

Bugger Off: Exploring legal, ethical, and religious aspects of sodomy¹

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Abstract

Around the world and within the United States, the legal definitions of sodomy, to whom it applies, and the penalties to be imposed, have varied enormously. On June 26, 2003, the US Supreme Court rendered its decision in *Lawrence et al. v. Texas* in which it invalidated the legality of anti-sodomy laws in the thirteen states that had retained them. This article examines the types of arguments used to support views about sodomy which are at the centre of debates in schools about discrimination against gays, whether a program promotes a “gay and lesbian lifestyle,” and whether gay-straight alliances (“GSAs”) can be formed.

It is a commonplace for those who wish to maintain social peace to admonish others not to discuss sex, politics, or religion. Since beliefs about these subjects are central to our sense of personal identity, we rush to defend ourselves when they are challenged. All three areas are tightly intertwined in any discussion of sodomy. Not surprisingly, therefore, the topic is volatile.

Attitudes about sodomy have been deeply influenced by Christian thought and institutions. Connections between sodomy and religion are easily illustrated. For example, even the basic English legal terms used to denote gay sexual experience are derived from the history of Christian religion. “Bugger”—a term much favoured in England—is derived from Medieval Latin “*bulgarus*” meaning heretic and was arrived at in Western Europe by associating the Balkans with what were deemed heretical sects such as the Bogomils and their alleged sexual practices.² If the theological lineage of “bugger” is somewhat deviant, the etymology of “sodomy” is, by contrast, theologically mainstream. In Genesis 19, the city of Sodom was reportedly destroyed by fire sent from heaven because of the unnatural carnal wickedness of its inhabitants. How to interpret this destructive act by a vengeful God has been the subject of much vigorous debate,³ but we can be confident in thinking that Biblical and church history have deeply influenced the very language in which many think and talk negatively about homosexuality.

The significance of the issue for moral education and school politics

In his scathing dissenting opinion of the Supreme Court’s judgment in *Lawrence et al. v. Texas* (2003), Justice Scalia accused the court of having “taken sides in the culture war.”⁴ In North America, the Stonewall Riots of 1969⁵ shook the courts, religious institutions, legislatures, and schools and provoked a human rights struggle on a scale equal to the civil rights movements of the late fifties and early sixties. There has, indeed, been a war within our culture.

Right-wing groups see schools as an important site to resist what they perceive as an encroachment of the “homosexual agenda.”⁶ School boards face pressure on curriculum issues,⁷ students struggle to establish gay-straight alliances on school premises,⁸ parents of gay students sue boards for failing to protect their children from harassment and discrimination,⁹ courts are forced to decide whether gay students can bring their partners to a graduation dance,¹⁰ and instructors fear that they will be fired for their sexual orientation.¹¹

Beneath the rhetoric about the gay and lesbian “lifestyle” lies the spectre of sodomy seen as a particularly wicked form of non-procreative eroticism. Such sexual activity has been condemned variously throughout history as unnatural (or a crime against nature), perverted, sinful, immoral, deviant, contrary to God’s ordinance, grossly indecent, psychopathic, and as a sign of mental illness.

A note on distinguishing the legal, ethical, and religious domains

I assume without much argument here that legal, ethical, and religious domains are logically distinct in significant ways.¹² A judgment about the rightness or wrongness of an action or activity might overlap across the three domains, but the justifications for the claim would differ. For example, murder is regarded as wrong because it is contrary to the law of the state, violates the principle of respect for persons, and is contrary to one of God’s commandments. Gluttony might be a sin but is not illegal and, without some tendentious

argument, would not be considered immoral. Killing cows and bulls is contrary to Hindu teaching, is illegal in some states in India but not in the United States (where about 41.8 million cattle are slaughtered annually), and would be regarded as immoral by those who defend their vegetarianism on ethical grounds. Mixed race marriages may be moral, but contrary to the laws of a state, and opposed by the teachings of the country's dominant religion. In wearing clothing made of both wool and linen, a person might disobey a Biblical injunction (Leviticus 19:19), but it would not be immoral or illegal. Homosexual sexuality might or might not be considered immoral, was deemed illegal in thirteen states in the United States before, but not after, June 26, 2003,¹³ and remains contrary to some religious precepts (for example, Leviticus 18:22). Putting "sodomites" to death would be immoral, illegal in the United States (though legal in many other countries), but countenanced by Biblical authority.¹⁴

