Sodomy Laws and Sodomy Law Reform

by Arthur S. Leonard

A medieval depiction of St. Paul (*ca* 1185), the author of several New Testament passages which condemn sodomy.

Criminal statutes that prescribe a penalty for the performance of anal or oral sex are frequently referred to as "sodomy laws," a reference to the Biblical story of Sodom and Gomorrah (Genesis 19), in which it is reported that God destroyed these two "cities of the plain" because of the sinful conduct of their inhabitants.

Although the exact nature of the sinful conduct is much disputed by Biblical scholars, it appears at least to have involved forcible sex, with men of the city threatening angels who had taken the appearance of men, and most likely intended to be performed in public, but the sodomy laws of concern in the struggle for glbtq rights are those that apply to private consensual sex between adults.

Other Biblical Precedents

The other Old Testament passage most often cited as condemning homosexuality is Leviticus 18:22, which literally translated appears to say that a man who engages in anal sex with another man is ritually impure, but which is generalized by some to mean that all homosexual intercourse, whether anal or oral, is a grave sin.

Various New Testament passages are also invoked against homosexual behavior, mostly in the context of inveighing against promiscuity, with which homosexual conduct was equated since it occurs outside of marriage (Romans 1:26-27; 1 Corinthians; 1 Timothy). The strictest view of sex in Jewish and Christian traditions is that all non-marital and extra-marital sex is sinful, and that the only appropriate use of the sexual organs is for procreation (or for bonding of husband and wife through sexual pleasure).

The English Precedents of Sodomy Laws

These Biblical citations were the original sources of the legal prohibition on anal sex in the earliest "sodomy law" passed by the English Parliament in 1533, during the period of the early English Reformation. Prior to the Reformation, the laws of England did not purport to regulate private sexual conduct, as matters of moral law were left to the Church for instruction and enforcement. When King Henry VIII determined to replace the Roman Church with his own English (Anglican) Church as the established church of England, he directed Parliament to devise civil laws to replace the church laws. The result was a statute that made a capital offense of "buggery," the "crime against nature," between people or a person and an animal.

The statute spoke in euphemisms, but the general understanding was that any sex act in which a man's penis penetrated the anus of a man or woman or animal, no matter how slightly, was a violation of the statute, which could subject the perpetrator to the death penalty. Neither consent nor whether the act was committed in private was deemed relevant. Under most interpretations, only men could be guilty of the offense, although a female participant might be prosecuted under some other common law concept, such as lewd and lascivious behavior. Blackstone, the great commentator on the laws of England, described the offense of sodomy as "more heinous than rape."

American Sodomy Laws

When the United States declared its independence from England in July 1776, the English sodomy law was considered part of the "common law" of the states. Criminal law in matters of sex has remained predominantly state law in the United States, although the federal government adopted its own "sodomy laws" applicable to federal property, the District of Columbia, and military personnel.

During the nineteenth century, many states replaced their common law crimes with penal statutes, but "sodomy" remained a common law offense in others. Most of the statutes spoke in euphemisms, referring to the "abominable and detestable crime against nature" or "unnatural acts" without spelling out the prohibited conduct.

Courts differed as to which acts were covered, with many finding that because of their historical origins, the sodomy laws did not prohibit oral sex, although other statutes or common law principles, such as "lewdness" or "wanton and lascivious behavior," could be used to prosecute those apprehended engaging in oral sex. In some jurisdictions, the prohibition applied only to an active male participant, while in others the passive party could also be prosecuted.

Some jurisdictions retained the death penalty, treating the offense as a serious felony, but others lessened the penalty to jail terms--often lengthy--or fines. Some courts extended the prohibition to sex between two women, although the "purists" maintained that at least one penis was required for sodomy to be committed.

Almost all of the actual prosecutions found in court records involved non-consensual or public sex acts, or prostitution, but neither the statutes nor the common law took account of whether the acts were consensual or where they took place. All sodomy was forbidden. There was no state that did not forbid anal sex, either by statute or common law tradition, and oral sex was also considered illegal virtually everywhere. The laws had no specific focus on homosexuality, as such.

