

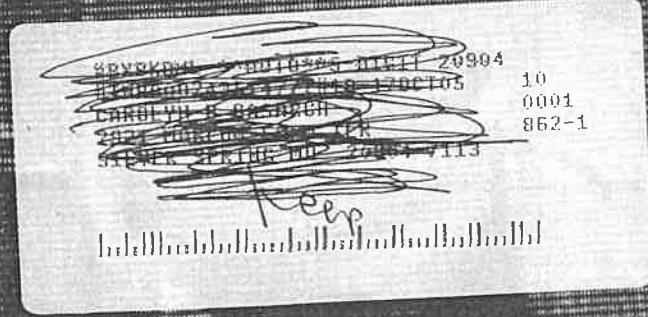
WHAT THE KURDS
REALLY WANT

WHAT SODOMY LAWS
REALLY MEAN

WWW.TNR.COM ▶ MARCH 24, 2003

THE NEW REPUBLIC AGAINST WAR WITH NORTH KOREA

MICHAEL LEVI, JOSHUA KURLANTZICK, ERIC WEINER, THE EDITORS



after the chemical attack, she recalled that people arrived from the village blind, raving, laughing, mad, and poisoned. A month later, Bahar went back to find her father. He'd gone back to Halabja to get milk for his baby daughter. She found him in the garden of his house, dead, flat on in his stomach, still covering his mouth with his hands. Forty-five other relatives of Bahar were also killed by the chemicals—"that smelled like onions and apples," said Yerevan, who was eight at the time.

Bahar said she has watched in confusion and anger at the Europeans demonstrating against a war to topple Saddam. "They know nothing of the oppression of Saddam," she said. "If they had suffered from it, they could never march in the streets against it." The trees in Bahar's father's garden all died from the chemicals. She buried her father and set about starting life over again, planting new trees. On a quiet street, behind stone walls and a metal gate, in her father's garden, the cherry blossoms on Bahar's young tree are in bloom. ■

We're all sodomists now.

Unnatural Law

BY ANDREW SULLIVAN

IN SEPTEMBER 1998, two men named John Lawrence and Tyron Garner were having sex in Lawrence's home in Houston, Texas. Without warning, police broke into the house and found the two engaged in what Texas law calls sodomy. (The police had been summoned by a neighbor who had complained about a man allegedly "going crazy" in Lawrence's house.) Lawrence and Garner were arrested, held for 24 hours, and ultimately fined \$200 after pleading no contest to the charge of sexual deviation. The two men later challenged the constitutionality of their conviction in the Texas Court of Appeals and in the Texas Criminal Court of Appeals, claiming it violated their rights to privacy and to equal protection of the laws. Neither Court agreed. Last December, the U.S. Supreme Court decided to hear the case. Most observers predict that the Court will strike down the law, though there's disagreement about the grounds on which the Court might make its decision and how far-reaching it will be. Oral arguments are due March 26.

The legal and constitutional arguments around this case are complicated and fascinating. But, in some ways, they are secondary. The most obvious questions surrounding *Lawrence v. Texas* are simple ones: What is actually wrong with sodomy? Why is it immoral? And why is it still illegal in 13 states and in many countries around the world?

These are basic questions our culture has avoided. For a long time, the immorality of sodomy was regarded as so self-evident it didn't bear examination. Then, in the newly tolerant world of the last few decades, the issue simply disappeared. For those who disapproved of homosexual sex, or of non-procreative forms of sex between heterosexuals, the subject was so distasteful it was passed over in silence. Since the laws had rarely been enforced against heterosexuals, there was no sense of urgency about their repeal. Even gay rights advocates tended to avoid the subject: Homosexuality, these advocates

argued, was not about sodomy as such. It was about love and friendship and relationships and family.

From a gay rights standpoint, you can see the benefits of this strategy. Reducing love, friendship, passion, and companionship—the critical elements of most gay relationships—to a simple physical act is simplistic. We'd never talk about heterosexual marriage primarily in terms of vaginal intercourse or merely sexual needs; it would slight the depth and variety of the heterosexual relationship. Nevertheless, it remains a simple fact that a large amount of the opposition to gay equality (especially among heterosexual men) comes from a visceral association of gay relationships with male sodomy. And, indeed, from the beginnings of our cultural discomfort with homosexuality, almost the entire legacy of stigmatization has focused on one thing only: the illicit, vile, unmentionable "crime against nature," which the law has long designated as the definition of homosexuality itself. In some ways, then, a new focus on sodomy is welcome. It offers us an opportunity to come to grips not only with the real nature of homosexuality but also with the real nature of those who wish to retain and even advance its stigmatization. And it provides an occasion not simply to defend negatively the right to private, consensual sodomy, but to defend positively its morality as well.

THE MORALITY OF sodomy, of course, is inextricable from its etymology. In the Book of Genesis, Sodom is a city uniquely condemned by God for its waywardness. Its sins merit utter destruction. But what are those sins? Alas, the text is not specific. Most modern scholars believe the original sin of Sodom was a refusal to be accommodating to travelers. Others believe it might have been the sin of rape. The Book of Ezekiel explains that Sodom and "her daughters had pride, overabundance of bread, abundance, and leisure, but they did not extend their hand to the

for. They were raised up and committed abominations before me." Even in the New Testament, Sodom is condemned in terms of its connection with "uncleanness" and "adultery." When the Book of Leviticus condemns men who lie with men, no reference is made to Sodom itself.

So how did the ironclad connection between gay male sex and the divine destruction of Sodom get made? Emory University theologian Mark Jordan's book *The Invention of Sodomy in Christian Theology* (written while he was a tenured professor at Notre Dame) is the deepest recent exploration of the issue. From the beginning, Jordan argues, non-scriptural sources associated Sodom with a variety of sins: pride, disobedience, in-hospitality, and sexual license. It was Augustine who in the fourth century went further, linking the place to *stupra in masculos* (debaucheries in men) and *flagitia contra naturam* (violations against nature). But, even in Augustine, the sexual sins of Sodom were not exclusively to do with same-sex sex. They were to do with sexual license, abandon, and what became known in Latin terminology as *luxuria*, the sin of worldly excess, incorporating gluttony and drunkenness and general self-indulgence.

It's worth noting, then, that from the very beginning sodomy and homosexuality were two categorically separate things. The correct definition of sodomy—then and now—is simply non-procreative sex, whether practiced by heterosexuals or homosexuals. It includes oral sex, masturbation, mutual masturbation, contraceptive sex, coitus interruptus, and anal sex—any sex in which semen does not find its way into a uterus.

So it's perhaps unsurprising that Jordan's research doesn't discover the actual nouns "sodomy" and "sodomite" until the eleventh century. The first and most influential polemic against it was the hermit monk Peter Damian's *Book of Gomorrah*. Given the period's expansive definition of sodomy (it did, after all, include masturbation), it's not surprising that Damian believed it was rife. But his particular fixation—which has persisted in religious teachings ever since—is with same-sex male sodomy. This is partly because Damian is most concerned with sodomy as a clerical vice, the ubiquity of which among priests he thought threatened the integrity of the Church. But what's fascinating about Damian is his struggle to understand the nature of the sodomite. He had no understanding of homosexuality, which even the Church now describes as an "innate" facet of human personhood. And so he keeps bumping up against the apparent ineradicability of the vice. All sins, after all, are redeemable in the eyes of God. But this sin seems immune to change. So Damian lays almost no emphasis in redeeming sodomites but, rather, focuses on purging them. This is where the analogy to Sodom comes in and why Damian seems so intent on connecting this vice to the ancient city. Because sodomites seem consumed by their desires and unable or preternaturally unwilling to change, the only possible response to them is damnation. Indeed, Damian favors the death penalty for such behavior, in line with Leviticus. The logic seems to be that, since these people cannot change, they must be destroyed, just as Sodom was destroyed, and that destruction is a vital reaffirmation of the divine order.

This linkage soon became an accepted part of Christian doctrine with regard to sodomy. And the consequences couldn't be starker. In Jordan's words, "Peter Damian's central address to the Sodomite is in fact and rather clearly an exhortation to someone to step forward for execution." Like Jews, whose persistence brought into question the universal claims of Christianity, so sodomites, in their dogged resistance to change, appeared as a living rebuke to the universal demands of creation. So, gradually, what might otherwise have been seen as one troubling subcategory in the sins of sexual excess, one variation on the broader theme of *luxuria*, gathered steam as a sin so great and so horrifying that it couldn't even be spoken of. To get an idea of how out of proportion the detestation of sodomy became, Jordan assessed the various confessional manuals of the very early Middle Ages. These were books designed to guide confessors in the hearing of penitents. One popular text, written by Paul of Hungary, gave instructions on how to judge and absolve every sin known to man—from pride to sloth to envy. But the subcategory of sodomy (dealt with under the rubric of *luxuria*) amounted to 40 percent of the entire text! It took up more space than anger, sloth, envy, pride, and gluttony combined.

