The Fate of Sodomy Law in the U.S.

VERNON ROSARIO

AMID THE TURMOIL of the French Revolution, one of the little-noticed legal transformations was the axing of *ancien régime* laws criminalizing "crimes against nature." The Constituent Assembly of 1789–1791 dropped longstanding (albeit rarely enforced) laws against "sodomy" and "pederasty" in the course of its broad modernization of the penal code in 1791. The revised police code, however, continued to treat "gross *public* indecency" as a misdemeanor alongside the corruption of minors "of either sex." Surprisingly, these changes happened without any recorded legislative debate. Legal historians have ascribed this first decriminalization of sodomy to the wave of Enlightenment secularization of law and society. Another factor was a libertarian conviction that the private sphere be protected from state intrusion.

These two legal principles have also been at play in the American revolution in sodomy law—which, unlike France, has taken far longer and left a voluminous paper trail. Yale law professor William Eskridge's analysis of this history is lengthy and you might need Ritalin to stay focused through the legal details. However, his lively, clear writing is accessible to the general reader, particularly since he sets the legal battles in the wider context of American social history. This is critical since one of his central contentions is that legal change requires societal change which facilitates the intensive, well-calculated legal strategy of civil rights organizations and legal scholars—including himself. Eskridge authored an influential *amicus* brief challenging sodomy laws for the libertarian Cato Institute.

The American colonies followed the English tradition of criminalizing the "abominable vice of buggery" that had begun in 1533 under King Henry VIII.

The American colonies followed the English tradition of criminalizing the "abominable vice of buggery" that had begun in 1533 under King Henry VIII. This capital crime was based on the Levitical injunction against "a man lying with a man." The Massachusetts Bay Colony simply cited Leviticus 20:13 in establishing its sodomy law in 1641 as a capital crime. Just what was included under the rubric of sodomy or the "infamous crime against nature" varied tremendously from state to state and even from court to court, in part because it was so "unmentionable." Most narrowly, these laws were applied to anal sex (between two men or a man and a woman). More broadly, they applied to all varieties of non-procreative sex, including cunnilingus, fellatio, "unclean practices" between women, bestiality, and even masturbation. Rape, fornication, and adultery were generally criminalized under separate statutes. Sodomy charges were most frequently applied in cases involving other sex crimes: forced sex, corruption of minors, prostitution, and bestiality. Eskridge makes the point that the sodomy statutes, nevertheless, served a broader function of clarifying cultural values: revulsion against the bestiality of sex, fear about pollution of a pure society, and terror over the destabilization of traditional gender roles and family order.

The breast-beating about traditional family values so familiar in current American politics dates back to the second half of the 19th century, according to Eskridge. He relies particularly on Walt Whitman, Elizabeth Cady Stanton, and Susan B. Anthony as revolutionary figures who disturbed the traditionalists with their calls for new forms of love, association, and social empowerment. Multiple social seismic shifts regarding sex and race were occurring in Victorian America, and Eskridge is careful to show how the civil rights struggles of women, African-Americans, and homosexuals are closely intertwined.* Anthony and Stanton first met at an anti-slavery meeting in 1851 and were dedicated abolitionists and women's rights activists. The clamor for women's suffrage provoked a backlash from traditionalists. The Civil War and Reconstruction led to huge migration and racial mixing, inciting a fear of miscegenation (a term first used in 1863) and producing a number of anti-miscegenation laws (which were only overturned by the U.S. Supreme Court in 1967 in *Loving v. Virginia*). The Reconstruction Amendments to the Constitution not only abolished slavery (Amendment 13) and gave freed African-Americans voting rights (Amendment 15), but also defined citizenship rights to protect African-Americans from persecutory, racist laws in Southern states (Amendment 14). The first clause of the 14th Amendment, however, would later become a highly contested foundation for the constitutional right to birth control, abortion, and homosexuality.

In addition to internal migration, America was transformed by immigration and urbanization at the turn of the century. Large cities also witnessed a florid growth in homosexual subcultures in the early 20th century. "Pansies," "fairies," and the trade who enjoyed sex with men congregated in streets, bars, and private homes. Prostitution also increased. Mannish "new women" were in evidence, if only because of their sartorial nonconformity. Anxiety over the effect of these gender benders and "sex deviates" fueled panic about public order, marital sanctity, and the corruption of minors. A majority of states broadened their sodomy laws to include fellatio. Eskridge argues that arrests and prosecutions for sodomy skyrocketed in the early 1900's, and he provides graphs showing arrests in those hotbeds of sodomy

Vernon Rosario, associate clinical professor of psychiatry at UCLA, is the author of Science and Homosexuality: A Guide to the Debates *(ABC Clio).*

* David A. J. Richards in *Women, Gays, and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law* (University of Chicago Press, 1998) gives similar emphasis to abolitionist feminism and Whitman in his constitutional analysis.

such as New York, Los Angeles, Washington, D.C, and St. Louis. However, it is not clear how to interpret these, since urban populations were also skyrocketing. While it may be difficult to ascertain whether sodomy or its prosecution was really increasing (on a per capita basis), it is clear that the press and public figures periodically went into conniptions over "sexual deviants." Historians have documented multiple sex panics in diverse cities, particularly after 1935.

