

# FAERIES, MARIMACHAS,<sup>†</sup> QUEENS, AND LEZZIES: THE CONSTRUCTION OF HOMOSEXUALITY BEFORE THE 1969 STONEWALL RIOTS

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## INTRODUCTION

The Stonewall Riots erupted on a hot night in June 1969 in New York City, when an unlikely group of revolutionaries, a few Black and Puerto Rican drag queens and butch lesbians, turned a routine bar raid into a street fight with the local police. The latter had just taken a payoff from the unlicensed bar owners and arrested the most obvious looking homosexuals.<sup>1</sup> A motley crew of effeminate queers resisted what would otherwise have been a routine raid on a bar that catered to gay people.<sup>2</sup> The conflict attracted an angry crowd of onlookers and supporters who fought into the night with coins, beer bottles, and sticks, and whose struggle ultimately came to symbolize the overthrow of decades of official harassment, repression, and degradation. A simple street fight on June 27th, 1969, changed history and breathed life into the then dormant and internally conflicted homophile movement.<sup>3</sup>

In recent years, gays and lesbians have staked out their deserved place in the annals of American legal, social, and political history<sup>4</sup> with a

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<sup>†</sup> The term *marimachas* is Mexican slang for lesbians. The gay male counterpart is *maricón* which is a play on the term *Maria*, a typical woman's name throughout Mexico and Latin America. *Macho* is a term that is used to describe hypermasculine behavior. Thus the term *marimacha* suggests "woman with masculine tendencies."

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<sup>1</sup> For a general description of the events, see John d'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* 231-33 (1983) [hereinafter *Sexual Politics*]; Paul Berman, *Democracy and Homosexuality*, *New Republic*, Dec. 20, 1993 at 23-24. See also *infra* part III.A.3. for discussion on the practice of "gayola" (accepting bribes from "gay" bar owners in return for lax enforcement of vice or health and safety laws).

<sup>2</sup> Sheerly out of convenience, I will at times intentionally collapse several terms used to identify the diverse membership of the non-majoritarian sexual population into either "gay," "queer," or "gay people."

<sup>3</sup> See *Sexual Politics*, *supra* note 1, at 233.

<sup>4</sup> See, e.g., *Lesbians, Gay Men and the Law* (William B. Rubinstein ed., 1993)

growing body of social and historical accounts of the Stonewall Riots<sup>5</sup> and of the pre-Stonewall gay world.<sup>6</sup> Typically, these revisionist histories briefly mention the constant threat of raids and harassment that dictated the closeted lifestyle of most gays and lesbians before the riots. References to the police raids, or to the Riots themselves, however, do not often examine the various social forces converging on that moment when a seedy working-class bar in Manhattan's West Village, which openly served homosexuals and outrageously dressed Black and ethnic drag queens, became the focal point of a conflict that instigated a national gay civil rights movement.<sup>7</sup>

This commemorative Article, written in honor of the 25th anniversary of the Stonewall Riots,<sup>8</sup> is driven by my interest in the infiltration of prejudicial attitudes into the daily operation of the legal system. Rather than simply adding to other historical accounts of the Riots, this Article has two major interpretive concerns. The first stems from my interest as a feminist in how culture is shaped by law and how law, in turn, shapes culture, in particular through attitudes about gender.<sup>9</sup> By examining various social elements that constitute the character of the Riots themselves, such as attitudes about sex, race, class, homosexuality, and gender roles or gender identity, I put the Riots in a context for seeing how the legal culture of enforcement,<sup>10</sup> especially that of the fifties and sixties, reflected

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[hereinafter Rubinstein]; *Sexuality and the Law: An Encyclopaedia of Major Legal Cases* (Arthur S. Leonard, ed., 1993) [hereinafter Leonard]; Martin B. Duberman, et al., *Hidden From History: Reclaiming the Gay and Lesbian Past* (1989) [hereinafter *Hidden from History*].

<sup>5</sup> See, e.g., Eric Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights, 1945-1990* 180-202 (1992); *Sexual Politics*, supra note 1, at 231-33. See generally Martin B. Duberman, *Stonewall* (1993) [hereinafter *Stonewall*].

<sup>6</sup> See, e.g., Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth Century America* (1991); Elizabeth Lapovsky Kennedy & Madeline D. Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (1993); Allan Bérubé, *Coming Out Under Fire* (1990); George Chauncey, Jr., *Gay New York* (1994).

<sup>7</sup> See, e.g., *Stonewall*, supra note 5; Marcus, supra note 5. The point here is not to suggest that this is a failure in the existing scholarship. The room for interpretation of landmark events is only now available because of the appearance of historical documentation, written and oral, previously completely absent from mainstream historical literature.

<sup>8</sup> The 25th anniversary of the Stonewall Riots was celebrated on June 26, 1994.

<sup>9</sup> See Elvia Arriola, *Gendered Inequality, Lesbians, Gays and Feminist Legal Theory*, 9 *Berkeley Women's L.J.* 103 (1994). See also Joan Wallach Scott, *Gender and the Politics of History* 2 (1988) (arguing for the use of gender as a category of analysis when "gender" is understood as knowledge of sexual difference in the Foucauldian sense, as the "understanding produced by cultures and societies of human relationships, in this case of those between men and women.").

<sup>10</sup> I mean by "legal culture of enforcement" not only statutory and decisional law

society's contemporaneous gendered value system.<sup>11</sup> An extraordinary aspect of pre-Stonewall gay social and legal history is the devotion of massive resources by the state to the elimination of gay life, an axiomatic but usually unhighlighted fact.<sup>12</sup> My goal here is to show how various strands of social attitudes about sex and gender—moral, medical, popular—shaped the fifties and sixties legal culture of enforcement and supported sometimes violent methods of police harassment, conduct that in turn constructed the image of the homosexual as a threat to the American social order. My emphasis on examining the social significance of the Riots for gay political and legal histories, by surveying society's changing attitudes about sex, gender, and homosexuality up to the night of the Riots, induced me to rely less on standard gay legal history and more, when possible, on unofficial accounts of an individual's contact with the legal culture of enforcement.<sup>13</sup>

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governing homosexuality, but also police enforcement techniques, the allocation of resources, and the "extralegal practices" and values of police, prosecutors, and judges, especially as these reflect the demands of mainstream gender attitudes. See Project: The Consenting Adult Homosexual and the Law: An Empirical Study of the Enforcement and Administration in Los Angeles County, 13 UCLA L. Rev. 643, 652 [hereinafter Project]; see also Roxanna Thayer Sweet, Political and Social Action in Homophile Organizations 180 (1968), reprinted (1975) [hereinafter Sweet]. Sweet points out that:

[t]he law enforcement officer's bases of judgment concerning particular cases are less determined by the letter of the law than by his judgment of popular morality. When there is a conflict between [the two], it is the latter that takes precedence in the police officer's mind. . . . [T]he training of a police officer is such that he learns to respond to signals of danger to the community . . . he accepts those judgments which describe homosexuals as being a danger to society.

Id. at 137–40.

An educational course administered to the St. Louis Police Department in 1949, cited as a model for other cities, demonstrates the degree of exposure fifties-era police had to the specific content of popular moral views: the course opened with a reading of the Biblical chapters 10–20 of Leviticus and proceeded to address current social morality on the subject of homosexuals. Val B. Satterfield, The Education of a Metropolitan Police Department Respecting Sex Molestation, 42 J. Crim. L., Criminology and Police Sci. 403, 403–06 (1951).

<sup>11</sup> See Elvia R. Arriola, I Feel Like A(n) (Un)Natural Woman: Transgenderism and Antidiscrimination Law and Theory, Presentation at Lavender Law IV, Portland, Or. (Oct. 23, 1994) (on file with author).

<sup>12</sup> One community in Los Angeles County in the mid-sixties devoted 50% of its vice crime resources to "operations against homosexuals." See Project, *supra* note 10, at 687 n.12.

<sup>13</sup> See *supra* note 10. See also Rhonda Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L.J. 799 (1979); Patricia Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1581 (1993); Leonard, *supra* note 4.

This Article also grew out of my interest in the re-telling of the story of the Riots. Thus, a second interpretive concern in this Article is a depiction of the Stonewall Riots as a snapshot of the rich diversity in this country of those considered sexual minorities, as, in a moment of apparent anarchy, a colorful mix of individuals of different backgrounds took on the New York City Police Department (NYPD) and its institutionalized lack of respect for the homosexual. As the 25th anniversary of the Riots drew near, I often encountered people who knew little about the Riots or about the outrageousness in dress and behavior of the Black and Puerto Rican drag queens who had been targeted for harassment by the NYPD. To paraphrase one historian of Stonewall, the danger of myth-making exists if one repeatedly leaves out essential details.<sup>14</sup> My own concern about the re-telling of this legendary event was the apparent failure by many gay people to acknowledge how race and class dynamics affected people's lifestyles and potential exposures to harassment in the pre-Stonewall gay world. These dynamics were visibly displayed by the cross-dressing attire and behavior of Black and ethnic drag queens and butch-looking lesbians, the people, not coincidentally, most often targeted in the gay bars for police harassment.<sup>15</sup> Because their sexual identities posed such a contrast to the largely closeted, white and middle-class pre-Stonewall gay world, their neglected perspective in the story of the Riots is a continuing reminder of the need to include race, gender, and class within any concept of a "gay and lesbian community." With these two interpretive concerns, this Article explores how the legal culture's implementation of specific social attitudes about sex, gender, race, and class shaped the technology of enforcement used by the police against homosexuals during the fifties and sixties.

Part I briefly addresses the cultural attitudes about sex and gender that served as an historical foundation for the 1969 Stonewall Riots. After a short background description of the colonial experience with homosexuality and gender identity, I focus on the ways in which pre-20th century culture defined gender roles and addressed expressions of sexuality that did not conform to these roles. I use women's experience with cross-dressing or masquerading to point out the rigidity of the gendered value system, which has conditioned social approval on conformity to rigid notions of masculinity and femininity. Notions of sexual deviance developed by doctors beginning in the late 1800s constructed homosexuality as a disease and as a social vice. I argue that the diagnosis and treatment of homosexuality evidences the cultural support of the sex/gender binary system and the masculine/feminine split.

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<sup>14</sup> See Stonewall, *supra* note 5, at xv.

<sup>15</sup> See *infra* part III.

Part II connects the developed social and medical views of homosexuality by the thirties with the rise of a pre-political consciousness or "gay identity" in the decades preceding the Stonewall Riots. I argue that the appearance of a gay identity in the forties and fifties is inseparable from the effects of two other postwar phenomena—the cultural campaign to reinforce traditional gender roles by encouraging working women to return to their roles as wives and mothers, and the rise of anticommunist hysteria.

Part III leads up to the events at Stonewall with a preamble that reconstructs the gay bar culture of the fifties and sixties by drawing heavily from one of the few comprehensive histories of a lesbian community that addresses the racial and economic dynamics of pre-Stonewall gay life.<sup>16</sup> This is followed by a survey of the technology of police harassment against homosexuals, including descriptions of some methods police officers typically abused in accordance with their personal prejudices. This part also explores the emergence of a pre-political middle-class gay consciousness and the weak efforts of pre-Stonewall gay organizations to halt the common gay bar raid. The ineffectiveness of pre-Stonewall political groups evidences the powerful role the state played in the systematic and intentional harassment of gays and lesbians and in the selective targeting of women and men who most threatened contemporary values regarding sex, race, and gender.

Thus, from the invisibility of gay people in past centuries (e.g., women who passed as men), through the emergence of gays in the cities, which paralleled medical diagnoses of homosexuality by drawing on prevailing gendered attitudes (e.g., making cross-dressing a symptom of sexual diseases), to gays' greater postwar visibility, the stories of how cross-dressing emerged as the symbol of gayness illustrate society's persistent cultural urge to have people conform to rigid notions of masculinity and femininity. By the mid-20th century, cross-dressing had become a target of vice crime enforcement, an overt symbol of gay identity, and a trigger of repressive police behavior aimed at the suppression of gender role nonconformity.

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<sup>16</sup> See Kennedy & Davis, *supra* note 6.

## I. GAYS AND THE GENDERED VALUE SYSTEM IN PRE-STONEWALL HISTORY: THE INVISIBLE AND THE DEVIANT

### A. The State and the Queer Individual in Colonial America

The Stonewall rioters had accumulated feelings of oppression stemming from at least two decades of open harassment of homosexuals by agents of the state.<sup>17</sup> Yet the rioters' frustration had its origin in the older foundation of historical disgust for same-sex eroticism. Of course, a main difference between the contempt for homosexuality in the forties, fifties, and sixties, and the opprobrium in earlier times is that earlier generations did not bother with terms or categories for identifying the kind of individual who offended society by having same-sex lovers. Same-sex eroticism was historically perceived as an isolated experience, rather than as an identifying characteristic of a person. In the colonial experience of homosexuality, for example, "sodomy" was included in the litany of potential moral crimes against the community and the church.<sup>18</sup> If anyone like the "gay person," a person who knew that sexual orientation formed an essential aspect of her/his identity, existed in earlier times, s/he was invisible. As one of America's first openly gay historians, Jonathan Ned Katz, put it, queers have been "the silent minority, the silenced minority—invisible women, invisible men."<sup>19</sup> Along with other historians, Katz has argued that it is possible to imagine gay people as having existed in different cultures and in distant times, and that gays probably existed in the same numbers throughout American history.<sup>20</sup>

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<sup>17</sup> See *infra* part III.

<sup>18</sup> See Jonathan N. Katz, *Gay/Lesbian Almanac: A New Documentary* 44–45 (1983) [hereinafter *Almanac*].

<sup>19</sup> Jonathan N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 1 (1978) [hereinafter *Gay American History*].

