

# EQUALITYMATTERS

## State Sodomy Laws Continue To Target LGBT Americans

August 08, 2011 3:26 pm ET - by Carlos Maza

Up until 1962, gay sex between two consenting adults was a felony in every state in the United States. So-called “crime against nature” or “sodomy” laws -- the term “sodomy” is a reference to the biblical story of Sodom and Gomorrah -- typically punished violators with lengthy prison sentences, fines, and even hard labor. Although these laws typically targeted gays and lesbians, some statutes were written broadly enough to cover any form of non-vaginal intercourse, including oral and anal sex between heterosexuals.

While many states moved to repeal their sodomy laws in the late 1900s, others -- like Georgia -- moved in the opposite direction. In the 1986 *Bowers v. Hardwick* decision, the Supreme Court **upheld** Georgia’s sodomy law, arguing that there was no “fundamental right upon homosexuals to engage in sodomy.”

After *Bowers*, several more states began moving towards decriminalizing private acts of gay sex between consenting adults. It wasn’t until 2003, however, that the Supreme Court finally reconsidered its position on sodomy laws.

In *Lawrence v. Texas* (2003), the U.S. Supreme Court **ruled** 6-3 that Texas’ sodomy statute was unconstitutional, marking a major legal victory on the path towards LGBT equality. With the remainder of state sodomy laws technically invalidated by *Lawrence*, the LGBT community began to shift its focus. Alexis Agathocleous, staff attorney with the Center for Constitutional Rights, **recently wrote**:

Coming seventeen years after *Bowers v. Hardwick*, the Supreme Court’s seething antigay decision that upheld a Georgia sodomy law, *Lawrence* felt like a sea change. Laws actually criminalizing the community, many people assumed, were a relic of the past. And accordingly, the LGBT rights movement shifted gears: litigation, lobbying, advocacy, and resources in the years since *Lawrence* have overwhelmingly focused on civil institutions such as marriage and visibility in the mainstream media. In short, the mainstream LGBT community stopped talking about criminal justice.

Eight years later, however, eighteen states still refuse to rewrite their laws and take these anti-gay relics off their books, with countless LGBT Americans continuing to feel their devastating effects as a result. Several state legislatures and courts have exploited loopholes in the *Lawrence* decision, while others have simply refused to acknowledge the decision altogether.



## Continued Enforcement

Nearly a decade after *Lawrence*, many states have continued to enforce laws prohibiting private, consensual sex between same-sex adults.

In Michigan, the practice of charging and *convicting* gay men under the state's "Abominable and Detestable Crime Against Nature" or "Gross Indecency" laws still exists, with violators facing the risk of having to register as sex offenders and prison sentences of up to 15 years. According to Rudy Serra, attorney and Chairman of the Executive Clemency Council for the State of Michigan, police officers continue to **aggressively prosecute** LGBT people without legal challenge:

The legislature still has not repealed the sodomy and gross indecency statutes, even after *Lawrence v. Texas*, and ultra-conservative ("strict constructionist") judges still continue to enforce the "legislative intent" to criminalize gay sex, regardless of what the U.S. Supreme Court says.

LGBT people in Michigan continue to be charged with crimes for public speech, in which they let another person know they are interested in private, unpaid sex with another adult. **Bag-A-Fag** (undercover decoy cop) operations, where police officers pretend to be gay men cruising for unpaid, consensual sex continue in Michigan. LGBT people are still at risk of spending **15 years in state prison** for acts that are perfectly legal in most other states. [emphasis added]

Even in states where sodomy laws are understood by judges to be unconstitutional, the presence of sodomy laws can cause gays and lesbians to be dragged into humiliating, costly, and discriminatory legal disputes.

In 2008, Nelson Sloan and Ryan Flynn were arrested by the Raleigh Police Department under North Carolina's "crime against nature" statute for engaging in private, consensual, homosexual sex. The charge is considered a Class I felony in the state and carried a punishment of up to two years in prison. "I have never been so humiliated in all my life," Sloan said. "It's just awful."