Dishonorable Passions: Sodomy Laws in America, 1861–2003
by William N. Eskridge Jr.
Viking. 528 pages, $32.95

These panics suggest the increasing homosexualization of sodomy in the public eye. Most sodomy laws made no distinction between homosexual or heterosexual perpetrators; indeed the term "homosexual" only arose in the late 19th century. In reality, the laws had mainly been applied to sexual activity involving prostitutes and minors or occurring in public places. However, during the 20th century, homosexuals became increasingly tarred as the primary threat to children and communities. As such, sodomy laws had a much broader effect than criminalizing a particular sexual activity—in fact, they were probably completely ineffective at suppressing domestic gay anal sex and were rarely employed for this purpose. Instead, they created a moral and legal climate of opprobrium that coerced homosexuals, both male and female, to remain in the closet for fear of jeopardizing their housing and career.

There were two avenues for decriminalizing private, consensual sodomy: legislative and judicial. A major impetus for legislative progress was the Model Penal Code (MPC) developed after several decades of discussion by the American Law Institute (ALI, founded in 1923). The MPC was an attempt to modernize and simplify the hodgepodge of American law and—as in post-revolutionary France—to secularize criminal law. It adopted Jeremy Bentham's utilitarian philosophy, in particular, that criminal law should follow the harm principle: only behavior that causes harm should be regulated. While fornication and adultery were unproblematically targeted for decriminalization, consensual sodomy remained problematic, primarily for political reasons: some members feared the ALI would be tarnished by its tacit support of sodomy. Ultimately, the ALI supported dropping consensual sodomy as even a misdemeanor. The same political battle replayed itself in state legislatures that considered adopting the MPC or simply modernizing their morals laws. Even reformist legislators caved in to fears of being branded soft on sodomy and condoning homosexuality. Nevertheless, brave legislators in many states managed to pass sodomy law reform in the late 1970's. In 1975, only nine states had decriminalized consensual sodomy, but, by 1979, 24 states had done so and thirteen had reduced it to a misdemeanor.

Ironically, the legislative approach fared better in rural states than in populous ones. Eskridge suggests this was because the invisibility of homosexuals in the rural states made sodomy decriminalization less immediately threatening. On the other hand, states with large gay communities like New York, Texas, and California were frightened by post-Stonewall gay visibility and felt a greater urgency to suppress homosexuals. An alternative explanation is that conservative, libertarian principles of keeping the government out of the bedroom worked to gay people's benefit in the gun-toting hinterland.

Eskridge's other major argument is that decreasing opposition to (if not active support for) sodomy law reform was a result of the increasing popularity of fellatio among heterosexuals. Alfred Kinsey's studies of sexual behavior in males (1948) and females (1953) had documented a higher than expected rate of fellatio and other traditional "crimes against nature" (including masturbation, homosexual sex, and bestiality). However, it's not clear that these activities had actually increased in frequency or acceptability by the general public. After all, Kinsey's studies were received with vociferous protest and continue to be denounced to this day by cultural conservatives.

While reform advanced in fits and starts state by state, the judicial route is ultimately the most compelling odyssey. The American Civil Liberties Union and gay rights organizations (Gay and Lesbian Advocates and Defenders and Lambda Legal Defense and Education Fund) began strategizing with the goal of ultimately shepherding a case to the U.S. Supreme Court. *Bowers v. Hardwick* (1986) was the first case to get there—a disastrous defeat. The facts of the case are convoluted. Michael Hardwick had been accidentally spied by the police while engaged in oral sex at home. He was arrested under a rarely used Georgia sodomy law that criminalized both hetero- and homosexual sodomy. Although charges were never brought against him, Michael Hardwick sued Georgia's Attorney General, Michael Bowers, to invalidate the law. The ACLU encouraged Hardwick to pursue the case, and he was ultimately represented by Harvard law professor Laurence Tribe before the Supreme Court.

The Court's decision to uphold Georgia's anti-sodomy law was condemned by the gay community and criticized at law schools. Eskridge's archival documentation of the backroom deliberations of the Court are fascinating. Despite the legal verbiage and citations, it seems clear that the majority was ultimately swayed by their personal homophobia in drawing a limit to constitutional claims of "privacy." Writing for the majority, Justice Byron White chose not to extend the right to privacy granted to heterosexual birth control or abortion decisions, but framed the case narrowly around the question of whether the constitution and the "Nation's history and tradition" protected homosexual sodomy. In drawing limits to privacy claims, White was also undermining the constitutional basis of *Roe v. Wade* (1973). Justice Lewis Powell, the swing vote on the court, claimed he knew no homosexuals even though he had a gay law clerk at the time. After retiring, Powell publicly regretted his de-

cision in the case.

