Sodomy Laws

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The Sensibilities of Our Forefathers

The History of Sodomy Laws in the United States

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Georgia

"[N]o satisfactory reason occurs to us why the lesser form of this crime against nature should be covered by our statute, and the greater excluded, when both are committed in a like unnatural manner, and when either might well be spoken of and understood as being 'the abominable crime not fit to be named among Christians'."

The Colonial Period, 1607-1776

Georgia, the last of the 13 British colonies to be settled, originally was founded as a penal colony. The original charter granted to the colony in 1732[1] provided that laws could be made locally,[2] that existing laws of the South Carolina colony (from which Georgia was erected) were not continued in force in Georgia,[3] and that laws enacted by Georgia could not be repugnant to the laws of England.[4] The South Carolina laws *not* received by Georgia included its sodomy law and common-law reception statute *(q.v.)*. Thus, at the founding, no provision concerned sodomy.

Despite this fact, two known criminal prosecutions were carried out in colonial Georgia for sodomy. The first occurred in 1734. An unnamed man received 300 lashes underneath a gallows.[5] This penalty was inflicted in the theocratic settlement of Ebenezer populated by German immigrants. The spiritual head of the colony later was made secular head as well, and a conflict arose over his mixing church and state.[6] This prosecution was not under English law and must be considered an aberration.

In 1743, an unnamed Irish "surgeon and apothecary" received the death penalty for sodomy in Fort Frederica, Georgia.[7] The official secretary of

the colony made a reference to "English laws" presumably being in force during this time,[8] but the fact that the death sentence apparently was carried out under military law casts some doubt as to which law was used to justify it.

In 1752, the proprietary rulers of Georgia surrendered power to the English Crown.[9] Even with this surrender, a local legislature remained that continued to enact laws.[10] This change of government apparently created a controversy as to what laws were in force, Georgian or English.

This question was answered with a law passed in 1755[11] making it a crime for any person to deny that *the statutory law of Georgia* still was in effect. This new law made no mention of English laws being recognized.

> **Period Summary:** *Georgia, ironically founded as a penal colony, was the only of the 13 English colonies in which sodomy was legal throughout its colonial period. Not only was there no sodomy statute, but the colony maintained a corrosive attitude toward the English common law and English statutes. Very few were considered in force in Georgia, the Henrican and Elizabethan "buggery" laws not among those few. It appears that there was a hostility toward England in Georgia, leading it to reject English law to the extreme of allowing sodomy to be practiced. The two known prosecutions of sodomy fell outside the orb of civil law. One occurred in a German religious settlement and the other was carried out under military auspices.*

The Post-Revolution Period, 1776-1873

After the revolution, Georgia enacted a law in 1784[12] that adopted all laws that existed in Georgia as of May 14, 1776[13] as well as

> the common laws of England, and such of the statute laws *as were usually in force* in the said province[.][14] [Emphasis added].

This wording made it clear that only the laws already recognized by Georgia in 1776 were to be continued. Since sodomy never had been a crime in the state, sodomy would remain legal until the legislature acted. This point is important, because at the time of the adoption of the U.S. Bill of Rights in 1791, Georgia was the only one of the 13 colonies without criminal penalties for sodomy, either by statute or common law. Two centuries later in the *Bowers v. Hardwick* case, Justice Byron White would make a major error by claiming that, since sodomy was criminal in all 13 colonies, the right to engage in sodomy was not a fundamental liberty.

Further discussion of this point will be with the detailed analysis of the *Hardwick* case.

As backup to this point, a survey was done of English laws that were considered in force in Georgia and thus adopted by the statute of 1784.[15] Compiler William Schley listed 119 English statutes that his exhaustive research showed were recognized as in force in Georgia throughout its history. The list did *not* include either the Henrican or Elizabethan buggery statutes.[16] Schley believed that the decision of the colonial rulers to accept or reject certain English laws

> was a matter of choice in the colonists to receive or reject so much and such parts only as they thought proper; or they might have rejected the whole, and adopted any other laws, provided they were not repugnant to the English laws; for this was the only restriction contained in the charter.[17]

By a 1770 statute, the colonists were

> entitled to the benefit of the English statutes as existed at the time of their colonisation, *[sic]* and which they have by experience respectively found to be applicable to their several local and other circumstances.[18]

Schley felt this statute was not determinate of what laws were in force, because "they do not point out which of the statutes were considered applicable, and therefore adopted."[19] The final decision as to what had been and had not been adopted was to "rest on opinion and reason."[20] Schley decided that when

> the colonial assembly made the declaration in regard to the common law, they never could have intended to adopt the whole body of the English common law, but must have meant only such parts and principles as were applicable to their situation, for it would have been absurd to think of carrying into effect in a desert and uncultivated country, all the complicated laws of a powerful, commercial, populous and refined empire.[21]

Therefore, when speaking of

> the common law in force in Georgia, we mean only so much, and such parts of the English common law as were adapted to the exigencies of a colony established in a new country...formed on

> different principles, and for purpose, essentially different from those which governed the parent. The statute law was also, only partially adopted, being expressly restricted by the resolution itself.[22]

Schley's analysis later was criticized by legal scholars, not because he left out adopted English laws, but because he *included too many.* The Georgia Supreme Court noted with approval that it was

> manifest from the terms of our Act of revival, that it was by no means considered that *all* the statutes of England, of a general nature, were of force in Georgia, prior to the 14th of May, 1776. [Emphasis is the Court's].[23]

In addition, if any doubt existed as to whether an English statute was in force, the doubt had to be resolved in the negative.[24]

This sexual freedom lasted into the 19th century. A criminal code adopted in 1816[25] included Georgia's first sodomy law, which provided a compulsory sentence of life imprisonment at labor.[26] For some reason, this code never was enforced.

