

# “One Train May Hide Another”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure

David Alan Sklansky\*

*One of the greatest practical achievements of Katz v. United States, now largely forgotten, was helping to restrict the once common practice of spying on men in toilet stalls to catch homosexuals. This may not have been accidental. The conception of privacy championed in Katz resonated strongly with pervasive concerns in the 1960s about homosexuality and its policing. The Justices, or at least some of them, may well have understood that Katz would make it harder for the police to keep toilet stalls under clandestine surveillance, and there is reason to believe they would have welcomed that result. In fact, homosexuality and its policing — especially male homosexuality and its policing — may be a suppressed subtext of modern criminal procedure more broadly. Anxieties about peepholes and undercover decoys in public lavatories, and about related investigative tactics targeted at homosexuality elsewhere, helped shape what the Court thought about the police and about the kinds of threats they posed. Traces of those anxieties may be visible in three pervasive features of the criminal procedure revolution: the preoccupation with protecting a particular kind*

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\* Professor of Law, University of California at Berkeley, Boalt Hall School of Law; John H. Watson, Jr. Visiting Professor of Law, Harvard Law School. An earlier version of this Article was presented at the March 2007 UC Davis Law Review Symposium marking the fortieth anniversary of *Katz v. United States*; it grew out of ideas I first floated at a conference at Harvard Law School in April 2006. For criticism, guidance, and help along the way, I am indebted to Kathryn Abrams, John Barrett, James Brudney, Paul Butler, Ann Carlson, Sharon Dolovich, Herbert Donaldson, Jerome Falk, Andrew Guzman, Angela Harris, Kenneth Karst, Christopher Kutz, Chrysanthi Leon, Gillian Lester, Tracey Maclin, Erin Murphy, Melissa Murray, Charles Reich, William Rubenstein, Paul Schwartz, Carol Steiker, Jordan Steiker, Simon Stern, Jeannie Suk, Eric Talley, Laurence Tribe, Alex Whiting, and Kenneth Ziffren, and to workshop participants at Berkeley, Harvard, and Yale. Shobitha Bhat, Meredith Desautels, Elizabeth Lambert, Sandhya Ramadas, and Sarah Spiegel provided superb research assistance.

*of privacy, the view of police as psychologically antidemocratic, and the commitment to reining in police discretion with judge-made rules.*

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## INTRODUCTION

Traveling through Kenya in the 1980s, the poet Kenneth Koch saw a sign at a railroad crossing warning that "one train may hide another." The admonition struck him as so evocative and so generative that years later he expanded it into sixty-eight lines of free verse. One idea may hide another, he wrote, one song may hide another, one injustice may hide another. "It can be important / To have waited at least a moment to see what was already there."<sup>1</sup>

One past may hide another, too. One narrative, or a cluster of narratives, can obscure other understandings, other fragments of our cultural inheritance, just as "one colonial may hide another, / One blaring red uniform another, and another, a whole column."<sup>2</sup> This Article is about one of those columns. It is about how conventional understandings of the U.S. Supreme Court's landmark ruling in *Katz v. United States*<sup>3</sup> have concealed part of the decision's meaning and significance. *Katz* is the case in which the Supreme Court held that the police need a warrant to eavesdrop electronically on a call made from a telephone booth. *Katz* is also the source for the modern understanding of the scope of the Fourth Amendment — the notion that the constitutional prohibition of "unreasonable searches and seizures"<sup>4</sup> protects, at its core, "reasonable expectation[s] of privacy."<sup>5</sup> The decision is not generally understood as having much to do with the long, sordid history of the policing of sexuality, the history that led, two years after *Katz*, to the Stonewall Riots of 1969. But the connections between *Katz* and that history are strong. I will argue, in fact, that neither the shape that *Katz* took nor the ramifications it had can be fully understood without taking account of the history of homosexuality and its policing.

I have a larger goal in this Article as well. I want to suggest that homosexuality is a suppressed theme not just of the *Katz* decision but of criminal procedure law as a whole. It is by now commonplace that much of the Supreme Court's criminal procedure jurisprudence during the middle part of the twentieth century — "far more than the opinions themselves suggest" — was a form of race jurisprudence, prompted largely by the treatment of black suspects and black

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<sup>1</sup> KENNETH KOCH, *One Train May Hide Another*, in ONE TRAIN 3, 3-4 (1994).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> 389 U.S. 347 (1967).

<sup>4</sup> U.S. CONST. amend IV.

<sup>5</sup> *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

defendants in the South.<sup>6</sup> I want to propose that concerns about homosexuality, and about the policing of homosexuality, played a role in these decisions as well — not as large a role as race, not the same kind of role as race, but an important role nonetheless, and a role virtually never acknowledged either by the Court or by its commentators.

The silence, I will suggest, may not be accidental. There may be an element of purposeful avoidance, whether conscious or not, in the way that persecution of gay men and lesbians has been marginalized in criminal procedure law and scholarship. For if the Warren Court downplayed the theme of racial equality in its criminal procedure cases, it steered clear of almost any discussion of homosexuality — and criminal procedure scholars have mainly avoided the subject as well. There is widespread awareness that the police systematically harassed gay men and lesbians in the 1950s and 1960s. There was widespread awareness at the time, too, and widespread disapproval, at least in liberal, upper-middle-class circles. But it was not a matter for Supreme Court pronouncements, nor was it then, or has it since become, grist for much theorizing by criminal procedure scholars. The theme of homosexuality in criminal procedure has been hidden in plain sight, not so much invisible as simply unmentioned — in a word, closeted. It is criminal procedure's secret subtext.

It is a *secret* subtext not just in the sense that it has been collectively suppressed, but in another sense as well: it is a subtext *about* secrets. The literary theorist Eve Kosofsky Sedgwick has famously called homosexuality “the open secret” of modern Western culture,<sup>7</sup> one bearing a unique, “distinctly indicative relation . . . to wider mappings of secrecy and disclosure.”<sup>8</sup> The outer reach of Sedgwick's argument — her insistence on the “special centrality of homophobic oppression” to all of the “important knowledges and understandings of twentieth-century Western culture as a whole”<sup>9</sup> — has given even some admiring readers pause.<sup>10</sup> But one need not “place gayness at the

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<sup>6</sup> Carol S. Steiker, *Introduction* to CRIMINAL PROCEDURE STORIES, at vii, viii (Carol S. Steiker ed., 2006); see also, e.g., Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305-06 (1982); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156-59 (1998); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

<sup>7</sup> EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 22 (1990).

<sup>8</sup> *Id.* at 71.

<sup>9</sup> *Id.* at 2, 33.

<sup>10</sup> See, e.g., LEO BERSANI, HOMOS 68 (1995).

center . . . of western civilization"<sup>11</sup> to think Sedgwick has a point in suggesting that homosexuality, as a particularly vexing, notoriously preoccupying set of secrets, may have influenced our collective thinking about secrets more generally. And if this ever happened, it is likely to have happened in the 1960s — a time of unusually intense public anxiety about homosexuality and its policing, the tail end of a particularly nasty campaign of homophobia, and, as it happens, the formative period for modern criminal procedure. So if homosexuality is not the key to twentieth-century epistemology, it still might be expected to reverberate in the way secrets are handled in criminal procedure. I will argue here that it in fact has done so, in ways that themselves have stayed a kind of open secret.

The Article is organized as follows. Part I recounts the traditional understanding of the *Katz* decision and its significance, drawing on my treatment of *Katz* in Carol Steiker's edited volume of *Criminal Procedure Stories*.<sup>12</sup> I pick that discussion not because it is especially trenchant but because it illustrates rather nicely the weakness I want to criticize in the conventional view of *Katz*.

The weakness is discussed in Part II of the Article, and it consists in what the traditional understanding of *Katz* leaves out: the role the decision played in responding to the widespread use of a particularly troubling investigative technique, unrelated to telephone eavesdropping, without ever mentioning the technique itself. The technique was patrolling for homosexual sodomy by spying on men in toilet stalls. One of the greatest practical achievements of *Katz*, now largely forgotten, was helping to restrict this sorry practice, and in the process giving aid and encouragement to the fledgling movement for gay rights. This benefit, moreover, may not have been entirely serendipitous. The Justices, or at least some of them, may well have understood that *Katz* would make it harder for the police to keep toilet stalls under clandestine surveillance, and there is reason to believe they would have welcomed that result. What they could not bring themselves to do, as a Court, was to publicly denounce the practice, or even to address it directly. But the conception of privacy championed in *Katz* resonated strongly with the concerns raised by toilet stall spying, and by the harassment of gay men and lesbians more broadly. In fact, the reasoning of *Katz*, and the linguistic formula of "reasonable expectations of privacy," had their closest

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<sup>11</sup> *Id.*

<sup>12</sup> David A. Sklansky, *Katz v. United States: The Limits of Aphorism*, in *CRIMINAL PROCEDURE STORIES*, *supra* note 6, at 223-60.

antecedents in a smattering of lower court decisions and scholarly writing on the legality of toilet stall surveillance.

In Part III of the Article, I broaden my focus and suggest that homosexuality is a suppressed subtext of criminal procedure as a whole, or at least criminal procedure as constructed in the 1960s and 1970s. I do not claim that criminal procedure in those years was really all about homosexuality, or even that police harassment of gay men and lesbians was as important as police racism in shaping the Warren Court's criminal procedure revolution. But I do want to cast doubt on William Eskridge's suggestion that "[t]he Justices would have been shocked that their decisions were being used to empower gay people."<sup>13</sup> Homosexuality and its policing — especially *male* homosexuality and its policing — were an important part of the background against which the Court constructed the modern constitutional law of the criminal process. Men's room surveillance, in particular, was a notorious fixture of 1960s law enforcement. When news broke in August 2007 that Senator Larry Craig had been arrested for soliciting sex in an airport men's room (and had quietly pleaded guilty to a reduced charge of disorderly conduct), many people were surprised that police in Minneapolis were still spending their time patrolling undercover for such overtures.<sup>14</sup> No one would have been surprised by such practices forty years earlier. Anxieties about peepholes and undercover decoys in public lavatories, and about related investigative tactics targeted at homosexuality elsewhere, helped shape what the Court thought about the police and about the kinds of threats they posed. Traces of those anxieties, moreover, may be visible in a number of key decisions, ranging from the focus on a particular kind of privacy in *Katz* to the invalidation of catchall vagrancy statutes in *Papachristou v. City of Jacksonville*.<sup>15</sup> Given the large role that criminal justice cases like these played in the early history of the gay rights movement, it is remarkable, as Eskridge has pointed out, how utterly absent gay men and lesbians were from the texts of the decisions.<sup>16</sup> But the silence may have reflected avoidance rather than obliviousness, discomfort rather than indifference.

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<sup>13</sup> William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 829 (1997).

<sup>14</sup> See Laura M. Mac Donald, Op-Ed, *America's Toe-Tapping Menace*, N.Y. TIMES, Sept. 2, 2007, at D10; Patti Murphy & David Stout, *Idaho Senator Says He Regrets Guilty Plea in Restroom Incident*, N.Y. TIMES, Aug. 29, 2007, at A19.

<sup>15</sup> 405 U.S. 156, 162 (1972).

<sup>16</sup> See Eskridge, *supra* note 13, at 956.

For some Justices, in fact, the silence may have been tactical. There may have been advantages, particularly in the 1960s, to combating police harassment of homosexuals indirectly, rather than addressing the issues head on. But there were also costs, I suggest in the conclusion to this Article, just as there were, and still are, costs to larger strategies of silence about homosexuality. Those costs are the most important reason to recover criminal procedure's secret subtext. Senator Craig notwithstanding, anxieties about homosexuality and its policing no longer influence attitudes toward law enforcement the way they once did, partly because police persecution of gay men and lesbians has greatly abated. But neglect for the role that homosexuality played in shaping modern criminal procedure remains part of the broad pattern of marginalization and enforced invisibility that can still demean gay lives and gay experience.