Eskridge argues that the timing just wasn't right. Ronald Reagan was in his second term, the Moral Majority was ascendant, and, most importantly, AIDS had been dominating the news for four years (despite Reagan's disastrous neglect of the epidemic). The country, and the Court, were not ready to appear soft on homosexuality.

In 1992, Colorado voters decided by a narrow majority to take an even tougher stance against homosexuality: Amendment 2 would have overturned gay rights ordinances in several large, liberal cities in favor of a broad ban on any state or local statute banning discrimination based on sexual orientation. The amendment was so far-reaching that the Colorado Supreme Court and the U.S. Supreme Court both overturned it on the basis that it violated the equal protection clause of the 14th Amendment. Writing for the majority, Justice Anthony Kennedy found that Amendment 2 not only failed to meet "strict scrutiny" but also defied "rational basis" for abridging fundamental civil rights for a legitimate state interest (*Romer v. Evans*, 1996). The only purpose it advanced was animus towards homosexuals. The dissenting Justices, Antonin Scalia, Clarence Thomas, and William Rehnquist, argued that this was reason enough. Scalia chastised the majority for taking part in the "culture war," yet he saw no constitutional problem in supporting conservative Coloradoans' attempt to "preserve traditional sexual mores against the efforts of a politically powerful minority." While Scalia's decisions are often colorfully histrionic, they can also be prescient. He noted that *Romer* conflicts directly with *Bowers*. That conflict would finally be resolved seven years later in *Lawrence & Garner v. Texas* (2003).

Texas' "crimes against nature" law had been revised in 1973 to decriminalize heterosexual sodomy but specifically criminalized homosexual "deviate sexual intercourse." John G. Lawrence and Tyrone Garner were accidentally caught *in flagrante delicto* by the police responding to a bogus call by Garner's peeved lover. The fact that Lawrence was white and Garner a black man may have predisposed the police to employ the rarely enforced sodomy law. It took four years for the case, navigated by Lambda Legal, to work its way to the U.S. Supreme Court. Paul Smith confidently delivered the oral argument on behalf of the petitioners, declaring that the Texas law was unconstitutional because it violated both the equal protection and due process clauses of the 14th Amendment. Charles Rosenthal Jr. argued on behalf of Texas in an increasingly bumbling performance. He confounded matters with his statements that it wasn't even proven that the plaintiffs were gay and that the anti-homosexual legal tradition didh978n't really matter since many states were repealing their sodomy laws anyway. Scalia frequently had to rescue Rosenthal.

The Court voted 6-3 against Texas. Justice Kennedy, again writing for the majority, endorsed only the due process argument and took the bold step of admitting the Court's earlier misjudgment: "*Bowers* was not correct when it was decided, and it is not correct today. ... *Bowers v. Hardwick* should be and now is overruled." This effectively invalidated all remaining state sodomy laws. Sandra Day O'Connor, in a separate opinion, favored the plaintiffs but on the equal protection argument; however, she disagreed on overturning *Bowers*. Scalia wrote a scathing dissent, once again accusing his colleagues of signing on to the "homosexual agenda." Echoing the fear-mongering of the religious right, he warned that nothing now barred people from claiming the constitutional right to bestiality, bigamy, incest, adultery, prostitution, and fornication. More presciently, he noted that the decision also undermined restrictions against homosexual marriage. Just a few months later, the Massachusetts Supreme Court would throw out the state's ban on same-sex marriage.

Scalia's decision was more devoted to laying the legal rationale for overthrowing *Roe v. Wade*. Basically, he argued that if the Court can abandon *stare decisis* (standing by precedent) because the foundations of a ruling have been criticized or undermined, then so too should *Roe* be wide open to reversal. Justice Thomas, in a brief dissent, simply reaffirmed conservatives' contention that there is no constitutional basis for a right to privacy (the foundation of *Roe*).

Eskridge concludes that sodomy reform was not an inevitable evolution in the law, but the result of cultural changes, grassroots education, and the GLBT community's commitment to family, community, and institutions. His conservative turn here is quite the opposite of the radical, queer bogeyman that Scalia and the religious right invoke. But Eskridge may be correct that a GLBT appropriation of the family values mantle is the only strategy that will protect us from the still powerful religious right. Even *Lawrence* could yet be overruled under a different alignment of cultural politics and Supreme Court justices. Ultimately, Eskridge's history is a potent reminder that gay rights, abortion rights, and civil rights in general are not a rational inevitability but a legal and political achievement that must be guarded vigilantly from the grassroots on up.