

ADVENTURES IN HETERONORMATIVITY: THE STRAIGHT LINE FROM LIBERACE TO LAWRENCE

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My title deserves explication. Social theorist Michael Warner coined the term heteronormativity in 1993 to refer to heterosexual culture's interpretation of itself as the natural, inevitable structure of society.¹ By heteronormativity, I mean the complex social, political, legal, economic and cultural systems that together construct the primacy, normalcy, and dominance of heterosexuality.²

The two particular adventures in heteronormativity that I am inspecting and juxtaposing are sodomy statutes targeting homosexuals, the subject of a vast legal literature,³ and the hetero-sexualized popular culture of Las Vegas

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¹ See MICHAEL WARNER, INTRODUCTION, FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY vii, xxi (1993). Warner described heteronormativity as understanding heterosexuality as "the elemental form of human association, as the very model of inter-gender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist." *Id.* See also Paisley Currah, *Politics, Practices, Publics: Identity and Queer Rights*, in PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES 258 (Shane Phelan ed., 1997) (attributing the term heteronormativity to Michael Warner); MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS AND THE ETHICS OF QUEER LIFE 41-88 (1999) (discussing problems associated with "normal" and "heteronormality").

² See also MONIQUE WITTIG, THE STRAIGHT MIND AND OTHER ESSAYS 27-28 (1992) (writing that the discourses of the straight mind are "those which take for granted that what founds society, any society, is heterosexuality").

³ See, e.g., PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT (2000); WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 44-98 (2d ed. 2004); WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 146-282 (3rd ed. 1997); Susan Ayres, *Coming Out: Decision-Making in State and Federal Sodomy Cases*, 62 ALB. L. REV. 355 (1998); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993); Adam Hickey, *Between Two Spheres: Comparing State and Federal Approaches to the Right to Privacy and Prohibitions Against Sodomy*, 111 YALE L. J. 993 (2002); Nan Feyler, *The Use of the State Constitutional Right to Privacy to Defeat Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986); Elizabeth A. Leveno, *New Hope for the New Federalism: State Constitutional Challenges to Sodomy Statutes*, 62 U. CIN. L. REV. 1029 (1994); Nan Feyler, *The Use of the State Consti-*

and Nevada, not previously a subject of legal scholarship. Anti-gay sodomy statutes and the hyper-sexualized culture of Las Vegas are not completely separate subjects: from 1977 to 1992, Nevada had a sodomy statute specifically targeting homosexual sex,⁴ one of just nine states to do so.⁵ Las Vegas may or may not represent the future of America,⁶ but it can certainly teach us something important about the cultural meanings of law and about the legal meanings of sexuality.⁷ Las Vegas is brash, loud and unabashedly about sex. The dominant culture of Las Vegas is an extreme commodification of sexuality.⁸ The city presents itself as a festival of pleasure for heterosexual men, with a stunning visual culture of commodified, sexualized images of available women.⁹ Las Vegas' image as the capital of extreme heteronormativity is part of the adventure.

Indeed, Las Vegas and Nevada *flaunt* their heterosexual identity, an identity unabashedly focused on the male pleasures of heterosexuality, promoted with a wink and a promise of sexual license without repercussions: "What happens in Vegas, stays in Vegas."¹⁰ As surely as the Nevada state flower is sagebrush, "Freedom for heterosexual men" could be the state slogan.¹¹ Las Vegas is the city known for drive-through wedding chapels and marriages performed

tutional Right to Privacy to Defeat Sodomy Laws, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986).

⁴ 1977 Nev. Stat. 1632; 1993 Nev. Stat. 518 (repealing NEV. REV. STAT. 201.193).

⁵ *Lawrence v. Texas*, 539 U.S. 558, 569 (2003).

⁶ See generally, HAL ROTHMAN, *NEON METROPOLIS: HOW LAS VEGAS STARTED THE TWENTY-FIRST CENTURY* (2002); see also MARC COOPER, *THE LAST HONEST PLACE IN AMERICA: PARADISE AND PERDITION IN THE NEW LAS VEGAS* (2004) (describing Las Vegas as America's symbolic capital).

⁷ See generally Halley, *supra* note 3, at 1730 (suggesting usefulness of "tools offered by cultural criticism" in studying impact of sodomy laws); Jane S. Schacter, *Skepticism, Culture, and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 687 (1997) (reviewing ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995) and URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (1995)) (urging "more cross-disciplinary scholarship focusing on the relationship between law and culture in the context of equality struggles").

⁸ Las Vegas offers a brash version of a ubiquitous phenomenon. For the claim that much commerce is inseparable from the commodification of sexuality, see David M. Skover & Kelley Y. Testy, *LesBiGay Identity as Commodity*, 90 CALIF. L. REV. 223, 238-39. (2002). "Sexuality is commerce, commerce is sexuality." *Id.* at 238 (footnote omitted).

⁹ Oddly, perhaps, many of the available women pictured on Las Vegas billboards, taxi signage, print ads, and sleazy circulars handed out to tourists on the Strip are represented as lesbians, or at least as partially- or un-clothed women together in sexual poses.

¹⁰ The Las Vegas Convention and Visitor Authority promotes the city with a highly successful slogan, "What happens in Vegas, stays in Vegas." See Chris Jones, *What Happens Here Turns Off Executives: Business owner criticizes 'Vegas Stories' ads; tourism official touts campaign's effectiveness*, LAS VEGAS REV.-J., Aug. 27, 2003, at 1A; *Leaving It in Las Vegas*, N.Y. TIMES, June 7, 2004, at A26.

¹¹ Interestingly, Nevada and Las Vegas have unusually high percentages of men to women. See Natalie Patton, *Men Continue to Outnumber Women in State: Only Alaska has Higher Male-Female Ratio, Census Shows*, LAS VEGAS REV.-J., Sept. 10, 2001, at 1A. One resident offered the explanation, "It's more of an adult Disneyland here for men than for women. I think you know what I mean." *Id.*

by Elvis impersonators, in the state that invented the quickie divorce, the only state that permits rural counties to license brothels.¹²

This is also the state that recently amended the Nevada Constitution to define marriage as one-man and one-woman with seventy percent in 2000 and then sixty-seven percent of the popular vote in 2002.¹³ In other words, on the subject of legal recognition for same-sex relationships, two-thirds of Nevadan voters prefer that what happens in Vermont, Massachusetts, and Canada, stays in Vermont, Massachusetts, and Canada. In this, Nevada is decidedly not an American Amsterdam, where a culture of sexual freedom supports prostitution and gay and lesbian rights. Nevada is not a sexually libertarian state, but a hetero-libertarian state. This hetero-libertarian license makes Nevada and Las Vegas a compelling site to study the intersections of law and sexuality, especially the legal regulation and policing of hetero-culture.

"Liberace" is the word in the title that needs little introduction. Liberace was a world famous entertainer and pianist, as famous for his gilded candelabra, extravagant furred and bejeweled costumes, and flamboyant materialism, as for his popularized renditions of classical music.¹⁴ At its height in the fifties, Liberace's television show had more viewers than *I Love Lucy*.¹⁵ Liberace is a much-analyzed figure in cultural studies and queer studies, the subject of academic articles and books.¹⁶

¹² See NEV. REV. STAT. 244.345 (8) (2004) (prohibiting the licensing of prostitution businesses in counties with a population of 400,000 or more).

¹³ Ed Vogel, LAS VEGAS REV.-J., *Question 2: Same-sex Marriage Ban Wins for Second Time*, Nov. 6, 2002, at 22A. According to Bette Midler's rejoinder during a February 14, 2004 performance in Las Vegas, the wedding chapels in Las Vegas are so tacky, this is the only city in the country where gays do not want to get married.

¹⁴ Liberace was a "U.S. pianist" who appeared as a soloist with the Chicago Symphony at age sixteen; "began giving concerts in flamboyant costumes with ornate pianos and candelabra" and later "performed frequently in Las Vegas." *Liberace*, BRITANNICA CONCISE ENCYCLOPEDIA, available at <http://www.britannica.com/ebc/article?eu=395460> (last visited Oct. 30, 2004).

¹⁵ JOCELYN FARIS, *LIBERACE: A BIO-BIBLIOGRAPHY* xi (1995).

¹⁶ See, e.g., Margaret Thompson Drewal, *The Camp Trace in Corporate America: Liberace and the Rockettes at Radio City Music Hall*, in *THE POLITICS AND POETICS OF CAMP* 149 (Moe Meyer, ed., 1994); MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING & CULTURAL ANXIETY* 353-74 (1997) (placing Liberace, Valentino, and Elvis on a "transvestite continuum"); DARDEN ASBURY PYRON, *LIBERACE: AN AMERICAN BOY* (2001); KEVIN KOPELSON, *BEETHOVEN'S KISS: PIANISM, PERVERSION, AND THE MASTERY OF DESIRE* 139-65 (1996). Kopelson argues that queer theorists have not focused sufficient attention on Liberace, having failed "to recognize the way [Liberace] underscored the 'performativity' of gender and sexuality—and class." *Id.* at 156. Kopelson argues that this failure is "due to the fact that [Liberace] didn't do these identities very well. Like early [Marcel] Proust, he was an amateur aristocrat. Like early [Andre] Gide, he was an amateur heterosexual. Like late [Roland] Barthes, he was an amateur homosexual. And if there's one person professional theorists . . . have yet to appreciate, it's the amateur." *Id.* Within an extended reading of Liberace, Kopelson writes that "Liberace can be called Barthesian, because he (re)produced dated texts non-campy snobs continue to consume." *Id.* at 154 (referring to Roland Barthes).



