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# Sodomy Laws in France: How The 1791 French Penal Code Decriminalized Sodomy Without The Will of The People

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Sodomy Laws in France:

How The 1791 French Penal Code Decriminalized Sodomy Without The Will Of The People

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PSU Challenge Honors History of Modern Europe

Mr. Vannelli

March 9, 2020

In October of 2016, out.com released an article titled, “Today in Gay History: France Becomes First West European Country to Decriminalize Homosexuality.” The author, Hilton Dresden, states that the “legalization of homosexual acts between two consenting adults came as part of the French Penal Code of 1791, during the French Revolution.”<sup>1</sup> The article would suggest that tolerance towards homosexuality has been prevalent in France for centuries, implying legislative permissiveness coincided with social acceptance.<sup>2</sup> To understand how progressive this legislation was, it is important to consider how much later other Western countries decriminalized same-sex sexual acts, termed sodomy: Italy in 1890, Denmark in 1933, the United Kingdom in 1982, and the United States in 2003. Generally speaking, Western countries generated very little legislative acceptance of homosexuality until the twentieth century, when changes in the law mirrored the broadening social acceptance towards the gay community.<sup>3</sup> So one must ask: Why was France so ahead of the curve in terms of acceptance towards homosexuality? The simple answer: They were not. In reality, the decriminalization of homosexual acts was not the result of drastic social change which favored homosexuality, but a passive result of legislation that ignored all victimless crimes and promised less governmental interference into people’s personal affairs. Same-sex sex acts simply happened to fall under this umbrella. The legality of homosexual acts did not originate from moral debates in courts, was never declared legal, and even had little to do with the concept of homosexuality itself.

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<sup>1</sup> Hilton Dresden, “Today in Gay History: France Becomes First West European Country to Decriminalize Homosexuality,” out.com (Out, October 6, 2016), <https://www.out.com/today-gay-history/2016/10/06/today-gay-history-france-becomes-first-west-european-country>).

<sup>2</sup> Ibid.

<sup>3</sup> Victor Asal, “Original Sin: A Cross-National Study of the Legality of Homosexual Acts.” (Comparative Political Studies 46, no. 3, 2013): 320-351. 333-334.

Ultimately, the decriminalization of sodomy in France was not a result of radical acceptance of homosexuality; rather the legislative change, as seen in the French Penal Code of 1791, occurred due to a widespread shift in political philosophy which contradicted preceding views on the role of religion in law, and the role of law in the life of the individual. Significantly, the new philosophy was only successful in impacting legislature because of the complete collapse of the monarchy and the regional Catholic hierarchy.

For the purposes of this paper, it is important to clarify the distinctions between the terms “sodomy” and “homosexuality.” “Sodomy” is not, as we know it today, the politically correct word for homosexual sex-acts. However, within this examination of the decriminalization of sodomy, the term is preferred by the source material and is most compatible with the historical context being examined. The concept of sodomy originated from the biblical story of Sodom,<sup>4</sup> from which it became a highly villainized term for sexual acts between men.<sup>5</sup> Throughout Western history, including the history of France, the meaning of the word “sodomy” has evolved to include bestiality, rape, sexual acts which cannot result in procreation, and adultery.<sup>6</sup> Going forward in this paper, the term “sodomy” will refer to the *act* of consensual homosexual sexual activity, unless stated otherwise. In contrast, the term “homosexuality” will not be used to reference specific acts, but the broader sexual preference towards members of the same gender. To clarify, this term is most used when discussing widespread views on homosexuality in historic France. As such, the public’s views on homosexuality will represent the public’s general stance

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<sup>4</sup> Genesis 18:19

<sup>5</sup> “Sodomy,” [www.etymonline](https://www.etymonline.com/word/sodomy#etymonline_v_23829) (Online Etymology Dictionary, 12AD), [https://www.etymonline.com/word/sodomy#etymonline\\_v\\_23829](https://www.etymonline.com/word/sodomy#etymonline_v_23829).

<sup>6</sup> “Sodomy, Sexual Behavior,” [Britannica.com](https://www.britannica.com/topic/sodomy) (Encyclopedia Britannica, 2014), <https://www.britannica.com/topic/sodomy>.

towards the *idea* of a sexual preference for a member of the same sex. That being said, much of the source material only refers to homosexuality and sexual acts between men, excluding same-sex relations between women. This is due the sparseness of information on same-sex relations between women in France, and the inattention to lesbian relationships in Western law at the time. The following analysis is most accurate with that awareness that the terms “homosexuality” and “sodomy,” while not definitively excluding female relationships, are being used in a male-focused context.