Just where the law should support or underwrite moral standards is a complicated matter that has been much debated over the last half century.¹⁵ Most recently, the issue surfaced in the United States Supreme Court judgment in *Lawrence et al. v. Texas* where Justice Scalia wrote:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers, supra*, at 196—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual," ante, at 18 [emphasis added]. The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," ante, at 17. This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

What is "sodomy"?

"Sodomy—that utterly confused category."

Michel Foucault, *The History of Sexuality: An Introduction*

Sodomy in ordinary language

Sodomy has no stable meaning in ordinary discourse.¹⁶ Goldberg (1994) puts it this way:

Sodomy. . . [i]s the name for every form of sexual behavior besides married, heterosexual, procreatively aimed sex. Sodomy could include sex between men or between women, sex between men and women not sanctioned by marriage or bent on frustrating reproduction, sex between humans of whatever gender, and animals.¹⁷

A quick survey of major English dictionaries confirms wide and significant variations of meaning.¹⁸ The early *An American Dictionary of the English Language*, Noah Webster (1828) offers a traditional, vague, and evasive definition: "A crime against nature." The recent *Cambridge Advanced Learner's Dictionary* (2001) is more explicit: "The sexual act of putting

the penis into a man's or woman's anus." The *Cambridge International Dictionary of English* (1995) offers a broader definition that includes fellatio:

The sexual act of putting the penis into a man's or woman's anus * Am. law:
Sodomy can also be the sexual act of fellatio (= putting the penis into a person's mouth).

The current *Merriam-Webster's Online Dictionary* (10th Edition) includes cunnilingus in its definition, albeit not explicitly:

1. Copulation with a member of the same sex or with an animal
2. noncoital and especially anal or oral copulation with a member of the opposite sex

Finally, and most startlingly, the *Random House Webster's College Dictionary* (1991) requires that a woman is sodomized only if the act is "enforced"—that is, only if she is raped:

1. Anal or oral copulation with a member of the same sex.
2. *Enforced anal or oral copulation with a member of the opposite sex.*
3. Bestiality. [Italics added.]

Sodomy in state legislation and the courts in the United States¹⁹

Not surprisingly, "sodomy" had no more consistent meaning in American state legislation or legal adjudication than it has had in ordinary language. The issues revolve around whether sodomy is restricted only to male homosexuals,²⁰ applies only to gay and lesbian people,²¹ homosexuals and married and/or unmarried heterosexuals,²² and whether, in any or all of these cases, it includes oral as well as anal sex.²³

Persuasive and programmatic definitions

Scheffler distinguishes between persuasive and programmatic definitions. Both types of definition possess a "descriptive meaning" which determines the limits to which the definition will refer. The former are designed to affect attitudes, while the latter are to affect action or policy. As Scheffler puts it, persuasive definitions are interpreted "in terms of emotive meaning, that is, in terms of psychological responses, feelings, and attitudes, whereas programmatic definitions are. . .interpreted in terms of the orientation of social practice."²⁴ In ordinary language, "sodomy" carries a negative connotation. Thus, to characterize an act as "sodomy" is to express disapproval of it and to encourage others to respond in the same way. According to emotivist theorists, this rhetorical device is often used to circumvent difficult moral argument or, at least, to taint it. In practical or policy settings, definitions can have important consequences. In the case of sodomy, to widen or narrow the descriptive component of the definition determines who may be prosecuted. Hence, programmatic definitions are often at the centre of court activity.

Variation in punishments across states

Prior to June 26, 2003, in the United States, the arbitrariness in defining who could commit sodomy and where²⁵ was matched by the variation in penalties legislatures imposed on the citizens of their states. For example, compare the sentences that could have been meted out in Oklahoma in contrast to Texas, or Michigan as opposed to Florida.