DARDEN ASBURY PYRON, *LIBERACE: AN AMERICAN BOY* (2001), courtesy of the University of Chicago Press, and the photographer John Roca, New York Daily News [johnrocapgraphy.com].

Indeed, the Liberace phenomenon is not easy to explain. First, what accounts for the unparalleled popularity with straight, middle America, especially older, heterosexual women, of such an obviously gender-bending, “flam-

ingly" gay entertainer?¹⁷ Cultural theorists,¹⁸ poets,¹⁹ and songwriters²⁰ have ably tackled this question, so my efforts here are focused on another question. How can Las Vegas, the proud home of the Liberace Museum,²¹ be so hostile to lesbian and gay legal rights? Asked another way, how could such a flamingly gay entertainer find such civic success and prominence in a city and state with an anti-gay legal and political regime? My answer is that Liberace used the law to erase his deviance. Specifically, Liberace aggressively used defamation lawsuits to legally establish his heterosexuality.²² Liberace was straight by law.²³

¹⁷ Drewal, *supra* note 16, at 149-50 ("Liberace's audiences, largely middle- and lower-middle class women over forty and their husbands, participated in what Michael Thompson . . . has called 'a conspiracy of blindness.'" (citing MICHAEL THOMPSON, RUBBISH THEORY: THE CREATION AND DESTRUCTION OF VALUE (1979)).)

¹⁸ See, e.g., Kopelson, *supra* note 16, at 143 ("it's possible Liberace lovers knew he was gay – just as they knew their favorite hairdressers and (less déclassé) decorators were. It's also possible they liked the fact that he was gay. It meant that they had a man they could talk to, if only in their dreams – an intimate associate who engaged in conversations their husbands weren't keen on, but who wouldn't prove to be a sexual 'threat.'").

¹⁹ See Diane Wakoski, *Why My Mother Likes Liberace*, in DIANE WAKOSKI, EMERALD ICE: SELECTED POEMS, 1962-1987 (1988). "What does it mean/ . . . /to love men,/to wear silly shirts,/ to have millions of pathetic old women/ in love with you/ my mother:/ yr only rival with her-/ Lawrence Welk." *Id.* "Do we need betrayers/ and deniers/ to reinforce our own failures?/ Or are we searching for / some final answer,/ beyond the greater measure,/ beyond sex,/ beyond our own mortality?" *Id.*

²⁰ E.g., Pat Ballard, *Mister Sandman* ("Mister Sandman, bring us a dream./ . . . / Give him a lonely heart like Pa-gli-acci/ And lots of wavy hair like Liberace!"). Kevin Kopelson quotes a version of Mister Sandman by an openly gay singing group, The Flirtations: "Mister Sandman, bring me a dream./ . . . / Give him a lonely heart like Pa-gli-acci/ But not as closeted as Liberace!" KOPELSON, *supra* note 16, at 153 n. 20 (identifying the lyricist as Jon Arterton, and locating the song on *The Flirtations Live: Out on the Road* [Flirt Records FL 1001]).

²¹ "The Liberace Museum is the most popular tourist destination in Las Vegas, outside of the casinos." DEKE CASTLEMAN, LAS VEGAS 197 (Julia Dillon & Barry Parr eds., 6th ed. 1999).

²² For commentary on whether allegations of homosexuality should be recognized as defamatory see Patrice S. Arend, *Defamation in the Age of Political Correctness: Should a False Public Statement That a Person Is Gay Be Defamatory?*, 18 N. ILL. U. L. REV. 99 (1997); Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 LAW & SEX. 119 (2003); Randy M. Fogle, *Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, Gay Rights, and Free Speech*, 3 LAW & SEX. 165 (1993); Rachel M. Wrightson, *Gray Cloud Obscures the Rainbow: Why Homosexuality as Defamation Contradicts New Jersey Public Policy to Combat Homophobia and Promote Equal Protection*, 10 J.L. & POL'Y 635 (2002); see also Janet Boeth James, *Imputation of Homosexuality as Defamation*, 3 A.L.R. 4th 752 (1981). As noted by Justice O'Connor in *Lawrence v. Texas*, the sodomy statute struck down in *Lawrence* had been recognized to render allegations of homosexuality defamation per se under Texas law. 539 U.S. 558, 583-84 (2003) (O'Connor, J., concurring) (citing *Plumley v. Landmark Chevrolet, Inc.*, 122 F. 3d 308, 310 (5th Cir. 1997) (applying Texas law)); and *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. App. 1980).

²³ This articulation is intended to invoke the milestone work, IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

Lawrence is *Lawrence v. Texas*,²⁴ the recent landmark United States Supreme Court decision that repudiated *Bowers v. Hardwick*²⁵ and struck down, as an unconstitutional infringement on liberty, Texas' criminal prohibition on same-sex sodomy. *Lawrence* was an extraordinary legal victory for lesbians and gay men. This victory followed decades of legal struggles against sodomy laws that powerfully marked lesbians and gay men as criminals, were used to justify job discrimination and loss of custody of our children, and, in some fundamental way, pushed us outside the protections of law and the promise of democracy. The history of struggles against sodomy laws includes significant legal and political battles here in Nevada, some of which I discuss and, I hope, honor, in this project.

"The straight line" pun is intended to playfully suggest a direct relationship between two apparently disparate phenomena, Liberace, the odd, campy, embarrassing, closeted entertainer, who died of AIDS in 1987,²⁶ and *Lawrence v. Texas*, the historic, 2003 legal victory for gay men and lesbians. "[T]he straight line" is also intended to emphasize that my subject is the legal, cultural, social, political dominance of heterosexuality. *Lawrence* is a rousing eradication²⁷ of the judicial hate speech of *Bowers v. Hardwick*, but it also contains a careful explanation of how eliminating presumptive felonious identity for gay people will not be carried so far as to disrupt the institution of heterosexual marriage.²⁸ Even when we talk about the gender bending pianist and the exciting, amazing gay rights victory of *Lawrence v. Texas*, we are focusing on queer eruptions or potential disruptions in the vast ocean of cultural, legal, and social heteronormativity.

My investigation of heteronormative law and popular culture appropriates the stories of Liberace, Las Vegas, and sodomy statutes to develop several theoretical themes. One theme concerns the multiple expressive functions of law,²⁹ with particular attention to the expressive functions of Nevada's sodomy laws³⁰ and of Liberace's repeated, successful defamation actions against jour-

²⁴ 539 U.S. 558 (2003). Important early commentary on *Lawrence* includes Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004); Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103 (2004); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

²⁵ 478 U.S. 186 (1986).

²⁶ FARIS, *supra* note 15, at 45-46.

²⁷ See Hunter, *supra* note 24, at 1126 (finding that *Lawrence* "eradicates" *Bowers v. Hardwick*).

²⁸ The soaring liberatory rhetoric of *Lawrence* is tempered by explicit limitations to prevent the decision from undermining heterosexual marriage. For example, Justice Kennedy's opinion for the court asserts that the sodomy statutes "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." *Lawrence*, 539 U.S. at 567 (emphasis added). The court protects the homosexual relationship up to but not past the point of "abuse to an institution the law protects." *Id.* Kendall Thomas has also articulated important caution about the rhetoric of *Lawrence*. Kendall Thomas, *Remarks for AALS Panel on Lawrence v. Texas*, Jan. 4, 2004 (cited in Franke, *supra* note 24, at 1408 n. 45).

²⁹ See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

³⁰ For important discussions on the expressive functions of sodomy laws, see JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 29 (1997) (discussing sodomy

nalists who dared to identify him as homosexual. The sodomy statutes and Liberace's lawsuits all constructed deviance; Liberace used the defamation laws to erase his own.

The focus on Liberace and sodomy laws also illuminates the contested authority of law, which is simultaneously fragile and commanding. What does it mean for a person who regularly has gay sex to establish as a matter of law that he has not? Liberace's successful deployment of the law helps to challenge dominant lawyerly notions of the meaning of legal pronouncements, and turn our attention to law as cultural performance.

I develop these themes through commentary on gay rights reformers' historic challenges to and eventual repeal of Nevada's sodomy laws, alongside the related history of the use of law by Nevada's most famous gay citizen and notorious closet case, Liberace. Specifically, this project describes: (1) *Doe v. Bryan*, the 1986 challenge to Nevada's sodomy laws; (2) Liberace, the phenomenon constructed by culture and law; (3) the successful efforts to repeal Nevada's sodomy statute in 1993; and (4) finally, a word on *Lawrence*.

I. *DOE V. BRYAN*³¹

In 1985, a year before a divided United States Supreme Court considered and rejected a constitutional challenge to the Georgia sodomy statute in *Bowers v. Hardwick*,³² Nevadan activists challenged Nevada's sodomy statute. Four anonymous plaintiffs, John Doe, Richard Roe, Jane Joe, and Mary Poe, represented by the National Gay Rights Advocates from San Francisco, an important early gay rights law firm that has not survived, challenged Nevada's sodomy statute on federal and state constitutional grounds. John Doe was a thirty-five year old college instructor; Richard Roe a thirty-nine year old banker; Jane Joe a thirty-one year old student of computer programming; Mary Poe a thirty-three year old graphic artist.

The Georgia sodomy statute challenged in *Bowers v. Hardwick* had been perceived by gay rights advocates as a prime candidate for a successful Supreme Court challenge. Michael Hardwick actually had been arrested for consensual same-sex sodomy, after a police officer, who may have had a personal vendetta against Hardwick, came to Hardwick's apartment to serve a warrant. The police officer was allowed into Hardwick's apartment by a guest, and found Hardwick and another man having sex in the bedroom.³³ In addition to

laws); Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643 (2001) (using empirical data to explore impact of South Africa's repeal of sodomy laws); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1013 (1995) (discussing expressive functions of sodomy laws); Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1041 (1999) (discussing the upholding of sodomy laws by the Supreme Court as example of law's expressive function); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992) (arguing that sodomy laws invite violence against gays).

