

January 2002

## Sodomy Laws and Privacy - The Cost of Keeping Gays in the Closet

Michael E. Brewer

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

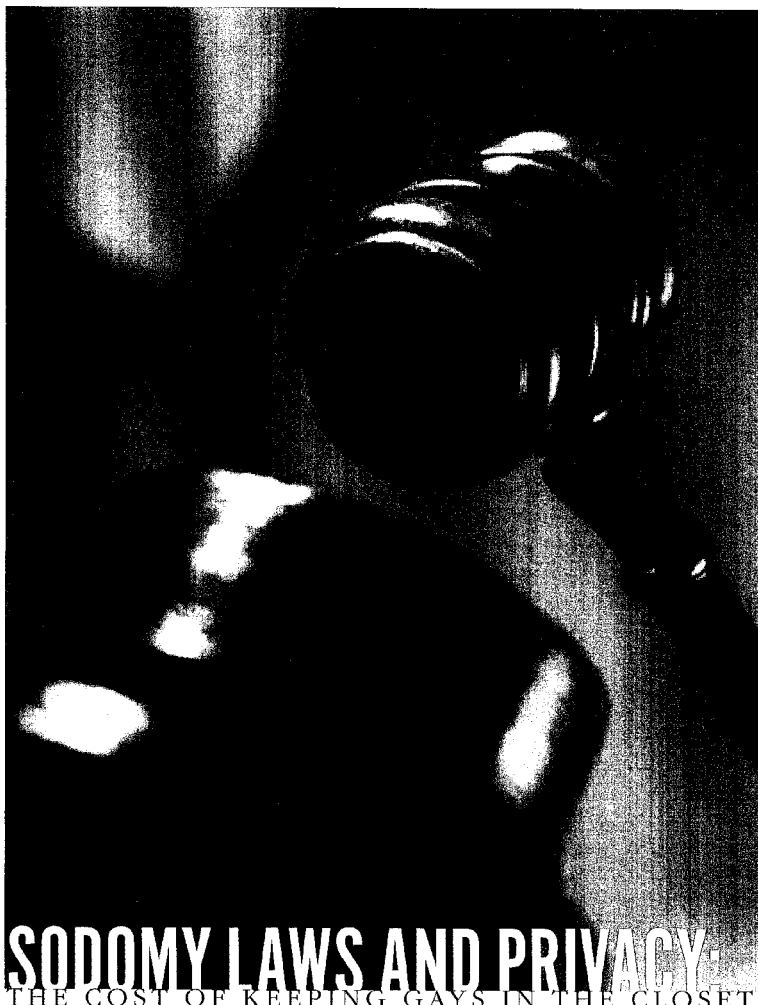
### Recommended Citation

Michael E. Brewer, Sodomy Laws and Privacy - The Cost of Keeping Gays in the Closet, 79 Denv. U. L. Rev. 546 (2002).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

## Sodomy Laws and Privacy - The Cost of Keeping Gays in the Closet



## SODOMY LAWS AND PRIVACY

THE COST OF KEEPING GAYS IN THE CLOSET

by Michael E. Brewer

**Millions** of Americans remember certain events of July 1969 as milestones in the national consciousness. On July 20 of that year, Neil Armstrong walked on the moon. One week later, on the streets of Greenwich Village, a typical police raid of a gay bar called the Stonewall Inn sparked an atypical response among the crowd of people who normally would have dispersed quietly after the police arrived.

For three days, crowds rioted through the streets of the Village, spawning a movement which has affected the daily lives of millions of gay, lesbian, bisexual, and transgender Americans. Whether the movement is labeled "Gay Liberation," "Gay Rights," or "Queer Activism," the momentum unleashed that hot July weekend has transformed the landscape of American society, politics, sciences, academia, and theology, and challenged the historical relationship of gay people to the law - especially sodomy laws.