Punishments for sodomy in state legislation prior to Lawrence et al. v. Texas (2003)

States that prohibited sodomy between same-sex couples only:

	<i>Legal description</i>	<i>Classification</i>	<i>Maximum punishment</i>
Kansas	Sodomy	Misdemeanor	6 months/\$1000
Missouri	Sexual misconduct	Misdemeanor	1 year/\$1000
Oklahoma	Crime against nature	Felony	20 years
Texas	Homosexual conduct	Misdemeanor	\$500

States that prohibited sodomy for everyone:

	<i>Legal description</i>	<i>Classification</i>	<i>Maximum punishment</i>
Alabama	Sexual misconduct (Does not apply to married couples)	Misdemeanor	1 year/\$2000
Florida	Unnatural and lascivious act	Misdemeanor	60 days/\$500
Idaho	Crime against nature	Felony	5 years to life
Louisiana	Crime against nature	Felony	5 years/\$2000
Michigan	Crime against nature	Felony	15 years
Mississippi	Unnatural intercourse	Felony	10 years
North Carolina	Crime against nature	Felony	3 years
South Carolina	Buggery	Felony	5 years/\$500
Utah	Sodomy	Misdemeanor	6 months/\$299
Virginia.	Crime against nature	Felony	5 years

Two US Supreme Court Cases: (a) Bowers v. Hardwick (1986) and (b) Lawrence et al. v. Texas (2003)

(a) Michael Hardwick, a bartender in a gay bar in Atlanta, Georgia, was targeted by a police officer for harassment. In 1982, an unknowing houseguest let an officer into Hardwick's home. The officer went to the bedroom where Hardwick was engaged in oral sex with his partner. The men were arrested on the charge of sodomy. Charges were later dropped, but Hardwick brought the case forward in an effort to have the sodomy law declared unconstitutional.²⁶

In 1986, the majority, represented by Justice White construed the case as requiring the court to create a "fundamental right to engage in homosexual sodomy." They found "little or no cognizable roots in the language or design of the constitution" for such a position. In reviewing a second argument presented by the plaintiff, the court ruled that "illegal conduct is not always immunized whenever it occurs in the home . . . otherwise it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." Chief Justice Burger concurred and wrote separately to underscore his support of the majority and to buttress the claim that "proscriptions against that conduct have ancient roots."²⁷

(b) Responding to a reported weapons disturbance in a private residence in 1996, Houston police entered petitioner Lawrence's apartment and saw him and another adult man, petitioner Garner, engaging in a private, consensual sexual act. The petitioners were arrested and convicted of deviant sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct.

In rendering the majority view in 2003, Justice Kennedy began:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition, the State is not omnipresent in the home Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Grasping quickly the depth and breadth of the repudiation of Bowers v. Hardwick, "several lawyers in the front rows of the courtroom, many of whom had fought for gay rights their entire careers, began crying openly as Kennedy all but apologized for the earlier ruling."²⁸

Two arguments in Lawrence et al. v. Texas

O'Connor and equality

As the basis for her support of the majority judgment, Justice O'Connor used the Fourteenth Amendment to the American Constitution²⁹ in which there is a presumption that homosexuals should be accorded the same treatment as heterosexuals.³⁰ As the Texas law punished only sodomy committed by homosexuals, it meted out unequal treatment. If this had been the widest grounds for the majority decision, the court would have struck down the sodomy laws in only four states—namely, Texas, Missouri, Oklahoma, and Kansas; sodomy laws in the other nine states would have been left standing.³¹

Kennedy and liberty

Justice Kennedy swept aside Justice Burger's historical claims and substituted a revised account.³² The majority judgment rested on an expanded interpretation of the liberty provisions of the constitution (the court in *Bowers v. Hardwick* had "fail[ed] to appreciate the extent of the liberty at stake"):

The [Texas] statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminalsWhen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

As for the role of majority opinion, the Court concluded thus:

[T]he issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code" *Planned Parenthood of Southeastern Pa. V. Casey*, 505 U.S. 833, 850 (1992).

The puritan/Roman Catholic view of sexuality and an alternate ethical theory about love and sex

Obviously the penis belongs to the vagina; that is something fundamental to the way God has made us.

