

Shifting the Scene of the Crime:

Sodomy and the American History of Sexual Violence

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The U.S. Supreme Court's decision in Lawrence v. Texas in 2003 was a triumph for the field of the history of sexuality. The majority decision declaring the state's sodomy law unconstitutional not only relied heavily on a historical argument, but also drew extensively on recent historical scholarship to support its position. Writing for the majority, Justice Kennedy argued that early American sodomy laws were directed at nonprocreative behavior generally, not at homosexual conduct in particular, and, in practice, not enforced against consenting adults acting in private. As such, there were no ancient roots supporting the proscription of consensual sodomy, as the 1986 Bowers decision that upheld sodomy laws had claimed. Those were the very arguments made in the brief put together by George Chauncey and a group of leading historians.<sup>1</sup>

But there is a further plank to Justice Kennedy's historical argument that is mentioned only in passing in the historians' brief, and that has attracted little comment in the aftermath of the decision.<sup>2</sup> In arguing that sodomy laws had not been enforced against consenting adults acting in private, Kennedy noted that "a substantial number of sodomy prosecutions and convictions . . . were for predatory acts against those who could not or did not consent." The substance of Kennedy's argument came from a brief submitted by the Cato Institute and written by legal scholar William Eskridge. Kennedy quoted one piece of Eskridge's evidence, the treatment of sodomy in a nineteenth-century legal treatise; the other basis for the claim was the

nature of the handful of sodomy cases in law reports before 1900, almost all of which dealt with coerced sex.<sup>3</sup> The lack of any further evidence reflects the lack of a sustained historical analysis of sodomy in terms of the history of sexual violence. Justice Kennedy's decision highlights that gap; Justice Scalia's dissent gives added importance to filling it. Historians have shown that sodomy was not simply concerned with same-sex behaviour, but they have not been able to elaborate what, in practice, it was concerned with, making it all too easy for Justice Scalia to continue to emphasize the criminalization of sodomy rather than the nature of that regulation, the law rather than its meaning in practice.<sup>4</sup>

This article first examines why sodomy has not been analyzed as sexual violence--that is, why sodomy prosecutions have not been part of the history of rape, and how gay history has analyzed sodomy cases. It then traces the history of sodomy as part of the history of sexual violence--to establish that the use of sodomy to punish sexual violence has long roots in American history, stronger roots than those that exist for the more recent use of the law to prosecute consensual acts. It is not only the nature of acts prosecuted as sodomy that gave the law that character, but also the parallel between those acts and their treatment in the law and that of sexual assaults on women and girls. That parallel has significance also for understanding sexual violence generally, requiring a new broader framework that recasts gender as only one of the identities and hierarchies created by coercion.

Different Gender, Different Law, Different Issues: Same-Sex Acts and the History of Rape

The text that is commonly regarded as launching historical research on rape, Susan Brownmiller's Against Our Will: Men, Women, and Rape, published in 1975, was a manifesto

for a broad history of sexual violence. The crime of rape provided the starting point for Brownmiller's analysis, but, reflecting a feminist politics concerned with acts that women experienced as sexual assault that did not fall within legal definitions, she ranged far beyond that legal category. Most of the analysis examined rape as an exercise of power derived from gender, but Against Our Will also included a chapter on power derived from emotional or social authority in which Brownmiller discussed assaults on children and "homosexual rape." However, having little material to work with, the treatment of victims other than adult women was sketchy. Homosexual rape was considered only in the prison context, and the discussion of children implicitly only encompassed girls, featuring no examples involving boys.<sup>5</sup>

Those limitations foreshadowed the difficulties that historians who responded to Brownmiller's book found in sustaining its broad vision of sexual violence. Looking to legal sources, scholars such as Barbara Lindemann and Marybeth Hamilton Arnold focused on prosecutions for rape in early American history.<sup>6</sup> The nature of that legal category encouraged a gendered concept of sexual violence: only women could be raped, and no parallel statutes existed that applied to sexual assaults on men or same-sex acts. Sodomy as it appeared in statute books was not a crime of sexual violence because the definition forbade acts regardless of the participants' consent, with both parties considered guilty. In effect, there did not appear to be any sources for a study of sexual violence against men other than for acts that took place in institutional contexts, such as prisons. These assaults on men were interpreted as "situational" and consequently not revealing of broader social relations and meanings. As the history of rape matured as a topic within women's history, historians increasingly drew on a range of sources in addition to rape prosecutions. Karen Dubinsky, Cornelia Dayton, Mary Odem, and Mary Beth Norton all look both at historical prosecutions for other crimes and at surviving material from

outside legal contexts, but, guided by a concept of sexual violence as an expression of heterosexual power, not at sodomy or other legal categories that encompassed same-sex assaults.<sup>7</sup>

The tensions in that approach are evident in Karen Dubinsky's Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929, that while dealing with Canada rather than the United States, is the only history of rape in North America to refer, albeit incidentally, to same-sex crimes.<sup>8</sup> Dubinsky clearly did not set out to find those cases--her subject was heterosexual conflict--but found male victims in some of the late-nineteenth-century legal categories, such as indecent assault, that she examined in search of female victims. In Dubinsky's analysis, however, those same-sex cases, "most of which involved adult men who had sex with boys usually between the ages of ten and fourteen," are presented in terms of difference.<sup>9</sup> They are discussed to make the point that, unlike girls, boys' had their complaints taken seriously and were treated unambiguously as victims. That distinction in treatment is one of the few elaborations of the assertion that sexual violence against males raises different issues from assaults on women. Dubinsky's sources also contain evidence at odds with that argument. At least some of the legal categories that dealt with assaults on girls also encompassed assaults on boys, pointing to a concept of sexual violence in which age and childhood blurred gender difference. The circumstances in which boys were assaulted also paralleled the experiences of girls, suggesting a shared vulnerability to the authority and emotional power of adults.

More recent studies by Diane Somerville and Sharon Block similarly undermine the argument for treating adult male victims as different and outside the history of rape. The legal counsel for Lawrence, Paul Smith, in the oral arguments before the Supreme Court, expressed the commonly held position that male "victims [of sexual assault] are more able to protect

themselves.”<sup>10</sup> That claim casts power in gendered terms, and ascribes to all men a bodily ability to resist physical coercion that women lack. Somerville and Block, by contrast, highlight forms of power other than gender at work in the sexual coercion of women, social and economic authority to which men were also subject, and which provide an as yet unrealized conceptual link between rape and sexual violence against males.<sup>11</sup>

