hardwick was charged with a violation of the Georgia statute prohibiting sodomy. The State of Georgia did not prosecute Hardwick because the district attorney decided against pursuing the case. Nevertheless, Hardwick sued in federal district court where he challenged the statute's constitutionality.[68]

1. Majority Opinion

The Supreme Court explored the constitutionality of Georgia's statute as it applied to both homosexuals and heterosexuals because the statute applied equally to both groups.[69] The Court could have easily formed a bright line rule determining whether all individuals have a constitutionally protected right to privacy to engage in acts of sodomy. The Court only opined, however, on the statute as it applied to consensual homosexual sodomy.[70] The majority opinion stated, "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have so for a very long time."[71] The very narrow holding was limited to the Court's interpretation of the Constitution. In upholding the Georgia sodomy law, the Court emphasized that its opinion did not affect state legislatures' power to decriminalize sodomy or state courts' ability to hold state statutes unconstitutional based on state constitutions.[72]

The majority opinion reviewed the Court's prior decisions concerning the right to privacy, finding that none of the rights previously recognized resembled the alleged constitutional right of homosexuals to participate in

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67. *Bowers*, 478 U.S. at 196. *Cf. Doe v. Commonwealth*, 403 F. Supp. at 1202 (2-1 vote to uphold Virginia sodomy provision). "In sum, we believe that the sodomy statute, so long in force in Virginia, has a rational basis of State interest demonstrably legitimate and mirrored in the cited decisional law of the Supreme Court." *Id.*

68. *Bowers*, 478 U.S. at 188. ("He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violated the Federal Constitution.").

69. *Id.*

70. *Id.* ("The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.").

71. *Id.* at 190.

sodomy.[73] The Court found specifically that homosexual sodomy had no connection with family, marriage, or procreation, and that the earlier line of privacy cases did not imply that all private consensual sexual conduct between adults is beyond state regulation.[74]

The Court explained that fundamental liberties unmentioned in the Constitution must be "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[75] Alternatively, a fundamental liberty may be one that is "deeply rooted in this Nation's history and tradition."[76]

The Court discerned no fundamental right to engage in homosexual sodomy.[77] It explored the historical roots of sodomy, which was criminalized not only in ancient times, but also at both common law and by the original thirteen states that ratified the Bill of Rights.[78] The Court concluded that a right to engage in sodomy was neither "deeply rooted in this

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72. *Id.* The majority continued:

> This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no questions about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds.

Id.

73. *Id.* at 190-91.

74. *Id.*

> Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Id.

75. *Id.* at 191-92.

76. *Id.* at 192 (citations omitted).

77. *Id.*

78. *Id.* at 192-93.

Nation's history and tradition," nor was it "implicit in the concept of ordered liberty."[79] Thus, the majority refused to recognize a constitutional right to engage in homosexual sodomy.[80]

The majority opinion also explained that crimes sometimes occur in the privacy of one's home, necessitating intrusion by the government.[81] The Court compared sodomy to other "victimless crimes" such as possession and use of drugs, possession of firearms, and possession of stolen goods.[82] The majority asserted that, if it allowed homosexual sodomy, it would be difficult to justify prosecuting individuals for "adultery, incest, and other sexual crimes even though they are committed in the home."[83]

2. Dissenting Opinions

a. Justice Blackmun

Justices Blackmun and Stevens wrote separate dissenting opinions in which they asserted that the Georgia statute infringed unconstitutionally on an individual's right to privacy. Justice Blackmun began his critique by writing, "The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make a persuasive one."[84] Justice Blackmun next surmised that the sex and status of the alleged perpetrator were irrelevant under the Georgia statute.[85] His dissenting opinion then examines the facts of the case using a privacy analysis that is applied uniformly to all individuals whether married or single, homosexual or heterosexual.[86]

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79. *Id.* at 193. After discussing the historical background, the Court wrote, "Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious." *Id.*

80. *Id.* at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

81. *Id.* at 195.

82. *Id.*

83. *Id.* at 195-96.

84. *Id.* at 203 (Blackmun, J., dissenting).

85. *See id.* at 200 ("A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." (citing GA. CODE ANN. § 16-6-2(a) (1984)).

86. *Id.* at 199-214.

Justice Blackmun determined that privacy is a two-pronged right, which encompasses the right to make decisions and the right to act in certain places.[87] He stated that Hardwick's case concerned both, adding that these rights to privacy form a central part of an individual's life.[88] Justice Blackmun found extremely important the ability to choose how to express one's self in an intimate sexual manner.[89] Regarding the right to act in certain places, he argued that Hardwick's sodomitical conduct should have been protected because it occurred in his home.[90] Justice Blackmun then concluded that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."[91]

To the majority's conclusion that there is no fundamental right to engage in sodomy, Justice Blackman responded that the Court's scrutiny should still apply to legislation regulating individuals' conduct, even though that conduct has been considered immoral or illegal for many years.[92] Justice Blackmun urged that the majority's rationale threatens the

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87. *Id.* at 204 ("First, [the Court] has recognized a privacy interest with reference to certain *decisions* that are properly for the individual to make . . . . Second, it has recognized a privacy interest with reference to certain *places* without regard for the particular activities in which the individuals who occupy them are engaged." (citations omitted)).

88. *Id.* ("We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life.").

89. *Id.* at 205.

> The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.

Id. (citations omitted).

90. *Id.* at 207.

91. *Id.* at 208.

92. *Id.* at 210.

> Like Justice Holmes, I believe that "[it] is revolting to have no better reason for a rule of law than that . . . it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Id. at 199 (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

nation's deeply rooted values by taking away the individual's right to make personal decisions.[93]

b. Justice Stevens

Justice Stevens also determined that the Georgia statute applied equally to all people who engaged in sodomy.[94] His dissenting opinion first explores whether a state could prohibit all people from engaging in sodomy before turning to whether a state could enforce a sodomy law against only homosexuals.[95]

Examining the Court's prior decisions, Justice Stevens remarked that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[96] He further opined that unmarried individuals share the same liberty interest.[97] Justice Stevens next determined that married couples possess a right to engage in private consensual sexual relations even if others consider their conduct immoral.[98] Deciding whether to engage in the sexual conduct is a matter of individual choice, not one to be left to the government.[99] Thus, Justice Stevens concluded, the Court's prior decisions interpreting the right to privacy allow all adults, regardless of marital status or sexual orientation, to decide whether to engage in private consensual sodomy.[100]

After determining that a state could not prohibit sodomy through a statute that applied equally to all individuals, Justice Stevens next explored

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93. *Id.* at 214.

> I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.

Id.

94. *Id.* at 216 (Stevens, J., dissenting).

95. *Id.*

96. *Id.* (citation omitted).

97. *Id.* ("Moreover, this protection extends to intimate choices by unmarried as well as married persons." (citations omitted)).

whether a state could enforce a law solely against one group of individuals, namely homosexuals.[101] He concluded that a state could not because homosexuals have the same individual interests as heterosexuals, and state intrusion into their right to choose how to live their personal lives would be legally improper.

> From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions. State intrusion into the private conduct of either is equally burdensome.[102]

3. Analysis

The Supreme Court limited the application of the *Bowers* opinion by narrowing the focus of its holding, and thus the case has limited precedential value. The majority opinion ignored the reasoning of the dissenting opinions, and it failed to consider the Georgia statute in its entirety. Because the Court did not offer any opinion on the statute as it applied to heterosexuals, it left open the question of whether consensual heterosexual

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98. *Id.* at 217-18.

> Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It may also prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression. But when individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the State—to decide. The essential "liberty" that animated the development of the law in cases likes *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.

Id. (citation omitted).

99. *Id.* at 217.

100. *Id.* at 218.

101. *Id.*

102. *Id.* at 218-19.

sodomy is constitutional.[103] The majority opinion neither overruled nor rejected the premise that married couples enjoy a right to privacy in intimate affairs.[104] As a result, when exploring whether married couples have a constitutional right to engage in sodomy, *Bowers* offers little assistance.

