

A COMPARATIVE ANALYSIS OF *DUDGEON V. UNITED KINGDOM* AND *BOWERS V. HARDWICK*

The United Kingdom and the United States have different laws governing homosexual sodomy. In 1981, the European Court of Human Rights, in *Dudgeon v. United Kingdom*,¹ held that male homosexual sodomy is not a criminal offense,² bringing Northern Ireland's law into conformity with that established in Britain more than 20 years before. Five years later, the United States Supreme Court announced in *Bowers v. Hardwick*³ that homosexuals do not have a fundamental right to engage in sodomy.⁴ The fact patterns of each case are quite similar, as are the arguments presented by counsel, and the societies served by each high court. Essentially, the only difference is the manner in which each court considered the issue of homosexual sodomy. That difference is crucial in determining which high court made the more reasonable decision in handling this issue.

FACTUAL AND JUDICIAL BACKGROUNDS

Dudgeon

Pursuant to the Misuse of Drugs Act of 1971,⁵ police in Northern Ireland executed a search warrant to Dudgeon's house, seizing marijuana, personal papers, correspondence, diaries, and various other items belonging to Dudgeon. The personal papers seized contained descriptions of homosexual activities. Dudgeon was questioned at the police station for four and one-half hours about his sexual life; the police intended to institute proceedings for the offense of "gross indecency between males."⁶ The Director of Public Prosecutions, along with the Attorney General, determined that it would not be in the public interest to bring proceedings against Dudgeon. One year later, Dudgeon's papers with annotations marked over them were returned to him.⁷

¹24 Y.B. Eur. Conv. on Human Rights 444, 4 E.H.R.R. 149 (1981).

²4 E.H.R.R. at 168.

³106 S.Ct. 2841 (1986).

⁴*Id.* at 2846.

⁵Misuse of Drugs Act, (1971 c. 38).

⁶4 E.H.R.R. at 160.

⁷*Id.*

The laws under which Dudgeon was threatened with prosecution were §§ 61 and 62 of the 1861 Offences against the Person Act,⁸ which made committing and attempting to commit sodomy, by two or more males, offenses punishable with maximum sentences of life imprisonment and 10 years' imprisonment, respectively.⁹ With the exception of Northern Ireland, §§ 61 and 62 were repealed throughout the United Kingdom more than 20 years ago.¹⁰

Between 1972 and 1980 no prosecutions were brought under this law that could not have been brought in a court in England or Wales, with the exception of the case at hand.¹¹ The laws in England and Wales only make attempts and acts of sodomy criminal if those acts are directed towards persons who are especially vulnerable, such as persons under 21 years of age or mental patients.¹²

The court in *Dudgeon* based its decision on several premises, including Article 8 of the European Convention on Human Rights,¹³ the intent of the law makers, and whether there is a need for such laws in a democratic society. Dudgeon raised several issues in his complaint, yet sodomy was the only issue addressed. The court left the remaining questions open to be decided by the legislature.

Dudgeon's complaint stated that the existence of criminal statutes relating to private homosexual conduct between consenting males over

⁸Sections 61 and 62 of the Offences Against the Person Act, 1861 [hereinafter cited as OAPA] read as follows:

Section 61: Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be kept in penal servitude for life.

Section 62: Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding ten years.

⁹*Id.*

¹⁰Sections 61 through 63 of OAPA were re-codified by the Sexual Offences Act, 1956, s.51 and Sch.4, 8 H.S.E. 170 (1969), and repealed by the Sexual Offences Act, 1967, in all United Kingdom jurisdictions with the exception of Northern Ireland (4 & 5 Eliz. 2, ch. 69) 36 H.S.E. 215.

¹¹4 E.H.R.R. at 158.

¹²*Id.*

¹³Article 8 of the European Convention on Human Rights [hereinafter cited as Convention] provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

the age of 21, or some lesser age, constituted an interference with his right to respect for his private life in contravention of Article 8.¹⁴ Among the reasons for claiming the sodomy law was an Article 8 breach was that the existing law was unnecessary and created hardship and distress for the substantial minority of persons affected by it.¹⁵

While Dudgeon claimed the law violated § 1 of Article 8, the government defended itself, using the "necessary in a democratic society" and "for the protection of health or morals" language contained in § 2 of Article 8 to justify the statute. The court rejected the government's claim, finding there was no great "necessity" in enforcing the law. The court found a lack of "necessity" in prohibiting private consensual homosexual sodomy for two reasons. First, the majority of the United Kingdom and other member states of the Council of Europe did not have such laws. Second, many people similarly situated with Dudgeon had not been prosecuted under this law. The court found that the failure to prosecute private homosexual conduct between consenting males over the age of 21 made it impossible to find a pressing social need for such prohibitions. Therefore, the court reasoned, laws against private sodomy between consenting adult males are not justifiable as being necessary in a democratic society.¹⁶

The court also looked to the Sexual Offences Act of 1967,¹⁷ which generally states that private consensual homosexual acts between adults are not criminal. The 1967 Act was introduced to Parliament following the Wolfenden Report.¹⁸ The Wolfenden Committee concluded that ". . . homosexual behaviour between consenting adults in private should no longer be a criminal offence."¹⁹ Among the statutes removed from the ambit of criminal prosecution were former §§ 61 through 63 of the 1861 Offences Against the Person Act.²⁰ These sections were repealed in England and Wales only—not in Northern Ireland.

¹⁴E.H.R.R. at 159.

¹⁵*Id.* at 160.

¹⁶*Id.* at 168.

¹⁷Sexual Offences Act, 1967, Chapter 60 provides:

1.-(1) Notwithstanding any statutory or common law provision, but subject to the provisions of the next following section, a homosexual act in private shall not be an offence provided the parties consent thereto and have attained the age of twenty-one years.

¹⁸Report of the Committee on Homosexual Offences and Prostitution (1957) [hereinafter cited as Wolfenden Report]. This report was commissioned by the British Home Secretary. The committee was headed by Sir John Wolfenden, and constituted a panel of men and women who heard several weeks of testimony on virtually all aspects of homosexuality.

¹⁹*Id.* at 25.

²⁰OAPA, *supra* note 8.

Finally, the court determined the primary purpose of the sodomy law to be for the protection of vulnerable members of society such as children and mental patients, but this goal was not achieved by preventing consenting adults from committing sodomy.²¹ Furthermore, the court was “not concerned with making any value judgment as to the morality of homosexual relations between adult males,” and it asserted that decriminalization does not imply approval by the court.²² Accordingly, the Northern Irish law was struck down. In a later hearing Dudgeon was awarded costs and expenses, but not punitive damages.²³

Bowers

Michael Hardwick was discovered committing sodomy with another consenting adult male in Hardwick’s bedroom by a police officer who entered the bedroom to serve Hardwick with unrelated legal papers.²⁴ Hardwick was charged with sodomy in accordance with a Georgia anti-sodomy statute.²⁵ This statute prohibits sodomy without distinguishing between heterosexual or homosexual sodomy, and provides a sentence of not less than one nor more than 20 years. The District Attorney “decided not to present the matter to the grand jury unless further evidence developed.”²⁶ Hardwick chose to challenge the statute, however. Hardwick’s rationale was that the statute put him, as a practicing homosexual, in imminent danger, even though the statute makes no mention of homosexuality.²⁷

Rather than ruling on the constitutionality of the Georgia statute as it applies to heterosexuals and homosexuals alike, the Supreme Court, through Mr. Justice White, chose to determine whether the

²¹4 E.H.R.R. at 168.

²²*Id.*

²³Dudgeon v. United Kingdom, 26 Y.B. Eur. Conv. on Human Rights 8, 5 E.H.R.R. 573 (1983).

²⁴106 S.Ct. at 2842.

²⁵Ga. Code Ann. §26-2002 (1984) provides as follows:

- (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.
- (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.

²⁶106 S.Ct. at 2842.

²⁷Ga. Code Ann. §26-2002, *supra* note 25.

United States Constitution confers a fundamental right upon homosexuals to engage in sodomy.²⁸ The Georgia statute does not stipulate that it is solely directed towards homosexuals, yet the Court chose to limit its analysis in this myopic manner. This is one of the most narrow applications of judicial review imaginable.

While it appears as if the majority of the *Dudgeon* court did not seem to allow their personal viewpoints regarding homosexuality to color its ultimate decision, the United States Supreme Court seems to find sufficient justification for upholding the law by presuming that a majority of the Georgia electorate finds "homosexual sodomy immoral and unacceptable."²⁹ If the Court were to decide every constitutional question by presuming a good reason for the enactment of such a law without looking beyond the face of the law, there would be no need for a Supreme Court.

When *Hardwick* attempted to classify homosexual sodomy as a right to privacy issue, along with such cases as *Skinner v. Oklahoma*,³⁰ *Griswold v. Connecticut*,³¹ and *Roe v. Wade*,³² the Court was quick to find that there was "no connection between family, marriage, or procreation on the one hand and homosexual activity on the other."³³ Mr. Justice White's finding that there is no connection is purely a legal fiction. Alfred Kinsey, a leading sexual behavior researcher, states that one in every ten American males is a homosexual.³⁴ Furthermore, Kinsey has found that more than one-third of all American males have had at least one homosexual experience in their lives ending in orgasm.³⁵ By virtue of the number of recent child-custody cases involving a gay parent,³⁶ it is undisputed that some homosexuals procreate. Therefore, it cannot be said that there is no connection between homosexuality on the one hand, and family on the other. However, in contrast with the above, the Court in *Bowers* holds that homosexuals have a fundamental right to procreate, even to commit sodomy, just not with another person of the same gender.

²⁸106 S.Ct. at 2843.

²⁹*Id.* at 2846.

³⁰316 U.S. 535 (1942).

³¹381 U.S. 479 (1965).

³²410 U.S. 113 (1973).

³³106 S.Ct. at 2844.

³⁴A. Kinsey, *Sexual Behaviour in the Human Male*, at 651 (1948).

³⁵Donald Porter Geddes, *An Analysis of the Kinsey Report on Sexual Behaviour in the Human Male and Female*, at 266 (1954).

³⁶For an excellent overview of lesbian and gay issues in child custody, see S. Law "Homosexuality and the Social Meaning of Gender," at 6-8 (to be published in 1988 *Wisc. L. Rev.*).

A portion of Mr. Justice White's reasoning in *Bowers* is analogous to the fallacious claim made by opponents of the Equal Rights Amendment who cried that the Amendment would have men and women sharing the same rest room and fighting side by side in military combat.³⁷ Mr. Justice White contends that if the door were opened to private consensual homosexual conduct, it would also give access to adultery, incest, and other sexual crimes because they are committed in the home.³⁸ Marriage, as Mr. Justice Stevens points out in his dissent, is a legally sanctioned relationship, and incest, as well as most other sexual crimes, involve inflicting one's will upon another.³⁹ It would be absurd to think any court would carry a right to privacy that far.

JUDICIAL APPLICATION OF THE *DUDGEON* AND *BOWERS* DECISIONS

Dudgeon has been used by courts in the United Kingdom to determine the extent to which they should go in granting individuals' rights. In *Rees v. United Kingdom*⁴⁰ the European Court of Human Rights held that the Convention⁴¹ must always be interpreted and applied in light of current circumstances, citing *Dudgeon* and its integration of prevailing views on sexual orientation as a current circumstance.⁴² In *Rees*, a British transsexual male made a claim under Article 12 of the Convention⁴³ that he should be allowed to marry a woman, and further, that under Article 8 of the Convention,⁴⁴ his original birth certificate must be altered to show his present gender. Although the court denied both claims,⁴⁵ the language in its opinion was sympathetic to Mr. Rees' plight and intimated that the legislature should make provisions for non-traditional sexual identities.⁴⁶

³⁷Carol Felsenthal, *The Biography of Phyllis Schlafly: The Sweetheart of the Silent Majority*, at 237-38 (1981).

³⁸106 S.Ct. at 2846.

³⁹*Id.* at 2858.

⁴⁰9 E.H.R.R. 56 (1986).

⁴¹European Convention on Human Rights.

⁴²9 E.H.R.R. at 67-68.