<sup>20</sup> The debate among gay and lesbian scholars focuses on whether the pervasiveness of homosexual behavior among varied cultures is sufficient evidence to support the idea of self-conscious "gayness" within those cultures or historical periods. It is one thing to say that there were people who had homosexual orientations. It is quite another to suggest the existence of a sexually-identified social group. Compare John Boswell, *Christianity, Social Tolerance and Homosexuality* 42–46 (1980) with *Sexual Politics*, *supra* note 1; see also John Boswell, *Revolutions, Universals, and Sexual Categories*, 21–26, in Rubinstein, *supra* note 4.

The history that Katz rediscovered in his germinal studies<sup>21</sup> paints a sordid picture of homosexuality as a misunderstood experience, appearing in the mind of the religious fundamentalist as an "abominable" crime against society, nature, and God.<sup>22</sup> In 1625, when Virginia colonists hanged shipmaster Richard Cornish for sodomizing one of his stewards, a witness at the trial decried the homosexual act as an overthrow of both "soul and body."<sup>23</sup> Reverend John Cotton, an early colonial legislator, re-interpreted the English sodomy laws, which had never included lesbianism, in order to apply the death penalty to the carnal relations between two women.<sup>24</sup>

Colonial legal authorities were not always completely inflexible in their attitudes towards same-sex eroticism and departures from expected gender-role behavior. The case of Thomas Hall<sup>25</sup> suggests that colonial judges confronted the difficulties of defining gender. In 1629, the General Court of Virginia heard testimony indicating that one Thomas Hall was rumored to be a man but wore women's clothing. Hall was examined by both men and women of the community and found to be "a perfect man." Suggesting he had female genitalia, he responded, "I have a piece of a hole."<sup>26</sup> Ultimately finding the relation between his gender and his dress murky and ambiguous, the court declared that "hee is a man and a woeman" and sentenced him to go about in men's clothing plus a "coif," a "cross-cloth," and an apron.<sup>27</sup>

Generally, however, neither colonial nor post-colonial Americans dealt comfortably with the subject of same-sex eroticism,<sup>28</sup> a fact confirmed by

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<sup>21</sup> See Almanac, *supra* note 18; Gay American History, *supra* note 19.

<sup>22</sup> See Almanac, *supra* note 18, at 44-45.

<sup>23</sup> Gay American History, *supra* note 19, at 26-30.

<sup>24</sup> *Id.* at 31-32. Lesbian legal theorist Ruthann Robsen argues that this historical commitment to expressions of male sexuality in sodomy statutes and their vague terms (e.g., "crime against nature") makes it impossible to know what aspects of lesbianism are covered by sodomy statutes. This vagueness allows biased judges and lawyers to impose their own interpretations of prohibited activity by resorting to such terms as "deviance" or "unnatural." See Ruthann Robsen, *Lesbian (Out)Law* 47-57 (1992).

<sup>25</sup> *In re Thomas Hall*, Minutes of the Council of the General Court of Virginia (1629), reprinted in Almanac, *supra* note 18, at 71-72.

<sup>26</sup> *Id.* at 72.

<sup>27</sup> *Id.* These are pieces of women's clothing; the ruling in the Hall case provides a curious historical twist on the "three garment rule" that evolved by the 20th century as an aspect of vice crime enforcement against pre-Stonewall gays and lesbians. Under that rule, homosexuals who cross-dressed as either "butches" or "queens" could avoid harassment and prosecution if they demonstrated to the police that they wore three items of clothing appropriate to their gender. See *infra* note 157 and accompanying text.

<sup>28</sup> The term "homosexuality" is distinctly modern and does not neatly fit any historical period, thus my reference to same-sex or same-gender eroticism. Similarly

the survival of the death penalty for sodomy well into the 19th century.<sup>29</sup> Post-colonial American decisionmakers were more inflexible than the *Hall* case towards the confusion of gender identity created by individuals who cross-dressed.

## **B. Surviving in an Unequal World: Nineteenth Century Women and the Masculine Masquerade**

The phenomenon of passing women, women who are known to have dressed and behaved like men,<sup>30</sup> is best understood as a reaction to the rigidity of the gendered value system. In the nineteenth century, cross-dressing as a man allowed women to do what other women, socialized by the middle-class dictates of the separate spheres ideology, could not do.<sup>31</sup> A woman born into the leisured classes was destined to live in a

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the colonial term "sodomy" included everything offensive to a particular world view which abhorred sex outside of the proper bounds of marriage, whether with same-sex individuals, animals, or objects. See John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 1-38 (1988) [hereinafter *Intimate Matters*].

<sup>29</sup> Reformists like Thomas Jefferson had proposed the more "civilized" penalty of castration as early as 1776. See *The Papers of Thomas Jefferson* 325 (Julian P. Boyd, ed.), reprinted in *Gay American History*, supra note 19, at 23. Pennsylvania was the first colony to revoke the death penalty for sodomy in 1786. But other colonies or states did not revoke the death penalty until after the Revolution or the War of 1812. *Id.* at 130-31.

<sup>30</sup> The practice of women passing as men dates at least to Biblical times. Historically, they were severely punished upon discovery. See The San Francisco Lesbian and Gay History Project, "She Even Chewed Tobacco": A Pictorial Narrative of Passing Women in America, in *Hidden from History*, supra note 4, at 183-94. Male masquerading also existed, but the evidence suggests that it was not as pervasive as it was for women. See *Gay American History*, supra note 19, at 317-22.

<sup>31</sup> Historians use the term "separate spheres" to characterize the value system that responded to the rise of industrialism and the transportation revolution. The term "separate spheres" describes the patterns of economic specialization in manufacturing, finance, and industry that transformed America into an industrialized nation and that affected every aspect of traditional social institutions, including the family and gender roles. In the midst of rapid social changes, the traditional gender role expectations of an agrarian economy were irrelevant. In particular, the middle-class housewife changed from an essential producer of household goods into a dependent caretaker of the home and husband. The term "separate spheres" is also associated with the phrase "cult of domesticity" which describes the Victorian value system that cast women as naturally pious, domestic, submissive, and pure, and as weaker and less intelligent than men and thus dependent. In this paradigm of femininity, a good woman was supposed to cater to men's sexual and emotional needs and be responsible for raising the next generation of good moral citizens. The male was cast as physically and intellectually superior to the female but as her inferior in the areas of morality and the control of sexual urges. See Nancy Cott, *The Bonds of Womanhood* (1977); see also Barbara Welter, *The Cult of True Womanhood, 1820-1860*, 18 *Am. Q.* 151 (1966). The separate spheres



golden cage; her entire upbringing was geared towards achieving a good marriage. As a wife, she would depend on a husband who, under the ancient doctrine of coverture, became the owner of her property, her earnings, her children, and her identity.<sup>32</sup> Thus by masquerading as a man, a woman might be freed to work, keep her earnings, own a business, get an education, join the army, vote, and even take a wife. Some women did just that, defying the social values of the day by fighting in the Civil War,<sup>33</sup> attending university concerts,<sup>34</sup> and even becoming effective political organizers who carried a reputation for being "sweet on women."<sup>35</sup>

The historical evidence suggests that some women effectively passed as men for lengthy periods of time, even though the consequences were obvious should the charaders be exposed. The phenomenon of passing women<sup>36</sup> illustrates two important concepts relevant to the history of the Stonewall Riots: first, in North American culture, gender has usually been viewed as binary and unambiguous; second, the two "genders," male and female, are absolute and non-negotiable.<sup>37</sup>

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ideology did not describe the social and economic reality of non-white and/or working-class women. See generally Paula Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* 41-44 (1984); Christine Stansell, *City of Women: Sex and Class in New York 1789-1860* (1987).

<sup>32</sup> The Married Women's Property Act of 1848 grew out of the early feminist struggle in this country over the "civil death" experienced by women upon marriage. The intent of these state laws was to empower married women to keep property they owned before marriage, to keep earnings and gifts, and to be responsible only for those debts they had agreed by contract to share. See Mary Becker et al., *Feminist Jurisprudence* 7-8 (1993).

<sup>33</sup> See *Gay American History*, supra note 19, at 212-14 (describing the case of Deborah Sampson who, disguised as a man, enlisted in the Continental Army as "Robert Shurtlieff"); *The Personal Memoirs of Union Army General Philip H. Sheridan*, reprinted in *Gay American History*, supra note 19, at 227-28 (account of female transvestite Civil War soldiers).

<sup>34</sup> See "Scandal" at Cornell University, reprinted in *Gay American History*, supra note 19, at 230-31 (in 1879, a woman dressed up in a man's suit to attend a concert with another woman).

<sup>35</sup> *Murray Hall Fooled Many Shrewd Men*, *N.Y. Times*, Jan. 19, 1901, reprinted in *Gay American History*, supra note 19, at 235.

<sup>36</sup> It appears that the range of potential motivations (money, love, freedom, fun) continued in 20th century examples of the opposite sex charade. See *A Gay Deceiver of the Feminine Gender*, *Cal. Police Gazette*, Apr. 27, 1967, at 3 (courtesy of Lesbian Herstory Archives Education Foundation, Brooklyn, N.Y. [hereinafter *Lesbian Archives*]) ("Miss Mary Walker, a fast young lady of Richmond, Va., took it into her head . . . to don male attire, and be engaged as a barman. Somehow the breeches seem to have put bad notions into her head, for she went making love to the pretty girls who came after the family beer.").

<sup>37</sup> The exception in North American history is the experience of the aboriginal

### C. The Medical Profession from 1880-1930 as a Clearinghouse of Information about Homosexuality

Gay bar raids in the fifties and sixties were orchestrated as clean sweeps of crime and filth. Proper society, doctors, and the legal system labeled the kind of people who patronized a "dive"<sup>38</sup> like the Stonewall Inn as socially queer, "perverts,"<sup>39</sup> and "homosexual offenders."<sup>40</sup> By the time of the Stonewall Riots, law and medicine were joined in a tight alliance; judges and police departments could turn to massive sources of official and unofficial medical-legal rhetoric about the nature and status of the homosexual offender. This alliance between law and medicine originated in two phenomena of the last century—Victorian gender attitudes and the movement to professionalize the medical sciences in late nineteenth century Europe and America.<sup>41</sup>

Beginning around the 1880s, doctors in Europe and America began to serve as clearinghouses of information on matters of marriage, sex, and intimacy.<sup>42</sup> They also began to record their observations and treatment of men and women who struggled with the experience of same-sex attraction in a society that only approved of heterosexual relationships.<sup>43</sup> For example, in 1884, a Dr. James G. Kiernan treated a twenty-two-year-old woman he diagnosed as having an asymmetrically-shaped cranium and a neurotic ancestry. These facts formed part of his assessment that his patient had an untreatable condition of sexual interest in other women. The best he could recommend was the asylum. Dr. Kiernan cautioned society not

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Native-Americans known as the "berdache." The berdache received social sanction among such tribes as the Mojave, Sioux, and Navajo to assume the gender role opposite to that which they were originally assigned. See Suzanne J. Kessler & Wendy McKenna, *Gender: An Ethnomethodological Approach* 24-29 (1978).

<sup>38</sup> Patrons of the Stonewall used this term to describe such bars which often operated without licenses, were small and stuffy, served watered down drinks, and depended on either organized crime for survival or on a payoff system to the police. See Marcus, *supra* note 5, at 199-200.

<sup>39</sup> See, e.g., *Nickola v. Munro*, 328 P.2d 271, 273 (Cal. Ct. App. 1958) ("the tavern had a general reputation in the county as a place where homosexuals were gathering for dancing and entertainment, and as a place catering to sexual perverts.").

<sup>40</sup> See, e.g., Paul H. Gebhard, *Sex Offenders* (1965).

<sup>41</sup> See Michel Foucault, *Discipline and Punish: The Birth of the Prison* 184-94 (1975).

<sup>42</sup> See, e.g., George H. Napheys, *The Physical Life of Woman: Advice to the Maiden, Wife and Mother* (1890) (courtesy Lesbian Archives, *supra* note 36). See also Jeanne Achterberg, *Woman as Healer* 140 (1990).

<sup>43</sup> See generally Michel Foucault, *The History of Sexuality* (1980) (studying the social construction of the homosexual as a separate identity in the consciousness of Western civilized societies).

to waste sympathy on such men and women, who, he said, would only use that concern to avoid seeking a cure for their perverted ideas.<sup>44</sup>

The emergence of a specialized science about homosexuality was crucial to later constructions of both social and internal concepts of homosexuality. Between the 1880s and the 1930s, medical reports began to categorize people as sexual perverts or "homosexuals" and to compare them to presumptively healthy "heterosexuals."<sup>45</sup> Homosexuals were associated with low mental ability and perversion and were prescribed castration, imprisonment, and psychiatric treatment.<sup>46</sup> Drawing from the value system of a society which accorded them the privileged status of experts, sexologists and researchers in the infant field of psychiatry used contemporary Victorian codes of sexual morality to judge a condition they associated with mental illness and/or social vice.<sup>47</sup>

Questions of gender identity and behavior formed a critical aspect of the medical assessments of homosexuality during the late nineteenth century. In earlier eras, reports of masquerading had simply taken a community by surprise.<sup>48</sup> In this era, cross-dressing surfaced as a specific medical anomaly and a symptom of the disease of homosexuality. For example, in 1914, Dr. Bernard S. Talmey wrote about "transvestism" as an abnormal desire of a male to dress like a woman and vice-versa.<sup>49</sup> Many of his patients appeared "normal" in all respects in that they married, ran businesses, had children, and joined literary societies. Yet they seemed capable of evincing their attraction for people of their own sex only with an intense desire to cross-dress or be like the other sex.<sup>50</sup> Victorian gender-role expectations had relaxed to the extent that more and more women went to college, ran businesses, and sought the right to vote.<sup>51</sup> However, in matters of sexual intimacy, neither a woman nor a man was free to explore same-sex eroticism. The medical wisdom of the day indicated that same-sex attraction bore the signs of lunacy and/or

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<sup>44</sup> See James G. Kiernan, *Sexual Perversion*, *Detroit Lancet* 1884, reprinted in *Gay American History*, *supra* note 19, at 134-35.

