Sodomy Laws

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The Sensibilities of Our Forefathers

The History of Sodomy Laws in the United States

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Colorado

"[The act] is so loathsome, so revolting, that courts have seized upon various statutory expressions to bring the act within the prohibition of the law."

The Post-Revolution Period, 1776-1873

The Colorado Territory originally was known as the Jefferson Territory and, in 1860, enacted a criminal code.[1] The Jefferson Territory did not include a law against sodomy, but did recognize English common-law crimes.[2] This made the penalty for sodomy death, since it still was so under English law.

In 1861, Congress established the Colorado Territory[3] and made no reference to sodomy, common-law crimes, or retention of laws enacted under the Jefferson Territory. Therefore, sodomy became legal.

Colorado reinstated common-law crimes in a statute passed later in 1861.[4] Since this law passed two months after England eliminated the death penalty for sodomy, the penalty matched that of the new English law, 10 years-life.

The first session of the Colorado territorial legislature passed a new code in 1861 that included a law against sodomy.[5] The law was written with the common-law definition and provided for a penalty of one year-to-life.[6] The crime was complete upon penetration.[7]

> **Period Summary:** *In the years 1860 and 1861, what is now Colorado experienced a tumultuous period regarding sodomy. In four criminal codes within two years, it changed from a common-law reception with a death sentence, to having sodomy legal, returning to common-law reception with a life imprisonment sentence, and then a statutory ban on sodomy with a 1 year-life sentence.*

The Victorian Morality Period, 1873-1948

In 1885, Colorado enacted an obscenity law[8] that included a ban on instruments "for self-pollution,"[9] which would ban sex toys. The penalty was set at a fine of $20 to $2,000 and one month-to-one year in the penitentiary at hard labor.

The earliest reported case under the sodomy statute was *Wilkins v. People,*[10] from 1922. In one of the sloppiest reported sodomy cases ever, the Colorado Supreme Court upheld Wilkins's conviction, saying that his partner's testimony was corroborated, as it promised to detail later in the opinion.[11] Nevertheless, nothing in the short opinion gives a clue as to the corroboration used in the trial. On petition for rehearing, the Court acknowledged that it "overlooked" one of Wilkins's assignments of error, the reputation of his partner as to previous sexual relations, which had been barred by the trial

judge. In a single sentence, the court held that the trial judge had discretion as to admit the testimony.[12]

Koontz v. People,[13] decided in 1927, concerned the applicability of the sodomy law to fellatio. The unanimous decision was that the term "crime against nature" did not prohibit an act of fellatio. The Court believed, however, that the act

> is so loathsome, so revolting, that courts have seized upon various statutory expressions to bring the act within the prohibition of the law. We have no such statutory expressions in this state to justify or excuse us in so holding. We cannot, because of our belief that the act charged against the defendant is even more vile and filthy than sodomy, stretch the sodomy section of the statute to include it.[14]

The Court felt that it could not "permit our detestation of the act to mislead us into assuming and exercising a purely legislative function by creating a new felony[.]"[15]

In 1937, the sex toys law was amended[16] to raise the minimum fine to $100 and to require the defendant to pay court costs. A proviso was that the law did not cover teaching in medical schools or the publication of medical texts.[17]

Despite the Court's hint in *Koontz* that the Colorado legislature should act, the change in the law didn't occur for more than a decade. In 1939, a new sodomy law was enacted[18] that specifically added language prohibiting either attempted or completed "unnatural carnal copulation per anus or per os" to the sodomy law and reduced the maximum penalty from life to 14 years.[19] At the same time, the statute had a solicitation provision added that subjected an offender to a jail term ranging from 30 days to two years for the "solicitation of any unnatural carnal copulation[.]"[20] Curiously, the statute also contained a clause stating that "an emergency exists"[21] so that the statute would take effect immediately. No explanation tells why a period of more than 11 years passed after the *Koontz* decision that oral sex was legal and the "emergency" requiring criminal penalties for it.

What was conceded to be error was allowed to stand in the 1943 case of *Happer v. People.*[22] Happer had been convicted on two counts, one of sodomy and one of an attempt to commit the act. He was sentenced to concurrent 7-10-year sentences for them. The court said that even if

> the verdict of guilty on the fourth count charging the attempt is, as defendant contends, supported by no evidence...defendant is not prejudiced by the verdict of guilty on the charge of attempt.[23]

This was because the sentence he received for it was running concurrently with the sodomy sentence, and he'd have to remain in prison for the same length of time anyway. The Court did not consider the fact that he'd have two criminal convictions on his record instead of one.