No other group of people has had their private, consensual sexual behavior attacked and scrutinized as much as the gay, lesbian, bisexual and transgender population. For this population, privacy concerns are of utmost importance, because what happens in the bedrooms of this group of citizens has been held up for public scrutiny and condemnation. This scrutiny of private behavior happens legally through the use of sodomy laws. Thus, for this community to be afforded the privacy rights that the rest of the American population enjoys in their bedrooms, sodomy laws must be first understood, and then finally abolished.

In the years since the events at the Stonewall Inn, public support for sodomy laws has waned as people become less tolerant in general of state regulation of adult, consensual sexual behavior. Specifically, social attitudes have moved toward the position that sexual activity between competent, mutually consenting adults should not be the subject of state interference. The bedrooms of gays and straights have become a private realm.

In the evolutionary lineage of laws touching the rights and behaviors of gays, sodomy laws form the starting point. The first American lawmakers imported them into the colonial codes,<sup>1</sup> adopting the prohibition against sodomy rooted in the British common law.<sup>2</sup> Sodomy laws were not invented to regulate

homosexual sex, though people associate sodomy with homosexual sex and homosexuals with sodomites. There are two reasons for this disjunction between origins and common perception. The first is historical. Not until the nineteenth century did homosexuality come to be seen as a condition or identity of a person.<sup>3</sup> The law did not categorize people as homosexual and did not apply laws to gays as a class. However, as society came to recognize gays as an identifiable group, sodomitical acts became more and more identified with homosexuals. The second reason is analytical. Though not applying by definition to acts of a class of people, laws prohibiting sodomy do apply to classes of acts.<sup>4</sup> Therefore, sodomy laws do not analytically relate to any one group.<sup>5</sup>

The legal definition of sodomy often confused courts well into the twentieth century. By 1940, courts applied sodomy statutes "to nearly all sexual activities other than procreative activities between husbands and wives."<sup>6</sup> From the beginning of the nineteenth century to that time, however, confusion about the definition of sodomy caused courts to struggle with how and when to apply sodomy laws.

At common law, copulation by a man with an animal or another male, adult or child, was clearly a sodomitical act. Under common law, however, some jurisdictions required prosecutors to prove that emission of semen had taken place.<sup>7</sup> Appellate courts sometimes reversed trial court decisions for lack of evidence of either seminal emission or penile penetration.<sup>8</sup> Prosecutors responded by urging courts to expand the definition of sodomy. They were not always successful. In some jurisdictions, courts overturned convictions on appeal after finding that fellatio was not an offense at common law or that statutes

adopting the common law did not encompass the act of fellatio.<sup>9</sup> They sometimes appealed to legislatures to define the offense more clearly.<sup>10</sup>

Confusion about the nature of the crime was sometimes compounded by Victorian modesty about things sexual. Appellate courts reluctantly dismissed or remanded some cases in which the criminal information failed to set forth facts describing in sufficient detail the circumstances of the crime<sup>11</sup> (in other cases, though, appeals court opinions contain graphic descriptions of the offense).<sup>12</sup> For the sake of propriety, some courts did not require a full description of the act charged in the bill of information.<sup>13</sup>

Some legislatures and courts expanded the scope of sodomy beyond its traditional common law definition. For instance, some courts ruled that anal intercourse by a man with a woman fell within the category of sodomy.<sup>14</sup> In some jurisdictions, a man or a woman who received in the act of fellatio could be found guilty of sodomy.<sup>15</sup> Attempted sodomy came to be a recognizable offense.<sup>16</sup> Late into the twentieth century, courts and theorists found that sodomy between two women was a legal impossibility.<sup>17</sup> As the definition of sodomy became broader over time, the law extended to acts by a male with another male, a female, or an animal. The common, requisite element for a conviction for sodomy, through the first half of this century, was genital sexual activity by a male. Without male sexual misbehavior, no act of sodomy could be performed. Sodomy laws, therefore, have been directed primarily at regulating male sexual behavior. They generally regulate female sexual behavior only insofar as it relates to male behavior. Because sodomy has been associated in the public mind with homosexuality, and because sodomy laws relate primarily

to male sexual behavior, criminal sodomy is associated primarily with male homosexuality.