<sup>45</sup> See *Almanac*, *supra* note 18, at 143.

<sup>46</sup> See Kiernan, *supra* note 44, at 208-37; see also *Almanac*, *supra* note 18, at 153-55.

<sup>47</sup> See, e.g., George Shradly, *Conditions Once Considered Criminal Are Really Pathological* (1884), reprinted in *Almanac*, *supra* note 18, at 197 (arguing that homosexuality would lead to insanity and suicide).

<sup>48</sup> See *supra* notes 33-35 and accompanying text.

<sup>49</sup> See Bernard S. Talmey, *Transvestism* (1914), reprinted in *Almanac*, *supra* note 18, at 344-48.

<sup>50</sup> *Id.*

<sup>51</sup> See generally Eleanor Flexner, *Century of Struggle: The Woman's Rights Movement in the United States* 302-03 (1959).

abnormalcy.<sup>52</sup> Doctors warned that a person's rejection of treatment for such a condition threatened the foundations of social order.<sup>53</sup>

In the pressing milieu of contemporaneous social purity campaigns against such social evils in the cities as liquor, crime, and sexual vices,<sup>54</sup> early twentieth century doctors pinned down a new category of mental illness. The symptoms were deviance from the expected range of feelings, behaviors, and attitudes of the typical heterosexual man or woman. Older moral views of sodomy<sup>55</sup> as a sinful crime meshed easily with emergent views of homosexuality as, at best, a form of insanity. Furthermore, questions of gender identity frankly constituted a critical element of the medical diagnosis of same-sex attraction. Afflicted individuals purportedly "fell in love" with people of their own sex, sought the identity of the opposite sex, or worse, openly took on the dress, emotions, and behaviors of the opposite sex.<sup>56</sup>

In 1921, a Boston court arraigned twenty-nine-year-old Ethel Kimball on charges of falsifying an application for a marriage license and for pretending to be a man.<sup>57</sup> She had courted her intended "bride" for two years and even fooled the girl's parents. The court ordered a medical diagnosis by a foreign expert who declared that Kimball was "sane but

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<sup>52</sup> See Gay American History, *supra* note 19, at 576.

<sup>53</sup> Few sexologists viewed positively the conditions of what was then being labeled "homosexuality" or "similisexuality." Defenses of homosexuality were rare. In 1908, one solo defender documented, in a massive social science treatise, the emerging subculture of homosexuality, arguing that homosexuality was no more than an inborn instinct capable of being lived out in various ways. Edward Prime Stevenson recorded social networks among male homosexuals in certain atmospheres for the "initiated," such as universities, "smart clubs," restaurants, and steambaths. Stevenson's report further noted the existence of marriages of convenience (with accepting wives) and of extensive gay social networks in "homosexual capitals" like Boston, New York, St. Louis, Milwaukee, and numerous other American cities. Edward Stevenson, *The Intersexes* (1908), reprinted in *Almanac*, *supra* note 18 at 326-32; see also Chauncey, Jr., *supra* note 6, at 276-78.

<sup>54</sup> Ruth Rosen, *The Lost Sisterhood: Prostitution in America 1900-1918*, at 14-15 (1982).

<sup>55</sup> See *supra* notes 19-27 and accompanying text.

<sup>56</sup> Thus the condition of "masked homosexuality" purportedly displayed itself as women falling in love with effeminate men or men being drawn to women with marked masculine traits (e.g. bicycle riding). Wilhelm Stekel & S.A. Tannenbaum: *Masked Homosexuality* (1914), reprinted in *Almanac*, *supra* note 18, at 352-53. Masked homosexuality was also presumed the trait of "androphobics" (men-haters), most often "old maids." Kiernan, *Androphobia* (1916), reprinted in *Almanac*, *supra* note 18, at 366.

<sup>57</sup> Ethel Kimball/John Hathaway, *N.Y. Times*, Dec. 16, 1921, at 5:3, reprinted in *Almanac*, *supra* note 18, at 404.

abnormal."<sup>58</sup> In defense of the masquerade, Kimball stated that she had dressed like a man in order to approach life from a male perspective, particularly in the area of employment. She also claimed that her fiancée knew all along she was really a woman.<sup>59</sup>

In the generations that followed, the legal system continued to rely on medical expertise to determine the sanity of people who acted like Kimball. Like earlier passing women, Kimball's masquerade afforded her freedom from her socially assigned identity. Thus she defied a society that insisted she marry and depend on a man<sup>60</sup> and that especially disapproved of same-sex eroticism.

By the forties, doctors invoked the paradigm of criminality to judge homosexual behavior even more harshly. For example, in 1941, a writer for the *Journal of Criminal Psychopathology* urged newspapers to give up the practice of minimizing the details of prosecutions for sodomy or lewd conduct out of respect for the victim's reputation. The author urged that one should not be indifferent to these "crimes against nature" as one might be to a "simple assault or robbery."<sup>61</sup> Consequently, the author felt that the community needed more detailed reports about homosexual offenses.<sup>62</sup>

## D. Law and the Trouble with Sex: 1900–1940

The seeds of the vice crime legislation and attitudes that inspired the police conduct at the Stonewall Riots were also sown in the nation's history of Social Progressivism. Long before law enforcement officials in the fifties and sixties enforced their understanding of the mental illness model of homosexuality, the medical profession played a significant role in driving the resources of the state toward the persecution of homosexuals as offenders of society's sexual moral codes. While sexual morality issues had escaped close scrutiny in the 19th century,<sup>63</sup> by the dawn of the 20th

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<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> See supra notes 31–36 and accompanying text.

<sup>61</sup> F.A. McHenry, *Homosexuality, Crime and the Newspapers*, 2 J. Crim. Psychopathology 533, 533–548 (1941), reprinted in *Almanac*, supra note 18, at 569.

<sup>62</sup> Id.

<sup>63</sup> Historians of sexuality have described most of the 19th century, a period of rapid changes brought about by urbanization of former agrarian communities, as a period of expanded male sexual freedom. This characterization suggests that post-colonial Americans were too busy with becoming urban citizens to regulate, as in earlier times, all aspects of a community's social and sexual behavior. The expanded male sexual freedom is attested to by the virtual absence, in places like New York, of prosecutions for consensual sodomy. For example, between 1796 and 1873, there were

century a new middle-class social order radically shifted its attention towards strict governance of sexual morality.<sup>64</sup> For example, prostitution, once deemed a "necessary evil" in the value system of the separate spheres,<sup>65</sup> now became one of the primary social evils targeted by social reformers.<sup>66</sup> Vice commissions were set up in many cities. Members worked with public and private bodies to study the impact of industrialization on urban social conditions. An increasingly impersonal and anonymous urban life appeared to contrast negatively with earlier agrarian lifestyles in which the watchful eye of the family and the community had enforced society's codes of sexual morality.<sup>67</sup>

The Progressives' social purity crusades and the growing medical discourse on sexual degeneracy complemented each other.<sup>68</sup> The middle-class reformer could rally around the unlivable aspects of city life, which ran the gamut from tenement housing and underpaid women and child workers<sup>69</sup> to women victimized by prostitution, white slavery, and the licentious sexual behavior of men.<sup>70</sup> Evoking an image of municipal housekeeping, social reformers and medical experts used the rhetoric of social purity to track down prostitutes in need of institutionalization in reformatories,<sup>71</sup> and perverts who could now be identified by their gendered behavior, attitudes, and dress.<sup>72</sup>

Consistent with these visionary quests, social reformers expected politicians and courts to do their part to uphold idealized Victorian

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fewer than two dozen prosecutions under the New York sodomy law. The historical evidence also suggests that beneath the rhetoric of Victorianism there lay an intense culture of sensual pleasure and of expanded opportunities for same-sex romanticism and intimacy, many of which included male-male relationships. See Rosen, *supra* note 54, at xii; see also *Intimate Matters*, *supra* note 28, at 121-24.

<sup>64</sup> *Gay American History*, *supra* note 19, at 136.

<sup>65</sup> Rosen, *supra* note 54, at 14-15; see also *supra* notes 30-31 and accompanying text.

<sup>66</sup> *Id.* at 39-40.

<sup>67</sup> See *id.* at 3, 38-46.

<sup>68</sup> The language of these purity movements was that of Victorian social morality, committed to curbing vice and enforcing sexual norms. See William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 *Yale J.L. & Human.* 265, 268-70 (1993).

<sup>69</sup> Cases illustrating the impulse for Progressive social reform in the legal system are *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating on substantive due process grounds states' right to regulate working hours); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding on paternalistic grounds the right of a state to improve conditions of employment for women).

<sup>70</sup> See Rosen, *supra* note 54, at 114.

<sup>71</sup> See *id.* at 21, 26-27.

<sup>72</sup> See *supra* notes 53-54 and accompanying text.

standards of social decency. Judges displayed their own discomfort with the subject matter of sex as they enforced laws directed at sexual deviancy, such as prostitution and sodomy statutes.<sup>73</sup> In the area of prostitution, for example, gender biases and sexually repressive attitudes surfaced in cases where judges viewed a boy's problem with sexual deviancy as a short-term threat that would be straightened out with parental control or probation. Meanwhile a young girl's single sexual transgression, which landed her in a reformatory, was deemed a true offense to how both the courts and society defined proper ladylike sexual conduct.<sup>74</sup> Quite often, adolescent female defendants from racial and ethnic minorities were chastised and lectured by judges as "fallen women" who had "sinned" against society.<sup>75</sup>

Repressive cultural attitudes about sex were similarly displayed in the law pertaining to homosexuality. In prosecutions for sodomy, judges felt the need to enforce strict codes of sexual morality and social decency. For example, in 1897, the Supreme Court of Illinois urged that "sentiments of decent humanity" amply justified the phrase "crimes against nature," and that the court's records "need not be defiled with the details of different acts which may go to constitute it."<sup>76</sup> In a 1910 prosecution under a sodomy statute, a South Dakota judge opened an opinion with an apology for actually discussing the matter of abnormal sex. He wrote that he regretted "soil[ing] the pages of our reports with a discussion of a subject so loathsome and disgusting as the one confronting us."<sup>77</sup>

Throughout the twenties and the thirties, judges' opinions in sex crime trials were afflicted with a vagueness bred by the enormous discomfort of having to address the subject matter of sex. As William Nelson has argued, by using the law to create social underclasses of individuals and to enforce the moral code of the day, judges simply reflected contemporary sexual attitudes.<sup>78</sup> Thus a 1923 court wrote that "it can hardly be necessary for us to say that the subject of this opinion has been distasteful. . . . An adequate consideration of it seemed to require a somewhat full discussion, and we have endeavored to meet this requirement without unnecessary

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<sup>73</sup> See Rosen, *supra* note 54, at 19-20.

<sup>74</sup> See *id.*

<sup>75</sup> See *id.* While laws against sexual misconduct applied to both women and men in colonial America, historians note that by the 19th century there was a stricter code of sexual morality for women; this stricter code accounted for the higher representation of women in this category of criminals. See Estelle B. Freedman, *Their Sisters' Keepers: Women's Prison Reform in America, 1830-1930* 13-14 (1981).

<sup>76</sup> *Honselman v. People*, 48 N.E. 304, 305 (Ill. 1897).

<sup>77</sup> *State v. Whitmarsh*, 128 N.W. 580, 581 (S.D. 1910).

<sup>78</sup> See Nelson, *supra* note 68, at 265-68.

indelicate expression . . . ."<sup>79</sup> These judicial attitudes about sex were shared by most of society and announced that desires for same-sex intimacy should be abhorred, feared, and repressed at all costs.

As the nation moved into the twenties and thirties, increasing social discourse on Freudianism combined with the legacy of the Progressive Era began to affect popular attitudes toward the increasing presence of homosexuality in the cities.<sup>80</sup> Professor George Chauncey's pathbreaking history, *Gay New York*, documents the widespread and visible existence of metropolitan gay subcultures since the turn of the century and the appearance of specific gay identities such as the "faerie" and the "queer."<sup>81</sup> Gays' visibility could not be denied, yet conflicting attitudes towards their acceptance by society at large appeared in popular culture. Some theatre and book reviewers, for example, criticized an author's or playwright's use of what were called "intermediate type" (homosexual) characters, while others saw their appearance as a sign of the times.<sup>82</sup> In 1929, successful efforts to prevent the banning of Radclyffe Hall's germinal novel on lesbianism, *The Well of Loneliness*, constituted a small victory.<sup>83</sup> In the 1930s, the Catholic Church developed a long list of indecent and proscribed literature with homosexual themes.<sup>84</sup> The motion picture industry matched this action by prohibiting the depiction of homosexuality.<sup>85</sup>

By the time the nation entered the forties and prepared for World War II, the collective forces of medicine, religion, social reform, law, and popular culture had forged a cultural mindset of negative attitudes about homosexuality. Social values included the notion that men and women are entirely different from each other yet ultimately destined for sexual

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<sup>79</sup> *Wise v. Commonwealth*, 115 S.E. 508, 511 (Va. 1923).

<sup>80</sup> See Chauncey, Jr., *supra* note 6, at 237 (arguing that the presence of gay and lesbian social networks was firmly established in New York City's Greenwich Village by the early 1920s).

<sup>81</sup> See *id.*

<sup>82</sup> See, e.g., Edward Carpenter, *My Days and Dreams* (1916), reprinted in *Almanac*, *supra* note 18, at 367-68; Dr. Constance Long, *A Sign of the Times for Those Who Can Read Portents*, reprinted in *Almanac*, *supra* note 18, at 385; see also Elvia R. Arriola, *Coming Out and Coming to Terms with Sexual Identity*, (book review) 68 *Tul. L. Rev.* 283 (1993).

<sup>83</sup> See *Sexual Politics*, *supra* note 1, at 19.

