"Only steers and queers come from Texas": The Texas Sodomy Statutes and the Making of an Other, 1860-1973

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“ONLY STEERS AND QUEERS COME FROM TEXAS”:
THE TEXAS SODOMY STATUTES AND THE
MAKING OF AN OTHER, 1860-1973

JEHOA L. ROSS
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Dedication

The world that was in my hands when I was a younger man is now a different world to me than I planned it to be.

The following work and the countless hours spent researching, ruminating, and writing to complete it are dedicated to the memory of my son, Dylan Stuart Ross, and that of my friend and colleague, Richard Clyde Foust.
“ONLY STEERS AND QUEERS COME FROM TEXAS”: THE TEXAS SODOMY STATUTES AND THE MAKING OF AN OTHER, 1860-1973

by

JECOA L. ROSS, B.A.

THESIS

Presented to the Faculty of the Graduate School of
The University of Texas at El Paso
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of the Requirements
for the Degree of

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Abstract

This thesis explores the history of sodomy as it has been conceptualized through the creation and enforcement of the Texas sodomy statutes between 1860 and 1973. In analyzing state court cases, legislative records, and newspaper accounts, I argue that the evolution of the concept of sodomy from its inception as a broad criminal category in the 1860 Texas sodomy statute to its more-narrow conceptualization by Texas legislators as a behavioral characteristic of homosexual status in the 1973 homosexual conduct statute was a political and historically contingent process. This process was political firstly in that it allowed for the construction of political identities based on bodily practices, and secondly in that shifting conceptualizations of sodomy were strategically utilized by local law enforcement, judges, and state lawmakers in Texas in order to exert power and maintain control over different groups of people between 1860 and 1973. The politicization of sexual behavior and human bodies in Texas by way of the state’s 1860 and 1943 sodomy statutes was made possible through not just the ambiguity of sodomy, which I posit as part of a legacy of confusion surrounding sodomy, but also through a dualistic conceptualization of sodomy adopted in the legislature, at crime scenes, and in court rooms across the state: On one hand, sodomy was conceived as an act. On the other hand, sodomy was also conceived as a behavior—often attributed to a specific type of person who was prone to habitually committing acts of sodomy—or more specifically, as an identity. The distinction between an act of sodomy and sodomitical status is important because, unlike the former, the latter is connected to a process of Othering, producing what I call the sodomitical Other.
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1. Sodomy in History and the Law: An Introduction

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.

—Oliver Wendell Holmes, Jr., The Common Law

In the early morning hours of June 29, 2009 in El Paso, Texas, a police officer threatened a gay couple with a citation for homosexual conduct after they kissed each other inside a local restaurant. The couple was part of a group of five men who decided to dine at Chico’s Tacos, which, despite its reputation as a popular late-night stop for partiers and night owls, was dubbed a “family” restaurant by one of the security guards who was there that night. The “Chico’s Five,” as they would later be named by El Paso Times reporter Daniel Borunda, were directed to leave the restaurant after the same security guard witnessed the couple kissing. When the group refused, both the guard and one of the men from the group began making calls to 911. When the police finally arrived on the scene, they backed the Chico’s security guards and threatened the young men with a citation. Not only was the police officer’s understanding of the Texas homosexual conduct statute incorrect—the statute had no proscription against kissing—but he also failed to take into consideration two important factors that should have affected his action. First and foremost, the United States Supreme Court had ruled six years earlier in Lawrence v. Texas (2003) that the Texas homosexual conduct statute was unconstitutional. The officer later pleaded ignorance about the Supreme Court ruling by bringing attention to the fact that the homosexual conduct statute was still in the Texas penal code—it was, and it still is today. Secondly, the police officer was also seemingly ignorant of the fact that the city of El Paso had
passed an ordinance that protected individuals against public discrimination based on sexual orientation the same year as the decision in *Lawrence*. There are no reports of a straight couple being kicked out of Chico’s Tacos for kissing, nor are there any reports of a straight couple being threatened with a citation for doing so.¹

Despite both the City of El Paso’s anti-discrimination ordinance and the U.S. Supreme Court’s ruling in *Lawrence v. Texas* (2003), lesbians and gay men are still discriminated against through policy and law. El Paso voters passed a ballot initiative that discontinued city-funded benefits for unmarried partners of city employees one year after the Chico’s Five incident. In the two years that followed, a religiously, morally, and legally charged battle ensued. The conservative-backed initiative was introduced in response to El Paso’s city council voting the controversial measure of city benefits into effect in August of 2009. Supporters of the initiative, led by local pastor Tom Brown, claimed that the measure “sends the message that the city approves of homosexuality and of heterosexual couples living out of wedlock.”² The controversy of the situation was perpetuated by a series of events that included the city council’s decision to restore the liberal measure on June 14, 2011, an attempt led by Pastor Brown to recall the city’s mayor and two city representatives, and finally, the Texas Supreme Court ending the recall effort in December of 2012.

The same threat of discrimination, stigmatization, and even arrest for lesbians and gay men still remains in other parts of the U.S. as well. Texas is but one of twelve states in the U.S. that has yet to remove their sodomy or homosexual conduct statutes from their penal codes, and

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it’s not the only one in which those statutes are still being enforced. Between 2011 and 2013, at least a dozen men were arrested for violations of Louisiana’s “unnatural carnal copulation” statute in East Baton Rouge Parish. The arrests were the result of a sting operation that targeted gay men by using undercover operatives to solicit free and consensual acts of sodomy. While the operation garnered national attention, leading the parish sheriff to make a public apology and promise to “ensure better supervision, training, and guidance” in 2013, the gay and lesbian community is still a target for those who hold a narrow and contorted perception of civil rights. Following the recent Supreme Court decisions which effectively legalized same-sex marriage in the U.S., there is currently a coalitional drive among conservative policymakers in which they are vying for a broadly conceived Constitutional protection for individuals or businesses who base discrimination against same-sex couples upon religious convictions. But the basis for such discrimination is far more problematic than this simplistic policy goal suggests.

Discrimination against gays and lesbians in the U.S. is based on a conceptually negligent association of homosexuality with sodomy. When the U.S. Supreme Court upheld Georgia’s sodomy statute and sanctioned its enforcement against private, consensual acts of sodomy between same-sex couples in Bowers v. Hardwick (1986), they did so partly on the basis that “Proscriptions against [homosexual sodomy] have ancient roots.” Making such an association is problematic because it is often done without giving due attention to the rich and complicated history of how sodomy has been conceived as a term, act, and crime. Sodomy is a religiously rooted term engendered by a medieval interpretation of the biblical story about the sin and

destruction of the city of Sodom. While the admonishment of sodomy (and by extension, that of homosexuality) is based firmly in religious convictions, the term of sodomy has lost its religious connotation through the secularization of sodomy proscriptions. The ways in which an act of sodomy has been conceived in both religious and secular frameworks are numerous. From idolatry to anal sex and from witchcraft to masturbation, the catchall term of sodomy has been used to label a number of acts, both sexual and not. The religious and secular histories of sodomy as a term and the multiple acts covered under its wide umbrella have led to the creation of ambiguous criminal statutes that have been enforced in various ways. By positing the history of the Texas sodomy statutes as endemic to this genealogy, this thesis shows that it is highly problematic and ahistorical to link a modern group of individuals who engage in a specific type of sexual behavior to the broadly constituted concept of sodomy and its repudiation.

**The Texas Sodomy Statutes**

The enactment of the 1973 Texas homosexual conduct statute is endemic of the nescience in associating homosexuality with sodomy. The Texas penal code currently defines homosexual conduct as a sexual offense consisting of “any contact between any part of the genitals of one person and the mouth or anus of another person [of the same sex].” This definition is rooted in a portion of the state’s 1943 sodomy statute, which read:

> Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation, or who shall voluntarily permit the use of his own sexual parts in a lewd and lascivious manner by any minor, shall be guilty of sodomy. 

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The connection between the 1973 homosexual conduct and 1943 sodomy statutes is that they both deem anal and oral sex criminal acts, but they do so in different ways. Whereas the older statute gave no distinction in proscribing against hetero- or homosexual acts of sodomy, the current one targets the sexual behavior of gay men and lesbians specifically. Furthermore, the 1943 statute included acts of bestiality and child molestation in its definition of sodomy, but these acts have nothing to do with homosexuality. The distinction between the two statutes is greater than their similarity.

The “ancient roots” that proscriptions against homosexuality are purported to have in sodomy laws become even more problematic in linking the 1973 Texas homosexual conduct statute to the state’s first sodomy statute. The Eighth Texas Legislature added a sodomy statute to the state’s three-year-old penal code in 1860. The statute gave no specific definition to the act or criminal nature of sodomy, simply stating that, “If any person shall commit, with mankind or beast, the abominable and detestable crime against nature, he shall be deemed guilty of sodomy.”7 The ambiguous language used in the statute corresponded with other states’ sodomy laws at the time, and it reflected the centuries-old rhetorical characterization of the crime as “peccatum illude horribile, inter Christianos non nominandum (that abominable sin not fit to be named among Christians).”8 On the other hand, the 1860 Texas sodomy statute’s enforcement did illicit the unmentionable crime’s utterance in late nineteenth and early twentieth-century court records and newspapers, transforming an ambiguous definition of sodomy into multifarious meanings. What these records don’t mention, however, is homosexuality.

7 The Penal Code of the State of Texas (Galveston: The News Office, 1857), 3, accessed September 26, 2014, http://www.lrl.state.tx.us/Scanned/statutes_and_codes/Penal_Code.pdf. It is important to make the distinction between an “act” and the “criminal nature” of sodomy because each hold different implications for how proscriptions against sodomy have been interpreted and enforced.
The purpose of this thesis is to impugn the continued legal and political discrimination against gay men and lesbians through policy and law in the United States. This is done by exploring the history of sodomy as it has been conceptualized through the creation and enforcement of the Texas sodomy statutes between 1860 and 1973. I argue that the evolution of the concept of sodomy from its inception as a broad criminal category in the 1860 Texas sodomy statute to its more-narrow conceptualization by Texas legislators as a behavioral characteristic of homosexual status in the 1973 homosexual conduct statute was a political and historically contingent process. That is to say that the modern association of homosexuality with sodomy—as it is invoked to justify anti-gay legislation—has become cemented over time through deliberate and strategic efforts by lawmakers, police, and judges who have worked to create and uphold political boundaries of exclusion for gay men and lesbians in the state of Texas.

The process of transforming a multifarious term (sodomy) into an explicitly defined behavioral characteristic of a legally-defined identity (homosexuality) was political in two important ways. First, this evolution allowed for the construction of political identities based on bodily practices: Regardless of how an act of sodomy was defined, individuals who allegedly perpetrated such a “crime” were often relegated to a status that was antithetical to state or national citizenship. Secondly, and in relation to this sodomitical body politics, shifting conceptualizations of sodomy were strategically utilized by local law enforcement, judges, and state lawmakers in Texas in order to exert power and maintain control over different groups of people for a number of historically contingent reasons between 1860 and 1973. This is seen in the late nineteenth and early twentieth-century racialization of the crime, which produced greater bond amounts, prison sentences, and vitriolic condemnation for acts of sodomy alleged against

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9 I use the term “political” here as it relates to politics being “the use of intrigue or strategy in obtaining any position of power or control,” as defined by Dictionary.com, Random House, Inc., accessed July 22, 2016, http://www.dictionary.com/browse/politics.
nonwhite men than were done so against white men in Texas. And as immigration and anti-immigrant sentiments grew exponentially during this period, sodomy was also seen as a characteristic of foreignness, compounding white anxieties about race or ethnicity with fears of foreign invasion and later, communist infiltration. By the mid-to-late twentieth century, sodomy had become perceived as an infectious tool used by rapists, child molesters, and “homosexuals” (who, in the public eye, could have all been one and the same) to prey upon American communities and lead innocent children into a life of depravity. All of these groups—the nonwhite, foreigners, political subversives, and gays and lesbians—were each targeted for exclusion in Texas using the sodomy statutes at some point between 1860 and 1973, and the ambiguity that had surrounded sodomy for centuries played a key role in this process.

The politicization of sexual behavior and human bodies in Texas by way of the state’s sodomy statutes was made possible through not just the ambiguity of sodomy, but also through a dualistic conceptualization of sodomy adopted in the legislature, at crime scenes, and in court rooms across the state. On one hand, sodomy was conceived as an act. Such a conception often served as a limitation to the enforcement of the Texas sodomy statutes. For example, an appeals court judge overturned a sodomy conviction against Charlie Prindle in 1893 because the statute at the time did not explicitly proscribe the act which the appellant had committed in a child’s mouth. On the other hand, sodomy was also conceived as a behavior—often attributed to a specific type of person who was prone to habitually committing acts of sodomy—or more specifically, as an identity. The distinction between an act of sodomy and sodomitical status is important because, unlike the former, the latter is connected to a process of Othering. Six men were arrested in El Paso in March 1956, for example, not because they were caught in acts of

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sodomy, but because they were allegedly “homosexuals.” According to the common understanding of homosexuality during the mid-twentieth century, which was reflective of both legal and medical discourses surrounding the subject, “homosexuals” were predisposed to the criminal behavior of sodomy (as much as nonwhites and foreigners were in the late nineteenth and early twentieth centuries). Arrests for sodomy were therefore also status charges in addition to charges for criminal acts. I must be clear, however, that while the purpose of this thesis relates to anti-gay discrimination, my primary focus here is on the history of sodomy, not homosexuality.

SODOMY AS AN HISTORICAL SUBJECT

The history of homosexuality in the U.S. is not complete without reference to sodomy and its proscription over the past several centuries. Nor is the history of sodomy complete without acknowledging its current conceptualization as “homosexual conduct.” I explore the latter history in this thesis rather than the former for two reasons. First, sodomy is seldom explored as an historical subject. It appears more frequently as an historical object used in studies that pertain to broader subjects—most commonly, the history of homosexuality (but also more general histories of sexuality, gender, religion, and law). Still, this body of works adds a valuable perspective to the present study and helps to situate it in a larger discourse of scholarship. This leads to my second reason for exploring the history of sodomy in this thesis rather than that of homosexuality: By looking beyond the boundaries that are normally placed on the study of sodomy and its criminalization, this thesis also engages in dialogues that center on the constitution of gender, race, and sexuality, as well as more generally, Otherness, within criminal law in Texas and the U.S.

The historiography that has been produced by the study of the history of homosexuality has typically taken one of two approaches, according to classicist and gay historian David M. Halperin in his 2002 book *How to Do the History of Homosexuality*: essentialist or constructionist. The essentialist approach posits that homosexuality has existed—not by name, but by practice—in every society throughout history. While this position is not necessarily an anachronistic imposition of sexual identity upon peoples who existed in history before the construction of sexual identities (although some scholars in the 1970s and 1980s have done exactly that), this approach is still outdated and allows for the tendency to blur the lines between important social and historical nuances in the development of homosexuality. Studies that take a constructionist approach, on the other hand, follow French theorist Michel Foucault’s contention that the “homosexual” came into being as “a personage, a past, a case history, and a child, in addition to being a type of life, a life form, and a morphology” during the late nineteenth century. But even the assertion that homosexuality is a modern invention is incomplete.