Graham Dow, Bishop of Carlisle, engaging in some gynaecological theology on BBC's *Newsnight*, June 19, 2003

One important issue, however, remains unsettled and unsettling. Justice Scalia was troubled because the court was running against what he took was a sizeable majority of American citizens who held that (1) homosexual sex is immoral and (2) the state should prosecute and punish those who engage in it.³³ To counter Scalia's concerns, recall a time when racism was widely accepted in American society and when the courts and the Constitution played a defining role in determining the rights of racial minorities in the face of widespread hostility and oppressive legislation. Also, it is vitally important to challenge the contention that homosexual sex—or more specifically, sodomy—is in and of itself immoral. That position seems to be implied in *Lawrence et al. v. Texas* but is never developed.

While most Christian churches are dominated by an anatomical, essentialist theology, the Roman Catholic Church is the most explicit. As the most centralized and hierarchical institution in Christendom, it attempts to maintain discipline and uniformity through pronouncements concerning doctrine and sacramental questions. Because of this openness, it is possible to examine its positions more fully than those held by other churches.

If one accepts the complete authority of, and all that is meant by, the living, sacred Tradition, the sacredness of Scripture, and the Magisterium of the Church, one has little recourse but to accept the Church's position on issues such as homosexuality. To challenge any aspect of the Church's interpretation entails doubting the authority of one or all three of these sources for statements of faith and belief. Believers operate within a closed system. So, for example, any interpretation of the Scriptures that is not in substantial accord with the Tradition, the Church would declare, is simply not properly understood. So tightly interlocked are these sources of validating beliefs that to challenge one is to challenge the whole system.

Given the Church's theology of Creation, "every genital act must be within the framework of marriage," and must aim at "human procreation in the context of true love"—that being the "finality of the specific function of sexuality."³⁴ Since homosexuals cannot engage in this way, their sexual relationships can never be approved. Homosexual actions are, thus, described as "intrinsically disordered," and the tendency towards these actions is judged "an intrinsic moral evil." Practicing homosexuals are "exclude[d] from the People of God"³⁵ and in need of a "conversion from evil." What is required of them is to "crucify all [their] self-indulgent passions and desires," to "carry the cross," and to lead a chaste life.³⁶ The theological framework used to interpret sexual phenomena utilizes concepts like "the Creator's sexual design," "God's personal call," the "divine plan," "the essential order of his nature," "immutable principles," "every person's constitutive elements," "the Divine Law—whereby God orders, directs and governs the entire universe and all the ways of the human community," and the like. To contest any part of it is to challenge the whole system and, not surprisingly, the personal price of such defiance is often very high.

Catholic theology aside, we might inquire anew what relationship the institution of marriage has to sexual preference. In the ceremony that joins the lives of two persons, little or no mention is made of progeny. The beloved promises "to have and to hold, from this day forward, for better, for worse, for richer, for poorer in sickness and in health, until death do us part." There is no obligation to propagate. Should a married couple fail to have children because of infertility, there is no obligation to seek artificial insemination (even if the technology is readily available). This situation in no way makes it a second-class marriage. Conversely, a couple may wish to prevent conception whether using the rhythm method or some other. The Church does not object to this but only to the means—the calendar is to be relied on (however unreliable), but not latex.

It is strange that the Church accuses those who support "the acceptance of the homosexual condition" of "reflecting, even if not entirely consciously, a materialistic ideology" when it makes an absolute defence of every possible meeting of sperm and ovum. No doubt, it is an unfathomable miracle when conception happens—one that is all the more miraculous the more minutely science describes and explains it. But people are under no obligation to become frequent miracle producers. Two or ten miracles is not necessarily two or ten times "better" than one miracle. Miracles defy quantification.

So there can be marriages without miracles and, in our day, there can be miracles without sexual intercourse. The use of the penis is quite optional. Of course, all of our sensual apparatus can be employed in loving relationships. Indeed, it is the loving that warrants the sexuality. If there is any redeeming to be done, it is through unconditional love, not some biological theory of creation. Gays and lesbians can and do experience unconditional love for one another. They can also be (and often are) loving parents. Lesbians can conceive without the assistance of penile penetration. They can and do form loving families.

