PRIVACY, PROPERTY, AND PUBLIC SEX

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> *Making a queer world . . . require[s] the development of kinds of intimacy that bear no necessary relation to domestic space, to kinship, to the couple form, to property, or to the nation.*[1]

The Supreme Court in *Lawrence v. Texas* relied on a right to sexual liberty to strike down a sodomy statute that criminalized same-sex sexual conduct.[2] In doing so, the Court limited that right in three ways: first, by making it clear that the sex in question has to be consensual;[3] second, that it must be engaged in by adults;[4] and third, that it must take place in the home (or in other similarly private places).[5] In its analysis, the Court found it relevant that the statute reached "the most private human conduct, sexual behavior, . . . *in the most private of places, the home.*"[6] The Court, in effect, equated the home with privacy and privacy with liberty. "Liberty," the Court noted, "protects the person from unwarranted government intrusions into a dwelling or other private places."[7] The defendants, the Court added,

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[1] Lauren Berlant & Michael Warner, *Sex in Public*, 24 CRITICAL INQUIRY 547, 558 (1998).

[2] 539 U.S. 558, 562 (2003).

[3] *Id.* at 578.

[4] *Id.*

[5] *Id.* at 567.

[6] *Id.* (emphasis added).

[7] *Id.* at 562.

were free to "choose to enter upon [a sexual] relationship *in the confines of their homes* and their own private lives and still retain their dignity as free persons."[8] The Court made clear, however, that if they had instead engaged in "public [sexual] conduct," then the constitutional right to sexual liberty would have been inapplicable.[9]

The geographization of sexual liberty that is evident in *Lawrence* began forty years earlier in *Griswold v. Connecticut*, the first case in which the Court applied substantive due process doctrine to sexuality-related issues.[10] The *Griswold* Court, in analyzing the constitutionality of a law that restricted access to contraceptives, drew a connection between the right of married couples to make decisions affecting their sexual intimacy and the spatial privacy afforded by the marital bedroom.[11] Several years later, in *Paris Adult Theater I v. Slaton*, the Court rejected the idea that a right to privacy prevented the government from regulating obscene materials shown at a movie theater, noting that "it is unavailing to compare a theater, open to the public for a fee, with the private home . . . ."[12] The Court added that "[t]he idea of a 'privacy' right and a place of public accommodation are, in this context, mutually exclusive."[13]

Under the Court's reasoning, then, there are certain sites, most particularly the home, which are *private* and therefore implicate considerations of privacy and sexual liberty. There are other sites, however, which are *public* and therefore do not implicate those considerations.

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[8] *Id.* at 567 (emphasis added).

[9] *Id.* at 578. The *Lawrence* Court did acknowledge in the opinion's opening paragraph that "there are . . . spheres of our lives and existence, outside of the home, where the State should not be a dominant presence." *Id.* at 562. The Court's specific admonition, later in the opinion, that public sexual conduct is not constitutionally protected, however, makes it clear that, under the Court's view, whatever the liberty interests individuals might enjoy outside the home, they do not include the right to engage in sexual conduct in public places. *Id.* at 578.

[10] 381 U.S. 479 (1965).

[11] The Court in *Griswold* asked the following question: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485-86. *See also Lawrence*, 539 U.S. at 564-65 (noting that *Griswold* "described the protected interest as a right to privacy and placed emphasis on the marriage relation *and the protected space of the marriage bedroom.*") (emphasis added).

[12] 413 U.S. 49, 65 (1973).

[13] *Id.* at 66-67.

One way of understanding the link between the nature of certain sites and a right to privacy under the Due Process Clause is through a property-based right to exclude. Bruce Ackerman has noted that "[t]he core of both 'privacy' and 'property' involves the same abstract right: the right to exclude unwanted interference by third parties."[14] The fact that the right to exclude is at its strongest when it is exercised in the home, then, goes a long way in explaining why both property law and privacy law privilege the home in the ways they do.[15] Indeed, as Ben Barros shows in his recent article on the home as a legal concept, the law, reflecting broader cultural norms, has long treated the home as a special zone where individuals are permitted to exclude others in order to engage in conduct that is not only, as an empirical matter, usually not observable by others, but that should also,

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[14] Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 347 (1992). *See also* Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.") (footnote omitted).

[15] *See, e.g.*, United States v. Berkowitz, 927 F.2d 1376, 1387 (7th Cir. 1991) ("[T]he right to exclude is one of the most—if not the most—important components of a person's privacy expectation in his home.").

There are important doctrinal links between property rights and privacy rights. The substantive due process right to privacy can be traced back to two cases from the 1920's that protected the interests of parents to make important decisions affecting their children. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). These cases, as Radhika Rao notes, relied exclusively on citations to Lochner v. New York, 198 U.S. 45 (1905) and its progeny, "clearly link[ing] parental rights in children with property rights in a person's labor and occupation. The cases preserve the privacy of the family by analogizing to other cases that prevent state interference with rights of property." Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 419-20 (2000) (footnote omitted). Rao adds that the link between property and privacy is not only one of form, but also of substance:

> [T]he two rights display a comparable structure, incorporate many of the same interests, and perform parallel functions.
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> . . . Both property and privacy revolve around such images of bounded space, of protected sanctuaries or spheres of decentralized decision-making. Property and privacy both draw upon these territorial metaphors, constructing boundaries that define a realm of physical or social immunity from state interference. The image of a protective sphere surrounding the individual—whether physical or social—is thus central to both rights.

Id. at 423-24 (footnotes omitted).

as a normative matter, be beyond the reach of governmental regulation.[16] A paradigmatic example of this latter point is *Stanley v. Georgia*, in which the Supreme Court held that even if the government can criminalize the possession of obscene materials outside of the home, it cannot do so when those same materials are possessed inside of it.[17]

The Court's geographization of sexual liberty has resulted in the protection of sexual conduct that takes place in the home (and, presumably, in analogous sites such as hotel rooms) while leaving unprotected sexual conduct that occurs in public sites. As this Article explores, however, the phenomenon of public sex problematizes the seemingly obvious connection between the "nature" of a site (i.e., its privateness or publicness) and the existence of cognizable privacy and liberty interests on the part of individuals who engage in sex at that site. This Article, therefore, questions whether the scope of the right to sexual liberty should be site-dependent. It argues that what should ultimately matter in determining the right's ambit is not *where* the sex takes place but whether the sexual actors' expectations of privacy are reasonable. Although there is undoubtedly a link between these two criteria, that link should not be so strong as to prevent sexual actors from claiming a right to sexual liberty in certain geographies outside of "dwelling[s] or other private places."[18]

The Article will proceed as follows: Part I begins with a brief discussion of the critique, advanced by some queer theorists, of the privileging of the home as a sexual site. Some queer theorists, as this Part will explain, have criticized the domestication of sexuality that accompanies that privileging, while simultaneously defending the rights of individuals to engage in public sex.

Part II explores the public sex literature to explain how sexual actors go about "privatizing" public sex sites. That literature shows that, although it seems counterintuitive, it is not necessary for a particular geography to be "private" in order for sexual actors to create privacy zones.

Part III argues that the scope of the right to sexual liberty under the Due Process Clause should not be determined solely by the nature of the

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[16] *See generally* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006) (discussing the cultural and legal development of the home as a protected zone of "safety, autonomy, and privacy," and the limitations on these protections).

[17] 394 U.S. 557, 568 (1969) (holding that although "the States retain broad powers to regulate obscenity, that power . . . does not extend to mere possession by the individual in the privacy of his own home.").

[18] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

site where sex takes place, in the same way that the right to privacy under the Fourth Amendment is not limited only to certain specific geographic sites such as the home. It further contends that this degeographization of the right to sexual liberty, when coupled with the substantive protection afforded to sexual conduct by the Supreme Court in *Lawrence*, should be enough to provide some constitutional protections to public sex under certain circumstances.

Finally, Part IV relies on the earlier discussion of public sex to problematize essentialized and rigid understandings of the distinction between so-called private and public sites. These understandings fail to account for the ways in which human practices and activities give rise to different ways of seeing and understanding particular geographies. In the end, a private/public distinction that views the two categories as mutually exclusive fails to reflect the multiplicity of meanings that accompany human practices and activities in any given site.

I. THE QUEER CRITIQUE OF DOMESTICATED SEX AND ITS CORRESPONDING DEFENSE OF PUBLIC SEX

Not surprisingly, the Supreme Court's opinion in *Lawrence* has been criticized by conservative commentators who have assailed the Court for limiting the discretion of legislators to enact laws based on majoritarian understandings of sexual morality.[19] Perhaps more surprisingly, the opinion has also been the subject of considerable criticism from progressive commentators. These critics, while agreeing with the result reached by the Court, take issue with its reasoning, in particular its understanding of liberty. The principal objections to that understanding are twofold. First, some progressive commentators criticize the Court for emphasizing a relational understanding of liberty, one that protects sexual intimacy when it is part of ongoing relationships, but that ignores the liberty implications of sexual conduct that takes place outside of those relationships.[20] As the argument goes, if the Supreme Court erred in placing too much emphasis on

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[19] *See, e.g.*, Lino A. Graglia, Lawrence v. Texas*: Our Philosopher-Kings Adopt Libertarianism as our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139 (2004). *See also* Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1584 (2004) (criticizing the Court for failing to "entertain the possibility that state legislators could have a valid reason for proscribing sodomy in general or homosexual sodomy in particular.").

[20] *See* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV., 1399, 1407-10 (2004); Teemu Ruskola, *Gay Rights versus Queer Theory: What is Left of Sodomy after* Lawrence v. Texas, 23 SOCIAL TEXT, 235, 238-39 (2005).

the sexual act of sodomy at the expense of the relationships of lesbians and gay men in upholding the constitutionality of sodomy statutes in *Bowers v. Hardwick*,[21] the *Lawrence* Court, in reversing *Bowers*, erred too far in the other direction by focusing almost exclusively on relationships and almost not at all on sex.[22]

Second, some commentators have criticized the Court for applying a privatized and geographized understanding of liberty, one that prioritizes and values sexual intimacy in the privacy of the home but leaves unprotected sexual conduct that takes place elsewhere.[23] The concern here is that limiting the scope of protected sexual liberty to sex in the home—what can be thought of as the Court's "domestication" of sexual liberty—at the expense of sexual liberty exercised at other sites, inevitably leads to increased stigmatization and regulation of sex that takes place outside of the home.[24]

For the gay rights movement, *Lawrence* represented the culmination of a twenty year effort to convince the courts to include gay sexual intimacy within the scope of constitutional protection afforded to other sexual conduct that takes place in the home.[25] Many queer theorists, however, are troubled by this effort to "domesticate" sexual liberty. From this perspective, the home, as a sexual site, can serve as an extension of the

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[21] 478 U.S. 186 (1986).

[22] *See* Franke, *supra* note 20, at 1408 ("Just as the Court's earlier *Bowers* decision . . . overdetermined gay men and lesbians in sexual terms, [*Lawrence*] at its heart underdetermines, if not writes out entirely, their sexuality.") (footnote omitted); Ruskola, *supra* note 20, at 239 ("[T]he crucial rhetorical limitation of *Lawrence* is precisely its inability, or refusal, to imagine (legitimate) homosexual sex that does not take place in a relationship and does not connote intimacy.").

[23] *See* Franke, *supra* note 20, at 1403 ("The cabining of *Lawrence*'s liberty is accomplished through its geographization . . . . Repeatedly, Justice Kennedy territorializes the right at stake as a liberty to engage in certain conduct in private."). *See also* Libby Adler, *The Future of Sodomy*, 32 FORDHAM URB. L. J. 197, 202 (2005) (suggesting that "*Lawrence* errs on the side of protecting people from some sex at the cost of putting a lot of other sex at risk of exclusion from constitutional protection.").

[24] Franke, *supra* note 20, at 1415-16, ("*Lawrence* is a slam-dunk victory for a politics that is exclusively devoted to creating safe zones for homo and hetero sex and/or intimacy, while at the same time rendering all other zones more dangerous for nonnormative sex.").

[25] *See* WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 148-64 (3d ed. 2008) (providing a history of constitutional challenges to sodomy laws).

closet, a place where sex is permitted (or tolerated) precisely because it is hidden from view.[26] The notion that the only gay sex that is permissible is that which takes place in the privacy of the bedroom reinforces the idea that such sex is shameful and debasing.[27] When lesbians and gay men limit their sexuality to sex with their partners in the privacy of their homes, the argument goes, they replicate the traditional sexual practices and mores of heterosexuals. The bedroom, then, acts as a sanitizing site through which gay sex is cleansed and made more acceptable (i.e., made more like heterosexual sex). In contrast, when gay sex takes place outside of the privacy of the home, its publicness transforms it into *queer* sex. It becomes, in other words, a form of transgressive sex that challenges heteronormative values and practices.[28]

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[26] *See* Franke, *supra* note 20, at 1411 ("Without more, *Lawrence*-like decriminalization merely signals a public tolerance of the behavior, so long as it takes place in private and between two consenting adults in a relationship.").

[27] Leading queer theorist Michael Warner contends that all sex is inextricably linked to shame because it always involves, at some level, a loss of control. He argues, therefore, that queer people should seek not to make sex less shameful, but to undermine a normative hierarchy of shame that seeks to cleanse certain forms of sex by stigmatizing others. As he puts it,

> [M]any people take shame and politics to be opposites. I think this is wrong, because it commits us to the unrealizable utopia of a world without shame . . . . Let's face it: shame isn't going to go away, where the life of the body or of the sex is concerned. And that isn't the problem in the first place. The problem is the hierarchy of respectability that makes some pleasures or ways of living normative, and others either forbidden or just inarticulate.. Through that hierarchy, some people (that is queers) are made to pay the price for everyone else's shame. If people were better about acknowledging and living with shame, they wouldn't be so eager to abject others.

Annamarie Jagose, *Queer World Making: Annamarie Jagose Interviews Michael Warner*, GENDERS, 2000, at ¶ 28, http://www.genders.org/g31/g31_jagose.html.

[28] *See* David Bell, *One-Handed Geographies: An Archaeology of Public Sex*, *in* QUEERS IN SPACE: COMMUNITIES, PUBLIC PLACES, SITES OF RESISTANCE 81, 82 (Gordon Brent Ingram, et al. eds., 1997) [hereinafter QUEERS IN SPACE] ("When once the gay good citizen comported him/herself with dignity and avoided public flamboyance, a queer citizen must be aware of the strategic positioning of the sexed body . . . as a site of resistance against the dead weight of heteronormativity.") (internal citation and footnotes omitted); Wayne Hoffman, *Skipping the Life Fantastic: Coming of Age in the Sexual Devolution*, *in* POLICING PUBLIC SEX: QUEER POLITICS AND THE FUTURE OF AIDS ACTIVISM 337, 349 (Dangerous Bedfellows ed. 1996) [hereinafter POLICING PUBLIC SEX] ("[M]any radical activists in the last few years have seen the political value of a public sexual culture that could help queers visualize a fantastic new sexual order."); MICHAEL WARNER, THE TROUBLE WITH NORMAL:

Part of the transgressiveness of public (or non-domesticated) sex lies in the fact that it is usually both anonymous and lacking in emotional commitment. Some queer theorists are critical of the efforts by the gay rights movement to "mainstream" gay sexuality by, for example, seeking admission into the institution of marriage.[29] From this queer theory perspective, the struggle to gain marital recognition of same-sex relationships is a misguided effort to normalize gay sexuality by creating the illusion that all gay people want the same thing, in terms of sexual intimacy, that ostensibly most straight people seek, that is, a life-long commitment with one sexual partner.[30] The anonymity and lack of emotional commitment that usually accompany public sex, then, become for some an appealingly transgressive alternative to the assimilationist and conservative goal of encouraging individuals, regardless of sexual orientation, to marry.[31]

SEX POLITICS AND THE ETHICS OF QUEER LIFE 174 (2000) [hereinafter WARNER, THE TROUBLE WITH NORMAL] ("The ability of sex in public places to reach . . . a primordial threshold [of disgust in others], at once arbitrary and unshakable, may . . . be for many people part of its psychic and social appeal."); MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS 25 (2002) [hereinafter WARNER, PUBLICS AND COUNTERPUBLICS] ("[L]esbians and gay men have found that to challenge the norms of straight culture . . . is to disturb deep and unwritten rules about the kinds of behavior and eroticism that are appropriate to the public.").

[29] *See, e.g.*, WARNER, THE TROUBLE WITH NORMAL, *supra* note 28, at 41-80 (criticizing the gay rights movement for seeking to normalize gay sexuality).

[30] *See* Jagose, *supra* note 27, at ¶ 9 ("same-sex marriage advocates continually appeal to the ideal of the long-term married couple as a shared norm."). For a general discussion of the tension between liberal supporters of gay rights and queer theorists, see Carlos A. Ball, *Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory*, 26 LAW & SOC. INQUIRY 271, 271-81 (2001) (book review).

[31] As David Bell notes, those who engage in public sex

> [A]re widely constructed as perverted by a heterosexist and profoundly vanilla society which can just about tolerate homosexuality provided it's out of sight and provided the participants conform with heteronormative constructions of love and sex; but the thought of people coming together in contexts beyond heteronormative romanticism and masculinist (hetero)sexuality, engaging in new forms of love and sex, is just too much to tolerate.

David Bell, *Perverse Dynamics, Sexual Citizenship and the Transformation of Intimacy*, *in* MAPPING DESIRE: GEOGRAPHIES OF SEXUALITY 304, 315 (David Bell & Gill Valentine eds., 1995) [hereinafter MAPPING DESIRE] (citation omitted) (emphasis removed).

Queer theorists value public sex not only because of its transgressiveness, but also because of its accessibility. Not everyone has a bedroom to call her own, and gay people in particular may have a hard time finding spaces in their family homes where they can have sex.[32] In contrast to bedrooms, public sex sites are generally accessible by anyone who is interested in the type of sex that takes place therein.[33]

The accessibility of public sex, in turn, plays an important role in transmitting knowledge about gay sexuality. Michael Warner notes that gay people have a limited opportunity to learn about gay sex, and that the ability to observe others engaging in that sex, whether in person or through pornographic materials, helps to educate gay people sexually. Warner points out that "[s]exual knowledges can be made cumulative," so that when queers see others like themselves having sex, they come to realize "that each touch, gesture, or sensation condenses lessons learned not only

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It is important to note that while public sex can be viewed as the antithesis of domesticated (and romantic) sex, that does not mean that it always lacks *intimacy*. Lauren Berlant and Michael Warner, for example, contend that public sex can in fact be intimate in the sense that it is framed by "a common language of self-cultivation, shared knowledge, and the exchange of inwardness." Berlant & Warner, *supra* note 1, at 561.

[32] See Lynda Johnston & Gill Valentine, Wherever I Lay My Girlfriend, That's My Home: The Performance and Surveillance of Lesbian Identities in Domestic Environments, in MAPPING DESIRE, *supra* note 31, at 99, 103 ("The home can . . . be a site of tension for women who identify as lesbians—a place where the ideal of the home as a place of security, freedom and control meets the reality of the home as site where heterosexual family relations act on and restrict the performance of a lesbian identity."); Scott Tucker, *Gender, Fucking, and Utopia: An Essay in Response to John Stoltenberg's Refusing to Be a Man*, 27 SOC. TEXT 3, 17 (1990) ("Gay people often have no freedom to be gay in the privacy of their homes, due to family and neighborly pressures.").

[33] *See* Jagose, *supra* note 27, at ¶ 30 ("The question of access is crucial for queers, who rely on [distinct] places to encounter each other among strangers."). Clive Moore has written the following about Australian "beats," that is, public places where men have sex with other men:

> The key characteristics of beats are easy access, non-"scene" homosexual activity, and no admission charges. For many youths and men who are just coming out, beats are where they find their first gay sexual partners. Beats are integral to the sexual web binding together both closeted and uncloseted homosexual men, as well as both homosexual men and homosexually active nonhomosexual men, cutting across all ages, classes, and races.

Clive Moore, *Poofs in the Park: Documenting Gay "Beats" in Queensland, Australia*, 2 GLQ: A J. OF LESBIAN & GAY STUD. 319, 322 (1995).

through one's own experience, but through the experience of others."[34] The domestication of sexuality seeks to hide what Warner calls the "corporeal publicness" of gay sex.[35] "The dominant culture of privacy," Warner tells queers, "wants you to pretend that your sexuality sprang from your nature alone and found expression solely with your mate, that sexual knowledges neither circulate among others nor accumulate over time in a way that is transmissible."[36] An important normative and political aspiration of the "queer project," then, is to "support forms of affective, erotic, and personal living that are public in the sense of accessible, available to memory, and sustained through collective activity."[37]

Warner has constructed a political vision of what he calls "counterpublics"—that is, of publics (or groups of individuals) that are "defined by their tension with a larger public."[38] One example of a counterpublic is the sexual culture of lesbians and gay men, one that "is understood to contravene the rules obtaining in the world at large, being structured by alternative dispositions or protocols, making different assumptions about what can be said or what goes without saying."[39] The workings of a queer sexual counterpublic can help to challenge social norms that seek to stigmatize certain erotic practices and shame those who engage in them. As Warner writes,

> [i]t is often thought, especially by outsiders, that the public display of private matters is a debased narcissism, a collapse of

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[34] WARNER, THE TROUBLE WITH NORMAL, *supra* note 28, at 178. *See also* PAT CALIFIA, PUBLIC SEX: THE CULTURE OF RADICAL SEX 81 (1994) ("Seeing other people having sex is reassuring and enlightening. . . . It's a direct and easy way to learn about sexuality, and I wish it were more accessible, especially to women."); Jagose, *supra* note 27, at ¶ 34 ("Queer kids growing up in isolated places around the country and around the world know, if only vaguely, that somewhere things are different: somewhere they can go and find strangers with whom they can share an intimate world.").

[35] WARNER, THE TROUBLE WITH NORMAL, *supra* note 28, at 178.

[36] *Id.* at 178-79. *See also* WARNER, PUBLICS AND COUNTERPUBLICS, *supra* note 28, at 57-58 ("Homosexuals can exist in isolation; but gay people or queers exist by virtue of the world they elaborate together, and gay or queer identity is always fundamentally inflected by the nature of that world.").

[37] Berlant & Warner, *supra* note 1, at 562. The "queer project" is Berlant and Warner's phrase. *Id.*

[38] WARNER, PUBLICS AND COUNTERPUBLICS, *supra* note 28, at 56.

[39] *Id.*

> decorum, expressivity gone amok, the erosion of any distinction between public and private. But in a counterpublic setting, such display often has the aim of transformation. Styles of embodiment are learned and cultivated, and the affects of shame and disgust that surround them can be tested, in some cases revalued.[40]

Queer theorists like Warner seek simultaneously to problematize the domestication of sexuality and to celebrate the phenomenon of public sex.[41] Although defending the rights of individuals to engage in public sex is controversial and is likely to make many people uncomfortable, it is important to note that advocates of public sex do not use that term to mean sex that takes place anywhere, at any time, and in front of anybody; instead, they mean *sex that takes place in sites other than the home* (as well as, presumably, outside of analogous places such as hotel rooms).[42] Examples of public sex sites include specific public bathrooms in parks and rest stop areas along highways, as well as commercial establishments (such as sex clubs and adult movie theaters) that make available designated areas within their facilities where individuals may engage in sexual conduct.[43] As I explain in the next section, those who engage in public sex frequently rely on practices and norms, as well as on the physical configurations of the chosen locations, to "privatize" public sites where sex takes place.[44]

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[40] *Id.* at 62. Warner adds that a counterpublic

> can work to elaborate new worlds of culture and social relations in which gender and sexuality can be lived, including forms of intimate association, vocabularies of affect, styles of embodiment, erotic practices, and relations of care and pedagogy. It can therefore make possible new forms of gendered or sexual citizenship—meaning active participation in collective world making through publics of sex and gender.

Id. at 57.

[41] Queer theory promotes a vibrant public sex *culture* that rejects normative hierarchies among different manifestations of sexualities. As such, it values not only public sex, but also "pornography, . . . cruising, sex work, and other elements in a publicly accessible sexual culture . . . ." WARNER, THE TROUBLE WITH NORMAL, *supra* note 28, at 173.

[42] *Id.* ("'public sex' is public in the sense that it takes place outside of the home . . . .").

[43] *See infra* notes 55-109 and accompanying text.

[44] *See infra* Part II.

Importantly, the descriptive conclusion that sexual actors rely on distinct mechanisms to privatize public sex sites is not inconsistent with the normative aspects of the queer project as it relates to public sex. Warner, for example, makes clear that he does not oppose the notion of privacy, nor does he deny that there is "a kind of privacy—even intimacy—in the gay male practice of public sex . . . ."[45] Instead, he is critical of the hypocrisy of a "politics of privatization,"[46] which seeks to condone (and even celebrate) public manifestations of heterosexual sex while stigmatizing nonheteronormative sex by confining it to the realm of the unseen and unacknowledged and unspoken.[47]

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[45] WARNER, THE TROUBLE WITH NORMAL, *supra* note 28, at 176-77. *See also id.* at 172 ("[a] public sexual culture is not just a civil liberty . . . but a good thing, and queer politics should make it a priority. This does not mean that I am arguing against privacy."). David Bell makes a similar point when he notes that "[w]hile we might try to assert that a private sphere would be unnecessary in the kinky city of queer play, we must at the same time realise that the need for privacy remains a fundamental requirement for those whose erotic configurations and tastes pass into forbidden zones." Bell, *supra* note 28, at 84 (footnotes omitted).

[46] WARNER, THE TROUBLE WITH NORMAL, *supra* note 28, at 172. *See also* Phil Hubbard, *Sex Zones: Intimacy, Citizenship and Public Space*, 4 SEXUALITIES 51, 52 (2001) ("[I]t is because sexual minorities have been excluded from public view . . . that the idea of bringing private sexual fantasies into public view has often been written about as representing a powerful political statement, a way that 'dissident' groups can challenge the tyranny of oppressive heterosexuality.") (citation omitted).

[47] As Warner puts it, "[i]mplicit in [the practices of public sex] is a challenge to the dominant segregation of spaces, which allows a tacit heterosexuality to be endlessly visible and publicly supported, while non-normative sexualities must be privatized to the point of invisibility and inaccessibility." Jagose, *supra* note 27, at ¶ 30.

Some commentators have criticized relying on the concept of privacy as a means to advance the interests of gay people. Michael Bronski, for example, argues that the promotion of the right to privacy by the gay rights movement has failed to distinguish sufficiently between privacy that is chosen by individuals and privacy that is imposed by society. Bronski notes that efforts to retreat from the gaze of others can contribute to invisibility and to strengthening (rather than to undermining) the closet. MICHAEL BRONSKI, THE PLEASURE PRINCIPLE: SEX, BACKLASH, AND THE STRUGGLE FOR GAY FREEDOM 158-65 (1998). *See also* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1456 (1992) ("From the perspective of gay men and lesbians . . . the privacy paradigm has always been both a tool and a trap, insofar as privacy has functionally served as a cornerstone for the very structure of domination that the principle has been used to attack.").

Although the merits of this critique of the right to privacy are outside the scope of this Article, it is worth noting that those who defend a right to public sex seem to deploy privacy descriptively rather than normatively. Michael Warner, for example, does not contend that sexual minorities are best protected through the enforcement of a right to privacy. In fact, Warner's project, by problematizing the distinction between the private and

II. THE PRIVATIZED GEOGRAPHIES OF PUBLIC SEX

There is no intrinsic relationship between sex on the one hand and privacy and geography on the other. A truly radical understanding of sexual liberty, for example, could seek to defend the rights of individuals to have sex anywhere, at any time, and in front of anybody. There are, however, at least three reasons why not even the most radical proponents of public sex defend such an expansive understanding of sexual liberty. The first is that those who do not want to observe the sex in question—individuals whom we can refer to as "unwilling gazers"—have a legitimate interest in not having sex thrust upon them. The second reason is that while a *willing* gaze by consenting observers may enhance the pleasurable experience arising from sex for some sexual actors, an *unwilling* gaze by hostile observers is likely to have the opposite effect by creating tension and discomfort, thus inhibiting or constraining the sexual actors.[48] Finally, unwilling gazes can lead to the harassment of sexual actors by hostile gazers or by law enforcement officials.[49]

It is not surprising, then, that queer theorists like Michael Warner acknowledge that considerations of privacy and the need to exclude outsiders are important components of public sex. Warner notes, for example, that "[p]ublic sex is public in the sense that it takes place outside the home, but it usually takes place in areas that have been chosen for their seclusion, and like all sex involves extremely intimate and private

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the public in matters of sexuality, calls into question the political advisability of relying on the right to privacy as a way of protecting sexual minorities. This does not prevent him, however, from recognizing, as a descriptive matter, that privacy is an important consideration for those who choose to engage in public sex. *See supra* note 45 and accompanying text.

[48] *See* RICHARD MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 103 (1988) ("The whole process and nature of sex is interrupted and destroyed if penetrated by the glance of an intruder—unless that glance itself becomes incorporated" into the process of sexual arousal.); Stephen O. Murray, *Self Size and Observable Sex*, *in* PUBLIC SEX/GAY SPACE 157, 162 (William L. Leap ed., 1999) [hereinafter PUBLIC SEX/GAY SPACE] (noting that some of those who engage in public sex seek privacy from "hostile observers" but not from "excited observers").

[49] *See* John Hollister, *A Highway Rest Area as a Socially Reproducible Site*, *in* PUBLIC SEX/GAY SPACE, *supra* note 48, at 55, 60 (noting need of sexual actors in public sex sites to protect themselves from harassers and from the police).

associations. . . . When people speak of 'public sex,' the crudeness of the term misleads us about what is at stake."[50]

As this part of the Article explains, privacy is an exceedingly important consideration for those who choose to engage in public sex. In fact, the likelihood of privacy serves as the crucial factor that helps to distinguish the vast number of public places that are not used as public sex sites from the limited number that are. The important point is this: *without privacy, a public place cannot function as a public sex site.*

It is crucial to distinguish, therefore, between the *concept* of privacy and the characterization of a particular *site* as either private or public. Whether a particular geography is deemed to be legally private depends primarily on whether individuals have, or exercise, property-based rights to exclude. As a practical matter, the home is "the most private of places,"[51] largely because it is there that the right to exclude is at its strongest. Other geographies may be private in similar ways. A non-domestic site where individuals congregate for particular purposes will be deemed private if the

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[50] WARNER, THE TROUBLE WITH NORMAL, *supra* note 28, at 173. Warner elaborates on this point as follows:

> Even quite educated people seem to find it difficult to see how [public sex] could mean anything other than sex in plain view, and therefore exhibitionism . . . . Public sex in the usual sense . . . retains an important kind of privacy. People who seek out sex in the parks or in toilets or in bathhouses do not usually do so indiscriminately and for the whole world's involvement. There is a presumption of consent, and a reasonable presumption of the exclusion of anyone who does not consent. That's one reason why people seek out secluded and dark places; for all their publicness, people in those places can reasonably expect privacy.
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> Jagose, *supra* note 27, at ¶ 30.

David Bell reaches a similar conclusion when he notes that

> [t]he term "public (homo) sex" is . . . a contradictory one, for in some ways public (homo)sex can be very *private*. In terms of the location of the sex act . . . nominally it is taking place in *public space*: the park, the public toilet, the alley, the beach, the parking lot, the woods, the docks, the street. But in terms of the identities of the participants, their knowledge of each other, and the wider "public" knowledge of the activities that go on in a particular setting, public (homo)sex can be very private . . . .

Bell, *supra* note 31, at 306.

[51] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

owners play an active gatekeeping function in determining who enters and who does not. Indeed, the most important distinction between a "private club" and a "place of public accommodation" is that owners (or members) of the former, but not of the latter, are selective in exercising their rights to exclude.[52] Places of public accommodation, while usually located on private property, are not deemed private *sites* because owners generally choose not to exercise their rights to exclude; instead, they broadly invite members of the public to enter to purchase goods or services.[53] Finally, at the other end of the property spectrum from homes are open access areas (such as parks and streets) where individuals have no legally enforceable rights to exclude.[54]

Our intuition, which is clearly reflected in our terminology, leads us to associate the concept of *privacy* with sites that are *private*. The phenomenon of public sex, however, should lead us to question whether that intuition is correct in every instance. The public sex literature, as I

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[52] *See, e.g.*, Brounstein v. Am. Cat Fanciers Ass'n, 839 F. Supp. 1100, 1106 (D.N.J. 1993) (noting that "[t]he touchstone of the determination of whether a membership organization is a 'place of public accommodation' is its selectivity in the admission of its members."). The question of whether an establishment is "private" has been an important one for courts in determining the scope of *Lawrence*. Courts have held that facilities where sex occurs are places of public accommodation rather than private clubs when their owners fail to be selective in who is permitted to enter the establishments. This designation, in turn, renders inapplicable the constitutional right to sexual liberty recognized in *Lawrence*. *See* 832 Corp. v. Gloucester, 404 F. Supp. 2d 614, 623-25 (D.N.J. 2005) (holding that *Lawrence* did not protect sexual conduct that took place in defendant's club, which was not private); Fleck & Assocs., Inc. v. Phoenix, 356 F. Supp. 2d 1034, 1041 (D. Ariz. 2005), *rev'd on other grounds*, 471 F.3d 1100 (9th Cir. 2006) ("*Lawrence* does not suggest that sexual activities in a place of public accommodation are Constitutionally protected. Because [the plaintiff's] club is not private, the sexual activities that take place there likewise are not private."). *See also* Recreational Devs. of Phoenix, Inc., v. Phoenix, 83 F. Supp. 2d 1072, 1083-84 (D. Ariz. 1999) (holding that lack of meaningful selectivity by operators of heterosexual sex club meant that it was not a private club); 31 West 21 St. Ass'n. v. Evening of the Unusual, 480 N.Y.S.2d 816, 829 (N.Y. Civ. Ct. 1984) (holding that heterosexual S/M establishment was not private because "anyone who appears at the front door . . . and pays the entrance fee is freely admitted to the Club.").

[53] *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (noting that owners of shopping center voluntarily limited their rights to exclude because facility was "open to the public at large.").

[54] *See* Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1001 (2006) ("Conventional property rights theory defines open access as a situation in which multiple privileges of use exist in relation to a resource, but in which no one person or group has a right to exclude others or make authoritative decisions concerning resource use.").

explain below, suggests that it is possible for the concept of privacy to apply in public sites, that is, in sites where individuals do not have, or choose not to exercise, a legal right to exclude. Indeed, sexual actors in both open access areas and in places of public accommodation frequently rely on practices and norms, as well as on the sites' physical configurations, to "privatize" those sites by successfully excluding unwilling gazers and other potential intruders.

Public sex, then, is public in the sense that it takes place in sites that our legal and cultural understandings deem to be public. Public sex, however, is not (always) public in the sense that it lacks privacy.

