# The Invention of Bad Gay Sex: Texas and the Creation of a Criminal Underclass of Gay People

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THE RECENT PROGRESS IN THE area of lesbian and gay rights in the United States has occasioned a good deal of triumphalism.[1] Many accounts, both scholarly and popular, have not only celebrated the rise of lesbian and gay rights under the Obama administration but also described what appears—at least in retrospect—to have been their steady, surprising, and inexorable expansion since the 1970s. According to that conventional narrative, lesbians and gay men have slowly but surely gained ever-greater access to full citizenship in many spheres of life.[2]

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[1] This essay focuses on the specific historical trajectory of lesbian and gay rights but not on the politics of the broader range of gender and sexual minorities and their organized social movements in the late twentieth century: lesbian, gay, bisexual, trans, and intersex people. Partly because they have focused primarily on questions of sex and gender, as distinct from sexuality, the trans and intersex movements charted overlapping but separate pathways from the gay movement's trajectory and therefore merit separate treatment. For recent overviews, see David Valentine, *Imagining Transgender: An Ethnography of a Category* (Durham, NC: Duke University Press, 2007); and Alice D. Dreger and April M. Herndon, "Progress and Politics in the Intersex Rights Movement: Feminist Theory in Action," *GLQ: A Journal of Lesbian and Gay Studies* 15, no. 2 (2009): 199–224.

[2] Examples of this narrative can be found in William N. Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (New York: Free Press, 1996); George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* (New York: Basic Books, 2009); Linda Hirshman, *Victory: The Triumphant Gay Revolution* (New York: Harper, 2012); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2012); and Lillian Faderman, *The Gay Revolution: The Story of the Struggle* (New York: Simon & Schuster, 2015). Margot Canaday's study of the federal regulation of homosexuality in the

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The received story of homosexual emancipation is not wrong, exactly. Indeed, it is hard to think of another group whose social and legal status has improved so dramatically in the last half century. Lesbians and gay men today are no longer excluded from a wide range of social and legal institutions. The federal ban on gay immigration fell in 1990; the US Supreme Court decriminalized "sodomy" between consenting adults in private in 2003; Congress repealed the military's "don't ask, don't tell" policy in 2011; and gay marriage is now the law of the land. Activists hope a federal ban on workplace discrimination on the basis of sexual orientation will soon expand lesbian and gay rights even further and thereby cap, if not complete, the centuries-old struggle for gay liberation.

There is no denying that many lesbians and gay men, especially those whose sexual lives have fit comfortably within widely accepted canons of propriety, privacy, domesticity, and coupledom, have benefited significantly from these developments. Other sexual minorities, both gay and straight, have fared less well under the new progressive regime. If we view the history of lesbian and gay rights since the 1970s specifically from the perspective of sexually nonconforming individuals, including those whose welfare has actually suffered during this period, such as teenagers, sex workers, and HIV-positive people, the familiar progressive narrative starts to look like a bright pathway narrowly threaded between deep shadows.[3] In what follows, I propose to retrace the history that gave rise to different outcomes for gay people whose noncoercive sexual conduct is now lawful and those whose is not and to discover the origin of one of the factors that contributed to their diverging fortunes.

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twentieth century does not clearly support the progress narrative, but it does forecast that gay equality will be fully realized, at least at the federal level, in the not-too-distant future: "I expect that well before my old age, I will live in a nation that allows LGBTs to share equally in the obligations and benefits of national citizenship" (*The Straight State: Sexuality and Citizenship in Twentieth-Century America* [Princeton, NJ: Princeton University Press, 2011], 264).

[3] In an interview from 1981, Michel Foucault suggested the need to qualify the assumption of gay progress when he said, "I think we should consider the battle for gay rights as an episode that cannot be the final stage" ("The Social Triumph of the Sexual Will," in *Ethics: Subjectivity and Truth*, ed. Paul Rabinow [New York: New Press, 1998], 157–62, 157). For other critiques of the progress narrative of gay rights, see Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 1999); Lisa Duggan, "Equality, Inc.," in *The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston: Beacon Press, 2003), 43–66; Katherine M. Franke, "The Domesticated Liberty of *Lawrence v. Texas*," *Columbia Law Review* 104, no. 5 (2004): 1399–1426; Joseph J. Fischel, "Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary," *Duke Journal of Gender Law & Policy* 17, no. 277 (2010): 277–311; Marc Stein, *Sexual Injustice: Supreme Court Decisions from Griswold to Roe* (Chapel Hill: University of North Carolina Press, 2010); Timothy Stewart-Winter, "Queer Law and Order: Sex, Criminality, and Policing in the Late Twentieth-Century United States," *Journal of American History* 102, no. 1 (2015): 61–72; and Trevor Hoppe and David M. Halperin, eds., *The War on Sex* (Durham, NC: Duke University Press, forthcoming).

We must begin by looking back to a time when most gay and much straight sex was illegal. Between 1948—the year that Harry Hay started to rally support among male homosexuals in Los Angeles who eventually formed the first homophile organization in the country (the Mattachine Society)—to 2003—the year that the US Supreme Court struck down Texas's sodomy statute in the case of *Lawrence v. Texas*—gay activists and their progressive allies, along with feminists and even some conservatives, worked to invent a new standard for acceptable, nonactionable, and constitutionally protected sexual behavior.[4] This new standard, which came to be known under the catch-phrase "consenting adults in private," was the criterion that the US Supreme Court finally enshrined into constitutional law in *Lawrence*. The new legal standard sanctified a specific form of gay sex—as well as all noncommercial sexual behavior between consenting adults acting in private—while continuing to disqualify by implication a wide range of behaviors that fell outside of that definition, thereby leaving them exposed to criminalization. The result was the consolidation of a new distinction between "good" and "bad" sex permitting the ongoing criminalization of sexual behavior that did not meet the new constitutional norm by increasingly punitive sex offender laws.

Beginning in the late 1970s, liberals and some feminists who were concerned with combatting rape and child sexual abuse formed an unlikely coalition with conservatives who were likewise invested in criminalizing sexual violence against women and children but also sought harsher punishments for "deviant" sexualities more broadly. Liberals and conservatives again coalesced in the 1980s to criminalize the sexual conduct of HIV-positive individuals.[5] Together, the efforts of these groups produced a new, unprecedented war on sex offenders that targeted a whole range of sexual practices—some of which actually were harmful, others of which were not. Since the 1990s that war has generated new punitive technologies—including state and federal registries of convicted sex offenders, Internet databases giving the public access to personal information about registered sex offenders, and civil commitment laws that allow for the indefinite confinement of sex offenders for "treatment"—that are too harsh even when they are applied to behaviors that do warrant punishment.[6] Today, between 10 and

[4] Harry Hay hatched the idea to found a gay rights organization called the Bachelors for Wallace at a party he attended with other gay men who promised to support presidential candidate Henry Wallace in exchange for the candidate's support for the decriminalization of "sodomy" between consenting adults in private. While the campaign for Wallace never came to fruition, the Mattachine Society was founded two years later in 1950. John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940–1970* (Chicago: University Of Chicago Press, 1983), 60; Lawrence v. Texas, 539 US 558 (2003).

[5] Marvin E. Schechter, "AIDS: How the Disease Is Being Criminalized," *Criminal Justice* 3, no. 3 (1988): 6–11.

[6] For an overview of these punishments, see Corey Rayburn Yung, "The Emerging Criminal War on Sex Offenders," *Harvard Civil Rights–Civil Liberties Law Review* 45, no. 1 (2010): 435–81.

20 percent of state prisoners are incarcerated for sex offenses—in some states the rate is as high as 30 percent—and as of 7 December 2015 the total number of people on the sex offender registry nationally was 843,280.[7] Meanwhile, the proportion of sex offenders subject to federal mandatory minimum sentences has skyrocketed (from 5 percent in 2001 to 51 percent in 2010),[8] and sex offender registration rates in general have spiked, even as trends in corrections for other types of crimes have plateaued.[9] Simply put, the war on sex offenders has been a key contributor to the expansion of the carceral state.

Although the war on sex offenders cut across social identities, one of its specific effects has been the criminalization of a legally constructed population of "bad" homosexuals during a period in which gay rights have otherwise expanded. Outside of the protective boundaries of "consenting adults in private," sexual misconduct laws still punish sex among teenagers, teen sexting, the sexual conduct of HIV-positive people, public sex, promiscuous sex, sex work, and sadomasochistic sex. For those members of the gay community who are doubly marginalized because they engage in erotic practices such as these, the struggle for equal citizenship is far from over.[10]

Because the codification of the "consenting adults in private" standard in 2003 established a new legal distinction between "good" and "bad" homosexuals, whereby the behavior of the former group gained constitutional protection while the behavior of the latter remains exposed to arrest, prosecution, and incarceration, it is important to understand exactly how that standard emerged and came to achieve the preeminent legal status it now occupies. That is what I propose to do by examining the thirty-year history of efforts to overturn the Texas sodomy law.

Of course, the movement to decriminalize sex between consenting adults in private did not begin in, nor was it exclusive to, Texas. But Texas

[7] Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics* (Princeton, NJ: Princeton University Press, 2015), 199. For statistics on registered sex offenders in the United States, see the website of the National Center for Missing and Exploited Children, http://www.missingkids.com/en_US/documents/Sex_Offenders_Map2015.pdf (accessed 8 February 2016).

[8] United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (2011), 300, http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system (accessed 1 August 2016).

[9] Trevor Hoppe, "Punishing Sex: Sex Offenders and the Missing Punitive Turn in Sexuality Studies," *Law & Social Inquiry* (forthcoming).

[10] Though this essay does not treat the criminalization of trans people (see footnote 1), sex offender laws subject many trans people to the same injustices as sexually "deviant" lesbians and gay men. Sarah Giovanniello, "STUDY: Fear of Criminalization Harms Trans People Living with HIV," July 3, 2013, http://www.glaad.org/blog/study-fear-criminalization-harms-trans-people-living-hiv (accessed 1 August 2016); Chase Strangio, "Arrested for Walking While Trans: An Interview with Monica Jones," April 2, 2014, https://www.aclu.org/blog/arrested-walking-while-trans-interview-monica-jones (accessed 1 August 2016).

was an especially key battleground because of the particular character of the state's political culture. Like the better-known gay meccas of New York City, San Francisco, and Los Angeles, Austin, Dallas, and Houston also fostered vibrant traditions of gay activism.[11] What was perhaps unique to Texas, however, was that gay activists had to reckon with an especially intense backlash from conservatives in the battle against the state's sodomy law. Unlike the twenty-nine other states that had decriminalized anal and oral sex between consenting adults in private by 1979, conservative groups in Texas had succeeded in 1974 in passing a new law that decriminalized heterosexual sodomy but left what the statute called "homosexual conduct" a crime. Ultimately, activists had to fight two and a half decades longer than in most other states to get the Texas sodomy law invalidated for gay sex, too. It was this peculiar nature of Texas's political culture—which included both a vibrant gay movement and exceptionally robust conservative opposition to gay rights—that made the state the origin of the court case that ultimately led to the reform of sodomy laws nationwide.

## The Origins of "Consenting Adults in Private"

The midcentury period gave rise to a wave of campaigns against sex crime in American culture and law at the local, state, and national levels. In the 1930s citizen groups around the country organized against the perceived threat that dangerous sexual deviants posed to women and children.[12] On 14 August 1937 a thousand people gathered at a meeting in Ridgewood, New York, to address the "increasing wave of sex crimes against young girls" in the wake of the "criminal attack" and murder of four-year-old Joan Kuleba by Simon Elmore, a worker in the Works Progress Administration, the Depression-era government agency that employed millions of jobless Americans to conduct various public works projects.[13] The same

[11] For histories of the gay movement in New York and California, see D'Emilio, *Sexual Politics, Sexual Communities*; Martin B. Duberman, *Stonewall* (New York: Dutton, 1993); Nan Alamilla Boyd, *Wide-Open Town: A History of Queer San Francisco to 1965* (Berkeley: University of California Press, 2003); and Lillian Faderman and Stuart Timmons, *Gay LA: A History of Sexual Outlaws, Power Politics, and Lipstick Lesbians* (New York: Basic Books, 2006). Six other states passed laws similar to Texas's homosexual conduct law in the 1960s and 1970s: Kansas in 1969, Montana in 1973, Kentucky in 1974, and Arkansas, Missouri, and Nevada in 1977. Oklahoma followed suit in 1986, as did Tennessee in 1989 and Maryland in 1990. Of these states, Texas likely had the best-developed gay movement. Eskridge, "Hardwick and Historiography," 633.

