

the Immigration and Customs Enforcement (ICE), Drug Enforcement Administration (DEA), Customs and Border Protection (CBP), and Federal Bureau of Investigation (FBI); and prosecutors, judges, and prison officials. It also includes private security officers who possess limited policing authority. The conscious choice to avoid the more common phrase “criminal justice system” reflects an acknowledgment of the reality that this system has not produced anything remotely approximating justice for the vast majority of people in the United States—particularly for people of color, poor people, immigrants, and queers—since its inception, but rather bears major responsibility for the continuing institutionalization of severe, persistent, and seemingly intractable forms of violence and inequality.

In describing the systemic violence and injustice of the criminal legal system, all individuals who work within it are not painted with one brush, nor is it assumed that everyone in the system intentionally sets out to do violence. Clearly, there are people in law enforcement who go about their duties with good intentions, and who display humanity toward people caught up in the system. Many who work in the criminal legal system—including people of color, working-class people, and queers—experience oppression from that system themselves, even as they navigate their responsibilities within it. At the same time, far too many people in law enforcement speak and behave in ways that are openly racist, homophobic, transphobic, misogynist, and anti-immigrant, and do not hesitate to misuse and abuse their power over others. The “bad apple” theory—the idea that a few rogue individuals are responsible for poisoning the barrel, and their identification and removal is the simple cure—cannot account for the historically pervasive, consistent, and persistent systemic violence that characterizes the criminal legal system. The barrel itself is rotten—that is to say, foundationally and systemically violent and unjust. Ultimately, regardless of our intentions, all of us are accountable for the roles we play in reinforcing or dismantling the violence endemic to policing and punishment systems. This book is an invitation—not only to LGBT people but to all people concerned about social and economic justice—to accept that responsibility.

1

SETTING THE HISTORICAL STAGE

Colonial Legacies

The great force of history comes from the fact that we carry it within us, are unconsciously controlled by it in many ways, and history is literally present in all that we do.

— JAMES BALDWIN¹

In 1513, Spanish conquistador Vasco Núñez de Balboa, traveling across the area now known as Panama on his way to the Pacific Ocean, encountered the Indigenous people of Quaraca. Upon discovering that some of the men “dressed as women” and engaged in sexual relations with each other, he ordered forty of them thrown to his hunting dogs, to be dismembered to their death. Memorialized in a contemporaneous painting, this incident is reported to be the first recorded Spanish punishment of sodomy on the American continent.² It certainly wasn’t the last.

Policing and punishment of sexual and gender “deviance” have existed for centuries in what is now known as the United States.³ From the first point of contact with European colonizers—long before modern lesbian, gay, bisexual, transgender, or queer identities were formed and vilified—Indigenous peoples, enslaved Africans, and immigrants, particularly immigrants of color, were systematically policed and punished based on actual or projected “deviant” sexualities and gender expressions, as an integral part of colonization, genocide, and enslavement.

Although an in-depth exploration of this history is beyond the scope of this book, a brief examination is helpful to understanding the role played by policing of sex and gender in maintaining systems

of domination. Violence such as that visited by Balboa on the people of Quaraca was neither a reflection of Indigenous traditions nor a mere byproduct of old-time European moralities brought across the Atlantic. It was foundational to the birth of the United States, and its echoes can be heard throughout the current criminal legal system.

SODOMY AND CONQUEST

The construction of gender hierarchies and their violent, sexualized enforcement was central to the colonization of this continent. As Native Studies scholar Andrea Smith states in *Conquest: Sexual Violence and American Indian Genocide*, the colonialism itself, along with the relationships it requires, is inherently raced, gendered, and sexualized.⁴

Instrumental to the rape of the North American continent and the peoples indigenous to it was the notion that Indigenous peoples were “polluted with sexual sin.”⁵ In fact, religious authorities—essential partners in the colonization of the Americas and the genocide of Indigenous peoples—promoted the “queering” of Native Americans throughout the sixteenth and seventeenth centuries. Some sixteenth-century Christian historians went so far as to depict mythologies of peoples indigenous to the area now known as Peru and Ecuador—in which the race of giants that preceded them and, among other things, engaged in sexual relations among males, died off—as reminiscent of the biblical tale of Sodom and Gomorrah. Several centuries later a historian described the destruction of the peoples’ mythical ancestors “as at Sodom and other places.”⁶ This “queering” of Native peoples was not limited to the allegorical; deviant sexualities were projected wholesale onto Indigenous peoples.