There is a teleological tendency inherent in the constructionist approach that places the history of homosexuality within an acts/status dichotomy. This teleology indicates that, before the social identification of gay men and lesbians, men and women who engaged in homosexual acts were perceived for a period of time as exactly that: men and women who were, for whatever reason (by influence of the devil, pathology, or racial taint, depending on the time period and the institution concerned with the matter), engaged in acts. Foucault explains that, for centuries, “sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridicial

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subject of them.” The late nineteenth-century invention of the “homosexual” by sexologists such as Austrian neurologist Sigmund Freud, German psychiatrist Richard von Krafft-Ebing, and English physician Henry Havelock Ellis marks the constructionist shift from understanding homosexuality as an act to conceiving it as an identity. But in light of the complicated history of sodomy, there is a need to disrupt this teleology.

Homosexuality is better understood as an ongoing process of reinvention. That is to say, it did not simply appear as an absolute concept of same-sex eroticism in the late nineteenth century, manifested in intimate acts of sodomy (same-sex anal or oral intercourse), and reified in the modern “homosexual”; rather, homosexuality is a fluid categorical enterprise that continues to both shape and be shaped by institutions which it encounters. Take, for example, the encounter of homosexuality with the practice of psychiatry, which Foucault touches on in his 1972 work *History of Madness* and explores more elaborately four years later in the first volume of *The History of Sexuality*. It was in this encounter that Foucault argues that homosexuality first became a human category (not to mention a term) which was used to classify what gay historian Jonathan Ned Katz calls “psychological anomalies, freaks.” This classification was a matter of contention over the several decades that followed this initial encounter, however, and the psychiatric concept of homosexuality was reinvented numerous times—as an inversion of biological sex by many early sexologists, a treatable pathology by Richard von Krafft-Ebing in the late nineteenth century, a *non-treatable* pathology by Sigmund Freud in the early twentieth century, and as a natural sexual behavior by U.S. biologist Alfred Kinsey in the mid-twentieth century—before the American Psychiatric Association decided in 1973 to declassify

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homosexuality as a pathological condition.\textsuperscript{16} The same pernicious conceptualization of homosexuality can be seen in the category’s encounters with different institutions in the U.S. as well. In her 2009 book \textit{The Straight State: Sexuality and Citizenship in Twentieth-Century America}, historian Margot Canaday explores how a hetero-homosexual binary was inscribed in federal immigration, welfare, and military policies in the U.S. She argues that the early- to mid-twentieth-century bureaucratic State “did not merely implicate but also constituted homosexuality in the construction of a stratified citizenry.”\textsuperscript{17} As with its encounter with psychiatry, homosexuality was both reinvented by and helped to shape “federal citizenship policy” in the U.S.

The connection between sodomy and homosexuality is much more disjointed than the history of homosexuality suggests, and using sodomy as an historical subject helps to highlight the fissures between the histories of sodomy and homosexuality. The first and most conspicuous difference is each history’s temporality. Whereas homosexuality is recognized as being a modern invention, the history of sodomy spans centuries. Sodomy was attributed to all manners of sexual deviancy by early Christian theologians such as Augustine of Hippo in the fourth and fifth centuries, Peter Damian in the eleventh century, and Thomas Aquinas in the thirteenth century. Throughout the Middle Ages, religious and secular proscriptions against sodomy also targeted nonsexual acts ranging from witchcraft to treason, hence another fissure: Unlike homosexuality, sodomy is not ubiquitously defined along the lines of sexual acts or behavior. From the early modern period until sodomy was first criminalized in Texas in 1860, sodomy statutes employed


ambiguous language to target various “criminals” who committed various “crimes.” The history of sodomy has produced what I call a “legacy of confusion.” This legacy is defined by three main factors: First, the proscriptions against sodomy found in both religious and secular texts often use highly ambiguous language. Second, these ambiguous proscriptions have both perpetuated and led to multifarious interpretations of sodomy. Lastly, sodomy’s legacy of confusion is defined by the way that ambiguous language and sundry interpretations have been used as a tool to construct and exclude what I call the “sodomitical Other.”

**The Sodomitical Other**

The history of sodomy and its criminalization in the state of Texas allows for a profound insight into much more than just the construction of the modern “homosexual” in the U.S. This history also provides an insight into the broader process of how the law is used to construct and define Otherness in general. I define Otherness in this thesis more generally as a legal category that is constructed to be the antithesis to citizenship in the U.S. nation-state. Canaday suggests that citizenship is conceived as either practice (“the activity of being a citizen”) or as a legal or cultural status (“citizenship as identity”). I consider both of these conceptions conjointly in my definition of Otherness. For example, citizenship has been defined in the history of the U.S. along lines of gender, race, and sexuality. That is to say that an individual’s racial, gendered, or sexual identity marked them with either a citizen or Other status at the same time that it either enabled or prohibited them from civic or political participation in the nation. In this sense, the Naturalization Act of 1790 Othered all women and nonwhite men by inscribing maleness and whiteness as prerequisites to U.S. citizenship. And as heterosexuality came to be inscribed in federal citizenship policy during the twentieth century, gay men and lesbians also became targets.

\[18 \text{Ibid.}, 8.\]
of exclusion. The creation and enforcement of the Texas sodomy statutes helped to produce a multifarious sodomitical Other that was denied both the practice and status of citizenship through investigation, persecution, and incarceration by the state as well as through ostracization by the public. There were three other important conceptual factors that contributed to this construction which I consider in this thesis: gender, race, and sexuality.

Gender is defined by the social ramifications of how differences in biological sex are perceived, discussed, and in many ways imposed. As such, and according to women’s historian Joan Wallach Scott, “gender becomes a way of denoting ‘cultural constructions’—the entirely social creation of ideas about appropriate roles for women and men.”19 Various determinations made about biological sex have often been compounded with cultural expectations regarding human behavior, resulting in the construction of specific gender roles. In a sense, masculinity is masculine through its contradistinction with femininity, and vice versa. In addition, the deployment of gender expectations through their association with other social constructions has been relied upon as a tool of various institutions of power to ensure the establishment of rule and order. For example, U.S. gender historian Gail Bederman argues in her book, Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880-1917, that middle-class white men infused ideas about race and masculinity in order to reestablish dominance over what they deemed a racially inferior and feminine underclass amidst radical changes in U.S. demographics and economics in the late nineteenth and early twentieth centuries. Bederman’s study points out that gender is fluid and “a historical, ideological process.” She explains that, “The ideological process of gender—whether manhood or womanhood—works through a complex political technology, composed of a variety of institutions, ideas, and daily

practices.” As a malleable process of conceptualization, gender becomes fixable to other social constructions, serving as a dual reinforcement for both itself and other constructive processes that help to classify the Other.

Race, like gender, is unequivocally a socially constructed collection of ideas about biological difference and proper human behavior which, while not real in and of themselves, have very real ramifications in society. The ways race has been conceived carry with them several similarities with gender: conceptions of race are based in perceived difference; race is fluid and subjective to shifting perceptions, discussions, and impositions; and race, as a mark of difference, can be a powerful tool of exclusion, especially when associated with other social constructions like gender or sexuality. Nineteenth-century historian Matthew Frye Jacobson notes in his study, *Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876-1917*, that conceptions of race fueled epistemic anxieties regarding the future of the white race in the early twentieth century. Alarmed at the racial heterogeneity that was caused by the mass migration of “degraded races” to the U.S. at the time, many feared for “America’s traditional Anglo-Saxon political grandeur and its disruption by these swarthy streams of obvious inferiors.” In his book, *West of Sex: Making Mexican America, 1900-1930*, western historian Pablo Mitchell places these Anglo-Saxon anxieties within the context of the U.S. West. He claims that, along with racial taxonomies, “Assessing families and domesticity, determining proper sexual behavior, gender roles, reproduction, and parenting was at the heart of

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colonial rule.” The concept of race, like gender, was used in the construction of a form of rule over human bodies.

Ideas about sexuality, again similar to those of gender and race, were constructed within shifting cultural contexts and were easily fixable to other social constructions. Mitchell asserts that “American race relations and racial hierarchies … are incomprehensible without a serious examination of sexuality.” Americanist Jennifer Terry claims in her 1999 book, *An American Obsession: Science, Medicine, and Homosexuality in Modern Times*, that studies on homosexuality reveal American culture’s “detectable subtexts that signal worries about the precariousness of masculinity, the specter of feminism, the rise of urban sexual subcultures, the instability of marriage and the family, and the dangers of class-crossing and race-mixing.” Terry’s claim suggests that any study into various subjects of history is incomplete without an analysis of sexuality. Foucault would agree:

> [Sexuality] appears … as an especially dense transfer point for relations of power: between men and women, young people and old people, parents and offspring, teachers and students, priests and laity, an administration and a population. Sexuality is not the most intractable element in power relations, but rather one of those endowed with the greatest instrumentality: useful for the greatest number of maneuvers and capable of serving as a point of support, as a linchpin, for the most varied strategies.

Sexuality is central to the workings of a society, especially when that society functions within the context of power differentials in the establishment of rule and order.

Legal mechanisms of power have a deep investment in the social constructions of gender, race, and sexuality. The imposition of “proper” gender roles, hierarchies of racial designations, and ideas about acceptable human sexual behavior are all rooted in “biopower,” which Foucault

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defines as “the subjugation of bodies and control of populations” through any number of techniques which are often but not exclusively deployed by the State.26 One of the most important aspects of biopower as it relates to this study is its capacity for production. Foucault argues that biopower “produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.”27 In other words, biopower contains the ability to produce human subjects that serve the purpose of perpetuating both the power over bodies and the institutions that exert it. Criminal law serves as a prime example of this productive capacity in that it inscribes the limits of acceptable human behavior from which two distinct human categories are produced: the lawful (those within the statutory limits) and the criminal (those outside them).

Discourse is the most important technique which criminal law uses in its deployment of biopower. Foucault argues that “power and knowledge are joined together” in discourse, and as such, he conceives of “discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable.” He explains further:

[We must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies. It is this distribution that we must reconstruct, with the things said and those concealed, the enunciations required and those forbidden, that it comprises; with the variants and different effects—according to who is speaking, his position of power, the institutional context in which he happens to be situated—that it implies; and with the shifts and reutilizations of identical formulas for contrary objectives that it also includes.28

The multifarious discourse that emerges from the records of sodomy cases in Texas during the nineteenth and twentieth centuries gives an insight into the inchoate operation of the law in controlling bodies in Texas. As such, these cases are an integral part of the larger history of

26 Ibid., 140.
28 Foucault, History of Sexuality, 100.
sodomy in the state at the same time that they highlight the fluidity of the ideological expressions of perceived differences and cultural notions of human behavior that make up the social constructions of gender, race, and sexuality. This sodomitical discourse directly shaped the making of a multifaceted imaginary model of anticitizenship—the sodomitical Other—and it still holds power today in antigay legislation.

The following two chapters excavate the legal discourse surrounding sodomy that is found in Texas court records, legislative documents, and newspapers between 1860 and 1973. This selective timeline of the state’s proscriptions against sodomy holds important implications regarding the conceptual progression from an acts-based understanding of sodomy to one which is based on status or identity. The creation of the Texas sodomy statutes and their varying enforcement show that such a trajectory was not linear. It was rather a consistent and historically contingent fluctuation between these ideas in which sodomy was construed both as an act that represented a fluke in an individual’s moral judgement and as a marker of an individual’s Otherness and predisposition for degeneracy. Chapter two explores the legal incongruity in conceiving exactly what constituted the act and criminal nature of sodomy between 1860 and 1943. It roots both the problems and efficacy of the 1860 sodomy statute’s ambiguous language in the centuries-long legacy of confusion that preceded it. Chapter two also sets the foundation for how the sodomitical Other was constructed in Texas, which is the subject of chapter three. The third chapter looks closely at the intersections of gender, race, and sexuality within Texas law and how from 1860 to 1973 that intersection became the discursive launching point for the sodomitical Other.

For many years, we have all been living … under the spell of an immense curiosity about sex, bent on questioning it, with an insatiable desire to hear it speak and be spoken about, quick to invent all sorts of magical rings that might force it to abandon its discretion. As if it were essential for us to be able to draw from that little piece of ourselves not only pleasure but knowledge, and a whole subtle interchange from one to the other: a knowledge of pleasure, a pleasure that comes of knowing pleasure, a knowledge-pleasure; and as if that fantastic animal we accommodate had itself such finely tuned ears, such searching eyes, so gifted a tongue and mind, as to know much and be quite willing to tell it, provided we employed a little skill in urging it to speak.

—Michel Foucault, *The History of Sexuality Volume 1: An Introduction*

There was no debate in the eighth Texas Legislature over the addition of a sodomy statute to the state penal code in 1860. The House and Senate Journals from the 1859-1860 legislative session show that state lawmakers were more concerned with other matters affecting the welfare of the state. Texas governor Hardin Richard Runnels addressed both chambers in a letter on November 9, 1859, laying out what would be the paramount affairs for the entire legislative session. There were four major concerns. First, the particulars of land appropriations for the University of Texas. Second, dealing with the tripartite violence between white frontier settlers, ethnic Mexicans, and Apaches along the Rio Grande river. Third, the encroachment of railroads and corporations upon the interests of the state government. And finally, the looming clash of northern and southern ideologies that would soon lead to secession and the Civil War.¹ Other concerns were introduced and addressed in the legislative discourse between November 1859 and February 1860, but the state’s first sodomy statute was added to the Texas Penal Code without even a mention of the word sodomy in the House or Senate.²

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² The sodomy statute was most likely discussed within a legislative committee designated to deal with amending the state’s first penal code, but those records are not available.
Most of the eighth legislature’s proposed amendments to the penal code were written in attempts to make the language used in criminal statutes more clear. Article 9 of the state’s first penal code required that criminal statutes reflect “the plain import of the words of a law,” and Article 6 rendered “wholly inoperable” any penal statute deemed unclear or in contradiction with another statute. This issue was so important to Texas lawmakers that even Article 9 was amended during the previous legislative session to include clearer language about criminal statutes requiring clearer language. But the language used in the first Texas sodomy statute was in no way transparent. Like most of the state sodomy statutes created in the U.S. before 1860, the criminal proscription in Texas combined the ambiguous language used in English statutes accredited to King Henry VIII and Sir William Blackstone. The Texas statute simply stated that “any person [who] shall commit the abominable and detestable crime against nature…shall be deemed guilty of sodomy.”

The Texas Legislature’s emphasis of using clear language in the penal code juxtaposed with the ambiguity of the language employed in the state’s sodomy statute is compelling, and given the lack of focus on the statute’s creation in legislative documents, this paradox seems unexplainable. Legal scholar Dale Carpenter suggests that even though state sodomy statutes were ambiguous, “there was little confusion about the assumed meaning.” But this suggestion can be questioned when considering the more than 100 appeals cases heard in the U.S. during the nineteenth century that made mention of sodomy (or “buggery” or “the crime against nature”). As gay historian Jonathan Ned Katz points out through his study of these cases in his book *Love Stories: Sex Between Men Before Homosexuality*, more than half of these appeals cases took

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3 Penal Code, TX (1857), 3; Laws of Texas, 1822-1897, Vol. IV, 1028.
5 Carpenter, *Flagrant Conduct*, 5.
place in the western U.S., and a total of twenty-four cases were from Texas alone—more than any other state.6 The exact meaning of an act of sodomy came into question in the majority of these cases. Historian Jacqueline N. Moore determined that, of these twenty-four cases, only eight were appeals to actual sodomy convictions, but they were on the grounds of contesting the legal interpretations of the ambiguous crime. Did an act of oral sex constitute an act of sodomy? What about acts of child molestation? Could an act of sodomy be committed against (or even by) a woman? And if an act of bestiality was commonly understood as an act of sodomy, then what evidence of the act was needed to secure a conviction? The larger question left to be answered today is, if sodomy was reported to have a widely understood and common meaning, why were there so many appeals to how the term was interpreted in criminal courts?7

Sodomy has always been what Michel Foucault calls “that utterly confused category,” but knowledge of the term’s rich and confused history is lost on much of the general public today.8 Sodomy is often regarded now as simply being an act of anal sex and it is commonly thought of as being exclusively associated with homosexuality. This association is flawed, however, because there have been a variety of other “acts” which have fit under the umbrella term of “sodomy” over the past several centuries that have nothing to do with erotic same-sex desire. Varied interpretations of what constituted sodomy were developed by a diverse group of authorities on the subject—from medieval Christian theologians such as Peter Damian and Thomas Aquinas to eighteenth-century English legal scholar Sir William Blackstone, for example—resulting in a paradoxical discourse of both silence (as the crime not fit to be named)

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7 Jacqueline N. Moore, *Cowboys and Cattlemen: Class and Masculinities on the Texas Frontier, 1865-1900* (New York: New York University Press, 2010), 241n. The other sixteen cases were either about slander (surprisingly several of them) or were lacking any detail in the court records.
and articulation (through criminal charges and prosecutions) that was manifest in the U.S. from colonial times on into the twentieth century.