In 1817, a new code was adopted[27] that used the same penalty for sodomy.[28] This code was enforced, giving Georgia its first sodomy law in 85 years of existence.

A revised criminal code adopted in 1833[29] abrogated common-law crimes[30] and adopted a unique sodomy law defining the act as

> carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman.[31]

The penalty of life imprisonment at labor remained.[32]

A new code adopted in 1850[33] gave a form for indictment that described the crime as between two males only and always as an assault.[34] An attempt to commit sodomy also was made a crime, set as an unspecified misdemeanor.[35]

> **Period Summary:** *Georgia continued to allow sodomy for some four decades after the Revolutionary War. It remained the only "free" state of the original colonies. English common-law crimes were abrogated by the state far earlier than in most states, showing a continued antipathy*

> *toward English law. The sodomy law longest in force in the state, that adopted in 1833, was a little more specific than most others. It outlawed "connection against the order of nature by man with man, or in the same unnatural manner with woman." Thus, it excluded activity between women, presumably because the mind set of the time could not contemplate such a thing as a Lesbian.*

The Victorian Morality Period, 1873-1948

In 1874, in the case of *White v. State,*[36] the Georgia Supreme Court ruled unanimously that no common-law crimes existed in the state.

The first reported sodomy case in the state was *Hodges v. State,*[37] in 1894. In one of the shortest such opinions in U.S. legal history, the conviction of a boy "under 14 years of age" for sodomy on another was overturned with two words: "Judgment reversed."[38]

In the case of *Herring v. State,*[39] in 1904, the Georgia Supreme Court decided that fellatio constituted a violation of the sodomy law. After noting the conflict between some writers on the subject and the sparse case law in the United States,[40] the Court decided that, because state law did not expressly limit the scope of the law,[41] and "[a]fter much reflection," if the

> baser form of the abominable and disgusting crime against nature—i.e., by the mouth—had prevailed in the days of the early common law, the courts of England could well have held that that form of the offense was included in the current definition of the crime of sodomy. And no satisfactory reason occurs to us why the lesser form of this crime against nature should be covered by our statute, and the greater excluded, when both are committed in a like unnatural manner, and when either might well be spoken of and understood as being "the abominable crime not fit to be named among Christians."[42]

Although the wording of the Georgia law did not use "crime against nature," this decision made Georgia the first state to have the act of fellatio read into that term and criminalized without a change of the statute. (The Illinois case of 1897 *(q.v.)* was based on a broader law).

Curiously, just a year later, in 1905, the Georgia Supreme Court made history in another way. Deciding *Pavesich v. New England Life Insurance Company,*[43] the Court became the first in the nation to find a constitutional

right to privacy. Justice Andrew Cobb, speaking for the unanimous Court, said that the right to privacy was grounded in the natural law.[44] The right to privacy was "absolute," yet subject to regulation if the private act violated "public law or policy."[45] Thus, an "absolute" constitutional right could be overturned by a statute simply because the statute made the act in question one of public policy. Liberty included

> the right to live as one will, so long as that will does not interfere with the rights of another or of the public.[46]

Cobb noted that it could be claimed

> to establish a liberty of privacy would involve in numerous cases the perplexing question to determine where this liberty ended, and the rights of others and of the public began.

That problem would be solved by "the wisdom and integrity of the judiciary."[47] Thus, the judiciary would stick its nose into your house to determine if what you were doing there was entitled to privacy or prosecution.

In 1911, in *White v. State*,[48] the Georgia Supreme Court issued a 10-word opinion reaffirming its decision in *Herring*.[49]

In *Jones v. State*,[50] from 1916, the Court issued a third ruling with the same result. It also decided that both participants in an act of fellatio were principals.[51] Unable to avoid moralizing, the Court said that

> [u]npleasant as it is to discuss a case of this disgusting character, it is nevertheless necessary to some extent. It is not essential, however, to recite or refer to the revolting evidence[.][52]

In 1917, in *Comer v. State*,[53] the Georgia Court of Appeals divided 2-1 to uphold a conviction under the sodomy law of a man for committing cunnilingus on a woman. The lengthy analysis of the Court: "Judgment affirmed."[54] In dissent, Judge Bloodworth, cautioning against the "loathsomeness" of the charge, was full of "regret" that he could not join the majority.[55] Bloodworth quoted from the statute that the act with a woman had to be "in the *same* unnatural manner" as with a man. [Emphasis his].[56] Since men could not engage in cunnilingus with each other, the act between a man and a woman could not be criminalized. Bloodworth called on the legislature to remedy the situation by expressly criminalizing such conduct.[57]

Also in 1917, the same court gave a victory to a defendant in the case of *Bennett v. State.*[58] The Court ruled unanimously, in another two-word decision, "Judgment reversed," that the placing of Bennett's hand on another man's crotch and saying, "Let's go down in the alley yonder" did not constitute an assault to commit sodomy.[59]

In 1931, the Court of Appeals handled the case of *Mobley v. State.*[60] It upheld the conviction of a prisoner for committing sodomy on a "boy" who also was in his cell but gives no clue as to whether the act was consensual.[61]

In the 1938 case of *Wharton v. State,*[62] the Court of Appeals decided, unanimously, that frottage did not violate the sodomy law.[63]

Another victory came just a few months later, early in 1939. In *Thompson v. Aldredge,*[64] the Georgia Supreme Court, in the first such case in the nation, and one of only four consensual cases ever reported, ruled unanimously that cunnilingus between two women did not violate the sodomy law, because of its clear statement that acts had to be committed either man with man or man with woman. Justice Warren Grice, writing for the Court, said that merely because

> the act here alleged to have been committed is just as loathsome when participated in by two women does not justify us in reading into the definition of the crime something which the lawmakers omitted.[65]

The opinion gives absolutely no information as to how Ella Thompson and her unnamed partner were discovered.