Homosexuality was criminalized in the first place due to the Roman Catholic Church. Historians generally agree that homosexual relationships in Ancient Greece and Rome occurred openly and were subject to little to no religious stigma.<sup>7</sup> However, when Christianity became the official religion of the Roman Empire in the fourth century, the government began enforcing new laws against sodomy. Emperors Constantius II and Constans introduced the first western anti-gay law in 342, and in 390 the death penalty was instituted for any men caught in the act of sodomy.<sup>8</sup> Pronouncements from the Roman Catholic Church asserted that sex outside of the constraints of marriage, and/or acted upon for reasons other than procreation was immoral. As these views became more mainstream, the condemnation of homosexuality and sodomy already established by law, was enhanced and embedded into social norms.<sup>9</sup> Even after the West Roman Empire dissolved in the fifth century, negative attitudes towards homosexuals persisted in the newly established European states, even outlasting the Modern Era. Many European nations were

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<sup>7</sup> Aleksandr Ilikbaev, “A Great Divide on Homosexuality in the Contemporary World: How Do Attitudes Change?” (Finland, University of Tampere, 2017): 7.

<sup>8</sup> Ibid.

<sup>9</sup> A. R. H. Copley, *Sexual Moralities in France, 1780-1980 : New Ideas on the Family, Divorce, and Homosexuality : An Essay on Moral Change*. (London: New York: Routledge, 1989): 15-16.

founded around the Roman Catholic Church or, at the very least, had Catholic beliefs entrenched within the foundations of their societies.<sup>10</sup> Public attitudes towards sodomy and homosexuality were no exception. Later, the Church would seek to expand intolerance to homosexuality beyond society and into the law.<sup>11</sup> The campaign by the Church was partially spurred on by Thomas Aquinas's *Summa Theologica*, the first major writing to classify sodomy as a crime against nature, and subsequently God.<sup>12</sup> As a result, Europe went from disapproving of and ignoring sodomy in legislature in 1250, to making it almost completely illegal throughout respective nations, including France, in 1300. While there are other social and political reasons the Catholic Church campaigned against sodomy, Western culture did shift substantially towards Aquinas's interpretation of the issue. This outlook also persevered in French culture, with the development of widespread judgement towards sodomy and homosexuality on the basis of Catholic and Christian morality.<sup>13</sup> The Catholic Church laid the foundation for the criminalization of sodomy across Europe, and as a result, much of the Western world, including France, came to associate homosexuality and sodomy with sin.

While initially the Catholic Church enforced the prosecution of sodomy in France, by the late Middle Ages the monarchy in France took on the duty of arresting, judging, punishing, and often executing suspected sodomites. Under the Ancien Régime, sodomy was a capital offense.

The Ancien Régime is known for its abusive legal system in which “any transgression against

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<sup>10</sup> Jeffrey Merrick, “Sodomy, Suicide, and the Limits of Legal Reform in Eighteenth-Century France.” (Studies in Eighteenth-Century Culture 46, 2017): 184.

<sup>11</sup> Aleksandr Ilikbaev, “A Great Divide on Homosexuality in the Contemporary World: How Do Attitudes Change?” (Finland, University of Tempere, 2017): 7.

<sup>12</sup> A. R. H. Copley, *Sexual Moralities in France, 1780-1980 : New Ideas on the Family, Divorce, and Homosexuality : An Essay on Moral Change*. (London: New York: Routledge, 1989): 16-17.

<sup>13</sup> André Vauchez, “Homosexuality”. (Encyclopedia of the Middle Ages, 2005).

society, property, or life[...] [would] be swiftly and severely punished.”<sup>14</sup> As a result, those accused of committing offenses could be imprisoned without trial, and denied access to council. This system lasted centuries, and impacted thousands.<sup>15</sup> <sup>16</sup> Because sodomy was viewed as a crime against society, it was legally treated as such. Through the late Middle Ages and into the eighteenth century, those accused of sodomy were often subject to this punitive legal system before being executed.<sup>17</sup> However, the last individuals accused of sodomy to be executed were burned in 1750, despite many being found guilty of sodomy after this point. From 1750 on, it seems, official French executions on the basis of sodomy disappeared. However, the French monarchy and its magistrates are known to have arrested dozens under the suspicion of sodomy, or for allegedly attempting to initiate sodomy, over thirty years after the last execution, in 1781.<sup>18</sup> Therefore, while executions on the grounds of sodomy had ceased, the authorities were still sensitive to the act of sodomy itself, as well as the suggestion of homosexuality.

