Arkansas 1, Texas 0:
Sodomy Law Reform and the Arkansas Law

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In 2002, the Arkansas Supreme Court led the state to join the majority of states and overturn its statute enshrining the ancient law against sodomy, which made criminal specific sexual actions between consenting adults.[1] The court held that the Arkansas law violated Arkansans' assurance of privacy and guaranty of equal protection in the state constitution.

In 2001, the Texas Court of Appeals had been confronted with the same issue, whether to uphold Texas's similar statute under Texas law.[2] The Texas court found that its statute was an appropriate exercise of state power to uphold Texan morals, which was an appropriate use of Texas's powers under the federal constitution.

Both cases were brought primarily under their states' constitutional laws. The appellants in both cases pursued state as well as federal constitutional relief, well knowing that the federal constitution had been interpreted in *Bowers v. Hardwick*, a 1986 decision,[3] to allow states to pass laws criminalizing homosexual acts between consenting adults.

The Texas case had been in the process of appeal when the Arkansas court ruled. When the Texas decision finally reached federal review in the United States Supreme Court, the Court reversed the Texas court on federal grounds, reversing *Bowers* and interpreting the U.S. Constitution's due process clause now to forbid such statutes by the states.[4] Thus, the national constitution has been brought into line with the Arkansas constitution. Even in Texas.

It might be satisfying to bask in another case of Arkansan progress, and to take some state pride in abolishing a pernicious law through the efforts of local lawyers and judges, rather than once again awaiting needed reform to be pronounced for us in Washington, D.C. And, it is always fun to one-up the Texans.

A mere celebration, however, might too easily neglect the hardship created by these statutes over the decades in which they were in force. We must be mindful that these laws have been the vehicle of criminal convictions that, by any light, we now

1. Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002).

2. Lawrence v. Texas, 41 S.W.3d 349 (Tex Ct. App. 14th Dist., 2001).

3. 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986).

4. Lawrence v. Texas, ___ U.S. ___ ,123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

must see as unjust. And we must be aware that these laws did more than to create crimes, but they did and still do affect other arenas of the law.

Celebration would also fail to recognize the sincerity of continuing reactions against these reforms, reactions driven by strongly felt opposition not just to the result but also to the manner in which it was achieved.[5] An underlying awareness of this reaction is important in considering the extent of the continuing vitality of the sodomy prohibition in related areas of the law.

Moreover, mere celebration of this reform would neglect important questions that remain. It is those questions that this note considers, in criminal law, family law, and the law of evidence.

I. The Cases

As an initial matter, it will be helpful to consider the two reform cases and their scope. Both cases, and their differing bases for their judgment, apply in Arkansas.

A. *Jegley*

Jegley v. Picado was brought as a declaratory judgment action before the Pulaski County Chancellor, although it was ultimately heard in the Pulaski County Circuit Court.[6] The plaintiffs[7] sought a declaratory judgment that Arkansas Code section 5-14-122 was unconstitutional "insofar as it criminalizes specific acts of private, consensual sexual intimacy between persons of the same sex."[8] These seven citizens admitted they had violated the statute before and planned to do so again.[9] They argued that they not only risked prosecution but also feared the loss of licenses, jobs, and child custody as a result of the statute's criminalization of their private conduct. Larry Jegley, the defendant in his official capacity as prosecuting attorney, moved for summary judgment, as did the plaintiffs.

Circuit Judge David Bogard granted summary judgment, finding that the plaintiffs had stated a justiciable claim for a declaratory judgment. He then declared that the Arkansas Constitution's Article Two guarantees of privacy and of equal protection were greater in scope than the similar clauses of the U.S. Constitution, and the Arkansas sodomy statute violated those state guarantees.[10] Larry Jegley appealed, represented by the state attorney general, arguing that the case was nonjusticiable, that the plaintiffs could not rebut the strong presumption of a statute's constitutionality, that Arkansas' right to privacy does not encompass gay sex, that the statute is not gender-biased, and

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5. *See*, for example, the dissenting opinions in *Jegley* and *Lawrence*. 349 Ark. at 641, 80 S.W.3d at 356 (Thornton, J., joined by Arnold C.J, dissenting, arguing deference to legislature and lack of plaintiff's standing). __ U.S. at ___, 123 S. Ct. at 2487, 156 L. Ed. 2d at 531 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J., arguing *stare decisis*, limits on due process, and a rational state interest underlying criminalization of consensual adult sexual acts.) See also the language of Justice McRae of Mississippi in note 70, below.

6. Bryant v. Picado, 338 Ark. 227, 996 S.W.2d 17 (1999). In the initial suit, the Attorney General of Arkansas – nominally Winston Bryant, and then Mark Pryor – was also named a defendant in his official capacity. The circuit court both dismissed the AG, finding that office lacked sufficient nexus with decisions regarding enforcement of the sodomy statute, and granted the plaintiffs' unopposed motion to certify Jegley as the representative of a class of all state prosecuting attorneys, sued in their official capacities. Jegley, 349 Ark. at 609.

7. Elena Picado, Randy McCain, Robin White, Bryan Manire, Vernon Stokay, Charlotte Downey, and George Townsand.

8. Jegley, 349 Ark. at 608-09.

9. The plaintiffs described themselves as long-time gay and lesbian residents of Arkansas, several of whom live with partners in long-term, committed relationships. They include a mother of two children, a teacher, a minister, a nurse, a school guidance counselor, a small-business owner, and computer-industry employees. Id.

10. *Id.* at 609-10. This result was presaged, particularly concerning equal protection, in Thomas Earl Pryor, *Does Arkansas Code Section 5-14-122 Violate Arkansas's Constitutional Guarantee of Equal Protection?* 51 ARK. L. REV. 521 (1981).

that the statute is a rational protection of public morality.[11] Justice Annabelle Imber, joined by Justices Brown and Hannah, affirmed despite a strong dissent by Justice Thornton, who was joined by Chief Justice Arnold.

