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Introduction: Republican Values and the Depenalization of Sodomy in France

“I am first human, then citizen and finally homosexual.”
What a lovely hierarchy! We were really naïve to imagine
that by hiding behind concepts of ordinary heterosexual
normality, we could attain any integration whatsoever. It
was self-mutilation pure and simple. With wounds that will
never heal.¹

Joseph-Marie Hulewicz, former editor of *Gai pied hebdo*²

Like any good closet, the French Republic has served both to protect and to restrain. French people who engage in same-sex sexual practices have largely escaped the kind of legal repression seen in other countries over the last two hundred years – in fact, France was the first country in Europe to legalize sodomy as early as 1791. Yet despite this legal tolerance, French homosexuals have been inclined to live their sexuality more discretely and to embrace identity politics with less enthusiasm than their American counterparts. Indeed, the values of the Republic have managed to keep expressions of both pro-homosexual and antihomosexual sentiments within a narrower range in France than has been the case in places like the United States – a country where both “gay pride” and homophobia have tended to be expressed more aggressively.

The French Republic has protected its homosexual citizens primarily through the core values of *secularism*, *separation between public and private spheres*, *liberalism*, and *universalism*; together these values have been responsible for keeping homosexuality legal in France and for limiting the possibilities for the most overt forms of homophobia. Following the Revolution of 1789, respect for *secularist principles* led to

2 *The Elastic Closet*

the elimination of all “crimes of superstition,” which included things such as witchcraft and blasphemy, but would have also included sodomy (defined here as homosexual acts between consenting adults), since it originated in Christianity and many philosophers had begun to argue that there was no rational basis for punishing it. In addition, the strong separation between public and private spheres in republican France has meant that the criminalization of consensual acts in private would be widely perceived as an unjustifiable invasion of privacy. Even more importantly, given that it is hard to imagine who the victim of sexual activity between consenting adults might be, the crime of sodomy would have violated the basic principle of classical *liberalism* that every crime must have an ascertainable victim.

Of course, many countries have shared the basic notion that laws should avoid punishing people for victimless crimes; so why was it easier for other liberal democracies to maintain sodomy as a crime than it was for France? The answer once again has to do with the particularities of French republicanism. In this case, the *universalist* vision of French law requires that basic legal principles be applied consistently, without any exceptions. While other legal systems can occasionally accommodate exceptions to their basic legal principles – particularly, when like in the case of sodomy, there is a long tradition of doing so – the universalist aspirations of the French republican legal system make this especially difficult. The rigidity of the French republican legal system in this respect has protected French people who engage in same-sex sexual acts from various forms of legal repression; because though French lawmakers may have wanted to reinstate the crime of sodomy at various moments since 1791, they have not had the license to do so.

But French republicanism has also created restraints. The strong separation between public and private spheres means that the American notion that “the personal is political” has resonated differently in the context of France, and public displays of sexual identity have not always been well received. Since the universalist discourse of French republicanism maintains that the opportunity to be socially integrated exists in principle for anyone willing to accept the restrictions of assimilation, tolerance of difference is not what is called for.

In recent decades, the French rhetoric of universalism has stymied French homosexuals from mobilizing politically around sexual identities and has encouraged various manifestations of social

respectability along with a surprisingly strong reverence for heteronormative values. Beginning in the early 1980s in particular, French gays and lesbians began to portray themselves in increasingly socially acceptable ways, as hardworking and decent folks who formed stable relationships and who presented little threat to the status quo. New movements and journals appeared in the early 80s that made every effort to distance themselves from the less palatable aspects of earlier movements – particularly the pedophilic, sadomasochistic, transsexual, transvestite, promiscuous, and public-sex elements. This change in self-representations by French gays and lesbians raises the question of whether it was public opinion of homosexuality or the meaning of what it is to be homosexual that underwent greater change in those years. There is reason to doubt that social attitudes changed radically in France in the 1980s, to the extent that gays' self-representations merely came more into alignment with the Republic's longstanding requirements for assimilation and acceptance.

What is presented here is a history of French homosexuals from Second World War to the present in the interconnected realms of law (from a discriminatory law enacted in 1942 under Vichy regarding sexual majority to anti-hate speech legislation in 2004), politics (from the homophile movements of the 1950s to a distinctly French articulation of queer radicalism in recent years), and the media (from the journal *Arcadie* in the 1950s to *Têtu* and PinkTV today) with a focus on the complex relationship between French republican values and the possibilities they have offered for change in each of these spheres. This focus relies on several interrelated arguments: first, that changes in the legal treatment of French homosexuals can occur independently of parallel shifts in widespread attitudes toward homosexuality, which are often best explained in terms of their continuity; second, that the recent history of homosexuality in France cannot be understood as a simple teleological progression toward ever greater freedom for homosexuals beginning in the mid-twentieth century and continuing up to the present, but as a complicated series of strategies adapted to each time period that have at times actually served to limit the freedoms of French homosexuals; and finally, that challenges to republican values have not been terribly effective – the resiliency and elasticity of republican discourse have made it difficult to subvert.

Though the book's title uses the gender-neutral term homosexuality, readers will notice that lesbians are less present in the first

chapters than at the end. The first part of the book looks at what legislators, judges, and medical doctors had to say about homosexuality. The fact is that while nineteenth-century and early-twentieth-century writers and artists were interested in representing lesbians in their works, medical “experts,” lawmakers and judges were paying less attention to their existence – for better or for worse.³ Even the sections of the book examining later periods reflect the fact that as late as the 1970s and 80s, French gay movements were almost exclusively male and for the most part, openly misogynist. Lesbian militants tended to find one another in women’s liberation movements, such as the *Mouvement de libération des femmes* (or its satellite organization the *Gouines rouges*), as opposed to trying to fight for attention in gay groups that claimed to serve both men and women. The French press has not been much better. Media sources that have declared themselves to be for both gay men and women, such as the magazine *Têtu*, offer almost nothing for lesbians. And while there are now two magazines explicitly designed for lesbians, *Lesbia* and *La Dixième Muse*, neither has managed to attract large numbers of readers. Given the lack of space offered to lesbians by the mainstream gay political movements and media sources, it is hardly surprising that an overwhelming majority of those involved in the nascent radical queer movement in France are women.