The monarchy’s persisting defensiveness towards homosexuality calls into question why the trend of punishment shifted away from execution. By the time Louis XVI came to power in 1774, the Ancien Régime intended to minimize the public exposure to homosexuality. When an individual was arrested for sodomy, they were no longer executed and often went unpunished as the monarchy feared that public attention to homosexuality would increase its

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<sup>14</sup> Leonore Loft, “Toward a More Just Criminal Code in Pre-revolutionary France: J.-P. Brissot (1754–1793).” (*Journal of Criminal Justice* 20, no. 2, 1992): 122.

<sup>15</sup> *Ibid.*

<sup>16</sup> A. R. H. Copley, *Sexual Moralities*, 18-19.

<sup>17</sup> D. A. Coward, “Attitudes to Homosexuality in Eighteenth-century France.” (*Journal of European Studies* 10, no. 40, 1980): 240-41.

<sup>18</sup> Jeffrey Merrick, “Sodomy, Suicide, and the Limits,” 185-187.

popularity.<sup>19</sup> French Catholic theologian and traditionalist abbé Bergier (1715-90), staunch believer in criminalizing sodomy, recognized this tactic in magistrates in 1790, stating “Unless the scandal is public, it is judged to be better to ignore it than to punish it.”<sup>20</sup> However, throughout modern France, sodomy was not treated equally among classes. While the lower class was subject to persecution, male elites often flaunted homosexual relationships, receiving impunity from legal subjugation.<sup>21</sup> For instance, members of the royal family of France and wealthy French politicians, such as Philippe I<sup>22</sup>, and the marquis de Villette<sup>23</sup> were infamous for being openly homosexual, and did not lose status or wealth as a result.<sup>24</sup> <sup>25</sup> This was the case with many key components of the French legal system: the lower class received highly punitive attention which resulted in deepening their oppression, while the elite were exempt from the law.<sup>26</sup> The disproportion of legal action among classes, alongside the harshening economic disparities, caused feelings of resentment from the lower class, one of many factors which precipitated the French Revolution.

The French Revolution was, at its core, a movement of the masses to break down oppressive economic and legal systems which favored the elite. While the Revolution was

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<sup>19</sup> Jeffrey Merrick, “Sodomy, Suicide, and the Limits,” 185-187.

<sup>20</sup> Ibid, 188.

<sup>21</sup> Olivier Blanc, “The ‘Italian Taste’ in the Time of Louis XVI, 1774-92.” (Journal of Homosexuality 41, no. 3-4, 2002): 71.

<sup>22</sup> Duke of Orléans (1640-1701), younger brother to King Louis XIV.

<sup>23</sup> Wealthy French writer and politician (1736-1793).

<sup>24</sup> Olivier Blanc, “The ‘Italian Taste’ in the Time of Louis XVI, 1774-92.” (Journal of Homosexuality 41, no. 3-4, 2002): 71.

<sup>25</sup> D. A. Coward, “Attitudes to Homosexuality,” 244.

<sup>26</sup> “French Penal Code of 1791,” Self.gutenberg.org (World Heritage Encyclopedia , 2019), [http://self.gutenberg.org/articles/French\\_Penal\\_Code\\_of\\_1791](http://self.gutenberg.org/articles/French_Penal_Code_of_1791)).



ultimately a failure, it did succeed in dismantling and reconstructing the monarchy, the overlapping courts of law which served as national justice system, and the religious institutions of the nation—allowing for the decriminalization of sodomy. Before the Revolution began, the nation was already in a state of tension due to widespread discontent among the common people. In 1789, the king called together the Estates General, a meeting of the First, Second, and Third Estates of France: the clergy, the nobility, and the representatives of the commoners. Because the voting system of this assembly favored the church and the nobility, the commoners' opinions were not reflected in the decisions, even though this group represented over 98% of the population. The Third Estate assembly performed a coup, creating the National Assembly to write an entirely new constitution which held the peasantry to the same standards of the nobility. This new constitution included the French Penal Code of 1791. The ideals of this constitution centered around the *Declaration of the Rights of Man and of the Citizen* (1789). The Penal Code, unlike the ruling documents before it, aimed not to infringe on the “personal” matters of the people, and thus did not acknowledge sodomy or homosexuality at all, decriminalizing them entirely.<sup>27</sup> Because of the nature of the morals relayed in *Declaration of the Rights of Man and of the Citizen*, and the government's adherence to them, the topic of sodomy, in and of itself, went unaddressed by the new government. The new government also fully abolished the monarchy, reconstructed the role of the Church in the state, restructured the courts, and officially transformed France into a Republic.<sup>28</sup> <sup>29</sup> Though primarily intended to create a balance between

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<sup>27</sup> Marc Ancel, “France” (The American Journal of Comparative Law, 1973): 263.