The Harassment of Sexual Minorities

These sodomy laws provided the legal basis for police harassment of sexual minorities (lesbians, gay men, bisexuals, transgendered people). Although the sodomy laws proscribed conduct that all persons might engage in, regardless of sexual orientation or gender, by the early twentieth century, they were identified by law enforcement authorities and the general public with the issue of homosexuality.

Even though particular persons with a homosexual orientation might never engage in any of the specific conduct that the laws proscribed, nonetheless the newly-emerged "homosexual identity" was bound up in the minds of authorities and the public with the prohibited acts. These laws were cited in support of various kinds of discrimination, some of which still persists today even in jurisdictions where consensual sodomy has long been decriminalized.

The Movement toward Reform

Winds of change began to stir in the 1950s, abetted by the publication of the Kinsey Reports after World War II. These books, one each about male and female sexuality, caused a sensation by suggesting that homosexual conduct was widespread. The psychiatric profession's view that same-sex conduct was a result of arrested psychological development and mental illness, which had emerged early in the twentieth century and gained general acceptance within the profession by mid-century, began to influence lawmakers, some of whom questioned whether a medical problem should be dealt with through the criminal law.

Both in England and the United States, prominent bodies recommended removing criminal penalties. In England, a special parliamentary committee chaired by Lord Wolfenden urged decriminalization of consensual sodomy between adults acting in private. In the United States, the American Law Institute (ALI), a prominent law reform body that was drafting a proposed Model Penal Code to be considered for adoption by state legislatures, proposed in 1955 that the ban should be limited to public or non-consensual acts.

The ALI also proposed making sex crime statutes more explicit, in line with a general movement towards making statutory law comprehensible to the lay person. Thus was born the crime of "deviate sexual intercourse," which was clinically described as conduct involving the mouth or anus of one person and the penis of another, or the mouth of one person and the vulva of another.

The British Parliament accepted the Wolfenden Committee recommendations in 1967. In the United States, Illinois was the first state to adopt the Model Penal Code's sex-crimes provisions as proposed, effective beginning in 1962. Some other states, such as New York, revised the sex-crimes provisions before adopting them, and retained criminal penalties for consensual, private acts of sodomy, although the category of crime was reduced from a felony with a long prison sentence to a misdemeanor with a short sentence or a fine, and anal or oral sex between persons married to each other was decriminalized.

At the same time, the medical profession was revising its views about sodomy. Responding to the research findings of pioneers such as Dr. Evelyn Hooker, who had presented research evidence refuting the view that homosexual persons were "mentally ill," and to persistent lobbying by the newly-emerging political movement for lesbian and gay rights that gathered momentum after the 1969 Stonewall riots in New York, the American Psychiatric Association voted to remove homosexuality from its official list of mental illnesses in 1973. By the mid-1970s, the psychiatrists had been joined by the American Psychological Association, the American Medical Association, and the American Bar Association in calling for the repeal of laws against consensual sodomy.

By the mid-1970s, almost half of the states had legislatively or judicially decriminalized consensual sodomy, but the legislative reform movement seemed to be stuck at that point.

Constitutional Challenges

Meanwhile, developments in constitutional doctrine at the level of the United States Supreme Court had led some legal scholars to suggest that sodomy laws might be vulnerable to constitutional challenge, at least regarding their application to consensual, private adult conduct. The most important cases were *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Loving v. Virginia*, 388 U.S. 1 (1967).

In *Griswold*, the Court found that a Connecticut statute banning the use of contraceptives to prevent pregnancy violated a constitutional right of privacy, grounded in the Due Process Clause of the 14th Amendment, which provides that no state shall deprive any person of life, liberty, or property without Due Process of Law. Under a mode of analysis called "substantive due process" that the Court developed during the latter part of the nineteenth century primarily as a mechanism to strike down statutory restrictions on commercial activity, the Court would treat as constitutionally "suspect" any state law that restricted a person's enjoyment of "fundamental liberties" unless the state could show that such a restriction was necessary to the achievement of a compelling interest.