³¹ *Doe v. Bryan*, 728 P.2d 443 (Nev. 1986).

³² *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³³ See Michael Hardwick, *What Are You Doing In My Bedroom?*, in PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 392-403 (1988); Thomas, *Beyond Privacy*, *supra* note 30.

the power of Michael Hardwick in fact having suffered the usually metaphoric injury of the state barging into his bedroom, the Georgia statute offered a wide target in that it criminalized both same-sex and heterosexual sodomy. The plaintiffs in the ACLU *Hardwick* challenge included a married couple, perceived to have the strongest substantive due process privacy claim.³⁴ The Supreme Court in *Bowers v. Hardwick* famously dismissed the married couple's due process claim to engage in sodomy in the sanctity of their marital bedroom in a footnote about standing,³⁵ and framed the issue as whether the constitution protects a right to homosexual sodomy.

Unlike the Georgia statute at issue in *Bowers v. Hardwick*, the Nevada sodomy statute had been amended in 1977 to be limited to homosexual sodomy. As amended, it classified anal intercourse, cunnilingus, and fellatio between consenting adults of the same sex as a felony punishable by one to six years in prison.³⁶ The identical sex acts committed by an opposite sex couple were no longer crimes. Interestingly, the earlier statute, as written, prohibited sodomy between a man and a woman or between two men. Consequently, sexual activities of lesbians, such as Jane Joe and Mary Poe and their partners, were criminalized for the first time in Nevada in 1977.³⁷

Nevada was one of only nine states that singled out same-sex sodomy for criminal prosecutions, each of which made that change in the 1970's.³⁸ The fact that Nevada put itself into the most aggressive wing of states in attempting to prohibit homosexual conduct, just a few years after re-committing itself to licensing [heterosexual] brothels,³⁹ is compelling evidence that the sexual libertarianism of the state is more accurately understood to be some species of hetero-libertarianism.

The *Doe v. Bryan* complaint was filed in September of 1985 in Reno. The district court dismissed the complaint on standing grounds, finding that the four plaintiffs, not having shown that they were at risk of prosecution, had no standing to challenge the sodomy statute.⁴⁰ An appeal to the Nevada Supreme Court followed.

The Nevada Supreme Court held oral argument on September 10, 1986, a few months after *Bowers v. Hardwick* had been decided, effectively narrowing *Doe* to state constitutional claims. Except for a short, related procedural diver-

³⁴ In fact, Georgia's attorney acknowledged during oral argument that application of the sodomy statute to a married couple would be unconstitutional. Oral Argument of Michael E. Hobbs, on Behalf of the Petitioner, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), at 1986 U.S. Trans. LEXIS 74, at 6.

³⁵ See Nan Hunter, *Life After Hardwick*, 27 HARV. C. R. - C. L. L. REV. 531, 541 (1992). (discussing standing problems in the *Bowers v. Hardwick* litigation).

³⁶ 1977 Nev. Stat. 1632; 1993 Nev. Stat. 518 (repealing NEV. REV. STAT. 201.193).

³⁷ *Id.*

³⁸ *Lawrence v. Texas*, 539 U.S. 558, 520 (2003).

³⁹ S.B. 214, 1971 Leg., 56th Sess. (Nev. 1971), enacted NEV. REV. STAT. 244.345 (limiting brothels to counties of population of less than 200,000); see also Barbara G. Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERSP. 307, 323-24 (2001) (discussing regulatory restrictions that enforce "heterosexual privilege").

⁴⁰ The trial court ruled in *Doe v. Bryan* on Nov. 5, 1985, the same day the United States Supreme Court granted certiorari in *Bowers v. Hardwick*.

sion,⁴¹ the standing issue consumed the oral argument. Members of the Nevada Supreme Court repeatedly questioned whether the same-sex sodomy law actually harmed anyone, including the four avowedly homosexual, sexually active, apparently felonious, anonymous plaintiffs. In response to the argument by plaintiffs' counsel that the sodomy statute marked the otherwise law-abiding plaintiffs as criminals, one member of the court recognized mere discomfort:

I am not sure how it brands them as criminals. Nobody has singled them out for public odium. They haven't been identified or branded in any way that I can see. They may feel, they may personally know that they fall within the classification of the statutes and that may make them feel uncomfortable, but I think it is an exaggeration to say they have been branded.⁴²

In an echo of the rhetoric of *Plessy v. Ferguson*,⁴³ one member of the court articulated the position that any branding of the plaintiffs was due to their refusal to remain closeted:

Well, then, they have branded themselves if they have identified themselves, haven't they? If they have gone out and publicly declared themselves as gay men and women then it is not the statute that brands them; it's themselves that branded them.⁴⁴

The Nevada court did not recognize that the expressive work of the law – imposing the stigma of being classified as felons – caused the plaintiffs any injury, and instead insisted that only direct legal enforcement of the statute against them would injure the plaintiffs.

It appears to me at this juncture that the statute remains a public expression of disapproval [sic] of consensual [sic] homosexual sodomy and nothing more I don't think there is any allegation in that complaint that this law has ever been enforced and so it would appear to me, since this activity presumably does not occur in public, it occurs in private, that we don't have any injury.⁴⁵

⁴¹ One member of the Nevada Supreme Court insisted that the plaintiffs had provided insufficient evidence in the record of sodomy prosecutions against consenting adults. Oral Argument Transcript at 4, *Doe* (No. 16978). Demanding sufficient evidentiary support was apparently procedural error, as the procedural posture of this case was whether the complaint had been properly dismissed without leave to amend, not whether a motion for summary judgment had been properly denied.

⁴² The state argued that the statute targeted voluntary behavior, not people. *Id.* at 6. "I do not believe . . . that it is the person that the statute brands. Rather, it is the conduct or the activity that person chooses to engage in that is against the law." *Id.* at 22.

⁴³ *Plessy v. Ferguson*, 163 U.S. 537 (1896). "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 551.

⁴⁴ Oral Argument Transcript at 7. For leading analyses of legal enforcement of the closet, see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); EVE KOSOFKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1990).

⁴⁵ Oral Argument Transcript at 13-14. Almost thirty years later, Justice Scalia in dissent in *Lawrence v. Texas* made a similar point. "I do not know what 'acting in private' means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by 'acting in private' is 'on private premises, with the doors closed and windows covered,' it is entirely unsurprising that evidence of enforcement would be hard to come by." *Lawrence v. Texas*, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting); see also Emma Henderson, *Of Signifiers and Sodomy: Privacy, Public Morality and Sex in the*

These comments are very similar to justifications for upholding sodomy statutes worldwide.⁴⁶ This position fails to acknowledge that a "public expression of disapproval" itself causes injury to the members of the public who are the objects of the disapproval embedded in criminal statutes.⁴⁷ The threat of a six-year prison sentence for having sex is an unusually vehement expression of disapproval. The perceived importance of the threat of prison to express disapproval is precisely the reason that legislators, including those in Nevada, chose to prohibit gay sex, even as they de-criminalized heterosexual sodomy.⁴⁸

In its *Doe v. Bryan* oral argument, the Nevada Supreme Court also reflected, ratified, and imposed on the plaintiffs in this case the vision of the homosexual as a predator, simultaneously both pathetic and dangerous.⁴⁹ One judge explained that he did not want to rule on the statute in the absence of an actual prosecution because a prosecution of truly consenting, mature adults would be one thing, but "if the controversy involved an exploitive relationship with a mature adult and a relatively young person who was barely within the age of consent" there would be a different question.⁵⁰ The justice was unmoved by counsel's reminder that the statute was being challenged only as applied to consenting adults: "Well I am not talking about minors, I am talking about young, vulnerable people. I am talking about vulnerable people gener-

Decriminalization Debates, 20 MELB. U. L. REV. 1023, 1035 (1996) (citing Parl. Deb., House of Commons, (Canada) 16 April 1969, 7615 (Mr. Rene Matte)) ("When two consenting adults are alone, when they do not cause any scandal, when there is no witness is there any problem? For them to be arrested, they will have to have been seen by someone . . . [so] according to the law nothing has changed.").

⁴⁶ E.g., "Intercourse in private is not found out. If it is found out, it cannot have been in private." Henderson, *supra* note 45, at 1035 (quoting United Kingdom, Par. Deb., House of Commons, 26 November 1958, 454 (Jean Mann)).

⁴⁷ For discussions of injuries inflicted by such statutes, see Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643 (2001); Diana Hassel, *The Use of Criminal Sodomy Statutes in Civil Litigation*, 79 TEX. L. REV. 813 (2001); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by 'Unenforced' Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000); Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999).

⁴⁸ See NEVADA LEGISLATIVE COUNSEL BUREAU, SENATE HISTORY, FIFTY-NINTH SESSION 133 (1977) (discussing S.B. 412, 1977 Leg., 59th Sess. (Nev. 1977)); Nev. Sen. Judiciary Comm., Mins. of Meeting, 59th Sess. (Apr. 5, 1977); Nev. Sen. Judiciary Comm., Mins. of Meeting, 59th Sess. (Apr. 18, 1977); Nev. Assem. Judiciary Comm., Mins. of Meeting, 59th Sess. (Apr. 29, 1977).

⁴⁹ See, e.g., Larry Cata Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529, 568-71 (1996) (describing the prevalent identity of predator imposed on gay men by courts). "Their is an unsavory life spent at the margins of the acceptable. Their innate understanding of the depravity of their actions is evidenced by their need to force themselves on those who know no better or who cannot defend themselves." *Id.* at 569.