A comment about terminology is in order at the outset. The word "homosexual" gives offense to many gay men and lesbians, and for good reason: it carries strong connotations of medicalization and demonization. But using a term like "gay" or "queer" in connection with debates over sexuality in the mid-twentieth century can misleadingly transfer modern sensibilities to an earlier time. Much of the now rich field of "queer studies," in fact, has been devoted to examining the artificiality and historical contingency of categories of sex, gender, and sexuality.<sup>17</sup> This body of work raises the stakes in choosing labels, but it provides no easy answer; on the contrary, it denies the existence of any objectively "right" way to talk about sex and sexuality, today or in any other era.<sup>18</sup> In the end, I have chosen to rely heavily on the term "homosexual," in part because my argument depends less on subjective experiences of same-sex intimacy than on public ideas about it, and "homosexual" was the dominant term with which those ideas were framed in the periods I will be discussing. But I will sometimes refer to "gay men" and "lesbians," even when discussing these earlier periods — sometimes to flag that I am talking at these junctures about actual people, and not their public images, and sometimes simply to be jarring, to remind myself and my readers not to reify the concept of "homosexuality" and to be wary of its baggage.

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<sup>17</sup> For helpful overviews, see JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 106-279 (2006); ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* (1996).

<sup>18</sup> See HALLEY, *supra* note 17, at 11-15; JAGOSE, *supra* note 17, at 101-26.

## I. KATZ AS WE KNOW IT

In December 1967 the Supreme Court reversed an interstate wagering conviction and \$300 fine in the case of Charlie Katz, a small-time Los Angeles sports bettor who may or may not also have been operating as a bookie. The Court concluded that agents of the Federal Bureau of Investigation had violated the Fourth Amendment's prohibition against "unreasonable searches and seizures" by bugging a pair of public telephone booths from which Katz had placed his bets.<sup>19</sup>

The decision was immediately seen as momentous on two different levels. First, and more specifically, it settled a decades-long controversy over the constitutional status of electronic eavesdropping. Katz made clear both that surveillance of this kind constituted a "search" within the meaning of the Fourth Amendment (contrary to what the Court itself had said a half century earlier in its much reviled decision in *Olmstead v. United States*<sup>20</sup>), and that warrants could properly issue for such searches (rejecting widespread speculation that electronic snooping might be flatly unconstitutional<sup>21</sup>). Second, and more generally, Katz laid the groundwork for a new understanding of — or at least a new way to talk about — the Fourth Amendment's purpose and scope. Justice Stewart's majority opinion in Katz decisively abandoned an old view (also associated with *Olmstead*) that the Fourth Amendment protected only against physical trespasses, and replaced it with a focus on a more freewheeling, less territorial version of privacy. The Amendment, the Court grandly declared, "protects people, not places."<sup>22</sup> Therefore "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," whereas "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."<sup>23</sup> Concurring separately, Justice Harlan read all this to mean the Fourth Amendment was concerned with "reasonable expectation[s] of privacy" — or, put otherwise, "expectation[s] of privacy . . . that society

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<sup>19</sup> See Sklansky, *supra* note 12, at 224-26.

<sup>20</sup> 277 U.S. 438, 465-66 (1928); see WALTER F. MURPHY, WIRETAPPING ON TRIAL: A CASE STUDY IN JUDICIAL PROCESS 125-29, 133 (1965).

<sup>21</sup> See *Osborn v. United States*, 385 U.S. 323, 352-53 (1966) (Douglas, J., dissenting); *Lopez v. United States*, 373 U.S. 427, 463-65 (1963) (Brennan, J., dissenting); TELFORD TAYLOR, *Search, Seizure, and Surveillance*, in TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19, 81-85 (1969); Samuel Dash, *Katz — Variations on a Theme by Berger*, 17 CATH. U. L. REV. 296, 308-09 (1968).

<sup>22</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>23</sup> *Id.*

is prepared to recognize as 'reasonable.'"<sup>24</sup> The Court as a whole quickly embraced this gloss,<sup>25</sup> and today, four decades later, *Katz* remains a landmark both because it provides the constitutional framework that continues to govern electronic surveillance, and because it provides the modern test for a "search" within the meaning of the Fourth Amendment. A "search," today, is an infringement on a "reasonable expectation of privacy."

Among scholars *Katz* is widely viewed as something of a failure. The problem is not what *Katz* said about electronic surveillance. The *Katz* compromise — that electronic surveillance is constitutional, but only with a warrant — commands strong support. The compromise was cemented by the federal wiretap statute, adopted in 1968;<sup>26</sup> by the Supreme Court's unanimous 1972 decision extending *Katz* to national security investigations, at least in their "domestic aspects";<sup>27</sup> and by the Foreign Intelligence Surveillance Act of 1978.<sup>28</sup> Today there are debates about applying this framework outside the context of domestic law enforcement (to foreign intelligence gathering, in particular), and to new technologies of communication (to the Internet, in particular). There are also debates about how much credit for this compromise belongs to the Court and how much belongs to Congress and state legislatures.<sup>29</sup> But almost no one argues that wiretaps should be allowed without warrants in run-of-the-mill criminal cases, or, at the other extreme, that electronic eavesdropping should be impermissible even with a warrant.<sup>30</sup> That part of *Katz*'s legacy is secure.

The problem has to do with the larger ambitions of *Katz* — with the test the case provides for determining whether any particular activity by the police rises to the level of a "search" regulated by the Fourth Amendment. "Reasonable expectation of privacy" sounds nice, but what does it mean? *Katz* itself offers little guidance on this score.

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<sup>24</sup> *Id.* at 360-61 (Harlan, J., concurring).

<sup>25</sup> See *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

<sup>26</sup> Omnibus Crime Control and Safe Streets Act of 1968 tit. 111, Pub. L. 90-351, 82 Stat. 211 (codified as amended at 18 U.S.C. §§ 2510-2522 (2000)).

<sup>27</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 321 (1972).

<sup>28</sup> Pub. L. No. 95-511, 92 Stat. 1783 (codified in pertinent part, as amended, at 50 U.S.C. §§ 1801-1811 (2000)).

<sup>29</sup> See, e.g., Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 839-56 (2004); David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 59-60 (2006); William J. Stuntz, *Of Seatbelts and Sentences, Supreme Court Justices and Spending Patterns — Understanding the Unraveling of American Criminal Justice*, 119 HARV. L. REV. F. 148, 155 (2006).

<sup>30</sup> See Sklansky, *supra* note 12, 249-53.

Justice Stewart more or less just asserted that a person using a telephone booth is "surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." A contrary finding, he noted delphically, would "ignore the vital role that the public telephone has come to play in private communication."<sup>31</sup> Justice Harlan suggested in his concurring opinion in *Katz* that assessing the reasonableness of an expectation of privacy "generally . . . requires reference to a place." Charlie Katz had a reasonable expectation of privacy, in Justice Harlan's view, because the telephone booth was "a temporarily private place" — an "area where, like a home . . . occupants' expectations of freedom from intrusion are recognized as reasonable."<sup>32</sup>

There was a hint of this line of thinking in the majority opinion, as well. Surely, Justice Stewart wrote, a person can reasonably expect privacy when he "occupies" a telephone booth, "shuts the door behind him, and pays the toll that permits him to place a call."<sup>33</sup> But an emphasis on the physical space of the telephone booth was hard to reconcile with the most famous passage in the majority opinion: Justice Stewart's rejection of the entire "effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected,'" and his grand proclamation, repeatedly reaffirmed in later cases, that "the Fourth Amendment protects people, not places."<sup>34</sup> Justice Harlan's explicit analogy between telephone booths and homes seemed to trivialize even the narrow holding of *Katz*, the ruling on the constitutional status of electronic eavesdropping. "Would the case have been different," asked an incredulous early commentator, "if the pay phone had not been surrounded by a booth?"<sup>35</sup> Later commentators, particularly those writing in the era of proliferating cell phones and disappearing telephone booths, have largely shared the incredulity.<sup>36</sup> Tying reasonable expectations of privacy to special,

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<sup>31</sup> *Katz v. United States*, 389 U.S. 347, 352 (1967).

<sup>32</sup> *Id.* at 360-61 (Harlan, J., concurring).

<sup>33</sup> *Id.* at 352 (majority opinion).

<sup>34</sup> See *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *Minnesota v. Olson*, 495 U.S. 91, 95 n.5 (1990); *Segura v. United States*, 468 U.S. 796, 810 (1984); *United States v. Mendenhall*, 446 U.S. 544, 550 (1980); *Smith v. Maryland*, 442 U.S. 735, 739 (1979); *United States v. Chadwick*, 433 U.S. 1, 7, 9 (1977); *United States v. Dionisio*, 410 U.S. 1, 8 (1973); *Desist v. United States*, 394 U.S. 244, 246 (1969); *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

<sup>35</sup> Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 140.

<sup>36</sup> Including me. See David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 158 (2002); Sklansky, *supra* note 12, at 257-58.

constitutionally protected places has seemed to drain *Katz* of much of its significance.

Perhaps for this reason, the Court itself has never adopted this part of Justice Harlan's concurrence in *Katz* — at least not explicitly.<sup>37</sup> At the level of results, though, Justice Harlan has proved prescient. In case after case, the Court has read the Fourth Amendment to provide protections that are place-specific. Inside the home, the Fourth Amendment applies with special force;<sup>38</sup> outside the home — in cars, on highways, in fields, in offices, and even in backyards — Fourth Amendment protection drops off dramatically.<sup>39</sup> And even in the home, surveillance rarely rises to the level of a search unless it involves, if not technically a trespass, at least a physical intrusion.<sup>40</sup> The result has been that, outside the area of electronic surveillance, the scope of the Fourth Amendment under *Katz* has looked a lot like the scope of the Fourth Amendment under the old, "trespass" test of *Olmstead v. United States*. *Katz* has seemed to make little practical difference.

This is what has given *Katz* its reputation as a failure. At best, the "reasonable expectation of privacy" test has seemed fraudulent — a flashy, modern-sounding way to dress up results that are really driven by the property-based reasoning set forth in *Olmstead* and nominally rejected in *Katz*.<sup>41</sup> At worst, *Katz* traded the relatively firm footholds of the *Olmstead* test for a loosey-goosey, unreliable focus on expectations of privacy that "society is prepared to recognize as 'reasonable.'"<sup>42</sup> Indeed to many observers, on and off the Court, the

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<sup>37</sup> But cf. *Kyllo v. United States*, 533 U.S. 27, 32-33 (2001) (glossing *Katz* as protecting "the privacy of the telephone booth").

<sup>38</sup> See, e.g., *Wilson v. Layne*, 526 U.S. 603 (1999); *Segura*, 468 U.S. at 810; *United States v. Karo*, 468 U.S. 705, 714 (1984); *Payton v. New York*, 445 U.S. 573 (1980).

<sup>39</sup> See, e.g., *California v. Acevedo*, 500 U.S. 565 (1991) (cars); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (highways); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (offices); *California v. Ciraolo*, 476 U.S. 207 (1986) (backyards); *Oliver v. United States*, 466 U.S. 170 (1984) (fields). In lower courts, too, the "most important factor" governing whether physical surveillance amounts to a "search" within the meaning of the Fourth Amendment has been "the nature of the place subjected to physical surveillance." Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 390-91 (1997).

<sup>40</sup> See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 103-06 (1998) (Breyer, J., concurring). Isolated exceptions to this generalization tend for that very reason to be highly controversial. See, for example, the Court's 5-4 decision in *Kyllo*, 533 U.S. at 35-36.

<sup>41</sup> See, e.g., *Kerr*, *supra* note 29, at 808-15.

