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Procedural Rules or Procedural Pretexts?: A Case Study of Procedural Hurdles in Constitutional Challenges to the Texas Sodomy Law

BY CHRISTOPHER R. LESLIE*

INTRODUCTION

Procedural rules serve many functions in the American judicial system. While some address such mundane issues as font size in briefs, other procedural rules essentially regulate access to American courts. Procedural rules on intervention determine who may enter an existing case; conversely, rules governing dismissal may permit a party to exit a case before any decision is reached on the merits. Procedural rules such as standing and mootness limit who may make a particular legal argument. While substantive law defines the scope of constitutional, statutory, and common law rights and obligations, procedural rules can indirectly affect substantive rights by determining who can advance certain legal positions in court. Although procedural rules are theoretically neutral—and should not favor one set of legal advocates over another—procedural rules are also subject to manipulation. This Article discusses the role of procedural rules in legal challenges to the Texas sodomy law and suggests that, in some instances, courts appear to apply procedural doctrines in a manner that effectively deprives gay Americans of meaningful access to courts. While the procedural decision in each individual case may be defensible, taking the cases as a whole, a pattern emerges: even though trial courts have often held that the Texas sodomy

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law is unconstitutional, appellate courts consistently invoke procedural rules to reverse these victories. While it is impossible to prove that judges are intentionally manipulating procedural rules to disadvantage gay-rights advocates, much evidence points in that direction.

Part I of this Article explains the increasing importance of procedural rules in the movement toward greater equality between gay and straight Americans. Mastering the procedural rules of American courts had low pragmatic value to gay citizens and their legal advocates for the first seven decades of the twentieth century. During this era, the participation of open homosexuals in American courts was traditionally confined to playing the role of the defendant in criminal matters. Homosexuals rarely won their cases. In response to their fears of a hostile judiciary, gay men and lesbians rarely initiated litigation to establish or protect their civil rights. As judges became more educated about homosexuality, relevant substantive law improved significantly. This, in turn, increased the importance of procedural rules in the march toward equality. In many jurisdictions, procedural rules have joined inadequate substantive law as a major obstacle to gay Americans achieving full citizenship.

To illustrate the role of procedural rules in the legal battle for greater equality, Part II presents a case study of legal challenges to the Texas sodomy law. The Texas sodomy law criminalizes private, non-commercial sodomy between consenting gay adults. The Texas legislature, courts, police departments, schools, social workers, and private organizations have all relied on the Texas sodomy law to justify discrimination against gay Texans. In litigation challenging the Texas sodomy law, at least six different courts—both federal and state—have held that the Texas sodomy statute unconstitutionally infringes on individual privacy rights. Yet the law remains in place because every decision that invalidated the law was met with a procedural maneuver—including Younger abstention doctrine, the intervention of improper parties, and the denial of standing on appeal to victorious parties below—that limited or eliminated any substantive ruling against the Texas sodomy law. A chronological examination of court challenges to the Texas sodomy statute demonstrates how some judges have employed procedural rules to keep the Texas sodomy law in place.

Finally, Part III explains why the Texas case study does not reflect an isolated anomaly. Courts in most states with sodomy laws have employed

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1 This case study uses the term “procedural rules” broadly to include all rules unrelated to the substantive merits of a case. Thus, Younger abstention, standing doctrine, and the dismissal of parties are considered procedural issues because they are generally independent of a litigant’s substantive legal claims.
the procedural rules of standing to prevent litigants from challenging sodomy statutes as violative of state constitutional privacy rights. These examples confirm the growing importance of procedural rules in gay-rights litigation.

I. THE GROWING IMPORTANCE OF PROCEDURAL RULES IN LITIGATION AFFECTING GAY AMERICANS

During the post-war era, most procedural rules governing access to courts were largely irrelevant to gay Americans. Gay defendants wanted desperately to avoid time in the courtroom. Most gay men and lesbians would not defend themselves against criminal charges—no matter how trumped up—because they could not risk the notoriety of a trial. In criminal cases, the trial was as much about shaming the defendant for his sexual orientation as it was about applying the law. Not surprisingly, gay people did not generally initiate civil litigation to protect their rights. Despite the plethora of laws condemning homosexuals, most gay Americans were loath to challenge the statutes and policies that damned them to second-class, and often criminal, status. Substantive law rarely protected homosexuals. No level of government had yet enacted any specific statutory protections for homosexuals as a group. Even when employers violated due process to rid themselves of gay employees, few gay people dared try to enforce their rights in court.

In addition to inadequate substantive law, gay Americans also lacked any meaningful infrastructure of legal advocacy. Although civil rights attorneys were actively pursuing equality for African-Americans, the 1950s concept of civil rights did not include protection for homosexuals.

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3 John D'Emilio, Sexual Politics, Sexual Communities 15 (1983) (“Court proceedings seemed designed to instill feelings of shame and obliterate self-esteem.”).
4 There were some exceptions that proved the rule. See Dudley Clendinen & Adam Nagourney, Out for Good 16 (1999).
6 See Clendinen & Nagourney, supra note 4, at 21.
7 See Note, Government-Created Employment Disabilities of the Homosexual, 82 Harv. L. Rev. 1738, 1746 (1969) (“[V]ery few cases concerning homosexuality reach the courts [because of] fear of publicity may keep nonprofessed homosexual workers from risking even administrative review.”).
For example, in 1957, the American Civil Liberties Union board of directors adopted a national policy statement that sodomy statutes were constitutional.\(^9\) Compounding the absence of organized legal advocacy organizations was the dearth of individual attorneys willing to represent gay clients. While gay attorneys would seem a natural fit for gay clients, openly gay attorneys could not practice law in many jurisdictions.\(^10\)

Gay men and lesbians began initiating litigation after the Stonewall riots of 1969 in Greenwich Village.\(^11\) Emboldened by the Stonewall rebellion, gay activists formed the radical Gay Liberation Front, which later spun-off the more formal and structured Gay Activists Alliance.\(^12\) These gay rights groups were in a much better position to advocate for gay rights, including holding demonstrations against anti-gay laws,\(^13\) lobbying politicians,\(^14\) and going to court.\(^15\)

Represented by effective advocates in the 1970s and 1980s, gay Americans in greater numbers began to fight successfully for employment,\(^16\) for custody of their children,\(^17\) and for their rights.\(^18\) Perhaps

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\(^10\) See, e.g., Florida Bar v. Kay, 232 So. 2d 378, 379 (Fla. 1970); see also State ex rel. Florida Bar v. Kimball, 96 So. 2d 825, 825 (Fla. 1957) (citing Florida’s sodomy law to disbar attorney); In re Boyd, 307 P.2d 625, 625 (Cal. 1957) (citing moral turpitude law to disbar attorney).

\(^11\) CLENDENIN & NAGOURNEY, supra note 4, at 12.

\(^12\) Id. at 50. Before these organizations, no group dared use the word “gay” in its title. Id. at 31.

\(^13\) Id. at 38.

\(^14\) Id. at 51.


the brightest spot in this era was the litigation brought by gay student organizations against major public universities across the country. Of course, advocates of equal rights for gay Americans suffered many defeats, the most significant being the Supreme Court's condemnation of homosexuals as criminals in *Bowers v. Hardwick*. Nevertheless, commentators perceive a judicial trend toward endorsing gay rights.

Largely due to the success of these legal challenges in the 1970s and 1980s, procedural rules became more important. When civil rights attorneys could clear the procedural hurdles, substantive victory was possible. Conversely, failure to navigate the procedural minefield had the same immediate practical effect as a complete loss on the merits: the anti-gay law remained enforceable.

Although the judicial system is traveling in the correct direction, it is still a long distance from the destination of truly even-handed treatment of gay litigants. While it is impossible to provide a comprehensive analysis of the relationship between gay people and the American court system, several observations appear correct. In the post-WWII era, procedural rules bore little significance because gay people were generally reluctant to acknowledge their sexual orientation in court and demand equal treatment. Historically, few gay Americans would initiate civil rights litigation. In the civil rights era following the Stonewall riots, however, gay people became willing to come forward and plead their cases.

Greater use of courts by gay Americans, and the corresponding expansion and improvement in substantive law that defined the legal rights of gay men and lesbians, increased the importance of access to courts and

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*See* CLENDINEN & NAGOURNEY, supra note 4, at 15-16.
therefore those courts' procedural rules regarding such access. If opponents of treating gay Americans with respect and humanity were able to manipulate procedural rules, the effect could resemble the openly hostile court system that had deterred gay people from going to court at all (in the post-war era) or the lack of favorable substantive law (in the early civil rights era). Like all litigants, attorneys advocating gay civil rights require a level playing field with rules that are known and evenly applied. Yet, as the following case study suggests, courts may not be applying procedural rules uniformly and appear to manipulate them in a manner that denies gay Americans equal access to justice.

II. A CASE STUDY IN PROCEDURAL HURDLES:
TEXAS SODOMY LAW LITIGATION

A case study of litigation challenging the constitutionality of the Texas sodomy law illustrates the role of procedural rules in hampering legal efforts to achieve greater equality for gay Americans. Both components of the case study's subject—sodomy laws and Texas—are good candidates for analysis. Sodomy laws continue to represent the archetypal anti-gay law. Although sodomy laws originally proscribed all anal intercourse—homosexual or heterosexual—current sodomy laws are either explicitly limited to same-sex conduct or are commonly interpreted to criminalize only homosexual activity.24 Along with religious dogma, sodomy laws are a major cause of homophobia and discrimination against gay Americans.25

The Texas sodomy law, in particular, makes an appropriate case study for several reasons. Texas has a long history of interpreting, adjudicating, and enforcing its sodomy law. In many instances, the decisions of Texas courts have significantly influenced how other state courts interpret their own state's sodomy statutes. Courts in Texas—both state and federal—have probably published more opinions regarding the constitutionality of sodomy laws than courts in any other state. Finally, more judges in Texas have held that the state sodomy law is unconstitutional than in any other state, and yet, through the manipulation of procedural rules, the law still remains valid and enforceable throughout most of the state.

To appreciate how the various legal challenges to the Texas sodomy law proceeded requires understanding the organization of the Texas court

25 See id. at 122-68.
system. The Texas judicial structure maintains two separate courts of last resort: the Texas Supreme Court and the Texas Court of Criminal Appeals. The Texas Supreme Court represents the highest court for civil matters and operates similarly to most state supreme courts. However, in contrast to most other states, Texas maintains a separate court of last resort on criminal matters, the Texas Court of Criminal Appeals. The Texas Supreme Court cannot overrule the decisions of the Court of Criminal Appeals. Either court could, in theory, invalidate the Texas sodomy law as unconstitutional.

In addition to these two state courts, Texas hosts four federal judicial districts. These federal district courts possess the authority to invalidate the Texas sodomy law if the statute contravenes the federal constitution. On appeal, either the Fifth Circuit or the Supreme Court could invalidate the Texas sodomy law as violative of the U.S. Constitution.

In sum, Texas is home to several distinct courts with the authority to adjudicate the constitutionality of prohibitions against private sodomy between consenting adults. In theory, this means that opponents of the Texas sodomy law have three bites at the apple, three different courts of last resort, any one of which could enjoin its enforcement. In practice, the invocation of procedural rules has thwarted most attempts to challenge the statute’s constitutionality.

A. The Early Evolution of the Texas Sodomy Law

The State of Texas enacted its first sodomy law in 1860. Article 342 of the Texas Penal Code provided: “Whoever commits with mankind or beast the abominable and detestable crime against nature shall be confined in the penitentiary for not less than five nor more than fifteen years.” This statute applied to sodomy between a man and a woman—whether married to each other or not—as well as to homosexuals.

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27 Id. (“[N]o other court of this state has authority to overrule or circumvent [the Court of Criminal Appeals’] decisions, or disobey its mandates.”).
28 See infra notes 205-06 and accompanying text.
31 See Baker, 553 F. Supp. at 1148. Texas courts noted that women were included within the term “mankind” as that word was used within the sodomy statute. Lewis v. State, 35 S.W. 372, 372 (Tex. Crim. App. 1896).
However, the penal code neglected to define any of the provision's terms. This led to litigation in the late 1800s, as Texas courts—like most state courts in jurisdictions with ambiguous sodomy statutes—attempted to flesh out the precise parameters of the "crime against nature." Because the 1860 Texas legislature did not provide statutory definitions, Texas courts turned to the common law. In an early opinion in the area, the Texas Court of Criminal Appeals held that the common law crime of sodomy did not include oral copulation. This opinion influenced other state courts to interpret the common law similarly.