The Georgia legislature showed that it was in no hurry to change the law after this court opinion.

A law enacted in 1939[66] permitted the granting of probation to certain felons, excluding those convicted of any of nineteen specified crimes, including sodomy.[67] Another provision of the law granted the trial court the power to reduce from a felony to a misdemeanor any conviction other than one of the nineteen excluded crimes, including sodomy.[68]

In the 1941 case of *Green v. State,*[69] the Court of Appeals upheld a sodomy conviction despite conflicting testimony. Apparently using a thesaurus to find a new negative adjective to describe sodomy, this Court called sodomy "gruesome."[70] A police officer allegedly spotted Green engaging in sodomy in the restroom of a public auditorium in Atlanta, even though another witness testified that it was questionable if anyone actually could have seen such detail from the position and distance the officer claimed to

be.[71]

Drunkenness was rejected as a sodomy defense in the 1944 case of *Carter v. State*.[72]

In *McKenzie v. State,*[73] from 1945, the Court of Appeals upheld a sodomy conviction, rejecting the defendant's contention that the absence due to illness of his lead counsel for a portion of the trial made it impossible for him to receive a fair trial.[74]

> **Period Summary:** *The early tolerance shown in Georgia disappeared by the turn of the century. The Alice Mitchell murder trial in Tennessee and the Oscar Wilde "gross indecency" trial in England caused a legal backlash both in England and the United States. In 1904, the Georgia Supreme Court became the first in the nation to hold that the term "crime against nature" embraced an act of fellatio. The Court referred to fellatio as the "baser form of the abominable and disgusting crime against nature." It claimed that, had fellatio been prevalent in England in earlier times, it would have been construed by courts to be covered under the term "crime against nature." This logic later was extended to cover heterosexual cunnilingus, although Lesbian cunnilingus was held not to be included owing to the specificity of the statutory language, "man with man, or in the same unnatural manner with woman."*

The Kinsey Period, 1948-1986

In 1949, Georgia finally amended its sodomy law,[75] more than a century after it last did so. No effort was made to reword the proscriptions to include frottage or acts between women. The compulsory life imprisonment penalty was reduced to a term of 1-10 years.[76]

As a result of this law, the Attorney General received an inquiry from a Mr. R.J. Harris, apparently a private citizen, as to whether the new penalty would ameliorate the sentences of those already in prison. The unofficial opinion[77] (because of Harris's private status) was that the law would not affect those already in prison.

Later in 1949, in *Barton v. State,*[78] the Court of Appeals overturned a sodomy conviction because the indictment had not specified how Barton was alleged to have committed the act, since different ways existed of committing sodomy.[79]

Barton was retried and convicted, and his second conviction also reached the Court of Appeals. In *Barton II*,[80] the Court upheld the right of the trial court to give Barton a life sentence for sodomy for an act committed prior to the amelioration of the penalty in 1949, even though he had been retried *after* the penalty had been changed.[81]

A new law enacted in 1950[82] eliminated the exclusion of sodomy from the list of crimes for which probation could be granted.

In the 1951 case of *Gibson v. State*,[83] the Court of Appeals upheld a sodomy conviction over the contention of the defendant that his partner was an accomplice whose testimony had not been corroborated. The Court believed that the youth of the partner, 15, along with other unspecified "circumstances in connection with the case," made the question of whether he was an accomplice a matter for the jury.[84] The Court also said that the "evidence, of course, is sordid."[85]

Another unofficial opinion of the Attorney General[86] in 1951 responded to an inquiry from a Mr. William Green, who asked for information on "offenses against the family" in Georgia. The Attorney General responded with a listing of them and included sodomy.[87]

In 1953, the Georgia Court of Appeals decided a sodomy case with a twist, *Community Theatres Co. v. Bentley*.[88] The court rejected a suit by a woman against the theatre corporation that employed a man who engaged in sodomy with her son. The court found that the sexual activity did not occur within the man's scope of employment, therefore absolving the employer of liability.

Georgia passed a law in 1956[89] that limited the parole eligibility of persons convicted of sodomy. Such persons had to receive a psychiatric examination before release on parole to see if they had any "mental, moral or physical impairment which would render release unadvisable."[90]

In 1957, the Court of Appeals upheld a sodomy conviction in *Johnson v. State*.[91] In this case, Johnson had been spotted by a police officer in a bus station "going upstairs" and then into a restroom. The officer went outside and looked in a window, spotting Johnson "commit the offense of sodomy on another man who also was arrested for this offense at that time."[92]

In the 1961 case of *Burge v. State*,[93] the Court of Appeals unanimously upheld a sodomy conviction when it rejected the defendant's contention that his partner's age needed to be stated in an indictment, with the Court noting that the age of the partner was irrelevant under state law.[94] The Court also stated that testimony as to the homosexuality of Burge was not corroborative of his guilt in an act of sodomy.[95]

