***Dronenburg v. Zech* (1984)**

741 F. 2d

The facts of this case, in which James L. Dronenburg bought suit against Vice Admiral Lando Zech, Chief of Naval Personnel, challenging the U.S. Navy's policy mandating the discharge of all homosexuals, are spelled out in this opinion from the U.S. Court of Appeals, District of Columbia Circuit. Opinion of the Court: Bork, Scalia, Williams.

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MR. JUSTICE BORK delivered the opinion of the Court.

James L. Dronenburg appeals from a district court decision upholding the United States Navy's action administratively charging him for homosexual conduct. Appellant contends that the Navy's policy of mandatory discharge for homosexual conduct violates his constitutional rights to privacy and equal protection of the laws. The district court granted summary judgment for the Navy, holding that private, consensual, homosexual conduct is not constitutionally protected. We affirm.

On April 21, 1981, the United States Navy discharged James L. Dronenburg for homosexual conduct. For the previous nine years he had served in the Navy as a Korean linguist and cryptographer with a top-security clearance. During that time he maintained an unblemished service record and earned many citations praising his job performance. At the time of his discharge Dronenburg, then a 27-year-old petty officer, was enrolled as a student in the Defense Language Institute in Monterey, California.

The Navy's investigation of Dronenburg began eight months prior to the discharge, in August, 1980, when a 19-year-old seaman recruit and student of the Language Institute made sworn statements implicating Dronenburg in repeated homosexual acts. The appellant, after initially denying these allegations, subsequently admitted that he was a homosexual and that he had repeatedly engaged in homosexual conduct in a barracks on the Navy base. On September 18, 1980, the Navy gave Dronenburg formal notice that it was considering administratively discharging him for misconduct due to homosexual acts, a violation of SEC/NAV Instruction 1900.9C (Jan. 20, 1978); Joint Appendix ("J.A.") at 216, which provided in pertinent part, that "[a]ny member [of the Navy] who solicits, attempts or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale."

On January 20 and 22, 1981, at a hearing before a Navy Administrative Discharge Board ("Board") Dronenburg testified at length in his own behalf, with counsel representing him. He again acknowledged engaging in homosexual acts in a Navy barracks.

The Board voted unanimously to recommend Dronenburg's discharge for misconduct due to homosexual acts. Two members of the Board voted that the discharge be characterized as a general one, while the third member voted that the discharge be an honorable one. The Secretary of the Navy, reviewing this case at appellant's request, affirmed the discharge but ordered that it be characterized as honorable. On April 20, 1981, the appellant filed suit in district court challenging the Navy's policy mandating discharge of all homosexuals. The district court granted summary judgment for the Navy.

Appellant advances two constitutional arguments, a right of privacy and a right to equal protection of the laws. Resolution of the second argument is to some extent dependent upon that of the first. Whether the appellant's asserted constitutional right to privacy is based upon fundamental human rights, substantive due process, the ninth amendment or emanations from the Bill of Rights, if no such right exists, then appellant's right to equal protection is not infringed unless the Navy's policy is not rationally related to a permissible end.…We think neither right has been violated by the Navy.

According to appellant, *Griswold v. Connecticut* … (1965), and the cases that came after it, such as *Loving v. Virginia* … (1967); *Eisenstadt v. Baird* … (1972); Roe v. Wade … (1973); and *Carey v. Population Services International* … (1977), have "developed a right of privacy of constitutional dimension." …Appellant finds in these cases "a thread of principle: that the government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her own body" except by the least restrictive means available and in the presence of a compelling state interests.… Given this principle, he urges, private consensual homosexual activity must be held to fall within the zone of constitutionally protected privacy.

Whatever thread of principle may be discerned in the right-of-privacy cases, we do not think it is the one discerned by the appellant. Certainly the Supreme Court has never defined the right so broadly as to encompass homosexual conduct. Various opinions have expressly disclaimed any such sweep.… More to the point, the Court in *Doe v. Commonwealth's Attorney for Richmond* … (1976), summarily affirmed a district court judgment … (E.D, Va. 1975) upholding a Virginia statute making it a criminal offense to engage in private consensual homosexual conduct. The district court in *Doe* had found that the right to privacy did not extend to private homosexual conduct because the latter bears no relation to marriage, procreation, or family life.… The Supreme Court's summary disposition of a case constitutes a vote on the merits; as such, it is binding on lower federal courts.… If a statute proscribing homosexual conduct in a civilian context is sustainable, then such a regulation is certainly sustainable in a military context. That the military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society has repeatedly been made clear by the Supreme Court.…

The cases cited by appellant…, and the suggestion that we apply them to protect homosexual conduct in the Navy, pose a peculiar jurisprudential problem. When the Supreme Court decides cases under a specific provision or amendment to the Constitution it explicates the meaning and suggests the contours of a value already stated in the document or implied by the Constitution's structure and history. The lower court judge finds in the Supreme Court's reasoning about those legal materials, as well as in the materials themselves, guidance for applying the provision or amendment to a new situation. But when the Court creates new rights, as some Justices who have engaged in the process state that they have done, … lower courts have none of these materials available and can look only to what the Supreme Court has stated to be the principle involved.

In this group of cases, … we do not find any principle articulated even approaching in breadth that which appellant seeks to have us adopt. The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be said that none of these covers a right to homosexual conduct.

The question then becomes whether there is a more general principle that explains these cases and is capable of extrapolation to new claims not previously decided by the Supreme

Court. It is true that the principle appellant advances would explain all of these cases, but then so would many other, less sweeping principles. The most the Court has said on that topic is that only rights that are “fundamental" or “implicit in the concept of ordered liberty" are included in the right of privacy. These formulations are not particularly helpful to us, however, because they are less prescriptions of a mode of reasoning than they are conclusions about particular rights enunciated. We would find it impossible to conclude that a right to homosexual conduct is "fundamental" or “implicit in the concept of ordered liberty" unless any and all private sexual behavior falls within those categories, a conclusion we are unwilling to draw.