Less than a century after Columbus first landed on American shores, Bernardino de Minaya, a Dominican cleric, condemned Native Americans by stating, “They are idolatrous, libidinous, and commit sodomy.”⁷ Colonial authorities joined the cry of their ecclesiastical counterparts. In the mid-eighteenth century a French colonizer described the members of one Indigenous nation as “morally quite perverted, and . . . addicted to sodomy.” Almost one hundred years later, another, English this time, wrote, “Sodomy is a crime not uncommonly committed [among Indigenous peoples] . . . Among their vices may be enumerated sodomy, onanism [masturbation], &

various other unclean and disgusting practices.”⁸ Similar notions of intrinsic sexual deviance were advanced by Spanish and Portuguese colonizers with respect to Indigenous peoples of Central and South America and the Caribbean. In 1519, Cortés described his impression of the Aztecs: “We have learned and have been informed, that they are doubtless all sodomites and engage in that abominable sin.”⁹ A missionary claimed, in response to a 1525 revolt among Indigenous youth he sought to convert, that Caribs were “sodomites more than any other race.”¹⁰

Historian Byrne Fone cautions that “it can hardly be said that colonization was primarily a battle against sodomy,” but notes that “sodomy . . . very often became a useful pretext for demonizing—and eliminating—those whose real crime was to possess what Europeans desired.”¹¹ Indeed, antisodomitical zeal frequently served as justification for sexualized violence used to seize Indigenous lands and eradicate or expel its inhabitants.

The imposition of the gender binary was also essential to the formation of the U.S. nation state on Indigenous land. As Smith explains, “In order to colonize a people whose society was not hierarchical, colonizers must first naturalize hierarchy through instituting patriarchy.” Although Indigenous societies are widely reported to have allowed for a range of gender identities and expressions, colonization required the violent suppression of gender fluidity in order to facilitate the establishment of hierarchal relations between two rigidly defined genders, and, by extension, between colonizer and colonized.¹²

Accounts of missionaries and colonists alike are replete with alternately voyeuristic and derogatory references to Indigenous “men” who take on the appearance, mannerisms, duties, and roles of “women,” and who are simultaneously described or assumed to be engaging in sexual conduct with members of the “same” sex. Such sexual relationships were generally described as degrading, involving “servile” positions and being “used” by men, although in some instances, they are characterized as special and valued friendships. Tales of women who dressed and acted as if they were men (according to Western ideas) while concealing their “true” nature (assumed to be female), often accompanied by derisive descriptions of sexual relations with women, were also recorded, albeit far less frequently.¹³

Policing and punishment of perceived sexual and gender deviance

among Indigenous peoples was often explicit and harsh. In one instance, Chief Justice Juan de Olmos “burned great numbers of these perverse Indians” in the early sixteenth century in what is now known as Ecuador.¹⁴ In 1530, conquistador Nuño de Guzmán is reported to have described the last person captured in a battle against Indigenous resisters as a person who had “fought most courageously, was a man in the habit of a woman, which confessed that from a child he had gotten his living by that filthiness, which I caused him to be burned.”¹⁵

Much of the early policing of nonconforming genders and sexualities was undertaken by Christian clergy and other religious authorities—for example, questions concerning whether a penitent had taken part in deviate sexual activity were featured in confessionals used by missionaries to Native peoples as early as 1565. In some cases collaboration between the church and state was more explicit. Gay historian Jonathan Katz cites one missionary’s eighteenth-century account of the arrival of two Native people at a mission in San Antonio, California, one of whom was described as “dressed like a woman.” The head of the mission went to investigate, accompanied by a soldier and a sentry. When this religious and military coterie caught the Natives “in the act of committing the nefarious sin,” they were “duly punished.” Churches continued to play an active role well into the nineteenth and early part of the twentieth centuries; Indian residential schools, the majority of which were run by Christian churches on behalf of the state, also served as locations of punishment of alleged gender nonconformity.¹⁶ An article from the *New York Medical Journal* recounts how “one little fellow while in the Agency Boarding School was found frequently surreptitiously wearing female attire. He was punished.”¹⁷

In other cases such policing was directly at the hands of military and government agents. At the turn of the twentieth century, “Indian agents” “endeavored to compel these people, under threat of punishment, to wear men’s clothing,” although their efforts met with resistance on the part of the individuals in question and their communities.¹⁸ One particular Indian agent assigned to the Apsáalooke Nation (Crow Tribe) is reported to have incarcerated gender-nonconforming Indigenous men and forced them to cut their hair and wear “men’s” clothing.¹⁹

Punishment of gender nonconformity and sexual deviance was also accomplished by more indirect means—including laws specifically prohibiting “immorality” among Native peoples enforced in the Court of Indian Offenses, established in 1883. Additionally, repression of Indigenous spiritual and cultural practices, central to the subjugation of Native peoples, was premised at least in part on the notion that “these dances and feasts are simply subterfuges to cover degrading acts and to disguise immoral purposes,” thereby justifying agents of the Bureau of Indian Affairs’ best efforts at suppression.²⁰

