'arbitrary *or unlawful* interference' with privacy and to '*unlawful* attacks' on honour (emphasis added). The ICCPR Human Rights Committee has issued a General Comment No. 16, see p. 735, *supra*, on Article 17 without mentioning questions of sexuality.

The United States Constitution makes no reference to a right to 'privacy' as such.

We turn to two judicial decisions interpreting and applying the European Convention and the US Constitution.

NORRIS v. IRELAND

European Court of Human Rights, 1989
Ser. A, No. 142, 13 EHRR 186

[The applicant, an Irish national and member of the Irish Parliament, was a homosexual and chairman of the Irish Gay Rights Movement. In 1977, he instituted proceedings in the High Court of Ireland, seeking a declaration that certain laws prohibiting homosexual relations were invalid under the Irish Constitution. Those laws included (i) section 62 of the Person Act 1861 to the effect that '[w]hosoever shall attempt to commit the said abominable crime [of buggery], or shall be guilty of any . . . indecent assault upon a male person', is guilty of a misdemeanor and subject to a prison sentence not exceeding ten years, and (ii) section 11 of the Criminal Law Amendment Act 1885 to the effect that any 'male person who, in public or in private, commits . . . any act of gross indecency with another male person', is guilty of a misdemeanor and subject to imprisonment not exceeding two years. The term 'gross indecency' was not statutorily defined and was to be given meaning by courts on the particular facts of each case. Later acts gave courts discretion to impose more lenient sentences.

At no time was the applicant charged with any offence in relation to his admitted homosexual activities, although he was continuously at risk of being so prosecuted on the basis of an indictment laid by the Director of Public Prosecutions. The Director made a statement in connection with this litigation to the effect that '[t]he Director has no *stated* prosecution policy on any branch of the criminal law. He has no unstated policy *not* to enforce any offence. Each case is treated on its merits'. Since the Office of the Director was created in 1984, no prosecution had been brought in respect of homosexual activities except where minors were involved or the acts were committed in public or without consent.

Mr Norris offered evidence of the ways in which this legislation had interfered with his right to respect for his private life, including evidence (i) of deep depression on realizing that 'any overt expression of his sexuality would expose him to criminal prosecution', and (ii) of fear of prosecution of him or of another man with whom he had a physical relationship.

The judge in the High Court found that '[o]ne of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals

leading, on occasions, to depression . . .'. However, he dismissed the action on legal grounds, and his decision was upheld in 1983 by the Supreme Court of Ireland. That court concluded that the applicant had standing (*locus standi*) to bring an action for a declaration even though he had not been prosecuted, for the threat continued.

The Supreme Court rejected the applicant's argument that the Irish Constitution should be interpreted in the light of the European Convention on Human Rights, for the Convention was 'an international agreement [which] does not and cannot form part of [Ireland's] domestic law, nor affect in any way questions which arise thereunder'. Article 29(6) of the Irish Constitution declared: 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas', and the Oireachtas (legislature) had not taken action to enact the Convention as domestic legislation.

The Supreme Court found the laws complained of to be consistent with the Constitution, since no right of privacy encompassing consensual homosexual activity could be derived from the 'Christian and democratic nature of the Irish State'. It observed (i) that homosexuality 'has always been condemned in Christian teaching as being morally wrong' and has been regarded for centuries 'as an offence against nature and a very serious crime', (ii) that '[e]xclusive homosexuality, whether the condition be congenital or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide', and (iii) that male homosexual conduct resulted in many states in 'all forms of venereal disease', which had become a 'significant public health problem'.

Mr Norris started proceedings before the European Commission of Human Rights, claiming that the Irish laws constituted a continuing interference with his right to respect for private life under Article 8 of the European Convention. In 1987, by six votes to five, the Commission expressed its opinion that there had been a violation of Article 8. The case was then referred to the European Court, which agreed with the conclusion in *Dudgeon* that the applicant could claim to be a victim of a violation of the Convention because of the risk of criminal prosecution that constituted a continuing interference with the applicant's right to respect for his private life. Excerpts from the judgment follow:]

39. The interference found by the Court does not satisfy the conditions of paragraph (2) of Article 8 unless it is 'in accordance with the law', has an aim which is legitimate under this paragraph and is 'necessary in a democratic society' for the aforesaid aim.