This argument is most fully elaborated in Sharon Block’s, Rape and Sexual Power in Early America. Block employs a conceptual framework that “analyzes the gap between the personal coercion of sex and the public classification of rape,” a “two-tiered conceptualization [that] reveals that social and economic relations underwrote sexual power, both through the act, and through a community’s reaction.”<sup>12</sup> Block demonstrates that in eighteenth-century America “sexual coercion was a gendered act of power, but was never divorced from other hierarchies. From the means of its commission through the likelihood of its definition as rape, men committed and women suffered acts of sexual coercion according to their social positions.”<sup>13</sup> For example, it was William Cress’s position of mastery, Block shows, not irresistible physical force, that allowed him to coerce his servant Rachel Davis into sexually vulnerable situations in 1808. In her testimony about how Cress had sexually coerced her, “Rachel repeatedly used versions of the phrase, ‘He said I must.’ Rachel usually recalled William using these words to force her to have sex with him on multiple occasions. Once, Rachel remembered, ‘he caught hold of me & said, I must go sleep with him.’ Another time, William insisted that Rachel accompany him alone to the dark field where he would rape her: ‘He said . . . I must come.’ The phrase, ‘He said I must,’ reminds us that sexual coercion was utterly enmeshed in social standing, racial privilege, and household authority.”<sup>14</sup>

Men, as well as women, occupied positions of servitude in colonial America, and the situation described by Block is strikingly echoed in the most analyzed sodomy case from the colonial period, the prosecution of Nicholas Sension in Connecticut in 1677. A prosperous member of the community of Windsor, Sension, according to the testimony of his neighbours, had made sexual advances to young male servants in his community over a period of three decades, often in the form of assaults, with one of his servants a particular target. However, it is not historians of rape, but scholars working on gay history who have analysed the Sension case, in pursuit of a different research agenda.

#### Looking Through the Law: Sodomy and Gay History

The trial of Nicholas Sension for sodomy has featured in two important works in gay history, neither of which treats it in terms of sexual violence.<sup>15</sup> B. R. Burg's Sodomy and the Perception of Evil: English Sea Rovers in the Seventeenth-Century Caribbean includes it as part of his broad argument that middle and lower class Englishmen displayed a lack of hostility to those who committed sodomy, and his contention that only acts that involved "more than ordinary buggery or sodomy" resulted in complaints or prosecutions. In the case of Nicholas Sension, Burg explains the complaint against him as either the action of a former servant trying to make trouble or the result of Sension's "solicitations . . . becoming so frequent that they could not be ignored." The nature of those "importunings," that Sension was in fact coercing young men, is not mentioned, nor does the evidence of coercion in the other cases that Burg discusses cause him to consider it as one of the circumstances that made an act "more than ordinary" sodomy.<sup>16</sup> Richard Godbeer's analysis of the Sension case shares Burg's focus on what it reveals

about attitudes toward same-sex behavior, using it to argue that “not all New Englanders shared the virulent horror of the sodomitical acts expressed in official discourse,” but adds a Foucauldian inflection. “While religious and legal statements match scholarly impressions of pre-modern sexual discourse as focused on acts rather than identity,” Godbeer contends, “popular perceptions of sodomy sometimes appear closer to the latter.” Modern terms like sexual assault and sexual predator are liberally sprinkled through Godbeer’s discussion, but sexual violence is incidental to his reading of the case. He, too, explains the complaints against Sension as the result of the increasing frequency, after the death of the servant he favored, of his approaches to other young men, and the increased social disruption that resulted.<sup>17</sup>

Burg and Godbeer focus on the gap between the statute and the law in practice; what matters to the arguments that they want to make is that courts and communities did not treat sodomy as severely as the law in the books. The precise nature of what was prosecuted is incidental, or at best secondary, to establishing that gap. As a result, neither historian places the sexual coercion that they found in sodomy prosecutions in the context of (hetero)sexual coercion and the history of rape. The scholar who has come closest to contextualizing sodomy in that way is Thomas Foster. Examining eighteenth-century Massachusetts, he concludes of the three sodomy prosecutions he found: “As violent sexual assaults, these sodomy cases are akin to the rape cases. . . . There seem to be no prosecutions of consensual sodomy in the existing records of the eighteenth century.”<sup>18</sup> Foster highlights that prosecutions for sodomy turn on questions of consent, not just the act and the gender identity of those involved. But locating sodomy in the broad fabric of legal practice is not the focus of his analysis, nor those of other historians of early America who have examined sodomy. Instead they look through the law, using legal cases as a window on same-sex behavior and social attitudes toward that behavior.

Historians of sexuality in the late nineteenth and twentieth century who have examined sodomy cases also use them as a window, but pay less attention to the law that frames their view than those who study the colonial period. They are not interested in the history of sodomy as such, instead extracting material from legal records and discussing it without reference to legal categories. George Chauncey does note, in his pathbreaking book Gay New York, that most sodomy prosecutions in New York City in the late nineteenth and early twentieth century were undertaken by the New York Society for the Prevention of Cruelty to Children (NYSPCC) and occurred “in the course of its more general campaign to protect the city’s children from assault.”<sup>19</sup> That statement is the only analysis of such prosecutions that Chauncey offers. He does not discuss sodomy further in part because the offence was not the main vehicle for efforts to police gay men; most were instead charged with disorderly conduct, a misdemeanor.<sup>20</sup> When Chauncey analyzes the relations between men and boys that constitute the majority of sodomy prosecutions, he does so apart from the law. His characterization of such wolf/punk relationships casts punks--the boys--as variously young homosexuals, victims of sexually aggressive older men, or individuals whose sexual subordination was merely an aspect of their general subordination to an older man. That treatment recognizes that relationships between men and boys involved elements of coercion, but Chauncey does not elaborate that aspect of the relationship or mention that wolves were prosecuted for sexual violence.<sup>21</sup>

Steven Maynard, writing about Toronto (in another useful Canadian comparison), and Peter Boag, writing about the Pacific Northwest, take the same approach. Both draw their examples of sexual relations between men and boys from prosecutions for a variety of crimes, and both emphasize that a mix of consent and coercion figured in those relationships. Neither examines how coercive relations were categorized and treated in the legal system.<sup>22</sup> Boag goes

further than Maynard in attributing much of the evidence of coercion in legal records to the “biases of those whom such affairs horrified and who little considered the feelings of the youthful participants.” He is quite explicitly trying to distinguish these cases from sexual violence, emphasizing that “working-class youths and boys regularly sought out men for economic, emotional and sexual fulfilment.”<sup>23</sup> Like Maynard, and Chauncey, Boag is concerned to overturn the contemporary construction of all sexual relations between men and boys as sexual abuse, in which boys are the victims of homosexual predators. The political and legal uses to which the figure of the homosexual child abuser has been put since the mid-twentieth century make such a project imperative, but in pursuing it, gay historians have overshadowed the experience of coercion that boys shared with girls, and obscured the extent to which sodomy laws continued to be employed against sexual violence.