At times modern lesbian and gay scholars appear to have adopted the colonial notion that peoples Indigenous to the Americas are somehow inherently, culturally, or traditionally “queer,” and claimed Native Americans to be members of “homosexual” cultures destroyed by wrong-minded colonists.²¹ But traditional Indigenous cultures cannot be understood by placing them into existing templates of homosexuality, transgender identity, or inflexible definitions of gender. As queer historian Martin Duberman cautions, “Glib analogies (‘Oh, so the Hopis had drag queens too!’) cannot be responsibly drawn; nor can Hopi ‘cross gender’ behavior be understood by simply linking and equating it to our own cultural reference points and definitions.”²² The powerful temptation to subsume Indigenous sexual and gender expressions within modern LGBT identities is no doubt driven at least in part by a desire to be visible throughout human history, to claim a connection with Native peoples, and to frame homosexuality and gender nonconformity as naturally present in peoples uninfected by homophobia and transphobia. However, the interpretation of Indigenous cultures through a white, European, gay, or even queer lens, based on sodomy-soaked European writing and observation driven by larger agendas, is itself a colonizing act that must be challenged. Such recolonization of Indigenous histories in service of a larger modern gay agenda is not our purpose here. Rather, we seek to illuminate the ways in which the policing of gender and sexuality are important tools for enforcement of other systems of domination.

More comprehensive inquiries into colonial policing of Indigenous sex and gender systems, centering the knowledge and perspectives of Indigenous peoples themselves, exist and remain to be written. Nevertheless, it is clear from the glimpse offered here that the gen-

dered and sexualized policing and punishment of Native peoples by European colonizers served as a foundation for laws, cultural norms, and practices that have criminalized people of color deemed sexually and gender deviant for the next three centuries in the United States.

HYPERSEXUALITY AMONG AFRICANS

Deviant sexualities were similarly ascribed to Africans as a necessary tool of the colonization of Africa, the transatlantic slave trade, and chattel slavery.²³ As noted by legal scholar Dorothy Roberts, "Even before the African slave trade began, Europeans explained the need to control Africans by mythologizing the voracious 'sexual appetites' of Blacks."²⁴

To the extent sub-Saharan Africans' sexualities were slotted into a homosexual/heterosexual framework, it appears they were often characterized as excessive and deranged heterosexualities. Across the Atlantic the quintessential myth of the Black male rapist preying on "pure" white women was used to justify countless acts of torture and murder by lynching—which, in reality, served to punish economically successful or nonsubmissive free Blacks. No less visceral, pervasive, and instrumental to the institution of slavery is the "jezebel" archetype, which frames African-descended women as sexually aggressive, insatiable, and even predatory toward white men, who were characterized as powerless to resist their advances. This controlling image of Black women was developed to cover the disfavored practice of miscegenation by slavers who sought to increase their wealth by forcing enslaved African women to reproduce through systemic rape.²⁵ Sociologist Patricia Hill Collins points out that over time the jezebel image has framed Black women as

the freak on the border demarking heterosexuality from homosexuality. . . . On this border, the hoochie participates in a cluster of "deviant female sexualities," some associated with the materialistic ambitions where she sells sex for money, others associated with so-called deviant sexual practices such as sleeping with other women, and still others attached to "freaky" sexual practices such as engaging in oral and anal sex.²⁶

She goes on to suggest that the projection of oversexualization onto Black women also contributes to "masculinizing" them,²⁷ thereby removing them from the protection of the law.

Africans, enslaved and free, were by no means immune from suggestions of homosexuality in colonial times. North African cultures in particular were characterized by European Christians as permissive of sodomy.²⁸ Moreover, scientific racism, which projected physical differences as representations of racialized sexualities, played a significant role in justifying domination of sub-Saharan Africa by Europeans.²⁹ As Collins remarks in a discussion of Sarah Baartje, a Xhosa woman kidnapped and displayed throughout Europe as the "Venus Hottentot," "European audiences thought that Africans had deviant sexual practices and searched for physiological differences, such as enlarged penises and malformed female genitalia, as indications of deviant sexuality."³⁰

The perception of allegedly abnormally enlarged genitalia, particularly overdeveloped clitorises, of African women was used to suggest that they were capable of and engaged in sexual activities with other women. A standard mid-nineteenth-century handbook on gynecology asserted that such anomalies were inherent, and led to the "excesses" known as "lesbian love."³¹ Siobhan Somerville reports in *Queering the Color Line* that "as late as 1921, medical journals contained articles declaring that 'a physical examination of [female homosexuals] will in practically every instance disclose an abnormally prominent clitoris,'" and that "'this is particularly so in colored women.'"³² In a Scottish case from the early nineteenth century explored at length by historian Lillian Faderman, one jurist refused to credit allegations that two teachers, Marianne Woods and Jane Pirie, engaged in sex with one another in part because he did not believe lesbians existed among white, middle-class, educated Christian women and because they did not have exaggerated physical features (enlarged clitorises) assumed to be solely possessed by African women.³³