The Raleigh police Captain at the time, T.D. Hardy, explained that, even though the state's law against sodomy had

been struck down by *Lawrence*, his department's actions were still valid:

"The law is still on the books. ...What the D.A.'s office will do with it, I don't know." [*The News & Observer*, 5/25/08, via Nexis]

The Assistant District Attorney eventually decided to drop the charges against the two men, citing *Lawrence*. Sloan responded by noting that he had nonetheless been punished for consensual sex:

"I am grateful that the DA's office has a better understanding of the Constitution than the Raleigh Police Department," Sloan said in a prepared statement Friday. "However, as long as this law remains on the books, it is a crime punishable by an arrest, a stay in jail, media attention and a fine of \$450." [*The News & Observer*, 5/31/08, via Nexis]

After the charges were dropped, Joe Furmick, the veteran Wake County magistrate who booked the two men, explained why he chose to continue enforcing the state's unconstitutional "crime against nature" law:

"I couldn't care less what these guys do," he said. "I'm with the old Victorian lady who said, 'I don't care what people do as long as they don't do it in the street and scare the horses.' But you don't want me to decide which laws to enforce and which not to. My opinion shouldn't enter into it." [*The News & Observer*, 5/31/08, via Nexis]

Unfortunately, the practice of improperly arresting gays and lesbians on "crime against nature" or sodomy charges only to have them later dismissed is not uncommon in states that still maintain these laws. In Virginia, for example, Attorney General Ken Cuccinelli's office defends the practice, [stating](#) it was "how the system works."

In some states, keeping sodomy laws on the books can result in abuse even in cases where sexual intercourse hasn't occurred. In 2009, two gay men were [kicked out](#) of an El Paso restaurant for kissing in public. When the men called the police, officers informed them that "it was illegal for two men to kiss in public and said they could be cited for 'homosexual conduct,'" even though the state statute only prohibits "deviate sexual intercourse with another individual of the same sex." The local police department eventually claimed that the officers involved were "relatively inexperienced," but the incident demonstrates the ease with which seemingly dormant anti-sodomy laws can quickly turn into weapons to be used against LGBT citizens.

## ***Lawrence's* Loopholes**

Several state legislatures and courts have attempted to exploit loopholes in the Supreme Court's decision in *Lawrence v. Texas* in order to continue enforcing laws criminalizing homosexuality. At the end of the majority opinion in *Lawrence*, Justice Kennedy [wrote](#) a paragraph outlining the parameters of the Supreme Court's decision:

**The present case does not involve minors.** It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. **It does not involve public conduct or prostitution.** It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other engaged in sexual practices common to a homosexual lifestyle. [emphasis

added]

This paragraph has been the source of a great amount of ambiguity for those attempting to determine the constitutionality of state sodomy laws. It is frequently cited by state and lower federal courts in order to attempt to limit the scope of *Lawrence*, especially when dealing with prostitution and sex with minors. As Joseph Wardenski, a trial attorney at the U.S. Department of Justice, Civil Rights Division, wrote:

Despite the Lawrence majority's broad themes of equality and dignity for gay men and lesbians, several commentators have argued that the decision's scope is much less expansive. Indeed, in several early decisions applying Lawrence, courts have interpreted the decision quite narrowly. The Court itself has thus far declined to weigh in on the correct reach of Lawrence. [Journal of Criminal Law and Criminology, Vol. 95 No. 4, 6/22/05, via Nexis]

As a result, some states have attempted to justify their "crime against nature" laws by arguing that their existing laws against crimes like prostitution and sex with minors are not written broadly enough to include oral and anal sex. According to the [North Carolina Gay and Lesbian Legal Association](#):

Law enforcement officers and prosecutors argue that they continue to enforce and press charges for crimes against nature because the laws against prostitution, sex with minors, and the like are not worded broadly enough to include oral and anal sex. While this rationale may seem reasonable at first, the problem is that enforcement of the crimes against nature law **penalizes homosexual men more severely than heterosexuals for sexual activity in secluded areas**. For example, a heterosexual couple "parking" at night in a deserted area or making love in the woods will most likely be ignored by law enforcement officers. At most, they will be charged with indecent exposure, a misdemeanor. Two men in an identical situation, however, will usually be charged with crimes against nature--a felony. [emphasis added]

The prostitution exception has caused some state sodomy laws to evolve into a kind of "gay tax" by allowing police officers and prosecutors to pursue harsher penalties against LGBT suspects than they would for heterosexuals. In Louisiana, for example, people accused of engaging in prostitution can be charged either under the state's prostitution statute or under the solicitation provision of Louisiana's "crime against nature" law, which exclusively targets oral and anal sex. According to the [Center for Constitutional Rights](#):

Police and prosecutors have unfettered discretion in choosing which to charge. But a Crime Against Nature conviction subjects people to far harsher penalties than a prostitution conviction. Most significantly, individuals convicted of a Crime Against Nature are forced to register as sex offenders.