Two minor revisions of the Penal Code failed to clarify the statute's reach. Between 1893 and 1896, Texas authorities revised its Penal Code and renumbered the sodomy law as Article 364. But still the legislature declined to define the prohibition's key terms. In 1925, the Texas legislature again reformed the Penal Code. Under the 1925 revision, the sodomy prohibition was recodified as Article 524, but its text remained unchanged.

While conceding that the Texas sodomy statute did not cover oral sodomy, some Texas judges urged that "legislation should be enacted covering these unnatural crimes." Several other state legislatures had

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33 William Eskridge calls Prindle the "leading case." William N. Eskridge, Jr., Hardwick and Historiography, 1999 U. ILL. L. REV. 631, 657-58 (noting other state courts following Prindle in interpreting their own sodomy laws).
36 See Pruett v. State, 463 S.W.2d 191, 195 (Tex. Crim. App. 1971). However, along with several other sexual prohibitions, the sodomy law was apparently omitted from the enrolled bill that contained the Revised Penal Code of 1925. See id. at n.9. Judges considered the omission inadvertent and the laws still valid. See Ex parte Copeland, 91 S.W.2d 700, 702 (1936) ("To impute to the Legislature the intent to repeal the statutes defining incest, bigamy, seduction, adultery, and fornication is today at its door the charge of ignoring the moral sense of the people of this state and striking down some of the strongest safeguards of the home. That such was not the legislative intent is apparent from the enrolled bill."). Thus, the sodomy prohibition remained the law. See Baker v. Wade, 553 F. Supp. 1121, 1148 n.1 (N.D. Tex. 1982).
37 Harvey v. State, 115 S.W. 1193, 1193 (Tex. 1909). While wanting the statute to include oral sex, the court reported the mere subject of sodomy taboo and considered "[t]he charge . . . too horrible to contemplate and too revolting to
already amended their "crime against nature" statutes to include oral sodomy.\(^\text{38}\) Some Texas courts noted with dismay that the Texas legislature had repeatedly re-enacted the Texas sodomy law without amendment to cover the additional act.\(^\text{39}\) This effectively prevented state judges from punishing the "vile and detestable ... act" of oral sodomy.\(^\text{40}\) So long as oral sodomy fell outside the common-law meaning of "sodomy," judges could not vote their morality.

Finally, responding to numerous opinions that restricted the definition of sodomy to anal intercourse, the 1943 Texas legislature significantly amended its sodomy law to include oral sex.\(^\text{41}\) The new statute provided:

> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be deemed guilty of a felony, and shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.\(^\text{42}\)

With the 1943 amendment of Article 524, "the offense of sodomy was for the first time fully defined by statute."\(^\text{43}\) Unconstrained by the common law definition, Texas courts interpreted Article 524 broadly.\(^\text{44}\)

**B. Constitutional Attacks Against Texas's Gender-Neutral Sodomy Law**

Because the new sodomy law still applied to married couples as well as to unmarried heterosexual and homosexual couples, Article 524 discuss." Id.

\(^{38}\) See Eskridge, supra note 33, at 658.


\(^{40}\) Id.

\(^{41}\) See Furstonburg v. State, 190 S.W.2d 362 (1945).


\(^{43}\) Slusser v. State, 232 S.W.2d 727, 729 (Tex. Crim. App. 1950). In addition to more clearly articulating the elements of criminal sodomy, the new statute also reduced the minimum prison sentence from five to two years.

represented a gender-neutral statute. Thus, everyone in Texas who engaged in oral sex was committing a felony. In practice, however, private, consensual sodomy was functionally immune from prosecution due to the difficulty of detecting such conduct. Texas police departments primarily enforced the law in cases of public sodomy (where the police could observe the conduct without running afoul of the Fourth Amendment) and forcible sodomy (where a complaining witness could testify against the defendant regardless of where the sodomy took place). Although the possibility of prosecution remained remote, many Texans who engaged in private sodomy believed Article 524 to be unconstitutional and sought an opportunity to make their case in court. In most cases, the invocation of procedural rules protected the statute from invalidation.

1. Buchanan v. Batchelor

In the first major challenge to Article 524's constitutionality, federal procedural rules rescued the law from defeat. Although the Texas legislature enacted its expanded sodomy law in 1943, not until the late 1960s did a gay man launch a major challenge to the law's constitutionality.45 This was consistent with the nationwide reticence of gay men and lesbians to appear in court.46

Alvin Buchanan initiated the modern era of constitutional challenges to the Texas sodomy statute after Dallas police had arrested him on two separate occasions for engaging in sodomy with another adult male in public restrooms.47 After he was charged with the crime of sodomy, Buchanan sought relief from the federal courts. He requested that a three-judge court be designated in the Northern District of Texas for the purposes of declaring Article 524 unconstitutional and enjoining the state's prosecution of him under the statute.48

Once designated, the three-judge panel granted leave for three additional individuals to intervene in pursuit of a permanent injunction against enforcement of Article 524.49 Michael and Jannet Gibson were a

46 See COMSTOCK, supra note 2, at 13.
47 Buchanan, 308 F. Supp. at 730. For the circumstances of each arrest, see infra notes 92-101 and accompanying text (discussing Buchanan arrests in greater detail).
48 Buchanan, 308 F. Supp. at 730.
49 Id.
married couple who argued that Buchanan would not adequately represent the privacy rights of married people who, like the Gibsons, engaged in private sodomy and feared prosecution under the law. Similarly, Travis Lee Strickland, a gay man, intervened because, he argued, Buchanan—who was twice arrested for what was arguably public sodomy—did not represent the interests of gay men, like Strickland, who engaged only in private sodomy. The participation of the intervenors seemed prudent in light of the standing issues. Because Buchanan had been arrested for public sodomy, his case presented a “serious question” as to whether he had standing to assert the constitutional rights of married couples and individuals who engaged only in private sodomy. The court considered the arrival of the Gibsons and Strickland to solve all standing problems, thus allowing the court to evaluate the merits of the constitutional argument.

After analyzing *Griswold*, its progeny, relevant analogous case law, and the Model Penal Code, the three-judge panel declared Article 524 unconstitutionally overbroad because it reached “the private, consensual acts of married couples.” As a result, although the court did not hold that the federal right to privacy applied to same-sex sodomy, the judges nonetheless declared the Texas sodomy law void on its face and therefore made the law unenforceable against gay couples as well. The court permanently enjoined the Dallas district attorney from enforcing Article 524.

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50 For discussion of the public versus private nature of Buchanan’s conduct, see infra notes 92-101 and accompanying text.
51 Buchanan, 308 F. Supp. at 731.
52 Id. Before addressing the substantive merits of the legal arguments against the Texas sodomy law, the court also addressed the defendants’ comity argument against federal intervention. The Buchanan panel declined to abstain from deciding the issue of Article 524’s constitutionality until Texas courts were afforded an opportunity to construe the statute and to adjudicate its constitutionality. The federal judges so held for two reasons:
   first, because there is no prospect of the immediate availability of a state forum where the questions raised here could be litigated which is particularly significant given the operation of an alleged overbroad statute on First Amendment rights . . . , and, second, because there exists in Article 524 no question of statutory interpretation for which the courts of this State would be of assistance in resolving.

Id. (citations omitted).
53 Id. at 735.
54 Id. at 736.
Result: The Texas sodomy law appears to be unenforceable, at least in Dallas.\footnote{The result is only apparent because a procedural maneuver later eliminated the victory. See infra notes 75-81. The district attorney appealed the decision to the United States Supreme Court.}

2. Pruett v. State

While Buchanan was winding its way through the federal courts, Johnnie Pruett launched his own attack in state court against the Texas sodomy law.\footnote{Pruett v. State, 463 S.W.2d 191 (Tex. Crim. App. 1971).} Pruett, an eighteen-year old, confessed to committing forcible sodomy against another male student.\footnote{Id. at 192.} Pruett pled nolo contendere, but upon conviction argued that Article 524 was unconstitutionally overbroad because it outlawed private sodomy between a consenting husband and wife.\footnote{Id. at 193.}

The judges of the Texas Court of Criminal Appeals first suggested that enforcement against married couples acting in private raised no problems as a matter of practice. If the sodomy were private, the court reasoned, then no witness could testify against the couple.\footnote{Id.} Furthermore, if the sodomy were truly consensual, then neither spouse could testify against the other pursuant to evidentiary privilege.\footnote{Id.} Based upon these practical limitations on successful prosecution, the judges seemed little surprised “that no case had been found where a husband or wife was convicted for the offense of sodomy for a private consensual act between the spouses.”\footnote{Id. at 194.} Indeed, because the likelihood of a conviction was “no more than ‘conceivable,’ ”\footnote{See id. at 192-93.} the constitutional issues seemed largely academic to the panel.

Despite the court’s logic that Article 524 could hardly affect the rights of married couples, the Texas judges still had to wrestle with the holding of a federal opinion that had just invalidated the law and had enjoined the Dallas district attorney from enforcing it.\footnote{Id. at 192-93.} The Texas court solved the problem by declining to follow Buchanan for four asserted reasons: the decision in Buchanan was not final,\footnote{Id. at 194.} state courts “are not bound by rulings
of lower federal courts on Federal Constitutional questions;65 "[t]he question of whether the sodomy statute may be invoked against married couples for private consensual acts has never been presented to this court in an appeal from such a conviction";66 and, finally, Griswold does not apply to sodomy statutes.67 Ignoring Buchanan's analysis on privacy rights, the court concluded that Article 524 was constitutional.68 The court claimed to distinguish Griswold because, while the Griswold Court found a birth control statute to be "offensive," the judges in Pruett found the act of sodomy to be "offensive."69 (How this constitutes a legal distinction sufficient to justify limiting an individual's constitutional right to privacy is never explained.) More importantly, the court seemed to employ a balancing test, whereby the court's desire to maintain the state sodomy statute was weighed against the low probability that the sodomy statute would interfere with consensual conduct in the marital bed. The court opined:

To extend the protection of this right of privacy to destroy the sodomy statute, when successful prosecution of private consensual acts of sodomy are at most only "conceivable" is not, in our view, consistent with the description of the marriage relationships and the right of privacy described by Mr. Justice Douglas [in Griswold].70

Despite its reference to Griswold, the court engaged in absolutely no discussion about the origins, contours, or purposes of constitutional privacy rights.

The court affirmed Pruett's conviction.71 However, the ultimate holding initially appeared to be more limited than a blanket endorsement of the statute's constitutionality. In later reviewing Pruett's sentence,72 the court

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65 Id.
66 Id.
67 Id. at 194-95.
68 Id.
69 Id. at 195.
70 Id.
71 Id. at 197.
72 Having lost his appeal, Johnnie Pruett came before the Court of Criminal Appeals again concerning his sentencing. Vance v. Clawson, 465 S.W.2d 164 (Tex. Crim. App. 1971). Pruett had been sentenced to confinement for two years, but the trial judge had credited Pruett for time served in custody before sentencing and had allowed for "good time" credit. Representing the state, the district attorney sued the trial judge to obtain a Writ of Prohibition from the Court of Criminal
noted: "Pruett's conviction was affirmed on appeal, with this court upholding the constitutionality of Article 524 as to forcible sodomy despite the holding in Buchanan v. Batchelor that such statute was 'void on its face for unconstitutional overbreadth [sic].' The court itself thus seemed to suggest that its Pruett holding did not evaluate Article 524 as applied to private, consensual sodomy. Subsequent decisions, though, ignored the court's language that appeared to limit Pruett's holding to instances of forcible sodomy."