⁵⁰ Oral Argument Transcript, at 17, *Doe* (No. 16978). The argument later returned to this theme: "But you don't have any facts upon which a sophisticated decision can be arrived at. Because I will state to you very honestly that I would be very loathe to approve a prosecution of two mature individuals for acts performed in private where there was no exploitive relationship. I would question whether that was a proper function for law enforcement. But if, on the other hand, there was an exploitive relationship in which a young man was sexually exploited by an older, more dominating person, I think that would present a much different questions about the constitutionality; and you are asking for a general declaration that in all circumstances this statute is unconstitutional." *Id.* at 18.

ally, perhaps by reason not of total mental incapacity, but a diminished capacity, older people.”⁵¹

The oral argument transcripts reveal a rhetorical struggle regarding the identification of the victims in the case. The plaintiffs, of course, presented a narrative in which ordinary, upstanding, middle class folks – the banker, college instructor, computer science student, and graphic artist – who just happened to be gay but otherwise were like everyone else, were the victims of an irrational law that identified them as felons subject to sentences of one to six years in prison for having sex. The court located the victims elsewhere.

[W]hat I am trying to say . . . is you haven’t identified the potential quote ‘victims.’ You have only identified the potential . . . the individuals who potentially want to engage in sexual activity. You haven’t pointed out with whom they might wish to engage in activity, whether with the kind of vulnerable people I am talking about or not, have you?⁵²

To this justice, the plaintiffs, simply by asserting their homosexual identity and desires, were predators, in sexual encounters assumed to be between true homosexuals and innocent victims. The “potential recipients of their attentions”⁵³ were the unseen victims.

The only vision of non-predatory homosexuals that the court could summon up was “two lonely middle-aged or old men” in a “flophouse.”⁵⁴ Apparently at least some members of the court sensed that prosecution of these two pathetic figures in the hypothetical flophouse could raise some fairness issues. But the recurring image that fascinated the court was the vulnerable victim of homosexuals, personified in the oral argument as a lonely, immature, low intelligence, “unsophisticated country bumpkin” whose vulnerability was exploited by the plaintiffs, who “convince him that they are his friends and . . . take him to bed.”⁵⁵

⁵¹ *Id.* at 19. The oral argument in *Lawrence v. Texas*, almost twenty years later, reproduced a similar vision of a gay person as predator.

“QUESTION: If you prevail, Mr. Smith, and this law is struck down, do you think that would also mean that a State could not prefer heterosexuals to homosexuals to teach kindergarten?”

[Smith answers that there would need to be some sort of justification, some sort of showing of concrete harm to the children, not just disapproval of homosexuality.]

QUESTION: Only that the children might – might be induced to – follow the path of homosexuality. And that would not be – that would . . . not be enough?”

Oral Argument of Paul M. Smith, on Behalf of Petitioners, 2003 U.S. Trans LEXIS 30, at 19-20.

⁵² Oral Argument Transcript at 20, *Doe*.

⁵³ “You have identified the plaintiffs, but you haven’t identified the potential recipients of their attentions.” *Id.*

⁵⁴ One justice posed a hypothetical: “Let’s assume we had a controversy that arose out of the prosecution of two men in a, let’s say a flophouse, two lonely middle-aged or old men both in full command of their faculties engaged in consent sexual activities in a flophouse [. . .] Police burst in on another matter, they’re prosecuted and sentenced to ten years.” *Id.* at 30.

⁵⁵ Let’s assume that we have a young man of 19 or just past 18, his 18th birthday, so he would be of age under the consent statute, OK? And we – but this is a very immature, vulnerable young man who doesn’t have a high IQ at all, let’s say – he is not mentally incompetent, he’s got let’s say an 80 IQ. An unsophisticated country bumpkin comes to Reno. He is alone and vulnerable and has no friends and needs support and nurturing, and your clients come along and convince him that they are

Plaintiff's counsel appropriately noted that that vulnerable young man could himself be thrown in prison for six years under the statute at issue, but the justice dismissed that possibility: "I'm not speaking of throwing him in jail. I'm assuming that the police in an endeavor to dissuade people from doing this, prosecutes your clients."⁵⁶

In this way, the very respectable and establishment identities of the anonymous plaintiffs were turned against them. Although they were in fact only in their thirties, they were cast by the court in the role of older, seductive, predators of the vulnerable, diminished capacity, younger, innocent, country bumpkins.

The plaintiffs in *Doe v. Bryan* did not use their real names, and attempted to have the record sealed so that the affidavits containing their real names would not be public record. The State of Nevada asserted the position that the plaintiffs had no right to have the files sealed. This was a consistent (plaintiffs in no real danger have no need to hide) and punitive position. Under pressure from the court at oral argument, the attorney for the state agreed that the records could be sealed.⁵⁷ The court was certainly humane in taking this position, but not consistent with its theme that the sodomy statute caused no real injury. The court's willingness to seal the record was entirely consistent with the central message of the court that homosexuality, if unspoken and closeted, would cause no problems.

Thus, the four plaintiffs in *Doe v. Bryan* negotiated the closet by initiating legal action for their rights to commit oral and anal sex with partners of the same sex, but doing it anonymously. The lesbian and gay plaintiffs attempted to use the legal system to vindicate their rights as lesbians and gay men, but they did it in secret, and successfully kept their names out of it.

The Nevada Supreme Court affirmed the trial court's dismissal on grounds that the plaintiffs lacked standing to challenge the prohibition of same-sex sodomy.⁵⁸ The standing doctrine is the procedural device through which the court

his friends and they take him to bed. Under those circumstances, do your clients have a constitutional right to engage in sex with that kind of young man?

Id. at 38-39; see also Henderson, *supra* note 45, at 1043 ("The rhetoric of the conversion of the innocent is a major theme in all debates about homo-sex . . .").

⁵⁶ Oral Argument Transcript at 39, *Doe*.

⁵⁷ One judge questioned the state's attorney, "What would you gain . . . these people have acted in good faith and tried to get an adjudication of a controversy and is there any reason in the world why that ought to be something that is available for use against them . . . ?" *Id.* at 29.

⁵⁸ *Doe*, 728 P.2d at 523. The Nevada Supreme Court was not alone in dismissing challenges to sodomy statutes on the basis of lack of standing. See, e.g., *State v. Morales*, 869 S.W.2d 941 (Tex. 1994) (finding that plaintiffs challenging sodomy statute did not have standing because they had not been arrested); *Miller v. State*, 636 So. 2d 391 (Miss. 1994) (denying challenge to Mississippi sodomy statute for lack of standing where defendant had sex with minor); but see, e.g., *Campbell v. Sundquist*, 926 S.W.2d 250, (Tenn. Ct. App. 1996) (holding that state declaratory judgment statute provided standing to challenge state "Homosexual Practices Act"); see generally Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 Wis. L. REV. 29 (2001) (decrying this standing analysis); but see Donald A. Dripps, *Bowers v. Hardwick and the Law of Standing: Noncases Makes Bad Law*, 44 EMORY L.J. 1417 (1995) (contending that challengers to sodomy statutes lack standing because the harm of the unenforced statutes is merely symbolic). The tradition of arguing lack of standing to defeat

measures pain, and its ability to provide relief.⁵⁹ Although each of the plaintiffs alleged that they regularly engaged in sexual practices outlawed by the statute, the court found that, without evidence that the plaintiffs were somehow at risk for prosecution, the plaintiffs did not suffer any real injury that repeal of the sodomy statute would alleviate. "There is no indication that appellants are facing an immediate threat of arrest for violation of [the sodomy statute] or that the risk of prosecution is, to any degree, more than imaginary or speculative."⁶⁰

II. LIBERACE

At the same time that *Doe v. Bryan* was being litigated, with then-Governor Richard Bryan as the nominal defendant, former Las Vegas "Outstanding Citizen"⁶¹ Liberace and Governor Bryan were nominal co-chairs of a major philanthropic holiday campaign for needy Nevadans, the Love Everybody campaign.⁶² Liberace also aggressively used the legal system to negotiate the closet, but he did it in his own name, flamboyantly and successfully, establishing his heterosexuality as a matter of law.

challenges to sodomy statutes was stretched to the breaking point in the *Lawrence* litigation. Texas argued in its brief that the *Lawrence* defendants did not have standing to challenge the constitutionality of the Texas sodomy law under which they had been arrested because nothing in the record indicated that they were homosexuals. Respondent's Brief at 33-34, *Lawrence*, (No. 02-102). The attorney for Texas attempted the same argument at oral argument. "But there's nothing on the record to indicate that these people are homosexuals. They're not homosexuals by definition if they commit one act. It's our position that a heterosexual person can also violate this code if they commit an act of deviate sexual intercourse with another of the same sex." Oral Argument of Charles A. Rosenthal, Jr., on Behalf of Respondent, *Lawrence*, at 2003 U.S. Trans LEXIS 30, at 26. The court presumably found that having been arrested for committing homosexual sodomy gave *Lawrence* and Gardner sufficient standing.

⁵⁹ Cf. Ann Althouse, *Standing in Fluffy Slippers*, 77 VA. L. REV. 1177 (1991) (analyzing standing of family members of capital defendants).

⁶⁰ *Doe*, 728 P.2d at 445; see also RICHARD POSNER, SEX AND REASON 309 (1992) (asserting that unenforced sodomy laws do little harm).

⁶¹ FARIS, *supra* note 15, at 45.