The Connecticut law had stymied Planned Parenthood's attempt to start family planning clinics in which married couples could be counseled about contraception. Law reformers opened such a clinic and arranged for the arrest of the clinic's director, Estelle Griswold, to challenge the statute. Writing for the Supreme Court, Justice William O. Douglas described a right of privacy formed from the penumbra of rights emanating from the specific provisions of the Bill of Rights and the 14th Amendment, and he asserted that the right of a married couple to receive counseling and use contraceptives came within this right. The moral objections of Connecticut legislators were deemed insufficiently weighty to justify this intrusion into

personal privacy.

In *Loving*, the Court struck down a Virginia statute making it a criminal offense for a white person to marry a person of another race. The Lovings had gone to the District of Columbia to marry and then moved back to Virginia, where they were arrested and prosecuted under this "miscegenation law." The Virginia trial court declared their marriage void and imposed a prison sentence that could be avoided only by leaving the state for at least 25 years. The Virginia Supreme Court upheld this decision, declaring that racial segregation was biblically grounded and necessary for the preservation of racial purity.

In reversing this ruling, the Supreme Court relied on alternative grounds. Chief Justice Earl Warren wrote for the Court that any state law that imposes restrictions on personal liberty through the use of racial classifications was inherently suspect as a violation of the Equal Protection Clause of the 14th Amendment, and that the preservation of racial purity was not a legitimate interest of the state. Alternatively, the Chief Justice found that the Due Process Clause protected the individual's liberty to select a marital partner, suggesting a right of intimate association whose violation by the state would require a substantial justification.

These decisions, followed by *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in which the Court made clear that the privacy right announced in *Griswold* applied to individuals, not just married couples, inspired gay rights law reformers to resort to the courts, asserting that the right of privacy would protect the private, consensual sexual activities of same-sex partners. Some initial lower court victories in Texas and Florida were soon overturned, however, and the Supreme Court appeared to cut short this avenue for law reform in *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *summarily affirmed without opinion*, 425 U.S. 901 (1976), when it affirmed a ruling by a federal trial court rejecting a privacy challenge to Virginia's sodomy statute.

Hardwick v. Bowers

Disappointed gay rights litigators shifted their emphasis to state courts, winning some impressive victories in Iowa and New York; but the sheer number of states retaining sodomy laws was such that the lure of a Supreme Court decision that would strike them all down proved irresistible and new efforts were mounted in Texas (*Baker v. Wade*) and Georgia (*Hardwick v. Bowers*).

By the mid-1980s, the federal courts of appeals had issued contrasting rulings in those two cases. The 11th Circuit Court of Appeals found in *Hardwick v. Bowers* that Georgia's sodomy law potentially violated the right of privacy, and ordered a trial for the state to present its justifications of the law. The 5th Circuit Court of Appeals overturned a trial court decision in *Baker v. Wade* that had invalidated the Texas Homosexual Conduct Law (a sodomy law that outlawed anal and oral sex only for same-sex partners). The 5th Circuit court held that *Doe v. Commonwealth's Attorney* was a binding precedent that could be changed only by the Supreme Court.

The state of Georgia appealed the *Hardwick* ruling, and Donald Baker, the gay Texas plaintiff, appealed the ruling against him. The Supreme Court agreed to review the Georgia case.

In a 5-4 ruling that proved controversial among legal scholars, the Court ruled in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that the Constitution did not include a "fundamental right for homosexuals to engage in sodomy." Writing for the majority, Justice Byron White described as "facetious" the claim that "homosexual sodomy" could be considered comparable to the kinds of privacy rights the Court had previously identified.

In lengthy dissenting opinions, Justice Harry Blackmun argued that the Court's privacy jurisprudence clearly applied to this case, and Justice John Paul Stevens insisted that the use of sodomy laws to prosecute homosexuals for conduct that would be considered Constitutionally sheltered when committed by opposite-sex couples violated the Equal Protection Clause as well as the Due Process Clause as an improper

restriction on personal liberty. Casting the decisive fifth vote to uphold the statute, Justice Lewis F. Powell observed that sodomy laws tended not to be enforced, but if somebody were actually to suffer a significant prison sentence for engaging in consensual sodomy, he would find a serious violation of the 8th Amendment's ban on "cruel and unusual punishment."

Chastened by the defeat in *Bowers*, the gay rights legal movement turned its attention to state courts, and over the next fifteen years achieved a string of important victories as state courts either struck down sodomy laws or indicated that they would not be enforceable against consenting adults whose conduct was private and non-commercial, using state constitutional principles.