Result: A three-judge federal court has held that the Texas sodomy law on its face violates the U.S. Constitution. A state appellate court has upheld the law "as [applied] to forcible sodomy." Article 524's constitutionality is in doubt. The law is unenforceable in Dallas pursuant to a federal injunction. The law appears enforceable elsewhere, at least in some circumstances.

3. Wade v. Buchanan

Direct appeal of Buchanan's case was still pending before the Supreme Court when the Texas state court issued its opinion in Pruett. Henry Wade—the Dallas District Attorney whom the Buchanan panel had enjoined from enforcing Article 524—had appealed the panel's decision. On appeal, the Supreme Court vacated the panel's opinion and remanded the case for reconsideration in light of the Younger abstention doctrine. The Younger abstention doctrine "provides that federal equitable relief is generally unavailable against pending state criminal prosecutions except in

Appeals. While affirming the pre-sentence custody credit, the appellate court ordered the judge to set aside the "good time" credit. Id. at 169.

In response to Pruett's petition for a writ of habeas corpus, the federal district judge held that Pruett was entitled to good time credit. On appeal, the Fifth Circuit upheld the district court's decision and chastised the Texas Court of Criminal Appeals for shooting "wide of the mark." Pruett v. State, 468 F.2d 51, 53 (5th Cir. 1972), aff'd en banc, 470 F.2d 1182 (5th Cir. 1973). Holding that the Texas court had violated Pruett's constitutional rights to due process and equal protection, the Fifth Circuit ordered that Pruett be released. Id. at 54.

73 Vance, 465 S.W.2d at 166 (emphasis added) (citations omitted).


narrowly defined and unusual circumstances." Younger abstention did not exist when the three-judge panel decided Buchanan over a year before Younger. In short, the Supreme Court had created a new procedural barrier and applied it against Buchanan, thus depriving him of a favorable substantive ruling.

At least one federal judge has strongly questioned the Court's invocation of Younger in disposing of the appeal in Buchanan. The Younger abstention doctrine counsels federal courts not to enjoin pending state criminal prosecutions, unless extraordinary circumstances are present. While the state had initiated a prosecution against Buchanan, this federal suit provided the only meaningful opportunity for married couples (like the Gibsons) and gay men who engaged only in private sodomy (like Strickland) to challenge the sodomy law's constitutionality. The three-judge panel in Buchanan had specifically noted the absence of criminal prosecutions against private, consensual sodomy. Although Buchanan could make constitutional arguments at his trial, neither the Gibsons nor Strickland could intervene in the defendant's criminal trial. Thus, with the opinion vacated, the Gibsons and Strickland had no forum in which to assert their federal constitutional rights.

Despite the fact that the United States Supreme Court vacated Buchanan on procedural grounds—and did not discuss the legal merits of the three-judge panel's decision to invalidate the Texas sodomy law—the Court's move seemed to strip the lower court's opinion of even its persuasive authority in Texas. After the Court vacated the panel decision, Texas state courts disregarded the original panel's opinion in Buchanan.

Result: Although a federal court held Article 524 unconstitutional on the merits, a new procedural rule scuttles the opinion's binding and persuasive authority. Given the vacatur of Buchanan and the state court's
ill-reasoned opinion in Pruett, the Texas sodomy law is enforceable throughout the state.

4. Dawson v. Vance

The Supreme Court’s vacatur order prevented Buchanan from pursuing his constitutional argument in federal court until after his case had finished winding its way through the state court system. Meanwhile, James Dawson had pursued a path similar to Alvin Buchanan’s. After being arrested for sodomy, Dawson requested the designation of a three-judge federal panel to evaluate Article 524’s constitutionality. A three-judge panel was convened, then dismissed. As in Buchanan, a married heterosexual couple (who only engaged in private, consensual sodomy) intervened to represent the privacy rights of similarly situated Texans. Here the similarities between Buchanan and Dawson end.

As this judge heard the plaintiffs’ claims after the Supreme Court’s decision in Wade v. Buchanan, he refused to fully entertain the substantive legal arguments of Dawson and the intervenors. The court disposed of the case on procedural grounds. Given the advent of Younger abstention and the Supreme Court’s remand in Buchanan, the judge dismissed the case on Younger grounds and, for extra measure, also denied standing.

Result: Article 524 is enforceable, in part, because procedural rules have prevented any federal challenge to the Texas sodomy law.

5. Pruett and the Supreme Court

Johnnie Pruett played by the new rules of Younger. He waited for the state court system to pronounce his guilt and sentence him. He then

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82 Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971). Dawson allegedly committed sodomy with a minor. Id. at 1322. As such, his conduct was clearly not constitutionally protected; he would have to rely on an overbreadth argument.

83 This three-judge panel was in the Southern District of Texas, while the Buchanan panel sat in Texas’s Northern District.


85 Dawson, 329 F. Supp. at 1321.

86 Id.

87 The judge dismissed the case on Younger grounds, then went ahead and published (without alteration) the opinion that he had written several months before the Supreme Court had announced the Younger doctrine and vacated the Buchanan opinion. Dawson, 329 F. Supp. at 1322. Given the dismissal based on Younger, the entire remaining opinion appears to be dicta.
appealed his conviction and challenged the constitutionality of Article 524 in federal court. Although he argued that the sodomy law violated the federal constitutional right to privacy—the precise argument that the three-judge federal panel articulated when it enjoined the Dallas district attorney from enforcing Article 524—the Supreme Court refused to evaluate the law's constitutionality. Despite the fact that Pruett's argument was based on the federal Constitution, the Supreme Court dismissed the case "for want of a substantial federal question." This seems surprising given that just the year before a three-judge federal panel had held this same law unconstitutional.

Result: Unchanged. After forbidding federal courts from evaluating the constitutionality of Article 524 before a criminal case has been fully prosecuted in the appropriate state courts, the Supreme Court three weeks later refuses to consider the constitutionality of that same law (although it initially granted certiorari) even after the state courts have convicted and sentenced the defendant under that statute.

6. Buchanan: Back to the State Courts

His initial federal victory vacated by the Supreme Court, Alvin Buchanan found himself back before the Texas courts. By the time that the Texas Court of Criminal Appeals weighed in, Buchanan had been convicted of two separate counts of sodomy, both in public restrooms, one in a local park and one in a Sears store. The lower court had sentenced Buchanan to two five-year terms of imprisonment, to run concurrently. Noting the Supreme Court's vacatur of Buchanan's federal litigation, the Texas Court of Criminal Appeals rejected Buchanan's constitutional attack on the Texas sodomy law. The court ignored the federal district court's opinion in Buchanan v. Batchelor, which had enjoined enforcement of Article 524 after thoroughly analyzing the doctrine of constitutional

92 Id. at 403.
93 Id.
94 Id.
privacy and had been reversed purely on procedural grounds. Instead, the court engaged in no discussion of constitutional privacy, but merely cited _Pruett_, which itself presented a cursory (three-sentence) discussion on constitutional privacy. Furthermore, the court ignored the fact that Pruett's sodomy was forcible, whereas Buchanan had engaged in consensual sodomy.

However, the court treated Buchanan's two episodes of sodomy quite differently. Having failed to persuade the court that the statute itself violated his constitutional right to privacy, Buchanan argued that the evidence used to convict him had been obtained in violation of his Fourth Amendment privacy rights. Because the restroom stalls in Sears were equipped with individual doors, the police observed Buchanan's activities from a "concealed position above the men's restroom." Police used the same method of clandestine surveillance in the park restroom, but the court found a critical distinction: the stalls there did not have doors. Because the restroom stall at Sears had a door that locked from the inside, the court concluded that Buchanan had a reasonable expectation of privacy. Therefore, the evidence for that sodomy charge had been illegally obtained; the conviction was reversed and remanded. In contrast, because the commode stalls at the park had no such doors, Buchanan had no reasonable expectation of privacy. Thus, this conviction was affirmed and Buchanan was still sentenced to a five-year term of imprisonment.

The rote allegiance of the Court of Criminal Appeals to _Pruett_ became the court's modus operandi for handling constitutional attacks against the Texas sodomy law. Subsequent cases essentially refused to entertain arguments regarding the constitutionality of Article 524, dismissing such arguments based on the authority of _Pruett_ without any discussion.

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95 Id. at 403.
96 Id. at 404.
97 Id.
98 Id.
99 Id.
100 Id.; see State v. Brown, 929 S.W.2d 588 (Tex. App. 1996); cf. State v. Limberhand, 788 P.2d 857 (Id. App. 1990) (discussing Fourth Amendment distinctions based on restroom stall design). Although invoking privacy-related rights, the court decided the case on Fourth Amendment grounds. The court did not recognize any constitutional right to privacy apart from the Fourth Amendment prohibition against unreasonable searches. See Cammack v. State, 641 S.W.2d 906, 909 (Tex. Crim. App. 1982) ("The court decided Buchanan on Fourth Amendment grounds.").
101 Buchanan, 471 S.W.2d at 404.
Although a three-judge federal panel had held the law unconstitutional and enjoined the state’s prosecution of Alvin Buchanan, through a procedural rule Buchanan lost the protection of that substantive holding. Instead, the state court summarily rejected Buchanan’s claim that his private, consensual sodomy was constitutionally protected.\(^{103}\)

Now that he was convicted and sentenced to several years in a Texas prison, Buchanan appealed to the federal courts for relief. Yet when he did, the Supreme Court denied certiorari and refused to hear his argument.\(^{104}\) A denial of certiorari in and of itself is not particularly suspicious; the Court denies most applications for certiorari. However, given the history of his case, the Court’s action appears disingenuous and, arguably, hypocritical. Despite the fact that Buchanan had convinced a three-judge federal panel of Article 524’s unconstitutionality, the Supreme Court vacated that decision based on a newly-created procedural rule that did not exist when Buchanan achieved his victory in the lower court. The Supreme Court told Buchanan that he had to go through the entire process of state court trial and appellate proceedings before the federal courts would consider his constitutional attack against Article 524. Yet, after making Alvin Buchanan defend himself against the criminal charges and face sentencing, the Court then denied Buchanan the opportunity to make his (previously successful) constitutional argument to a federal court.

**Result:** Unchanged. Procedural rules prevent challenge to Texas sodomy law in federal court.

C. **Texas’s Transition From a Gender-Neutral to a Gender-Specific Sodomy Law**

1. **New Penal Code**

Beginning in 1965, Texas initiated a major overhaul of its entire Penal Code.\(^{105}\) In 1967, the State Bar appointed the Texas State Bar Committee

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\(^{103}\) The court essentially defined the Sears sodomy as private. Buchanan, 471 S.W.2d at 404.


on the Revision of the Penal Code ("the Committee") to draft a new Penal Code, which the State Bar could then recommend to the Legislature.106 Dean Page Keeton of the University of Texas School of Law presided over the Committee comprised of judges, district attorneys, and criminal defense attorneys.107 The Committee evaluated and debated the proposals of its large staff of attorneys, academics, and law students.

On June 21, 1968, the Committee considered the staff's Report on Sexual Offenses, as well as a proposed Chapter on Sexual Offenses.108 The preliminary draft did not criminalize the private, non-commercial, sexual conduct of consenting adults, whether homosexual or heterosexual.109 Several Committee members took umbrage at the proposal to legalize private same-sex sodomy. One Committee member argued that Texas police officers wanted private homosexual sodomy to constitute criminal conduct because "the act itself is so destructive of moral fiber and so insidious."110

On a five-to-four vote of the Committee members present, the Committee rejected the proposal to decriminalize the private, sexual relations of gay Texans. The driving force behind the Committee's decision to continue to criminalize private, same-sex conduct was the Committee members' strongly-held belief that, if they legalized such activity, the Legislature would reject the entire proposed Penal Code.111 The Committee also voted to retain the criminalization of private, consensual same-sex sodomy in order to drive gay Texans from the public sphere.112 Committee members feared that if the adult gay subculture were visible, then homosexuality could become more acceptable and younger people might not be sufficiently deterred from engaging in same-sex conduct.113 So, the Committee decided to decriminalize only opposite-sex sodomy and to make same-sex sodomy a gross misdemeanor.114 Over the next two years, the

106 Id.
107 For more on the role and composition of the Committee's staff, see id. at 29-30. Complete list of membership is in Page Keeton, Revision of the Penal Code, 33 Tex. B.J. 511, 512 (1970).
108 Beitel, supra note 105, at 24.
109 Id. at 25; see Page Keeton, Preliminary Draft: Revision of the Texas Penal Code, Report on Sexual Offenses, Draft 2 (June 7, 1968).
110 Beitel, supra note 105, at 30 (quoting C. Glenn Conner).
111 Id. at 48-49.
112 Id. at 44-45.
113 Id. at 49.
114 Carol Vance proposed that private same-sex sodomy between consenting adults be a gross misdemeanor. Id. at 31 (citing Texas State Bar Committee on Revision of the Penal Code at 31). Vance had served as the named appellant in the
staff continued in vain to attempt to convince the Committee that the new Penal Code should stay out of Texas bedrooms.