Although the *Bowers* opinion holds no precedential value regarding heterosexuals, whether married or not, it clearly limits the right of homosexuals to engage in sodomy with each other. For several reasons, the Court should overturn the opinion.

The *Bowers* majority held that there was no right to privacy primarily because it discerned no fundamental liberty interest for individuals to engage in homosexual conduct.[105] The Court mistakenly made this assumption based on the lack of protection historically afforded to sodomy.[106] The same argument, however, could be extended to other personal decisions protected by the right to privacy, such as interracial marriage.[107] Moreover, had the Court always followed this analysis, such things as civil rights and women's right to vote would not exist. In its haste to rely on this

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103. *Id.* at 188. *See also* United States v. Henderson, 34 M.J. 174, 177 (C.M.A. 1992) ("Admittedly, the [*Bowers*] majority focused on the constitutionality of the Georgia statute as it pertained to consensual 'homosexual sodomy,' leaving open the question of the constitutionality of consensual heterosexual sodomy.").

104. *See, e.g.*, State of Idaho v. Holden, 890 P.2d 341, 347 (Idaho Ct. App. 1995) (finding statute that prohibited private consensual oral sodomy between married persons to be unconstitutional because it infringed upon the constitutional right of privacy).

105. *Bowers*, 478 U.S. at 192-93.

106. *Id.* at 193-94. *But cf.* John E. Theuman, Annotation, *Validity of Statute Making Sodomy a Criminal Offense*, 20 A.L.R. 4th 1009 (2000) ("Litigation challenging the constitutionality validity of sodomy laws has increased sharply in recent years, apparently as a result of changing sexual mores which are typified by the claim that what consenting adults do in private should be their own business and nobody else's.").

Although the Court refused to consider whether heterosexuals have a fundamental right to commit sodomy, the historical discussion indicates that all sodomy was a criminal offense. *Bowers*, 478 U.S. at 193-94. Thus, according to the Court's logic, all sodomy should be prohibited. The author could find no cases supporting that analysis. Also, had the Court truly believed its logic, it could have expanded the scope of its opinion to prohibit all sodomy.

107. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847-48 (1992), the Court wrote, "Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967) [a case founded in equal protection principles]." *See generally* Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 N.D. J.L. ETHICS & PUB. POL'Y 753, 755-56, 762-63 (2000).

argument, the majority opinion failed to address the second part of the constitutionality test, which is unrelated to the historical background of the alleged liberty: Is the right to privacy as it pertains to sexual intimacy "implicit in the concept of ordered liberty?"[108]

The *Bowers* majority focused on the wrong right. The case was not about the right to engage in homosexual intimacies; rather, it was about the freedom to make an individual choice, free from governmental intrusion, about a personal, private, consensual sexual relationship that affects nobody but the participants. The Court failed to follow its past precedents expanding the zone of the right to privacy, and chose instead to outlaw an act that it presumably determined was personally immoral. Ironically, the Court refused to recognize an individual's ability to make a personal choice, arguably one of the most important fundamental liberties.

At the end of the opinion, the *Bowers* majority offers an unconvincing justification for its holding. Government intrusion into private sexual conduct is acceptable in the case of homosexual sodomy, argued the Court, because to hold otherwise would make it difficult to prosecute other sexual crimes occurring in the home.[109] The Court failed to articulate, however, the public harm caused by allowing two individuals, whether homosexual or heterosexual, to engage in private acts of consensual oral or anal sodomy. Additionally, the Court offered no basis for the assertion that the government would be precluded from prosecuting other sexual criminal acts, such as incest or rape, which may occur in the home.

The dissenting opinions of Justices Blackmun and Stevens offer logical and rational reasons why all individuals should enjoy the right to engage in sexual intimacy free from governmental intrusion. These opinions are also consistent with the Court's previous decisions defining and expanding the right to privacy.[110] The majority's conclusion—that the right to engage in intimate sexual affairs in the privacy of one's home is

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108. *Bowers*, 478 U.S. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

109. *Id.* at 195-96.

110. *See, e.g.*, *id.* at 203-04 (Blackmun, J., dissenting) (citing Thornburgh v. American Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986); United States v. Karo, 468 U.S. 705 (1984); Payton v. New York, 445 U.S. 573 (1980); Roe v. Wade, 410 U.S. 113 (1973); Rio v. United States, 364 U.S. 253 (1960); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)), 216 (Stevens, J., dissenting) (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird; 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

not protected by the right to privacy—flies in the face of logic considering the trend of these prior decisions. Thus, the majority opinion clearly limited the expanding right to privacy.[111]

Decided by a 5-4 vote, *Bowers* was almost decided the other way. Justice Powell, who voted with the majority and wrote a concurring opinion,[112] initially was going to vote against the Georgia sodomy law.[113] Although Justice Powell personally disfavored laws prohibiting sodomy,[114] he voted with the majority because he did not recognize a fundamental right to commit private consensual sodomy.[115] Therefore, the decision is more tenuous than the majority opinion would lead readers to believe.

To compound matters, the Court of Appeals for the Armed Forces erroneously interpreted *Bowers* for the proposition that consenting adults do not have a general constitutional right to sexual intimacy.[116] Rather, as discussed previously, the *Bowers* opinion is limited in its application to consensual sexual relations between homosexuals.[117] Nothing in the case limits consenting heterosexuals from engaging in sexual relations.

C. Right to Privacy and Sodomy

The right to privacy should cover all service members' ability to engage in private consensual oral and anal sodomy. This right of privacy is subject to different interpretations by the states and the military because

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111. The Court realized, however, that its ruling did not prohibit states from finding sodomy statutes unconstitutional based on state constitutions. *Id.* at 190-91.

112. *Id.* at 197-98 (Powell, J., concurring) (speaking of how excessive prison terms may constitute a violation of the cruel and unusual punishment clause of the Constitution.).

113. *See* Al Kamen, *Powell Changed Vote in Sodomy Case; Different Outcome Seen Likely if Homosexual Had Been Prosecuted*, WASH. POST, July 13, 1986, at A1.

114. *Id.*

> Though Powell did not agree with the reasoning, he voiced sufficient distaste for the anti-sodomy law that he agrees to provide the crucial fifth vote for an overall decision striking the Georgia statute. . . . Powell, sources said, dislikes anti-sodomy laws, feeling that they are useless, never enforced and unenforceable.

Id.

115. *See Bowers*, 478 U.S. at 197 (Powell, J., concurring).

116. *See* United States v. Bygrave, 46 M.J. 491, 495 (1997).

117. *See supra* note 70 and accompanying text.

the Supreme Court has not fully defined an adult's right to privacy concerning intimate sexual relations.[118] Thus, the Court leaves to the different states and the military the task of defining the parameters of the right to privacy as it concerns the right to engage in sexual intimacy.[119] Currently, the military restricts service members' ability to engage in acts of sodomy.

1. Current Status in the Military

In *United States v. Scoby*,[120] the Court of Military Appeals discussed whether service members enjoy the right to privacy as it pertains to private oral sodomy. The court held there was no right to privacy in *Scoby* because the sodomy was committed in a public place.[121] The court went one step further, however, and wrote, "[T]o dispose properly of other cases in which we granted review to await decision in this case, we must decide whether Article 125 can constitutionally be applied to sexual acts performed in private quarters, with or without the presence of other persons."[122] The *Scoby* court then held that Article 125 does not violate a constitutional right to privacy.[123] This decision reflects the current state of military law, and military courts still refuse to recognize service members' right to privacy to engage in private consensual oral sodomy.

In *United States v. Allen*,[124] the United States Air Force Court of Criminal Appeals upheld an appellant's conviction for engaging in anal sodomy with his wife. Two of the three judges concurred with the lead opinion in all respects except for the determination that the right to privacy constitutionally protects consensual sodomy.[125] In this case, the appellant told his wife to prostitute herself both to make money to pay their bills and to "improve their sexual relationship."[126] Although the wife did not want

118. Carey v. Population Srvs. Int'l, 431 U.S. 678, 688 n.5 (1977). The Supreme "Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults . . . ." *Id.*

119. *See Bowers*, 478 U.S. at 190 (placing limitation and allowing states to regulate based on state constitutions).