In 1963, in *Riley v. Garrett,*[96] the Georgia Supreme Court unanimously overruled the 1917 *Comer* decision and stated that cunnilingus did not constitute a crime under the sodomy law. The reasoning was that, due to the wording of the law, since two men could not perform cunnilingus, the law could not recognize as criminal cunnilingus between a man and a woman.[97]

A 1964 statute[98] expanded the power to reduce crimes from felonies to misdemeanors to the jurors in a case, as well as the trial judge, and eliminated the list of excluded crimes from this power, thus permitting the reduction of a sodomy charge to a misdemeanor.[99]

Georgia became the first Southern state to adopt a comprehensive criminal code revision after the American Law Institute made its recommendation to decriminalize consensual sodomy. It did not follow the recommendation. In the new code of 1968,[100] Georgia raised the penalty for sodomy from 1-10 years to 1-20[101] and expanded the law to include cunnilingus, including between women.[102] A provision also outlawed solicitation for sodomy as an unspecified misdemeanor.[103] The public indecency law was expanded to include a "lewd appearance in a state of partial or complete nudity,"[104] and a "lewd caress or indecent fondling of the body of another person."[105]

In 1969, in *Mitchell v. State,*[106] the Court of Appeals decided that proof of penetration could be obtained from circumstantial evidence only[107] and that the testimony of a police officer need not be corroborated,[108] thus giving police *carte blanche* for harassment.

In a case from 1970, *Carter v. State,*[109] the Georgia Court of Appeals decided that the state's revised sodomy law did not require actual penetration. All that was required to constitute a violation was "some contact."[110]

An Opinion of the Attorney General from 1973[111] held that examination of a sex criminal before parole was required under the law.

A commission recommended, in late 1976, the repeal of the state's sodomy law, but the legislature chose to ignore the recommendation.[112]

In 1977, the Court of Appeals upheld a conviction for solicitation of sodomy in *Anderson v. State.*[113] Anderson had offered to give an undercover police officer a "blow job" and the Court found this term to be of sufficient clarity that the jury could render an intelligent verdict.[114]

In the brief 1983 case of *Massey v. State,*[115] the Court of Appeals said that the testimony of a consenting partner in sodomy needed no corroboration, despite the command of Georgia law that convictions could not be had on the uncorroborated testimony of an accomplice.[116]

The 1984 case of *Allen v. State*[117] decided several issues. The Court of Appeals ruled that the state's prostitution law covered sexual acts for hire between males,[118] that homosexual activity constituted adultery,[119] and upheld the right of the trial court to charge the jury that the prostitution law covered "physical intimacies" between persons, rather than the narrower term "sexual intercourse."[120] This decision allowed prosecutions for practically any kind of erotic activity for hire.

The sodomy case of the century was *Bowers v. Hardwick et al.*[121] decided in 1986. Michael Bowers had been arrested in Atlanta in his own bedroom for consensual fellatio with another male by a police officer who had been admitted to the apartment by a roommate. Challenging the constitutionality of the Georgia sodomy law, Hardwick lost at the trial court, but won in the Eleventh Circuit Court of Appeals.[122] By a vote of 5-4, the U.S. Supreme Court reversed the Court of Appeals and found the law to be constitutional. The opinion was written by Justice Byron White following a number of back-room machinations.[123] First, White apparently attempted to temper the impact of his opinion, realizing the unprecedented storm of controversy that would be unleashed by it, by stating that the *Hardwick* case

> does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.[124]

White rejected the claim that the previous Court decisions on privacy could give Hardwick any relief. Dismissing any possibility of a loving, stable relationship between persons of the same sex which would include sexual intimacy, he believed that no

> connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.[125]

White also said that the Court was "quite unwilling" to declare a

"fundamental right to engage in homosexual sodomy."[126] Because of the "ancient roots" in law against sodomy, no such fundamental right could be inferred from it.[127] White noted, incorrectly, that sodomy was a crime in all 13 colonies at the time of the adoption of the Bill of Rights,[128] and included errors in his history of the laws in existence at the time of the adoption of the 14th Amendment in 1868.[129] The other historical error is that the sodomy laws in existence in 1868 did not, with two possible exceptions, recognize oral sex as a crime.[130] Oral sex is what Hardwick performed to trigger his arrest. Against this lengthy history of criminalization, White stated that a claim of sodomy as a fundamental right was "at best, facetious."[131] The Court would not "discover new fundamental rights imbedded in the Due Process Clause" because it was

> 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 design of the Constitution.[132]

White and his four colleagues apparently saw no contradiction in this claim from the previously decided cases on privacy, even though none of the terms "family," "marriage," or "procreation" is found in the Constitution. That right to privacy was the same judge-made law that White criticized. The fact that almost all of the reported sodomy cases throughout the United States involved either force, an underage partner, or acts in a public place also seemed lost on the Court. White concluded his exceedingly superficial opinion by stating that the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was a rational basis for the existence of the law.[133] Again, he overlooked the contradiction in that the laws against contraception, abortion, and miscegenation, because they were on the books, had the "presumed" support of a majority of the electorate, but that fact did not stop the Supreme Court from striking them down.