The confusion that Foucault attributes to sodomy lies in the question, what (exactly) is it? Legislators, judges, and law enforcement in Texas were forced to address this question in a number of legal encounters with different “criminal” acts between 1860 and 1943. This chapter explores the varied responses to these encounters as well as the no less varied answers to the question, what is sodomy? State newspapers, court records, and legislative documents provide a keen insight into how both the act and criminal nature of sodomy were conceptualized within a legal context by lawmen, judges, and lawmakers. In excavating this sodomitical discourse from the available sources, this chapter shows how there was hardly a consensus on the legal meaning of an act or the criminal nature of sodomy in Texas during the late nineteenth and early twentieth centuries.

The first section of this chapter explores the roots of confusion in the varied and shifting understandings of sodomy throughout several centuries preceding the creation of the first Texas sodomy statute in 1860. The second section looks closely at how an act of sodomy was interpreted in nineteenth-century legislative documents, court records, and newspaper accounts in Texas. This section also highlights how sodomy’s legacy of confusion impeded the sodomy statute’s enforcement in Texas. The third section delves into the criminal nature of sodomy in Texas, which, like the act itself, was and continues to be impossible to isolate into one definition. The last section examines how the long legacy of confusion shaped the state’s response to a dramatic increase in sodomy arrests leading to the creation of a new sodomy statute in 1943. Overall, the 1860 Texas sodomy statute and its enforcement served as a continuation of the legacy of confusion that preceded it, and as such, it stands as an important and often overlooked
part of a long and complicated history of the human body and the mechanisms put in place to control it.

**A Legacy of Confusion**

Sodomy is etymologically linked to the ancient city of Sodom, which, according to the Bible, was destroyed by the Hebrew god because of its immorality. The definition of the term is not as easy to trace through history, however. The “sin of Sodom” and thus the reason for the city’s destruction is vaguely described in Genesis 18:20 as simply being “very grievous.” One interpretation of what constituted the sin of Sodom is that it was the Sodomites’ engagement in erotic same-sex acts, or more anachronistically, homosexuality. This interpretation derives from Genesis 19:5. In this biblical passage, male residents of Sodom demand that Abraham’s nephew, Lot, turn over two angels that were visiting him in the city, saying, “Bring them out unto us, that we may know them.”\(^9\) Another translation of this passage even substitutes the word “rape” for the word “know.” But Christian theologian Derrick Sherwin Bailey has argued that this translation and others similar to it are incorrect. He contends that the English word “know” in the King James Version of this passage was translated from the Hebrew *yadha’*, which in this context means “get acquainted with.” He also notes that “it is exceptional to find *yadha’* employed in a coital sense,” and on the rare occasion that it is, it is strictly used to denote coitus between a man and a woman.\(^10\) Theologians of the medieval Christian Church adopted the first interpretation, associating the biblical proscription against same-sex coitus—“Thou shall not lie

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\(^9\) Gen. 18:20, 19:5, King James Version. The word “rape” in Gen. 19:5 is used in the Revised Berkeley Version.

with mankind, as with womankind”—with the sin of Sodom, or “sodomy.” 11 But this association is far from exclusive.

There is yet a different interpretation for what specific transgression underlies the sin of sodomy. According to medieval historian Michael Goodich, the biblical prohibition of same-sex coitus was originally meant to assure that there was a clear religious distinction between the Hebrews and their pagan neighbors. Groups of people such as the Chaldeans and Canaanites were reported to have practiced many sexual acts, including those between members of the same sex, in their religious rituals.12 As such, engaging in erotic same-sex acts was considered a form of idolatry by the ancient Hebrews. According to religious historian Wainwright Churchill, the ancient Hebrews considered “almost any practice [sexual or not] that was associated with the religious life of non-Jews … as a form of idolatry,” and this perspective was adopted by the Christian Church during its early development.13 In the first stages of Rome’s new state religion, engaging in erotic same-sex acts was seen as a practice carried out by pagans and heathens and it was thus associated with idolatry, witchcraft, and heresy. As early modern historian William E. Monter argues, the “intense hatred of sexual deviance in Western Christendom was closely associated with religious deviance.”14 In this view, the process of Othering is at the root of proscriptions against sodomy. The ancient Hebrews and early Christians used erotic same-sex behavior as an identifier of ethnic or religious Otherness, and as such, laid the foundations for the construction of a sodomitical Other in the West.

11 Lev. 18:22, New King James Version.
12 Michael Goodich, The Unmentionable Vice: Homosexuality in the Later Medieval Period (Santa Barbara: ABC-Clio, Inc., 1979), x. Also see Churchill, 200.
Medieval Christian theologians such as Augustine of Hippo and Peter Damian expanded the transgressive category that included the sin of sodomy through a new discourse that centered on “nature.” Augustine equated sodomy to “the sins belonging to lust” in the fourth century and claimed that, out of all such sins, “that which is against nature is the worst.” Peter Damian agreed with Augustine in 1049, writing that sodomy was an “act of insane, unbridled lust” and that, “Unquestionably, this vice … surpasses the enormity of all others.” Damian emphasized the grievousness of the sin, claiming: “It is the vice that violates temperance, slays modesty, strangles chastity, and slaughters virginity with a knife dipped in the filthiest poison.” By positing the “befouling cancer of sodomy” within a larger categories of lust and the unnatural, Augustine and Damian conflated several sexual acts to mark sodomy as a blanket term. Damian defined sodomy as masturbation, mutual masturbation, femoral coitus, and anal sex. Another early Church father, Thomas Aquinas, disagreed with Damian over two hundred years later by trying to relegate sodomy to just “copulation with an undue sex, male with male, or female with female.” At the same time, however, Aquinas included “every genital contact intended to produce orgasm other than penile-vaginal intercourse in an approved position” within the larger category of “unnatural acts.” As these religious proscriptions gradually became secularized as criminal statutes in Europe beginning in the twelfth century, “sodomy” and “unnatural acts” became interchangeable, allowing Augustine’s and Damian’s interpretation of sodomy as a

17 Ibid., 6-7.
catchall term to take precedence. The result was that charges of sodomy came to describe even more various transgressions against Christian morals and the Crown.

The ambiguity of the language used in European criminal sodomy proscriptions led to arrests and charges for various sexual transgressions into the early modern period, including anal and oral sex, bestiality, child molestation, masturbation, incest, and even interreligious or interracial sex. But charges of sodomy were not limited to sexual acts. Offenders were often conjointly charged with idolatry, heresy, witchcraft, abortion, arson, robbery, or even treason. Punishments for the crime of sodomy also varied throughout medieval Europe, including burning at the stake, decapitation, castration, and hanging, but they almost always resulted in death. Early modern historian Maria R. Boes notes that, while the expanded definition and interpretation of sodomy led to an overall “explosion of prosecutions” in Europe between the mid-thirteenth and late seventeenth centuries, the enforcement of sodomy proscriptions “did not manifest itself uniformly.” Several other historians concur with Boes, pointing out that understandings of what constituted an act of sodomy and the cultural attitudes toward it varied from community to community, kingdom to kingdom, and culture to culture.21

One fascinating example of the heterogeneity of how sodomy was interpreted as a crime can be found in the case of John/Eleanor Rykener. In December 1394, a woman named Eleanor

\footnote{19 For associations with other crimes, see Maria R. Boes, “On Trial for Sodomy in Early Modern Germany,” in 
\textit{Sodomy in Early Modern Europe}, ed. Tom Betteridge (Manchester: Manchester University Press, 2002), 29; Monter, 41-48; and Churchill, 202, 206. For Punishments, see Goodich, \textit{The Unmentionable Vice}, 77-80.}

\footnote{20 Boes, 27.}

Rykener was detained for prostitution in London. What befuddled Eleanor’s interrogators following her arrest was that she was not, as she claimed and appeared to be, a woman. According to the official document transcribing the interrogation of John/Eleanor Rykener, which was first published by medieval historians Ruth Mazo Karras and David Lorenzo Boyd in 1994, the interrogators were more fixated on Rykenner’s “gender transgression and conflation” than they were on the prisoner’s admitted acts of prostitution or sodomy. What was even more perplexing to the interrogators was that Rykener not only admitted to having had sex “as a woman” with several men, but also to having “had sex as a man with many women both married and otherwise.” The legal conception of prostitution at the time was highly gendered and, as a man, Rykener could not be charged with the crime. In fact, as Karras and Boyd’s investigation shows, John/Eleanor wasn’t even charged with sodomy after the interrogation and was released shortly after his/her arrest. Rykener’s case shows how sodomy proscriptions in medieval and early modern Europe was interpreted and criminally enforced heterogeneously.

Sodomy, like prostitution, was also commonly conceived along lines of gender. In one of his most famous letters to Pope Leo IX, which is commonly known as The Book of Gomorrah, Damian asked, “Who will make a mistress of a cleric, or a woman of a man?” According to him, performing the submissive role in erotic same-sex acts was equivalent to male-gender transgression, or a man performing the female gender. While Rykener’s transvestitism was a physical manifestation of this transgression, John/Eleanor’s interrogators didn’t make the same connection to sodomy. In medieval London, the gender perfidiousness associated with erotic

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22 Karras and Boyd, Loc. 3388. The specific act of sodomy was never put into explicit terms, but it construed to be either anal or oral sex.


24 Damian, 15.
same-sex acts transcended the penetrator/penetrated dichotomy that Damian hinted to in his letter to the Pope. In their 2011 book, *Sex before Sexuality: A Premodern History*, medievalist Kim M. Phillips and early modernist Barry Reay discuss how associated “hierarchies of penetrator/penetrated, superior/inferior, masculine/feminine and active/passive” were not accepted in all areas of medieval and early modern Europe.” They further explain that, “This divide is typically found between southern Europe, where conceiving of erotic same-sex acts followed in the same vein of Greco-Roman pederasty, and northern Europe, which had no such distinctions.” Being in the latter region, the London interrogators considered not only Rykener but also his/her lovers implicated in the confession to be complicit in acts of sodomy.

Early sodomy statutes in British colonial America borrowed from those set forth by King Henry VIII and William Blackstone in the sixteenth and eighteenth centuries respectively, using ambiguous and religiously charged language that could be used to target a number of transgressions. Statutes that criminalized “the detestable and abominable vice of buggery” or the “crime against nature” as it was “committed with mankind or beast” led to multifarious interpretations of what constituted an actual act of sodomy. In his 1976 book *Sexual Variance in Society and History*, gay historian Vern L. Bullough points out that “between one-fifth and one-fourth [of] all prosecutions for sex offenses [were] labeled as sodomy” during Plymouth’s colonial period, arguing that these offenses were for various acts, including “coitus in ano, mutual masturbation, and bestiality.” Legal historian William N. Eskridge, Jr. claims that the creation and enforcement of colonial sodomy laws served three goals: [T]o protect vulnerable

26 Barnett, 81. King Henry VIII’s statute against sodomy defined the crime as “the detestable and abominable vice of Buggery committed with mankind or beast,” and Blackstone’s *Commentaries on the Laws of England* described sodomy even more vaguely as the “crime against nature.”
persons … from sexual assault … as well as from the seeds of ‘atheism.’ … [T]o protect the institution of procreative marriage generally. … [And] the maintenance of community purity and order.”

While conceptions of sodomy were secularized in the U.S. during the eighteenth and nineteenth centuries, proscriptions against sodomy seemed to serve the same goals, and they did so in the same fissured manner as seen in the Plymouth colony. The question—and thus the confusion—remained: what is sodomy?

**Defining Acts of Sodomy in Texas During the Nineteenth Century**

Identifying how Texas lawmakers, law enforcement, and judges defined an act of sodomy is a difficult task for historians. This is because of two main factors: First, there is hardly any mention of sodomy in legislative documents, and secondly, the majority of court records and newspaper reports of sodomy cases contain no description of the actual act that was being prosecuted. Moreover, the lack of recorded sodomy charges in Texas preceding the enactment of the first sodomy statute in 1860, along with the absence of any discussion regarding the statute’s addition to the penal code in the state’s first eight legislative sessions, suggest that there was no precedent for a sodomy proscription in Texas other than the fact that other states in the U.S. had them in their penal codes. Thirty of the other thirty-two states and three of the six organized territories in the U.S. at that time already had criminal statutes for sodomy by 1860. It is also possible that adding a sodomy statute to the Texas penal code was the result of a moral

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Eskridge, 387-407. The enactment of sodomy proscriptions in the other states and territories were as follows: Alabama, 1841; Arkansas, 1838; California, 1850; Connecticut, 1642; Delaware, 1719; Florida, 1842; Georgia, 1732; Illinois, 1795; Indiana, 1881; Iowa, 1892; Kansas Territory, 1855; Kentucky, 1792; Louisiana, 1805; Maine, 1821; Maryland, 1776; Massachusetts, 1641; Michigan, 1816; Minnesota, 1851; Mississippi, 1839; Missouri, 1835; Nebraska Territory, 1858; New Hampshire, 1679; New Jersey, 1668; New Mexico Territory, 1851; New York, 1665; North Carolina, 1778; Ohio, 1805; Oklahoma Territory, 1890; Oregon, 1853; Pennsylvania, 1682; Rhode Island, 1647; South Carolina, 1712; Tennessee, 1829; Utah Territory, 1876; Vermont, 1779; Virginia, 1610; Washington Territory, 1893; and Wisconsin, 1839.
obligation assumed by devoutly religious members of the House and Senate Judiciary committees where the statute was most likely introduced. Such a possibility would support Eskridge’s contention that the mid-to-late 1800s saw a resurgence of Puritan idealism through the Second Great Awakening in the U.S. As it was during the First Great Awakening in the colonial period, “the neo-Puritans of the 1860s attempted to defend a legal and moral status quo” through the endorsement and normalization of a “Bible-based code of conduct.” Whatever the reason for the creation of the first Texas sodomy statute, there is no evidence to suggest that it was prompted by reports of sodomy taking place in the state.

While there seemed to be no concern exhibited by the Texas legislature about a clear definition of sodomy, the ambiguous language that the lawmakers used in the 1860 statute became a concern for state courts. Soon after the statute’s enactment, the judges who presided over *Fennel v. State* (1869) and *Frazier v. State* (1873) ruled that the proscription could not be enforced because of its lack of clear language and the statute’s failure to define what constituted a “crime against nature.” The basis for these rulings lay in articles six and nine of the penal code, which together required “the clear import of the words of a law” for a criminal statute to not be regarded as “wholly inoperable.” But following a legislative revision of the Texas penal code in 1879, which removed the necessity for crimes to be “expressly defined” in order to prosecute them, the courts were enabled to rely on both common law and judges’ own interpretations of

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31 Correspondence, 2D105-2D106, Benjamin Holland Epperson Papers, 1834-1876; Correspondence, 2D162-2D163, 2D165, Benjamin Cromwell Franklin Papers, 1805-1915; Correspondence, 2F41-2F42, Roger Quarles Mills Papers, 1813-1938; Correspondence, 2K163, Isaiah Addison Paschal Papers, 1844-1870; Correspondence, 2H28-2H29, James Webb Throckmorton Papers, 1838-1888; Correspondence, 2R299-2R300, Louis Trezvant Wigfall Papers, 1833-1874, Dolph Briscoe Center for American History, University of Texas, Austin. While the personal correspondence of Epperson et al. contains no references to the creation or enforcement of the 1860 sodomy statute, it does show how their Christian faith and religious rhetoric were an important part of their daily lives.

32 Eskridge, 16, 23.

sodomy. Unlike the rulings in *Fennel* and *Frazier, Ex Parte Bergen* (1883) confirmed a sodomy conviction, citing the recent legislative change. Coincidentally, neither the specific act which was dubbed “sodomy” in *Bergen* nor its criminal nature was included in the court record.\textsuperscript{34}

Despite the lack of specificity found in court records and newspaper accounts of sodomy cases in the nineteenth century, there is enough evidence to show that Texas courts interpreted the crime of sodomy to consist of at least two different acts. The first known Texas sodomy case, *Campbell v. State* (1866), described the committed offense as “a crime against nature” with a mare. There were no details about the specific act that Warren Campbell had committed with the mare, but it can be determined that it was sexual, or rather, an act of bestiality.\textsuperscript{35} There were at least two other cases of sodomy in Texas courts during the nineteenth century that dealt with acts of bestiality, thereby making the act the most commonly reported type of sodomy as well as inscribing into the legal record one of the many acts incorporated under the shadow of sodomy’s legacy of confusion.\textsuperscript{36}

The second act which Texas courts interpreted as an act of sodomy was a matter of legal contention. Nineteenth-century understandings of sodomy in the rest of the U.S. included such acts as anal sex, bestiality, and even masturbation. Including oral sex under the umbrella term of sodomy, however, was not as easily accepted. This issue was addressed for the first time in Texas by *Prindle v. State* (1893). Charilie Prindle was arrested and convicted for forcing a child to commit an act of oral sex upon him. The arresting lawman and the court that secured the conviction believed that oral sex constituted an act of sodomy. The Texas Court of Criminal Appeals disagreed, however. The presiding judge began his decision for the court by giving the

\textsuperscript{34} *Ex Parte Bergen*, 14 Tex. Crim. App. 52 (1883).
\textsuperscript{35} *State v. Campbell*, 29 Tex. 44 (1867), as cited in Katz, *Love Stories*, 360n.
\textsuperscript{36} Moore, 241n.
common law definition of sodomy and then explained why it could not be related to the conviction and sentence of Prindle:

‘This offense consists in the carnal knowledge committed against the order of nature by man with man, or in the same unnatural manner with woman; or by man or woman, in any manner, with beast.’…Sodomy, which ‘is the abominable and detestable crime against nature,’ known to the common law, is, by article 342 of the Penal Code, made an ‘offense’ in this State…The evidence discloses the act relied on in this case was committed in a child’s mouth. However vile and detestable the act proved may be, and is, it can constitute no offense, because not contemplated by the statute, and is not embraced in the crime of sodomy.37

The court’s decision immediately affected other Texas courts of law deciding on cases that involved a charge of sodomy. That same year, a criminal case against two men in San Antonio, who were charged with sodomy and aggravated assault for an unspecified act against a young boy, was dismissed “owing to a recent decision of the Criminal Court of Appeals [in Prindle v. State] affecting cases of this character.” One of the men charged pled guilty to the count of aggravated assault and was charged a twenty-five dollar fine.38 If oral sex was understood as an act of sodomy by law enforcement, it was no longer prosecutable as such in the court of law, even when committed as a forceful act against a child. Moreover, there were no criminal statutes against child molestation at the time.

Despite the appeals granted in Fennel, Frazier, and Prindle, the Texas legislature made no revision to the 1860 sodomy statute until 1943. In 1874, following Fennel and Frazier, a legislative bill was proposed in the State Senate to require the Judiciary Committee “to report a bill defining more clearly the offences of sodomy, adultery, and fornication,” and two years after the 1893 decision in Prindle, a House bill was introduced “to classify sodomy according to degree and provide for the punishment thereof.” No action was taken in pushing either bill

38 San Antonio Daily Light July 7, 1893, 8; San Antonio Daily Express, November 19, 1893, 6.
through the legislature, and the House and Senate journals give no indication why.\textsuperscript{39} Moreover, in the \textit{Report of the Attorney General of the State of Texas for the Years 1893-94}, Texas Attorney General Charles A. Culberson made no mention of the crime of sodomy or even the \textit{Prindl}e decision.\textsuperscript{40} The lack of concern exhibited by the Texas Legislature in clarifying exactly what constituted an act of sodomy during the nineteenth century directly affected the court’s ability to secure convictions. Furthermore, while court records indicate that law enforcement and judges understood at least two different acts (bestiality and oral sex) as sodomy, the courts made no attempts to specifically define an act of sodomy in writing, thus contributing to a continuation of sodomy’s legacy of confusion.

\textbf{SEXUAL VIOLENCE AND THE GENDER OF SODOMY}

The varied interpretations of what exactly constituted an act of sodomy during the nineteenth century in Texas makes it difficult likewise to define the criminal nature of sodomy as it was conceived during this period. Jonathan Katz describes one interpretation of the “crime against nature” in relation to a more recent understanding of sodomy:

Judicial practice and tradition constituted a bestiality/sodomy connection, a historically specific association of human-beast mating and men’s anal intercourse with other humans. That linking seems strange only to readers who grew up in the twentieth century, after the homo/hetero divide – the mass dissemination of a new, gender-divided, erotic system called homosexuality and heterosexuality. Under the epochal new ordering and naming of sexuality (within that same-sex/different sex arrangement of eros) human-beast intercourse and the anal intercourse of humans were thought of as essentially different sorts of acts. The nineteenth-century distinction between procreative and nonprocreative closely linked its bestiality cases to those involving men’s sexual relations with human males, females, and children.\textsuperscript{41}

\textsuperscript{39} \textit{Galveston Daily News}, February 13, 1874, 1; January 15, 1895, 4.

\textsuperscript{40} Charles A. Culberson, \textit{Report of the Attorney General of the State of Texas for the Years 1893-94} (Austin: Ben C. Jones & Co., 1895), 3. Despite Culberson’s concern for the “marked increase of crime” between 1893 and 1895, the detailed appendices to his report made no reference to the number of arrests, indictments, or convictions for the crime of sodomy.

\textsuperscript{41} Katz, \textit{Love Stories}, 64.
Similar to Katz’s contention, William Eskridge and the CATO Institute’s Robert A. Levy state in an Amicus Curiae brief for the petitioners in *Lawrence v Texas* (2003) that the main “purpose of nineteenth century sodomy laws was protection of children, women, and weaker men against sexual assault.”

As the decision in *Prindle v. State* (1893) shows, however, the 1860 Texas sodomy statute did not protect children. Moreover, the assertion that sodomy was conceived of as an act of sexual violence was not necessarily reflected in the statute’s place in the Texas penal code. Sodomy was initially included in Title XII of the penal code, which was reserved for crimes against “public morals, decency, and chastity,” such as miscegenation, incest, adultery, prostitution, and indecent exposure, while criminal statutes concerning rape, assault, and other violent crimes were included in Title XVII, “crimes against the person of an individual.” Another way that interpreting sodomy as a form of sexual assault in Texas can be problematized is by observing how victims were defined.

The early Texas penal code exhibited legislators’ acute concerns about regulating sexual behavior among the state’s citizens during the nineteenth century. “The traditional attitudes of American culture,” according to Barnett, “make monogamous heterosexual marriage the moral norm, and all expressions of sexuality outside that institution morally deviant.” These same moral attitudes were reified in the Texas Penal Code in several sections, including Title XII. At the penal code’s initial inception in 1857, Title XII included proscriptions for the following offences: “unlawful marriage,” including bigamy and interracial marriage; “incest and adultery,” with the definition of adultery extending to premarital cohabitation; “disorderly houses,” or brothels; and “indecent exhibitions and publications,” criminalizing public exposure and any

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44 Barnett, 1.
“print, picture, or written composition, manifestly designed to corrupt the morals of youth.” 45 Along with these proscriptions, statutes concerning rape, assault with intent to rape, and even abortion, were included in the section concerning “crimes against the person of an individual,” and statutes concerning seduction were included in the section reserved for “miscellaneous offences.” 46 While on the surface these criminal statutes seem to be aimed at controlling sexual behavior in Texas, a deeper look shows that the major concern of these proscriptions was the control of women’s bodies. In her book Entry Denied: Controlling Sexuality at the Border, Gender and Women’s Studies scholar Eithne Luibhéid describes how “women’s bodies historically serve as the iconic sites for sexual intervention by state and nation-making projects.” 47 While her study focuses on the control of sexuality through the “immigration control apparatus” in the U.S. from the late nineteenth century to well into the twentieth, Luibhéid’s approach to interpreting the language and enforcement of laws targeting specific expressions of sexuality extends to that of the Texas Penal Code in the nineteenth century as well.

Examples of how criminal statutes directed toward sexual behavior were highly gendered can be found in those dealing with seduction and rape. The statutory proscription for seduction applied to any man who, if “by promise to marry, shall seduce an unmarried female, under the age of twenty-five years, and shall have carnal knowledge of such female.” 48 Not only was seduction a crime in which only a woman could be victimized, but the statute of limitation in charges of seduction was oddly set at “twenty-five years.” In addition, a specific clause was

45 Penal Code, TX (1857). For unlawful marriage, see 71-72, Art. 384-387, Ch. I, Title XII; incest and adultery, see 72-73, Art. 388-395, Ch. II, Title XII; disorderly houses, see 74, Art. 396-398, Ch. III, Title XII; and indecent exhibitions and publications, see 74, Art. 399, Ch. IV, Title XII.
46 Ibid. For assault with intent to rape, see 97 Art. 493, Ch. III, Title XVII; rape, see 102-103, Art. 523-530, Ch. VI, Title XVII; abortion, see 103-104, Art. 531-536, Ch. VII, Title XVII; and seduction, see 155-156, Art. 788-791, Ch. III, Title XXI (Art. 791 in Ch. III is incorrectly numbered as Art. 781).
47 Eithne Luibhéid, Entry Denied: Controlling Sexuality at the Border (Minneapolis: University of Minnesota Press, 2002), xi.
48 Penal Code, TX (1857), 155, Art. 788, Ch. III, Title XXI.
provided in Article 791 removing liability from married men who committed the crime of seduction if it could be proven that the victimized woman had prior knowledge of the man’s marriage.\textsuperscript{49} Similar to the statutes for seduction, the language used in the proscriptions for rape singled out women as the only possible victim of the crime, stating that, “Rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud.” Also similar to the articles on seduction, the articles on rape included certain clauses that nullified liability. First, the age of a rape victim’s consent was set at ten years old. “[T]he carnal knowledge of a female under the age of ten years” would be prosecuted as rape regardless of consent “and with or without the use of force, threats or fraud.” This meant that a girl as young as ten years old would have to give herself over to medical and courtroom examinations in order to prove that she had been raped, which was an ordeal that could be an incredibly intimidating and horrifying experience for a woman of any age. As such, this clause could have easily worked in an offender’s favor. Secondly, any male under the age of fourteen could not be held liable for rape.\textsuperscript{50} This liability clause exposes the incongruity of nineteenth-century gender expectations in Texas, suggesting that a female’s innocence becomes suspect four years before a male’s.

The statutes concerning seduction and rape in the early Texas penal code not only construct a gendered idea of who can be a victim of sexual assault, but they also reveal who can be a perpetrator of such a crime. This construction is highlighted by historian Nayan Shah in his discussion of similar statutes in California at the time. In his book \textit{Stranger Intimacy: Contesting Race, Sexuality and the Law in the North American West}, Shah claims that, “Underwriting the new age standards that defined consensual sex between males and females was a conventional understanding of gender that naturalized male aggression in contrast with female

\textsuperscript{49} \textit{Ibid.}, 156, Art. 791, Ch. III, Title XXI.
\textsuperscript{50} \textit{Ibid.}, 102, Art. 523, and 103, Art. 528, Ch. VI, Art. XVII.
vulnerability.”\textsuperscript{51} Positing this gender relationship as the basis for crimes of sexual assault lends itself to the construction of a male-aggressor/female-victim dichotomy, and in so doing, it complicates the idea that sodomy was construed as a form of sexual violence in the nineteenth century. This is because sex was construed narrowly as penile/vaginal intercourse, and any contact of sexual organs outside of “natural” sex was seen as unnatural, or more specifically, unsexual. Moreover, there is only one sodomy case from the nineteenth century which involved a female victim.\textsuperscript{52} It would have been difficult for nineteenth-century officials to conceive of a man being the victim of sexual assault because, as historian Stephen Robertson suggests in his 2010 article in the \textit{Journal of the History of Sexuality}, “only women could be raped, and no parallel statutes existed that applied to sexual assaults on men or same-sex acts.”\textsuperscript{53}

It seems that one of the two most common victims of the crime of sodomy were people who weren’t actually involved in the act. Eskridge writes that, “Many sodomy prosecutions have involved sexual activities that disturbed the peace because they shocked ‘innocent’ observers.”\textsuperscript{54} For example, the legal victims in acts of bestiality would have been the passersby who saw the crime take place. Another example of such victimization in a sodomy case was reported in the \textit{San Antonio Daily Light} in 1893. In late July of that year, two men were observed engaged in “a horrible crime against nature” inside a San Antonio residence they had illegally entered. The two men were initially booked for disorderly conduct, but upon appearing before the court recorder the morning after the arrest, charges of sodomy were filed against them and their case was transferred to the San Antonio Justice Court. Unable to pay the 500-dollar bonds they were


\textsuperscript{54} Eskridge, 4.
given, the two men remained in jail until their charges ended up being dismissed at trial seven months later.\textsuperscript{55} Given that the court’s decision to dismiss the case happened shortly after \textit{Prindle v. State} (1893) was decided, it is possible to suggest that the specific act of sodomy here was that of oral sex, but this cannot be confirmed with the lack of details. The other most common victims in nineteenth-century sodomy cases in Texas tended to be children. This fact also makes defining both the criminal nature and the act of sodomy problematic because, firstly, there was no statute criminalizing child molestation at the time, and secondly, the details surrounding most of the cases in which an act of sodomy was committed against a youth are scant.\textsuperscript{56} Therefore, charges of sodomy with a child could have been made for any number of specific acts.

**Redefining Sodomy in the Twentieth Century**

It would take fifty years following the decision in \textit{Prindle v. State} (1893) to ease the doubt cast over sodomy convictions in Texas. There were a total of thirty-two appeals cases heard in Texas courts that made at least some mention of sodomy in them between 1893 and 1943. Of those cases, twenty-six of them were actual appeals to sodomy convictions. This number is striking considering that there were only eight appeals to sodomy convictions in Texas during the nineteenth century. The confusion surrounding what constituted an act of sodomy had evolved into contestation. This increase in the number of appeals cases also marks a rise in the legal discourse surrounding sodomy in Texas. Most importantly, one of the first cases in this list produced the very first explicit definition of what constituted an act of sodomy. Writing for the Texas Court of Criminal Appeals in \textit{Lewis v. State} (1896), Judge Henderson affirmed Alex Lewis’s conviction for the crime of sodomy committed against a woman. In doing so, the judge

\textsuperscript{55} \textit{San Antonio Daily Light} July 26, 1893, 8; July 27, 1893, 1; February 21, 1894, 4.

gave a definition for sodomy in charging that Lewis “copulated with a woman by penetrating her fundament or anus with his penis.”\(^\text{57}\) This decision does not mark an end to the confusion, however. Rather, it marks a rift in the legal discourse surrounding sodomy by introducing a new, more specific language to sodomy’s legacy in Texas.

The new precedent for specificity affected sodomy convictions in Texas, but not in a uniform manner. Giving utterance to the details that judges perceived as “revolting” or “gruesome” in appeals cases didn’t always ensure conviction as they did in Lewis. In Mullins v. State (1903) the appellant was contesting a sodomy conviction for an alleged act of bestiality with a dog. The two witnesses to the act gave explicit testimony of seeing the act take place, but they could not confirm seeing the appellant’s “private parts” during the alleged act. The Texas Court of Criminal Appeals reversed the previous judgement due to an “insufficiency of evidence.”\(^\text{58}\) Two years later, the same court heard a similar appeals case involving a conviction for an alleged act of bestiality with a hog. In Langford v. State (1905), the three witnesses gave an even greater detailed account than that in Mullins: “Each testify that they saw appellant with his pants unbuttoned and his penis erect; he would get on the sow and kinder hunch or go through the motion as if copulating. When appellant would begin his motions, the sow would move up, and he would scratch her sides, and she would stop.” Unlike the previous case, the witnesses testified to seeing the appellant’s penis, but the court still ruled that there was an insufficient amount of evidence to secure conviction without witnessing the actual penetration of the hog.\(^\text{59}\)

\(^{57}\) Lewis v. the State, 36 Tex. Crim. App. 37 (1896).
Aside from introducing a specific conception of what constituted an act of sodomy into the sodomitical discourse in Texas, the decision in *Lewis v. State* (1896) created another precedent which affected the understanding of sodomy’s criminal nature. The victim in *Lewis* was a woman and, as stated above, the nineteenth-century interpretation of victimhood in crimes of sexual assault was highly gendered. In this instance, therefore, the criminal nature of sodomy was conceived as sexual assault. The language which the Texas Court of Criminal Appeals chose in commenting on this fact, however, held implications for sodomy cases in which men were victimized. Citing *Lewis* in the Texas Court of Criminal Appeals decision in *Adams v. State* (1905), the presiding judge asserted that whether the victim was “a male or female, the copulation being against the order of nature, such carnal knowledge would not be in the usual way, and would therefore constitute the crime of sodomy.” This assertion countered the appellant’s basis for appeal, which was that the indictment for sodomy omitted an important detail regarding the sex of the victim. The appellant posited his appeal upon the gendered conception of sodomy. He claimed that his indictment did not designate the sex of the victim and, since the victim’s name could be attributed to either the female or male sex, the conviction was null and void based on the absence of a real victim. The court’s decision did more than quash the appellant’s argument: it set a precedent that rendered victims of sodomy genderless.⁶⁰

Regardless of how an act or the criminal nature of sodomy was conceptualized after *Prindle v. State* (1893), one fact was clear: there was a marked increase in arrests for sodomy in Texas during the early twentieth century. The dozens of reports of sodomy arrests found in Texas newspapers were less specific in describing the acts performed or the nature of the crimes than the court records, but there was enough said about sodomy to reflect some continuity between

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the nineteenth and twentieth centuries: The majority of sodomy charges before 1943 were made for alleged acts of bestiality and assaults against children. The problem, however, was that the legal precedent set by *Mullins v. State* (1903) in requiring more specificity to legitimate bestiality charges, and by *Prindle v. State* (1893) in considering acts of oral sex—even when children were forced to perform them—rendered the 1860 Texas sodomy statute practically unenforceable. Even upon a complete revision of the Texas penal code in 1925, as Judge Hawkins of the Texas Court of Criminal Appeals stated in the court’s decision in *Munoz v. State* (1926), “The [sodomy] law has not been amended but instead has been reenacted in the same language as originally found.” This showed another continuity between nineteenth and twentieth century sodomy cases: a lack of concern about a clearer sodomy statute exhibited by Texas lawmakers countered with the overt concern expressed by judges. In the same decision, Judge Hawkins claimed that, “[I]n many States where a similar law to ours on the subject of sodomy had received a like construction as ours the legislature of those States amended the law and extended the definition beyond the common law meaning so it would embrace acts shown in the present case.” Without amending the statute in the penal code’s 1925 revision, the court was forced to reverse the conviction for an act of oral sex in *Munoz*.61

By 1943, the frequency of sodomy arrests combined with the amount of sodomy convictions reversed in appeals cases led Texas lawmakers to declare an emergency in the state’s forty-eighth legislature. On January 20, 1943 House Representative Joe Carrington of Midland proposed House Bill 36, “An Act amending Article 524, Revised Penal Code of the State of Texas, to define Sodomy and to fix the penalty therefor; and declaring an emergency.”62 Upon the bill’s second reading two months later, Rep. Carrington provided the Judiciary Committee’s

amended version. The first section of the bill gave a detailed definition for criminal acts of sodomy, including bestiality, same- and opposite-sex anal or oral intercourse, and using “sexual parts in a lewd or lascivious manner” with a minor. This new language inscribed the discourse that had surrounded sodomy in Texas for decades, directly relating to the issues that had been raised in Mullins v. State (1903), Lewis v. State (1905), and Prindle v. State (1893). In addition to this, the revised bill provided a constitutional exception regarding the passing of the bill:

The fact that the present law does not sufficiently define sodomy, and the further fact that this vile crime is all too prevalent in our State, creates an emergency and an imperative public necessity that the constitutional rule requiring that bills be read on three several days in each House be suspended, and said rule is hereby suspended, and that this Act shall take effect and be in force from and after its passage, and it is so enacted.63

The threat of sodomy had suddenly become so great that the Judiciary Committee created a clause that would streamline the bill through the constitutionally defined legislative process. The bill was passed that day and from it began a new era of sodomy prohibition, which exhibited the same sense of urgency as its decree.

The confused and contested discourse that surrounded the 1860 Texas sodomy statute and its enforcement were rooted in a centuries-long legacy of multiple conceptions of the term, act, and crime of sodomy. This legacy was both in response to and a perpetuation of the interminable question, What is sodomy? Etymologically, sodomy is the sin of Sodom. Theologians within the early Christian church did not come to a consensus as to what the sin of Sodom constituted specifically, however. Rather, they shaped a multifarious discourse that joined sodomy with “unnatural acts” inside a realm of sexual deviance that included several different types of acts from anal sex to intercourse in an improper position. As sodomy prohibitions became secularized

63 Ibid., 931.
in Europe during the late medieval and early modern periods, the list of possible acts that fit under the umbrella terms of sodomy or unnatural acts multiplied and included nonsexual acts with sexual ones. This led to ambiguously worded criminal statutes that were broad enough to cover the multiplicity of acts dubbed sodomy. The most influential of these criminal sodomy statutes in Anglo North America were those penned by King Henry VIII and Sir William Blackstone, and many of the states in the U.S., including Texas, inherited their ambiguous language.

In 1860, the Texas Legislature enacted the state’s first sodomy statute, ignoring a legal requirement to use clear language in state penal statutes. The statute’s waffling enforcement throughout the late nineteenth and early twentieth centuries increasingly revealed a dissimilitude in how the act and criminal nature of sodomy were interpreted by law enforcement, judges, and legislators. Whereas a lawman might arrest a man for an act of oral sex, a judge would feel compelled to dismiss the charge because the act wasn’t explicitly covered under the state sodomy statute. Legislators, on the other hand, didn’t chime in until sodomy had reached an “emergency” status in 1943, replacing the 1860 statute with a more explicit statute that defined acts of sodomy. The only act that was agreed upon in the legal record as an act of sodomy prior to 1943 was bestiality, but even these seemingly open and shut cases were harder to prosecute without witnesses providing an uncomfortable degree of details to the act. The criminal nature of sodomy was likewise a matter of contention. Whereas historians have noted that sodomy was often understood as a form of sexual violence in the nineteenth century, this created a legal paradox given the gendered nature of the Texas Penal Code: men couldn’t be raped and women couldn’t be sodomized. The ambiguous language used in the 1860 sodomy statute coupled with the multifarious interpretations of what constituted sodomy negatively affected the statute’s
enforcement before 1943. But this history of the 1860 sodomy statute and its enforcement in the nineteenth and twentieth century is incomplete.

While this discordant discourse surrounding sodomy in Texas plagued successful prosecutions of sodomy charges, it did not necessarily create a stalemate or spell of inactivity regarding the proscription against sodomy in the state. Instead, it led to the production of an increasingly overt and varied sodomitical discourse within Texas newspaper reports, court records, and legislative documents, consisting of both silence and clamor, ambiguity and specificity, indifference and hysteria. The next chapter will show that it was from this discursive context, as it intersected with equally problematic social constructions of gender, race, and sexuality, that the sodomitical Other was constructed in Texas during the nineteenth and twentieth centuries.
3. Constructing the Sodomitical Other in Texas, 1860-1973

What makes power hold good, what makes it accepted, is simply the fact that it doesn’t only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression.

—Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*

In the March 2, 1946 edition of the *Port Arthur News*, evangelist Ed Holt made a plea to the youth in his community. Holt begged young boys and girls to cover their nakedness in order to “save the world from sodomy.” Specifically, he was addressing the increased attention toward human sexuality in popular culture at the time, suggesting that “such things [would bring] the wrath of God upon the children of disobedience.”¹ The following year, a record number of arrests made on charges of sodomy were reported in Texas newspapers. Of the fifteen arrests reported in eight different newspapers in 1947, six were for acts of sodomy committed against minors, one was included in a case of assault with attempt to rape, and eight gave no details as to the act committed or the nature of the crime.² That same year, a legislative committee investigation into the conditions at Texas prisons found that, “Every form of perversion is practiced [in the prisons] all the time.” House Representative Sam Sellers of Waco was quoted on the front page of the August 28, 1947 edition of the *Big Spring Daily Herald* as saying that “some inmates are ‘treated worse than animals’ and [he] described sodomy and self-mutilation as

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‘regular and consistent.’”\(^3\) Despite the enactment of the state’s second sodomy statute in 1943, which gave a clearer yet no less multifarious definition of the crime than its predecessor, sodomy was as much of an “utterly confused category” as it had been for centuries.\(^4\) But it was more important for legislators, law enforcement, judges, and laymen alike to define the type of individual who would commit such a crime than it was to define the crime itself.

The 1860 and 1943 Texas sodomy statutes served as constructive tools of power in the assignation of Otherness to various individuals and groups. This was not despite the statutes’ ambiguities, but rather because of them. In her examination of twentieth-century federal policies regarding homosexuality, Margot Canaday similarly argues that the federal government’s “vague devices,” working in conjunction with “explicit prohibitions” helped to “constitute homosexuality” as a state-constructed status that was opposite to not just heterosexuality, but also “first-class citizenship.”\(^5\) The construction of the sodomitical Other in Texas during the nineteenth and twentieth centuries was also dependent upon the multiple discourses surrounding other social constructions in the state. In an interview published in *Power/Knowledge: Selected Interviews and Public Writings, 1972-1977*, Michel Foucault discussed this dependence in relation to state power:

> [R]elations of power … necessarily extend beyond the limits of the State. In two senses: first of all because the State … is far from being able to occupy the whole field of actual power relations, and further because the State can only operate on the basis of other already existing power relations. The State is superstructural in relation to a whole series of power networks that invest the body, sexuality, the family, kinship, knowledge, technology and so forth.\(^6\)

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\(^3\) *Big Spring Daily Herald*, August 28, 1947, 1.


\(^5\) Canaday, 173, 169.

Considering first that sodomy proscriptions were used as a tool of power in regulating the function of bodies, and secondly that regulatory power in Texas was constituted in social constructions of race and gender, then the construction of the sodomitical Other through the Texas sodomy statutes was based on understandings of gender as a binary construction and race as a hierarchical one.

This chapter explores the ways in which some men were constructed as an Other through the shifting interpretations and enforcement of the Texas sodomy statutes. I argue that an imaginary model of anticitizenship was constructed at the discursive intersection of historical misunderstandings of sodomy, shifting ideas about gender, race, and sexuality, and the fearful imaginings of an anxious public propagated by institutions of power which had a hand in defining the parameters of citizenship. The sodomitical Other was as multifarious as the acts used in its construction, being posited as antitheses to shifting threats to State power. The first section in this chapter describes how the 1860 sodomy statute was used in the making of a racialized sodomitical Other, basing such a construction on existing ideas about gender and race in Texas. The second section explains how the pathological “homosexual” was constructed in nineteenth-century Europe, and how that construction was understood differently by lawmakers in the United States and Texas during the early-to-mid twentieth century. The third section describes how the previous confusion surrounding the nature of sodomy and the legal efforts to define it led to a conflation of criminal and sexual identities which was imposed on “homosexual” bodies by a fearful public during the Cold War, and the last section describes how this new construction was first contested in federal and state courts, but then reified in the 1973 homosexual conduct statutes.
GENDER, RACE, AND OTHERNESS IN THE NINETEENTH CENTURY

Gender has been used as a tool of state power and state-making at several points in the history of the United States. Women’s historian Joan Wallach Scott defines gender as “the knowledge of sexual difference” in her book *Gender and the Politics of History*, and she claims that the ways in which gender is used and defined “become contested politically and are the means by which relationships of power—of domination and subordination—are constructed.” In her book, *The Anarchy of Empire in the Making of U.S. Culture*, Americanist Amy Kaplan similarly argues that femininity and masculinity both played large roles in the shaping and deployment of U.S. imperial projects both abroad and at home. Furthermore, U.S. historian Gail Bederman joins Kaplan in noting the ways in which this gender dynamic relates directly to race in the construction of the U.S. state in her book, *Manliness and Civilization: A Cultural History of Gender and Race in the United States, 1880-1917*. These connections between gender and domination, imperialism, racialization, and state-making are also found in the early history of the state of Texas.

One connection between gender and state-making can be found in a brief article entitled “Life on the Rio Grande” that was published in the midst of the U.S.-Mexico War in the April 1847 edition of *Godey’s Lady’s Book*. Before peace was even formally drawn between the two North American nations, the article remarked at the quick and immense growth of “American colonists” in the state of Texas since its 1845 annexation into the U.S. “[W]ith more than two hundred thousand inhabitants,” the writer exclaimed, “[and] a list of the post-offices now established in Texas—one hundred and nineteen,” the Texas frontier seemed to be a fertile land,

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7 Scott, 2.
ripe for reproduction in colonial terms. The article and illustration are examples of how, according to Kaplan, the nineteenth-century “language of domesticity permeated representations of national expansion.” The frontier was a living space destined for American domesticity. To achieve such a domestic status, however, the frontier had to go through a violent transformation, which was only possible through its conquest. Therefore, a contradictory relationship was drawn between masculinity and domesticity in relation to the Texas frontier during the nineteenth century.