120. 5 M.J. 160 (C.M.A. 1978).

121. *Id.* at 164-65.

122. *Id.*

123. *Id.* at 166.

124. No. ACM 32727, 1999 CCA LEXIS 116, at *1 (A.F.Ct. Crim. App. Apr. 22, 1999), *aff'd*, 53 M.J. 402 (2000).

125. *See id.* at *30 (Young, S.J., dissenting), *40 (Schlegel, J., dissenting).

126. *See id.* at *45 (Schlegel, J., dissenting).

to be anally sodomized because she was forcibly sodomized as a teenager, she eventually succumbed to her husband's desires.[127]

The lead opinion in *Allen* expressly held that the right to privacy covers sexual conduct between a husband and a wife.[128] In his dissent, Senior Judge Young argued that the lead opinion completely ignored Congress's decision to criminalize all sodomy in Article 125.[129] While asserting that the right to privacy may be limited if there is a compelling governmental interest, Senior Judge Young never articulated what interest is served by regulating consensual sodomy.[130] Even if it was unconstitutional to prohibit married couples from engaging in consensual sodomy, Senior Judge Young stated that he would not grant the appellant any relief because his acts of sodomy were not in furtherance of and did not support the marital relationship.[131] Senior Judge Young premised his dissenting opinion, in part, on his finding that the appellant, convicted of consensual sodomy, had forcibly sodomized his wife.[132]

In the other *Allen* dissent, Judge Schlegel argued that anal sodomy did nothing to promote a marital relationship.[133] Based on his concluding remarks, however, it is reasonable to infer that the facts of the case prevented Judge Schlegel from acknowledging a constitutional right to privacy regarding consensual marital sexual relations. Specifically, he found the appellant's behavior to be violent, anything but consensual, and not in furtherance of the marital relationship.[134]

The Court of Appeals for the Armed Forces reviewed the *Allen* case, but declined to hold that anal sodomy between a husband and a wife is constitutionally protected.[135] The court found that, although the appellant was convicted of consensual sodomy, the facts "graphically depict[ed] a pattern of degradation and depersonalization."[136] According to the court, these specific acts did not promote a marital relationship and were thus undeserving of constitutional protection.[137] The court said it evaluated the

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127. *Id.* The appellant reneged on a promise to his wife that he would stop anally sodomizing her if she let him videotape the act. *Id.* at *46.

128. *Id.* at *9.

129. *Id.* at *35 (Young, S.J., dissenting).

130. *Id*.

131. *Id.* at *37 (Young, S.J., dissenting). "Under all the circumstances of this cases, I am unable to conclude that the acts of sodomy were truly consensual or that the accused's conduct was in furtherance of or support of the marital relationship." *Id.* at *39-40.

132. *Id*. at *39-40.

133. *Id*. at *45 (Schlegel, J., dissenting).

nature of the charged acts in determining whether Article 125 was constitutional as it pertained to married service members.[138] The Court of

134. *Id.* at *46-47 (Schelgel, J., dissenting). He wrote:

> The use of temporal police power to punish the appellant for sodomizing his wife does not strike me as anymore an unwarranted violation of the sanctity of this marriage, than the punishment he received for assaulting her or encouraging her to sell herself to help pay the bills. We know he harmed her physically while performing this sexual act because the pain caused her to cry and sometimes scream. I also infer he harmed her emotionally as she was forced to recall the trauma she suffered when she was violated as a teenager.
>
> In my humble opinion, the result here does not offend the Constitution or marriage as an institution. Instead, the appellant's conviction for violating Article 125 is permissible because he violated the marital union by using it to impose his desire on his wife, who but for that marital union would have never allowed her body to be subjected to that invasion.

Id.

135. United States v. Allen, 53 M.J. 402, 410 (2000).

136. *Id.*

137. *Id.* at 410. The issue remains whether the Court of Appeals for the Armed Forces would have found a marital exception if the facts indicated a purely consensual fact pattern.

138. *Id.*

> The facts of this case make it clear that appellant's acts were not in furtherance of the marriage. Regardless of whether the facts would have been sufficient to prove beyond a reasonable doubt that appellant engaged in forcible sodomy, they clearly demonstrate that the charged acts do not warrant constitutional protection because they were not "in furtherance of or supportive of the interests of the marital relationship. . . ." Instead, the facts graphically depict a pattern of degradation and depersonalization, of which the acts of sodomy were a part, that appellant visited upon his former wife. Such a pattern falls outside the ambit of conduct that could be considered in furtherance of the marriage for purposes of determining whether the statute should be invalidated on constitutional grounds. In that regard, we emphasize that we are not engaged in a subjective evaluation of the quality of marriage; rather, our consideration is focused on the reasonable inferences that may be drawn from the record concerning the nature of the charged acts in the context that immediately surrounded their commission.

Id. (citation omitted).

Appeals for the Armed Forces concluded that Allen's behavior did not fall within the ambit of constitutionally protected conduct.[139]

In *United States v. Kulow*,[140] the Navy-Marine Court of Criminal Appeals held constitutional a service member's conviction for engaging in consensual sodomy with his wife.[141] The court identified no marital privilege in the military that would preclude prosecution of a married person for engaging in sodomy with his or her spouse.[142] The court determined, however, that Congress and the Court of Appeals for the Armed Forces never intended that service courts ignore the right to privacy inherent in the marital relationship.[143]

The *Kulow* court went one step further toward recognizing the right to privacy when it wrote, "The law does not favor prosecuting consensual sexual activities of married couples that occur within the sanctity of their own bedrooms."[144] After undergoing a constitutional analysis suggesting that the court would recognize a right to privacy protecting married service members' acts of consensual sodomy with their spouse, the court held that no such right existed. [145] The court premised its holding, however, upon the facts of the case that involved Kulow's service-discrediting sexual and physical abuse of his spouse, not his mere consensual sodomy.[146] Thus, the holding of the case should be limited to cases of "forcible" sodomy.

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139. *Id.*

140. No. NMCM 96 02153, 1997 CCA LEXIS 484, (N-M. Ct. Crim. App. Aug. 29, 1997).

141. He was charged with forcible sodomy and found guilty of the lesser included offense of consensual sodomy. *Id.* at *5, *29-30.

142. *Id.* at *9-10, *29.

143. *Id.* at *10-11 (citing United States v. Foster, 40 M.J. 140, 146 (C.M.A. 1994)).

144. *Id.* at *22 (discussing the law in general, not military jurisprudence specifically).

145. *Id.* at *29.

146. *Id.* at *27. The court wrote:

> While the members did not find that the appellant had raped his wife or that the anal sodomy was forcible, there was no question but that his actions were part of an abusive marital relationship and that the incident in question constituted abuse. Such abuse undermines good order and discipline.

Id.

2. States Have Found the Right to Privacy Allows People to Engage in Sodomy

Although the military justice system criminalizes consensual sodomy, many states have decriminalized this conduct.[147] States accomplish this through one of three methods: an executive decision not to prosecute, a judicial opinion that the conduct is constitutionally protected, or a legislative decision to decriminalize sodomy. Generally, states only protect private consensual sodomy. Even in states that recognize a constitutional right to engage in sodomy, that right does not extend to sexual acts committed in public.[148]

This article next provides a summary of court cases determining that state statutes infringed upon the right to privacy protecting individuals' right to engage in private consensual oral or anal sodomy. Some of the cases interpret state constitutions, which often extend the right to privacy beyond the protection afforded by the U.S. Constitution.

a. Georgia

In the 1998 case, *Powell v. Georgia*, the Georgia Supreme Court ruled on the same Georgia statute that the U.S. Supreme Court upheld in *Bowers*.[149] Powell was charged with rape and forcible sodomy, but convicted for violating the Georgia sodomy statute by engaging in consensual oral sodomy with his wife's seventeen-year-old niece. [150]

Powell argued that the right to privacy granted to him by the state constitution protected the act.[151] The Georgia Supreme Court agreed, holding that the state's sodomy statute was unconstitutional as it pertained to private, consensual, and noncommercial acts.[152] The court held that the right to privacy protected acts of consensual sodomy, and that no compelling state interest justified state regulation in this area.[153] Because the Georgia Constitution expressly grants its citizens the right of privacy, however, the

147. *See, e.g.*, United States v. Henderson, 34 M.J. 174, 178 (C.M.A. 1978) (referring to Massachusetts).