The right wing knows that decriminalizing sodomy not only makes previously forbidden forms of loving legal, but it opens the way to a more inclusive view of marriage. To fend off this possibility in the United States, the Republican Senate majority leader said shortly after the Supreme Court judgment that he supports the extraordinary step of creating a constitutional amendment to ban homosexual marriage.³⁷ For reasons given here, we strongly urge the Senator and his cronies to “bugger off!”

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Notes

1. An earlier draft of this paper was presented at the twenty-ninth annual conference of the Association of Moral Education held in Krakow, Poland, July 16-20, 2003.

2. *Random House Webster's College Dictionary* (New York: Random House, 1991). Vern Bullough claims that buggery "did not always mean a sexual act and attempts to read sexual activities into the term have led to a serious misreading of history." The first uses in thirteenth century statutes in France were "to stamp out heresy, not list sexual sins" (see Bullough and Brundage (1982), p. 207-08). Only later was "bugger" restricted to sexual practices.

"Whether Albigensians [a religious sect in southern France in the Middle Ages] engaged in sodomy cannot be definitely known. But they were accused of doing so as a product of their heresy, and the accusation inflamed popular hysteria against them and conflated the sexual with the doctrinal sin. Thus, over time, *bougrerie* gradually became synonymous with sodomy. Sodomy is first described as "buggery," an anglicized form of the French word, in an English law of 1533. The term originally applied in Europe to doctrinal dissent was now used in England to indicate a sexual sin" (Fone, 2000, p. 152).

The 1533 reference is to the "Preamble to the Act of 1533" under Henry VIII. According to Hyde (1970, p. 37), "[t]he first detailed treatment of the subject of "Of Buggery, or Sodomy," by any legal authority, apart from passing mention, occurs in the Third Part of Coke's *Institutes*, which was completed in 1628."

3. This is not surprising as much hangs in the balance, especially for those insisting that prohibitions against homosexual love are God given and enforced. For a short summary of different lines of interpretation, see Boswell (1980), p. 92-98, and Fone (2000), p. 75-86. Fone is convinced that "[f]or both Jews and early Christians, the Old Testament story of the destruction of Sodom became the foundation text of homophobia, even though neither Jews nor early Christians, including Christ himself, unanimously interpreted it as a text condemning homosexual behaviour" (2000, p. 8).

4. Supreme Court of the United States, 539 U.S., No. 02-102, June 26, 2003 on page 18.

5. See Duberman (1993).

6. For example, in the United States, the Culture and Family Institute, an affiliate of powerful Concerned Women for America, focuses on what it sees as "cutting edge social issues with particular emphasis on the homosexual activist movement. . .that threaten[s] to undermine marriage, family, and religious freedom." A list of such organizations could be extended almost endlessly.

7. In Canada, see Chamberlain et al. v. The Board of Trustees of School District No. 36 (Surrey) (December 21, 2002) [at <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/chamberl.en.html>]. In 1997, James Chamberlain, a K-1 teacher, sought approval from his Surrey school board to use three books—*Belinda's Bouquet*, *Asha's Mums*, and *One Dad, Two Dads, Brown Dads, Blue Dads*—as supplementary learning resources for use in teaching the family life curriculum. The books depicted same-sex parented families. The board passed a resolution denying approval for the books. Its overarching concern was that the books would engender controversy in light of

some parents' religious objections to the morality of same-sex relationships. After more than six years of acrimonious controversy and legal struggle, the Supreme Court of Canada ruled that "the Board violated the principles of secularism and tolerance in s. 76 of the Act. Instead of proceeding on the basis of respect for all types of families, the Board, proceeded on an exclusionary philosophy, acting on the concern of certain parents about the morality of same-sex relationships, without considering the interest of same-sex parented families and the children who belong to them in receiving equal recognition and respect in the school system." On June 12, 2003, the board again banned the books, this time on grounds of poor grammar, lack of "continuity," inconsistent spelling, and because it raised the subject of dieting "clumsily" (see "Surrey bans 3 gay books from schools—again," *The Province*, Friday, June 13, 2003).