In October of 1970, the Committee published its first Proposed Revision of the Texas Penal Code, which punished same-sex sodomy in section 21.06. The proposed code classified same-sex sodomy as a Class A misdemeanor, punishable by a maximum fine of $1000 and a maximum jail term of one year.115 Despite the apparent satisfaction of the Texas District and County Attorneys Association with the first proposed section 21.06, the 1972 Proposed Revision of the Penal Code made section 21.06 a Class B misdemeanor, which reduced the maximum sentence to six months.

In 1973, the Texas Legislature debated the proposed changes to the penal code, including section 21.06. Although some legislators favored decriminalizing private, consensual same-sex sodomy, many legislators feared that such a move could undo the entire reform effort and condemn the new Penal Code to defeat.116 However, the Subcommittee on Criminal Matters of the Senate Jurisprudence Committee further reduced section 21.06 to a Class C misdemeanor, which eliminated jail time and limited the maximum fine to $200. Section 21.06 was entitled “Homosexual Conduct” and provided: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” Section 21.01 defined “deviate sexual intercourse” as “any contact between any part of the genitals of one person and the mouth or anus of another person.” The Texas Legislature enacted the new Penal Code in 1973. Its provisions became effective on January 1, 1974.117

For heterosexual Texans who engage in sodomy, the new Penal Code represented a complete victory. By omitting any language that would punish such acts, the code decriminalized all private, non-commercial sex between consenting heterosexual adults.

For gay Texans, the penal reform did not appear on its face to represent a significant setback over the old Code. The criminality of specific same-

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115 Beitel, supra note 105, at 31.
116 Id. at 33-34. It is amazing that the hatred of some legislators towards gay Texans runs so deep that these law-makers would sabotage a comprehensive eight-year criminal law reform effort just to make sure that private, sexual conduct remained criminal for gay people (but no longer for heterosexuals).
sex acts did not change under section 21.06. What was illegal under Article 524 was still illegal under section 21.06. But the ultimate outcome was a mixed bag and, arguably, a setback for most gay Texans. On the positive side, the maximum imprisonment for consensual sodomy was decreased from a term of imprisonment up to fifteen years to no jail time at all. As a result, during the transition period from Article 524 to section 21.06, some criminal defendants unsuccessfully tried to have crimes committed under the old Code punished under the new Code. But the change in punishment did little to affect the average gay Texan. Most sexually-active gay Texans engage solely in private, sexual activity with another consenting adult. Reducing the punishment for sodomy convictions was largely irrelevant because, as the Prueitt court observed, it was extremely unlikely that a person would be arrested and convicted for engaging in private, consensual sodomy. With the diminished punishment for sodomy, any defendant accused of forcible or public sodomy would be prosecuted under different penal code sections that provided for jail time and steeper fines.

The net effect of the new law was decidedly negative for gay men and lesbians in Texas. While the reduction of private sodomy from felony to misdemeanor status had little practical effect for most gay Texans, the new law embodied a substantially different tenor than Article 524. Coupled with the decriminalization of heterosexual sodomy, the new Texas sodomy law became a specifically anti-gay criminal law. Entitled “Homosexual Conduct,” section 21.06 represented an explicit indictment of gay sexuality and only gay sexuality.

This set up gay Texans for discrimination based on their presumed conduct. Texas authorities used the new sodomy law against all gay men and lesbians within their jurisdiction, not just against those individuals who

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118 See Donoho v. State, 643 S.W.2d 698, 700 (Tex. Crim. App. 1982) (“Though defined in simpler terms today the offense has remained substantively the same since the Court began to construe the 1943 amendment.”).

119 However, years later, the Texas legislature amended section 21.06 to prohibit “the penetration of the genitals or the anus of another with an object.” See Baker, 553 F. Supp. at 1151.


121 The vast majority of reported sodomy convictions in Texas involved either public conduct or forcible sodomy.

122 Thus, for the incident of “public sodomy,” Alvin Buchanan would have been prosecuted under section 21.07, not 21.06.
were caught, arrested, prosecuted, and convicted for engaging in same-sex sodomy. For example, Texas police departments used the sodomy law to deny employment opportunities to all gay job applicants.\textsuperscript{123} It should come as no surprise that Texas police departments invoked section 21.06 to justify discrimination against gay Texans. This was the intent of some Committee members who drafted the new Penal Code and held "the basic view that [gay men and lesbians] would either not be hired, or would be hired only so long as they effectively hid their sexual orientation."\textsuperscript{124}

Courts, too, applied section 21.06 in contexts unrelated to traditional criminal prosecutions. For example, courts have used the sodomy law to revoke probations.\textsuperscript{125} Texas courts use section 21.06 to preclude gay defendants from arguing the promiscuity defense to charges of sexual abuse where heterosexual defendants are allowed to advance such a defense.\textsuperscript{126} By criminalizing same-sex conduct, section 21.06 also meant that (incorrectly) calling someone gay constituted slander in Texas.\textsuperscript{127} Immigration officials and federal courts relied on section 21.06 to justify deporting otherwise law-abiding gay immigrants.\textsuperscript{128} In sum, Texas courts noted that if a man is a homosexual, he "is also a criminal" under § 21.06 of the Texas Penal Code.\textsuperscript{129}

Section 21.06 ultimately stigmatizes and injures gay Texans in myriad ways unrelated to criminal enforcement of the law.\textsuperscript{130} Texas legislators have cited the sodomy law as justification for cutting AIDS-related funding to "gay-identified" organizations.\textsuperscript{131} Legislators also invoked section 21.06 to


\textsuperscript{124} Beitel, supra note 105, at 45.


\textsuperscript{127} See, e.g., Head v. Newton, 596 S.W.2d 209, 210 (Tex. App. 1980); see also Buck v. Savage, 323 S.W.2d 363, 369 (Tex. Civ. App. 1959) (calling someone gay is "slanderous per se because [it] impute[s] to appellee the commission of the crime of sodomy").

\textsuperscript{128} See In re Petition for Naturalization of Richard John Longstaff, 538 F. Supp. 589, 592 (N.D. Tex. 1982).


\textsuperscript{130} See Leslie, supra note 24.

\textsuperscript{131} See Michael H. Garbarino, Homosexuality and Texas Law: An Analysis of Texas v. Morales and its Implications, 1 TEX. F. ON CIV. LIB. & CIV. RTS. 50, 51 n.7 (1994).
justify excluding gay Texans from protection under the state’s hate crimes statute. The Texas Republican Party relied on section 21.06 to deny the Log Cabin Republicans, a gay Republican organization, a booth at the party’s state convention. Texas social workers invoked the state’s sodomy law in an attempt to prevent gay couples from serving as foster parents. Texas educators are instructed to teach Texas schoolchildren that homosexual conduct is criminal.

The elimination of imprisonment for sodomy convictions failed to mitigate any of these new enforcement mechanisms. Although housed in the Penal Code, section 21.06 did not serve as a traditional criminal law; rather section 21.06 was intended to—and did—serve as an off-the-shelf mechanism to discriminate against gay Texans. Section 21.06 converted all gay men and lesbians into de facto criminals. Given the serious injuries facilitated by the law, access to the courts to challenge the statute’s constitutionality became critical.

The legal arguments against section 21.06 would necessarily differ from those launched against the prior sodomy prohibition. In Buchanan, Pruett, and Dawson the criminal defendants attacked the Texas sodomy law as unconstitutionally overbroad. Each defendant (and, in Buchanan and


\[133\] See PEOPLE FOR THE AM. WAY FOUND., HOSTILE CLIMATE 101 (1997).


\[135\] TEx. HEALT H & SAFETY CODE ANN. § 163.002(8) (Vernon 1992) (stating that sex education materials should emphasize “in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense”). See John A. Russ IV, Note, Creating a Safe Space for Gay Youth: How the Supreme Court’s Religious Access Cases Can Help Young Gay People Organise at Public Schools, 4 VA. J. SOC. POL’Y & L. 545, 568-69 n.120 (1997) (mocking the absurdity of the Texas statute).

\[136\] Baker v. Wade, 553 F. Supp. 1121, 1126, 1129 (N.D. Tex. 1982). Although some may respond that section 21.06 only proscribes specific acts, sodomy laws conflate status and conduct, punishing the former in the name of the latter. See generally Leslie, supra note 24.
Dawson, the intervenors) essentially argued that the private, consensual conduct of married couples was constitutionally protected and that article 524 reached this conduct. Such overbreadth arguments were inapplicable to section 21.06 because the statute did not proscribe the sexual conduct of married couples, or any other heterosexual couples, no matter how transient the coupling. Accordingly, to challenge section 21.06 gay men and lesbians would have to assert their own privacy rights or argue that the new sodomy law violated their right to equal protection because it treated homosexuals and heterosexuals quite differently. Both positions had appeal. However, the privacy argument appeared stronger.

As the Texas legislature revised statutory law, privacy jurisprudence—within and outside of Texas—was also undergoing significant changes. The constitutional concept of individual privacy was maturing and expanding. The original Buchanan decision had only Griswold to build upon. By the close of the 1970s, federal courts had significantly enlarged the concept of individual privacy. Eisenstadt v. Baird had expanded Griswold beyond the marital bedroom; now unmarried individuals had a constitutional right to privacy that encompassed the right to purchase and use contraceptives. Roe v. Wade and Carey v. Population Services brought the right to obtain an abortion within constitutional privacy guarantees. Similarly, Texas courts had also expanded its citizens’ state constitutional right to privacy. In 1976, the Texas Supreme Court opined that under the Texas Constitution “the State’s intrusion into the individual’s zones of privacy must be carefully limited.”

Although the Supreme Court significantly expanded the federal right to privacy in connection with conduct most often associated with heterosexual activity (e.g., contraception and abortion), the privacy rights of homosexuals did not progress as dramatically. The bleakest spot of 1970s

138 See infra Parts II.D.1-2, 5-6.
139 Sodomy law opponents could also argue that section 21.06 violated the Establishment Clause, but this argument stood little chance of success. See Baker, 553 F. Supp. at 1145-46.
141 Id. at 453-54.
privacy jurisprudence was Doe v. Commonwealth's Attorney.\(^{145}\) In Doe, the plaintiff—who had been neither arrested nor charged with sodomy—brought a declaratory judgment action in federal court to have the Virginia sodomy law declared unconstitutional.\(^{146}\) The three-judge panel held that the statute did not violate the federal constitutional right to privacy.\(^{147}\) The Supreme Court summarily affirmed.\(^{148}\) Although the Court articulated no reasoning and—by definition—was silent as to the basis for its summary affirmation, Doe would complicate subsequent attempts in Texas to challenge section 21.06's constitutionality.\(^{149}\)

D. Constitutional Attacks Against Texas's Gender-Specific Sodomy Statute

After the Texas legislature restricted the state's sodomy prohibition to same-sex conduct, the Texas courts made it substantially more difficult for Texans to challenge the constitutionality of the state's sodomy law. Protecting the sodomy law from constitutional attack was primarily achieved through the invocation—and, in some cases, misuse—of procedural rules.\(^{150}\)

1. Childers v. Dallas Police Department

Steven Childers sought a position as storeroom keeper for the Dallas Police Department.\(^{151}\) Although Childers had received high test scores on


\(^{146}\) Doe, 403 F. Supp. at 1200.

\(^{147}\) Id.