A. Open Access Areas

The most extensive study of public sex remains the sociological work conducted by Laud Humphreys forty years ago, published in his book *Tearoom Trade: Impersonal Sex in Public Places*.[55] In the late 1960's, Humphreys spent several months observing, primarily in an unnamed Midwestern city, the conduct and norms of men who had sex with other men in public bathrooms, in particular those located in public parks.[56] Humphreys concludes that whether a public bathroom serves as a

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[55] LAUD HUMPHREYS, TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES (1970) (Aldine Transactions ed. 2005). For biographical information on Humphreys's life and career, see Glenn A. Goodwin et al., *Laud Humphreys: A Pioneer in the Practice of Social Science*, 61 SOC. INQUIRY 139, 142-44 (1991).

The phenomenon of public sex remains primarily a male one. It has been suggested that "the threat of sexual violence against all women makes 'lesbian' cruising less common." Bell, *supra* note 31, at 317 n.3 (citation omitted). *See also* Gordon Brent Ingram, et al., *Lost in Space: Queer Theory and Community Activism at the Fin-de-Millénaire*, *in* QUEERS IN SPACE, *supra* note 28, at 3, 10 ("[S]evere, historically rooted misogyny has blocked the development of female eroticized space."); Tucker, *supra* note 32, at 19 ("[I]f the public world was not so threatening to all women, and so hostile to sexually independent women in particular, who can say that more lesbians, too, would not take similar risks in finding pleasure and partners?"). For essays on the relationship between different geographies and lesbian sexuality, see FROM NOWHERE TO EVERYWHERE: LESBIAN GEOGRAPHIES (Gill Valentine ed., 2000).

[56] After Humphreys published his findings in the late 1960's, there were some who questioned the ethics of his methodology for, among other things, violating the privacy of those whom he observed. *See* Peter M. Nardi, *Reclaiming the Importance of Laud Humphreys' "Tearoom Trade: Impersonal Sex in Public Places,"* *in* PUBLIC SEX/GAY SPACE, *supra* note 48, at 23, 23-24 (summarizing some of the ethical concerns raised by Humphreys's work). For a sample of the debate engendered by Humphreys's research methodology, see HUMPHREYS, *supra* note 55, at 175-232.

"tearoom," that is, whether it functions as a site where men can potentially have anonymous sex with other men, depends on the extent to which the site affords them privacy.[57] If a particular site can protect the sexual actors from unwilling gazers and unwilling gazers from the sexual actors, then it can be transformed from a mundane bathroom into a sexualized site.

Humphreys concludes that if a public bathroom is to function as a public sex site, it has to be in an isolated location within the public park so that those who visit the park for (other) recreational purposes are unlikely to patronize it.[58] In addition, as Humphreys puts it,

> [t]he ideal setting for homosexual activity is a tearoom situated on an island of grass, with roads close by on every side. The getaway car is just a few steps away; children are not apt to wander over from the playground; no one can surprise the participants by walking in from the woods or from over a hill; it is not likely that straight people will stop there at all.[59]

According to Humphreys, there are other factors that determine whether a particular public bathroom will become a public sex site. It is helpful, for example, if the facility in question has opaque windows, preferably with a missing pane. This makes it possible to shield most of the conduct that takes place inside from outside view, while simultaneously allowing those on the inside to see (through the missing pane) who might be approaching the site.[60] Doors that lead into the restrooms which squeak or

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[57] The origin of the word *tearoom* is unknown, though Humphreys notes that "British slang has used 'tea' to mean 'urine.'" HUMPHREYS, *supra* note 55, at 2 n.2. The use of the word to describe a public bathroom where men have sex with other men, while once quite common, seems to be less so today.

[58] *Id.* at 7.

[59] *Id.*

[60] *Id.* at 12. "[O]ne of the first acts of participants after the spring opening or renovation of a facility is to break out a few carefully selected panes so that insiders can see who is approaching." *Id.* at 8. The sociologist Edward Delph, who conducted an ethnographic study of public sex sites used by men in New York City during the 1970's, also notes the importance of physical features in determining whether a particular bathroom is used as a tearoom. He notes, for example, that "[t]oilets shielded by protective devices [i.e., stalls and doors] tend to be used for illicit sexual activity rather than those that have none. [In addition,] the longer the hall preceding the toilet, or the more numerous the obstacles to the main room of the convenience, the safer it becomes from surprise visitors." EDWARD W. DELPH, THE SILENT COMMUNITY: PUBLIC HOMOSEXUAL ENCOUNTERS 66-67 (1978).

stick also serve as site-specific devices that protect privacy by alerting the sexual actors of the imminent arrival of visitors.[61]

Furthermore, Humphreys notes that sexual actors in public sites engage in practices that help to keep the sex undetected by unwilling gazers. He describes, for example, how some individuals in the tearooms play "the role of the lookout ('watchqueen' in the argot), a man who is situated at the door or windows from which he may observe the means of access to the restroom. When someone approaches, he coughs. He nods when the coast is clear or if he recognizes an entering party as a regular."[62]

Humphreys also describes how the sexual actors engage in a multi-step process of collective action to make sure that sexual advances are made only to those who have previously made it clear that they are interested. The process often begins with the "approaching" stage, whereby a man drives around the public bathroom in question a few times, parks immediately in front of it, and then remains in the car for several minutes.[63] This action communicates sexual interest to those already in the restroom. As Humphreys put it, "[s]traights do not wait; they stop, enter, urinate, and leave."[64]

The second step involves "positioning." Once inside the bathroom, an interested sexual actor communicates that interest by where and how he

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[61] HUMPHREYS, *supra* note 55, at 8. Humphreys found that for at least some of the sexual actors whom he observed, part of the appeal of public sex was the excitement generated by the possibility of being caught. *See id.* at 151 ("My interviews indicate that much of the effective value of the sexual release found in tearooms would be lost without the consequentiality that lies beyond the payoff phase of the game.").

[62] *Id.* at 27.

[63] *Id.* at 60-61.

[64] *Id.* at 61. Humphreys also explains how the presence of unoccupied cars near the restroom is an important signaling mechanism for those interested in using the location for sexual purposes. Sexual actors "seldom enter a park restroom unless the presence of other unoccupied cars indicates that potential partners are inside. A lone arriver will usually wait in his auto until at least one other has parked nearby." *Id.* at 7. The possible presence of cars driven by individuals who want to use the park for other purposes (such as to stroll or to play sports) sends a confusing signal, which is one of the reasons why sexual actors prefer isolated restrooms. *See id.*

There are other ways in which sexual actors can use automobiles to signal their interest to potential participants in open access areas. For example, in Davis v. State, No. CACR 06-934, 2007 WL 1207375, at *1 (Ark. App. Apr. 25, 2007), the police testified that the turning on and off of an automobile's reverse lights "was a common signal used to indicate that one wanted to meet another individual" for sexual purposes at a public park.

stands.[65] If he "stand[s] comfortably back from the urinal, allowing his gaze to shift from side to side or to the ceiling[,]" he lets others know of his interest.[66] On the other hand, a man who stands close to the urinal and either closes his eyes or looks down will be assumed not to be interested in sex.[67] "This strategy, followed by an early departure from the premises, is all that those who wish to 'play it straight' need to know about the tearoom game. If he makes the positioning move in that manner, no man should ever be concerned about being propositioned, molested, or otherwise involved in the action."[68]

The third step entails "signaling," whereby the willing participant "steps back a few inches from the urinal, so that his penis may be viewed easily."[69] This is often followed by self-stimulation leading to an erection, which signals to those in the room that the person is interested in sex.[70] This signaling is key because, as Humphreys puts it,

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[65] HUMPHREYS, *supra* note 55, at 61-63.

[66] *Id.* at 62.

[67] *Id.*

[68] *Id.* at 62.

[69] *Id.* at 64.

[70] There are ways, of course, in which to signal sexual interest other than by exposing sexual body parts, as the circumstances surrounding the recent arrest of United States Senator Larry Craig (R-Id) in a Minneapolis airport bathroom shows. (For background information about the arrest, see, e.g., *Senator, Arrested in an Airport Bathroom, Pleads Guilty*, N.Y. TIMES, Aug. 28, 2007, at A19.) According to the officer who arrested Senator Craig, the latter, after entering a toilet stall occupied by the former, "tapped his right foot." Motion to Withdraw Plea, Exhibit B at 1, Minnesota v. Craig, No. 27-CR-07-043231 (Minn. Dist. Ct. Aug. 8, 2007) ("Lewd Conduct Narrative" completed by Minneapolis-St. Paul Airport Police Officer Dave Karsnia, June 27, 2007). The officer "recognized this as a signal used by persons wishing to engage in lewd conduct." *Id.* The officer then engaged in a form of signaling of his own by "moving [his] foot up and down slowly," which communicated to Craig that he was also (ostensibly) interested in sexual conduct. *Id.* For a comparison of the Craig incident with Humphreys's findings several decades earlier regarding how sexual actors use public bathrooms in ways that exclude nonconsenting parties, see Laura M. MacDonald, Op-Ed., *America's Toe-Tapping Menace*, N.Y. TIMES, Sept. 2, 2007, § 4, at 10.

Edward Delph has catalogued the signaling mechanisms used by sexual actors in public bathrooms, one of which involves the tapping of shoes. *See* DELPH, *supra* note 60, at 80 (noting how in public bathrooms, feet are used "to signal. The slightest shuffle of a shoe, a move usually [made] toward the occupied commode, initiates communication."). Delph also explains how sexual actors, when standing outside of the stalls, use bathroom mirrors to communicate with each other. *See id.* at 68 (noting how mirrors "are . . . used for indirect

> [n]o one will be "groped" or otherwise involved in the directly sexual play of the tearooms unless he displays this sign [the erection]. This touches on the rule of not forcing one's intentions on another, and I have observed no exceptions to its use. On the basis of extensive and systematic observation, I doubt the veracity of any person (detective or otherwise) who claims to have been "molested" in such a setting without first having "given his consent" by showing an erection.[71]

The last stage prior to sexual contact, which usually involves oral sex,[72] entails what Humphreys describes as the "contracting" step, that is, "the expression of mutual consent."[73] This is done either by the "insertee" reaching out to touch the exposed penis or by the "insertor" moving into a stall where someone (usually an insertee) is already located.[74] "If neither of these moves is rejected, the contract is sealed."[75]

It says something about the efficacy of the multi-step process described by Humphreys, one that is aimed at communicating to others present an interest in having sex, that of the hundreds of times that he saw men approach each other in order to "seal the deal," the offer of sex was

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visual communication. With eyes signaling via reflection, unwanted . . . others located on the sides miss the unfolding dialogue.").

[71] HUMPHREYS, *supra* note 55, at 64.

[72] Humphreys only observed individuals engaging in anal sex twice, and mutual masturbation occasionally. *Id.* at 75.

[73] *Id.* at 66.

[74] Humphreys explains how insertees (i.e., those interested in giving oral sex) signal their interest by positioning themselves inside the bathroom stalls and then waiting for an insertor to signal his interest. *Id.* at 64-65.

[75] *Id.* at 66. Humphreys also explains that when an unexpected visitor suddenly enters the restroom, all sexual contact ceases. The sexual actors then adopt a wait and see strategy to determine whether the new person is interested in sex or is only interested in going to the bathroom. *See id.* at 78-80. *See also* DELPH, *supra* note 60, at 62 (noting that when a non-sexual actor enters a public sex site, the sexual actors immediately begin to play "roles that conform with the conventional and expected performances. Any unfolding sexual drama is temporarily suspended until [the non-sexual actor] depart[s]."); Young v. State, 849 P.2d 336, 339 (Nev. 1993) (noting that visual surveillance of a public bathroom in a public park by police proved to be "futile" because officers "could be seen and heard approaching the stalls, thus enabling the individuals to discontinue their [sexual] activities and elude detection.").

rejected only once.[76] As Humphreys notes, "[b]y moving through gradual stages, the actors have achieved enough silent communication to guarantee mutuality."[77]

Humphreys, then, describes a world in which those who use the restrooms in question for their traditional uses co-exist with the sexual actors with little interference from each other. The sexual actors use both the physical characteristics of the sites and their own practices and norms to effectively exclude unwilling gazers and other potential intruders.[78]

A more recent study by John Hollister of a highway rest stop that functions as a sexual site confirms Humphreys's findings about how sexual actors go about privatizing open access areas.[79] Hollister explains, for example, that where individuals park their automobiles (far from or near the restroom facility) and where they stroll after they park (away from or toward the facility) communicate sexual intentions, *but only to the initiated.*

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[76] HUMPHREYS, *supra* note 55, at 67. Humphreys observed about "two hundred homosexual encounters in public restrooms. . . ." *Id.* at 160.

[77] *Id.* at 67. Frederick Desroches has studied data gathered by police departments that have investigated public sex among men in five Canadian cities. *See* Frederick J. Desroches, *Tearoom Trade: A Research Update*, 13 QUALITATIVE SOC. 39 (1990). He concludes that "[p]olice observations in all five communities reveal that youth and children are not involved in sex play, the action is noncoercive, and silence and impersonality are maintained." *Id.* at 53.

[78] Pat Califia has confirmed Humphreys's findings, concluding:

> [M]y own conversations with tearoom cruisers indicate that it is highly improbable that a family would encounter public sex at, say, a highway rest stop unless they chose to picnic in a urinal. Sex probably is not happening all over the rest stop, park, or beach. It's happening behind the bathroom door. The people behind that door usually keep out a sharp eye for intruders; I can't imagine anything more likely to cause everyone to abdicate the throne than a nuclear family plus hamper, thermos, folding lawn chairs, Polaroid camera, and large, nosy dog.

CALIFIA, *supra* note 34, at 77.

Califia adds that "[t]here is almost always some kind of physical barrier—some bushes, a bathroom door, or a car—between the participants in public sex and the outside world. This barrier screens out the uninitiated. If more than two people are present, one of them usually acts as a lookout." *Id.* at 76. *See also* Richard R. Troiden, *Homosexual Encounters in a Highway Rest Stop*, *in* SEXUAL DEVIANCE & SEXUAL DEVIANTS 211, 213 (Erich Goode & Richard R. Troiden eds., 1974) ("The sheltering bush provides a potential occasion for the expression of intimacy in the midst of a very public, impersonal place.").

[79] Hollister, *supra* note 49, at 58.

As Hollister puts it, "[c]ommunication takes place in relation to the space, and the likely possibilities for the use of that space. Participants reach conclusions as to a man's sexual availability based on how he approaches and occupies the space, and they [in turn] use the space in ways that the other man might recognize."[80] He adds that "[t]he communication is rarely so obvious or direct as to expose the situation to someone who is there by accident, or who may respond violently."[81]

As with Humphreys's tearooms, Hollister finds that the private/sexual and public/nonsexual uses of the highway rest stop coexist with little interference from each other: "Rest area cruisers take great care

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[80] *Id.* at 60. Hollister found a similar use of geography at two large urban parks. The presence of single men in a wooded and secluded part of the park, when coupled with the act of walking slowly, signaled an interest in sex to interested others: "I found I could convey interest by entering one of the less ambiguous bushes, and convey lack of interest by walking faster and along main paths. . . . Awareness of these zones enables cruisers to separate fellow players from intruders of various kinds." *Id.* at 59.

Hollister's observations led him to note the crucial link between cruising for sex and particular geographical spaces:

> Cruising . . . cannot be separated from the locations where it takes place. Cruising as an activity may take place anywhere, but men will have a far greater chance of success in a spot where a steady stream of other men expect to find each other, and it is in these spots that men learn the [cruising] techniques. Communication and consummation take place using the available props. *Use of conducive spaces is central to all cruising.*

Id. at 58 (emphasis added).

Aaron Betsky elaborates on the relationship between certain urban spaces and the cruising by men that can take place therein. He notes that a cruising space has

> certain definable characteristics. First, it needs conditions that in and of themselves dissolve walls and other constraints. This means that most cruising takes place either at night or inside dark, unused buildings. . . . Second, such a space must be labyrinthine. It must frustrate "normal" use and detection by providing multiple barriers to intervention or observation . . . . Third, cruising finds the edges of both the city as a whole and buildings within the city. It exploits the points where truck drivers and other transient sailors of the postmodern sea gather, the places where the city breaks down into fields, and the stoops, porticos, windows, and doorways of buildings.

AARON BETSKY, QUEER SPACE: ARCHITECTURE AND SAME-SEX DESIRE 148 (1997).

[81] Hollister, *supra* note 49, at 60.

in camouflaging themselves. The few who don't are as effective in inducing [other cruisers] to leave as a policeman. . . . [T]he sites I observed were concealed from nonparticipants."[82]

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[82] *Id.* at 63. Hollister adds that, at the rest stop he studied, "[s]everal groups coexisted at the same location but rarely interacted or conflicted with each other: the passing motorists who stopped quickly, used the facilities, and moved on, or slept for the night in their cars; the truck drivers; and the men who sought to get off with each other." *Id.* at 56.

Maurice van Lieshout has written about his observations at a highway rest stop in Holland where public sex between men regularly took place until it was closed down in 1991. *See* Maurice van Lieshout, *Leather Nights in the Woods: Locating Male Homosexuality and Sadomasochism in a Dutch Highway Rest Area, in* QUEERS IN SPACE, *supra* note 28, at 339. Lieshout's observations are consistent with Hollister's in terms of how the sexual actors used the geographical site to cruise for sex with others who were similarly interested. Lieshout reports that those who were interested in sex parked their vehicles at the back of the rest area's parking lot, while "visitors who only came to 'rest' tended to have no special preference in where they parked their cars. Their numbers were small, and most only stayed there for a short time." *Id.* at 350. Most of the sexual contact took place in a wooded area next to the parking lot:

> During my observations, most men usually went to [a] gap in the fence in order to enter the woods. After crossing [a] cycle track diagonally, they arrived at the main access to the sexual zone. . . . This access point is at the beginning of a wide and dark path where participants tried to adjust to the darkness. Some cruising took place at the beginning of this path—especially between new arrivals and men who seemed to be leaving.

