Sodomy

Home
USA Laws
World Laws
News
Editorials
Repeal Bills
Legal Cases
Effects
Strategies
History
Research
Advocates
Feedback

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The Sensibilities of Our Forefathers

The History of Sodomy Laws in the United States

By George Painter

Texas

"[He's] a raving, vicious bull, running at large upon the highways, seeking whom he should devour[.]"

The Post-Revolution Period, 1776-1873

The Republic of Texas adopted a criminal code in 1836[1] that made no reference to sodomy, but did recognize common-law crimes.[2] Since no specific penalty was attached to the code for violation of common-law crimes, the English penalty of death applied.

After statehood, Texas maintained common-law crimes with a statute of 1854,[3] but the penalty was limited to a fine or imprisonment, at the discretion of the jury.[4] Another section, which could have been written by Gertrude Stein, said that a

> common law offence for which punishment is prescribed by the statute, shall be punished only in the mode prescribed by statute, shall be punished only in the mode prescribed *[sic]*.[5]

Texas passed its first sodomy law in 1860.[6] The statute used the common-law definition and set a penalty of 5-15 years in prison.[7]

The first reported sodomy case in the state, *State v. Campbell*,[8] from 1867, decided that an indictment or information merely charging a defendant with "the abominable and detestable crime against nature" was not sufficient for prosecution. The Texas Supreme Court agreed with the defendant that the

indictment, as worded, did not state an offense.[9]

A similar issue occurred in the case of *Fennell v. State,*[10] from 1869. The Supreme Court again reversed the conviction because state law required all criminal laws to be "expressly defined[.]"[11]

> **Period Summary:** *Texas existed for some time off common-law crimes and did not enact a sodomy law until just before the Civil War. However, due to Texas Supreme Court decisions interpreting common-law requirements for criminal indictments, convictions were overturned consistently during this time. Even though the vague term "crime against nature" was held to be insufficient for an indictment to stand, the Texas legislature made no effort to change the law to permit such prosecutions.*

The Victorian Morality Period, 1873-1948

I. Sodomy

In a third case raising the same issue (the prosecutors and trial courts must have been remiss at keeping up with case law in the state), *Frazier v. State,*[12] from 1873, the Texas Supreme Court got even more emphatic. "[W]e must hold that there is no such offense known to our law as the one charged in the indictment[.]"[13]

The Texas legislature finally made an effort to change the law so that sodomy prosecutions could be sustained. A law was enacted in 1879[14] that eliminated the very stringent requirement that criminal offenses be clearly defined and abrogated common-law crimes.[15]

This became the basis for the first reported unsuccessful sodomy conviction appeal in Texas. In 1883, in *Ex Parte Bergen,*[16] the Texas Court of Criminal Appeals ruled that, as a result of the statutory change, criminal offenses no longer had to be "expressly defined."[17]

In the 1889 case of *Medis et al. v. State,*[18] the Court of Criminal Appeals upheld a conviction for consensual sodomy (and sentence of 10 years) of two men. Charles Medis was discovered *in flagrante delicto* with the prosecuting witness, Milton Werner, while Ed Hill lay nearby, reading a newspaper. Werner was heard to say that he was to be served next. When the unspecified witnesses came upon Medis and Werner, the two "separated" but both acknowledged their participation in the act.[19] Nothing in the opinion explains why Werner was not prosecuted, or why Hill was. Werner "was evidently consenting[.]"[20]

In the case of *Prindle v. State,*[21] from 1893, the Court of Criminal Appeals unanimously overturned the sodomy conviction of Charlie Prindle for fellatio. The Court felt that, however

> vile and detestable the act proved may be, and is, it can constitute no offense, because not contemplated by the statute, and is not embraced in the crime of sodomy. The legislature has not named or defined and crime under which defendant can be prosecuted or punished, under the evidence adduced in this case.[22]

This was the first reported fellatio prosecution in the United States under a sodomy law that had not been amended clearly to include such acts and became a precedent for numerous other courts in the United States.

In the brief case of *Lewis v. State*[23] from 1896, the Court of Criminal Appeals unanimously ruled that the sodomy law applied to heterosexual activity.[24]

In 1898, the Court of Criminal Appeals decided the case of *Darling v. State.*[25] Shorty Darling had been called, by the prosecutor, a

> raving, vicious bull, running at large upon the highways, seeking whom he should devour; was dangerous, and should be penned up where he would have no more such opportunities to commit such abominable and detestable crimes.[26]

The Court said that this claim was "in no way verified as being true," but affirmed the conviction.[27]

In 1904, in *Green v. State,*[28] the Texas Court of Criminal Appeals unanimously reversed a sodomy conviction because penetration had not been proven.

The Court of Criminal Appeals again rejected the contention of a sodomy defendant that heterosexual acts were not coverable by the law in 1905 in *Adams v. State.*[29]

In 1906, 13 years after the appellate court spoke, some trial courts in Texas still were prosecuting fellatio under the sodomy law. In the case of *Mitchell et al. v. State,*[30] the Court of Criminal Appeals again unanimously reversed such a conviction.

In 1907, in *Brown v. State,*[31] the Court of Criminal Appeals ruled that a trial court had no authority to sentence a juvenile under the age of 16 to a lesser penalty for sodomy than the 5-year minimum prescribed by the state

criminal code.[32]

The Court of Criminal Appeals decided for a third time in 1909, in *Harvey v. State,*[33] that fellatio could not be prosecuted under the sodomy law. The fact that the legislature had not acted frustrated the Court. "We think that some legislation should be enacted covering these unnatural crimes."[34]

In 1925, in *Holmes v. State,*[35] the Texas Court of Criminal Appeals overturned the conviction of a man for "indecent fondling" of a boy, saying that evidence of the boy's possible accomplice status had to be considered by a jury.[36]

Surprisingly, the next reported sodomy case in Texas, *Munoz v. State,*[37] from 1926, some 33 years after the *Prindle* decision, was the fourth reported case in which the Court of Appeals overturned a fellatio conviction under the sodomy law. Clearly, lower courts were hoping that eventually a change in the membership of the court would lead to a reversal of the earlier precedent. The *Munoz* court noted the many sessions of the legislature