<sup>84</sup> See *id.* at 19-20.

<sup>85</sup> Vito Russo, *The Celluloid Closet* 30-31 (1981). Although popular demands for the guarantee of better films had surfaced as early as 1919, through the organized efforts of the women's club movement, the first public signs of a movement to purify the movie screens emerged in 1933 at a convention of the Catholic Charities in New York City. See Ruth A. Inglis, *Freedom of the Movies* 64, 120-21 (1964).



attraction and intimacy only with each other. Other sexual options remained non-negotiable in a paradigm which constructed heterosexuality as normal and homosexuality as either criminal, immoral, or sick.<sup>86</sup> At the forefront in creating this paradigm were doctors who, in seeking the status of professionals, found a rich source of expertise in the diagnosis and treatment for homosexuality.<sup>87</sup> In the forties, the doctor interested in sexology could even resort to a handy glossary of homosexual slang for use in detecting the problem of homosexuality among his patients. The breadth of Dr. Handy's dictionary, part of a study on sex variants, suggested not only that the homosexual subculture was growing, but also that its increased size, diversity, and visibility necessitated more detailed scrutiny by social institutions.<sup>88</sup>

## **II. POSTWAR GAYS AND LESBIANS AND THE DAWNING OF MINORITY CONSCIOUSNESS: 1940–1960**

### **A. Gays and the War, or "Do You Like Girls?"**

As an act of rebellion against the presumed wrongfulness and criminality of gay sexual love, the Stonewall Riots furthered the social construction of the gay identity. For decades before the Riots, a sense of group homosexual identity had been slowly developing.<sup>89</sup> However, at the beginning of World War II, the individual discovering a homosexual orientation in himself or herself inherited the earlier generation's silence about sex and homosexuality.

Social constructions of homosexuality underwent a great transformation in the 1940s culture of war preparation. Homosexual behavior, previously seen as a symptom of mental illness, became the identifying characteristic of a deviant personality. Not surprisingly, rigid gender attitudes found their way into the issue of military service by homosexuals. Allan Bérubé has noted that a few influential psychiatrists, who subscribed to the widely held belief that homosexuality was a mental disorder, assisted the Draft Board in screening draftees.<sup>90</sup> While induction officers looked for prior arrests,

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<sup>86</sup> See Russo, *supra* note 85, at 16.

<sup>87</sup> See generally Foucault, *supra* note 41.

<sup>88</sup> See Gershon Legman, *The Language of Homosexuality*, in George Henry, *Sex Variants: A Study of Homosexual Patterns* 1149 (1941), reprinted in *Almanac*, *supra* note 18, at 571.

<sup>89</sup> See generally Chauncey, Jr., *supra* note 6 (documenting gay culture in the fifty years between 1890 and World War II).

<sup>90</sup> See Bérubé, *supra* note 6, at 14–15.

military doctors tested a draftee's knowledge of homosexual slang and scanned his body for signs of effeminacy that would classify him as "4-F." In addition to being checked for obvious disqualifying traits, such as a slight build, a high voice, or a limp wrist, male inductees were asked how they felt about girls.<sup>91</sup> But in the rush to qualify as many soldiers as possible, the military failed to detect many gays and lesbians who did not conform to the gendered stereotypes of homosexuality.<sup>92</sup> Meanwhile, less patriotic draftees tried to avoid service by answering "yes" to the questions aimed at excluding homosexuals.<sup>93</sup> Consequently, military medical personnel turned to medical experts for advice on how to distinguish the authentic sexual deviant from the soldier who simply aped homosexuality in hopes of being discharged and sent home.<sup>94</sup>

The fixation on gendered stereotypes as the key to identifying the homosexual person made it impossible for the military to rid itself of all homosexuals during the war years. Individuals who escaped detection, like navyman Paul Hardman, recall a tremendous amount of sexual activity during wartime, including some activity that was treated as if it "never happened."<sup>95</sup> Sergeant Johnnie Phelps, who served directly under General Eisenhower, believes that ninety-five percent of the 900 women in the Women's Auxiliary Army Corps battalion were lesbians.<sup>96</sup> Meanwhile, the slightest transgression of traditional gender behaviors resulted in a quick, efficient discharge. One man, who was questioned after he patted a sailor on the shoulder and told him he was good looking, was given a Blue Section 8 discharge after admitting that he was a homosexual.<sup>97</sup> The Section 8 discharge, which indicated insanity, was part of the military's program to keep out people whose habits and traits were deemed unsuitable for military service, including homosexuals.<sup>98</sup>

Despite the harshness of military policies, the sex-segregated environments of war made it possible for gay individuals to meet others like

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<sup>91</sup> See *id.* at 24–25.

<sup>92</sup> See *id.* at 23 (of 18 million men screened during the war, only 4,000–5,000 were rejected because of homosexuality).

<sup>93</sup> See *id.* at 20.

<sup>94</sup> See A. C. Cornsweet & M. F. Hayes, *Conditioned Response to Fellatio*, 103 *Am. J. Psychiatry* 76 (1946); excerpted in *Almanac*, *supra* note 18, at 608.

<sup>95</sup> Mary Ann Humphrey, *My Country My Right to Serve: Experiences of Gay Men and Women in the Military, World War II to the Present 19–28* (1988); see also Bérubé, *supra* note 6, at 102–05 (describing gay dating practices during the war).

<sup>96</sup> See Humphrey, *supra* note 95, at 40.

<sup>97</sup> See *id.* at 33 (blue indicated that the discharge was neither honorable or dishonorable).

<sup>98</sup> See *id.* at 34.

themselves. John d'Emilio argues that the increased gay social contacts and homosexual experiences of those who served in the military played a significant role in the postwar renewal of the cities' gay subculture.<sup>99</sup> Postwar urban gays in the cities created a sense of community through socializing in the relaxed environments of bars and private clubs.<sup>100</sup> However, they also faced danger, for the old "crimes against nature" laws were still in force when they returned from the war.

## **B. Homosexuality and Anticommunist Fervor: The Gendered Politics of Postwar America**

In the forties and fifties, amidst the social and political conservatism fed by the rising fear of the Soviet Union, an intense drive to repress all signs of the thriving gay subcultures emerged.<sup>101</sup> One usually thinks of the fifties as a time of threats to the civil liberties of writers, actors, labor leaders, and government employees whose loyalty was questioned by self-appointed crusaders.<sup>102</sup> Much of the political history written to date ignores the role that anticommunist politics played in creating the systematic oppression of homosexuals which eventually sparked the riots at the Stonewall Inn.<sup>103</sup>

### *1. Gender and the Homosexual Menace*

During the McCarthyist fifties, the decade of the "homosexual menace,"<sup>104</sup> anticommunist politics converged with the fear of betrayal by sex perverts, whose stereotyped weak-willed nature was linked to the fear of Russian spies.<sup>105</sup> As historian Elaine Tyler May has argued, postwar anticommunist politics and social attitudes were driven by the fear that an outsider ideology threatened the fundamental principles of Americanism. United States containment policies of communism abroad, therefore, also entailed the containment of anything and everything that threatened American home life, viewed by many as the cornerstone of American

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<sup>99</sup> See *Sexual Politics*, supra note 1, at 31-32.

<sup>100</sup> See *id.* at 32-33.

<sup>101</sup> See Chauncey, Jr., supra note 6, at 360 (number of men in New York arrested for homosexual activity rose sharply during postwar years).

<sup>102</sup> See generally Stanley Kutler, *The American Inquisition* (1982).

<sup>103</sup> But see *Sexual Politics*, supra note 1, at 40-43 (describing the Cold War as a "sustained attack" on gays and lesbians).

<sup>104</sup> *Id.* at 43.

<sup>105</sup> See *Sexual Politics*, supra note 1, at 41-42.

strength and character.<sup>106</sup> The "Red" was anyone who supported radical changes in family, work, or gender roles. The war had upset traditional gender roles when middle-class wives became working women; it was now time to return America to its prewar state of normalcy, which included reconstructing "the family" in terms of procreative heterosexual values.<sup>107</sup>

Communism appeared to threaten the non-equalitarian, traditional nuclear family, where the husband was deemed superior in matters of wages, sex, and domestic control. Demobilization brought with it a firm commitment, by both government and industry, to reestablishing prewar patterns in the relationship between the sexes.<sup>108</sup> Employers were encouraged to purge women from the thousands of men's jobs they had taken during the war.<sup>109</sup> Government and industry jointly engaged in widespread propaganda campaigns aimed at getting women to return to their traditional roles as financially dependent wives and mothers.<sup>110</sup> Many women willingly returned home, but those who enjoyed working found it harder and harder to keep a job. Others were able to stay with an employer only if they accepted a lower-paying menial job.<sup>111</sup>

Not surprisingly, the homosexual was marked as a grave threat to the resurging strength of the American way of life.<sup>112</sup> A national hysteria erupted when members of the House Un-American Activities Committee (HUAC) discovered, by chance, that several federal employees had been dismissed because of their homosexuality.<sup>113</sup> The shocking information that homosexuals had been on the federal payroll triggered a highly publicized national campaign to search out men and women in government jobs whose polluted lifestyle forced them to hide their true identities. The fear of disclosure purportedly made gays easily susceptible to extortion and blackmail, and thus presumptively disqualified them for work involving national security.<sup>114</sup> From the equation of homosexuality with

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<sup>106</sup> See generally Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (1988).

<sup>107</sup> See Ruth Milkman, *Gender at Work: The Dynamics of Job Segregation by Sex During World War II* 99-127 (1987).

<sup>108</sup> See *id.*

<sup>109</sup> See *id.* at 101, 113.

<sup>110</sup> See *id.* at 99.

<sup>111</sup> See *id.* at 108.

<sup>112</sup> An irony of blaming gays for threatening the American way of life is that, arguably, the expansion of capitalism actually created the social conditions which allowed people to explore same-sex eroticism. See generally John d'Emilio, *Capitalism and Gay Identity*, in Rubenstein, *supra* note 4, at 26.

<sup>113</sup> See *id.* at 30.

<sup>114</sup> See *Sexual Politics*, *supra* note 1, at 40-44.

communism, there emerged the specter of a communist takeover by homosexuals who "by the very nature of their vice . . . belong[ed] to a sinister, mysterious and efficient International."<sup>115</sup>

## 2. *Postwar Social Awareness of the Gay Identity (or the "Sex Pervert")*

Using rhetoric that cast traditional heterosexual values as the source of American strength, conservative demagogues like Joseph McCarthy fed the nation's panic with charges against homosexuals. McCarthy claimed that gays threatened national security by infiltrating the halls of government.<sup>116</sup> The homosexual scapegoat was shown as vulnerable to blackmail.<sup>117</sup> Any threat to society's traditional gender role expectations, such as that posed by men and women who were "immature, unstable and emotionally enfeebled by the gratification of their perverted desires," had to be eliminated.<sup>118</sup> McCarthyism's homosexual panic thus carried the taint of a gendered politics. In promoting a certain brand of Americanism, conservative politicians strove to preserve their image of normalcy, epitomized by the traditional white, middle-class, and heterosexual family.

The link between communism and homosexuality had been strengthened, albeit unwittingly, by the 1948 publication of Alfred Kinsey's neutral and bland treatise, *Sexual Behavior in the Human Male*,<sup>119</sup> which was followed in 1953 by a similar study of female sexuality.<sup>120</sup> To

<sup>115</sup> R.G. Waldeck, *Homosexual International*, Human Events, Sept. 29, 1960, reprinted in Martin Duberman, *About Time: Exploring the Gay Past 199* (1986) [hereinafter *About Time*].

<sup>116</sup> See Roger S. Mitchell, *The Homosexual and the Law* 56 (1969). The reasoning behind this persecution was that homosexuals were emotionally unstable perverts who had weak moral fiber. See *Employment of Homosexuals and Other Sex Perverts in Government*, Sen. Doc. No. 241, 81st Cong., 2nd Sess. (1950), reprinted in *About Time*, supra note 115, at 152, 154.

<sup>117</sup> See *Sexual Politics*, supra note 1, at 42-43.

<sup>118</sup> *Id.* at 43.

<sup>119</sup> See Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* (1948). This study challenged widely held beliefs concerning male sexuality. Kinsey concluded that "37 percent of American men had at least one post adolescent homosexual experience leading to orgasm, 4 percent were exclusively homosexual throughout adulthood"; thus, homosexuality was much more widespread than anyone had ever imagined. *Sexual Politics*, supra note 1, at 35.

<sup>120</sup> See Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* (1953). This study concluded that the incidents of female homosexuality, though fewer than those of male homosexuality, were nonetheless extensive. Twenty-eight percent of women responded erotically to other women, while 13 percent had experienced orgasm with another woman. See *Sexual Politics*, supra note 1, at 35.

postwar Americans, the most shocking information that surfaced from Kinsey's work was that homosexuality was not an isolated phenomenon.<sup>121</sup> Such data aided the construction of homosexuality as a threat to the American social order. The idea that gays existed in great numbers shocked a society in which many people still lowered their voices when discussing sexual topics, particularly homosexuality. Any suggestion that homosexuality might be common undermined dominant American values.

An irony of the homosexual panic is that the fifties were actually a period of conflicting social attitudes towards sex. People were beginning to talk more openly about sex in general, but gay sex remained a taboo or kinky subject. The earlier generation's Victorianism was giving way to a culture in which themes about sex were boldly portrayed in plays, including *A Streetcar Named Desire* by gay playwright Tennessee Williams.<sup>122</sup> Nevertheless, the paradigm of normal sexual behavior continued to be the procreative heterosexual lifestyle. The dominant images of fifties culture memorialized the idealized heterosexual family in the television sitcoms of the period, such as *Leave it to Beaver*, *Ozzie and Harriet*, and *Father Knows Best*. On the whole, these shows depicted normalcy as stable, heterosexual, nuclear all-American families living in clean and orderly suburban homes.<sup>123</sup> Against the background of these powerful idealized images, the fifties culture perceived the homosexual as a social and sexual deviant who deserved neither the status of federal employee nor the privileges of basic American citizenship.

