HOMOSEXUAL CONDUCT AND THE LAW

by Irving J. Sloan

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Irving J. Sloan
General Editor

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Chapter 1

THE HISTORICAL BACKGROUND

The earliest legal argument for outlawing homosexuality is found in Plato's *Laws*. Plato argued that male homosexual acts are unnatural on two grounds. First, such acts undermine the development of desirable masculine traits such as courage and self-control. This idea probably rested on the assumption that homosexual acts degrade men to the status of women. That is, it would be self-degradation for men to allow themselves to make love, or to be made love to, by a man, which is the proper role of a woman. Second, Plato argued that male sexuality has one proper form or nature, namely, procreation within marriage, and that homosexuality is unnatural because it is sterile.

The idea that homosexuality involved the degradation of a man to the status of a woman is at least strongly suggested by the seeming prohibitions on male homosexuality in the Old Testament and by St. Paul's statement of these prohibitions in the context of rigidly defined sex roles.

> Thou shalt not lie with mankind, as with womankind: it is abomination.
>
> *Leviticus: 18:22*
>
> If a man also lie with mankind, as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be them.
>
> *Leviticus: 20:13*

(See also New Testament: Romans: 1:26; 1 Corinthians 6: 9; 10 & 11; 14,15)

The early Christian Church believed that homosexuality was abnormal and should be severely punished. That view was based on interpretations of the Old Testament prohibitions against homosexuality by church leaders

such as St. Paul as indicated here. The medieval Christian Church believed that homosexuals should be put to death by burning, hanging or burying alive, because God, according to the account in Genesis of the fire and brimstone destruction of Sodom and Gomorrah, condemned their citizens for their participation in homosexual and immoral acts. The customary penalties were less severe however. They usually consisted of exile, castration, corporal punishment and exclusion from the sacrament of communion.

The attitude of the medieval Christian Church was best characterized by Thomas Aquinas in *Summa Theologica.* In his litany of the sins of lust, he ranked on one level those directed against mere human beings. Above those, on the highest level, were the sins against God. There he placed bestiality, homosexual sodomy, heterosexual sodomy, and masturbation. Acquinas argued that God created men and women as sexual beings only for procreation purposes. As non-procreative sexual gratification, sodomy was considered a pleasure of the flesh and therefore in conflict with man's spiritual destiny. Sodomy was also considered againt the order of God's creation, in conflict with His intentions, and therefore a sin against God. Adultery, fornication, and rape, however, were considered lesser sins.

This religious condemnation of sexual deviance strongly influenced the Anglo-American secular prohibitions. During the Middle ages in England, homosexuality was, along with heresy, blasphemy, witchcraft, adultery, and the like, within the jurisdiction of the ecclesiastical courts. The first English statute forbidding homosexual acts was enacted when Henry VIII transferred powers of the ecclesiastical courts to the king's courts. When Henry's statute was revived under Elizabeth I, the new statute, confirming the religious grounds of its legitimacy,

recited that the law was made necessary to combat the prevalence of the "horrible and detestable vice of buggery, aforesaid, to the high displeasure of Almight God." Blackstone later restated this early sodomy legislation as the "infamous *crime against nature,* committed either with man or beast . . . the very mention of which is a disgrace to human nature," citing the Old Testament prohibitions and the Sodom and Gomorrah legend for the appropriateness of capital punishment, preferably by burning.

Blackstone's treatment of homosexuality had a clear influence on American colonial statutes (see Appendix F). The Puritans abhorred homosexuality; they saw it as a symptom of English moral corruption. The American colonies imitated Blackstone's language in their sodomy statutes, using such language as "unnatural" or "crime against nature." As the U.S. Supreme Court noted in its most recent decision, *Hardwick v. Bowers,* 106 S.Ct. 2841 (1986), prohibitions against homosexuality have been a part of American jurisprudence since the colonization of the country.

So it is that Blackstone's characterization of *sodomy,* as a "crime against nature," had become the basis for most American sodomy laws. North Carolina, for example, in its original sodomy statute read: "Any person who shall commit the abominable and detestable crime against nature, not fit to be named among Christians, . . . shall be adjudged guilty of a felony and shall suffer death without the benefit of clergy." While some states continue to use the Blackstonian language, most jurisdictions that retain prohibitions against sodomy have rewritten their statutes to describe with greater specificity the types of private consensual sexual acts deemed to be illegal. This is largely due to avoid challenges to the term "unnatural" as unconstitutionally vague.