This book is divided into four chapters ordered chronologically along with an introduction that provides background information on the repeal of the crime of sodomy in France in 1791, a summary of the mechanisms of the French republican legal system that have forced lawmakers to keep homosexuality legal ever since, and a quick look at the ways in which nineteenth-century police, judges and medical legal “experts” looked for ways to control homosexuality in the absence of discriminatory laws. After this historical overview, the first chapter (“It Could Have Been Worse”) begins by looking at the period from 1942 to 1968, a time when French legislators, unable to reinstate the crime of sodomy, adapted their strategies and contented themselves with two juridically acceptable, but somewhat inconsequential laws that satisfied French law’s requirement that every crime have a victim. The first law, enacted in 1942 under the Vichy government, found victims in France’s youth and expanded this class of potential victims by raising the age of sexual majority for homosexuals to 21.⁴ The second, passed in 1960, found its victim

in the public and doubled the penalty for public indecency when it involved people of the same sex. The story of both of these laws serves as an example of how the liberal values and the universalist spirit of the Republic's legal system protected gay people from more extreme forms of legal repression.

The second chapter ("Attempts at Subversion") examines the period of the 1970s, a time when the discriminatory laws from the previous period remained in force while the most radical forms of political action ever witnessed appeared. This exceptional period in the history of gay political strategies offers an example of the resiliency and elasticity of republican values and their capacity to withstand attempts to subvert. The analysis of the political radicalism of the early 70s raises the question as to what forms of political action are most effective in producing legal change in the context of France. Can a stringently anti-assimilationist, anti-republican political stance be effective? If the laboratory of the early 70s tells us anything, the answer is no. Political groups' radical demands proved entirely incapable of producing legal change, and it was only after more assimilationist movements appeared in the late 70s that real legal change occurred.

Legal, political, and cultural changes since the 1980s are the subject of the third chapter ("French Homosexuals Build a More Stately Closet"). Between 1980 and 1982, the two discriminatory laws from 1942 and 1960 were repealed and French gays and lesbians were offered new opportunities for social normalization and assimilation. In the 1980s, French homosexuals began to create a new space for themselves, a space that in many ways was better than the one they had just come out of. Certainly, the new face of homosexuality led to a number of positive changes: opportunities for social assimilation increased and gay political groups successfully lobbied for an antidiscrimination law in 1985, for legally recognized partnerships for same-sex couples in 1999 (the *pacte civil de solidarité* or "PaCS") and for an anti-hate-speech law in 2004. However, it is also possible to see the ways in which deference to the French republican model of assimilation during this time reproduced some form of "closet." Beginning in the 1980s, control was no longer exerted downward through legal restrictions, but inward. After years of legal censure, French gay people had learned that external control was possible, that it would remain a threat, and that to escape future censure and

to preserve society's new degree of tolerance, they had to replace external controls with self-control.

Finally, the fourth chapter ("‘Outing’ the French Gay Media") reflects on the influence of Republican universalist rhetoric on gay media from the 1990s up through the first decade of the twenty-first century. This final chapter turns to three contemporary media sources, the magazine *Têtu*, the magazine *Préférences*, and the French television station PinkTV, for its analysis of the ways in which interiorized forms of self-control continue to influence French gays' self-representations and prevent them from asserting difference even in their own media. For all three media sources studied here, it is clear that the target population is gay men, yet out of deference to French universalism, they have all felt the need to claim to be serving other, broader audiences. The goal here is to expose these media sources' true identities; to "out" them. The fact that these media sources cannot simply come out as entertainment for gay men on their own is an indication that French republicanism is alive and well today, and that over time the rhetoric of universalism has proved to be elastic enough to remain seductive.

Republican values and the depenalization of sodomy

With the ratification of the Penal Code of 1791, France became the first country in the modern world to decriminalize sodomy.⁵ On its face, this anomaly of French legal history might be taken to indicate that nineteenth-century France was a relatively tolerant space for people who practiced homosexual acts. Such a shallow analysis of legal change is, however, misleading: widespread social attitudes cannot be ascertained simply on the basis of the absence or presence of particular laws. Although the legal basis for criminalizing sodomy disappeared in 1791, various forms of repression continued over the course of the nineteenth century and into the twentieth century, and in some respects became more severe. Like other legal changes associated with the Revolution of 1789, the strong rupture in the legal treatment of sodomites was not reflected in social attitudes, which are best described in terms of their continuity.

Clearly, there are many reasons why a society's laws do not represent a mere codification of its citizens' general will. In a representative democracy, the actions of lawmakers are limited not only by

constitutional constraints but also by political necessities. Even the desire for a constitutionally and politically viable form of state control may never make its way into legislation, particularly when other means of accomplishing the same goals exist. Indeed, with regard to homosexuality in nineteenth-century France, discriminatory laws proved somewhat unnecessary, to the degree that police, judges, and medicolegal “experts” of the time were able to exercise effective control through discriminatory uses and interpretations of existing, nondiscriminatory laws. Nevertheless, the French Revolution did represent an improvement for French sodomites as revolutionary ideals encouraged a remaking of French government and society – and even if social attitudes were slow to change, there is no doubt that things could have been worse, especially when one considers the legal penalties for sodomy in other countries at the time.

The absence of sodomy laws in France since 1791 represents a strong rupture not just across space but also across time. Viewed historically, the 1791 legal reform represents an exceptionally radical and abrupt break with the longstanding legal precedent for the crime of sodomy. Yet even given the surprising nature of this kind of abrupt legal change; an equally radical rupture in social attitudes would generally be more difficult to account for. Indeed, the implausible conclusion that French people after 1791 differed significantly from other Europeans of the same time or from French people prior to 1791 in their attitudes toward homosexuality seems to rely on a common but faulty assumption that a causal connection necessarily exists between legal and social change.

Before turning to a more detailed discussion of the relationship between the repeal of sodomy in 1791 and the continuity of widespread social attitudes toward homosexuality afterwards, it is useful at this point to look first at the forms of legal repression existing prior to 1791, beginning with original source of modern European legal systems: the Roman Empire.

Laws regulating homosexuality in modern Western societies generally, and in France in particular, have their origins in the legal system of Rome. Until the arrival of Constantine II, homosexuality was tolerated, provided that: (1) it did not interfere with the citizens’ duties to the city; (2) the Roman citizen made use only of inferior persons, such as slaves, as pleasure objects; and (3) during the homosexual activity, the Roman citizen maintained the dominant

or active role.⁶ The first Roman law aiming to restrict homosexual acts in a more comprehensive way was not promulgated until 342, under Constantine II. It stated that “when a man behaves in bed in the way of a woman...the crime is one of which it is better not to speak...Consequently, we order that the law rise up, a sword in its hand, and strike the abominable man who has made himself guilty of such a crime, that this man be subject to an atrocious and refined chastisement.”⁷ Here the meaning of the punishment, “atrocious and refined chastisement,” is not clear. Yet, in the centuries to come, the punishment associated with this crime “of which it is better not to speak” would become increasingly precisely defined in European legal systems.

During the Middle Ages, the conciliar and synodal rules of the Christian Church began to play a more central role in the repression of homosexuality. The most clear and damaging of these proclamations came from the Council of Nablus, which in 1120 had put together the most complete and coherent collection of canonical law, and the most severe with regard to “sins of the flesh” ever witnessed in the history of the Catholic Church. With these proclamations, homosexuality became punishable in no ambiguous terms by death through burning on the stake.⁸ However, it was not until 1317 that the death penalty first enounced by the Council of Nablus claimed its first victim in France: a certain Robert de Péronne burned alive at the stake in Laon.⁹ The number of documented cases of individuals condemned for sodomy¹⁰ in France did not accelerate at this point, but rather remained fairly low in the years following. In fact, documentary evidence indicates that between 1317 and 1789, the number of individuals burned at the stake in France reached only thirty-eight. This is a relatively small number, especially when compared to the number of witches and charlatans executed during the same period.¹¹ Of the thirty-eight executed for sodomy, approximately one-third were accused of additional crimes including rapes and murders. It is extremely difficult to provide precise numbers, since there are immense voids in the archival records for executions of sodomites. These voids are primarily the result of the fact that when a sodomite¹² was burned at the stake, the documents associated with the trial were frequently burned along with him.¹³

Generally, it was the procedure of the French medieval legal system to eliminate all traces of the condemned individual’s existence,

including personal belongings and other property of the condemned, by throwing all these things together in the fire with him. It was also standard procedure, though no one can say with what frequency it was carried out, to destroy all documents associated with the condemned individual's trial at the time of his burning. The rationale for all of this was that this crime was of such a heinous character as to merit annihilating any evidence of the condemned individual's life. It can also be seen as evidence of a fear of contagion for other members of society through exposure to these objects or documents. Perhaps, it was thought that mere knowledge of the possibility of such a crime, which might come through reading the trial's documents, could inspire others to commit it.

In France, sodomy remained punishable by death until the early eighteenth century, when authorities began to rethink their motivations and strategies for controlling homosexuality. During the Renaissance and the Reformation, homosexuality had been conceived of and punished as a sin, as an abomination before God. The Enlightenment ideals of the early eighteenth century, however, encouraged a more rational and secular approach to punishment. Beginning in the 1720s, French judges and police relied on a new understanding of homosexuality as a disorder, as a socially unacceptable taste or leaning, which needed to be controlled, particularly because of its suspected connection with the criminal underworld.¹⁴ With this shift in the understanding of the dangers of homosexuality, from sin to disorder, the executions of sodomites ceased. The new understanding of homosexuality required new forms of control and in the decades following, homosexuals became subject to greater surveillance. Police began to monitor homosexuals closely, to take note of their meeting places, and generally, to collect as much information about their behaviors as possible.

The shift in the early eighteenth century from sodomy as a sin against God to sodomy as a corrupting force of society is indicative of the growing influence of Enlightenment ideas, which called on human beings to take control of their own destinies. By the mid-eighteenth century, punishment in the form of public execution was no longer acceptable in France: the rationalization of punishment during this time corresponded with the notion that punishment for punishment's sake or on the grounds of revenge could no longer be justified. The only legitimate grounds for punishment were incapacitation (to

prevent criminal recidivism) and deterrence. This rationalization of ideas of punishment corresponded with a shift in tangible forms of punishment, from burning at the stake to efforts to control, police, and monitor homosexual activities.

Some *philosophes*, including Condorcet, Montesquieu and Anacharsis Cloots, had expressed tolerant views of homosexuality, and even those like Voltaire, who felt contempt for homosexual practices, nonetheless argued that the penalties for sodomy under the *ancien régime* had been too harsh.¹⁵ The Enlightenment thinkers' rational approach to punishment offered no grounds for punishing homosexual acts provided that they occurred between consenting individuals. In the words of Condorcet, "sodomy, when there is no violence involved, cannot be part of the criminal law; it does not violate the rights of anyone."¹⁶ Yet it is hard to measure with precision the influence of these ideas on the Constituent Assembly that was in charge of drafting the Penal Code of 1791. Indeed, there is no indication that the Assembly even took the *philosophes'* opinions of sodomy into account, since "the legislators never provided any explanation for this omission, *which they never even debated.*"¹⁷ Thus as Michael Sibalis suggests, "the decriminalization of sodomy was simply a fortuitous and unforeseen consequence of their secularization of criminal law."¹⁸ At the very least, the ideas of the Enlightenment, "helped to open up the discursive space in which the traditional intolerance of same-sex sexuality could be contested, or at least quietly dropped."¹⁹ The only possible reference to sodomy in the legislative debates of 1791 comes from Le Pelletier de Saint-Fargeau's explanation to the Constituent Assembly that the new penal code should outlaw only "true crimes" and not "those phony offenses, created by superstition, feudalism, the tax system, and despotism."²⁰ Crimes "created by superstition" undoubtedly referred to crimes originating in the Christian religion including blasphemy, heresy, sacrilege, and witchcraft, and also quite probably bestiality, incest, and sodomy. The vagueness of the term "crimes created by superstition" allowed Revolutionary legislators simply to pass over "in silence, acts that had once, at least in theory, merited the most severe penalties."²¹

Of course, the legislators' silence does not on its own indicate that the omission of the crime of sodomy was unintentional. Another possible interpretation is that in the minds of the legislators, sodomy remained of such a heinous character as to merit a certain degree of

rhetorical modesty. Perhaps, they believed that an open discussion of the crime of sodomy would have offended prevailing moral sensibilities, and hence, should be referred to only obliquely during the legislative debates. In the end, the answer to the question of whether the legislative silence in 1791 was the result of modesty or accidental omission may be lost to history, but perhaps it does not matter which interpretation is valid, since they both support the same conclusion – neither the interpretation based on modesty nor the interpretation based on accidental omission can be used as evidence of an overt expression of tolerance of sodomy by lawmakers.

Sodomy was not the only crime left out of the Penal Code of 1791; in fact the only sex crime that remained in the code was rape – an indication perhaps that the legislators of 1791 considered matters of sexual morality to be generally outside the scope of the law.²² The only other exception to the legislative silence with regard to sex crimes was a law from July 1791, enacted independently of the Penal Code that treated the issue of public indecency.²³ The legislative silence that began in 1791 continued until the end of the Napoleonic era; then in 1810, two new sexual crimes appeared in the French penal code: the crime of “sexual assault with violence of a child younger than fifteen years” (*attentat à la pudeur avec violence sur un enfant de moins de quinze ans*) and the crime of “corruption of minors” (*incitation habituelle de mineurs à la débauche*), which was generally understood as pimping minors for prostitution. The Penal Code of 1810 did not yet make any mention of “sexual assault without violence” – a crime that does not appear until 1832, when the age of sexual majority was set at eleven (raised to thirteen in 1863) – nor did it make any mention of sodomy.

One popular explanation for the omission of the crime of sodomy in 1810 is that it was the result of the efforts of one man: the jurist, Jean-Jacques Régis de Cambacérès, arch chancellor under Napoleon Bonaparte. He benefited from a powerful position under Napoleon, it is true. It is doubtful, however, that the exclusion of the crime of sodomy in the Penal Code of 1810 can be traced solely to Cambacérès's political and personal influence. For one thing, the crime of sodomy was first omitted in 1791, when he was still an unknown provincial judge.²⁴ With regard to the reforms of 1810, the confusion probably stems from the fact that Cambacérès did play an important role in the writing of the *Civil Code* of 1804 but did not participate in the drafting the Penal Code of 1810.²⁵

The Penal Code's silence regarding sodomy frustrates nineteenth-century police and judges

Evidence of a widespread desire to restrict homosexual acts comes from judges, police and legal scholars who called for stronger mechanisms for controlling homosexual activities. Given the prevalence of the desire to restrict homosexual acts and the moral climate under the Empire, which would have most likely welcomed the reinstatement of the crime of sodomy quite readily, the omission of the crime of sodomy in 1810 seems especially peculiar.

Between 1791 and the drafting of the Penal Code in 1810, judges from across France expressed frustration with the absence of a crime against sodomy. A case from 1794 illustrates this: two men, Etienne Rémy, a twenty-two-year-old soldier and Mallerange, a fifty-year-old civilian, were arrested on the Champs-Élysées after police found them half-naked and in a compromising position. At their trial, the judges of the Correctional Court of Paris decided that “in this case, it is a matter of knowing whether the accused were guilty of the crime against nature.”²⁶ Their reference to the “crime against nature” indicates that these judges were unaware that the crime of sodomy had been abolished in 1791. The court later corrected itself and issued a final verdict based on criminal laws in force at the time, specifically, the law against public indecency. When the case was appealed, the judges were shocked to discover that the Penal Code did not mention sodomy. In the end, they agreed with the lower court that Mallerange’s and Rémy’s actions fell under the public indecency law of 1791, even though they imagined that the omission of the crime of sodomy could only be explained by the “horror inspired by the crime,” which would have prevented legislators from talking openly about it.²⁷ Judges from other courts agreed. That same year for example, a judge from a criminal court in Indre declared that “crimes against nature so revolt the mind, that one can hardly believe in their existence... should not these sorts of crimes be classed among offenses in the Penal Code?”²⁸

Members of the police force vocalized their revulsion for homosexual practices as well. In 1798, Police commissioner Picquenard wrote a letter to Merlin de Douai, President of the Executive Directory stating that “pederasts have established themselves [in Paris]... Citizen President, criminal laws are lacking for these sorts of crimes. These notorious crimes have not been articulated clearly enough, thereby

hindering courts and assuring that the guilty remain unpunished."²⁹ The executive branch of the government also expressed its opinion for the need to restrict homosexual acts; and in 1805, the issue of sodomy even reached Napoleon who was called upon for an authoritative decision on the issue of whether the law against public indecency from 1791 could be interpreted to proscribe homosexual acts more generally. Napoleon, referred the question to Jérôme Guillard, the imperial prosecutor for the department of Eure-et-Loir, who was shocked that "our new laws have, as some people seem to think, remained silent on [sodomy]."³⁰ He recognized that the crime did not appear in the Penal Code but assumed that the code's silence was due to the prudishness of the Constituent Assembly, which "perhaps out of respect for public decency...did not want to set down the horrible name [of the crime] in black and white."³¹ Napoleon was the ultimate arbiter for the issue, and though he expressed his extreme dislike for homosexual practices, he insisted that the law preserve its silence with regard to sodomy: "We are not in a country where the law should concern itself with these offenses. Nature has seen to it that they are not frequent. The scandal of legal proceedings would only tend to multiply them."³²

Legal scholars were no more tolerant of homosexual acts than judges and police, as is apparent in the language of a legal dictionary of the 1830s: "The various acts that we have just reviewed, however shameful and culpable they may be, no longer appear in our penal legislation... Moreover, can justice prosecute them without danger?... What good would it do to unmask so many hidden depravities, so many shameful mysteries? Does morality benefit from these vile revelations?"³³ Now this context of a widespread desire to restrict homosexual practices raises an obvious question: If so many authorities were in agreement over the desire to restrict homosexual acts, what prevented nineteenth-century legislators from simply reinstating the crime of sodomy? To answer this, it is important to recall that the various forms of sexual control available in the nineteenth century (sexual assault with violence, public indecency, sexual acts with minors, and procuring minors for prostitution) went no further than penalizing crimes with ascertainable victims. Legislators seem to have recognized that sodomy (defined as sexual acts between consenting adults in private) was a victimless crime, which could not be penalized without violating basic principles of the French legal

system. This wisdom on the part of lawmakers was attributable at least in part to “their attachment to the rationalist principles inherited from eighteenth-century philosophy, which permeated the entire code of 1810.”³⁴ In this way, the same rationalist values that inspired the republican Penal Code of 1791 made repression of “other kinds of perversion utterly impossible in 1810 beyond those... that were legitimized by the use of violence.”³⁵

The incompatibility of French universalism and victimless crimes

In all liberal legal systems a fundamental principle requires that every crime have a victim. This principle may be restated in different forms, for example: one’s own liberty ends once it begins to infringe upon the liberty of another. Or in the words of the famous eighteenth-century French legal scholar Jean-Étienne-Marie Portalis, “When all individuals can do whatever they please, they may do things that disturb others, they may do things that disturb a great number of people. The freedom of particular individuals would inevitably lead to the suffering of all. It is necessary therefore to have laws to direct actions.”³⁶ This idea that a particular activity can only be prohibited if it harms another is the basis for the requirement that every crime must have an ascertainable victim.

For some crimes, the victims are of course relatively artificial legal creations. For example in France, duels have been forbidden between two consenting individuals since the sixteenth century (Henri II’s death in a duel in 1559 brought about the first law against duels), where the victim created through French legal scholars’ writings on the topic was the public, and in particular, women, who would have had to witness the duel’s violence. In fact, the “public” is frequently cited as the victim of crimes for which it is not obvious who the victim would otherwise be. In recent decades, the state has extended the notion of victim by claiming the right to limit individual freedom in the interest of public health through laws requiring seat belt use, for example. However, with regard to sexual acts in private between consenting adults, the determination of the victim becomes problematic. So why is it that France managed to keep homosexual acts legal while other liberal democracies like the United States continued to criminalize them?³⁷

After the French Revolution, the nascent Republic found inspiration for the structure and general principles of its new legal system not in the legal precedents of the *ancien régime* but in the writings of jurists of the Bologna School from the eleventh century who had resuscitated the ancient Justinian code of the Roman Empire. Consequently, as the product of academics, the French legal system has been characterized primarily by its extremely rational or “artificial” nature, striving for universality of principles and a high level of coherency among its various provisions. Portalis explained that “Laws are not purely acts of power, they are acts of wisdom, of justice and of reason.”³⁸ The need for coherency, rationality, and *universality* of principles makes it particularly difficult for the republican legal system to accommodate exceptions to general principles such as the requirement that every crime must have a victim.

If the French legal system’s need for coherency and universality of principles is considered remarkably strong in comparison to the legal systems of most liberal democracies, than legal systems like the common law systems of the United States or of England can be seen as representing the opposite end of the continuum. These systems have arisen from a series of historical precedents, and in this way, they are characterized by a relatively “organic” evolution and by their respect for tradition. Like the French system, these systems also rely on certain fundamental principles; however, they are different from the French system in that they can more easily accommodate exceptions to general principles, particularly when such exceptions arise from a long respected tradition. American anti-sodomy laws are a good example of such an exception. In 1962, the developers of the American *Model Penal Code* explicitly recognized that sodomy laws violated the principle that every crime must have a victim by asserting that for the crime of sodomy it is acceptable to sacrifice “personal liberty, not because the actor’s conduct results in harm to another citizen but only because it is inconsistent with the majoritarian notion of acceptable behavior.”³⁹ In the famous 1986 American case concerned with the issue of the constitutionality of sodomy, *Bowers v. Hardwick*,⁴⁰ the Supreme Court heard arguments, some arguing that sodomy laws violated the principle that every crime have a victim, and others responding that the long tradition of criminalizing sodomy, which dates at least as far back as medieval England, justified an exception to this general principle: “Proscriptions against

that conduct have ancient roots...Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights."⁴¹ Justice Burger added that "decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization... To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."⁴²

In this way, the historical origins of the French legal system help explain why in the early days of France's First Republic it would have been especially difficult to forbid sexual acts between consenting adults, since such a law would have presented an exception to the general liberal principle that every crime must have a victim, and in the context of universalist France, exceptions to such basic principles would have been nearly impossible to make. As the French legal scholar, Jean Danet, points out: "Laws are understood to punish only when there are victims. Individuals 'forced' to witness a sexual act, or victims of physical violence exercised toward sexual ends legitimized punishment. Any other pleasure or perversion remained outside the scope of penalization so long as it was consented to by all parties concerned."⁴³ The universalist spirit of the First Republic's Penal Code of 1791 carried through the various regimes of the nineteenth century up to the present day, protecting individuals who engaged in same-sex sexual acts from the kinds of harsh treatment seen in other European countries (except for a few countries, such as the Netherlands in 1811, that adopted the French Penal Code after having it imposed on them by French revolutionary and imperial armies).

The decriminalization of homosexuality in France protected French homosexuals to an extent, but not entirely. Nineteenth-century police and judges were able to use the existing nondiscriminatory laws, especially the law on public indecency, in discriminatory ways. Louis Canler, a police official from the July Monarchy, explained in his memoirs that the discriminatory treatment of homosexuals was justified because of their alleged connection to the criminal underworld – the idea being that surveillance of homosexuality would ultimately lead to fewer thefts of private property.⁴⁴ Surveillance efforts increased in the decades following. Félix Carlier, who was head of the vice police for the Paris prefecture in the 1860s, reveals that "from 1860 to 1870, the repression was so severe that there were

moments of true panic [among homosexuals]."⁴⁵ He adds that,

In general, pederasts tremble in the face of public opinion. [But] they are only cynical with each other. In their dance parties, in their private meetings, they push this cynicism to an unheard of degree. You would think that you were in a group of drunk call girls during a night of orgies...[but] when those people are no longer in their own environment...they show timidity up to the point of cowardice; they whose audacity at times is without limits. Instead of defending themselves, they run. Then through anonymous letters [of denunciation], they take revenge against each other.⁴⁶

Through exceptional attention to details, these anonymous letters of denunciation often display too much knowledge on the part of their authors for them to escape suspicion themselves.⁴⁷ This explains why, in an effort to preserve anonymity, these letters were almost always written in capital letters with childlike script. These denunciations serve as evidence of a widespread knowledge of the legal requirements for police repression of homosexuality, and in particular, the requirement that the sexual act in question be conducted in public. For example, a letter from October 1879 describing homosexual acts that had taken place in the public urinals at the *Place des Petits Pères* in Paris focused on how the acts were capable of harming the general public, arguing that the acts perpetrated at the urinals, which were out of view, produced sounds that could nonetheless be heard from outside.⁴⁸ This letter was in fact successful in leading to the arrest of ten people several days later.⁴⁹ The general awareness of the legal requirements and of the possibility for discriminatory police enforcement, as shown by these letters is evidence of a shared fear on the part of Paris homosexuals during this period; a fear which manifested itself in the (self-)denunciations of the time. A cycle established itself, by which denunciations allowed for increased police repression, which escalated fears and gave rise to more letters. Thus as William Peniston has pointed out, "despite the decriminalization in the penal codes, same-sex sexual behavior became increasingly criminalized, at least in the practices of the police."⁵⁰

This is not to say that homosexuality went into the closet during this time. On the contrary, a vibrant homosexual subculture for both

men and women developed during the last decades of the nineteenth century, particularly in the central *arrondissements* of Paris, complete with its own cultural codes and places to socialize. At the end of the century, gay male communities and lesbian communities overlapped to a large extent and shared “many neighborhoods and institutions, from Montmartre...to the brothel (gay or otherwise), the theater, the masked ball, the *brasserie*, and the dance hall.”⁵¹ Meanwhile, the areas where only men cruised one another included the many new outdoor spaces and the *grands boulevards* that came along with the Haussmannization of the city. The accompanying commercial revolution led to the creation of new luxury shops, which provided covered arcades in front of the city’s new luxury shops where “the objects for sale included not only material things, but human beings as well.”⁵² According to Régis Ravenin’s study, in addition to these public spaces, men could meet one another in at least 110 commercial establishments all over Paris with a somewhat higher density in the second and ninth *arrondissements*.⁵³ These meeting spaces did not go unnoticed, however, and the increased visibility of homosexuality led to calls for increased surveillance. In the context of the homosexual community of Paris at the end of the nineteenth century, the mechanisms of control existed as much through external police repression as through internalized mechanisms of self-control. Power exercised in the form of self-control or auto-censure is an important aspect of Foucault’s assertion that power is “dispersed through the network of relationships which make up society and based in discourse...that it is not exercised in a single, downward vector.”⁵⁴ Dispersed power and its reliance on mechanisms of self-control appears as the most appropriate lens through which the policing of the Parisian homosexual “community” of the *Belle Epoque* can be examined.