> since the court announced the law and made the foregoing observation. The law has not been amended, but instead has been re-enacted in the same language as originally found. The law has been construed by the court contrary to the state's contention and that construction now seems to have legislative sanction.[38]

An "almost" legalization of sodomy was shot down by the Court of Criminal Appeals in the 1936 case of *Ex Parte Copeland.*[39] Following a 1925 recodification of criminal law, the certified copy of the new law was discovered to have a number of pages missing, but retaining a clause to repeal all provisions not found in the bill. In this case, Copeland was accused of incest, but the sodomy provision was another that was lost mysteriously after passage by the legislature. The Court found that the missing pages were inadvertent, not intentional, and that incest (and sodomy) still were criminal.[40] In fact, to

> impute to the Legislature the intent to repeal the statutes defining incest, bigamy, seduction, adultery, and fornication [and sodomy] is to lay at its door the charge of ignoring the moral sense of the people of this state and striking down some of the strongest safeguards of the home.[41]

It would be some time still before the Texas legislature moved on the issue of oral sex. In 1943, it passed a law[42] that followed the laws of Ohio *(q.v.),* Iowa *(q.v.),* and Nebraska *(q.v.)* in outlawing fellatio, but not cunnilingus,

with the following curiously redundant language.

> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being for the purpose of having carnal copulation...shall be guilt of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.[43]

Thus, one must have carnal copulation for the purpose of having carnal copulation in order to violate this law. Carnal copulation for other purposes apparently remained legal. An emergency clause was added because "the present law does not sufficiently define sodomy[.]"[44] The "emergency" took 50 years for the legislature to address.

Also in 1943, Texas enacted a broad law[45] against vagrancy. Among the new vagrants under the law were anyone engaging in "lewdness,"[46] with no specification as to the "lewdness" occurring in public, and anyone who resided in or remained in any place "for the purpose of...lewdness[.]"[47]

The new sodomy law was challenged as too vague in 1945 in *Furstonburg v. State.*[48] The Court of Criminal Appeals rejected the defendant's contention that the law was so broad that it covered shaking hands and kissing.[49]

The case of *Medrano v. State,*[50] from 1947, was decided by the Court of Criminal Appeals with no details whatsoever. However, because Medrano received only 2-5 years for his act, near the bottom end of the penalty scale, it is to be presumed that his act was consensual.

II. Sterilization

In 1893, the sterilization of all "sexual perverts" was recommended by the editor of the *Texas Medical Journal* and endorsed by the Governor of Texas.[51] One suggestion, endorsed by the editor, was the sterilization of "all criminals of whatever class." This was recommended after the news of the Alice Mitchell murder case in Tennessee *(q.v.).*[52] Castration was recommended as a substitute "for all sexual crimes or misdemeanors, including confirmed masturbation."[53] Governor Jim Hogg, formerly Attorney General of the state, gave his assurance that the castration of inmates of an insane asylum would be constitutional.[54]

> **Period Summary:** *Another reversal of a sodomy conviction, followed by a half-decade, led to the Texas legislature finally amending state law to*

permit vague wording of criminal indictments. This permitted "crime against nature" to be a sufficient wording for an indictment. Texas became the first state in which a fellatio conviction under a non-specific sodomy law was prosecuted. Following English precedent, the Texas Court of Criminal Appeals ruled that such acts could not be prosecuted. As with the common-law specificity issue, the Texas legislature made no effort to change the law and convictions for fellatio continued to be overturned by courts for more than three decades. It was not until 1943, fifty years after the Texas courts first spoke on the issue, that the sodomy law was revised to permit prosecutions for oral sex. However, Texas chose to follow the Ohio-Iowa-Nebraska wording that outlawed fellatio, but not cunnilingus. Although no sterilization law ever was enacted by the state, one had been advocated during Victorian times.

The Kinsey Period, 1948-1986

In 1949, in *Slusser v. State,*[55] the Court of Criminal Appeals upheld the sodomy conviction of a man for "lewd and lascivious" acts with a quite willing ten-year-old boy. The court acknowledged that the boy was an accomplice, but felt that his testimony was corroborated sufficiently to permit the conviction to stand.

In the 1950 case of *Pipkin v. State,*[56] the Court of Criminal Appeals ruled unanimously that a 14-year-old male who was picked up by a stranger and fellated by him, and who made no objection or effort to get away, consented to the act and was therefore an accomplice whose testimony had to be corroborated.[57]

Also in 1950, the Court of Criminal Appeals unanimously upheld the conviction, in *Bichon v. State,*[58] of a man for sodomy with his minor son. The son's age is not stated and Bichon's penalty was eight years in prison, half the 15-year maximum permissible. No detail is given as to why a police officer had been directed to an unidentified "room" where Bichon and his son "were found engaged in the abominable conduct."[59]

In a third case from 1950, *Strong v. State,*[60] the same court rejected the contention that two teenagers who witnessed a consensual act of fellatio on a third teenager were accomplices to the act.[61]

In 1952, in *Gordzelik v. State,*[62] the Court of Criminal Appeals upheld the conviction of a 17-year-old male for forcing a 13-year-old male at knifepoint to fellate him. Curiously, the defendant had received the

minimum sentence for his act, two years.

In *Luevanos v. State*,[63] also from 1952, the Court of Criminal Appeals upheld a sodomy conviction based on evidence that was "circumstantial in nature"[64] and, for unclear reasons, felt the need to stress that Luevanos was "of Mexican descent[.]"[65]

In 1953, in *Young v. State*,[66] the Court of Criminal Appeals sustained a sodomy conviction and maximum sentence of 15 years for an act of fellatio in a parked car with another male who consented only because "he was afraid of him[.]"[67] In *Gordzelik*, a minimum sentence had been passed even though the prosecuting witness had been held at knifepoint. In this case, a maximum of 15 years had been rendered against the unarmed defendant even though the only "threat" issued was his statement that he had once harmed someone else.