<sup>28</sup> “French Revolution ,” History.com (A&E Television Networks, November 2009), <https://www.history.com/topics/france/french-revolution>).

<sup>29</sup> Aleksandr Ilikbaev, “A Great Divide on...” 8.

the common people and the elite, the deconstruction of traditional institutions of power expedited the decriminalization of sodomy.

While a modern analysis of the decriminalization of sodomy in a Western state would typically conclude that legislative change occurred because of or alongside a broadening social acceptance of homosexuality, that is not the case of eighteenth century France. One might mistake the prevalence of sodomy as an indicator of public support for homosexuality, as sodomy became more common during the Pre-Revolutionary period.<sup>30</sup> France experienced a national rise in publicized eroticism, particularly pornographic literature and art, during the seventeenth and eighteenth centuries which set the stage for greater sexual expression among homosexuals.<sup>31</sup> Notably, during the early Revolutionary period, groups of homosexual men would become well-known for meeting in bookshops, frequently, and seeking out popular homoerotic literature of the time, such as “*The Children of Sodom to the National Assembly, Clandestine Loves, Secret Diversions, Sodom and Cythera, and Private Lives of Mirabeau, Villette, Maury, and others*”.<sup>32</sup> While homosexual activity was largely undocumented at the end of the eighteenth century, the consensus amongst scholars, partially drawn from the increasing frequency in which areas became reputed as meeting sights for planned homoerotic encounters, is that homosexuality became less covert at this time. Paris, France has been described as a “gay

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<sup>30</sup> Robert Aldrich, “Homosexuality and the City: An Historical Overview.” (Carfax Publishing, 2004): 1725.

<sup>31</sup> Stanley, John D. “Europe: The Enlightenment.” [glbtqarchive.com. glbtq inc., 2014. http://www.glbtcarchive.com/ssh/europe\\_enlightenment\\_S.pdf.](http://www.glbtcarchive.com/ssh/europe_enlightenment_S.pdf)

<sup>32</sup> Olivier Blanc, “The ‘Italian Taste’ in the Time of Louis XVI, 1774-92.” (Journal of Homosexuality 41, no. 3-4, 2002): 80.

capital” since the eighteenth century.<sup>33</sup> Around the same time, the city became host to known groups of homosexual men, prominent enough to take on the identity of a “sexual minority.”<sup>34</sup> This narrative starkly contrasts the obscured public homosexual presence in the earlier eighteenth century. However, this development was not a result of greater public acceptance, but occurred as a response to the reducing punishments towards homosexuals in the latter half of the century. Moreover, the tumultuous nature of the Revolution and the years leading up to it would generate a change in priorities among authorities: homosexuality, when compared to rebellion, was the less significant threat to the status quo.<sup>35</sup> Despite the alleviation of punishment and rise of open homosexuality, widespread opinion of homosexuality saw little improvement during this era.

In fact, eighteenth century France, even through the decriminalization of sodomy, saw very little change in tolerance towards and stigmas associated with homosexuality. Typically, sodomy was marked as an act against nature. The topic was strictly taboo and the sin associated with it stimulated religion-based persecution if not evasive dissociation; many people refused to even discuss the idea of sodomy or homosexuality for fear that they would become associated with the stigma. <sup>36</sup> This can be reasoned from the fact that words which denoted sodomy inflicted lasting stigma and were rarely used outside of legal circles, and even within them, euphemisms such as “le goût antiphysique”<sup>37</sup> and “le péché philosophique”<sup>38</sup> were preferred by the mid-

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<sup>33</sup> Robert Aldrich, “Homosexuality and the City: An Historical Overview.” (Carfax Publishing, 2004): 1725.

<sup>34</sup> Robert Beachy, “The German Invention of Homosexuality.” (Illinois, The University of Chicago Press Journals, 2010): 802.

<sup>35</sup> Aleksandr Ilikbaev, “A Great Divide on...” 8.

<sup>36</sup> Jeffrey Merrick, “Sodomy, Suicide, and the Limits,” 186-187.

<sup>37</sup> Meaning translates to “the antiphysical taste.”

<sup>38</sup> Meaning translates to “the philosophic sin.”

eighteenth century.<sup>39</sup> Beyond religious attitudes, homosexuality was detested because of the negative attributes it suggested of men. Accusations of sodomy depicted men as giving into their most appalling and selfish desires over their religious convictions, therefore demonstrating weak will, “[m]ost commentators assumed that sex between men [...] implied surrender to uncontrolled but not uncontrollable passions and therefore weakness of character.”<sup>40</sup>

Homosexuality was also detested because it contradicted gender norms, as it was seen as feminizing men.<sup>41</sup> The public assumed that two men in a homosexual relationship would take on the same roles occurring in heterosexual relationships. One of the two would strong and virile—the man—while the other is passive and effeminate—the woman.<sup>42</sup> This popular view can best be recognized in common 18<sup>th</sup> century French satire, in which a youthful, effeminate protagonist is corrupted by a older hyper-sexualized masculine figure, and the “young hero may become the object of the unnatural affections of a teacher, preacher or lecher, but he inevitably escapes and goes on to greater heterosexual things.”<sup>43</sup> This idea of men being degraded with weakness and femininity did not sit well with the French gender norms of the time. Beyond being an affront to gender norms, sodomy was also recognized by philosophers of the day as a rejection of man’s civic duty to procreate, therefore being an unethical act.<sup>44</sup> The common view of sodomy was

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<sup>39</sup> D. A. Coward, “Attitudes to Homosexuality,” 233.

<sup>40</sup> *Ibid*, 186.

<sup>41</sup> John D. Stanley, “Europe: The Enlightenment.” ([gbltqarchive.com](http://gbltqarchive.com), 2004).

<sup>42</sup> Beachy, “The German Invention of Homosexuality,” 814.

<sup>43</sup> D. A. Coward, “Attitudes to Homosexuality,” 248.

<sup>44</sup> *Ibid*, 241.

that it was a threat to the institutions of marriage and the family on top of inherently subsisting of religious stigma.<sup>45 46</sup>

The general disapproval and stigmatization of homosexuality would not change before, during, or after the French Revolution. Moreover, the legislative shift towards tolerance for sodomy and homosexuality did not coincide with any similar social change. The ethical discourse around sodomy had barely begun when it was decriminalized, and as a result, the legal issue was resolved while the moral issue was left unattended to within the eighteenth century. This can be observed through the continued discourse, and continued apathy, among French philosophers on the morality of homosexuality observed throughout the nineteenth century. Furthermore, the people were more attached to the moral stances against sodomy, than the legal ambivalence to it. Despite the law, most felt strong antagonism for homosexuality, for instance, “[i]n 1805, when several soldiers attacked two pederasts<sup>47</sup> in Chartres, one assailant told the victims ‘that they were villains [...]’ In 1806, in Issoudun, the father of a thirteen-year-old boy an all infected with a venereal disease thundered, ‘How is it that we do not chase from the city these scoundrels who corrupt all the young people?’ ...”<sup>48</sup> These were not isolated incidents, but were representative of the overall hostility that many Frenchmen felt towards homosexuality even after the law had changed.<sup>49</sup> The general outlook towards homosexuality did not impact, and was not impacted by the legislative freedoms offered to homosexuals in the French Penal

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<sup>45</sup> Beachy, “The German Invention of Homosexuality,” 807.

<sup>46</sup> Jeffrey Merrick, “Sodomy, Suicide, and the Limits,” 188.

<sup>47</sup> Synonymous to “sodomite.”

<sup>48</sup> Merrick, Jeffrey. *Homosexuality in Modern France*. (New York, NY: Oxford University Press, 1996): 86.

<sup>49</sup> *Ibid.*

Code of 1791. However, while the Penal Code completely excluded sodomy, homosexuals were still unfairly treated by the execution of another law. Article 330 of the French Penal Code of 1791, while written as a general rule against public indecency, unfairly persecuted homosexual individuals.<sup>50</sup> Though this law only specifies “public indecency” as a crime, it was up to law enforcement and the courts to decide what was “indecent.” Evidence suggests that homosexuals were disproportionately affected by this law because any sort of public act of romantic or sexual attention towards a member of the same sex could be classified as indecent.<sup>51</sup> For instance, when describing how Article 330 and the issue of homosexuality overlapped, one late eighteenth century policemen asserted that while homosexuality might not be a crime in itself it became one when “the criminal circumstances in which it may be practiced” violated standards for public decency.<sup>52</sup> Because openly participating in sodomy and other homosexual behaviors violated then standards for public decency “[i]t was to be Article 330 that brought the larger number of homosexuals to the attention of the police.”<sup>53</sup> Despite this, the legislative change, while it did not increase tolerance of sodomy and homosexuality, switched the general mindset away from viewing homosexuality, *in private*, as a crime. Going forward, homosexuality would be generally understood as an illness to be treated.<sup>54</sup> The early nineteenth century saw greater “studies” into homosexuality, whose focuses included how to identify homosexuals and “heal” them. These studies occurred across various fields of science, including psychology, biology, and pathology.