Justice Imber's majority opinion initially framed the question before the court, and its mandate, quite broadly. Noting that the plaintiffs "assert that the statute violates their fundamental right to privacy and their equal protection rights under both federal and state constitutional law" she wrote, "We agree with appellees and hold that Ark. Code Ann. § 5-14-122 is unconstitutional under the Arkansas Constitution."[12] As will be seen in the analyses of the constitutional doctrines, the court's ruling is actually somewhat narrower.

In reaching this conclusion, the majority first disposed of the justiciability question, finding that the plaintiffs were each a "person . . . whose rights, status, or other legal relations are affected by a statute," entitled to "have determined any question of construction or validity arising under the . . . statute, . . . and obtain a declaration of rights, status, or other legal relations thereunder."[13] The opinion then turned to the privacy issues.

Article Two of the Arkansas Constitution, Section 29, echoes the federal Ninth Amendment:

> This enumeration of rights shall not be construed to deny or disparage others retained by the people and to guard against any encroachments on the rights herein retained, or any transgression of any of the higher powers herein delegated, we declare that everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void.

Applying this provision, the majority reviewed a raft of other articles and amendments to determine that Arkansas "has a rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution."[14] Applying this right to the case, the majority held that "the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults. Because Ark. Code Ann. § 5-14-122 burdens certain sexual conduct between members of the same sex, we find that it infringes upon the fundamental right to privacy guaranteed to the citizens of Arkansas."[15] Finding no compelling state interest to justify the infringement, the court found that "Arkansas's sodomy statute at Ark. Code Ann. § 5-14-122 is unconstitutional as applied to private, consensual, noncommercial, same-sex sodomy."[16]

Turning to the state's equal rights amendment, the Court rejected the defense that the sodomy law is not gender-biased. The state constitution requires, "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."[17]

Applying an equal protection analysis derived from the three-tiered analysis of classifications

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11. Numerous briefs *amici curiae* were filed, predominately in support of the appellees, including one by National Conference for Community Justice, the Right Reverend Larry E. Maze, Rabbi Eugene Levy, the Reverend Jo Ellen Willis, the Reverend Donna Rountree, More Light Presbyterians of Central Arkansas, and Professors Donald Judges, Cynthia E. Nance, Richard B. Atkinson, and Morton Gitelman, members of the faculty of the law school.

12. *Id.* at 608.

13. *Id.* at 613-22 quoting ARK. CODE ANN. § 16-111-104 (1987). Statutory analyses continued in the opinion until page 631.

14. *Id.* at 631-32

15. *Id.* at 632.

16. *Id.*

17. ARK. CONST. art. 2, § 18.

under federal equal protection, the state court found that the statute could not survive even the lowest level of scrutiny. The state's attempt to employ its broad police powers to protect public morals was here being applied only to acts between people of the same gender, not between all people. The state offered no justification for either the prohibition or the distinction that could show "why this conduct is injurious to the public welfare when engaged in by members of the same sex but completely protected when engaged in by members of opposite sexes."[18]

Noting earlier cases in which the state properly protected the public from offensive sexual displays, protected individuals from forcible sexual contact, and protected minors from sexual abuse, the majority held that General Assembly cannot act, under the cloak of police power or public morality, arbitrarily to invade the personal liberties of the individual citizen without violating the state constitution, which the sodomy statute did.[19]

Justice Brown, joined by Justice Hannah, concurred to emphasize his concern for state enforcement of criminal laws that would destroy the privacy of the home to police non-commercial sexual acts. Further, he particularly distinguished the biased focus of the sodomy statute with the universal application of the Public Sexual Indecency Act.[20] Justice Thornton, joined by Chief Justice Arnold, dissented, arguing solely that the plaintiffs' cause of action was non-justiciable.[21]

The extent of the court's opinion is not, as described initially, to void the statute.[22] Rather, the court's opinion declares unconstitutional the application of the statute in any manner that violates the rights to privacy or to equal protection as a result of "all private, consensual, noncommercial acts of sexual intimacy between adults" particularly prohibiting legal burdens upon those who practice "certain sexual conduct between members of the same sex."[23]

B. *Lawrence*

On September 17, 1998, the police of Harris County, Texas, responded to a "weapons disturbance," which was later known to be a false report (although the opinions leave it unclear whether the report alone or the assignment of a report as the basis for the response was false). Officers entered the apartment of John Lawrence, where they saw him and Tyrone Garner having sex.[24] The police arrested them both, kept them in custody over night, and charged them before a Justice of the Peace with deviate sexual intercourse with another individual of the same sex, a misdemeanor in Texas.[25] After their motions to quash their arrest were denied, they each pled *nolo contendere*, thus barring them from raising any question of the legality of the police entry and arrest.[26] The court fined each of them $200 and court costs of

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18. Jegley, 349 Ark. at 636.

19. *Id.* at 637 and 638, *citing* Union Carbide Carbon Corp. v. White River District, 224 Ark. 558, 275 S.W.2d 455 (1955), Ports Petroleum Co. v. Tucker, 323 Ark. 680, 916 S.W.2d 749 (1996).

20. ARK. CODE ANN. § 5-14-111.

21. Jegley, 349 Ark. at 641-47.

22. *See* text accompanying note 12, above.

23. *See* text accompanying note 15, above.

24. Brief of Petitioner, Lawrence v. Texas, No. 02-102, U.S. Supreme Court, January 16, 2003, at 2.

25. Lawrence, 156 L. Ed. 2d at 515. Texas Penal Code Ann. § 21.06(a) (2003), entitled "Homosexual Conduct," provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." Section 21.01 defines deviate sexual intercourse as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

26. Lawrence v. Texas, 41 S.W. 3d 349 (Tex. Ct. Crim. App. 14th Dist., 2001). This is different from the story told by Justice Kennedy, which is merely that "The right of the police to enter does not seem to have been questioned." Lawrence, 156 L.Ed. 2d at 515.