“*Pédéraste*” rather than “*homosexuel*” was the term used in the police reports of the latter half of the nineteenth century. The word *pédéraste*, however, almost never takes on the meaning of sexual acts between male youth and male adults in these reports. An example of this use of the word *pédéraste* in reference to same-sex acts between adults can be found in a series of police reports from April of 1865,⁵⁵ dealing with the investigation of a certain Monsieur Cabanier, a knight of the Imperial Guard, described as “a man from the South, a handsome young man with a husky voice.”⁵⁶ These documents were produced for a trial for the removal of Cabanier from the Imperial

Guard on the grounds of homosexual activities conducted in private. Homosexual members of the military had more to fear during that time than civilians, because homosexual acts, even when conducted in private, could bring on investigations leading toward expulsion from the military. The need for secrecy gave rise to special meeting spaces for homosexual members of the military that were sheltered from public view.

Cabanier frequented some of these spaces, in particular, the Hôtel de l'Alma (situated in the old Passage de l'Alma on the left bank), the Taverne Anglaise, and the military parties at the Ecole Militaire's Salon de Mars – three key spots in the cartography of military men's homosexual activities during this time.⁵⁷ The police reports state that Monsieur Cabanier “had [sexual] relations with other *pédérastes* who were known by women's names;”⁵⁸ that he “often came to the Hôtel de l'Alma, and that in asking about the civilian *pédérastes* who frequented that place, he would often say: ‘Isn't there a single one here tonight?’”⁵⁹ The police reports conclude with the words “Cabanier is a *pédéraste*.”⁶⁰ In these reports, and indeed, in others of the time, the use of the term *pédéraste* is clearly not intended to refer to sexual acts between adults and youth. However, it is not clear to what degree connotations of pederasty might have nonetheless continued to resonate with the word *pédéraste* during this time.

Among the documents for Cabanier's trial, the oral testimony of a certain Louise Ferrand, a twenty-three-year-old prostitute who also frequented the Hôtel de l'Alma, provides a particularly informative indicator of the construction of sexual identities from the time.⁶¹ Cabanier claimed before the military tribunal that he had had sexual relations with Ferrand. According to his testimony, it seems that this single fact could alone serve as evidence of his heterosexuality, and consequently, of the impossibility of his having participated in homosexual acts.⁶² What is more surprising, perhaps, is that the military tribunal focused its attention on this defense and on an examination of the relations between Cabanier and Ferrand. Ferrand claims in her oral testimony, however, that she and Cabanier never had sexual relations:⁶³

Here are the circumstances: a certain Monsieur Emile d'Orléans, a well known *pédéraste* at the Hôtel de l'Alma had invited Cabanier to walk around with him for the whole day and to avoid suspicion, he asked me to join the group – Emile took care of paying for

everything that day and in evening when he took us to the Taverne Anglaise, a meeting spot for *pédérastes*. We went back to the Hotel around one o'clock in the morning, and since Emile didn't want to stay over, and moreover, since my room was the only one free and it was too late to go back where we came from, Cabanier slept with me, but in all innocence and honor.⁶⁴

Through its extensive examination of the possibility for sexual relations between Ferrand and Cabanier, the military tribunal makes apparent its assumption that homosexual and heterosexual desires could not coexist within a single person. This understanding of a fixed sexual orientation, as either entirely heterosexual or homosexual, is quite different from older models of sexual categorization, going back as far perhaps as ancient Greece, if not further, which assumed that a single person was capable of both heterosexual and homosexual acts. In this way, these documents from 1865 serve as evidence that an understanding of sexual orientation resembling that of contemporary gays and lesbians (that is, as a comprehensive and invariable sexual identity) already seems to have been established by the second half of the nineteenth century.

Nineteenth-century medical "experts" identify two of sodomy's victims: the public and youth

The police's interest in monitoring homosexuals in the latter half of the nineteenth century coincides with an increased reliance on medical "experts," whose studies would eventually lay the groundwork for future legal control by explicitly identifying two potential victims of homosexuality: the "public" and "youth." By the beginning of the Third Republic, a veritable medico-criminological science was beginning to take shape. Perhaps, French society was looking for new moral guidance in the form of scientific clerics to replace the old moral order's direction, and found guidance in the new "experts" of morphology, phrenology, psychiatry, and medico-criminology. The most famous doctor in this field was Ambroise Tardieu who explained that

The characteristic signs of passive *pédérastie*, which we will look at in succession, are the excessive development of the buttocks, the

infundibular (funnel-shaped) deformation of the anus, the relaxation of the sphincter ... It is on the virile member that we expect to find the mark of active habits. The dimensions of the penis on individuals who participate as the active partner in sodomy are either very spindly or very voluminous: slenderness is the general rule, fatness is the rare exception; but in all cases, the dimensions are excessive in one direction or the other...⁶⁵

At the end of his extensive report on the supposed physical characteristics of homosexuals, Tardieu explained that his purpose was to give "to the expert medical witness the means to recognize pederasts by certain signs, and thus, to resolve with greater certainty and authority than has been possible up to the present, the questions for which justice invokes his assistance in order to pursue and, if possible, eradicate this disgraceful vice."⁶⁶ Indeed, with the developing notions of contagion tied to the Pasteurian revolution, medical reports like Tardieu's began to place the emphasis on the dangers homosexuality might pose to "public order." And in 1895, Doctor Paul Garnier published a study that focused solely on the case of fetishist homosexuals, and in particular, the fetish for polished leather boots, which stated this thesis quite clearly. In the general conclusion to his study, Garnier explains that "the moral troubles resulting from such obsessions is such that they remove one's capacity for self-control. Consequently, it is in the interest of both the person charged and of public order to put him under the control of an administrative authority in order to place him in an insane asylum."⁶⁷