\(^{148}\) Doe, 425 U.S. at 901.

\(^{149}\) See, e.g., Cyr v. Walls, 439 F. Supp. 697, 701-02 (N.D. Tex. 1977) (stating in dictum that "[t]here can be no doubt that such state sodomy and homosexuality laws [like section 21.06] are constitutional") (citing Doe). See infra notes 157, 204.

\(^{150}\) Even pre-reform defendants had difficulty challenging the Texas sodomy law in some cases. In Taylor v. State, 482 S.W.2d 246 (Tex. Crim. App. 1972), Alvin Ray Taylor pled guilty to sodomy and was on probation. While on probation, he was caught shoplifting. When the state sought to revoke Taylor's probation, he argued that the sodomy law that he had originally been convicted of violating was unconstitutional. The court denied Taylor the power to make the argument because an "appellant may not rely upon errors which allegedly occurred at his original trial on an appeal from his revocation of probation." Id. at 247.

the Department’s aptitude exam and had earned positive evaluations, the interviewing sergeant denied Childers the position. Department regulations precluded the hiring of criminals. In response to questions during the interview, Childers admitted that he was gay. The sergeant “based his decision on the fact that Childers was telling him that he was an habitual lawbreaker.” In federal court, Childers challenged the Department’s discriminatory employment policy on both First Amendment and due process grounds and the constitutionality of section 21.06. Even though the Department predicated its decision not to hire Childers on section 21.06, the federal court invoked the procedural rules of standing to deny Childers the ability to make his constitutional argument. As a result of procedural rules, Childers was denied his full day in court.

Further, discussing the merits in dicta, the judge stated that “[w]ithout an authoritative Supreme Court holding to the contrary, the Supreme Court ruling in Doe, though summary, is binding on this Court.” This assertion is flawed on several levels. First, the year after Doe, the Court itself noted that it had “not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults.” Second, the summary affirmance in Doe was not binding with respect to substantive privacy rights because the Court’s affirmance might have been based on standing. At a minimum, an open question clearly remained about whether the decision in Doe was based on standing, given the huge number of challenges to sodomy laws that courts refuse to hear based on standing.

152 See id.
153 Id.
154 Id. at 144.
155 See id. at 138 (quoting the language of the court).
156 Id. at 138, 143.
157 Id. at 146 (citing Hicks v. Miranda, 422 U.S. 332, 344-45 (1975)).
158 Carey v. Population Servs., 431 U.S. 678, 694 n.17 (1977); see Baker v. Wade, 553 F. Supp. 1121, 1138 (N.D. Tex. 1982) (explaining how this statement reflected the opinion of six Justices that the summary affirmance in Doe did not resolve the constitutionality of state sodomy laws), rev’d, 769 F.2d 289 (5th Cir. 1985) (en banc); cf. Childers, 513 F. Supp. at 146 (incorrectly asserting that the operative Carey language was only voiced by a plurality of justices).
160 See Leslie, supra note 80.
Indeed, five years later, even the Supreme Court in *Bowers* did not rely on *Doe* as precedent.\(^{161}\)

**Result:** Procedural rule precludes attack on the Texas sodomy law's constitutionality.

2. **Baker v. Wade**

Because the Texas sodomy law facilitated stigmatization, discrimination, and violence against gay men and lesbians, Donald Baker initiated litigation in federal district court against local law enforcement authorities to prevent them from enforcing the statute.\(^{162}\) Baker sought a declaratory judgment that section 21.06 violated three constitutional provisions: privacy guarantees, the Equal Protection Clause, and the Establishment Clause.\(^{163}\) The State of Texas intervened in the suit.\(^{164}\) After the state's intervention, the court—pursuant to Baker's request—certified a defendant class of all district, county, and city attorneys in Texas who had responsibility for enforcing section 21.06.\(^{165}\)

Judge Buchmeyer took evidence from Baker and his expert witnesses, a psychiatrist and a sociologist.\(^{166}\) The judge evaluated the nature of homosexuality: he noted the fact that homosexuality was not a disorder and that the American Anthropological Association, American Psychological Association, and American Bar Association had all adopted resolutions supporting the repeal of state sodomy laws.\(^{167}\) The judge found that sodomy laws did not affect the incidence of homosexuality, but did injure homosexuals. The evidence at trial convinced Judge Buchmeyer that—even if unenforced via criminal prosecution—section 21.06

result[s] in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals—fear of arrest, loss of jobs, discovery, etc.—can cause severe mental health problems. Homosexuals, as

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\(^{161}\) *Bowers v. Hardwick*, 478 U.S. 186, 189 n.4 (1986) ("Petitioner also submits that the Court of Appeals erred in holding that the District Court was not obligated to follow our summary affirmance in *Doe*. We need not resolve this dispute, for we prefer to give plenary consideration to the merits of this case rather than rely on our earlier action in *Doe*.").

\(^{162}\) See *Baker*, 553 F. Supp. at 1121.

\(^{163}\) *Id.* at 1125.

\(^{164}\) *Id.*

\(^{165}\) *Id.*

\(^{166}\) *Id.* at 1129.

\(^{167}\) *Id.* at 1129-30.
criminals, are often alienated from society and institutions, particularly law enforcement officials. They do suffer discrimination in housing, employment and other areas.\textsuperscript{168}

These injuries were sufficient both to confer standing on Baker to challenge the law and to undermine the state’s assertions of the statute’s necessity.\textsuperscript{169}

After thoroughly analyzing the relevant case law, the origins of the federal right to privacy, and all of the expert testimony presented, Judge Buchmeyer found that section 21.06 was not supported by any "compelling state interest"\textsuperscript{170} and held that the law violated Baker’s constitutional right to privacy.\textsuperscript{171}

Addressing Baker’s equal protection claim, Judge Buchmeyer first observed that section 21.06 discriminated between homosexual and heterosexual sodomy.\textsuperscript{172} Under the rational basis test, the state had to show that “the discrimination between heterosexuals and homosexuals bears ‘some rational relationship to legitimate state purposes.’”\textsuperscript{173} The Dallas District Attorney conceded that he knew of no rational basis for the classification.\textsuperscript{174} The court declined to determine whether Baker was entitled to an intermediate level of review because section 21.06 failed even the (traditionally weak) rational basis test.\textsuperscript{175}

Judge Buchmeyer rejected Baker’s establishment of religion argument against section 21.06.\textsuperscript{176} Nevertheless, the \textit{Baker} court held that section 21.06 violated the U.S. Constitution because it infringed the fundamental right to privacy and the right to equal protection of gay Texans.\textsuperscript{177}

After Judge Buchmeyer issued his opinion, Danny Hill, the district attorney for Potter County, filed a notice of appeal from the district court’s invalidation of the Texas sodomy law.\textsuperscript{178} Soon thereafter, the Texas

\textsuperscript{168} \textit{Id.} at 1130.
\textsuperscript{169} \textit{Id.} at 1147-48.
\textsuperscript{170} \textit{Id.} at 1143. Indeed, the court found that the law was “not even rationally related to any legitimate state interest.” \textit{Id.} Neither the Dallas District Attorney nor the City Attorney could come up with any state interest furthered by the sodomy law. \textit{Id.} at 1132-33, 1142.
\textsuperscript{171} \textit{Id.} at 1143.
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.} (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Silva v. Vowell, 621 F.2d 640, 647 (5th Cir. 1980)).
\textsuperscript{174} \textit{Id.} at 1144.
\textsuperscript{176} \textit{Baker}, 553 F. Supp. at 1145-46.
\textsuperscript{177} See supra notes 170-75 and accompanying text.
\textsuperscript{178} Baker v. Wade, 743 F.2d 236, 239 (5th Cir. 1984), \textit{rev’d on reh’g}, 769 F.2d 289 (5th Cir. 1985) (en banc).
Attorney General filed a notice of appeal. However, before the Fifth Circuit took any action, the Texas Attorney General withdrew his notice. A Fifth Circuit panel held that Hill, who was neither a named party nor a class representative, could not intervene and prosecute the appeal.

**Apparent Result:** The federal court enjoined all Texas prosecutors from enforcing section 21.06. The Texas Attorney General—and the class representatives—had decided not to appeal. That should have meant the end of the Texas sodomy law. But the manipulation of procedural rules would again spare section 21.06.

3. **Baker v. Wade (Fifth Circuit en banc)**

Despite the Texas Attorney General’s explicit decision to drop the case, the Fifth Circuit granted Danny Hill a rehearing en banc. Hill tried unsuccessfully to have the Texas Supreme Court issue a writ of mandamus to the Attorney General to force him to appeal the lower court’s invalidation of section 21.06. That having failed, Hill next went to the district court to intervene in the litigation and substitute himself as the class representative. Both the district court and the Fifth Circuit panel rejected Hill’s persistent attempts to continue the litigation.

At this point, an en banc Fifth Circuit engaged in a series of procedural machinations. First, a sharply divided en banc court allowed an appeal of a district court opinion to proceed even though no party to the suit had an appeal pending. Because Hill was not a party to the case when he filed his notice of appeal, Hill had no right to appeal. Second, the court manipulated the procedural rules of intervention. The Fifth Circuit had never permitted a party to “intervene” at the appellate level when there was no appeal pending by the original parties who

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179 *Id.*
180 *Id.*
181 *Id.* at 244.
182 Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc).
183 *Id.* at 291.
184 *Id.* Hill also moved to set aside the final judgment and to reopen the evidence. *Id.* at 294 (Goldberg, J., dissenting).
185 See Baker v. Wade, 743 F.2d 236 (5th Cir. 1984), rev’d on reh’g, 769 F.2d 289 (5th Cir. 1985) (en banc).
186 See *supra* notes 180 and accompanying text.
187 Baker, 769 F.2d at 293.
188 The majority acknowledged that the trial court should decide the issue of intervention and the appellate court should only come in afterwards to review the district court’s decision. *Id.* at 292. Nevertheless, after the district court had specifically found that Hill failed to satisfy both the legal and factual requisite for
litigated the case in the district court. Yet Hill was allowed to intervene although the losing party had consciously abandoned its appeal. Even in cases with an appeal pending, the Fifth Circuit had never allowed a non-party to intervene on appeal if that non-party had been aware of the action in the district court and had failed to intervene in the lower court. Although the previous Potter County District Attorney had been advised of the opportunity to intervene in the litigation, he declined to intervene. Hence, Hill sought to intervene in a case that was effectively over. Perhaps even more unorthodox and surprising was the Fifth Circuit's decision to allow Hill's intervention in his own appeal even though he had no such right. Hill's actions, in other words, amounted to an improper intervention into an invalid appeal. Danny Hill was not a named defendant, not a class representative, and had not tried to intervene until after the case was over.

Finally, independent of the irregularities of allowing intervention given the case's posture, the Fifth Circuit manipulated the procedural rules by allowing Hill to intervene when he did not meet the basic requirements for intervention. Hill had no personal interest in the litigation. The State of Texas was the real party in interest because the case involved the constitutionality of its statute. That should have been the end of the matter, especially considering that the state would ultimately pay many of the costs associated with the appeal. As the dissent explained:

When both the State's Attorney General and the class representatives have decided that it is not in the state's interests to appeal, it is not the province of any one of the 1085 district, county, and city attorneys of the State to do so on the a priori basis that all others are out of step and that he alone knows the state's true interest.

intervention, the Fifth Circuit allowed Hill to directly intervene at the appellate level in complete contravention of the established procedural rules. Id. at 295 (Rubin, J., dissenting). "A federal court of appeals takes no evidence, creates no record, and decides no factual issues in the first instance. It is a court of review."
Ultimately, a newly conservative Fifth Circuit was so "[d]etermined to uphold the constitutionality of a Texas statute whatever obstacles bar the way, [that] the majority opinion trample[d] every procedural rule it consider[ed]." Examining the body of federal court challenges to the Texas sodomy law, procedural rules seemed to be interpreted to disadvantage gay litigants. The federal courts had interpreted procedural rules strictly to keep gay litigants out of court, but interpreted procedural rules broadly in Baker in an effort to allow anyone willing to come forward an opportunity to eliminate a ruling that benefited gay Americans. The Baker dissent noted the highly suspicious nature of the court's ruling: "If this en banc decision is precedent, it assuredly rewrites the adjective law. If it is not intended to be precedential, but only a special life-support contrivance, undertaken for the one purpose of salvaging the [Texas sodomy] statute, it denies equal justice both to the litigants before us and to those who, in the future, will be denied equally extreme judicial measures."