The same day, also in a case called *Young v. State*,[68] the Court of Criminal Appeals overturned a conviction for indecent exposure to two "boys" because the state allowed testimony by two other "boys" as to sexual activity between the defendant and them. The Court found the testimony to be prejudicial to the defendant.[69]

A conviction for consensual fellatio enjoyed in a jail cell was sustained by the Court of Criminal Appeals in 1956 in *Blankenship v. State*.[70] In the trial, witnesses had been asked by the prosecution if they had heard that Blankenship had been arrested some 30 times previously.[71]

Another case of consensual sodomy was the subject of the 1957 case of *Jones et al. v. State*.[72] A Houston police officer named McGee, who must have had X-ray vision, testified that he saw a car parked near a school in the dark early hours of the day and went to investigate. He stated that he, in the dark and while sitting in his car, could see William Jones and Wilford Beckham (referred to as a "37 year old musician"),[73] with Beckham crouched in a corner of the car, wearing only a shirt, with "his rectum exposed." McGee also saw Jones with his pants down, his penis erect, being on top of Beckham. He *then* saw Jones withdraw his penis from Beckham's rectum.[74] The impossibility of seeing all of this in the order stated is obvious. If Jones had been sodomizing Beckham, neither Jones' penis nor Beckham's rectum would have been visible, even in daylight and while standing and looking directly into the car, not to mention in darkness and while sitting in a car parked far enough away that its approach could not be heard by the defendants.

In 1958, in *Sinclair v. State*,[75] the Court of Criminal Appeals unanimously upheld the conviction of a man for consensual fellatio committed in an Amarillo theatre. The Court first ruled that actual penetration of the mouth was not necessary to constitute a violation of the law[76] and upheld the right

of Texas to try Sinclair without the assistance of counsel,[77] which five years later would be rendered invalid by the U.S. Supreme Court when it decided that all felony defendants had to have the assistance of counsel.

In the 1960 case of *Sartin v. State*,[78] the Court of Criminal Appeals sustained a sodomy conviction of a man for kissing and fondling the penis of a very willing 14-year-old male. The conviction could be sustained because the 1943 sodomy law also had outlawed the fondling of the genitals of minors, whether or not the minor consented.[79]

Also in 1960, in *Willard v. State*,[80] the Court of Criminal Appeals upheld a sodomy conviction for sex with a 15-year-old male who said that he consented to being fellated because

> he felt a pistol in appellant's pocket and "was scared on account of that gun. I said, I don't care, because I have heard of guys doing it before—because you know, after they ask you, then they will shoot you if you don't let them."[81]

Police officers testified that Willard

> had a habit of parking near a rest room and had been warned that the next time he was found there he would be charged with vagrancy and would go to jail. One of the officers testified without objection that appellant "has a reputation of being what he is being charged with."[82]

Another consensual sodomy conviction was sustained in 1961 in *Shipp v. State*.[83] Two men who engaged in rather brazen anal intercourse in an open area of a public restroom in Lubbock had received the minimum penalty of two years. They had been witnessed by a police detective and a parks policeman who were hidden in a tool shed that opened into the latrine.[84] Shipp's introduction of his wife as a character witness was to no avail.[85]

Yet another consensual act was the subject of the 1962 case *Rayburn v. State*.[86] The Court of Criminal Appeals upheld the conviction of a man for sodomy with his stepson, whom he adopted. The 16-year-old son had been watching television and masturbating when his father sat next to him on the couch and began masturbating also. The father then began masturbating the son, then fellating him, both with the son's consent.[87] Although the son was properly labeled as an accomplice, the father had made a written confession to police, and this was determined to be sufficient corroborating evidence.[88]

Consent also was involved in the 1963 case of *Bue v. State*.[89] Two

prisoners in the El Paso city jail received the maximum sentence of 15 years for consensual anal intercourse committed in their cell. The sentence was challenged as excessive, but the Court noted only that it was within the statutory limits, and therefore rejected the claim.[90]

Another consensual act of sodomy with a teenage male was the subject of the 1966 case of *Moats v. State.*[91] The conviction was upheld. The sentence received had been only three years, nearly the minimum.

In 1967, in *O'Neal v. State,*[92] the Court of Criminal Appeals allowed a conviction to stand after testimony of other partners than the one at issue was admitted solely to show O'Neal's "lascivious intent."

A strange case involving a high school guidance counselor and three teenage males was the subject of *Johnston v. State*[93] from 1967. One of the teenage students went to Johnston's home with him after Johnston "assured me that he wasn't a queer" and "talked about hypnotizing him with a vibrator."[94] Later the teen was seduced after another hypnotism attempt and continued a sexual relationship with Johnston.[95]

The Texas Court of Criminal Appeals, deciding *Brenneman v. State*[96] in 1970, simply stretched the available law to cover the situation at hand. John Brenneman had been convicted of an "assault" by placing his hands inside the pants of a teenage male. The state law under which he was convicted referred to "an assault with a whip or cowhide," but the court ruled that those limiting words "include any disgrace that was inflicted upon the assaulted party." [97]

In 1970, a federal court case challenging the Texas sodomy law was decided in *Buchanan v. Batchelor.* [98] Judge Sarah Hughes noted that there had never been a prosecution in Texas of a married person for private sodomy with his or her spouse, [99] and that it was unclear if there had been any such prosecution of "homosexuals for private acts of sodomy[.]"[100] Texas contended that it had only prosecuted the law in cases of acts of force, with minors, or in public.[101] A total of 451 sodomy arrests had been made in the City of Dallas between January 1, 1963 and July 3, 1969, an average of 69 per year.[102] Even though the case involved both a Gay man and a married couple challenging the law, the court's conclusion was that the law was unconstitutionally broad in that it regulated the acts of married couples.[103] Buchanan, the Gay man, was lost in the shuffle of the opinion, but the court did issue an injunction to prohibit enforcement of the sodomy law, without the injunction limited only to married couples.[104] The U.S. Supreme Court reversed on other grounds.[105]

The Court of Criminal Appeals of Texas reached the opposite conclusion in the 1970 case of *Pruett v. State.*[106] Unfortunately, the case was not one of consensual sodomy, it being a forced act in a state institution. Mentioning

the *Buchanan* decision, the state court noted the "cause for alarm" in the breadth of the federal court's decision[107] and declined to follow it.[108]

In a one-size-fits-all approach, the Court of Appeals rejected another challenge to the Texas law in 1971 in *Everette v. State.*[109] Decided just a week after the Supreme Court vacated *Buchanan,* the Texas court upheld the law again, even though Everette's two-year sentence, the minimum allowable under state law, obviously made his case one of consensual activity, unlike that in *Pruett.*[110]