None of the three studies I have discussed placed the legal treatment of relations between men and boys in the context of those between men and girls, of the history of rape. In an article published in 2005, Nayan Shah has done exactly that. Recognizing that “the greater police and prosecutorial interest in punishing adult male sexual conduct that involved youth paralleled the rise of legislation that created statutory protections for females with regard to rape,” Shah examines sodomy cases from California in the 1910s and 1920s alongside statutory rape. He finds that sodomy and statutory rape prosecutions not only stemmed from the same concern; they also confronted the same legal rules about how to determine if the act was one “of violation or invitation,” which judges and prosecutors in sodomy cases borrowed from the case law on statutory rape. Those overlaps make clear that early-twentieth-century sodomy prosecutions turned on questions of consent and coercion, just as statutory rape did. Shah does not consider the implications of that insight for the longer history of sodomy. His concern is how sodomy

prosecutions were being used to create and defend American masculinity against the racial threat posed by adolescent males' relationships with adult migrants, which leads him to highlight the role that race and class identity played in distinguishing natural intergenerational male friendship from unnatural sexual predation. Nonetheless, Shah's work echoes my own wider-ranging study, Crimes against Children: Sexual Violence and Legal Culture in New York City, 1880-1960, in establishing age as another largely unrealized conceptual link between rape and sexual violence against males. Even when sodomy law was revised at the end of the nineteenth century, and prosecutions assumed an apparently very different character, Shah and I show that in practice sodomy cases continued, as they had in the colonial period, to parallel rape prosecutions.<sup>24</sup>

### Sodomy, Rape, and the History of Sexual Violence

To consider sodomy as a crime of sexual violence requires first confronting the fact that the statutes themselves were not cast in those terms, but more broadly in opposition to nonprocreative and nonmarital sexual activity. That the crime was understood in practice in more narrow terms can be seen in the details of colonial and state laws. Whereas southern American colonies (Virginia, Georgia, and the Carolinas), in adopting English common law, simply prohibited buggery or the crime against nature, without further explanation, the laws of New England and the middle American colonies (Delaware, Maryland, Pennsylvania, New Jersey, and New York) elaborated what the offence encompassed, delineating aspects that would also have been part of how the crime was understood in the south. The Massachusetts Laws and Liberties of 1648 exempted an unwilling participant in sodomy from the death penalty, but provided that he be severely punished, a provision subsequently adopted in New York, New

Jersey, Plymouth, Connecticut, New Hampshire, and Pennsylvania.<sup>25</sup> The New Haven Colony went further in regards to victims of coercion, who “crying out, or in due season complaining,” were entirely exempt from punishment.<sup>26</sup> These provisions indicate that sodomy laws did not disregard consent, and did not simply punish anyone involved in an act. Common law proof requirements led to even more attention to consent. The construction of the crime of sodomy as one in which both parties were guilty made each an accomplice of the other, whose evidence had to be corroborated in order for it to provide grounds for a conviction. Only an individual who had been coerced was considered by the law not to be an accomplice and hence capable of giving testimony that could on its own establish a crime. The accomplice rule made prosecutions for consensual acts of sodomy almost impossible, unless they occurred in public, while still allowing prosecutions to be mounted in cases of sexual violence.<sup>27</sup>

Justice of the peace manuals, on which colonial lawmakers and officials relied for information about how to interpret and enforce common law and American statutes, drew on English precedents that likewise focused on coercion.<sup>28</sup> Colonists brought these books with them, and began, in 1711, to publish their own editions, which closely followed English texts, with some abridgement and additions of American material. Each contained an alphabetical list of offences, providing for each a description, legal history, discussion of what constituted the offence, its punishment, and, in some cases, warrant and indictment forms intended to be of practical use to justices and magistrates.<sup>29</sup> The most revealing elements in regards to sodomy are the indictments: they appeared only in manuals published in the southern colonies of Virginia, North Carolina, and South Carolina. All employed the phrases “with force and arms” and “did make an assault,” and those from Virginia and South Carolina included as the subject of the act, respectively, a seventeen-year-old boy and a virgin girl of eleven years of age, and “a youth

about the age of . . . years.”<sup>30</sup> These forms in effect introduced the association with coercion absent from the common law definitions adopted in southern colonies; the authors of northern manuals that omitted such forms worked with statutes that explicitly addressed coercion.

Sodomy laws in New England and the Middle Colonies spared from the death penalty not only those who had been coerced but also parties under the age of fourteen who had consented. Justice of the peace manuals published in both the northern and southern colonies also specified that such individuals, and girls under the age of twelve who consented, were not guilty of a felony, and thus not subject to the death penalty.<sup>31</sup> Those provisions did not amount to an age of consent as in rape law, that established a girl younger than ten years of age as a victim regardless of her consent. That the age of consent was not replicated in sodomy statutes reflected its origins in laws on marriage and feudal strategies of property protection, which did not apply to sodomy, and the lack of a victim in an act of sodomy, for which both parties were culpable. Instead, the sodomy statutes drew on emerging notions of an age of criminal responsibility. As Holly Brewer has recently and brilliantly unpacked, this concept was in flux in the seventeenth century: the sodomy laws reflected this uncertainty in recognizing an individual younger than fourteen not as not responsible for his actions but rather as not as responsible for what he did. But the age of responsibility evolved to open the door to a parallel situation to that provided by the age of consent.<sup>32</sup> If a child was not responsible for his actions, then he could not be an accomplice; consequently he not only escaped prosecution, but his uncorroborated testimony provided sufficient evidence to convict an adult man who had committed sodomy with him.

Those provisions and publications suggest that sodomy laws were not completely out of alignment with the meaning of the law in practice in the colonial period. Sodomy prosecutions appear to have overwhelmingly been for acts involving coercion or young boys.<sup>33</sup> The

qualification in that statement reflects the sparse details that survive of the circumstances of the cases, and the frequent lack of precise evidence of age, rather than clear evidence that any of the prosecutions targeted consensual acts. Godbeer does report two cases that may have involved a consensual act--in each case both participants were punished--but both prosecutions were also associated with coercion. The complaints that led to the discovery of the acts came from men whom one of the parties had earlier attempted to coerce into committing sodomy, a history of coercion that casts a shadow over the acts that were prosecuted.

Rictor Norton, writing about prosecutions at London's Old Bailey in the eighteenth century, has recently argued that the assaults and coercion present in sodomy cases are an element introduced by the legal system, and are a misrepresentation of consenting relations. In none of the American cases, however, do the references to coercion appear to be a legal fiction, introduced so that prosecutors could avoid the requirements of the accomplice rule and prosecute both parties or so that one of the parties could avoid prosecution or reduce his punishment. Norton also argues that the "genuine assaults involved no more than unwanted sexual solicitation."<sup>34</sup> Certainly much of the language used--terms such as "pressing," or "seeking to allure others thereunto,"--does not describe physical assault. However, Norton's reading does not account for the power with which those solicitations could be invested, especially if the victim was in some way subject to the authority of the man making them. The targets of Nicholas Sension's sexual advances, for example, were servants and young men in positions subordinate to him, some of whom depended upon his goodwill for their future.<sup>35</sup> Solicitations could also be a preface to more direct coercion. Samuel Norman, a seventeenth-century sea captain, first attempted to get his fourteen-year-old servant to provide him with a rubdown, removing his breeches so that pain caused by horse riding could be massaged away. When that approach

failed, “Norman turned the boy about, bent him over, bared his posterior, and the deed was quickly done”--and repeated on at least three more occasions on the voyage.<sup>36</sup> The shipboard setting of this assault makes starkly clear how the situation of servants and youths afforded them little ability to give effect to their refusal to respond to advances from their masters and older men. Norton implicitly assumes that, unlike a boy, an adult could physically resist a solicitation and assault by another man--his example is of attempt at sodomy defeated by “two or three good pelts over the head.”<sup>37</sup> But that argument, too, discounts social power. Several men reported that even after they had successfully resisted an assault by Sension, he continued to attempt to coerce them. Nathaniel Pond, his servant, was one of those men. Sension, Pond told his brother, “did often in an seemly manner makes attempts tending to sodomy, so that [Nathaniel] was forced by violence to throw him off.” His position as Sension’s indentured servant meant that Pond’s resistance brought him at best only a brief respite--and, according to the testimony of a fellow servant, on at least one occasion it failed to prevent him from being sodomized.<sup>38</sup>