148. *See* United States v. Scoby, 5 M.J. 160, 164 (C.M.A. 1978) (referring to New Jersey and New Mexico).

149. Powell v. State of Georgia, 510 S.E.2d 18 (Ga. 1998) (citing GA. CODE ANN. § 16-6-2(a) (2000)).

150. *Id.* at 20.

151. *Id.*

U.S. Constitution was not an issue in *Powell.* Thus, *Bowers* did not bind the Georgia Supreme Court.[154]

Arguably, *Powell* and similar state court cases may be distinguished from service court cases that interpret only the U.S. Constitution. The logic of the state court cases should still apply, nevertheless, even though state constitutions grant their citizens a more expansive right of privacy than does the U.S. Constitution. State constitutions expressly grant the right to privacy, unlike the U.S. Constitution, which does not include the right to privacy within the four corners of the document. But state constitutions do not explicitly confer the right to engage in private consensual sexual activity, and state courts must still determine whether the right to privacy protects these acts.[155] Thus, the Georgia court's conclusion is logical, whether or not the right to privacy is expressly granted in a constitution: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity."[156]

b. Montana

In another state court case, the Supreme Court of Montana held unconstitutional a Montana statute that precluded consensual homosexual conduct.[157] A state constitutional provision explicitly granted the "right of individual privacy,"[158] leading the court to conclude that the state's citizens have a right to expect that their private sexual conduct will be free from government intrusion.[159] The Montana court observed that "it is hard

152. *Id.* at 25-26. Interestingly, the statute is still on the books as valid law. GA. CODE ANN. § 16-6-2(a) (2001). In relevant part, the statute reads, "A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." *Id.* The annotations to the Georgia Code do not refer to *Powell.*

153. *Powell*, 510 S.E.2d at 24-26. "[I]nsofar as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent, [the statute] 'manifestly infringes upon a constitutional provision'. . . which guarantees the citizens of Georgia the right of privacy." *Id.* at 26 (citation omitted).

154. *Id.*

155. *See id.* at 24; Gryczan v. State of Montana, 942 P.2d 112, 122 (Mont. 1997).

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

157. *Gryczan*, 942 P.2d at 115, 126 (holding that no compelling state interest existed to allow regulation of consenting adults who engage in private, same-gender, noncommercial, sexual conduct). Respondents were homosexuals who stated that they engaged in homosexual conduct in the past and intended to do so in the future. *Id.* at 115-16.

to imagine any activity that adults would consider more fundamental, more private and, thus, more deserving of protection from governmental interference than non-commercial, consensual adult sexual activity."[160] Moreover, the Montana court found no compelling state interest to overcome this right to privacy.[161]

c. Indiana

In 1968, the United States Court of Appeals for the Seventh Circuit evaluated the constitutionality of Indiana's sodomy statute in *Cotner v. Henry*,[162] a case involving a man convicted for consensually sodomizing his wife.[163] Cotner challenged his conviction, arguing that the statute constituted an unwarranted invasion into his marital relationship.[164] Indiana's

158. *Id.* at 121.

> Unlike the federal constitution, Montana's Constitution explicitly grants to all Montana citizens the right to individual privacy. Article II, Section 10 of the Montana Constitution provides:
>
> Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Id.

159. *Id.* at 122. The court wrote:

> It cannot seriously be argued that Respondents do not have a subjective or actual expectation of privacy in their sexual activities. With few exceptions not at issue here, all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation. Quite simply, consenting adults expect that neither the state nor their neighbors will be cohabitants of their bedrooms. Moreover, while society may not approve of the sexual practices of homosexuals, or, for that matter, sodomy, oral intercourse or other sexual conduct between husband and wife or between other heterosexuals, that is not to say that society is unwilling to recognize that all adults, regardless of gender or marital state, at least have a reasonable expectation that their sexual activities will remain personal and private.

Id.

160. *Id.* at 123.
161. *Id.* at 126.
162. 394 F.2d 873 (7th Cir. 1968).
163. *Id.*

sodomy statute was similar to Article 125 because it did not distinguish between consensual and nonconsensual conduct or between married and unmarried individuals.[165] The court reversed Cotner's conviction and sent the case back with instructions that, if it were retried, the Indiana court would need to consider Cotner's right to privacy under *Griswold*.[166] The Court was explicitly clear: under *Griswold*, the state had to show a compelling interest for a statute to limit a married person from engaging in private consensual sexual relations.[167]

In a subsequent case, the Supreme Court of Indiana upheld the constitutionality of Indiana's sodomy statute as it applied to unmarried individuals.[168] The court relied on *Griswold* and *Cotner* to determine that the statute was constitutional when applied to unmarried individuals.[169] The U.S. Supreme Court had not yet decided *Eisenstadt*, which extended the protections afforded by *Griswold* to unmarried individuals.[170] Thus, the Indiana Supreme Court was left to interpret cases that had only extended the right to privacy to married individuals' sexual relations. Judge DeBruler's dissent[171] argued that the statute was void for vagueness and unconstitutionally infringed upon unmarried adults' right to engage in private consensual sexual relations.[172] Judge DeBruler stated also that the law provided no support for treating unmarried individuals differently than married individuals.[173]

The preceding cases and others[174] demonstrate that many courts agree that state regulation of private consensual sodomy unconstitutionally infringes upon individuals' right to privacy, whether granted by the U.S. Constitution or a state constitution. The Court of Appeals for the Armed Forces and the service courts, however, have not embraced these courts' rationale. It is time for the military courts to recognize that the right to pri-

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164. *Id.* at 874.

165. *See id.*

166. *Id.* at 876 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

167. *Id.* at 875.

168. Dixon v. State of Indiana, 268 N.E.2d 84, 87 (Ind. 1971). The court found that the statute was not void for vagueness and that sodomy constituted a crime pursuant to the statute. *Id.*

169. *See id.* at 85-87.

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

171. *Dixon*, 268 N.E.2d at 90 (DeBruler, J., dissenting). Judge Prentice concurred with Judge DeBruler. *Id.*

172. *Id.* at 87-90 (DeBruler, J., dissenting).

vacy, under the Due Process Clause, encompasses service members' ability to engage in private consensual oral and anal sodomy.

3. Are Service Members Allowed to Engage in Sodomy with Their Spouses?

In military jurisprudence, there is no marital defense[175] to sodomy.[176] The Court of Appeals for the Armed Forces has indicated, however, that a defense may exist in certain circumstances.[177] In 2000, the court had an opportunity to recognize a marital exception in *United States v. Allen*, but chose not to.[178] Thus, a service member can still be convicted of private consensual sodomy with his or her spouse.[179]

Before *Allen*, the Court of Appeals for the Armed Forces granted review to determine whether a service member's conviction for consensual sodomy with his wife violated his right to privacy. In *United States v. Thompson*,[180] appellant placed a loaded handgun to his wife's head, but the weapon would not fire.[181] While appellant attempted to load a second clip into the handgun, his wife performed oral sodomy on him in a successful

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173. *Id.* at 90.

> I believe that private sexual conduct between consenting adults is within that constitutionally protected zone.
>
> It is true that both *Griswold* and *Cotner* concerned the marital relationship. However, I see no valid reason to limit the right of sexual privacy to married persons. The majority opinion offers no reason why being married should make a difference in the applicability of the statute and I believe there is none. The moral preferences of the majority may not be imposed on everyone else unless there exists some harm to other persons. Sexual acts between consenting adults in private do not harm anyone else and should be free from state regulation.

Id.