<sup>42</sup> See, e.g., Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5 (2002).

Katz test has come to seem wholly circular: an expectation of privacy is reasonable if the Court is willing to protect it.<sup>43</sup> And some scholars have concluded that privacy, even without the indeterminacy of the “reasonable expectations” test, is simply the wrong anchor for Fourth Amendment analysis.<sup>44</sup>

In broad outline, this is the account I gave of *Katz* in Professor Steiker’s collection of *Criminal Procedure Stories*. I was more sympathetic than other scholars have been to the “reasonable expectation of privacy” test, but equally dismissive of Justice Harlan’s suggestion that the key to the case was an analogy between telephone booths and private homes. The Court might have done better in *Katz*, I suggested, to make clear that it was protecting the confidentiality of a communication — that Charlie Katz’s expectation of privacy was reasonable not because of where he was but because of what he was doing.<sup>45</sup> I concurred with a view Samuel Dash had expressed the year after *Katz* was decided: that it was best understood as a case about electronic eavesdropping, not about the scope and purpose of the Fourth Amendment more generally.<sup>46</sup>

That view is completely consistent with the scholarly consensus about the difference *Katz* has made — or, better put, about the lack of any difference the case has made outside the area of wiretapping and bugging. The remainder of this article will explore what that view misses and what that consensus ignores.

## II. KATZ AND STONEWALL

It is true that the Supreme Court’s decision in *Katz* has had few repercussions for investigative practices not involving the home and not involving communications. But it had direct and important ramifications for one such practice: spying on men in toilet stalls. The literature on *Katz* rarely mentions men’s room surveillance, probably

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<sup>43</sup> Justice Scalia, for example, made precisely this charge in 1999, in an opinion joined by Justice Thomas. See *Carter*, 525 U.S. at 97 (Scalia, J., concurring).

<sup>44</sup> See, e.g., Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307 (1998); William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995); Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751 (1994).

<sup>45</sup> Sklansky, *supra* note 12, at 258; see also Sklansky, *supra* note 36, at 195-98; cf. *Alderman v. United States*, 394 U.S. 165, 178 (1969) (describing *Katz* as recognizing that “the Fourth Amendment protects a person’s private communications as well as his private premises”).

<sup>46</sup> See Dash, *supra* note 21, at 304 n.44.

because criminal procedure scholars think of this police tactic, if they think of it at all, as a small and squalid footnote in law enforcement history. But in 1967, when Katz was decided, spying on toilet stalls — through cracks, heating ducts, and other peepholes — was a familiar part of the pattern of harassment, humiliation, and persecution shaping the lives of gay people, particularly gay men. So the role that Katz played in helping to end the practice was no small thing.

The use of public washrooms as favored sites for homosexual encounters dates at least to the early twentieth century, and so do efforts by the police to combat the practice by surreptitious surveillance.<sup>47</sup> Men's rooms offered "privacy in public"<sup>48</sup> — a broadly accessible, readily identifiable venue where "it was easy to orchestrate sexual activity . . . so that no one uninvolved would see it."<sup>49</sup> By 1967, when Katz was decided, the use of public restrooms for impersonal homosexual activity was widespread and well known throughout the United States, and surreptitiously monitoring restrooms, through peepholes or with undercover decoys, had become a chief tactic in the policing of homosexuality.<sup>50</sup> Members of the UCLA Law Review, reviewing Los Angeles County police and court records in the mid-1960s, found that of 493 felony arrests for homosexual activity, 274 were made in public restrooms.<sup>51</sup> Most of these arrests were for sexual conduct directly witnessed by the arresting officers — typically, it seems, from hidden observation posts.<sup>52</sup>

Men's room spying would have accounted for an even larger share of sodomy enforcement in Los Angeles County in the mid-1960s were it

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<sup>47</sup> See GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 196-99 (1994); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U. L. REV. 703, 719 (1997).

<sup>48</sup> LAUD HUMPHREYS, *TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* 11 (Aldine Transaction ed., 2006) (1970).

<sup>49</sup> CHAUNCEY, *supra* note 47, at 197. Thus "[t]he observers' need to hide was significant; as even the police admitted, the men they observed would have stopped having sex as soon as they heard someone beginning to open the outer door." *Id.*

<sup>50</sup> See HUMPHREYS, *supra* note 48, at 84-85; Eskridge, *supra* note 47, at 718-19.

<sup>51</sup> Jon J. Gallo et al., *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643, 689 n.21, 707 n.134 (1966).

<sup>52</sup> *Id.* Of the 493 felony arrests reviewed, 459 were based on observations by the arresting officer. *Id.* at 708 n.142. Arrests by decoy officers posing as homosexuals and trolling for solicitations typically resulted not in felony arrests but in misdemeanor charges of lewd conduct, public indecency, or disturbing the peace — the same kind of charges these tactics generated decades later against Senator Larry Craig. *Id.* at 707, 827; see Murphy & Stout, *supra* note 14.

not for a pair of state judicial decisions in 1962. In *Bielicki v. Superior Court*, the California Supreme Court threw out evidence of sodomy that Long Beach vice squad officers had obtained by spying through a pipe overlooking two closed toilet booths in an amusement park. The court reasoned, unanimously, that the spying violated the search-and-seizure provisions of both the federal and California constitutions, because it invaded the "personal right of privacy of the person occupying the stall."<sup>53</sup> Several months later, in *Britt v. Superior Court*, the court reaffirmed its ruling in *Bielicki* and elaborated its rationale.<sup>54</sup> "The crucial fact," the justices explained, "was neither the manner of observation alone nor the place of commission alone, but rather the manner in which the police observed a place and persons in that place which is ordinarily understood to afford personal privacy to individual occupants." The "constitutionally protected right of personal privacy" protected a person not only at home but "when as a member of the public he is temporarily occupying a room . . . offered to the public for private, however transient, individual use."<sup>55</sup>

This was the reasoning later adopted in *Katz*, of course.<sup>56</sup> But *Bielicki* was decided half a decade before *Katz*, and the legal support network for defendants brave enough to challenge sodomy prosecutions, a network thin enough in California, was even thinner elsewhere in the country.<sup>57</sup> The American Civil Liberties Union did not take a position opposing enforcement of sodomy laws until 1967.<sup>58</sup> Even "homophile" organizations — the early, fragmented antecedents of the gay rights movement, which focused their efforts in the early 1960s on securing public understanding and respect for gay men and lesbians — often were uncomfortable defending defendants accused of

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<sup>53</sup> 371 P.2d 288, 292 (Cal. 1962).

<sup>54</sup> 374 P.2d 817, 819 (Cal. 1962). Paul Britt was filmed having sex with another man in a department store men's room stall. A police officer with a movie camera "was stationed . . . in a space between the ceiling of the men's restroom and the next floor above. From this vantage point he could, by means of two vents, look down into the four toilet stalls of the room." *Id.* at 818.

<sup>55</sup> *Id.* at 819 (emphasis omitted).

<sup>56</sup> See Comment, *Criminal Law: Unreasonable Visual Observation Held to Violate Fourth Amendment*, 55 MINN. L. REV. 1255, 1259 (1971).

<sup>57</sup> See NAN ALAMILLA BOYD, *WIDE OPEN TOWN: A HISTORY OF QUEER SAN FRANCISCO TO 1965*, at 200-36 (2003); JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 176-95 (2d ed. 1998). The Society for Individual Rights, formed in San Francisco in late 1964, was by the end of 1966 the largest "homophile" group in the United States, with more than 1000 members. See D'EMILIO, *supra*, at 191.

<sup>58</sup> See D'EMILIO, *supra* note 57, at 48, 212-13.

carrying out or soliciting sex in "public."<sup>59</sup> So Bielicki was not followed by courts outside California, but neither was it rejected. Appellate cases raising the issue simply did not materialize.

In 1965, though, a panel of the Ninth Circuit had to decide whether to follow Bielicki, and it chose not to. The case was *Smayda v. United States*, and, as the court conceded, the facts were "quite similar" to those in *Bielicki* and *Britt* — save that the toilet stall was in Yosemite National Park, giving the federal courts jurisdiction under the Assimilative Crimes Act.<sup>60</sup> A park ranger spied on Smayda and his codefendant through a hole cut in the ceiling of a toilet stall serving a set of tent-cabins; the hole was disguised to look like an air vent.<sup>61</sup> The defendants were convicted of oral copulation and sentenced to six months in jail, five years of probation, and suspended, thirty-month prison terms.<sup>62</sup>

A divided panel of the Ninth Circuit affirmed. For two different reasons, the court concluded that the Fourth Amendment did not restrict the police from secretly watching a public toilet through a peephole installed in advance. First, the toilet stall was "a public place," and "[b]y using a public place appellants risked observation," in effect waiving any Fourth Amendment protection against surveillance, whether open or covert.<sup>63</sup> Second, even if the stall was thought to be somehow akin to a house, there was no "trespass" into or "physical invasion" of the stall.<sup>64</sup> "[E]ven the inspection of the interior of a house, from the outside, and without a trespass, has never been held to be an unlawful search."<sup>65</sup> These were essentially the same

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<sup>59</sup> See *id.* at 75-125; Martin Meeker, *Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s*, 10 J. HIST. SEXUALITY 78, 106 (2001); Robert C. Doty, *Growth of Overt Homosexuality in City Provokes Wide Concern*, N.Y. TIMES, Dec. 17, 1963, at A1. On the "strategy of respectability" pursued by advocates for gay men and lesbians in the 1960s, see also Marc Stein, *Boutilier and the U.S. Supreme Court's Sexual Revolution*, 23 L. & HIST. REV. 491, 518 (2005).

<sup>60</sup> 352 F.2d 251, 253 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966). Herbert Donaldson, who represented Smayda and his codefendant at trial and before the Ninth Circuit, and Evander Smith, who prepared the certiorari petition with Donaldson's assistance, were closely associated with the Society for Individual Rights, and with other, early efforts at gay organizing in San Francisco. See BOYD, *supra* note 57, at 227-36; Interview by Paul Gabriel with Herb Donaldson (Sept. 2, 1996) (unpublished oral history, archived at GLBT Historical Society, S.F., Cal.).

<sup>61</sup> *Smayda*, 352 F.2d at 252.

<sup>62</sup> See Petition for Writ of Certiorari at 1-2, *Smayda*, 382 U.S. 981 (No. 730).

<sup>63</sup> 352 F.2d at 255.

<sup>64</sup> *Id.* at 256; see also *id.* at 259 (Pope, J., concurring).

<sup>65</sup> *Id.* at 256 (majority opinion).

arguments later invoked against Charlie Katz in the lower courts. In fact, the Ninth Circuit's decision in *Katz*, which rejected the defendant's Fourth Amendment's claim, explicitly relied on *Smayda*.<sup>66</sup>

The Ninth Circuit did not actually hold in *Smayda* that there was no Fourth Amendment protection in public toilet stalls. Discomfited by that prospect — “[w]e are made as uneasy as the next man by the thought that our legitimate activities in such a place may be spied upon by the police” — the court upheld covert surveillance in public toilet stalls only when the police had “reasonable cause” to suspect crimes were being committed, and only when the surveillance was “confine[d] . . . to the times when such crimes are most likely to occur.”<sup>67</sup> But the conflict with *Bielicki* was clear. “Reasonable cause” in this context did not mean “probable cause” of the kind the Fourth Amendment ordinarily required for a “search” or “seizure.”<sup>68</sup>

There was a strong dissent in *Smayda*, written by Judge James Browning, who had recently been appointed to the Ninth Circuit following a three-year stint, at Earl Warren's request, as Clerk of the U.S. Supreme Court. Foreshadowing *Katz*, Judge Browning argued that “the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances.” Users of public toilet stalls, he thought, had a “reasonable expectation of partial privacy.”<sup>69</sup> In the law reviews, too, *Smayda* drew sharply critical notices.<sup>70</sup>

The defendants petitioned for certiorari, pointing in part to the direct conflict with California case law and stressing, with careful

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<sup>66</sup> *Katz v. United States*, 369 F.2d 130, 133 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

<sup>67</sup> *Smayda*, 352 F.2d at 257. The toilet stall surveillance in Yosemite started at 11:00 p.m. — after, as the supervising officer explained, “the family-type people had quit using the facility.” *Id.* at 252.

