

# Virtual Mentor

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## HEALTH LAW

### The Decriminalization of Sodomy in the United States

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#### Introduction

Laws prohibiting sodomy existed in the penal codes of numerous US states for more than 100 years, criminalizing this sexual behavior between same-sex and opposite-sex partners. Two challenges to these laws ultimately made their way to the Supreme Court [1, 2], illuminating not only how the Court viewed the laws' purpose and utility but also how American social norms had evolved since the laws were first placed on the books.

#### A Short History of Sodomy Laws in the United States

*Sodomy laws in the nineteenth century.* Although debates about sodomy laws during the latter half of the twentieth and the early twenty-first centuries focused almost entirely on their criminalization of homosexual conduct, nineteenth-century laws broadly construed sodomy as “crimes against nature, committed with mankind or with beast” [3]. This affront to nature was typically not defined by penal codes, so American courts relied on well-established common-law meanings of sodomy that involved the penetration of a “penis inside the rectum of an animal, a woman or girl, or another man or a boy” [3].

Punishing “homosexual sodomy” was not the driving force behind the implementation of these laws [4], which were intended to achieve two purposes. First, sodomy laws sought to protect “public morals and decency”; sodomy was listed along with bigamy, adultery, the creation and dissemination of obscene literature, incest, and public indecency [5]. Second, these laws were used to protect women, “weak men,” and children against sexual assault [6]. Court records from the nineteenth century reveal that these laws were used to prosecute nonconsensual activity and that consenting adults who engaged in sodomy within their homes were considered immune from prosecution [7].

*Sodomy laws in the twentieth century.* The nature and enforcement of sodomy laws changed dramatically in the next century. The addition of oral sex to many sodomy laws—which expanded the group of potential violators to include, for example, men engaging in sexual activity with other men in public places like bathrooms—and the creation of police forces in America’s rapidly growing urban areas fueled arrests and imprisonment for violations of these statutes [8]. City and state governments vigilantly apprehended supposed criminals in response to public outcry against indecency, sexual solicitation in the nation’s cities, and the predation and molestation of minors [9, 10]. During the 1950s, McCarthyism resulted in state- and nationwide

witch hunts of male “homosexuals” in which the acts of oral and anal sex between consenting adult men were conflated with child molestation [11].

This persecution of private sexual acts between consenting adults generated criticism from highly influential legal authorities such as the American Law Institute—an organization comprising legal scholars, practitioners, and judges responsible for drafting the Model Penal Code (MPC), which state legislatures often adopted in part or in its entirety in developing their criminal laws—and several state commissions that argued for the decriminalization of private sodomy between consenting adults [12].

In 1955 the American Law Institute voted to decriminalize consensual sodomy, and the MPC subsequently did not include such laws in its statutory language. During the 1960s and 1970s, the United States Supreme Court established that, within the Due Process Clause of the Fourteenth Amendment, there exists a right to privacy that prevents states from “interfer[ing] with people’s control of their own bodies, disrupt[ing] personal relationships, and intrud[ing] into the innermost sanctum of the home, the bedroom” [3]. From the foundation of this right, the Court struck down state laws that attempted to prohibit the use of contraceptives and intruded into marital privacy [13], limited access to contraceptives for unmarried people [14], and restricted a woman’s right to obtain an abortion [15]. Although these rulings did not touch existing sodomy laws, the ’60s and ’70s saw momentous action in decriminalization: eighteen states decriminalized consensual sodomy consistent with the MPC [16]. Kansas, Texas, Montana, Kentucky, Missouri, Nevada, and Tennessee decriminalized opposite-sex consensual sodomy, leaving consensual same-sex sodomy as a misdemeanor crime [16].

Other states, however, balked at such proposed reforms, arguing that changes to sodomy laws promoted homosexuality and unnatural conduct [16]. States that adopted the revised MPC saw tremendous protests from religious groups and right-wing political interests [16]. States such as Idaho reinstated the previous version of the MPC (containing the criminalization of consensual sodomy), and Arkansas, which adopted the revised MPC, responded to public outrage by recriminalizing same-sex consensual sodomy with the approval of then-State Attorney General Bill Clinton [16].

### ***Bowers v. Hardwick (1986)***

*Facts of the case.* In 1982, a 29-year-old gay man named Michael Hardwick was working as a bartender in a gay bar in Atlanta, Georgia [17]. One night, as Hardwick was leaving the bar, he threw a beer bottle into a trash can in front of the establishment [17]. Seeing this, police officer Keith Torick cited Hardwick for drinking in public despite Hardwick’s protestation that this was not the case [17]. Officer Torick inadvertently wrote down the wrong court date on the summons, and, when Hardwick did not appear in court, an arrest warrant was issued [17]. Torick’s first attempt to track down Hardwick at his home was unsuccessful, but, on the second attempt, Torick entered Hardwick’s unlocked apartment and opened a

bedroom door, where he found Hardwick engaging in oral sex with another man [17].

Torick arrested both men, who were then charged with violating Georgia's sodomy law [17]. The statute, Georgia Annotated Code section 16-6-2, specified that "a person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth and anus of another" [18] and "a person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years" [19].