8. In the classic case, *East High [Gay/Straight Alliance] v. Board of Education* heard before the U.S. District Court for the District of Utah (December 3, 1999)—students at Salt Lake City's East High tried to organize a gay/straight alliance (GSA) in 1996. The school board officially banned all non-curricular clubs in an effort to stop the formation of an alliance because, under the Equal Access Act, schools accepting federal funds may not censor some non-curricular clubs if others are allowed on campus. On September 5, 2000, under the glare of lawsuits and national publicity, the board voted to lift the ban. The Salt Lake City conflict is not an isolated occurrence: see cases in El Modena High School, Orange, California (September, 2000); Boyd County High School, Ashland, Kentucky (December, 2002); and Neenah High School, Appleton, Wisconsin (June, 2002). Despite these struggles and perhaps because of LAMDA's support with litigation, GSAs have spread quickly across the United States. For a list of those in California only, see <http://www.gsanetwork.org/directory/index.html>. Presumably, Section 28 of the Local Government Act in England would have prevented the formation of such clubs. Section 28 was repealed in Scotland on June 21, 2000, but remained on the books in England until November 18, 2003. For an account of the effects of Section 28 and prolonged efforts to have it repealed in England, see Madeleine Colvin with Jane Hawksley, *Section 28: A practical guide to the law and its implications* (London: National Council for Civil Liberties, 1989) and Don Cochrane, "Educational Rights for Gay and Lesbian Students and Teachers: Great Britain and Canada Compared," presented at the annual conference of the Association of Moral Education, Glasgow, Scotland, (July) 2000. In Alabama, Section 16-1-28 of its statutes puts a damper on safe-sex education for gays and lesbians: "No public funds or public facilities are to be used to promote lifestyle or activities prohibited by sodomy and sexual misconduct laws [and] (b) No organization or group that receives public funds or uses public facilities, directly or indirectly, at any college or university shall . . . provide information or materials that explain how such acts may be engaged in or performed," though under sub-section (c) students could engage in "political advocacy of a change in the sodomy and sexual misconduct laws of this state."

9. The landmark case involved Jamie Nabozny who successfully sued his school board in Ashland, Wisconsin for \$900,000 (1996). See also Mark Iverson's suit against the Kent School District in Washington (1998); Willi Wagner against the Fayetteville Public Schools, Arkansas (1998); and George Loomis against the Visalia Unified School District (August, 2002); and, in Canada, David Knight against the Halton District School Board of Ontario (see "Ontario teens suing school board over bullying," *The Globe and Mail*, June 3, 2002).

10. See Krystal Bennett from Ferndale, Washington who was crowned graduation prom king in June, 2001; Cy Scott, Baton Rouge, Louisiana in May, 2002; Mark Potterf, Dayton, Ohio in

May, 2001; and Mark Hall who won an injunction in the Ontario Superior Court against the Durham Catholic School Board that allowed him to attend his high school prom with his same-sex partner in May, 2002.

11. In a celebrated case in Canada, Delwin Vriend successfully sued King's College, University of Alberta, and the Province of Alberta for wrongful dismissal. Vriend had been removed from his position as a laboratory co-ordinator at this Catholic college in a province where there was no explicit sexual orientation protection in human rights legislation. The Canadian Charter of Rights and Freedom was invoked successfully when the case was appealed to the Supreme Court of Canada (April, 1998).

The best-known case in the United States concerns Wendy Weaver, a popular volleyball coach and psychology teacher at Spanish Fork High School in Salt Lake City. When it became known in July, 1997 that she was a lesbian, she was removed from her responsibilities as a coach and issued a written order by school officials saying that any discussion of her sexual orientation on or off school grounds with anyone, in any way related to the school, would be grounds for dismissal. On April 4, 2003, the Utah Supreme Court said that only district officials—not protesting parents—could decide whether the instructor could continue to teach. Many gay and lesbian teachers are afraid that they will be dismissed if they are “out” even when there is legal protection in their jurisdiction; dismissal because of sexual orientation is often difficult to prove because school administrators can often find other grounds for terminating appointments. For a discussion of the issue in England, see http://news.bbc.co.uk/1/hi/uk_politics/2960008.stm.