The Colorado Supreme Court labeled a defendant as "queer" in the 1945 case of *Martin v. People.*[24] Wendell Martin had picked up two sailors in Wyoming and brought them to his home in Colorado, where they agreed to stay overnight. A conversation occurring there was

> to the effect that there are people who are prone to conduct themselves within contemplation of the inhibitions of the statute here, and that to the "initiated" such persons are known as "queers," or one such individual as a "queer." The charge is that defendant carried on with one of the sailors in such manner that in testifying the sailors referred to defendant as a queer.[25]

After accepting Martin's sexual service, the sailors robbed him of his money, watch, and car. The sailors were charged with robbery, but acquitted. In his sodomy trial, Martin was called a "queer" by the prosecutor.[26] The Colorado Supreme Court unanimously overturned Martin's conviction because the prosecutor injected character evidence against him in violation of the long-standing rule that character evidence can not be introduced by the prosecutor unless the defendant first introduced favorable character evidence.[27]

In 1947, in *Shier v. People,*[28] the Colorado Supreme Court upheld a sodomy conviction that was based

on testimony of a housekeeper that she knew of a relationship between the defendant and a third party, but was unaware of one between the defendant and the party in question. The trial court refused to grant a mistrial, and the high court believed that it was not prejudicial to the defendant.[29]

In another 1947 case, *Dustin v. People,*[30] the Colorado Supreme Court unanimously sustained a sodomy and solicitation conviction of a man for fellatio with a consenting teenage male. A relationship existed between the two and letters written from the man to the teenager were admitted into evidence as corroboration of the sexual activity.[31]

> **Period Summary:** *Colorado became one of only four states, and the only one in the West, to outlaw the use of sex toys. There were no published sodomy cases in the state for nearly a half-century. Once those cases began appearing in the courts, there was a nearly uniform success rate for the state's prosecutions. The Colorado Supreme Court did rule against a prosecution of fellatio under the "crime against nature" law, but the legislature overturned that decision with a new law.*

The Kinsey Period, 1948-1986

Colorado enacted a psychopathic offender law in 1953[32] that provided for indefinite commitment of those convicted of a number of sex crimes, including "unnatural carnal copulation" and an attempt to commit it, if the offender were considered either a habitual offender or dangerous to the community.[33]

In 1955, in *Hawkins v. People,*[34] the Colorado Supreme Court unanimously upheld a sodomy conviction and rejected Hawkins's contention that the psychopathic offender law required him to be evaluated by a psychiatrist. The Court found that the trial judge had discretion in the matter and stated that the law applied only to those who were "dangerous."[35] Despite saying that Hawkins was not dangerous, it found nothing wrong with his sentence of 2-6 years in prison.

In 1957, Colorado revised its psychopathic offender law[36] and accidentally omitted sodomy from the list of triggering offenses, although an assault to commit the same remained.[37]

A poignant letter written by a Gay teenager to his parents in 1958 discussed his arrest in Denver on a consensual sex charge. Written on the eve of his sentencing, he was unaware of whether he would receive probation or a felony sentence.[38]

In 1960, the Colorado Supreme Court used euphemisms to decide *Tague v. People.*[39] The case obviously was one of consensual, adult sodomy, but the Court couldn't bring itself to use that term either in the syllabus or body of the opinion. It said only that, according to the indictment, Tague and his companion "did unlawfully and feloniously commit a statutory offense in and upon each other[.]"[40] However, it found the evidence insufficient, and overturned the conviction.[41]

Another letter was to the editor of the *Mattachine Review* in 1961. "Mr. A.M." had been arrested for consensual sex with another adult and was fired from his job with the federal government as a result. He was looking forward to probation, but was uncertain that he would get it.[42]

The sex toys law was amended again in 1961[43] to insert the word "knowingly" in front of the prohibition, to follow the U.S. Supreme Court decision requiring *scienter* in order to be prosecuted for obscenity. This law also repealed the state ban on nude photos.[44] The law remained until the 1971 criminal code revision.