$141.25.[27] They then exercised their right to a trial *de novo* in the county criminal court. There they argued that the statute was an unconstitutional deprivation of state and federal rights to privacy and to equal protection, challenges rejected by the trial court, accepted on appeal (as to the equal protection argument), and then rejected by a majority of the Court of Appeals *en banc.*[28]

On *cert.*, Justice Kennedy wrote for the majority, overturning the Court's decision in *Bowers v. Hardwick*,[29] which had upheld a similar sodomy statute in Georgia, under which a homosexual had been arrested. Specifically, Justice Kennedy found that the earlier opinion had not fairly considered the question presented and had relied on a faulty historical record, and that claims then made notwithstanding, the United States, the various states, and the common law had not consistently prosecuted the "infamous crime against nature not fit to be named among Christians" under that label or its later descriptions.[30] Moreover, not only had the states largely abandoned the powers the Court had protected in *Bowers*, but also the Court had narrowed those powers in two later cases.[31] Interestingly, Justice Kennedy also took note, at length, of the academic criticism of Bowers as well as the reform movements of Europe and the rest of the developed world, which had abandoned similar laws over the last half-century.[32]

The majority opinion then turned to consider Justice Stevens's dissent in *Bowers*, which noted that the mere fact of a majority of legislators making an act criminal as immoral was not sufficient to trump an interest in fundamental liberties or equality.[33] Finding that the dissenting analysis should have been controlling, the majority held that the old majority opinion "ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[34]

Continuing, Justice Kennedy made clear the narrow realm in which the Texas sodomy law was before the court.

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27. Brief of Petitioner, op. cit.

28. *Id.* at 4.

29. 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). The initial charges in *Bowers* were dismissed, and that case sought a declaration of unconstitutionality based on a fear of futuer enforcement. For more on *Bowers*, its incoherence in the light of the Georgia statute it upheld, and the philosophical background of morals cases, see Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969 (1994).

30. Lawrence, 156 L. Ed. 2d at 517-521.

31. Justice Kennedy noted that when *Bowers* was announced, 25 States prohibited sodomy. By 2002, only 13 still did, and only 4 barred only homosexual conduct. No state had a custom of frequent enforcement against consenting adults acting in private. Further, since then the Court had strengthened the liberty prong of due process in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), and overturned a state constitution's prohibition of laws protecting homosexual rights, finding the prohibition to violate the Equal Protection Clause. *See* Romer v. Evans, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996). Lawrence, 156 L.Ed. 2d at 523.

32. Lawrence, 156 L. Ed. 2d at 519, *citing*, among many others, J. KATZ, THE INVENTION OF HETEROSEXUALITY 10 (1995), and at 522, *citing* Dudgeon v. United Kingdom, 45 Eur. Ct. H. R. (1981) P52.

33. Lawrence, 156 L.Ed. 2d at 525, *quoting*

> Our prior cases make two propositions abundantly clear. First, 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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

478 U.S., at 216 (Stevens, J. dissenting) (citations in original omitted).

34. Lawrence, 156 L.Ed. 2d at 525.

> 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. The petitioners are entitled to respect for their private lives.[35]

While there were other opinions,[36] this note is concerned with the effects of Justice Kennedy's majority opinion on state law. Those effects are these: At least, sodomy laws that prohibit acts between consenting adults violate the adult's liberty interests under the constitution. More than likely, laws that create a burden on homosexuals or others as a result of private consenting choices with adults will be treated to heightened scrutiny for violations of equal protection. Probably, without some other basis, the mere assertion of exercise of a state's police power to protect the public health, safety, and morals is not a legitimate state purpose as a basis for enacting a penal statute.

II. The Statute, the Cases, and the Remnants

Interestingly, the history of the statute before the court in *Jegley*, Arkansas Code section 5-14-122, is one of consistent, if slow, reform and moderation. The statute provides:

> (a) A person commits sodomy if such person performs any act of sexual gratification involving:
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> (1) The penetration, however slight, of the anus or mouth of an animal or a person by the penis of a person of the same sex or an animal; or
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> (2) The penetration, however slight, of the vagina or anus of an animal or a person by any body member of a person of the same sex or an animal.
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> (b) Sodomy is a Class A misdemeanor.[37]

Although a prior enactment had enshrined the earlier common-law crime of sodomy as a capital offense,[38] this statute's direct antecedent originat-

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35. *Id.*

36. Justice O'Connor concurred, stating that she reversed the vote she cast in *Bowers*, but not on the substantive grounds of due process she said Justice Kennedy employed, but on the specific grounds that she now believes such statutes violate equal protection. Lawrence, 156 L. Ed. 2d at 526-30. Justice Scalia, joined by the Chief Justice and Justice Thomas, dissented, arguing that the precedential effect of *Bowers* was entitled to more respect; that the liberty interest in issue could hardly reach the significance needed for due process protection, being neither deeply rooted in this Nation's history and traditions nor necessary to a sense of ordered liberty; that there is a rational basis for the statute in protecting public conceptions of morality, and that no equal protection claim could be shown. *Id.* at 530-43. Justice Thomas also wrote, to point out his view that the law, while deserving of repeal, did not have sufficient infirmity to justify the majority's decision. *Id.* at 543.

37. ARK. CODE ANN. § 5-14-122.

38. The Code of 1837 listed sodomy under the heading of Rape in the criminal code:
"The infamous crime against nature, either with man or with beast, shall subject the offender on conviction therof, to death." Rev'd Stat. Ark. 1837, Ch. XLIV Art. IV, § 3 (p. 244).

Although I have not reviewed all of the territorial acts for this note, the origin of this statute appears to be a Missouri territorial act based on the common law. Regardless of its source, the effect in 1837 was to make the edict law. According to a statute passed in 1836, the governor appointed three lawyers to "revise and arrange the statute laws of the State, and prepare a code of civil and criminal law by which its people should thereafter be governed" which was drawn from the territorial statutes of Arkansas and Missouri, given that Arkansas had been in the Missouri territory. *See* Albert Pike, *Preface*, in *Revised Statutes of the State of Arkansas, adopted at the October Session of the General Assembly of Said State, A.D. 1837, in the Year of Our Independence the Sixty-Second, and of the State the Second Year* (Rev'd by William McK. Ball and Sam. C. Roane; notes by Albert Pike)(Boston: Weeks, Jordon and Co., 1838).

ed within a few years of statehood, modifying the penalty to incarceration.[39] That statute persisted with only minor modifications until it was amended in 1977, resulting in the language above, which lowered the criminal penalty from 5 to 21 years in prison, so that it became a year or less in jail and a fine of $1,000 or less.[40]

The statute, however, prohibits more conduct than that at issue in *Jegley*. Not only by its express language, including conduct with animals, but as illustrated in cases of its judicial application, it restricts conduct that does not involve private, consensual, noncommercial acts between adults.