[...]

CCR further contends that the only reason our clients are registered sex offenders is that they were convicted under the provisions of a 200-year-old statute that condemns non-procreative sex acts and sex acts traditionally associated with homosexuality, solely on grounds of moral disapproval.

Being forced to register as a sex offender can have devastating, life-long consequences for those who are charged

under "crime against nature" laws. Ian Doe, a Louisiana resident who was kicked out of his house at age 13 for being gay and turned to sex work in order to survive, [explained](#) how being labeled a sex offender has undermined his ability to find a job and secure medical care:

DOE: And because of this charge, I can't get a decent job now. I can't do anything because of the charge ... I've been everywhere trying to get employment. I've been -- the minute they find out that I'm a sex offender or I'm a registered sex offender, they tell me "no thank you" or they'll call me back or they'll get back with me, and they never do. ... I don't believe that I deserve this kind of -- this kind of punishment. I did four years in prison for this. While I was in prison for this crime, for this crime that I didn't even do that -- all I said was "fifty dollars," and they put me away for four years. And while I was in there, I was raped by an officer, a federal officer of the law that worked at the prison who was dealt with. I also was infected with HIV. I go into prison, and I get infected, and while -- and now I'm out here dealing with my health. I'm dealing with trying to get a job. ... I don't believe I deserve to be punished like this. I believe that this should be changed for many reasons. But for one, we don't deserve this. I mean, it's because all the lack of a judgment of one police officer to do something, so if he wants to put a prostitution charge or if he wants to put a "crimes against nature" charge on you. There's no crime committed.

As Doe's testimony illustrates, "crime against nature" laws are especially devastating for the most vulnerable members of the LGBT community: [homeless LGBT youth](#), most of whom have either been kicked out of their homes or forced to run away from hostile family members due to their sexual orientation or gender identity. Once on the streets, many LGBT teens resort to [sex work](#) in order to survive, making them easy targets for officers looking to enforce sodomy laws.

LGBT youth are also targeted by the "minor exception" that some courts have argued was established in *Lawrence*. As Wardenski wrote:

Since *Lawrence*, however, some courts have misunderstood and wrongly applied one seven-word phrase in Justice Anthony Kennedy's majority opinion, "[t]he present case does not involve minors," which this comment will refer to as "the minor exception." This phrase has been incorrectly interpreted to limit the reach of *Lawrence* by excluding LGBT youth from the decision's scope, since its proper application is to preclude adult sex offenders from seeking a liberty interest to engage in sexual conduct with children--an issue unrelated to sexual orientation. [Journal of Criminal Law and Criminology, Vol. 95 No. 4, 6/22/05, via Nexis, internal citations removed for clarity]

This exception can play a tremendous role in determining the fate of LGBT teens engaging in same-sex sexual activity. In *State v. Limon* (2004), a Kansas state appellate court applied the exception in order to prosecute an 18-year-old man who, shortly after turning 18, engaged in consensual oral sex with a 14-year-old boy (both of them lived in the same state mental health facility). Wardenski explained how the use of the "minor exception" dramatically increased the 18-year-old's punishment:

If the younger boy had been female, Kansas's so-called "Romeo and Juliet" law would have applied, subjecting the defendant to a sentence of just thirteen to fifteen months. The Romeo and Juliet statute provided that in statutory rape cases involving voluntary sexual relations between two "members of the opposite sex" where the defendant is nineteen or under and less than four years older than the other youth, the defendant would face significantly shorter prison terms and more lenient attendant penalties, such as

reduced post-release supervision periods and sex offender registration requirements. Because the defendant, Matthew Limon, was of the same sex as the younger boy, however, the Romeo and Juliet law's shortened presumptive sentence did not apply, subjecting Limon instead to the severely long prison sentence and to sex offender registration requirements. [Journal of Criminal Law and Criminology, Vol. 95 No. 4, 6/22/05, via Nexis, internal citations removed for clarity]

Sodomy laws establish a basis upon which state governments can punish LGBT people more severely than heterosexuals, even when the crimes they commit are the same.