[12] For a particularly salient account of the midcentury campaigns against deviant sexuality, see George Chauncey, "The Exclusion of Homosexuality from the Public Sphere in the 1930s," in *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890–1940* (New York: Basic Books, 1994), 331–54.

[13] Quoted in Tamara Rice Lave, "Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws," *Louisiana Law Review* 69, no. 3 (2009): 549–92, 551, from "Painter, 57, Admits Killing Girl of 4," *New York Times*, 15 August 1937.

year, communities in Massachusetts organized "drives to stop crimes of sex degeneracy" following the murder of five-year-old Chester Harris of Cambridge.[14] Simultaneously, the director of the Federal Bureau of Investigation, J. Edgar Hoover, called for a "War on the Sex Criminal." Hoover warned that "the sex fiend, most loathsome of all the vast army of crime, has become a sinister threat to the safety of American childhood and womanhood."[15] By 1950 fifteen states and the District of Columbia had passed "sexual psychopath" laws allowing for the indefinite confinement of anyone, as the statutes of several states put it, whose "utter lack of power to control his sexual impulses" made him "likely to attack . . . the objects of his uncontrolled and uncontrollable desires."[16] Driven by the media, private citizens, and law enforcement officials, these campaigns established a whole new legal edifice for the policing of deviant sexuality.

After World War II, campaigns against sex crime focused increasingly on homosexuality. The new sexual psychopath laws applied to a range of sex offenses, including sodomy (which Texas's statute defined as anal or oral sex with a human or beast), that rendered gay men vulnerable to being held indefinitely against their will in state hospitals.[17] This was the fate of twenty gay men whom the police rounded up in Sioux City, Iowa, in 1955 following the kidnapping and murder of an eight-year-old boy named Jimmy Bremmers. The men, who had nothing to do with the murder but who had been arrested because the police believed that a "sex fiend" might have abducted the boy, were judged to be sexual psychopaths and incarcerated at the state's mental hospital in Mount Pleasant, some of them for almost twenty years.[18] Between 1940 and 1970 the number of appellate court decisions about sodomy doubled nationally, and a disproportionate number of them (60 percent) pertained to gay conduct.[19] As historians such as David K. Johnson have documented, the crackdown on suspected Communists in government during the Red Scare of the 1950s was accompanied by a Lavender Scare, a nationwide string of inquisitions targeting gay public

[14] "To Counsel Hurley on Sex Crime Laws," *New York Times*, 5 September 1937.

[15] Quoted in Estelle B. Freedman, "'Uncontrolled Desires': The Response to the Sexual Psychopath, 1920–1960," *Journal of American History* 74, no. 1 (1987): 83–106, 94, from the *New York Herald Tribune*, 26 September 1937.

[16] The California, Massachusetts, Nebraska, and Vermont laws all used this language. Quoted in Freedman, "Uncontrolled Desires," 84, from American Bar Foundation, *The Mentally Disabled and the Law*, ed. Samuel J. Brakel and Ronald S. Rock (Chicago: University of Chicago Press, 1971), 362–65.

[17] The Texas legislature adopted this definition in 1943 (1943 Tex. Gen. Laws 194). The definition that preceded it prohibited "the abominable and detestable crime against nature," which encompassed anal sex and bestiality but not oral sex. See 1859–60 Tex. Gen. Laws 97. Baker v. Wade, 553 F.Supp. 1121 (1982).

[18] Neil Miller, *Sex-Crime Panic: A Journey to the Paranoid Heart of the 1950s* (Los Angeles: Alyson Books, 2002), 11.

[19] William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861–2003* (New York: Viking, 2008), 85.

servants and leading to the expulsion in 1950 of nearly six hundred federal employees who were suspected of being gay.[20]

The antigay crackdowns of the 1950s were fueled by a number of rhetorical tropes that associated homosexuality with deviance. One of the most common of these portrayed gays as predatory individuals who were constantly seeking to recruit others, particularly vulnerable youngsters, into their ranks. A 1950 US Government Report titled *The Employment of Homosexuals and Other Sex Perverts in Government*, which was the product of an investigation by the US Senate Appropriations Committee sparked by Senators J. Lister Hill, a Democrat from Alabama, and the Republican Kenneth Wherry of Nebraska, relied on this argument in order to justify antigay discrimination in government employment. "One homosexual can pollute a Government office," the report asserted, because homosexuals "will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of the young and impressionable people who might come under the influence of a pervert."[21] By conflating one form of sexual deviance (homosexuality) with other, even more menacing ones (seduction, predation, intergenerational sex), the myth of the gay predator and corrupter of youth provided a key ideological justification for the intensification of the state repression of homosexuality.

At the same time, some progressives argued against the legal treatment of homosexuality as a criminal menace. The American Law Institute (ALI), a prestigious, Philadelphia-based organization of jurists and lawyers, was in the vanguard of this movement in the United States. In 1951 the ALI commissioned the Model Penal Code (MPC) to help guide states seeking to overhaul their outdated criminal codes. Louis Schwartz, a law professor at the University of Pennsylvania, was put in charge of drafting the section on sex offenses.[22] His thinking about homosexuality was deeply influenced by Alfred C. Kinsey's 1948 landmark study *Sexual Behavior in the Human Male*, which revealed, among other things, how utterly common homosexual behavior was among American men.[23] The final draft of the MPC, published

[20] David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2006), 2. The literature on the Lavender Scare is vast. For the most recent account, see Douglas M. Charles, *Hoover's War on Gays: Exposing the FBI's "Sex Deviates" Program* (Lawrence: University Press of Kansas, 2015).

[21] Quoted in Johnson, *The Lavender Scare*, 116, from United States Congress, Senate Committee on Expenditures in the Executive Departments, *Employment of Homosexuals and Other Sex Perverts in Government* (Washington, DC: Government Printing Office, 1950), 4.

[22] Louis B. Schwartz, "Morals Offenses and the Model Penal Code," *Columbia Law Review* 63, no. 4 (1963): 669–86, 674.

[23] Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, "Homosexual Outlet," in *Sexual Behavior in the Human Male* (Philadelphia: W. B. Saunders Company, 1948), 610–66. An essay by Marie-Amelie George examines the nine states that, between 1943 and 1953, formed commissions to assess the effectiveness of their sexual psychopath laws. The Model Penal Code's liberal attitude about consensual sodomy, she argues, was influenced by those commissions, which, in turn, were influenced by the work of Alfred C. Kinsey.

in 1962, recommended that the states decriminalize sodomy between consenting adults in private but advised that "deviate sexual intercourse by force or imposition," "corruption of minors and seduction," "indecent exposure," "open lewdness," and prostitution should remain criminal. The draft also criticized sexual psychopath laws for including consensual sodomy within their ambit and, in doing so, "permit[ting] too ready an inference of public danger from relatively minor episodes of deviate sexuality."[24] In making these arguments, the MPC was participating in a broader progressive movement to decriminalize a range of other so-called victimless crimes as various as expressions of intimacy in gay bars, the private consumption of illegal drugs, gambling, pornography and obscenity, prostitution, and public drunkenness.[25] By figuring sodomy, too, as a victimless crime, the MPC challenged the midcentury legal regime in which all anal and oral sex was officially illegal.

The MPC's proposal to decriminalize sodomy between consenting adult in private reflected a trend that European countries were already codifying in the law. Sweden implemented a similar reform in 1944.[26] In the United Kingdom, a string of public scandals about homosexuality in 1954 prompted the formation of a government committee charged with investigating the effects of laws against sodomy and prostitution. Three years later, in 1957, the Departmental Committee on Homosexual Offenses and Prostitution released what became known as the Wolfenden Report (named after Lord Wolfenden, the committee's chair), which recommended that "homosexual behaviour between consenting adults in private should no longer be a criminal offense" while retaining, as the Model Penal Code had done, penal sanctions aimed at deterring offenses against minors, public decency, and prostitution.[27] Ten years later, Parliament's passage of the Sexual Offences

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Marie-Amelie George, "The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States," *Journal of the History of Sexuality* 24, no. 2 (2015): 225–61, 252, 255.

[24] American Law Institute, *Model Penal Code: Proposed Official Draft. Submitted by the Council to the Members for Discussion at the Thirty-Ninth Annual Meeting on May 23, 24, 25 and 26, 1962* (Philadelphia: American Law Institute, 1962). For a more thorough discussion about homosexuality and the Model Penal Code, see Eskridge, *Dishonorable Passions*, 121–24.

[25] See my "The Creation of the Modern Sex Offender," in Hoppe and Halperin, *The War on Sex*, forthcoming.

[26] Unlike what was eventually achieved in *Lawrence v. Texas*, which decriminalized all "sodomy" between consenting adults in private, the Swedish statute specified a number of restrictions on homosexual behavior in particular, including gay sex between teachers and their students, between prison wardens and their prisoners, and other relationships involving positions of authority. Jens Rydström, "Sweden 1864–1978: Beasts and Beauties," in *Criminally Queer: Homosexuality and Criminal Law in Scandinavia, 1842–1999*, ed. Jens Rydström and Kati Mustola (Amsterdam: Aksant, 2007), 183–213, 186.

[27] Home Office and Scottish Home Department, "Report of the Committee on Homosexual Offenses and Prostitution" (London: Her Majesty's Stationery Office, 1957), 25. On the public scandals about male homosexuality leading up to the Wolfenden Report, see Patrick Higgins, *Heterosexual Dictatorship: Male Homosexuality in Postwar Britain* (London: Fourth Estate, 1996).

Act 1967 brought the Wolfenden Report's recommendation to fruition for adults twenty-one years of age or older, while the age of consent for heterosexual behavior remained sixteen.[28] East Germany followed suit in 1968, as did West Germany and Canada in 1969. These countries formed the vanguard of a movement that was just beginning to catch on in the United States.

After some hesitation, civil libertarians in the United States joined the trend. At first, in the 1950s, the American Civil Liberties Union (ACLU) did not actively champion gay rights causes. As Merle Miller, a member of the national ACLU Board in the 1950s who later came out as gay, put it in his 1971 coming-out memoir: "When homosexuals and people accused of homosexuality were being fired from all kinds of government posts, the ACLU was notably silent. And the most silent of all was a closet queen who was a member of the board of directors, myself."[29] Nevertheless, as the historian Leigh Ann Wheeler has argued, although the ACLU did little openly to defend homosexuality during that decade, "as one of the few organizations to offer any support at all, it became a veritable networking hub and information clearinghouse for homosexual victims of discrimination."[30] In the 1960s the organization made the rights of homosexuals a more explicit priority. It adopted a new policy statement about homosexuality in 1967, taking the position that the "right of privacy should extend to all private sexual conduct and should not be a matter for invoking the penal statutes." However, like the Model Penal Code and the Wolfenden Report, the ACLU also affirmed the state's legitimate interest in regulating "public solicitation for sexual acts" and, especially, "sexual practices where a minor is concerned."[31]

The proposal to decriminalize the sexual behavior of consenting adults in private was a relatively modest sex law reform compared with the more radical ideas of Alfred Kinsey. In *Sexual Behavior in the Human Male*, Kinsey pointed out that the law assumed that most sexual practices outside of marital coitus were harmful without bothering to back up that assumption with scientific evidence. "It is ordinarily said," he wrote, "that criminal law is designed to protect property and to protect persons, and if society's only interest in controlling sex behavior were to protect persons, then the criminal codes concerned with assault and battery should provide adequate

[28] Sexual Offences Act, 1967, c. 60 (Eng.). The ages of consent for homo- and heterosexual behaviors were not equalized in Great Britain until 2000. See Sexual Offences (Amendment) Act, 2000, c. 44 (Eng.).

[29] Quoted in Vern L. Bullough, "Lesbianism, Homosexuality, and the American Civil Liberties Union," *Journal of Homosexuality* 13 (1986): 23–33, 24, from Merle Miller, *On Being Different* (New York: Random House, 1971), 11.

[30] Leigh Ann Wheeler, *How Sex Became a Civil Liberty* (New York: Oxford University Press, 2012), 111.

[31] News Release, 31 August 1967, folder 23, box 1127, American Civil Liberties Union Records: Subgroup 2, Subject Files Series, Public Policy Papers, Department of Rare Books and Special Collections, Princeton University Library, Princeton, NJ.

protection. The fact that there is a body of sex laws which are apart from the laws protecting persons is evidence of their distinct function, namely that of protecting custom."[32] Kinsey believed that the state was in essence enforcing socially constructed norms by dividing "good" from "bad" sex by baselessly stigmatizing "bad" sex as a uniquely harmful category of crime. The logical extension of Kinsey's insight to public policy would be for the state to stop singling out sex as its own category of crime; to commission empirical research about whether or not particular sex acts are actually harmful; and to punish those behaviors under the laws of assault and battery. By contrast, the "consenting adults in private" idea proposed to redraw the line dividing good from bad sex without directly confronting the assumption of harm that the state made about sex on the "bad" side of the line and without attempting to eliminate sex itself as a target of criminal justice.[33] Reformers accomplished the less far-reaching proposal to decriminalize sodomy specifically between consenting adults in private in a few pockets of American law in the 1960s. Illinois was the first state to do so in 1961 in the context of a broader overhaul of the state penal code. Though the Council of Catholic Churches raised some objections to the new code's relaxation of criminal abortion laws, the decriminalization of a certain kind of gay sex did not become the object of public debate. Indeed, the historian Edward Alwood conjectures that "many legislators may not have realized that they had repealed the state's sodomy law."[34] In the same decade, the legislatures of Florida, Minnesota, New York, Maryland, and other states considered and rejected similar proposals. In 1969 Connecticut became the next state after Illinois to pass such a measure.[35]

Early homophile activists greeted the progressive movement to decriminalize "sodomy" between consenting adults in private with enthusiasm, though many were reluctant to actively pursue that legal reform goal themselves. In 1957 the editors of the *Ladder*—the magazine of the Daughters of Bilitis, the first lesbian rights organization in the country—commended the ACLU for adopting a policy statement that took a stand against the denial of due process to homosexuals, failing to register the fact that the

[32] Kinsey, *Sexual Behavior in the Human Male*, 4.

[33] On the assumption that sex is "a dangerous, destructive, negative force," see Rubin, "Thinking Sex," 11. On Kinsey's strategic use of empirical research to challenge the stigma on sex, see Paul A. Robinson, *The Modernization of Sex: Havelock Ellis, Alfred Kinsey, William Masters and Virginia Johnson* (Ithaca, NY: Cornell University Press, 1989), 49–50.

[34] Edward Alwood, *Straight News: Gays, Lesbians, and the News Media* (New York: Columbia University Press, 1996), 53. Quoted in Timothy Stewart-Winter, "Raids, Rights, and Rainbow Coalitions: Sexuality and Race in Chicago Politics, 1950–2000" (Ph.D. diss., University of Chicago, 2009), 71. Technically, after the Illinois legislature repealed the state sodomy law, the state no longer had a law criminalizing anal and oral sex of any kind—not just between consenting adults in private. However, laws remained on the books penalizing public sex, sex involving minors, and rape.

[35] William N. Eskridge Jr., "Hardwick and Historiography," *University of Illinois Law Review* 1,999, no. 2 (1999): 631–702, 662–63.

ACLU had also affirmed the constitutionality of laws criminalizing homosexual conduct.[36] Similarly, in 1959 Prescott Townsend—an activist with the Boston chapter of the Mattachine Society, one of the oldest homophile organizations in the country—proposed to introduce a bill in the Massachusetts State Senate to decriminalize sodomy between consenting adults in private.[37] However, the much larger and more established New York Mattachine Society refused to "sponsor or introduce any type of legislation." "It will be much more to our advantage," the New York Mattachine secretary-general wrote in a letter to Townsend, "to stay in the background and work with other more general groups."[38] Although concerns about respectability and acceptance—coupled with the virulently homophobic political culture of the 1950s—prevented early homophile activists from spearheading a legal challenge to sodomy laws themselves, the homophile press reported excitedly about straight progressives who did.[39] In 1955 *ONE* magazine described the budding international movement to decriminalize sex between consenting adults in private as a "new deal for deviates."[40] "The Wolfenden Report: Is It a 'Magna Carta' for Homosexuals?" wondered an article in the November 1957 issue of the *Mattachine Review*.[41] The consenting adults in private standard, homophile activists hoped, would continue to spread, giving gay men and lesbians a legal way to practice their sexuality.

Though homophile activists had reason to believe that their aspiration could come to fruition, it quickly became clear that they would not get their wish right away. In the late 1950s and early 1960s the US Supreme Court ruled in favor of gay rights in three key cases. In the case *One, Inc. v. Oleson* from 1958, the Court overturned a lower court's ruling that a homophile magazine was obscene; it did the same thing again in 1962 in a case involving three male physique magazines.[42] The next year, five justices rejected a ruling that had upheld the deportation of a gay alien.[43] In 1967, however, the Supreme Court affirmed the deportation of Clive Boutilier, a Canadian, based on Boutilier's disclosure that he had had consensual

[36] "The ACLU Takes a Stand on Homosexuality," *Ladder*, March 1957.

[37] Prescott Townsend to Curtis Dewees, 27 November 1959, folders 2–4, box 7, Mattachine Society, Inc., of New York Records, Manuscripts and Archives Division, New York Public Library, New York, NY (cited hereafter as NYPL).

[38] Donald S. Lucas to Prescott Townsend, 15 December 1959, folders 2–4, box 7, Mattachine Society, Inc., of New York Records, NYPL.

[39] On the politics of the homophile movement, see D'Emilio, *Sexual Politics, Sexual Communities*, 75–128.

[40] "New Deal for Deviates," *ONE*, October 1955.

[41] "The Wolfenden Report: Is It a 'Magna Carta' for Homosexuals?," *Mattachine Review*, November 1957.

[42] ONE, Inc. v. Oleson, 355 US 371 (1958); MANual Enterprises v. Day, 370 US 478 (1962).

[43] Rosenberg v. Fleuti, 374 US 449 (1963).

adult gay sex in private.[44] In so doing, the Court effectively excluded homosexual conduct from protection under the right to privacy—a right it had just established two years earlier for married couples in the *Griswold v. Connecticut* case, which dealt with the use of contraceptives. Still, the Supreme Court had yet to address the question of the constitutionality of state sodomy laws themselves—but it would soon do so in a court battle originating in Texas.[45]

## THE EARLY CAREER OF "CONSENTING ADULTS IN PRIVATE" IN *BUCHANAN V. BATCHELOR*

There was a cleft between the emerging legal argument about "consenting adults in private" and the behaviors for which the police tended to arrest gay men in the 1950s and 1960s. In fact, in the entire history of Texas's sodomy law, there was not a single reported court case, much less a conviction, involving only adults who had consensual gay sex in a private place until *Lawrence v. Texas.* Of course, this does not necessarily mean that the police *never* enforced the law against the behavior of consenting adults in private, only that those cases have been lost to posterity.[46] Many of the recorded court cases from this period involved sex in public: the 1957 case *Jones et al. v. State*, for example, in which a Houston police officer arrested two men for having sex in a parked car, and *Sinclair v. State* from 1958, a case about consensual oral sex in an Amarillo theater. Some involved rape, like the 1952 case *Gordzelik v. State*, in which a seventeen-year-old male forced a thirteen-year-old to fellate him at knifepoint. Still others entailed sex between adults and teenagers, like the 1960 case *Sartin v. State*, in which the Court of Criminal Appeals upheld the sodomy conviction of an adult man for kissing and fondling the penis of a fourteen-year-old boy. Most, if not all, of the consensual gay sex against which the police enforced the sodomy law took place in public or semipublic spaces, involved minors, or sometimes both.[47]

With this in mind, it is unsurprising that the first-ever court challenge to the constitutionality of Texas's sodomy law was a case about public sex.

[44] Boutilier v. INS, 387 US 118 (1967); Stein, *Sexual Injustice*, 57, 15–16.

[45] Griswold v. Connecticut, 381 US 479 (1965). The Supreme Court extended the right to use contraceptives to single people in 1972, and it again relied on privacy doctrine when it established the right to have an abortion in 1973. See Eisenstadt v. Baird, 405 US 438 (1972); and Roe v. Wade, 410 US 113 (1973).

[46] Dale Carpenter, "The Unknown Past of *Lawrence v. Texas*," *Michigan Law Review* 102, no. 7 (2004): 1464–1527, 1474–75.

[47] Ibid., 1472–73; Jones et al. v. State, 308 S.W.2d 48 (1957); Sinclair v. State, 311 S.W.2d 824 (1958); Sartin v. State, 335 S.W.2d 762 (1960); Gordzelik v. State, 246 S.W.2d 638 (1952); George Painter, "The History of Our Forefathers: The History of Sodomy Laws in the United States," GLAPN: Gay & Lesbian Archives of the Pacific Northwest, http://www.glapn.org/sodomylaws/sensibilities/texas.htm (accessed 3 June 2015).

On 26 May 1969 Alvin Leon Buchanan, a "confessed homosexual," as the court record refers to him, filed a suit against Dallas Chief of Police Charles Batchelor to contest being arrested for sodomy. The police had apprehended Buchanan twice for cruising and having consensual oral sex, once in the men's restroom of Reverchon Park, a public park in the Oak Lawn area of Dallas, and again in a restroom with enclosed commodes in the basement of a Sears & Roebuck department store. Local trial courts convicted him of both offenses and sentenced him to two concurrent sentences of five years in prison.[48]

Had he been arrested just ten years earlier, Buchanan would almost certainly have remained in prison without a court challenge. But the late 1960s was a period of upheaval with respect to the law of sexuality, particularly in Texas. Just four years after the US Supreme Court declared that the right to sexual privacy guaranteed to married couples the right to use contraceptives, the time was ripe to find out just how far the right to sexual privacy could extend. And so a young gay lawyer in his twenties named Henry J. McCluskey Jr. took on Buchanan's case in order to challenge the constitutionality of the sodomy law. Parallel to McCluskey's case, his good friend, another attorney named Linda Coffee, was spearheading her own challenge to the state's antiabortion statute in *Roe v. Wade*. Henry Wade, the Dallas County district attorney, who was one of the defendants in *Buchanan*, also represented the state of Texas in *Roe*.[49]

In a stroke of inventiveness, McCluskey engineered a workaround to reconcile the fact that his client had been arrested for public sex with the fact that an argument based on the notion of sexual privacy was most likely to succeed in court. In order to prevent this contradiction from undermining his case, the attorney introduced a straight married couple as additional plaintiffs in the case alongside Buchanan. The couple, whom the *Dallas News* referred to as "Mr. and Mrs. Michael C. Gibson," had never been arrested for sodomy, but they contended that they "fear[ed] prosecution for sodomy," since Texas's sodomy law included even their (unspecified) behavior within its scope.[50] The attorney also added another gay male plaintiff named Travis Lee Strickland, who "claimed that Buchanan did not protect the interests of homosexuals who do not commit acts of sodomy in public places but fear future prosecution because of acts committed in

[48] Buchanan v. Batchelor, 308 F.Supp. 729 (1970); transcript of proceedings (8–9 September 1969), The State of Texas vs. Alvin Leon Buchanan, C-69-1494-L, case files, records, Dallas Criminal District Court, Archives and Information Services Division, Texas State Library and Archives Commission, Austin, TX (cited hereafter as TSLAC).

[49] Roe v. Wade, 314 F.Supp. 1217 (1970). For a more thorough discussion about Linda Coffee's court challenge in *Roe*, see David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: Macmillan Publishing Company, 1994), 398–404.

[50] "Ruling on Sodomy Appealed," *Dallas News*, 22 April 1970.

private."[51] In 1970 a three-judge federal panel agreed in part with the legal arguments that McCluskey had mounted. Ignoring the fact that the complaint originated with Buchanan, the panel ruled that the sodomy law was unconstitutional because it "operate[d] directly on an intimate relation of Michael Craig Gibson and Jannet [*sic*] Gibson, husband and wife, and the class they represent."[52] Sodomy in Texas was now legal, not because the judges believed that the state had unfairly criminalized gay sex but because they thought that the law violated the right of married heterosexuals to sexual privacy. Nonetheless, the effect of the ruling was to strike down the law entirely.

The court's invalidation of the sodomy law meant that oral and anal sex and even bestiality were now technically legal in any context, not just between consenting adults in private. Recognizing this, lawmakers at the local level passed new legislation to fix the problem. Soon after the federal panel's ruling, the Dallas City Council hastily passed City Ordinance No. 12844, which prohibited sodomy, defined as oral or anal copulation, "in a public place," as well as soliciting another person in public to have sex in public. The ordinance did not, however, target homosexual sodomy in particular, and it did not prohibit the practice of asking somebody in public to go commit sodomy in a private place. In other words, it is quite possible that Dallas might have been the first local jurisdiction in the country to pass a law that regulated sodomy according to the consenting adults in private principle.[53] The Dallas ordinance's exclusion of public conduct from protection is exactly what homophile activists predicted would happen in the 1960s when discussing sodomy law reform with the ACLU. In his critique of the organization's 1967 policy statement about homosexuality, which recommended the decriminalization of "sodomy" between consenting adults in private, the gay rights activist Frank Kameny warned that "the police in many communities are skipping over laws barring homosexual practices and using anti-solicitation laws."[54] Subsequently, other locales passed similar measures. Between 1971 and 1974 six more states decriminalized consensual sodomy following the Model Penal Code's recommendation; except for Hawaii, all of those states also passed new laws criminalizing loitering in order to solicit others to commit homosexual sodomy. When the Colorado legislature adopted a new penal code in 1971, for example, it decriminalized sodomy between consenting adults in private—but simultaneously enacted a new law forbidding loitering in a public place "for the purpose of engaging in or soliciting another person to engage in prostitution or deviate sexual inter-

[51] Buchanan v. Batchelor, 308 F.Supp. 729 (1970).

[52] Ibid.

[53] A journalist for the gay magazine the *Los Angeles Advocate* conjectured that the Dallas city ordinance "may be America's first city 'consenting adult' law" ("Dallas Plugs Hole with Own Sodomy Law," *Los Angeles Advocate*, April 1970).

[54] Quoted in Stein, *Sexual Injustice*, 163.

course." Unlike the Dallas ordinance, the Colorado law apparently applied even to instances of solicitation to have gay sex in private. After the new penal code took effect in July 1972, the Denver police continued to arrest gay men, not for sodomy this time but for "lewd acts," "indecent acts," or "behaving in a lewd, wanton, or lascivious manner."[55] At the same time as legislators passed laws that made the state more tolerant of some kinds of homosexual behavior, they also made it more repressive of others.

Despite these moves toward decriminalizing private acts, more conservative forces like Dallas County District Attorney Henry Wade believed that sodomy should not be legal in any context. Wade filed an appeal with the US Supreme Court of the three-judge panel's ruling in the *Buchanan* case, arguing that sodomy did not warrant protection under the right to privacy because of the harm it caused to the institution of marriage. "Sodomy in marriage often leads to revulsion and divorce. Many women have taken the witness stand in divorce cases and testified as grounds for divorce that they were forced to submit to unnatural sex acts." In addition to sodomy's deleterious effect on marriage, Wade continued, decriminalizing sodomy would establish legal precedent that could lead to the decriminalization of other, even more harmful conduct like "smok[ing] pot or peyote" or "murder committed in the privacy of a bedroom during a lover's [*sic*] quarrel."[56] According to District Attorney Wade, lifting the legal prohibition on sodomy, even just for married heterosexuals, would lead down a slippery slope to the disintegration of law and order more generally. As we will see, however, Wade's effort to restrict heterosexual conduct was becoming increasingly unpopular.

Buchanan's attorney, Henry McCluskey, had originally complained that while he had received some financial support from Dallas's Circle of Friends, the first homophile organization in Texas, founded in 1966, the Dallas gay community had in general been disappointingly indifferent to the case.[57] That changed once it became apparent that the case might go to the Supreme Court. The nationally distributed gay periodical the *Los Angeles Advocate* advertised an appeal for funds to help pay for the legal fees of the cross-appeal with the Supreme Court; "Dallas sodomy case is now the most important one ever," read the fundraiser's headline.[58] Attorney and professor Walter Barnett of the University of New Mexico law school, who was a pioneering legal scholar in the area of sexual civil liberties, handled the cross-appeal in collaboration with the ACLU. He warned readers of the *Advocate*, "If the United States Supreme Court reverses this decision

[55] Eskridge, *Dishonorable Passions*, 177–79.

[56] "Wade Appeals Sodomy Ruling to High Court," *Dallas News*, 6 August 1970.

[57] "Circle of Friends Did Support Buchanan, President Replies," *Advocate*, 13–26 May 1970.

[58] "Dallas Sodomy Case Is Now the Most Important One Ever," *Los Angeles Advocate*, 13 May 1970.

and upholds the constitutionality of this statute of Texas, the cause of law reform all over the United States will have been set back for our lifetime."[59] Now that it was apparent that a case from Texas could determine the fate of gay rights in the United States writ large, the national gay movement got involved. The North American Conference of Homophile Organizations (NACHO), a consortium of local gay rights groups, filed a motion with the US Supreme Court for permission to submit a friend-of-the-court brief in the case. NACHO argued that the state of Texas "may not constitutionally make a crime of sexual conduct that occurs in private between consenting, competent adults, whether or not it is procreative in nature, and that the State of Texas, although it may validly regulate such conduct occurring in public places, may not in doing so discriminate against homosexuals or impair general rights of privacy."[60] By framing their legal argument broadly to include the decriminalization of gay conduct, activists transformed *Buchanan* into the most significant challenge to a state sodomy law that the gay movement had ever conducted.

The publicity surrounding the *Buchanan* case provoked a spike in concern in the mainstream press about gay male public sexual culture, as well as an increase in police repression of that culture. At the same time, the responses to the case demonstrated a growing indifference on the part of mainstream society to homosexual sex performed in private between consenting partners. Concerned that decriminalizing sodomy would cause homosexuality to spread in society, an editorial in the *Dallas News* proposed that the "next Texas Legislature should write another statute, omitting the 'privacy' angle and concentrating on homosexuals who collect in public places and influence others."[61] The paper seemed less interested in policing private sexual conduct, even on the part of lesbians and gay men, and more focused on the visibility and erotic life of gay communities in public. In March 1971 the US Supreme Court held in an 8–1 decision that the federal panel that had voided the sodomy law did not have the authority to do so. Because his lawyers had filed a lawsuit in a federal district court, the Court argued, Buchanan had not exhausted all possible remedies in the state courts by facing trial and then appealing to the state courts of appeal after being convicted. The high court therefore remanded the case to the state level on procedural grounds.[62] Taking advantage of this delay, District Attorney Wade launched a new crackdown on gay sex in public. The Dallas police's vice squad assigned seven officers full-time to "sodomy and pornography arrests" and between March and July 1971 filed more than twenty cases

[59] Ibid. Barnett published his book *Sexual Freedom and the Constitution: An Inquiry into the Constitutionality of Repressive Sex Laws* with the University of New Mexico Press in 1973. "Barnett Book Will Be Landmark in March for Sexual Freedom," *Advocate*, 4 July 1973.

[60] Motion of North American Conference of Homophile Organizations for Leave to File Brief as Amicus Curiae and Brief Amicus Curiae, Wade v. Buchanan, 401 US 989 (1971).

[61] "Homosexuals and the Law," *Dallas News*, 23 January 1970.

[62] "Sodomy Ruling Sent Back," *Austin Statesman*, 30 March 1971.

with the district attorney's office for sodomy arrests in particular, most of which were brought against people who had committed acts in public restrooms at White Rock Lake and Lee Park.[63] During the same period, the state resumed its prosecution of Buchanan, resulting in a conviction that the Texas Court of Criminal Appeals then affirmed in July.[64] Sodomy was now illegal again in Texas, and the public controversy and police repression that *Buchanan* had inspired transformed the issue of sex in public into a liability for the gay movement's effort to reform sodomy laws. Nevertheless, the case also inspired future activists to consider how private conduct might be instrumentalized as a possible site for the decriminalization of gay sex.

## The Invention of "Homosexual Conduct"

Though their court challenge had failed, gay activists still had at their disposal the alternative strategy of reforming Texas's sodomy law through the legislature. Collaborating with their left-leaning Christian allies, the Circle of Friends coordinated a letter-writing campaign to the chairman of the bar committee that the legislature had established in 1965 to oversee the revision of the state's penal code.[65] In 1967 the chairman, Dean Page Keeton of the University of Texas Law School, met with representatives of the Circle of Friends during a visit to Dallas. In keeping with the recommendation of the American Law Institute's Model Penal Code, Keeton agreed to include a provision in the penal code revision proposal that "all sexual acts between consenting adults in private be outside the purview of the law."[66] The Circle of Friends—which organized frequent events with a number of left-leaning Christian groups like Dallas's Munger Place Methodist Church—planned to pay the expenses of "one or more of our minister friends" to travel to Austin to represent them when the bar committee considered the proposal.[67] The support of mainstream liberals like Dean

[63] "Sodomy Prosecutions Have Been Renewed," *Dallas News*, 13 July 1971; "Dallas DA Goes All Out on Traffic in Public Toilets," *Advocate*, 18 August 1971.

[64] Buchanan v. State, 471 S.W.2d 401 (1971); Thomas F. Coleman, "Procedure and Strategy in Gay Rights Litigation," *New York University Review of Law and Social Change* 8 (1978–79): 317–23.

[65] Circle of Friends newsletter, October 1967, folder 13, box 65, Resource Center LGBT Collection, Series 2: Phil Johnson Collection, Sub-Series 1: Personal Collection, AR0756, UNT Libraries, University of North Texas, Denton, TX (cited hereafter as UNT); Randy Von Beitel, "The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee," *Human Rights* 6, no. 1 (1976): 23–74, 24–30.

[66] Circle of Friends newsletter, October 1967, folder 13, box 65, Resource Center LGBT Collection, Series 2: Phil Johnson Collection, Sub-Series 1: Personal Collection, AR0756, UNT.

[67] Ibid. On the role that the Christian Left played in the rise of gay rights, see Heather Rachelle White, *Reforming Sodom: Protestants and the Rise of Gay Rights* (Chapel Hill: University of North Carolina Press, 2015); and Anthony M. Petro, *After the Wrath of God: AIDS, Sexuality, and American Religion* (New York: Oxford University Press, 2015).

Page Keeton gave activists reason to hope that their goal of decriminalizing gay sex between consenting adults in private might yet be realized.

One of the biggest obstacles standing in the way of that goal was the myth that gays were predisposed to molest children, a slander that gay activists tried to counter by appealing to like-minded liberal law reformers and mental health professionals. Circle of Friends cofounder Phil Johnson complained in the organization's newsletter that conservative Christians helped perpetuate the stereotype. An article in the popular Christian magazine the *Plain Truth*, which circulated to 1.4 million readers in five languages, had claimed in its September 1968 issue that homosexuals were, as Johnson paraphrased it, "waging a determined campaign to seek out, seduce, and 'convert' to this loathsome perfersion [*sic*] CHILD 'converts.'" "Most homosexuals," he retorted, "prefer to be intimate with those of about their own age—as heterosexuals prefer."[68] The myth of the gay child molester was also a central concern at a 1970 conference about homosexuality that was sponsored by a group called the Dallas Young Adult Institute and took place at the First Presbyterian Church in the same city. In a lecture entitled "What Is Homosexuality?" the psychiatrist Dr. Jerry Lewis disputed the simplistic claim that adult homosexuals converted children to homosexuality by seducing and molesting them, concluding that there was "much to suggest at the present time that sexual activity between consenting adults in private is not [should not be] a legal matter."[69] Most lawmakers were unlikely to agree, however. As Dean Page Keeton, who attended the conference, forecast, while the penal code revision committee might be convinced to reduce the penalty for sodomy from a felony to a misdemeanor, it was highly unlikely that they would "eliminate homosexuality [between consenting adults in private] as an offense."[70] Law reformers' proposal to decriminalize gay sex specifically for consenting *adults* in private was designed to address the concern that homosexuality was harmful to minors. Even so, the myth of the gay child molester incoherently but powerfully detracted from that goal.

If lawmakers were unlikely to decriminalize gay sodomy between consenting adults in private, some proposed that they ought to do so at least for heterosexuals. In 1971 the Democratic Representative Joe Golman introduced in the Texas legislature House Bill 320, which proposed to add a provision to the sodomy law that would remove "private consensual acts between a married person and his lawful spouse" from its scope. The bill's exclusion of homosexuality from its purview mirrored a statute that the Kansas legislature had recently enacted in 1969 making Kansas the first

[68] Circle of Friends newsletter, September 1968, folder 13, box 65, Resource Center LGBT Collection, Series 2: Phil Johnson Collection, Sub-Series 1: Personal Collection, AR0756, UNT.

[69] Martha Man, "Little Change Seen in Texas Law on Sodomy," *Dallas Times-Herald*, 19 April 1970.

[70] Ibid.

state to decriminalize sodomy between consenting adults in private for heterosexual conduct while leaving conduct between "members of the same sex" a crime.[71] In Texas Golman's bill received support from prominent law enforcement officials; no one opposed the bill when it was under consideration in a House subcommittee, though the Democratic representative Tom Moore tried unsuccessfully to amend it to decriminalize sodomy among unmarried heterosexuals as well. According to its architect, the bill would help the state to distinguish innocuous heterosexual behaviors from what Golman called "homosexual rape"—presumably referring to the stereotype that homosexuals were child predators.[72] However, had it passed, House Bill 320 would have created a situation in which Texas's sodomy law discriminated against homosexuals in particular as a class of people. "This sodomy law change as proposed," Dallas resident Terrell R. Eastwood opined in a letter to Lieutenant Governor Ben Barnes, "is the most discriminatory and prejudicial piece of legislation I know of since the state of Texas enacted restrictive civil rights laws against our negro citizens of this state after the civil war."[73] Golman's bill did not pass, but the controversy surrounding it made clear, just as the initial success of the *Buchanan* case had, that the sodomy law's conflation of hetero- and homosexual behaviors within the same category of deviance was becoming more and more controversial among Texas legislators in the context of the larger revolution of heterosexual sex that was taking place in American law.

Combined with the increasing opposition to the criminalization of straight sodomy, the conviction of a critical mass of state officials that homosexuality was dangerous led the committee responsible for drafting a new penal code to reconstruct the sodomy law to prohibit gay sex only. In a survey he conducted through personal interviews with the bar committee members, the legal scholar Randy Von Beitel found that members opposed decriminalizing gay sex between consenting adults in private because they thought such a move would lead to the decriminalization of other, more harmful behaviors, resulting particularly in "more children being preyed upon by homosexually-oriented pedophiliacs" and "more homosexual acts being committed in public places."[74] Others worried that removing criminal sanctions on gay sodomy would result in the legislature rejecting the new penal code altogether.[75] For these reasons, once the *Buchanan*

[71] Kan. Stat. Ann. § 21-3505; Eskridge, "Hardwick and Historiography," 633.

[72] HB 320 Bill Analysis, [1971], records of Lt. Gov. Ben Barnes, Texas Office of the Lieutenant Governor, TSLAC.

[73] Terrell R. Eastwood to Ben Barnes, 19 April 1971, records of Lt. Gov. Ben Barnes, Texas Office of the Lieutenant Governor, TSLAC; H. Neal Parker to Bob Gammage, [1973], box 97-230/11, folder: "Homosexual Conduct in Penal Code, 1973," Gammage (Robert) Papers, Dolph Briscoe Center for American History, University of Texas at Austin, Austin, TX (cited hereafter as UT–Austin).

[74] Von Beitel, "Private Homosexual Acts," 46, 43.

[75] Ibid., 53.

case had been resolved, the bar committee recommended that "deviate sexual intercourse with another individual of the same sex" remain criminal, now as a misdemeanor instead of a felony, while heterosexual sodomy be decriminalized.[76] With the reconstructed "homosexual conduct" statute in place, Governor Dolph Briscoe signed the new penal code into law on 14 June 1973.

As Dean Page Keeton put it, the new homosexual conduct law was "better than nothing." The argument that gay sex practiced by consenting adults in private was a victimless crime had at least convinced lawmakers to reduce gay sodomy from a felony crime carrying two to fifteen years in prison to a misdemeanor that entailed no jail time and a maximum fine of $200—not a total decriminalization of gay sex, then, but close. Unfortunately, however, the police could still arrest gay men, perhaps even more easily now, by using the new penal code's public lewdness law, which prescribed up to a year in jail and/or a maximum fine of $2,000.[77] And unlike the sodomy law that preceded it, the homosexual conduct law now singled out gays and lesbians as a specific class of people whose sexual behavior disqualified them from full citizenship, in effect defining them as potential or actual criminals. Such a disqualification compounded the social stigma of homosexuality and homosexual sex. In future court challenges, gay rights attorneys had to come up with new strategies to contest the newly explicit conflation in the law of deviance with homosexuality itself.

## "The Perfect Plaintiff": Don Baker's Challenge to the Homosexual Conduct Law

By the end of the 1970s the idea that the sexual behavior of consenting adults in private should be decriminalized had become increasingly mainstream within US political culture even as certain implications of this principle remained hotly contested. By 1979 liberal coalitions had achieved the repeal or invalidation of laws punishing sodomy between consenting adults in private in twenty-nine states.[78] After years of lobbying from gay activists, in 1980 the Texas Democratic Party finally passed a resolution calling for the repeal of the homosexual conduct law's prohibition of "private sexual conduct . . . between consenting adults of the same sex."[79] National gay rights organizations, too, framed their efforts in terms of "privacy," as was the case with the Right to Privacy Foundation (RPF), a forerunner to the Human Rights Campaign (HRC), which incorporated in July 1981.[80] At the

[76] Ibid., 32.

[77] "Texas Reform: Better Than Nothing?," *Advocate*, 14 April 1971.

[78] Eskridge, *Dishonorable Passions*, 201.

[79] "Democrats Vote No on 21.06," *Dialog: Newsletter of the Dallas Gay Political Caucus*, October 1980.

[80] RPF Articles of Incorporation, folder 1, box 39, Human Rights Campaign records, #7712, Division of Rare and Manuscript Collections, Cornell University (cited hereafter as Cornell).

same time, conservatives were successful over and over again in blocking the repeal of the homosexual conduct law. A 1975 repeal effort, which received the support of over one hundred mental health professionals, as well as the Texas Women's Political Caucus, failed, as did subsequent attempts during the 1977 and 1979 legislative sessions.[81] The police repression of public sex persisted with bathhouse raids in Dallas and Galveston in 1976 in which the police arrested gay men on charges ranging from public lewdness to indecent exposure to homosexual conduct.[82] The same year, the US Supreme Court declined, without argument or explanation, to evaluate the constitutionality of Virginia's sodomy law in *Doe v. Commonwealth's Attorney*, leaving the states free to continue punishing sodomy if they so chose.[83]

Gay activists in Texas struggled to find a suitable plaintiff to contest the constitutionality of the homosexual conduct law in court. Their best shot at convincing a court to overturn the statute was to show that the police were using it specifically to regulate the consensual sexual behavior of adults in private, yet the vast majority of arrests for gay sex did not involve such a case. Lacking an ideal test case, gay activists tried to engineer one themselves. In 1976 activists with the Houston Gay Political Caucus (HGPC) appealed to the city's police chief, R. W. "Pappy" Bond, to authorize the arrest of a gay man for having sex with another adult man in private. The homosexual conduct law, the HGPC pointed out at a meeting with Bond, had never been enforced in Houston, where the police relied on the state's public lewdness statute to arrest gay men. When activists asked the police chief if he would cooperate in making an arrest for homosexual conduct in a "private dwelling," he laughed and replied, "Sure. I've never turned down a chance for a legal arrest yet." In its coverage of the meeting, the *Advocate* urged readers to contact the HGPC if they had been prosecuted under the homosexual conduct law or were willing to volunteer as "test subjects" for a legal challenge to its constitutionality.[84] In order to challenge the statute's prohibition of gay sex between consenting adults in private, activists needed to find someone who had actually been arrested for having gay sex in private with another consenting adult partner.[85] They never found one.

[81] "Texas Group Says 'Yes,'" *Advocate*, 4 June 1975; "Women Back Rights," *Advocate*, 24 September 1975; Rob Shivers, "Lone Star Solons Defeat Sodomy Reform," *Advocate*, 13 August 1975; "Point of Order Kills Rider on Texas Bill," *Advocate*, 14 June 1979.

[82] "Dallas Police Begin Bar Raids," *Advocate*, 15 December 1976; "Dallas Won't 'Cower,'" *Advocate*, 29 December 1976; "40 Men Busted at Texas Bath," *Advocate*, 8 September 1976.

[83] Doe v. Commonwealth's Attorney, 425 US 901 (1976); W. Cecil Jones, "Doe v. Commonwealth's Attorney: Closing the Door to a Fundamental Right of Sexual Privacy," *Denver Law Journal* 53 (1976): 553–76.

[84] "Texas Police Chief Will Cooperate in Sodomy Test," *Advocate*, 24 March 1976.

[85] Gay activists' attempt to mastermind a test case to challenge the homosexual conduct law resembled the strategy of the American Civil Liberties Union in the infamous 1925 Scopes trial. In that case, the ACLU purposefully drummed up a test case in order to defend teaching evolution in public schools. See Scopes v. State, 278 S.W. 57 (1925).

The HGPC's attempt to engineer an arrest for gay sex between consenting adults in private represented a shrinking of the kind of privacy that gay activists could viably pursue. A comparison of this attempt with the strategy that gay activists used in the 1970 case *Buchanan v. Batchelor* is instructive in this regard. In that case, the reader will recall, the main plaintiff, Alvin Leon Buchanan, was arrested while cruising for sex in public venues—though one of his two arrests happened in an enclosed bathroom stall in a restroom at Sears, which could arguably be construed as private. Yet Buchanan's lawyer—the young, maverick gay attorney Henry McCluskey—used Buchanan to challenge Texas's sodomy law as it applied to the behavior of consenting adults in private. Implicitly, at least, McCluskey was relying on a broad definition of "privacy" that encompassed not just sex in private or domestic spaces but also clandestine behavior done in spaces that were technically public.[86] After losing that case, gay activists shifted gears to pursue a less expansive and inclusive right to privacy centered on behavior in the home.

In addition to the problem of finding a suitable plaintiff to challenge the homosexual conduct law, gay activists now also had to deal with the Christian Right, a powerful new counterinsurgency dedicated to promoting what they insisted were "traditional" family values. The Christian Right became an important player in national sexual politics in 1977 through the evangelical Christian singer Anita Bryant's "Save Our Children" campaign, which succeeded in overturning a gay rights ordinance in Dade County, Florida, by claiming that homosexuals were trying to "recruit" children into their ranks. "This recruitment of our children," the Bryant campaign warned in a full-page advertisement in the *Miami Herald*, "is absolutely necessary for the survival and growth of homosexuality—for since homosexuals cannot reproduce, they *must* recruit, *must* freshen their ranks."[87] When Bryant visited Houston that June, the HGPC and the Dallas Gay Political Caucus (DGPC) organized a protest march of over six thousand gays and lesbians and their allies.[88] The following year, California senator John Briggs tried to extend the momentum of "Save Our Children" through an unsuccessful referendum campaign to ban gay teachers in the state.[89] Joining the cohort of law enforcement officials that preceded it, this powerful new political force was committed to maintaining the use of state power to suppress homosexuality.

[86] Lisa Duggan describes this more expansive notion of privacy as "a kind of right-to-privacy-in-public: a zone of immunity from state regulation, surveillance, and harassment" ("The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, ed. Russ Castronovo and Dana D. Nelson [Durham, NC: Duke University Press, 2002], 175–94, 181).

[87] David B. Goodstein, "Opening Space," *Advocate*, 20 April 1977.

[88] "First Texas Gay Protest Staged in Houston June 16," *Dallas Gay Political Caucus News*, [July 1977].

[89] Neil Miller, "Victory Celebrated in Briggs Initiative Vote," *Gay Community News*, 18 November 1978.

In the face of the new right-wing movement to restigmatize gays and lesbians as sex deviants, gay activists mounted their first court challenge to the new homosexual conduct law using a plaintiff whom they presented as "respectable" by distancing his public persona from any association with sex, public or private. In 1979 Donald "Don" Baker, a gay man from Dallas who was the vice president of the Dallas Gay Political Caucus, filed a class-action lawsuit to challenge the police enforcement of the statute with the support of the Texas Human Rights Foundation (THRF), an Austin-based gay legal advocacy organization. Baker had never actually been arrested or accused of having sex in private; rather, he argued in his suit that the homosexual conduct law had a "chilling effect" on his sex life, as well as on the social climate for gay people in the state, and thus violated their rights to privacy and equal protection under the law.[90] Baker and his lawyers crafted a public identity portraying him as, in the words of the THRF, the "perfect plaintiff" to challenge the homosexual conduct law.[91] Up until that point, a THRF press release pointed out, all of the known arrests of gay men under the homosexual conduct law had been for sex in bookstores, bathhouses, and parks—discredited sexual practices that did not lend themselves to gaining support for the national strategy of decriminalizing homosexual conduct between consenting adults in private. One of the THRF's main objectives in the case was therefore to educate the public that "gays are normal, productive members of society." The publicity surrounding Baker deemphasized his sex life, highlighting instead other aspects of his identity. In an interview with the *Dallas Times-Herald*, Baker described himself as "pretty much a middle-of-the-road, typical Dallas man" (and, the interviewer added, "a schoolteacher, a Vietnam veteran, a devout Christian—and a homosexual").[92] "In order for them to prove that homosexuals are not perverts," he explained elsewhere, "I just had to be the average Joe Blow on the street." "Out of the Closet, into the Fire: A 'Private' Man Now Goes Public for Gays' Rights," read another headline in the *Dallas Morning News*.[93] Baker and his lawyers aimed to distance gay sex from its associations with perversion and criminality by constructing him as a model citizen whose sex life, other than the fact that he slept with men, adhered rigorously to heteronormative moral standards.

Unlike in the last court challenge to Texas's sodomy law and with Baker as their poster boy, gay activists could now make the argument that the homosexual conduct law violated the rights of consenting adults in private without contradicting the facts of the case. Reflecting on a recent televised

[90] "New Challenge Mounted to Texas Sodomy Law," *Advocate*, 7 February 1980.

[91] History of the Texas Human Rights Foundation's Effort to Challenge Sec. 21.06, [1982], folder: "THRF—Press Releases 1979–83," box 4B31, Texas Human Rights Foundation Papers, UT–Austin; Steve Blow, "'The Perfect Plaintiff' Hits Legal Trail for Homosexuals," *Dallas Morning News*, 21 November 1979.

[92] Roger Oglesby, "Gay Man Says He's 'Typical,'" *Dallas Times-Herald*, 16 June 1981.

[93] Keith Anderson, "Out of the Closet, into the Fire," *Dallas Morning News*, 9 August 1981.

debate in Houston about gay rights in 1980, a THRF media coordination memo from Keith McGee noted that "the opposition insisted on emphasizing sexual acts when describing gay people. She [the unnamed conservative Christian interlocutor] repeatedly called gays sodomites, and in so doing created an introduction to the biblical scriptures supposedly referring to gays by that term." The interlocutor's persistent use of the word "sodomy," McGee complained, helped her win the debate by emphasizing the disgustingness of gay sex and avoiding substantive discussion about how the homosexual conduct law underpinned discrimination against gay people. Gay activists, McGee continued, could combat this kind of stigmatizing rhetoric about gay sexuality by framing the stakes of the law in terms of the "rights of consenting adults in private," since "privacy is something everyone can understand in this age of computers, big government, and 1984 being four years away."[94] Faced with the reality that the Christian Right could successfully discredit gays by highlighting their association with deviant sex, gay activists redoubled their efforts to shift the debate away from a conversation about gay people's right to sexual freedom toward a more broadly palatable discussion about privacy, now carefully defined as the right to be left alone by the state.[95]

The new punishments for sex offenders that Texas legislators were enacting in the early 1980s made it even more urgent for gay activists to achieve the decriminalization of gay sex between consenting adults in private in the *Baker* case. In 1981 the legislature considered a bill proposing to establish a new program for the treatment, punishment, and surveillance of sex offenders called the Interagency Council on Sex Offender Treatment (CSOT). Gay activists opposed the bill because it included "public lewdness"—a law that authorized the police to arrest gay men for public sex—within its ambit. "There is also the real possibility," worried Austin's Lesbian/Gay Rights Advocates in a lobby report, "that the scope of this bill might be widened to include [the homosexual conduct law], and thus lead to the labeling of all homosexuals as sex offenders."[96] This did not come to pass, and the legislature removed public lewdness from the purview of the CSOT before enacting it. However, the mere possibility that the program could be applied to consensual and private gay sex raised the stakes for the gay movement in its effort to remove "homosexual conduct" from the purview of the criminal law.[97]

[94] 21.06 Media Coordination Memo, [1980], folder 10, box 495, Resource Center LGBT Collection, Series 6: Personal Collections, Sub-Series 3: Don Baker, AR0756, UNT.

[95] On how feelings of disgust underpin opposition to gay rights, see Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010).

[96] LGRA Lobby Report, 28 March 1981, folder: "Lesbian/Gay Rights Advocates," box 14, Texas Gay/Lesbian Task Force Records, 1970s–1991, MSS 380, Woman's Collection, Texas Woman's University, Denton, TX (cited hereafter as TGLTF).

[97] LGRA Lobby Report, 27 May 1981, folder "Lesbian/Gay Rights Advocates," box 14, TGLTF.

Gay activists got their wish the following year when the US District Court judge Jerry Buchmeyer found in favor of Don Baker and declared Texas's homosexual conduct law to be unconstitutional. In his fifty-three-page decision, Judge Buchmeyer asserted that the homosexual conduct law's sole and illegitimate function was to single out gay sex between consenting adults in private for criminalization, since there already existed other sex laws prohibiting rape, "sexual abuse by force," "offenses involving minors," and "sexual conduct in public."[98] Unlike the *Buchanan* decision twelve years earlier, which had overturned Texas's sodomy law because it violated the right to privacy of married heterosexuals, Judge Buchmeyer's decision invalidated the homosexual conduct law on the grounds that it discriminated against gay people by denying them the same right that heterosexuals in Texas had enjoyed since the reform of the sodomy law in 1974.

While homosexual conduct was now legal when practiced by consenting adults in private, gay activists noted, the decision allowed a range of other gay behaviors to remain vulnerable to criminalization. As M. Robert Schwab, the president of the Texas Human Rights Foundation and chief legal strategist in *Baker*, warned in a press release: "I want to caution the gay community as to the impact of Baker vs. Wade. Private sexual acts of consenting adults have been legalized. The ruling did not effect [*sic*] laws against prostitution or sex acts between adults and minors. It did not legalize any sexual activity in public. To the extent that people were charged with 21.06 [homosexual conduct] in the past for sexual activity that was arguably public, those people will now likely be charged with Public Lewdness, a far more serious crime. Caution is essential."[99] In other words, for Schwab, the invalidation of the homosexual conduct law did not represent a total liberation of gay sexuality from legal oppression. Rather, the *Baker* decision created a new distinction between "good" and "bad" gay sex in the law, affording protection to sex on the good side of the line from which behaviors on the bad side were disqualified.

Although conservative lawmakers exploited the outbreak of the HIV/AIDS epidemic in an effort not just to reinstate but to intensify the homosexual conduct law, the gay-progressive coalition held its ground. In 1983 Republican Representative Bill Ceverha introduced House Bill 2138, which proposed a reinstatement of the homosexual conduct law and taking convictions for "deviate sexual intercourse with another individual of the same sex" up to a second-degree felony—a penalty much more draconian than the former punishment prescribed for homosexual conduct when

[98] Baker v. Wade, 553 F.Supp. 1121 (1982).

[99] Final Decision: Baker v. Wade, 17 August 1982, folder: "THRF—Press Releases 1979–83," box 4B31, Texas Human Rights Foundation Papers, UT–Austin. Schwab died of AIDS-related complications two years later in 1984. He was thirty-six years old. See Hollis Hood and Peter Freiberg, "Texas Attorney, Activist M. Robert Schwab Dies of AIDS," *Advocate*, 24 January 1984.

that crime was classified as a Class C misdemeanor.[100] Worse still, the bill also proposed to criminalize mere solicitation for sex, and it would have banned gays and lesbians from employment as schoolteachers, food handlers or processors, health care workers, police officers, or "any other position of public leadership or responsibility."[101] When the House Committee on Criminal Jurisprudence considered the bill, it heard testimony from the Nebraska psychologist Dr. Paul Cameron, a key spokesperson for the Christian Right organization the Moral Majority and author of the article "Is Homosexuality Disproportionately Associated with Murder?"[102] In his testimony before the committee, Ceverha made a range of arguments about the dangerousness of gay sex: the "homosexual himself will say that it is not uncommon to have five hundred to a thousand different sexual partners"; homosexuals were "disproportionately involved in child abuse in real fact and in statistics"; and many gay men engaged in the allegedly risky sex practice of "handballing" (fisting).[103] But other participants in the hearing about the bill regarded Ceverha's incendiary rhetoric about homosexuality as extravagant. As Dr. Peter Mansell, a professor of Preventive Oncology at the University of Texas's Anderson Hospital in Houston, made clear: "I was originally asked to come here to talk about Acquired Immune Deficiency Syndrome, and the contention in the original bill that this was a public health hazard which was being increased by homosexual activity. *I was not aware of the fact that I would actually be taking part in a moralistic sexual witch-hunt.*"[104] In a desperate attempt to convince his colleagues to take his bill seriously, Ceverha stressed that, "from my viewpoint, while *a lot of people make light of this legislation, joke about it*, it's not a funny issue." His fellow lawmakers disagreed, though, and House Bill 2138 died in committee.[105] Legislators' response to Ceverha suggested that the progress gay activists had made in the previous fifteen years was holding steady. Most viewed his proposal as extreme, and even in the context of the AIDS epidemic, they were unwilling to recriminalize gay sex between consenting adults in private, at least not in a way that was even more severe than it had been before Judge Buchmeyer held that the statute was unconstitutional.

[100] Anti-Gay Bill Introduced, folder "HB2138 (1983)," box 14, TGLTF; Tex. Penal Code § 21.06.

[101] Anti-Gay HB 21.38 Still a Threat, folder "HB2138 (1983)," box 14, TGLTF.

[102] Campbell B. Read to Wayne Peveto, 6 May 1983, folder "HB2138 (1983)," box 14, Texas Gay/Lesbian Task Force Records, 1970s–1991, MSS 380, TWU. In 1984 the American Psychological Association revoked Cameron's membership in the professional organization for violating ethical principles. See Hollis Hood, "Anti-Gay Crusader Paul Cameron Ousted from Psychology Group," *Montrose Voice*, 30 November 1984.

[103] HB 2138 Criminal Jurisprudence Committee transcripts, 19 April 1983, folder: "HB 2138," box 4B38, Texas Human Rights Foundation Papers, UT–Austin.

[104] Ibid.

[105] "New Antigay Sex Bill Dead, for Now, in Texas Legislature," *Advocate*, 21 July 1983.

While the Christian Right's attempt to exploit AIDS as an argument for making the homosexual conduct law more draconian was unsuccessful, it did get the law reinstated in its previous form. At first, it had seemed that no one was going to appeal Buchmeyer's decision. The older cohort of law-and-order conservatives that had opposed the gay movement in the *Buchanan* case did not seem interested in challenging *Baker*. Dallas County District Attorney Henry Wade said in an interview that his office would probably not contest it because so few cases of private homosexual conduct had been prosecuted under the now-defunct law anyway; Texas Attorney General Jim Mattox also declined to appeal.[106] However, the case was revived when Danny Hill, the district attorney in Amarillo, picked up the "appeal ball," as he put it, using the justification that he, along with all other district attorneys in the state, had been named codefendants in the suit.[107] A new appeal was scheduled before the Fifth Circuit Court of Appeals, the federal court in New Orleans whose jurisdiction included Texas.[108] Joining Hill, a newly incorporated nonprofit group calling itself Dallas Doctors Against AIDS (DDAA) filed a motion asking for permission to provide the court with evidence positing a causal link between homosexual conduct and the transmission of AIDS.[109] The Fifth Circuit agreed to entertain District Attorney Hill's appeal, as well as to entertain the evidence presented by DDAA. Hill was not present in the courtroom but was instead represented by three Dallas lawyers who had also served as counsel for DDAA. In 1985 the court overturned Judge Buchmeyer's decision and reinstated the homosexual conduct law by a 9–7 vote. Six of the nine judges who voted for the law's restoration were Reagan appointees.[110] In its majority opinion, the court did not mention AIDS explicitly, justifying its decision instead on the basis of a supposedly timeless tradition of moral and legal prohibition of homosexuality.[111] Donald Campbell, an attorney for DDAA, celebrated the judgment as "a great victory for the citizens of Texas, the American people, the American judicial system and for morality and public health in this country."[112] "We Are Criminals, Again," a headline in the gay press

[106] Doug Nogami, "Law against Homosexuality Rejected," *Dallas News*, 18 August 1982; "Mattox Foe Targets Sodomy Law," *Dallas Times-Herald*, 27 November 1985.

[107] Joe Baker, "Texas Backs Out of Sodomy Appeal, but New Foes Will Take Up Case," *Advocate*, 28 April 1983.

[108] There are eleven circuit courts in the United States. The only court higher than these is the US Supreme Court.

[109] Glenna Whitley, "Group Seeks Reinstatement of Law in Effort to Fight AIDS," *Dallas Morning News*, 25 February 1983.

[110] Christy Hoppe, "Homosexual-Acts Law Needed, Lawyers Say," *Dallas Morning News*, 18 April 1984. It is the purview of the US president to appoint judges to the federal circuit courts of appeals.

[111] Baker v. Wade, 769 F.2d 289 (5th Cir. 1985).

[112] Mark Carreau, "Appeals Court Upholds Texas Anti-Sodomy Law," *Houston Chronicle*, 27 August 1985.

noted drily.[113] There the issue rested. Homosexual conduct on the part of consenting adults in private remained illegal in Texas until the Supreme Court revisited the issue in its *Lawrence* decision in 2003.

The Texas gay movement's use of the privacy strategy in the *Baker* case calls for a revision of the conventional narrative that militant queer activists and theorists typically use to explain the turn to the right in gay politics since the 1970s. According to this orthodox view, the gay movement became generally more conservative from the 1990s on. In the process, wealthy national organizations like the Human Rights Campaign (HRC)—which had become increasingly disconnected from the population they purported to represent—ejected from the scope of the movement's politics a variety of radical aims that gay liberation activists of the 1970s had once pursued, including a stronger defense of deviant sexualities. "Too often we sacrifice parts of our communities to our enemies rather than acknowledging and appreciating our sexual and cultural diversity," argued the gay rights activist Bill Dobbs at an alternative gay pride event in New York City in 1994. "We are sometimes our own worst enemies."[114] In 1999, in what has since become a foundational queer polemic, Michael Warner wrote that the official gay movement, with the HRC at its helm, has "increasingly narrowed its scope to those issues of sexual orientation that have least to do with sex" and has become "more and more enthralled by respectability."[115] In 2003 the queer theorist Lisa Duggan coined the term "homonormativity," a play on the more conventional term "heteronormativity," to describe this phenomenon. In the essay in which she coined the neologism, Duggan criticized the Log Cabin Republicans and an online writers' group called the International Gay Forum (IGF), arguing that their politics did "not contest dominant heteronormative assumptions and institutions"; rather, they "up[held] and sustain[ed] them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption."[116] In short, elite activists had hijacked the gay movement and stripped it of the radical potential it once held as they came to pursue more conservative goals like gay marriage.[117]

There is much evidence to support this way of understanding the trajectory of the gay movement since the 1970s. It is of course true that all of the major national gay rights organizations, such as the Human Rights

[113] Don Ritz, "We Are Criminals, Again," *Dallas Voice*, 30 August 1985.

[114] Excerpts from Remarks at Spirit of Stonewall Press Conference, 24 June 1994, folder 98, box 1, John C. Graves Papers, 1971–1996, University Libraries, Archives and Special Collections Department, Northeastern University, Boston, MA.

[115] Warner, *The Trouble with Normal*, 25.

[116] Duggan, "The New Homonormativity," 179.

[117] For three more recent examples of the vast body of queer criticism in this vein, see Puar, *Terrorist Assemblages*, xxvi; Christina B. Hanhardt, *Safe Space: Gay Neighborhood History and the Politics of Violence* (Durham, NC: Duke University Press, 2013), 9; and Katherine Franke, *Wedlocked: The Perils of Marriage Equality* (New York: NYU Press, 2015), 7.

Campaign, the National LGBTQ Task Force, and even the American Civil Liberties Union, have advocated for a relatively narrow right to sexual privacy, and the marital bond with which it is associated, while neglecting to defend nonnormative sexualities outside of that scope to the same extent.[118] And it is easy to think of a number of specific examples of gay activists working in the 1990s and later, such as Andrew Sullivan and Michelangelo Signorile, who have indeed been perfectly happy to throw a defense of consensual but nonnormative sexual practices, among other things, under the bus in their quest to gain other rights.[119] However, the scholars and activists who have produced this narrative about co-optation of the gay movement have done so on the basis of a limited understanding of only the most recent historical developments. If queer theorists were to extend their temporal frame and examine the actual historical context in which gay activists solidified their commitment to the privacy strategy in the 1970s and 1980s, as I have done here, a different story would emerge, reminding us that the gay movement was just one, relatively marginal player in the field of sexual politics in the late twentieth-century United States. In the *Baker* case, gay activists were constrained by what the political scientist Doug McAdam calls the "structure of political opportunities" in which they were operating.[120] The gay movement's greatest ally, liberals, had long limited their vision of sex law reform to the decriminalization of sex between consenting adults in private, while conservatives were doing everything they could to oppose even that relatively limited goal. Gay activists, that is to say, were constrained by the larger political culture that limited the types of arguments they could make about sexual freedom if they wanted to achieve their goal of sodomy law reform.

This evidence calls attention to the limitations of homonormativity as an analytic construct. Out of all the groups that participated in sexual politics in the late twentieth century, why single out the gay movement for criticism? The category itself enacts a weirdly homophobic critical stance by leading those who wield it to scrutinize the gay movement disproportionately in a way that belies the historical record. In addition to this academic concern, there is also a political reason why queer activists and scholars should resist this tendency in the future. It promotes divisiveness between ostensibly

[118] On the connection between the right to sexual privacy and the right to marry, see the late Justice Antonin Scalia's dissenting opinion in *Lawrence v. Texas.* The Court's reasoning in *Lawrence*, he argued, "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples" (Lawrence v. Texas, 539 US 558 [2003] [Scalia, dissenting]).

[119] "Following legalization of same-sex marriage and a couple of other things," the political commentator Andrew Sullivan once proposed, "I think we should have a party and close down the gay rights movement for good" (Todd Simmons, "Falwell, Gingrich . . . Signorile? A New Group Called Sex Panic! Claims Some Gay Activists Are Helping the Far Right's Agenda," *Advocate*, 16 September 1997).

[120] Doug McAdam, *Political Process and the Development of Black Insurgency, 1930–1970* (Chicago: University of Chicago Press, 1982), 41.

"radical" queer theorists and "homonormative" gay activists—two groups that will need to work together in order to create a new movement for sexual justice. It is high time for queer activists and theorists to focus our energies on deconstructing plain old heteronormativity.

## THE FALL OF THE HOMOSEXUAL CONDUCT LAW

The dominant feeling among the gay activists involved in the *Baker* case was that their defeat in the final phase of the case was a temporary setback. They had appealed the Fifth Circuit Court's decision to the US Supreme Court, which declined to hear the case in favor of a similar one that originated in the state of Georgia. In its 1986 *Bowers v. Hardwick* decision, the Court affirmed that it was constitutional for the state of Georgia to prohibit "homosexual sodomy," ignoring the fact that Georgia's sodomy law actually banned "any sexual act involving the sex organs of one person and the mouth or anus of another" and was therefore neutral with respect to the sexes of the persons engaged in sodomy.[121] Though defeated, Texas gay activists forecasted that they would eventually prevail. "I feel very strongly that my opinion is right and that someday it will be the law," Judge Buchmeyer stated confidently in a speech he gave at a banquet sponsored by the Dallas Gay Alliance in 1987.[122] The same year, Don Baker, writing in the *Dallas Times-Herald* about the progressive coalition he helped form to block President Ronald Reagan's nomination of archconservative Robert Bork to the Supreme Court, commented: "The system is slow to move, but it will move. . . . In the meantime, we must keep the pressure on."[123] And so they did. The National Gay and Lesbian Task Force finally formed its Privacy Rights Project, after years of struggling to secure funding for it, in the wake of *Bowers* to combat state sodomy laws.[124] Numerous other states had decriminalized gay sex between consenting adults in private, and it was only a matter of time, gay activists and their allies believed, until Texas would do the same.

Though the homosexual conduct law remained on the books in the 1990s, the gay movement's challenge to it gained ever more momentum.

[121] Bowers v. Hardwick, 478 US 186 (1986); Ga. Code § 16-6-2; Janet E. Halley, "Misreading Sodomy: A Critique of the Classification of 'Homosexuals' in Federal Equal Protection Law," in *Body Guards: The Cultural Politics of Gender Ambiguity*, ed. Julia Epstein and Kristina Straub (New York: Routledge, 1991), 351–77.

[122] Curtis Rist, "Judge Buchmeyer Publicly Assails '85 Ruling Upholding Sodomy Law," *Dallas Morning News*, 13 September 1987.

[123] Ron Boyd, "Minorities Fear Erosion of Rights Gains," *Dallas Times-Herald*, 13 September 1987. President Reagan ultimately nominated Antonin Scalia for the US Supreme Court instead of Bork. See David A. Kaplan, "Scalia Was 'Worse' Than Bork," *New York Times*, October 9, 1987.

[124] What Is the NGLTF Privacy Project?, box 100, folder 2, National Gay and Lesbian Task Force records, #7301, Cornell.