40. It is common ground that the first two conditions are satisfied. As the Commission pointed out in paragraph 58 of its report, the interference is plainly 'in accordance with the law' since it arises from the very existence of the impugned legislation. Neither was it contested that the interference has a legitimate aim, namely the protection of morals.

41. It remains to be determined whether the maintenance in force of the impugned legislation is 'necessary in a democratic society' for the aforesaid aim. According to the Court's case law, this will not be so unless, *inter alia*, the

interference in question answers a pressing social need and in particular is proportionate to the legitimate aim pursued.

. . .

42. . . . It was not contended before the Commission that there is a large body of opinion in Ireland which is hostile or intolerant towards homosexual acts committed in private between consenting adults. Nor was it argued that Irish society had a special need to be protected from such activity. In these circumstances, the Commission concluded that the restriction imposed on the applicant under Irish law, by reason of its breadth and absolute character, is disproportionate to the aims sought to be achieved and therefore is not necessary for one of the reasons laid down in Article 8(2) of the Convention.

. . .

44. . . . As early as 1976, the Court declared in its *Handyside* judgment of 7 December 1976 that, in investigating whether the protection of morals necessitated the various measures taken, it had to make an 'assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context' and stated that 'every 'restriction' imposed in this sphere must be proportionate to the legitimate aim pursued'. It confirmed this approach in its *Dudgeon* judgment.

. . . [A]lthough of the three aforementioned judgments two related to Article 10 of the Convention, it sees no cause to apply different criteria in the context of Article 8.

. . .

46. As in the *Dudgeon* case, . . . not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of paragraph (2) of Article 8.

Yet the Government has adduced no evidence which would point to the existence of factors justifying the retention of the impugned laws which are additional to or are of greater weight than those present in the aforementioned *Dudgeon* case. At paragraph 60 of its judgment of 22 October 1981 the Court noted that

> As compared with the era when [the] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.

It was clear that 'the authorities [had] refrained in recent years from enforcing the law in respect of private homosexual acts between consenting [adult] males . . . capable of valid consent'. There was no evidence to show that this '[had] been injurious to moral standards in Northern Ireland or that there [had] been any public demand for stricter enforcement of the law'.

Applying the same tests to the present case, the Court considers that, as regards Ireland, it cannot be maintained that there is a 'pressing social need' to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that 'such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved'.

47. The Court therefore finds that the reasons put forward as justifying the interference found are not sufficient to satisfy the requirements of paragraph (2) of Article 8. There is accordingly a breach of that Article.

[The Court then considered the applicant's request for compensation under provisions of the Convention.]

49. The applicant requested the Court to fix such amount by way of damages as would acknowledge the extent to which he has suffered from the maintenance in force of the legislation.

[I]t is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violation found stems directly from the contested provision and not from individual measures of implementation. It will be for Ireland to take the necessary measures in its domestic legal system to ensure the performance of its obligation under [the Convention].

For this reason and notwithstanding the different situation in the present case as compared with the *Dudgeon* case, the Court is of the opinion that its finding of a breach of Article 8 constitutes adequate just satisfaction for the purposes of . . . the Convention and therefore rejects this head of claim.

. . .

NOTE

Consider the following observation of Andrew Clapham in *Human Rights in the Private Sphere* (1993), at 64:

> . . . [T]he courts, even when faced with a popular legitimate law, such as the law of the Isle of Man on birching [a form of whipping or spanking with a birch rod, used under the law referred to for discipline of children], may prefer to follow the Strasbourg lead. A parallel can be drawn between this case and the situation concerning homosexuality in Northern Ireland, where the Court of Human Rights, faced with another popular law (which prohibited sexual relations between men), found a breach of human rights: Dudgeon v. United Kingdom. It is in these types of situation involving unpopular minority interests that human

rights theory is really tested. Both laws were relatively popular in the Isle of Man and Northern Ireland respectively and it was the European Court of Human Rights in Strasbourg that held the laws to violate human rights. It may well be that such a court can bring a detachment to bear on domestic laws that national courts may find hard. It is for this reason that even if the United Kingdom were to adopt the European Convention in the form of a Bill of Rights, the right of individual petition to Strasbourg should still be kept open, so that the European Court of Human Rights has the chance to examine cases arising in the United Kingdom context and give authoritative judgments on the scope of the rights guaranteed by the Convention.