Where Blacks who are, or who are perceived to be, queer, are concerned, perceptions of African people as primitively and deviantly hypersexual that developed during the colonial period amplify images of lesbians, gay men, and transgender people as psychotically sexually insatiable and sexually predatory. The continued vitality of these

historical narratives are evidenced by the framing of Black women as sexual predators of white women in prison settings, and the pervasive profiling of women of color, particularly transgender women of color, as sex workers.

IMMIGRANT SEXUALITIES AS THREATS TO THE NATION

The sexualities of successive waves of immigrants to the newly formed United States, beginning with Spanish, British, French, and Dutch colonizers, followed by northern and southern European immigrants in the mid-nineteenth and early twentieth centuries, and more recently migrants from Latin America and Asia, were similarly pathologized in the service of building a raced national identity, excluding undesirables, and maintaining classed power relations. The notion of homosexuality as a foreign threat justifying both exclusion and repression has a long history, dating from the time of the Crusades, "Moorish" invasions, and the Ottoman Empire.³⁴ It has been reflected throughout U.S. history in immigration laws that, until 1990, excluded "homosexuals," and, until 2009, HIV-positive people, and in aggressive policing of immigrant sexualities.

Asian men who came to the United States in the nineteenth century were particularly framed as "importers of 'unnatural' sexual practices and pernicious morality" as justification for both their surveillance within the United States and their exclusion from it. Asian women were similarly characterized as inherently sexually deviant, albeit in a slightly different fashion. For instance, Chinese women were so widely perceived as "prostitutes," and barred from entry on that basis, that Congress saw no reason to make specific reference to them in the Chinese exclusion laws. Asian populations in the United States were similarly subject to presumptions of involvement in prostitution and targeted policing of sex work.³⁵ Arab and Middle Eastern immigrants who began to arrive in the United States in greater numbers in the early twentieth century were also, as Joseph Massad points out in *Desiring Arabs*, historically and culturally depicted as "sexually deviant."³⁶

Even British and French immigrants were not immune to exclusionist allegations of homosexual tendencies, although the consequences were not as serious as they were for immigrants of color. Katz describes an early sort of "homosexual panic" in New York City in the

nineteenth century during which newspapers promoting "sporting culture"—another form of "deviant" sexuality involving heterosexual promiscuity and patronizing houses of prostitution—described "sodomites" as foreign threats. One such publication claimed that among sodomites "we find no Americans, as yet—they are all Englishmen or French," and maintained that homosexuality was neither native nor natural to America, emphatically stating, "These horrible offences [are] foreign to our shores—to our nature they certainly are—yet they are growing apace in New York."³⁷

COLONIAL POLICING OF SODOMY

Sodomy laws, widely perceived as the cornerstone of criminalization of homosexuality, arose in the colonies against this backdrop of sexual and gender deviance unevenly projected onto certain populations. The declaration of such laws as unconstitutional in 2003 by the U.S. Supreme Court is widely heralded as signaling the end of queer criminality in the United States. But colonial sodomy laws represented neither the beginning nor the end of policing sexual deviance. Such laws were in fact selectively enforced, often in a manner designed to reinforce hierarchies based on race, gender, and class. They were frequently accompanied by formal and informal policing, at times completely outside the legal framework of buggery and sodomy law enforcement. Nevertheless, given its central role in the LGBT imagination of queer relationships to the criminal legal system, the history of sodomy laws bears examination.

Complex historical realities are often minimized or lost altogether in a conventional, generic "gay" story about sodomy laws and their impacts. The story, loosely told by some gay activists, follows a relatively straightforward trajectory that goes something like this: *Sodomy laws, promulgated by puritanical, homophobic religious leaders, once served as the primary means of oppressing and stigmatizing gay people. Just as people were discriminated against on the basis of race or gender, LGBT people were criminalized just for being persons who loved people of the same sex, or cross-dressing. The repeal of sodomy laws is essential to ensure that LGBT people will no longer be criminalized; while it does not completely erase the stigma of homosexuality, it diminishes it considerably.*

Many scholars seek to tell more nuanced and complex tales of sex-

ualities and law in the colonial period, emphasizing the role systems of sexual regulation played in reinforcing other forms of social regulation based on race, class, and gender. Others explore the broader cultural meaning of the laws and the symbolic representation of “the sodomite.”³⁸ Yet the conventional story still holds a firm place in the popular imagination of many, both queer and straight. Perhaps its appeal lies in its seductive simplicity, the ease with which it allows us to blame antiquated laws for homophobic oppression, thereby relieving individuals, communities, and institutions of any responsibility, not only for their own actions and prejudices, but also for systemic criminal legal persecution that continues beyond the passage or repeal of any single law.