In 1989 a woman named Mica England filed a lawsuit against the Dallas Police Department for refusing to hire her because she was a lesbian. Because England had failed a polygraph test question asking if she had "ever committed a deviant sex act," the DPD argued that she was guilty of the crime of homosexual conduct and was thus unfit to work as a police officer. England's suit challenging the constitutionality of the homosexual conduct law ultimately failed, but she and the Dallas Gay Alliance persuaded the city council to force the police department to change its hiring policies in order to stop excluding gay people from employment.[125] Also in 1989 the Texas Human Rights Foundation, drawing on support from a range of religious, mental health, and other professional organizations, mounted another constitutional challenge to the homosexual conduct law in the case *State v. Morales*. Since the THRF's previous challenge to the law in the federal courts had failed, the five plaintiffs in *Morales* pursued their case in a civil court at the state level, where they argued that the statute violated the property and personal rights of gays and lesbians by limiting their right to privacy, by curtailing their employment opportunities, and by encouraging hate crimes.[126] They won their case in a state district court in 1990, and the court of appeals in Austin upheld the ruling in 1992.[127] However, the Texas Supreme Court reinstated the law two years later on procedural grounds.[128] The court argued that it lacked the jurisdiction to rule on the constitutionality of a criminal law in a civil case in which "no vested property rights were being impinged."[129] Still, the homosexual conduct law was becoming increasingly unpopular. During the gubernatorial race against Republican candidate George W. Bush in 1994, incumbent candidate Ann Richards was outspoken about her opposition to the homosexual conduct law, calling it "really nothing more than statutory harassment."[130]

On the evening of September 17, 1998, Houston police officers arrested two gay men, John Lawrence and Tyron Garner, for homosexual conduct after walking in on the two lovers while they were in Lawrence's

[125] City of Dallas v. England, 846 S.W.2d 957 (1993); City Council Meeting, 22 January 1992, folder 41, box 35, Resource Center LGBT Collection, Series 1: Resource Center Records, Sub-Series 3: Research, Sub-Series 2: LGBT Research, AR0756, UNT.

[126] "Suit Filed against Sodomy Law," *Washington Blade*, 5 May 1989.

[127] Mary Lenz, "State Judge Throws Out Texas Anti-Sodomy Law," *Houston Post*, 11 December 1990.

[128] State v. Morales, 869 S.W.2d 941 (1994).

[129] The homosexual conduct law, the court acknowledged, "stigmatize[d] [the plaintiffs] as criminals," making it harder for them to find employment opportunities. However, "not one of the plaintiffs point[ed] to any *specific* instance of such an injury, making the fashioning of any specific equitable relief [by the courts] impossible." The opinion made no mention of Mica England, who clearly had suffered such an injury. Lisa M. Keen, "Texas Sodomy Ruling 'Bizarre,'" *Washington Blade*, 14 January 1994.

[130] Ken Herman, "Anti-Sodomy Law Becomes Issue in Race between Richard, Bush," *Houston Post*, 14 January 1994.

apartment.[131] (Garner's lover, Robert Eubanks, had called the police on them in a fit of jealousy.) A rare instance in which the police had actually enforced the homosexual conduct law against the consensual behavior of adults in private, the arrest afforded an irresistible opportunity to challenge the law on privacy grounds. The Lambda Legal Defense and Education Fund seized the chance and brought another constitutional challenge to the statute. Lambda's challenge went all the way up to the US Supreme Court, which held in its 2003 *Lawrence v. Texas* decision that Texas's homosexual conduct law was unconstitutional.[132] Reversing the holding of its *Bowers v. Hardwick* decision seventeen years earlier, the majority opinion in *Lawrence* asserted that "the Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life."[133] In so ruling, the Court invalidated all of the thirteen remaining state sodomy laws as they applied to the sexual behavior of consenting adults in private.[134] By removing the homosexual conduct law's attribution of a criminal status to gay sex, *Lawrence* undermined a key justification for denying gays and lesbians the rights and obligations of full citizenship: immigration, parenting, military service—and, as Reagan-appointed justice Antonin Scalia bemoaned in his dissenting opinion, marriage.[135]

## CONCLUSION

Although *Lawrence* represented a major expansion of rights, both sexual and otherwise, for gays and lesbians, the decision excluded a range of nonnormative sexual behaviors, both gay and straight, from decriminalization. In *Bowers v. Hardwick*, the Court had asserted that decriminalizing private homosexual conduct between consenting adults would lead to the decriminalization of other, more nefarious behaviors: "If respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We

[131] However, Dale Carpenter has argued, "it is unlikely that sheriff's deputies actually witnessed Lawrence and Garner having sex," as the police had claimed ("Unknown Past of *Lawrence v. Texas*," 1466).

[132] Eskridge, *Dishonorable Passions,* 299–330.

[133] Lawrence v. Texas, 539 US 558 (2003).

[134] Technically, thirteen and a half states still had sodomy laws on the books at the time of *Lawrence*. In 1999 a Missouri court of appeals invalidated some of the remaining sodomy ordinances—which were the purview of the counties, not the state government—in the state, but the decision applied only to Missouri's Western District counties. State v. Cogshell, 997 S.W.2d 534 (Mo. Ct. App. 1999).

[135] George Chauncey, "'What Gay Studies Taught the Court': The Historians' Amicus Brief in *Lawrence v. Texas*," *GLQ: A Journal of Lesbian and Gay Studies* 10, no. 3 (2004): 509–38, 510.

are unwilling to start down that road."[136] The *Lawrence* Court, for this reason, was at pains to distinguish between the behaviors that it was and was not decriminalizing. The majority opinion, written by Justice Anthony Kennedy, emphasized that the case "does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, or public conduct or prostitution. It does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle."[137] After five decades of effort on the part of gay activists and their sympathizers, *Lawrence*, at long last, codified legal protection for the sexual behavior of consenting adults in private. At the same time, in the wake of the decision, a range of consensual but nonnormative sexual behaviors remain subject to criminalization, and the people who engage in those behaviors remain exposed to the full interdictory and punitive force of criminal law.

One consequence of *Lawrence* has been the construction of a new underclass of gay people, a criminal underclass—composed of "bad homosexuals"—whose sexual conduct deviates, in one way or another, from the now constitutionally protected standard requiring that acceptable sexual conduct can only take place between consenting adults in private. That criminal underclass is populated by LGBT teenagers like Kaitlyn Hunt, who, when she was an eighteen-year-old high school senior in 2013, was sentenced to four months of jail time, two years of house arrest, and nine months of probation for having consensual sex with her girlfriend, a fourteen-year-old freshman. In May 2015 a jury found the HIV-positive former college wrestler Michael Johnson, better known as "Tiger Mandingo," guilty of not disclosing his status to several sexual partners and infecting one of them with HIV. Johnson says that he did tell them, but even if he did not, the sentence he faces of life in prison is excessive. In August 2015 the Department of Homeland Security arrested seven staffers of the gay escort website Rentboy.com and charged them with promoting prostitution. Even though it made no accusations of trafficking, child prostitution, coercion, money laundering, or organized crime, the federal government seized over $1.4 million from the company and had the website shut down, arguably driving gay sex work underground and making it less safe for both sex workers and clients. The charges against six of the accused were quietly dropped six months later. In an era otherwise characterized by the expansion of gay rights, these "bad" homosexuals are still waiting to be liberated.[138]

[136] Bowers v. Hardwick, 478 US 186 (1986).

[137] Lawrence v. Texas, 539 US 558 (2003). Numerous scholars have drawn attention to the limitations of the sexual right that *Lawrence* established. For three particularly salient analyses of this issue, see Franke, "Domesticated Liberty of *Lawrence v. Texas*"; Stein, *Sexual Injustice*, 301–2; and Fischel, "Transcendent Homosexuals and Dangerous Sex Offenders."

[138] Sara Ganim, "Gay Florida Teen Kaitlyn Hunt Pleads No Contest in Underage Sex Case," *CNN*, 9 October 2013, http://www.cnn.com/2013/10/03/justice/florida-kaitlyn-hunt-plea-deal/index.html; Debbie Nathan, "The New York Times, Kurt Eichenwald and the World of Justin Berry: Hysteria, Exploitation and Witch-Hunting in the Age of

The invention of "consenting adults in private" has not been an unmitigated blessing even for those whose behavior falls on the "good" side of the line. The new legal standard only offers lesbians and gays protection from criminalization in the form of a negative right to be left alone by the state under very specific conditions. It is better than nothing for gays to have the right to sometimes be left alone now and then. But better than nothing is not enough. People also need the positive right to exercise sexual pluralism: the right to have sex in whatever way they would like to, in a variety of spatial and relational contexts that cannot necessarily be delineated in advance, as long as they do not harm anyone else.[139]

The new modes of sexual inequality that the legal standard of protecting the acts of consenting adults in private has helped to introduce demand that historians of the gay movement take sex more seriously as a category of political analysis. Like most popular accounts of the rise of gay rights, many historians have signed on to an overly optimistic view of the extent to which lesbians and gay men as a class are now, or will soon be, free from legal oppression. If we consider the trajectory of gay rights specifically in terms of their relationship to sex, however, it becomes clear that all lesbians and gay men, in different ways, remain subject to unjust forms of state repression, marginalization, or normalization. From the perspective of sex, we are all still waiting to be free.

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Internet Sex," *CounterPunch* 14, no. 7/8 (2007): 1–12; Steven Thrasher, "'Tiger Mandingo' Found Guilty in HIV Case, Faces Life in Prison," *BuzzFeed*, http://www.buzzfeed.com/steventhrasher/tiger-mandingo-found-guilty-in-hiv-case-faces-life-in-prison (accessed 19 November 2015); "12 Arrested in Gay Cruising Area near Rehoboth Beach," *Washington Blade: Gay News, Politics, LGBT Rights*, 4 August 2015, http://www.washingtonblade.com/2015/08/04/12-arrested-in-gay-cruising-area-near-rehoboth-beach/; Stephanie Clifford, "7 Charged with Promoting Prostitution by Working on Rentboy.com, an Escort Website," *New York Times*, 25 August 2015, http://www.nytimes.com/2015/08/26/nyregion/7-charged-with-promoting-prostitution-by-working-on-rentboycom-an-escort-website.html; Anonymous, "Rentboy Wasn't My 'Brothel.' It Was a Tool to Stay Alive in This Economy of Violence," *Guardian*, 1 September 2015, http://www.theguardian.com/commentisfree/2015/sep/01/rentboy-online-brothel-tool-economy-sex-work; John Marzulli, "Criminal Charges Dropped against 6 Rentboy.com Staffers," *New York Daily News*, February 17, 2016, http://www.nydailynews.com/new-york/criminal-charges-dropped-6-rentboy-staffers-article-1.2534766. Essays by Katherine Franke, Marc Stein, and Sara McClelland and Michelle Fine provide additional examples of the criminalization of "bad" consensual sex, gay and straight, after *Lawrence*: Franke, "Domesticated Liberty of *Lawrence v. Texas*," 1411–13; Marc Stein, "Boutilier and the US Supreme Court's Sexual Revolution," *Law and History Review* 23, no. 3 (2005): 491–536, 492–93; Sara I. McClelland and Michelle Fine, "Over-Sexed and under Surveillance: Adolescent Sexualities, Cultural Anxieties, and Thick Desire," in *The Politics of Pleasure in Sexuality Education: Pleasure Bound*, ed. Louisa Allen, Mary Louise Rasmussen, and Kathleen Quinlivan, Routledge Research in Education (New York: Routledge, 2014), 12–34.

[139] Warner, *The Trouble with Normal*, 171–72. "The problem is not to discover in oneself the truth of one's sex, but, rather, to use one's sexuality henceforth to arrive at a multiplicity of relationships" (Michel Foucault, "Friendship as a Way of Life," in *Power*, ed. James D. Faubion and Paul Rabinow, trans. Robert Hurley [New York: New Press, 2001], 135–40, 135).

## About the Author

Scott De Orio is a doctoral candidate in history and women's studies at the University of Michigan–Ann Arbor. His research focuses on the relationship between sexuality and the expansion of the American state in both its carceral and regulatory dimensions. His work in progress, "Punishing Queer Sexuality in the Age of LGBT Rights," examines the creation of a new system of regulation and punishment of queer sexual conduct in the late twentieth century. His writing has appeared in the blog *NOTCHES: (re)marks on the history of sexuality,* and he has an article forthcoming in an edited collection, *The War on Sex* (Duke University Press, 2017).