WHAT IS WRONG WITH PUBLIC SEX ?

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Presented at the meetings of the American Sociological Association, San Francisco, California, September 4, 1969.

As America creeps slowly out of its Puritan cocoon, there is evidence of perceptible change in attitudes toward sexual deviation. Even the churches are undergoing a change of conscience regarding homosexuals and their behavior, as indicated by the growth of the Council on Religion and the Homosexual, the recent appointment of a study commission on this subject by the Episcopal Church, and the statements of a number of major theologians.[1] In line with recommendations by the American Bar Association, the State of Illinois has brought its penal code on homosexual activity into accord with the statutes of European nations that operate under the Napoleonic Code.

Such statutory reforms, however, condone homosexual acts only when engaged in by consenting adults in private. The consensus is still to condemn such behavior in public settings. The majority of students in a recent criminology class were inclined to censure those who chose a park restroom for homosexual liaisons. Having been instructed in an examination to react as if each were the judge in the trial of two men who had been apprehended by a plain clothes detective in such an act, fifty-two percent of the students replied that they would reprimand the guilty parties - or refer them to psychiatric treatment - not because there was anything wrong with what the men had done, but because

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[1] For examples of such positions see: "Churchmen Speak Out on Homosexual Law Reform," San Francisco: The Council on Religion and the Homosexual, 1967.

they had chosen an inappropriate place to do it. One man answered, in part:

> If [police] do come upon such activity they should reprimand the parties and tell them to 'move on' to more private quarters, even though arrest and degradation rituals of the courts are of no value in dealing with these matters.

Another student, a member of the vice squad of the metropolitan police department, replied as follows:

> This sexual liaison was criminal due to the fact that it was in a public place even though there was no one else present except the detective. The participants disregarded the proper moral standards of society by using such a place.

Since they were writing an examination for an instructor who made his bias on this subject known, their answers may not be taken as representative of even a university-level population; nonetheless, it is noteworthy that the public place of the offense bore such weight in their judgments. Not the nature of the act, but the attendant circumstances, were thought to be worthy of censure.

Albert J. Reiss, Jr., has noted this same legal phenomenon:

> The more public the circumstances in which any sexual behavior takes place, the stronger the taboo and the sanctions against violators. By way of illustration, masturbation is generally permitted in private, but it is strongly tabooed in public as a form of exhibition.[2]

Granted that there is no qualitative difference between masturbation in private and masturbation in public, between acts of fellatio performed in a public john and the same acts taking place in bedrooms, what is there about public sex which raises the taboo? Our first sociological task is to isolate the attendant conditions which result in condemnation of public sexuality. How does society define what is public and what is private for the purpose of imposing its sanctions?

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[2] Albert J. Reiss, Jr., "Sex Offenses: The Marginal Status of the Adolescent," in John Gagnon and William Simon, eds., Sexual Deviance, New York: Harper and Row, 1967, pp. 57-58.

Reiss uses the term, "social visibility," in discussing public offenses - but without defining his term other than by the above quotation. He thus fails to distinguish between social visibility and physical visibility. The physical visibility of an offense is the most obvious, common sense, answer to how the public situation should be socially defined. In their volume, Detection of Crime, Tiffany, McIntyre, and Rotenberg comment that police enforcement is directed against the homosexual who solicits in public, "for he, like the streetwalking prostitute, is visible to the public."[3] Again, they fail to define the nature, degree, or extent of visibility necessary for invoking society's sanctions. Can there be auditory or tactual "visibility," or is a blind man immune to such public offense? Can a prostitute escape apprehension by wearing a Scarlet A on her forehead, which is visible only to those equipped with a special tint of colored glasses? By failing to draw her drapes, a woman in a high-rise apartment may strip before thousands of viewers; yet she is less apt to be prosecuted than are her "voyeuristic" viewers. A popular form of contemporary prostitution is engaged in by women who fellate their customers in autos which line the drives of urban parks, with little concealment from knowing viewers driving by. Men who engage in fellatio behind the closed doors of a toilet stall, however, are far more subject to arrest.

