Potential justice gives clue to future

Court decision supports moral choice

Presidential campaigns can produce a net subtraction from public understanding. Attention given to ersatz events comes at the expense of attention to real events. Rallies are recorded; real clues to the future are scanted.

One such clue may have come recently when a judge who is on President Reagan's short list of potential Supreme Court nominees made a decision illuminating a judicial style, and a potential path for a return to reasonableness on the abortion issue.

George Will

The decision was by Robert Bork of the U.S. Court of Appeals for the District of Columbia. It concerned the Navy's right to discharge a sailor for repeatedly engaging in homosexual activities in barracks on a Naval base. The sailor contended that the discharge violated his constitutional right to privacy.

Navy rules stipulate that homosexual behavior shall normally result in discharge because homosexuality in a military environment "seriously impairs efficiency and morale." The question was: Does homosexual conduct enjoy the overriding protection of a constitutionally protected "privacy right"?

The drama of the question derives from the fact that in 1973 the Supreme Court discovered a constitutional right to abortion. It discovered that right within a larger zone of privacy rights that the Court could not convincingly relate to other constitutional provisions.

The sailor argued that Court rulings on privacy have, cumulatively, established this principle: Government should not interfere with an individual's freedom to control intimate personal decisions regarding his or her body, except when compelling state interests make it necessary. He argued that consensual homosexual activities fall within a zone of constitutionally protected privacy more important than the Navy's concerns.

Bork wrote that the Court has neither said nor logically implied such a principle. The idea of a privacy right grew as a supposed "emanation" from other guarantees explicitly made in the Constitution. When the Court first spoke of a privacy right-by-emanation, the Court was merely recognizing that it is sometimes necessary to protect another that is. (The Court held that the NAACP had a privacy right to keep its membership list secret from the state of Alabama in order to protect its First Amendment associational rights.)

Bork's analysis is broadly majoritarian, deferring to the discretion of the community's popularly elected branches of government as they make choices about activities that shall be, on moral grounds, regulated. He pointedly noted that even in the chaotic 1973 abortion decision, the Court said the privacy right "cannot be said to be absolute. In fact, it is not clear to us that the claim . . . that one has an unlimited right to do with one's body as one pleases has a close relationship to the right of privacy previously articulated in the Court's decisions."

Indeed. The previously articulate right of privacy was subservient to the community's decision to protect other activities on moral grounds. Although Bork does not reach out to the issue, his analysis makes clear the difficulty of finding in the Constitution or in a settled, coherent body of Court decisions a basis for denying the community the right to regulate abortion.

How, suddenly, in 1973, did the law of 50 states become unconstitutional burdens on a right of abortion? What had happened to the community's right of democratic choice regarding the values at issue? Perhaps a clue to the Court's unarticulated thinking is in an argument the sailor adduced for a constitutional privacy right to protection for homosexual activity.

He argued that the very fact of community disapproval of an activity disables the government from regulating the activity. That is, unless any activity disapproved by the community is given the special status of a protected constitutional right, then no minority rights are safe.

Bork replied that this theory --that majority morality and majority choice is always made presumptively invalid by the Constitution — attacks the premise of Democratic government. It would "destroy the basis for much of the most valued legislation our country has. It would, for example, render legislation about civil rights, worker safety, the protection of the environment, and much more, unconstitutional. In each of these areas, legislative majorities have made moral choices contrary to the desires of minorities."

(The sailor's lawyer, insisting that moral abhorrence could never be a basis for regulating an activity, was asked about bestiality. He replied that bestiality could be prohibited because it is cruel to animals — which, evidently, he considers abhorrent.)

Bork struggled to extract from the Supreme Court's various privacy pronouncements a principle applicable to the sailor's case. However, his analysis is an intimation of how a reconstituted Court could, on majoritarian grounds, dis-establish some freshly minted constitutional "rights" and restore the community's right to make moral choices.