Therefore, it would appear that the statute is not, ultimately, a constitutional dead letter, although its application or reference in many situations it was intended to affect would be unconstitutional. While one might hope that the legislature will repeal the statute and place whatever constitutional and reasonable prohibitions that should persist clearly into other parts of the code, in the interim, some questions must be considered.

III. Further Questions

A. Criminal Law

We know from *Lawrence* that it is unconstitutional in the United States for a state to make criminal the conduct of an adult engaged with another adult in private, consensual, non-profit sex. Beyond that point, *Lawrence* leaves many issues unanswered, such as whether the federal government may enforce prohibitions on such conduct in the military, or in the District of Columbia, or in national parks. From the reasoning of the majority, it would seem certain only that the District of Columbia cannot make criminal such conduct. The other questions remain in some doubt. We know from *Lawrence* and from *Romer* that legal burdens that fall on only gays or lesbians must be justified by more than a mere reference to protecting public morals, and indeed we may consider it unlikely that such burdens can be justified at all.

We know from *Jegley* that the Arkansas sodomy law is unconstitutional if applied to private, consensual, noncommercial acts of sexual intimacy between adults. It is clearly unconstitutional to enforce the law against an individual for the sole reason that the conduct involved is between members of the same sex.

There have been, however, prosecutions under the sodomy law that remain outside the logical scope of these limitations. Even though the bulk of these prosecutions could have been brought under other statutes, they were brought under the sodomy law. Until the legislature repeals the statute, such prosecutions will continue to be within its scope and seemingly remain unaffected by *Lawrence* [41] or *Jegley.* [42]

In most cases, the conduct that may be considered sodomy is also conduct that may violate other statutes, such as the statutes prohibiting rape or child abuse. In such cases, sodomy is a separate charge, and both charges may be brought, but the defendant cannot usually be convicted of both offenses for the same act.[43] One purpose for which

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39. In 1838 the sodomy law was reformed and punishment lessened: "Every person convicted of sodomy, or buggery, shall be imprisoned in the penitentiary for a period of not less than five nor more than twenty-one years. Ark. Acts, Dec. 17, 1838, § 4.

At the common law, sodomy has been held to include acts of buggery. Strum v. State, 168 Ark. 1012, 272 S.W. 359 (1925). In their more restrictive meanings, however, sodomy included only prohibited sex acts with another human, and buggery included only prohibited sex acts with animals of another species. *See, e.g.* Wise v. Commonwealth, 135 Va. 757, 115 S.E. 508 (1923). The Arkansas legislature clearly intended its sodomy statute to include both forms of conduct.

40. *See* ARK. CODE ANN. §§ 5-4-201 and 5-4-401.

41. Justice Kennedy was clear that *Lawrence* "does not involve minors ... persons who might be injured or coerced or .. in relationships where consent might not easily be refused ... public conduct or prostitution." Lawrence, 156 L. Ed. 2d at 525.

42. The sodomy law was unconstitutional as applied to "all private, consensual, noncommercial acts of sexual intimacy between adults." Jegley, 349 Ark. at 636.

43. The prosecution of conduct constituting more than one offense is governed by ARK CODE. ANN. § 5-1-110.

prosecutors bring such multiple charges before the jury is to inflame the jury, and so to make a conviction on one charge or another more likely from the same evidence.

1. Minors

The sodomy statute applies to conduct involving a minor. The Arkansas appellate record demonstrates that the sodomy statute has recurrently been used to convict the predators of children.[44]

There are, of course, other statutes dealing with sexual contact with or between minors. The child sexual indecency statute, for example, makes a felony of sexual solicitation by anyone over 18 years of age with anyone under 15.[45] However, the most comprehensive elements of the state's regulation of minor sexuality are in the new sexual assault statutes, which have replaced the old statutes for the offense of violation of a minor with an array of finely calibrated offenses for sexual contact between an adult or fiduciary and a minor who is not the assailant's spouse, including a variety of distinct offenses for sexual contact among teenagers or by professionals and clients or by clergy and laity.[46] Besides these statutes, carnal abuse is committed by late adolescents with those under 14.[47] Sexual Misconduct, once called statutory rape, is a separate offense.[48]

There is considerable overlap among the sodomy, sexual indecency, sexual assault, carnal abuse, and rape statutes as they apply to minors. Each statute employs a different array of definitions and defenses. This redundancy gives great latitude to prosecutors in bringing charges, and potentially in courts, in selecting a charge on which to convict. Even so, it also produces considerable uncertainty as to what crime is actually committed or is properly to be the basis for indictment or prosecution.

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44. *See, e.g.,* Woolford v. State, 202 Ark. 1010 (1941) (adult and 14-year old boy); Mangrum v. State, 227 Ark. 381, 299 S.W. 2d 80 (1957)(adult and 9-year old boy); Hice v. State, 268 Ark. 57, 593 S.W.2d 169 (1980) (20-year-old male with a 9-year old girl); Thompson v. State, 280 Ark. 265, 658 S.W. 2d 350 (1983)(adult and 12-year-old boy).

45. Sexual indecency, a Class D felony, is committed by anyone over eighteen who solicits someone fifteen or under, or who is said to be fifteen or under, for "sexual intercourse, deviate sexual activity, or sexual contact" or who exposes their private parts to a minor for gratification. *See* ARK. CODE ANN. § 5-14-110.

46. Sexual assault in the first degree is a Class A felony. It is committed by a person who has sex with someone under 18 and not a spouse, either if the assailant is employed by the state departments of correction or human services, or a jail or juvenile detention facility, and the victim is in the custody of any of those institutions; or if the assailant abuses a position of trust or authority, particularly a professional or a school employee with authority over the victim, to engage in a sexual act. Consent is no defense, but an age difference of three years or less is a defense. *See* ARK. CODE ANN. § 5-14-124.