Data gathered on sex in public restrooms ("tearooms" in the subcultural argot) and other homosexual marketplaces, reveal a wide range of locales for sexual behavior: public johns, balconies of movie theaters,

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[3] Lawrence P. Tiffany, Donald M. McIntyre, Jr., and Daniel L. Rotenberg, Detection of Crime, Boston: Little, Brown, 1967, p. 239.

public baths, alley-ways, hotel rooms, apartments, homes, beaches, in automobiles, and behind bushes of parks. The places differ widely, not only in relative popularity for specific sexual exchanges, but also in terms of legal stigma attached to their use.

Sanctions against homosexual behavior in these locations do not vary with the degree of physical visibility. Except in those increasingly common instances when hidden cameras are employed by the police, it is very rare that tearoom sex is viewed by anyone other than the participants - or a third person serving in the role of lookout.[4] On the other hand, my respondents consider homosexual behavior in certain public baths as much safer in spite of its greater visibility. This suggests that the question is a proprietary one, that public sex occurs on public property in contrast with private sex on private property. If the issue were simply one of public domain, however, the sanctions directed against fellatio in a department store tearoom should be more lenient than those adverse to fellatio in the tearoom of a public park. In the United States, at least, this is not true.

Perhaps the most thorough discussion of public order in the literature of sociology is found in Goffman's Behavior in Public Places, and it is to this work that I turn for leads in the formulation of a viable theory on the social control of public sex. In discussing face-to-face interaction, he has this to say:

> Copresence renders persons uniquely accessible, available, and subject to one another. Public order, in its face-to-face aspects, has to do with the normative regulation of this accessibility.[5]

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[4] For explanation of the methodology of my research, see Chapter II of my forthcoming book: Tearoom Trade: Impersonal Sex in Public Places, Chicago: Aldine, 1969.

[5] Erving Goffman, Behavior in Public Places, New York: Free Press, 1963, p. 22.

If public order, in the sociological sense, is concerned with normative regulation of the accessibility of copresence, then the specific concern of criminologists should be to isolate any social norm which, when violated in regard to copresence, activates the legal process.

Copresence - this unique mutual availability - occurs in a multitude of situations, under a number of conditions which may determine the social status of the relationship. It may exist between partners of a marriage, between lovers, among guests at a party, between strangers or blood brothers; it may happen in a bedroom or garden, in an auto at the drive-in movie, in a restroom, or on the street; it may be preceded by an elaborate ceremony, a passing introduction, a structured game, or no warning at all. When such accessibility leads to a sexual act, these attendant conditions often determine the legal status of the act and, what is of greater importance, the manner and degree of involvement (if any) of the forces of social control.

In a matter, such as deviant sexual behavior, where the social norms are of sufficient strength to be reflected in written law, what evidence is there of factors tangential to the central action, which may move or still the machinery of criminal justice? The hint of an answer is to be found in a number of criminal statutes pertaining to sexual deviance. The majority of western nations (West Germany and most of the United States excepted) provide no legal sanctions against sexually deviant acts <u>as such</u>, unless certain attendant conditions are violated: (1) such acts must not take place "in public"; (2) physical force must not be used

to obtain consent; (3) parental or other legal force may not be employed; (4) none of the participants may be below what each society considers the age of consent.