Despite this popular association, however, the historical application of sodomy laws to consensual gay male sex appears to be far less than to other situations regulated by sodomy laws. A survey of 148 appeals court decisions in sodomy cases from 1883 through 1944 reveals few cases involving consensual, adult male-to-male sexual activity.<sup>18</sup> Sodomy involving animals accounts for 9.5% (14) of the cases. The same percentage involves "girls," presumably females under the age of 18. Cases involving adult females account for 8.8% (13). In 20% (30) of the cases, the sex and age of the other party is not identified in the court's opinion. Sex with males age 18 and under occurred in 30% (43) of the cases. Of those, six cases (4% of the total) involve boys age seven or younger. (The youngest identified was three years of age). Sodomy with adult men accounts for 22% (33) of the total number of cases.

The fact that so many of the cases involve non-consensual sex acts is a function of the nature of the acts themselves. Unless a third party witnesses an act of sodomy and reports it, the crime will unlikely be discovered unless one of the actors reports it to authorities or tells another about it. Unlike rape or child sexual abuse, where there is always a perpetrator and a victim, in sodomy cases it is not always correct to refer to the actors as perpetrator and victim. They may be consenting adults. In a minority of the historical cases surveyed, third parties (sometime law enforcement officers) who happened to be at the right place at the right time observed the acts. In almost all cases involving animals, the actor was seen by neighbors performing the act which the

**elimination of the nation's way to legally invade the privacy of the bedrooms...**

neighbors either reported to authorities or about which they circulated stories which led authorities to an arrest. In a few cases, especially involving female prostitutes, charges were brought after the women testified regarding the nature of the sex acts they had had with a customer. However, in most of the cases surveyed, a male perpetrated an unwanted sexual act on a victim.

These cases illustrate the fact that sodomy laws are rarely enforced in cases of consensual, adult same-sex male sexual activity. They also illustrate, by comparison to appellate decisions of recent years, the contemporary strategy of attacking the validity of sodomy laws on the ground that they violate constitutionally protected rights to privacy. These privacy-based attacks have achieved mixed success. In 1986, the United States Supreme Court found that the Constitution contains no privacy right protecting same-sex sexual activity because such activity has no connection to family, marriage or procreation.<sup>19</sup> Since the Court handed down that decision, several state courts have found that their states' constitutions offer greater privacy protections than does the federal Constitution and declared their states' sodomy laws unconstitutional.<sup>20</sup> Not all states' constitutions are so generous, and not all state privacy-rights cases have succeeded.<sup>21</sup>

One wonders, though, whether the attack is worth the effort. After all, prosecution for sodomy is not regularly used against homosexuals, and sodomy is not analytically identifiable only with homosexuality. So why does the popular mind associate sodomy laws so closely with homosexuality, and why do gays adamantly support attempts to repeal the sodomy laws still on the books?<sup>22</sup>

The answer to these questions rests, at least in part, on the role the very existence of sodomy laws plays in the shaping of gay identity and defining the place of gay people in American society. Janet Halley argues that sodomy laws serve to subordinate gay identity and

superordinate heterosexual identity.<sup>23</sup> The laws, she contends, lead to an identification of homosexuality with sodomy and confirms the subordination of gay people.<sup>24</sup> Others suggest that unenforced sodomy laws "create a criminal class," brand "gay men and lesbians as criminals," create a "social hierarchy" that inflicts emotional harm on gay people, and legitimize anti-gay violence.<sup>25</sup>