Until the 1960s, homosexual behavior was prohibited in all fifty states and the District of Columbia through some form of sodomy statute. Then in 1961, Illinois became the first state to adopt the American Law Institute's Model Penal Code provision, which decriminalized adult, consensual, private, sexual conduct (see Appendix B). In supporting its position, the American Law Institute (ALI) noted that such nations as France, Great Britain, Canada, Mexico, Italy, Denmark, and Sweden had repealed their sodomy statutes. The ALI also cited scientific studies that found homosexual conduct to be neither "unnatural" or socially harmful. As the gay rights movement emerged as a strong activist and lobbyist group, the ALI proposal gained support in the 1970s when legislators in twenty additional states acted to decriminalize private, consensual homosexual conduct (see Chapter 2). Since then only Wisconsin has acted to decriminalize sodomy.

Chapter 2

SODOMY: STATUTORY AND CASE LAW

As it was noted in Chapter 1, sodomy laws were inherited from the English common law and statutory law by the American colonies. At first there was some doubt as to whether this offense was classified as a felony or a misdemeanor. But it soon came to be considered so repulsive that the obtainment of property under threat of accusation of sodomy constituted robbery.

At the present time almost every state has statutes governing sodomy. Each state has promulgated its own sodomy statute and there is little or even no correspondence between the activity prohibited as sodomitical in one state and that outlawed in another. Furthermore, the problem of definition exists even within the states themselves since a number of jurisdictions prefer to designate the crime as "sodomy," "the crime against nature," and "act of gross indecency," or to employ some other equally unrevealing phrase.

> A person commits sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .
>
> *Ga. Code Ann. §26-2002*

> (1) A person commits sodomy if such person performs an act of sexual gratification involving: (a) the penetration, however slight, of the anus or mouth of an animal or person by the penis of a person of the same sex or an animal or (b) the penetration, however slight, of the vagina or anus of an animal or person of the same sex or an animal.
>
> *Arkansas §41-1813*

In recent years there have been many debates and studies concerning the appropriateness of state regulation

of the moral and sexual life of its citizens. Statutory prohibitions of deviate sexual behavior taking place between consenting adults in private quarters have been under increasing attack and challenge. Sociological studies have added fuel to the debate by reporting that contemporary sexual behavior is very different from legally defined norms as they appear in the statutes. The Kinsey Report estimated that four percent of white males are exclusively homosexual throughout their lives after the onset of adolescence, and that at least eight percent are exclusively homosexual for a three year period between the ages of 16 and 55. This is one in nine of the white male population. Other studies have indicated that ninety-five percent of the total male population have violated, at some time or another in their life, one or more statutes regulating sexual behavior.

Influenced by these studies the American Law Institute questioned the utility and efficacy of the criminal law in prohibiting deviate sexual conduct. The Institute ultimately concluded in its recommendations for the Model Penal Code that homosexual behavior between consenting adults in private should no longer be a criminal offense. Private sexual conduct was considered properly cognizable by the criminal law only when it directly affected the "public good." Deterring sexual behavior because it is "sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition" is the responsibility of religious and social bodies and not of the state. Total restriction of the individual's freedom of choice in the area of private morality was viewed as itself morally improper. The individual, argued the Institute, must assume personal responsibility for his actions, irrespective of the criminal law. Personal responsibility, considered the basis of modern ethical and religious systems, was believed debased unless there

remained areas of private morality which are, "in brief and crude terms, not the law's business."

In England, the Wolfden Committee on Homosexual Offenses and Prostitution published a Report in 1957 which has been viewed as the most important and probably most influential study of the role of the legal system in terms of homosexual behavior. As does the American Law Institute, the Wolfden Report rejects using the criminal law for purposes other than the preservation of public order and decency, the protection of the citizen from offense or injury, and the protection of the general public from exploitation and corruption. Except as necessary to attain these goals, it should not be the function of the law to "enforce any particular pattern of moral or sexual behavior." Private sexual conduct was considered properly recognized by the criminal law only when it directly affected the "public good." Deterring sexual behavior because it is sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural tradition, is the responsibility of religious and social bodies and not of the state. Further, these studies argued, total restriction of freedom of choice in areas of private morality was viewed as itself morally improper. The individual must assume personal responsibility for his actions, irrespective of the existence of the criminal law. Personal responsibility, considered the basis of modern ethical and religious systems, was believed debased unless there remained areas of private morality which are, ". . . in brief and crude terms, not the law's business."