BOWERS v. HARDWICK

Supreme Court of the United States, 1986
478 U.S. 186 106 S. Ct. 2841

[A Georgia statute defined the crime of sodomy as 'any sex act involving the sex organs of one person and the mouth or anus of another'. Hardwick (who was under some surveillance by the police) was arrested in his home bedroom immediately after engaging in oral sex there with a consenting adult male. He was charged with the crime of sodomy and, before being tried, challenged the statute.

The Supreme Court, by a 5–4 vote, held that the statute was constitutional. Five opinions were written, including the opinion for the Court by Justice White, two separate concurring opinions and two dissents. The excerpts below from several opinions touch only on a few themes that provide comparisons with the opinion in *Norris*.]

OPINION OF JUSTICE WHITE FOR THE COURT

. . . 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. . . .

We first register our disagreement with the [opinion of the Court of Appeals below] that the [Supreme] Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy. . . .

[The opinion referred to prior decisions involving child rearing and education of children, to procreation and contraception, to marriage, and (*Roe v. Wade*) to abortion. Some of those decisions relied on a right to privacy not explicit in the Constitution but found to be within the protection provided by constitutional provisions such as the Due Process Clause of the Fourteenth Amendment.]

. . . [W]e 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. . . .

. . .

. . . Proscriptions against [consensual sodomy] have ancient roots . . . Sodomy was a criminal offense at common law and . . . [i]n 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. . . . Against this background, to claim that a right to engage in such conduct is [quoting from prior decisions in unrelated cases seeking to give content to concepts like due process or basic rights] 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. 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. . . .

. . .

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. . . .

CHIEF JUSTICE BURGER, CONCURRING

. . . Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

. . .

JUSTICE BLACKMUN (JOINED BY JUSTICES BRENNAN, MARSHALL AND STEVENS), DISSENTING

This case is [not] about a 'fundamental right to engage in homosexual sodomy', as the Court purports to declare. . . . Rather, this case is about [quoting here and below from prior decisions of the Court] 'the most comprehensive of rights and the rights most valued by civilized men', namely, 'the right to be let alone'.

. . . I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians'.

. . .

. . . We protect those rights [to family, procreation] 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. . . . We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. . . .

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

. . .

The assertion [in the State Attorney General's brief] that 'traditional Judeo-Christian values proscribe' the conduct involved cannot provide an adequate justification [for the Georgia statute]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. Thus, far from buttressing [the Attorney General's] case, invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the statute] represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. . . .

. . . [The State] and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. . . .

. . . This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legal cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

. . .

NOTE

Compare Laurence Tribe, *American Constitutional Law* (2nd edn., 1987), at 1428:

> . . . Therefore, in asking whether an alleged right forms part of a traditional liberty, it is crucial to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct. The proper question, as the dissent in Hardwick recognized, is not whether oral sex as such has long enjoyed a special place in the pantheon of constitutional rights, but whether private, consensual, adult sexual acts partake of traditionally revered liberties of intimate association and individual autonomy.
>
> . . . It should come as no surprise that, in the kind of society contemplated by our Constitution, government must offer greater justification to police the bedroom than it must to police the streets. Therefore, the relevant question is not what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of Georgia was doing there.

QUESTIONS

1. Do you believe that it was significant for the opinions that the European Convention is explicit about the right to 'respect' for 'private life' and the US Constitution is not? If there were no Article 8 in the European Convention, how would you as counsel for the applicants have argued your case? How might the Court have resolved it?

2. What are the salient differences between the opinions of the courts in *Norris* and *Bowers* with respect to trends in legislation and mores in European states (in *Norris*) or in states of the United States federalism (in *Bowers*)? Are the trends similar?

3. What method do you think the Court should explicitly follow in deciding a case like *Norris*, or the birching case from the Isle of Man, with respect to trends in European states? Should it survey the legislation and the practice under that legislation (whether or not to prosecute, nature of punishment, and so on) in all member states? What should it make of the survey? Would all states have equal 'weight' in the decision? What relevance would a 'trend' have—for example, 30 years ago 90 per cent of the states barred the practice at issue, but now only 60 per cent bar it (or the reverse, earlier permitted and now often barred)?

NOTE

The South African Constitution of 1996 includes the right to privacy and the right to dignity. The equal protection provision of Section 9 states: