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## Rebuilding the Closet: *Bowers v. Hardwick*, *Lawrence v. Texas*, and the Mismeasure of Homosexual Historiography

Jody Madeira, M.S., J.D.<sup>1</sup>

### Introduction

By now, constitutional law and social science scholars cutting their teeth on legal constructions of homosexuality have picked clean the bones of one of the hallowed texts of the critical genre: Justice Blackmun's dissent in *Bowers v. Hardwick*.<sup>2</sup> Blackmun's critique of the majority's "almost obsessive focus on homosexual activity"<sup>3</sup> ultimately leads him to echo the words of Justice Holmes:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>4</sup>

In *Bowers*, Blackmun argued in vain, for even in its reviled state, the majority opinion in *Bowers*, despite constant criticism, was for over a decade the word of law for defining a fundamental right to engage in certain forms of sexual activity, and has increasingly provided the pattern for defining fundamental rights to engage in activities entirely unrelated to sexuality.

Although *Bowers* itself has now been overruled and numerous historiographers have noted the opinion's many inconsistencies and inaccuracies, continued state and federal jurisprudential reliance upon its historical rationale in the context of determining whether or not a plaintiff is asserting a cognizable fundamental right underscores the need for continuing redress of such problems. It comes as no surprise that the 'homosexual' stigma that has allegedly persevered from ancient Rome to post-industrial America offers a convenient, tradition-gilded anchor to weigh down holdings against homosexual plaintiffs. However, the context of *Bowers* has greatly expanded to reach issues far removed from its sexual orientation nexus. In essence, the shabby arguments utilized by the majority in *Bowers* are constantly utilized to bolster decisions regarding fundamental rights queries quite separate from issues of sodomy or even sexual orientation.

Any competent jurist knows that, "[w]hile the Supreme Court frequently makes history through its landmark decisions, it also often uses history to reach them."<sup>5</sup> Though the Court rarely bungles history so badly, one can scarcely fault the Court for their misuse of history in

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<sup>2</sup> 478 U.S. 186 (1986).

<sup>3</sup> *Id.* at 200.

<sup>4</sup> *Id.* (Blackmun J., dissenting) (citing Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

<sup>5</sup> Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 809 (1997).

*Bowers* when so many other scholars and legal practitioners misuse or outright abuse historical arguments. The frequency with which historical arguments are made demonstrates the need to address whether historiography is an effective archaeological tool with which to assess legal historical arguments. Using *Bowers* as an example, this paper will address the appropriateness of historiographical arguments in the context of constructing homosexuality. Historical inconsistencies and omissions, together with the truth that historical socio-cultural attitudes and values are no longer part of our lived experience, fundamentally alter our conceptions of that which has come before. This is particularly true in scholarly analyses addressing the historical construction of homosexuality. Though it is perfectly possible (and always accurate) to point to the first time that the term ‘homosexuality’ appeared in the English language, and its first use as a referent for a person with a same-sex sexual orientation, it is not possible or even pertinent to identify the true point at which homosexuality emerged, either as an urban subculture or as a general societal awareness that sexual orientation was in fact a category by which to classify Self and Other. The truth of these assertions will become readily apparent by the conclusion of this analysis.

This paper acknowledges that “[i]t is now commonplace to disparage the Hardwick Justices’ performance as historians, though it is less common to specify what was wrong with it.”<sup>6</sup> In an effort to engage in such specification, this paper will first address mischaracterization of history in *Bowers*, which portrays the historic legal and ecclesiastical penalties of what the Court labels as “homosexual activities” as a continuous, unitary narrative extending from the halls of the Emperors Theodosius and Justinian to the legislative assembly rooms of Georgia and Texas. This illusory perspective portrays the criminalization of sodomy (and therefore the identity of homosexuality itself) as an impossible cultural continuum. The impossibility of this continuum lies not only in its implicit assumption that states and other lawmaking entities throughout history shared the same cultural, moral, religious, and legal principles, but also in its unqualified adoption of the secular state as the successor to religious authority and the seamless secular synthesizing of penitential prohibitions against sexual sin into secular prohibition against sexual crime. By summarizing the legal treatment of such allegedly homosexual behaviors from the Roman Republic to modern America, this paper will not only demonstrate that the *Bowers* conception of history as a continuum is in reality a series of discrete communal units, but will also show that the confines of this continuum emphasize only the horizontal progression of time, quashing significant differences in the authority of the entities who enact the laws and more importantly in the laws themselves.

After summarizing and analyzing the scholarly criticism of historic *Bowers* blunders, this paper will elaborate upon other broader difficulties with the *Bowers* decision—difficulties that are characteristic of many homosexual historiographies. The first of these conundrums, the erroneous assumption that sodomy statutes of past centuries were a former species of anti-homosexual legislation, arises from the historic implications of the Court’s conflation of homosexual status with the act of sodomy. This conflation of homosexuality and sodomy is particularly ironic as Michael Hardwick engaged in oral sex, or fellatio (not the anal sex that is

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<sup>6</sup> Janet E. Halley, *Reasoning about Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1751 (1997).

typically defined as sodomy) which was not criminalized in any state until 1879.<sup>7</sup> The second and third of these topics, the collapse of morality into legality and the subsequent collapse of the legal into the social, also necessarily follow from the Court's collapse of status into act. Each of these three conflated concepts—the collapse of sodomy criminal statutes with antihomosexual legislation, morality with legality, and legal principles with social perspectives—will be addressed in the context of the prior historical discussion of legislation prohibiting same-sex activity from Republican Rome to modern America. The paper will then describe how *Bowers* faulty historiography was not merely a series of uninformed generalizations but a conscious strategy dictated by the Court's originalist platform that was developed to uphold the majority's interpretation of Georgia's anti-sodomy statute. Finally, the paper will conclude by explicating what impact the language of *Lawrence v. Texas* will have on future constructions of homosexuality and its histories.

### ***I. Conceptions of Same-Sex Lovemaking and Sodomy Laws from Republican Rome to Modern America***

#### When in Rome . . .

For a Roman male, the “highest expression of virility” was to dominate other men, and so the truly virile Roman male did not limit himself to women.<sup>8</sup> Besides the importance of being an active partner, there was only one additional limitation on a Roman male's expression of penetrative virility: a Roman male could not have relations with a free Roman youth, for the Romans were concerned that submitting to another man by acting as the passive partner in same-sex relations would undermine a youth's own developing virility.<sup>9</sup>

Those who violated mores governing sexual relations with members of the same sex violated the tenets of *stuprum*.<sup>10</sup> Same-sex violations of *stuprum* were not perceived as any more or less shameful or egregious than those violations of *stuprum* that involved sexual relations between men and women; “[s]tuprum was not defined with reference to the sex of a man's partner.”<sup>11</sup> The offenses defined under *stuprum* included “illicit sexual relations in general, including adultery and relations with a widow or an unmarried girl or boy of respectable status.”<sup>12</sup> A consequence of violating sexual mores of Roman society was *infamia*, or the loss of public honor.<sup>13</sup> *Infamia* was “the opposite of *existimatio*, ‘reputation,’ and *dignitas*, ‘social standing,’” and an *infamis* had “as a consequence of moral turpitude, lost the status of a full citizen.”<sup>14</sup>

<sup>7</sup> William N. Eskridge, Jr., *Hardwick and Historiography* 1999 U. ILL. L. REV. 631, 636.

<sup>8</sup> EVA CANTERALLA, *BISEXUALITY IN THE ANCIENT WORLD* 98 (Cormac Ó Cuilleánáin trans., 1992).

<sup>9</sup> *Id.* at 100.

<sup>10</sup> See generally, CRAIG A. WILLIAMS, *ROMAN HOMOSEXUALITY: IDEOLOGIES OF MASCULINITY IN CLASSICAL ANTIQUITY* 97 (1999) (describing *stuprum* as a violation of the sexual integrity of freeborn Romans); JUDITH EVANS GRUBBS, *LAW AND FAMILY IN LATE ANTIQUITY: THE EMPEROR CONSTANTINE'S MARRIAGE LEGISLATION* 95 (1995) (describing *stuprum* as an offense whereby a married man's lover was an unmarried virgin or widow).

<sup>11</sup> WILLIAMS, *supra* note 10, at 97.

<sup>12</sup> GRUBBS, *supra* note 10, at 95.

<sup>13</sup> See Catherine Edwards, *Unspeakable Professions: Public Performance and Prostitution in Ancient Rome*, in *ROMAN SEXUALITIES* 66, 69 (Judith P. Hallett & Marilyn B. Skinner eds., 1997).

<sup>14</sup> *Id.*

Roman males attempted to formalize same-sex unions by two methods: same-sex “marriage” and collateral adoption. Marriages between men “were clearly practised only by a minority of people, whose social status allowed them to provoke public opinion openly and brazenly to exhibit their homosexuality.”<sup>15</sup> The second method, collateral adoption, may have been more successful; however, there is only limited scholastic explication of the procedures by which a Roman male could adopt his same-sex partner. Biographical references to actual marriages celebrated by two people of the same sex are not found until the time of the Empire, when Suetonius, Nero’s biographer, described at least two same-sex marriage ceremonies in which Nero acted as the bride (to a freedman) and the groom (to Sporus).<sup>16</sup> Elagabalus, Emperor of Rome from 218 to 222, followed in Nero’s marital footsteps and “flagrantly took a passive role with other males,” forming a long-term relationship with an athlete named Heiropolis.<sup>17</sup> According to a source of that same time period, “at this time men who wished to advance in the imperial court either had husbands or pretended they did.”<sup>18</sup>

In the early years of the Republic, “there was no fixed procedure for penalizing acts of *stuprum*” as all offenses were private violations under the *paterfamilias*’ discretion.<sup>19</sup> Only the act of seducing a free Roman carried legal consequences with any frequency.<sup>20</sup> The legal limitations on same-sex seductions of free Romans promulgated in the later Republic officially defined and punished *stuprum*, taking it out of the family and replanting it in the public forum of the courts.<sup>21</sup>

Without a doubt, the most significant legislation passed in the Republic delimiting and punishing *stuprum* was the *lex Scatinia*.<sup>22</sup> Unfortunately, the text of the law itself is lost to us, but explicit references to this law are found in the writings of Cicero, Suetonius, Juvenal, Ausonius, Tertullian, and Prudentius.<sup>23</sup> Scholars estimate the passage of the *lex Scatinia* occurred in approximately 149 BC.<sup>24</sup> Some scholars hold that the *lex Scatinia* was in force at the end of the Republican era.<sup>25</sup>

Scholars also disagree over exactly which forms of same-sex activity the law penalized. While some state that the *lex Scatinia* only punished *stuprum cum puero*, activity committed with free-born boys, others argue that it punished sex between adults, or that it only punished the passive partner.<sup>26</sup> It may also have rendered illicit the act of taking a passive role in sexual

<sup>15</sup> CANTARELLA, *supra* note 8, at 176.

<sup>16</sup> JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 80-81 (1994) (citing Suetonius, *Nero* 28). *See also* Dio Cassius, *Epitome* 62.28 (referring to a marriage contract between Nero and Sporus, and public celebrations of the marriage held by the Romans and the Greeks).

<sup>17</sup> BOSWELL, *supra* note 16, at 84 (citing Dio Cassius, 80[79].5, 14, 15, 16).

<sup>18</sup> BOSWELL, *supra* note 16, at 85 (citing Lampridius 11).

<sup>19</sup> WILLIAMS, *supra* note 10, at 119.

<sup>20</sup> *See id.* at 99-100 (discussing Val. Max. 6.1.11, 6.1.10).

<sup>21</sup> WILLIAMS, *supra* note 10, at 119-20.

<sup>22</sup> WILLIAMS, *supra* note 10, at 120 (discussing penalties of *Lex Scatinia*).

<sup>23</sup> CANTARELLA, *supra* note 8, at 106-07.

<sup>24</sup> *Id.* at 110 (citing Livy, *P. Oxy.* IV 668 col. V).

<sup>25</sup> CANTARELLA, *supra* note 8, at 110-11.

<sup>26</sup> *Id.* at 111.

activity with another male in addition to penalizing *stuprum cum puero*.<sup>27</sup> The punishment inflicted under the *lex Scatinia* was a set fine of 10,000 sesterii.<sup>28</sup> It does not appear that the *lex Scatinia* was very effective; it did not seem to halt the seduction and love of free-born boys; “[i]gnoring the law, men openly attempted to seduce boys, pestering them in the streets.”<sup>29</sup>

The final piece of legislation limiting sexual activity between males that was promulgated during the Republic appears to be an edict passed by an urban praetor approximately thirty years after the *lex Scatinia* entitled *De adtemptata pudicitia*.<sup>30</sup> This edict attempted to “punish the cruising lecher” who had not been deterred by the *lex Scatinia*.<sup>31</sup> The edict established an unknown penalty that would be imposed on “anybody who disturbed, on the public highway, not only respectable women, but also *praetextati* [free-born boys].”<sup>32</sup> The *De adtemptata pudicitia* illustrates that “the dichotomy between heterosexual and homosexual behaviour was beside the point—the *inpudicitia* of *pueri* was neither more nor less serious than that of women.”<sup>33</sup>

There has been much scholarly debate concerning the *Lex Iulia de adulteriis coercendis*, which was promulgated in 18 BC on a proposal from Augustus.<sup>34</sup> As its name suggests, the *Lex Iulia* regulated *stuprum* most ostensibly in the form of adultery and it appears likely that “the two laws ran side by side, neither interfering with the other, each regulating a different sector of sexual life.”<sup>35</sup>

Legislation concerning *stuprum* remained largely unaltered until the fourth century.<sup>36</sup> By early Imperial Rome, “passive homosexuality” had become a “vice” that the imperial authority felt obliged to combat through legislation.<sup>37</sup> Christianity, which had matured from a persecuted Roman cult into an official imperial religion, “introduced a new way of looking at sex, which came from the Hebrew tradition,” and which centered around the “principle of ‘naturalness,’ which was exclusive to heterosexual intercourse.”<sup>38</sup> Concerns other than religion also prompted a tightening of legislation governing same-sex activity; as “pagan sexual morality was becoming more restrictive in some circles in the first two centuries of the Empire,” and “[t]he jurists whose rulings criminalized some forms of homosexual behavior were all pagan.”<sup>39</sup>

A great number of the earliest regulations promulgated in the early Empire appear to be limitations on male prostitution. Caligula supposedly banished male prostitutes from the city of

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 113. Cantarella discusses a passage from Quintilian’s *Institutio Oratoria*, which describes a man who committed “gross indecency on an *ingenuus*” who then hanged himself on account of shame; while the man was not punished for the death of the *ingenuus*, he was sentenced to pay 10,000 sesterii, “the set penalty for sexual abusers.” *Id.* (discussing Quintil., *Inst. Orat.* IV, 2, 69).

<sup>29</sup> COLIN SPENCER, *HOMOSEXUALITY IN HISTORY* 72 (1995).

<sup>30</sup> CANTARELLA, *supra* note 8, at 115-16.

<sup>31</sup> SPENCER, *supra* note 29, at 72; CANTARELLA, *supra* note 8, at 115.

<sup>32</sup> CANTARELLA, *supra* note 8, at 114.

<sup>33</sup> *Id.* at 117.

<sup>34</sup> *Id.* at 142.

<sup>35</sup> *Id.* at 144.

<sup>36</sup> *Id.* at 145.

<sup>37</sup> *Id.* at 219.

<sup>38</sup> *Id.* at 221.

<sup>39</sup> DAVID GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 232 (1988).

Rome, and the emperor Alexander Severus taxed male prostitutes and used the proceeds to restore various structures.<sup>40</sup> Male prostitution was outlawed altogether by Marcus Julius Philippus.<sup>41</sup> These laws were tremendously ineffectual, as was another promulgated by Julius Paulus, praetorian prefect under Alexander Severus, that stated that anyone who forced a slave to submit to a “homosexual act” was guilty of corrupting the slave.<sup>42</sup>

A praetorian edict forbidding passive homosexuals from representing others in legal proceedings was reported by Ulpian early in the third century.<sup>43</sup> Men who had been “raped by pirates or by the enemy in time of war” were not subject to this restriction, however, for it only reached those who tried to play the “woman’s role” in sexual activity with another man.<sup>44</sup>

In a constitution dated December 4, A.D. 342 issued from Milan, Constantius and Constans issued a statement condemning the passive role in same-sex sexual activity.<sup>45</sup> On August 6, A.D. 390, Theodosius I sent another constitution to Orientius, the vicar of the city of Rome, the text of which is preserved in *Romanarum et Mosaicarum legum Collatio*.<sup>46</sup> Cantarella asserts that this law applies to those who played the passive role in same-sex relations.<sup>47</sup> In 438 the constitution of Theodosius the Great was inserted by Theodosius II in the Theodosian code in a significantly amended form which mandated that all passive homosexuals were to be burned alive; in 506, Alaric II, King of the Visigoths included this provision in the *Breviarium Alaricianum*, “to regulate the relationships between Roman citizens living in his kingdom.”<sup>48</sup>

Until now, legislation affecting sexual relations between men had been in the same vein, either punishing *stuprum* itself or punishing those who assumed the passive role in same-sex intercourse. With Justinian, however, such legislation was radically altered. Justinian’s *Institutions*, published in 533, stated that “he who exercises his shameful lust with a man is punished *gladio* on the basis of the *Lex Iulia*,” and established penalties for active participants in same-sex relations for the first time.<sup>49</sup> The promulgation of these new restrictions was most likely the result of not only Justinian’s commitment to Christian morality but also a sense of superstition as well. In his *Novella*, published in 538 following a series of earthquakes and plagues, Justinian implies that men who engaged in sexual activity with other men were to blame for these tragedies.<sup>50</sup>

In the years following the publication of the *Institutions*, Justinian dedicated two more constitutions to the topic of same-sex relations, confirming that the death penalty applied to all

<sup>40</sup> CANTARELLA, *supra* note 8, at 173 (discussing Suet., *Cal.* 16; Hel., *Lampr. Alex. Sev.* 24 3-4).

<sup>41</sup> CANTARELLA, *supra* note 8, at 173-74 (discussing Aur. Vict., *De Caes* 28.6).

<sup>42</sup> GREENBERG, *supra* note 39, at 228.

<sup>43</sup> CANTARELLA, *supra* note 8, at 173 (discussing *Dig.* 3.1.1.6).

<sup>44</sup> WILLIAMS, *supra* note 10, at 125.

<sup>45</sup> CANTARELLA, *supra* note 8, at 175, (citing Code Theod 9.7.3).

<sup>46</sup> CANTARELLA, *supra* note 8, at 177, (citing Mos. Et Rom Legum. Coll., V, 3).

<sup>47</sup> CANTARELLA, *supra* note 8, at 177.

<sup>48</sup> *Id.* at 181, (discussing Brev. III 4, 5).

<sup>49</sup> CANTARELLA, *supra* note 8, at 181 (citing Inst. 4.18.4).

<sup>50</sup> Louis Crompton, *What do you say to someone who claims that homosexuality caused the fall of Greece and Rome?*, reprinted in *HOMOSEXUALITY IN THE ANCIENT WORLD* 114 (Wayne R. Dynes & Stephen Donaldson eds., 1992).

participants regardless of what sexual role they played.<sup>51</sup> The first of these constitutions, issued in 538, dealt with “those who ‘perform actions contrary to nature herself,’” and warned that “those who commit these actions are ordered by the emperor to ‘take into their souls the fear of God and the judgment to come, and abstain from these devilish and illicit lusts’.”<sup>52</sup> In 559, Justinian issued the second of the constitutions that was “specifically addressed to those committing sins of lust against nature.”<sup>53</sup> It proclaimed, “we speak of outrages committed by men, where they act most basely by abandoning themselves sinfully, men with men.”<sup>54</sup> These two constitutions illustrate that the legal conception of sexual activity between males has been manipulated by Christian doctrine, that “[h]omosexuality has been transferred into the field of crimes which offend the divinity,” and that “[l]aw is now a weapon of the church.”<sup>55</sup> A survey of literary sources reveals that the punishment proscribed by Justinian was castration.<sup>56</sup>

### The Middle Ages

After the fall of Rome, the Roman legal legacy was inherited by Germanic tribes through the *Leges Barbororum*; “[a]t first, the codes applied only to the German population in each territory, while Roman law [applied to] the conquered Roman population.”<sup>57</sup> Only later did they become applicable to both.<sup>58</sup> Except for one provision, none of these codes mention same-sex acts, and Greenberg asserts that “[t]he literary and historical sources suggest that . . . this is because there was no prejudice against it.”<sup>59</sup> Only the law of Visigothic Spain under King Chinaswinth in A.D. 650 mentioned such acts and prescribed castration for “those who lie with males, or who consent to participate passively in such acts.”<sup>60</sup>

It appears as if rulers adopted edicts forbidding same-sex sexual activity according to the strength of their religious convictions. Kings who assumed the role of church head for political reasons also enforced church doctrine. Citing the Bible as his authority, King Egica, who appointed his own bishops, deemed castration and execution the punishment for same-sex activity.<sup>61</sup> More than a few of “Charlemagne’s capitularies concerned sins against nature, sodomy,” and same-sex relations between monks but provided no penalties, simply ordering violators to cease such relations.<sup>62</sup> According to Greenberg, “[t]his comparative mildness reflected the superficiality of the Gallic population’s conversion to Christianity.”<sup>63</sup>

<sup>51</sup> CANTARELLA, *supra* note 8, at 182.

<sup>52</sup> *Id.* at 182 (citing Nov. LXXVII, *caput* 1.1.1.2 pr.).

<sup>53</sup> CANTARELLA, *supra* note 8, at 183.

<sup>54</sup> *Id.* at 183, (citing Nov. CXLI pr.).

<sup>55</sup> CANTARELLA, *supra* note 8, at 183.

<sup>56</sup> *Id.* at 185.

<sup>57</sup> GREENBERG, *supra* note 39, at 250.

<sup>58</sup> GREENBERG, *supra* note 39, at 250.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (citing *Lex Visigoth* 3.5.4). “This secular penalty was to be followed by excommunication.” GREENBERG, *supra* note 39, at 250-51. After the Sixteenth Council of Toledo in 693, these penalties were strengthened by a canon that called for degradation of clergy and exile, and lay men were to receive one hundred lashes as well. *Id.* at 251. King Egica supplemented this ecclesiastical provision with an edict mandating castration and execution. *Id.* (citing *Lex Visigoth* 3.5.7).

<sup>61</sup> See GREENBERG, *supra* note 39, at 251.

<sup>62</sup> *Id.* at 253.

<sup>63</sup> *Id.*



It fell to enterprising Christians who were unsatisfied with this state of affairs to take “advantage of the poor quality of official record-keeping to forge royal documents advancing the transformation of the realm into a corporate Christian kingdom.”<sup>64</sup> Among these forged documents are the *False Capitularies* of Benedict Levita authored between 847 and 852, in which Benedict published capitularies from Frankish kings dating from 569 to 829; while many of these are authentic, some are derived from Roman legal sources, Bavarian and Visigothic customary law, and, of course, ecclesiastical texts.<sup>65</sup> Predictably, three of these capitularies mention same-sex relations; two warn that such activities endanger the continued existence of kingdom and church but mention no penalty besides repentance and temporary excommunication and a third proposes that sodomites be burned.<sup>66</sup> Greenberg posits that these forgeries were “attempts to create . . . concern in what appears to be a largely indifferent population.”<sup>67</sup>

Aside from the law, there is evidence that aristocratic young males did engage in same-sex relations. Medieval writers commonly associated male aristocracy with such activity, including “Kings Edward II, William Rufus, and Richard the Lion-Hearted of England, Frederick II of Germany, Philip II of France, and Conradin of Sicily; in addition, nobility such as Robert, Duke of Normandy and brother to William Rufus, and William Atheling, son of Henry I of England, were all linked with same-sex activity.”<sup>68</sup> As the characteristics suggested by many of these prominent names imply, this aristocracy was not necessarily “effete” but, as Greenberg suggests, merely engaged in activity “consistent with the life of a warrior devoted to hand-to-hand combat.”<sup>69</sup> Greenberg asserts that this condonation of same-sex activity explains the dearth of legislation barring such acts until the mid-thirteenth century.<sup>70</sup>

Ecclesiastical authorities, however, were all too eager to fill such gaps in secular law. Penitentials, “manuals for confessors to be used as guides in the imposition of penances for different sins,” devote some space to same-sex conduct; most discuss only male same-sex activity, and list separate provisions for different means of stimulation, with penalties being assigned on the basis of ecclesiastical rank, age, whether the act was causal or habitual, and whether the penitent’s role was active or passive.<sup>71</sup> Penance ostensibly provided sinners opportunity to “expiate their sin by mortifying the flesh, reflecting upon its gravity and resolving not to commit it again.”<sup>72</sup> In contrast to the secular code, which punished certain opposite-sex sexual relations, penitentials are much more concerned with sexual relations, but “only a small number of the sex-related canons deal with homosexual sins,” a number that decreases in vernacular penitentials.<sup>73</sup> Frantzen posits that there are three divisions of same-sex relations: those between adult men and women, those “between boys or between a boy and a man,” and

<sup>64</sup> *Id.* at 254.

<sup>65</sup> *Id.* at 254.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 255.

<sup>68</sup> *Id.* at 259.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 260.

<sup>71</sup> *Id.* at 262.

<sup>72</sup> JEFFREY RICHARDS, *SEX, DISSIDENCE, AND DAMNATION: MINORITY GROUPS IN THE MIDDLE AGES* 136 (1990).

<sup>73</sup> ALLEN J. FRANTZEN, *BEFORE THE CLOSET: SAME-SEX LOVE FROM BEOWULF TO ANGELS IN AMERICA*, 167-68 (1998).

specific sex acts such as “mutual masturbation, fellatio, anal intercourse, and interfemoral intercourse.”<sup>74</sup> There are several penitentials whose prescribed punishments are still known; these may be categorized as Latin penitentials and Anglo-Saxon penitentials;<sup>75</sup> Anglo-Saxon penitentials deal with sexual behavior almost entirely in the context of marriage and adultery.<sup>76</sup> A great deal of discrepancy exists even within a single penitential as to which penance should be levied for same-sex relations.

The Latin *Penitential of Theodore*, authored by the seventh-century Archbishop of Canterbury, assigns a penance of ten years for frequent fornication with a male, fifteen years if the offender is over twenty; another canon imposes ten years regardless of the sinner’s age or frequency and elsewhere imposes a seven-year penance for sodomites, while yet another passage states that a man receives four years for the first offense and fifteen years for habitual acts, and one year less if the act is not habitual.<sup>77</sup> In Theodore’s *Penitential*, three categories of male offenders are distinguished--the sodomite, the masculus, and the mollis; while the masculus is “a man who fornicates with another man ... the ‘mollis’ was associated with a woman” and the sodomite was not, and so scholars have supposed that the mollis was the passive partner in same-sex relations.<sup>78</sup> This penitential also advocated a twenty-day fast or beating for a boy who engaged in interfemoral intercourse, and a one-year fast or three forty-day fasting periods for a boy who had sex with a man.<sup>79</sup> The *Decretum* of Burchard of Worms, dating from 1025, imposed a penance of seven years fasting and abstinence for a single penitent who committed sodomy once or twice and 10 years if the sinner was married, extended to 15 years if the offense was habitual.<sup>80</sup> This penitential also differentiates between same-sex sodomy, which received ten years penance for the first offense and twelve years for habitual offenses, and opposite-sex sodomy, which received three years penance for adults and two years penance for boys.<sup>81</sup> Other same-sex acts received far lighter penances, with mutual masturbation earning thirty days and interfemoral sex 40 days. The *Penitential of Thorlac Thorhallson*, the twelfth-century bishop of Skalholt, Iceland, assigned a penance of nine to ten years for same-sex relations and bestiality.<sup>82</sup> The *Penitential of Cummean*, dating from the seventh century, assigned a penance of one year for the first offense and two for repeat offenses in one paragraph, but elsewhere states that the penance is two years for boys and three to four years for men.<sup>83</sup> This penitential also has a chapter on the “‘sinful playing of boys,’ which included kissing, masturbation, imitating acts of fornication, bestiality, interfemoral intercourse, fellatio, anal intercourse, and heterosexual intercourse,” with assigned penances for each.<sup>84</sup> Bede’s *Penitential* assigns four years “penance

<sup>74</sup> *Id.* at 149

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 142.

<sup>77</sup> *Id.* at 151.

<sup>78</sup> *Id.* at 152.

<sup>79</sup> *Id.* at 159.

<sup>80</sup> Richards, *supra* note 5, at 136-37.

<sup>81</sup> *Id.* at 137.

<sup>82</sup> GREENBERG, *supra* note 39, at 262.

<sup>83</sup> *Id.*

<sup>84</sup> FRANTZEN, *supra* note 73, at 157. Kissing receives special fasts or harsh penances for those 20 years or older, where the sinner lived on bread and water and was excluded from church. *Id.* Mutual masturbation between boys 20 years old received a 20 to 40 day penance, 100 days if repeated and one year if more frequently; interfemoral intercourse earned 100 days for the first offense and one year upon repetition; sex between two boys earned the younger boy a week’s fast and a fast of a week and twenty days if he consented. *Id.*

to the sodomite and seven years if the act is habitual or if the offender is a monk.”<sup>85</sup> Egbert’s *Penitential* assigns seven years’ penance to a sodomite, seven years for a habitual act, and three years for men who fornicate anally.<sup>86</sup> Egbert also refers to sodomy as a capital sin, but assigns clergy different penances based on the sinner’s ecclesiastical rank<sup>87</sup> at the same time as stating elsewhere that the penance for those in orders or habitual offenders is ten years, but sometimes seven years for other offenders, one year for molles, and 100 days for boys.<sup>88</sup> Egbert’s *Penitential* imposed one year’s penance for the first offense of interfemoral intercourse and two years for the second offense.<sup>89</sup> “The *Old English Penitential* draws penances from the *Penitential* of Halitgar,” assigning penances of fifteen years for males twenty or older and a lifelong fast for a married man of forty.<sup>90</sup> The *Scrifiboc* required a boy forced into sex by an older or larger boy to do seven days’ penance, twenty if he consented, and advocated beating for fornication between two boys.<sup>91</sup>

Severe penances for same-sex relations are often matched by severe penances for sins involving opposite-sex relations. The *Penitential of Cummean* assigns seven years’ penance for men who habitually engage in same-sex relations.<sup>92</sup> Regino of Prüm’s book of ecclesiastical discipline assigns three years’ penance for anal intercourse with a person of either sex and three years for opposite-sex fornication.<sup>93</sup> The *Book of David*, dating from A.D. 500 to 525, states that fornication with a woman “vowed to God or a husband” or with an animal or another male should live “dead to the world.”<sup>94</sup> The *Penitential of Theodore* assigns three years to a woman who has same-sex relations and fifteen years for same-sex or opposite-sex fornicators.<sup>95</sup>

While there are harsher penitentials that impose heavy penalties for same-sex sodomy, Greenberg notes that it was not same-sex relations as a paradigm of activity that was being punished but non-procreative sexual relations: “homosexuality was not the primary category for distinguishing acceptable sex from unacceptable; the principal distinction had to do with the potential for conception.”<sup>96</sup> In addition, those assigned penance for same-sex relations did not appear to lose communal status as a result of their behavior; “[e]ven where the penalties were severe and the sin was regarded as grave, the penitent was still regarded as a member of the community, not as an alien or monstrosity. . . . He was not ‘a homosexual’—a distinct type of person—but someone who engaged in a homosexual act.”<sup>97</sup> However, the penitentials do reveal that certain sinners did indeed have a sexual identity based on their involvement in same-sex

<sup>85</sup> *Id.* at 153.

<sup>86</sup> *Id.* at 153-54.

<sup>87</sup> Bishops get fifteen years penance, priests twelve, deacons ten, subdeacons nine, clerics seven, and laypersons five. *Id.* at 154.

<sup>88</sup> *Id.* at 153-4.

<sup>89</sup> *Id.* at 162.

<sup>90</sup> *Id.* at 155.

<sup>91</sup> *Id.* at 158.

<sup>92</sup> GREENBERG, *supra* note 39, at 265.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 263.

acts. Groups such as sodomites and molles also known as English bædlings, existed, and each of these groupings comprised “a category of male persons known by their sexual practices.”<sup>98</sup>

In the thirteenth century the Church initiated an effort to reform the priesthood and attacked same-sex relations among priests. In the twelfth century, such legislation had been passed; in 1102, the Council of London passed ecclesiastical provisions stating that sodomitic clergymen were to be deposed, and laymen were to be deprived of their “legal status and dignity.”<sup>99</sup> Saint Anselm, a twelfth-century Archbishop of Canterbury, urged that these ecclesiastical penances for same-sex relations be moderated as “this sin has been so public that hardly anyone has blushed for it.”<sup>100</sup> Pope Leo IX too had taken a quite forgiving stance toward sinful clergy.<sup>101</sup> Such provisions grew more wicked teeth. As Richards notes, “a systematic and coherent code of Church law emerged to replace the fragmentary and sometimes contradictory set-up that had previously existed.”<sup>102</sup> The Fourth Lateran Council of 1215 established Inquisition procedures under which moral offenses could be investigated and those found guilty by church courts could be handed over to secular authorities for punishment.<sup>103</sup> Handbooks for confessors known as *Summae* replaced the “sometimes contradictory and negotiable penitentials.”<sup>104</sup> Gratian’s *Decretum* incorporated Augustine’s definitions of sexual sin and distinguished between natural sins, such as fornication and adultery, and unnatural sins, such as same-sex relations and bestiality.<sup>105</sup> Alain of Lille in *Liber Poenitentialis* (A.D. 1199-1202) defined “sin against nature as expending one’s seed outside the proper vessel.”<sup>106</sup> Paul of Hungary’s work by the same name authored in 1220 considered “sin against nature as the wasting of one’s seed outside its normal vessel”; Paul attributed unnatural sin to overindulgence in food, drink, and leisure.<sup>107</sup> Richards notes that this theory “gives the impression that homosexuality was regarded not as something innate and inescapable but rather a habit deliberately taken up as an act of defiance and wickedness.”<sup>108</sup> The Council of Nablus in Jerusalem in 1120 declared that the “persistent adult male sodomite was to be burned.”<sup>109</sup> Similarly, the Third Lateran Council of 1179 advocated deposition and penance for clerical sodomites and excommunication for laymen.<sup>110</sup> These punishments were also adopted by the Council of Paris in 1212 and the Council of Rouen in 1214, enforced by the Lateran Council of 1215, and incorporated into the *Liber Extra*, papal decretals, for Pope Gregory IX in 1234.<sup>111</sup> By the late twelfth century, same-sex acts had been reserved to the bishop or his representative for

<sup>98</sup> FRANTZEN, *supra* note 73, at 174.

<sup>99</sup> *Id.* at 237.

<sup>100</sup> GREENBERG, *supra* note 39, at 266.

<sup>101</sup> St. Peter Damian and the *Liber Gomorrhianus* (A.D. 1048-1054) advocated barring clergy who had engaged in same-sex relations from the priesthood, but Leo IX ruled that those guilty of solitary or mutual masturbation or interfemoral intercourse could be readmitted to ecclesiastical rank if their sins had not been long-term or promiscuous and if they completed penance and curbed desires. RICHARDS, *supra* note 72, at 139-40.

<sup>102</sup> *Id.* at 139.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 141.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 142.

<sup>110</sup> *Id.* at 143.

<sup>111</sup> *Id.*

punishment.<sup>112</sup> In 1221, the Cistercians expelled convicted sodomites from the order, and, together with the Dominican and Carthusian orders constructed prisons to house criminals, including sodomites.<sup>113</sup> Pope Gregory IX's 1233 papal bull *Vox in Raoma* linked same-sex activity to heresy and witchcraft.<sup>114</sup>

The thirteenth century also marked the rebirth of secular prohibitions against same-sex relations, as many secular governments enacted laws prohibiting 'crimes against nature' and ecclesiastical provisions were more strictly enforced.<sup>115</sup> The reasons for this change are not clear, but Eskridge asserts that

It can be said that more punitive attitudes coincided with the quickening of a culture in the West that was urban, bourgeois, and statist.... [This] culture created more occasions for people to find, pursue, and enjoy same-sex partners. Increasing economic opportunities ... gave substantial numbers of men more freedom to choose and diversify the nature of their sexual liaisons."<sup>116</sup>

As a result, same-sex relations became more prominent and wide-spread and political powers repressed those who did not conform.<sup>117</sup> Richards posits that the impetus for the animus towards same-sex relations was the rediscovery of Roman law, which laid the foundation for "a moral role for monarchical law-makers" who, following Justinian, would proscribe harsh punishments.<sup>118</sup> Edward I of England and Louis IX of France ruled that those engaging in same-sex relations would be burned, and Alfonso X of Castile preferred that the punishment would be "castration followed by hanging by the legs until dead."<sup>119</sup> The fifteenth-century Spanish sovereigns Ferdinand and Isabella preferred burning.<sup>120</sup> Such laws were enforced, perhaps from political rather than moral rationales—in 1307, Philip IV of France arrested the Knights Templar and charged them with engaging in same-sex relations on demand; 36 died under torture and another 72 were burned.<sup>121</sup>

Cities and towns, following the "puritanical and moralistic influence of the Mendicant Orders, moved to suppress homosexuality" and declared that habitual sodomites be put to death by burning or beheading, although infrequent and underage offenders received lesser penalties.<sup>122</sup> Siena appointed men to hunt sodomites, and by the mid-thirteenth century, the Inquisition was established and "lay confraternities associated with Mendicant orders became a

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 35 (1990).

<sup>116</sup> *Id.* at 36.

<sup>117</sup> *Id.*

<sup>118</sup> RICHARDS, *supra* note 72, at 143.

<sup>119</sup> *Id.* at 143-44.

<sup>120</sup> *Id.* at 144.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 145. Such towns included Ancona, Belluno, Bologna, Cremona, Faenza, Florence, Lucca, Modena, Orvieto, Parma, Perugia, Reggio Emilia, Siena, Spoleto, Todi, Urbino. *Id.* Perugia fined for the first two offenses and burned third-time offenders, Todi fined offenders under 33 and burned those over 33, and Florence fined and beat offenders under 16. *Id.*

means of persecuting heretics and sodomites.”<sup>123</sup> Cities set up special offices to eradicate this vice. In 1415, the Florentine Office of Decorum was established to police public morals and set up municipal brothels to “wean young Florentine males away from sodomitic practices”; in 1432, the Office of the Night was set up to suppress sodomy and institute a fine scale of 50 to 500 florins for the first four sodomy offenses and a punishment of burning for the fifth.<sup>124</sup> Other cities, such as Venice, commissioned certain citizens to report activity.<sup>125</sup>

In summary, attitudes toward same-sex activity changed dramatically from the early to the late Middle Ages. Richards asserts that “what changed . . . was not a move from tolerance to intolerance for reasons not intrinsic to Christian belief but an alteration in the means of dealing with it,” with punishments changing from penance to burning.<sup>126</sup> Richards further emphasizes that “there was never any question of homosexuals being allowed to carry on with homosexual activity unpunished. They were obliged to give it up or risk damnation.”<sup>127</sup> It is important to realize, however, that just because such laws were on the books does not mean that they were enforced with any regularity. As Norton comments, “[i]t is not really true to say, for example, that in thirteenth-century France sodomites had their testicles amputated on the first offence, their penis amputated on the second, and were burned for a third offence . . . because no one was prosecuted under this law.”<sup>128</sup> Thus, Norton asserts, “medieval prosecutions were exceedingly rare, though there are exceptional cases.”<sup>129</sup>

### The Renaissance

As is evident from the European legal currents in the late Middle Ages, “Western society’s obsession with certain categories of people became more pronounced,” with “isolated persecutions of individuals engaging in sinful conduct” giving way to “hysterical persecutory crazes that swept up throngs of people (heretics, witches, sodomites) in popular, ecclesiastical, and official dragnets.”<sup>130</sup> Beginning in the fifteenth century, there is some history of prosecutions but the laws were still not applied consistently or vigorously and cases are sporadic.<sup>131</sup>

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 145-46.

<sup>125</sup> *Id.* at 147. The Vicar-General of Venice mandated lifetime imprisonment on bread and water for Augustinian sodomites, and defined sodomy as exclusively same-sex. *Id.* A 1467 provision mandated that doctors, barbers, and healers report anal injuries. *Id.* In the 1450s a sodomy census was taken with two nobles per parish assigned for one year to investigate sodomy in their jurisdictions. *Id.* at 148.

<sup>126</sup> *Id.* at 149.

<sup>127</sup> *Id.*

<sup>128</sup> RICTOR NORTON, *THE MYTH OF THE MODERN HOMOSEXUAL: QUEER HISTORY AND THE SEARCH FOR CULTURAL UNITY* 137 (1997).

<sup>129</sup> *Id.* Norton reports that there were fifty prosecutions in Florence from the mid-fourteenth century to the mid-fifteenth century and the death sentence was imposed in twelve cases. *Id.*

<sup>130</sup> ESKRIDGE, *supra* note 115, at 36.

<sup>131</sup> NORTON, *supra* note 128, at 137. Norton remarks that Spanish prosecutions varied from city to city, with 52 executions for sodomy in Seville, 17 in Valencia, 34 in Zaragoza, and 2 in Barcelona from the late sixteenth century to the early seventeenth century. *Id.* at 138. During the same time period, France saw 121 appeals from death sentences for sodomy; in 1533, two women were acquitted of tribadism; in the sixteenth century, several females were burned for dressing as men and marrying women; in 1691, a sodomite was confined to the General Hospital; and in 1750, two lovers were burned. *Id.* In Geneva, during a 120-year period from the mid-sixteenth century on, there were 62 prosecutions and 30 executions for sodomy; in Ghent and Bruges, 24 monks were burned to death in

In England, the death penalty for sodomy, referred to as “buggery,” was instituted in 1533 under Henry VIII (and reenacted in 1562 under Elizabeth I); “the law was directed against a series of sexual acts, not a particular type of person.”<sup>132</sup> The first prosecution came in 1540 and the second one year later in 1541, but the third did not arrive until 1631.<sup>133</sup> Apparently, these early sodomy trials did not prosecute men for sodomy alone but also for other offenses such as religious heresy, political offences, violations of class distinction, or violence.<sup>134</sup> Therefore, there was little “hard and fast evidence of widespread abhorrence of homosexuality during the reigns of James I and Charles I” as “one execution is hardly enough to terrify three or four generations of potential queers.”<sup>135</sup>

### Pre-Industrial and Industrial Europe

Increased scrutiny of sexual practices continued into the seventeenth and eighteenth centuries. Faced with such scrutiny, those attracted to others of the same sex “gravitated to underground communities inhabited by like-feeling residents, namely, subcultures of inverts in urban areas such as London; Paris; most major Dutch cities, including Amsterdam; most major Italian cities, including Venice; and elsewhere by the early eighteenth century.”<sup>136</sup>

Enlightenment Europe had been characterized by an insurgence of intellectual interest in Socratic love and classical heritage, and some scholars have posited that intellectuals of the time used these philosophical mediums to promote a kind of homoeroticism concerning “male eros.”<sup>137</sup> This concept of male eros did not involve sodomy, being more a love celebrated by the mind than a love celebrated by the body. This movement uplifted male eros and condemned sodomy, favoring not harsh punishment but prevention.<sup>138</sup> Gerard posits that it was this Enlightenment movement which “put an end to the criminal laws condemning sodomy in large parts of the Western world.”<sup>139</sup> Whatever the impetus for repeal, the “supposed increase in intolerance during the rise of market capitalism ... is refuted by an actual *decrease* in the severity of the laws.”<sup>140</sup> The French Penal Code of 1791 decriminalized homosexual acts, and Russia, Austria, and Tuscany repealed the death penalty for homosexuality in the late eighteenth century; at the same time, penalties were reduced in all Latin American countries, with Brazil decriminalizing homosexuality in 1830.<sup>141</sup>

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the sixteenth century and three men in the seventeenth century. *Id.* In Leiden, two women were flogged and banished for “lesbianism” before 1700. *Id.*

<sup>132</sup> Robert Padgug, *Sexual Matters: Rethinking Sexuality In History*, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 54, 59 (Martin Bauml Duberman, Martha Vicinus, & George Chauncey, Jr. eds., 1989). *See* 25 Hen. ch. 6 (1533), 5 Eliz. 17 (1562).

<sup>133</sup> NORTON, *supra* note 128, at 139.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> ESKRIDGE, *supra* note 115, at 42.

<sup>137</sup> Gert Hekma, *Sodomites, Platonic Lovers, Contrary Lovers: The Backgrounds of the Modern Homosexual*, in THE PURSUIT OF SODOMY: MALE HOMOSEXUALITY IN RENAISSANCE AND ENLIGHTENMENT EUROPE 436 (Kent Gerard & Gert Hekma eds., 1989).

<sup>138</sup> *See id.* at 444.

<sup>139</sup> *Id.* at 445.

<sup>140</sup> NORTON, *supra* note 128, at 140.

<sup>141</sup> *Id.*

Though some scholars contend that Britain decreased its penalties for same-sex acts “as imperialism advanced,” the majority disagree.<sup>142</sup> Laws against same-sex relations in the eighteenth and nineteenth centuries, “though *narrowly defined* the punished acts (sodomy in the sense of anal intercourse, punishable severely, often by death), were *broadly applied* (sodomy as anything other than provable anal intercourse, punishable by a fine, the pillory and two years’ imprisonment).”<sup>143</sup> In 1861, the Offences Against the Person Act, amended in 1885 by the Labouchère Amendment, recodified the same-sex acts criminalized as felonies or misdemeanors since 1533.<sup>144</sup> Before 1885, Norton reports that most men prosecuted were convicted of “attempted sodomy,” a misdemeanor involving oral intercourse, mutual masturbation, frottage, groping, and soliciting.<sup>145</sup> The Labouchère Amendment used the term ‘gross indecency’ instead of ‘attempted sodomy’ to refer to such acts,<sup>146</sup> and deemed such acts committed between two men in public or in private misdemeanors to be punishable by “up to two years of hard labor.”<sup>147</sup> Norton asserts that the Amendment “had no effect . . . upon queers’ own conception of what was legal or illegal,” and “it has not been established that prosecutions increased because of this amendment.”<sup>148</sup>

The public perception of sodomites also changed during this time period. Trumbach suggests that between 1100 and 1700 “effeminacy had been . . . characteristic of both the man who sexually cared too much for women, as well as of the male who took the passive role in sexual intercourse,” while “sodomy had been an act of which all men were capable.”<sup>149</sup> Increasingly, however, sodomites were seen as not merely passive but effeminate as well.<sup>150</sup>

### Colonial America

Obviously, the Europeans who emigrated from England in the seventeenth and eighteenth centuries departed the mother land’s shores while Henry VIII’s 1533 sodomy law was still in effect. Colonial legal codes incorporated this statute and often referred to the Bible as well, assigning death as the appropriate punishment for sodomy.<sup>151</sup> Statutory provisions in Plymouth, Massachusetts, Connecticut, and New Hampshire all cited a passage from Leviticus, while a Rhode Island law followed the Book of Romans in defining sodomy.<sup>152</sup> Jamestown (in 1610)<sup>153</sup>

<sup>142</sup> *Id.* at 140-41.

<sup>143</sup> *Id.* at 141.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* .

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 199.

<sup>148</sup> *Id.* at 141.

<sup>149</sup> Randolph Trumbach, *Sodomitical Assaults, Gender Role, and Sexual Development in Eighteenth-Century London*, in *THE PURSUIT OF SODOMY: MALE HOMOSEXUALITY IN RENAISSANCE AND ENLIGHTENMENT EUROPE* 407, 408 (Kent Gerard & Gert Hekma eds., 1989).

<sup>150</sup> *Id.*

<sup>151</sup> JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970*, at 14 (1983).

<sup>152</sup> LEILA J. RUPP, *A DESIRED PAST: A SHORT HISTORY OF SAME-SEX LOVE IN AMERICA* 28 (1999). The Leviticus passage reads, “[i]f any man lyeth with mankind, as he lyeth with a woman, both of them have committed abomination; they both shall surely be put to death.” *Id.* The passage from Romans states that sodomy is “a vile



and the other southern colonies adopted the English “buggery” statute.<sup>154</sup> Some New England colonies expanded upon the 1533 Act; the Massachusetts Bay colony debated and ultimately rejected the Reverend John Cotton’s proposal in 1636 that “intercourse” between two women be classified as sodomy, but in 1656 the New Haven colony prohibited same-sex acts, including intercourse, masturbation, and other carnal knowledge.<sup>155</sup> Eskridge reports that there were twenty prosecutions and four executions for sodomy during the colonial period.<sup>156</sup> Rupp more specifically states that from 1607 to 1740 there were nineteen cases where sodomy was charged and five executions.<sup>157</sup> Norton, on the other hand, states that an 1861 sodomy conviction was the first for almost 200 years.<sup>158</sup> All-in-all, by 1830, all of the original 13 states had enacted legislation criminalizing sodomy, but most eliminated the death penalty as a possible punishment.<sup>159</sup> Thomas Jefferson authored a 1779 Virginia provision mandating castration as the punishment for all men convicted of rape, sodomy, bestiality, or polygamy.<sup>160</sup> Magistrates also used lewd-behavior provisions for prosecuting those who engaged in same-sex activity.<sup>161</sup>

Colonists did engage in same-sex activity, for “criminal records, church sermons, and other evidence” testify to the presence of same-sex “homosexual activity,” but “[s]ame-sex erotic behavior remained sporadic and exceptional.”<sup>162</sup> Opposite-sex relations dominated sexuality, and “the imperative to procreate dominated the social attitude toward and organization of sexuality” so that “the existence of lesbians and gay men was inconceivable.”<sup>163</sup> As D’Emilio notes, “[e]ven the trials of persistent offenders document daily lives that revolved around a heterosexual family role,” and colonists did not conceive of same-sex acts as different from other prohibited sexual activities that “occurred outside the sanctioned bonding of husband and wife.”<sup>164</sup> Rupp concludes, from “the minimal evidence we do have,” that “ordinary people . . . did not always harshly judge people accused of same-sex sexuality.”<sup>165</sup>

### Industrial and Post-Industrial America

During the latter half of the nineteenth century, a momentous economic shift occurred, and industrial capitalism relocated people from the home-based economy to the marketplace.<sup>166</sup> D’Emilio suggests that this enabled the modern concept of homosexual identity to emerge.<sup>167</sup> The prosecution of same-sex behavior took on moral overtones once again when it was identified

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affection, whereby men given up thereto to leave the natural use of woman and burn in their lusts one toward another, and so men with men work that which is unseemly.” *Id.*

<sup>153</sup> D. MICHAEL QUINN, SAME-SEX DYNAMICS AMONG NINETEENTH-CENTURY AMERICANS 34 (1996).

<sup>154</sup> RUPP, *supra* note 152, at 28.

<sup>155</sup> WILLIAM N. ESKRIDGE, GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 157 (2002).

<sup>156</sup> *Id.*

<sup>157</sup> RUPP, *supra* note 152, at 30.

<sup>158</sup> NORTON, *supra* note 128, at 139.

<sup>159</sup> ESKRIDGE, *supra* note 155, at 157.

<sup>160</sup> QUINN, *supra* note 153, at 35.

<sup>161</sup> D’EMILIO, *supra* note 151, at 14.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> RUPP, *supra* note 152, at 30.

<sup>166</sup> D’EMILIO, *supra* note 151, at 11.

<sup>167</sup> *Id.*

with vice in the late nineteenth and early twentieth centuries. In post-Civil War America, purity movements emerged to reinforce traditional gender roles and fight prostitution;<sup>168</sup> these social movements influenced municipal, state, and national policy between 1881 and 1921.<sup>169</sup> The New York Penal Code of 1881 “exemplified post-Civil War state morals codes,” and prohibited sodomy along with rape, abduction, abortion, and bigamy.<sup>170</sup>

Those involved in purity movements soon found out that sodomy statutes were not the best means by which to suppress sexual deviance because invoking the criminal system invoked by proxy important rights for the defendant, including a requirement that a person could not be convicted for sodomy based upon a “willing adult accomplice’s testimony.”<sup>171</sup> To remedy this, states such as Pennsylvania enacted new sodomy statutes which were “taken to cover and include” acts where one person has carnal knowledge of another, including oral sex; New York passed a similar law in 1886, as did Ohio in 1889, Louisiana in 1896, Wisconsin in 1898, Iowa in 1902, Washington in 1909, Missouri in 1911, Virginia in 1916, and Minnesota in 1921.<sup>172</sup> In 1923, New York passed a law forbidding homosexual “lewdness,” including cruising, and fortified existing public solicitation laws.<sup>173</sup> States either followed the English approach of creating a separate crime for oral sex, often phrased as ‘gross indecency’ as in Michigan (1903); ‘lewd and lascivious acts’ as the laws of Massachusetts (1887), Maryland (1916), and Florida (1917) termed it; ‘private lewdness’ as was found in New Jersey (1906); ‘crimes against nature’ as in Illinois (1897), and Georgia (1904); or the forthright ‘oral copulation’ found in California (1915, 1921).<sup>174</sup> Despite these broader phrasings of same-sex activity, most arrests continued to occur under municipal provisions such as “public lewdness, indecency, vagrancy, disorderly conduct, and solicitation,” which granted the defendant far fewer procedural protections.<sup>175</sup>

Eskridge asserts that no statutes focused on “consensual erotic activities between people of the same sex” and that sodomy laws were only rarely applied to adults who engaged in consensual same-sex activity.<sup>176</sup> By 1881, 36 out of 39 states had criminalized sodomy or the “crime against nature;” however, in 1880 only 63 prisoners were in American jails for committing such crimes.<sup>177</sup> Eskridge characterizes social and legal attitudes of that time period toward same-sex activity by stating that while “society gave same-sex intimacy no sanction, neither did it impose legal penalties.”<sup>178</sup> This changed by 1890, when 224 people were incarcerated for crimes against nature; New York City, which had prosecuted 22 sodomy cases from 1796 to 1873, was arresting as many men annually by 1890, and prosecutions were up in Philadelphia, Boston, and Chicago by 1900, with those in Baltimore, St. Louis, Cleveland, Los Angeles, and San Francisco making arrests in the double digits from 1911 to 1920, when

<sup>168</sup> ESKRIDGE, *supra* note 155, at 19.

<sup>169</sup> *Id.* at 24.

<sup>170</sup> *Id.* at 19.

<sup>171</sup> *Id.* at 24.

<sup>172</sup> *Id.* at 24-25.

<sup>173</sup> JENNIFER TERRY, AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY 270 (1999).

<sup>174</sup> ESKRIDGE, *supra* note 155, at 25.

<sup>175</sup> *Id.* at 27.

<sup>176</sup> *Id.* at 19.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

Richmond and Nashville recorded their first sodomy arrests.<sup>179</sup> Quite obviously, arrests for sodomy comprised but a tiny fraction, which Eskridge estimates to be one percent, of all arrests.<sup>180</sup>

In the early twentieth century, homosexuality, or inversion, was acquiring the overtones of mental illness, and mental illness itself was acquiring a criminal aura; several states passed laws in the 1920s that were based on “psychopathic theories of disease,” such as Massachusetts’ Briggs Law of 1921, which required psychiatric evaluation of “recidivist felons and those convicted of capital offenses.”<sup>181</sup> Laws passed in the late 1930s in states such as California, Ohio, Minnesota, Michigan, and Illinois specified “sexual psychopathology” as a criminal motive.<sup>182</sup> New York law mandated that the accused in a criminal case be screened, and further required that those convicted of a felony undergo psychiatric evaluation at Bellevue Hospital to assist the judge in determining an appropriate sentence.<sup>183</sup> Such laws were enacted in the hopes that people could be deterred from homosexuality.<sup>184</sup> Prosecutions grew more aggressive; from 1936 to 1940, sodomy arrests increased in Baltimore, Cleveland, Washington, D.C., Miami, New York, and St. Louis, and from 1936 to 1937 incarcerations for “predatory” offenses such as “rape, statutory rape, indecent liberties, and sodomy” rose from 9.8 percent to 14.9 percent.<sup>185</sup> Post-World War II years ushered in increased anxiety against sexual psychopaths; in Washington, D.C., (where Congress enacted the Miller Act of 1948, which doubled the maximum penalty for child molestation from 10 to 20 years), California (which raised maximum penalties in 1952 for oral sex with minor and sodomy to life in prison), Illinois (which increased penalties in 1945 for indecent liberties with minors), and New York (which made consensual adult sodomy a misdemeanor in 1950 but raised the sentence for forceful sodomy or sodomy with a minor) all revised laws to impose harsher penalties on those engaging in sodomy or other same-sex conduct.<sup>186</sup> Those convicted under sexual psychopath laws, who were often homosexuals, were sent to hospitals like California’s Atascadero State Hospital, where they were subjected to lobotomies, shock therapy, and sterilization.<sup>187</sup> Private, as well as public, same-sex behaviors were eventually criminalized, as in 1953 in Washington, D.C., and by 1961, 21 states had followed suit.<sup>188</sup>

As Eskridge notes, in contrast to ‘inverts’ in the 1880s, who were not particularly targeted by criminal laws, by World War II,

A homosexual with an active social life had a good chance of spending time in jail, possibly for sodomy but most likely for misdemeanors such as disorderly conduct, lewd vagrancy, indecent exposure, lewd or lascivious conduct, indecent

<sup>179</sup> *Id.* at 25.

<sup>180</sup> *Id.*

<sup>181</sup> TERRY, *supra* note 173, at 459 n. 7.

<sup>182</sup> *Id.* at 272.

<sup>183</sup> *Id.* at 276.

<sup>184</sup> ESKRIDGE, *supra* note 155, at 43-44.

<sup>185</sup> *Id.* at 41, 42.

<sup>186</sup> *Id.* at 60-61.

<sup>187</sup> *Id.* at 62.

<sup>188</sup> *Id.*

liberties with minors, loitering near a public toilet or schoolyard, or sexual solicitation.<sup>189</sup>

This surveillance of sexual activity of course had profound consequences for the homosexual community, encouraging homosexuals to keep their sexual attractions secret. Eskridge notes that in the 1930s and 40s homosexuals spoke of “wearing the mask” or “masquerade” to refer to the visibility of their sexual orientation.<sup>190</sup> After World War II, however, the more restrictive closet metaphor soon replaced the mask metaphor.<sup>191</sup>

The closet has slowly become less necessary over the years since 1981 as increasing numbers of states and cities have enacted laws protecting homosexual people against discrimination and violence.<sup>192</sup> Courts are increasingly likely to normalize homosexuality by recognizing domestic partnerships and second-parent adoptions by same-sex parents.<sup>193</sup>

## ***II. Bowers’ Powers: The Case and the Criticism it Inspired***

Of course, one can scarcely conclude any history of same-sex activity regulation, however brief, without mentioning the infamous *Bowers v. Hardwick*.<sup>194</sup> In *Bowers*, Justice White considered a Georgia anti-sodomy statute, similar to the anti-sodomy laws of “the many States that still make such conduct illegal and have done so for a very long time.”<sup>195</sup> It is legal legend by now that White, writing for the majority, states that there was no fundamental right to engage in homosexual sodomy, in part because “[p]roscriptions against that conduct have ancient roots.”<sup>196</sup> These “ancient roots,” extended to the American shores, are linked to the fact that “[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights,” and that, when the Fourteenth Amendment was ratified in 1868 “all but 5 of the 37 States in the Union had criminal sodomy laws.”<sup>197</sup> White also noted that “until 1961, all 50 States outlawed sodomy,” and at the time of the opinion, “24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.”<sup>198</sup>

In his concurrence, Justice Burger echoes the historical criminalization of sodomy and bolsters White’s historical analysis, stating that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization,” and that such prohibitions are “firmly rooted in Judeo-Christian moral and ethical standards.”<sup>199</sup> Burger states not only that homosexual sodomy was “a capital crime under Roman law,” but also notes that “[d]uring the English Reformation when powers of the

<sup>189</sup> *Id.* at 43.

<sup>190</sup> *Id.* at 55.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 139.

<sup>193</sup> *Id.*

<sup>194</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>195</sup> 478 U.S. at 190.

<sup>196</sup> *Id.* at 192.

<sup>197</sup> *Id.* at 192-93.

<sup>198</sup> *Id.* at 193-94.

<sup>199</sup> *Id.* at 196 (Burger, C.J., concurring).

ecclesiastical courts were transferred to the King's Courts, the first English statute criminalizing sodomy was passed."<sup>200</sup> Burger then remarks that "[t]he common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies," a legal connection that explains the Georgia Legislature's 1816 passage of the statute under analysis that "has been continuously in force in one form or another since that time."<sup>201</sup> Burger concludes with the famous assertion that "[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."<sup>202</sup>

The historical assertions of Justices White and Burger did not go unchecked, however. In his dissent, Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, state that the "invocation" of Judeo-Christian tradition could not support the Georgia statute at issue: "petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that § 16-6-2 represents a legitimate use of the state's secular coercive power."<sup>203</sup> Blackmun further remarks that the "theological nature" of "Anglo-American antisodomy statutes is patent" as sodomy was not a secular offense in England until 1533, having been "in Sir James Stephen's words, 'merely ecclesiastical.'"<sup>204</sup> In regards to the transformation of sodomy from an ecclesiastical sin into a criminal offense, Blackmun notes that "the transfer of jurisdiction over prosecutions for sodomy to the secular courts seems primarily due to the alteration of ecclesiastical jurisdiction attendant on England's break with the Roman Catholic Church, rather than to any new understanding of the sovereign's interest in preventing or punishing the behavior involved."<sup>205</sup> Justice Stevens also equates the criminalization of heterosexual sodomy with that of homosexual sodomy, stating that "it is the indiscriminate prohibition of sodomy, heterosexual as well as homosexual, that has been present 'for a very long time.'"<sup>206</sup>

*Bowers* has left a profound legacy, extending far beyond the boundaries of homosexual sodomy and even homoerotic sexuality. Of course, numerous courts have copied *Bowers'* historical analysis in cases involving criminalized sodomy or homosexual identity.<sup>207</sup> Numerous courts, in opinions addressing issues such as the discipline or termination of an employee for adultery,<sup>208</sup> assisted suicide,<sup>209</sup> nonobscene nude dancing as expression,<sup>210</sup> and a zoning

<sup>200</sup> *Id.* at 196-97.

<sup>201</sup> *Id.* at 197.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 211 (Blackmun, J., dissenting).

<sup>204</sup> *Id.* at 212 n. 6 (quoting 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 429-30 (1883)).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 215 (Stevens, J., dissenting).

<sup>207</sup> See *Able v. United States*, 968 F. Supp. 850 (E.D.N.Y. 1997), *rev'd*, 155 F.3d 628 (1998); *Christensen v. State*, 468 S.E.2d 188 (Ga. 1996); *Powell v. State*, 510 S.E.2d 18 (Ga. 1988); *State v. Smith*, 766 So. 2d 501 (La. 2000); *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001), *rev'd*, 123 S. Ct. 2472 (2003); *Santillo v. Commonwealth*, 517 S.E.2d 733 (Va. App. 1999); *United States v. Hall*, 34 M.J. 695 (A.C.M.R. 1991).

<sup>208</sup> See *Mercure v. Van Buren Tp.*, 81 F. Supp. 2d 814 (E.D. Mich. 2000) (holding that the discharge of a police officer after an affair with the estranged wife of another officer was not a violation of his free association and privacy rights under the First and Fourteenth Amendments); *Oliverson v. West Valley City*, 875 F. Supp. 1465 (D.Utah 1995).

<sup>209</sup> See *Kevorkian v. Thompson*, 947 F. Supp. 1152 (E.D. Mich. 1997); *Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997); *Compassion in Dying v. State of Washington*, 79 F.3d 790 (9th Cir. 1996), *rev'd*, 521 U.S. 702 (1997).

ordinance restricting locations of sexually-oriented businesses<sup>211</sup> have referred to the *Bowers* holding. Still other cases have not cited *Bowers* but have greatly mimicked the majority's superficial historical analysis in addressing unrelated legal issues such as child custody disputes.<sup>212</sup> Only a few courts have rejected *Bowers*' historical analysis as troublesome.<sup>213</sup>

*Bowers*' rather flimsy analysis of history has of course engendered much criticism. Most of these criticisms make use of a Foucaultian analysis, contending that homosexuality did not exist until the eighteenth century and thus Justices White and Burger failed to capture the recent construction of homosexuality as a viable social category. Other scholars struggle to make a case that same-sex relations, while legally prohibited, were socially celebrated in various historical venues from Rome to the World War II era.

Anne B. Goldstein's 1988 analysis of *Bowers*' historical errors faults Justices White and Burger for not realizing that "‘homosexuality’ lacks an unambiguous, uncontroversial, meaning" and claiming that "historical conceptions of ‘homosexual sodomy’ . . . informed the framers' vision of the Bill of Rights and the Fourteenth Amendment."<sup>214</sup> Contending that *Bowers*' historical analysis is insufficiently "accurate to guide constitutional interpretation," Goldstein argues that the majority's reference to 'ancient roots' "oversimplifies and distorts a complex historical record" and "misuses the relatively modern concept of 'homosexuality' to depict the past."<sup>215</sup> Goldstein states that, instead, homosexuality is a "cultural and historical artifact," not a conception that lies "outside of history," and further states that "[n]o attitude toward 'homosexuals' or 'homosexuality' can really be identified before the mid-nineteenth century because the concept did not exist until then" as "[b]efore the late 1800s, sexuality . . . was something a person did, not what he or she was."<sup>216</sup> Thus, Goldstein explicates how "White and Burger were inserting their modern understanding of 'homosexuality' anachronistically into systems of values organized on other principles, obscuring the relative novelty of the distinction between 'homosexuality' and 'heterosexuality' with a myth about its antiquity."<sup>217</sup> Focusing more specifically on the "act/identity problem" in *Bowers*' history, Janet Halley echoes Goldstein's criticism in her statement that "[t]o claim that present sodomy statutes prohibit the same thing as ancient sodomy prohibitions and as the colonial proscriptions which Justice White so lovingly cited, is to promote formal sameness over radical historical discontinuity."<sup>218</sup> Halley asserts that this leads to a submergence of all discontinuity which acts as the "basis for [the Court's] fundamental rights holding, a uniform history of sodomy throughout Western

<sup>210</sup> See *Miller v. City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (challenging the constitutionality of Indiana's public indecency statute, the Seventh Circuit overruled the district court and found that non-obscene nude dancing performed as entertainment was expression and thus entitled to a protection under the First Amendment which made the statute's total ban on nudity unconstitutional), *rev'd*, 501 U.S. 560 (1991).

<sup>211</sup> See *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986) (upholding constitutionality of zoning ordinances which regulated sexually-oriented businesses with four minor severable exceptions).

<sup>212</sup> See *Ex Parte H.H.*, 830 So. 2d 21, 28-35 (Ala. 2002).

<sup>213</sup> See *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (affirming that state homosexual sodomy statute was unconstitutional because it violated the privacy and equal protection of the Kentucky Constitution).

<sup>214</sup> Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L.J.* 1073, 1079-80 (1988).

<sup>215</sup> *Id.* at 1081, 1086.

<sup>216</sup> *Id.* at 1087.

<sup>217</sup> *Id.* at 1088-89.

<sup>218</sup> Halley, *supra* note 6, at 1752.

history.”<sup>219</sup> Finally, in more recent critical charges, Eskridge contends that Justice White’s historical commentary ignores the “normative regime of sodomy laws,”<sup>220</sup> that White places homosexuality at the mid-nineteenth century ratification of the Fourteenth Amendment when none knew what that condition meant,<sup>221</sup> and that Justice White poses a twentieth-century conceptualization of the homosexual as an ancient entity.<sup>222</sup>

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<sup>219</sup> *Id.* at 1755.

<sup>220</sup> See ESKRIDGE, *supra* note 155, at 161. Here Eskridge notes that

White’s ahistorical misreading of the prohibitory regime of sodomy laws helped obscure a deeper problem with his analysis, namely, his ahistorical misreading of the normative regime of sodomy laws. Sodomy laws have at different points in time reflected no fewer than three different normalizing regimes: sexual acts must be procreative and marital, must be mutual and consensual, and/or must be gendered or heterosexual. Focusing only on the third option, White imposed his own normalizing regime and ignored the norms that would have justified sodomy regulation in 1868 and before.

As Burger’s concurring opinion appreciated, the primary historical justification for penalizing sodomy was the Judeo-Christian valorization of sex within the context of procreative marriage. . . . When American states codified their criminal laws in the middle third of the nineteenth century, most of them followed this Judeo-Christian tradition and included sodomy prohibitions in close proximity with abortion, fornication, adultery, and incest. . . . Although the framers of the fourteenth amendment would have rationalized sodomy laws as requiring that sex occur within procreative marriage, White ignored this rationale because it was foreclosed by the Court’s precedents.

*Id.*

<sup>221</sup> See *id.* at 163. Eskridge states that

White faulted *Hardwick* for engaging in “homosexual” sodomy. *Hardwick*’s rationalization for sodomy laws, compulsory heterosexuality, would have been literally incomprehensible to the framers of the fourteenth amendment, who would not have recognized the word “homosexual” or “heterosexual” . . . . One would read the pre-1900 cases in vain to find any mention of homosexuality, a condition that did not even exist. To be sure, nineteenth-century America was appalled that a man would be anally penetrated, but it was appalled because that penetration was sinfully nonprocreative, was probably without meaningful consent, and violated the gender role of the victim.

*Id.*

<sup>222</sup> See *id.* As Eskridge notes,

Byron White’s choice of a normalizing regime for sodomy laws had nothing to do with the expectations of the nineteenth-century legislatures that adopted such laws or of the framers of the fourteenth amendment. His choice was *his choice*, alone. His choice was rooted in twentieth-century law’s creation of the “homosexual” as the object of criminalization, persecution, and erasure. Understood in this way, *Hardwick* upheld proscriptions that had neither “ancient roots” nor sanctification by “millenia of moral teaching.” The “roots” of the Court’s focus on homosexuality were, instead, the antifeminist movement and the eugenic sexologists before World War I. The “moral teaching” of antihomosexual animus was that of modernized natural law and theories of sexual psychopathy.

*Id.*

### III. Handling History: A Social Constructivist Rejoinder

My purpose in this paper is not to take issue specifically with the rather troubling historical assertions in *Bowers*, nor to criticize in turn preexisting criticisms of *Bowers*. Rather, I wish to burrow to a deeper methodological level to the use of history in constitutional analysis itself. I approach my argument from a social constructivist perspective, which of course both informs and influences my viewpoints of the use of history in constitutional analysis. This perspective assumes that homosexuality is socially constructed in a communal sense, and, therefore, follows in the footsteps of scholars such as Goldstein, Halley, Eskridge, Hutchinson,<sup>223</sup> and others, who assert that homosexuality is a recent cultural category. According to Hutchinson, “[a] community is a social group, often geographically defined, whose members commonly share certain experiences, world views, value systems, and cultural attributes”; community is, therefore, founded upon commonality, and “its members’ relationships are solidified by ties providing a feeling of collective identity, self-awareness, and affirmation.”<sup>224</sup> Communities are not mutually exclusive, but are “built into amalgamations of each other” so that “[t]here is no essential heart or immutable center to a community.”<sup>225</sup> Instead, communities are kaleidoscopic, “made and remade in intricate relation to each other at every level, in a process by which the influence of other communities penetrates not only the porous peripheral border but also seeps up through the supposedly solid communal floor.”<sup>226</sup> This paper’s basic premise, however, is more expansive than merely retracing the history of homosexuality to demonstrate *Bowers*’ flimsy historical assertions. Instead, I find fault with analyses which reach far back in time, and would contend that beyond a certain point in time a historical perspective is largely useless when proffered as a bolster for legal argumentation.

A historical retelling of a group’s identity is as socially constructed as the group identity itself, particularly as a history often purports to explicate or actually constitute a group’s identity. Such an analysis is influenced by current perceptions of historical players, as well as the socio-cultural orientations of those who are enunciating the historical sagas. In order to effectively engage in social construction, we must possess some phenomenological awareness of the categories we are explicating; they must on some level be part of our lived experience. The social construction of history is not exception; in order to effectively come to terms with historical categories, these categories and the ideologies that inform them must not be alien to our cultural senses but must somehow resonate with our past experiences or heritage. Some historical periods are so alien to us, either from passage of time or from lack of preserved historical accounts, that either we must acknowledge our own inability to effectively access the social construction of these historical categories or we must engage in academic fraud, passing our perceptions off as genuine antiques when they are but modern perspectives in antique guise. Engaging in social construction when the time periods we seek to access gives way too easily to manipulation and confusion of fact and affect and so cannot be trusted. Therefore, I urge that we

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<sup>223</sup> Darren Lenard Hutchinson, “Closet Case”: *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 110-11 (2001).

<sup>224</sup> Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 54 (1994).

<sup>225</sup> *Id.* at 59.

<sup>226</sup> *Id.*



abandon historiography all together in legal analyses of homosexual identity when it is used to reconnect with cultures with which (in reality) it is impossible to connect.

I start from Justice Harlan's assertion in *Poe v. Ullman*<sup>227</sup> that history is a living entity. While fossils of past epochs do grace present-day culture, it is now impossible to form concrete conclusions about homosexuality in many of these historical eras simply because the pertinent sources of the time no longer exist. How can we assume that the *Lex Scatinia* forbade same-sex acts when we must piece together what the *Lex Scatinia* said from literature from the time, including satirical writings? I concede that historical inquiry for its own sake has much to offer, and that such research efforts are invaluable. However, how can we make informed and accurate legal conclusions on the basis of a history about which we remain largely ignorant?

With respect to investigations of homosexual history, legal scholars are just as out of touch with some epochs of history as the *Bowers* majority. That at best tenuous conclusions can be drawn about homosexual status from Rome to the late Renaissance is amply demonstrated by the language of the brief historical summary embodied in Part I of this analysis.

The stability of historiography does not improve with time; rather, in investigating homosexuality through legislation prohibiting same-sex relations, we lose sight of homosexuality altogether, focusing instead on specific acts such as sodomy and thereby conflating legal status with social identity. We succeed only in confusing legal regulation and prosecution records, signs of authoritarian disapproval of homosexuality or same-sex relations, with social disapproval of homosexuals as a class of persons. An explication of homosexual identity and its role in constitutional legal analysis illuminates the problems of such a historiographical approach. Such an explication assumes that historical investigations of a socially constructed group such as homosexuals necessitate interpretations of group identity, for historical studies are themselves studies of identity construction and past reactions to identity constructions. Therefore, historiographers of homosexuality inquire into homosexual history through the lens of homosexual identity, as constructed and interpreted in different communal levels of city, state, and nation. The bridge between homosexuality as a socially-constructed category and homosexual identity has been made in the context of race and racial identity by Lopez.<sup>228</sup> Of course, homosexuality is closely identified with communities, and communities are similarly tied to identities; one need only recall the religious and social animus which has informed popular constructions of homosexuality as a perverse or immoral practice. Homosexuality is constructed by and acquires meaning in a community, and these constructions further inform homosexual identity.

In the past, then, homosexual identity was constructed and interpreted by communities just as it is in the present. Investigating the history of homosexuals through legislation and prosecution records, while informative, lends the perception that only certain authoritative

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<sup>227</sup> *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.")

<sup>228</sup> Lopez, *supra* note 224, at 57. ("Thus, membership in a community powerfully shapes personal identity. If race is closely linked to communities and communities similarly tied to identities, then race and identity are themselves connected.")

communities are connected to homosexuality and inform homosexual identity—that homosexual identity is externally imposed by authorities through legal and other means. This at best undervalues and at worse ignores the contributions of other communities. Such an analysis not only ignores the fact that other communities are connected to homosexuality and construct and inform homosexual identity, but it also suggests that homosexuals themselves do not construct and inform their own group identities, and by implication, that they are not a group. However, homosexuals emerged as a group when they came together into communities, at whatever historical point that occurred. Thus, legal prohibitions of sodomy and other same-sex acts do not define a class of people known as homosexuals, but merely distinguish acts which were prohibited behaviors; if categories were created, they were of the ‘sodomite’ and not of the ‘homosexual’ variety. Such external constructions of homosexuality which only examine the sense-making contributions of certain communities are thus illusory because homosexuality is socially constructed by all communities, being “closely tied to the construction of personal identities and communities.”<sup>229</sup> Homosexuality is “not just an external definition of group membership, but a source of social identity,” and so connections between homosexuality, “community ties, and personal identity illustrate how what we look like [or who we are attracted to] often says something important about who we are.”<sup>230</sup> Therefore, homosexuality is an informal definition of membership as well. The enunciation of homosexuality as a social category had communal implications; like members of the Native American, Mexican, and California Chinese populations, homosexuals (and heterosexuals) lived as members of other communities before “elements of their morphology became racially [and sexually] meaningful.”<sup>231</sup> After the categories of homosexuality and heterosexuality were conceived and constructed, however, people were divided into different communities because their sexual attractions acquired new communal meaning, and their sexual attractions defined the boundaries of these new, narrower communities.

If researchers are not somehow part of the constructive community, then they cannot readily come to terms with the identities of the groups in that community, and the reasons and processes by which the groups are constructed as they are. Furthermore, because communities are not mutually exclusive and are perpetually in flux, researchers must be able to access historical communities in order to ascertain the ways in which they overlap. Lopez asserts that “the community ties we honor as individuals are themselves volatile, changing not only over time but also depending on the setting.”<sup>232</sup> This then, underscores the importance of context; “[c]ontext is everything” for the historiographer.<sup>233</sup> In order to be conversant with context, one must know how “questions of community and identity change in response to other questions,”<sup>234</sup> such as “Compared to what? As of when? Who is asking? In what context? For what purpose?”<sup>235</sup>

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<sup>229</sup> *Id.* at 54.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 60.

<sup>233</sup> Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 15 (2000).

<sup>234</sup> Lopez, *supra* note 224, at 60.

<sup>235</sup> *Id.* at 60 (citing Barbara Johnson, *Thresholds of Difference: Structures of Address in Zora Neale Hurston*, in “RACE,” WRITING, AND DIFFERENCE 322, 323 (Henry Louis Gates, Jr., ed., 1986)).

Historiographers must take special care in describing the historical communities that provided the interpretive context for constructions of group identity lest they overemphasize the role of a particular group instead of the larger communal context which informs that group. Like “racial fabrication,” analyzing history in terms of heterosexuality and homosexuality fundamentally “changes communities by emphasizing or even creating commonalities while eroding previously relevant differences.”<sup>236</sup> The “construction of certain morphological features” as socially meaningful and the resultant social mediation of identity “serve[s] to shape communities by providing a common experience to people who earlier or in a different context may not have seen themselves as similar.”<sup>237</sup> Thus, the unwary historiographer may dispense sagas of communal experiences, perceptions of homosexuality, and constructions of homosexual identity that simply did not exist. Such erroneous attribution is an especially easy mistake to make as the social realities of a category, when emphasized over other categories, can overwhelm other areas of difference—therefore, historical interpretation is, for better or for worse, a means of uniting and dividing, of drawing different borders and creating new ones.<sup>238</sup> Fortunately, it is has become overwhelmingly simpler to analyze those constructions of homosexual identity which have emerged in recent years, for communities are now more resilient than in the past. Because of “technological transformations and communication revolutions, communities increasingly . . . remain intact and culturally meaningful even when their members are physically dispersed.”<sup>239</sup> A community that is culturally meaningful is one whose cultural meanings are still accessible, whether the community exists in the present or in the past.

Clearly, then, one must “know” an identity and a community to ascertain how elements of identity interact; only then can one see how an identity category “aligns with a system of social stratification that inscribes it as identity.”<sup>240</sup> One also needs to access history to ascertain an identity’s social standing and alignment; “[o]ne’s identity . . . is based not on an individual’s self-perception of the salience of certain characteristics, but on the centrality of those characteristics to her standing and treatment in society.”<sup>241</sup> In a historical analysis that is uninformed, communal and individual identities become separated when they never should be; “identity at the level of the individual and identity at the level of the community are only analytically distinct. In our lived experience, . . . they are continuous and reciprocal.”<sup>242</sup> Finally, without a lived experience of history, a researcher is not only ignorant of identity and its constructions but also of the politics of identity and the processes which inform them. According to Hunter, “‘identity politics’ captures the moment of recognition of, and reaction against, a system of exclusion,” and “[r]ecognizing exclusion, one’s place, and one’s community’s place in that discursive system . . . is the experience from which identity and identity politics emerge.”<sup>243</sup> Being able to somehow experience the emergence of identity and identity politics is crucial, for

<sup>236</sup> *Id.* at 55.

<sup>237</sup> *Id.*

<sup>238</sup> *See Id.* at 56. As Lopez asserts, “[t]he social reality of race and racism to some extent overwhelms the differences dividing professional, blue collar, evangelical, Episcopal, Northern, Southern, urban, and rural Blacks.”

*Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Hunter, *supra* note 233, at 5.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 6.

<sup>243</sup> *Id.* at 7.

this genesis marks the “moment of affiliation, of realization of exclusion” and therefore “is a (perhaps the) moment of identity formation. It is the moment when identity’s social meaning becomes manifest to the individual in a matrix of community.”<sup>244</sup>

In summary, an accessible social identity, together with its communal context, is one that is “active and expressive, rather than static and clinical.”<sup>245</sup> When researchers analyze identities and communities that are outside of their lived experience, history becomes one-dimensional instead of the multidimensional, “living” history that Harlan speaks of in *Poe*. When history is one-dimensional, it is a shadow of its former social self; a historical analysis that is not informed by lived experience cannot effectively explicate identity but can only conjure up its ghost. Such one-sided explications, if conclusory, can be a way of escaping from the complexities of a multidimensional historical analysis of identity, and are merely entertaining, not respectable contributions to legal scholarship. It is so easy to lend illusory dimensions to historical shadows. It is then child’s play to manipulate history like a marionette, prompting it to dance here to vindicate contemporary homosexual animus, tickling it to dance there to infer a history of social marginalization on the basis of legal regulation.

At this point, it is essential to note that a group does not have one identity, or one set of identity politics. Homosexuality has not had only one existence; it has not been restricted to one enunciation. Instead, it has had and continues to have a plurality of existences and enunciations. These various existences and enunciations are related, but are historically and geographically unique, discrete in both time and space. To know one enunciation is to know *just* that one, and not to know all. Moreover, each identity’s existence has its own enunciation or expression that validates its social existence at a particular point in time. Such an expression is necessary to confirm the identity, and is, therefore, representative of that identity; “[i]dentities, once formed, require expression to exist,” and the “representation or expression of identity is necessary for that identity to have a social existence.”<sup>246</sup> Such expressions make identity performative, and consequently, identities and expressions are not “preordained by nature but [are themselves] generated and sustained by a matrix of cultural mechanisms, a matrix that allows the performance to be read and understood.”<sup>247</sup> Once again, if these matrixes are not accessible to researchers, then identities and their expressions, even though they are performative and therefore visible, cannot be understood in their proper historical context.

In essence, then, such a proper historical context no longer exists in many epochs for historical analyses of homosexuality. It is for this reason that I am restricting my critique of historiography as a methodology to homosexuality, instead of extending it to race and gender as well. Every nation has cultural narratives which resound in the lived experiences of its citizens. These narratives keep alive the histories of certain social groups. In America, our cultural narratives resound with the history of African Americans and women. Our cultural narratives do not resound with the history of homosexuals. Thus, the histories of African Americans and women are part of our lived experience as imbibers of American culture, and are accessible in ways that the history of homosexuals is not. This is not necessarily a sign of a conscious cultural

<sup>244</sup> *Id.*

<sup>245</sup> Hutchinson, *supra* note 223, at 86.

<sup>246</sup> Hunter, *supra* note 233, at 9.

<sup>247</sup> *Id.* at 9-10.

refusal to preserve narratives of homosexual history; I would posit that the history of homosexuals is a recent history in America, beginning at any one of several points in the twentieth century, perhaps around the 1930s and 1940s with the hysterical characterization of homosexuality as a perversion, perhaps around the 1960s when Stonewall took place. Homosexuality as a history may start at one point for straight people, at another point for gay people, and at yet another point for lesbians, or it could be unique to an individual instead of to a group. I cannot pretend to determine at what point a history of homosexuality begins to be enunciated. I will, however, posit that homosexuality is not a recent historical evolution, but that the *consciousness* of a homosexual history is. In other words, to rewind homosexual history to the days of Rome or to place it within the context of a twelfth-century penitential is to take homosexuality out of its communal context, to place it in an identity shaped by straight people, a heteronormative history that homosexuals cannot and most likely do not want to appropriate.

We have already seen to some extent that improper historiography confuses legal status with identity. Such a historiography also conflates moral status with identity, and confuses the secular prohibition of same-sex acts with religious prohibition. All of these conflation stems from the erroneous presentation of identity as continuous over time, which in turn stems from a failure to see homosexual identity in a discretely communal, socially-constructed manner. It is obviously an overgeneralization to believe that a penance always reflected a certain level of social disapprobation for same-sex activity. However, even the assumption that the assignment of a harsh penance for sodomy reflected the level of ecclesiastical disapproval of that act is overbroad, for penances were allocated according to the discretion of the ecclesiastical official administering the penance, and were not hard and fast sentences for sin. This truth invokes once again the importance of identity and its communal context. It is also possible to use communal theories of identity construction to explain why ineffective historiography conflates secular and religious prohibitions of same-sex acts. The state and the church have nearly always been distinct communities, overlapping at times, but remaining largely separate with the exception of historical periods when various, rulers such as Henry VIII of England, assumed the responsibilities attendant upon a religious head of state, formerly the Pope, as well as those attendant upon a secular prince. Even in such circumstances, the Roman Catholic Church always longed to reassert its own authority by deposing such secular rulers as religious figureheads and returning erring nations to its Christian flock. Those uninformed of this historical distinction between the secular and religious communities find it easy to conflate ecclesiastical penance with statutory punishment because they fail to realize that the Church, a discrete community, had authority in spiritual spheres which, for a time, the state, another discrete community, had no interest in usurping. The identity of homosexuality was constructed differently within the ecclesiastical community than it was in the secular community; and even when the two merged ecclesiastical prosecution with secular punishment in the Inquisition, each discrete community played a distinct role and inhabited a unique sphere of authority. Moreover, in the eighteenth and nineteenth centuries, when secular governments revised sodomy laws by including somewhat religious references to ‘unnatural acts’ and ‘crimes against nature,’ such revisions were dictated not by theologic rationales but by the secular community’s perceived need to correct problems that arose in the context of prosecuting same-sex acts (namely, phrasing same-sex acts as “unnatural” allowed the provisions criminalizing such acts to be broadly construed). Viewing prosecution and punishment in terms of a communal construction of homosexuality inherently undermines historiographic tendencies to simplify analyses by representing history as

a smooth continuum instead of a series of pinpricks that converge upon an action at a particular time in history. Communities, as discrete spatial units with discrete histories of their own, produce discrete constructions of homosexuality, so that a continuum model has no place in a homosexual historiography.

#### IV. *Lawrence v. Texas*

*Lawrence v. Texas*<sup>248</sup> assumes a place in the pantheon of privacy jurisprudence as a literal “benchmark” enunciating limitations on a State’s right to constrain individual behaviors.<sup>249</sup> This section will explicate how the individualized focus and conduct-centered conclusions which are the hallmarks of the privacy rights vehicle bar the effective enunciation of the type of communally-focused legal principle which is essential to the acknowledgment of a homosexual identity.

Under the facts of *Lawrence*, a reported weapons disturbance brought Harris County, Texas police officers to the Houston apartment of John Geddes Lawrence.<sup>250</sup> When officers entered the apartment, they found Mr. Lawrence “engaging in a sexual act” with another man, Mr. Tyron Garner.<sup>251</sup> Both men were arrested and held overnight, then charged and convicted for “deviate sexual intercourse, namely anal sex, with a member of the same sex.”<sup>252</sup> Lawrence and Garner sought to challenge the statute under which they were convicted<sup>253</sup> on Equal Protection grounds in Harris County Criminal Court, but were unsuccessful; both men were fined \$200 and assessed court costs.<sup>254</sup> The Court of Appeals for Texas likewise rejected this claim, after which petitioners appealed to the United States Supreme Court, which granted certiorari.

#### The Majority Opinion

A fundamental rights analysis invariably focuses on *individual* rights and not *group* identity, thus pushing homosexuality itself in the background while foregrounding same-sex intimate behaviors. Justice Kennedy locates this particular right, as expected, in the individual.<sup>255</sup> The right in question—to engage in intimate same-sex relations, inherently broader than the individual—is not extended beyond the intimate couple.<sup>256</sup> Even references to homosexuality modify the noun “person.”<sup>257</sup>

<sup>248</sup> *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

<sup>249</sup> Thus, this case comes from the same tradition as *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Roe v. Wade* 410 U.S. 113 (1973).

<sup>250</sup> 123 S. Ct. at 2475.

<sup>251</sup> *Id.* at 2475-76.

<sup>252</sup> *Id.* at 2476.

<sup>253</sup> Tex. Penal Code Ann. § 21.06(a) (2003).

<sup>254</sup> 123 S. Ct. at 2476.

<sup>255</sup> As Justice Kennedy states, “[t]he statutes do seek to control a *personal* relationship that, whether or not entitled to formal recognition in the law, is within the liberty of *persons* to choose without being punished as criminals.” *Id.* at 2478 (emphasis added).

<sup>256</sup> In the words of Justice Kennedy,

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free

In order to overcome the curse of the *Bowers* tomb, Justice Kennedy, the knight errant, must thwart both the crafty specter of historical construction and answer the riddle of the ghost of moral precedent. The Justice first confronts the specter of the so-called “ancient roots” that haunted criticisms of *Bowers* for years. Initially, Justice Kennedy neatly sidesteps the apparition by stating that the *Bowers* court “misapprehended the claim of liberty there presented to it” by “stating the claim to be whether there is a fundamental right to engage in consensual sodomy.”<sup>258</sup> He then notes the many criticisms of *Bowers* and concludes, “we need not enter this debate in the attempt to reach a definitive historical judgment,” only to qualify that assertion with one reservation: “the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.”<sup>259</sup>

Justice Kennedy’s method of exorcising the ghost of *Bowers*’ “ancient roots” argument is to engage its historical presumptions on their own terms—countering historical fiction with apparent historical fact to set the record on homosexual history straight. The majority opinion builds its historical foundations on the very same contested territory on which critics have previously fought messy battles over matters of historical accuracy. Justice Kennedy, for instance, bases his assertions on scholars’ conclusions that “there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”<sup>260</sup> Thus, the majority opinion wades into the same mire in which critics of *Bowers* have been floundering about for years.

It is at this juncture that the limitations of a privacy rights analysis become fully apparent. At the outset, Justice Kennedy grounds himself on the strong earth of textual analyses of early American anti-sodomy legislation, as interpreted by jurists of the times.<sup>261</sup> Such a discussion, while infinitely more substantial than *Bowers*’ historical quicksand, conflates conduct with group status and constructed identity. References to “homosexual conduct” abound, rendering one-dimensional those who participate in such conduct, and casting entirely into darkness the group whose members may or may not see sexual conduct as a defining characteristic of their group identity. Justice Kennedy does note the connection between conduct and social category when he states that the “absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.”<sup>262</sup> However, his next statement extinguishes any potential exhibited by that brief sentence by returning once more to “homosexual conduct.”<sup>263</sup>

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persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.

*Id.*

<sup>257</sup> For instance, Kennedy’s assertion that “[t]he liberty protected by the Constitution allows homosexual *persons* the right to make this choice.” *Id.* (emphasis added).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> See *id.* (referring to *King v. Wiseman*, 92 Eng. Rep. 774 (K.B. 1718), and “nineteenth century commentators” who interpret such legislation).

<sup>262</sup> *Id.* at 2478-79.

<sup>263</sup> As Justice Kennedy states,

After this, the journey is an easy, smooth journey of logic aboard the privacy doctrine to the end of the junction and its happy, but still limited, conclusion. Discussions of anti-sodomy laws give way to accounts of their infrequent enforcement, which is in turn explained away by a rather shallow assertion once again centered entirely in the context of conduct:

In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.<sup>264</sup>

Thus, it is societal disapproval of homosexual *conduct* that is at issue, not societal disapproval of homosexuals themselves as a group. Infrequent prosecutions for “homosexual conduct” are divorced from the inevitable societal animus and instead attributed to the “very private” nature of the conduct itself.<sup>265</sup> Public attention to such conduct and the ensuing tides of indignation and vindication only swept away those practitioners who were *visible*; the public eye could not attack those engaging in same-sex intimacies literally undercover—driven out of sight by the very same moral opinions and persecution which engendered anti-sodomy legislation.

With the majority opinion firmly centered in the private context of individual conduct and sanitized by an appropriately bounded description of such behaviors, Justice Kennedy sums up the *Bowers* debacle with the following lukewarm catch-all: “In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”<sup>266</sup> With these words, Justice Kennedy spins the prior historical analysis into a justification to depart from *Bowers*’ precedent. This is the keystone of the majority opinion in which Justice Kennedy could have enunciated a communal basis for the ruling rooted in group identity by explaining how societal animus towards homosexuals themselves had abated in recent years. Again, however, Justice Kennedy’s choice of a privacy rights vehicle dictates the outcome, compelling him to comment not upon any reduction in societal animus towards *homosexuals*, but to leap *past* that logical assertion to describe a reduction in societal animus towards homosexual *conduct* that is somehow devoid of any accompanying decrease in antipathy towards homosexuals.<sup>267</sup> His employment of an analysis of

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Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

*Id.* at 2479.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 2480.