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<sup>50</sup> D. A. Coward, “Attitudes to Homosexuality,” 232.

<sup>51</sup> Ibid, 232-233.

<sup>52</sup> A. R. H. Copley, *Sexual Moralities*, 24.

<sup>53</sup> Ibid, 25.

<sup>54</sup> John D. Stanley, “Europe: The Enlightenment.”

One notable study of this period was crafted by Parisian forensic pathologist August Tardieu, who studied and examined French prostitutes and prison inmates—coming to the conclusion that homosexuals possessed pointy penises and funnel-shaped anuses—in the hopes of finding a reliable physical method of identifying homosexuals. This study takes the presumption of homosexual relationships innately having active and passive roles for granted, and comes to the conclusion that homosexuality is a choice made out of vice, countering other theories of the day which argued it to be a mental illness.<sup>55</sup> Some scholars assert that the medical investigations of the time could be blamed on a premature legalization occurring without change in general philosophy.<sup>56</sup> Whatever the case, the view quickly became that homosexuality, while not a crime, *was* a disease, which maintained the previous stigma around homosexuality as well as explaining the broader legislative change.<sup>57</sup>

While much of the stigma and sin associated with homosexuality was a result of the Catholic Church's condemnation of sodomy, which remained even after the French Penal Code of 1791, the weakening state of the Church within Revolutionary France was pivotal to decriminalizing sodomy. At the time, the general public became less loyal to the Church. The lessening of support towards the clergy, originating from the feelings that the clergy had not made an effort to support the needs of the common people, particularly on the state level, became a source of contention between people and their faith. The National Assembly even took action to limit the power of the clergy within the state, aiming to make them more dedicated to the

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<sup>55</sup> Beachy, "The German Invention of Homosexuality." 813-815.

<sup>56</sup> *Ibid*, 814.

<sup>57</sup> Jeffrey Merrick, "Sodomy, Suicide, and the Limits," 186.

people of France than their ties to Rome.<sup>58</sup> The lessening of religiosity was a key aspect of the decriminalization of sodomy. In groups experiencing poverty, such as the French common people before the revolution, there is a lessening confidence in religious institutions.<sup>59</sup> The common people of France found that the Clergy was not doing enough to support them politically or economically, therefore depressing their support for it. In spite of this, the citizens did not, as a whole, disconnect from their faith, but rather held issue with the role of the Church in the state. As a result, there was greater support for separation between the state and Church, and for a stronger focus on governance based upon reason. This era of rejecting religion in favor of reason is referred to as the Age of Enlightenment.

The Age of Enlightenment was a philosophical movement which dominated the eighteenth century. While the French Revolution occurred during the backend of the Age of Enlightenment, the ideas from this era largely impacted the actions of the governing assembly through the turn of the century and beyond. Enlightenment ideas largely centered around humanitarianism, reason, and secularism, built around the ideological framework that man has certain innate rights that must not be infringed upon.<sup>60</sup> The Enlightenment gained widespread acceptance and was one of several major causes of the French Revolution. Citizens who had been mistreated and subjugated by traditional authorities were finally faced with an ethical framework that acknowledged their unjust treatment and encouraged them to make drastic change. The Enlightenment ideals even went so far as to place reason above religion when

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<sup>58</sup> Aleksandr Ilikbaev, "A Great Divide on..." 8-9.

<sup>59</sup> Ibid, 10-11.

<sup>60</sup> John D. Stanley, "Europe: The Enlightenment."



considering the morality of an issue.<sup>61</sup> While there is a case to be made that the spreading of Enlightenment ideals and rise of sexual expressiveness made people more receptive of homosexuality, in truth, attitudes towards homosexuals were consistently abhorrent through the end of the Enlightenment.<sup>62</sup> Moreover, even Enlightenment philosophers lacked support for homosexuality; many, like Rousseau and Voltaire, outright condemned the act of sodomy.<sup>63</sup> The widespread shift into Enlightenment philosophy greatly impacted people's views of the law and government and the role of faith in the world, but did not change the religion-based convictions of the people.<sup>64</sup>

The new Enlightenment beliefs on the role of law and religion, despite not strongly supporting social tolerance of homosexuality, were the primary ideological reason for the decriminalization of sodomy in the French Penal Code of 1791. When the National Assembly crafted the French Penal Code of 1791, they were basing the new legal framework around the articles specified in the *Declaration of the Rights of Man and Citizen*.<sup>65</sup> This philosophical declaration, asserting laissez-faire ideology, limited the role of the government, particularly in the personal affairs of the people, and outlined what standards laws must be held to.<sup>66</sup> The articles' focus on reason above religion and the freedoms of man serve as the epitome of

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<sup>61</sup> John D. Stanley, "Europe: The Enlightenment."