Chief Justice Warren Burger wrote a brief concurring opinion that made White's opinion seem pro-Gay. Laws against "homosexual conduct" had been around for a long time and they were

> firmly rooted in Judeao-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law.[134]

Blackstone referred to sodomy,

> "the infamous *crime against nature"* as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." [Emphasis is Burger's].[135]

For the Court to

> hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.
>
> This is essentially not a question of personal "preferences" but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.[136]

Another, more temperate, concurrence was that of Justice Lewis Powell, who originally had voted to strike the law, then changed sides. Although he joined the majority on the broad issue of fundamental rights, Powell felt that the law was unconstitutional as cruel and unusual punishment because of the 1-20 year penalty that could be imposed for Hardwick's consensual act. However, since Hardwick never had raised that issue, it could not be used as a reason to strike the law.[137]

The language of White and even Burger pales when compared to the timbre of the dissent of Justice Harry Blackmun, joined by Justices Brennan, Marshall, and Stevens. Blackmun, in his most eloquent written opinion, and certainly one that is among the Supreme Court's most eloquent, began by chastising the majority for its inability to understand what the issue was about. The case was not about a fundamental right to engage in homosexual sodomy, but about the right to be let alone.[138] Critical of the "haste" with which the majority reversed the Court of Appeals and saying that it "distorted" the issue in the case,[139] Blackmun got to the heart of the matter. The majority's

> almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used.[140]

Blackmun noted that the Georgia law of 1968 actually *broadened* the scope of the law to cover not only acts between women, but also all heterosexual sodomy.[141] Although Blackmun saw potential relief for Hardwick under both the Eighth and Fourteenth Amendments, he decided to concentrate on Ninth Amendment privacy issues.[142] He felt that only

> the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality[.]" [Citations omitted]. The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as

> ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of the relationship will come from the freedom of an individual to choose the form and nature of these intensely personal bonds.[143]

Blackmun also stated that the majority's

> failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests.[144]

He believed not. Blackmun sarcastically disposed of Georgia's argument that the sodomy law helped prevent the spread of communicable diseases.

> Inasmuch as this case was dismissed by the District Court on the pleadings, it is not surprising that the record before us is barren of any evidence to support petitioner's claim. [Footnote omitted].[145]

Blackmun attacked the argument that the length of time that sodomy has been criminalized was a rational basis for its constitutionality[146] and skewered Georgia for citing religious authorities to prove that the sodomy law "represents a legitimate use of secular coercive power."[147] He also gave a brief, eloquent statement of what the case was all about.

> It is precisely because the issue raised by the case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.[148]

In conclusion, Blackmun noted that the Court took only three years to realize its error in a major religious freedom case and reverse itself,[149] and stated that he could

> only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.[150]

Although he joined the historic dissent of Blackmun, Justice John Paul

Stevens also wrote a separate dissenting opinion pointing out that, historically, sodomy was considered equally odious whether heterosexual or homosexual and the laws against it did not exempt married couples.[151] He also believed that the right of privacy was equal for all persons, regardless of affectional orientation.[152]

> **Period Summary:** *Georgia reacted to the first Kinsey report by making the first change in its sodomy law in more than a century in 1949 when it eliminated the compulsory life sentence. However, it also followed the medical model then prevalent in society—the belief that those engaging in sodomy were "sick." Separate laws limited probation for convicted sodomites and required mental examinations of them. One example of judicial thaw was the 1963 Georgia Supreme Court decision that overruled the World War I-era precedent that heterosexual cunnilingus was covered by the law. Since the unique wording of the sodomy law had not been changed with the penalty, it still covered only acts "man with man, or in the same unnatural manner with woman." The Court reasoned that, since two men could not perform cunnilingus, that act was not prohibited to heterosexuals. Georgia became the first Southern state to adopt a new criminal code after the American Law Institute published its Model Penal Code. Passed in 1968 as the first wave of Gay activism swept over the country, the code showed no humanitarian impulses. The maximum penalty for sodomy was doubled from 10 to 20 years, and the wording was changed to permit prosecution of Lesbians and heterosexuals. This law was challenged in federal court raising broad civil liberties questions and, in 1986, the U.S. Supreme Court upheld it in a 5-4 vote. Ironically, the Court gave as its reasoning the "presumed belief" that a majority of the Georgia electorate found homosexual sodomy "immoral" and "unacceptable." This "presumed belief" overlooked the history of toleration that opened the Georgia colony's history and lasted throughout the colonial era and into the federal era.*

The Post-Hardwick Period, 1986-Present

In 1986, in *Wimpey v. State,*[153] the Georgia Court of Appeals sustained a sodomy conviction over the contention of Wimpey that what he had been

accused of doing was "anatomically impossible."[154] The Court did not give any specifics of the alleged act.

Also in 1986, in *Stover v. State,*[155] the Georgia Supreme Court rules 6-1 that a consensual act of sodomy occurring on an open bed of a truck occurred in a "public place." Justice George Smith dissented without opinion.

In the 1987 case of *Gordon v. State,*[156] the Georgia Supreme Court upheld a sentence of 10 years in prison followed by 10 years of probation for a man convicted of *consensual* sexual activity with a very willing 16-year-old male. In addition, the Court implicitly stated that the law did cover acts between people of the opposite sex when it declined to address the issue.[157]

In 1990, the Georgia Supreme Court, deciding the case of *Ray v. State,*[158] unanimously rejected the contention of Ray that the sodomy law was enforced selectively against persons with a homosexual orientation. The rejection was based simply on the fact that Ray had shown "no evidence" to that effect.[159] The fact that the *Hardwick* case showed selective enforcement seemed to be lost on the Court.

A victory came in the 1991 case of *Fisher v. State,*[160] when the Georgia Court of Appeals unanimously overturned a solicitation conviction. The court found that the defendant had been encouraged by the undercover police officer, and the facts of the case made it unclear as to whether Fisher actually had solicited him.