This gendered contradiction can be seen in a second example from Godey’s Lady’s Book. Another allusion to the borderlands was made in the periodical as part of chapter seven from Ups and Downs in Old Virginia, a serial novel written by Penny Patch. Narrated from the perspective of a mid-nineteenth-century Virginia debutante, Miss Frazer, the chapter exemplifies Victorian-Era ideals of proper gender roles in high-class American society. Among Miss Frazer’s several suitors is Captain Brandon, an officer in the U.S. army who Miss Frazer describes as “a hero of the Rio Grande.” In a dialogue between the two characters, Captain Brandon discusses his personal encounter with “the fair Mexicans; their jetty locks; their bright, sloey black eyes; their ruby lips, as they are poutingly entwined around the fragrant cigaritto; their dainty feet…. [T]hey unite all that is lovely in woman. They are the angels of light … across that land of fierce misrule and hopeless anarchy.” Through highly gendered terms, this fictionalized account of an American soldier reflecting on his meeting with beautiful Mexican women both romanticizes and emasculates Mexican culture. The Mexican damsel in distress can only be saved from the turmoil of the frontier by the gentlemanly American soldier “at whose command your patriotism

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10 Kaplan, 27.
11 Penny Patch, Ups and Downs in Old Virginia, Chapter VII, Godey’s Lady’s Book 36 (June 1848): 325-326.
burns or chills; who holds men’s hearts, as it were, in chains; … who builds them up into stern, resolute men, or makes them as docile children in his hands.”

There are two visions of colonizing the borderlands in these examples from *Godey’s Lady’s Book*. In the latter example, the frontier is populated by Mexicans willing to allow state military intervention and, ultimately, the introduction of American civilization and the domestication of their disorderly homeland. In the former example, the frontier is wide open, uninhabited, and a natural space for the penetration and reproduction of American dreams. Both visions exhibit what Kaplan calls “a process of domestication, which entails conquering and taming the wild, the natural, and the alien.” Moreover, this same discourse of civilization invoked in other texts, leading Bederman to suggest that “the interesting thing about ‘civilization’ is not what was meant by the term, but the multiple ways it was used to legitimize different sorts of claims to power.” This suggestion relates directly to the colonization and development of Texas during the nineteenth century, as well as to the dual nature of gender: Both pliable and static, the knowledge of sexual difference could be used to characterize such state projects as colonization, war, or nationalism at the same time that that characterization depended on the fixity of a biological or natural gender binary. This was not the only ideology that was integral to state power and construction in nineteenth-century Texas, however. Not only is the relationship of gender and domination similar to the nineteenth-century dynamic of a racial hierarchy in Texas, it is also related.

Ideas about race and gender in the nineteenth-century U.S. were inextricably linked. Furthermore, these ideas were rooted in fears of the contamination and emasculation of the white

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12 Ibid., 327-328.
13 Kaplan, 25.
14 Bederman, 23.
race. Bederman summarizes the dominant ideology at the time: “[W]hen late nineteenth-century Americans began to synthesize new formulations of gender, hegemonic discourses of civilization explained concisely the precise relation between the male body, male identity, and male authority. White male bodies had evolved through centuries of Darwinistic survival of the fittest.” In this ideology, nonwhite peoples were naturally prone to poverty, perversion, and crime. For example, Texas Attorney General Clark surmised as to why there had been a marked increase in crime across the state in his 1874 annual report:

[M]ore than three hundred thousand slaves, subject for life to constant restraint and supervision, were turned loose as free citizens, subject to no control save their own debased caprices. Unacquainted with the laws, and pampered by designing men with the idea of a peculiar favoritism toward them on the part of the government, it was but natural for many of them daily to commit offenses, and to furnish the largest percentage of our prison and penitentiary inmates.

As it was with the relationship of state power and gender, white supremacy was dependent on a static and scientifically rooted hierarchy of race in the nineteenth-century U.S., placing predominantly Protestant, Anglo Saxon white men at the top and often lumping “nonwhites” into one category of inferiority. Perceived threats to the stability of such a hierarchy, however, such as the end of the institution of slavery following the Civil War and the increasing ethnic diversity in the industrial workforce, brought anxieties about the vitality of white supremacy to the surface in newspapers, court records, and government documents. The resulting “rhetoric of empire,” as it is termed by literary analyst David Spurr, was also evident in reports of sodomy cases in Texas during the nineteenth century.

15 Ibid., 42.
17 Jacobson, 110. Jacobson identifies what Spurr calls “rhetoric of empire” as the “recurring linguistic patterns and choices … in travelogues, novels, journalistic pieces, or the administrative writing of colonial bureaucrats” which reflect the “dominant assumptions and values” about the “various social and political practices associated with a policy of imperialism.”
There is a tendency in many Texas court records and newspaper reports from the nineteenth century to identify people of color as an explicit Other to whiteness. While some men were clearly identified as “negro,” “colored,” or “Mexican” when they were charged for crimes, there was no such distinction for white, and presumably Protestant, men. 18 Similarly, the language used about men of color charged with sodomy was far more inflammatory than that used for white men charged with the same crimes. For every white man who was arrested for, charged with, or convicted of sodomy, Texas newspapers rarely reported the details of the cases, and in the instances that they did, they were done without any rhetorical inflection of condemnation. For nonwhites, however, such adjectives as “bestial,” “brutal,” and “horrible” were used to describe the accused or their crime. The most explicit example of this incendiary rhetoric is found in an 1886 *Laredo Times* report:

A brute named Esteban, surname unknown, was jailed to day [sic] for committing the beastial [sic] crime of sodomy. The victim is a thirteen year old boy. The statute covering the offence is so dubious that tears are entertained that the court of Appeals will reverse the conviction sure to be had here, provided evidence shows up. Such a wretch should be emasculated, and transported out of the country.19

According to the author of this brief report, the man’s alleged crime was so severe that it warranted his exclusion from both the male gender (through castration) and U.S. citizenship, highlighting white male anxieties related to the permanence of a necessarily ordered gender binary and racial hierarchy.

While many of the reports on sodomy cases like the one above have no follow-up reports in newspapers and are often buried in or entirely disappeared from court records, the available evidence is still able to reflect that sentences for sodomy convictions in the nineteenth century


19 *Laredo Times* January 31, 1886, 3.
were routinely more severe for people of color. As provided by the 1860 Texas sodomy statute, sentences for sodomy could not be “less than five nor more than fifteen years.”\(^\text{20}\) The majority of men found guilty for sodomy and who were not designated as racially or ethnically Other in newspaper accounts were sentenced to five to seven year prison terms. There are exceptions, however, such as in the cases of Ed Hill and Charles Medis in 1888, and William Green in 1889, each of whom were sentenced to ten years in the state penitentiary.\(^\text{21}\) Of these three cases, Green’s gave no details as to the specifics of the crime, and both Hill’s and Medis’s sentences were appealed and overturned in 1889.\(^\text{22}\) Men who were sentenced for convictions of sodomy and were identified as nonwhite, on the other hand, received longer sentences. Gregario Ballesteros was sentenced to fifteen years in Webb County in 1880, and “Señor Hernandez” to ten years in El Paso in 1885.\(^\text{23}\) Even after the decision in *Prindle v. State* made convictions for sodomy more difficult, a “colored” man was sentenced to fifteen years imprisonment for the crime in Cuero in 1896.\(^\text{24}\) In addition, when bond amounts for sodomy arrests were reported, they reflected this same bias. Men who were not designated as racially or ethnically Other were often given 250 to 300-dollar bonds while men who were deemed as Other were given 500-dollar bonds.\(^\text{25}\)

This tendency for racialization in public and legal accounts of sodomy cases continued into the twentieth century as well. In *Richardson v. State* (1906), a sodomy case heard in the Texas Court of Criminal Appeals involving a conviction for an act of bestiality, the original


\(^{21}\) *Galveston Daily News*, July 13, 1888, 8; April 24 1889, 3.

\(^{22}\) *Ibid.*, March 13, 1889, 8; July 12, 1889, 8.


\(^{25}\) *Galveston Daily News*, August 24, 1886, 3; September 5, 1889, 8; *San Antonio Light* July 12, 1884, 4; July 26, 1893, 8 and July 27, 1893, 1.
judgement was affirmed against a man of color despite the fact that the evidence reviewed in the appeals case was insufficient for prosecution.26 This decision is striking because the same court had reversed a judgement on a sodomy case involving an alleged act of bestiality just one year before Richardson for the reason that the evidence did not justify the conviction.27 Furthermore, it was alleged that one of the jurors who had found Richardson guilty of sodomy exclaimed that, “[I]t was proper to convict [the] defendant anyhow, because he had it in his mind to do something of the kind, and if some white woman had passed he would have raped her.”28 It seemed that Richardson’s conviction and its affirmation in the appeals court was based on conceptions about his race.

The above examples of sodomy cases involving people of color highlight how early constructions of the sodomitical Other centered on conceptions of gender and race in Texas during the nineteenth and twentieth centuries. In addition, the white male anxieties that surface in these newspaper accounts and court records also contain a crucial element of the “rhetoric of empire.” Jacobson describes this element as the “erotic charge” of the language used and “its depiction of libidinous primitives in opposition to restrained and properly modest—Christian—moderns.”29 By using incendiary rhetoric to describe men of color charged with sodomy or their alleged crime, these accounts constructed a vision of the nonwhite Other as transgressors of gender and violators of nature. Such a construction coincides with Canaday’s argument that “perversion itself was seen as a racial characteristic.”30 Other states exhibited the same tendencies in enforcing their sodomy statutes as well. William N. Eskridge, Jr. notes in his book,


*Dishonorable Passions: Sodomy Laws in America, 1861-2003*, that of the sixty-three people reported to be imprisoned for crimes against nature in the 1880 U.S. Census, over half of them were males of color and one-third of the remaining white prisoners were foreign born. In fact, just in Washington D.C. alone, “eighty percent of the people arrested for sodomy between 1881 and 1921 were African Americans.”

Constructing persons of color as the sodomitical Other would become overshadowed by a more ambiguous Other in the coming decades, however.

**CONSTRUCTING THE “HOMOSEXUAL”**

Beginning in the late nineteenth century, an increase in the special medical attention that was given to human sexual behavior took place amid shifts in theory and growing social concerns about the subject. The physical and social sciences had been gradually replacing institutionalized moral governorship over both individuals and society since the seventeenth century, but as historian Ronald Bayer asserts in his 1981 study *Homosexuality and American Psychiatry: The Politics of Diagnosis*, early sexologists “assumed from the faltering religious tradition the function of serving as a guarantor of social order, substituting illness for that of sin.”


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31 Eskridge, 22, 57.
both companionship and variety in erotic life.”

Investigations into the “variety” in human sexual behavior led to the fascination for, if not the invention of, what Foucault calls “sexual heterogeneities.” In *The History of Sexuality Volume 1: An Introduction*, Foucault labels this era of sexual discovery as “Scientia Sexualis.” It was “the age of multiplication: a dispersion of sexualities, a strengthening of their disparate forms, a multiple implantation of ‘perversions.’” Of these “perversions,” the medical community gave much of their attention to sexual inversion.

Sexual inversion was ultimately understood by sexologists as a transgression of gender. British socialist and author Edward Carpenter summed up this important aspect in his 1908 contribution to the field of sexology. In *The Intermediate Sex: A Study of Some Transitional Types of Men and Women*, Carpenter argued that, “The only theory—from K. H. Ulrichs to Havelock Ellis—which has at all held its ground … is that in congenital cases of sex-inversion there is a mixture of male and female elements in the same person.” Sexologists from the medical field, like German psychiatrist Richard von Krafft-Ebing, British physician Havelock Ellis, and Austrian neurologist Sigmund Freud, all agreed that when a person’s “sexual aim” could only be satisfied by a “sexual object” that was another person of the same sex, then the person with the “aberrant” sexual aim possessed an inverted sexual instinct. In other words, erotic same-sex desire in a man was the result of that man having a female sexual instinct, and vice versa for the same desire in a woman.

While there was general agreement among sexologists regarding the gendered nature of sexual inversion, there was much debate about whether the condition was congenital or acquired.

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34 Foucault, *History of Sexuality*, 37.
This debate was important in the way that it related to legal proscriptions against certain sexual behaviors, like the Texas sodomy statute. Krafft-Ebing placed sexual inversion within a dichotomy of being either acquired or congenital: instead of it being universally one way or the other, it could instead be conditionally either. By the early twentieth century, however, it was widely accepted among sexologists that it was both. In the words of Ellis, inversion was caused by “a congenital predisposition as well as an acquired tendency.” Regardless of which stance sexologists took on the matter, they were generally sympathetic to men and women who were prosecuted for consensual erotic same-sex acts. This sympathy was not initially adopted in the United States, however.

The Americanization of sexology produced a new type of deviant: the sexual psychopath. In his article, “The Development of Sexology in the U.S.A. in the Early Twentieth Century,” Vern L. Bullough claims that European sexologists’ authority over sexuality was challenged by social hygiene reformers in the U.S. during the Progressive Era because of the lack of attention given to “the social aspects of sexual behavior.” As a result of the progressives’ influence, sexology in the U.S. tended to focus “on basic heterosexual problems” which were derived from progressive concerns for aberrant sexuality’s “association with vice and crime.” In this respect, U.S. sexologists spent more time addressing venereal disease, prostitution, and less often, sodomy. They saw deviant sexuality as behavior inherent in the lower (and predominately nonwhite) classes in society. More dangerously, however, these sexologists saw “social disease” as infectious and they helped to engender fears of contamination in U.S. society.

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37 Krafft-Ebing, 79-80.
38 Ellis, 82-84.
Fears about the spread of sexually deviant behavior in the U.S. became politicized thanks to efforts by U.S. sexologists, leading to a nationwide hysteria. In her 1987 article, “Uncontrolled Desires: The Response to the Sexual Psychopath, 1920-1960,” historian Estelle B. Freedman explores how the “violent, male, sexual criminal” was constructed by state and psychiatric authorities in the U.S. in response to “sex crime panics” that began in the 1930s. These “panics” derived from the popularization of a superficial interpretation of Freud’s arrested sexual development theory. Instead of surmising that sexual inversion was a natural, childhood step in human psychosexual development and that adult “homosexuals” were trapped in that state, both psychiatrists and laymen in the U.S. believed that twentieth-century “homosexuals” were naturally prone to violent, sexual attacks on children. This fear was influenced by the history of criminal sodomy cases in the late nineteenth and early twentieth centuries, many of which were based on coerced sexual acts against children. This was especially the case in Texas. Even with the ambiguous wording in the 1860 sodomy statute, charges of sodomy were still used to prosecute men who perpetuated such acts during the early- to mid-twentieth century. Cases were brought against Ellis Jackson in 1906, George Pettit in 1929, Michael Crowley and Lonnie Gidcumb in 1933, and Refugio Garcia and Elmer Joe Meckel in 1940 for committing “sodomy” with boys under the age of 18. The predatory image of the twentieth century homosexual would last for decades, feeding old fears of contamination among youths in the United States.