The constitutionality of the psychopathic offender law was upheld in 1961 by the Colorado Supreme Court in *Truesdale v. Tinsley,*[45] and in 1963 by a federal court, in the same case.[46]

In 1963, the legislature amended the state's psychopathic offender law[47] to correct the error of six years before and reinstated "unnatural carnal copulation" as one of the triggering crimes.[48]

In a 1964 case, *Swanson et al. v. People,*[49] two men who had been convicted of sodomy and imprisoned for three years sought a motion to vacate their sentence on the ground that the testimony of an accomplice had not been corroborated.[50] The Colorado Supreme Court unanimously rejected the

motion, both for procedural reasons, and on the substantive ground that Colorado case law permitted conviction of a defendant on the uncorroborated testimony of an accomplice.[51]

Two men were arrested at a Gay bar in late 1964 for kissing each other.[52] The head of the Denver vice squad allowed his belief that "homosexual practices are morally wrong" to influence his law enforcement and argued that legalizing sodomy would "hasten our downfall."[53] An early 1965 report revealed that the state's sodomy law led to fewer than 1% of all "vice" arrests in Denver the preceding year. Supposedly, prison sentences for sodomy were a rarity. Most arrestees were sentenced to psychiatric treatment.[54]

Despite earlier court decisions to the contrary, including a refusal by the U.S. Supreme Court to hear a similar case, the psychopathic offender law came to grief in the United States Supreme Court in the case of *Specht v. Patterson,*[55] in 1967. The Court unanimously found the law unconstitutional because the defendants were not afforded basic due process of law in the proceedings.[56]

In 1970, the Colorado Supreme Court was faced with the case of *Gilmore v. People*[57] that questioned the applicability of the sodomy law to an act of cunnilingus and the alleged vagueness of the statute. The Court, sitting In Department, ruled unanimously that the law included merely placing the mouth or tongue on a vagina[58] and that the statute was "most definite in nature."[59]

In 1971, Colorado adopted a comprehensive revision of the state's criminal code.[60] The new statute abrogated common-law crimes[61] and repealed the sodomy statute, with an age of consent set at 16.[62] However, the new code created the crimes of public indecency[63] and of loitering "for the purpose of engaging or soliciting another person to engage in prostitution or deviate sexual intercourse"[64] with a penalty of up to six months in jail and/or a fine of $500.[65] The public indecency law included any "lewd fondling or caress of the body of another person"[66] that conceivably could cover kissing.

Exactly that act got two Denver Gay men in trouble in 1974. Undercover police arrested them for "lewd fondling in public" for kissing. A jury returned a "not guilty" verdict after only ten minutes of deliberation. One juror felt constrained to speak to the press and called the arrest "harassment."[67]

The loitering law was not looked upon favorably by a majority of the Colorado Supreme Court when it was challenged. In the 1974 case of *People v. Gibson,*[68] the Court split 4-3 to strike the law down on the ground that it punished a status and did not require any overt act to accompany the loitering.[69]

In 1975, the legislature passed a new sex offenses law[70] that lowered the age of consent from 16 to 15.[71]

> **Period Summary:** *Despite its history of conservatism on the sodomy issue, Colorado became only the third state, and the first in the West, to decriminalize sodomy with its 1971 criminal code. During this time the courts retained their strong support for sodomy prosecutions. The growing Gay rights movement has been effective in the state, for the legislature lowered the age of consent in 1975 and the Colorado Supreme Court struck down the law outlawing "loitering" for purposes including solicitation for "deviate sexual intercourse."*

The Post-Hardwick Period, 1986-Present

> **Period Summary:** *There are no published cases dealing with the limits of state power to regulate sexual activity in places such as restrooms or parked cars. Because of the decriminalization of consensual sodomy, only that occurring in semi-public places still may be subject to prosecution.*

Footnotes

[1] *Provisional Laws and Joint Resolutions Passed at the First and Called Sessions of the General Assembly of Jefferson Territory,* (Omaha:Robertson & Clark, 1860), enacted Jan. 25, 1860.

[2] *Id.* at 27, §151.

[3] 12 Stat. 172, enacted Feb. 28, 1861.

[4] *The Revised Statutes of Colorado,* (Central City CO:David C. Collier, 1868), page 105, ch. XVI, enacted Oct. 11, 1861.

