from page 5 Hardwick v. Bowers: whole approach of the majority justices was viciously heterosexist. The laws being challenged did not prohibit anal and oral sex between gays; it was a general prohibition, as it is in 18 of the 23 other States with such laws. There was no sound legal reason for the majority to restrict the analysis to gays; only the fact that the challenge was brought by a gay man gave them any semblance of appropriateness in doing so. Accusing the majority of distorting the question presented by the case, the four dissenting justices argued --correctly-- that the case was really "about" 'the most comprehensive of rights and the most valued by civilized men [sic]... the right to be let alone'."

So why did the majority judges obsess on "homosexual sodomy?" One possibility is that they simply wished to avoid the issue of heterosexual intimacy altogether. It may well be that the majority judges believe that no one has a right to sexual privacy; certainly their reasoning, specious as it is, would support that conclusion. But imagine how foolish they would have appeared to the general public if their ruling had been all-inclusive. People whose notion of "family" has been gleaned from glossy post-war magazines may be able to agree with the idea that "family, marriage and procreation" cannot be compared with "homosexual activity." Yet even they would look askance at a statement that there would be no connection between the first three and "intimate" sexual behavior." Obviously these things are related; equally obvious is the conclusion that if one is a fundamental right, all are. Imagine too how idiotic the majority would have seemed arguing that since non-procreational sex has been proscribed since ancient times, and was forbidden in the colonies, and is still outlawed in 19 states and D.C., the Constitution doe not protect oral and anal sex between straights. They would have been accused of living in the Middle Ages, and condemned by nearly everyone.

In short, if the Supreme Court had ruled that State legislatures may constitutionally intervene into the intimate lives of all Americans, public uproar would have been immediate and deafening. So why didn't the Court just say: "Gays have no right to sexual privacy but straights do?" Gays are an easy target, after all. The media's insistent characterization of AIDS as a "gay plague" has convinced a lot of people that it is okay to trample on gays' civil rights. And a lot more thought it was fine to begin with: witness Falwell heralding the Court's decision as "a clear statement that perverted moral behavior is not accepted practice in this country." (*NYT*, July 1, 1986)

I think the answer to this puzzle is fairly straightforward. The majority judges recognized that either sexual intimacy is a right, or it is not, regardless of the gender of one's partner. And I think that recognition horrified them. Either they had to announce to a nation heavily dominated by the religious Right that everyone, including gays, is entitled to engage in whatever consensual sex acts they please, or they had to risk the wrath of the rest of the population by saying that government can regulate everyone's sexuality. There simply was no basis on which to rule that gays and straights enjoyed different degrees of privacy.

And so, fearful of hostility from both liberal and conservative straights, the Court decided it could defer the question of heterosexuality --perhaps forever-- and instead focus on a group that few people would rally to support. By exempting straights from their ruling, the court was attempting to deprive gays of their most logical allies in struggles against sexual repression: other sexual human beings. To a great extent, it succeeded. Liberals have decried the ruling, but for the most part, straights have been silent, confident that they are safe-- at least for now.

The Supreme Court's ruling does not necessarily preclude all future federal constitutional challenges to State sodomy laws. For example, 14th amendment equal protection arguments can be made against laws which penalize oral/anal sex between gays but not straights, or against those which prohibit it between two males or between a male and female, but not between two women, as is the case with many statutes.

But whatever the possibilities for restoration of rights at the federal level, gays had best not hold their bgreath awaiting them. Action now is better concentrated at the State level. Since State constitutions can be interpreted to offer more rights than the federal one, nothing stops State judges from invalidating sodomy statutes on State constitutional grounds. In fact, in several states, including New York and Pennsylvania, they have already done so, using an equal protection analysis. Nonetheless, litigation in this area is a gambler's game. Win and the other side forfeits its repression chips. Lose, and they get the jackpot.

A slower, less risky, course is concentrated political effort, both formal and informal, directed at repealing the sodomy statutes themselves. In some cases, ordinary lobbying maybe the most effective technique; in others, dramatic actions, such as mass surrenders of gays and straights who are "guilty" of this heinous crime, may prove persuasive. Obviously, repeal will not come easily. The 24 States with sodomy laws are not exactly bastions of liberalism: Alabama, Texas, Arizona, Arkansas, Tennessee, etc. (Of the northeastern States, only Rhode Island and Maryland still outlaw sodomy.) And at the same time, gays who live in more progressive areas must not be lulled into complacency. What Hardwick v Bowers means in practical terms is that there will be no federal constitutional impediment to States re-enacting laws they previously repealed, and moreover, it means that proponents of re-enactment will be armed with juicy and authoritative rhetoric to cite on behalf of their efforts.

Paradoxically, the most critical impact of the decision will probably be felt in areas it "legally" does not touch. Sodomy laws or not, cops are not going to be busting into bedrooms. But the Court's language and reasoning will no doubt be invoked whenever gay rights are at stake. For example, in States still having sodomy laws, custody battles between gay and straight parents are likely to focus on the "illegality" of the gay parent's behavior, and the "trauma" the child would endure if the parent were arrested. While it is certainly true that anal and oral sex --all that is usually prohibited by sodomy laws-- are far from the only forms of gay sexual expression, the distinction may well be lost on a conservative judge. and frankly, who would want to try making this distinction in the midst of a custody suit? Similarly, even though the Supreme Court's decision has no legal effect on issues relating to adoption, or immigration, or discrimination in housing, employment or occupational licensing, it will surely be quoted extensively in attempts to limit gay rights in those areas.

As noted earlier, most people will not remember the details of the decision for long, or will not understand its legal limits. So one vital task for gay activists has to be public education, both about the terms of the decision and about its potential effect on the lives of millions of Americans. Another crucial task is a redoubled effort to secure anti-discrimination provisions in State and local laws, in union contracts, in non-union employment policies, in school admission procedures and disciplinary codes, in social service manuals, etc. A third is to publicize and promote enforcement of such regulations as already exist.

Even though Hardwick v Bowers will not result in massive arrests and prison terms for gays,its ideological repercussions will be tremendous. Perhaps the best way to conceptualize the damage this decision will do to gays is to imagine what a victory the opposite result would have represented, both in legal and moral terms. Weighing the political advantage now held by the right, it is clear there is no time to wait before starting to fight back.