Still, the horrific impacts of sodomy laws on queer lives should not be underestimated. Over the centuries these laws have been used not only to arrest and punish people in criminal legal proceedings, but also as a central justification for demonizing LGBT people in many secular and religious arenas. Enforced or not, sodomy laws have accumulated a cultural force that extends far beyond their now technically defunct legal reach.

It is equally true that much of the policing of sexual and gender nonconformity did not take place through the prism of sodomy laws. Race, gender nonconformity, class, culture, and relationship to the nation-state are permitted only occasional guest appearances in the conventional story—and then only in supporting roles. Those whose lives don’t fit into the template of the “white, gay male with a fair degree of economic privilege persecuted under sodomy laws” are slotted into a static framework as historically diverse add-ons whose purpose is to give anecdotal texture and representational variety without fundamentally altering the story itself.

A narrow telling of the story of sodomy laws also creates mutually exclusive categories of “people who are discriminated against on the basis of race” and “people who suffer oppression as queers.” It then proceeds to set up a false dichotomy between the two in such a way as to erase the experiences of LGBT people of color persecuted through sodomy laws, as well as those of people punished for gender and sexual deviance under other laws. It inappropriately analogizes two historically distinct experiences: one is rooted in the designation

of entire peoples as property or subjects of elimination or exclusion, while the other is rooted in the selective policing of individuals and individual acts. In so doing it obscures how the latter is used in service of the former³⁹ and conveys the message that a change here and there in law can produce justice. Simply put, the conventional story of sodomy laws in the United States is reductive, misleading, and, in certain respects, a colonizing story in its own right.

THE ADVENT OF SODOMY LAWS

Sodomy laws did not spring from whole cloth on American shores. Homosexual and nonprocreative sexual acts have been punishable by death since at least the time of the early Israelites, in 400 BCE—although who suffered this fate was largely determined by economic, gendered, racial, and political factors. Jewish law, recorded in the Hebrew Bible, famously states in Leviticus 20:13, “If a man also lie with man, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood *shall* be upon them.”⁴⁰ According to Plato, thought by many to have had sexual relations with men himself, “The crime of male with male, or female with female, is an outrage on nature and a capital surrender to lust of pleasure.”⁴¹ In ancient Rome, a married woman who engaged in any sexual activity with another woman, even mutual caressing, could be tried for adultery, and if found guilty, executed by her husband. Sixth-century Roman law, which forms the basis of Roman Catholic and Protestant law and civil law, provided that adulterers or those guilty of “giving themselves up to ‘works of lewdness with their own sex’” were to be sentenced to death.⁴² Seventh-century Visigoth law imposed a sentence of castration on men who “kept” “male concubines,” and Charlemagne warned that he would punish all “sodomites.”⁴³

In *The Invention of Sodomy in Christian Theology*, Mark Jordan credits eleventh-century theologian Peter Damian with coining the abstract concept of sodomy. Jordan traces its evolution from the misreading of the story of Sodom and Gomorrah, now generally understood to be a cautionary tale on hospitality to strangers, as well as a demonstration of the power of the deity in the Hebrew Bible to wreak destruction as punishment for generalized excesses of the flesh. While

Damian's polemic against "the Sodomitic vice" was largely a call for the removal from office of clergy found to have engaged in it, he asserted that it was a crime deserving of death among common people as well, thereby building a foundation for subsequent cultural and legal constructions of "sodomy."⁴⁴

The century preceding Columbus' fateful voyage saw reinforcement and consolidation of laws against homosexual acts. A 1348 Spanish law imposed a sentence of castration followed by stoning of individuals found to have voluntarily engaged in sodomy. The Portuguese king issued a 1446 edict that sodomites were to be burned, consistent with the punishment meted out on Sodom and Gomorrah. Such punishments were most often carried out against "outsiders" to Iberian society: "Moors," Jews, and Catalans. In 1497 the Spanish monarchy reaffirmed the death penalty for sodomy, changing only the method, from stoning to hanging, and eliminating castration as a precursor to death by torture.⁴⁵ The first civil English sodomy law was enacted in 1533, prohibiting "the detestable and abominable Vice of Buggery committed with mankind or beast," and imposing punishment by death and forfeiture of all property belonging to the executed person.⁴⁶