Richard Posner observes that the main contemporary significance of laws against homosexual sodomy is to make a statement of opposition to homosexuality.<sup>26</sup> He subscribes to the proposition that sodomy laws in fact apply only to homosexual sodomy, and that they would be unconstitutional if applied to heterosexual sodomy.<sup>27</sup> Posner devotes a chapter in his book "*SEX AND REASON*" to the analysis of social policy toward gay people from the point of view of law and economics theory. He places sodomy laws in context with other laws which establish anti-gay policy, such as those forbidding same-sex marriage and limiting career opportunities for gays in the military, government service, and education.<sup>28</sup> From the point of view of law and economics theory, Posner criticizes laws, including sodomy laws, which subordinate gays in society.<sup>29</sup> He questions why society has an interest in subordinating gays.<sup>30</sup> He subjects anti-gay policy to an economic cost-benefit analysis.<sup>31</sup>

Law and economics theory assumes that a person acts rationally to choose economically beneficial modes of action: that people make choices to act in their best interest, and that self-interest is identifiable with economic benefit. "[R]ational man goes where the balance of costs and benefits inclines."<sup>32</sup> Laws promote or hinder the aggregate benefit to society by encouraging or discouraging people from making certain choices rather than others. If a person has no ability to make a rational choice, then that person has no ability to choose an economically efficient form of action, and law, therefore, is ineffective to influence that person's action. The issue of

choice in being gay is central, therefore, to a law and economics analysis of the efficiency of laws subordinating gay people.

The question of whether people choose to be homosexual has formed the core of debate over the morality of homosexuality. If being gay is a pure moral choice and society places a value on restraining that choice, then sodomy laws may be analyzed in terms of their efficiency as a counter-incentive to make the choice to be gay. Religious and social conservatives, for example, tend to view homosexuality as a choice, lifestyle, or preference. Their premise is that homosexuality is a social evil, that it is a choice, and therefore, that it can be effectively discouraged through legal disincentives.

Being gay, however, is not a choice. Rather, it is a pre-moral condition (such as conservatives generally believe heterosexuality to be). Legitimate scientific research recognizes that people do not choose their sexuality and science has discarded theories that homosexuality is a disease that can be treated or cured.<sup>33</sup> Therefore, using law as a disincentive for being homosexual makes no practical sense. The best the law can do is to discourage homosexual activity, not homosexuality per se. The fact that being gay is not a choice begs the question: what social value (or disvalue) is there to limiting homosexual activity? What are the costs, and what are the benefits?

Posner identifies two results of limiting same-sex sexual activity that some perceive as beneficial.<sup>34</sup> The first is prevention of the spread of AIDS; the second is limiting the exposure of young people to the blandishments of homosexuality which would lure them into a homosexual lifestyle.<sup>35</sup> Posner dismisses them both as perceived and not real benefits, the first being ineffectual (perhaps even if sodomy laws were enforced), the second being based on a false belief that young people convert to homosexuality.<sup>36</sup>

If the benefits of limiting same-sex sexual activities are illusory, why bother to regulate gay sex? Posner

points to a deep-seated anti-gay sentiment in Anglo-American culture, which he associates with the rise of companionate marriage.<sup>37</sup> Posner theorizes that in societies where marriage was not historically companionate, that is, where the function of marriage was primarily political or procreational, as in ancient Greece and Rome, homosexual activity was tolerated or even encouraged. He believes that the origin of American society's traditional abhorrence of same-sex sexual activity relates to the restraint that societies which value companionate marriages place on the sexual activities of males.<sup>38</sup> Such societies place a high value on monogamous sexual activity, and a high disvalue on "any form of nonmarital sexual activity."<sup>39</sup> Posner's theory does not account, however, for the fact that American society does not react as negatively to pre-marital and extra-marital heterosexual activity as it does to gay sex, a fact which suggests that the origins of the "disgust" which drives the traditional American antipathy toward homosexuality lies elsewhere.<sup>40</sup>