The root of all this is the medieval notion that it is a rebellion against God for semen to be ejaculated outside a womb. This idea sprang in part from medical notions that sperm itself contained all the ingredients necessary for human life. The conflation of sperm with embryos—making masturbation indistinguishable from abortion—rested also on the notion that women were merely defective males, whose bodies contributed nothing to new life but a temporary harbor. Indeed, in many medieval texts, the definition of sodomy also included procreative sex in which the woman is on top of the man, violating the "natural" supremacy of men.

Thomas Aquinas, the most influential of medieval theologians and whose work is still the basis of "natural law" theology, took the depravity of sodomy even further in his thirteenth-century masterpiece *Summa Contra Gentiles*: "After the sin of homicide whereby a human nature already in existence is destroyed, this type of sin appears to take next place, for by it the generation of human nature is precluded." Second only to murder! This is partly because sperm was believed to be embryonic but also because "in sins against nature, in which the very order of nature is violated, an injury is done to God himself, the orderer of nature." While Aristotle, 16 centuries earlier, had viewed erotic acts between men as sins of natural human disorder as opposed to the subhuman practices of cannibalism or bestiality, Aquinas conflated all of them.

These, then, were just some of the early Western arguments about sodomy. And, though many of them have been shown to be based on bad science (e.g., the equation of sperm with embryos), others have endured. Some of this is not surprising. The argument that sodomy is unnatural, for example, carries intuitive weight. After all, if sex is functionally or ideally for procreation, sex with no possibility for procreation is always going to be teleologically problematic. But the weight of the hostility to it, the way in which it is singled out for intense

hostility, the manner in which even mentioning it is regarded as dangerous, and the fact that it seems largely beyond the capacity of God to forgive—all these elements are not so easily explained. The notion that 40 percent of a Christian confessional treatise should be devoted to an issue that Jesus fails to mention once in the Gospels should strike the objective reader as odd. Ditto the comparison of non-procreative sex to murder. Part of it may come from simple heterosexual incomprehension at the idea of same-sex attraction. Part perhaps from a particular concern among priests and monks about sodomy's popularity within their own ranks. Part also from some kind of visceral heterosexual-male aversion to same-sex sodomy. But, whatever the reasons, the foundations were set for the modern world's recourse to criminal law to back up this theological aversion, a recourse that is reverberating even today.

IN 1533, SODOMY became a formal crime in England for the first time, as Henry VIII incorporated what had previously been exclusively ecclesiastical legalities into civil law. The early American colonies absorbed this legal precedent to varying degrees, with Massachusetts, for example, adopting a law against man "sleeping with mankind" as early as 1641. In most cases, the early colonies' laws made no distinction between same-sex sodomy and sodomy between a woman and a man, and the usual punishment was death, although it doesn't appear to have been implemented very often. In fact, from the beginning, there was a huge discrepancy between the rhetoric behind such laws and the willingness to enforce them—perhaps an indication of how extreme the phobia had become and how unrelated to reality it was. Sodomy laws in the United States remained virtually unchanged until the early part of the last century, when they were expanded in almost all cases to include oral sex. Most recognized no marital exclusion from prosecution; and, in most cases, no right to privacy trumped legal culpability. By the mid-twentieth century, almost all state sodomy statutes added cunnilingus to their understanding of "crimes against nature"; Oregon and Maryland were able to outlaw mutual masturbation under the same rubric of "perverted practices." A few states even experimented with the forced sterilization or institutionalization of sodomites.

But, as attitudes toward sexuality gradually liberalized in the latter part of the century, the legitimacy of sodomy laws waned, as did their enforcement. In 1971, four years after Britain famously legalized private, adult consensual sodomy, 47 states still retained their long-standing sodomy laws. But, three decades later, only 13 states (plus Puerto Rico and the military) retain them. This liberalization was by no means steady: The biggest reality check came in 1986 with the now-famous *Bowers v. Hardwick* case. A gay couple had been arrested in a private home for consensual sodomy; many observers predicted the Supreme Court would rule such arrests unconstitutional. After all, the Court had previously ruled in *Griswold v. Connecticut* that married couples had a right to use contraception—i.e., practice non-procreative sex, a.k.a. "sodomy"—in their own homes. It had also recognized a right to privacy in the choice of

a woman to have an abortion. But, when it came to the right of homosexual non-procreative sex in private, the Court drew a distinction. Chief Justice Warren Burger's concurrence to the decision expressed the reasoning behind the ruling:

Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. . . . [Eighteenth-century English legal scholar Sir William] Blackstone described the 'infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act, 'the very mention of which is a disgrace to human nature' and 'a crime not fit to be named.' . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Burger dismissed any notion of homosexual orientation as a part of human nature and derided any comparison to private heterosexual conduct as absurd. "Are those with an 'orientation' towards rape to be let off merely because they allege that the act of rape is 'irresistible' to them?" Burger wrote in a letter to Justice Lewis Powell during the *Hardwick* deliberations. "Are we to excuse every 'Jack the Ripper?'" (Burger's correspondence was unearthed and published by Joyce Murdoch and Deb Price in their indispensable book, *Courting Justice: Gay Men and Lesbians v. the Supreme Court*.) Justice Byron White, who wrote the decision, regarded the whole idea of a homosexual right to privacy as "facetious." He treated the case not as a matter of sodomy as such but of homosexuality, refusing to say whether heterosexual sodomy was equally without protection under Georgia's law. When Professor Laurence Tribe, representing the plaintiffs, talked of the sanctity of a person's home being invaded by cops policing homosexual activity, Powell was offended. "I must say that when Professor Tribe refers to the 'sanctity of the home,' I find his argument repellent," Powell spoke into his Dictaphone as the case was proceeding. "'Home' is one of the most beautiful words in the English language. It usually connotes family, husband and wife, and children—although, of course, single persons, widows and widowers, and others also have genuine homes." But homosexuals? Inconceivable to Powell. Such was the legacy of the sodomy laws and the culture and view of human nature they represented. The fact that Georgia's law was rarely if ever enforced against heterosexuals raised no red flags in the majority of the Court's minds.

Indeed, it was precisely the greater sexual liberalism of the day that ironically led the idea of sodomy to be radically narrowed in scope—and applied solely to homosexual sex. Worried that prohibiting sodomy as such might intrude upon the privacy of large majorities of their heterosexual citizens, and that enforcing such laws exclusively on homosexuals might lead to equal protection challenges, some states—starting with Kansas in 1969—amended their sodomy laws to explicitly apply only to homosexuals. Perhaps the most spectacular

example took place in Texas. In 1973, Texas legalized heterosexual anal and oral sodomy, along with bestiality, but simultaneously fashioned a new criminal law directed solely at gays. The law was specifically defended as late as the 1990s by then-Governor George W. Bush. Three other states—Kansas, Missouri, and Oklahoma—have such discriminatory laws as well. Their constitutionality will be what is at issue in this spring's Supreme Court ruling.

BUT CONSTITUTIONALITY, HISTORY, and even religious tradition still don't answer the more fundamental question: Why exactly is sodomy immoral? There is little doubt that Jewish and Christian scriptures prohibit such sexual practices. But they also prohibit divorce, which is now legal across the Western world. And the same medieval religious tradition that fixated on sodomy was also riddled with anti-Semitism and opposition to usury. If the last two prohibitions have been abandoned as mere prejudice, why not the first? The relevant question when we are addressing the maintenance of secular laws or social disapproval of sodomy is therefore not: Has it always been so? But rather: Why is it so?

The fundamental answer is that it is "unnatural": It violates the purpose of human sexuality, which is designed to foster procreation. At some level, that argument surely makes sense. There is something unique and miraculous about the connection between male-female sex and the creation of new life. Its connection to a marital structure in which that new life can be nurtured, protected, and elevated is also one that is obviously vital to defend. Catholic thinkers have developed the most elaborate modern doctrine on this subject. That doctrine affirms something life-giving and important: the nexus between sex, marriage, and family. As a symbol of what sexuality can be about, indeed what it is ultimately about, this linkage makes moral and theological sense. It also makes social sense. The data that children are better adjusted when they grow up in stable, nurturing, traditional homes is overwhelming. It makes all the sense in the world for a society to find a way to celebrate and protect this arrangement for, if nothing else, the benefit of the next generation.

The trouble comes when this vision of what sex *can* be about becomes an instruction about what sex *can't* be about. To say that sexual activity reaches its heights within a procreative marital act is not the same thing as saying that all other variants of sexuality are immoral, let alone worthy of divine damnation along the lines of Sodom. Even within perfect, Catholic, procreative marriages, after all, non-procreative sexual activity is inevitable. For some periods within a woman's menstrual cycle, sex cannot be procreative. Throughout pregnancy, sex cannot be procreative. After menopause, sex cannot be procreative. Moreover, unless people are married as children, there will always be a period of adolescence in which sexual capacity will far outstrip any ability to restrict it to procreation alone. These are simply facts. Human sexuality can indeed be channeled. But the standard that it must only ever be directed to procreation is

simply one that almost no human being can ever fully live up to. In fact, the whole concept of an exclusively procreative sexuality, however beautiful in theory, is simply meaningless in practice. It does not exist. It has never existed. It cannot exist. Sodomy, in its broad, original sense, is inextricable from being a sexual human.

Indeed, one could make the case that sodomy is biologically hardwired. Even in the course of an ideal-type procreative marriage, untold populations of sperm will be "wasted," along with any number of eggs ready to be fertilized. The amount of sperm a male produces cannot even remotely be exclusively directed toward reproduction. Those who argue that sodomy is immoral therefore have to acknowledge that nature itself has built in non-procreative sexual production of sperm and eggs to a ridiculous degree. There's an obvious reason for this: By making human males produce so much sperm, much of it superfluous, nature maximizes the odds of some of it leading to new life. If this seems paradoxical, try this thought experiment. Imagine a parallel universe in which a human male has, say, one ejaculation per year. Suddenly the prohibition against sodomy makes far more sense. Such a precious and rare opportunity to procreate should surely not be wasted. But then look how far that universe is from our actual one. The average adolescent male, at the peak of his sexual drive, might ejaculate several times a day. If you are drawing logical inferences from nature itself, which is in part the basis of natural law, it seems to me that nature is far more accepting of sodomy than the religious and moral authorities would ever have us believe.

Moreover, to treat human sexuality as entirely instrumental to the production of children surely demeans it. A marital sexual act, engaged in for reasons of passion, love, commitment, or mutual comfort, is not rendered meaningless or immoral if it doesn't happen to produce another human being at the end of it. To say otherwise is to reduce human beings to reproductive animals and the meaning of their sexuality to a purely functional dimension. The body, after all, is a complex thing. To speak of any part of it as having a single and exclusive purpose, in the manner of Aquinas, is to reduce the complexity of human experience to the relative simplicity of an animal. Is an eye being used immorally if you use it not to see but to wink? Or a mouth somehow deployed immorally if we use it not to eat or drink or breathe but to smile?

AWARE OF THE crudeness of the Aquinas position, today's natural law theorists, in a new twist, have dropped his insistence on procreation as the sole criterion by which sexual interaction can be morally judged. They now argue not from what appears to be in nature, as understood by contemporary or even medieval science, but what they posit as the "natural good" of marriage. The point of sexual activity, they now assert, is not just procreation but the unitive experience of marriage itself—the permanent bodily fusion of two human beings of the opposite sex. The actual desires or sexual orientations of human beings are not morally relevant. Sex is about the natural good

of marriage, and all human beings must adhere to that natural good or disavow sex altogether.

So sex is no longer about reproduction and nothing else. It's about marriage and nothing else. "The union of the reproductive organs of husband and wife really unites them biologically," Catholic theologian John Finnis argues. They become maritally, biologically one, and, if they put any barriers between them in their sexual acts—condoms, for example—they are violating that biological unity and destroying their marriage. Moreover, because marriage changes the very identity of a person, non-procreative sex leads to what these theologians call the human being's moral "disintegration."

Notice how this new form of natural law, while trying to avoid reducing human beings to mere reproduction factories, nevertheless ends up exactly where we began. Even in a marriage, let alone outside of it, oral or anal or contraceptive or mutually masturbatory sex is still immoral. Whereas, in earlier natural law, marriage seemed to be a regrettable but necessary way to restrain the evil of sexual desire, the new natural law places marriage front and center and sees procreative sex as the critical and positive practice that makes marriage real.

This new doctrine is further amended in an amicus brief filed by two eminent Catholic thinkers in the upcoming *Lawrence v. Texas* case. In Texas, defenders of criminalizing same-sex sodomy face what might seem an insurmountable obstacle. They have long claimed that sodomy is wrong, whoever practices it—heterosexuals or homosexuals. But the Texas law only polices sodomy when practiced by homosexuals. Amazingly, the Catholic authors of the brief, Robert P. George and Gerard Bradley, find a way to justify this: "The critical difference upon which the legal distinction rests is not the raw physical behavior but the relationships: same-sex deviate acts can never occur within marriage, during an engagement to marry or within any relationship that could ever lead to marriage. Physically similar sexual acts between married persons are constitutionally protected. Physically similar acts between unmarried persons of different sexes occur within relationships which Texas may wish to encourage, either as valuable in themselves, or because they could mature into marriages, or both."

So sodomy is not only now legally tolerable within heterosexual marriage, it is even tolerable *outside* marriage, as long as the practitioners are heterosexual and can therefore be regarded as engaging in a relationship—even if only a one-night stand—that could conceivably one day lead toward marriage. George and Bradley even go so far as to say that such non-marital, sodomitic relationships between heterosexuals could even be deemed by civil authorities as "valuable in themselves." This defense of premarital sex from some of the most orthodox Catholics on the planet! George and Bradley then provide an additional practical reason for enforcing sodomy statutes against gays but not against straights: "Texas could reasonably conclude that criminal prosecution is too blunt a tool with which to distinguish along the spectrum of opposite-sex relationships, all potentially marital and many

verging on or preparing for the strictly marital. Not wishing to intrude upon, damage, and perhaps destroy valued and incipiently marital relationships, Texas could reasonably decide to leave all these opposite-sex relationships undisturbed by the criminal law."

In other words, criminalizing sodomy as such, without taking into consideration the relationship in which such sodomy takes place, or how such sodomy could one day lead to marriage, is too crude a legal framework. It would also be impossible to enforce. Imagine a police force required to make sure that every act of heterosexual cunnilingus is monitored and criminalized. It's simply impractical. But, because there are far fewer homosexuals and they are more identifiable, the law can be used to punish them and them alone. And, because their relationships can never be marital and therefore are of no social use, there's no social cost incurred when cops "intrude upon, damage, and perhaps destroy" such relationships.

The same reasoning occurs within the new natural law theology as well. Here again, sodomy is officially forbidden, but, when you look more closely, you see that it is only effectively forbidden to gays. What if, for example, a marriage cannot naturally or biologically conform to the demands of non-sodomitic sex? What if a spouse is infertile or post-menopausal? You might think these would sadly remain outside the possibility of marriage as the good defined by the new theologians, alongside homosexuality. But no. In these cases, non-procreative sex acts are still okay as long as they conform to what George calls "the reproductive type (whether or not ... they are intended to be, or even can be, reproductive in effect)." In other words, as long as the couple is *mimicking* procreative sex, they're okay. Even if they have no intention of being procreative, it's okay. Even if they know their act is not procreative, it's morally fine. Non-procreative sex is now permissible in a whole variety of circumstances, *as long as you're heterosexual*. The Church's modern doctrines—in a curious echo of Texas's exclusively anti-gay sodomy law—are designed not to ban sodomy from human sexuality but to ban homosexuals from sexual dignity.

What the George-Bradley brief shows is how the principled stand against all sodomy—however implausible—has now essentially been abandoned as a basis for law in modern society, even by its most fervent defenders. What's left is merely hostility toward homosexuals. Logically, of course, heterosexual sodomy should be *more* stigmatized than homosexual sodomy. A man and a woman, after all, have a choice to procreate or not to procreate; two women or two men do not. If you're trying to frame the law to encourage procreation, why only apply it to those who cannot procreate at all while removing such an incentive for the only group for whom such an incentive makes sense? Just as the intense prohibition on sodomy seems to have emerged in part from a medieval fear and incomprehension of homosexuals, so it has ended up centuries later in exactly the same place: as a means not of upholding a universal morality but of maintaining a stigma against a single class of persons.

AS A SIMPLE empirical matter, we are all sodomites now, but only homosexuals bear the burden of the legal and social stigma. Some studies have found that some 90 to 95 percent of heterosexual couples engage in oral sex in their relationships, similar numbers use contraception, and a smaller but still significant number practice anal sex. We don't talk about this much because we respect the privacy of intimacy. The morality of sex in today's West is rightly one in which few public moral judgments are made about any sexual experiences that are private, adult, and consensual. Within these parameters, non-procreative sex is simply the norm.