By the fifties, society had radically reconstructed its perception of homosexuality. Homosexuality went from being an aberrant social behavior to being a characteristic of a social identity known as the "sex pervert," who lurked in one's workplace or neighborhood.<sup>124</sup> In turn, the

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<sup>121</sup> See David Halberstam, *The Fifties* 277 (1993).

<sup>122</sup> See *id.* at 254-56 (discussing *Streetcar's* struggles with censorship).

<sup>123</sup> See *id.* at 508-14 (summarizing fifties television shows).

<sup>124</sup> For example, in 1955, Boise, Idaho was swept into a maelstrom of panic and suspicion over rumors of a large homosexual underground in the city. In an editorial entitled "Crush the Monster," *The Idaho Daily Statesman* declared that:

[d]isclosure that the evils of moral perversion prevail in Boise on an extensive scale must come as a distinct and intensely disagreeable shock to most Boiseans. It seems almost incredible that any such cancerous growth could have taken roots and developed in our midst.

It's bad enough when three Boise men . . . are reported to have confessed to violations involving 10 teenage boys; but when . . . the court announces that . . . an investigation . . . has only scratched the "surface," the situation is one that causes general alarm and calls for immediate systematic cauterization.

construction of the homosexual as scapegoat gave birth to gay self-awareness, the seed of gay minority consciousness, as the very people targeted for persecution sought each other out for support and comfort.<sup>125</sup> John d'Emilio, who has dated the emergence of a gay minority consciousness to postwar America, argues that social contacts in bars, clubs, and house parties encouraged the rise of pre-political social networks.<sup>126</sup> In their landmark study of a working-class lesbian community in Buffalo, New York, historians Elizabeth Kennedy and Madeline Davis have noted the stability of lesbian bars that emerged right after the war.<sup>127</sup> They also argue that the gay bar culture and gay house parties created social networks critical to the emergence of a gay political consciousness.<sup>128</sup>

A gay minority or political consciousness could not emerge until homosexuals were aware that they were the objects of fear and prejudice and that they could only reveal the details of their private lives at great risk to their social and economic security. The cultural hysteria bred by anticommunist politics accomplished this task. Gay men and lesbians, surrounded by the rhetoric of the "homosexual menace," needed to identify with others who were also feeling the weight of the campaign to eliminate their very existence.

### C. Sexual Vigilantism in the Halls of Justice

The resounding antihomosexual rhetoric that issued from the halls of Congress was heeded by state and local guardians of law and morality who instituted their own campaigns for antihomosexual vigilantism. For example, *Stoumen v. Reilly*,<sup>129</sup> decided in 1950, the first year of the homosexual panic, illustrates the attitude some lower court judges had

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Reprinted in John DeGrassi, *The Boys of Boise: Furor, Vice, and Folly in an American City* 3 (1966).

<sup>125</sup> A sign of the impact persecution had on the formation of the gay identity appears in the organizational goals of Eann MacDonald's Bachelors Anonymous, a group devoted to the interests of the "androgynous minority": "encroaching American Fascism . . . seeks to bend unorganized and unpopular minorities into isolated fragments . . . government indictment of Androgynous Civil Servants . . . [legally establishes] GUILT BY ASSOCIATION." Eann MacDonald, *Preliminary Concepts* (1950), reprinted in *Gay American History*, *supra* note 19, at 409. Eann MacDonald was the pseudonym of Henry Hay, one of the founders of the Mattachine Society. See *id.* at 406-07.

<sup>126</sup> See *Sexual Politics*, *supra* note 1, at 31-32.

<sup>127</sup> See Kennedy & Davis, *supra* note 6, at 4.

<sup>128</sup> See *id.* at 3; see also *infra* part III.

<sup>129</sup> *Stoumen v. Reilly*, 222 P.2d 678 (Cal. App. 1950).

towards bar owners who let their establishments become homosexual meeting places. The issue in the case before Judge McWilliams was whether Sol Stoumen, the owner of the Black Cat Restaurant, had violated the California Alcohol Beverage and Control Act (ABC) by letting his premises become a "disorderly house" under the terms of the statute.<sup>130</sup> Stoumen's attorney argued that persons with homosexual tendencies should be able to congregate in restaurants and bars.<sup>131</sup> Judge McWilliams saw the matter differently: he suspended the restaurant's liquor license and stated that "for a proprietor of a restaurant knowingly to permit his premises to be regularly used as a meeting place by [homosexuals] . . . with all of the potentialities for *evil and immorality* drawing out of such meetings . . . justifies action."<sup>132</sup> Without any clear language in the law aimed at the congregation of sex perverts in an ordinary bar, the State's case against Stoumen was thin.

Although petitioner Stoumen prevailed on appeal, the California Supreme Court's decision, one of the first to distinguish between homosexual status and homosexual conduct,<sup>133</sup> virtually invited the legislature to amend the law (the ABC) to reach the immoral conduct of "sex perverts." The California legislature responded in 1955 and made it possible for the state to shut down gay bars throughout the fifties and sixties.<sup>134</sup> *Kershaw v. Department of Alcoholic Beverage Control*<sup>135</sup> illustrates the social and jurisprudential developments after *Stoumen*. There, a California appellate court ruled that, under the new ABC Section 58, a bar might be shut down upon proof that same-sex patrons danced, touched, hugged, and kissed. The new law forbade a bar from catering to drug dealers, panderers, or sexual perverts.<sup>136</sup> Justices Peters and Bray also took pains, as they interpreted the meaning of "perversion," to express,

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<sup>130</sup> Id. at 682.

<sup>131</sup> Id.

<sup>132</sup> Id. (emphasis added).

<sup>133</sup> The California Supreme Court, which reversed the lower appellate decision, stated in the relevant provision of the Alcoholic Beverage and Control Act that "mere proof of patronage, without proof of the commission of illegal or immoral acts on the premises, or resort thereto for such purposes, is not sufficient to show a violation of Section 58." *Stoumen v. Reilly*, 234 P.2d 969, 971.

<sup>134</sup> The law was amended in 1955 to require the Board of Equalization to suspend a liquor license when "the premises of the licensee are a resort for prostitutes, pimps, panderers, or sexual perverts." See Leonard, *supra* note 4, at 193. Most courts interpreted *Stoumen* to mean that the law prohibited immoral conduct; thus, immoral conduct constituted a ground for suspending the license.

<sup>135</sup> 318 P.2d 494 (Cal. Ct. App. 1957).

<sup>136</sup> Id. at 497.



as bluntly as their discomfort allowed, their view of homosexuality according to contemporary values:

Seeking and obtaining sexual satisfaction with a person of the same sex is considered an aberrant method by the great majority of people. The methods of copulation available to two persons of the same sex would certainly be so regarded. No more precise definition is necessary for the purposes of this case.<sup>137</sup>

Underlying the legal system's view of the homosexual bar culture was a distinct desire that private citizens, such as the owners of bars and restaurants, also enforce the social and moral codes of proper gender behavior. A homosexual was a sexual pervert. In sentiment and behavior, and sometimes also in dress, he or she defied the majority's value system and, therefore, threatened the stability of social order. The danger was so clear that the state had an absolute right and duty to prevent homosexual behavior from taking place both in private and in public. Although there was no victim to complain, offending society's morality was enough to make displays of gay affection criminal.

### **III. MISERY LOVES COMPANY: THE RISE OF HOMOSEXUAL IDENTITIES IN THE FACE OF SELF-RIGHTEOUS PERSECUTION BY THE STATE**

By the end of the fifties and through the sixties, society knew and talked about homosexuality openly but in distinctly derogatory terms. Supported by the public view of homosexuality as a form of antisocial behavior, the legal culture of enforcement took the task upon itself to maintain the norms of social decency. In some cases the individual prejudices of police officers and prosecutors determined whether a person's conduct was acceptable under socially prescribed gender roles. The legal culture's main targets for persecution were the people who patronized bars that openly catered to a homosexual clientele.

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<sup>137</sup> Id.

## A. The Role of the State in the Enforcement of Moral Values

### 1. *Gay Bar Culture as a Means of Survival*

One of the more ironic details of the history of gay bar raids in the fifties and sixties is that many, if not most, of these establishments had a mixed gay/straight patronage. As pioneer historians Elizabeth Kennedy and Madeline Davis found in their study of Buffalo's lesbian community, in the fifties there were no strict "lesbian" versus "gay male" or straight versus homosexual bars.<sup>138</sup> A 1966 empirical study of the vice squad practices in fifteen city police departments in Los Angeles County similarly determined that, frequently, the bars targeted for surveillance for sex crimes had a mixed patronage.<sup>139</sup> Yet the frequent police patrolling and raids did not prevent gay bars from becoming an important aspect of the prepolitical structure of many metropolitan homosexual communities. For example, for Buffalo's pre-Stonewall lesbian community, Kennedy and Davis concluded, after interviewing forty-five older lesbians over a fifteen-year period, that many lesbians viewed the bars as a second home.<sup>140</sup> Lesbian youth particularly benefitted from the social contacts made in the bars, for many had already been rejected by their families and high school peers because of their sexual orientation. The bars were more than a place to drink or socialize with a date or lover. They were sources of important friendships and connections, a means of creating a meaningful life despite society's open hostility to the lesbian sexual identity.<sup>141</sup>

A characteristic feature of the working-class bar culture in the fifties and sixties was the extensive use of butch-femme roles.<sup>142</sup> The gay male counterpart was the image of the queen or "camp."<sup>143</sup> As Kennedy and Davis have theorized, each of the identities and specific behaviors identified with butch-femme roles was a unique way of mocking society's rigid sex/gender value system. Most lesbians understood the social significance of going out in public as a butch or of dressing as a femme and being in the company of a butch. For the lesbian butch, the masculinized dress of pants

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<sup>138</sup> Kennedy & Davis, *supra* note 6, at 72-74.

<sup>139</sup> See Project, *supra* note 10, at 721 n.213.

<sup>140</sup> See Kennedy & Davis, *supra* note 6, at 38, 52.

<sup>141</sup> See *id.* at 44-49.

<sup>142</sup> See *id.* at 151-90.

<sup>143</sup> See *id.* at 383.

and men's shirts, and the shortened genderless nickname, communicated a "to not deny who I am" attitude to the rest of society. The butch was likely to be openly harassed as a "homo" or "queer." The femme received less ridicule when alone, but, in the bars and in a butch's company, she would also be harassed and ridiculed.<sup>144</sup>

Kennedy and Davis's study noted a little discussed but clear difference between the identity of the gay male queen and that of the lesbian butch. Queens developed the phenomenon of "camp," a theatrical, incongruous, and humorous behavior which lets people know that one is a man who is acting like a woman. The identity of the queen and his (her) camping is generally associated with the building of gay male consciousness and, through his (her) shocking behavior, increased societal awareness of homosexuals.<sup>145</sup> The butch lesbian, however, never developed camp; humor was never an element of her persona. Rather, the butch's effectiveness was based, within the lesbian community, on a usurpation of society's male prerogatives, including pursuing female love and serving as the protector of women's space.<sup>146</sup> Thus, the butch role, especially in the pre-Stonewall years, carried a heavy burden—that of women's struggle for the right to function independently of men in the public world, especially in the dangerous environment of the bar.<sup>147</sup>

These unique interpretations of the dominant and rigid sex/gender value system, and the persistent way in which lesbian and gay working-class individuals adopted butch, femme, and camp roles despite the systematic harassment they provoked are essential to an understanding of the working-class lesbian or gay bar culture. At the cost of ridicule, abuse, and sometimes illegal violence, such persistence communicated a willingness to be themselves, to carve out safe space, and to defy society's rejection of their need for love.

## *2. Don We Now Our Gay Apparel: Police Harassment in Gay Bars in the Fifties and Sixties*

Pre-Stonewall gay bars differed from each other in their sociological make-up. Using the Buffalo lesbian experience as a prototype,<sup>148</sup> it appears that the bars reflected the race and class tensions of society at large. Middle-class bars were mostly populated by closeted white professionals,

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<sup>144</sup> See id. at 169–70.

<sup>145</sup> See id. at 383.

<sup>146</sup> See id.

<sup>147</sup> See id. at 185–86.

<sup>148</sup> See id. at 113–50.

people who were generally uncomfortable with the openness of the working-class crowds. Because the middle-class bar might serve the more closeted upwardly mobile homosexual patron, an owner might be more strict about the dress and conduct of the bar's patronage. Working-class bars could be either mostly black or white. Fifties American culture was more openly racist and discouraging of integration than contemporary culture; thus, black lesbians tended to stay close to their own communities in their search for welcoming bars and clubs. House parties in the black neighborhoods also provided a place for black lesbians and gays to socialize.<sup>149</sup> The working-class white bars were also likely to serve as points of experimentation for racial desegregation of public accommodations.<sup>150</sup> However, it was the largely working-class and racially integrated bar, such as the Stonewall Inn, which catered to men and women who adopted camp or butch-femme roles, that was most likely to be the subject of systematic harassment.

Kennedy and Davis observed, from their study of the Buffalo lesbian community, that by the 1950s there were lesbian butches who were not just adopting masculinized dress and behavior on their weekend social outings but were making it a larger part of their identity.<sup>151</sup> By defying society's gender role expectations, the masculinized dress and behavior of the butch or the feminized dress of the gay male drag queen could draw extreme negative attention not only from a vice officer, but also from the broader reaches of an underground gay social network, especially from the closeted middle-class. Middle-class homophile organizations like the Mattachine Society had specific policies against blatant effeminacy by men or butchness by women.<sup>152</sup>

Homosexual men and women had continuous contact with each other primarily in the gay bar culture. But the gay bar culture also brought gays, lesbians, and others who defied society's gendered norms (in dress or behavior) into continuous contact with the law. In the social context of antigay prejudice, to hint at the fact that one had departed from traditional gender role expectations only invoked suspicion and oppression. To socialize at an underground bar meant risking the pain of a handcuff or the possibility of an undercover vice cop's hand at one's collar. Men and women, caught without warning in the middle of a raid, suddenly found

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<sup>149</sup> See *id.* at 123-31.