Id. at 350.

> Farther into the woods, there was another path that had a short, very dark, and tunnel-like entrance . . . . This path functioned as a second exploration zone and the main artery of the cruising area on leather nights . . . . During their stay in the [rest stop area], most men walked up and down this path many times. It served as a conduit from more social to explicitly sexual activities. It was the place in which to have a chat with an acquaintance without losing opportunities to make more overtly sexual contact. A passerby could easily show interest in a person who was talking to someone else. If the attraction was mutual, the men speaking would wind up their conversation in order for the initially "cruised" man to follow the cruiser.

Id. at 351.

Lieshout notes how sexual interest was signaled primarily through eye contact. *Id.* at 352-53. Once the interest was reciprocated, the individuals retreated to an area to the left side of the path. *Id.* at 352. On the other side of the path was an area that was especially wooded and dark.

The studies conducted by Humphreys and Hollister suggest that public sexual geographies in open access areas can be defined and delineated in particular ways that protect the privacy of the sexual actors.[83] In this sense, they constitute sexual safety zones with distinct boundaries that, like homes, rely on policing mechanisms to isolate the sexual actors from the rest of the world.

The nature of those mechanisms varies according to the sexual site in question. Privacy in the home is ultimately subject to protection through legal means, and in particular through an enforceable right to exclude.[84] Privacy at public sex sites located in open access areas, on the other hand, is maintained not through state-sponsored means but primarily through self-regulation, as the sexual actors themselves take the necessary steps to create and maintain their privacy.[85] In both the home and in public sex sites,

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> This area was used as a backroom or orgy room . . . . At night it is very difficult to see anything there, and it was necessary to use other senses in order to track other people. In trying to manoeuvre [sic] in the darkness, often the best thing to do was to walk until you bumped another guy. Hands grasping at you, sensual sounds, the smell of poppers [a drug inhaled through the nose], and a vague visual sense of moving figures made it clear you were not alone.

Id.

Lieshout's observations are consistent with what Edward Delph found in his ethnographic study of male sexual actors in parks in New York City. Delph observed the actors signaling sexual interest in each other through how and where they walked; eye contact; the turning of heads; and standing in particular spots in relation to others. DELPH, *supra* note 60, at 103.

[83] Michael Clatts has conducted an ethnographic study of two public areas near the famous Stonewall bar in New York City. (The riots that took place in Greenwich Village in 1969, which were in response to police harassment of Stonewall patrons, are generally acknowledged to mark the birth of the gay rights movement). Michael C. Clatts, *Ethnographic Observations of Men who Have Sex with Men in Public: Toward an Ecology of Sexual Action*, in PUBLIC SEX/GAY SPACE, *supra* note 48, at 141. Clatts found that some men who meet at the bar sometimes retire to two nearby public areas. The first of these sites is the entrance hallway of a brownstone building. The site is conducive to sexual conduct because most of the residents in the building are elderly, and therefore unlikely to be out late at night. *Id.* at 145. Another factor that helps to privatize the site is the existence of an outer door, which unlike the inner door, does not require a key, and which has a one-way mirror that allows those in the inside to view those who are approaching the building. The second site is an alley that leads down to a parking garage. The alley is protected from view from the street by a wall that runs along its entire length. *Id.*

[84] *See supra* notes 14-17 and accompanying text.

[85] *See supra* notes 55-83 and accompanying text.

however, the goal of the mechanisms is the same: to protect the privacy of sexual actors from unwilling gazers and other potential intruders.

B. Places of Public Accommodation

So far, this Article has discussed public sex sites located in open access areas. Some public sex sites, however, are located on private property, in particular in places of public accommodation such as sex clubs, bathhouses, and adult movie theaters. These commercial establishments designate areas within their facilities where patrons can engage in sexual conduct. Like tearooms and bedrooms, these sites constitute distinct sexual geographies that function as sexual safety zones, protecting the privacy of the sexual actors by shielding them from the unwilling (or unwanted) gazes of outsiders.

In many ways, the importance of privacy in this second category of public sex sites is best illustrated by the way in which public sex advocates in the mid-1990's resisted efforts by New York City—ostensibly to prevent the transmission of HIV—to regulate, monitor, and, in some cases, shut down commercial sex establishments.[86] Interestingly, in this type of controversy, it is public sex advocates who resist efforts to remove doors from the booths and cubicles used by patrons to engage in sexual activity at such establishments.[87] It is public sex advocates who demand that the

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[86] New York City's regulatory efforts aimed at commercial sex establishments and other adult businesses in the 1990's, and the resistance to them, are explored in POLICING PUBLIC SEX, *supra* note 28. Jim Eigo summarizes the criticism of the city's efforts to aggressively police commercial sex establishments patronized by men interested in having sex with other men as follows:

> Some studies suggest that gay men are likelier to have safer sex in public settings than in private. Unpublished research suggests gay men who have risky sex have it both in private and public. This argues for keeping sex spaces open: with bedrooms beyond reach, where engage gay men who are having unsafe sex if not in public spaces?

Jim Eigo, *NYC's War on Sex: Some Notes From the For (& the Aft)*, 3 STEAM: A Q. J. FOR MEN 414, 419 (1995). *See also* Michael Warner, *Why Gay Men are Having Risky Sex*, VILLAGE VOICE, Jan. 31, 1995, at 34 ("[N]ot a single study has shown that the second wave of AIDS can be traced to sex clubs. Most risk happens in the bedroom, not the back room."). For a critique of the city's efforts in the 1990's to close down or relocate adult business through the enforcement of new zoning regulations, see Berlant & Warner, *supra* note 1, at 551-52; WARNER, THE TROUBLE WITH NORMAL, *supra* note 28, at 157-62.

[87] Jay Blotcher, *Sex Club Owners: The Fuck Suck Buck Stops Here*, *in* POLICING PUBLIC SEX, *supra* note 28, at 25, 40 (describing as "extreme" rules that would require the removal of "doors to all cubicles [in sex establishments] to facilitate sex monitoring").

privacy of sexual actors be respected, while it is government officials—in arguing that the doors have to be removed in order for monitors to observe whether unsafe sex is taking place—who demand that sex be observable by others.[88] It is public sex advocates, in other words, who want to make sex more private and less public, while it is government officials who want to make sex less private and more public (and presumably, in the process, discourage the sex).

The privatized nature of some commercial sex establishments is also apparent from a recent ethnographic study of a particular Washington, D.C., gay adult bookstore conducted by William Leap.[89] The front section of the bookstore offers visitors a variety of sexual products such as sex toys and pornographic magazines and videos, but does not make available a space for actual sexual conduct.[90] Leap reports that individuals interested in sex must make their way to a backroom in the store. That room "contains a complex arrangement of dimly lit chambers, enclosed cubicles for one-on-one erotic exchange, and open areas for group sex and other visible erotic displays."[91] As the name "backroom" suggests, its location within the commercial site

> is very much intended as a private space and not as a public location. To gain access to this area, the customer pays an

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[88] Califia has argued that when government officials ordered that adult bookstores in Indianapolis and Los Angeles reduce the size of (or remove altogether) doors from cubicles in sex establishments, they "transform[ed] private places into public ones." CALIFIA, *supra* note 34, at 77. There is a surprisingly large number of cases that have addressed the government's authority to require that operators of adult sex establishments remove doors to cubicles and booths in their facilities. *See, e.g.*, Mitchell v. Comm'n on Adult Entm't Establishments, 10 F.3d 123 (3d Cir. 1993) (upholding statute requiring that adult entertainment establishments leave viewing booths completely open on a side open to a public room); Ellwest Stereo Theaters, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982) (upholding ordinance requiring booths in adult movie theaters to be observable from the outside of these booths); Stadium Book & Video v. Miami-Dade County, Nos. 04-20537-CIV-JORDAN, 04-21156-CIV-JORDAN, 04-20553-CIV-JORDAN, 2006 WL 2374740 (S.D. Fla. July 31, 2006) (upholding constitutionality of ordinance requiring adult bookstores to remove viewing booth doors); Doe v. Minneapolis, 693 F.Supp. 774, 781-82 (D. Minn. 1988) (same); *see also* Delgadillo v. Whitey, Inc., 2005 WL 477967 (Ca. Ct. App. Mar. 2, 2005) (upholding injunction requiring adult bookstore to remove doors and locks from booths).

[89] William L. Leap, *Sex in "Private" Places: Gender, Erotics, and Detachment in Two Urban Locales*, *in* PUBLIC SEX/GAY SPACE, *supra* note 48, at 115.

[90] *Id.* at 119.

[91] *Id.* at 118.

> entrance fee[,[92]] . . . then passes through a turnstile and through thick black curtains into the darkened area beyond. The further into this area the customer goes, the greater the opportunities for male-centered erotic exchange—and the greater the restrictions on using verbal statements as a means for facilitating such exchange. . . . [T]he seclusion, the darkness, the avoidance of verbal communication—all of which signify *private* erotic spaces in many segments of modern day America.[93]

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[92] The amount of the fee "is reduced substantially if the customer has already purchased an annual membership and displays his membership card." *Id.* at 129.

[93] *Id.* at 119. Leap explains that the backroom actually consists of four different locations: a small movie theater with benches; a room with wooden cubicles; a room with freestanding movable blocks; and an area with vending machines, video games, and a bathroom. *Id.* at 130. "Each area has its own physical composition, and each area is associated with a different type of erotic activity and participation 'style.'" *Id.* The movie theater is understood to be an area "for individualized fantasy and for masturbation." *Id.* While in the theater area, men sometimes signal interest by sitting next to each other. *Id.* If the interest is mutual, the men proceed to the second room, where some sexual contact takes place behind cubicle walls. *Id.* at 130-31. Sex also takes place in the third area, where "darkness substitutes for the symbolic seclusion created by the cubicle walls." *Id.* at 131. (Leap notes that in the third location, the men will sometimes move around "the freestanding blocks to partition th[e] area in various ways." *Id.*). Finally, the fourth location—an area that includes the vending machines and the bathroom—is understood to be a sex-free resting zone. *Id.*

The sexual actors whom Leap interviewed told him that they liked the bookstore's backroom as a sexual site because it

> provides an enclosed, regulated, sex-positive environment, where men are able to pursue male-centered erotic interests without fears of discovery, harassment, or retaliation. Public parks, department store restrooms, and highway rest stops do not offer the same amount of protection, and invite interference from unwanted spectators, from the police, and from queer-bashers.

Id. at 135.

Lieshout found similar sexual uses of backrooms in some of Amsterdam's leather bars. These bars usually have three zones: "the actual bar in the front"; a "transitional area" that has a billiard table and a television showing pornographic movies; and a backroom where sex takes place. Lieshout, *supra* note 82, at 352. In the transitional area, there is less talking than in the bar, as many "are looking intently at the crowd in order to find a sex partner." *Id.* In fact, Lieshout points out that "[g]enerally speaking, the further one penetrates these leather bars, the less talking takes place, the less lighting is installed, and the more sexual activities can be expected." *Id.* at 352-53.

Leap also conducted an ethnographic study of a private health club in Washington, D.C, where men have sex with other men.[94] As in the bookstore, whether a specific location within the health club is used by patrons for sexual purposes depends on the degree to which it affords privacy to the sexual actors. Most sex takes place in the sauna,[95] which like the bookstore's backroom, can only be accessed after navigating the entire length of the establishment.[96] As in the bookstore's backroom, the sauna accommodates little light or conversation.[97] Unlike in the bookstore, however, sex in the health club does take place in more than one location within the facility. Importantly, all of these additional sexualized spaces (such as alcoves in changing rooms and shower stalls) have physical characteristics that protect sexual actors from unwilling gazers and other intruders.[98]

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[94] Leap, *supra* note 89, at 117-22.

[95] *Id.* at 122.

[96] Leap describes the location of the sauna as follows:

> [It] is located at the furthest point from the entrance to the health club. To reach the sauna, a club member must check in at the entry desk, walk past the aerobic studios, enter the men's locker room, walk past the television room, disrobe and store clothing in a locker, go through the room with the lavatories and toilets, pass the whirlpool, walk up three steps, and turn left: only then does the club member face the sauna room door.

Id. at 119.

[97] *Id.*

[98] *See id.* at 122 ("Locations for on-site erotic activities included the partially enclosed alcoves in the changing rooms, which were created by the cul-de-sac placements of the other lockers [and] the shower stalls, which were protected from outside viewing by heavy cotton shower curtains.").

Although the men who have sex in the bookstore's backroom seem to identify as gay, *see id.* at 129, many of those who have sex in the health club identify as straight, *id.* at 123-24. Leap suggests that these men, many of whom have wives or girlfriends, *id.* at 126, may be interested in sex at "an '(officially) heterosexual' health club," because it permits them to avoid being labeled as gay, *id.* at 116.

Similarly, a majority of the men whom Humphreys observed having sex in restrooms in public parks, *see supra* notes 55-77 and accompanying text, "were married and living with their wives." HUMPHREYS, *supra* note 55, at 105. For these men, the impersonal and speedy nature of the sexual interactions was appealing, in part, because it helped them "protect their family relationships." *Id.* at 105. *See also* Hollister, *supra* note 49, at 62 (noting that most of the men who cruised a highway rest stop in the early evening hours were

Ira Tattelman's description of a gay bathhouse in New York City also helps us understand the ways in which a particular site's physical characteristics, as well as the practices and norms of its users, serve to privatize it.[99] Immediately upon entering the bathhouse, there is a waiting area consisting of an admissions desk and a café. On one side of the café's counter, the men are fully clothed; on the other side, the men are in towels or naked. The counter, in other words, serves as a threshold that begins the process of separating the outside world from the inside.[100] After the

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"husbands on their way home from work."). Frederick Desroches, in his study of police records of arrests of men in public sex sites in five Canadian cities, found that fifty-eight percent of the men were "known to be married and living with their wives." Desroches, *supra* note 77, at 47.

[99] Ira Tattelman, *Speaking to the Gay Bathhouse: Communicating in Sexually Charged Spaces*, *in* PUBLIC SEX/GAY SPACE, *supra* note 48, at 71. Although the facility described by Tattelman was the New Saint Marks Street bathhouse, which was closed by New York City in the mid-1980's in response to the growing AIDS epidemic, there were, as of the late 1990's, still dozens of gay bathhouses operating in the United States. *Id.* at 76.

Allan Bérubé has described the process through which "Turkish baths, Russian baths, public baths, health resorts, and spas" in the late nineteenth and early twentieth centuries were transformed into places where men could have sex with other men. Allan Bérubé, *The History of Gay Bathhouses*, *in* POLICING PUBLIC SEX, *supra* note 28, at 187, 189. Bathhouses, along with bars, were the first sites in the United States that became "zones where it was safe to be gay. In a nation which has for generations mobilized its institutions toward making gay people invisible, illegal, isolated, ignorant, and silent, gay baths and bars became the first stages of a civil rights movement for gay people in the United States." *Id.* at 188. Bérubé adds that

> [f]or the gay community, gay bathhouses represent a major success in a century-long struggle to overcome isolation and develop a sense of community and pride in their sexuality, to gain their right to sexual privacy, to win their right to associate with each other in public, and to create 'safety zones' where gay men could be sexual and affectionate with each other with a minimal threat of violence, blackmail, loss of employment, arrest, imprisonment, and humiliation.

Id. See also CALIFIA, *supra* note 34, at 33 ("As the most visible gay institutions, [bathhouses] made it possible for many men to experiment sexually with other men . . . . They [also] taught gay men to see themselves as members of a common tribe with similar interests and needs."); GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940 207 (1994) ("The safest, most enduring, and one of the most affirmative of the settings in which gay men gathered in the first half of the twentieth century was the baths.").

[100] As Tattelman notes, "[n]o one crosses the counter to get to the other side and no one on the clothed side even considers undressing." Tattelman, *supra* note 99, at 78.

entrance fee is paid, the visitor must register and hand over valuables. Once these admissions requirements are satisfied, "[a] buzzer unlocks the heavy inner security door that separates the space outside from the space inside."[101]

The upper floors of the bathhouse consist mostly of small rooms—about fifty of them—all of which have doors. Patrons follow specific codes of behavior in relation to these spaces—a closed door signals that those inside do not want to be observed or joined, while an open door signifies a possible invitation to come in.[102] "Once someone approaches the door, the man in the room maintains the right to accept, reject, invite, or refuse access to the room and to himself. The contacts are verified with an exchange of eye signals."[103]

There is little verbal communication inside the bathhouse, including in the sauna and steam rooms on the lower floors where sex also takes place.[104] Communication is engaged largely through what Tattelman calls "the language of the body."[105] This language "needs to be learned in order to send a message and to ascertain whether the other individual is interested. These gestures and signals guarantee that people who do not want to have sex are not put into uncomfortable situations and that those who participate do so willingly."[106]

Considering all of these studies together, it becomes clear that the concept of privacy is a crucial consideration for individuals who engage in

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[101] *Id.* at 79.

[102] *See id.* at 85 ("The closed door signals the room is for occupants only, providing a degree of privacy and exclusivity to [the occupants'] activities. On occasion, the men in the room will leave the door slightly ajar, attracting others to watch over the activity or join in.").