Note that the last three conditions are specifically directed to the question of whether participation is voluntary. Whatever socio-psychological motives may lie behind the restriction to adults as sex-objects, the legal emphasis is placed on "the age of consent or discretion." The same may be said of sanctions against the sexual involvement of parents, foster parents, legal guardians, or institutional staff personnel with their wards. A case in point is the Danish legislation summarised in The Wolfenden Report:

> Homosexual acts committed with children under fifteen are punishable. . .Similarly punishable are homosexual acts procured by the use of force, fear, fraud or drugs, and offenses against inmates of certain institutions (e.g., orphanages and mental hospitals) when they are committed by persons employed in or supervising such institutions. . .Homosexual acts with a person under twenty-one are punishable if they are committed by abuse of superior age or experience. . .Indecent behavior against any person of the same sex is an offense when the offender by his behavior violates the other person's decency or gives public offense.[5]

In so many of these legal codes, prohibition of sexual acts in public appears to be an afterthought, tacked on to a series of guarantees to free consent. If, however, the regulation of age yields to an interpretation as "that level of maturation when free consent is possible," could it be that the regulation of place speaks also to the safeguarding of consent? The suggestion is that the "public" nature of the offense becomes a crucial variable because it violates a norm

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[6] A compendium of European laws regarding homosexual activity is found in: The Wolfenden Report, New York: Lancer Books, 1964, Appendix III.

which western societies, at least, demand in the case of all sexual (and many other interpersonal) acts. This is the principle of free consent. The criminological concern, then, is not merely with the regulation of copresence but with measures taken to insure the freedom of consent to copresence.

Some may ask what the physical setting of sexual acts has to do with the consent of participants. It has little relevance, unless we consider that physical settings - like physical visibility - are socially defined. That, I believe, is what Reiss means when he writes of "social visibility." Building on the basis of his theory, thus defined, we should be able to propose a series of integrated and testable hypotheses:

First, the settings for sex are socially visible in the degree to which they preclude the voluntary consent to copresence of those who may be involved as witnesses or participants in the act.

Second, in a restatement of the hypothesis by Reiss, the more socially visible the circumstances in which any sexual behavior takes place, the stronger the sanctions against violators.

And, in a combined form, the more the social setting of a sexual act precludes the consent to copresence of those who may be involved as witnesses or participants, the stronger the sanctions against violators.

A definition may also be deduced from these hypotheses: "Public sex," when perceived as a threat to society, refers to sexual acts so situated as to result in the involuntary accessibility of others as sex-objects or witnesses.

This theoretical approach should help clarify a number of problems confronting the student of sexual deviance. For example, why is a public bath - in spite of occasional raids on these facilities by the police - thought to be so much safer a locale for homosexual activity than a public restroom? The answer, provided by my research subjects, is that the bath is less public. Now, the bath is certainly not less visible than the tearoom. Even gay bathhouses advertise and sport neon signs; they are presumably open to use by any male; and the sexual activity is frequently more obvious than in any tearoom. Excluding private clubs and suburban health and sauna centers, however, the urban baths in America have a solid reputation. The man who enters one knows what he is getting into. Part of the entrance fee is surrender of the consent to copresence. There is even a ritual to symbolize this act of will: first, the customer hands over his wallet and watch in return for a locker key; then he is conducted to the locker room, where he must undress under the gaze of others. Thus dispossessed of his identity kit and other defenses, he receives a towel (always too small) and a pair of shower clogs. Of course, he may yet deny his accessibility and refuse to engage in sexual acts, but only by creating a "scene," in which he will be labeled as the offending party.

In public restrooms, on the other hand, there is no such act of will upon entering. Unless he is "wise to the situation," a man may enter a tearoom where, in copresence, he finds himself embarrassed by his accessibility for involvement in acts to which he would not normally consent. Sexual activity in accommodations as socially visible as public restrooms, then, violates a strong cultural norm against abrogation of

the individual's right of consent to copresence. At this point, another problem arises: in the course of observing some two hundred homosexual encounters in public johns, it became obvious that the unwilling participant may withdraw at any time from the tearoom encounter - without creating a scene or losing either his purity or composure. Because of cautions built into the strategies of these encounters, no man need fear being molested in such facilities, unless he wills to demonstrate by showing an erection that he wants to get in on the action. If he plays the straight role properly, no one need be shocked or offended by the sexual games that are played in tearooms.