⁴³Article 12 of the European Convention on Human Rights provides:

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

⁴⁴Convention, *supra* note 13.

⁴⁵9 E.H.R.R. at 68.

⁴⁶"... the Court is conscious of the seriousness of the problems affecting these persons [transsexuals] and the distress they suffer. . . . The need for appropriate legal measures should therefore be kept under review. . . ." *Id.* at 67-68.

In *Norris v. The Attorney General*,⁴⁷ a claim was made against §§ 61 and 62 of the Offences Against the Person Act of 1861,⁴⁸ as being inconsistent with Article 40, section 1 of the Constitution of Ireland.⁴⁹ *Dudgeon* was cited as a moving force in the decriminalization of sodomy in Northern Ireland.⁵⁰ The claimant, Norris, sought to remove all criminal penalties for homosexual conduct. The *Norris* court rejected the inconsistency claim on grounds that some members of the public should be protected from homosexual activity by criminal sanctions, and caution should be used when proposing “. . . a significant reversal of legislative policy in an area in which deep religious and moral beliefs were involved.”⁵¹ However, the *Norris* court was also sympathetic to sociological problems facing homosexuals.⁵²

⁴⁷1984 Ir.R. 36.

⁴⁸OAPA, *supra* note 8.

⁴⁹Constitution of Ireland, Article 40, section 1 states:

All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

⁵⁰1984 Ir.R. at 61.

⁵¹*Id.*

⁵²Justice McWilliam, for the majority, drew several conclusions from the evidence presented:

1. There is probably a comparatively large number of people with homosexual orientations in Ireland.
2. Of those, a proportion are exclusively homosexual.
3. The exclusively homosexual orientation is congenital and not a matter of choice.
4. There is not any satisfactory method of treatment to alter this exclusively homosexual orientation, so the homosexual must live with it, although there have been a few successful changes in orientation effected.
5. There is no foundation for any common beliefs that male homosexuals are mentally unbalanced, effeminate, vicious, unreliable or less intelligent, or are more likely to assault or seduce children or young people than are heterosexual males.
6. There is a general prejudice against homosexuals with a lack of consideration for their problems.
7. One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease.

Id. at 42.

While *Bowers* has frequently been applied to deny homosexuals a wide latitude of rights,⁵³ one of its most expansive uses has been to renew United States Senator Joseph McCarthy's⁵⁴ view that a "moral pervert" in a sensitive position is a security risk because of susceptibility to blackmail.⁵⁵

*Padula v. Webster*⁵⁶ involved a lesbian who had applied for a position with the Federal Bureau of Investigation. Margaret Padula applied for the position of special agent with the F.B.I., and ranked 297th out of 1273 applicants. During a routine background check, the Bureau discovered not only "favorable information about the applicant's abilities and character," but also that she was a practicing lesbian. As a result, Padula was not offered a position with the Bureau.⁵⁷ Padula filed suit.

The United States Court of Appeals for the District of Columbia Circuit, with Judge Bork sitting on the bench, decided that a lesbian who was open about her sexual orientation might compromise her performance in a sensitive security operation when faced with the threat of blackmail.⁵⁸ The court reasoned that "[i]t is not irrational for the Bureau to conclude that the criminalization of homosexual conduct coupled with the general public opprobrium toward homosexuality exposes many homosexuals, even 'open' homosexuals, to the risk of possible blackmail. . . ."⁵⁹ The reasoning behind this case is nonsensical, and would not have been acceptable had *Bowers* been supportive of homosexual rights.

In response to an inquiry from a Temple University Law Professor about F.B.I. hiring practices, John Mintz, the Bureau's legal counsel, wrote that the F.B.I. was confident it had not engaged in improper

⁵³*Gay Inmates of Shelby Jail v. Barksdale*, 819 F.2d 289 (6th Cir. 1987) (no due process violation in segregating gay inmates from general prison population); *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*, 107 S.Ct. 2971 (1987) (the word "olympic" may not be used to describe what was known as the "Gay Olympics"); *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984), *cert. denied* 105 S.Ct. 1371 (1987) (teacher fired solely because of her lesbianism); *Doe v. Bryan*, 728 P.2d 443 (Nev. 1986) (no standing to challenge sodomy statute for homosexual never prosecuted under statute); *Appeal in Pima County Juvenile Action B-10489*, 151 Ariz. 335, 727 P.2d 830 (App. 1986) (bisexual not allowed to be foster parent to juvenile).