But to say they're the norm is perhaps too defensive. The norm is also, many have come to understand, a social, personal, and moral good. It is hard to see why, for example, sexual pleasure, fantasy, and escape are somehow inimical to human flourishing—and there's plenty of evidence that their permanent or too-rigid suppression does actual psychological and spiritual harm. Relationships that include sexual adventure and passion and experimentation are not relationships of "disintegrated" people but relationships in which trust is the prerequisite for relief, release, and renewal. The meaning of these sexual experiences is as varied as the people in them. And there are many contexts in which to understand these sexual experiences other than as purely procreative.

You can think of sex—within marriage and in other relationships—as a form of bonding; as a way to deepen and expand the meaning of intimacy; as a type of language even, where human beings can communicate subtly, beautifully, passionately, without words. And, in a world where our consumer needs are exquisitely matched by markets, in which bourgeois comfort can almost anesthetize a sense of human risk and adventure, sex remains one of the few realms left where we can explore our deepest longings, where we can travel to destinations whose meaning and dimensions we cannot fully know. It liberates and exhilarates in ways few other experiences still can. Yes, taking this to extremes can be destructive. And yes, if this experience trumps or overwhelms other concerns—the vows of marriage, the trust of a faithful relationship, the duty we bear to children—then it can be a social harm. But the idea that expressing this human freedom is somehow intrinsically and always immoral, that it somehow destroys the soul, is an idea whose validity is simply denied in countless lives and loves.

But, if many of us—gay and straight alike—have absorbed this new sexual consensus, we still deny it in our legal and social treatment of homosexual sex. The convolutions that legal authorities now have to go through to justify this discrepancy are getting more and more elaborate and less and less convincing. At some point, the unfairness of this must surely impinge itself on our collective consciousness. The maintenance of sodomy laws is but one bookend in this anachronistic structure; the other is marriage itself. One reason there is such fierce resistance to the repeal of sodomy laws is that the supporters of such laws fear that, once those laws are removed, there will be essentially no legally relevant

difference between heterosexual marriages and homosexual relationships. The two issues might be legally separate—as we can see by the many states that have no sodomy laws and yet retain exclusively heterosexual marriage laws. But, logically, this discrepancy makes less and less sense. Both gay and straight relationships in our culture are now primarily sodomitic in their sexual practices. Both adhere to the general principles of equality, adulthood, privacy, and consent that have become our *de facto* social norms for adult relationships. Within both straight and gay relationships, there is a wide spectrum of conformity to monogamy, child-rearing, social responsibility, and even gender roles. As the years go by and as legally protected same-sex relationships mature as a social institution, the differences that remain are slowly diminishing.

Yes, there are psychological and social distinctions between these types of relationships. Lesbian relationships—which make up the majority of same-sex civil unions in the only state where such unions are legal, Vermont—tend to be more monogamous than many heterosexual relationships, and they tend to house more children than gay-male relationships. Gay-male relationships tend to be less monogamous than their lesbian and heterosexual counterparts. Heterosexual relationships, for their part, also span the gamut—from traditional, lifelong monogamy to serial marriages and multiple divorces to discreet philandering on the parts of many. There are even explicitly open marriages or, in some ethnic subcultures, hyper-traditional arranged ones. In our multicultural world, the differences between an arranged marriage between immigrants in a Maryland suburb and a baby-boomer third marriage in Tribeca are easily as great as those between gay and straight couples. Ditto the differences between a yuppie power couple with no children and apartments in multiple cities and a home-schooling family of ten in the Rocky Mountains. Such diversity doesn't lead us to make legal distinctions between the validity of the marriages involved. In fact, the extraordinary diversity of the content of marriages makes us even more concerned to provide some overarching and unifying social and legal uniformity. And, once you have removed the criterion of sodomy as the distinctive difference between gays and straights, and between marriage and non-marriage, you can see how arbitrary both sodomy laws and laws forbidding gay marriage actually are.

We live in a world, of course, where the past obviously matters. The tortured history of the persecution of homosexuals, structured around a deep and often hysterical aversion to sodomy, looms over us still. But history isn't destiny. And unreason isn't a good basis for law. Perhaps this year will finally see the U.S. Supreme Court assess not the power of inherited fear but the illogic of inherited discrimination. Perhaps it will find a way, as it has with other marginalized peoples in the past, to liberate a whole class of persons not merely from the stain of a dark and painful persecution but into the possibility of a more humane future: to give human desire meaning, gay love structure, and sex for all of us the freedom and dignity it has so long been denied. ■