[5] *Laws of Colorado 1861-62,* page 297, §46, enacted Nov. 5, 1861.

[6] *Id.*

[7] *Id.* §45.

[8] *Colorado Laws 1885,* page 172, enacted Apr. 9, 1885.

[9] *Id.* §1.

[10] 72 Colo. 157, decided Sep. 11, 1922. Rehearing denied Nov. 6, 1922.

[11] *Id.* at 158.

[12] *Id.* at 159. The *Biennial Report of the Attorney General of the State of Colorado 1921-1922,* page 16, curiously lists the crime for which Wilkins was charged as "immoral practices," which could show that any number of erotic activities could have been prosecuted as "crime against nature."

[13] 263 P. 19, decided Dec. 5, 1927.

[14] *Id.* at 21-22.

[15] *Id.* at 22.

[16] *Colorado Laws 1937,* page 504, ch. 133, enacted June 7, 1937.

[17] *Id.* at 505, §2.

[18] *Colorado Laws 1939,* page 318, ch. 97, enacted Apr. 3, 1939.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] 141 P.2d 1016, decided Sep. 27, 1943.

[23] *Id.* at 158-159.

[24] 162 P.2d 597, decided Oct. 1, 1945.

[25] *Id.*

[26] *Id.* at 597-598 and 599.

[27] *Id.* at 600-601.

[28] 181 P.2d 366, decided May 5, 1947.

[29] *Id.* at 367.

[30] 181 P.2d 457, decided May 19, 1947.

[31] *Id.* at 458.

[32] *Colorado Laws 1953,* page 249, ch. 89, enacted Apr. 1, 1953.

[33] *Id.* §1.

[34] 281 P.2d 156, decided Mar. 14, 1955. Rehearing denied Apr. 4, 1955.

[35] *Id.* at 158.

[36] *Colorado Laws 1957,* page 329, ch. 122, enacted Apr. 23, 1957.

[37] *Id.* §39-19-1.

[38] Reprinted in *Mattachine Review,* June 1960, pages 20-23.

[39] 352 P.2d 673, decided May 31, 1960.

[40] *Id.* at 674.

[41] *Id.* The fact that the "statutory offense" was sodomy is known only from the *Biennial Report of the Attorney General of the State of Colorado 1959-1960,* page 97.

[42] *Mattachine Review,* January 1961, page 24.

[43] *Colorado Laws 1961,* page 327, ch. 107, enacted Apr. 11, 1961.

[44] *Id.* at 327-328, §2.

[45] 366 P.2d 655, decided Dec. 4, 1961. Rehearing denied Dec. 26, 1961. Cert. denied, 370 U.S. 929, decided June 18, 1962.

[46] 316 F.2d 783, decided Mar. 28, 1963.

[47] *Colorado Laws 1963,* page 282, ch. 96, enacted Feb. 11, 1963.

[48] *Id.*

[49] 390 P.2d 470, decided Mar. 23, 1964.

[50] *Id.*

[51] *Id.* at 471.

[52] *Denver Post,* Feb. 16, 1965, 15:4.

[53] *Denver Post,* Feb. 18, 1965, 12:1.

[54] *Denver Post,* Feb. 18, 1965, page 12.

[55] 386 U.S. 605, decided Apr. 11, 1967.

[56] *Id.* at 610.

[57] 467 P.2d 828, decided Apr. 6, 1970.

[58] *Id.* at 829.

[59] *Id.*

[60] *Colorado Laws 1971,* page 388, ch. 121, enacted June 2, 1971, effective July 1, 1972.

[61] *Id.* at 389, §40-1-104 (3).

[62] *Id.* at 425, §40-3-411.

[63] *Id.* at 453.

[64] *Id.* at 470, §40-9-113 (2) (c).

[65] *Id.* at 390, §40-1-107.

[66] *Id.* (d).

[67] Leigh W. Rutledge, *The Gay Decades,* (New York:Plume, 1992), pages 63-64.

[68] 521 P.2d 774, decided Apr. 15, 1974.

[69] *Id.* at 775.

[70] *Colorado Laws 1975,* page 627, ch. 171, enacted July 1, 1975.

[71] *Id*. at 629, §18-3-403 (e).

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