⁶² *Love All People Christmas Concert*, LAS VEGAS SUN, Dec. 8, 1985, at 65. Then Governor Bryan had formerly served as a State Senator, in which capacity he was a member of the Judiciary Committee and co-sponsor of the legislation that eliminated Nevada's prohibition on heterosexual sodomy but maintained it for homosexual sodomy. See S.B. 412, 1977 Leg., 59th Sess. (Nev. 1977); see also Nev. Sen. Judiciary Comm., Mins. of Meeting at 13, 59th Sess. (Apr. 18, 1977) (reporting that Senator Bryan stated that the Committee had concluded that "we did not want to legalize homosexual relations. On the question of heterosexual relationships between adults, that we wanted to decriminalize.").



Liberace

Love All People Christmas concert

Love All People will sponsor its seventh annual benefit concert, "Christmas Around the World," 3 p.m. Dec. 15 at the Sahara Hotel Space Center.

Chairmen are Gov. Richard Bryan and Liberace. All proceeds go to Love All People Music Academy to help the group continue its commitment to fight drug and alcohol abuse among youths.

Call 731-0502.

Love All People Christmas Concert, LAS VEGAS SUN, Dec. 8, 1985, at 65, courtesy of the Las Vegas Sun.

The gender bending aspect of Liberace's performances had been noted throughout his celebrity, and by the time of *Doe v. Bryan*, Liberace's homosexuality had been widely and publicly discussed for over thirty years. Beginning as early as 1954, a rash of gossip papers and magazines ran stories about Liberace's homosexuality.⁶³ In the fifties Bob Hope joked about Liberace and "powderpuffery."⁶⁴ Liberace wisely chose not to take on Bob Hope, but in 1956 Liberace initiated a lawsuit against a minor British comedian whose skit mocked Liberace's sexuality with a wig, gestures, and a ditty: "My fan mail is really tremendous, It's going so fast my head whirls; I get more and more, They propose by the score – And at least one or two are from girls."⁶⁵ Liberace won an out of court settlement.⁶⁶

Liberace was playing the Riviera Hotel in Las Vegas in July 1957 when the *Hollywood Confidential* published a heavily hyped exclusive about Liberace having molested a (male) press agent.⁶⁷ Liberace responded with a well-publicized \$22 million defamation suit. Liberace subsequently settled for

⁶³ See FARIS, *supra* note 15, at 12-13; PYRON, *supra* note 16, at 213. For example, Jocelyn Faris cites to and quotes a 1954 gossip magazine story about Liberace, *Don't Call Him Mister*, that suggested associations between Liberace and public bathroom sex. The article also noted that, "For a Hollywood bachelor, he is girl-less to a surprising degree." *Don't Call Him Mister*, RAVE, Aug. 1954, quoted by FARIS, *supra* note 15, at 12, 206; see also *id.* at 176 (describing March 1955 PRIVATE LIVES article, *Are Liberace's Romances For Real?*). Author David Ehrenstein recounts that he was ten in 1957 when he was told by a nine year old neighbor girl that Liberace (and Tab Hunter, Rock Hudson, and Johnny Ray) were homosexual. DAVID EHRENSTEIN, OPEN SECRET: GAY HOLLYWOOD, 1928-1998 10 (1998).

⁶⁴ PYRON, *supra* note 16, at 193. Jocelyn Faris quotes a Bob Hope monologue from that time: "But it isn't his fault, really. You see, he was such a delicate baby that instead of slapping him, the doctor patted him with a powder puff, and he's been smiling ever since." FARIS, *supra* note 15, at 8 (citing BOB THOMAS, LIBERACE: THE TRUE STORY (1987)).

⁶⁵ PYRON, *supra* note 16, at 194 (citing LIBERACE, LIBERACE: AN AUTOBIOGRAPHY 222, 224, 226, 234 (1973)).

⁶⁶ *Id.*

⁶⁷ *Id.* at 221-22; see FARIS, *supra* note 15, at 209 (describing *Liberace Gives Deposition in Magazine Suit*, L.A. TIMES, Jul. 19, 1957).

\$40,000, having won on the technicality; he had been in Dallas at the time that he supposedly molested the press agent.⁶⁸

Liberace's most notorious lawsuit⁶⁹ was the defamation action he filed against London *Daily Mirror* columnist William Conner. Conner, writing under the penname Cassandra, wrote in 1956 about Liberace:

He is the summit of sex – the pinnacle of Masculine, Feminine, and Neuter. Everything that he, she, and it can ever want. [. . .] This deadly, winking, sniggering, snuggling, quivering, giggling, fruit-flavored, mincing, ice-covered heap of mother love has had the biggest reception and impact on London since Charlie Chaplin arrived at the same station, Waterloo, on September 12, 1921.⁷⁰

The defamation action inevitably turned on the meaning of these words, but what did they mean? The *Daily Mirror* defended the defamation claim by arguing that the words suggested that Liberace had sex appeal, but Liberace insisted that he was forced to challenge the column because it meant he was homosexual.⁷¹ The Cassandra column reportedly tormented Liberace because it repeated the charge that he was not a man because he was gay.⁷²

What was Liberace's strategy for prosecuting this defamation suit? He lied, perjuring himself repeatedly. According to a contemporaneous *Los Angeles Times* account of the London trial, when asked whether he was a homosexual, Liberace answered, "No, sir." When asked whether he "ever indulged in homosexual practices, Liberace testified, 'No, sir, never in my life.'"⁷³ Perhaps in the grip of the same image of the pathetic and dangerous sexual predator that had captured the Nevada Supreme Court, Liberace explained under oath, "I am against the practice because it offends convention and it offends society."⁷⁴ Liberace won his libel trial and \$22,000, reported as the

⁶⁸ PYRON, *supra* note 16, at 223 (citing KENNETH ANGER, *HOLLYWOOD BABYLON* 381-83 (1981)); *see also* FARIS, *supra* note 15, at 17; BOB THOMAS, *LIBERACE: A BIO-BIBLIOGRAPHY* (n.d.); *M. O'Hara Drops '57 \$1-Million Libel Suit*, N.Y. TIMES, Jul. 2, 1958; *E Flynn '55 Suit Settled*, N. Y. TIMES (Jul. 9, 1958); *Liberace Settles Libel Suit Against Confidential for \$40,000*, N.Y. TIMES (Jul. 16, 1958).

⁶⁹ *See* FARIS, *supra* note 15, at 196 (describing *Jealousy*, TIME, June 29, 1959, at 34); *id.* at 206 (describing *Liberace Defends Reputation In Libel Action in London Court*, L.A. TIMES, Jun. 9, 1959, at 2). This litigation is the subject of a play staged in London in 2004, *Liberace's Suit*. *See, e.g.,* Lyn Gardner, *Liberace's Suit*, GUARDIAN UNLIMITED, May 28, 2004 (theatre review), at <http://www.guardian.co.uk/arts/critic/review/0,1169,1226733,00.html> (last visited Oct. 30, 2004).

⁷⁰ PYRON, *supra* note 16, at 194 (citing THOMAS, *supra* note 68, at 121-22); *see also* FARIS, *supra* note 15, at 14-15 (providing slightly different version of column). Conner's column continued, "[Liberace] reeks with emetic language that can only make grown men long for a quiet corner, an aspidistra, a handkerchief, and the old heave-ho. Without doubt he is the biggest sentimental vomit of all time." EHRENSTEIN, *supra* note 63, at 118 (quoting L.A. TIMES Jun. 9, 1959).

⁷¹ FARIS, *supra* note 15, at 14-17; PYRON, *supra* note 16, at 229 (quoting FARIS, *supra* note 15, at 217).

⁷² PYRON, *supra* note 16, at 227.

⁷³ EHRENSTEIN, *supra* note 63, at 118 (quoting *Liberace Defends Reputation in Libel Action in London Court*, LOS ANGELES TIMES, June 9, 1959); *see also* Author, *Liberace Testifies: Denies in London Libel Suit That He Is Homosexual*, N.Y. TIMES, Jun. 9, 1959, at 43; PYRON, *supra* note 16, at 229 (quoting LIBERACE, *supra* note 65, at 233). As is widely acknowledged now, "Liberace was, of course, lying." EHRENSTEIN, *supra* note 63, at 118.

⁷⁴ *Id.*

largest award in British defamation history.⁷⁵ With lies as outlandish as any of his fur coats, Liberace won where Oscar Wilde famously had lost.⁷⁶ Darden Pyron, a Liberace scholar and biographer, defends his subject by quoting Michel Foucault: "To call homosexuals liars is equivalent to calling the resisters under a military occupation liars."⁷⁷

Somehow, Liberace succeeded in creating a legal fiction that was extraordinarily effective. Liberace was one of the few people on earth who was legally certified to be heterosexual. That legal seal of approval, as it were, was a license to camp, a license to bend every gender rule with impunity. By vehemently denying his homosexuality, including in a court of law, Liberace sanitized his identity, choosing to be an upstanding citizen, not an outlaw. By publicly avowing heterosexual loyalty, Liberace created a gay act that was permissible because it was officially just an act.

Within a framework of identity politics, the perjury was perhaps an unforgivable betrayal. This wealthy and famous man disavowed his own homosexual desires and disavowed his many lovers, choosing material wealth and celebrity over honesty.⁷⁸ A post-modern or queer theory interpretation is more complex.

Liberace's denunciation of homosexuality was a world-wide spectacle of compliance. Under theories of cultural inoculation,⁷⁹ a dominant ideology can be most confirmed in its authority by the presence of a hint of transgression. Liberace's gender-bending performance and presence provided just enough conflict to keep the dominant ideology intact: accommodating and restraining Liberace's sexual transgression strengthened the heteronormative structure, confirming its ability to identify and co-opt challenges.⁸⁰ Liberace's constant sexual innuendo, his effeminate, mincing behavior, the cross-dressing, were all reduced to entertainment undertaken within dominant heterosexuality. Laws forbidding gay sex reinforce heterosexual dominance at the same time that they make homosexual conduct visible; the spectacle of a closeted gay entertainer reinforces heterosexual power, in part by hinting at something different.