[103] *Id.*

[104] *See id.* at 85-89 (describing the use of these rooms as sexual sites). There are also locations within the bathhouse that are understood by patrons to be sex-free zones. *See id.* at 90.

[105] *Id.* at 73.

[106] *Id. See also* Ira Tattelman, *The Meaning at the Wall: Tracing the Gay Bathhouse*, *in* QUEERS IN SPACE, *supra* note 28, at 391, 403 (noting that in gay bathhouses, "[b]ehavior was coded by location, posture, eye contact, and hand gestures."); Martin S. Weinberg & Colin J. Williams, *Gay Baths and the Social Organization of Impersonal Sex*, *in* GAY MEN: THE SOCIOLOGY OF MALE HOMOSEXUALITY 164, 173 (Martin P. Levine ed. 1979) ("At the baths, 'road maps' for transforming the intent into interaction are manifest in the form of interactional rules involving body language and other nonverbal signals.").

sex in places of public accommodation, as it is for sexual actors in open access areas.[107] Sexual actors at all of these sites rely on the locales' physical characteristics, as well as on their own practices and norms, to privatize the sites. The actors thus constitute the sites as sexual safety zones in ways that isolate them from the rest of the world.[108] And they do so informally, without relying on property-based rights to exclude.[109]

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[107] *See supra* notes 55-85 and accompanying text. In some ways, public sex, whether in open access areas or in places of public accommodation, can be *more* private than bedroom sex. Participants in bedroom sex almost always know more about their sexual partners than do participants in public sex. Even when the bedroom sex is of the casual, "one-night stand" variety, the visitor to the home, at the very least, knows where the sexual partner lives. And obviously, when the bedroom sex is part of an ongoing relationship, the parties know a great deal about each other. When sex is part of an ongoing relationship, in other words, there is little privacy *between* the sexual actors.

In contrast, the anonymity that is usually a component of public sex means that almost everything about the self remains unknown to sexual partners. Humphreys, for example, found that tearoom sexual actors protected their anonymity (and therefore their privacy) by abiding by a strong norm of silence. HUMPHREYS, *supra* note 55, at 12-13. *See also* Leap, *supra* note 89, at 122 (noting that sexual acts observed in private health club "[o]ften . . . took place almost entirely in silence.") The expectation is that sexual acts will take place without talking (either before, during, or after sex) and, as a result, without the exchange of identifying information that is usually (though not always) shared in bedroom sex. Sexual actors in public areas, then, frequently seek to protect their privacy not only from the outside world, but also from each other.

[108] Jeffrey Weeks has argued that public sex "involve[s] a redefinition of privacy." JEFFREY WEEKS, SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS & MODERN SEXUALITIES 222 (1985). The traditional understanding of privacy is constructed around particular geographic sites, most notably the home. Public sex actors, on the other hand, construct privacy through "a tacit but firm agreement about the conditions for entry and the rules of appropriate behavior." *Id.*

[109] In writing about commercial sex establishments, Lior Strahilevitz has suggested that they constitute limited commons areas, which, in the spectrum of property regimes, lie somewhere between private property and open access sites. Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After* Lawrence v. Texas, 54 DEPAUL L. REV. 671, 684-85 (2005). In limited commons areas, he notes, "[a] collective permits its members to use a resource freely but excludes outsiders from the property." *Id.* at 684. It bears emphasizing, however, that while patrons of commercial sex establishments act as "insiders" who seek to exclude "outsiders," see Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998), they do not have a legally enforceable right to exclude such as the one enjoyed by individuals while in their homes. If the patrons, then, are to have a constitutionally-protected right to engage in sexual conduct while in those establishments, it cannot be grounded in a property-based right to exclude. These issues are discussed in greater detail in Part III, *infra*.

III. SEXUAL LIBERTY AND REASONABLE EXPECTATIONS OF PRIVACY

The Supreme Court in *Lawrence* applied the following categorical rule: Individuals have a right to sexual liberty as long as the sex takes place in "a dwelling or other private places," but not when it takes place elsewhere.[110] Lower courts have followed this categorical rule in holding that the right to sexual liberty under *Lawrence* does not apply, for example, to sex that takes place in commercial establishments or in public bathrooms.[111] In so holding, the courts have explained that *Lawrence* is inapplicable because those sites are public rather than private.[112]

Although there has not been, to my knowledge, polling conducted on this issue, it is probably safe to surmise that most Americans would disagree with the proposition that the scope of a constitutional right to sexual liberty should encompass sexual conduct that takes place in the types

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[110] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[111] *See, e.g.*, 832 Corp., Inc. v. Gloucester, 404 F. Supp. 2d 614, 623 (D.N.J. 2005) (holding that contrary to argument raised by owners of a nightclub where consensual sex took place, "*Lawrence* did not recognize a broad right to engage in sexual conduct outside of private settings."); Fleck & Assocs., Inc. v. Phoenix, 356 F. Supp. 2d 1034, 1041 (D.Ariz. 2005), *rev'd on other grounds* 471 F.3d 1100 (9th Cir. 2006) ("*Lawrence* does not suggest that sexual activities in a place of public accommodation are Constitutionally protected. Because [the plaintiff's] club is not private, the sexual activities that take place there likewise are not private."); Singson v. Commonwealth, 621 S.E.2d 682, 689 (Va. Ct. App. 2005) (holding that *Lawrence* did not apply in a case where defendant "approached a stranger in a public restroom in a public department store during business hours . . . [b]ecause [his] proposed conduct involved a public rather than private location."); Tjan v. Commonwealth, 621 S.E.2d 669, 672 (Va. Ct. App. 2005) (same).

[112] *See* sources cited in previous footnote. In this sense, there is little difference between the public sex cases that followed *Lawrence* and those that preceded it. *See, e.g.*, State v. Davis, 623 So. 2d 622, 624 (Fla. Ct. App. 1993) (holding that defendant, charged with engaging in lewd conduct at a commercial establishment, "did not have a reasonable expectation of privacy at a place where the public could patronize."); United States v. Buck, 342 A.2d 48, 49 (D.C. 1975) ("any arguable right to privacy for persons engaging in [sexual] conduct does not extend beyond the seclusion of the home."); United States v. McKean, 338 A.2d 439, 441 (D.C. 1975) ("Because of the public nature of the [health club] establishment where the alleged [sexual] conduct took place, appellees may not claim a right to or reasonable expectation of privacy in the constitutional sense of the word, regardless of whether the cubicles in which the alleged acts occurred were in fact 'secluded.'") (footnote omitted); Herland v. District of Columbia, 182 A.2d 362, 363 (D.C. 1962) ("We have no difficulty in finding that an unlocked men's washroom in a hotel reasonably describes a place that is public or where an indecent act could be seen by others. The fact that the other male participant was willingly engaged with appellant in an act of perversion does not relieve appellant from guilt in committing such indecent act with him in public.").

of geographical locations discussed in Part II.[113] The concern, especially when it comes to open access areas, is that the sex will be observed, as Lior Strahilevitz puts it, "by an adult who would prefer not to see the act in question or a child who cannot consent effectively."[114]

I do not dispute the notion that the state has a legitimate interest in minimizing the chances that such unwilling observations will take place. It is possible, however, to acknowledge this legitimate state interest without having to conclude categorically, as the Court did in *Lawrence*, that the right to sexual liberty under the Due Process Clause is inapplicable in geographical sites outside of the home (and presumably outside of analogous places such as hotel rooms). I propose, therefore, that courts, rather than applying a site-dependent categorical rule in determining the scope of the right to sexual liberty, instead assess the reasonableness of the privacy expectations of the party claiming such a right. As Part III.A of this Article explains, this is the standard that courts use when applying another important constitutional provision that protects the privacy interests of individuals—namely, the Fourth Amendment.

Before I delve into the discussion of Fourth Amendment doctrine, I want to make it clear that I am not suggesting that the mere incorporation of such doctrine into the area of substantive due process in matters related to sexual conduct will, by itself, be enough to provide constitutional protection to some instances of public sex. Instead, I rely on search and seizure caselaw to make the point that whether a right to liberty/privacy exists under principles of substantive due process in matters related to sexuality should not be determined solely by the nature of the site where the sex takes place, in the same way that a right to privacy under the Fourth Amendment is not limited to certain specific geographic sites such as the home. My

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[113] One commentator has explained the antipathy felt by many towards public sex as follows:

> "Impersonal," "casual," or "anonymous" sexual contacts . . . still have a bad reputation among a majority of people. It is the kind of sex that offends notions of romantic love, steady relationships, or long-term commitment—ideas that are widespread in modern Western culture. Many people consider "impersonal" sex as a way of compensating for a lack of personal sex. Furthermore, it means practicing promiscuity. That this kind of sex is pursued and enjoyed as an end in itself often seems shocking. The fact that sexual acts often take place, not in private but in public, adds greatly to state hostility and controversy.

Lieshout, *supra* note 82, at 342.

[114] Strahilevitz, *supra* note 109, at 688.

contention, in other words, is that the right to sexual liberty under the Due Process Clause should be degeographized to the same extent that the right to privacy under the Fourth Amendment has been degeographized. As Part III.B will argue, this degeographization of the right to sexual liberty, when coupled with the substantive protection afforded to sexual conduct by the Supreme Court in *Lawrence*, should be enough to provide some constitutional protection to public sex. Part III.C explains why it is that the expectations of privacy of those who engage in public sex can be reasonable under certain circumstances.

A. The Degeographization of Privacy Under the Fourth Amendment: Lessons for Substantive Due Process

The degeographization of the right to be free from unreasonable searches and seizures can be traced to the Supreme Court's decision in *Katz v. United States*.[115] The issue in *Katz* was whether the government's electronic surveillance of a phone booth constituted a search and seizure under the Fourth Amendment. Both the government and the defendant focused their arguments before the Court on whether the phone booth was a "constitutionally protected area."[116] The Court, in rejecting that analytical approach, concluded famously that "the Fourth Amendment protects people, not places."[117] It added that "what [a person] seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected"[118] and that "*[w]herever* a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."[119]

Katz has been generally understood as standing for the proposition that what ultimately matters under the Fourth Amendment is not where a search takes place, but whether the defendant had a "reasonable expectation of privacy."[120] Before *Katz*, it was necessary for defendants to have a

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[115] 389 U.S. 347 (1967).

[116] *Id.* at 351. The Court itself had looked to the possible existence of a "constitutionally protected area" in a Fourth Amendment case only a few years earlier. Silverman v. United States, 365 U.S. 505, 512 (1961).

[117] *Katz*, 389 U.S. at 351.

[118] *Id.* (emphasis added).

[119] *Id.* at 359 (emphasis added).

[120] This famous standard is found not in the majority opinion, but in Justice Harlan's highly influential concurrence. Harlan explained that the Fourth Amendment is implicated when "a person [has] exhibited an actual (subjective) expectation of privacy and .

property-based right to exclude others before they would be permitted to challenge the government's actions under the Fourth Amendment. Indeed, prior to *Katz*, the Court had tightly linked Fourth Amendment protections to considerations of property law, in particular to the law of trespass.[121] For example, the Court, several decades before *Katz*, held that governmental surveillance of a defendant's telephone conversation without an "actual physical invasion of his house or curtilage" fell outside of the Amendment's protection.[122] The consensus among commentators is that the Court in *Katz* departed from the earlier cases by grounding Fourth Amendment jurisprudence in considerations of privacy rather than in those of property.[123]

This shift by the Court has by no means meant that the right to exclude has become irrelevant to the Fourth Amendment analysis. Instead, the fact that a defendant had a right to exclude others from the premises that were searched is a factor—in many instances, a crucial one—in establishing the reasonableness of her privacy expectations. As the Court has noted,

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. . that . . . expectation [is] one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

[121] *See* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("[W]ell into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.") (citations omitted).

[122] Olmstead v. United States, 277 U.S. 438, 466 (1928). *See also* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 312 (1998) ("[B]eginning with *Olmstead v. United States*, the Court used property law to define constitutionally protected areas and limited the Fourth Amendment inquiry to the protection of tangible items from physical invasions of real property.") (footnotes omitted). In contrast, Justice Brandeis's dissent in *Olmstead* called for a more robust understanding of the Fourth Amendment, one that rendered impermissible "every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed . . . ." *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

[123] *See, e.g.*, Clancy, *supra* note 122, at 327 ("Katz sought to extinguish inquiry into constitutionally protected areas and to substitute privacy as the interest protected by the amendment.") (footnotes omitted); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 247 (1993) ("Until the 1960s the Court generally relied upon the residue of the formalist linkage between property and privacy interests in determining scope of the amendment."). In contrast, Orin Kerr argues that "the basic contours of modern Fourth Amendment doctrine are largely keyed to property law." Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809 (2004). For a response to Professor Kerr, see Sherry F. Colb, *A World Without Privacy: Why Property Does not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889 (2004).

"[o]ne of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude."[124]

The fact that property law may provide individuals challenging searches and seizures with rights to exclude others from the properties subject to the searches can go a long way in establishing that their expectations of privacy are reasonable. It is largely for this reason that the Court, despite its pronouncement in *Katz* that the Fourth Amendment "protects people, not places,"[125] has continued to privilege the home in its search and seizure jurisprudence. Indeed, when the home is involved, the Court has in effect concluded that, except under narrow circumstances,[126] a defendant's expectations of privacy are reasonable.[127] Although individuals in their homes are subject to as much Fourth Amendment protection after *Katz* as they were before, what ultimately drives the analysis after that case is not the existence of a property-based right to exclude, but is instead the reasonableness of the defendant's privacy expectations.[128]

That the right to exclude is not dispositive for purposes of the Fourth Amendment is evident from two lines of Supreme Court cases. The first is the so-called open fields cases, where the Court has held that the

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[124] Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) (citation omitted). *See also* Oliver v. United States, 466 U.S. 170, 183 (1984) ("The existence of a property right is . . . one element in determining whether expectations of privacy are legitimate.").

[125] *Katz*, 389 U.S. at 351.

[126] There is no reasonable expectation of privacy, for example, when the home owner fails to shield objects or actions that can be observed from the street by the naked eye. *See* Kyllo v. United States, 533 U.S. 27, 31 (2001) (noting the Fourth Amendment does not render impermissible the "visual surveillance of a home") (citation omitted); California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.").

[127] *See Kyllo*, 533 U.S. at 34 (holding that the expectation of privacy regarding the interior of homes is reasonable); Payton v. New York, 445 U.S. 573, 589 (1980) (noting that in no setting "is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ."); *Id.* at 601 (Powell, J., concurring) ("the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.").

[128] *Rakas*, 439 U.S. at 143 n.12 ("Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest.").

government may come onto uncultivated land belonging to the defendant without violating the Fourth Amendment as long as officials do not approach areas that are adjacent to the home.[129] Although the right of property owners to exclude others applies to these private, uncultivated lands, that is not enough for the government's actions to fall within the Fourth Amendment's ambit. As the Court has put it, "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment."[130]

The second line of cases involves the application of the Amendment to government workplaces. The Court has held that government employees under certain circumstances have reasonable expectations of privacy in their places of work.[131] Yet those employees do not have property-based rights to exclude others from their work sites.[132]

To sum up, the following three propositions accurately reflect the Court's contemporary Fourth Amendment jurisprudence that is relevant for our purposes: first, whether a Fourth Amendment right exists depends on the reasonableness of the defendant's expectations of privacy;[133] second, the right to exclude is neither necessary (as in the workplace cases) nor sufficient (as in the open fields cases) to determine whether individuals have rights under the Fourth Amendment;[134] and third, except under narrow circumstances, the expectations of privacy held by individuals while in their homes are reasonable.[135]

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[129] Oliver v. United States, 466 U.S. 170, 176-78 (1984).

[130] *Id.* at 183-84.

[131] O'Connor v. Ortega, 480 U.S. 709, 716-17 (1987).

[132] The lack of a necessary connection between a property-based right to exclude and the scope of the Fourth Amendment is also clear from Minnesota v. Olson, 495 U.S. 91 (1990). The Court in *Olson* held that an overnight guest in a home enjoys a reasonable expectation of privacy for purposes of the Amendment. *Id.* at 98. Under property principles, however, a guest is a mere licensee who does not have the legal right to exclude others. *See id.* at 99 (noting that guests' expectations of privacy are reasonable even though it is hosts "who [have] ultimate control of the house" and "who have the authority to exclude despite the wishes of the guest. . . .").

[133] *See supra* notes 115-23 and accompanying text.

[134] *See supra* notes 129-32 and accompanying text.

[135] *See supra* notes 125-28 and accompanying text.

My proposal is that courts apply these same three propositions in determining the scope of the right to sexual liberty under the Due Process Clause. A right to sexual liberty, like the right to be free from unreasonable searches and seizures under the Fourth Amendment, should protect people and not places. Under my proposal, as under the Fourth Amendment, what should ultimately matter is the reasonableness of the parties' privacy expectations. In addition, under this approach, as under the Fourth Amendment, the nature of the site where sex takes place, and more particularly, the existence of a right to exclude, would be a factor in assessing the reasonableness of a sexual actor's privacy expectations, but not a dispositive one.

Although the standard I propose to assess the scope of the right to sexual liberty under the Due Process Clause is the same as the standard for determining when Fourth Amendment protections are implicated, the finding of a constitutional violation would, under each provision, lead to different results. The Fourth Amendment, of course, applies to the means used by the government to investigate alleged criminal activity. If that Amendment is violated, then the government is prohibited, under the exclusionary rule, from introducing improperly gathered evidence at trial.[136] The Fourth Amendment, however, does not address the question of whether the conduct that led to the underlying criminal charge is properly proscribable. Yet, that is precisely the issue addressed by the substantive due process analysis. The remainder of this Part therefore argues that when sexual actors in public places can show that their expectations of privacy were reasonable given the particular circumstances of their case, the government should be precluded from charging them with a crime arising from consensual private sexual activity in a public place, regardless of the nature of the investigative methods and procedures used.[137]

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[136] *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence obtained through unconstitutional search is inadmissible).