Though the majority of these medial studies were concerned with male homosexuality, nineteenth-century sexologists did not ignore lesbians. Like their studies of male homosexuals, the studies of lesbians blamed many cases of female homosexuality on an individual's vulnerability to contagion when faced with broader social changes. As Gretchen Schultz has pointed out in her recent study of representations of fin-de-siècle lesbianism, the spread of female homosexuality was attributed to the existence of all-female spaces, which were "presumed to be breeding-grounds for lesbianism, be they prisons, brothels, boarding schools, or convents," but was also strongly associated with the "changing roles and growing liberties of women (such as increased access to education and growing numbers of women in the work force resulting in greater independence from men)..."⁶⁸

Collectively, these medicolegal experts' testimonies of male and female homosexuality and the effort they made to couch the dangers of homosexuality in terms of its threat to the public (either through notions of contagion or through the threat posed to "public order") served to establish a victim in this context. This particular line of reasoning, through a reliance on the potential harm done to the victim constructed in the form of the "public," was articulated with greater precision as the nineteenth century drew to a close, and by the interwar period, the notion that there might be certain situations where homosexuality would not be a victimless crime had become well ingrained in political discourse.

After the First World War, homosexuality was blamed for the alleged social weaknesses responsible for France's defeat, though as Carolyn Dean points out "it is never clear in these attacks whether homosexuality was the cause or symptom of the war...but in every instance, homosexuality reenacted the trauma of war as the experience of spectacularly degraded manhood."⁶⁹ Nineteenth-century fears of contagion were heightened during the interwar period, as social commentators began to recognize that homosexuals were not so easily identified, that even seemingly masculine men or feminine women could be susceptible to homosexual desires, that the "disease" of homosexuality could spread through French society silently and invisibly. The medical experts' testimonies from the nineteenth century that enumerated identifying characteristics of homosexuality became increasingly discredited, which meant that homosexuality might be much more widespread than had been previously imagined and could be spreading undetected, making it nearly impossible to control or limit. Young men during the "fragile" years of adolescence were considered to be particularly susceptible to contamination from older homosexuals.⁷⁰ As one doctor put it in the 1930s, "how many little boys have become homosexual because of the candy offered by a handsome gentleman encountered one day at the end of school?"⁷¹

Somewhat paradoxically, fears of the invisible spread of the disease of homosexuality coincided with an increased visibility of the homosexual scene in the interwar period. In the 1920s, it was possible to find specialized bars and homosexuals began to feel safe even if the sense of security was to a large extent illusory.⁷² Also, in 1924, French homosexuals produced their first journal, *Inversions*

dans l'art, la littérature, l'histoire, la philosophie et la science (the name was changed to *Amitié* in 1925). The editors of *Inversions* made it clear that the French homosexual community was not to be understood as a subculture trying to gain access to the dominant culture, but rather as "a society within society." The idea was that homosexuals already occupied important positions in society and the journal's mission was merely to expose this reality. *Inversions* was the first journal of its kind, aimed specifically toward homosexuals, yet sold openly in a number of Parisian kiosks. The words "in art, literature, history, philosophy and science" in the title made it clear that the journal's strategy was to emphasize the contributions homosexuals have made to these socially recognizable pillars of knowledge throughout history, to emphasize a connection between homosexuality and production of high culture, to assert that it was not at all a question of bringing homosexuals into high culture because they were already there.

Between the pages of an issue of *Inversions*, one was sure to find at least one article that "outed" a celebrated writer, such as Shakespeare or Goethe. The underlying assumption was not just that homosexuality had been practiced by many of history's greatest figures, but also that there seemed to exist a link between homosexuality and creative genius: "Should homosexuals be considered abnormal? If we consider an intellectual, a poet or a genius abnormal, I would accept that the homosexual is an abnormal being...But through some strangeness of nature, these are the same beings who are inclined toward homosexuality. Is there a direct link between homosexuality and genius?"⁷³ Articles legitimized homosexuality also through references to classic antiquity and to more contemporary writers such as Oscar Wilde, André Gide, or Walt Whitman. Despite the fact that the editors were not themselves men of letters and that none of the more famous homosexuals writers of the period ever contributed to the journal, writers maintained a seemingly forced tone of cultivated civility and simulated erudition. The aim of *Inversions* was not to assert difference or to claim that homosexuals should be treated as equals despite their difference, but rather to claim that homosexuals were already assimilated, not just into society at large but into the most prestigious spaces of high French culture: "Now, all or almost all great men, the most creative men, the most generous men and the most fertile men, have loved Ganymede rather than the vulgar Venus."⁷⁴

Yet despite this increased visibility associated with presence of specialized bars and with a journal like *Inversions*, homosexual political movements like those seen in Germany and in Britain at the time did not form during the interwar period in France. This had to do with the relative legal tolerance in France, but also with what Florence Tamagne refers to as “the individualism of French homosexuals,” who tended to shun the idea of belonging to associations.⁷⁵ As a result, the public’s image of homosexuality was constructed not so much by homosexuals themselves, but by police and by doctors, who portrayed homosexuals as criminals and as potential traitors to the French nation. The growing association of homosexuality with moral decadence, with notions of contagion, and with the alleged weakness of France’s men after the war led to even greater calls on government officials to do something to stop its spread. These fears, on the eve of the Second World War, required action, symbolic or real, on the part of the government. This historical context and also the growing perception that homosexuality might indeed have its victims – either in the form of youth through contagion or the public through the threats it allegedly posed to public order or national security – set the stage for legal action. It was therefore not a chance event when in 1942, a law responding to these fears – the first to discriminate explicitly between homosexual and heterosexual acts since 1791 – was signed and promulgated by the Marshal Philippe Pétain.

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