⁷⁵ PYRON, *supra* note 16, at 233.

⁷⁶ At his lover's urging, in 1895 Oscar Wilde initiated a libel action against his lover's father, the Marquess of Queensbury, who had accused him of posing as a "sodomite" [sic]. Wilde stopped the libel suit at the threat of testimony from former lovers, but was subsequently successfully prosecuted for gross indecency and socially and financially ruined. See MICHAEL S. FOLDY, *THE TRIALS OF OSCAR WILDE: DEVIANCY, MORALITY, AND LATE-VICTORIAN SOCIETY* (1997); MOISES KAUFMAN, *GROSS INDECENCY: THE THREE TRIALS OF OSCAR WILDE* (1998).

⁷⁷ PYRON, *supra* note 16, at 230 (quoting Michel Foucault, *Sexual Choice, Sexual Act*, interview conducted by James O'Higgins, *SALAMAGUNDI* (Fall/Winter 1982-83), also quoted in EHRENSTEIN, *supra* note 63, at 118 (1998)); see generally SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (Vintage Books 1989).

⁷⁸ "In denying his homosexuality, he confirmed his career." PYRON, *supra* note 16, at 228.

⁷⁹ See ROLAND BARTHES, *MYTHOLOGIES* 150-51 (Annette Lavers, trans., 2d ed., Hill & Wang 1972).

⁸⁰ Cf. Joan W. Howarth, *Women Defenders on Television: Representing Suspects and the Racial Politics of Retribution*, 3 J. OF GENDER, RACE, & JUST. 475, 506-07 (1999/2000) (citing JOHN FISKE, *TELEVISION CULTURE* 38-39 (1987)). "Having survived confrontation, a hegemonic order is strengthened in its ability to identify and co-opt challenges." *Id.*

That is only part of the story. Another part is that, in the kind of reversal familiar to students of Michel Foucault, with his celebrity and his aggressive denials Liberace made homosexuality present in American culture in ways that it had not been before.⁸¹ At a time when many family newspapers did not use the word "homosexual," Liberace's denial that he was homosexual was prominent news.⁸²

By this account, Liberace undermined hetero-dominance by infiltrating it.⁸³ Liberace was heterosexual, officially. Liberace was officially and legally normal. Therefore, normal included outrageous flirting with everyone, men and women, and erasing the secure line between gay and straight, homosexual and heterosexual, beloved family entertainer and pervert.⁸⁴ Liberace brought flaming gay camp (from Las Vegas) into America's living rooms.

Liberace's use of law is a central part of this reading. Refusing victimhood and outlaw status, Liberace used the law to establish his worthiness for the civic mainstream. Perhaps Liberace's willingness to file lawsuits and denounce and deny homosexuality confirmed his identity as an upright citizen because it meant that he was heterosexual; that is, perhaps people really did believe his claims that he was exclusively heterosexual. On the other hand, for others who were not taken in by the lies, perhaps he proved himself by being willing to perjure himself to keep homosexuality closeted. Liberace in essence traded sodomy for perjury, proving his worthiness. To the extent that the ideology of the closet is uninterested in private homosexuality yet vehement in policing against public declarations, being understood to have perjured oneself in service of the closet is no disgrace. This might be particularly true in Las Vegas, home of bold artifice.

Liberace's choice explains how he has survived as a favorite son of Las Vegas. Nevada, like Liberace, uses law aggressively to control, contain, and

⁸¹ See MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, VOL. 1 (1978); cf. Jeffrey Escoffier, *The Wilde Thing: The Importance of Being Honest*, LAMBDA BOOK REPORT, Aug. 1998, at 8-9 (positing that Oscar Wilde's unsuccessful trials transformed Wilde into "one of the first out homosexuals," a new identity category). "Foucault argues that sex and sexual matters have become increasingly public issues in the twentieth century and in particular homo-sex and homo-sexuality have attained notoriety through various scandals (the trials of Oscar Wilde for example) and panics (the McCarthy purges referred to earlier)." Henderson, *supra* note 45, at 1030 (citation to FOUCAULT, *An Introduction*, *supra*, omitted).

⁸² *Liberace Testifies: Denies in London Libel Suit That He Is Homosexual*, N.Y. TIMES, Jun. 9, 1959, at 43; see PYRON, *supra* note 16, at 234.

⁸³ "The subterranean constructions of sexuality through unmarked transvestism, however, constitute a mode of resistance by which marginalized groups insinuate their own voices, albeit in masked form, into official public discourse." Drewal, *supra* note 16, at 177 (citing SCOTT, *supra* note 45, at 136). According to Margaret Thompson Drewal, there was not only a "straight reception" to Liberace's performances, "but also a gay reception that resists compulsory heterosexuality and by extension patriarchy. Furthermore, this gay perspective is largely unavailable to a heterosexual audience participating in the conspiracy of blindness." Drewal, *supra* note 16, at 151.

⁸⁴ According to Drewal, Liberace's performance can be understood as "hold[ing] out the possibility of subverting and extending the rhetoric of sign systems by flooding dominant discourse systems through the contagious, yet subterranean, power of metonymic conjunction" called by James C. Scott "'the hidden transcript' . . . 'by which marginalized groups insinuate their own voices, albeit in masked form, into official public discourse.'" Drewal, *supra* note 16, at 151 (quoting SCOTT, *supra* note 45, at 136).

condemn homosexuality. The fifteen years of a sodomy statute targeting gays, the super-majority votes to keep marriage heterosexual, the lack of domestic partnership legislation, the lack of non-discrimination protections in housing, education, or public accommodations, and the precarious standing of lesbian and gay families, is a consistent legal regime to control, contain, and condemn homosexuality.⁸⁵ Las Vegas' gentlemen's clubs, ubiquitous pictures of naked women, quickie marriages and quickie divorces, and backdrop of prostitution, render Las Vegas a playground for hetero-male dominance. Yet Las Vegas is about artifice and false fronts. The spectacle of Las Vegas accommodates female impersonators, swishy magicians, "family-oriented" gay acts. In this raunchy, masculine, hetero playground of Las Vegas, Liberace then⁸⁶ and, at least until recently, Siegfried and Roy now, provide the "wholesome" entertainment.⁸⁷ Perhaps it is as simple as suggesting that the city of artifice and of hyper-heterosexuality has an unsurprising affinity for the closet. Perhaps Liberace's heterosexual identity worked in the same way that the Venetian Hotel represents Venice and the Luxor Hotel is perceived to be Egyptian.

In Nevada's deep cultural division between the world of the tourists and the family-oriented world of the locals, the legal regimen condemning and controlling homosexuality is part of the realm of the locals, part of who or what Nevada understands itself to be. Liberace's combination of outlandish performance and pretensions of normality found a perfect home here. By legally establishing his heterosexuality, Liberace embraced Nevada's civic identity. As Mr. Showmanship, Liberace promoted the Las Vegas of glitz and spectacle. As a gender provocateur, Liberace's legally constructed closet made him the gender provocateur equivalent of the Venetian Hotel or the Luxor.⁸⁸ The massive pyramid and sphinx and obelisks of the Luxor hotel are a cleaned up, out-sized, commercialized, fun, brash, All-American version of Egypt. Liberace's avowal of heterosexuality cleaned up and domesticated⁸⁹ his act, rendering it all-American, as well.

Persons who perjure themselves are conventionally thought to show disrespect for the law, and certainly a person who perjures himself in defamation

⁸⁵ Jennifer Brown predicted in 1995 that Nevada would not abandon its conservative politics or risk its success as a destination for conservative tourists by becoming an early location for same-sex marriage, in spite of Nevada's historic readiness to enact loose laws regarding marriage, divorce, gambling, and prostitution for economic advantage. Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 827-29 (1995).

⁸⁶ "No entertainer would have longer or more comprehensive associations with the gambling resort. In many ways, his career matches the city's history, and together the two represent one of the extraordinary, daffy, and striking phenomema of the second half of twentieth-century American history." PYRON, *supra* note 16, at 259.

⁸⁷ See Steve Friess, *The Truth about Siegfried & Roy*, THE ADVOCATE, NOV. 11, 2003, at 57 (challenging the media's silence about Siegfried & Roy's romantic history and sexual identities, and quoting a fan distraught over Roy's tiger mauling accident, "They were one of the last wholesome things left to see in this town").

⁸⁸ See James R. Gaines, *Liberace*, PEOPLE, OCT. 4, 1982, at 57 ("For the last several years Liberace has considered his home to be Las Vegas . . . Here the false front is exalted as a sign of sanctuary, a place of safety").

⁸⁹ Cf. RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992) (analyzing the law's domestication of lesbians).

lawsuits with the same audaciousness that he denies having had face lifts or wearing a toupee⁹⁰ appears un-impressed with the honor and majesty of the rhetorical search for truth in a court of law. But Liberace had great respect for the expressive power of law. Liberace understood that law's categories have power, even when detached from something like factual reality, so he aggressively used the law to establish his own legitimacy. Liberace's rise to stardom, and to civic leadership, are testaments to the expressive power of law. The fact that he was straight by law entitled him to status as a civic leader. It also freed him to play overtly with his sexuality and made it safe for him to make his sexual identity one of the jokes of his performances. If Liberace was straight by law, no amount of flamboyant "powderpuffery," to use Bob Hope's phrase, let alone sex with men, could make him gay.