Several scholars have dispelled the myth that lesbianism was not punished by law to the same extent as male homosexuality.⁴⁷ In Spain and Italy the degree of punishment depended on the "severity" of the crime. Use of a "material instrument" was cause for death; if no instrument was used, a sentence less than death, such as beating or imprisonment, was imposed. Mere overtures led only to public denouncement.⁴⁸ According to Faderman, several women—generally of lower classes and gender nonconforming—were prosecuted and punished in Britain for "possession or use of such an instrument."⁴⁹ Lesbian scholar Ruthann Robson describes one instance in France in which "a transvestite [was] burned for 'counterfeiting the office of husband.'" She also cites research that uncovered 119 cases of women who "dressed as men" in the Netherlands between 1550 and 1839, in which sentences of death, lifetime exile, whipping, and, where sexual relations with a woman were involved, enforced separation were imposed.⁵⁰ The increased severity of punishment associated with the assumption of male social and sexual roles is indicative of the role policing of homosexuality played in upholding patriarchal gender re-

lations. As Bernadette Brooten concludes, "Gender role transgression emerges as the single most central reason" for the regulation of relationships among women.⁵¹ These laws and practices were brought by English, French, Dutch, and Spanish colonial governments to the Americas, forming the basis of sodomy laws in the United States.

Throughout the seventeenth and eighteenth centuries, the terms *buggery* and *sodomy* were sometimes, but not always, used interchangeably. Both of these legal constructions were notoriously imprecise, but both terms proscribed nonprocreative sexual acts and included "carnal copulation" between males, otherwise known as anal penetration. Copulation with an animal (bestiality) was usually prosecuted as buggery.⁵² Colonial sodomy laws typically did not specifically address sexual activity involving two women, with one exception: the 1656 New Haven sodomy law prohibited female sex that "is against nature," citing Romans 1:26 as its basis.⁵³ Each of the colonies had its own criminal legal code, but sodomy and buggery were capital crimes in all of them, on par with murder, treason, and adultery.

However, it cannot be presumed that a monolithic population of "gay" people in the colonial era shared an equal risk of being accused of sodomy, convicted, and executed. Historians generally agree that the policing and enforcement of buggery and sodomy laws were sporadic and highly selective. There were fewer than ten documented executions for buggery/sodomy—including bestiality—in the seventeenth century, still fewer in the hundred years that followed.⁵⁴ While many more people were known to have relationships or sexual encounters with people of the same sex and to transgress gender norms, not all were punished equally.

RACE, CLASS, AND SODOMY POLICING

The best candidates for trial and execution were men charged with bestiality, along with the animals with which they were alleged to have sex. Sodomy prosecutions beyond those involving alleged bestiality do not appear to have involved consensual sexual relationships or encounters. Writing of Massachusetts in the eighteenth century, historian Thomas A. Foster concludes that there were no criminal prosecutions of consensual sexual encounters or relationships between men, only of incidents of forcible sodomy. Where forcible

sodomy was alleged, those targeted for prosecution appear to have engaged in behavior that upset “orderly hierarchies of race, age, and status among men.”⁵⁵ While both Black and white men accused of sodomy faced possible execution, swift imposition of a death sentence appears to have been more likely for Black men. In 1646, Jan Creoli, a man described only as “a negro,” was executed—“choked to death and then burnt to ashes”—for what was said to be his second sodomy offense in the Dutch colony of New Netherland. According to Katz, Manuel Congo, the ten-year-old Black boy who was allegedly sodomized by Creoli, was also sentenced to death by being tied to a stake, flogged, and burned.⁵⁶

Decades later, in 1712, a Black man named Mingo (also known as Cocho) was convicted of the charge of forcible buggery and, in accordance with Massachusetts law, was sentenced to be hanged. Colonial records describe Mingo as a servant in the household of Captain Jonathan Dowse, a Charlestown mariner. His alleged crime was forcible buggery of the white captain’s young teenage daughter, or “Lying with & Entering her Body not after the Natural [use?] of a Woman, but in a detestable & abominable Way of Sodomy a Sin Among Christians not to be Named.”⁵⁷ In addition to highlighting the potential application of sodomy statutes to heterosexual conduct, Mingo’s case raises the specter of America’s long history of harshly penalizing sexual relations between white women and men of African descent. According to Katz, such interracial sexual relations were considered “a practice worse, by far, than sodomy.”⁵⁸

The Massachusetts Superior Court heard only three sodomy cases, including Mingo’s, during the entire eighteenth century, illustrating how infrequently sodomy prosecutions were brought, even in colonial times. Sweeping generalizations cannot be made based on such a small number of cases, but their outcomes nevertheless suggest the possibility of a broader pattern. Foster points out that “of the three men accused of sodomy in the Superior Court—a black servant, a white servant, and a [white] gentleman—only the black servant was executed.”⁵⁹ The other two cases, both alleging some form of forcible sexual intercourse between men, were dropped.

