the practice.[658] The privacy of the home does not protect all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults."[659] Interestingly, Justice Blackmun, in dissent, was most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[660]

Yet, *Lawrence v. Texas*,[661] by overruling *Bowers*, brought the outer limits of noneconomic substantive due process into question by once again using the language of "privacy" rights. Citing the line of personal autonomy cases starting with *Griswold*, the Court found that sodomy laws directed at homosexuals "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[662]

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that there was no "fundamental right [of] homosexuals to engage in acts of consensual sodomy," as homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." 478 U.S. at 191–92.

[658] 478 U.S. at 191–92. Chief Justice Burger's brief concurring opinion amplified this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

[659] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195–96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217–18) suggested that these crimes are readily distinguishable.

[660] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See* id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomy by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219. Justice Blackmun would instead have addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. 478 U.S. at 204–06. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to "family, marriage, or procreation." 478 U.S. at 191. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[661] 539 U.S. 558 (2003).

[662] 539 U.S. at 567.