## Codifying Anti-LGBT Bias

Even in states where sodomy and "crime against nature" laws are *never* enforced, the mere presence of the laws sends a powerful signal about the value of LGBT members to state and local communities. These laws reinforce negative stereotypes about homosexuality, same-sex relationships, and the validity of the lives of LGBT people. As explained in the Harvard Law Review:

**Lawrence... has not eradicated the criminal statutes themselves nor their potential to inflict harm on gay and lesbian Americans.** Since these laws were always "honored in the breach," and wreaked their most insidious effects external to criminal prosecutions, no great victory can be claimed merely from having these unenforced statutes held unenforceable. [Harvard Law Review, Vol. 118 No. 1070, 2004, via Lexis, emphasis added]

As a result, un-repealed sodomy laws continue to reinforce damaging stereotypes about gay and lesbian people, branding them as criminals and justifying anti-gay bigotry. As Christopher R. Leslie, Assistant Professor of Law at the Chicago-Kent College of Law, wrote:

Sodomy laws exist to brand gay men and lesbians as criminals. Social ordering necessitates the criminalization of sodomy, thereby creating a hierarchy that values heterosexuality over, and often to the exclusion of, homosexuality. **This symbolic effect of sodomy laws is not dependent on their enforcement. Even though very few men and virtually no women ever suffer the full range of criminal sanctions permitted under state sodomy laws, these statutes impose "the stigma of criminality upon same-sex eroticism."**

Based on the mischaracterization that sodomy laws apply only to homosexuals, sodomy laws are currently justified as necessary to uphold an anti-gay morality. **Any deterrent effect from sodomy laws is secondary to these primary symbolic effects. For their supporters, the laws are "seen not as a prohibition to be enforced as such, but rather as a symbol of societal disapproval."** Supporters argue that "these statutes may serve an important function even if unenforced." But the apparent function is not to condemn homosexual conduct, but homosexual persons. As one commentator put it, **"unenforced sodomy laws are the chief systematic way that society as a whole tells gays they are scum."** Indeed, in every state **"where sodomy statutes remain on the books, animus against lesbians and gays has been a major, if not the sole, reason for the decision to retain them."** [Harvard Civil Rights-Civil Liberties Law Review, Vol. 35 No. 103, Winter 2000, via Lexis, emphasis added, internal citations removed for clarity]

Although Leslie was writing in 2000, his conclusion remains true after *Lawrence*. Many state politicians continue to use



anti-gay animus to justify maintaining their state sodomy laws. In states like [Texas](#) and [Kansas](#), lawmakers consistently defeat efforts to repeal their sodomy laws. One Texan lawmaker said he was “hesitant to do any changing” to the state law books, asserting that it “better reflects the views of a lot of citizens.”

In Montana, where the state Republican Party maintains the criminalization of homosexuality as part of its [party platform](#), GOP lawmakers recently defeated an effort to eliminate the state’s sodomy law. During the House Committee hearing on the effort, lawmakers [repeatedly](#) equated homosexuality with bestiality and pedophilia and warned that gay sex would drive up health care costs by spreading HIV.

This anti-gay animus isn’t limited to state politicians either. GOP presidential candidate Rick Santorum has repeatedly [stated](#) that he believes *Lawrence* was wrongly decided. National anti-gay groups like the [American Family Association](#) (AFA) continue to push for the re-criminalization of sodomy. Peter Sprigg, Senior Fellow for Policy Studies with the Family Research Council (which filed an [amicus brief](#) in the *Lawrence* case), advocated a return to criminalization on [national television](#).