Social creatures are always engaged in structuring interaction so as to provide maximum self-protection. The sexual deviant does not deviate from this rule. I am familiar with a coffeehouse where male hustlers ply their trade. At the door, a youngman sells drink tickets and asks if the customer knows "what kind of a place this is." The consent to copresence must be given upon entering for, immediately afterward, one is confronted with a scene of male couples dancing and embracing and necking in the booths. Before long, a clean-cut youngster may offer to sell himself to you for twenty dollars. The visitor departs this setting only to the accompaniment of stares and remarks.

Another place where both professional and semi-professional male prostitutes operate is in the automobile of a "score" or customer. Any knowledgeable young hitchhiker soon learns the price, in terms of consent, which he must pay for a ride. By accepting a lift, the thumber agrees to being subject to his benefactor. If the rider stops the action

short of sexual involvement, he will do so apologetically; and his denial of consent may incur the righteous indignation of the driver. Since hitchhikers are themselves engaging in activity of questionable legality, they are generally hesitant in reporting sexual advances to the police - even if they have been ordered out of the car by a disappointed driver.

Because part of our socialization consists in learning such common understandings of the social construction of reality as "what you should expect in this place or that vehicle," the price of admission to settings of low social visibility is generally well communicated. In these settings, a high degree of consent to copresence is given upon entrance - a certain amount of accessibility may be "taken for granted" because it has been granted. In the public marketplace, however, such liberties may not be taken. When the consensual cover-charge is low or nonexistent, the prices within the doors must remain relatively high. In tearooms, explicit signs of accessibility must be exacted before one may become involved in the action.

In order to facilitate the testing of our hypotheses of the social visibility of sexual settings, it is necessary, finally, to suggest a continuum along which a number of public situations involving sex may be placed. /Please keep in mind that social situations need not be physical settings - since both are social constructions, I do not propose to differentiate between them in this paper./

At the top of the continuum, where there is the lowest level of consent to copresence granted upon entrance, I would place the

steps of the Capitol or Church during a Sunday Service. Immediately below this would be shopping malls or public thoroughfares. Against these public settings, the sanctions are so high as to effectively preclude all but the most daring sexual actors.

Farther down the continuum, requiring little consent at entering but explicit expression of willingness to participate at later stages of the interaction, the tearooms should be placed. Because of their high degree of social visibility, these facilities are the scenes of much activity on the part of social control forces. Here, too, might be placed open places in the parks and public beaches.

At the next stage, more initial consent to copresence is demanded, but some consent is yet required later in the interaction. Here we might find automobiles, on the streets and parked at drive-in movies, along with the balconies of down-town movie houses. The threat of social sanctions now diminishes rapidly.

Nearing the bottom of the continuum, I would place the public baths and gay coffee houses. Here, the consent to be granted at entrance is so high as to leave little doubt of the customer's intention to participate. Because, by common knowledge, the public's right to consent is guarded at the door, proactive police action in these settings is very rare.

The recent study of sexual activity in Philadelphia prisons, as reported in Trans-action, suggests a final category at the very bottom of this scale of social visibility.[7] Only prisons, jails, and institutions for "the mentally defective" belong in this range. At this

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[7] Alan J. Davis, "Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans," in Trans-action, St. Louis: Trans-action, Inc., December, 1968, pp. 8-13.

level, society has taken away the right of consent to copresence. Social sanctions against even homosexual rape are almost nonexistent. Persons found in these settings are thought to be either incapable or unworthy of any act of will, thus any consent to copresence is denied them. They are accessible to anyone, because the world is inaccessible to them.

Beyond this lies the infra-realm of private sex. In the absence of social visibility and vice squad activity, strong cultural norms protect the sanctity of consent to copresence in bedrooms and parlors. Here, however, most rapes and acts of incest are committed, most child molestation is found, most seduction of teenagers occurs.

This continuum suggests a final hypothesis: As both social visibility and sanctions decrease, due to apparent protection of the right of consent to copresence, the danger to society of sexual activity in these settings increases. It is the safeguarded, walled-in, socially invisible variety of sex we have to fear, not that which takes place in public.