[137] This Article focuses on the scope of the right to sexual liberty under the Due Process Clause, as opposed to the right to be free from unreasonable searches and seizures under the Fourth Amendment. On this latter point, Professor David Sklansky has recently written a fascinating article tracing the adoption of the "reasonable expectation of privacy" standard in *Katz* to earlier lower court decisions and scholarly writings discussing police investigations of bathroom sex among men. David Alan Sklansky, *"One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U. C. DAVIS L. REV. 875, 888-94 (2008). Sklansky argues that *Katz* helped to restrict what he calls the "sorry practice" of police spying on gay men in toilet stalls. *Id.* at 879. In doing so, he contends that *Katz* and its progeny played an important role in "giving aid and encouragement to the fledgling movement for gay rights." *Id.*

B. Sex is Different

A skeptic of my efforts to analogize the right to sexual liberty under the Due Process Clause to the right to be free from unreasonable searches and seizures under the Fourth Amendment might point to the fact that the Court has made it clear, in interpreting the latter provision, that the taking of steps to shield an activity is not enough to create a reasonable (or objective) expectation of privacy.[138] This is the case even if the party in question has a subjective expectation of privacy. Thus, for example, even if those who use a secluded area of a park to sell illegal drugs intend to "privatize" that site by excluding unwilling gazers, society is not, for that reason alone, required to recognize their subjective expectation of privacy as reasonable. In all likelihood, therefore, a police officer who observes a drug sale in that secluded part of the park would not, under the Fourth Amendment, be precluded from testifying about that observation.

It is important to keep in mind, however, that the issue under the Fourth Amendment, as already noted, is not whether the government has the authority to proscribe certain conduct, but is instead whether its officials used appropriate means in investigating the alleged criminal conduct.[139] For purposes of the Fourth Amendment, then, the fact that a defendant was arrested for engaging in sexual conduct in a public place, for example, is no different than if he was arrested in the same locale for selling illegal drugs.

In determining the scope of the substantive protection afforded by the Due Process Clause, however, it matters very much that the conduct in question involves consensual sex between adults. The Court in *Lawrence*, after all, emphasized that the choice of sexual partners raises particularly important considerations of liberty.[140] Indeed, the Court noted that there are few choices that individuals make that are more personal and intimate than those associated with "the right to make certain decisions regarding sexual

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[138] "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." Oliver v. United States, 466 U.S. 170, 182-83 (1984). In *Oliver*, the Court rejected the notion "that steps taken to protect privacy [such as the posting of 'No Trespassing' signs and the erecting of fences] establish that expectations of privacy in an open field are legitimate." *Id.* at 182.

[139] *See supra* note 136 and accompanying text.

[140] Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty both in its spatial and in its more transcendent dimensions.").

conduct."[141] It is inconsistent with the importance of the liberty interests at stake in matters related to sexual intimacy and conduct to conclude that

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[141] *Id.* at 565. In emphasizing the liberty implications that inhere in the choice of sexual partners, the Court quoted with approval the following language from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992):

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Lawrence, 539 U.S. at 574.

As already noted, some commentators have criticized the *Lawrence* Court for emphasizing a relational understanding of sexual liberty, one that protects sexual intimacy when it is part of ongoing relationships but ignores the liberty implications of sexual conduct that takes place outside of those relationships. *See supra* notes 20-22 and accompanying text. I have elsewhere noted the Court's emphasis on the relational components of sexual liberty. *See* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 84 MINN. L. REV. 1184. 1211-14 (2004). I do not, however, read *Lawrence* as standing for the proposition that *only* sexual liberty that is part of ongoing relationships is constitutionally protected. Although the Court may have assumed that the defendants had a more committed relationship than they actually did, *see* Ruskola, *supra* note 20, at 242 (noting that the defendants in *Lawrence* "apparently [had] just a one-night stand"), the holding of the case was not limited to sexual conduct that takes place within an ongoing relationship. *See* Mark Strasser, Lawrence, *Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285, 293 n.51 (2006) (although "[t]he *Lawrence* Court realized that sodomitical relations might take place in the context of a more enduring relationship[,] . . . the opinion was not predicated on whether Lawrence and Garner had [such] a . . . relationship . . . ."). *See also* Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy, and Equality*, 65 OHIO ST. L.J. 1341, 1398 (2004) ("*Lawrence* does more than simply validate same-sex relationships that mimic traditional 'marriages.' Instead, *Lawrence* recognizes, first, the central role that sexual desires and intimacies play in the development of individual personalities and, second, the importance of sexual experimentation and choice in individuals' efforts to realize and secure their sense of self.").

Furthermore, it is important to keep in mind that much of the discussion of relationships in *Lawrence* is in the section of the opinion where the Court explains why *Bowers v. Hardwick*, 478 U.S. 186 (1986), was constitutionally flawed. *Lawrence*, 539 U.S. at 566-67. The *Lawrence* Court was appropriately critical of the *Hardwick* Court for claiming that sodomy regulations only impacted the ability of individuals to have sex. *See id.* at 567 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."). That criticism, however, does not translate into the legal or moral proposition that the right to

those interests become *wholly inapplicable* when individuals choose to have sex outside of "a dwelling or other private places."[142]

The crucial point is this: most criminal activity is proscribed regardless of where it takes place.[143] Thus, the Due Process Clause does not circumscribe, for example, the authority of the state to criminalize the selling of illegal drugs, regardless of whether the sale takes place on a street corner or in the privacy of a home. After *Lawrence*, however, the Due Process Clause *does* limit the power of the state to criminalize consensual sexual conduct as long as it takes place in private. As Part II explained, and as the next section will elaborate,[144] there is reason to believe that sex in public places can indeed be private to the extent that those who engage in it successfully exclude unwilling gazers.

Therefore, a degeographized understanding of the Due Process Clause (akin to that of the Fourth Amendment), coupled with the *Lawrence* Court's recognition that individuals have an important liberty interest in choosing their sexual partners, calls for a more expansive interpretation of what constitutes a reasonable expectation of privacy in the context of public sex than courts have so far been willing to provide.[145]

A substantive due process analysis that seeks to assess the reasonableness of the privacy expectations of sexual actors outside of the home, by focusing on the extent to which they have taken reasonable precautionary steps to exclude unwilling gazers, would permit courts to continue to protect the legitimate interests of those who have not consented to observe the sexual conduct in question. At the same time, this approach accounts for the fact that the liberty interests of individuals implicated in their choice of sexual partners do not completely disappear when that choice is made and exercised in geographies outside of the home.

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sexual liberty is worth protecting only when it is exercised from within committed relationships.

[142] *Lawrence*, 539 U.S. at 562.

[143] There are exceptions to this general rule. It might be illegal, for example, to be intoxicated in a public place, but not in a private one such as a home. It also might be illegal to smoke cigarettes in certain public places, but not at home. I thank Andy Leipold for providing me with these examples.

[144] *See infra* notes 146-68 and accompanying text.

[145] For examples of courts that have provided a narrow interpretation of privacy interests, see sources cited in note 111, *supra*.

C. The Reasonableness of Privacy Expectations of Those Who Engage in Public Sex

It would seem clear, even under the Court's current understanding of the right to sexual liberty, that not all consensual sex between adults in the home is constitutionally protected. The right would presumably not protect sexual actors, for example, who insist on having sex in front of an unobstructed window in their homes, making it possible for those who pass by to observe the sexual acts.[146] This example illustrates how the mere physical presence of sexual actors in their home is not sufficient to trigger the application of a constitutional right to sexual liberty.

The more controversial issue is whether the presence of the sexual actors in the home (or analogous places like hotel rooms) should be *necessary* for the constitutional right to sexual liberty to apply. The intuition of most people, including judges, seems to be that when sex takes place at a site that is generally accessible by the public, the sexual actors in question effectively waive whatever privacy interests they may have arising from their sexual conduct.[147]

The discussion of public sex sites in Part II, however, suggests that it is possible to create zones of privacy in public places.[148] An expectation of privacy at these sites may be reasonable if the sexual actors have taken the necessary steps to shield their conduct from unwilling gazers. It would seem, for example, that individuals have a reasonable expectation of

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[146] A committee report issued by the Illinois legislature explained the scope of the state's criminal prohibition against public indecency as follows:

> It is the probability of public view that is crucial rather than the ownership or use of the particular real estate upon which the act occurs. For example, a person standing nude before a lighted window of his private apartment at night, adjacent to a well traveled public sidewalk would be, for purposes of this statute, in a public place. Contrawise, a couple in a parked car on a public right-of-way but in a lonely country lane might not be in a public place, depending upon the likelihood of others traversing this particular area at such hours.

People v. Legel, 321 N.E.2d 164, 168 (Ill. App. Ct. 1974). *See also* Byous v. State, 175 S.E.2d 106, 107-08 (Ga. Ct. App. 1970) ("If intentionally done for the purpose of being seen by members of the public, then the fact that it is within a private residence and done from behind a window will not remove it from the statutory prohibition" against public indecency).

[147] *See* cases cited in note 111, *supra.*

[148] *See supra* notes 55-109 and accompanying text.

privacy when they have sex at a commercial establishment behind the closed doors of a cubicle or booth. The doors serve as physical barriers that, when coupled with a prevailing norm that other patrons will not enter unless invited,[149] make it unlikely that the sex will be observed by unwilling gazers.[150]

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[149] *See supra* note 102 (discussing understanding among users of gay bathhouse that closed cubicle doors mean that individuals inside do not want to be disturbed or observed).

[150] *See* CALIFIA, *supra* note 34, at 76 ("People sitting behind the closed door of a bathroom or of a movie booth in an adult bookstore can reasonably assume they have privacy.").

Although the Supreme Court has not addressed the issue, several lower courts have recognized that, under certain circumstances, a reasonable expectation of privacy under the Fourth Amendment can exist in public restrooms. Courts have held, for example, that "a person using a public restroom enjoys a reasonable expectation of privacy in being shielded from view by the privacy partitions in the restroom." United States v. Hill, 393 F.3d 839, 841 (8th Cir. 2005). This is particularly true when the conduct in question takes place behind closed bathroom stalls. *See, e.g.*, Ward v. State, 636 So.2d 68, 72 (Fla. Dist. Ct. App. 1994); People v. Dezek, 308 N.W.2d 652, 655 (Mich. Ct. App. 1981). Although for some courts the absence of a stall door is determinative of the lack of a reasonable expectation of privacy, *see, e.g.*, Young v. State, 849 P.2d 336, 342 (Nev. 1993); Buchanan v. State, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971), other courts have held that the absence of a door does not render the expectation of privacy unreasonable while an individual is inside a toilet stall. *See, e.g.*, People v. Triggs, 506 P.2d 232, 236 (Cal. 1973) ("The expectation of privacy a person has when he enters a rest room is reasonable and is not diminished or destroyed because the toilet stall being used lacks a door."); State v. Casconi, 766 P.2d 397, 399 (Or. Ct. App. 1988) ("Simply because an individual chooses to use a public restroom or a stall without doors does not mean that he is automatically deprived of all privacy when he enters.").

Some courts have held that there is no reasonable expectation of privacy in a public restroom when the person uses the site for sexual purposes as opposed to its traditional purposes. *See* People v. Anonymous, 415 N.Y.S.2d 921, 923 (N.Y. Just. Ct. 1979) ("The public's right to expect privacy in such locations is reasonably limited to the performance of excretionary and ablutional acts indigenous to a restroom [but] never for sexual acts of any nature."); State v. Henry, 783 N.E.2d 609, 617 (Ohio Ct. App. 2002) ("Ohio courts have found that society is not prepared to recognize as reasonable an expectation of privacy by persons engaging in behavior in restrooms that goes beyond the intended purposes of the restroom, i.e., sexual acts."); *see also* Smayda v. United States, 352 F.2d 251, 254 (9th Cir. 1965) (holding, in case of individuals arrested for engaging in oral sex in bathroom in public park, that there is no reasonable expectation of privacy when a public restroom is used for criminal activities). For other courts, however, the fact that the defendants engaged in sexual acts in public restrooms did *not* preclude a finding that their expectations of privacy were reasonable. This second group of courts has focused instead on the degree of intrusiveness that accompanied the police's surveillance of the bathroom. *See, e.g.*, Kroehler v. Scott, 391 F. Supp. 1114 (E.D. Pa. 1975) (issuing an injunction prohibiting police officers from looking into toilet stalls from holes that they made in bathroom ceiling for the purpose of investigating sexual conduct); *Triggs*, 506 P.2d at 409-11 (holding that

Admittedly, not all of the sexual conduct that occurs in commercial sex establishments takes place behind closed doors. Nonetheless, some commercial sex establishments are configured in ways that make it unlikely that sex which takes place outside of booths and cubicles will be observed by unwilling gazers. The use of the backroom in the gay adult bookstore discussed in Part II is an example of such a configuration.[151] In order to enter that backroom, patrons have to pay a fee,[152] and then go through a set of curtains to enter a dimly lit area.[153] "The important characteristics [of this backroom] are several: the site is marked, explicitly, for erotic activity, and persons who enter the site may freely assume that they share similar erotic interests with persons already on-site."[154] It is reasonable to assume,

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officer's "clandestine" surveillance of sex in a public bathroom from vantage point of "plumbing access area" constituted an impermissible search); State v. Bryant, 177 N.W.2d 800, 804 (Minn. 1970) (ruling that observation by police officer, stationed on top of a ceiling ventilator above public restroom, of sexual conduct in toilet stalls was inadmissible). For a review of the surprisingly large number of Fourth Amendment cases that have arisen from events taking place in public restrooms, see Michael R. Flaherty, *Search and Seizure: Reasonable Expectation of Privacy in Public Restroom*, 74 A.L.R. 508 (1989).

[151] *See supra* notes 89-93 and accompanying text.

[152] It is possible to argue that, in charging a fee to enter either the facility itself, or a particular location within that facility, the owner (usually through his employees) exercises a gatekeeping function that privatizes the site. The problem with this argument is that the actual gatekeeping done by owners and their agents at most commercial sex establishments seems to be quite limited. *See supra* note 52 (citing sources). It would appear, in other words, that at most establishments, potential patrons are admitted as long as they are willing to pay the entrance fee. In my estimation, therefore, the payment of a fee should not *by itself* create the necessary conditions for a finding that the sexual actors' expectations of privacy are reasonable. Instead, the payment of a fee to enter a backroom, for example, can be one of several factors that contribute to the shared understanding by users regarding the sexualized nature of the zone in question. That shared understanding is a crucial component of the process of privatization of public sex sites because it considerably lessens the likelihood that nonconsenting third parties will observe the sexual conduct in question. *See* Leap, *supra* note 89, at 129 ("The attendant's gatekeeper functions as well as the fee/membership requirements underscore the backroom's status as 'private' space . . . ."); Murray, *supra* note 48, at 165 (noting that at "[g]ay sex clubs[,] . . . [g]atekeepers collect money, so that anyone who is present is not only conscious of what kind of place he is in, but has paid to be in a place where men meet men for sex, most of which occurs on the premises, albeit in varying degrees of seclusion.").

[153] *See supra* notes 91-93 and accompanying text.

[154] Leap, *supra* note 89, at 127. When Leap interviewed the patrons of this particular establishment, they repeatedly "use[d] the term 'private' . . . to identify and describe [the backroom]." *Id.* at 129.

therefore, that individuals who enter that particular backroom have consented to observe, and to be observed engaging in, sexual conduct.

It is also, however, reasonable to assume that the likelihood that sex will be observed by unwilling gazers increases, and the extent of the reasonableness of the privacy expectations of the sexual actors therefore decreases, when shifting from private commercial sites to open access areas. Nonetheless, the sociological literature on public sex shows that it is possible, at least under some circumstances, for sexual actors to use open access spaces in ways that go undetected by potential unwilling gazers.[155]

It may be argued that the possibility that sex in open access areas may be observed by a third party renders unreasonable the sexual actors' expectations of privacy. What should ultimately matter in establishing the scope of the right to sexual liberty, however, should not be whether the sex is observed but whether such observation is consensual.[156] The state's interest in regulating sexual conduct is implicated only once it is likely that the sex will be observed by unwilling gazers. There is no harm that justifies the interference with sexual liberty when there is consent on the part of both the observers and the sexual actors. As Richard Mohr argues,

> [w]e need to abandon the idea that in order for sex to be considered private, it must be hidden away behind four walls. It is not geography or mere physical enclosure that makes sex private. . . . The sex act creates its own interpersonal sanctuary which in turn is necessary for its success. . . . If the participants are all consenting to be there with each other for the possibility of sex polymorphic, then they fulfill the criterion of the private in the realm of the sexual.[157]

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[155] *See supra* notes 55-109 and accompanying text.

[156] Michael Clatts, in his ethnographic study of two public sex areas in New York City, makes a distinction between "observed" sex and "public" sex. *See* Clatts, *supra* note 83. What distinguishes the two is that the former occurs only in places where it is understood by everyone present that men congregate in order to have sex with other men or to observe such sex. *Id.* at 160.

[157] Tattelman, *supra* note 99, at 73 (quoting Richard Mohr, *Parks, Privacy, and the Police*, THE GUIDE, Jan. 1996, at 16, 17-18). Mohr adds that "[i]f all the members present at [a sexual] encounter are there by mutual consent, it is the rest of the world that is thereby excluded by the nature of the sexual encounter. Therefore, nothing about the nature of sexual encounters requires that the number of persons engaging in private sexual acts be limited." MOHR, *supra* note 48, at 104.