Sexual assault in the second degree is a Class B felony. It includes the crime of rape, also outlawed in § 5-14-103, in being committed by a person who has sex with another by force, or with another who is incapable of giving consent. It also incorporates a form of statutory rape, applying to a person who has sex with any person under 14 and not a spouse, or under 18 either if the assailant is a parent or guardian; or is employed by the state departments of correction or human services, or a jail or juvenile detention facility and the victim is in the custody of any of those institutions; or if the assailant abuses a position of trust or authority, particularly a professional or a school employee with authority over the victim, to engage in a sexual act; or is under 18 with a 14-year old but not less than three years older than a victim under 12 or less than three years older than a victim over 12; or is a teacher with a student under 21. Consent is no defense, but age differences can be a defense as specified. *See* ARK. CODE ANN. § 5-14-126.

Sexual assault in the third degree is a Class C felony. It includes state employees and professionals, as well as clergy, any of which abuse their position of trust to engage in sex with someone under 18, as well as anyone under 18 with a person not a spouse under 14 and more than three years younger. Consent is not defense. *See* ARK. CODE ANN. § 5-14-128.

47. Carnal abuse exists in three classes. First-degree abuse, a Class A felony, includes conduct by one under 18 with one not a spouse, or under 14 but more than two years in difference. Second-degree abuse, a class C felony, includes sexual activity with another, not a spouse, who is mentally defective. Third-degree abuse, a Class D felony, includes conduct by one 20 or older with one not a spouse 16 or less. *See* ARK. CODE ANN. §§5-14-104, 105, 106.

48. Sexual Misconduct, a class A misdemeanor, is committed by any person with someone not a spouse under the age of 16. ARK. CODE ANN. § 5-14-107.

The sodomy law has the broadest definition and the most minimal defenses. Further, acts between two minors, or between two people within three years of one another, that could not amount to sexual assault as a class C felony persists as sodomy, a Class A misdemeanor. Of course, conduct committed by a minor (which would essentially mean conduct between minors) would be treated within the procedural framework of juvenile justice.

The most significant arena of uncertainty remains in the tension between the prohibition on the use of the sodomy statute to prosecute acts between people of the same sex and the apparent allowance of the use of the sodomy statute to prosecute acts with minors. On the face of it, the statute would forbid sexual acts as described, and the effects of *Jegley* and *Lawrence* do not reach to prosecutions with minors. On the other hand, the statutes that are designed most to deal with minors do not use minority as the limit for prosecution. In at least one Arkansas case brought under the sodomy statute, against an adult who fellated a seventeen-year-old, [49] neither the sexual assault nor the sexual misconduct nor the carnal abuse statutes would apparently have applied.

While a legislative answer to this ambiguity is still to be hoped for, some presumption must guide prosecutors and judges in the interim, and I think the more appropriate presumption is that sodomy prosecutions be restricted to circumstances in which the conduct could amount to sexual assault on the basis of age or position of authority. Two policies would favor a cautious application of the sodomy law in such circumstances.

First, the legislature has recently created a comprehensive series of offenses defining the ages and age differences at which sexual conduct among and with minors is an offense. The balances in this resolution would be greatly distorted if a generic offence for most sexual acts by or with a person under 18 remained a crime.

Second, the courts have emphasized not only the privacy rights at stake in sex-crime prosecutions but also the rights to equal protection endangered by persecuting same-sex partnerships. There are numerous dangers to both privacy and equal protection that arise from employing the sodomy law in the range of late adolescence where the sexual assault laws do not apply. First, because sodomy includes sex by hand and by mouth, it includes conduct more likely to be engaged in by late adolescents than most other forms of sexual activity, which could result in a prosecution for a less serious form of sexual act when a more serious sexual act would not be punishable. Of course, sodomy can be committed between people of opposing genders just as it can be committed by people of the same gender, but the question would persist as to the forms of conduct that would attract prosecution. A pattern would very likely emerge of prosecution for same-sex conduct that does not affect other sexual conduct.

Thus, while the sodomy law persists as a means for the protection of minors from sexual predators, the legislature has recently adopted other means that are both sufficient and more carefully drawn. To the degree that the sodomy law is still used as the basis of prosecution, its primary benefit is its designation as a misdemeanor, allowing indictments for lesser included offences in circumstances in which sexual assault or indecency would also apply.

2. Coerced or Involuntary Conduct

The Arkansas sodomy law has been employed in various circumstances to punish coerced sexual conduct or conduct in which consent cannot meaningfully be given.[50] Neither *Lawrence* nor *Jegley* considered the application of a sodomy law in a situation of coerced or non-consensual sex.[51] It is therefore likely that application of the sodomy law is still constitutional in such cases, as

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49. Kindlinger v. State, 1991 Ark. App. LEXIS 357 (Ark. Ct. App., Div. 1, June 12, 1991)(No. CACR 90-267, unpublished).

50. In *Young v. State*, 296 Ark. 394, 757 S.W. 2d 544, (1988), a sodomy prosecution was brought against a rapist's accomplice, as no proof of force was needed for sodomy. For sodomy in other assaultive cases, see *Verser v. State*, 256 Ark. 609, 509 S.W. 2d 299, (1974). For sodomy in a case of supervision in which consent was impossible, see a case of a physician interfering with a patient. *Hummel v. State*, 210 Ark. 471, 196 S.W. 2d 594 (1946).

51. *See* notes 41 and 42 and accompanying text, above.

long as it is not used in a manner that would violate the balances enshrined in the rights to privacy or equal protection of the defendant. In this instance, though, the interest of the state in protecting those who do not or cannot consent to sexual conduct would be a compelling state interest, and it would likely be sufficient to support an analysis of the statute under either privacy or equal protection.

Even so, as a prudential matter, there is great redundancy between the sodomy law, the rape law,[52] the HIV exposure law,[53] the sexual assault laws,[54] incest law,[55] and the abuse of adults law.[56] It is difficult to determine any manner in which the sodomy law provides an opportunity for a coercive offence that is not within the scope of at least one of these laws. Although the legislature may always act to end the practice, prosecutors have the continued authority to bring sodomy prosecutions, even though it would appear far better policy to used these better-tailored statutes.