In 1991, the public indecency law was amended to make a third or subsequent conviction for the "lewd caress or indecent fondling" a felony with a penalty of 1-5 years in prison.[161]

A bill to repeal the sodomy law was introduced into the Georgia Senate in 1993 by Senator Ronald Slotin (D-Atlanta). He believed that its chance of passage was slim, but that the introduction was to "start the process."[162] The bill would redefine criminal sodomy so as to exclude "private consensual sexual behavior among adults."[163] However, it did not pass.

A constitutional challenge to the Georgia sodomy law, using the *Pavesich* case, met with defeat in 1996 in the case of *Christensen v. State.*[164] The vote of the court to uphold the sodomy law was 5-2, but there was not a majority opinion. The plurality opinion of three justices, written by Justice Hugh Thompson, answered the privacy rights argument with a single sentence. "We hold that the proscription against sodomy is a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public."

Justice Norman Fletcher concurred on far more narrow grounds, limiting his comments to the fact that Christensen's prosecuted solicitation occurred

in a public place and was asked of a stranger. One other justice concurred only in the judgement. Thus, Thompson's opinion was without precedental value as to the constitutional protection of private sexuality.

Separate dissents were written by Justice Leah Sears, the state's most consistent and eloquent defender of the dignity of Gay and Lesbian people, and by Justice Carol Huntstein. Sears criticized Thompson's opinion for stating that

> what is beyond the pale of majoritarian morality also is beyond the limits of constitutional protection. If we lived in an autocracy, the majority *[sic]* would be correct. But such is not the case.[165]

The result of the opinion was "pathetic and disgraceful."[166] Sears believed that, in "the long history of human governance," the

> advent of democracy marked a major moral advance because of its recognition of the inherent dignity of the individual and the worth of his private life. The underlying idea that the individual has a right to rule himself in both private and public affairs was a monumental challenge to the many authoritarian conceptions of government that preceded democracy. Quite consciously, then, this country's original social contract with its citizens recognized and gave credence to our immense variety of personal tastes and values, and granted to each citizen the right to pursue his or her own conception of the good. Under the unique American democratic scheme, government was intended to play a relatively insignificant role in the individual's pursuit of the good.[167]

Sears "respectfully yet resolutely" dissented.[168]

Huntstein called to the other side's attention the fact that the Georgia sodomy law covered both married and unmarried heterosexuals as well. She also said that the sodomy law and criminal laws like it are "based upon the body parts involved during private consensual sex," and "are ignored and ridiculed by the populace," and "enforced with discriminatory selectivity." This only can "breed contempt and foster disdain and disrespect for the law, the State, and the law enforcement community."[169]

Evidently the highest court did some thinking on this issue. In 1998, less than three years after *Christensen,* the Georgia Supreme Court did an about-face with *Powell v. State.*[170] Fortunate that *Christensen* did not

command a majority, that case became easier to overrule. By a 6-1 vote, the Court, speaking through Justice Robert Benham, found, in perhaps this country's least interestingly written sodomy law-striking opinion, that *Pavesich* and its progeny made a compelling argument to void the law.

A long dissent was written by Justice George Carley, the Court's most unrelenting opponent of Gay and Lesbian rights. He complained that the majority "concludes that our state constitution does confer upon the citizens of Georgia a fundamental right to engage in a consensual act which the majority itself concedes, as it must, that many Georgians find 'morally reprehensible'."[171] Thus, Carley believed that constitutional rights were determined by public opinion polling and that not necessarily even majority beliefs should prevail, only "many" members of the public.

> **Period Summary:** *Since the Hardwick decision was announced, the Georgia courts have been nearly uniformly conservative in their outlook on sexual freedom. The Georgia legislature showed no initiative to repeal the law. Curiously, the Georgia Supreme Court reversed itself in less than three years and found a room for private, consensual sodomy in the state's constitutional protection for privacy.*

Footnotes

[1] William A. Hotchkiss, *A Codification of the Statute Law of Georgia, Including the English Statutes of Force,* (Savannah:John M. Cooper, 1845), page 20. The charter was signed June 9, 1732.

[2] *Id.* at 24.

[3] *Id.* at 25-26.

[4] *Id.* at 26.

[5] William H. Brown, trans., *Detailed Reports on the Salzburger Emigrants Who Settled in America...Edited by Samuel Urlsperger,* Vol. 3, (Athens GA:University of Georgia Press, 1972), page 314.

[6] *Id.* at xi to xix.

[7] E. Merton Coulter, ed., *The Journal of William Stephens 1743-1745,* Vol. 2, (Athens GA:University of Georgia Press, 1958-59), page 3. The diary entry is dated Aug. 7, 1743 and states that the sentence had been carried out a short while before. Stephens noted that he learned of this event only by

being told by a Mr. Spencer, and that the news was "a little Surprizing *[sic]*" to him.

[8] *Id.* at 157.

[9] William Schley, *A Digest of the English Statutes of Force in the State of Georgia,* (Philadelphia:J. Maxwell, 1826), page xxvi. The surrender occurred in June 1752.

[10] *Id.*

[11] *The Earliest Printed Laws of the Province of Georgia 1755-1770,* Vol. 1, (Wilmington DE:Michael Glazier, Inc., 1978), no pagination, enacted Feb. 17, 1755.

[12] Oliver H. Prince, *A Digest of the Laws of the State of Georgia,* (Milledgeville:Grantland & Orme, 1822), page 310, enacted Feb. 25, 1784.

[13] *Id.* §I.