After reversal by the Supreme Court, Buchanan ended up in Texas courts again, challenging his arrest in a public restroom. In 1971, in *Buchanan v. State,*[111] the Court of Criminal Appeals decided, unanimously, that surveillance of enclosed and locked toilet stalls was an unconstitutional invasion of privacy.[112]

Another challenge on behalf of married couples was rejected by a federal court in 1971 in *Dawson et al. v. Vance et al.*[113] This time the federal court refused to issue an injunction against enforcement of the law against married couples because no married couple had ever been prosecuted under the law, and because future prosecution of them was unlikely.[114] The court found sodomy to be a "heinous" crime, laws against which federal courts should respect.[115]

Texas attempted to clear up some of the confusion over the scope of the sodomy law with a comprehensive criminal code revision enacted in 1973.[116] Common-law crimes still were abrogated[117] and the sodomy law was renamed "homosexual conduct."[118] The law outlawed oral and anal sex only between persons of the same sex and established a penalty of a maximum fine of $200, with no jail term possible.[119]

An effort to repeal this law in the 1975 legislative session failed when the Texas House of Representatives voted 117-14 to delete a repeal from a criminal law revision bill.[120]

A novel claim by a prisoner who was caught engaging in consensual sexual relations with another prisoner was rejected by the Court of Criminal Appeals in the 1976 case of *Bishoff v. State.*[121] Bishoff claimed that he had been "dreaming he was with a woman and they were 'making love'."[122]

In 1976, Dallas police began a program of harassment of Gay bath houses and other establishments, seeking to enforce the sodomy law against private, consensual behavior, despite its earlier denial of interest in such acts in the *Buchanan* case.[123]

A victory came in the 1977 case of *Brown v. State.*[124] Brown had been charged under the public lewdness law for engaging in "deviate sexual

intercourse" in a "reckless" manner. The Court of Appeals found this to be fatally defective, because the state never specified just what acts Brown was alleged to have committed.[125]

In 1978, in *Green v. State,*[126] the Court of Criminal Appeals, sitting *en banc,* ruled 6-2 that a viewing booth in a bookstore was a "public place" within the meaning of Texas law prohibiting sexual activity in a public place.[127]

Another conviction for "public lewdness" was sustained by the Court of Criminal Appeals in 1978 in *Resnick v. State.*[128] Resnick had placed his hand on the clothed crotch area of an undercover police officer in an adult movie theatre after the officer voluntarily entered a private viewing booth with him. The Court rejected Resnick's contention that the failure to make "flesh-to-flesh" contact prevented his prosecution.[129]

In 1979, Texas enacted a law[130] that outlawed the sale or possession for sale of dildos or artificial vaginas.[131] This law did not outlaw purchase or use of them.

In 1981, in *Westbrook v. State,*[132] the Court of Appeals unanimously ruled that an enclosed booth in an adult bookstore was a "public place" and affirmed the public lewdness conviction of Bruce Westbrook for fondling an undercover police officer. It was "public" because Westbrook entered the booth after the officer, thus showing that anyone could come in.[133]

The Court of Appeals in Texarkana upheld another conviction for sexual activity in a public place in *Donoho v. State*[134] in 1982. Gregory Donoho was dancing with James Roberson in a Gay bar in Dallas when he dropped to his knees and began kissing Roberson's fully clothed crotch area. Donoho was arrested by undercover police officers in the bar.[135] He also argued that state law required "flesh-to-flesh contact" and, since Roberson was clothed, he did not engage in "intercourse" with him.[136] The Court rejected the contention with the specious argument that, had that been the intent of the legislature, it would have said so specifically.[137] It is difficult, however, to imagine sexual intercourse with clothing. On appeal, the Court of Criminal Appeals, sitting *en banc,* unanimously reversed.[138] After reviewing the history of the Texas sodomy law,[139] Judge Sam Houston Clinton wrote that "deviate sexual intercourse" required

> either penetration of the mouth by bared genitalia or placing the mouth directly *on* the genitalia of another human being. [Emphasis is the Court's].[140]

In 1982, the Court of Appeals voted 2-1 to overturn a public lewdness

conviction in the case of *Herring v. State.*[141] John Herring had allowed one Danny Burks to fondle his genital area and was thus arrested. The Court's majority, speaking through Justice A. Joe Fish, found that the statute did not contemplate a violation by *being* fondled, only in fondling, since the law clearly banned the touching *of another person.*[142] The dissenter, Justice Jon Sparling, gave a good deal of information on the homophobia of both himself and the Dallas police. On the evening in question

> several Dallas Police Department officers assigned to vice were working undercover in a "[G]ay" bar located in the 3900 block of Cedar Springs in Dallas County. There were between 150-200 patrons in the bar, mostly men, and there was a dance floor where the men were seen dancing together. Several officers testified to the same series of events. Danny Burks was sitting on a barstool with his legs spread, kissing the appellant "passionately" on the lips. While kissing, appellant was rubbing Danny Burks' genitals with his hand. They were willing participants in that neither made any movement to avoid the contact.
>
> The first officer then called other officers to observe. They testified that when they arrived, appellant and Danny Burks were then standing at the end of the bar, kissing on the lips and hugging, during which Danny Burks was seen rubbing appellant's genitals for a moment or two. Both appellant and Danny Burks were arrested shortly thereafter.[143]

Sparling said that he would hold

> the *act* of appellant in going to a "[G]ay" bar, his *act* of kissing Danny Burks, his *act* of rubbing Danny Burk's *[sic]* genitals, and his *act* of spreading his legs to accommodate the "rubbing" are sufficient to prove that the appellant was acting with the intent to "promote" and "encourage" the sexual contact.[144] [Emphasis is the court's].

He "vigorously" disagreed with the majority.[145] Had Sparling's view prevailed, the mere act of going into a Gay bar would be evidence of criminal conduct.