Twenty-four states and the District of Columbia impose criminal sanctions for some form of consensual sodomy (see Appendix A).

Three states have had their sodomy statutes invalidated:
NEW YORK
PENNSYLVANIA
TEXAS

The New York case, *People v. Onofre,* 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936, which invalidated that state's statute prohibiting consensual sodomy, will be discussed here as the compelling example of a presently minority but "enlightened" approach to consensual sodomy between consenting adults of the same or different sex in private. In the *Onofre* decision, the court extended the *Griswold* line of privacy cases (*Griswold v. Connecticut,* 381 U.S. 557-marital right of privacy recognized; *Stanley v. Georgia,* 394 U.S. 557-right to use obscene material in privacy of home; *Eisenstadt v. Baird,* 405 U.S. 438-unmarrieds cannot be deprived of equal access to contraceptives; *Rosen v. Wade,* 410 U.S. 113-right to abortion recognized) to support a fundamental right to engage in both homosexual and heterosexual sodomy in private. The court construed the privacy right first articulated in *Griswold* and *Eisenstadt* as standing for a fundamental right of privacy encompassing "the right . . . to make decisions with respect to the consequence of sexual encounters and, necessarily, to have such encounters. . ." Noting that the state had made no showing of physical harm to individuals engaging in sodomy, the court saw no reason that "the right of privacy . . . to indulge in acts of sexual intimacy by unmarried persons" should not extend to protect consensual sodomy, both homosexual and heterosexual. Having determined that the sodomy statute impinged significantly upon this fundamental right, the court applied a standard of strict scrutiny. The state had failed to show (beyond its assertions) any danger to public health or morals due to sodomous conduct. The court,

therefore, found no compelling state interest to justify the violation of privacy.

The influence and strength of this decision is, however, questionable at the present time. The emergence of AIDS as a widespread disease among men who practice homosexual sex which is essentially sodomistic raises the public health issue which always gives the state power to regulate even personal conduct. (This matter is discussed later in Chapter 3.)

What raises still another question about the *Onofre* holding as precedent is the fact that the United States Supreme Court has not accepted the argument made in *Onofre*. In the first case dealing with the notion that the right to privacy protects consenting adult homosexual activity, *Doe v. Commonwealth's Attorney,* 425 U.S. 901, the Court upheld the Virginia sodomy statute by rejecting several constitutional objections. In effect, the Court's decision left the state courts and legislatures free either to retain the laws or to invalidate them.

However, the 1986 case of *Hardwick v. Bower,* 106 S. Ct. 2841 (see Appendix E), the Supreme Court rejected a challenge to a Georgia sodomy statute which the Court of Appeals below had struck down on the ground that such a statute violated the defendants' fundamental rights because their homosexual conduct was a private and intimate association that was beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The Court's 5-4 majority held that the case did not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. The Court majority saw the issue as being whether the Constitution confers a fundamental right upon homosexuals to engage in sodomy and thereby invalidates the laws of those states that still make such conduct illegal.

The Court disagreed with the Court of Appeals argument that prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy. The Court saw no connection between family, marriage, or procreation which were the subjects in the cases cited, and homosexual activity. It rejected the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state prohibition. In short, the Court held that in constitutional terms there is not such thing as a fundamental right to commit homosexual sodomy. The Court refused to invalidate the sodomy laws of 25 States on this basis.

This latest Supreme Court ruling is likely to discourage state courts to follow the New York *Onofre* decision or the Pennsylvania and Texas cases which invalidated those states' sodomy statutes prohibiting consensual sodomy in private.

There are, nevertheless, twenty-one states which have decriminalized consensual sodomy between adult homosexuals:

ALASKA
CALIFORNIA
COLORADO
CONNECTICUT
DELAWARE
HAWAII
ILLINOIS
INDIANA
IOWA
MAINE
NEBRASKA
NEW HAMPSHIRE
NEW JERSEY
NEW MEXICO
OHIO
OREGON
SOUTH DAKOTA
VERMONT
WASHINGTON
WEST VIRGINIA
WYOMING

Whatever, however, the as yet undefined contours of the right to engage in consensual sexual acts free from

government interference may ultimately be, an essential prerequisite for constitutional protection of such acts is that they be performed in private.