3. Public Acts

The sodomy law has been applied to acts in public or constructively in public.[57] As with generic public indecency laws, though, it has not been clear what is and what is not public under the statute.[58] (Although most close calls on appeal turn out to have been in public.)

The question of the extent to which the sodomy law may be enforced in public is no longer only a matter of statutory interpretation or even of legislative prerogative. The Arkansas Supreme Court and the U.S. Supreme Court have now protected private consensual relations among adults, and the state cannot attempt to enlarge the scope of public conduct into private realms. This limit is a potentially complicated and confusing arena in which the courts might well import questions of the expectation of privacy from other arenas of criminal procedure, notably the Fourth Amendment.[59]

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52. ARK. CODE ANN. § 5-14-103.

53. ARK. CODE ANN. § 5-14-123.

54. ARK. CODE ANN. §§ 5-14-124, 125, 126.

55. ARK. CODE ANN. § 5-26-202.

56. ARK. CODE ANN. § 5-28-103.

57. *See* Burford v. State, 242 Ark. 377, 413 S.W.2d 670 (1967)(participants naked from the waste down in the back of a station wagon on a disused roadside at night); Carter v. State, 255 Ark. 225, 500 S.W. 2d 368 (1973)(in a car in a well-lighted rest area); State v. Black, 260 Ark. 864, 545 S.W.2d 617 (1977)(in the city jail drunk tank); United States v. Lemons, 697 F. 2d 832 (8th Cir. 1983) (in a public restroom).

58. The case of Whatley v. State, 708 N.E.2d 66, 95 A.L.R.5th 705 (Ind. Ct. App. 1999), illustrates the difficulty of drawing the line. The court held that a nude man driving a semi-trailer truck with a sleeping berth on the state's highways was in a "public place" within the meaning of a statute providing that a person commits public inde cency when the person knowingly or intentionally appears in a state of nudity in a public place, although the man had characterized his truck as a "home on wheels" and argued that his semi was not a public place because mem bers of the public did not enter and exit or congregate within the cabin of his rig. This annotation collects the cases in which the courts discussed what constitutes a "public place" within the meaning of a state statute or local ordinance prohibiting indecency or the commission of a sexual act in a public place.
David Carl Minneman, *What Constitutes "Public Place" Within Meaning of State Statute or Local Ordinance Prohibiting Indecency or Commission of Sexual Act in Public Place*. 95 ALR 5th 229.

59. In contrast to the relatively breezy analysis by which courts found public conduct in a darkened car on an empty roadside in *Burford*, or a public restroom in *Lemons*, discussed in note 56, see Amy J. Nelson, *Note, Criminal Procedure: Atwater v. City of Lago Vista: The Due Process Dilemma of Fourth Amendment Seizures for Traffic Violations*, 55 OKLA. L. REV. 671 (2002); Sean M. Lewis, *Note, The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?* 101 MICH. L. REV. 273 (2002).

At the very least, what is consensual may well turn out to conflict with what is public. The Arkansas sodomy law has been specifically construed to apply to locations in which all of the adult consenting participants are on notice that sexual acts may occur there.[60] Enforcement of the law in such circumstances might well invade a reasonably interpreted conception of privacy. Further, according to how such enforcement squares with the enforcement of other statutes regulating non-sodomous sexual activity, such an enforcement may well amount to a continuing violation of equal protection.

As with the other crimes considered, the sodomy statute is redundant in this domain with another, the public indecency law.[61] While prosecutorial opportunity to employ the sodomy law persists for public acts, prudence would suggest restriction to the public indecency statute. Such a restriction would also allow the development of a more reliable base of case law and interpretation over the dimensions of public space and public view than would be possible with a division into the less determinate domains of sodomy that is not private.

4. Prostitution

Justice Imber and Justice Kennedy both clarified their opinions to consider only non-commercial acts. I have found no reported appellate cases in Arkansas in which a person apparently engaged in an act of prostitution was indicted or arrested for sodomy. Such cases are not, however, unknown in other states.[62]

Arkansas's law criminalizing prostitution is clear. "A person commits prostitution if in return for or in expectation of a fee he engages in or agrees or offers to engage in sexual activity with any other person."[63] While sodomy persists as a tack-on offense, prudentially, there seems no reason for a prosecutor to bring an indictment for sodomy that would not likely violate the limits of privacy or equal protection.

5. Animals

It is a matter of historical accident that the former distinction between buggery and sodomy was abandoned in both the common law and its codifications. Thus not only are the words near-synonyms, but also these quite different forms of conduct are regulated under a single statute.[64]

The sodomy statute has been applied in Arkansas to prosecute individuals who have sexual relations with animals of other species, and two cases have been reported on appeal.[65] Nothing in either *Lawrence* or *Jegley* expressly extends any constitutional protection to such conduct. That said, it is conceivable that an argument for privacy

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60. "Public place" under the sodomy law includes establishments that limit their fare only to consenting adults and forewarned viewers. Young v. State, 286 Ark. 413, 692 S.W.2d 752 (1985), *cert. denied*, 474 U.S. 1070, 106 S. Ct. 830, 88 L. Ed. 2d 801 (1986). (N.B. – 1986 was the year of *Bowers v. Hardwick*.)

61. Public sexual indecency, a class A misdemeanor, is committed by any person who "engages in any of the following acts in a public place or public view: (1) An act of sexual intercourse; or (2) An act of deviate sexual activity; or (3) An act of sexual contact." ARK. CODE ANN. § 5-14-111. According to section 5-14-101, public place "means a publicly or privately owned place to which the public or substantial numbers of people have access," and public view means "observable or likely to be observed by a person in a public place."

62. *See, e.g.,* McFadden v. Commonwealth 3 Va. App. 226; 348 S.E. 2d 847 (Ct. App. Va., 1986) (conviction for attempted oral sodomy reversed owing to statutory amendment to remove attempts from prostitution law); Shab v. State, 187 Ga. App. 513; 370 S.E. 2d 775 (Ct. App. Ga., 1988)(prostitution and solicitation for sodomy same transaction but different offenses); Crawford v. State, 154 Ga. App. 362; 268 S.E. 2d 414 (Ct. App. Ga., 1980)(john's trial for consenting to sodomous prostitution).