174. Other courts have held unconstitutional state statutes that regulate sodomy.

In *State of Idaho v. David Holden*, 890 P.2d 341 (Idaho Ct. Apps. 1995), the court determined that a man's conviction for two counts of sodomy performed with his wife was unconstitutional. After thoroughly reviewing the Supreme Court's prior holdings regarding the right to privacy, the Idaho court determined that the right to privacy covers intimate aspects of a marital relationship.

attempt to divert his attention from the weapon. In a *per curiam* decision,

174. (continued):

> Although the scope of the right to privacy has not been fully defined by the United States Supreme Court, in light of the foregoing decisions there can be little doubt that it encompasses the most personal and intimate aspects of a marriage relationship. It is thus apparent that a constitutionally protected privacy interest is invaded when a statute like Section 18-6605 purports to prohibit particular sexual acts practiced consensually in private by married couples.

Id. at 347. The court explicitly indicated that it did not consider *Bowers* to have any effect upon the privacy rights of married couples. *Id.* at 348. Finally, the court did not consider whether the statute affected the rights of unmarried individuals since the issue was not before the court. *Id.* at 349.

In *State of Iowa v. Robert Eugene Pilcher*, 242 N.W.2d 348 (Iowa 1976), the Supreme Court of Iowa found a sodomy statute unconstitutional because it invaded the constitutional right to privacy. Pilcher was convicted of engaging in sodomy with someone other than his spouse. *Id.* at 350. The statute Pilcher violated was similar to Article 125 in that it did not distinguish between consensual or nonconsensual acts and married or unmarried individuals. *Id*. at 352. The court interpreted the long line of privacy cases in American jurisprudence to mean that individuals had a right to privacy to engage in private consensual sexual conduct. *Id.* at 358. The court determined that, because the right to privacy applied to married couples, the right had to apply to unmarried individuals as well under the Equal Protection Clause. *Id.* at 359. The holding was limited to heterosexual sodomy. "We therefore hold the statute cannot be constitutionally applied to alleged sodomotical acts performed in private between consenting adults of the opposite sex. We do not intimate any view of the constitutionality of the statute as applied in any other factual situation." *Id.* at 360.

In *Commonwealth of Pennsylvania v. Bonadio*, 415 A.2d 47 (Penn. 1980), the Supreme Court of Pennsylvania found unconstitutional a statute prohibiting sodomy between unmarried individuals. The state argued that it was important to create different classifications for married and unmarried individuals to "further a state interest in promoting the privacy inherent in the marital relationship." *Id.* at 51. The court did not determine whether there is a right to privacy to engage in sexual relations. *Id*. at 51. Rather, the court held that the statute's sole applicability to unmarried individuals constituted a violation of the Equal Protection Clause. The court stated:

> Similarly, to suggest that deviate acts are heinous if performed by unmarried persons but acceptable when done by married persons lacks even a rational basis, for requiring less moral behavior of married persons that is expected of unmarried persons is without basis in logic. If the statute regulated sexual acts so affecting others that proscription by law would be justified, then they should be proscribed for all people, not just the unmarried.

Id. at 51-52.

175. A spousal exception exists for indecent assault, MCM, *supra* note 2, pt. IV, ¶ 63b(1), and for carnal knowledge, UCMJ art. 120(b)(1) (2000).

the court held that there was no furtherance of the marital relationship because the case involved brutality.[182] The court wrote: "The extent to which the constitutional right to privacy prohibits a prosecution for sexual relations within a marital relationship raises important constitutional questions. Any such constitutional right, however, must bear a reasonable rela-

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176. United States v. Allen, 53 M.J. 402, 410 (2000); United States v. Scoby, 5 M.J. 160, 166 (1978). *See also Allen*, 53 M.J. at 411 (Sullivan, J., concurring) ("In the military, the law seems clear—any type of sodomy remains a crime. I will continue to apply the law as written, which makes no mention of a marital exception."); *Kulow*, 1997 CCA LEXIS 484 at *39 (Clark, S.J., concurring):

> Since neither the Congress nor our superior Court has indicated the existence of a spousal exception to the offense of consensual sodomy, I am reluctant to venture so far from my brethren as to engage in judicial activism by finding such an implied exception. Nevertheless, since the trend in other jurisdictions is so clear, I find the absence of guidance in this area to be troubling.

Id.

177. In *United States v. Bygrave*, 46 M.J. 491, 495 (1997), the court wrote that "the fact that appellant was unmarried at the time of these sex acts may also be of constitutional significance." (citation omitted). The court continued, "Nor need we consider whether our evaluation of the interests in the present case would differ if appellant had been prosecuted for sexual acts within the context of a marital relationship." *Id*. at 497 (involving an assault where a service member who was HIV positive engaged in consensual sexual intercourse; the government had an interest in proscribing unprotected sex by HIV infected service members with other service members); *Scoby*, 5 M.J. at 166 ("Here, it suffices that we record our agreement with the general rule, and leave to a case directly involving a married couple consideration of whether the exception exists and can properly be applied to the military community."). *See also Kulow*, 1997 CCA LEXIS 484, at *35-36 (Clark, S.J., concurring) ("Had this offense been charged as consensual sodomy I would find it more troubling than I do in its present context—a lesser included offense of the charged forcible sodomy.").

178. *See Allen*, 53 M.J. at 411. The court could have found a marital exception, but it did not mention the existence of one or the lack thereof. *Id*.

179. It is highly unlikely that a convening authority would refer a single charge and specification for engaging in consensual oral sodomy with one's spouse in violation of Article 125. A courts-martial may convict a married individual for consensual oral sodomy, however, if the court finds the individual guilty of consensual sodomy as a lesser included offense of forcible sodomy. The government may also charge consensual oral sodomy in cases where a service member allegedly committed several other offenses.

180. United States v. Thompson, 47 M.J. 378 (1997).

181. *Id*. at 379.

182. *Id*.

tionship to activity that is in furtherance of or supportive of the interests of the marital relationship."[183]

The Court of Appeals for the Armed Forces came closest to recognizing a marital exception to Article 125 in *Thompson* and *Allen.* Rather than conclude that there is a marital defense, however, the court determined that the acts were violent and did not advance the marital relationship.[184] Having never expressly ruled out the existence of a marital defense in previous cases, the court may find the act constitutionally protected by the right to privacy if faced with a situation where a service member is convicted of private consensual sodomy without a hint of force.[185]

Neither *Thompson* nor *Allen* discussed the meaning of the phrase "in furtherance of or supportive of the interests of the marital relationship."[186] Rather, the Court of Appeals for the Armed Forces merely determined in both cases that, because force and brutality were involved, there was no furtherance of the marital relationship. The court did not indicate that the ability to bear children had anything to do with furthering the marital relationship.[187] Thus, by refusing to acknowledge that unmarried service members have the constitutional right to privacy to engage in consensual oral and anal sodomy, the Court of Appeals for the Armed Forces may be taking steps in that direction by failing to adequately explain what constitutes a sexual act in support of the marital relationship.

Although no marital exception to Article 125 currently exists, the Supreme Court precedents remain clear—the government should not invade marital relationships absent a compelling state interest.[188] State courts have interpreted *Griswold* and its progeny to mean that married couples have a right to privacy concerning their private sexual intimacies.[189] The right to privacy to engage in such intimacies is a fundamental right even though the Constitution does not expressly mention it.[190] The courts

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183. *Id.*

184. *See id.*; United States v. Allen, 53 M.J. 402, 410 (2000).

185. *See* United States v. Kulow, No. NMCM 96 02153, 1997 CCA LEXIS 484, at *36 (N-M. Ct. Crim. App. Aug. 29, 1997) (Clark, S.J., concurring) ("I find it ironic that a spousal privilege exists which allows either party to a marriage to prevent the other from disclosing confidential communications between them, yet one of the most intimate types of confidential communications between married persons—consensual sexual relations—is subject to criminal sanctions.").

186. *Thompson*, 47 M.J. at 379. *See also Allen*, 53 M.J. at 410.

187. *See Thompson*, 47 M.J. at 379; *Allen*, 53 M.J. at 410.

188. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

189. *See supra* notes 166, 174 and accompanying text.

clearly hold that a married couple's ability to engage in private sexual relations with each other absent intrusion from the government is one of the most valued rights that American citizens enjoy.[191]

The Supreme Court has left open the specific issue of whether married couples' right to privacy encompasses their ability to engage in consensual oral sodomy.[192] Courts have not interpreted the Court's silence to mean, however, that married couples do not enjoy this right.[193] *Bowers* offers little guidance, because it truly has no impact on cases dealing with any type of heterosexual relationship.[194] Moreover, the *Bowers* majority should have followed the lead of the dissenting judges, examined the Georgia statute as it applied to all individuals, and held that the right to privacy encompassed sexual intimacy. Instead, the majority found a way to prohibit conduct, namely homosexual sodomy, of which it disapproved. *Bowers* aside, the law clearly supports a right to privacy, which allows people to freely engage in consensual oral sodomy in private with one's spouse. As later discussed, the distinction between married and unmarried individuals also appears to be diminishing.

Although military courts have not yet recognized a marital defense to Article 125, they presumably would do so if faced with the proper fact pattern.[195] Thus, in all probability, married service members can engage in purely consensual sodomy with their spouses under the UCMJ.[196] The tough issue is not whether married service members can engage in private

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190. *See Griswold*, 381 U.S. at 483.

191. *See supra* notes 160, 166-67, 173-74 and accompanying text.

192. *See* Carey v. Population Srvs. Int'l, 431 U.S. 678, 689 (1977); Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

193. *See* United States v. Henderson, 34 M.J. 174, 178 n.8 (C.M.A. 1992).

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

195. Although Judge Sullivan appears unwilling to recognize a marital defense, the other four judges who joined in the *Allen* majority opinion appear willing to do so. *See* United States v. Allen, 53 M.J. 402, 410 (2000).

196. *But see supra* notes 177-79 and accompanying text.

consensual oral sodomy; rather, it is whether all service members, regardless of marital status, can engage in such conduct.[197]

4. Unmarried Service Members Should Be Allowed to Engage in Sodomy

The next step is to determine whether unmarried service members should also enjoy the constitutional right to privacy to engage in private consensual oral sodomy with others. The Supreme Court has not spoken on this issue. In this area, however, state courts have determined that unmarried individuals should enjoy the same rights as married persons.[198]

If the Supreme Court was faced with a case in which it had to determine whether unmarried individuals have the constitutional right to engage in private consensual oral sodomy, the Court should, based on its past decisions concerning the right to privacy, hold that the right exists. First, the Court should determine that married people have a constitutional right to privacy, which allows them to engage in private consensual oral sodomy. Second, under *Eisenstadt*, the Court should find that the Equal Protection Clause requires the government to treat unmarried individuals the same as married individuals, thereby extending the right to all individuals regardless of marital status. Finally, the Court should defer to the numerous state court decisions, and adopt their well-considered rationale as its own.

There is no justification for the government to deny unmarried individuals the right to privacy to engage in consensual private oral and anal sodomy.[199] States have been unable to show a compelling governmental interest for creating statutes that criminalize only unmarried individuals' behavior.[200] Additionally, a married couple consists of two individuals who have made a decision to spend their lives together. Underneath the marriage lies two individuals, each with a right to privacy equal to that of an unmarried individual. The Supreme Court held in *Eisenstadt* that unmarried individuals are a protected class, and that the Equal Protection Clause of the Fourteenth Amendment prohibits states from creating legis-

197. United States v. Scoby, 5 M.J. 160, 166 (C.M.A. 1978). The Court of Appeals for the Armed Forces recognizes that there may be a problem if Article 125 is made only applicable to unmarried individuals. The court wrote, "There is no claim, and no evidence, that the article has been intentionally and discriminatorily applied to unmarried persons as distinguished from married individuals." *Id.* (citations omitted).

198. *See supra* notes 153, 157-58, 173-74.

lation that treats certain groups of individuals differently based on criteria unrelated to the statute's purpose.[201] Thus, although individuals are unmarried, they should be treated the same as married individuals with regards to the right to enter into sexual intimacies.[202]

Finally, opponents of this position would argue that allowing unmarried individuals to engage freely in private consensual oral and anal sodomy would not further the marital relationship, and thus such acts should not be protected by the right to privacy. This argument ignores *Eisenstadt*, which held that the Equal Protection Clause affords individuals the right to be treated the same as married individuals in certain circumstances.[203] Also, the courts have not perfected a test for what constitutes an act that is in furtherance of the marital relationship. Traditionally, courts have

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199. United States v. Jones, 14 M.J. 1008, 1012-13 (A.C.M.R. 1982) (Badami, J., dissenting). Judge Badami, in his dissenting opinion, wrote:

> This language [of *Eisenstadt*] makes it clear that the right of privacy is a right of all persons, whether married or not . . . . I believe that in view of *Griswold* and *Eisenstadt* and the cases following them, no sound argument can be made that the right of privacy in sexual conduct between consenting heterosexual adults is "fundamental" only when the consenting adults are married to each other. The right of privacy is deemed fundamental because it is basic to the concept of the individual in our American culture and because it is a necessary prerequisite to the effective enjoyment of all our other fundamental rights. As *Eisenstadt* and its progeny have recognized, these reasons are wholly unrelated to the existence *vel non* of a marriage relationship. I believe that a right of sexual privacy between consenting heterosexual adults is fundamental.

Id. Judge Badami added that he was not bound by *Scoby*, which found Article 125 to be constitutional, because it only involved homosexual conduct. *Id.* at 1014.

200. *See supra* notes 153, 157-58, 173-74 and accompanying text.

201. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 (1972). *See also* Carey v. Population Srvs. Int'l, 431 U.S. 678, 686-87 (1977).

202. While the author recognizes the argument can be made that married individuals are different than unmarried individuals in that the former have made a lifelong commitment to stay together, that rationale does not apply here. First, Congress provided no reason in its legislative history why unmarried individuals should be treated differently than married individuals. Second, nothing suggests that the distinction between the two groups of individuals is related to Article 125's purpose. Third, the Supreme Court and state courts have found that, in certain circumstances, unmarried individuals deserve the same rights as married individuals. *See supra* notes 57-59, 153, 157-58, 173-74 and accompanying text.

203. *See Eisenstadt*, 405 U.S. at 447. Although unmarried individuals should be treated the same as married individuals under the Equal Protection Clause, the latter often enjoy protections not afforded to the former. *See supra* note 175 (citing spousal exceptions for indecent assault and carnal knowledge).

looked to such things as the ability to bear children, but under that rationale, sodomy would not be legal since it does not produce offspring. While courts have not perfected a test, they have clearly watered down the meaning of the phrase "in furtherance of marriage."[204] The phrase now offers scant guidance when dealing with the right to privacy concerning the ability to engage in private consensual sodomy, thus further diminishing the distinction between married and unmarried individuals.

According to many cases, nothing outweighs individual liberties.[205] The right to privacy grants all individuals, whether married or unmarried, heterosexual or homosexual, service member or civilian, the liberty to make certain decisions and engage in certain acts. This should include an adult's right to decide to and engage in private consensual sexual relations—regardless of type—without government intervention. Assuming the right to privacy encompasses these sexual relations, the courts should only examine the underlying sexual conduct to determine whether a compelling governmental interest justifies its regulation. As demonstrated in Part C.5, no compelling governmental interest is served by criminalizing private consensual sodomy. Thus, absent the required compelling interest, the right to privacy should protect all individuals' ability to engage in private consensual sexual relations, including oral and anal sodomy.

Applying *Eisenstadt*'s rationale, homosexuals should also be allowed to engage in private consensual oral sodomy.[206] Whether homosexuals themselves constitute their own protected class is irrelevant because they are entitled to the privacy rights that all individuals share. *Bowers* focused too narrowly on an individual's right to engage in homosexual sodomy. The constitutional issue is not whether homosexuals can engage in sodomy, but whether all individuals can do so.[207] If all individuals can do so, then homosexuals can too. If the government wishes to regulate such conduct, it can do so only if there is a compelling governmental interest to intrude into the constitutional right of privacy.[208] This article next demon-

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204. *See* State of New York v. Onofre, 415 N.E.2d 936, 942 (N.Y. 1980).