Liberace understood his lawsuits to be part of his performance. The witness stand in the Old Bailey was not merely an especially prominent stage, but the law and the lies were dramatic props, not unlike the candelabra and the diamond rings. In this sense, Liberace's perjuries were undertaken because of his respect for the performative power of law, and his understanding (or perhaps hope) that the expressive impact of a legal certification of heterosexuality would enable him to continue his homosexual behavior and his stardom, with impunity. Liberace's perjury was a grand gesture, by a man who valued grand gestures above all.

Liberace did not seem capable of re-directing his sexuality or toning down his flamboyance. However, he was completely capable of changing his legal status, so he did so, providing another lesson in the permeability and indeterminacy of law.

Having officially established his heterosexual identity, Liberace was freed to play with sexual ambiguity in his performances. David Ehrenstein suggested that in playing with his sexual identity, "Liberace knew exactly what he was doing: just how far to go. His every word / and gesture was crafted to raise the question of his sexual identity in the minds of his adoring fans Liberace's entire performing persona ceaselessly exploited the notion that he might be other than heterosexual."⁹¹ Certainly Liberace's deployment of the law was not his only strategy for protecting himself from being identified as homosex-

⁹⁰ Liberace also denied having plastic surgery or wearing a toupee. PYRON, *supra* note 16, at 368.

⁹¹ EHRENSTEIN, *supra* note 63, at 118-19, 120 (quoted by PYRON, *supra* note 16, at 229-30). Pyron described Liberace's November 23, 1963, appearance on the Jack Paar show. "'When you are out and people recognize you, do you get much reaction?' inquired the talk show host. And, in a voice best described as purring, the entertainer smiled coyly and replied, 'Oh yes, it takes courage to come up to me, and they will say, 'Are you . . . or aren't you . . . ?''" PYRON, *supra* note 16, at 247. Film-maker, author and cultural critic John Waters reviewed Liberace's *THE WONDERFUL PRIVATE WORLD OF LIBERACE* for *VOGUE*:

He denies having a face life or wearing a wig, and in one eyebrow-raising chapter recalls losing his virginity at age sixteen to a woman "twice my age," even though, he says, "the thrill of making it with an older woman diminished as I grew older. Younger girls started to represent more of a challenge, probably because of their comparative innocence." All of this from a man who, the last time I saw his show (a sort of vaguely kinky ice capades), made a grand entrance hollering, "Eat your heart out, Tootsie!"

John Waters, *Why I Love Liberace*, *VOGUE*, Nov. 1986, at 270, quoting LIBERACE, *THE WONDERFUL PRIVATE WORLD OF LIBERACE* (1986).

ual. In writing about camp and homosexuality, cultural scholar David Bergman has identified what he calls "the Liberace Effect," by which he means "to be so exaggerated an example of what you in fact are that people think you couldn't possibly be it."⁹² Although some critics found Liberace's performances distastefully gay, most of his fans saw clean, wholesome fun.⁹³

With his repudiation of homosexuality alongside his gender manipulations and sexual outrageousness, we might say that Liberace was queer before its time,⁹⁴ or perhaps prematurely post-civil rights.⁹⁵ From the vantage point of 2004, Liberace's aggressive embrace of the closet is as provocative as his equally aggressive "misuse" of law. Liberace's position in contested space, somehow combining adamant denial and coded, teasing revelations, took different shapes in different eras. He maintained his denials throughout, yet became more open about his male lovers, and allowed himself to be seen and photographed with lovers and gay friends.⁹⁶ During the worldwide publicity in 1982 related to Scott Thorson's palimony lawsuit against Liberace, his spokesperson positioned Liberace as separate from and opposed to the gay community: "This is not the first time Liberace has been the victim of slander at the hands of the gays."⁹⁷ Liberace's death from AIDS in 1987 was international news,⁹⁸ even marked by a Ted Koppel *Nightline* on "why Liberace did not reveal his gay lifestyle."⁹⁹

⁹² David Bergman, *Introduction*, in *CAMP GROUNDS: STYLE AND HOMOSEXUALITY* 3, 14 (1993). Bergman points out that one use of "The Liberace Effect" is as "a highly effective use of camp to ward off physical abuse in a homophobic society." *Id.* "But such effects work not by dismantling the gender system but by trading on its blindness." *Id.*

⁹³ Liberace told *PEOPLE* in 1982:

"My act is just that far away from being drag," he says, "but I would never come onstage like, say, Danny La Rue [a comic female impersonator], who is a very dear friend of mine. I have a general family audience appeal, and I don't want to develop only a gay following. It's going to take many, many years for this kind of an audience to accept people who are totally gay or come out on Johnny Carson. I've seen careers hurt by that kind of thing – look at Billie Jean King. But with a name like Liberace, which stands for freedom, anything that has the letters L-I-B in it I'm for, and that includes gay lib."

James R. Gaines, *Liberace*, *PEOPLE*, Oct. 1, 1982 (partially quoted in *PYRON*, *supra* note 16, at 203).

⁹⁴ Perhaps Liberace shared this with Oscar Wilde. Cf. Martha M. Ertman, *Oscar Wilde: Paradoxical Poster Child for Both Identity and Post-Identity*, 25 *LAW & SOC. INQUIRY* 153 (2000).

⁹⁵ Cf. Schacter, *supra* note 7.

⁹⁶ Pyron reports that Liberace stopped vehemently denying his homosexuality in the mid-seventies, on the theory that the public did not care any more, even introducing his chauffeur/lover on stage as "my friend and companion." *PYRON*, *supra* note 16, at 312.

⁹⁷ *Id.* at 372 (quoting ALEX THORLEIFSON, *BEHIND THE CANDELABRA: MY LIFE WITH LIBERACE* 208-09 (1988)).

⁹⁸ See, e.g., *Liberace Had AIDS: Doctors Covered Up Cause of Death, Coroner Says*, *WASH. POST*, Feb. 10, 1987 at B1, B4; *Omission of AIDS From a Report on Liberace's Death Is Defended*, *N.Y. TIMES*, Feb. 14, 1987, at 7 (Nat'l ed.).

⁹⁹ *PYRON*, *supra* note 16, at 414 (citing to Brian Greenspun, interviewed on *Nightline*, quoted in the *LAS VEGAS SUN*, Feb. 6, 1987, and cited in *FARIS*, *supra* note 15, at 181). Presumably the *Nightline* investigation revealed some of the oppression against gay people that the court in *Doe v. Bryan* refused to acknowledge.

III. REPEAL OF NEVADA'S SODOMY LAWS

Doe v. Bryan, the unsuccessful challenge to Nevada's sodomy statute, was litigated in the years between Scott Thorson's palimony lawsuit and Liberace's death. In 1993, five years after Liberace's closeted death, activists and legislators succeeded in repealing Nevada's same-sex sodomy laws, becoming the first of five states to repeal its anti-gay sodomy statute (followed by Tennessee, Kentucky, Montana, and Arkansas between 1996 and 2002).¹⁰⁰

The legislative debates in Nevada were similar in many ways to others, worldwide, on this issue. The repeal emphasized privacy rights, and the argument that the fact of adults having private consensual sex offers no reason for criminal sanctions.¹⁰¹ As in other public disputes about protections of gays and lesbians, somehow the rhetoric of "special rights" was imported:¹⁰² for example, during the debates, one member of the Nevada Assembly placed a sign on his desk that read, "No special rights for sodomites."¹⁰³

The Nevada repeal also had its own unique flavor; one of the concerns stated in the legislative record was whether repeal of the sodomy statute would mean that the brothels would have to accommodate homosexual men as customers.¹⁰⁴ The reassuring answer was no, because the counties, through their licensing, could and would maintain the brothels are only for the sale of heterosexual.¹⁰⁵ The sodomy laws represented the hetero-libertarian culture of the state; the repeal of the sodomy laws vindicated the principles of unmodified libertarianism. The repeal was a huge victory for gays and lesbians, and our allies.

This legislative reform was also immersed in normative questions about the source of law's authority. Speaker after speaker described Nevada's sodomy law as largely unenforceable, and acknowledged that its function was to express societal disapproval of homosexuality. Legislators who opposed repeal repeatedly suggested that the fact that it was not enforceable was irrelevant, because of the importance of the message it sent. Most of the debate centered on the direct question of whether a message of disapproval was the correct message. But another consistent argument made by advocates for repeal, especially those who did not want to be understood to be endorsing homosexuality, was that unenforced laws are not good laws. These arguments reflected the conventional, positivist assumption that unenforceable laws undermine the power and authority of law. But do they? The activists on both sides of this reform issue understood the usefulness of Nevada's largely unenforced and per-

¹⁰⁰ *Lawrence v. Texas*, 539 U.S. 558, 569 (2003).

¹⁰¹ See Nev. Sen. Judiciary Comm., Mins. of Meeting, 67th Sess. (May 24, 1993).

¹⁰² See generally, Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 300-07 (discussing deployment of "special rights" rhetoric in gay rights struggles).

¹⁰³ An Oral History Interview with Lori Lipman-Brown, conducted by Dennis McBride, at 1 (1998) (available at Univ. of Nev. At Las Vegas, Lied Library, Dep't of Special Collections).

¹⁰⁴ See NEVADA LEGISLATIVE COUNSEL BUREAU, JOURNAL OF THE SENATE, SIXTY-SEVENTH SESSION, 931, 934 (1993). Why no concern about lesbians? The invisibility of potential lesbian customers is striking, reinforcing, perhaps, that the dominant representation of lesbians in Nevada culture has been as fantasy objects of the heterosexual male gaze.