<sup>68</sup> *Id.* at 257. A concurring opinion in *Smayda* tried to distinguish *Bielicki* on the ground that the surveillance in Yosemite was conducted with the consent and cooperation of the private concessionaire responsible for operating the men's rooms. *Id.* at 259 (Pope, J., concurring). But there had been similar authorization from the property owner in *Bielicki*, see 371 P.2d 288, 289 (1962), and probably also in *Britt*. The panel opinion in *Smayda* treated the whole issue of the concessionaire's cooperation as immaterial (which it clearly was, in light of *Stoner v. California*, 376 U.S. 483 (1964)), and the dissent dismissed the issue in a short footnote. See 352 F.2d at 259 n.1 (Browning, J., dissenting).

<sup>69</sup> 352 F.2d at 260.

<sup>70</sup> See Comment, *supra* note 56, at 1260-61; Anthony D. Osmundson, Note, *Fourth Amendment Application to Semi-Public Areas: Smayda v. United States*, 17 HASTINGS L.J. 835 (1966); Walter H. Ryland, Comment, *Police Surveillance of Public Toilets*, 23 WASH. & LEE L. REV. 423 (1966).

ambiguity, the "great many persons . . . affected by the issues" raised in the case.<sup>71</sup> By leaving the class of interested persons unspecified, the petition tiptoed around an explosive set of interconnected questions: whether the case was about sodomy enforcement or lavatory modesty; the prevalence of homosexual encounters, particularly in public washrooms; and the degree to which same-sex desire was the province of a distinct and identifiable minority or a common, maybe even universal, aspect of human experience.<sup>72</sup> Tiptoeing could only do so much, though. *Smayda* was still a prosecution for homosexual fellatio in a men's room stall. In early 1966 the Supreme Court denied review,<sup>73</sup> with only Justice Douglas voting to take the case.<sup>74</sup>

But *Smayda* hardly escaped notice at the Court. In voting for certiorari, Justice Douglas was following the recommendation of his law clerk,<sup>75</sup> who was not alone in thinking the case significant. In particular, Chief Justice Warren's clerk, Kenneth Ziffren, "strongly urge[d]" review of the Ninth Circuit's decision.<sup>76</sup> Ziffren had served the previous year as editor in chief of the *UCLA Law Review*, and he told Warren that he knew from conversations with Los Angeles vice officers that the law enforcement tactics in *Smayda* were "all too typical."<sup>77</sup> The opening lines of the memorandum, which Warren appears to have underlined, called *Smayda* "a highly significant search and seizure and 'right to privacy' case."<sup>78</sup> "This case," Ziffren wrote later in the memorandum, "upsets me terribly."<sup>79</sup> It deserved certiorari not only because of the "recurrence and importance of the particular situation" before the Court, but also because of the

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<sup>71</sup> Petition for Writ of Certiorari, *supra* note 62, at 7.

<sup>72</sup> On the last of these questions, see SEDGWICK, *supra* note 7, at 84-85.

<sup>73</sup> 382 U.S. 981 (1966).

<sup>74</sup> See Chief Justice Warren's docket sheet for *Smayda v. United States* (original in Papers of Earl Warren, Library of Congress, Box 381) (photocopy on file with author); Justice Brennan's docket sheet for *Smayda v. United States* (original in Papers of William J. Brennan, Library of Congress, Part I, Box 130, Folder 2) (photocopy on file with author).

<sup>75</sup> See Memorandum to Justice Douglas regarding *Smayda v. United States* (Dec. 27, 1965) (original in Papers of William O. Douglas, Library of Congress, Box 1357) (photocopy on file with author).

<sup>76</sup> Memorandum to Chief Justice Warren regarding *Smayda v. United States* 12 (Jan. 4, 1966) (original in Papers of Earl Warren, Library of Congress, Box 283) (photocopy on file with author).

<sup>77</sup> *Id.* at 10.

<sup>78</sup> *Id.* at 1.

<sup>79</sup> *Id.* at 10.

implications for "privacy rights in general," including protection from "electronic surveillance."<sup>80</sup> Justice Clark's law clerk, in contrast, was "not offended" by the surveillance in *Smayda*; "[p]ublic toilet stalls," he wrote, "shouldn't become a sanctuary for homosexual play." But even Justice Clark's clerk thought the Court would and should take the case, given the important issue it raised.<sup>81</sup>

A few months later, moreover, when Justice Douglas dissented in a trio of undercover informant cases,<sup>82</sup> he pointed to *Smayda*, and the men's room spying it condoned, as exemplifying a growing and alarming assault by law enforcement on the dignity and privacy of individuals:

We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government . . . . Secret observation booths in government offices and closed television circuits in industry, extending even to rest rooms, are common. Offices, conference rooms, hotel rooms, and even bedrooms are 'bugged' for the convenience of government. Peepholes in

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<sup>80</sup> *Id.* at 12.

<sup>81</sup> Memorandum to Justice Clark regarding *Smayda v. United States* 3, 4 (Jan. 5, 1966) (original in Tom Clark Papers, Tarlton Law Library, Univ. of Tex. at Austin, Box B211, Folder 2) (photocopy on file with author). Other clerks recommended against certiorari. Justice Harlan's clerk did not "see why a little experimentation by California in a close case in the 4th Amendment area necessarily has to require review by this Court the instant there is a conflict." Memorandum to Justice Harlan regarding *Smayda v. United States* 2 (Jan. 7, 1966) (original in John Marshall Harlan Papers, Mudd Manuscript Library, Princeton Univ.) (photocopy on file with author). Justice Fortas's clerk inclined toward the view that "a public restroom is not a place where Fourth Amendment protections apply against visual observations," and thought that "if public restrooms are to be usable by the ordinary citizen," the choice was between "carefully circumscribed peeping" and "increased use of informers and decoys" — which would be both more "offensive" and more "likely to amount to entrapment." Memorandum to Justice Fortas regarding *Smayda v. United States* 3-5 (undated) (original in Abe Fortas Papers, Yale Univ. Library, Box 4, Folder 75) (photocopy on file with author).

<sup>82</sup> *Osborn v. United States*, 385 U.S. 323, 340 (1966) (Douglas, J., dissenting). Technically, Douglas dissented in *Osborn* and in *Lewis v. United States*, 385 U.S. 206 (1966), and concurred with Justice Clark's position in *United States v. Hoffa*, 385 U.S. 293 (1966). Since Justice Clark argued in *Hoffa* that the Court should have dismissed the writ of certiorari as improvidently granted rather than affirm, as it did, the judgment below, Justice Douglas was, for practical purposes, dissenting from the Court's disposition of all three cases. See *Hoffa*, 385 U.S. at 321 (Clark, J., concurring).

men's rooms are there to catch homosexuals. See *Smayda v. United States*, 9 Cir., 352 F.2d 251 . . . .<sup>83</sup>

The following year the Court decided *Katz*, squarely rejecting arguments virtually identical to the ones the Ninth Circuit had relied on in *Smayda*, and vindicating the 1962 decisions of the California Supreme Court. In the wake of *Katz*, the California Supreme Court reaffirmed and extended its earlier condemnation of toilet stall spying,<sup>84</sup> and courts elsewhere in the country slowly followed suit.<sup>85</sup> Not all of those courts went as far as the California justices, who found an expectation of privacy against covert surveillance even in toilet stalls without doors.<sup>86</sup> But courts in a range of jurisdictions read *Katz* to provide Fourth Amendment protection at least in enclosed toilet stalls.

In doing so, they generally stressed precisely that aspect of the *Katz* opinions that scholars have treated as a red herring: Justice Harlan's description of a telephone booth as a "temporarily private place," analogous, during its short use, to a house. "Surely," the Minnesota Supreme Court pointed out, Justice Harlan's reasoning applied to facilities that "assure the user of privacy as much as a telephone booth does."<sup>87</sup> A Michigan appellate court agreed: "bathroom stalls . . . like the telephone booth in *Katz*," are "temporarily private places whose momentary occupants' expectations of privacy are recognized by society as reasonable."<sup>88</sup> An Idaho appellate court found "no constitutional distinction between a public telephone booth and a public restroom stall with regard to the privacy expectation generated within"; in either case, the expectation was one "society would recognize as objectively reasonable."<sup>89</sup> Repeatedly, courts ruling on

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<sup>83</sup> *Osborn*, 385 U.S. at 340-42 (Douglas, J., dissenting). Like much else in this opinion, this language was adapted from an unpublished dissent Justice Douglas had circulated in January 1966 when the Court initially voted to deny certiorari in *Lewis*, shortly after denying certiorari in *Smayda*. The pertinent documents are in Boxes 1387 and 1388 of the Papers of William O. Douglas at the Library of Congress; photocopies are on file with the author. See also *infra* note 236.

<sup>84</sup> *People v. Triggs*, 506 P.2d 232, 237 (Cal. 1973).

<sup>85</sup> See, e.g., *Eskridge*, *supra* note 13, at 834 & n.54 (citing cases).

<sup>86</sup> *Triggs*, 506 P.2d at 237.

<sup>87</sup> *State v. Bryant*, 177 N.W.2d 800, 803 (Minn. 1970) (reversing sodomy conviction based on observations made by police officer and department store employee hiding in ceiling over men's room and watching through ventilator).

<sup>88</sup> *People v. Dezek*, 308 N.W.2d 652, 655 (Mich. Ct. App. 1981) (invalidating covert videotaping and audio monitoring of men's room stalls at highway rest area by use of equipment hidden in the ceiling).

<sup>89</sup> *State v. Limberhand*, 788 P.2d 857, 861 (Idaho Ct. App. 1990) (throwing out

the constitutionality of men's room spying returned to the emphasis Justice Harlan had given to telephone booths as special, quasi-private locations, notwithstanding the insistence by the *Katz* majority that the Fourth Amendment "protects people, not places."<sup>90</sup>

None of this should surprise. However strained the analogy may be between a telephone booth and a house, the analogy between a toilet stall and telephone booth is easy to draw — so easy, in fact, that the leading treatise on search-and-seizure law treats the application of *Katz* to closed restroom stalls as "clear beyond question."<sup>91</sup> It is difficult to think of another space that so closely resembles a telephone booth in providing "privacy in public."<sup>92</sup> (Department store fitting rooms come close,<sup>93</sup> but they play a less central role in everyday life.) Small wonder, then, that men's room surveillance cases pushed some courts and commentators in the pre-*Katz* era toward ways of thinking and talking about the Fourth Amendment that closely prefigured the Supreme Court's later endorsement of the "reasonable expectation of privacy" test, and more particularly Justin Harlan's place-based application of that test. The California Supreme Court stressed the degree of privacy "ordinarily understood" to protect a person "temporarily occupying a room . . . for private, however transient" purposes.<sup>94</sup> Judge Browning, dissenting in *Smayda*, stressed the defendants' "reasonable expectation of partial privacy."<sup>95</sup> The *UCLA Law Review* study of the policing of homosexuality in Los Angeles County in the mid-1960s similarly reasoned that the Fourth Amendment should protect "reasonable expectation[s] of privacy" in "semi-public places."<sup>96</sup>

As far as I can tell, these were the first uses of the "reasonable expectation of privacy" formula in any Fourth Amendment discussions, judicial or scholarly. Nor were these obscure discussions. *Smayda* was a notorious decision — lambasted in the law reviews, and

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testimony from officer conducting surveillance of rest area men's room stall from adjacent stall, through hole cut in partition).