*Initial court proceedings.* Michael Hardwick's challenge to the Georgia sodomy law was dismissed without a trial by a federal district court, but, on appeal to the US Court of Appeals for the Eleventh Circuit, a divided panel of judges looked to the reasoning of those cases during the 1960s and 1970s in which the US Supreme Court had found and refined a fundamental right to privacy [20]. The appeals court found that the Georgia sodomy statute violated Hardwick's fundamental rights because his homosexual activity was a "private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment" [20]. Georgia's Attorney General disagreed with the ruling of the Eleventh Circuit, because other federal circuit courts of appeals had upheld the constitutionality of similar state statutes, and he petitioned the Supreme Court to review the case to resolve the differences among the courts.

*US Supreme Court.* The controlling opinion of the Supreme Court did not frame the question before it in terms of a fundamental privacy issue. Writing for the majority, Justice White framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of many states that still make such conduct illegal and have done so for a very long time" [21]. The answer to this question was "no." Even though the Georgia sodomy law criminalized the behavior of both heterosexuals and homosexuals, the Court's majority fixated on the fact that the case before them involved a gay man.

In its analysis, the court cited the precedent that fundamental liberties under the Constitution are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed" [22] and that these liberties could be characterized as "deeply rooted in the Nation's history and tradition" [23]. Yet, in this case, the court announced that "it is obvious to us that neither of these formalities would extend a fundamental right to homosexuals to engage in acts of consensual sodomy" [24]. The Court grounded its reasoning in the fact that states had had sodomy laws in place since the nation's founding, and, therefore, a right to homosexual sodomy could not be "deeply rooted" in tradition or history [25].

While Hardwick also challenged the statute because his conduct was carried out in the privacy of his home, the Court responded that "victimless crimes, such as the possession and use of illegal drugs do not escape the law where they are committed at home" [26]. Finally, Hardwick asserted that the law must have a rational basis for

its existence and that there is none for the Georgia statute besides the public's view that homosexuality is immoral and unacceptable. Once again, the Court disagreed, stating "The law...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" [27].

The court thus upheld and deemed constitutional the Georgia sodomy law. This conclusion, which surprised many in the legal and civil rights communities, would not be revisited by the US Supreme Court for 17 years.

### ***Lawrence v. Texas (2003)***

*Facts of the case.* On September 17, 1998, John Lawrence spent the day with Tyrone Garner and Robert Eubanks, who were in a tumultuous relationship [28]. After a drunken argument erupted over whether Eubanks, Garner, or both could stay the night at Lawrence's place, Eubanks stormed out of the apartment [28]. Later that night, the Harris County sheriff's office received a call saying that a black man was "going crazy with a gun" in Lawrence's apartment [28]. Minutes later, four sheriff's deputies entered the unlocked apartment and made their presence known, but heard and saw nothing [28]. Only when the deputies entered a back bedroom did they find Lawrence and Garner supposedly engaged in a sexual act [28].

Both Lawrence and Garner were arrested and charged with violating the Texas sodomy law. The Texas law in question, Texas Penal Code Annotated section 21.06(a), stated that "a person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex," with "deviate sexual intercourse" defined as "any contact between any part of the genitals of one person and the mouth or anus of another person" or "the penetration of the genitals or the anus of another person with an object" [29].

*Initial court proceedings.* The loss before the Supreme Court in *Bowers v. Hardwick* dealt a devastating blow to the gay community in the US. In an effort to prevent the Court from viewing the transgressions as purely sexual and to frame the legal issue in a different light, the brief for Lawrence and Garner focused on intimacy, privacy, and relationships [28]. In their trial before a Justice of the Peace following their arrests, Lawrence and Garner pled no contest to the charges—meaning they admitted to the facts of the charges but not their guilt—so that they could challenge the legality of the law. From there, Lawrence and Garner's lawyers were tenacious in appealing rulings against them, taking the case to the Texas Criminal Court, the Texas Fourteenth Court of Appeals, the Texas Criminal Court of Appeals, and, finally, to the US Supreme Court. The petitioners asserted that the Texas law policed citizens' homes, intruding into "their most intimate and private physical behavior and dictating with whom they may share a profound part of adulthood" [30].

*US Supreme Court.* Writing for the majority, Justice Kennedy framed the question before the Court as one of "whether the petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause of the

Fourteenth Amendment to the Constitution” [31]. After reviewing the Court’s understanding of the basis of the fundamental right to privacy, Justice Kennedy turned his attention to how the sodomy statutes in both *Bowers* and the present case sought “to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals” [32]. The court characterized laws aimed at same-sex couples as motivated by animus towards homosexuals that arose from religious and moral condemnation. Despite the importance of these beliefs to some, Kennedy argued, they should not be applied to the whole of society [33]. He wrote, “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled” [34].

Finally, the court’s majority then struck down the Texas sodomy law, and, ultimately, all laws of its kind:

The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their identity by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention from the government [34].

### **Conclusion**

The rise and fall of sodomy laws in the United States exemplify the ways in which the law has been used to legitimize the sexual norms of a society or represent the idealized norms it seeks to promote. But these laws, like many legal instruments, became mainly tools of oppression that were wielded by the majority towards members of minority groups, and the sexual norms they promulgated came to bear less and less resemblance to the prevailing beliefs in US society. The demise of these laws through the legal challenges of *Bowers v. Hardwick* and *Lawrence v. Texas* not only brought legislation more in line with contemporary sexual norms, but also demonstrated how far acceptance of gay citizens had come.

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