<sup>150</sup> See *id.* at 113-23.

<sup>151</sup> See *id.* at 68.

<sup>152</sup> See *infra* part III.A.1; see also *The Purposes of the Daughters of Bilitis, The Ladder* (May 1957) (courtesy of Lesbian Archives, *supra* note 36) (asserting Daughters of Bilitis' intentions for "the integration of the homosexual into society by . . . advocating a mode of behaviour and dress acceptable to society").

themselves tossed into a paddy wagon and hauled off to jail. In working class bars, the seeds of the 1969 revolution were sown by the systematic violence of vice officers doing their job to raid the gay bars so as to clear the city of "moral filth."

The selective prosecution of cross-dressers and homosexuals illustrates not only the state's blatant disregard for gays' civil rights, but also its intention to maintain a rigid and gendered social order. The personal testimony of a lesbian named "Peg B." in a Greenwich Village bar in 1964 shows how an experience as the victim of a gay bar raid became an unforgettable memory of pain, shock, and humiliation:

We had barely ordered a couple of beers and had a dance to the jukebox, when suddenly a large man appeared in the doorway and yelled, "This is a raid." Everyone froze; then, like a bunch of sheep, we all trooped downstairs and into the waiting paddy wagons, about 43 of us. . . . In the paddy wagon, a woman panicked and ate her driver's license. . . . After what seemed like hours, we were taken, two at a time, into a small room and searched by police women. We had to pull down our underwear and bend over. It was very humiliating.<sup>153</sup>

A fictionalized autobiographical account of the selective harassment of female cross-dressers caught in a bar raid is provided by author Leslie Feinberg, who identifies herself as a butch who came out as a lesbian during the late fifties:<sup>154</sup>

None of us saw the red light flashing.

The music died and everyone groaned. Then the police flooded into the club. I held my hand up to shield my eyes from the spotlight, but I still couldn't see what was happening. I heard shouting and tables and chairs overturning. I remembered there

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<sup>153</sup> Peg B., Description of a Raid on a Lesbian Bar Called Maryangelas on 7th Avenue South in Greenwich Village, NYC (courtesy of Lesbian Archives, *supra* note 36).

<sup>154</sup> Some readers may question the usefulness of fictional literature to illustrate a historical point. First, many of these incidents of sexualized violence are difficult to document and constitute painful memories, which the victims often feel are better left unrecorded. Second, where such evidence exists, it is scarce; the singular written account by "Peg B.," *supra* note 153, emerged from a scouring of over one dozen fully packed archival folders at the Lesbian Herstory Archives over a three-week period. Third, the work of novelists who positively portray lesbian characters can be a rich source of insights into the plight of lesbians whose lives intersect with the legal system. The fictionalized accounts of lesbians often are a concerted effort by the author to undermine the unfavorable stereotypes of lesbians and to tell her own story through the veiled protection of a fictional character. See Anne B. Goldstein, *Representing Lesbians*, 1 *Texas J. of Women and the L.* 301 (1992).

was only one door—there was no escape this time. At sixteen years old I was still underage.

I slowly took off my new blue suit coat, folded it neatly, and put it on the piano at the back of the stage. For a moment I considered taking off my tie, thinking somehow it might go easier for me if I did. But of course, it wouldn't have. In fact, the tie made me feel stronger in order to face whatever lay ahead of me. I rolled up my sleeves and stepped off the stage. A cop grabbed me and cuffed my hands tightly behind my back. Another cop was smacking Booker, who was sobbing.<sup>155</sup>

Police harassment in and out of the gay bar raids was gendered, misogynist, and racist.<sup>156</sup> The gendered aspect of the enforcement was displayed by the concerted effort to penalize the "obvious" queers, the individuals who cross-dressed. A common harassment technique involved enforcing the rule that an individual had to wear at least three pieces of clothing appropriate to his or her gender.<sup>157</sup> The rule seems humorous now,<sup>158</sup> but in the pre-Stonewall years gay and lesbian bar patrons adhered to these rules in the hopes of fending off not just ridicule by vice officers, but often grossly violent treatment from these guardians of society's gendered value system. Feinberg writes:

I looked over at Ed. The cop was patting her down and running his hands up her thighs. He pulled her wallet out of her pocket, took out the money, and stuffed it in his own pocket.

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<sup>155</sup> Leslie Feinberg, *Stone Butch Blues* 61 (1993).

<sup>156</sup> Feinberg's character "Booker" is a black lesbian who forms a friendship with the white lesbian butch "Jess."

<sup>157</sup> The source of the three-garment rule remains unclear. There are recorded cases of prosecutions against individuals for violating the masquerading laws. See, e.g., *People v. Archibald*, 260 N.E. 2d 871 (N.Y. 1970) (man dressed as a woman and standing on subway platform); *People v. Gillespi*, 202 N.E. 2d 565 (N.Y. 1964) (man dressed as a woman). Oral historical accounts confirm that in New York the police harassed drag queens and butch lesbians by invoking Section 887(7) of the Code of Criminal Procedure which forbade wearing a disguise except in cases of masquerade parties or by special permission. The statute was not enforced on Halloween night. See *Stonewall*, *supra* note 5, at 299 n.39. Personal experiences with the three garment rule are also recorded in *Faderman*, *supra* note 6, at 185, and Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* 141 (1992). See also *The When and Now of It Nab 43 Women, Girl in Bar Raid*, *Impact* (Nov. 1980 New Orleans) (courtesy Lesbian Archives, *supra* note 36) at 13.

<sup>158</sup> In one East Coast city on New Year's Eve, police patrolled lesbian bars for violators of gendered norms, arresting women wearing "fly-front pants." An observer of this phenomenon viewed this pattern of police behavior as arbitrary enforcement based on regional attitudes about looking "straight." For example, on the West Coast, women had long been accustomed to wearing "man-tailored" or fly-front pants. See *Sweet*, *supra* note 10, at 180.

"Eyes straight ahead," the cop behind me had his mouth close to my ear.

The other cop began shouting at Ed. "You think you're a guy, huh? You think you can take it like a guy? We'll see. What's these?" he said. He yanked up her shirt and pulled her binder down around her waist. He grabbed her breasts so hard she gasped.<sup>159</sup>

. . . .

"C'mon Jesse," a cop taunted me, "let's have a pretty smile for the camera. You're such a pretty girl. Isn't she pretty, guys?" They snapped my mug shot. One of the cops loosened my tie. As he ripped open my new dress shirt, the sky blue buttons bounced and rolled across the floor. He pulled up my T-shirt, exposing my breasts. My hands were cuffed behind my back. I was flat up against a wall. . . . My knees were wobbling. *Lt. Mulroney*, that's what his badge read. He saw me looking at it and slapped me hard across the face. His hand clamped on my face like a vise. "Suck my cock," he said quietly.<sup>160</sup>

### 3. Vice Squads, Homosexuals, and the Technology of Enforcement

Throughout the fifties and sixties, the police departments of virtually every major city of the United States served as the state's agents for the systematic enforcement of moral values by regulating public and private homosexual conduct.<sup>161</sup> Gays and lesbians of that period usually view the history of police regulation of parks,<sup>162</sup> bathhouses, parked cars, restaurants, bars, and home parties frequented by homosexuals as a tale of intentional harassment. Social change came about in the late sixties only

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<sup>159</sup> Feinberg, *supra* note 155, at 56.

<sup>160</sup> *Id.* at 62.

<sup>161</sup> The entrapment technique of sending undercover police officers into bars to identify illegal behavior was criticized in the *San Francisco Examiner* as unnecessary and as a waste of resources—many people felt that the police would be better used in the transit system where attacks on riders were increasing. Cited in *Special Cops for Gay Bars*, 7 *The Mattachine Review*, Nov. 1961, at 4–8.

<sup>162</sup> See, e.g., *Calling Shots*, 6 *Mattachine Review*, Oct. 1960, at 22 (reporting the arrest of nine men, one a priest and another a college official, in a raid on Waukesha, Wisconsin's Frame Park). See also *Atlanta Police Launch Drive in Parks, Use Cameras*, 3 *The Advoc.*, Aug. 1969, at 12.

after the gay and lesbian communities of certain cities began to manifest long overdue political resistance.

Many details of the abuses done in the name of the enforcement of such vice crimes as loitering, vagrancy, lewd conduct, solicitation, sodomy, oral copulation, and molestation never appeared in official records. This documentary gap has several explanations, the first being the obvious cultural taboo that prevailed during these decades about discussing homosexuality. Thus, although an occasional newspaper might have printed a sensational headline about a massive raid on a gay bar,<sup>163</sup> the regular course of police regulation, which in some cities constituted weekly visits to selected locales by vice officers, was not written up. Second, homosexual conduct constituted a victimless crime. Without a complaining victim, the sex offender's crime was only against society's dominant values; a vice cop had the discretionary authority either to charge an individual or to issue a warning. As the Supreme Court of the United States would rationalize a generation later in *Bowers v. Hardwick*,<sup>164</sup> the state invoked an historical right and duty to regulate homosexuality based on the reflection of Judaeo-Christian values in "moral" legislation.<sup>165</sup> Third, the same cultural taboo and prejudice that could be triggered by one's alleged involvement with homosexuality discouraged harassed victims of vice law enforcement from filing civil rights complaints for fear of exposure and the consequent damage to one's career or community and family relations. Fourth, a complaint of abuse at the hands of the state was a futile gesture, given the prevailing view that homosexuality constituted a mental illness or immoral crime.<sup>166</sup>

Despite this paucity of technical data about ways in which the police departments of cities regulated and harassed homosexuals at beaches, bathhouses, parks, parked cars, and even private parties, social historians have recovered some of the details of the impact of basic law enforcement techniques used by the police to regulate consensual homosexual conduct. The gay and lesbian oral history provided by pre-Stonewall "old-timers" is consistent with the few studies of law enforcement techniques being used in the sixties against homosexual women and men.<sup>167</sup> One 1966 study,

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<sup>163</sup> For example, the New Orleans *States* ran a headline on September 12, 1953 reading "43 Women, Girl in Bar Raid" and described the arrest of 43 women and a juvenile girl in a downtown bar that apparently had signs stating "no men allowed." See *The When and the Now of It*, *supra* note 157.

<sup>164</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>165</sup> In that value system, the argument goes, the law secularizes the belief that homosexuality is unnatural and immoral, and its practice justifies both social and moral opprobrium. *Id.* at 196-97 (Burger, C.J. concurring).

<sup>166</sup> Seymour Pollack, *The Sex Offender and the Law*, 446 (1972).

<sup>167</sup> Project, *supra* note 10. Steven A. Rosen, *Police Harassment of Homosexual*



for example, comparing the police practices of the City of Los Angeles with the police practices of other major cities, found that one Los Angeles community devoted as much as fifty percent of its vice enforcement resources to the regulation of homosexual cruising and socializing locales.<sup>168</sup> Also, the consensual aspect of most crimes related to homosexuality required that police officers be trained in the use of surreptitious techniques in order to apprehend offenders. Standard operating techniques included plainclothes police decoys and clandestine operations, routine police patrol, warnings, and raids which purported to enforce fire codes.<sup>169</sup>

The study further found that police vice officers typically resorted to the standard operating technique of the decoy to enforce antihomosexual vice laws. The decoy practice is the best example of the exercise of discretionary authority by a vice officer. In a typical situation, the decoy would set up the context through conversation, observation, gestures, or by simply waiting in a public restroom for the suspected homosexual to engage in some responsive touching or solicitation. Once the suspect had uttered an invitation or performed a hint of a gesture, the decoy would encourage the performance of the suggested act in a different location, such as a parked car, at which point the decoy's partner would apprehend the homosexual. According to the authors, because the consensual nature of the alleged crime typically called for whispering or close touching, enforcement with the decoy technique was very difficult. Nevertheless, it served as the standard practice of the Los Angeles Police Department throughout the fifties and sixties.<sup>170</sup> The discretionary aspects of the enforcement technique led the authors to question both the decoy practice itself and the courts' reliance on evidence provided by a decoy officer.<sup>171</sup> Various practices suggested the potential for abuse or the interjection of a police officer's personal prejudices into the enforcement of vice laws. For example, decoys were known to engage in entrapment techniques such as "swishing" of the hips or affecting other effeminate behavior.<sup>172</sup> Three

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Women and Men in New York City 1960-1980, 12 Colum. Hum. Rts. L. Rev. 159 (1981) [hereinafter *Police Harassment*].

<sup>168</sup> Project, *supra* note 10, at 687 n.12 (other cities allocated resources specifically toward regulating homosexual socializing, but a comparatively small amount).

<sup>169</sup> See *id.* at 719-20 (in a fire code "raid," the police would make people file out of the bar, supposedly so they could be counted to see if the bar exceeded its legal capacity).

<sup>170</sup> *Id.* at 691 n.30.

<sup>171</sup> *Id.* at 695-96.