In dealing with a topic like this, in which we are asked to protect from regulation a form of behavior never before protected, and indeed traditionally condemned, we do well to bear in mind the concerns expressed by Justice White…

"That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the 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 even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930's and 1940's, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."

Whatever its application to the Supreme Court, we think this admonition should be taken very seriously by inferior federal courts. No doubt there is “ample precedent for the creation of new constitutional rights," but, as Justice White said, the creation of such rights “comes nearest to illegitimacy" when judges make “law having little or no cognizable roots in the language or even the design of the Constitution.” If it is in any degree doubtful that the Supreme Court should freely create new constitutional rights, we think it certain that lower courts should not do so. We have no guidance from the Constitution or, as we have shown with respect to the case at hand, from articulated Supreme Court principle. If courts of appeals should, in such circumstances, begin to create new rights freely, the volume of decisions would mean that many would evade Supreme Court review, a great body of judge-made law would grow up, and we would have "preempt[ed] for [ourselves] another part of the governance of the country without express constitutional authority." If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the use of this court.

Turning from the decided cases, which we do not think provide even an ambiguous warrant for the constitutional right he seeks, appellant offers arguments based upon a constitutional theory. Though that theory is obviously untenable, it is so often heard that it is worth stating briefly why we reject it.

Appellant denies that morality can ever be the basis for legislation or, more specifically, for a naval regulation, and asserts two reasons why that is so. The first argument is: "if the military can defend its blanket exclusion of homosexuals on the ground that they are offensive to the majority or to the military's view of what is socially acceptable, then no rights are safe from

encroachment and no minority is protected against discrimination." … Passing the inaccurate characterization of the Navy's position here, it deserves to be said that this argument is completely frivolous. The Constitution has provisions that create specific rights. These protect, among others, racial, ethnic, and religious minorities. If a court refuses to create a new constitutional right to protect homosexual conduct, the court does not thereby destroy established constitutional rights that are solidly based in constitutional text and history.

Appellant goes further, however, and contends that the existence of moral disapproval for certain types of behavior is the very fact that disables government from regulating it. He says that as a matter of general constitutional behavior principle, "it is difficult to understand how an adult's selection of a partner to share sexual intimacy is not immune from burden by the state as an element of constitutionally protected privacy. That the particular choice of partner may be repugnant to the majority argues for its vigilant protection—not its vulnerability to sanction." … This theory that majority morality and majority choice is always made presumptively invalid by the Constitution attacks the very predicate of democratic government. When the Constitution does not speak to the contrary, the choices of those put in authority by the electoral process, or those who are accountable to such persons, come before us not as suspect because majoritarian but as conclusively valid for that very reason. We stress, because the possibility of being misunderstood is so great, that this deference to democratic choice does not apply where the Constitution removes the choice from majorities. Appellant's theory would, in fact, destroy the basis for much of the most valued legislation our society has. It would, for example, render legislation about civil rights, worker safety, the preservation of the environment, and much more, unconstitutional. In each of these areas, legislative majorities have made moral choices contrary to the desires of minorities. It is to be doubted that very many laws exist whose ultimate justification does not rest upon the society's morality. For these reasons, appellant's argument will not withstand examination.

We conclude, therefore, that we can find no constitutional right to engage in homosexual conduct and that, as judges, we have no warrant to create one. We need ask, therefore, only whether the Navy's policy is rationally related to a permissible end.… We have said that legislation may implement morality. So viewed, this regulation bears a rational relationship to a permissible end. It may be argued, however, that a naval regulation, unlike the act of a legislature, must be rationally related not to morality for its own sake but to some further end which the Navy is entitled to pursue because of the Navy's assigned function. We need not decide that question because, if such a connection is required, this regulation is plainly a rational means of advancing a legitimate, indeed a crucial, interest common to all our armed forces. To ask the question is to answer it. The effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline. The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate. This very case illustrates dangers of the sort the Navy is entitled to consider: a 27-year-old petty officer had repeated sexual relations with a 19-year-old seaman recruit. The latter then chose to break off the relationship. Episodes of this sort are certain to be deleterious to morale and discipline, to call into question the even-handedness of superiors' dealings with lower ranks, to make personal dealings uncomfortable where the relationship is sexually ambiguous, to generate dislike and disapproval among many who find homosexuality morally offensive, and, it must be said, given the powers of military superiors over their inferiors, to enhance the possibility of homosexual seduction.

At oral argument, appellant's counsel was pressed by the court concerning his proposition that the naval regulations may not permissibly be founded in moral judgments. Asked whether moral abhorrence could never be a basis for a regulation, counsel replied that it could not. Asked then about the propriety of prohibiting bestiality, counsel replied that that could be prohibited but on the ground of cruelty to animals. The objection to cruelty to animals is, of course, an objection on grounds of morality.

The Navy's policy requiring discharge of those who engage in homosexual conduct serves legitimate state interests which include the maintenance of "discipline, good order and morale[,] … mutual trust and confidence among service members, … insur[ing] the integrity of the system of rank and command, …recruit[ing] and retain[ing] members of the naval service … and … prevent[ing] breaches of security." … We believe that the policy requiring discharge for homosexual conduct is a rational means of achieving these legitimate interests.… The unique needs of the military, "a specialized society separate from civilian society, " … justify the Navy's determination that homosexual conduct impairs its capacity to carry out its mission. Affirmed.