

More frequent was the incarceration of convicted pedophiles, which still continues. Far more homosexuals arrive in local jails for prostitution (particularly "street transvestites"), and other—usually non-violent—offenses.

*Conclusion.* The patterns of sexual behavior and sexual exploitation documented in recent studies have a long history. In the nineteenth century such behavior could simply be dismissed as another sordid aspect of "prison vice," but with the coming of a more scientific approach prison administrators have had to confront this issue at least in terms of the effect on the inmates whom they held in custody. Isolation and maximum-security wards for obvious homosexual prisoners were attempted, but they did not keep the young and physically slight prisoner with no previous homosexual experience from being victimized. The lurking danger for the individual prisoner has become so overt that an appellate court has even upheld the right of a prisoner to escape if he surrenders to the authorities within a reasonable time, and courts of the first instance have hesitated to send convicted persons to prison because of the likelihood that they would be exposed to sexual violence.

Proposals for reform include new systems of inmate classification based on scoring devices designed to indicate the level of security required for each prisoner. However, the state often does not have available space within suitably differentiated facilities to provide the correct berth for each prisoner. A more fundamental flaw with such proposals is that they do not address the reasons for sexual aggression, so that present patterns are likely to replicate themselves within each classification level.

One strategy which, so far, has yet to be tried would be to legalize consensual sexuality in prison and encourage the formation of stable, mutually supportive pair-bonds in that context, while reserving the full weight of administrative attention and discipline for rape. With administra-

tors continuing to regard both rape and consensual homosexuality as problems to be equally eliminated, such suggestions have produced only "we can't sanction homosexuality" replies.

So long as the sex-segregated prison remains society's answer to crime, the issues of rape and of consensual homosexual behavior behind prison bars are likely to persist. So, also, will the strong suggestion that most sexually active heterosexuals, deprived of access to the opposite sex and not discouraged by their peers from doing so, will eventually turn to another person of the same sex, and may even become emotionally attached to that person. The full implications of that statement, supported as it is by a considerable body of experience, for our concepts of sexual orientation and potential, have yet to be explored.

*See also Situational Homosexuality.*

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## PRIVACY

The right to privacy—freedom from unauthorized or unjustified intrusion—has become relevant to the issue of homosexuality because of the role that has

befallen it as an argument for homosexual rights. Legal and philosophical literature of the 1980s abounded in pieces arguing that the right of privacy should or should not be extended to the homosexual behavior of consenting adults in private.

*Antecedents.* Recent in its practical application, the right is nonetheless grounded in a long-established dichotomy. The notion of the private as distinct from the public realm goes back to classical antiquity, to the contrasting Greek adjectives *idiotikos* and *demosios*, for which Latin used the equivalents *privatus* and *publicus*. In a much-discussed passage, Cicero has the phrase *res publica, quae . . . populi res est*, which means simply that the adjective *publicus* is equivalent to the genitive of *populus*: the commonwealth is the property of the people (*De re publica*, I, c. 26) Hence the public is that which belongs to or concerns the *demos*, the *populus*; the private is a matter for the individual citizen. Privacy, be it noted, was not a term of Roman law or in the Romance languages; it made its appearance in English only at the close of the Elizabethan era, while French legal texts must still resort to the paraphrase *vie privée* to express the notion contained in English *privacy*.

*Common Law.* The right of privacy entered the common law tradition in the middle of the eighteenth century as the heir to a long series of judicial precedents dating back almost to the Norman Conquest (1066) that protected the sanctity of individual property rights. The initial logic was that the law should protect a man's letters from unauthorized use by others, not on the ground that his privacy had been invaded, but rather that his property had been stolen. In three English cases of 1741, 1820, and 1849 respectively, the right of privacy was asserted as a kind of property right. Further than this the English courts did not go, and it was left for the American interpreters of the common law to develop the modern concept of privacy.

*American Law.* It was a technological innovation, not a theoretical one, that proved the catalyst. Photography at its outset was a time-consuming procedure that required the full consent and self-discipline of the subject. However, the moment that instantaneous photography was introduced commercially, pictures could be taken "in a flash" without the knowledge or permission of the subject. The unauthorized use of such photographs by the "yellow" press of the 1880s for purposes of scandal inspired two young Boston lawyers to act. On December 15, 1890 the *Harvard Law Review* published an article "The Right to Privacy" by Samuel D. Warren and Louis D. Brandeis—an article so splendidly conceived and executed that Dean Roscoe Pound later deemed it to have done nothing less than add a chapter to the law. Warren, a scion of a socially prominent and wealthy Massachusetts family, had been offended by the press coverage of his own social life in his home in Boston's exclusive Back Bay, and the outcome was the article written literally *pro domo*.

The article began with a succinct account of how the common law principle that "the individual shall have full protection in person and in property" had developed so that in the case of property its principles extended to the products and processes of the mind. It went on to assert that "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house tops.'" The two authors concluded that "the protection afforded to thoughts, sentiments, and emotions expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone." They appealed to the common law

notion, not always honored in practice, that "a man's house" is "his castle, impregnable, often, even to its own officers engaged in the execution of its commands." Even at the time the article appeared, reasonable men differed widely as to how much this so-called right of privacy owed to history and how much to imagination. The article partook of both the past and the future, and in the course of the twentieth century, the positions taken on the issue have determined in large part whether the courts or the legislatures would emerge as guardians of privacy.