<sup>172</sup> *Id.* at 692 n.37.

police departments followed the practice of permitting the targeted homosexual to touch the decoy's genitals before effecting an arrest.<sup>173</sup>

Routine patrol and harassment constituted the most standard aspects of the regulation of homosexual conduct during the fifties and sixties in public places. The UCLA project, after interviewing at least fifteen different city agencies, defined official harassment as active police conduct intended either to eliminate public congregations of homosexuals when there was no sign of illegal activity or to discourage patronage of establishments via arrests for trivial offenses.<sup>174</sup> Harassment constituted those practices intended not to arrest but to drive homosexuals out of a town or an establishment. Typical techniques included a plainclothes officer checking identifications of patrons every half hour, running a check on their history of traffic violations, or charging an individual with jaywalking.<sup>175</sup> An outrageous 1956 magazine article aimed at the heterosexual middle-class male titled, *How the King Cole Bar at the St. Regis got "De-Fagged"* exemplifies the existence of unofficial harassment. The author invoked the full range of contemporaneous terms that referred to gay men derogatorily—"pests, pansies, queers, fairies and fawning fags" as he recounted how a hotel hired a private investigator to sit in the bar and, over the course of a few days, take photos and fingerprints off of drink glasses, a scheme that effectuated a quick and permanent dispersal of the patrons.<sup>176</sup>

Bars were targeted for health and safety code violations such as exceeding maximum patronage numbers. The UCLA Project documented that, in the sixties, regulation or shutdown of a bar that catered to homosexuals was possible under either one of two California state laws: the Red Light Abatement Act,<sup>177</sup> which enjoined as a nuisance any building used for lewdness or prostitution, and the Department of Alcoholic Beverages Control,<sup>178</sup> which allowed the revocation of licenses for "disorderly" premises.<sup>179</sup> The practice may have been technically legal, but as a part of homosexual vice crime enforcement, the laws were

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<sup>173</sup> Id. at 696.

<sup>174</sup> Id. at 718.

<sup>175</sup> Id. at 719-20.

<sup>176</sup> Stonewall, *supra* note 5, at 191-93.

<sup>177</sup> Cal. Pen. Code § 11225 (West 1969).

<sup>178</sup> See Project, *supra* note 10, at 727 n.234 (the Department of Alcoholic Beverages Control acted under Cal. Const. art. XX, §22); see also *supra* notes 129-137 and accompanying text.

<sup>179</sup> Project, *supra* note 10, at 726-27; see also Kennedy & Davis, *supra* note 6, at 41 (in the 1940s in Buffalo, the mere presence of homosexuals in a bar was interpreted by the New York State Liquor Authority as disorderly conduct).

selectively enforced in locales where there was suspected homosexual patronage.

The dry studies of enforcement techniques never capture the blatant and arbitrary discrimination that frequently accompanied a vice officer's exercise of his discretionary authority.<sup>180</sup> The police officer who could simply observe illegal behavior without a decoy did not need to exercise his discretion. In contrast, one contemporaneous study revealed that police officers who had no observable conduct to sanction typically went ahead with harassment techniques based only on their personal interpretation of the moral values of the day.<sup>181</sup>

As previously discussed in connection with the *Stoumen* case,<sup>182</sup> the attempted shutdown of a gay bar could encourage judicial concern that displays of homosexual affection offended society's basic gendered values.<sup>183</sup> In some cases, however, regulation of bars arose from the state's effort to enforce federal tax laws. For example, Mafia-run bars were the targets of raids not only because they catered to gays but also because the owners of these establishments did not pay federal liquor taxes.<sup>184</sup> Homosexual patrons were both burdened and benefitted by this nefarious arrangement. On the one hand, the bar connected to organized crime might be the only establishment in a community willing to serve gays. On the other, the Mafia connection encouraged the owners to charge their patrons high prices for drinks and food.<sup>185</sup> The practice of "gayola," or the passing of money between a bartender and a police officer, further illustrates the web of hypocrisy surrounding the pre-Stonewall homosexual bar patron. Gays' membership in a social underclass exposed them to prosecution for vice laws, while the enforcers themselves engaged in illegalities with a sense of impunity that grew out of the low social status accorded to homosexuals.<sup>186</sup>

## **B. Viewing Pre-Stonewall Homosexual Politics Through the Lenses of Gender, Race, and Class**

Generally viewed as the high mark of resistance in gay history, the Stonewall Riots have been seen as a moment of anarchy, when the members

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<sup>180</sup> See *supra* text accompanying note 163.

<sup>181</sup> See Sweet, *supra* note 10, at 137-40.

<sup>182</sup> See *supra* part II.C.

<sup>183</sup> See *supra* note 137 and accompanying text.

<sup>184</sup> See Police Harassment, *supra* note 167, at 174-75.

<sup>185</sup> See *id.* at 172.

<sup>186</sup> See Sweet, *supra* note 10, at 145.

of an openly despised social underclass fought back and questioned the state's power to systematically abuse their civil rights. Doubtless, as an act of defiance and direct confrontation with the state, the story of the Riots is one of the most important stories in gay history. But some gay historians have noted the problems of mythmaking generated by ahistorical retellings of the story of the Riots.<sup>187</sup> The Riots can be too easily blended into the birth of the gay civil rights movement, a perspective that often fails to separate instigators from later mass organizers. A more accurate perspective asks: who was actually there?

The perspectives of gender, race, and class are equally critical to the retelling of the story of the Stonewall Riots. With sensitivity to those elements of the story, historians can tell a story of the Riots that evokes today's concerns about sensitivity to the diversity of the gay and lesbian, or transgendered, community.<sup>188</sup> One should look back on the Riots with an eye to the fact that the typical raided bar was probably working-class and somewhat racially integrated, with patrons who publicized their sexual identity through butch and femme role playing. A perspective sensitive to issues of gender attitudes, as well as race and class, would also recognize the state's violent harassment of the butch-looking lesbian who appropriated male prerogatives and of men in drag who undermined the tenets of male supremacy by dressing in female garb. Such perspectives encourage examination of the critical role that police contact played in the formation of pre-Stonewall sexual identity and in the infiltration of prejudice into the legal system. The social conditions for prejudice existed in cultural attitudes—social, medical, and moral—while the instruments for expressing those prejudices existed in the vaguely worded laws which allowed law enforcers to define vice crime according to the values of a heterosexist culture.<sup>189</sup>

The meaning of the Riots for gay history, and for the largely white middle-class values that define the gay movement of today, is changed by the perspectives of gender, race, and class. Indeed, the Riots cannot be attributed to the homophile politics that flourished in the sixties.<sup>190</sup> For

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<sup>187</sup> See, e.g., *Stonewall*, *supra* note 5, at xv–xvi.

<sup>188</sup> See Steven Seidman, *Identity and Politics in a "Postmodern" Gay Culture: Some Historical and Conceptual Notes*, reprinted in *Fear of a Queer Planet: Queer Politics and Social Theory* 105 (Michael Warner ed., 1993) (discussing the diversity of the contemporary gay community).

<sup>189</sup> A 1968 sociological study of the homosexual culture noted that "the police may be one of the few heterosexual elements with which [homosexuals] come into contact as homosexuals. . . . [T]he reaction of police officers to homosexuality is doubly an important factor in the development of self-definitions for individual homosexuals who are questioned and/or arrested." *Stonewall*, *supra* note 5, at 161.

<sup>190</sup> See generally *Sexual Politics*, *supra* note 1, at 231.

the organizations that grew out of the McCarthyist-fueled homosexual panic, the Mattachine Society and Daughters of Bilitis (D.O.B.), were largely governed by a politics of respectability and of accommodation to society's fear of homosexuality.<sup>191</sup>

### 1. *In the Closet: The Middle Class Politics of Respectability*

Pre-Stonewall literate middle-class organizations like the Mattachine Society and D.O.B. offered some homosexual men and women an abstract, yet real, sense of community. Mattachine was formed in 1950, at the height of the McCarthyist terrorism that began with the House Committee on Un-American Activities' questioning of the loyalty of homosexuals working for the federal government.<sup>192</sup> Some Mattachine members, including Henry Hay, one of its founders, were members of the Communist Party in Los Angeles; their radical politics led them to see themselves as an oppressed cultural minority.<sup>193</sup> Unlike the politically motivated Mattachine, D.O.B., founded in San Francisco by Del Martin and Phyllis Lyon, started as a way for lesbians to socialize outside the gay bar scene.<sup>194</sup> Over time, Mattachine and D.O.B. worked closely with each other during the repressive 1950s.<sup>195</sup> Through meetings in people's homes and discreet mailings of newsletters, Mattachine and D.O.B. members learned that other gay people existed.<sup>196</sup> For individuals living in small towns, knowing that gay communities existed probably brought a sigh of relief.<sup>197</sup>

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<sup>191</sup> See *id.* at 125. Two studies performed in the sixties provide exhaustive and careful treatment of pre-Stonewall homophile groups. See Edward Sagarin, *Structure and Ideology in an Association of Deviants* (1965); Sweet, *supra* note 10.

<sup>192</sup> See *supra* part II.B.1.

<sup>193</sup> See *Sexual Politics*, *supra* note 1, at 63-74 (describing the founding of Mattachine); see also Marcus, *supra* note 5, at 26-36 (biography of Chuck Rowland, Mattachine founder); *supra* notes 104-118 and accompanying text.

<sup>194</sup> See *Sexual Politics*, *supra* note 1, at 101-02.

<sup>195</sup> See *id.* at 103-04; Marcus, *supra* note 5, at 70-80.

<sup>196</sup> Many people isolated from other homosexuals and from the gay community were brought into the national network through the publications *ONE* and *The Mattachine Review*. See Wayne R. Dynes, *Encyclopedia of Homosexuality* 782 (1990). Subscribers to *The Ladder*, the newsletter of the Daughters of Bilitis, wrote, "Our neighborhood is not at all oriented to gay life, nor is there any gay socializing nearby, most of our friends are straight . . . . [The newsletter] is our only link to a chain too far away to get to." A Letter to D.O.B. (1969) (from D.O.B. Archives, courtesy of Lesbian Archives, *supra* note 36).

<sup>197</sup> See, e.g., A Letter to D.O.B., *supra* note 196.

Publications like D.O.B.'s *The Ladder* and Mattachine's *ONE* tried to keep up with relevant legal and social developments, in particular the latest sex research on the subject of homosexuality.<sup>198</sup> By the sixties, it was clear that psychiatry, in particular, displayed a tight alliance with the legal system, serving as a resource of expertise in treating the sexual sociopath or "sex offender."<sup>199</sup> The alignment between law, psychiatry, and psychology carried a double-edged sword. On the one hand, the medical model of deviance affirmed the belief that homosexuality was a form of mental and emotional pathology. On the other, an occasional sex researcher advocated greater tolerance from majoritarian society. Thus, not surprisingly, some homosexuals willingly participated in sex research projects devised with the purpose of discovering the level of social adjustment and "normalcy" in the average homosexual.

Mainstream society's lack of sympathy for homosexuals encouraged most middle-class homosexuals to go into the closet, to hide their true identity. They survived in a heterosexual charade of marriage or in the identity of a bachelor or spinster. In some parts of the country there appeared to be no other choice. A 1955 crisis in Boise, Idaho illustrates the hostility and waves of panic that could take over a community on the suspicion that one might be the unwitting neighbor or co-worker of a homosexual. The arrest of three men on charges of consensual sodomy and seduction of minor boys led to a publicized witch hunt for members of a "homosexual ring" that had infiltrated the most respectable corners of the community. As stories of the search for alleged homosexuals, largely instigated by political rivals in local politics, hit the newspapers, some homosexuals simply packed up and left for other cities. The dramatic episode of the "Boys of Boise" became a year and a half long political fiasco that depleted government resources and divided the Boise community.<sup>200</sup>

Not surprisingly, the potential for a homosexual panic in any community encouraged the middle-class Mattachine Society to adopt a

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<sup>198</sup> The Mattachine Society "wanted only collaboration with the professionals—established and recognized scientists, clinics, research organizations and institutions—the sources of authority in American Society." Dynes, *supra* note 196, at 781.

<sup>199</sup> See, e.g., Seymour Pollack, *The Sex Offender and the Law* (1972) (compiling reports and studies performed in the 1960s for various segments of the judiciary, prosecutors, and members of the bar who had to deal with the punishment phase of sex offender cases). This study focuses on the aspect of sex crime prosecutions referred to as the "psychiatric-legal consultation." *Id.* at 1.

<sup>200</sup> See DeGrassi, *supra* note 124; see also Anonymous Interview with a Victim Witch Hunt in Boise, Idaho, reprinted in *Gay American History*, *supra* note 19, at 109-19.

"don't rock the boat" political stance. Early attenders of Mattachine meetings recall that "almost all the people who came to discussion groups were very conformist."<sup>201</sup> Middle-class conformism also encouraged adherents of the politics of respectability to disassociate themselves from effeminate queens and "stalking butches" who openly defied society's gendered role expectations in dress.<sup>202</sup> To the conformist, such physical demeanor invited suspicion and prying into her private life, which threatened the loss of significant connections within a community and the economic security of one's job. Photographs of pre-Stonewall demonstrators on behalf of fired federal workers display the conservative tone of pre-Stonewall middle-class homosexual politics: looking no different from the typical heterosexual, men in suits and women in dresses and heels marched with placards in front of Congress.<sup>203</sup>

The conformism of the middle-class groups also made them ineffective in bridging the race and class gaps that existed within the gay and lesbian worlds. A black lesbian activist from the early sixties remarked that she and another black friend once attended a DOB meeting and were repelled by it. The white women had been uncomfortably cool, shocked, or inhospitable.<sup>204</sup>

## *2. Out of the Closet: Dressing in the Mental Illness Model of Homosexuality*

By organizing from the premise that homosexuals were "pathological sex offenders" who at best deserved tolerance from the rest of "normal" society,<sup>205</sup> the middle-class segment of the homosexual population was destined to depend on the straight community's changing political moods to get anywhere in their search for respect, tolerance, and acceptance. The

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<sup>201</sup> Marcus, *supra* note 5, at 49.

<sup>202</sup> *Id.* at 48. See also *The Purposes of the Daughters of Bilitis*, 1 *The Ladder* 2 (1957) (courtesy of the Lesbian Archives, *supra* note 36). The drive to conformism in some groups extended beyond dress to behavior: Eann MacDonald, later known as Henry Hay (a.k.a. Harry Hay), set out to "regulate the social conduct of our minority" in his objectives for the group Bachelors Anonymous. See MacDonald, *supra* note 125, at 410.