205. *See supra* note 43 and accompanying text.

206. *Eisenstadt* does not discuss whether homosexuals are a protected class. Rather, the case holds that legislation cannot treat certain groups of individuals differently based on criteria that are unrelated to the statute's purpose. *Id*. at 447.

207. The right to privacy may protect individuals' ability to engage in all intimate, consensual, and private sexual relations. This article, however, only proposes that the portion of Article 125 restricting individuals from engaging in consensual, private, noncommercial oral sodomy be deemed unconstitutional.

strates that no compelling governmental interest justifies criminalizing private consensual sodomy.

5. No Compelling State Interest Justifies Criminalizing Consensual Sodomy

Assuming the right to privacy protects individuals' ability to engage in private and consensual oral and anal sodomy, one must recognize that no right is absolute. A compelling governmental interest may limit or intrude upon that right.[209] Although "compelling" is the key word, its definition is not set in stone, and the state carries the burden to demonstrate its interest.[210]

No court has identified a compelling state interest that justified regulating private consensual sodomy. Rather, the cases simply avoid the issue by holding that there is no right to privacy allowing people to freely engage in such conduct. Thus, the cases never reach the second part of the constitutionality test. Likewise, Congress apparently never considered whether regulating private consensual sodomy in the military would prevent any harm.[211] Therefore, when it enacted Article 125, Congress articulated no compelling governmental interest that would be served.[212]

The Supreme Court has held that there must be a compelling state interest to overcome a "significant encroachment upon [a] personal liberty."[213] Statutes that regulate the private sexual conduct of consenting

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208. Even if the courts or legislature were to change Article 125, current military regulations still prohibit homosexual conduct and serve as grounds for an administrative discharge. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 635-200, PERSONNEL SEPARATIONS: ENLISTED PERSONNEL ch. 15 (1 Nov. 2000); U.S. DEP'T OF ARMY, REG. 600-8-24, PERSONNEL-GENERAL: OFFICER TRANSFERS AND DISCHARGES para. 15-2 (21 July 1995). *See also* Able v. United States, 155 F.3d 628 (2d Cir. 1998) (holding that the military services do not violate the Constitution when they administratively discharge a service member for homosexual conduct).

209. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

210. *See* Carey v. Population Srvs. Int'l, 431 U.S. 678, 686 (1977) The Court wrote, "'Compelling' is of course the key word; where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Id.* (citations omitted).

211. *See supra* note 30.

212. That is not surprising, however, since this particular right to privacy was not yet recognized. Congress had no compelling reason, nor was it required to provide one.

adults generally do not serve a valid state purpose,[214] and individuals should be free to make their own moral decisions if their conduct "*does not harm others.*"[215] Protecting someone's health or life, including service members or their spouses, is a valid governmental interest.[216] States also have a role in preventing offensive public sexual behavior, forcible sexual conduct, sexual misuse of minors, and cruelty to animals.[217] As a result, most states justifiably prohibit conduct such as rape, bestiality, indecent assault, statutory rape, and corruption of minors.[218] By analogy, Article 125 serves a compelling interest by regulating forcible or public sod-

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213. Bates v. Little Rock, 361 U.S. 516, 524 (1960). *See also Roe*, 410 U.S. at 154-55.

214. *See*, *e.g.*, Commonwealth of Pennsylvania v. Bonadio, 415 A.2d 47, 49-51 (Pa. 1980) (holding unconstitutional a Pennsylvania statute prohibiting adults from engaging in private oral sodomy). The case also discussed equal protection because the statute applied only to unmarried individuals. *Id.*

215. *Id.* at 50.

216. United States v. Bygrave, 46 M.J. 491, 496 (1997). The court found a compelling governmental interest in restricting HIV-positive service members from engaging in unprotected sexual intercourse. The court did not determine whether there exists a constitutional right to engage in private heterosexual sex. *Id.*

217. *See Bonadio*, 415 A.2d at 49; Powell v. State of Georgia, 510 S.E.2d 18, 24 (Ga. 1998).

218. *See, e.g.*, *Bonadio*, 415 A.2d at 49 (Pennsylvania); *Powell*, 510 S.E.2d at 24 (Georgia).

> Implicit in our decisions curtailing the assertion of a right to privacy in sexual assault cases involving sexual activity taking place in public, performed with those legally incapable of giving consent, performed in exchange for money, or performed with force and against the will of a participant, is the determination that the State has a role in shielding the public from inadvertent exposure to the intimacies of others, in protecting minors and others legally incapable of consent from sexual abuse, and in preventing people from being forced to submit to sex acts against their will. The State fulfills its role in preventing sexual assaults and shielding and protecting the public from sexual acts by the enactment of criminal statutes prohibiting such conduct. . . ."

Powell, 510 S.E.2d at 24 (citations omitted).

omy.[219] Regulating private consensual sodomy, however, serves no such interest.[220]

Community opinion is not a compelling state interest.[221] Even if people disapprove of sodomitical behavior or find it reprehensible,[222] that does not create a compelling state interest justifying state intrusion into the right of privacy.[223] The Supreme Court of Montana stated specifically that "legislative distaste of what is perceived to be offensive and immoral sexual practices of homosexuals" did not constitute a compelling governmental interest.[224] The court then held that the Montana statute prohibiting private and consensual sexual relations between homosexuals was unconstitutional.[225] Other state courts have held that regulating private consensual sodomy between individuals, regardless of marital status, serves no compelling state interest.[226]

These cases demonstrate that criminalizing private consensual sodomy serves no compelling state interest. Admittedly, obvious state interests are served by regulating certain types of sodomy, such as sodomy without consent or with a minor. Private consensual sodomy between two adults harms no one. The military justice system should acknowledge this reality by decriminalizing that portion of Article 125, which prohibits a service member from engaging in private consensual sodomy with another adult.

6. The Military's Unique Environment Does Not Create a Compelling Governmental Interest

In domestic jurisdictions, no compelling state interest allows intrusion into the right to privacy as it pertains to one's ability to engage in private consensual sodomy. Due to differences between the civilian and military justice systems, however, the question remains as to whether the

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219. *See* Hatheway v. Secretary of the Army, 641 F.2d 1376, 1383 (9th Cir. 1981).

220. *See* United States v. Jones, 14 M.J. 1008, 1014 (A.C.M.R. 1982) (Badami, J., dissenting) ("I am unable to perceive of any injury or any danger that will accrue to anyone by allowing private consensual sodomy by heterosexual adults.").

221. *Powell*, 510 S.E.2d at 26 ("While many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible, this repugnance alone does not create a compelling justification for state regulation of the activity.") (citations omitted).

222. Buchanan v. Batchelor, 308 F. Supp. 729, 733 (N.D. Tx. 1970), *vacated on other grounds*, Wade v. Buchanan, 401 U.S. 989 (1971). The Texas court stated that sodomy "is probably offensive to the vast majority" of people. *Id.*

military retains a compelling interest to regulate such conduct. Mere differences between the systems do not provide cause for military courts to disregard the civilian courts' constitutional decisions pertaining to sod-

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223. State of New Jersey v. Saunders, 381 A.2d 333, 342-43 (N.J. 1977) (dealing with fornication and holding that the state should not regulate private morality).

> Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate "remedy" for such conduct cannot come from legislative fiat. Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right of personal autonomy is fundamental to a free society. Persons who view fornication as opprobrious conduct may seek strenuously to dissuade people from engaging in it. However, they may not inhibit such conduct through the coercive power of the criminal law. As aptly stated by Sir Francis Bacon, "[t]he sum of behavior is to retain a man's own dignity without intruding on the liberty of others." The fornication statute mocks the dignity of both offenders and enforcers. Surely police have more pressing duties than to search out adults who live a so-called "wayward" life. Surely the dignity of the law is undermined when an intimate personal activity between consenting adults can be dragged into court and "exposed." More importantly, the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy.