<sup>267</sup> As Justice Kennedy writes,



national and international legal treatment of homosexual conduct only *rebuilds* the closet around homosexuals as a group. It is at this point in the opinion that the devastating privacy rights anchor of the opinion hooks itself. Relying on a quote from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>268</sup> Kennedy describes the homosexual conduct in question in the following manner:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>269</sup>

The only portion of the majority opinion which is centered in a communal context is a brief but significant statement linking conduct homosexual conduct and group identity:

When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.<sup>270</sup>

Once again, however, the impact of this assertion is defeated from the ensuing context of this remark. Justice Kennedy emphasizes that homosexual *persons* would be demeaned by a criminal sodomy conviction—just as any other person convicted of a sex offense requiring registration would be demeaned.<sup>271</sup> Thus, the harm still accrues to the individual's identity, and not that of the group. Ultimately, then, though Justice Kennedy recognizes that the “values we share with a

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Chief Justice Burger joined the opinion for the Court in *Bowers* and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." 478 U.S., at 196, 106 S.Ct. 2841. As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, e.g., Eskridge, Hardwick and Historiography, 1999 U. Ill. L.Rev. 631, 656. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.

*Id.*

<sup>268</sup> 505 U.S. 833 (1992)

<sup>269</sup> 123 S. Ct. at 2481 (citing *Planned Parenthood*, 505 U.S. at 851).

<sup>270</sup> 123 S. Ct. at 2482.

<sup>271</sup> As Kennedy states, “[w]e are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of a least four States were he or she to be subject to their jurisdiction.” *Id.*

wider civilization”<sup>272</sup> compel the recognition of a right for persons to engage in private same-sex relations, these values do not likewise render necessary a corresponding acknowledgment of the legitimacy of homosexuals as a group, effectively rendering the term “homosexual” an “H-bomb” with potential for legal devastation and societal consternation. This rebuilt closet is a large and very dark one, for as Justice Kennedy comments, the holding of *Lawrence* “does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>273</sup> One can still only come out in private, and then only in the company of one other. It remains for another court to open the door to wider recognition.

### The Concurrence of Justice O’Connor

Justice O’Connor’s concurrence rejects a privacy rights analysis in favor of the inherent communal focus of Equal Rights.<sup>274</sup> O’Connor quickly identifies the brand of constitutional scrutiny to be applied: a heightened rational basis standard, which has been used to overturn illegitimate state interests such as “a bare ... desire to harm a politically unpopular group.”<sup>275</sup> The potential of this “more searching form of rational basis,” to acknowledge the existence of a communal homosexual identity, turns out to be applied only to a law that “inhibits personal relationships.”<sup>276</sup> All is not without hope, however, for when held up to the magic Equal Protection mirror, the personal relationships of homosexuals *as a class* are treated differently from those the personal relationships of heterosexuals *as a class*.<sup>277</sup> O’Connor thus finally (like Justice Kennedy) makes that crucial link between criminalized conduct and social status, on a much more explicit and deeper level:

And the effect of Texas' sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law "legally sanctions discrimination

<sup>272</sup> *Id.* at 2483 (“To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.”).

<sup>273</sup> *Id.* at 2484.

<sup>274</sup> *Id.* (O’Connor, J., concurring) (“Rather than relying on the substantive component of the Fourteenth Amendment’s Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment’s Equal Protection Clause.”).

<sup>275</sup> *Id.* at 2485 (citing *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>276</sup> *Id.* at 2485.

<sup>277</sup> As Justice O’Connor states,

The statute at issue here makes sodomy a crime only if a person “engages in deviate sexual intercourse with another individual of the same sex.” Tex. Penal Code Ann. § 21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by § 21.06.

*Id.*

against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing."<sup>278</sup>

Justice O'Connor's Equal Protection analysis also evades the trap of conflating sodomy with homosexuality by explicitly contextualizing it as an *activity* that can be engaged in by two groups.<sup>279</sup> Kennedy's earlier historical analysis merely hinted at this principle, but without such an explicit communal context. It is Justice O'Connor's analysis of homosexuals as a class, however, that is the true heart of her concurrence. Justice O'Connor grounds her discussion in the assertion that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'"<sup>280</sup> She then explicitly couples societal animus towards homosexuals with anti-sodomy legislation by expressly equating disapproval of homosexual conduct with disapproval of homosexuals as a group.<sup>281</sup> Not only does the law function to perpetuate such animus, but the law itself is more effective as a tool of that animus: "because Texas so rarely enforces its sodomy law as applied to private, consensual acts, the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior."<sup>282</sup> This explication delves much deeper than does Justice Kennedy's assertion that infrequent sodomy prosecutions resulted from the private nature of the intimate conduct. In forging a closer connection, Justice O'Connor describes the legal treatment of "homosexual" in the defamation category of slander *per se* to emphasize the twisted logic of Texas's rationale; in effect, the state admits that "being homosexual carries the presumption of being a criminal."<sup>283</sup>

<sup>278</sup> *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992).

<sup>279</sup> See, for instance, Justice O'Connor's language in the following assertion: "*Bowers* did not hold that moral disapproval of a group is a rational basis under the Equal Protection Clause to criminalize homosexual sodomy when heterosexual sodomy is not punished." *Id.* at\*16.

<sup>280</sup> *Id.* (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

<sup>281</sup> As she states,

Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.*, at 641. . . . When a State makes homosexual conduct criminal, and not "deviate sexual intercourse" committed by persons of different sexes, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."

*Id.* (citing *Romer*, 517 U.S. at 641).

<sup>282</sup> 123 S. Ct. at 2486.

<sup>283</sup> *Id.* at 2487. The entire context of this statement is as follows:

Indeed, Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander *per se* because the word "homosexual" "impute[s] the commission of a crime." *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 310 (C.A.5 1997) (applying Texas law); see also *Head v. Newton*, 596 S.W.2d 209, 210 (Tex.App.1980). The State has admitted that because of the sodomy law, *being* homosexual carries the presumption of being a criminal. See *State v. Morales*, 826 S.W.2d, at 202-203

At the conclusion of her concurrence, Justice O'Connor too is careful to boundary the language of her opinion with statements cautioning one to be wary of any assumed extensions of her reasoning: "[t]hat this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review."<sup>284</sup> Specifically, she emphasizes national security and the marital institution as other interests which, if asserted, are presumptively "legitimate enough" to buoy up anti-homosexual legislation.<sup>285</sup> Ultimately, Justice O'Connor's rebuilt closet is situated within a more communal context, her reasoning, like Kennedy's, affirms that homosexuals as a group may still be isolated and ostracized because of their conduct outside of a private space, forcing homosexuals once more into the darkness.

### Justice Scalia's Dissent

A discussion of the treatment of homosexuals as a group in *Lawrence v. Texas* would be incomplete without considering Justice Scalia's rather scathing dissent. Epitomizing the textually conservative judicial approach, Scalia roasts Kennedy's (also conservative) assessment that the societal attitude towards *private* homosexual conduct has thawed. Describing this case as stemming from a lack of "individual or societal reliance on *Bowers*,"<sup>286</sup> Justice Scalia harkens back to "the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."<sup>287</sup> Worse, his assessment explicitly conflates laws criminalizing homosexuality with those outlawing other forms of deviant sexual conduct, thus conflating homosexuality itself with deviance (thus conjuring up days when homosexuality was a mental illness) and completely denying any homosexuals' claim to a legitimate group identity:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. . . . The impossibility of distinguishing homosexuality from other

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("[T]he statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law"). Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law. See *ibid.* In *Romer v. Evans*, we refused to sanction a law that singled out homosexuals "for disfavored legal status." 517 U.S., at 633, 116 S.Ct. 1620. The same is true here. The Equal Protection Clause "neither knows nor tolerates classes among citizens." *Id.*, at 623, 116 S.Ct. 1620 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J. dissenting)).

*Id.*

<sup>284</sup> 123 S. Ct. at 2487.

<sup>285</sup> *Id.* at 2487-88 ("Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage.").

<sup>286</sup> 123 S. Ct. at 2489 (Scalia, J., dissenting).

<sup>287</sup> *Id.* at 2490.

traditional "morals" offenses is precisely why *Bowers* rejected the rational-basis challenge.<sup>288</sup>

Decrying the majority opinion as a "massive disruption of the current social order,"<sup>289</sup> Justice Scalia strongly echoes the conduct-based approach of the majority's historical analysis, asserting that it need not matter whether the sodomy act was criminal as between homosexuals or heterosexuals—what was at issue was that sodomy *itself* was criminalized.<sup>290</sup> Poking fun at Justice Kennedy's speculations as to the enforcement of sodomy laws,<sup>291</sup> Justice Scalia nonetheless relies on such an argument to strengthen his contention that the right to engage in sodomy is not a right at all.

Justice Scalia also neatly sidesteps the Equal Protection treatment of this issue with a smoke-and-mirrors trick of reasoning, asserting that the discrimination at issue is facially "against men or women as a class."<sup>292</sup> This inherently denies homosexuals the group identity that Justice O'Connor accords them and forecloses the possibility that homosexuals could be seen as anything approaching a suspect class whose existence would mandate heightened scrutiny—a logical consequence if they are constructed as sexual deviants. Justice Scalia's diminution of homosexuality as a group identity is perhaps most strongly illustrated by his comparison of the group to "nudists."<sup>293</sup>

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<sup>288</sup> *Id.* See also *id.* at 2495 ("The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," . . . the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.") (citing *Bowers*, 478 U.S. at 196).

<sup>289</sup> *Id.* at \*22.

<sup>290</sup> As Justice Scalia asserts,

It is (as *Bowers* recognized) entirely irrelevant whether the laws in our long national tradition criminalizing homosexual sodomy were "directed at homosexual conduct as a distinct matter." *Ante*, at ---7. Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it *was* criminalized . . . ."

*Id.* at \*25.

<sup>291</sup> As Justice Scalia explains,

The key qualifier here is "acting in private"--since the Court admits that sodomy laws *were* enforced against consenting adults (although the Court contends that prosecutions were "infrequent," *ante*, at ---9). I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by. (Imagine the circumstances that would enable a search warrant to be obtained for a residence on the ground that there was probable cause to believe that consensual sodomy was then and there occurring.)

*Id.* at \*25.

<sup>292</sup> *Id.* at 2495.

<sup>293</sup> Addressing the claim that the Texas anti-sodomy statute is targeted towards homosexuals as a group, Scalia counters, "Of course the same could be said of any law. A law against public nudity targets 'the conduct that is closely correlated with being a nudist,' and hence 'is targeted at more than conduct'; it is 'directed toward nudists as a class.'" *Id.* at 2496.

Effectively on fire by the middle of the fifth segment of his dissent, Justice Scalia finally ignites the barricade of cultural arguments that the majority opinion and Justice O'Connor have erected to dismantle the *Bowers* precedent. Proclaiming the onslaught of a "homosexual agenda,"<sup>294</sup> Scalia gloomily protests that "the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer," turning a deaf ear to the "many" homophobic Americans who "do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."<sup>295</sup> He then denies that any national accord on a positive construction of homosexual identity exists, equating the cultural attitudes of a pluralist culture with the actions of elected legislators.<sup>296</sup> Justice Scalia denies harboring any personal animosity towards homosexuals,<sup>297</sup> but nonetheless implies that the advocacy of the "homosexual agenda" has by some grassroots miracle manipulated the democratic process to gain a sufficient foothold to dupe six Supreme Court Justices into finding a privacy right where none should rightly exist. As he phrases it, "persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else."<sup>298</sup> Ultimately, a controversial agenda that successfully quests for judicial change is full of diabolical potential. For Scalia, the consequences of such tyranny—which acknowledges the existence of positive constructions of homosexual identity—are unthinkable.<sup>299</sup>

<sup>294</sup> *Id.* ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.").

<sup>295</sup> *Id.* at 2497.

<sup>296</sup> As Justice Scalia states,

So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress, see Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong., 2d Sess. (1994); Civil Rights Amendments, H.R. 5452, 94th Cong., 1st Sess. (1975); that in some cases such "discrimination" is *mandated* by federal statute, see 10 U.S.C. § 654(b)(1) (mandating discharge from the armed forces of any service member who engages in or intends to engage in homosexual acts); and that in some cases such "discrimination" is a constitutional right, see *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000).

*Id.* at 2497.

<sup>297</sup> *Id.* ("Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means.").

<sup>298</sup> *Id.*

<sup>299</sup> As Justice Scalia remarks,

Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, *ante*, at ---18; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," *ante*, at ---6; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution," *ibid.*? Surely not the encouragement of procreation, since the sterile and the

### ***V. Conclusion: We're not in Rome, so Don't Do What the Romans Did***

Historiography is most effective when it confines itself to history which is part of lived experience instead of free ranging over ten centuries of Western heritage. Some historiographers who relish the freedom to explore the unascertainable depths of centuries upon centuries of history might resent being 'tied' to the comparatively recent past. Others might inquire how historiography will acquire the historical authority that currently appears to resonate within its bounds. Any historical authority lent by discussions of ancient Roman legislation, medieval penances, or Enlightenment invocations of Socratic homoeroticism is purely illusory; these epochs are now static times, documented only through isolated diaries or prescribed punishments. We can no longer access these communities, and therefore cannot realistically assess their homosexual constructions. While we may not be able to access these constructions for interpretive purposes, nothing prevents us from accessing them for reporting purposes. Only conclusions based upon these constructions invokes the possibility of grievous error.

Instead, one should question why historical communities which are no longer a part of our lived experience should inform contemporary constructions of homosexuality at all. This is a query that many courts have consistently dodged. The weight of homosexual animus grows considerably lighter when the shadows of misconstrued historical constructions are thrown off. The glory of Rome belongs to Rome and must be left to Rome, not carried forth to the present day. Rome's glory was founded by a civilization that thrived when it absorbed the religious and social constructions of other civilizations' cultures that were within its lived experience, such as those of ancient Greece. Rome fell when it became divided and inflexible, unable to adapt to alternative cultural constructions. If we learn any lesson from Rome, it should be by this analogy. In our own lived experience, homosexuality is not an unnatural practice but a symptom of a far more threatening phenomenon: diversity.

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elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortably assures us, this is so.

*Id.* at 2498.