⁵⁴Sen. McCarthy worked with the House Un-American Activities Committee in the 1950s, which actively sought out groups such as homosexuals and communists for possible prosecution as being un-American.

⁵⁵Edwin R. Bayley, *Joe McCarthy and the Press*, at 161-62 (1981).

⁵⁶822 F.2d. 97 (D.C. Cir. 1987).

⁵⁷*Id.* at 99.

⁵⁸*Id.* at 104.

⁵⁹*Id.*

discrimination regarding sexual orientation.⁶⁰ Further on in the *Padula* opinion, however, Mintz admits that homosexual applicants are unlikely to be hired because of susceptibility to blackmail.⁶¹ This policy makes any homosexual F.B.I. agent *automatically* susceptible to blackmail. While an agent may be open with the rest of the world about her homosexuality, she may fear losing her job if the F.B.I. finds out, and so give in to the blackmailer's demands. The F.B.I. has created this threat of blackmail, and now uses it to discriminate against homosexuals. Had *Bowers* been decided like *Dudgeon*, the F.B.I. would have little ground to preclude Padula for her sexual orientation.

Another expansive use of *Bowers* occurs in *Thigpen v. Carpenter*.⁶² In a prior custody hearing, the parties had been awarded joint custody of their children. In *Thigpen*, however, the father of the children brought to the court's attention the mother's lesbianism, and her custodial rights were terminated. Even though the mother, Thigpen, testified that she and her lover would never engage in sexual conduct in front of the children,⁶³ the court found that ". . . homosexuality is generally socially unacceptable, and the children could be exposed to ridicule and teasing by other children."⁶⁴ The concurring opinion cites *Bowers* as giving strength to the use of public opinion against sodomy, then uses that public opinion against sodomy to deny Thigpen her children.⁶⁵

COMPARATIVE ANALYSIS

The disparity between the United States' and the United Kingdom's legal positions on homosexuality is immense. During the 1950s, under the influence of Sen. McCarthy, the United States House Un-American Activities Committee busily persecuted homosexuals.⁶⁶ In Great Britain during this same period, the Secretary of State for the Home Department commissioned the Wolfenden Report which recommended decriminalizing homosexual behavior.⁶⁷ United States' law is strongly anti-homosexual and often precludes gays and lesbians not only from engaging in legalized sexual activity, but also from enjoying the same benefits as other members of society, such as the bond of marriage,

⁶⁰*Id.* at 98-9.

⁶¹*Id.* at 99.

⁶²21 Ark. App. 194, 730 S.W.2d 510 (1987).

⁶³730 S.W.2d at 513.

⁶⁴*Id.* at 514.

⁶⁵*Id.*

⁶⁶Bayley, *supra* note 55.

⁶⁷Wolfenden Report, *supra* note 18.

tax and insurance benefits, and job security. Although the United Kingdom does not allow same-sex marriages,⁶⁸ and is by no means a haven for homosexuals, it does allow adult homosexuals the fundamental right of private consensual sexual relations.⁶⁹

This disparity has little to do with one country having a greater need to prohibit homosexuality. The Northern Irish law was struck down because the court found little need in a democratic society for such prohibitions.⁷⁰ Northern Ireland, however, was nearly 20 years behind the rest of the United Kingdom in granting greater freedoms for homosexuals.⁷¹ This implies that United States' laws in this area of human rights are at least 7 years behind those of Northern Ireland, and more than 20 years behind the rest of the United Kingdom.