This argument applied only to the sphere of civil law. Criminal acts as such were crimes whether committed in public or in private. However, the common law also knew offenses that were criminal because they were committed in public or in such a manner as to become a public nuisance. The **Criminal Law Amendment Act** of 1885, moreover, had made acts of indecency between males punishable whether "committed in public or in private," and the supporters of the recommendations of the Wolfenden Committee focused attention exactly on those "committed in private" as the ones which they sought to remove from the concern of the law. While Parliament was debating this step, the United States Supreme Court in *Griswold v. Connecticut* (1965) found unconstitutional a Connecticut statute prohibiting all persons from using contraceptives, on the ground that the statute and its enforcement violated a married couple's right of privacy. Writing for the majority, Justice Douglas conceded that such a right could not be found on the face of the Constitution, but maintained that the right was created from "penumbras" of the Bill of Rights "by emanations from those guarantees that help give them life and substance."

In the wake of *Griswold*, the Supreme Court had little difficulty in expanding this right of privacy to protect an interracial couple's decision to marry, a person's right to view obscene material in

the privacy of his home, and a woman's decision to abort a pregnancy. In these decisions the Court employed a "substantive due process analysis" rather than the *Griswold* penumbra rationale. This procedure has not gone unchallenged, indeed it has been attacked as judge-made law and an expression of judicial ideology, but the Supreme Court has remained steadfast in asserting that a right of privacy exists as a product of the Constitution.

*Application to Sodomy Statutes.*

Once recognized, the constitutional right of privacy developed in *Griswold* and its offshoots was advanced as a ground for attacking the constitutionality of state sodomy statutes, but the courts were uncertain as to whether this right should extend to consensual sexual activity. Since sodomy in medieval usage extended far beyond homosexuality, certain heterosexual acts fell within its scope, and these the courts have had no difficulty in treating as protected by the right of privacy, so that they could in good conscience strike down the laws prohibiting them. However, because of the particular intensity with which the taboo on homosexual acts has been maintained in American culture, these same courts have been reluctant to extend equal protection to homosexual activity.

The issue came to a head in two cases, *Doe v. Commonwealth* (1976) and *Bowers v. Hardwick* (1986). The first summarily affirmed the decision of the District Court for the Eastern District of Virginia upholding a Virginia sodomy statute on the ground that the right of sexual privacy extended only to decisions relating to the home, marriage, and the family. In the second, a majority of 5-4 denied that the Court's prior decisions have construed the Constitution to confer a right of privacy on homosexual activity; "No connection between family, marriage and procreation on the one hand and homosexual activity on the other has been demonstrated." The assertion that a right to engage in homosexual sodomy is "deeply rooted in this Nation's history and tradition" was

dismissed as absurd. Last of all, the plaintiff's argument that his conduct should be protected because it had occurred in the privacy of his own home was rejected. The majority argued that a decision rendered in 1969 was "firmly grounded in the First Amendment" and therefore inapplicable as the present case did not deal with printed material. The minority opinion held that homosexuals, like everyone else, have a "right to be let alone" and that "A way of life that is odd . . . but interferes with no rights or interests of others is not to be condemned because it is different."

*Broader Implications.* The battle line remained drawn between those who defend the right of the state to uphold a moral code derived from the canon law of the medieval church, and those who cherish the Enlightenment principle that offenses against religion and morality, so long as they do not violate the rights of others or the interests of the state, do not fall within the scope of the criminal law. In that respect the concept of privacy is a legal weapon, an ideological innovation which the defenders of homosexual rights seek to interpose between the received law, the *jus receptum*, and the individual having overt sexual relations with a person of the same sex in the interest of a *jus recipiendum*, a more just law which if adopted would protect homosexuals in the exercise of sexual freedom.

The paradox of this situation is that the "deep structure" of society prescribes that sexual acts be private, that is to say, performed out of range of the sight and hearing of others who would rightly take offense if the acts were inflicted upon their consciousness. A legal commentator in Nazi Germany recognized that private sexual acts harm no one and are seldom detected, but argued that if they were committed in public they would cause outrage and scandal; the law should therefore proceed *as if* the private acts had been performed in public. In other words, although the state power is invading the

privacy of the participants and exposing them to humiliation and punishment, they should be punished on the fiction that they had deliberately violated the moral feelings of others by behaving indecently in public. One could hardly imagine a better example of paranoid logic, yet it is this type of thinking that underlies the refusal of the courts to extend the protection of privacy to homosexual behavior. By contrast, in the Dudgeon case (1981) the European Commission of Human Rights in Strasbourg held that laws penalizing private homosexual acts violated the right of privacy embodied in Article 8 of the European Convention on Human Rights of 1950. The struggle for the recognition of the right of privacy in this sphere of sexual conduct will likely continue unabated into the twenty-first century.

*See also Law: United States.*

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## PRIVATE PRESSES

Presses that produce books in limited quantities not intended for the regular channels of the book trade are termed "private." Some of them have had to operate clandestinely, as the contents of the books would have attracted the atten-