The 1982 case of *Cammack v. State*[146] was decided by the Court of Appeals sitting *en banc.* The Court divided 5-4 to rule that an enclosed booth in an adult bookstore was a "public place" for purposes of the public

lewdness statute. Robert Newell, an undercover Dallas police officer, had been fondled by Ronald Cammack in the booth and arrested him. Judge John Onion, writing for the majority, reiterated the *Westbrook* decision and, in a very short opinion, stated that a booth that could be entered by anyone was a "public place."[147] For the dissenters, Judge Roberts believed that the nature of the bookstore and the actual expectation of privacy in such a booth had to be taken into account.[148] Roberts rightfully challenged the majority's logic, since Texas courts had determined earlier that toilet stalls, even if occupied by more than one, were private rather than public places. He could see no constitutional difference between sex in a toilet stall and sex in a bookstore video booth.[149]

A challenge to the constitutionality of the "homosexual conduct" law was launched in the 1982 case of *Baker v. Wade*,[150] a case that dragged on for more than three years. In the district court, Judge Jerry Buchmeyer wrote an exhaustive and very pro-Gay opinion that found the law to be unconstitutional as an invasion of privacy[151] and a denial of equal protection of the law.[152] The Texas Attorney General refused to appeal the decision, but a county prosecuting attorney did so. In 1984, a three-judge panel unanimously found that the attorney, Danny Hill, had no standing to appeal.[153] The Court granted an *en banc* rehearing and, by a vote of 9-7, reversed the three-judge panel.[154] In a surprisingly brief opinion, Judge Thomas Reavley held that the Supreme Court's summary affirmance of the lower court in the *Doe* case from Virginia *(q.v.)* was controlling.[155] As a result, the right to privacy did not include a right to engage in sodomy.[156] In addition, the equal protection argument could not be used because homosexuals never had been held to be a suspect classification.[157] Curiously, the dissent of the court was confined to its belief that Hill had no standing to appeal the district court's decision. Only Judge Irving Goldberg wrote a separate dissent arguing that the law was unconstitutional as a violation of privacy and a denial of equal protection.[158] On a motion for rehearing,[159] the *en banc* court voted 10-6 to deny the motion. Baker had criticized the Court for having overlooked many of the issues decided by the trial court,[160] but Judge Reavley, again writing for the majority, said "it is simply not the business of the court to act upon them."[161] The court would not "decide the morality of sexual conduct for the people of Texas."[162] Reavley rejected the equal protection argument because the law was

> directed at certain conduct, not at a class of people. Though the conduct be the desire of the bisexually or homosexually inclined, there is no necessity that they engage in it. The statute affects only those who choose to act in the manner prescribed.[163]

This curious argument could be used to justify a law against marriage, since

it could be argued that there is no "necessity" that a person marry. In fact, it could be used to justify the outlawing of any conduct that did not have an undefined "necessity."

The Court of Criminal Appeals decided in 1983, in *State v. Liebman,*[164] that there was a limited right of privacy in enclosed booths in adult book stores. Liebman entered one booth and his companion entered the neighboring one. A glory hole existed between them and undercover police witnessed the two entering the neighboring booths. Two officers, named Przywara and Thomas, entered a separate booth and, standing in each other's cupped hands, looked over the seven-foot wall to observe Liebman standing against the wall. They assumed he was using the glory hole and then went to the booth on the other side of Liebman's partner and, again using each others' hands to look over, saw Liebman's penis being masturbated.[165] Although the Court found "a subjective expectation of privacy under the circumstances and conditions" of the case,[166] it twisted that right to death in a technical vice that Liebman's conduct was subject to a search by the police because *he invaded the privacy of the neighboring booth.*[167] Even though the two men entered the adjoining booths knowingly and with consent, the partner who put part of his body into the other was violating the privacy of that party. The Court hinted that they should have entered *the same booth* to assure a constitutional level of privacy.

Texas enacted a sex offender treatment law[168] in 1983 that authorized a state government council to provide for treatment for persons convicted of certain sexual offenses, initially *not* including the "homosexual conduct" law.[169]

In 1985, deciding *Yorko v. State,*[170] the Texas Court of Criminal Appeals, sitting *en banc,* voted 6-3 to uphold the law banning the sale of "sex toys." Speaking for the majority, Judge Thomas Davis said that citizens were not free to obtain dildos for their own use.[171] The court held

> the rationale justifying the State's exercise of police power against obscene expression—that is, the protection of the social interest in order and morality—also justifies the State in criminalizing the promotion of objects designed or marketed as useful primarily for the stimulation of human genital organs.[172]

Period Summary: *Sodomy convictions were upheld the vast percentage of time during this era. A federal court struck down the sodomy law in 1970 on privacy grounds, only to have that ruling reversed by the U.S. Supreme Court on a technicality. The only statutory change to the law*

> *came in the 1973 criminal code revision, when the penalty was reduced to a misdemeanor with a $200 fine as the maximum. The law also was made applicable only to people of the same sex. A later federal court challenge to the sodomy law, after it had been made discriminatory in application, led to victory in the District Court, reversal of that decision by the Court of Appeals, and a refusal by the U.S. Supreme Court to review that decision.*

The Post-Hardwick Period, 1986-Present

In the 1987 decision of *Walker v. State,*[173] a district Court of Appeals unanimously overturned the conviction of a man for a sexual assault on a 14-year-old male because testimony that the young man had on previous occasions engaged in similar activity with other men and boys should have been admitted to allow the defendant the defense of promiscuity.[174]

In 1989, the sex offender treatment law was revised.[175] It made considerable changes in the operation of the law, but still excluded the "homosexual conduct" law.

A challenge to the Texas "homosexual conduct" law was launched in 1990. In *Morales et al. v. State,* the Texas State Constitution was used.[176] At the trial court level, the law was ruled unconstitutional with no written opinion. Judge Paul Davis struck the law down after hearing one hour of arguments and conferring with opposing attorneys for five minutes.[177] On appeal,[178] the Court of Criminal Appeals unanimously sustained the ruling, deciding that the Texas Constitution offered a greater protection of privacy than did the U.S. Constitution. Chief Justice Jimmy Carroll, writing for the court, rejected the state's contention that the *Hardwick* decision foreclosed a constitutional challenge to the Texas law. Carroll pointed out that Texas courts often found that guarantees in the Texas Constitution were broader than those of the federal constitution, which Carroll called "only a floor below which the State may not fall in affording protection to individuals."[179] Making reference to another case in which a specific right to privacy was recognized under the Texas Constitution,[180] Carroll conceded that the Texas Supreme Court had not specifically included homosexual conduct within that right (nor was it specifically excluded). However, he said