White men who were influential enjoyed a more protected status, even when they were widely perceived to engage in coercive sexual practices with unwilling subordinates such as indentured servants

and younger men of lesser social and economic standing. In one case a prominent seventeenth-century colonial gentleman, Nicholas Sension of Windsor, Connecticut, was accorded a second and even third chance to reform his behavior before facing formal charges in court thirty years after town elders first addressed his sodomitical behavior. In the late 1640s Sension, a wealthy, white, married member of his community, was first investigated by town elders who had received complaints about his aggressive and coercive sexual approaches to a number of younger men. Sension received an informal reprimand. A similar inquiry followed in the late 1660s when a sodomy complaint was made by one of Sension’s indentured servants. No formal criminal action was taken, though Sension was ordered to reduce the servant’s period of indenture by a year and pay the young man modest compensation for abuse. A decade later, in 1677, Sension appeared on charges of sodomy in General Court. According to colonial historian Richard Godbeer, “The frank and detailed testimony presented to the court by neighbors and acquaintances left no room for doubt that Sension had made sexual advances to many younger men—often indentured servants in his and other households—in his community over a period of three decades. These advances, deponents claimed, had often taken the form of attempted assault” and, on some occasions, involved offers by Sension to pay for sex. However, “Legal prosecution became possible only when the social disruption brought about by Sension’s advances seemed to outweigh his worth as a citizen.” Accordingly, “The citizens of Windsor allowed Nicholas Sension to avoid prosecution for over thirty years and to live as a respected member of his community, despite his ‘sodomitical actings.’” Sension was convicted of the noncapital offense of attempted sodomy and penalized for it.⁶⁰

Similarly, in 1726, charges of same-sex activity leveled against New London, Connecticut, minister Steven Gorton were dropped for lack of evidence. Thirty years later, the General Meeting of Baptist Churches punished Gorton for his long history of “offensive and unchaste behaviour, frequently repeated for a long space of time,” by barring him from communion for less than a year. The evidence suggests that however stringent the laws were, respected community members were not eager to send white neighbors—particularly those who were wealthy—to face formal charges, much less to be sentenced to death. Robert F. Oaks states, “Despite the harsh penalties for sod-

omy and buggery, Puritan leaders often refused to apply them, especially for homosexual activity." In a number of recorded instances, some men were convicted of "lude behavior and uncleane carriage" or other, lesser charges carrying a sentence of corporal punishment and, in some instances, banishment, but not death.⁶¹

This does not mean that white men were wholly exempt from capital convictions. In 1624, Richard Cornish, a ship's captain, was found guilty of buggery involving a sexual attack on his (white) indentured servant and steward in Virginia Colony and sentenced to death. The execution did not, however, produce justice for the servant, who was ordered by the court to secure another master "who would then help compensate the government for the costs of prosecuting and executing Cornish. In effect . . . [the servant's] labor helped defray the cost of his master's execution."⁶²

Two other sodomy-related executions of white men were recorded in New England in the seventeenth century, but according to Godbeer, "in neither case was the route to conviction straightforward" nor exclusively driven by clear-cut cases of sodomy.⁶³ The story of colonial enforcement of sodomy and buggery laws tracks the narrative of criminal injustice in the United States—of profound racial and class disparities in policing and punishment from charging to prosecution to conviction to sentencing. It is not that "just as other people were persecuted based on race, queers were punished for being gay." It is that sodomy statutes were used, like other criminal statutes, to enforce existing race, class, and gender power structures.

WHERE ARE THE WOMEN?

Historian William Eskridge, Jr., asserts that women did not become "responsible actors in the theater of perverted sexuality" until the late nineteenth century, when oral sex was added to sodomy laws and police also began to arrest women, primarily for fellatio performed on men.⁶⁴ His attempt at inserting women into the conventional narrative of sodomy law enforcement only underscores the inadequacy of the frame itself. Women have always packed the stage of the theater of the sexually perverse, doing one criminalized star turn after another. But the policing of female sexual and gender nonconformity often proceeds along different paths, escaping mainstream gay notice.