<sup>62</sup> D. A. Coward, "Attitudes to Homosexuality," 247-248.

<sup>63</sup> Ibid, 240-241.

<sup>64</sup> John D. Stanley, "Europe: The Enlightenment."

<sup>65</sup> Document on citizen's rights, made up of seventeen articles, written by the Marquis de Lafayette and Abbé Sieyès, and presented to the National Assembly in 1789.

<sup>66</sup> Marc Ancel, "The Collection of European Penal Codes and the Study of Comparative Law." (Pennsylvania, University of Pennsylvania Law Review, 1958): 347.

Enlightenment ideals.<sup>67</sup> This publication was highly favored by the National Assembly because it addressed the issues of injustice and tyranny within the government, and served as a clear safeguard against unjust laws in crafting the Penal Code of 1791. As the discourse leading to the French Revolution was largely based around an unfair power balance and inhumane enforcement of religion-based laws, the *Declaration of the Rights of Man and Citizen* clearly laid out the rights of the people and the basic secular standards all laws should be held to. Article 4 states,

“Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.”<sup>68</sup>

While historians are limited to their own interpretations when analyzing which articles led to the decriminalization, this Article likely had the greatest impact on whether to include sodomy in the Penal Code of 1791. In the absence of this article, the National Assembly would have needed to reconcile with the popular beliefs against sodomy, the pretense that the law would not interfere into people’s personal lives, and their explicit aim of excluding religious dogma from the code entirely. This article, which outlines that victimless crimes may not be considered crimes, removed the decision of whether to include sodomy from their hands, as from a secular standpoint, there can be no victim in consensual sex between two men. Article 4 allowed the avoidance of the religious belief that sodomy was inherently wrong, laying a clearer path to the

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<sup>67</sup> John D. Stanley, “Europe: The Enlightenment.”

<sup>68</sup> Gerald Murphy, “Declaration of the Rights of Man and of the Citizen,” Marxists.org (The Constitution Society, n.d.), <https://www.marxists.org/history/france/revolution/rights-man.htm>).

Enlightenment belief that the government should not infringe upon harmless actions of the people, particularly in personal affairs.<sup>69 70</sup>

While the public did not support legal tolerance of homosexuality, the widespread ideological shifts of the eighteenth century, as well as the Enlightenment, inadvertently led to the decriminalization of sodomy. However, neither philosophers of the Enlightenment, the government, nor the people were in support of homosexuality, despite its increasing prevalence. Even after sodomy was decriminalized, it became viewed as an ailment. The legislative change was truly an unintended result of the ideas infused in the Penal Code which were entirely unrelated to homosexuality: the belief that religious dogma should not determine law, the concept that a crime without a victim is not a crime, and the belief that the government should not interfere in personal affairs. However, the perception of homosexuality within the law and society can still be observed. Take Article 330 of the French Penal Code of 1791 as an example. Article 330 of the French Penal Code outlining public indecency does not mention sodomy officially, thus avoiding religious dogma.<sup>71</sup> Despite this, it disproportionately affected homosexuals because it relied on interpretation of the public and the police when determining what was “appropriate” for public, affirming the existence of widespread stigma against homosexuality. Here, is also the unintended use of religious dogma by identifying the victim of the crime the person who has to view this “sin” or “disease”. Sodomy seems to have barely missed the mark of being made illegal in this document, solely because of the emphasis on

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<sup>69</sup> John D. Stanley, “Europe: The Enlightenment.”

<sup>70</sup> Udi Sommer, “Institutional Paths to Policy Change: Judicial Versus Nonjudicial Repeal of Sodomy Laws.” (Law & Society Review 47, no. 2, 2013): 415.

<sup>71</sup> D. A. Coward, “Attitudes to Homosexuality,” 232.

harmless personal affairs being immune to legal intervention. As a whole, the decision to omit the word “sodomy” from the Penal Code of 1791 entirely was not a result of an active socio-political desire for legal acceptance of homosexuality, but a passive result of increased popularity of a philosophy whose basic principles rejected longstanding oppressive systems and ideas.