[14] *Id.*

[15] William Schley, *A Digest of the English Statutes of Force in Georgia,* (Philadelphia:J. Maxwell, 1826).

[16] *Id.* at 491-494.

[17] *Id.* at xx.

[18] *Id.* at xxvi-xxvii.

[19] *Id.* at xxvii.

[20] *Id.*

[21] *Id.*

[22] *Id.* at xxviii.

[23] *Cain and Morris v. Monroe,* 23 Ga. 82, at 90 (1857).

[24] *Id.* at 91.

[25] *Statutes of Georgia 1811-1819,* No. 380, enacted Dec. 19, 1816.

[26] *Id.* at 571, §35.

[27] *Id.* No. 381, enacted Dec. 20, 1817.

[28] *Id.* at 618, §35.

[29] *Digest Laws of Georgia Prior to 1837*, page 619, Penal Code, enacted Dec. 23, 1833, effective June 1, 1834.

[30] *Id.* at 620, §24.

[31] *Id.* at 625, §83.

[32] *Id.* §84.

[33] Howell Cobb, *A Compilation of the Penal Code of the State of Georgia, with the Forms of Bills of Indictment Necessary in Prosecutions Under It and the Rules of Practice*, (Macon:Joseph M. Boardman, 1850). The code was published in August, 1850.

[34] *Id.* at 89, §6.

[35] *Id.* at 787.

[36] 51 Ga. 285, decided during January Term 1874.

[37] 19 S.E. 758, decided June 4, 1894.

[38] *Id.*

[39] 46 S.E. 876, decided Mar. 4, 1904.

[40] *Id.* at 881.

[41] *Id.*

[42] *Id.* at 881-882.

[43] 50 S.E. 68, decided Mar. 3, 1905.

[44] *Id.* at 69-70.

[45] *Id.* at 70.

[46] *Id.*

[47] *Id.* at 72.

[48] 71 S.E. 135, decided Apr. 12, 1911.

[49] *Id.*

[50] 88 S.E. 712, decided Apr. 21, 1916.

[51] *Id.* at 73.

[52] *Id.*

[53] 94 S.E. 314, decided Nov. 14, 1917.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] 94 S.E. 626, decided Dec. 19, 1917.

[59] *Id.*

[60] 44 Ga.App. 793, decided Nov. 27, 1931.

[61] *Id.*

[62] 198 S.E. 823, decided Sep. 29, 1938.

[63] *Id.*

[64] 200 S.E. 799, decided Jan. 12, 1939.

[65] *Id.* at 800.

[66] *Georgia General Acts and Resolutions 1939*, page 285, No. 332, enacted Mar. 24, 1939.

[67] *Id.* at 286.

[68] *Id.* at 287, §2.

[69] 16 S.E.2d 428, decided Sep. 11, 1941.

[70] *Id.*

[71] *Id.*

[72] 31 S.E.2d 666, decided Sep. 20, 1944. Rehearing denied Oct. 19, 1944.

[73] 33 S.E.2d 539, decided Mar. 8, 1945. Rehearing denied Mar. 26, 1945.

[74] *Id.* at 544-545.

[75] *Georgia General Acts and Resolutions 1949*, page 275, No. 66, enacted Feb. 8, 1949.

[76] *Id.* at 276, §26-6902(b).

[77] *Opinions of the Attorney General of Georgia 1948-1949,* page 494, issued Apr. 20, 1949.

[78] 53 S.E.2d 707, decided June 1, 1949.

[79] *Id.* at 710-711.

[80] 60 S.E.2d 173, decided June 20, 1950.

[81] *Id.* at 176.

[82] *Georgia General Acts and Resolutions 1950,* page 352, No. 762, enacted Feb. 17, 1950.

[83] 65 S.E.2d 818, decided June 14, 1951. Rehearing denied July 17, 1951.

[84] *Id.*

[85] *Id.*

[86] *Opinions of the Attorney General of Georgia 1950-1951,* page 257, issued Nov. 20, 1951.

[87] *Id.* at 258.

[88] 76 S.E.2d 632, decided May 16, 1953. Rehearing denied June 1, 1953.

[89] *Georgia General Acts and Resolutions 1956,* page 580, No. 377, enacted Mar. 9, 1956.

[90] *Id.* at 582, §5.

[91] 101 S.E.2d 107, decided Nov. 13, 1957.

[92] *Id.*

[93] 120 S.E.2d 200, decided May 12, 1961.

[94] *Id.* at 201.

[95] *Id.* at 202.

[96] 133 S.E.2d 367, decided Oct. 15, 1963.

[97] *Id.* at 370.

[98] *Georgia General Acts and Resolutions 1964,* Vol. 1, page 483, No. 924, enacted Mar. 18, 1964, effective July 1, 1964.

[99] *Id.* at 484, §5.

[100] *Georgia General Acts and Resolutions 1968,* page 1249, No. 1157, enacted Apr. 10, 1968, effective July 1, 1969.

[101] *Id.* at 1299, §26-2002.

[102] *Id.*

[103] *Id.* §26-2003.

[104] *Id.* at 1301, §26-2011(c).

[105] *Id.* §26-2011(d).

[106] 170 S.E.2d 765, decided Oct. 6, 1969.

[107] *Id.* at 766-767.

[108] *Id.* at 766.

[109] 176 S.E.2d 238, decided June 12, 1970.

[110] *Id.* at 240.

[111] *Opinions of the Attorney General of Georgia 1973,* page 31, issued Feb. 21, 1973.

[112] *The Advocate,* Vol. 206 (Dec. 29, 1976), page 8.