<sup>90</sup> See, e.g., *Kroehler v. Scott*, 391 F. Supp. 1114, 1116-17 (E.D. Pa. 1975) (invalidating covert observation of public men's room stalls at public park and train station through holes drilled in ceilings).

<sup>91</sup> 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.4(c), at 438 (2d ed. 1987).

<sup>92</sup> HUMPHREYS, *supra* note 48, at 11.

<sup>93</sup> LAFAYE, *supra* note 91, at 441-42.

<sup>94</sup> *Britt v. Super. Court of Santa Clara County*, 374 P.2d 817, 819 (Cal. 1962).

<sup>95</sup> *Smayda v. United States*, 352 F.2d 251, 260 (9th Cir. 1965) (Browning, J., dissenting).

<sup>96</sup> See Gallo et al., *supra* note 51, at 713, 717.

a prominent part of the picture Justice Douglas painted of creeping totalitarianism in his dissent from the undercover informant rulings of 1966. The *UCLA Law Review* study was widely read and widely relied on.<sup>97</sup> None of this means that Justice Harlan lifted the phrase "reasonable expectation of privacy" from Judge Browning and the *UCLA Law Review*, nor that Katz's lawyers did something similar in arguing that the Fourth Amendment inquiry in their case should focus on whether "the average reasonable man" would believe Katz had "intended and desired his conversation to be private."<sup>98</sup> "Reasonable expectation of privacy" is not, after all, a particularly strange turn of phrase, at least not for lawyers. (An isolated use can be found even earlier, in a 1956 law review note on radio interception under the federal wiretapping statute.<sup>99</sup>) But the rhetorical overlap is striking. It underscores the degree to which toilet stalls and telephone booths presented different versions of the same challenge to Fourth Amendment jurisprudence in the 1960s: the problem of "semi-public" places,<sup>100</sup> designed to "provide some, if not complete, privacy."<sup>101</sup> (Annotating a memorandum from his clerk regarding the petition for certiorari in *Smayda*, Justice Fortas more colloquially described public toilet stalls as "sort of private."<sup>102</sup>)

Thus it was inevitable that Katz would have large implications for the policing of homosexuality. As it turned out, those implications went beyond protecting privacy in toilet stalls, important as that was. The court victories that Katz made possible for gay litigants and their lawyers, like the victories made possible by other Supreme Court decisions in the late 1960s and early 1970s, helped to embolden the homophile movement, contributed to a growing sense among gay men and lesbians that they had rights they could insist on and enforce, and gave ammunition to politicians interested in getting the police out of the homosexual harassment business. In all of these ways, Katz, along with other decisions having nothing ostensibly to do with homosexual

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<sup>97</sup> See HUMPHREYS, *supra* note 48, at 82-88; HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 374 (1968); Jack Star, *The Sad "Gay" Life*, LOOK, Jan. 10, 1967, at 31, 32.

<sup>98</sup> Brief for Petitioner at 13, *Katz v. United States*, 389 U.S. 347 (1967) (No. 35). Katz's lead attorney before the Supreme Court, Harvey Schneider, later claimed the inspiration for his argument was the "reasonable man" test in tort law. See Sklansky, *supra* note 12, at 240.

<sup>99</sup> See Recent Case, *Monitored Unlicensed Radio Broadcast Admitted in Prosecution of Crime Unrelated to Federal Communications Act*, 104 U. PA. L. REV. 715, 718 (1956).

<sup>100</sup> Gallo et al., *supra* note 51, at 717; Osmundson, *supra* note 70, at 835.

<sup>101</sup> Kitch, *supra* note 35, at 137.

<sup>102</sup> Memorandum to Justice Fortas, *supra* note 81, at 1.

rights, helped pave the way to Stonewall and the gay liberation movement.<sup>103</sup> It may be impossible to disentangle the precise role that *Katz* in particular played in this broad social process, but that makes this aspect of the decision's legacy no less important. At the very least, it should give us pause before writing off Justice Harlan's place-based understanding of *Katz* — his suggestion that a telephone booth is, in critical respects, like a temporary home — as trivializing the ruling and debasing its rationale. Outside the area of wiretapping, it was Justice Harlan's view of *Katz* that led most directly to what was almost certainly the decision's largest practical impact.

For reasons I have tried to make clear, that impact could not have surprised anyone who was passingly familiar in 1967 with the controversy over men's room snooping and the policing of homosexuality more generally. That category plainly included Justice Douglas, and, as we will see, there are grounds for thinking it included other members of the Supreme Court, as well. They were unlikely to have been shocked by the use of *Katz* to help gay litigants.

In fact, the effects *Katz* had on the policing of homosexuality may have helped, consciously or unconsciously, to motivate and to shape the decision. The case to be made for that proposition, though, is almost entirely circumstantial; it rests heavily on considerations suggesting that discomfort with police tactics targeted at homosexuals may have left larger marks on modern criminal procedure. Let us turn now to those considerations.

### III. THE SECRET SUBTEXT OF CRIMINAL PROCEDURE

As Professor Eskridge has documented, *Katz* was not the only criminal procedure decision of the 1960s and 1970s that helped the fledgling gay rights movement. The vast majority of charges brought for homosexual conduct involved no victim, not even an offended onlooker.<sup>104</sup> That alone meant, as Eskridge points out, that "proof was typically shaky and often relied on illegal confessions, searches, and seizures"<sup>105</sup> — which in turn meant that the Supreme Court's decision in *Mapp v. Ohio*,<sup>106</sup> applying the Fourth Amendment exclusionary rule to state prosecutions, made prosecutions for homosexual conduct more difficult to bring. The lack of complaining witnesses gave the tightened rules for custodial interrogations, promulgated in *Escobedo*

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<sup>103</sup> See D'EMILIO, *supra* note 57, at 211-18; Eskridge, *supra* note 13, at 832-42.

<sup>104</sup> See, e.g., Gallo et al., *supra* note 51, at 688 & n.17.

<sup>105</sup> Eskridge, *supra* note 13, at 833.

<sup>106</sup> 367 U.S. 643 (1961).

v. Illinois<sup>107</sup> and *Miranda v. Arizona*,<sup>108</sup> great relevance for gay defendants, as well.<sup>109</sup> Even more important was *Papachristou v. City of Jacksonville*<sup>110</sup> — nominally a decision about the due process bar against overly vague laws, but in practical effect a withdrawal of the blank check police enjoyed to arrest anyone they believed was up to no good.<sup>111</sup> The vagueness analysis in *Papachristou* proved a potent weapon against antiquated statutes that proscribed, with infamous imprecision and decorous circumlocution, the "crime against nature," or "sodomy with man or beast."<sup>112</sup> More directly and immediately, *Papachristou* meant police could no longer treat looking for a homosexual partner as a de facto crime, either under simple prohibitions of "vagrancy" or "disorderly conduct," or under more focused, but hardly less ambiguous, statutes against "lewd vagrancy" or the like.<sup>113</sup>

The role that criminal procedure law played in ameliorating the oppression of gay men and lesbians — a story that Eskridge tells superbly — has, by itself, important implications for thinking about criminal procedure today. But I want to argue that the effects of the criminal procedure revolution on the policing of homosexuality may not have been wholly accidental. I want to suggest the possibility that homosexuality and its policing played a role in shaping modern criminal procedure.

In making this suggestion, I confront at the outset a very large problem. None of the Supreme Court's criminal procedure decisions in the formative decades of the 1950s, 1960s, and 1970s said anything

<sup>107</sup> 378 U.S. 478 (1964).

<sup>108</sup> 384 U.S. 436 (1966).

<sup>109</sup> See Eskridge, *supra* note 13, at 832.

<sup>110</sup> 405 U.S. 156 (1972).

<sup>111</sup> See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 600-08 (1997); Tracey L. Meares, *Terry and the Relevance of Politics*, 72 ST. JOHN'S L. REV. 1343, 1344-45 (1998); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 201-06; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 790 n.54 (2006).

<sup>112</sup> On the ambiguous language of traditional prohibitions against sodomy — "legal definition at its vaguest" — see Ralph Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in *SEXUAL BEHAVIOR AND THE LAW* 5, 81-82 (Ralph Slovenko ed., 1965); see also, e.g., MORRIS PLOSCOWE, *SEX AND THE LAW* 183 (rev. ed. 1962); Gallo et al., *supra* note 51, at 661-62. On the impact of *Papachristou*, see Eskridge, *supra* note 13, at 855-57.

<sup>113</sup> See Eskridge, *supra* note 13, at 857-61. Eskridge notes that the void-for-vagueness rule of *Papachristou* was also successfully invoked against cross-dressing prohibitions. See *id.* at 861-63.

about homosexuality. Of course those decisions downplayed the issue of race, too, and no one today doubts that racial tensions had a lot to do with the criminal procedure revolution.<sup>114</sup> But that is largely because the facts of the criminal procedure cases decided by the Supreme Court were often racially charged,<sup>115</sup> because the criminal procedure revolution coincided with the development of a jurisprudence explicitly aimed at combating racial discrimination,<sup>116</sup> and because the Court itself occasionally took note of the intersection of criminal justice and racial equity.<sup>117</sup> Nothing similar can be said about sodomy enforcement or other forms of police harassment of gay men and lesbians. None of the Court's criminal procedure cases in the Warren and Burger Court eras — or since then, for that matter — involved the policing of homosexuality. No jurisprudence explicitly protecting gay men and lesbians, and squarely condemning discrimination against them, emerged alongside modern criminal procedure law. And, aside from Justice Douglas's solo dissent in the 1966 confidential informant cases, the Justices never suggested, even in passing, that criminal justice had something to do with the privacy of sexual practices or respect for sexual identities.<sup>118</sup>

In fact, the Court conspicuously avoided the topic of homosexuality throughout the 1960s and 1970s. In the seventeen years between 1967, the year *Katz* was decided, and 1984, the year of *Bowers v. Hardwick*, the Court did not hear oral argument in a single case involving the rights of gay men or lesbians.<sup>119</sup> This was no accident. When political scientist H.W. Perry interviewed Justices and law clerks about the 1976-1980 court terms, homosexuality was the only area of public controversy they admitted the Court had purposely

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<sup>114</sup> See *supra* note 6 and accompanying text.

<sup>115</sup> See, e.g., Kahan & Meares, *supra* note 6, at 1156-57.

<sup>116</sup> See, e.g., Pye, *supra* note 6, at 256.

<sup>117</sup> See, e.g., Terry v. Ohio, 392 U.S. 1, 14-15 & n.11 (1968); Bumper v. North Carolina, 391 U.S. 543, 546 (1968).

<sup>118</sup> Arguably there is one other exception to this generalization. In 1972, when the Court upheld an investigatory "stop and frisk" based largely on a tip from a confidential informant, Justice Marshall pointed out in his dissent that the "[t]he only information that the informant had previously given the officer involved homosexual conduct in the local railroad station" — information that the officer tried but failed to substantiate. *Adams v. Williams*, 407 U.S. 143, 156-57 (1972) (Marshall, J., dissenting).