Id. (citation omitted). *See also Powell*, 510 S.E.2d at 26. *But see* Carter v. State of Arkansas, 500 S.W.2d 368 (Ark. 1973). In a case involving homosexual sodomy committed in public, the Arkansas Supreme Court refused to find that a state statute prohibiting sodomy, which applied to consenting adults, was unconstitutionally overbroad or in violation of Carter's right to privacy. *Id*. at 370. The court summarily disposed of the constitutional claim and chose instead to focus on the broadness allegation. The court acknowledged that societal changes towards sodomy may "have rendered our sodomy statutes unsuitable to the society in which we now live," but it was up to the legislature to acknowledge the appropriateness of making those changes. *Id*. at 371. The court found that the sodomy statute was "a legitimate exercise of the police power by the General Assembly to promote the public health, safety, morals and welfare." *Id*. at 372 (citations omitted). The court found that the behavior took place at a rest area frequented by travelers, and that the sheriff had received many complaints about public homosexual conduct. *Id.* at 372.

Carter is distinguishable from other cases. It contains no references to Supreme Court cases on the right to privacy, and the court found no right to privacy. Thus, the court did not explore whether there was a compelling governmental interest to uphold the statute. Finally, the case involved homosexual acts committed in a public area about which the authorities had received numerous complaints, not private, consensual sexual intimacy.

224. Gryczan v. State of Montana, 942 P.2d 112, 126 (Mont. 1997).

225. *Id*.

226. State of Idaho v. Holden, 890 P.2d 341, 347 (Idaho Ct. App. 1995); State of Iowa v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976). *See supra* note 174 (discussing these cases).

omy.[227] Thus, it is possible to apply state court rationales to a military setting.[228]

Generally, the protections afforded by the Constitution apply to service members.[229] In *Parker v. Levy*,[230] the Supreme Court remarked that the "military is, by necessity, a specialized society separate from civilian society."[231] Conduct that is acceptable in civilian society may cause problems in a military setting.[232] For example, fraternization that is acceptable for a civilian business may diminish the effectiveness of a military unit.[233] The military's unique circumstances may thus allow regulation of a right that may otherwise be allowed in the civilian sector. Therefore, it is possible that—even if the right to privacy allowed service members to engage in consensual sodomy—the conduct could still be proscribed if it was committed "under service discrediting circumstances" or if it was "prejudicial to good order and discipline."[234]

It is disingenuous to argue that private consensual sodomy is prejudicial to good order and discipline or service discrediting. If two adults engage in private consensual sodomy, the act causes no harm to anyone or any military unit, and it does not compel others to look with disfavor upon the military. That is, because private and consensual, the conduct neither affects good order and discipline, nor discredits the service. Of course, if an act of sodomy is nonconsensual or committed in public, then it should remain prohibited under Article 125. Under those circumstances, others

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227. *See* United States v. Witham, 47 M.J. 297, 300-01 (1997). "It is beyond cavil that there are differences between our military justice system and the various civilian criminal justice systems in our country. However, these differences do not necessarily dictate that constitutional decisions on civilian criminal justice be found per se inapplicable to the military justice system." *Id.* (citations omitted).

228. This can be done even if the state constitutions grant a more expansive right of privacy than the U.S. Constitution (while some state constitutions expressly grant the right to privacy, the right clearly exists under the U.S. Constitution as well). Moreover, state courts use an analytical approach identical to federal courts when they determine whether there is a compelling governmental interest, which justifies an intrusion into the right to privacy. *See infra* Part III.A.

229. United States v. Kulow, No. NMCM 96 02153, 1997 CCA LEXIS 484, at *25 (N-M. Ct. Crim. App. Aug. 29, 1997).

230. 417 U.S. 733 (1974).

231. *Id.* at 743.

232. *Kulow*, 1997 CCA LEXIS 484, at *25-26.

233. *Id.* at *26.

234. *Id.* at *24-25 (discussing married individuals, but rationale should be extended to all individuals).

are affected, someone is harmed, the service is discredited, and the government's interest to regulate such conduct is compelling.[235]

While service members sometimes have limited constitutional rights, the government still must show a compelling interest to limit those rights.[236] Military necessity may be a compelling interest[237] because the military must maintain a strong force.[238] No case suggests, however, that allowing service members to engage in private consensual oral or anal sodomy would detract from the military's ability to meet this objective. To the contrary, Judge Badami of the Army Court of Criminal Appeals wrote, in a dissenting opinion in *United States v. Jones*,[239] that the "absolute need for a disciplined armed force" did not outweigh a service member's right to engage in private and consensual sexual relations.[240] In a concurring opinion in an Army Court of Military Review case, moreover, Senior Judge Miller noted that the military has the obligation "to curb promiscuity and sexual misconduct among service members," but those interests must be balanced against the right to privacy.[241]

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235. Not only should these acts remain a crime under Article 125, but depending on the facts and how the alleged offense is charged, they could satisfy the elements of other military crimes, such as indecent acts or indecent assault. *See* UCMJ art. 134 (2000). *See generally* Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 104 (1991) (arguing that the military has an interest to prohibit a service member from engaging in sexual relations either with an inappropriate partner or in an inappropriate place).

236. United States v. Allen, No. ACM 32727, 1999 CCA LEXIS 116, at *4 (A.F.Ct. Crim. App. Apr. 22, 1999), *aff'd*, 53 M.J. 402 (2000).

237. *See* Middendorf v. Henry, 425 U.S. 25 (1976); *Parker*, 417 U.S. at 758 ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); United States v. McFarlin, 19 M.J. 790, 792 (A.C.M.R. 1985).

238. Hatheway v. Secretary of the Army, 641 F.2d 1376, 1382 (9th Cir. 1981). It appears the court would have found Article 125 to violate the right to personal autonomy, but the case concerned homosexual conduct, behavior the court found inappropriate. *Id.*

239. United States v. Jones, 14 M.J. 1008, 1014 (A.C.M.R. 1982) (Badami, J., dissenting).

240. *Id.* (discussing heterosexual sexual relations).

241. *Id.* at 1011 (Miller, S.J., concurring) ("[The c]ourt need not reach the difficult determination of whether a compelling military interest underlies and justifies the application of the sodomy statute to this conduct."). Although appellant was charged with consensual sodomy, Senior Judge Miller did not believe the conduct was consensual. If the conduct was consensual, he wrote, it "would doubtless make more difficult an attempt by the military to intrude on the intimate sexual relations between consenting adults, carried out under secluded conditions." *Id.* (citation omitted).

7. Proposed Revision to Article 125

To acknowledge all service members' right to privacy, a right that outweighs any governmental interest to regulate private consensual sodomy, Article 125 should be revised to read:

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person by force, with an individual under the age of 16, or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

The proposed language specifically removes the phrase "with another person of the same or opposite sex," to acknowledge the constitutionally protected status of consensual oral and anal sodomy committed in private. There is no specific language added concerning marital status or sexual orientation because the right to privacy applies equally to all individuals. Also, the phrase "unnatural carnal copulation . . . with an animal" remains to address bestiality, which should remain prohibited due to compelling state interests. Therefore, the net effect of the change is to eliminate private consensual sodomy as a crime under the UCMJ, and thus protect the constitutional right to privacy.

IV. Conclusion

Service members have a constitutional right to privacy, which protects their ability to engage in private consensual sodomy with another adult. Currently, Article 125 does not allow any service member to legally participate in sodomy of any type. Military courts suggest that married service members may participate in oral or anal sodomy, although they have not definitively ruled on the issue. Under equal protection principles, unmarried individuals should share the same right to privacy that married individuals enjoy. The fundamental right to privacy thus protects married and unmarried individuals' ability to decide to and to engage in private consensual sodomy with another adult.

The state, or in this case, the military, must show a compelling governmental interest to restrict this right to privacy. Regulating sodomy serves no governmental interest, let alone a compelling one. Thus, either

Congress should revise Article 125, or the Court of Appeals for the Armed Forces should declare unconstitutional that portion of Article 125, which prohibits private consensual sodomy.