> we can think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private. If consenting adults have a privacy right to engage in sexual behavior, then it cannot be constitutional, absent a compelling state objective, to prohibit [L]esbians and [G]ay men from engaging in the same conduct in which heterosexuals may legally

> engage. In short, the State cannot make the same conduct criminal when done by one, and innocent when done by the other.[181]

Carroll skewered the State's argument that the law existed to protect "public morality" since laws existed against public sexual behavior, and the State admitted that it "rarely, if ever, enforces this statute."[182] He added

> If [L]esbians and [G]ay men pose such a threat to the State, why then does the State not enforce the statute on a regular basis by investigating suspected homosexuals, obtaining search warrants, making arrests, and prosecuting offenders?[183]

In 1993, while the case was pending with the Texas Supreme Court, the Texas legislature killed a bill to repeal the homosexual conduct law.[184]

The Texas Supreme Court agreed to review the decision and, after a one-year delay, the case was dismissed on a 5-4 vote.[185] Undoubtedly because of the reelection pressures of three Justices, all of them in the majority, the Court issued the astonishing conclusion that it could not decide the constitutionality issue.[186] Speaking for the Court, Justice John Cornyn decided that a civil court had no authority to determine the constitutionality of a criminal statute without either a prosecution under it or the loss of a property right as the result of the statute's existence. Since Morales and her coplaintiffs did not fall into either category,[187] they reversed and remanded the case to the district court with instructions to dismiss for want of jurisdiction.[188] In an equally technical dissent, Justice Bob Gammage stated that the majority appeared to be misconstruing a number of precedents over the preceding century relating to the equity powers of Texas courts. Gammage closed by saying that the majority was "[s]hirking its equitable duty to provide a remedy for a wrong" and warned that, under the majority's analysis,

> the State may adopt all manner of criminal laws affecting the civil or personal rights of any number of citizens, and by declining to prosecute under them, ensure that no court ever reviews them.[189]

By dismissing *Morales* but having refused to review the *England* case, in which the sodomy law was struck down in a property right case, the effect was total confusion as to the status of the sodomy law in Texas.[190]

In 1993, the sex offender treatment law was broadened.[191] This new law, signed by Governor Ann Richards, brought under its operation anyone convicted of "a sex crime under the laws of a state or under federal law."[192] Since "homosexual conduct" is a "sex crime," this new law now covered it. Another provision of this law permitted the council to obtain information

on any previous conviction of sex offenders for "a sexual offense," again covering the misdemeanor "homosexual conduct" law.[193]

In *Regaldo v. State,*[194] from 1994, an appellate court upheld the conviction for selling dildos in violation of a state law banning the sale of "obscene devices." Extending the *Yorko* decision, the court found that there was no constitutional right to use such devices, including by married couples or medical professionals providing therapy.[195] The U.S. Supreme Court refused to review the decision.[196]

In 1995, in *Campbell v. State,* the Texas Court of Appeals upheld the public lewdness conviction of a man for groping a police officer in an adult theatre.[197]

Also in 1995, country singer Ty Herndon was arrested for gesturing to an undercover police officer and masturbating in front of him when they were together. The charges were dropped in favor of drug charges against Herndon. He was arrested shortly before he was scheduled to give a concert for the state convention of police chiefs.[198]

The confusion emanating from the *Morales* decision was heightened by the 1996 case of *City of Sherman v. Henry.*[199] The Texas Supreme Court unanimously upheld the right of a police force to deny a promotion to an officer for engaging in adultery. Writing for seven members of the Court, Justice Greg Abbott based his decision that heterosexual adultery was not constitutionally protected by the U.S. Supreme Court's *Bowers v. Hardwick* decision.[200] Although discussing *Hardwick* in great detail, Abbott never mentioned specifically that homosexual sodomy was not protected by the state constitution. However, sharp concurrences by two Justices made it clear that they believed the opinion swept more broadly than its wording. Justice Rose Spector called Abbott's opinion "a gratuitous opinion that so narrowly and unreasonably circumscribes a fundamental right."[201] Justice Priscilla Owen called Abbott's opinion "broader than necessary to decide the very narrow issue in this case[.]"[202]

Restroom stalls continue to be a sexual haven in Texas, even if one's own home isn't. In 1996, in *State v. Brown,*[203] a conviction for masturbating in a stall was overturned. Robert Brown was alone in a stall when an undercover police officer, Greg Shipley, peered through a glory hole, saw him, then made eye contact through a crack in the door. He arrested Brown when Brown opened the door and continued to masturbate. The state argued that Brown's going into a stall with a glory hole and his opening the door eviscerated any privacy claim. Judge Melchor Chavez, speaking for the 2-1 majority, found that argument "tempting," but "unpersuasive."[204] Chavez noted that Shipley looked into the glory hole, not knowing who was in the stall next to him and that he, not Brown, initiated the eye contact that led to Brown opening the door.

Texas is in a unique position among states with sodomy laws, owing to its unique penalty of just a fine. According to a 2001 decision of the U.S. Supreme Court, *Atwater et al. v. City of Lago Vista et al.*,[205] police can, without offending the Constitution, arrest people for crimes that have no jail term. However, in order to make such an arrest, the arresting officer actually must witness the crime.

Period Summary: *Another challenge to the constitutionality of the sodomy law led to a curious conclusion. Filed under the state constitution on privacy grounds, victory was secured both in the trial court and by the Court of Criminal Appeals in a class action suit and on property rights grounds in another case brought by a Lesbian denied a police job because she engaged in sodomy. The Texas Supreme Court refused to review the latter case, leaving it stand as precedent, but dismissed the first case, claiming that a constitutional claim on a criminal charge in a civil case could not be had. By leaving the latter decision standing, however, it appeared that the law fell, but the decision in the most recent case on sexual privacy seem to say that it didn't.*

Footnotes

[1] *Laws of the Republic of Texas,* Vol. I, (Houston:Office of the Telegraph, 1838), page 187, enacted Dec. 21, 1836.

[2] *Id.* at 195, §54.

[3] *The Laws of Texas 1822-1897,* Vol. III, (Austin:Gammel Book Co., 1898), page 58, ch. XLIX, enacted Feb. 8, 1854.