<sup>203</sup> See, e.g., *Stonewall*, *supra* note 5, at 137 (picture from May 21, 1965).

<sup>204</sup> See *Stonewall*, *supra* note 5, at 234. This occurrence attests to the enduring problem of black lesbian invisibility resulting from persistent homophobia in the black community and racism in the lesbian and feminist communities. See *Home Girls: A Black Feminist Anthology* xli (Barbara Smith ed., 1983); see also Kennedy & Davis, *supra* note 6, at 115-23.

<sup>205</sup> MacDonald, *supra* note 125, at 2.

internalization of the medical model<sup>206</sup> came from a sense of unworthiness, of an inevitable succumbing to the dreadful truth of being an outlaw and a social outcast.<sup>207</sup>

However, one cannot entirely dismiss the political changes that were being effected in and out of the courts, sometimes with the help of middle-class homophile organizations or an occasional sympathetic radical lawyer.<sup>208</sup> Middle-class gays turned to the homophile organizations for education and support. In some cities, by the mid-sixties, the presence of these organizations gave members and non-members a sense of community empowerment. Some organizations began to employ the rhetoric of liberal democracy to argue for civil rights as a victimized social minority,<sup>209</sup> which represented a more positive integration of the medical model. The sixties milieu also fostered increased public discussions of homosexuality, which were a byproduct of the lifting of censorship rules that had prohibited the mention of homosexuality in the movies.<sup>210</sup> Thus, as film historian Russo notes, images of homosexuality abounded, but, influenced by the

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<sup>206</sup> Organizations as early as 1950 would incorporate the perspective of a need for healing and integration into straight society of "handicapped" persons into their charters. Another of Eann MacDonald's goals for Bachelors Anonymous was to handle the problem of "profligacy" as an "emotional disease" to be treated clinically." *Id.*

<sup>207</sup> The contemporary sex research treatises illustrated the intense role that psychiatry played, not only in the evaluation of the level of dangerousness displayed by sex offenders, but also in gays' perceptions of themselves and their self-worth. Knowing that social and legal experts relied on the printed categories of sexual deviancy makes these treatises ironic documentors of later common stereotypes of gays. People convicted solely on the ground of consensual sodomy with another adult were lumped together in these analyses with incestors, child molesters, exhibitionists, and rapists. See, e.g., Gebhard, *supra* note 40; Pollack, *supra* note 199. This grouping is almost certainly an artifact of the earlier complete submersion of all of these offenses in the older term "crimes against nature." See generally Morris Ploscowe, *Sex and the Law* 198 (1951).

The judicial rhetoric in *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967), one of the first "gay rights" cases of the 1960s, marks the dubious contributions of the medical sciences to the question of whether someone who admitted his homosexual orientation was worthy of American citizenship. In *Boutilier*, the Court determined that the 1952 Immigration and Naturalization Act employed the term "psychopathic personality" to refer to all homosexuals, including Clive Michael Boutilier, whose sexuality was described by psychiatrists as unfixed. *Id.* at 119. See generally Leonard, *supra* note 4. The Court ruled in favor of the government, which desired to exclude Boutilier on medical grounds.

<sup>208</sup> See Marcus, *supra* note 5, at 147-65.

<sup>209</sup> See Sweet, *supra* note 10, at 45-70.

<sup>210</sup> Censorship rules in the film industry dated from 1921 when the National Association of the Motion Picture Industry adopted a plan of self-regulation, condemning the production and exhibition of certain kinds of pictures and themes. The most frequent targets of censorship were sex and moral vice. See Ruth Inglis, *Freedom of the Movies* 83-84 (1947).



mental illness model, most of them were filled with negative and degrading stereotypes such as the tortured and raging schoolteacher.<sup>211</sup>

By the late sixties, internal policy conflicts had prevented many of the city-based homophile organizations from effectively thwarting the impact of the routine police raid. The progress of the literate gay middle-class was painfully slow and largely futile against the more blatant abuses being committed by the state. The politics of respectability not only produced small gay rights groups but also created a large gap between those groups and the homosexuals who bore the greater weight of state oppression.<sup>212</sup> As Madeline Davis and Elizabeth Kennedy have argued, the seeds for a strong political movement did not lie in the activities and interests of the closeted middle-class.<sup>213</sup> Rather, the social settings of the working-class homosexual population, such as the butch-femme and butch-queen bar culture, laid the structural foundations for the post-sixties civil rights movement.<sup>214</sup>

Despite the growth of dozens of chapters of Mattachine, DOB, and other human rights groups, not one had been able to stop police raids of socializing locales like bars or even home parties.<sup>215</sup> Without a strong base of support in the gay community, one could not expect that the middle-class gay politics of respectability would ignite an effective challenge to the state's intrusions on gay socializing.

### **C. Makers of a Revolution: The Stonewall Riots**

By all accounts, the visit by the officers of Manhattan's Sixth Precinct to the Stonewall Inn was standard operating procedure. In the midst of a mayoral reelection campaign, agents of the state set out to clean up the city and raided several gay bars.<sup>216</sup> Given the systematic nature of the harassment that had evolved by the late sixties, the patron of a gay bar faced the constant threat of being charged with lewdness or solicitation. It

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<sup>211</sup> See Russo, *supra* note 85, at 139.

<sup>212</sup> In 1968, Roxanna Sweet observed the independence of organizations formed in response to the harassment from earlier groups which barely addressed the problem by noticing that these groups were "isolated organizations which spent far more time fighting among themselves than in dealing with the injustices of the 'outside' world." See Sweet, *supra* note 10, at 169-70.

<sup>213</sup> Kennedy & Davis, *supra* note 6, at 138-45.

<sup>214</sup> But see Kennedy & Davis, *supra* note 6, at 43 (discussing lack of integration in various lesbian groups).

<sup>215</sup> See, e.g., *Terror in the Tubs: The Raid that Wasn't*, *Advoc.*, June 1969, at 3 (detailing a police raid on a private bath house session in Los Angeles).

<sup>216</sup> See *Sexual Politics*, *supra* note 1, at 50.

did not take much to provoke an arrest by an undercover vice cop. For example, an observer recalled a set-up involving a man who reached into his pocket for a packet of cigarettes, which an ABC agent characterized as an attempted groping of the man sitting next to him.<sup>217</sup> Such police conduct generally intimidated its victims.<sup>218</sup> The relationship between gays and the culture of enforcement changed radically, however, in the small hours of the morning of Saturday, June 28, 1969.

The events of Stonewall unfolded with the participation of individuals like Rey "Sylvia Lee" Rivera, a Puerto Rican gay man who dressed in female drag and who knew that looking "like a faggot" was an invitation to go to jail. Multiple arrests characterized Rivera's life as a former streetwalker. At age ten, he had even attempted suicide, feeling alone in his preferences for sewing and cooking over traditional boys' games and knowing he disappointed his grandmother by his desire to be a girl. By adulthood, Rivera had embraced his identity as an ethnic effeminate gay man. Unable to hide his racial difference from dominant white middle-class America, his identity as a drag queen made him even more noticeable amidst his mostly closeted and "respectable" homosexual peers in the 1960s.<sup>219</sup>

A visit to the Stonewall Inn was a risk for someone like Rivera because the owners catered to an eclectic crowd of students and young businesspeople as well as gays and lesbians. In that atmosphere it was not easy to spot the undercover detective who might use any gesture between people of the same sex as the basis of a charge of lewd conduct or solicitation.<sup>220</sup> Socializing in semi-drag that fateful night, Rivera recalls the visit by the eight police officers who purportedly were looking for a payoff from the Mafia-connected bar owners. In New York City, virtually every gay bar had connections to organized crime.<sup>221</sup> The corruption survived on a payoff system.<sup>222</sup> There was an unspoken agreement to arrest transvestites and lesbian butches; the police would shut down gay bars that allegedly permitted their patrons to flirt, hold hands, kiss, hug, and dance with each other, all in violation of lewd conduct and solicitation

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<sup>217</sup> See Marcus, *supra* note 5, at 64.

<sup>218</sup> See *id.* at 81-86, 115, 173.

<sup>219</sup> See *id.* at 187-96.

<sup>220</sup> See *id.* at 64.

<sup>221</sup> See Police Harassment, *supra* note 167, at 170-71.

<sup>222</sup> See *supra* part III.A.3 (discussion of "gayola").

statutes.<sup>223</sup> Not surprisingly, Rivera's outfit made him one of the first escorted out of the unlicensed Stonewall Inn.

Rey Rivera didn't know if it was "the customers or if it was the police, but that night everything just clicked."<sup>224</sup> The officers got their payoff, called in the paddy wagon, and began escorting out patrons, including Rivera, who displayed his gayness by wearing face make-up and women's blouses even when he wasn't in full drag. But something in the circus-like mood shifted as some of the exiting customers struck starlet poses for the gathering crowd. Shouting began as the officers used their billy clubs to beat a lesbian into submission and pushed her into the paddy wagon, only to be pushed back out by a drag queen who thrust herself onto the police and the crowd. Within seconds, the crowd was throwing bottles and coins as they yelled, "You got your payoff, here's some more." With only eight officers and no backup, the NYPD was forced back into the Stonewall Inn, only to be met with a firebomb. This outburst marked the beginning of a fight that lasted through the entire weekend.<sup>225</sup>

By the next day, people like Rivera, wise from their civil rights activism, knew something different had happened. Rivera had experienced the stigma of growing up as a poor Puerto Rican-Venezuelan in the Bronx, and, as an adult, suffered harassment for being obviously queer with a masculine body in a too-tight dress. He knew that like the members of other civil rights movements, gays and lesbians were angry and eager to dismantle the power structure and value systems of a state that harassed, intimidated, and jailed men and women who stepped out of society's scripted gender roles. With the first American gay riot, restless and frustrated gays and lesbians took their place among the era's other liberation movements—angry feminists, anti-war protesters, and black civil rights activists.

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<sup>223</sup> See Marcus, *supra* note 5, at 64, 75–76, 184; see also *Police Harassment*, *supra* note 167, at 171.

<sup>224</sup> See Marcus, *supra* note 5, at 191.

<sup>225</sup> The New York Times reported that four policemen were hurt and 13 people arrested, and that hundreds of youths rampaged around Greenwich Village after plainclothes officers raided the Stonewall Inn. See *A Gay News Chronology*: Jan. 1969–May 1975, at 6 (Jonathan Katz, ed., 1975) (entry for June 29, 1969).

#### **IV. CONCLUSION: THE STONEWALL RIOTS: A RADICAL RESPONSE TO THE LEGAL CULTURE OF ENFORCEMENT**

Labeled by society as sex perverts or deviants, stereotyped in the popular culture as pansies and faeries or bulldaggers and dykes, the patrons of the Stonewall Inn knew their place in society. Their dress and mannerisms signalled their departure from traditional gender role expectations. While cross-dressing liberated elements of one's identity, the obviousness of the act also communicated one's membership in a social underclass. The historical context of police harassment makes the history of the Stonewall Riots an essential aspect of feminist history. The queer threatened the very foundations of patriarchy and the meaning of gender roles and family relationships in American society—issues that were the focus of the sixties and seventies feminist politics.

The race and class aspects of the harassment at the Stonewall Inn link the Riots to other forms of civil rights activism. Individuals' stories, like that of Rey Rivera, who was targeted for harassment both as a cross-dresser and as a black Hispanic, remind gay historians and activists of the need for a responsible retelling of the story of the Riots, one that acknowledges the diversity of the gay and lesbian, or transgendered, community. Through such stories, historians can learn of the defiance of black and Puerto Rican drag queens and butch-looking working-class homosexuals, the message they communicated by crossing society's gendered boundaries, and the reactions their behavior could trigger from socially conservative enforcers of the law.

The events at the Stonewall Inn in 1969 remind gay people of the need to be wary of goals and strategies that ignore the realities of racism, classism, and sexism in the lesbian and gay worlds. When we aspire to be accepted by the dominant heterosexual culture, we risk making ourselves over in its image, thus failing to confront the total diversity of the homosexual community. In 1969, the Riots at the Stonewall Inn were an unprecedented, yet not unexpected, event—a night in which working-class gender-transgressive gays and lesbians challenged the middle-class politics of respectability. A rare moment of anarchy created the opportunity for dozens of men and women to protest state oppression. United, they took a forceful step towards awakening the dormant homophile movement and overthrowing the tyrannical heterosexual value system.

A story of the Stonewall Riots grounded in the perspective of radical diversity offers historians a complex picture of self-acceptance, oppression, prejudice, victimization, and frustration. Pre-Stonewall enforcers of the

vice laws were brutal, yet ultimately ineffective in ridding society of people who mocked rigid definitions of masculinity and femininity. Those individuals who openly cross-dressed defied the dominant value system and, in so doing, carved out safe spaces in city bars, helping to forge the basis for post-Stonewall political growth. One can understand why, against the backdrop of repressive attitudes, modern medical "wisdom," and law enforcement techniques, a group of effeminate queers on a hot June night at the Stonewall Inn decided to fight back. They rebelled against the stereotype of themselves and threw off "the wounded look that fags [and lesbians] all had ten years ago."<sup>226</sup> The group of gays and lesbians at the Stonewall Inn spontaneously decided not to tolerate one more night of routine harassment by agents of the state. As Feinberg put it, in the words of her character Jess:

There are times, the old bulls told me, when it's best to take your beating and hope the cops will leave you on the ground when they're done with you. Other times your life may be in danger, *or your sanity, and it's worth it to try to fight back*. It's a tough call.<sup>227</sup>

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<sup>226</sup> Sexual Politics, *supra* note 1, at 232 (comment on Stonewall Riots by poet Allen Ginsberg).

<sup>227</sup> Feinberg, *supra* note 155, at 56 (emphasis added).