In one section of his recent article addressing the issue of public sex, Lior Strahilevitz seems to agree with the proposition that sexual actors in open access sites are

The California Supreme Court, in interpreting that state's prohibition on the solicitation or commission of lewd conduct in public places, has held that criminal liability can be imposed only if those who are solicited to engage in sex or who are in a position to observe sexual acts are likely to be offended.[158] In doing so, the court noted that "[t]he statute . . .

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quite effective in privatizing those sites. He notes, for example, that "[i]n general, people who want to have sex in open access spaces try to limit the number of non-consenting passersby who might witness the act—choosing relatively isolated or less visible locations. They thus try to find open access spaces that nevertheless offer a strong probability of social privacy." Strahilevitz, *supra* note 109, at 693 (footnote omitted). *See also id.* at 694 (noting that it is "rare" for sex in public sex sites to be observed by non-consenting individuals). It is therefore surprising that Strahilevitz eventually concludes that the state's authority to regulate sexual conduct in open access areas should be "virtually untrammeled" because there is "a very substantial risk" that non-consenting individuals will observe the sex. *Id.* at 696.

[158] Pryor v. Mun. Ct., 599 P.2d 636, 639 (Cal. 1979). The male defendant in *Pryor* was approached by an undercover police agent. The officer parked his car near where the defendant was standing. After a brief conversation, the defendant suggested they engage in oral sex. According to the police officer, the defendant proposed that they engage in the sexual act inside the car at a nearby parking lot. *Id.* The defendant contended that the disorderly conduct statute under which he was charged was unconstitutionally vague. *Id.* The state supreme court agreed, but then proceeded to narrow the scope of the statute as a way of remedying its vagueness. *Id.* at 645. Other courts have also held that their state prohibitions against lewd and indecent conduct require the government to show that the defendant knew of the presence of others who were likely to be offended. *See, e.g.*, Commonwealth v. Sefranka, 414 N.E.2d 602, 608 (Mass. 1980).

Aside from issues of judicial construction, some public lewdness and indecency statutes explicitly require that the conduct in question offend or alarm others. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 5901 (West 2008) (making it a criminal offense for a person to engage in "any lewd act which he knows is likely to be observed by others who would be affronted or alarmed"); TEX. PENAL CODE ANN. § 21.08 (Vernon 2008) (a person commits the offense of indecent exposure if "he exposes his anus or any part of his genitals with the intent to arouse or gratify the sexual desire of any person, and he is reckless about whether another person is present who will be offended or alarmed by his act."). In *Broussard v. State*, 999 S.W.2d 477 (Tex. Ct. App. 1999), the defendant was charged under Texas's indecent exposure statute after another man performed oral sex on him in a small theater at the back of an adult bookstore. *Id.* at 480. The court held that the *presence* of at least three other persons in the theater constituted sufficient evidence for the trier of fact to "infer [that the defendant] knew others were present who might be offended or alarmed." *Id.* at 483. It is not clear, however, that the defendant had any reason to know (or even suspect) that the particular men in the theater might be offended or alarmed by his conduct. Two of those individuals masturbated themselves in the theater, and one of them performed fellatio on the defendant. *Id.* It is therefore unlikely that either of them was "affronted or alarmed" by the defendant's conduct.

The third individual was the undercover officer. *Id.* It would appear that there was no reason for the defendant to believe that the third man would be offended by his conduct

serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct."[159] The court then added that "even if [the sexual] conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, *the state has little interest in prohibiting that conduct if there are no persons present who may be offended.*"[160] The mere presence of onlookers, in other words, is not enough to make the conduct punishable. Although the constitutional challenge in the case was grounded in the alleged unconstitutional vagueness of the statute rather than on substantive due process principles, its holding is consistent with the analytical approach that I suggest should be used to determine the scope of the right to sexual liberty in public places.[161]

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given that this third man stood in the back of the room calmly and voluntarily observing what the other men were doing. *See id.* (noting that undercover officer "stood against the wall to make observations."). *See also* Commonwealth v. Can-Port Amusement Corp., No. 050295, 2005 WL 2009672, at *1 (Mass. Super. June 29, 2005) (noting that patrons in adult movie theater did not "appear[] to the [police] officers to be shocked or alarmed by th[e] open sexual activity [that was taking place on the premises].").

[159] *Pryor*, 599 P.2d at 646. The court also made it clear that in order to be constitutional, the statute had to prohibit particular sexual conduct "involv[ing] the touching of the genitals, buttocks, or female breast, for purposes of sexual arousal, gratification, annoyance or offense." *Id.* at 639.

[160] *Id.* at 647 (emphasis added).

[161] Courts have varied in their interpretations of the scope and meaning of *Pryor*. In an early case, decided only a year after *Pryor*, a California appellate court upheld a trial court's finding that an operator of an adult gay bookstore knew that sexual conduct which took place therein would be offensive to others. *See* People v. Adult World Bookstore, 108 Cal. App. 3d 404 (Cal. Ct. App. 1980). Although there was no evidence that any patrons had complained about the sexual conduct in question, the court nonetheless concluded that "[n]ot everyone who enters a dirty bookstore (euphemistically adjectived [sic] 'adult'), expects to be molested, propositioned, or subjected to an open view of live homosexual acts of others." *Id.* at 409. (Police officers "reporte[d] instances of masturbation and oral copulation observed by them through openings (glory holes), in the partitions between certain of the booths" and "invitations to them from male patrons . . . to share booths for the purpose of engaging in homosexual activities . . . ." *Id.* at 407. However, there was no evidence, as the court suggested, that anyone was "molested."). Despite the court's acknowledgment that the California Supreme Court's case law made "it clear that knowledge of possible offense to third persons is a question of fact and cannot be answered solely by reference to the location in which the conduct occurred," *id.* at 410 (citation omitted), the court seems to have done precisely that by concluding that adult bookstores are patronized by "neutral customers," *id.* at 410, who are *always* likely to be offended by observing sexual conduct.

The more recent opinion, *Brown v. County of San Joaquin*, No. CIV. S-04-2008 FCD PAN, 2006 WL 1652407 (E.D. Ca. June 13, 2006), offers a more robust reading of

There can be, of course, no guarantee that sex in open access areas, such as public bathrooms and highway rest stops, will remain undetected. It is always possible that, despite significant precautions taken by sexual actors, unsuspecting individuals may nonetheless stumble across sexual conduct that they will find offensive. The question, however, should not be whether it is possible that an unwilling gazer will observe the sex. It is, after all, possible that an unwilling gazer (such as an unexpected visitor) will stumble across sexual conduct that takes place in the home. The question instead should be whether it is *likely* that a nonconsenting third party will observe the sex.[162] The public sex literature suggests that such an outcome is unlikely in at least some open access sites under some circumstances.[163]

We should, therefore, resist the urge to jump to the conclusion that sex in open access areas should always be constitutionally unprotectable.

Pryor. Brown drove into a public park and parked near one of the restroom facilities located therein. He got out of the car, but did not immediately go in. *Id.* at *1. (As noted in Part II, this is a common step taken by men at public restrooms and highway rest stops who want to signal to other interested men that they are interested in sex. *See supra* note 63 and accompanying text.) After a few minutes, Brown went into the restroom and was "followed shortly thereafter" by a police officer in plain clothes who was monitoring the bathroom. *Id.* at *2. The police officer claimed that he eventually observed Brown masturbating in front of the urinal, a fact disputed by Brown. *Id.*

The court determined that it was unclear, under the analysis called for by *Pryor*, whether there was sufficient probable cause to conclude that Brown knew or should have known that the alleged masturbation would be offensive to the officer. *Id.* at *5. As the court noted,

> [t]he undisputed evidence reveals that [the officer] spent *several minutes in the restroom*, walked back and forth behind plaintiff twice, and left and reentered the restroom at least once. [Brown] provides evidence that he saw defendant [the officer] staring at him. Plaintiff also testified that [the officer] twice asked him if he was okay while standing at the urinal.

Id. (citations omitted). There was evidence, in other words, that Brown may have reasonably believed that the officer (who was posing as a bathroom patron) was interested in engaging or observing sexual conduct.

[162] *See* People v. Lake, 67 Cal. Rptr. 3d 452, 458 (Cal. Ct. App. 2007) (holding that "the mere 'possibility'" that someone will be offended is not enough to show violation of statute prohibiting the solicitation of lewd or dissolute conduct in a public place; instead, there has to be "some *likelihood* that third persons be present and be offended by the conduct."). *See also* People v. McNamara, 585 N.E.2d 788, 792-93 (N.Y. 1991) (noting, in case involving alleged public lewdness, that "[o]bviously, places that are public in a property sense can be very private in terms of the likelihood of casual observation.").

[163] *See supra* notes 55-83 and accompanying text.

This is particularly true in cases in which law enforcement officials have to engage in intrusive or deceptive practices to observe the sexual conduct in question. Public sex advocates argue that much of the sex that takes place in open access areas would go undetected *but for* the aggressive investigative tools used by government officials.[164] Pat Califia, for example, notes that "[i]f people are going to see what is going on in these places, they must intrude. They must actively look for things that will offend them either by penetrating physical barriers, by setting up covert surveillance, or by posing as potential participants."[165] The greater the efforts that must be engaged in by law enforcement officials and others to observe public sex, the more likely it is that the sexual actors in question are taking the necessary steps to exclude unwilling gazers and other potential intruders.[166]

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[164] In Young v. State, 849 P.2d 336 (Nev. 1993), the police suspected that sexual conduct was taking place in a public restroom located in a public park. Visual surveillance of the bathroom proved to be "futile," however, because the officers "could be seen and heard approaching the stalls, thus enabling the individuals to discontinue their activities and elude detection." *Id.* at 339. The fact that the sexual actors were apparently effective in shielding their conduct from unwilling gazers led the "officers [to] set up a monitor and video equipment in a maintenance room separating the men's and women's restrooms. A miniature camera was installed in a metal alarm box with a grate-type bottom located above the two stalls over the partition." *Id.* (footnote omitted).

[165] CALIFIA, *supra* note 34, at 76. Califia quotes Matthew Coles, a lawyer who represented men charged with soliciting others to have sex in a public place (and who later became the Director of the ACLU's Lesbian and Gay Rights Project), as stating that "[i]n four years of practicing law, I've *never* seen a [public sex] case based on the complaint of a citizen (not a cop) who got propositioned when he didn't want to be." *Id.* at 77 (citation omitted).

[166] The actions of the police, and their methods of investigating public sex, are important in addressing the seemingly persistent problem of the *unequal* enforcement of solicitation and public lewdness laws against men who have sex with men. There is considerable evidence that law enforcement officials frequently target consenting and uncompensated male on male sexual solicitation and conduct in public places—frequently by conducting extensive and expensive investigations—while paying little attention to the same conduct when the sexual actors in question are of different sexes. *See* 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, 84 (noting that "[m]any police departments employ undercover operations designed to entrap gay men into offering or requesting oral sex . . . . Although most sodomy laws apply equally to heterosexual and homosexual sodomy, police departments do not expend resources in search of heterosexuals willing to give or receive oral sex (or other forms of sodomy)."). *See also* Pryor v. Mun. Ct., 599 P.2d 636, 644 (Cal. 1979) ("Three studies of law enforcement in Los Angeles County indicate that the overwhelming majority of arrests for violation [of the lewd conduct statute] involved male homosexuals.") (citation omitted); *id.* at 644 n.8 ("A perusal of . . . studies suggests both that the police selected techniques and locations of enforcement deliberately designed to detect a disproportionate number of male homosexual offenders, and that they

Given the visceral reaction by many individuals to the very notion of public sex, many (perhaps most) judges, at least initially, might be unwilling to conclude that the expectations of privacy by sexual actors in public sites are reasonable.[167] At the very least, however, courts should

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arrested male homosexuals for conduct which, if committed by two women or by a heterosexual pair, did not result in arrest.") (citations omitted). For newspaper accounts of the targeting of gay men by law enforcement agencies, see, e.g., Amber Arellano et al., *Group Says Detroit Cops Target Gays: Decoys Used to Raise Case, Triangle Charges*, DETROIT FREE PRESS, July 6, 2001, at 1B; Matt Lait, *LAPD Officers Target Gays, Police Commission is Told*, L.A. TIMES, May 6, 1998, at B3. The actions of the Detroit police led the city council to approve an award of $170,000 to settle litigation challenging a pattern of entrapment in the enforcement of public lewdness laws against gay men at a local park. *See* Darren A. Nichols, *Detroit Settles Lawsuit over Police Sting on Gays*, DETROIT NEWS, May 16, 2002, at D2. *See also* Martinez v. Port Auth. of N.Y. & N.J, No. 01 Civ.721(PKC), 2005 WL 2143333 (S.D.N.Y Sept. 2, 2005), *aff'd*, 445 F.3d 158 (2d Cir. 2006) (defendants ordered to pay $464,000 to compensate plaintiff for police policy of arresting men for public lewdness at a subway station without probable cause); Baluyut v. Super. Ct., 911 P.2d 1, 4 (Cal. 1996) (defendants presented evidence of ten arrests over a two-year period which led the trial court to conclude "that the operation was focused solely on persons who had a proclivity to engage in homosexual conduct."); State v. Pinkal, No. C6-00-508, 2001 WL 55463 at *7 (Minn. Ct. App. Jan. 23, 2001) (noting that defendant presented "statistical evidence . . . show[ing] that there is a higher incidence of indecent conduct citations issued in an area where gay men tend to gather [and] [b]y way of affidavit . . . that there are witnesses who . . . should be able to testify that laws proscribing indecent conduct are selectively enforced against gay men because of anti-homosexuality sentiment.").

The investigation of public sex by many police departments, then, raises serious equal protection issues. The actions taken by law enforcement officials, however, are also relevant to the substantive due process issues discussed in this Article because they show the lengths to which those officials must go to in order to put themselves in a position to view sexual conduct that the sexual actors attempt to shield from others. *See* HUMPHREYS, *supra* note 55, at 84-85 (describing surveillance techniques used by police, including cameras and two-way mirrors); *Young*, 849 P.3d at 339 (describing police's use of a miniature camera to monitor a public bathroom).

[167] The ability of the "reasonable expectation of privacy" standard to afford protection to sexual actors in public places will, of course, depend on the willingness of judges to recognize that individuals who engage in sexual acts in public places can have legitimate expectations of privacy in at least some circumstances. It is admittedly troubling in this regard that, in the Fourth Amendment context, the shift from a property-based analysis to a privacy-based one, which at first seemed to herald greater protections for individuals, has been used more recently by the Court to limit those protections. *See* Clancy, *supra* note 122, at 340 ("while a liberal Court substituted privacy in lieu of property analysis to expand protected interests, a conservative Court has employed privacy analysis as a vehicle to restrict Fourth Amendment protections.") (citations omitted). The Court has done this by concluding that individuals lack a reasonable expectation of privacy in a broad range of circumstances. For a summary of the Court's Fourth Amendment caselaw on this point, see *id.* at 331-39.

dispense with the categorical rule that limits the right to sexual liberty to the home and instead adopt the "reasonable expectation of privacy" standard that has become the cornerstone of Fourth Amendment jurisprudence. This would, in turn, encourage individuals who choose to engage in public sex to introduce evidence regarding the efforts, made by themselves and others, to privatize particular public sex sites in ways that make it unlikely that their sexual conduct will be viewed by nonconsenting others.[168] Eventually, this might lead courts, prosecutors, and the public to take another look at what actually takes place in many instances of public sex and to perhaps recognize the seemingly counterintuitive—but often descriptively accurate—proposition that sex in public places can be extremely private.

IV. PROBLEMATIZING THE GEOGRAPHIC PRIVATE/PUBLIC DISTINCTION IN MATTERS RELATED TO SEX

There will undoubtedly be objections to the idea that the constitutional right to sexual liberty applies to public sites, especially those in open access areas. Most of those objections will be grounded in the view

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[168] The district court judge in *United States v. Malone*, 822 F. Supp 1187 (Pa. D. 1993), applied the type of analysis that this Article advocates in public sex cases. The defendant in *Malone* was convicted by a federal magistrate of engaging in a lewd act at a National Park in Pennsylvania. Under Pennsylvania law, made applicable to federal property under the Assimilative Crimes Act, 18 U.S.C. 13 (Supp. 1988), it is a criminal offense for a person to engage in "any lewd act which he knows is likely to be observed by others who would be affronted or alarmed." 18 PA. CONS. STAT. ANN. § 5901 (West 2000). The district court reversed, concluding that the defendant did not intend to engage in conduct that he knew would alarm or affront others. *Malone*, 822 F. Supp at 1189. In doing so, the court noted the steps that the defendant took to privatize the public site:

> [T]he evidence shows that Malone [the defendant] invited Hetrick [an undercover police officer] to walk a good distance from the picnic area to a "normally wooded" (as opposed to "heavily wooded") area. This area was several yards from the railroad grade, was accessible only by a narrow foot path, and was shielded from the main trail by trees. Then, by the time Malone "rubbed [Hetrick's] chest in a circular motion," the men were another 20 yards from the open space. There was no testimony that anyone else did see them or was likely to see them. Every detail even of Hetrick's story suggests Malone was looking for privacy, not for public display.