In the end, the Fifth Circuit's procedural maneuvers served only one purpose: to insure that openly gay Texans would not be treated the same as heterosexuals. There is little alternative to this interpretation given that under the direction of the intervenors, the Baker "appeal and post trial motions were characterized by vicious, bigoted and fraudulent attacks against gay people, reminiscent of the racebaiting of earlier times." Given the aggressively anti-gay tone of all of Hill's papers on appeal, it is all the more suspicious that the appellate court would distort the procedural rules in such an unprecedented manner to allow him to be heard.

198 Thomas J. Coleman, Jr., Disordered Liberty: Judicial Restrictions on the Rights to Privacy and Equality in Bowers v. Hardwick and Baker v. Wade, 12 THURGOOD MARSHALL L. REV. 81, 101 (1986) ("By the time the case was argued before the entire court, its composition had changed considerably due to the appointment of six 'conservative activist' judges by President Reagan, at least one of which had engaged in homophobic political activity prior to her appointment.").
199 Baker, 769 F.2d at 293 (Rubin, J., dissenting).
201 Baker, 769 F.2d at 293 (Rubin, J., dissenting).
202 Ironically, before the Fifth Circuit's rejection of privacy rights for gay citizens, the Circuit had received national attention for its decisions protecting the constitutional rights of disfavored groups. See Harvey Couch, A Brief History of the Fifth Circuit Court of Appeals, 56 TUL. L. REV. 948, 956 (1982).
After engaging in these procedural gymnastics, the court reversed the district court's opinion and held the Texas sodomy law to be constitutional.\textsuperscript{204}

Result: Although section 21.06 appears to be invalidated once and for all, the Fifth Circuit resurrects the fallen law by bastardizing procedural rules.

4. Bowers v. Hardwick

Indirectly, \textit{Bowers v. Hardwick} represented yet another challenge to the Texas sodomy law.\textsuperscript{205} Just as the Supreme Court's decision in the Texas-originated case of \textit{Roe v. Wade} invalidated abortion statutes outside of Texas, if the Supreme Court had decided \textit{Bowers} differently, the decision would have invalidated all sodomy statutes, including Texas's.\textsuperscript{206} But, instead of reading the federal constitutional right to privacy to include private, consensual same-sex conduct, the Court pulled the Constitution beyond the reach of gay Americans.

In addition to a devastating defeat on the substantive legal issues, \textit{Bowers} also demonstrated the importance of procedural rules in litigation affecting gay rights. Although the Georgia sodomy law condemned all consensual sodomy, heterosexual and homosexual, the \textit{Bowers} majority limited the constitutional inquiry solely to same-sex sodomy.\textsuperscript{207} The Court upheld the Georgia statute based largely on historical animus toward homosexuality.\textsuperscript{208} The \textit{Bowers} majority mocked the notion of a fundamental

\textsuperscript{204} \textit{Baker}, 769 F.2d at 293 (Rubin, J., dissenting) ("The court's judicial sponsorship of Danny Hill as spokesman for the State of Texas is not only unprecedented but ill-advised.").

The majority also made a critical mistake with respect to substantive law in its deference to the Supreme Court’s summary affirmance in \textit{Doe v. Commonwealth's Attorney}, which it stated was “controlling authority” on the constitutionality of sodomy laws. \textit{Id.} at 292. The majority discussed no case law because it considered \textit{Doe} to be binding upon" the court. \textit{Id.} The majority asserted that there could "be no question but that the decision of the Supreme Court in \textit{Doe} was on the merits of the case, not on the standing of the plaintiffs to bring the suit." \textit{Id.} at 292. In fact, the Court's summary affirmance of \textit{Doe} may well have been based on the Court's interpretation of the rules of standing. See supra notes 158-61 and accompanying text.

\textsuperscript{205} \textit{Bowers} v. Hardwick, 478 U.S. 186 (1986).

\textsuperscript{206} Of course, prohibitions against forcible sodomy, public sodomy, sodomy with a minor, and commercial sodomy would still have remained valid.

\textsuperscript{207} \textit{Bowers}, 478 U.S. at 190-91.

\textsuperscript{208} \textit{Id.} at 191-96. The Court's reading of the historical record is flawed on many counts. See generally Anne B. Goldstein, \textit{History, Homosexuality, and Political Values: Searching for the Hidden Determinants} of \textit{Bowers v. Hardwick}, 97 YALE
right to commit homosexual sodomy. The Court was able to frame the legal question as limited to "homosexual sodomy" because a married heterosexual couple (the Does)—who had sought to intervene and challenge the sodomy law as infringing upon their constitutional privacy rights—was denied entry into the case based on procedural standing rules. If the Does had overcome the procedural hurdle of standing, their participation would have necessarily changed the entire tenor of the opinion.

Finding the federal constitutional privacy argument foreclosed by Bowers, opponents of section 21.06 adopted a legal strategy based on the Texas Constitution. Fortunately, after the defeats in the federal cases of Childers and Baker, Texas privacy jurisprudence expanded in the 1980s. Most importantly, the Texas Supreme Court found a right to privacy embedded within the Texas Constitution. This provided hope that civil rights advocates could convince Texas courts that section 21.06 violated the Texas state constitutional right to privacy.

**Result:** Section 21.06 is insulated from federal privacy arguments. The focus shifts to state courts and the Texas Constitution.

5. State v. Morales (Appellate)

The early 1990s witnessed two apparently successful challenges to the constitutionality of the Texas sodomy law based on the Texas Constitution.

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L.J. 1073, 1074-75 (1988); Eskridge, supra note 33, at 635-36.


210 See Leslie, supra note 80, at 65 n.189.

211 Although the Court’s decision in Bowers would appear to make the discussion about the procedural monkeyshines in Baker purely academic, if the Fifth Circuit had not “trample[d] every procedural rule,” Baker v. Wade, 769 F.2d 289, 293 (5th Cir. 1985) (Rubin, J., dissenting), in its result-driven scramble to maintain the Texas sodomy law, the district court opinion in Baker v. Wade would have survived Bowers v. Hardwick. Bowers merely held that the federal constitutional right to privacy did not invalidate state sodomy prohibitions as applied to same-sex conduct. Bowers, 478 U.S. at 190. While this would have overruled the privacy portion of the opinion, Judge Buchmeyer also invalidated section 21.06 on equal protection grounds. Baker v. Wade, 553 F. Supp. 1121, 1144 (N.D. Tex. 1982). Bowers would not have affected this part of the opinion and the injunction against enforcement would have remained fully in place.

212 See infra Part II.D.5-6.

213 Texas State Employees Union v. Texas Dep’t of Mental Health & Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987).
But in both cases, procedural machinations prevented these decisions from actually invalidating the law.

In the state capital of Austin, a group of gay and lesbian civil rights advocates ("the Morales plaintiffs") sought a declaratory judgment that section 21.06 violated state constitutional guarantees of due process, equal protection, and privacy. The Morales plaintiffs sued the state directly. Following the defeat of federal privacy rights arguments delivered by Bowers, the activists relied exclusively on the Texas Constitution.

The Morales plaintiffs achieved two clear victories before the Texas courts. The trial court held section 21.06 unconstitutional and enjoined the state from enforcing the statute. On appeal, the state led with procedural arguments and concluded with a substantive defense of the sodomy law. Procedurally, the state argued that courts in a civil action did not possess jurisdiction to evaluate the constitutionality of penal code sections. The appeals court rejected the argument and invoked the "well-recognized exception [allowing review] . . . when the criminal statute is unconstitutional and its enforcement will cause irreparable injury to vested property rights." The court found that the injuries inflicted by the sodomy laws—including stigmatization, sanction of hate crimes, and encouragement of discrimination against gay men and lesbians in employment, housing, and other areas—constituted actual harm to gay Texans, including the Morales plaintiffs. Despite the actual harm inflicted by the Texas sodomy law, the state argued that an equity court could not enjoin enforcement of a criminal statute. The court rejected this argument because of the inadequate remedy at law given the state's refusal, or inability, to enforce the law through criminal prosecutions. In short, the

215 Id.
216 Id.
217 Id. at 202-03.
218 Id. at 202.
219 Id. (citations omitted).
220 Id. at 203.
221 Id.
222 Id.

Thus, appellees are confronted with this dilemma: They suffer actual harm from the existence of § 21.06, harm that the State acknowledges, yet they are unable to attack the statute's constitutionality because of the State's apparent refusal to enforce the statute. Appellees, therefore, claim that they lack an adequate remedy at law. We agree.
state allocated most of its energy to the erection of procedural obstacles in the path of civil rights advocates by asserting that gay Texans cannot argue that an explicitly anti-gay law is unconstitutional and that judges did not have authority to hear the advocates' claims or to act upon them.

After the civil rights advocates cleared all of the procedural hurdles, the Austin appeals court reached the merits of the constitutional argument. The state argued that Texas constitutional protections were identical to federal constitutional rights. As such, according to the state, the Supreme Court's decision in *Bowers v. Hardwick* disposed of the activists' claims. But the appellate court noted that the Texas Constitution protected privacy rights more broadly than did the U.S. Constitution. In evaluating the reach of Texas's constitutional privacy protections, the court concluded that it could "think of nothing more fundamentally private and deserving of protection than sexual behavior between consenting adults in private." The court then explained that the Texas sodomy statute did not further any compelling governmental objective. With that, the appellate court declared section 21.06 unconstitutional and affirmed the district court's decision to enjoin the state from enforcing it.

*Result:* Section 21.06 appears dead.

6. City of Dallas v. England

Meanwhile, about 200 miles north of the state capital, another Texan initiated her own battle against the Texas law. The Dallas Police Department, with its policy implicitly validated by *Childers*, continued to discriminate against gay job applicants. As presumptive criminals, gay Texans were forbidden to work in criminal law enforcement. Thus, when Mica England, a lesbian, applied for employment with the Department and

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Id.

223 Id.
224 Id. at 203-04.
225 Id. at 204.
226 Id.
227 Id. at 204-05. The sole objective advanced by the state was the protection of "public morality." The appellate court methodically explained why this rationale was insufficient. Id. at 205.
228 Id.
230 See supra Part II.D.1.
231 England, 846 S.W.2d at 958.
answered truthfully when asked about her sexual orientation, the Department considered her a criminal and refused to hire her, regardless of her qualifications and aptitude.\textsuperscript{232}

England sued the City of Dallas, its police chief, and the State of Texas, claiming that the Department’s employment policy was predicated upon an unconstitutional statute: Section 21.06. She sued to have the statute declared unconstitutional and for injunctive relief to prevent the statute’s enforcement.\textsuperscript{233}

The trial court held section 21.06 unconstitutional and enjoined the City of Dallas and its police chief from enforcing the law.\textsuperscript{234} On appeal, the law enforcement officials argued, as the defendants in Morales had, that the court lacked jurisdiction to rule on the constitutionality of a criminal statute. The court rejected this argument, as well as the appellants’ qualified-immunity defense. Reaching the merits, the appellate court relied upon Morales and held section 21.06 unconstitutional.\textsuperscript{235}

\textit{Result:} Two Texas appellate courts have ruled section 21.06 unconstitutional. The statute appears unenforceable.

7. \textit{State v. Morales (Texas Supreme Court)}

At the close of 1993, the legal landscape looked promising for gay Texans. Two separate state appellate court opinions had held that section 21.06 violated the state constitutional right to privacy. The state’s primary anti-gay edict—a major source of discrimination—appeared dead. But, celebration proved premature. Procedural sleights of hand—in Morales and England—eliminated the thrust of both legal victories.