The stigmatizing effect of these laws outlives the anti-gay legislators that put them into place. As Leslie point outs, sodomy laws can take on “lives on their own,” guiding public hostility towards LGBT people even as the LGBT community continues to make advancements at the state and national level:

Sodomy laws are kept on the books, even though state governments do not intend to actively enforce them, because the laws send a message to society that homosexuality is unacceptable. Even without actual criminal prosecution, the laws carry meaning. **Statutes have significance completely independent of their actual enforcement. Law reflects society and informs it. Current generations enshrine their morality by passing laws and perpetuate their prejudices by handing these laws down to their children.** Soon, statutes take on lives of their own, and their very existence justifies their premises and consequent implications. [Harvard Civil Rights-Civil Liberties Law Review, Vol. 35 No. 103, emphasis added, Winter 2000, via Lexis, internal citations removed for clarity]

The anti-gay public hostility reinforced by state sodomy laws can contribute to widespread violence against members of the LGBT community. While state governments may not wish to enforce their archaic anti-gay statute, members of the public may wish to enforce the law privately, typically in the form of gay-bashing:

[M]ere decriminalization is an inadequate remedy for the harms inflicted by sodomy laws. As long as the statutes continue to bear the imprimatur of the state and are enshrined in state penal codes, the state continues to express a degrading attitude toward a minority group, demeaning its members... [U]ntil these laws are disavowed, they continue to validate "private enforcement" - gay bashing by private citizens. [Harvard Law Review, Vol. 118 No. 1070, 2004, via Lexis]

Even when they don’t motivate acts of anti-gay violence, the messages produced by sodomy laws can have a profound impact on the way that LGBT youth develop their sense of self-worth and self-esteem. The criminalization of homosexuality reinforces the idea that LGBT people are outlaws who live “outside the boundary of social acceptance.” According to Ryan Goodman, Bigelow Fellow and Lecturer in Law at University of Chicago Law School:

Many people first learn about the existence of sodomy laws during their adolescence. For lesbian and gay individuals, the law tells them, at an early age, that they are outside the boundary of social acceptance. A common misunderstanding of the law is that it outlaws homosexuals or bans being gay. The distinction

between conduct and identity is conflated, and one clear message sent is that homosexuals are delinquents; the law signifies public abhorrence of lesbians and gays. Even for individuals who keep the distinction between act and identity fairly clear, the law unmistakably signals disapproval of homosexuality. This affects individuals' self-image both in their reflections of themselves and in their parents' assessments of them, another prism through which they perceive themselves. [California Law Review, Vol. 89 No. 643, May 2001, via Lexis, internal citations removed for clarity]

Studies have already **demonstrated** that rates of LGBT teen suicide are higher in conservative areas. Given the impact that these laws can have on creating virulently homophobic social and political climates in these states -- as well as the toxic debates that arise when efforts are made to repeal them -- it isn't difficult to imagine that they also play a role in contributing to the astronomically high rates of LGBT youth suicides in America.

## Moving Forward

It is clear that the promise of the Supreme Court's decision in *Lawrence v. Texas* remains unfulfilled. Despite significant progress made by the LGBT community in recent years, many LGBT Americans continue to live in the shadow of their state's outdated sodomy laws. These laws are consistently misused and manipulated in order to single out and punish sexual minorities, often in ways that fly in the face of the *Lawrence* decision.

Even in states where these statutes are never enforced, anti-LGBT animosity is fanned by government recognition that LGBT people are to be viewed as criminals in the eyes of the law. This animosity helps create the conditions for anti-LGBT hate crimes as well as disproportionate rates of suicide among non-heterosexual youth.

As the American public moves towards greater respect for and tolerance towards LGBT people, the issue of still-standing state sodomy laws should not be forgotten. These statutes continue to represent a major obstacle on the path to full LGBT equality. Their repeal should be just as much of a priority for the LGBT community as is the struggle for marriage equality. As Serra **wrote**:

As long as we are vulnerable to felony charges for consensual, unpaid sex with other adults, marriage equality and other goals are superfluous. Many LGBT people deny the problem because they feel that defending sex offenders is unpopular and because they buy into the majority's hysteria over sex crimes, but our most basic, fundamental rights to liberty, privacy and intimate association are still at risk.

---

*Previously:*

**[“Homosexual Conduct” Still Illegal In Fourteen States](#)**

**[Santorum To Beck: States Should Be Allowed To Criminalize Gay Sex](#)**

**[Montana House Committee Votes To Keep Unconstitutional Sodomy Law On The Books](#)**

Copyright © 2010 Equality Matters. All rights reserved.