12. See, for instance, Stephen E. Toulmin's *An Examination of the Place of Reason in Ethics* (Cambridge: Cambridge University Press, 1960) and his *Human Understanding: The Collective Use and Evolution of Concepts* (Princeton, NJ: Princeton University Press, 1972); Paul H. Hirst, “Liberal Education and the Nature of Knowledge,” in R.D. Archambault (Ed.), *Philosophical Analysis and Education* (London: Routledge and Kegan Paul, 1965).

13. The following states repealed their sodomy laws: Illinois (1962), Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), Hawaii (1973), Ohio (1974), North Dakota (1975), New Hampshire (1975), New Mexico (1975), California (1976), Maine (1976), Washington (1976), West Virginia (1976), Indiana (1977), South Dakota (1977), Vermont (1977), Wyoming (1977), Nebraska (1978), Iowa (1978), New Jersey (1979), Alaska (1980), Wisconsin (1983), Nevada (1993), District of Columbia (1993), Rhode Island (1998), and Arizona (2001).

These states had their sodomy laws overturned in the courts: Pennsylvania, *Commonwealth v. Bonadio*, 1980; New York, *People v. Onofre*, 1980; Kentucky, *Commonwealth v. Wasson*, 1992; Tennessee, *Campbell v. Sundquist*, 1996; Montana, *Gryczan v. Montana*, 1997; Georgia, *Powell v. State*, 1998; Maryland, *Williams v. Glendening*, 1998; Minnesota, *Doe, et al. v. Ventura, et al.*, 2001; Massachusetts, *Doe v. Reilly*, 2002; and Arkansas, *Picado v. Jegley*, 2002.

14. Leviticus 20:13 “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them” (King James Version). This “shall-surely-be-put-to-death” passage creates difficulties for literal-minded fundamentalists. In response to *Listening. . . Understanding Human Sexuality*, a

study guide produced by The Presbyterian Church in Canada's General Assembly Special Committee on Sexual Orientation, the minister of St. Andrews Church, Moncton, New Brunswick, conveniently interpreted the recommendation for the death penalty metaphorically: "Asked if it wasn't 'extreme' to quote Leviticus 20:13—which prescribes death for men having sex with each other—to defend the critique's point of view, Rev. Martin Kreplin said the verse indicates the seriousness with which God takes the matter of homosexuality" (*The Presbyterian Record* (Canada), June, 2003).

15. See, for example, H.L.A. Hart (1963), p. 4: ". . . the subject of these lectures . . . concerns the legal enforcement of morality and has been formulated in many different ways: Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such to be a crime?"

16. Noting that the meaning of "sodomy" is so unstable, the renowned historian John Boswell cautioned against its use in scholarly work:

Wherever possible, the term "sodomy" has been excluded from this study, since it is so vague and ambiguous as to be virtually useless in a text of this sort. (*Christianity, Social Tolerance, and Homosexuality*, Chicago, IL: University of Chicago Press, 1980, p. 93, n. 2.)

17. Jonathan Goldberg, *Reclaiming Sodom* (New York: Routledge, 1994), p. 4.

18. Curiously, no definitions of sodomy are provided in the *Penguin Canadian Dictionary* (Markham, ON: Penguin Books Ltd., 1990) (though a definition of "bugger" is offered: "n. Slang. 1. One who bugs; also one who plants bugs. 2. [familiar use] bastard: *You little bastard!*"), *Thorndike Century Senior Dictionary* (New York: Scott Foresman and Co., 1941), or *Webster's New World Basic Dictionary of American English* ("The Name You Trust") (New York: Macmillan, 1998). Foucault (1978/1990) would have relished these examples of silencing.

19. Examples have been chosen from the United States only because within that country the patchwork of laws, definitions, and penalties is relatively easy to document. State laws and state and federal court decisions are readily available. In principle, but not in practice, a selection of others countries might have been chosen just as easily.