Id. (emphasis added). Additionally, the court in *Malone* correctly concluded that the undercover officer did not qualify as an "other" who was likely to be affronted or alarmed by the defendant's conduct because the former agreed to accompany the latter for a walk away from the picnic area. The policeman also observed the defendant rub his groin area "for several *minutes* . . . without indicating alarm." *Id.* at 1188-89.

that particular geographies are either intrinsically public (e.g., a park) or intrinsically private (e.g., a home) and that the "natural" characteristics of sites should determine the ambit of the sexual liberty rights that can be exercised therein.[169] This essentialized understanding of geography, however, fails to account for the ways in which human practices and activities give rise to different ways of seeing and understanding particular geographies. In the end, a private/public distinction that views the two categories of places as mutually exclusive fails to reflect the multiplicity of meanings that accompany human practices and activities in any given site.

That a rigid public/private distinction is of limited analytical use is clear from the fact that even the home, the most private of sites, is subject to a significant degree of public oversight and regulation. There are many aspects of what takes place in the home that are legitimate grounds of public regulation. The state, for example, has the authority to regulate everything from the number of people who can live in a particular dwelling[170] to whether certain substances (such as illegal drugs) may be consumed therein. This exercise of public regulatory authority does not deny that in some instances and for certain purposes, what takes place in the home is deemed private and is thus shielded from public regulation. The point instead is that the line between the public and private in this context is neither static nor pre-determined by a site's intrinsic nature. There is perhaps no better illustration of this than the fact that sexual intimacy between two individuals of the same sex in the home was a legitimate subject matter of governmental regulation until June 26, 2003, when the Supreme Court issued its opinion in *Lawrence v. Texas*.[171]

In the same way that seemingly private places can be rendered public for purposes of regulation, seemingly public places can be privatized for certain purposes. The phenomenon of public sex illustrates that there is no natural division between the public and the private in even the most public of places.[172] Where the line between the public and the private is

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[169] *See, e.g.*, United States v. Mather, 902 F. Supp. 560, 565 (Pa. D. 1995) (concluding that "every square inch of the [National] Park's grounds is public, and thus Park grounds cannot supply a venue for sex akin to the privacy of a room").

[170] *See, e.g.*, Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding constitutionality of an ordinance that prohibited more than two unrelated individuals from living together in an area zoned for single-family residential use). *See also* Soules v. U.S. Dep't of Housing & Urban Dev., 967 F.2d 817, 819 (2d Cir. 1992) (noting a "New York State Health Department rule that required separate bedrooms for children of different sexes over five years old").

[171] 539 U.S. 558 (2003).

[172] *See supra* Part II.

drawn varies from site to site, and is determined by the human activities and practices that take place therein. Those activities and practices destabilize seemingly pre-determined understandings of the publicness or privateness of particular sites. As William Leap notes,

> [c]ertainly, the regulatory authority of the state can designate any location as public space and enforce that designation through various means. But such regulations cannot prevent interpretations of public space in completely nonregulatory terms . . . ; nor can they prevent assertions of privacy within such locations. . . . Accordingly, rather than assuming that interpretations of *public* or *private* space are locations, fixed within local terrain, it seems more appropriate to treat *public* and *private* as attributes of landscape which are assigned to particular sites by particular social actors and for particular reasons.[173]

The law of public sex as currently constituted, which grants individuals little or no immunity from criminal prosecution, deploys a rigid and formalistic understanding of "public places." To see why this is the case, it is helpful to briefly summarize the way in which the terms "space" and "place" (which are usually used as synonyms by lay people) differ in meaning for many in the field of geography.

"[U]ntil the 1970s, most human geographers considered space to be a neutral container, a blank canvas that is filled by human activity."[174] From this perspective, it was possible to conceptualize space in entirely objective and empirical ways that were independent of human experiences and interactions.[175] As a result, many geographers understood their field as one that called exclusively for measurement and quantification of observable and natural phenomena.

Beginning in the 1970's, however, a group of geographers began to question the presumed objectivity of this type of analysis. Some of the most important early dissenters, inspired by insights gleaned from psychology, "develop[ed] a behavioural perspective that explored the role of the conscious mind in shaping human spatial behaviour."[176] Although these

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[173] Leap, *supra* note 89, at 136.

[174] *Editors' Introduction*, *in* KEY THINKERS ON SPACE AND PLACE 1, 4 (Phil Hubbard et al. eds., 2004) [hereinafter KEY THINKERS ON SPACE AND PLACE].

[175] "This absolute or 'empirico-physical' conception suggested that space can be conceived as outside of human existence; rather than playing an active role in shaping social life, it is regarded as a backdrop against which human behaviour is played out . . . ." *Id.*

[176] *Id.* (citation omitted).

thinkers still largely clung to "the tenets of positivist inquiry," they did so by emphasizing notions of subjectivity and the importance of social relations in the conceptualization of space.[177]

This initial critique of the understanding of geography as an entirely objective science eventually gave way to a more fundamental critique of the long-held assumption within the discipline that it was possible to conceptualize space independently of human existence. It was this critique, which was influenced by both Marxist and postmodernist theories, that led to the emergence of the concept of "place . . . as a particular form of space, one that is created through acts of naming as well as the distinctive activities and imaginings associated with particular spaces. For many geographers [today], place . . . represents a distinctive (and more-or-less bounded) type of space that is defined by (and constructed in terms of) the lived experiences of people."[178]

To many contemporary geographers, then, it does not make sense to conceive of distinct spaces as having meanings that are independent of the human interactions that occur therein. From this perspective, the meanings of *private* places and *public* places, for example, are attributed through human practices and activities rather than through characteristics that are somehow pre-determined and static. This understanding "recognizes the open and porous boundaries of place as well as the myriad interlinkages and interdependencies among places. Places are thus relational and contingent, experienced and understood differently by different people; they are multiple, contested, fluid and uncertain (rather than fixed territorial units)."[179]

In contrast to the ways in which many contemporary geographers understand the different meanings and characteristics of "place," the law of public sex continues to cling to a rigid and essentialized understanding of "public places," one that views sites such as parks and public bathrooms as having intrinsic and uniform characteristics that determine the type of

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[177] *Id.*

[178] *Id.* at 5. *See also* YI-FU TUAN, SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE 6 (1977) ("What begins as undifferentiated space becomes place as we get to know it better and endow it with value.").

[179] *Editors' Introduction*, *in* KEY THINKERS ON SPACE AND PLACE, *supra* note 174, at 6. The literature on this topic is vast. Some representative examples include THE POWER OF PLACE: BRINGING TOGETHER GEOGRAPHICAL AND SOCIOLOGICAL IMAGINATIONS (John A. Agnew & James S. Duncan eds., 1989); THE ANTHROPOLOGY OF LANDSCAPE: PERSPECTIVES ON PLACE AND SPACE (Eric Hirsch & Michael O'Hanlon eds., 1995); and TUAN, *supra* note 178.

conduct that can appropriately take place therein. When individuals use public sites for sexual purposes, they challenge and contest the notion that those sites, because they are legally and culturally deemed to be "public," should also automatically be defined as nonsexual zones. By privatizing those sites, even if only temporarily, sexual actors contribute to the attribution of different meanings to them.[180] Those attributions are neither static nor permanent, but instead vary according to the practices and expectations of the site users at any given time.[181]

The boundaries between the private and the public in the context of sex and sexuality are much more fluid and contestable than the current law of public sex recognizes. Indeed, as Jeffrey Weeks argues, those

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[180] *See* Bell, *supra* note 31, at 315 ("By eroticising anonymity and publicity, (some) participants in public (homo)sex are actively challenging hegemonic definitions of public and private") (citations omitted). *See also* Gordon Brent Ingram, *Marginality and the Landscapes of Erotic Alien(n)ations*, *in* QUEERS IN SPACE, *supra* note 28, at 27, 39 ("[P]ublic space, like both conventional and marginal sexual identities, has been and will continue to be constructed and reconstructed."); Ingram et al., *supra* note 55, at 21 ("A queer space is an activated zone made proprietary by the occupant or *flâneur*, the wanderer. It is at once private and public. Our cities, our neighborhoods, our homes, are loosely defined territories inscribed not merely by the laws of proprietary ownership but by implicit and shifting inflections of presence, conspicuous or otherwise.").

[181] Although the issue is beyond the scope of this Article, much has been written on the use of public spaces (in particular urban ones) by sexual minorities to foster communities of friendship, support, and political activism in a society that is generally hostile to them. *See e.g.*, Robert Aldrich, *Homosexuality and the City: An Historical Overview*, *in* CITIES OF PLEASURE: SEX AND THE URBAN SOCIALSCAPE 89 (Alan Collins ed., 2006); Manuel Castells & Karen Murphy, *Cultural Identity and Urban Structure: The Spatial Organization of San Francisco's Gay Community*, *in* URBAN POLICY UNDER CAPITALISM (Norman I. Fainstein & Susan S. Fainstein eds., 1982); Lawrence Knopp, *Sexuality and Urban Space: A Framework for Analysis*, *in* MAPPING DESIRE, *supra* note 31, at 149. When members of sexual minorities use public sites for *sexual* purposes they can be understood as engaging in a similar effort to appropriate geographies from which they have been traditionally excluded. While in theory, for example, everyone is able to walk through a public park, a same-sex couple who wants to do so while holding hands is likely to face opprobrium, harassment, and sometimes even violence. *See* Hubbard, *supra* note 46, at 56 ("Even in cities where the authorities are seemingly tolerant and even encouraging of gay tourism and nightlife . . . , it is evident that most gay men and women face routine prejudice, discrimination and violence on the streets.") (citation omitted). It would appear, however, that the process of geographic appropriation by public sex sexual actors has different implications than, for example, when gay people move into a particular neighborhood. For one thing, public sex sites are less stable and permanent geographies. *See id.* at 66 ("Unlike contemporary gay villages, red-light districts and other public expositions of sexual dissidence, . . . these spaces [are] not . . . fixed and permanent communities . . . . Instead, they [are] ephemeral sites of freedom and control which [can] be used to create fleeting but transitory identifications out of which new identities and citizenships could emerge.").

"borderlines are extremely difficult to detect, let alone police, and where we should stake out the fences between public passion and private conscience, or between private needs and public indifference, are far from certain."[182]

There are many aspects of sex that are public in nature. It is common, for example, for individuals to first meet their sexual partners in public places (such as on the streets, in workplaces, or in bars). Even when the sex occurs in a home or hotel room, the initial contact often occurs in places that are publicly accessible.[183] In addition, much of what individuals learn about sex and sexuality is learned from the broader culture.[184] When it comes to sex, most of what we do in private, we learn in public. Most sex, therefore, has a public dimension to it, regardless of whether it is consummated in a private or public place.

Indeed, our very understanding of sex and sexuality is determined publicly. As Michel Foucault famously recounted, one of the constitutive characteristics of the modern era is the ways in which scientific, medical, and psychiatric disciplines have subjected sex and sexuality to constant public discussion.[185] These disciplines have studied, analyzed, and schematized human sexuality through an endless discussion and cataloging of sexual desires, tendencies, and acts. As Foucault notes, beginning in the eighteenth century, "sex was taken charge of, tracked down as it were, by a discourse that aimed to allow it no obscurity, no respite."[186] He adds that "[w]hat is peculiar to modern societies . . . is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the* secret."[187]

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[182] *See* Bell, *supra* note 31, at 304 (quoting Jeffrey Weeks, Changing Sexual and Personal Values in the Age of AIDS, Address Before Forum on Sexuality Conference, Amsterdam (June 1992) at 2). *See also* WEEKS, *supra* note 108, at 222 (noting that public sex "places break with the conventional distinctions between private and public, making nonsense of our usual demarcations.").

[183] See Jagose, *supra* note 27, at ¶ 30 ("You can have sex in a quite private place that is publicly accessible; this is true anytime people meet in bars or clubs or bathhouses or chat rooms, even if they go home or to a hotel or to a locked cubicle.").

[184] "Sex is . . . public in the sense of being learned, or shared. Our most intimate pleasures and sensations are public in this sense." *Id.*

[185] *See generally* MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY (1990).

[186] *Id.* at 20.

[187] *Id.* at 35.

It is not just the disciplines discussed by Foucault that have sought to bring sex out in the open, as it were. It is fair to say that American commercial and cultural life is saturated with sexual images and discourses—as is clear to anyone who watches television programs and commercials for only a few minutes. This saturation belies the notion, upon which the contemporary law of public sex is grounded, that matters of sex and sexuality intrinsically belong to the sphere (whether conceptual or physical) of "the private." It would seem, then, that most sex, and not just public sex, embodies an amalgamation of the public and the private.

Society, however, is much more willing to tolerate (and in some cases even celebrate) the public manifestations of certain types of sex than of others. Our society, for example, does not seem particularly concerned by titillating images of half-naked different-sex couples in billboard advertisements that are viewed, willingly or not, by thousands of people (including many children).[188] And yet, we are quick to express dismay at the idea that two men, for example, might have sex in an isolated section of a public park, even if it is highly unlikely that they will be observed by others. The *certainty* that children will observe titillating heteronormative sexual images on a billboard is, under our current norms and regulations, of little social concern.[189] In contrast, the mere *possibility* that third parties might observe sex that takes place in the isolated area of a park is for many enough to justify social condemnation, and state regulation, of the sexual conduct in question. It would seem, therefore, that the issue is not so much *where* sex belongs, but is instead *what type of sex* belongs where.

A skeptic might argue that the relevant difference between these two examples is that in the case of the billboard, there is a *representation* of sexual conduct, while in the case of the park, there is *actual* sexual conduct, which is more harmful to those who are forced to observe without first consenting. This distinction, it can be argued, explains why society is more likely to condemn the sex in the park than the billboard. There are, however, two reasons why that distinction fails to entirely explain society's greater willingness to tolerate the latter than the former. First, it seems fair

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[188] *Cf.* Clark Hoyt, Editorial, *A Semi-Nude Minor? In the Times?*, N.Y. TIMES, Dec. 16, 2007, at 10 (quoting a *New York Times* editor who stated that "[w]e're well past the point in our culture when there is a bright line that separates sexually charged images of men and women just short of 18 from art.").

[189] *See* Ruskola, *supra* note 20, at 242 (noting that "'the world of public intimacy' . . . remain[s] reserved for manifestations of normative heterosexuality.") (quoting LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON: ESSAYS ON SEX AND CITIZENSHIP 5 (1997)).

to assume that the public would be less tolerant of the billboard if the scantily clad couple in the titillating advertisement was comprised of two men or two women. If the billboard portrayed a same-sex couple, there would undoubtedly be calls from many quarters to protect children from being exposed to homosexuality. Second, the aggressiveness with which law enforcement agencies have historically investigated public sex between men, while largely ignoring public sex between different-sex individuals,[190] suggests that what ultimately matters when it comes to condemnation and regulation of public sex is not the sexual conduct itself, but *who* engages in that conduct.

There is admittedly a tension between the "publicness" of certain sites (such as parks and rest stops) and the "privateness" of the sexual conduct that can take place therein. That tension, however, does not give rise, as the current law of public sex seems to assume, to an *intrinsic* contradiction that requires the application of a categorical rule that leaves the sexual conduct in question completely outside of constitutional protection.[191] Instead, the tension highlights the fluidity that, as already noted, inheres in the boundaries between the "public" and the "private" in matters of sex and sexuality.[192] If "the most private human conduct"[193] can take place in the most public of places with little chance of being detected by nonconsenting third parties, that suggests not that the private sexual conduct is occurring in the "wrong place," but instead that what our laws and culture deem to be a "public place" is not always public for all purposes by all users in all instances.

CONCLUSION

The notion that the scope of the right to sexual liberty should depend in part on the nature of the site where the right is exercised is deeply ingrained in both our law and our norms. As this Article has shown, however, it is possible to delink the concept of privacy from the privateness or publicness of the sites where sexual conduct takes place. Such a delinking does not require questioning the proposition that individuals have a legitimate interest in not having to observe sexual conduct by others

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[190] *See supra* note 166 and accompanying text.

[191] *See supra* notes 101-12 and accompanying text.

[192] *See supra* notes 158-89 and accompanying text.

[193] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

unless they consent. Instead, the delinking simply recognizes the fact that, as the sociological literature shows, those who engage in public sex frequently and effectively privatize public sex sites.[194]

There is an inconsistency between the Supreme Court's geographization of the right to privacy under the Due Process Clause, as it relates to sexual conduct, and the right to privacy under the Fourth Amendment. In interpreting the latter provision, the Supreme Court has made it clear that it protects people and not places.[195] The application of a similar analytical framework under the Due Process Clause, as this Article has suggested, should lead courts to recognize the extent to which particular sexual actors are able to successfully privatize certain public sites.[196]

Same-sex sexual conduct was once so highly stigmatized that courts refused to grant it constitutional protection regardless of *where* it took place.[197] Under this approach, geography was irrelevant in determining the authority of the state to regulate same-sex sexual conduct. After *Lawrence v. Texas*, place matters because consensual sex is now protected from state regulation only as long as it takes place in the home.[198] This geographization of the right to sexual liberty, however, leaves unprotected all sexual conduct that takes place in public places, no matter how private that sexual conduct might be.

The social stigma faced by those who engage in public sex is analogous to the stigma that once applied to all same-sex sexual conduct. As this Article has argued, however, when considerations of consent and privacy are present, the sexual conduct that is part of public sex merits constitutional protection.

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[194] *See supra* notes 55-109 and accompanying text.

[195] *See supra* notes 120-23 and accompanying text.

[196] *See supra* Part III.C.

[197] *See* Bowers v. Hardwick, 478 U.S. 186, 194-96 (1986).

[198] 539 U.S. 558 (2003). *See supra* notes 1-9 and accompanying text.