<sup>119</sup> See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 134 (2001). Regarding the Court's aversion to gay rights cases in the 1970s, see also PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 137-42 (2000).

avoided.<sup>120</sup> And on those rare occasions in the 1960s when the Justices directly addressed the subject, their discomfort was manifest.<sup>121</sup> Seven months before deciding *Katz*, for example, the Court ruled in *Boutilier v. INS*<sup>122</sup> that homosexuals were among the "aliens afflicted with psychopathic personality, epilepsy, or a mental defect," excluded by statute from entry into the United States. Justice Clark's opinion for the Court tersely reviewed the evidence of congressional intent while holding the human dimensions of the case at arm's length; the opinion "was as impersonal as if the court were ruling on whether a law barring importation of 'carrots' could be used to block all foreign turnips."<sup>123</sup> Justice Brennan dissented but chose not to write; instead he simply noted his agreement with the dissenting opinion in the court below. Even Justice Douglas, who five months earlier had publicly criticized snooping on homosexuals in men's rooms, wrote a rambling, awkward dissent that was plainly intended to be sympathetic to homosexuals, but parts of which came across as condescending and insulting.<sup>124</sup>

All of this suggests that the Court's long silence about homosexuality may have reflected sensitivity to the subject rather than indifference. But sensitivity is not the same thing as fixation. Sometimes out of sight really is out of mind. If the Court tried hard to avoid the subject of homosexuality . . . well, maybe it succeeded. I think, on the contrary, that the subject was not so easily dodged, particularly when it came to regulating the police. But given the Court's reticence, the argument I make will necessarily be suggestive rather than conclusive.

The argument will be in two parts. First, the criminal procedure revolution coincided with a period of intense public anxiety about homosexuality, and also about its policing. There is no reason to think the Justices of the Supreme Court escaped from that anxiety, and it would be extraordinary if they could have walled it off in their minds when deciding criminal procedure cases. Second, concerns about homosexuality and its policing help make sense of certain features of the modern law of criminal procedure. Those features go beyond specific rulings like *Katz* and *Papachristou*. They include three

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<sup>120</sup> See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 257 (1991).

<sup>121</sup> On this theme, see MURDOCH & PRICE, *supra* note 119.

<sup>122</sup> 387 U.S. 118, 119 (1967).

<sup>123</sup> MURDOCH & PRICE, *supra* note 119, at 117.

<sup>124</sup> See *Boutilier*, 387 U.S. at 125 (Douglas, J., dissenting); MURDOCH & PRICE, *supra* note 119, at 122-23; Stein, *supra* note 59, at 526. Justice Fortas joined the dissent.

more pervasive patterns: the preoccupation with protecting a particular kind of privacy, the view of police as psychologically antidemocratic, and the notion that police discretion should be reined in with judge-made rules.

### A. *Homosexuality and the Sixties*

Recent years, particularly the last decade and a half, have seen the emergence of a rich body of scholarship on the history of homosexuality in twentieth-century America.<sup>125</sup> These works make clear that the 1960s, the formative period for modern criminal procedure, was also a time of exceptional public anxiety about homosexuality and its policing. Much of the anxiety can be traced back to three overlapping developments in the 1940s and 1950s: the postwar sex crime panic, Alfred Kinsey's study of male sexuality, and McCarthy-era hysteria about homosexuals employed by the federal government. In the aftermath of these episodes, public attention to homosexuality and its policing reached new heights in the 1960s.

First, the sex crime panic. The late 1940s and early 1950s were marked by extraordinary public concern over sex offenders, "perverts," and "sexual psychopaths" — categories that were sometimes employed interchangeably.<sup>126</sup> FBI Director J. Edgar Hoover warned that "the most rapidly increasing type of crime is that perpetrated by degenerate sex offenders,"<sup>127</sup> and Atlanta police were far from unusual in calling sex crimes "the number one social problem

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<sup>125</sup> The works I have found most helpful are ALLAN BÉRUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990); BOYD, *supra* note 57; CHAUNCEY, *supra* note 47; D'EMILIO, *supra* note 57; DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004); and the series of studies by William Eskridge, culminating in WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

<sup>126</sup> See JOHNSON, *supra* note 125, at 55-59; Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317, 1318 (1998); Estelle B. Freedman, "Uncontrolled Desires": *The Response to the Sexual Psychopath, 1920-1960*, 74 J. AM. HIST. 83, 83-84, 94 (1987); John Howard, *The Library, the Park, and the Pervert: Public Space and Homosexual Encounter in Post-World War II Atlanta*, 62 RADICAL HIST. REV. 166, 170, 175 (1995); Chysanthi Settlege Leon, *Compulsion and Control: Sex Crime and Criminal Justice Policy in California, 1930-2007*, at 23-57 (2007) (unpublished Ph.D. dissertation, Univ. of Cal., Berkeley) (on file with author).

<sup>127</sup> Freedman, *supra* note 126, at 94 (quoting J. Edgar Hoover, *How Safe is Your Daughter*, AM. MAG., July 1947, at 144). "Implying that this threat to social order required total mobilization, Hoover continued: 'Should wild beasts break out of circus cages, a whole city would be mobilized instantly. But depraved human beings, more savage than beasts, are permitted to rove America almost at will.'" *Id.*

of the day."<sup>128</sup> Fifteen states established commissions to study the problem, and many enacted new, punitive sanctions for sexual psychopaths,<sup>129</sup> typically defined for statutory purposes as individuals made dangerous by their "utter lack of power to control [their] sexual impulses."<sup>130</sup> The U.S. Attorney for the District of Columbia launched a crackdown on sex crimes, and Congress passed its own "sexual psychopath" law, toughening the penalties for sex offenders caught in the nation's capital.<sup>131</sup>

For complicated and contested reasons, the labels "pervert" and "sexual psychopath" served at times as code for homosexual. Part of the explanation, no doubt, was the intense focus in postwar America on "normal," heterosexual, two-parent households.<sup>132</sup> Probably, too, part of the explanation was that homosexuality was still widely understood as a set of practices that could be engaged in by someone who was not, essentially, a "homosexual." During the 1940s and 1950s a gradual and uneven process was still underway, replacing an older "division of men into 'fairies' and 'normal men' on the basis of their imaginary gender status" with "the now-conventional division of men into 'homosexuals' and 'heterosexuals,' based on the sex of their sexual partners."<sup>133</sup> For many Americans in the 1940s and 1950s, homosexual practices were just particular instances of a whole range of shameful, pathological conduct engaged in by men, and sometimes women, who lacked normal habits of self-control — that is to say, by perverts and their extreme type, sexual psychopaths.

Even a "normal" person, it was thought, might engage in these practices in a weak moment — a concern we will revisit later. The important point for now is that in the 1940s and 1950s the idea still had broad currency that homosexuality was essentially a set of

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<sup>128</sup> Howard, *supra* note 126, at 170 (quoting ATLANTA CONST., Dec. 8, 1949).

<sup>129</sup> See JOHNSON, *supra* note 125, at 56. By the 1960s these statutes were facing mounting attacks, but they were not widely repealed until the late 1960s and early 1970s. On the parallels between the sexual psychopath statutes and the more recent wave of statutes targeting "sexual predators," see, for example, ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 22-23 (2006); Andrew Horwitz, *Sexual Psychopath Legislation: Is There Anywhere to Go But Backwards?*, 57 U. PITT. L. REV. 35, 36-38 (1995).

<sup>130</sup> See Freedman, *supra* note 126, at 84 (quoting state statutes); Alan H. Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L. CRIMINOLOGY & POL. SCI. 215 (1960).

<sup>131</sup> See JOHNSON, *supra* note 125, at 57-58.

<sup>132</sup> For a thoughtful argument along these lines, see ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* 94-103 (1988).

<sup>133</sup> CHAUNCEY, *supra* note 47, at 13; see also *id.* at 47-63.

demented practices, like bestiality or public masturbation, not a matter of personal character or identity. So the categories of homosexual, pervert, and psychopath were frequently conflated, even by writers with liberal sympathies. (Writing his pioneering ethnography of policing in the 1950s, William Westley found it natural to lump homosexuals together with rapists, peeping toms, and exhibitionists, under the umbrella label of “deviants.”<sup>134</sup> As late as 1961, Jane Jacobs, mounting her crusade against traditional urban planning, reflexively used the term “pervert parks” for downtown green spaces frequented by gay men.<sup>135</sup>) The upshot was that the campaign against sexual psychopaths often became, in practice, a campaign against homosexuals.<sup>136</sup> In 1947, for example, the U.S. Park Police launched a widely publicized “Pervert Elimination Campaign,” cracking down on gay cruising in two Washington, D.C. parks.<sup>137</sup> Eight years later, the State of Iowa briefly opened a “sexual psychopath” ward at its mental hospital in Mount Pleasant, and then filled the ward largely with “the hairdressers and window dressers of Sioux City.”<sup>138</sup>

If the postwar sex crimes panic increased public attention to the “problem” of homosexuality, the Kinsey report pushed it into the stratosphere. Kinsey and his associates actually published two reports: *Sexual Behavior in the Human Male*, in 1948, and *Sexual Behavior in the Human Female*, in 1953, and they were both blockbusters. But the first — which stayed on the *New York Times* bestseller list for six months<sup>139</sup> — likely had the larger impact, in part because it was the first, and in part because nothing in either book was more explosive than the findings about the prevalence of homosexual conduct among men. Only four percent of men were exclusively homosexual from adolescence on, but thirty-seven percent — “more than one male in three of the persons that one may meet as he passes along a city street” — had at least one post-adolescent homosexual encounter leading to orgasm, twenty-five percent had “more than incidental homosexual experience or reactions . . . for at least three years between ages the age of 16 and 55,” and ten percent were “more or

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<sup>134</sup> William Westley, *Violence and the Police*, 59 AM. J. SOC. 34, 37 (1953).

<sup>135</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 92-93, 97-98 (1961) (Vintage Books ed. 1992).

<sup>136</sup> See BÉRUBE, *supra* note 125, at 258-59; NEIL MILLER, *SEX-CRIME PANIC: A JOURNEY TO THE PARANOID HEART OF THE 1950S* (2002); MURDOCH & PRICE, *supra* note 119, at 135-38; Freedman, *supra* note 126, at 94; Howard, *supra* note 126, at 170.

<sup>137</sup> See JOHNSON, *supra* note 125, at 59-63.

<sup>138</sup> MILLER, *supra* note 136, at 157.

<sup>139</sup> See JOHNSON, *supra* note 125, at 53.

less exclusively homosexual" for such a three-year period.<sup>140</sup> The figures were so high they stunned even Kinsey and his colleagues, who confessed they were "totally unprepared" for the high incidence of male homosexuality they discovered.<sup>141</sup> More than anything else in the Kinsey reports, these figures caused a sensation.<sup>142</sup>

Doubts about Kinsey's methods were raised from the start, and today most experts think his prevalence estimates for homosexuality were too high.<sup>143</sup> In the 1950s and 1960s, though, Kinsey's figures were widely taken as roughly accurate, if not too low. Karl Llewellyn, that angst-ridden "icon of American legal theory,"<sup>144</sup> was probably typical in finding Kinsey's figures on male homosexuality at first "unbelievable," but then slowly coming to accept them.<sup>145</sup> (The explanation, he concluded, was that homosexuality was much more common outside "the group of men with whom I come in contact, at the age period at which I meet them closely."<sup>146</sup>) Throughout the 1950s and 1960s, Kinsey's results were often cited more or less uncritically, in academic work as well as in the popular press.<sup>147</sup> The precise numbers were less important than the overall conclusion that

<sup>140</sup> ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 623, 650-51 (1948). For discussion of these figures, see, for example, D'EMILIO, *supra* note 57, at 33-37; JOHNSON, *supra* note 125, at 53-54; William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 84 (2001). The figures on lesbianism, in the 1953 report, were less extreme although still large enough to shock many readers: "13 percent [of women] had experienced orgasm with another woman," and "the percentage of women either exclusively or primarily homosexual in orientation was between one-third and one-half of the corresponding male figures." D'EMILIO, *supra* note 57, at 35 (citing KINSEY ET AL., *supra*, at 446-501).

<sup>141</sup> KINSEY ET AL., *supra* note 140, at 625.

<sup>142</sup> See D'EMILIO, *supra* note 57, at 33-37; JOHNSON, *supra* note 125, at 53-55.