20. Originally, sodomy was thought of solely as a male activity—no penis, no sodomy. This assumption ruled out charges against lesbians, but not, of course, charges against heterosexual relations between a man and a woman. That was a separate matter. When a case of alleged cunnilingus was brought on appeal to the British House of Lords in 1811, the charge, which would have required a broadening of the definition, was thrown out because "the crime alleged here has no existence" (Jonathan Katz (Ed.), *Miss Marianne Woods and Miss Jane Pirie Against Dame Helen Cumming Gordon* (NY: Arno Press, 1975; cited in George Painter, 1991-2002, p. 9). In 1921, the English Parliament defeated a measure that would have outlawed "gross indecency" between females because hardly any women knew of such a thing (Jeffery Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*

(London: Quartet Book, 1977, pp. 106-107; cited in George Painter, 1991-2002, p. 10). The first case of cunnilingus to be upheld in a court in the United States occurred in North Dakota in 1917 (George Painter, 1991-2002, p. 10).

21. Texas–Statute, Sec. 21.01; Missouri–Statute, 566.090; Oklahoma–Statute 21-886 Crime Against Nature; South Carolina–Statute Section 16-15-120. The author is indebted to the extraordinary work of George Painter, 1991-2002, for his pioneer work in tracking case law in this area.

22. Alabama Criminal Code, 13A-6-60 Definitions, (2) Deviate Sexual Intercourse; Kansas Statute 21-3505, Criminal Sodomy; and Idaho (which excludes persons who are married to one another but is unclear how it might have applied to unmarried couples); North Carolina Statute: 14-177; Utah Statute 76-5-403. See George Painter.

23. Both anal and oral sex in Kansas; Texas, Statute, Sec. 21.01; South Carolina, Statute Section 16-15-120; Utah, Statute 76-5-403; but only anal sex in Oklahoma, Statute 21-887. See George Painter.

24. See Israel Scheffler's ground-breaking and influential *The Language of Education* (1960), p. 20, n. 9.

25. In an extraordinary twist in a 1962 sodomy case in California, the right to sexual activity in a public washroom was constitutionally guaranteed. The precedent was set in *Bielicki v. Superior Court of Los Angeles*, 371 P.2d 288 (California, 1962) and upheld in other courts. See George Painter, n. 114.

26. Internet: Sodomy Laws, USA Laws, Georgia. Available at <http://www.sodomylaws.org/usa/georgia/georgia.htm>

27. Burger wrote:

Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. See Code Theod. 9.7.6; Code Just. 9.9.31. See also D. Bailey, *Homosexuality* [478 U.S. 186, 197] and the *Western Christian Tradition* 70-81 (1975). During the English Reformation when powers of the ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed. 25 Hen. VIII, ch. 6. Blackstone described "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." 4 W. Blackstone, *Commentaries* *215. The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816, the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

28. Jan Crawford Greenburg. "Supreme Court strikes down laws against homosexual sex," *Chicago Tribune*, June 27, 2003. Justice Kennedy wrote: "Bowers was not correct when it was decided, is not correct today, and is hereby overruled."

29. Amendment XIV of the American Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

30. Justice O'Connor wrote:

The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. . . .

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct and only that conduct—subject to criminal sanction. . . . A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.

31. Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia.

32. Justice White wrote:

At the outset, it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter American laws targeting same-sex couples did not develop until the last third of the 20th century [The] historical premises [on which the Burger court relied] are not without doubt and, at the very least, are overstated. . . . scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults In all events. . . "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry" The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.

33. Cp. Justice White in *Bowers v. Hardwick* to the effect that Georgia was right in maintaining its statute because of a "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."

34. "Declaration on Certain Questions Concerning Sexual Ethics" (1975). See also in the same document, ". . . the deliberative use of the sexual faculty outside normal conjugal relations essentially contradicts the finality of the faculty."

35. "On the Pastoral Care of Homosexual Persons" (1986).

36. *Ibid.*

37. "Frist backs constitutional ban on marriage," *USA Today*, June 29, 2003:
http://www.usatoday.com/news.washington/2003-06-29-frist-gay-marriage_x.htm

See also, "Bush to Back Gay Marriage Ban Amendment," *Chicago Tribune* (Associated Press), February 4, 2004.