As I alluded to earlier, what is striking about colonial sodomy cases is the extent to which many involved the same sexual power, directed against servants and minors, at work in rape cases. Based on an examination of published records from Connecticut, Massachusetts, Maryland and Virginia, Mary Beth Norton argues that most seventeenth-century rape prosecutions and convictions in both northern and southern colonies involved assaults on teenage girls or young children. Sharon Block’s wider-ranging examination of eighteenth- and early-nineteenth-century prosecutions finds “multiple cases of father-daughter molestation” and small, but growing numbers of assaults on girls by unrelated men.<sup>39</sup> Purely physical sexual assaults were the least common form of rape, in large part because men with social power had no need to resort to force. As Block shows, “Masters might force their servants into vulnerable situations,

fathers might invoke their patriarchal right to sexual access to a daughter, and neighbors might be able to create opportunities for sexual coercion through socializing.”<sup>40</sup> Although the evidence is fragmentary, subordinate males appear to have fared little better than similarly situated women in their efforts to take action against sexually coercive masters.<sup>41</sup> Bringing sodomy into this picture of early American sexual culture highlights that the extensive sexual power that flowed from social authority was deployed against males as well as females; as such, it was not based on gender difference, not on heterosexual power, but on a broad sexual power. Sexual violence created not just a gender hierarchy but also other relations of dominance and subordination.

This culture of sexual power and coercion also appears to characterize the first three quarters of the nineteenth century, although both rape and sodomy have been subject to only limited analysis in this period. Justice of the peace manuals published in those years continued to frame sodomy as assault. Those that included indictments either employed the same forms contained in earlier texts, or adopted one from an English text published in 1824, stripped of religious language and “unnecessary” “ancient forms,” that included the phrase “did make an assault.”<sup>42</sup> Accounts published in the new sensational press featured boys as victims. Some had clearly been coerced, by means of force or through the use of social power. The “confirmed sodomite” whose arrest in New York City in 1847 was reported in the National Police Gazette lured young children into stables and privies, and assaulted the two apprentices with whom he shared a bed in his employer’s home.<sup>43</sup> A servant coerced by his employer appeared in the flash press campaign against sodomites in 1840s New York. On 12 February 1842, The Whip called to the attention of the authorities an Englishman named Captain Collins, who “forced” a barkeeper in his employ “to nightly lie with beasts in the shape of men.”<sup>44</sup> Most of the boys featured in the flash press campaign did not suffer such assaults, but were nonetheless portrayed as victims. A

letter published in Flash on 14 August 1842, for example, men “parading our streets of an evening, watching for their prey, and hundreds of young boys, yes, sir, boys as young as twelve years to eighteen, are victims to their foul and disgusting deeds.”<sup>45</sup>

Nineteenth-century examples of prosecutions also conform to the colonial pattern, both those in reported American appellate court cases and a group of those tried in New York City. Of the ten reported sodomy cases preserved in the historical record from the decades prior to 1880, six involved men and boys or youths, and one involved force. The remaining three cases include two for which no details of the facts survive.<sup>46</sup> In New York City between 1796 and 1873, only twenty-two men were indicted for sodomy, most of whom had sodomized boys or youths, were alleged to have used force, or had been caught in public.<sup>47</sup> Four hundred and forty six men were indicted for rape in the same period, between one third and one half for acts with female complainants younger than nineteen years of age.<sup>48</sup> Marybeth Hamilton’s detailed study of forty-eight of those rape cases prosecuted between 1790 and 1820 reveals very few cases that involved a straightforward physical assault; instead, prosecutions featured neighbors, lodgers, and employers manoeuvring girls and women into situations where they could be subject to coercion. Eleven-year-old Mary Brett’s struggles with her employer in 1818, for example, echo those of Rachel Davis and Nathaniel Pond. After having Mary drink some milk punch laced with alcohol, and then lie down in the back room of the grocery store, Dennis Horsey came into the room and tried to lift her skirts. When she resisted his efforts, and prevented him from flipping her over, he unbuttoned her pants and lay down beside her. Mary shooed him away with her hand, while “he kept saying only let me have a little taste.” It took the arrival of a customer to cause Horsey to desist, after which Mary refused all his pleas to return to the bed.<sup>49</sup>

Evidence of the prosecution of consensual acts of sodomy in the colonial, early national and antebellum periods is limited and ambiguous, yet the weight of evidence makes clear that what was criminalized in practice were coercive acts and acts with children--neither of which are mentioned in Justice Scalia's account of the history of sodomy. It is only after sodomy laws begin to be revised in the 1880s that consensual acts involving adults start to constitute a significant proportion of sodomy prosecutions, a situation that falls far short of substantiating Justice Scalia's defence of the position that criminalizing sodomy in general is "deeply rooted in this nation's history and tradition."<sup>50</sup>

At first glance, the amendments to sodomy statutes that began in 1879, and the consequent changes in the nature and prevalence of sodomy prosecutions, appear unrelated to sexual violence and to sever the association between sodomy and rape evident in the preceding centuries. Legislators and judges for the first time specified the act referred to in sodomy laws, in the process including, in addition to the anal acts long considered sodomy, oral acts not previously criminalized. The redefined sodomy laws were employed more frequently than their predecessors. By the 1890s in New York City there were on average as many prosecutions each year as there had been in the entire period between 1796 and 1876.<sup>51</sup> It is the instances of consensual acts between adults among those prosecutions that have drawn the attention of scholars, but such departures from earlier practice were in the minority. Half of the reported appellate court cases continued to involve acts with children.<sup>52</sup> In the lower court in which felonies were prosecuted, the Court of General Sessions, the proportion was even higher, although it was perhaps the novelty of the application of sodomy laws to consensual acts likely led to their overrepresentation among reported cases.<sup>53</sup> Arrest records from other jurisdictions suggest that this continuity in practice was not limited to New York City; so, too, do justice of

the peace manuals and legal treatises.<sup>54</sup> While some late-nineteenth-century legal writers began to include indictments that made no mention of assault, they placed them alongside forms that presented sodomy as an assault, which most other authors continued to include.<sup>55</sup> “I do not suppose this allegation of assault to be necessary,” the prominent treatise writer Joel Prentiss Bishop commented in 1885, “while yet for practical reasons I should retain it,” capturing how sodomy retained its association with sexual violence even as consensual acts gained prominence.<sup>56</sup>

In New York City, the organization responsible for prosecutions involving children, the NYSPCC, also drafted and lobbied for the change in the state’s sodomy law. Such legislation was an extension of the NYSPCC’s child protection work, which also included amendments to the rape and abduction laws likewise intended to make it easier to use them to protect children, and enforcement efforts that produced a jump in prosecutions for rape and other offences. Where between one third and one half of rape prosecutions in New York City in the years between 1790 and 1876 involved girls under eighteen years of age, the proportion jumped to over 85 percent in the next eighty years. Those efforts to protect girls were not entirely distinct from the NYSPCC’s efforts to protect boys. In the years between 1886 and 1955, 24 percent of sodomy cases involving children under eighteen years of age concerned acts with girls.<sup>57</sup>

Revised sodomy laws paralleled those pertaining to rape not only in their authors and prosecutors but also in the circumstances of the acts that gave rise to prosecutions in turn-of-the-century New York City. They took place in similar locations, in the victims’ homes and in locations around those homes, such as shared basements, hallways and toilets, or in public men’s rooms, although boys were more likely to be assaulted further from home than girls. Assailants also took advantage of the power adults could exert on children, persuading boys to accompany

them by requesting help, asking them to run errands, and promising them money, gifts, or, in the case of runaways, shelter, to secure their cooperation. The sexual act in sodomy prosecutions was obviously different from what occurred in rape cases, but prosecutors treated it in the same way. Although the sodomy statute allowed for both parties to an act to be prosecuted, children were not prosecuted for sodomy. Instead, their involvement was treated as involuntary, as was that of girls in rape prosecutions.<sup>58</sup>

That crimes against children dominated the definition and prosecution of both sodomy and rape in the decades after 1880 makes clear that, late-nineteenth-century amendments to the law notwithstanding, the crime of sodomy continued to be primarily seen as a form of sexual violence. Prosecutions for both offenses reflected a new emphasis on age, the product of the emergence of new ideas about childhood centred on physiological and psychological development. As those ideas evolved over the first half of the twentieth century, they caused sodomy and rape to mirror each other ever more closely.<sup>59</sup>

In the first two decades, prosecutors presented boys and girls differently, but both were portrayed in the terms most likely to lead judges and jurors to see them as victims of sexual violence. A girl's status as a child and hence as a victim depended upon her lack of understanding and sexual knowledge, a trait that revealed itself in her passive behavior. Any active resistance was taken as a sign of sexual understanding and lost innocence, and the failure of that resistance became, as it did for adult women, an indication of consent. Prosecutors did not display the same concern to emphasize passivity when the complainant was a boy. A view of boys as instinctively able to "take their own part" and defend themselves from attack caused prosecutors and jurors to treat a boy's resistance to a man as an expression of his masculine nature and not as a sign of understanding. His failure to successfully resist could consequently

result from being overpowered, not from his consent. That difference contributed to those boys who charged that they had been sodomized being accorded more credibility than girls, a credibility gap reflected in the outcomes of prosecution. The conviction rates for rape and sodomy cases involving children under age ten are similar, but the rate for sodomy cases involving pubescent boys aged eleven to seventeen is 50 percent more than that for rape cases involving girls of the same age.<sup>60</sup>

After 1930, greater public awareness of same-sex desire and arguments that it represented a stage of adolescent development, made jurors and judges as suspicious that a boy alleged to have been coerced might have consented as they were that a girl had. Prosecutors responded by presenting boys, like girls, as passive and without understanding. That approach helped to maintain conviction rates for prosecutions involving young boys at same levels as for cases involving girls; in cases involving pubescent children, that treatment was overtaken by changing ideas about adolescence. Mental hygienists had begun to promulgate the idea that sexual expression was a normal and necessary part of adolescence, undermining the claims of teenagers to the protection from sexual violence afforded to children. Jurors displayed a growing unwillingness to indict, let alone convict, men who had sexual intercourse with teenage girls, and those few who were convicted typically received suspended sentences. Although men who sodomized teenage boys continued to be convicted at a higher rate, those convictions reflected the increased hostility of mid-twentieth-century jurors toward homosexual men--also evident in the increasing use of sodomy laws to prosecute consensual acts--rather than an assessment that the boys had been coerced. When judges came to sentence men convicted in those sodomy prosecutions, they handed down sentences in line with those for statutory rape, indicating that

they no longer imputed resistance to the boys involved in the act, and consequently did not see any violence as having occurred.<sup>61</sup>

Sodomy fell more closely into line with rape in law as well as in practice. In 1950, New York legislators amended the state's sodomy statute so that it used the same language and structure as the law on rape. In place of the definition of sodomy that emphasised the act and made no mention of age, the new law employed the same age of consent, and gave boys the same protection from violence as the rape law did in the case of girls. In effect, although boys still did not fall within the scope of the rape statute, and lacked protection from acts of intercourse, the amended law treated and protected boys in the same way that the rape law did girls.<sup>62</sup> It would be more than a decade, after this approach had been endorsed by the American Law Institute and incorporated in the Model Penal Code, the statutory text published in 1962 that provided a standard that shaped law reform across the nation, before other states began to narrow their sodomy laws to apply only to cases that involved violence and children as New York had. It is the decriminalization of consensual acts between adults in those laws--New York's law only went as far as reducing such acts to the status of a misdemeanor--that has drawn scholarly attention. That it also redefined sodomy as sexual violence has gone unexamined.<sup>63</sup> Yet it was in those terms that Governor Thomas Dewey presented the law, explaining it as being intended to address the "rigid provisions of the existing definitions," by introducing "distinctions between crimes involving force or the abuse of children and those which do not contain those elements."<sup>64</sup>

At the level of the statute book, this legislation represented a radical departure from how sodomy had been defined and understood. Looking beyond law in the books, I have shown elsewhere that the law was a reflection of what had been happening in practice in the courts since the NYSPCC revised the sodomy statute in the late nineteenth century.<sup>65</sup> A longer view makes

clear that the understanding of sodomy as a form of sexual violence in fact predated the NYSPCC's intervention by over two hundred years. The mid-twentieth-century law, far from being anomalous or a departure, captured more accurately than any previous legal definition how sodomy had always been employed in American courts.

From this perspective, it is the severing of the association of sodomy and rape in the last half of the twentieth century that is the anomaly. Beginning in the late 1950s, crimes against boys were absorbed into the concept of child molestation, and into the gender-neutral legislation that it encouraged, and which became part of the rape law reform agenda. At the same time, consensual acts involving adult men began to make up a significant proportion of sodomy prosecutions, although still a minority. Gay rights activists drew attention to those cases, promoting an understanding of the crime that spurred campaigns for its abolition.<sup>66</sup> Discussion of sexual assaults on men focused narrowly on what occurred in prison. The newly graphic and extensive writing about this sexual violence in the late 1960s and 1970s cast it not as sodomy but as rape, in the process drawing on feminist analyses that cast rape in gendered terms, encouraging a view of prison rape as "feminizing" its victims. By the time that the project of historicizing rape was begun, sodomy was no longer associated with sexual violence, and a new understandings of gender and a focus on women and girls shaped the direction of the field.