[4] *Id.* at 68, §58.

[5] *Id.* §59.

[6] *Texas General Laws, 8th Session 1859-60,* page 97, ch. 6, enacted Feb. 11, 1860, effective July 1, 1860.

[7] *Id.* Art. 399c.

[8] 29 Tex. 44, decided during January Term 1867.

[9] *Id.* at 45.

[10] 32 Tex. 378.

[11] *Id.* at 379.

[12] 39 Tex. 390.

[13] *Id.*

[14] *The Revised Statutes of Texas*, (Austin:State Printing Office, 1885), enacted Feb. 21, 1879.

[15] *Id.* Penal Code, Art. 3.

[16] 14 Tex.App. 52, decided Apr. 13, 1883.

[17] *Id.* at 56-57.

[18] 27 Tex.App. 194, decided Feb. 9, 1889.

[19] *Id.* at 195.

[20] *Id.* at 196.

[21] 21 S.W. 360, decided Feb. 15, 1893.

[22] *Id.* at 361.

[23] 35 S.W. 372, decided Apr. 29, 1896.

[24] *Id.*

[25] 47 S.W. 1005, decided Nov. 30, 1898.

[26] *Id.*

[27] *Id.*

[28] 79 S.W. 304, decided Mar. 9, 1904.

[29] 86 S.W. 334, decided Mar. 22, 1905.

[30] 95 S.W. 500, decided Mar. 21, 1906.

[31] 99 S.W. 1001, decided Feb. 6, 1907.

[32] *Id.*

[33] 115 S.W. 1193, decided Jan. 27, 1909. Rehearing denied Feb. 10, 1909.

[34] *Id.*

[35] 269 S.W. 95, decided Feb. 18, 1925.

[36] A companion case of Holmes' led to the sustaining of his conviction on another similar charge. 269 S.W. 96.

[37] 281 S.W. 857, decided Mar. 10, 1926.

[38] *Id.*

[39] 91 S.W.2d 700, decided Mar. 18, 1936.

[40] *Id.* at 700-701.

[41] *Id.* at 702.

[42] *Laws of Texas 1943*, page 194, ch. 111, enacted Apr. 8, 1943, effective May 11, 1943. The bill passed the House 127-0 and the Senate 24-0.

[43] *Id.*

[44] *Id.* §2.

[45] *Laws of Texas 1943*, page 253, ch. 154, enacted Apr. 20, 1943, effective immediately. The bill passed both chambers unanimously.

[46] *Id.* §1(16).

[47] *Id.* §1(18).

[48] 200 S.W.2d 362, decided Oct. 24, 1945. Rehearing denied Nov. 28, 1945.

[49] *Id.* at 363.

[50] 205 S.W.2d 588, decided Nov. 5, 1947.

[51] F.E. Daniel, "Castration of Sexual Perverts," reprinted in the *Texas Medical Journal*, 27:369-385 (Apr. 1912). Originally presented in 1893.

[52] *Id.* at 377.

[53] *Id.* at 378.

[54] *Id.* at 380-381.

[55] 232 S.W.2d 727, decided Dec. 21, 1949. On motion to reinstate appeal, Feb. 8, 1950. On rehearing, June 23, 1950. Rehearing denied Oct. 11, 1950.

[56] 230 S.W.2d 221, decided May 24, 1950.

[57] *Id.* at 222-223.

[58] 230 S.W.2d 812, decided May 31, 1950. Rehearing denied June 23, 1950.

[59] *Id.*

[60] 234 S.W.2d 60, decided Nov. 22, 1950.

[61] *Id.* at 60-61.

[62] 246 S.W.2d 638, decided Jan. 23, 1952. Rehearing denied Mar. 5, 1952.

[63] 252 S.W.2d 179, decided June 28, 1952. Rehearing denied Oct. 29, 1952.

[64] *Id.*

[65] *Id.*

[66] 263 S.W.2d 164, decided Nov. 11, 1953.

[67] *Id.* at 165.

[68] 261 S.W.2d 836, decided Nov. 11, 1953.

[69] *Id.* at 837.

[70] 289 S.W.2d 240, decided Feb. 29, 1956.

[71] *Id.* at 241.

[72] 308 S.W.2d 48, decided Nov. 13, 1957.

[73] *Id.* at 49.

[74] *Id.*

[75] 311 S.W.2d 824, decided Jan. 15, 1958.

[76] *Id.* at 825.

[77] *Id.*

[78] 335 S.W.2d 762, decided Apr. 20, 1960.

[79] *Id.* at 763. Famed attorney Percy Foreman represented Sartin.

[80] 338 S.W.2d 472, decided June 22, 1960.

[81] *Id.* at 473.

[82] *Id.* at 474.

[83] 342 S.W.2d 756, decided Jan. 25, 1961.

[84] *Id.*

[85] *Id.* at 757.

[86] 362 S.W.2d 649, decided Dec. 12, 1962.

[87] *Id.*

[88] *Id.* at 649-650.

[89] 368 S.W.2d 774, decided June 19, 1963.

[90] *Id.* at 775.

[91] 402 S.W.2d 921, decided May 18, 1966.

[92] 421 S.W.2d 391, decided June 21, 1967. Rehearing denied Oct. 4, 1967. Second rehearing denied Nov. 8, 1967.

[93] 418 S.W.2d 522, decided June 28, 1967. Rehearing denied Oct. 4, 1967.

[94] *Id.* at 523.

[95] *Id.* at 523-524.

[96] 458 S.W.2d 677, decided Jan. 14, 1970.

[97] *Id.* at 678.

[98] 308 F.Supp. 729, decided Jan. 21, 1970.

[99] *Id.* at 731.

[100] *Id.*

[101] *Id.* at 733.

[102] *Id.* at 735.

[103] *Id.* at 736.

[104] *Id.*

[105] 401 U.S. 989, decided Mar. 29, 1971.

[106] 463 S.W.2d 191, decided Nov. 25, 1970. Rehearing denied Jan. 27, 1971. Appeal dismissed, 402 U.S. 902, decided Apr. 19, 1971. Application for stay denied, 402 U.S. 939, decided May 3, 1971. Justice Potter Stewart voted to grant the stay.