Finally, the analysis of France decriminalizing sodomy would not be complete without considering what circumstances were needed for the attitudes and philosophical trends of the times to actually impact legislature. Had there not been a major revolution which broke down the systems that the criminalization of sodomy relied upon for centuries, the eighteenth century decriminalization would have never taken place.<sup>72</sup> Typically, when the legislature’s position is not put into the hands of the people, they are more likely to decriminalize sodomy. For instance, when the decision is put in the hands of elected officials instead of judges, decriminalization is less likely because the backlash of the people could prevent officials’ reelection, whereas judges’ positions are immune to the wills of the populace.<sup>73</sup> While decriminalization in France *was* enacted by elected representatives of the National Assembly, the tumultuous nature of the Revolution allowed for the assembly to create laws with little check from other institutions or the public. As there was no current sodomy law to contend with, after the previous legal system had been entirely abolished, legislators did not have to make it legal, they just had to avoid making it illegal. Additionally, there was no need to announce the legality of sodomy, again avoiding the public backlash which would have plagued the decision otherwise. This is not to say that the decriminalization of sodomy was a thoughtful decision on the part of politicians, rather that it

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<sup>72</sup> Udi Sommer, “Institutional Paths to Policy Change,” 418.

<sup>73</sup> *Ibid.*

required *no thought* from either leadership or the populace, occurring unintentionally as a result of governmental reform transpiring alongside a more socially lenient public philosophy. As a whole, the “decriminalization of sodomy” could just be considered as the “ignoring of sodomy,” as the code avoided the idea entirely, thus passively making it legal.<sup>74</sup> Furthermore, the government was not the only system successfully broken down and restructured during the Revolution, the prevalence and strength of the Catholic Church within France was restructured as well. Because of the overall lack of order between the dissembled institutions and the passive nature of the legislature, the National Assembly did not have to contend with any institutions on the issue of sodomy.<sup>75</sup> Accordingly, it would be fair generalize that the decriminalization of sodomy in the Penal Code of 1791 occurred largely because of the ease at which it could.<sup>76 77</sup>

In summation, the French decriminalization of sodomy in the 1791 Penal Code seemingly had very little to do with homosexuality, its role in society, or public attitudes toward it. Had the decriminalization been based upon these factors, it might never have occurred. In the end, the decriminalization of sodomy in Revolutionary France was truly a result of circumstance: the revolutionary and political ideologies required for this change, as spelled out in the *Declaration of the Rights of Man and Citizen* occurring in conjunction with the Revolution which broke down the systems of religion, monarchy, and judicial law which had been holding sodomy laws in place for centuries. It could even be said that the “First West European Country to Decriminalize

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<sup>74</sup> Aleksandr Ilikbaev, “A Great Divide on...” 8.

<sup>75</sup> Victor Asal, “Original Sin: A Cross-National Study of the Legality of Homosexual Acts.” (*Comparative Political Studies* 46, no. 3, 2013): 325-326

<sup>76</sup> Udi Sommer, “Institutional Paths to,” 415.

<sup>77</sup> Achim Hildebrandt, “Routes to Decriminalization: A Comparative Analysis of the Legalization of Same-sex Sexual Acts.” (*Sexualities* 17, no. 1-2, 2014): 233.

Homosexuality” was in fact just the first nation to coincidentally have an ideology which supported decriminalization at a time when leaders could get away with it. However, the decriminalization of sodomy did little to ease the hardships on the French homosexual community. Given that punishment for sodomy before the Revolution was generally only pursued if inaction would result in publicity, and afterwards only limited to public displays of homosexuality, there was little overall change in how the law treated homosexuals. Nor did the social attitude towards homosexuality improve. Both before and after the Revolution, homosexuality was deemed too taboo for discussion; the association with sin and male degradation was never settled by decriminalization, and few were willing to openly debate the subject. The evolution of how society viewed homosexuality was limited to the addition of sodomy being designated as an illness as opposed to a crime. The fact that the decriminalization of sodomy truly did very little in relieving the challenges of the French homosexual community, begs the question: can decriminalizing sodomy without the backing of the people generate significant societal change? With this, occurs the ethical preponderance of whether such a morally debated topic *should* have been decriminalized at the time it was. While a global legal and social examination is needed to explore these questions, the case of France remains a sufficient example of a nation decriminalizing sodomy without majority support for the homosexual community. Furthermore, the instance may bring light to the oft-unconsidered question of whether there is a *wrong* time to assert legal progress. As a whole, the study into sodomy legislation in France and the social ideals which accompanied it, emphasized that social acceptance of homosexuality, even if legal permission is already established, is crucial to easing the burdens of the gay community, a rule that remains true today.

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