Whatever the origin of anti-gay animus may be, Posner recognizes that this animus is simply irrational. He characterizes it as being the "biggest externality: the revulsion that so many people in our society feel at the very idea of . . . sexual deviance . . . . The disgust that homosexual intercourse arouses . . . explains the survival of sodomy laws better than the external effects of such intercourse do."<sup>41</sup>

What are the costs to society, and to gay people, of society's attempts to limit gay sexual activity? Here, Halley's connection of sodomy laws with subordination of gay people is helpful. Although sodomy laws are rarely used to prosecute sexually active gay people, they contribute to and form a locus for the subordination of gay people. Posner points out that gay people incur costs when society punishes people for sexual orientation, or *threatens* to punish.<sup>42</sup> Attitudes supported by the very existence of sodomy laws lead to the subordination of gay people, in turn leading to two high-cost results: a clandestine search for partners, and, when the cost of that

search is too high, marriage to members of the opposite sex.<sup>43</sup> Both these situations result from a fear of expression of "gayness" in a society in which gay people are subordinated to heterosexual people.

Subordination also results in the cost of mental distress from the alienation which subordination engenders in gay people and their families and friends, including high rates of suicide among gay youth.<sup>44</sup> In addition, the emotional and economic costs rise from fighting political battles to overcome subordination. Some of those battles take place in arenas traditionally recognized as being "political," while some occur in arenas such as churches and workplaces which are also political, but not usually denominated as such.

These costs to gay people may actually be viewed as benefits by an anti-gay society which seeks to keep gay identity and behavior clandestine, and impel gay people into traditional heterosexual marriage. As Posner points out, the higher the cost of gay activity (sexual or otherwise), the less activity there will be.<sup>45</sup> But the cost to society of achieving those perceived benefits is high: clandestine behavior results in social disruption, unhappy marriages result in family dysfunction and divorce, emotional distress leads to economic inefficiency, and legal battles destabilize private and public equilibria.

Society has begun to discover that subordination of gay people may be too costly to continue, at least to the degree that it has subordinated them in the past. The post-Stonewall era has witnessed increasing incorporation of openly gay people in society, and a gradual decline of some barriers to their inclusion. Among the signs indicating the change: gay people are finding acceptance or toleration in neighborhoods outside of gay urban ghettos, corporations and government agencies are extending benefits to same-sex partners, and the media portray gay people in a positive light.

Yet states attempt to pass amendments to their constitutions specifically excluding gay people from special legal consideration,<sup>46</sup> heated debates rage in legislatures

and Congress over protecting "traditional family values" from "threats" by gay people, and discrimination in workplaces is still common. And sodomy laws remain on the books.

Obviously, society has not concluded that the benefits of eliminating traditional anti-gay structures outweigh the costs of subordinating gay people. But what about the costs of maintaining sodomy laws? As Posner notes, the cost to the taxpayer of retaining criminal penalties for gay sexual behavior is minimal, especially when those penalties are rarely or weakly enforced.<sup>47</sup>

The time has come, indeed is long past, when sane and rational voices should speak out for the elimination of the nation's sodomy laws - the nation's way to legally invade the privacy of the bedrooms of a substantial population should end. Their cost to society is simply too high to allow them to remain silently, but not ineffectively, in our criminal codes. The population of citizens that is affected by these laws deserves the same respect for the privacy of their bedroom as the rest of the population. Regardless of whether courts find that federal or state constitutions guaranty the right of adults to behave as they choose to behave in the privacy of their bedrooms, lawmakers should take responsibility for the social inequities and economic harm they or their predecessors have created. The movement that began publicly on the streets of New York in 1969 has at the beginning of the 21st Century evolved into a force for the recognition of some people's right to pursue happiness in privacy and peace.

Michael Brewer is legal director of the Colorado Legal Initiatives Project, a program of the Gay, Lesbian, Bisexual and Transgender Community Center of Colorado. He is formerly the executive director of the Western Colorado AIDS Project, headquartered in Grand Junction, Colorado. He was graduated with honors from the University of Denver College of Law in 1999.