<sup>143</sup> See, e.g., Rubenstein, *supra* note 140, at 84-85.

<sup>144</sup> James J. Connolly, Peggy Pschirrer & Robert Whitman, *Alcoholism and Angst in the Life and Work of Karl Llewellyn*, 24 OHIO N.U. L. REV. 43, 44 (1998); see also, e.g., WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 87-127 (1973).

<sup>145</sup> Karl N. Llewellyn, *The Limits of Sexual Law*, in ABOUT THE KINSEY REPORT: OBSERVATIONS BY 11 EXPERTS ON "SEXUAL BEHAVIOR IN THE HUMAN MALE" 113, 124 (Donald Porter Geddes & Enid Curie eds., 1948).

<sup>146</sup> *Id.* Kinsey found a reduced level of homosexual activity among college-educated men between the ages of 21 and 25. See KINSEY ET AL., *supra* note 140, at 634-35. He thought part of the explanation was that during this period "many individuals attempt to stop their homosexual relations, and try to make the heterosexual adjustments which society demands." *Id.* at 629.

<sup>147</sup> See, e.g., PLOSCOWE, *supra* note 112, at 188-94; Edward H. Knight, *Overt Male Homosexuality*, in *SEXUAL BEHAVIOR AND THE LAW*, *supra* note 112, at 434, 437; Gallo et al., *supra* note 51, at 648-49; Slovenko, *supra* note 112, at 8; Ernest Havemann, *Why?*, LIFE, June 26, 1964, at 76, 79; William J. Helmer, *New York's "Middle-class" Homosexuals*, HARPER'S, Mar. 1963, at 85, 85; Star, *supra* note 97, at 31.

homosexual conduct among men was far more widespread than previously imagined. Some people thought that fact argued for greater tolerance; others took it as cause for alarm. Either way, as Kinsey's findings "seeped in popular consciousness,"<sup>148</sup> homosexuality became a greater subject of public concern. "There is a cud in these figures for long chewing," Llewellyn mused.<sup>149</sup>

It is worth pausing over Llewellyn's reactions, because they were far from idiosyncratic, particularly among the liberal intelligentsia. Llewellyn, very much "the product of the times in which he lived and worked,"<sup>150</sup> argued that Kinsey's findings about homosexuality were cause neither for alarm nor, exactly, for tolerance, but rather for understanding — for "facing the facts."<sup>151</sup> The facts to be faced had to do with neither a sin nor a matter of personal identity but, at bottom, simply a vice — something "normal" people might try in moments of weakness ("When kids are kids they will experiment with anything,"<sup>152</sup>), but which, if not resisted, could take over and degrade a person's whole life. So Llewellyn called for distinguishing sharply "between the occasional and the habitual, the inducer and the inducee, the older and the younger man."<sup>153</sup> "[S]ome rethinking" was warranted of the sanctions imposed on the hard-core group, but Llewellyn's main hope was that Kinsey's findings would dissuade authority figures from slapping a self-fulfilling, stigmatizing label on men caught experimenting with homosexuality. "Knowledge that men move into and out of the practice," he suggested, should point "to saner policing and to hopeful curing practice. For the greatest psychological block — horror at, or self-abnegation in, being utterly 'unnatural' — yields when the patient learns that one out of three of all the rest of us have met and solved the problem."<sup>154</sup> This view of homosexuality as a vice to be resisted — and the corresponding

<sup>148</sup> D'EMILIO, *supra* note 57, at 37; *see also, e.g.*, BOYD, *supra* note 57, at 187.

<sup>149</sup> Llewellyn, *supra* note 145, at 125.

<sup>150</sup> Connolly, Pschirrer & Whitman, *supra* note 144, at 44.

<sup>151</sup> Llewellyn, *supra* note 145, at 130.

<sup>152</sup> *Id.* at 124.

<sup>153</sup> *Id.* at 125.

<sup>154</sup> *Id.* In an undelivered letter written seven years earlier, at turns confessional and opaque, Llewellyn had used similar language in connection with his own struggles with impotence, which he blamed for the failure of his first marriage: "And there was a personal deficiency. I had not met things, but had retreated." Later in the letter Llewellyn attributed his sexual inadequacy in part to "a touch of mother-influenced over-respect for women," and in part to "a habituated movement into other lines." Letter from Karl Llewellyn to Dr. Max Meyer (Sept. or Oct. 1941), *reprinted in* Connolly, Pschirrer & Whitman, *supra* note 144, at 120-21; *see also id.* at 60 & n.64.

picture of the confirmed homosexual as a kind of dissolute junkie or, closer to home for Llewellyn, an alcoholic — was common in the 1950s and 1960s.<sup>155</sup> It was compatible, in a way, with the vague sense that homosexuals were petty versions of sexual psychopaths, having lost much but not yet all of their self-control. Alcoholism, in fact, was widely linked with homosexuality: "Both psychiatric literature and popular fiction [in the 1950s] portrayed the alcoholic as a repressed homosexual who acted on his same-sex desires only while intoxicated."<sup>156</sup>

Kinsey's findings about the prevalence of male homosexuality were accepted in part because Kinsey was a well-credentialed and well-regarded biologist — "a scientist, not a moralist . . . a revealer of facts"<sup>157</sup>; in part because of the sheer amount of research his team carried out<sup>158</sup>; and in part because his results confirmed an "uneasy sense" many Americans already had at the close of the 1940s that homosexuality was a larger part of national life than previously acknowledged.<sup>159</sup> When John Cheever called 1948 "the year everybody in the United States was worried about homosexuality,"<sup>160</sup> he had more in mind than the reaction to Kinsey's research. The massive mobilization associated with World War II had created conditions conducive to sexual experimentation, allowing many gay men and lesbians to "come out" to themselves and to each other, and raising general awareness of homosexuality.<sup>161</sup> During and after the war, visible gay subcultures began to emerge in major American cities,<sup>162</sup> and "a spate of postwar novels brought the phenomenon [of

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<sup>155</sup> On Llewellyn's lifelong battle with alcoholism, and the treatments he received under alias in the 1940s, see Connolly, Pschirrer & Whitman, *supra* note 144.

<sup>156</sup> JOHNSON, *supra* note 125, at 9.

<sup>157</sup> Donald Porter Geddes, *New Light on Sexual Knowledge*, in ABOUT THE KINSEY REPORT, *supra* note 145, at 5, 6; see also SARAH E. IGO, *THE AVERAGED AMERICAN: SURVEYS, CITIZENS, AND THE MAKING OF A MASS PUBLIC* 244-46 (2007).

<sup>158</sup> See, e.g., IGO, *supra* note 157, at 247-48.

<sup>159</sup> MAX LERNER, *AMERICA AS A CIVILIZATION: LIFE AND THOUGHT IN THE UNITED STATES TODAY* 683 (1957).

<sup>160</sup> JOHN CHEEVER, *THE JOURNALS OF JOHN CHEEVER* 117 (1991).

<sup>161</sup> The now classic account is BÉRUBE, *supra* note 125. On the changing meaning of "coming out," see *id.* at 6-7; CHAUNCEY, *supra* note 47, at 8 n.\*; Eskridge, *supra* note 13, at 824. Before the war, "coming out" commonly meant having one's first homosexual experience, but in the 1940s gay men and lesbians began using the phrase more broadly, "to mean that they had found gay friends and the gay life." BÉRUBE, *supra* note 125, at 6. Later, in the late 1960s and early 1970s, the "critical audience to which one came out . . . shifted from the gay world to the straight world." CHAUNCEY, *supra* note 47, at 8 n.\*.

<sup>162</sup> See BOYD, *supra* note 57, 111-23; D'EMILIO, *supra* note 57, at 23-39; JOHNSON,

homosexuality] home to millions of readers.”<sup>163</sup> By 1958, Leslie Fiedler was complaining that homosexuals had become “the staunchest party of all” among American writers.<sup>164</sup> Kinsey’s numbers may have startled, but for many readers they resonated, on reflection, with felt reality. Llewellyn predicted in 1948, for example, that “further sampling” would reduce Kinsey’s estimates “by about half.” But, he asked, “[w]hat matter?” The facts to be faced would remain essentially unaltered.<sup>165</sup>

All of these developments helped lay the groundwork for what historian David Johnson aptly calls the “Lavender Scare” — the rampant gay-baiting that was part and parcel of McCarthyism and lasted well into the 1960s.<sup>166</sup> Gay men and lesbians were the largest single category of “security risks” purged from federal government service in the Cold War; Johnson estimates that as many as 5,000 may have lost their jobs.<sup>167</sup> Red-baiting and gay-baiting often coincided. Not only was it assumed that many communists were homosexuals, and vice versa, but the essential features of the communist underground were often said to be replicated among homosexuals: a clandestine, worldwide network, invisible to outsiders, with its own codes and secret meeting places, stealthily gaining converts, and fundamentally antithetical to American values.<sup>168</sup> J. Edgar Hoover’s FBI, at the forefront of the domestic anticommunist campaign, also played a key role — through a “Sex Deviates” program that Hoover initiated in 1951 — in spying on alleged homosexuals, disseminating rumors of homosexuality, and purging homosexuals from government service.<sup>169</sup>

Even more so than the Red Scare, the Lavender Scare had a powerful undercurrent of anti-intellectualism — or, to put it another way, anti-intellectualism during the Cold War drew heavily on an atmosphere of homophobia that strengthened and was in turn reinforced by alarm about “security risks.” The arch-villains of McCarthyism, the State Department’s “striped pants boys,” were caricatured as not only soft

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*supra* note 125, at 41-64.

<sup>163</sup> JOHNSON, *supra* note 125, at 55.

<sup>164</sup> LESLIE FIEDLER, *The Un-Angry Young Men: America's Post-War Generation*, in 1 THE COLLECTED ESSAYS OF LESLIE FIEDLER 389, 405 (1971) (reprinting an essay first published in *Encounter* in January 1958).

<sup>165</sup> Llewellyn, *supra* note 145, at 124.

<sup>166</sup> JOHNSON, *supra* note 125, 1-14.

<sup>167</sup> See *id.* at 8, 166.

<sup>168</sup> See *id.* at 33-35.

<sup>169</sup> See ATHAN THEOHARIS, J. EDGAR HOOVER, SEX, AND CRIME 23-24, 103-05 (1995).

on communism but soft in general: effeminate, snobbish, over-educated "cookie pushers."<sup>170</sup> Adlai Stevenson, widely derided as an intellectual "egghead" in his 1952 presidential run, was also tarred by orchestrated rumors that he was homosexual.<sup>171</sup> The very concept of the "egghead" tied together anti-intellectualism and homophobia: an egghead was "a person of spurious intellectual pretensions, often a professor or the protégé of a professor; fundamentally superficial; over-emotional and feminine in reactions to any problems."<sup>172</sup> Along with the Red Scare, the Lavender Scare quickly spread outward from investigations of government officials to embrace many other sectors of American life. Private businesses, particularly those hoping to sell goods or services to the government, began widespread screening and surveillance of their employees to ferret out homosexuals. School teachers, local government employees, and university professors came under scrutiny for their sexual practices and inclinations.<sup>173</sup>

The panic about "lavender lads" in government service, combined with the sex crime panic and Kinsey's explosive findings, led police departments around the country to increase their harassment of homosexuals.<sup>174</sup> This was particularly true in the nation's capital, where "local sex-crime arrests and the federal government's anti-gay policies formed a reinforcing circle," as "arrests were used as evidence to fire gay civil servants, and the alleged security risk posed by gay civil servants served as justification for stepped-up enforcement and prosecution."<sup>175</sup> District of Columbia police officials testified before Congress that political subversives were often homosexuals, that 5,000 homosexuals lived in the capital, and that 3,750 of them were employed by the federal government. These figures were largely

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<sup>170</sup> See JOHNSON, *supra* note 125, at 65-77; EDWARD A. SHILS, *THE TORMENT OF SECRECY: THE BACKGROUND AND CONSEQUENCES OF AMERICAN SECURITY POLICIES* 85 (1956).