The state appealed the Morales decision and argued that the plaintiffs did not have standing to make the legal argument that section 21.06 was unconstitutional. In a five-to-four vote, the Texas Supreme Court reversed the lower court opinion on procedural grounds.\textsuperscript{236} The Court opined

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\textsuperscript{232} \textit{Id.}
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\textsuperscript{233} \textit{Id.} Although she had initially sued for damages and attorneys’ fees as well, the trial court considered these inappropriate for summary judgment and it severed these issues and assigned them a new cause number. \textit{Id.} at 958-59. Thus, the litigation discussed in this Article concerns only the suit for injunctive relief.
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\textsuperscript{234} The trial court dismissed the state as a party to England’s lawsuit. \textit{Id.} at 958.
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\textsuperscript{235} \textit{Id.} Although both the Morales and England decisions were issued by the appellate court based in Austin, each panel had three different judges, for a total of six appellate judges concluding that section 21.06 violated the Texas Constitution.
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\textsuperscript{236} State v. Morales, 869 S.W.2d 941 (Tex. 1994).
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that when acting as a court of equity it had no jurisdiction to evaluate the constitutionality of a criminal statute unless the plaintiffs could show an irreparable injury to a recognized property right. The majority then reprimanded the plaintiffs for failing to create a record of discrimination predicated on section 21.06. Yet the Court neglected to note that that part of the record was not developed because "[t]he State [had] stipulated that plaintiffs’ job choices are limited, that they face discrimination in housing, family, and criminal justice matters, and that they suffer psychological harm to their relationships because they are labeled criminals by the very existence of the statute." The majority ignored the stipulated facts in the case, and then punished the plaintiffs for not having evidence of these in the record. The facts were in the record; they were stipulated.

The Texas Supreme Court’s reversal in Morales magnified the suspicion of many observers that the Texas courts were manipulating procedural rules to reach their desired result. Two facts fueled this suspicion. First, the Texas Supreme Court refused to give the plaintiffs even the opportunity to amend their complaint or pleadings to show direct injury. The Court instead remanded with instructions to the appellate court to remand the case to the district court with instructions to dismiss the entire case for lack of jurisdiction.

Second, Texas Supreme Court justices are elected in statewide elections for a six-year term of office. The elections are staggered so that every even-numbered year, three justices are up for re-election. Of the three justices facing re-election in 1994, just months after the Morales decision came down, two voted to reverse the appellate court and one to affirm. That was the margin of victory that protected the Texas sodomy law from defeat.

After five years of litigation, two hard-fought victories, and immeasurable consumption of the civil rights community’s scarce resources, the Morales litigation ultimately resolved nothing. At the end of the race, the Texas Supreme Court set up a procedural hurdle—one that the appellees

237 Id. at 942.

238 Id. at 953-54 (Gammage, J., dissenting) (footnote omitted) (emphasis in original).

239 See Garbarino, supra note 131, at 53 (noting that some individuals consider the Morales opinion to be “‘dishonest’ and politically motivated”).

240 Morales, 869 S.W.2d at 949.

had cleared twice before in the same litigation—to prevent them from successfully pursuing their appeal.

8. England Revisited: 
Procedural Machinations Make Success Illusory and Fleeting

Even with the Court of Appeals’s Morales decision reversed, the England decision remained. But the legal effect of England was not as clear as gay advocates had initially believed. The England case solved the standing problems that the Texas high court created in Morales. England clearly had suffered employment discrimination because of section 21.06—an infringement of a property right adequate to create jurisdiction. However, although the England court had held the Texas sodomy statute unconstitutional, its decision did not prevent the State from enforcing that statute because of a critical procedural maneuver: the trial court had dismissed the state as a party, allowing the suit to proceed against the city and its police chief.242 England perfected an appeal to keep the state as a party in the suit. The appellate court, however, affirmed the dismissal of the state on sovereign immunity grounds.243 With the state no longer a party, the reach of the case diminished significantly.244

Because of the appeals court’s ruling on the procedural issue, the precedential value of the England opinion is uncertain. First, the Texas Supreme Court’s reversal in Morales on procedural grounds may have undermined England. Although the Morales majority of the Texas Supreme Court stated that it was not addressing the merits of England,245 the England appellate court asserted that it had jurisdiction based on the appellate decision in Morales.246 When the Texas Supreme Court reversed Morales on precisely this ground, it begs the question whether the England court had proper jurisdiction.247 Furthermore, subsequent courts have questioned the continuing viability of England.248 Even the Dallas Police

242 England, 846 S.W.2d at 960.
243 Id.
244 In contrast, Donald Baker brought suit against all city, county, and district attorneys in their official capacities. See Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982), rev’d, 769 F.2d 289 (5th Cir. 1985).
245 Morales, 869 S.W.2d at 942 n.5.
246 England, 846 S.W.2d at 958.
247 See Garbarino, supra note 131, at 52 (describing England as controversial because “it relied in part upon precedent which was later dismissed”).
Department has apparently ignored the court's decision, choosing instead to "retain the . . . ban on hiring gays and lesbians."¹²⁴⁹

*England* may also illustrate how Texas courts invoke procedural rules to avoid ruling on controversial issues, such as the sodomy statute. If England's case had wound its way to the high court, then the Texas justices would have had to reach the merits of the constitutional arguments. The court could not duck the constitutional issue as it did in *Morales*. But for procedural rules, England could have forced the Texas Supreme Court to show its hand. Although the City of Dallas applied for a writ of error, the Texas Supreme Court declined to hear the case, again invoking a procedural hurdle. The *Morales* majority noted that the City of Dallas had not filed a motion for rehearing with the court of appeals and that this oversight was sufficient to prevent the state supreme court from exercising jurisdiction over the case.²⁵⁰ As a result of this combination of procedural rulings, the *England* decision was limited to Dallas, and the Texas Supreme Court never had to evaluate the constitutionality of section 21.06.


In *Morales*, the trial court rejected the State's sovereign immunity argument.²⁵¹ On appeal, the State waived its jurisdictional argument and relied on its standing argument.²⁵² In contrast, the trial judge in *England* accepted the state's immunity argument.²⁵³ In *England*, the state knew not to waive the sovereign immunity argument because it could not make the standing argument (which eventually prevailed in *Morales*). The entire basis of the standing argument was undermined in *England*. In *Morales*, the State relied on the argument that none of these plaintiffs had suffered adverse job consequences as a result of the Texas sodomy law despite the fact that the State had already stipulated to the injuries inflicted by sodomy laws.²⁵⁴ The State's argument did not apply to Mica England, who had clearly been denied a job opportunity.²⁵⁵


²⁵⁰ *Morales*, 869 S.W.2d at 942 n.5.

²⁵¹ See *England*, 846 S.W.2d at 960.


²⁵³ *England*, 846 S.W.2d at 960.

²⁵⁴ See supra notes 236-38.

²⁵⁵ *England*, 846 S.W.2d at 958.
Although it would have been more prudent for England's attorney to sue the Texas Attorney General in his capacity as law enforcer, the attorney had reason to believe that he could sue the state directly. The trial judge in Morales had so held, and the State had essentially waived its sovereign immunity in Morales by not pursuing the issue on appeal. Furthermore, the State had affirmatively intervened in the Baker challenge to section 21.06.

In the end, these cases illustrate the same overriding theme: procedural rules have become critical in gay rights litigation. Both cases present strong gay plaintiffs who have initiated civil rights litigation and have persuaded Texas state judges that the Texas sodomy law violates the state constitutional right to privacy. Neither case was reversed on the merits. Yet, neither case prevented the state from continuing to enforce its sodomy law and from using section 21.06 to justify discrimination against gay Texans in myriad ways.

E. Lessons from the Lone Star State

Gay rights advocates have been unable to get a full and fair hearing on the constitutionality of the Texas sodomy law in either the Texas court system or in the federal courts. The primary stumbling block has not been inadequate substantive law but the manipulation of procedural rules. While each individual procedural ruling may be defensible, taken as a whole, a clear pattern emerges: courts appear to use procedural rules to protect the sodomy statute. Texas courts have myriad procedural rules that prevent litigants from challenging the constitutionality of the Texas sodomy law.

To insulate the Texas sodomy law from attack, courts—both federal and state—have 1) invoked the Younger abstention doctrine; 2) applied standing law to forbid sodomy law opponents from challenging the law; 3) refused to hear appeals of those convicted under the law; 4) allowed non-parties to appeal decisions against the sodomy law; and 5) violated procedural rules regarding intervention. It appears that courts have lowered procedural hurdles for sodomy law proponents and raised them for sodomy law opponents.

Examining all of the Texas cases together, a clear pattern emerges: the invocation of procedural rules has undermined every judicial decision to invalidate the Texas sodomy law as unconstitutional. In Buchanan, a three-judge panel held that the Texas sodomy law violated the U.S. Constitution.

256 Morales, 826 S.W.2d at 202.
257 Baker, 553 F. Supp. at 1125.
The Supreme Court vacated that decision based on the newly articulated procedural rule of *Younger* abstention. Over a decade later, the federal district court in *Baker* held a full trial and issued a comprehensive opinion invalidating section 21.06 and enjoining its enforcement. A new conservative appeals’ court majority manipulated a series of procedural rules in order to reverse the lower court’s opinion. In *Morales*, two lower courts invalidated the Texas sodomy law as violating the state constitutional right to privacy and the Texas Supreme Court reversed on procedural grounds. At the same time, another Texas appellate court held section 21.06 unconstitutional but the impact of the opinion was blunted by a procedural decision to dismiss the state as a defendant. Finally, procedural hurdles have prevented other challenges from even getting off the ground.

This pattern lends itself to two interpretations. The strong hypothesis would argue that courts manipulate procedural rules to protect the Texas sodomy law. The Fifth Circuit’s en banc decision in *Baker* presents the best direct evidence of the strong hypothesis. Yet *Buchanan* (where a gay man never received federal review of his conviction after the Supreme Court vacated the decision invalidating the Texas sodomy law) and *Morales* (where the Texas Supreme Court incorrectly applied standing doctrine) represent reasonable supporting evidence of this hypothesis. While each case taken in isolation may be defensible, taken as a whole, they represent strong circumstantial evidence of manipulation.

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258 See supra notes 76-77 and accompanying text.
259 See supra Part II.D.2.
260 "Despite the Fifth Circuit's reversal of [Baker], the district court's opinion stands as one of the best expressions of the argument favoring a broad right to privacy." Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 600 (1986).
261 See supra Parts II.D.5, II.D.7.
262 See supra Parts II.D.3, II.D.8.
264 Furthermore, state attorneys attempt to manipulate factual records in order to take advantage of procedural hurdles. At the trial court level, the defendants argued that *Baker*’s suit “should be dismissed because no one is ever prosecuted under [section 21.06].” *Baker* v. Wade, 553 F. Supp. 1121, 1124 (N.D. Tex. 1982). However, the defendants also stipulated "that cases involving violations of this statute 'have been prosecuted by various assistant city attorneys and assistant district attorneys' in Dallas." *Id.* at 1126 (quoting parties' stipulated facts in final pretrial order). Similarly, the State in *Morales* stipulated that section 21.06 inflicts
The weak hypothesis would point to the pattern found in the challenges to the Texas sodomy law and conclude that procedural barriers represent a significant obstacle to gay citizens being able to use the judicial system to secure their rights. The weak hypothesis would not argue that these decisions are necessarily wrong or even inconsistent with the opinions issued in non-sodomy cases. Rather, these cases only demonstrate the difficulty of challenging the Texas sodomy law. The weak hypothesis may also emphasize the importance of procedural rules given that attempts to repeal section 21.06 have failed miserably. For example, while campaigning to be the Governor of Texas, George W. Bush vowed to veto any legislative attempt to legalize private, consensual same-sex sodomy. Instead of repealing section 21.06, the Texas legislature has expanded the reach of its sodomy law to preclude more types of private, same-sex conduct between consenting adults.