63. ARK. CODE ANN. § 5-70-102.

64. *See* note 39, above.

65. *See* Stevens v. State, 111 Ark. 299, 163 S.W. 778 (1914) (testimony of deputy sheriff, who observed acts of defendant with a mare, may have been testimony as accomplice after the fact owing to deputy's non-intervention and offer to conceal the crime if the 17-year-old defendant would leave the state, creating a question for the jury); Hudspeth v. State, 194 Ark. 576, 108 S.W. 2d 1085 (1937)(evidence was sufficient to prove defendant was discovered by police while engaged in carnal relations with a cow in another's barn).

or for equal protection might be made that could extend to such behavior. Even so, the state interest in the protection of animals should be sufficient to survive scrutiny on such grounds, and there is yet no reason to believe that the statute would not be constitutional when applied to acts with animals. When the offense is committed with an animal owned by another, the state interests in both the protection of private property and in maintaining public order would seem to be quite compelling.

This is, indeed, the only one of the four areas surveyed in the criminal law in which there is no other statute clearly redundant to the legislative purpose. The Arkansas animal cruelty law does not specify whether buggery amounts to cruelty.[66]

Thus there is, here as in the other applications of the sodomy law, considerable room for increased legislative clarity. Even though there seems to be little question that the offense of buggery with an animal may still be prosecuted under section 5-14-122 consonant with both the state and the federal constitutions, there is a more compelling problem of whether a criminal response is the best answer to the underlying question posed by a potential defendant's conduct. Granting that the state has an interest in the animal – and granting that this interest is important – this state interest in the animal would appear still less significant than the state's interest in the person. It is unclear, and certainly unconsidered as a matter of legislative history, whether that person or the polity are best served by criminal sanction, mental health review, or even by toleration or excuse in such circumstances.

B. Civil Matters

There should be no doubt that the Arkansas Supreme Court intended not only to invalidate the application of the sodomy statute as the basis of a crime between consenting adults but also to end the practice of using the excuse of sodomy laws as a means of denying homosexual litigants their equality before the law in other matters. Justice Imber's opinion recognized this denial as one aspect of the equal protection problem recently demonstrated as a result of the operation of the sodomy statute.

> [O]ur sodomy statute has been used outside the criminal context in ways harmful to those who engage in same-sex conduct prohibited by the statute. See, e.g., Stowe v. Bowlin, 259 Ark. 221, 531 S.W.2d 955 (1976) (holding that court should have allowed appellant to impeach appellee's credibility as a witness by referencing appellee's admitted engagement in sodomy); Thigpen v. Carpenter, 21 Ark. App. 194, 730 S.W.2d 510 (1987) (affirming chancellor's consideration of appellant's homosexuality as a relevant factor in depriving her of the custody of her children).[67]

We must accept the invitation to consider the implications on, at least, the law of evidence and family law, occasioned by the unconstitutionality of the sodomy law as applied to same-sex adult relationships.

1. Family Law

In the *Thigpen* case, a wife and husband who divorced were initially granted joint custody of their two minor daughters, in accord with their pre-divorce settlement agreement.[68] Four months later, the father moved to be granted sole custody of both daughters, pleading primarily that the

66. Cruelty to animals, a Class A misdemeanor, includes knowingly subjecting "any animal to cruel mistreatment." ARK. CODE ANN. § 5-62-101.

67. Jegley, 349 Ark. at 621

68. Thigpen v. Carpenter, 21 Ark. App. 194, 730 S.W.2d 510 (Ark. Ct. App., Div. 2, 1987). Judge Cracraft concurred to emphasize his belief that lesbianism was the problem. 21 Ark. App. 200.

mother was engaged in a lesbian love affair. The father had known of the mother's affair prior to the divorce and had entered the custody agreement knowing of it. Even so, the court of appeals noted that the chancellor had not been told of it, held that the chancellor properly applied the Arkansas standard that presumes all illicit (that is, unmarried) affairs are detrimental to children, held that the mother's homosexuality was properly a factor for the chancellor to consider, and upheld the chancellor's finding that the wife was to surrender custody.[69]

The mere fact of homosexuality has been applied in many jurisdictions in child-custody cases to support a claim that a gay or lesbian former spouse is an unfit parent.[70] Even before *Lawrence* and *Imber*, an increasingly strong argument persisted that this use violated equal protection.[71]

Following the criticism of the *Thigpen* case quoted above, a similar question arose again in the Arkansas Court of Appeals. In an unpublished opinion, the court properly emphasized the significance of the conduct of a parent on a child is its effect on the child, not whether it is homosexual or otherwise.[72] Moreover, it affirmed a trial court's award to a lesbian mother over the complaint of the father and former husband that the mother's gender preference made her unfit.[73]

So it would appear both from the aside in *Jegley* and from the later conduct of the Court of Appeals that the sodomy law is no longer a basis for determining child custody in Arkansas.

Another arena of family law that has been regulated by the sodomy statute is the treatment of spouses. Sodomy has been a means of prosecuting cases of abuse by one spouse of the other.[74] That utility is not in itself affected by *Lawrence* or *Jegley*, as it has no effect on same-gender relationships.

That arena does, however, give rise to a last issue of family law, one that is not resolved and would seem to be unaffected by *Jegley* or by *Lawrence* – whether the equal protection analyses employed by either court to protect same-sex relationships would extend to marriage or civil unions. Justice Kennedy went out of his way to ensure that issue was not before the national court, and it certainly is not within the procedural posture of *Jegley*. Thus, while one might consider the opinions as forerunners in such matters, there is no assurance that they will herald such a change.