Although there were a few losses in the state courts, most of the lawsuits ended in victory for the gay challengers of the laws, and a few states during the 1990s legislatively repealed sodomy laws, so that by 2003, barely a dozen states still retained actively enforceable sodomy laws on their statute books, and in only four states were those laws solely targeted at same-sex conduct.

Romer v. Evans

By this time, the gay rights legal movement was ready for another crack at the Supreme Court. In framing challenges to the sodomy laws in Arkansas, Puerto Rico, and Texas, such organizations as Lambda Legal Defense Fund and the ACLU Lesbian and Gay Rights Project determined that the time was right, not least because of the Supreme Court's 1996 ruling in *Romer v. Evans*, 517 U.S. 620, the first major substantive gay rights victory in a Supreme Court case in more than a generation.

In *Romer*, the Court voted 6-3 to declare unconstitutional an anti-gay amendment to the Colorado Constitution that had been approved in a referendum of Colorado voters. Known as Amendment 2, it provided that neither the state nor any of its subdivisions could recognize a discrimination claim based on a person's homosexual or bisexual orientation or conduct.

Writing for the Court, Justice Anthony M. Kennedy found that Amendment 2 violated the Equal Protection Clause in a fundamental way, making lesbians and gay men unequal to the other citizens of Colorado for no particular reason other than "animus" against them. In a virulent dissenting opinion, Justice Antonin Scalia contended that this ruling was inconsistent with *Bowers v. Hardwick*. Gay and lesbian rights legal groups agreed with Scalia's assessment of inconsistency and concluded that a majority of the court might be ready, in an appropriate case, to overrule *Bowers*.

Glbtq advocates also drew comfort from the broad language about the liberty protected by the Due Process Clause in the Supreme Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833.

Lawrence v. Texas

The vehicle for bringing the issue to the Supreme Court was *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), in which the Houston district attorney undertook an actual prosecution of two gay men for engaging in "homosexual sodomy" in a private house, who had been arrested by police officers responding to a false report.

This time, five members of the Court agreed that the concept of protected liberty under the Due Process Clause of the 14th Amendment is broad enough to question the constitutionality of a law that penalizes consensual private sexual activity between adults. Writing for the Court, Justice Kennedy found that Texas had advanced no justification for this law other than moral disapproval, and that this was insufficient.

Concurring separately, Justice Sandra Day O'Connor agreed that the law should fall, but on Equal Protection grounds, because Texas was one of a handful of states that had removed criminal sanctions for heterosexual

sodomy while retaining them for homosexual sodomy. She would not accept the state's contention that moral disapproval of homosexuality was a legitimate reason to forbid certain conduct to same-sex partners when it was allowed for opposite-sex partners.

Once again dissenting vehemently, Justice Scalia argued that the Court's rationale spelled the end for all sex crimes laws whose justification was moral disapproval.

In light of *Lawrence*, sodomy laws may not be used constitutionally in the United States to penalize private, consensual sex between adults. However, they may still be used to punish oral or anal intercourse as part of inter-generational sex (sex between adults and minors), non-consensual sex, commercial sex (prostitution), and public sexual conduct, until the courts determine the extent to which the rationale of *Lawrence* may extend to these areas.

In the immediate aftermath of *Lawrence*, the Supreme Court ordered the Kansas courts to reconsider a lower court decision in *Limon v. Kansas*, in which an 18-year-old man was sentenced to 17 years in prison for initiating oral sex with a boy who was just under 15 years old while both were residents of a group home for vocationally-impaired teenagers. (Had the underage partner been a girl, the maximum penalty would have been barely more than a year.) The Supreme Court indicated that this case should be reconsidered "in light of *Lawrence v. Texas*," implying that any use of sex crimes laws that treats gay sex differently from non-gay sex may be constitutionally questionable.

The Supreme Court's decision in *Lawrence*, the culmination of half a century of efforts to achieve decriminalization of consensual sodomy between adults, establishes a new groundwork for evaluating all legal claims relating to lesbian and gay rights, making this decision the most important one ever rendered by the Supreme Court concerning the citizenship rights of gay people.

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