In re-examining what has historically been prosecuted as sodomy, then, the Supreme Court's decision in Lawrence v Texas highlighted not only the research of historians of sexuality but also the need for further work in placing the crime in a different context, that of the history of rape. The outline of what that relocation might look like that I have offered here suggests that shifting the scene of the crime in that way sharpens the historical arguments made in the Lawrence case about the absence of a long-established criminalization of all same-sex acts. It

also has the potential to transform the history of rape into a broader history of sexual violence. Such a framework extends Sharon Block's argument that sexual coercion "was a gendered act of power but was never divorced from other hierarchies."<sup>67</sup> Those additional dimensions of power come more clearly into focus in a history of sexual violence that recognizes the parallels between rape and sodomy, in which acts no longer pivot on gender difference. Sexual violence still created a gender hierarchy, but as part of larger process of creating dominant and subordinate identities and hierarchy.

This is not an argument that gender does not matter; it is a call to ask new questions about exactly how gender does matter, by looking at sexual violence using a broader frame in which a binary notion of gender no longer overshadows all other categories to the extent that sexual violence operates solely as a term for what a male does to a female. It is likely true that women and girls have historically been the vast majority of those subject to sexual coercion--although this is a historical question that needs to be further explored--but that should not become grounds for narrowing the terms in which we analyze such violence. Shifting sodomy to the history of sexual violence promises to shift that history to a broader consideration of power and identity.

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Earlier versions of this article were presented at the Organization of American Historians (OAH) Conference in Washington, D.C., 21 March 2006, and at the Yale Research Initiative on the History of Sexuality, 24 September 2007. Thanks to Estelle Freedman for inviting me to be part of the OAH panel; she and Regina Kunzel, the third member of the panel, also offered valuable advice. Thanks also to George Chauncey and Joanne Meyerowitz, who invited me to Yale University, where they and the audience asked searching questions that sharpened my arguments.

<sup>1</sup> Lawrence v. Texas, 539 US 538 (2003), especially Opinion of the Court, 6-10, at

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<http://www.supremecourtus.gov/opinions/02pdf/02-102.pdf>; “Brief of Professors of History George Chauncey, Nancy F. Cott, John D’Emilio, Estelle B. Freedman, Thomas C. Holt, John Howard, Lynn Hunt, Mark D. Jordan, Elizabeth Lapovsky Kennedy, and Linda P. Kerber as Amici Curiae in Support of Petitioners,” available online at:

[http://supreme.lp.findlaw.com/supreme\\_court/briefs/02-102/02-102.mer.ami.hist.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.hist.pdf).

<sup>2</sup> Marc Spindelman has published a law review article focused on what the decisions and the arguments made to support it mean for understandings of sexual violence within the gay community (“Surviving Lawrence v. Texas,” Michigan Law Review 102 [2004]: 1615-65).

<sup>3</sup> Lawrence v. Texas, 539 US 538 (2003), Opinion of the Court, 8; William Eskridge, “Brief of the Cato Institute as Amicus Curiae in Support of Petitioners,” 9-12, available online at: [http://supreme.lp.findlaw.com/supreme\\_court/briefs/02-102/02-102.mer.ami.ci.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.ci.pdf).

<sup>4</sup> Lawrence v. Texas, 539 US 538 (2003), Scalia, J., dissenting, 11-14.

<sup>5</sup> Susan Brownmiller, Against Our Will: Men, Women and Rape (Harmondsworth, U.K.: Penguin, 1975), 256-82. Florence Rush, whose research Brownmiller drew upon for her discussion of child rape, did subsequently publish a book on children that brought boys somewhat more into focus. See Florence Rush, The Best Kept Secret: Sexual Abuse of Children (New York: McGraw Hill, 1980).

<sup>6</sup> Barbara Lindemann, “‘To Ravish and Carnally Know’: Rape in Eighteenth-Century Massachusetts,” Signs 10, no. 1 (1984): 63-82; Marybeth Hamilton Arnold, “‘The Life of a Citizen in the Hands of a Woman’: Sexual Assault in New York City, 1790 to 1820,” in Passion and Power: Sexuality in History, ed. Kathy Peiss and Christina Simmons (Philadelphia: Temple University Press, 1989), 35-56.

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<sup>7</sup> Karen Dubinsky, Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929 (Chicago: University of Chicago Press, 1993); Cornelia Dayton, Women before the Bar: Gender, Law, and Society in Connecticut, 1639-1789 (Chapel Hill: University of North Carolina Press, 1955); Mary Odem, Delinquent Daughters: Policing and Protecting Adolescent Female Sexuality in the United States, 1885-1920 (Chapel Hill: University of North Carolina Press, 1995); and Mary Beth Norton, Founding Mothers and Fathers: Gendered Power and the Forming of American Society (New York: Vintage Books, 1996).

<sup>8</sup> Mary Beth Norton does consider rape and sodomy together, on the basis that New Englanders obsessed with defining both, but sees the link between them that “both acts involved sex that was simultaneously nonmarital and nonprocreative” (351). However, she overlooks that the two crimes were also linked by coercion, although her discussion of colonial sodomy statutes is the only one that mentions the sections that referred specifically to coercion.

<sup>9</sup> Dubinsky, 57.

<sup>10</sup> Lawrence v. Texas, 02-102, Oral Argument, 16, available online at:  
[http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/02-102.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-102.pdf).

<sup>11</sup> Diane Somerville, Rape and Race in the Nineteenth-Century South (Chapel Hill: University of North Carolina Press, 2004); Sharon Block, Rape and Sexual Power in Early America (Chapel Hill: University of North Carolina Press, 2006).

<sup>12</sup> Block, 2-3.

<sup>13</sup> *Ibid.*, 12.

<sup>14</sup> *Ibid.*, 239.

<sup>15</sup> Robert Oaks’ pioneering study of sodomy in the colonial period does not mention the Sensations case, but his analysis of sodomy is similarly concerned with attitudes toward

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homosexual behavior. See Robert Oaks, "'Things Fearful to Name': Sodomy and Buggery in Seventeenth-Century New England," Journal of Social History 12, no. 2 (1978): 268-81.

<sup>16</sup> B. R. Burg, Sodomy and the Perception of Evil: English Sea Rovers in the Seventeenth-Century Caribbean (New York: New York University Press, 1983), 37-38.

<sup>17</sup> Richard Godbeer, "'The Cry of Sodom': Discourse, Intercourse, and Desire in Colonial New England," William and Mary Quarterly 52, no. 2 (1995): 276-77.

<sup>18</sup> Thomas Foster, Sex and the Eighteenth-Century Man: Massachusetts and the History of Sexuality in America (Boston: Beacon, 2006), 160.

<sup>19</sup> George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940 (New York: Basic Books, 1994), 141.

<sup>20</sup> *Ibid.*, 185.

<sup>21</sup> *Ibid.*, 88-95, esp. 88.