There were even more examples of what Americans called sexual psychopaths in Texas immediately following the 1943 revision to the state sodomy statute. In 1944, a merchant seaman named Almond Bodary was charged with sodomy for molesting several young girls in the


41 Port Arthur News, June 19, 1929, 11; January 16, 1933, 2; Gidcumb v. State, 128 Tex. Crim. App. 395 (1935), Valley Star Monitor Herald, February 18, 1940, 10; April 14, 1940, 3. There were several other criminal cases of sodomy reported in Texas newspapers during this time, but many of them failed to give details of the crime.
Galveston area. He pled guilty to the charge and was sentenced to five years in the state penitentiary.\footnote{Galveston Daily News, March 15, 1944, 9.} The next year, J. P. Rayborough pled guilty to having “practiced with young Lubbock boys what the law calls the ‘abominable and detestable crime against nature,’ sodomy.” Upon Rayborough’s sentencing, the presiding Judge G.V. Pardue claimed, “I’d a lot rather see you hanged to one of those elm trees out on the lawn.”\footnote{Lubbock Morning Avalanche, July 24, 1945, 12.} An important distinction must be made between the response to the sexual psychopath in Texas and the response elsewhere in the U.S. Texas was not one of the twenty nine states to pass sexual psychopath statutes, “under which courts committed individuals charged with or convicted of certain crimes, typically sex offenses, to psychiatric institutions” instead of penitentiaries. Legal historian Marie-Amelie George claims in her 2015 article, “The Harmless Psychopath: Legal Debates Promoting the Decriminalization of Sodomy in the United States,” that sexual psychopath statutes “treated offenders as patients instead of criminals,” but in Texas, sodomy was interpreted as a willful act to harm, and such offenses could only find justice in a prison sentence.\footnote{Marie-Amelie George, “The Harmless Psychopath: Legal Debates promoting the Decriminalization of Sodomy in the United States,” Journal of the History of Sexuality 24.2 (2015): 226-227.} Such was the case in the Texas Court of Criminal Appeals decision in \textit{Grubbs v. State} (1940). The appellant had motioned for a new trial following his conviction for the crime of sodomy based on the development of new evidence in his favor. Basically, the appellant had been able to procure sworn statements from family and community members that he was insane and, as such, had no distinctive knowledge between right and wrong. The court, however, ruled that they “would not be justified in reversing this case,” and the appellant continued his ten year prison sentence.\footnote{Grubbs v. State, 138 Tex. Crim. App. 507 (1940).}
But why was the nature of the sexual psychopath perceived so differently in Texas? While discussing a new sex crime bill in 1950, District Attorney Bob Long noted how a number of doctors believed that surgery could “cure” child molesters and other sex offenders, but he concluded that “you can’t stop a homosexual that way.” Freedman claims that the construction of the sexual psychopath was dependent upon “three converging trends”:

First, as courts and prisons became important arenas into which American psychiatry expanded beyond its earlier base in state mental hospitals, the recently established specialization of forensic psychiatry sought new explanations for criminal behavior. Second, the social stresses of the Depression drew attention to the problems of male deviance. Third, the social scientific study of sexuality became respectable, and the influence of psychoanalytic theories on American psychiatry during the 1930s provided an intellectual base for a sexual theory of crime.

As this construction relates to Texas, however, I argue that gender played a far more crucial role. As discussed above, the state of Texas was itself a gendered space, and such an attribution depended on the fixity of a gender binary. If homosexuality was the product of a dangerous glitch in nature, as it was proposed to be by sexologists, then the system that supported state projects on a gendered basis would become fallible. If such a view was accepted, then state control over bodies and behavior could be relinquished. That view was rejected in Texas.

The paradox of ambiguity in the 1860 Texas sodomy statute was resolved in the creation of the 1943 statute. The separate acts which constituted the crime of sodomy were put into clearer terms, thus ending the tendency of courts having to dismiss unprosecutable charges or overturn previous convictions. But one element of the first statute’s ambiguity was carried on in its revision: While the crime of sodomy was specific, the criminal who committed the act was dangerously ambiguous. Furthermore, the ambiguity left over in the 1943 statute compounded with the multifariousness of the different acts that could constitute an act of sodomy created a

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46 El Paso Herald Post, February 22, 1950, 2. The report did not specify what type of surgery the board of lawyers was discussing, but the context of the discussion seems to relate to castration.

47 Freedman, 88.
new sense of obsession over not just who could be marked as the sodomitical Other, but what crimes that individual or group was capable of committing. Eskridge explains that, “While hysteria creates an underclass that is animalistic and disgusting, obsession understands its objects as contagious or predatory, but often hidden, which means they must be hunted out.” With homosexuality being linked to sodomy and its long legacy of confusion, gay men were ascribed a nefarious status that represented a multifarious transgression against a number of social constructions. The “homosexual” defied widely accepted understandings of gender, sex, and even citizenship, and as such, the sodomitical Other was easily linked to other perceived threats to the natural order.

CONFLATION AND CONFLICT

There was a gradual shift in the ways that human bodies were surveilled, disciplined, and controlled during the early- to mid-twentieth century, and the end of World War Two marked its apex. Consuming fears of communist infiltration and of the consequences that would follow filled U.S. society with fear at this time, and the equally pervasive duty to eradicate the specter of communism went beyond the legal reach of national, state, and local governments. Cold War historian Stephen J. Whitfield argues that this duty fell on everyone, including “legislators and judges, union officials and movie studio bosses, policemen and generals, university presidents and corporation executives, clergymen and journalists, Republicans and Democrats, conservatives and liberals.” Michel Foucault suggests through his theory of panopticism that surveillance and discipline are constructed by institutions of power to be self-imposed by the individual subject. He explains in Discipline and Punish: The Birth of the Prison that, “He who

48 Eskridge, 29.
is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.”

In the midst of Cold War hysteria in the U.S., however, the practice of surveillance and discipline expanded beyond the self to the community, from panopticism to synopticism. Policing bodies was no longer restricted to the law in this new realm of scrutiny and the federal government propagated this fact, calling on all U.S. citizens to diligently root out the communist anticitizen.

One of the most dangerous characteristics of the new political Other in the mid-twentieth century was that, similar to the recently constructed sodomitical Other, their subversion was often not outwardly identifiable. This created “ideological and rhetorical linkages between political subversion and sexual perversion” according to twentieth-century U.S. historian Stacy Braukman, resulting in increased legal and public attention to the rise in “secret” gay and lesbian “communities.”

The federal response to this new threat was solidified in executive orders from Presidents Harry S. Truman and Dwight D. Eisenhower, the McCarren-Walter Act, and most publicly, in U.S. Senator Joseph McCarthy’s anticommmunist (and tangentially antihomosexual) crusade. The executive orders excluded “homosexuals” from federal and military employment and the McCarren-Walter Act prohibited them from even entering the country, together noting that sexual deviance was a valid reason for such exclusion.

The specter of McCarthyism led to the outing of federal employees, school teachers and university professors, costing them their jobs and standing in their respective communities. The federal stance against homosexuality was

52 Ibid., 88-99; Canaday, 21.
not only mirrored in sodomy arrests, but community members also took part in the exclusion of the sodomitical Other. The new obsession had spread all over the nation—from government offices, to school campuses, to living rooms—and as it was conflated with fears of Communist infiltration during the Cold War, it challenged the concept of privacy as a fundamental right to American individualism.

The ambiguous criminality of the sodomitical Other was constructed through many sodomy cases across the U.S. following World War II, and extensive attention was given to them in Texas newspapers. One such case involving a French artist living in Atlanta became a national spectacle in 1947. Paul Rene Refoule was detained by county police after his American socialite wife, Peggy, was mysteriously slain on May 14. After several interrogations, some of which Refoule would later claim involved torture, detectives ended up arresting the artist for sodomy based on incriminating information that had been gathered during questioning. Refoule had allegedly confessed to carrying on several extramarital affairs with women before his wife’s death, and among the sexual acts committed in those affairs were acts which the police considered to violate the Georgia sodomy statute. After months of litigation in both the criminal sodomy case and a lawsuit filed by Refoule against the police, the charges were dropped on November 24.\textsuperscript{53} Despite the fact that Refoule was able to avoid conviction, the heightened publicity surrounding his case embodied him as the foreigner, the sexual deviate, the encroaching inevitability of contagion that U.S. citizens needed to protect their families and themselves from. While the legal system was unable to secure a victory against that threat in Refoule’s case, it would find some success the following year in Missouri.

\textsuperscript{53} \textit{Amarillo Daily News}, June 16, 1947, 2; June 18, 1947, 8; August 1, 1947, 13; November 25, 1947, 8.
On May 27, 1948 E.K. Johnston, a journalism professor at the University of Missouri, and two other men were arrested on “morals charges” in Columbia, MO. This case was different from Refoule’s in that it involved allegations of homosexuality. The Amarillo Daily News reported that these men were involved in a “homosexual ring” which was described in “a near-fantastic story of ‘mad parties’ at Johnston’s apartment and at a cabin near Salem, Mo., in which as many as 30 members of the ‘ring’ gathered to boast of conquests and to indulge in homosexual practices.” Nearly a year later, Johnston, another university professor, a university student, and two other men pled guilty to sodomy charges and were each sentenced to four years of probation. Had it not been for the testimony of Johnston’s colleague Dr. Edwin F. Gildes, who claimed that he was not a “menace to society,” the men would have been sentenced to prison instead. Despite escaping a prison sentence, Johnston was still subject to the denouement of synopticism, losing his position at the university and being driven out of his community. Johnston’s case was proof that the “homosexual” had become the quintessential sexual deviate, a legitimate criminal who deserved some sort of punishment, and a necessary target for scrutiny in the public eye.

Homosexuality became a target for legal and public scrutiny in Texas also, requiring meticulous investigation and pursuit by law enforcement. A moral crusade against the perceived threat took place in the border city of El Paso in 1956. Coverage of the first set of arrests in the “morals drive” was provided in the El Paso Herald-Post on March 22. Two separate articles in the newspaper gave incendiary reports concerning the six men who were involved in “a ‘well-organized ring’ of local homosexuals.” One of the articles even touted that the “ring” could conceivably have been comprised of over 200 men, including civilians and servicemen from Fort

54 Ibid., May 28, 1948, 28; November 18, 1948, 6; January 7, 1949, 11.
Bliss and Biggs Air Force Base. After dozens of arrests and two grand jury investigations, however, only five indictments were made. The turning point of the investigation came when accusations against Raymond B. Charney led to his arrest and termination from his job as a newscaster for the local KELP radio station. A month after his arrest one of Charney’s two teenage accusers rescinded their testimony, and the case was dismissed. Still, the crusade left an impression that homosexuality was both deserving of legal and public scrutiny as well as a cause for exclusion.

The initial arrests in El Paso came after an investigation had been launched by a county grand jury and city police in January. The investigation was based on a complaint that had been filed in November of the previous year against a man named Armando Lujan, accusing him of a “moral offense,” and including the name of a serviceman from Biggs Air Force Base. After the months-long investigation in which “the grand jury talked with more than 20 airmen, soldiers, transients, and permanent residents of El Paso,”56 police finally raided a home in March 1956 where they found Lujan and five other men with “women’s clothing and photographic equipment.”57 While there is no evidence to suggest that the six men were engaged in any sexual activity during the arrest, they were each charged with sodomy and four of the men, including Lujan, were released within a day on one thousand dollar bonds. There is no indication of why one of the men, Alva T. Payne, was held at the El Paso County Jail until July 3, but the other man who was not immediately released, William E. Scripps, was concurrently charged for

56 Ibid., September 24, 1956, 2. Details of the investigation of Armando Lujan were published after his sentencing in September.
57 Ibid., March 22, 1956, 28.
possession of narcotics, convicted on both charges five months later, and transferred to a penitentiary on September 5.\textsuperscript{58}

The police investigation and the initial arrests closely resembled a case that took place in Waco, TX three years earlier. The Waco story made the front page of the \textit{Lubbock Evening Journal} on April 13, 1953. According to the newspaper, a “homosexual convention” which included a “mock wedding” was interrupted by local police, and sixty-three men were arrested. Like the “ring” raided by El Paso police three years later, several of the men arrested in Waco were found “dressed in women’s apparel, including heavy make up, high heel shoes, evening gowns and spring hats.”\textsuperscript{59} In addition to this similarity, the raid in Waco followed an extensive investigation that dated back at least three months before arrests were made. One significant difference between the cases was the type of charges filed against the arrested men. While the initial arrests in El Paso were made on charges of sodomy with one thousand dollar bonds, the arrests in Waco were made on charges of vagrancy with mere twenty-five dollar bonds. As the 1956 crusade in El Paso continued, several of the dozens more arrested were also charged with vagrancy instead of sodomy. Vagrancy was a catchall term that could be used in arrests for different types of deviant behavior, sexual or not. In fact, the most common charge found in the 1956 El Paso County Jail register was for vagrancy. Even two El Paso fortune tellers ended up pleading guilty to charges of vagrancy on August 3, 1956, after being arrested only days earlier. They each paid a ten dollar fine and court costs.\textsuperscript{60} As for men who were arrested for engaging in erotic same-sex acts and charged with vagrancy, legal scholar Dale Carpenter notes how they “routinely pleaded guilty to the offense, paid whatever fine was imposed, and hushed up about

\begin{footnotes}
\item[58] El Paso County Jail Records, January to July 1956.
\item[59] Lubbock Evening Journal, April 13, 1953, 1, 10.
\item[60] El Paso Herald-Post, August 3, 1956, 1.
\end{footnotes}
their convictions.”\textsuperscript{61} Arrests for vagrancy mimic the ambiguity of the 1860 sodomy statute and how it was used to target undesirable Others. What is most telling about the raids in Waco and El Paso, however, is how gender transgression was seen as the defining characteristic of the “homosexual.”

As the above cases show, a foreign artist, a university professor, a radio newscaster—\textit{anyone}—had the potential of being the sodomitical Other; even a person that someone would least expect. Such was the case in a debate that unfolded in the “Ask Mrs. Carroll” column of the\textit{El Paso Herald Post} in the summer of 1952. Responding to a wife and mother who had written to the paper for advice concerning her husband coming out to her as a homosexual, Mrs. Carroll cited the national publicity surrounding the routing out of homosexuals from the federal government and all but demanded that the woman leave and divorce her husband at once. Two weeks later, the paper published an anonymous response to Mrs. Carroll’s advice which claimed that homosexuality was “just a disease that can be overcome like any other illness if you have the right treatment” and urged the woman to stay with her husband. Mrs. Carroll’s return was as rigid as her initial response, claiming that homosexuals were “unfortunate and often, evil, persons who try to blight the innocent,” and that they “are to be pitied, but they are not to be lived with by normal women rearing normal children.”\textsuperscript{62} This snippet of someone’s private life not only exemplifies the reach of the state-constructed sodomitical Other, but it also highlights how that construction was created at the intersection of legal perspectives and medical debates on homosexuality. More importantly, however, Mrs. Carroll’s response conveys another grave concern regarding contamination at the time: the protection of children from the sexual predator.

\textsuperscript{61} Carpenter, 14.