This leaves only one way for gay Texans to get standing to challenge the Texas sodomy law: Texas police must arrest someone for engaging in private, same-sex sodomy with another consenting adult and Texas prosecutors must break their tacit promise not to prosecute such conduct. This is precisely the origin of the most recent challenge to section 21.06, Lawrence v. State. Responding to a report of a “weapons disturbance” at a residence, the police happened upon two men, John Lawrence and Tyron Garner, engaged in oral sex in a private bedroom. When the district attorney prosecuted the men for violating section 21.06, the defendants pleaded nolo contendere and argued that section 21.06 violated the equal protection and privacy guarantees of both the federal and state constitutions. As to equal protection, the defendants contended that the Texas sodomy law unconstitutionally discriminated with respect to sexual orientation and to gender. The Texas appellate court held that—because the penal code treated homosexuals and heterosexuals differently—the statute violated the Texas Equal Rights Amendment. (Having so held, the court declined to reach the defendants’ privacy arguments.) But the victory was short-lived. The Houston appellate court took the case en banc and reversed, rejecting all constitutional attacks against section 21.06.

a wide range of injuries against gay Texans. Morales, 826 S.W.2d at 203. Yet, on appeal, the State argued that the statute was essentially harmless. See Morales, 869 S.W.2d at 943.

265 See Baker, 553 F. Supp. at 1151.
267 See supra note 119.
269 Id. at 350.
Unlike in previous challenges to the Texas sodomy law, this loss does not involve the manipulation of procedural barriers. While this Article focuses on procedural rules rather than substantive law, and does not seek to reargue the merits of the claims, a few brief observations reveal some suspicious reasoning used by the en banc appellate court to uphold the statute.

With respect to the equal protection claims based on sexual orientation, the court reasoned that the Texas sodomy law—which proscribes only same-sex sodomy—makes no classification based on sexual orientation because people "having a predominately heterosexual inclination may sometimes engage in homosexual conduct." While the court's assertion appears disingenuous on its face, it also ignores how the Texas sodomy law is used to condemn gay Texans regardless of their actual conduct. Even if someone with a "predominantly heterosexual inclination" would theoretically be subject to prosecution for committing an occasional act of sexual conduct with a person of the same sex, the sodomy law imposes its primary burdens outside of criminal prosecution on gay people, not on people with "predominantly heterosexual" inclinations.

Having concluded that the Texas sodomy law is facially neutral, the court then held that sexual orientation is not a suspect classification and that "the prohibition of homosexual conduct advances a legitimate state interest and is rationally related thereto, namely, preserving public morals." Indeed, because the legislature could advance a "moral justification" for punishing homosexuality, the court concluded that its "power to review . . . [the] legislative act is extremely limited." The assertion conflicts with the Supreme Court's decision in Romer v. Evans, which struck down a Colorado constitutional amendment that prohibited localities from enacting anti-discrimination measures to protect gay citizens.

Discussing the equal protection claims based on gender, the majority in Lawrence asserted that the Texas sodomy "statute is gender-neutral on

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270 Id. at 353.
271 See Leslie, supra note 24, at 168-77 (discussing how sodomy laws are enforced against homosexual status); see also supra notes 123-35 and accompanying text (discussing how the Texas sodomy law is enforced against gay and lesbian Texans in ways unrelated to actual conduct).
272 Lawrence, 41 S.W.3d at 357.
273 Id. at 355; see also id. at 355 n.16 ("Where a statute does not run afoul of explicit constitutional protections, its moral justification is virtually unreviewable by the judiciary.").
275 See Lawrence, 41 S.W.3d at 376-78 (Anderson, J., dissenting).
its face. Yet section 21.06 is the antithesis of a gender-neutral statute; the law criminalizes oral or anal sex only "with another individual of the same sex." Whether or not fellatio constitutes a criminal act in Texas is solely a function of the gender of the person performing the act. To reject the defendants' claim that section 21.06, as applied, violated their right to equal protection on the basis of gender, the court reasoned that, because the law applied equally to male and female homosexuals, heightened scrutiny was not appropriate. The statute survived rational-basis scrutiny, as it did on the previous equal protection claim. The analysis is clearly at odds with the Supreme Court's holding in *Loving v. Virginia*, where the Court invalidated a state anti-miscegenation law on equal protection grounds. Even though the statute applied equally to white and black individuals. The *Lawrence* majority attempted to distinguish *Loving* by asserting that the Texas sodomy law was not "intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender." The court's supposition belies a fundamental misunderstanding about the role of sodomy laws in perpetuating gender stereotypes. Ultimately, conduct that is legal for women in Texas (i.e., performing fellatio) is criminal for men and yet the state never had to demonstrate how this distinction was "suitably tailored to serve a compelling state interest."

Finally, in rejecting the constitutional privacy arguments, the *Lawrence* majority failed to even mention those decisions that might interfere with its mission of upholding the Texas sodomy law. Thus, in the *Lawrence* opinion neither *Morales* nor *England* exist. While *Morales* was reversed on procedural grounds, *England* is a valid decision of a Texas appellate

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276 *Id.* at 359.
277 See Leslie, *supra* note 24, at 110-12 (discussing the difference between gender-neutral and gender-specific sodomy laws; noting that Texas maintains a gender-specific sodomy law).
278 TEX. PEN. CODE ANN. § 21.06 (Vernon 1994) (emphasis added).
279 See *Lawrence*, 41 S.W.3d at 359 ("To the extent the statute has a disproportionate impact upon homosexual conduct, the statute is supported by a legitimate state interest.").
281 *Lawrence*, 41 S.W.3d at 358.
283 *Lawrence*, 41 S.W.3d at 357 (noting the legal test that would have been applied if the court had applied strict scrutiny, as required by the Texas Equal Rights Amendment).
284 See *supra* notes 236-38 and accompanying text.
court. The en banc court in Houston tried neither to distinguish nor undermine England; it simply ignored it. Looking beyond Texas's borders, the Lawrence court cited favorably the Louisiana Supreme Court's recent decision to uphold that state's sodomy law, but the majority failed to concede that Louisiana is the exception. All other state appellate courts that have addressed the constitutionality of sodomy laws in the post-Bowers era have held that such laws violate state constitutional privacy rights, but the Lawrence majority did not mention these decisions at all.

These observations support the hypothesis that some judges may manipulate the law in order to preserve sodomy statutes. In the cases discussed previously, procedural rules appear to have been manipulated to insulate the Texas sodomy statute from review; in Lawrence, it is substantive law that has arguably been manipulated. But that is an argument for another day.

Lawrence and Garner have appealed their case to the Texas Court of Criminal Appeals. The court has discretion whether to hear the appeal.

Regardless of what happens on appeal, the Lawrence case demonstrates the impact of the procedural manipulations in previous cases. If the Fifth Circuit judges in Baker had not bastardized the procedural rules governing intervention and appeals, then Lawrence and Garner would not have had to endure the humiliation of arrest. If the Texas Supreme Court had not used a weak standing argument to reverse the appellate court's invalidation of the state sodomy law in Morales, Lawrence and Garner would not have been forced to spend a day in jail. If the State had not been dismissed as a party in England (or if the proper parties had been added), then Lawrence and Garner would have been spared the onslaught of publicity about their sex lives and the rigors of litigation.

Even if the Texas Court of Criminal Appeals upholds section 21.06's constitutionality, as a matter of substantive law, the legal battle against that law would continue. For example, federal courts could still invalidate the

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285 See supra Part II.D.8.


289 Of course, if the court strikes down section 21.06, then that should be the end of the story. However, it is possible that a clear victory in the Texas Court of Criminal Appeals could still be undone by legislative action. This is particularly true if the court were to base its decision on equal protection grounds. If section
law as violating federal equal protection guarantees, based on either sexual orientation or gender—arguments that may have new vitality after *Romer*. But procedural rules would remain a critical barrier to overturning the Texas sodomy law. Even powerful substantive legal arguments are irrelevant if procedural barriers prevent civil rights advocates from advancing these arguments in court.

III. THE TEXAS CASE STUDY IS NOT ATYPICAL

The improper and inconsistent invocation of procedural rules to foreclose gay litigants from pursuing their legal rights is not limited to challenges to the Texas sodomy statute. While Texas courts have employed a wide array of procedural rules, other states with sodomy laws have relied primarily on standing doctrine to prevent citizens from attacking the constitutionality of sodomy statutes in court.

By the 1990s, most states had eliminated their sodomy laws. The vast majority did so during legislative overhauls of their state penal codes. Nevertheless, over a dozen states maintain sodomy laws in their criminal codes. As in Texas, these laws are used to facilitate a wide range of discrimination against gay men and lesbians, including in employment, custody decisions, and immigration. While Texas boasts the longest paper trail of legal challenges to its state sodomy laws, most states with sodomy laws have similarly imposed procedural barriers to protect their statutes from constitutional challenge. In the post-*Bowers* era, when state courts reach the merits of privacy arguments against state sodomy laws, they generally strike down the statutes as violating a state constitutional right to privacy. Nonetheless, most state courts in those states with

21.06 is unconstitutional solely on equal protection, the Texas legislature may make statute constitutional by simply amending the law to include heterosexual conduct. In contrast, if section 21.06 unconstitutionally infringes on the privacy rights of Texans, the legislature could not undo the opinion through mere statutory amendment; the Texas Constitution itself would have to be amended, a much more arduous task.


291 See Leslie, * supra* note 80. 292 See, e.g., Powell v. State, 510 S.E.2d 18 (Ga. 1998); Wasson v. Commonwealth, 842 S.W.2d 487 (Ky. 1992); Gryczan v. Montana, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn App. 1996); State v. Morales, 826 S.W.2d 201 (Tex. App. 1993), overruled on jurisdictional grounds, 869 S.W.2d 941, 943 (Tex. 1994). In all of these cases, the state courts found that the relevant state constitution afforded greater protection to privacy rights than the
sodomy statutes have invoked standing doctrine as a procedural barrier to preclude gay rights advocates from arguing that sodomy laws are unconstitutional.

State courts consistently deny standing to challenge sodomy laws unless the litigants before the court were arrested for committing private, non-commercial sodomy with other consenting adults. This creates five requirements to achieve standing: 1) an arrest for sodomy that was 2) private; 3) non-commercial; 4) consensual; and 5) with another adult. If a litigant fails to establish one of these five elements, most state courts will preclude that litigant from arguing that the state sodomy statute constitutes an unconstitutional infringement on individual privacy rights. Although each element may appear reasonable at first glance, many state court judges have employed them in a manner that effectively prevents anyone from challenging the state's sodomy law. Some state courts appear to manipulate these elements to insure that no one has standing to challenge a sodomy law's constitutionality.

This demonstrates how procedural rules can be as important as rules of substantive law in gay rights litigation. A favorable substantive law is of little value if litigants cannot get into court and get a ruling on the merits.

CONCLUSION

Gay Americans have made substantial (though still partial) progress in American courts with respect to the substantive law that protects the rights of gay men and lesbians. This process, however, has increased the importance of procedural rules that regulate access to the courts. Procedural barriers that prevent gay litigants from making their substantial legal arguments have become an albatross around the neck of many gay civil rights litigants. Through procedural rules—unrelated to the substantive arguments about the legal rights of gay men and lesbians—some courts limit the ability of gay rights advocates to make substantive legal arguments that stand a good chance of prevailing. For example, when post- Bowers state courts reach the merits in cases challenging the constitutionality of state sodomy laws, most state courts invalidate the statutes based on a state U.S. Constitution.

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See Recent Decisions, 15 DUQUESNE L. REV. 123, 124 n.4 (1976) ("There has been a lack of litigation on the issue of private adult consensual sexual behavior due to the problem of standing. If an act is truly private, prosecution would be rare or nonexistent. Force accompanying the conduct or public exposure of any kind invalidates a claim that the action is protected by the right of privacy.").
This line of cases striking down sodomy laws makes it more difficult for other state courts to uphold sodomy laws on the merits. Given the strong criticism of *Bowers v. Hardwick* by academics and commentators, as well as the steady stream of state court opinions invalidating sodomy laws on privacy grounds, the least controversial way for a state court to uphold its sodomy statute is to invoke procedural rules that protect the statute from constitutional attack. This case study of legal challenges to the Texas sodomy law suggests that some judges may interpret procedural rules in precisely such a manner. Historically, institutionalized homophobia and weak substantive law deterred most gay Americans from pursuing their rights in court. Now, in many instances, procedural hurdles represent a significant barrier to full equality for gay Americans in our society.