<sup>22</sup> Steven Maynard, "'Horrible Temptations': Sex, Men, and Working-Class Male Youth in Urban Ontario, 1890-1935," Canadian Historical Review 78, no. 2 (1997): 191-235; Peter Boag, Same-Sex Affairs: Constructing and Controlling Homosexuality in the Pacific Northwest (Berkeley: University of California Press, 2003).

<sup>23</sup> Boag, 9.

<sup>24</sup> Nayan Shah, "Between 'Oriental Depravity' and 'Natural Degenerates': Spatial Borderlands and the Making of Ordinary Americans," American Quarterly 57, no. 3 (2005): 703-25; Stephen Robertson, Crimes against Children: Sexual Violence and Legal Culture in New York City, 1880-1960 (Chapel Hill: University of North Carolina Press, 2005).

<sup>25</sup> New York adopted its law in 1665, New Jersey in 1668, Plymouth in 1671, Connecticut in 1672, New Hampshire 1680, and Pennsylvania, in this form, in 1706. See

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Jonathan Katz, Gay/Lesbian Almanac: A New Documentary (New York: Harper and Row, 1983), 92, 105-7, 118-19, 125.

<sup>26</sup> Mary Beth Norton, 349-50; Katz, Gay/Lesbian Almanac, 102.

<sup>27</sup> William Eskridge, Gaylaw: Challenging the Apartheid of the Closet (Cambridge, Mass.: Harvard University Press, 1999), 162; Robertson, 63-64.

<sup>28</sup> Thanks to the anonymous reader for the Journal of the History of Sexuality who suggested that I consult justice of the peace manuals. I examined all the American editions published in the eighteenth century, which are available in the digital edition of Early American Imprints, Series I: Evans, 1639-1800, and the English texts they mirrored, available in Eighteenth Century Collections Online, <http://www.gale.cengage.com/DigitalCollections/products/ecco/index.htm> (accessed July 2008).

<sup>29</sup> For a broad account of these manuals see John A. Conley, "Doing it by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America," Journal of Legal History 6, no. 3 (1985): 257-98. For an analysis of their treatment of rape see Block, 126-52.

<sup>30</sup> John Grimke, The South-Carolina justice of peace, containing all the duties, powers and authorities of that office, as regulated by the laws now of force in this state, and adapted to the parish and county magistrate, 2 vols. (Philadelphia: R. Aitken, 1788), 1:73-74; Francois-Xavier Martin, The office and authority of a justice of the peace, and of sheriffs, coroners, &c. According to the laws of the state of North-Carolina (New Bern, N.C.: Francois-Xavier Martin, 1791), 78; William Hening, The new Virginia justice, comprising the office and authority of a justice of the peace, in the Commonwealth of Virginia (Richmond, Va.: T. Nicolson, 1795), 93-94. Grimke and Hening both derived their indictments from a 1769 manual by John Lord Viscount Dudley and Ward and T. Cunningham; Martin relied on a 1704 manual by William

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Nelson, which included a form from Edward Coke's Booke of Entries, published in 1614. See John Lord Viscount Dudley and Ward and T. Cunningham, The Law of a Justice of Peace and Parish Officer, 4 vols. (London: Woodfall and Strahan, 1769), 4:66; and William Nelson, The Office and Authority of a Justice of Peace, Collected out of all the Books Which Have Hitherto Been Written on That Subject (London: Richard and Edward Atkins, 1704), 101.

<sup>31</sup> See, for example, the most widely used northern manual, Conductor generalis, or The office, duty and authority of justices of the peace, high-sheriffs, under-sheriffs, goalers, coroners, constables, jurymen, over-seers of the poor, and also the office of clerks of assize and of the peace (Philadelphia: Andrew Bradford, 1722), 37; see also Grimke, 72; Martin, 78. **[What does the question mark mean—that the treatise was anonymously published? Yes, so I've removed it]**

<sup>32</sup> Holly Brewer, By Birth or Consent: Children, Law, and the Anglo-American Revolution in Authority (Chapel Hill: University of North Carolina Press, 2005), 181-229.

<sup>33</sup> All those for which Godbeer provides details have some association with coercion, as do all three discussed by Foster.

<sup>34</sup> Rictor Norton, "Recovering Gay History from the Old Bailey," London Journal 30, no. 1 (2005): 46.

<sup>35</sup> Kirsten Fischer discusses a slander case in North Carolina involving an accusation of sodomy. The man accused of sodomy was a captain of militia, justice of the peace and assemblyman who "use[d] divers ways to seduce and perswade" young men in the neighbourhood to let him bugger them--a man who used social power to coerce subordinates (Suspect Relations: Sex, Race, and Resistance in Colonial North Carolina [Ithaca, N.Y.: Cornell University Press, 2002], 146-47).

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<sup>36</sup> Burg, 147. For another case from seventeenth-century Virginia, involving a shipboard assault by a master on his servant, see Jonathan Katz, Gay American History: Lesbians and Gay Men in the U.S.A., rev. ed. (New York: Meridian, 1992), 16-19.

<sup>37</sup> Norton, 46.

<sup>38</sup> Godbeer, 273. Godbeer provides only limited details of these assaults. A fuller description is offered in Colin Talley, "Gender and Male Same-Sex Erotic Behavior in British North America in the Seventeenth Century," Journal of the History of Sexuality 6, no. 3 (1996): 387-88. Talley offers no analysis of this case beyond noting that "Sension was behaving exactly the way that one would expect a dominant patriarch to act in his transgenerational and transclass sexual adventures" (388). For excerpts from the transcript of Sension's trial in 1677 see Katz, Gay/Lesbian Almanac, 111-18.

<sup>39</sup> Norton, 351-52; Block, 97.

<sup>40</sup> Block, 86.

<sup>41</sup> Sension escaped prosecution for over thirty years, and when action was taken against him, he was not sentenced to be whipped or fined, let alone to be put to death, but merely had his property placed in bond. Two clergymen discussed by Godbeer likewise escaped with suspensions from their pulpits, after which they won reinstatement. The captain who assaulted his cabin boy in the case discussed by Burg also escaped punishment. The men who were punished for crimes on board ship either transgressed racial boundaries, or were repeat offenders from among the crew. The one exception was a ship's captain named Richard Cornish, executed in Virginia in 1624 for sexually assaulting his twenty-nine-year-old indentured servant. Two other men were executed for sodomy in colonial New England. One was a black man who had assaulted a white child; the others had a long history of assaulting children (and perhaps lacked

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Sension's social standing). See Foster, 158; and Katz, Gay/Lesbian Almanac, 69, 90. [Some citation needs to be included for these examples so that scholars can investigate further, if they wish. I could not identify the third case, so I have revised this section]

<sup>42</sup> I examined all the American texts published between 1800 and 1900 available in The Making of Modern Law: Legal Treatises 1800-1926, <http://www.gale.cengage.com/DigitalCollections/products/ModernLaw/index.htm> (accessed July 2008 []), What does this reference mean? Is this a printed source, an online source, or something else? It is an online database – I've substituted a generic url]), a total of 449 volumes. For examples of manuals that retained eighteenth-century forms see Joseph Chitty, A practical treatise on the criminal law, 4 vols. (Philadelphia: E. Earle, 1819), 2:45-46; Jeremiah Perley, The Maine justice, 3rd ed. (Hallowell, Me.: Glazier, Masters, and Smith, 1835), 308; and Alexander Tiffany, A treatise on the criminal law of the state of Michigan (Detroit, Mich.: Wm. A. Throop, 1870), 833. For examples that used the stripped back form see Thomas Starkie, A treatise on criminal pleading (Exeter, N.H.: Gerrish & Tyler, 1824), 434-35; John Archbold, A summary of the law relative to pleading and evidence in criminal cases (New York: S. Gould, 1824), 210; and Elijah Haines, A practical treatise on the powers and duties of justices of the peace and constables, in the state of Illinois (Chicago: Keen & Lee, 1855), 199-200. [Is the lack of capitalization in these titles the original or your own changes? It is the original]

<sup>43</sup> "A Confirmed Sodomite," National Police Gazette, 11 December 1847. Thanks to Shane White for locating this story and the following examples during his own research at the American Antiquarian Society.