The Texas Court of Criminal Appeals alone heard a total of twenty-four cases about acts of sodomy committed against children between 1944 and 1969, with almost half taking place between 1950 and 1955, and the majority of which giving explicit details for the acts involved.63 Stacy Braukman argues that sexual crimes committed against minors and their association with sodomy were “the most damning stereotypes of homosexuals” in this period, but it was the intersection of sodomy’s association with homosexuality, sexual psychopathy, child molestation, and the imminent threat to national security that gave the construction of the sodomitical Other its dynamism in the 1950s and 1960s.64 In addition to the sodomy cases dealing with criminal acts against minors, there were a total of forty other cases heard in the Texas Court of Criminal Appeals during this time that made at least the mention, if not the explicit description of consensual, violent, or incestual acts of sodomy. Expanding on anthropologist James C. Scott’s assertion that, “States are powerful … because they simplify complex social facts into a set of categories that are easily ‘legible,’” Canaday contends that “state practices make a variety of gender codes and sexual behaviors legible as homosexuality.” Caught within this explosion of discourse surrounding sodomy and the associated conceptual milieu of un-Americanism, the “homosexual” was reimagined “in law and policy … as the anticitizen.”65


64 Braukman, 123.
65 Canaday, 214, 9.
The construction of the mid twentieth-century sodomitical Other and its conception as the antithesis to citizenship in the U.S. was rooted in a contorted interpretation of privacy that was influenced by Cold War fears. Given the perceived nature of the criminal acts perpetrated by the homosexual anticitizen and the alleged danger that they posed, a thin line was drawn between privacy and secrecy. This led to the involvement of both police and the public in the surveillance and discipline of the sodomitical Other. Men didn’t have to be caught in the act of sodomy to be arrested, and they didn’t have to be convicted in court to be excluded by their respective communities. According to Stacy Braukman, the fear of “the homosexual who could pass for straight—who, in the role of teacher, minister, Boy Scout Troop leader, or camp counselor, would never raise suspicions among the parents of his or her youthful targets” led to an obsessive synopticism that breached the walls between citizen and government. Citizenship’s right to privacy was valid only if that personal realm didn’t envelop a sexual status that posed a danger to children or, worse yet, national security. In other words, privacy was for citizens whereas secrecy was for anticitizens. Ultimately, however, it would be this intrusion into the realm of privacy that would strip the 1943 Texas sodomy statute of its power.

**From Sodomy to Homosexual Conduct**

Despite the new language in the 1943 Texas sodomy statute and its role in the making of the mid twentieth-century sodomitical Other, the enforcement of the statute, which depended on a malleable application of the right to privacy, was rendered legally problematic in 1970, leading to legislative intervention in 1973. The statute was ruled unconstitutional by a federal district court in *Buchanan et al. v. Batchelor et al.* (1970). The original plaintiff in the case, Alvin Buchanan, was a gay man who had been arrested on two occasions for committing consensual

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66 Braukman, 114.
acts of sodomy in a Dallas public restroom. Buchanan’s contestation of the constitutionality of the 1943 Texas sodomy statute was soon supported by three other individuals as it reached the federal court, but in a different way. The new plaintiffs claimed that the sodomy statute encroached upon their right to privacy by instilling a fear of “prosecution for the commission of private acts described as sodomy.”67 Just as the 1860 Texas sodomy statute entered into an era of contestation in the early twentieth century, its replacement was questioned based on the language it used to target a state-constructed ambiguous criminal.

The right to privacy has been interpreted and inscribed by the U.S. Supreme Court as an individual’s right to personal choice in relation to their own life, liberty, or property without the intrusion of any governmental agency. This interpretation dates as far back as the late nineteenth century, when the Court ruled in Boyd v. United States (1886) to protect “the sanctity of a man’s home and the privacies of life” against unwarranted search and seizure.68 This protection of privacy was extended to matters of intimacy almost a century later in Griswold v. Connecticut (1965), an appeal to the conviction of two medical professionals who were engaged in advising and distributing contraceptive materials to married couples in Connecticut. The court ruled that such a criminal statute was an unconstitutional affront to the right to privacy of married couples, citing the first, third, fourth, fifth, and ninth amendments to the U.S. Constitution.69 The Dallas federal court cited the Griswold decision in striking down the 1943 Texas sodomy statute on the grounds that it was an “unconstitutional overbreadth insofar as it reaches the private, consensual acts of married couples.”70 The decision did not inscribe the same right to privacy for the original

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68 Boyd v. United States, 116 U.S. 616, 630 (1886).
appellant, however. It rather solidified the divide between heterosexual and homosexual while surreptitiously giving state lawmakers a precedence for constructing a more explicit definition of the twentieth century sodomitical Other.

As part of a recodification of the Texas penal code in 1973, the Texas Legislature removed the 1943 sodomy statute entirely, and in its place provided a non-punitive definition for “deviate sexual intercourse.” The new definition excluded bestiality and child molestation, stating that, “Deviate sexual intercourse means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.” The new sodomitical Other was reified in legal language in Section 21.06 of the revised penal code, however, which labeled “homosexual conduct,” or “deviate sexual intercourse with another individual of the same sex,” as a criminal sexual offense. In the decades that followed, the 1973 Texas homosexual conduct statute became the cornerstone for anti-gay legislation in the state. One example can be seen in the 1991 decision to amend the Texas Health and Safety Code to read: “Course materials and instruction relating to sexual education or sexually transmitted diseases should include...[an] emphasis, provided in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under Section 21.06, Penal Code.” The Texas Legislature sought to inscribe the sodomitical Other not just in the legal language within the state penal code, but also in state-funded classrooms. Ultimately, however, the statute was ruled unconstitutional in Lawrence v. Texas (2003), the U.S. Supreme Court case that struck down all of the homosexual conduct and sodomy statutes in

72 Texas Penal Code Annotated §21.06(a) (Vernon 2011).
73 Texas Health and Safety Code Annotated § 85.007(b), and § 163.002 (Vernon 2010).
the country. Still, the Supreme Court was unable to erase the near 150 year-long legacy of confusion that had surrounded the term, the crime, and the status of sodomy in Texas.

Gender, race, and sexuality were all social constructions which were used to define the parameters of citizenship and Otherness in Texas during the nineteenth and twentieth centuries. The state of Texas itself was constructed through discourse as a gendered space from its inception as a U.S. state, complete with racial boundaries and a natural code of sexual conduct. The earliest sodomitical Other in Texas was made at the intersection of this trifecta and the legacy of confusion surrounding sodomy. The nonwhite Other was conceived as a natural harbinger of sodomitical behavior and duly targeted by the ambiguous 1860 sodomy statute. The introduction of new ideas about sexuality—or more specifically, homosexuality—into the state’s consciousness during the early- to mid-twentieth century led to the transformation of a new, more ambiguous sodomitical Other. While the 1943 sodomy statute possessed the appropriate language to warrant the investigation, arrest, and public prosecution of such an individual, it was flawed in that its target was still too broad. By 1973, however, Texas legislators were able to refine their discursive technique of power and exclusively target gays and lesbians in the state. The construction of the sodomitical Other was thus a political and historically contingent process which reflects the broader legal system of Othering undesirable elements which were antithetical to the interests of those who controlled it.
Conclusion

[O]nly steers and queers come from Texas, Private Cowboy, and you don’t much look like a steer to me so that kinda narrows it down.

*Full Metal Jacket*, 1987

I drew the title of this thesis from Stanley Kubrik’s 1987 cult classic film *Full Metal Jacket* for several reasons. The movie follows a group of U.S. Marines through basic training and the battlefield during the Vietnam War and it encapsulates both the power and limits of hypermasculinity. The line, “only steers and queers come from Texas” is emblematic of this dichotomy, spoken (or rather, yelled) by a hypermasculine drill instructor hellbent on breaking down the psyche of his marines in training, to convince them that they are outsiders, degenerates, unworthy of membership in the marine corps. This initial Otherness during basic training provides the cornerstone of an important binary, however, in which the new marines’ Otherness is set opposite to the fully trained, ready-for-combat soldiers. This thesis also constructs one side of an exclusive/inclusive binary, positing the sodomitical Other at the side which is opposite to citizenship in the U.S. But there are more uses for this iconic phrase, “[O]nly steers and queers come from Texas.”

The first time I heard this phrase was when I was fourteen years old, not from watching *Full Metal Jacket* (I saw the film a few years afterward), but from my father—a retired U.S. Army Staff Sergeant—in a candid conversation. He asked me if I had ever heard the phrase before and, despite my negative reply, he offered what he thought was the perfect response should I ever be on the receiving end of the accusation: “If anyone ever asks you if you’re a steer or queer, you say, ‘Bend over so you can feel my bullhorn.’” While on one hand this response is reflective of crass, hypermasculine heteronormativity meant to be funny in ritual male bonding, it presents on the other hand an important facet of the construction of the sodomitical Other. “Steers” and “queers” are linked within a sodomitical discourse that posits bestiality and
homosexuality as the same (and seemingly negative) behavior. Of course, this was not a revelation I had at fourteen years old, but that interaction I had with my father has come to mind often throughout the process of conducting research for this project and it is salient to my concluding remarks.

The phrase, “[O]nly steers and queers come from Texas” is indeed iconic: it is embedded in the cultural consciousness of the U.S. This is evident in the more than forty-six million dollar total domestic gross revenue of Full Metal Jacket and the near 130 million dollars made from the 1982 film An Officer and a Gentleman, which also used the phrase. It is evident in smirks on the faces of literally everyone who has heard me recite this thesis title. And it is evident in candid, hypermasculine jokes between fathers and their fourteen year-old sons. What is not so evident, however, is that the underlying messages in this iconic phrase about Otherness and the confused nature of sodomy are also prevalent in U.S. culture, even if only at a subconscious level. That is the nature of sodomitical discourse: it is both explicit and implicit at the same time and, much like the 1973 Texas homosexual conduct statute, it is still active today.

The sodomitical discourse outlined in this thesis has deep roots. The creation and enforcement of the 1860 Texas sodomy statute can only be understood in the context of the history of sodomy that precedes it. That history produced a legacy of confusion created by a multiplicity of discourses surrounding the ways in which sodomy was conceived. The ambiguity employed in sodomy proscriptions from the medieval to early modern periods produced a limitless realm of social control through those proscriptions’ enforcement by targeting and excluding different sorts of people for different sorts of crimes. Through time, however, the still ambiguous definition of sodomy was interpreted more narrowly as being a crime of a sexual
nature, and its incorporation into state penal codes in the United States along with its enforcement reflected the same contraction. But the power potential for the control of human bodies remained embedded in the discursive space that was left open for interpretation.

Interpreting the term, act, and crime of sodomy in Texas was a contentious endeavor during the nineteenth century. The 1860 Texas sodomy statute gave no explicit definition for what constituted an act of sodomy other than calling it a “crime against nature” committed with “mankind or beast.” The task of interpreting both the act and criminal nature of sodomy was left to state law enforcement and courts, but even then, those individuals were wary to put their interpretations into clear and specific words. This lack of clarity in the language used in both the penal code and the court decisions that abstained from naming the risqué details rendered the 1860 Texas sodomy statute almost unenforceable. Still, there are at least two acts which can be excavated from the written record that show how sodomy was conceived of in Texas before 1893. The first of these acts, which was most commonly prosecuted in Texas courts, was bestiality. The second of these acts was fellatio, but unlike bestiality, such an act was eventually deemed unpunishable due to the ambiguous language used in the sodomy statute. With these two acts, the criminal nature of sodomy could be seen as a form of sexual violence, but not without complication. Whereas the inscription of other crimes that were designated as sexually violent into the Texas penal code portrayed a very clear picture of a victim and aggressor, sodomy did not. Moreover, victims of sexual violence were concretely defined as female, but an act of sodomy carried no such distinction. Given the available records from nineteenth-century sodomy cases in Texas, there were typically two types of genderless victims of sodomy: those who witnessed the crime and children.
Sodomy was redefined in Texas during the twentieth century through a shift in the discourse surrounding the act. Through the decisions in several court cases, sodomy was explicitly inscribed in the legal record as the penile penetration of the anus or mouth of a human being or animal and any sexual act committed upon a minor. Despite calls from judges in the state, however, this specificity was not resounded in any legislative action to revise the 1860 sodomy statute. As such, the statute remained practically unenforceable until 1943. Following a dramatic increase in the number of sodomy arrests in Texas as well as the amount of sodomy convictions being overturned in the Texas Court of Criminal Appeals, legislators reacted by bypassing the state constitution to enact a new sodomy statute in 1943. This did not dispel the legacy of confusion that had surrounded the term, act, and crime of sodomy for centuries, however. It rather perpetuated the discursive multiplicity that lay at the heart of that legacy, and with it, a potential for the State construction of Otherness and its imposition on human bodies.

Constructing the sodomitical Other in Texas during the nineteenth and twentieth centuries was dependent upon the ambiguity and confusion that was inherent in the state’s legal proscriptions against sodomy. The ambiguously worded 1860 sodomy statute was easily pliable with how “unnature” was conceptualized in a southern state given over to social constructions rooted in fixed ideas about a gender binary, a racial hierarchy, and appropriate sexual behavior. As such, the already existing construction of the nonwhite Other and its association with a predilection to deviant behavior led to a racial disparity in the enforcement of the 1860 sodomy statute during the late nineteenth and early twentieth centuries. The number of arrests, bond amounts, and the severity of punishments for men of color accused of sodomy far outweighed those for white men. From its inception, the proscription of sodomy in Texas was most powerful in a discursive context wherein the concept of “unnature” intersected with other epistemic
anxieties regarding the vitality of white supremacy. But this discursive intersection which racialized the sodomitical Other and its resulting hysteria were both displaced by the mid twentieth century. The introduction of genderless sodomy victims, decreasingly racialized sexual psychopaths, more specific definitions of sodomitical acts in the 1943 sodomy statute, and fears about psychological and political contamination into this milieu of social constructions produced a new sodomitical Other in Texas.

The multifarious discourse that had surrounded sodomy in Texas since the creation of the state’s first sodomy statute in 1860 and onto the creation of the 1943 replacement statute converged upon the “homosexual” body in the post-World War Two era. The new “homosexual” was perceived to transgress gender, commit unnatural sexual acts with the same sex as well as with animals, threaten national security, and prey on innocent children, infecting them with the same tendencies, all at once. This prolific intersection produced a sodomitical Other that was the multifarious embodiment of anticitizenship in the U.S. The most disturbing characteristic of the new construction, however, was the level of secrecy in which the sodomitical Other could operate. While the enforcement of the 1943 Texas sodomy statute did not ubiquitously lead to the incarceration of gay men or lesbians, it did lead to the public ostracization of these individuals which inhibited the legitimacy of their place in society. The ambiguous crime had evolved into the ambiguous criminal and the era of hysteria surrounding the sodomitical Other had morphed into one of public obsession. But when the vehicle of that obsession in Texas—the 1943 Texas sodomy statute—encroached upon the legitimacy of private heterosexual relations in 1970, a call for a legally defined division between heterosexuality and homosexuality came from a Texas federal court and was answered by state lawmakers in the creation of the 1973 Texas
homosexual conduct statute. Sexuality had become a marker of status that had gone far beyond earlier postulations of sexologists, and *homosexual status* became an explicit crime in Texas.

The U.S. Supreme Court’s 2003 ruling in *Lawrence v. Texas* does not mark the end of this history. Sodomy and homosexual conduct statutes still exist within state penal codes in the U.S. and, to varying degrees, they are still enforced. Moreover, legislators still use the familiar sodomitical discourse to justify anti-gay legislation. This discourse is used to target more than just gay men and lesbians, demonizing transgender individuals and other members of the LGBTQI community. It is important to recognize, however, that invoking the “ancient roots” of sodomy prohibition in this maelstrom of prejudice is baseless and contrived. The alignment of sodomy with homosexuality (let alone with race or gender) extends from a political project to define citizenship by juxtaposing an imagined target for exclusion with it. It is a fraudulent process of Othering that infects not just the law in the U.S., but U.S. culture as well.
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