[113] 235 S.E.2d 675, decided May 12, 1977.

[114] *Id.* at 676-677.

[115] 299 S.E.2d 148, decided Jan. 7, 1983.

[116] *Id.*

[117] 316 S.E.2d 500, decided Feb. 15, 1984. Rehearing denied Mar. 5, 1984. Cert. denied Apr. 25, 1984.

[118] *Id.* at 501-502.

[119] *Id.* at 502.

[120] *Id.*

[121] 478 U.S. 186, decided June 30, 1986. Rehearing denied, 478 U.S. 1039, decided Sep. 11, 1986.

[122] 760 F.2d 1202.

[123] When the case arrived at the Supreme Court after the Eleventh Circuit struck down the law, only Byron White and William Rehnquist voted to hear the case. Before a denial of certiorari could be handed down (thus leaving the Eleventh Circuit's striking of the law standing), liberal Justice William Brennan changed his vote, believing it an important civil liberties case. His close friend and fellow liberal Thurgood Marshall was persuaded to change his vote, giving the case the four votes necessary for a hearing. Brennan then was persuaded by Justice Harry Blackmun to change his vote again, fearing that the Court's conservative majority would reverse the Eleventh Circuit, leaving only three votes to hear the case. At this, Chief Justice Warren Burger changed his vote as well, again giving the case the necessary four votes for review. Marshall then considered withdrawing his vote, but feared appearing like a Brennan clone, so he kept his vote for review. See the *Washington Blade,* Oct. 20, 1995, page 1.

[124] 478 U.S. 186, at 190.

[125] *Id.* at 191.

[126] *Id.*

[127] *Id.* at 192.

[128] *Id.* and n.5. In Georgia, the state at issue, sodomy was, and always had been, legal at the time of the adoption of the Bill of Rights. See the early part of this chapter. White also made lesser errors in the footnote, e.g., New Hampshire's first sodomy law was adopted in 1679, not 1718, and a new law was enacted in 1791 before the adoption of the Bill of Rights *(q.v.)*; New York's sodomy law in force at the time of the adoption of the Bill of Rights was passed in 1788, replacing the 1787 law White claimed was in force *(q.v.)*; and Rhode Island passed its first sodomy law in 1647, not 1662, and the 1663 law [not 1662 as White claimed] was replaced by a law of 1729 *(q.v.)*.

[129] *Hardwick,* at 193, n.6. He lists the wrong laws for Arkansas, Florida, Kansas, Maine, Rhode Island, and Vermont, and omits sodomy laws in existence for the District of Columbia, Idaho, North Dakota and South Dakota (then known together as the Dakota Territory), and Wyoming, as well as a common-law reception statute in New Mexico. See the respective jurisdictions for these laws.

[130] Fellatio possibly was recognized as a crime only in Connecticut and Tennessee under their oddly worded laws *(q.v.)*. A large percentage of the states did not judicially recognize fellatio or cunnilingus as sodomy and had to rewrite their laws to cover it specifically.

[131] *Hardwick,* at 194.

[132] *Id.*

[133] *Id.* at 196.

[134] *Id.*

[135] *Id.* at 197.

[136] *Id.*

[137] *Id.* at 197-198. Powell later, after having left the Court, stated that he, in hindsight, realized that he voted the wrong way in the case. See the *Washington Post,* Oct. 26, 1990, 3A:1. The history of Powell's switch is found in the *Washington Blade*, Oct. 20, 1995, page 1.

[138] *Hardwick*, at 199.

[139] *Id.* at 200.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 202.

[143] *Id.* at 205.

[144] *Id.* at 208.

[145] *Id.*

[146] *Id.* at 210-211.

[147] *Id.* at 211.

[148] *Id.* This quotation was reprinted widely in newspapers reporting the Court's decision. See *USA Today*, July 1, 1986, page 1.

[149] *Hardwick*, at 213-214. The cases concerned compulsory flag salutes by students and were brought by Jehovah's Witnesses. The first case, which they lost, was *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), and that precedent was overruled in a broadly worded decision in favor of religious freedom, *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943).

[150] *Hardwick*, at 214.

[151] *Id.* at 215.

[152] *Id.* at 218-219. Ironically, Bowers later admitted having engaged in adultery while Attorney General. Adultery still is a criminal offense in Georgia. *The Oregonian*, June 6, 1997,

14A:1.

[153] 349 S.E.2d 773, decided Oct. 14, 1986. Cert. denied Nov. 13, 1986.

[154] *Id.* at 774.

[155] 350 S.E.2d 577, decided Dec. 4, 1986.

[156] 360 S.E.2d 253, decided Sep. 24, 1987.

[157] *Id.* at 254.

[158] 389 S.E.2d 326, decided Mar. 8, 1990.

[159] *Id.* at 327.

[160] 405 S.E.2d 117, decided Apr. 1, 1991.

[161] *Georgia General Acts and Resolutions 1991,* page 966, No. 406, enacted Apr. 11, 1991.

[162] *Washington Blade,* Apr. 2, 1993, page 34.

[163] Senate Bill 350, §1.

[164] 468 S.E.2d 188, decided Mar. 11, 1996. Reconsideration denied Mar. Mar. 28, 1996.

[165] *Id.* at 191.

[166] *Id.* at 192.

[167] *Id.* at 198-199.

[168] *Id.* at 199.

[169] *Id.* at 199.

[170] 510 S.E.2d 18, decided Nov. 23, 1998. Reconsideration denied Dec. 17, 1998.

[171] *Id.* at 27.

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