<sup>44</sup> "The Sodomites and Their Practices, No. 3--Old Collins," The Whip, 12 February 1842. On the flash press see Patricia Cline Cohen, Timothy Gilfoyle, and Helen Lefkowitz

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Horowitz, The Flash Press: Sporting Male Weeklies in 1840s New York (Chicago: University of Chicago Press, 2008).

<sup>45</sup> “Monsters,” Flash, 14 August 1842, reprinted in Cohen, Gilfoyle, and Horowitz, 197-98.

<sup>46</sup> Jonathan Ned Katz, Love Stories: Sex between Men before Homosexuality (Chicago: University of Chicago Press, 2001), 402-6.

<sup>47</sup> John D’Emilio and Estelle Freedman, Intimate Matters: A History of Sexuality in America (Chicago: University of Chicago Press, 1997 (1988)), 123; Edwin Burrows and Mike Wallace, Gotham: A History of New York City to 1898 (New York: Oxford University Press, 1999), 797. Neither source gives precise figures for the number of cases involving each circumstance; both rely on unpublished research by Michael Lynch, which I have been unable to obtain.

<sup>48</sup> The 1820s were an exception, with 76 percent of cases involving girls. See Timothy Gilfoyle, City of Eros: New York City, Prostitution, and the Commercialization of Sex, 1790-1920 (New York: W. W. Norton, 1992), 349-50.

<sup>49</sup> Arnold, 45-46. Sodomy and sexual violence against women did not, however, move in lockstep. The nineteenth century saw the enactment of criminal seduction laws, which expanded definitions of heterosexual violence, which had ignored assaults by men on women they knew, to include coerced sexual acts within relationships when the man had promised to marry the woman. Such offers commonly came quickly in working-class relations and did not preclude the presence of coercion and force. See Stephen Robertson, “Seduction, Sexual Violence, and Marriage in New York City, 1886-1955,” Law and History Review 24, no. 2 (2006): 325-67. [Is this what you mean to say? Otherwise, how are these acts part of a definition of “heterosexual violence”? No – see clarification]

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<sup>50</sup> Lawrence v. Texas, 539 US 538 (2003), Scalia, J., dissenting, 12.

<sup>51</sup> Eskridge, 374.

<sup>52</sup> *Ibid.*, 375.

<sup>53</sup> Robertson, Crimes against Children, 239-40.

<sup>54</sup> For arrests see William Eskridge, Dishonorable Passions: Sodomy Laws in America, 1861-2003 (New York: Viking, 2008), 56, 66, 76-77, 86-87, 98.

<sup>55</sup> For new indictments see Francis Wharton, Precedents of indictments and pleas, 2 vols. (Philadelphia: Kay & Bro, 1881), 1: 219-220; and Samuel Maxwell, A practical treatise on criminal procedure (Chicago: Callaghan, 1887), 487-88. For texts that retained old forms see Alexander Tiffany, A treatise on the criminal law of the state of Michigan (Detroit: Richmond & Backus, 1889), 917; Ossian Cameron, Illinois criminal law and practice (Chicago: E. B. Myers, 1898), 70; Robert Marr, The criminal jurisprudence of Louisiana, 2 vols. (New Orleans: F.F. Hansell & Bro., 1923), 1:223-24. [Likewise here, is the lack of capitalization in these titles and that of the note below yours or original? In original]

<sup>56</sup> Joel Prentiss Bishop, Prosecution and defence: practical directions and forms for the grand-jury room, trial court, and court of appeal in criminal causes (Boston: Little, Brown, 1885), 527.

<sup>57</sup> Robertson, Crimes against Children, 240-41; 244-45 (N=16/66). For the crime against nature statute see Laws of New York 1881 (Albany: New York State, 1881), vol. 3, chap. 676, 74-75. For judicial interpretation of that law, see Lambertson v. The People, 5 Parker's C. R. 200 (1861). For the amendments sponsored by the NYSPCC, see Laws of New York 1886 (Albany: New York State, 1886), chap. 31, 41; and Laws of New York 1892 (Albany: New York State, 1892), chap. 325, 682. [The full citation for each of these Laws of New York is needed.]

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<sup>58</sup> Robertson, Crimes against Children, 57-72.

<sup>59</sup> Even the relative absence of the coerced acts involving adults that appeared among earlier sodomy prosecutions may have reflected broad understandings of sexual violence in this period, which allowed limited scope for such assaults. The relatively greater understanding and physical capacity attributed to adults contributed to jurors and judges employing a definition of rape in the case of women that was even narrower than that provided in the law. Only a physically violent attack where no prior relationship between victim and assailant existed constituted rape, and then only if a woman suffered “observable injuries” that demonstrated that she had resisted to the limit of her capacity. See Robertson, Crimes against Children, 32-35. If this age-inflected understanding of sexual coercion had carried over into sodomy cases, the expectation that men possessed an instinctive ability to resist an assault physically would have foreclosed much of the narrow definition of sexual violence available to women.

<sup>60</sup> Robertson, Crimes against Children, 37-135, 240-41.

<sup>61</sup> *Ibid.*, 139-202, 244-45.

<sup>62</sup> Laws of New York 1950 (Albany: New York State, 1950), chap. 525, 1278-79. For the interpretation of this statute see People v. Doyle, 304 N. Y. 120 (1952); and William Nelson, The Legalist Reformation: Law, Politics and Ideology in New York, 1920-1980 (Chapel Hill: University of North Carolina Press, 2001), 202-5. [Full citations needed for the Laws of New York and for People v. Doyle – People v Doyle is a full legal citation]

<sup>63</sup> William Eskridge is one of the few scholars to note this change, but consensual sodomy is the focus of his discussions (Gaylaw, 84; and Dishonorable Passions, 92, 119-120).

<sup>64</sup> Papers of Governor Dewey, 1950 (Albany: State of New York, 1950), 412.

<sup>65</sup> Robertson, Crimes against Children, 172-73.

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<sup>66</sup> Eskridge, Dishonorable Passions, 109-386.

<sup>67</sup> Block, 12.