¹⁰⁵ NEV. REV. STAT. 201.295-2101.440, 244.35, 244.360, 269.175 (2001) (Nevada Brothel Statutes).

haps even unenforceable sodomy statute as a bulwark against a possible "norm cascade"¹⁰⁶ in favor of greater equality for gays and lesbians.¹⁰⁷ Without the theoretical grounding that could be found now in either liberal law and economics analysis¹⁰⁸ or critical theories of power and culture,¹⁰⁹ activists on both sides waged a fierce battle to control expressive functions of law. Finally, though, the same lack of enforcement that had been used to justify the dismissal of *Doe v. Bryan* through lack of standing became a primary justification for repeal of the sodomy statute in 1993.

IV. *LAWRENCE V. TEXAS*

My title notwithstanding, the United States Supreme Court did not mention *Liberace* in the *Lawrence* decision. But it did mention the Nevada history of the same-sex sodomy law having been enacted in 1977 (along with sodomy laws enacted in eight other states directed exclusively at same-sex sexual activity), and having been repealed in 1993. The 1977 Nevada law was cited, along with those of eight other states, for the lack of historical pedigree of laws targeting gay sex, and for the small number of states that enacted sodomy laws targeted at gays and lesbians. "It was not until the 1970's that any State singled out same-sex relations for criminal prosecutions, and only nine State have done so."¹¹⁰ The court emphasized the repeals by five of those states, including Nevada, in order to isolate the Texas sodomy statute, and suggest popular support for the Court's decision.

The *Lawrence* court acknowledged in 2003 what the Nevada Supreme Court had refused to see two decades earlier: "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."¹¹¹ *Lawrence* recognizes that "[t]he stigma this criminal statute imposes . . . is not trivial."¹¹² *Lawrence* thus stands as a mon-

¹⁰⁶ See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (explaining that "norm cascades occur when there are rapid shifts in norms.")

¹⁰⁷ As is not unusual in Nevada politics and culture, opponents to the repeal identified the bulwark as especially necessary to prevent California's influence from encroaching further into Nevada.

¹⁰⁸ See, e.g., Sunstein, *supra* note 106.

¹⁰⁹ E.g., FOUCAULT, *supra* note 81; BARTHES, *supra* note 79; BUTLER, *supra* note 30.

¹¹⁰ *Lawrence v. Texas*, 539 U.S. 558, 569 (2003).

¹¹¹ *Id.* at 523; see also *id.* at 581 (O'Connor, J., concurring) ("Texas' sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else").

¹¹² *Id.* at 523-24.

QUESTION: "But the argument of – of Bowers, to overrule Bowers is not directly related to sodomy. It's related, but not directly. It's that people in their own bedrooms, which have their right to do basically what they want, it's not hurting other people. And they – the other side – says Bowers understated the importance of that. It got the history wrong. It didn't understand the relationship of the sodomy to families and in addition, Bowers has proved to be harmful to thousands and thousands and thousands of people, if not because they're going to be prosecuted, because they fear it – they might be, which makes it a possible instrument of repression in the hands of the prosecutors."

Oral Argument Transcript, 2003 U.S. Trans. LEXIS 30, at 31.

ument to the power of even unenforced law. By repudiating *Bowers*, *Lawrence* vindicated John Doe, Richard Roe, Jane Joe, and Mary Poe. *Lawrence* also vindicated Liberace's choice to use the law to construct a false closet. Liberace insisted on being part of the American mainstream.¹¹³ When made to choose, he chose being a citizen, not a criminal.

In his typically acid *Lawrence* dissent, Justice Scalia tells us something that Liberace knew, namely that that laws about homosexuality are a contested part of our culture.¹¹⁴ Liberace knew that laws about homosexuality are part of our culture,¹¹⁵ and he boldly incorporated those laws into his performance to protect himself from the anti-gay culture. Liberace's defamation victories were culturally powerful legal results, even if they were not actually true, *especially* because they were not actually true. As Nevadan legislators wanted to keep laws on the books making homosexual sex criminal, even without enforcing it, to send a message of disapproval, Liberace used his defamation lawsuits and victories to create an official message of approval.

Justice Scalia decried that "the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."¹¹⁶ Although Liberace preferred a stance of uncritical sentimentality about democratic principles and law,¹¹⁷ John Doe, Richard Roe, Jane Joe, and Mary Poe might have asked, "what democratic rules of engagement?"¹¹⁸ Or, at least, "what neutrality?"

Justice Scalia used his *Lawrence* dissent to emphasize another painfully obvious point:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.¹¹⁹

Justice Scalia is telling us another thing that Liberace knew. Many Americans do not want persons who *openly* engage in homosexual conduct as partners in their business, as scoutmasters for their children, or as odd, effusive, mincing, campy entertainers, with a string of handsome, young protégés and chauffeurs and assistants. Like Justice Scalia, Liberace never embraced what

¹¹³ See Waters, *supra* note 91, at 270. "Even though Mr. Showmanship Himself would have you believe that under all the hype, furs, and hot pants lurks a normal guy who dresses conservatively, loves his mother, Saint Anthony, and decorating, I'm convinced he's so all-American he's gone over the edge." *Id.*

¹¹⁴ Robert Post knows it too. See Post, *supra* note 24, at 8 ("constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture").

¹¹⁵ With Liberace, Jane Schacter "resist[s] a conception of law and culture as atomized, autonomous spheres and instead seek[s] to understand self-consciously the ways in which culture gives meaning to law, and law to culture." Schacter, *supra* note 7, at 719.

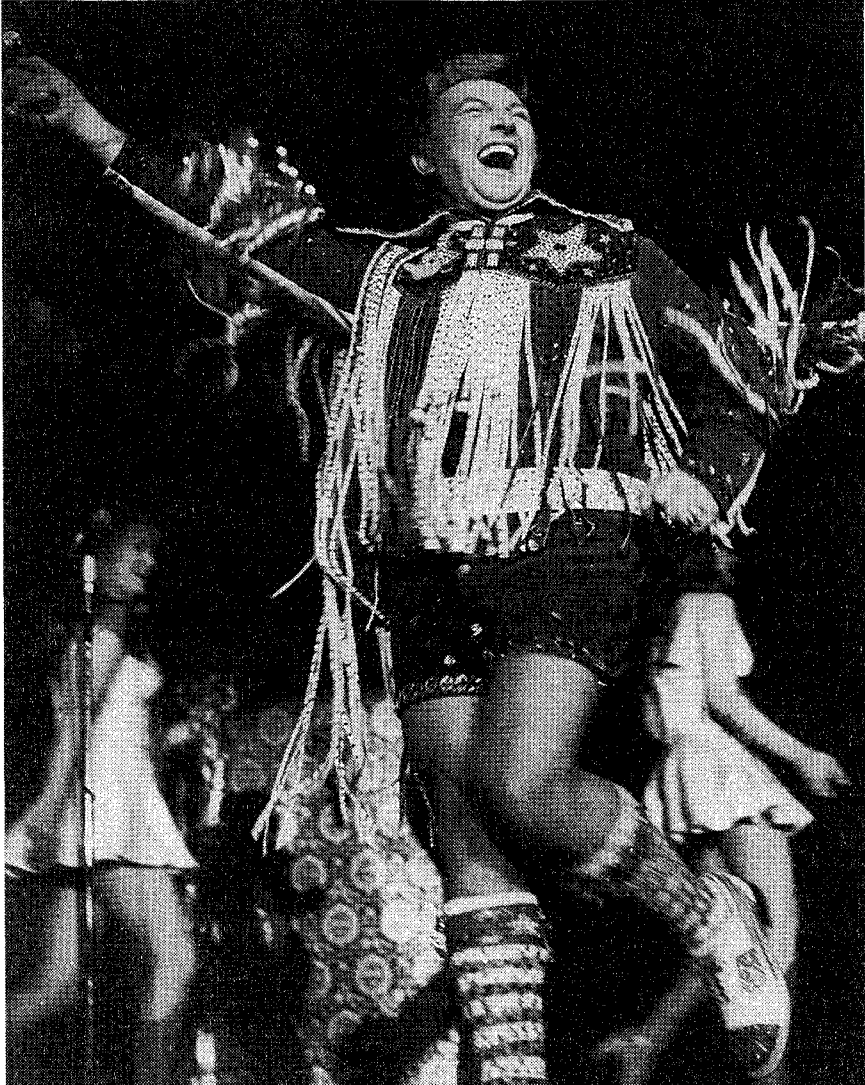
¹¹⁶ *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

¹¹⁷ Liberace had an uncritical, sentimental, yet robust sense of his own entitlement to the protections of freedom.

¹¹⁸ In this discussion, Justice Scalia's "democratic rules of engagement" sound a little like the Marquess of Queensbury's Rules for boxing, created by Oscar Wilde's brutal nemesis. See *supra* note 76 and citations therein.

¹¹⁹ *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting).

Justice Scalia, with marked antipathy, calls the "homosexual agenda."¹²⁰ Justice Scalia would uphold the laws that criminalize same-sex sex and keep homosexuals secret and closeted, on the run and outside the law. Liberace used a different legal strategy. He used the law to liberate himself, all by himself. Liberace used the law to make himself straight, to allow him to unleash his spectacular, queer self upon Las Vegas and the world.



Liberace in Hot Pants (1971), courtesy of Las Vegas News Bureau.

¹²⁰ See *Lawrence*, 539 U.S. at 602 (Scalia, J., dissenting). "Today's opinion is the product of a Court, which is the product of a law-profession culture, that had largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." *Id.* "For Liberace, the Stonewall revolution was as much a millstone as a milestone." PYRON, *supra* note 16, at 305.