The definition of sodomy in the colonies was male-centric from the

beginning; only one exception exists. However, no women were prosecuted under the New Haven law, or in any of the other colonies, on direct charges of sodomitical "actings" with other women—although trials and punishment of "witches" often raised allegations of deviant sexuality, including copulation with other women in orgiastic gatherings of witches' covens.⁶⁵ There are two recorded instances in which white women appear to have been charged with colonial offenses relating to same-sex intimacy. In 1642, a servant, Elizabeth Johnson, was sentenced in Massachusetts Bay Colony to be whipped and fined for "unseemly practices betwixt her and another maid," as well as for other acts of insubordination, including being rude and stubborn in the presence of her mistress, covering her ears to avoid hearing the "Word of God," and killing and burying a pig. Seven years later, two women from Yarmouth, Plymouth Colony, were charged with "leude behavior with each other upon a bed."⁶⁶

Obviously, female sexual and gender nonconformity were never centered in sodomy law; no amount of trying to shoehorn women into a generic gay story will produce an accurate picture. The harsh policing and punishment of Native and enslaved women did not require formal legal proceedings; that was simply colonial business as usual.⁶⁷ Poor white women, free women of color, and immigrant women of low status and few financial means who transgressed sexual and gender norms were usually swept into the multipurpose, criminal legal archipelagos of fornication, prostitution, vagrancy, disorderly conduct, and "lewd, lascivious, and unseemly" behavior. Penalties would involve public shaming, combined with corporal punishments common to the day, such as whipping and branding, as well as fines.

While well-to-do white women might be charged with fornication or adultery, few actually appeared in court. It is likely that their sexual policing and punishment was more often privatized, that they were dealt with by their own religious communities or bundled off for indeterminate periods of forced confinement in homes or other places that were situated safely away from public view.⁶⁸

THE BEGINNING OF "REFORM"

Eventually—and over a long period of time—the death penalty for sodomy was abolished. Pennsylvania was the first colony to do so, at the beginning of the eighteenth century. Quaker lawmakers replaced

capital punishment for those convicted of sodomy or bestiality with life imprisonment, but only for whites. A separate law ensured that Black people convicted of buggery, burglary, murder, or the rape of a white woman could still be put to death, though the law was silent on the rape of Black women. This humanitarian "reform" marked an early explicit attribution of inferior legal status to Blacks under colonial sodomy laws.⁶⁹ As the effort to reduce the use of capital punishment for sodomy gained momentum, Thomas Jefferson unsuccessfully recommended that Virginia require male rapists and "sodomists" to be castrated, and that women convicted of sodomy have a hole at least a half inch in diameter drilled through the cartilage of their noses.⁷⁰

The temptation is to imagine that sodomy laws and the troubling history that attends them are now mere historical artifacts whose cultural shadows will eventually disappear. It simplifies things to describe those laws as the result of religious rigidity and repression, ignorance, and psychological prejudice, and to cast the contemporary Religious Right in the role of dour Puritans, as the primary producers of queer oppression. Yet complexity muddies the reductive waters. Even in the colonial period, not everyone possessed the same frenzied, antisodomitic zeal that characterized some notable religious and civic leaders. And even progressive religious groups, such as the Quakers, were complicit in strengthening racism and other institutional forms of violence in their own policing of sodomy.

From the colonial period on, sodomy laws would continue to evolve, and their enforcement would begin to escalate by the late nineteenth century. The very existence of those laws would be used by the late twentieth century to help fuel initiatives seeking to limit and, where possible, roll back gains made by gay and lesbian people. That story, sometimes taken to be the foundational story of LGBT oppression, is told elsewhere.

This discussion does not attempt an original interpretation of the evolution of sodomy law and its policing. Rather, the focus is broadened to include the policing and punishment of queer people and lives that go forward under *many* legal premises, often outside of any recognizable legal framework. It is commonly believed that only certain, proscribed sexual *acts* were punished in the seventeenth and eighteenth centuries; that sexual *identities* as we now know them did

not take hold until the early twentieth century.⁷¹ As Somerville puts it, "Michel Foucault and other historians of sexuality have argued, although sexual acts between two people of the same sex had been punishable during earlier periods through legal and religious sanctions, these sexual practices did not necessarily define individuals as homosexual *per se*. Only in the late nineteenth century did a new understanding of sexuality emerge, in which sexual acts and desires became constitutive of identity." Foucault himself characterizes the shift as follows: "The sodomite had been a temporary aberration, the homosexual was now a species."⁷²

By the latter part of the nineteenth century, so-called scientific efforts to classify and control normal and abnormal sexualities were well underway. Despite critiques of Foucault's analytical limitations, his description of the shift in Western classification of sexuality holds.⁷³ As queer identities substituted for individual perverse acts, the process of criminalizing sexual and gender nonconformity was facilitated through the construction of ever-shifting and evolving archetypal narratives. Rooted in historical representations of Indigenous peoples, people of color, and poor people as intrinsically deviant, fueled and deployed by mass media and cultural institutions, these narratives now permeate virtually every aspect of the criminal legal system.