2. The Law of Evidence

The other area of private law specifically criticized in *Jegley* for its employment of the sodomy statute is the law of evidence.[75] In partic-

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69. *Id.*, 21 Ark App. at 198-200

70. The issue has, from certain quarters elicited great passion quite recently. *See, e.g.,* Weigand v. Houghton, 730 So. 2d 581, 590 (Miss. 1999) ("The conscious [sic] of this Court is shocked by the audacity and brashness of an individual to come into court, openly and freely admit to engaging in felonious conduct on a regular basis and expect the Court to find such conduct acceptable, particularly with regards to the custody of a minor child.") (McRae, J., dissenting). More generally see also Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 859-61 (1997) (criticizing the rationales used by legislatures to justify denying custody to same-sex parents).

71. *See*, e.g., Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 620-21 (1989).

72. Ratliff v. Ratliff, 2003 Ark. App. LEXIS 281 (Ark. Ct. App., Div. 1, No. CA02- 844)(April 9, 2003)(unpublished). As an aside, it must be wondered why this opinion is not published. It is a perfect example of the form of precedent that is limited in its utility by the regrettable practice of limiting opinions from later precedential force through the dubious citation rules. For a longer rant on this topic, with more careful research, see Steve Sheppard, *The Unpublished Opinion Opinion: How Richard Arnold's Anastasoff Opinion Is Saving America's Courts from Themselves,* 2002 ARK. L. NOTES.

73. *Id.* at 37.

74. *See* Smith v. State, 150 Ark. 265, 234 S.W. 32 (1921)(husband convicted of sodomy of wife).

75. *See* Jegley, 349 Ark. at 621, *citing and criticizing* Stowe v. Bowlin, 259 Ark. 221, 531 S.W. 2d 955 (1976) (holding that court should have allowed appellant to impeach appellee's credibility as a witness by referencing appellee's admitted engagement in sodomy).

ular, sodomy has been the excuse to attempt to embarrass and undermine the credibility of gays and lesbians acting as witnesses, whether in their own causes[76] or in the causes of others.[77]

Two rationales underpinned the impeachment of a witness who had engaged in sodomy. The first, and more common, was to use sodomy as an indirect basis of impeachment, in that the witness had engaged in felonious conduct, and the testimony of a felon was not to be trusted.[78] The other employed sodomy as a direct basis, in that the witness had engaged in immoral or reprehensible conduct, proving that the witness was untrustworthy.[79] A third approach was attempted but rejected fifty years ago, to attempt to establish insanity merely by proof of a sodomous act.[80]

In cases illustrating both of the successful theories, the sodomous acts that was promoted as a basis for impeachment appear to have been adult, consensual, private, and non-commercial. These are situations in which the federal and state constitutions will now clearly forbid the use of sodomy laws as the basis for criminal liability. Thus, it is certain that non-commercial sodomy between consenting adults – simple homosexual conduct – is no longer an admissible basis for the impeachment of a witness, regardless of whether that witness is also a party. This use of the sodomy law is now patently unconstitutional.

The other significant question of evidence that arose under the sodomy law will probably remain both rare and unaffected by recent cases, that is whether the testimony of the victim is a sufficient basis for conviction, or whether such evidence must be corroborated. The common-law answer has been for the jury to be asked to determine whether the victim was indeed an accomplice, such as an accomplice after the fact, for failure to report the crime. In such cases, the law does not allow unsupported testimony as the sole evidence to underpin a conviction.[81]

In the light of the narrowing of the statute from constitutionally protected acts among homosexuals, very little of this statute persists that is not covered by other laws.[82] The prudential answer, once again, will be for litigants to avoid becoming enmeshed in suits or trials over sodomy between heterosexuals. Both the federal and the state benches stressed the need to respect the privacy of the individual, and yet the nature of any search and seizure is unlikely to protect such privacy interests.

C. Other Arenas

While these questions of criminal law, family law, and evidence have attracted the greatest notice on the Arkansas appellate bench, still other questions persist. The most important practice fields in many states in which the sodomy laws have been used to limit the rights of gays and lesbians are employment and immigration.[83] These matters have generated little appellate litigation here, and so they are generally beyond the scope of this discussion.

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76. Stowe v. Bowlin, 259 Ark. 221, 531 S.W. 2d 955 (1976).

77. Hale v. State, 252 Ark. 1040, 483 S.W. 2d 228 (1972).

78. *See* Stowe v. Bowlin, 259 Ark. at 225.

79. *See* Hale v. State, *supra* note 77.

80. *See* Campbell v. Scott, 216 Ark. 878, 228 S.W. 2d 470 (1950).

81. *See* Smith v. State, 150 Ark. 265, 234 S. W. 32 (1921) (the evidence proved the prosecuting witness did not consent; so her evidence did not have to be corroborated); Woolford v. State, 202 Ark. 1010, 155 S. W. 2d 399 (1941) (same issue).

82. Strum v. State, 168 Ark. 1012, 272 S. W. 359 (1925).

83. For a useful catalogue that extends this list, see Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation,* 79 TEX. L. REV. 813 (2001).

That said, in all of these arenas, each case gives rise to a question of whether the conduct in issue would have been brought as a criminal sanction or as the basis for a lost right or civil claim, except for the homosexuality of the litigant. When that question can plausibly be answered in such a manner that there is any cause arising only from the gender preference of a competent adult in consorting with another competent adult, we can with confidence expect the answer to be unconstitutional.

IV. Initial Conclusions

The Arkansas Supreme Court, the *Jegley* litigants, and their lawyers have done the State a great service. It is now the responsibility of all of the institutions of the state's law to integrate that success into the framework of the law.

First, one would hope that the legislature will revisit Title 14's sex offenses. The redundancy and confusion among offenses would be great enough to require such revision, even in the absence of the striking down of one of its oldest crimes. In any event, those aspects of the statute with a continuing vitality, such as the protection against certain aspects of the abuse of minors or the abuse of other species of animal, deserve greater consideration by the legislature.

Second, regardless of legislative change, it is incumbent on the bench and bar to be cautious of any use of the sodomy statute. The statute cannot be employed on the basis of the genders of a defendant and an accomplice. To the extent that it is, the employment is unconstitutional. To the extent that it is not, great prudence and caution is still required to ensure that the constitutional values of equality and privacy are not sacrificed without sufficient cause. In most cases, it may prove the best policy for prosecutors to seek alternative means to accomplish those tasks once pursued through section 5-14-122.