[107] 463 S.W.2d, at 193.

[108] *Id.*

[109] 465 S.W.2d 162, decided Apr. 7, 1971.

[110] *Id.* at 162-163.

[111] 471 S.W.2d 401, decided July 14, 1971. Rehearing denied Oct. 26, 1971.

[112] *Id.* at 404. The U.S. Supreme Court refused to hear this case. 405 U.S. 930, decided Feb. 22, 1972.

[113] 329 F.Supp. 1320, decided July 29, 1971.

[114] *Id.* at 1324-1325.

[115] *Id.* at 1326.

[116] *Laws of Texas 1973*, page 883, ch. 399, enacted June 14, 1973, effective Jan. 1, 1974.

[117] *Id.* at 886, §1.03.

[118] *Id.* §21.06.

[119] *Id.*

[120] *The Advocate*, Vol. 170 (Aug. 13, 1975), page 5.

[121] 531 S.W.2d 346, decided Jan. 14, 1976.

[122] *Id.* at 347.

[123] *The Advocate*, Vol. 205 (Dec. 15, 1976), page 10.

[124] 558 S.W.2d 470, decided Nov. 16, 1977. Rehearing denied Dec. 14, 1977.

[125] *Id.* at 472.

[126] 566 S.W.2d 578, decided Apr. 26, 1978. Rehearing denied June 14, 1978.

[127] *Id.* at 582.

[128] 574 S.W.2d 558, decided Dec. 20, 1978.

[129] *Id.* at 559-560.

[130] *Laws of Texas 1979*, page 1974, ch. 778, enacted June 13, 1979, effective Sep. 1, 1979.

[131] *Id.* at 1975, §43.23(a)(7).

[132] 624 S.W.2d 294, decided Oct. 22, 1981.

[133] *Id.* at 295.

[134] 628 S.W.2d 483, decided Jan. 12, 1982. Rehearing denied Feb. 9, 1982. Discretionary review granted Apr. 28, 1982.

[135] *Id.* at 484.

[136] *Id.* at 484-485.

[137] *Id.* at 485.

[138] 643 S.W.2d 698, decided Nov. 24, 1982.

[139] *Id.* at 699-700.

[140] *Id.* at 700.

[141] 633 S.W.2d 905, decided Mar. 2, 1982. Rehearing denied May 17, 1982.

[142] *Id.* at 908.

[143] *Id.* at 911-912.

[144] *Id.* at 912.

[145] *Id.*

[146] 641 S.W.2d 906, decided Oct. 20, 1982. Rehearing denied Dec. 15, 1982.

[147] *Id.* at 908.

[148] *Id.* at 909.

[149] *Id.* at 909-910.

[150] 553 F.Supp. 1121, decided Aug. 17, 1982.

[151] *Id.* at 1143.

[152] *Id.* at 1143-1145.

[153] *Id.* 743 F.2d 236, decided Sep. 21, 1984. Rehearing *en banc* granted Jan. 28, 1985.

[154] 769 F.2d 289, decided Aug. 26, 1985. Rehearing denied Oct. 23, 1985.

[155] *Id.* at 292.

[156] *Id.*

[157] *Id.*

[158] *Id.* at 293.

[159] 774 F.2d 1285, decided Oct. 23, 1985. Cert. denied, 478 U.S. 1022, decided July 7, 1986. Justice Marshall voted to hear the case.

[160] 774 F.2d, at 1286.

[161] *Id.*

[162] *Id.* at 1286-1287.

[163] *Id.* at 1287.

[164] 652 S.W.2d 942, decided May 11, 1983. Rehearing denied July 20, 1983.

[165] *Id.* at 944.

[166] *Id.* at 946.

[167] *Id.* at 949.

[168] *Laws of Texas 1983,* page 2667, ch. 462, enacted June 19, 1983, effective Sep. 1, 1983.

[169] *Id.* §1.

[170] 690 S.W.2d 260, decided May 22, 1985.

[171] *Id.* at 265.

[172] *Id.* at 266.

[173] 727 S.W.2d 759, decided Mar. 24, 1987.

[174] *Id.* at 760-761.

[175] *Laws of Texas 1989*, page 3554, ch. 785, enacted June 15, 1989, effective Sep. 1, 1989.

[176] *Washington Blade*, May 5, 1989, pages 16-17.

[177] *Washington Blade*, Dec. 14, 1990, page 21.

[178] 826 S.W.2d 201, decided Mar. 11, 1992. Rehearing overruled Apr. 15, 1992. Discretionary review dismissed May 27, 1992.

[179] *Id.* at 204.

[180] *Id.* The case was *Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation* (746 S.W.2d 203).

[181] *Morales*, at 204.

[182] *Id.* at 205.

[183] *Id.*

[184] *Lesbian/Gay Law Notes*, May 1993, 41:1.

[185] 869 S.W.2d 941, decided Jan. 12, 1994.

[186] *Washington Blade*, Jan. 14, 1994, page 1.

[187] 869 S.W.2d, at 942-943.

[188] *Id.* at 949.

[189] *Id.* at 954.

[190] *Lesbian/Gay Law Notes*, February 1994, 13:1.

[191] *Laws of Texas 1993*, page 2246, ch. 590, enacted June 12, 1993, effective Sep. 1, 1993.

[192] *Id.* §1(4).

[193] *Id.* §1(c)(1).

[194] 872 S.W.2d 7, decided Jan. 13, 1994. Discretionary review denied May 18, 1994.

[195] *Id.* at 9.

[196] 130 L.Ed.2d 126, decided Oct. 3, 1994.

[197] *Lesbian/Gay Law Notes*, April 1995, 53:3.

[198] *The Oregonian*, July 19, 1995, 2A:2.

[199] 928 S.W.2d 464, decided July 8, 1996. Rehearing overruled Sep. 19, 1996.

[200] *Id.* at 469-474.

[201] *Id.* at 475.

[202] *Id.* at 476.

[203] 929 S.W.2d 588, decided Aug. 29, 1996. Rehearing overruled Sep. 26, 1996.

[204] *Id.* at 592.

[205] 149 L.Ed. 549, decided Apr. 24, 2001. Rehearing denied June 18, 2001.

[Home] [Texas] [History] [Sensibility of Our Forefathers]