With the AIDS epidemic especially present in the male homosexual population, one U.S. court has expressed an added need for preventing homosexual sodomy; Judge Robert Donnelly of the Missouri Supreme Court, in *State v. Walsh*,⁷² stated that the sodomy laws protect public health from the threat of AIDS, a deadly disease that has spread largely because of "the general promiscuity characteristic of the homosexual lifestyle."⁷³ To make Judge Donnelly's supposition true, the law will have to be enforced as zealously against heterosexuals who engage in AIDS-spreading sexual activity as it is against homosexual activity. This is not likely to happen in the United States. Professor Sylvia Law⁷⁴ writes that "[o]ur law and culture punish those who engage in adult consensual homosexual conduct more than those who engage in comparable heterosexual conduct."⁷⁵ Though the courts claim to be protecting the country from the spread of AIDS by enforcing sodomy statutes against homosexuals, lesbians are left in a precarious position. To this date, there is no case of a woman passing AIDS to another woman through lesbian sexual contact. An attorney for *Walsh*,⁷⁶ Arlene

⁶⁸Rees v. United Kingdom, 9 E.H.R.R. 56 (1987).

⁶⁹*Dudgeon*, *supra* note 1.

⁷⁰*Id.*

⁷¹Sexual Offences Act, *supra* note 17.

⁷²713 S.W.2d 508 (Mo. 1986).

⁷³*Id.* at 512-513. Another aspect of AIDS litigation involving the *Bowers* decision is wrongful death actions against suppliers and donors of AIDS-tainted blood. In *Tarrant County Hospital v. Hughes*, 734 S.W. 2d 675 (Tex. App. 1987), there was found to be no doctor/patient privilege to prevent discovery of the identity of a donor of AIDS-tainted blood. In direct conflict with this is *Rasmussen v. South Florida Blood Services, Inc.*, 500 So. 2d 533 (Fla. 1987), which held that a blood donor's right to privacy outweighs a victim's interest in discovering the donor's identity.

⁷⁴Professor of Law, NYU Law School.

⁷⁵Law, *supra* note 36, at 2.

⁷⁶*Walsh*, *supra* note 73.

Zarembka, says sodomy laws are used only against men: "The police associate homosexuality with men. Lesbians are invisible."⁷⁷ Accordingly, Judge Donnelly's supposition of containing the AIDS virus through sodomy laws does not logically relate to the prohibition against lesbian sodomy.

While the *Bowers* Court does not consider lesbianism, the *Dudgeon* court does, albeit briefly. The court points out that acts of homosexuality between females have never been criminal offenses in Northern Ireland.⁷⁸ In *X v. United Kingdom*,⁷⁹ the government justified its difference in the treatment of male and female homosexuals on the basis of a difference in the nature of the social problem presented in each case.⁸⁰ The government cited German studies which showed male homosexuals tended to proselytize adolescents and be masochistic, although the Commission did not attempt to classify lesbians.⁸¹ The Commission omitted to point out that men in general, heterosexual or homosexual, prey on adolescents of both sexes and can be not only masochistic, but also abusive towards women and other men.⁸² To single out gay men and put them alone in this category is to deny that society also creates heterosexual men who are abusive. Furthermore, it is equally inaccurate to point a finger at *all* gay men, as at *only* gay men.

CONCLUSION

It is surprising for two democratic nations to have such strikingly antithetical laws concerning the same issue, while the two countries are so similar in other ways. There are people in each nation who strongly oppose homosexual rights as well as those who support these rights. However, the issues involved here are not ones allowing for a decision either way—as uncertain as the toss of a coin. The European Court of Human Rights saw private consensual homosexual sodomy as a fundamental right long overdue in Northern Ireland, while the United States Supreme Court felt that granting such a right would be to disregard the majority belief that sodomy is immoral. At best, the United States' decision is inequitable. In deciding other issues, the

⁷⁷Reidinger, *Missouri Vice*, 72 Nov. A.B.A. J. 78 (1986).

⁷⁸4 E.H.R.R. at 152.

⁷⁹3 E.H.R.R. 65 (1981).

⁸⁰*Id.*

⁸¹*Id.*

⁸²Toby, *Violence and the Masculine Ideal: Some Qualitative Data*, 364 *Annals*, at 19-22 (1966).

Court has often gone against the will of the majority. The *Dudgeon* holding indicates that homosexual rights should be classified as human rights. If the United States Supreme Court were to view homosexual rights as human rights, it would realize it is precisely because of the majority's uninformed opinion against homosexual rights that homosexuals merit greater protection under the Constitution.

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