<sup>171</sup> Stevenson's celebrated riposte to the "egghead" accusation — "Eggheads of the world, unite! You have nothing to lose but your yolks!" — probably worsened matters; its wittiness seemed to confirm the charge. GEORGE PACKER, *BLOOD OF THE LIBERALS* 155 (2000); see also Willie Morris & Ed Yoder, *Down South We Fry Them on the Sidewalks*, in *SHIFTING INTERLUDES* 7, 7-8 (Jack Bales ed., 2002). On the rumormongering about Stevenson's sexuality, see JOHNSON, *supra* note 125, at 121-22; THEOHARIS, *supra* note 169, at 105-07.

<sup>172</sup> JOHNSON, *supra* note 125, at 93 (quoting Louis Broomfield).

<sup>173</sup> See *id.* at 167-69; DEBORAH NELSON, *PURSuing PRIVACY IN COLD WAR AMERICA* 13 (2002); Gerald Sullivan, *Political Opportunism and the Harassment of Homosexuals in Florida, 1952-1965*, J. HOMOSEXUALITY, Aug. 1999, at 57.

<sup>174</sup> See D'EMILIO, *supra* note 57, at 49-53; Howard, *supra* note 126; Sullivan, *supra* note 173, at 61-63.

<sup>175</sup> JOHNSON, *supra* note 125, at 177.

invented, and they were significantly below what could be extrapolated from Kinsey's prevalence estimates. But they fueled the panic over "perverts" in government service and bolstered support, in many quarters, for the "notoriously aggressive" tactics of the District of Columbia vice squad in policing homosexuality.<sup>176</sup> In the early 1950s, arrests for homosexuality in the nation's capital exceeded 1000 per year; a large portion of the arrests were made by undercover officers propositioning or soliciting propositions from men they suspected were homosexual.<sup>177</sup>

The Lavender Scare of the 1950s had critics from the outset, and the backlash strengthened as the decade progressed. Liberal journalists and political cartoonists lampooned the hysteria and suggested, in a rhetorical move destined to be echoed in later decades, that there might be something prurient in the very interest Congress was taking in the sexual habits of government employees.<sup>178</sup> By the mid-1950s prominent psychiatrists were denouncing the "hysteria" about homosexuality in government service and the "witch hunts" it triggered.<sup>179</sup> Magazines ran stories about the danger even heterosexual men faced of being wrongly accused of homosexual solicitation.<sup>180</sup> After the Democrats won control of Congress in 1954, Senator Hubert Humphrey led a review of government security procedures and lashed out at the power and discretion vested in the hands of security officers.<sup>181</sup> And two years earlier, in 1952, courts in the District of Columbia initiated a series of rulings that took explicit aim at abusive police tactics in the policing of homosexuality.<sup>182</sup> In the first and most widely cited of these cases, *Kelly v. United States*, the District of Columbia Circuit all but accused the arresting officer of perjury, and it directed trial courts to take special steps to prevent unjust convictions in misdemeanor prosecutions for homosexual solicitation. "[T]he testimony of a single witness to a verbal invitation to sodomy should be received and considered with great caution," the court admonished; character evidence offered by the defendant should be weighed heavily, because "[t]here is virtually no protection, except one's

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<sup>176</sup> *Id.* at 85-90, 174.

<sup>177</sup> See D'EMILIO, *supra* note 57, at 49-50.

<sup>178</sup> See JOHNSON, *supra* note 125, at 86, 106-07.

<sup>179</sup> *Id.* at 143.

<sup>180</sup> *Id.* at 110-11.

<sup>181</sup> See *id.* at 143.

<sup>182</sup> See *Guarro v. United States*, 237 F.2d 578, 582 (D.C. Cir. 1956); *Kelly v. United States*, 194 F.2d 150, 153-55 (D.C. Cir. 1952); *McDermett v. United States*, 98 A.2d 287, 290 (D.C. 1953).

reputation and appearance of credibility, against an uncorroborated charge of this sort"; and courts should "require corroboration of the circumstances surrounding the parties at the time."<sup>183</sup>

By the end of the 1950s, there was widespread sentiment that gay-baiting had gone too far. One telling indicator was *Advise and Consent*, Allan Drury's hugely popular, Pulitzer-winning novel of Washington intrigue, published in 1959, subsequently made into a Broadway play and then, in 1962, lavishly adapted for the screen.<sup>184</sup> The novel spent a record-breaking ninety-three weeks on the *New York Times* bestseller list; in a widely circulated photograph from the 1960 presidential campaign, Richard Nixon holds the book open before him while discussing it with John Kennedy.<sup>185</sup> The plot involved an admirable, conscientious Senator — a rising political star with a photogenic wife and child — driven to suicide by the politically motivated disclosure of a brief homosexual affair he had had during World War II.

Open reference to homosexuality was relatively new to Broadway,<sup>186</sup> and even newer to Hollywood. The motion picture Production Code, in fact, had declared the subject off limits. Partly in response to pressure from United Artists, the studio producing *Advise and Consent*, and Otto Preminger, the film's director, the Code was revised in 1961. The new language allowed "homosexuality and other sexual aberrations" to be "treated with care, discretion and restraint."<sup>187</sup>

The book, stage, and screen versions of *Advise and Consent* all "highlighted the excess of the hunt for homosexuals,"<sup>188</sup> but it is worth noting that they did so by showing how the hunt could victimize a "normal" man. The movie makes clear, as critic Mark Feeney observes, that the homosexual affair was "an aberration brought on by the rigors of wartime," for which the up-and-coming Senator is now "more than suitably ashamed."<sup>189</sup> That is unmistakable in the novel, as well. The wartime affair results from "surging loneliness" and "the burden of so much agony everywhere in the world . . . . Any other

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<sup>183</sup> Kelly, 194 F.2d at 153-55.

<sup>184</sup> See JOHNSON, *supra* note 125, at 141; Slovenko, *supra* note 112, at 90.

<sup>185</sup> See Avis Thomas-Lerner, *Author, Journalist Allen Drury Dies*, WASH. POST, Sept. 3, 1998, at C6. The photograph is reprinted in, for example, Jon Meacham, *The Insider*, STAN. MAG., Jan.-Feb. 1999, at 58, 61.

<sup>186</sup> See John Gassner, *Broadway in Review*, 13 EDUC. THEATRE J. 46, 49 (1961).

<sup>187</sup> See VITO RUSSO, *THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES* 120-22 (rev. ed. 1987); Chon Noriega, "Something's Missing Here!": *Homosexuality and Film Reviews During the Production Code Era, 1934-1962*, CINEMA J., Autumn 1990, at 20, 30.

<sup>188</sup> JOHNSON, *supra* note 125, at 141.

<sup>189</sup> MARK FEENEY, *NIXON AT THE MOVIES: A BOOK ABOUT BELIEF* 116 (2004); see also RUSSO, *supra* note 187, at 143.

time, any other place, . . . it would never have happened; but many things like that happened in war . . . and no one noticed and no one cared."<sup>190</sup> The play, more moralistic than the book or the movie, refashions the affair into an isolated, "one time" encounter, "a very old and very tired sin," which even the Senator's wife recognizes has "nothing to do" with his later life.<sup>191</sup> The "honorable young politician"<sup>192</sup> of *Advise and Consent* is Llewellyn's "occasional," situational homosexual; he had "met and solved the problem."<sup>193</sup> Lifelong, committed homosexuals make no appearance in the novel or the play,<sup>194</sup> and they make an unappealing, strikingly lurid appearance in the movie. A scene set in a gay bar makes the social life of homosexuals seem sad, tawdry, and "as repulsive as possible."<sup>195</sup> The word "homosexual" itself does not appear in the novel and is not spoken in the play or the movie.

In all of these respects — the new but limited frankness about homosexuality; the simultaneous pity for, repulsion from, and vague fascination with the gay world; the special concern for "normal" men caught up in the hounding of homosexuals; and the dim view of gay-baiters themselves — *Advise and Consent*, in each of its versions, was strongly of its time. The 1960s witnessed "a noticeable shift" in "the sheer quantity of discourse about homosexuality."<sup>196</sup> Some of the discourse was pornographic, let loose by changes in First Amendment law.<sup>197</sup> But in mainstream media, too, "portrayals of gay life multiplied," reflecting a growing "fascination with this exotic, unexplored realm of American society."<sup>198</sup> The shadowy, almost taboo nature of the topic was frequently stressed; homosexuals were

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<sup>190</sup> ALLEN DRURY, *ADVISE AND CONSENT* 288 (1959). When the Senator is exposed, he tells his wife that "[p]eople go off the track sometimes, under pressures like the war. That's what happened to me. I went off the track." *Id.* at 432.

<sup>191</sup> LORING MANDEL, *ADVISE AND CONSENT* 80, 129, 158 (1961).

<sup>192</sup> Gassner, *supra* note 186, at 49.

<sup>193</sup> See *supra* notes 151-54 and accompanying text.

<sup>194</sup> Save for fleeting reference, in the play, to the subsequent history of the Senator's wartime seducer: "caught" and "medically discharged" from the Navy, he winds up an "assistant postmaster in Indiana," suspicious that "his medical records might be preventing his advancement." MANDEL, *supra* note 191, at 127.

<sup>195</sup> Noriega, *supra* note 187, at 34 (quoting review appearing in June 8, 1962, issue of *Commonweal*); see also RUSSO, *supra* note 187, at 141-43.

<sup>196</sup> D'EMILIO, *supra* note 57, at 129.

<sup>197</sup> See *id.* at 129-34; MURDOCH & PRICE, *supra* note 119, at 27-50, 65-83; Eskridge, *supra* note 13, at 883-85, 890-95.

<sup>198</sup> D'EMILIO, *supra* note 57, at 129; see also *id.* at 134-39; Eskridge, *supra* note 13, at 889.

described throughout the decade as "barely known"<sup>199</sup> and "undiscussed,"<sup>200</sup> their very presence a "sensitive open secret."<sup>201</sup> Beyond that, the consistent themes in mainstream treatments of homosexuality in the 1960s were that homosexuals were everywhere, particularly in big cities; that for the most part they were discreet and unthreatening; and that they deserved more pity than fear. The "gay world" was "actually a sad and often sordid world," cutting "across the spectrum of American life."<sup>202</sup> Homosexuals, "found in every conceivable line of work," were "condemned to a life of promiscuity."<sup>203</sup> They were "often quite lonely people who need[ed] to surround themselves with friends and stay continually amused."<sup>204</sup> But many if not most homosexuals, particularly those who married, were "solid members of the community,"<sup>205</sup> discreet about their practices, and threatening no real harm. "Generally speaking," in fact, the gay world frowned on "any behavior which attracts heterosexual attention . . . if for no other reason than that it [was] considered bad public relations."<sup>206</sup>

What homosexuals were thought to fear most, in fact, was exposure. That was what made them vulnerable to blackmail, and that was what made being arrested for homosexual conduct so horrible.<sup>207</sup> As the District of Columbia Circuit pointed out in *Kelly*, "the results of the accusation itself are devastating to the accused," regardless of the ultimate disposition of the charges.<sup>208</sup> The terror and cruelty of a charge of homosexuality, the way such a charge could destroy, in a blow, a man's reputation and livelihood, his family life and his place in the community — all of this was well known to Americans regardless of their own sexual practices, and witnessed repeatedly, often close at hand. The solid, well-regarded family man suddenly disgraced by an arrest in a men's room or a public park was a familiar story, replayed again and again throughout the 1960s. When Walter Jenkins, married

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<sup>199</sup> See Helmer, *supra* note 147, at 85.

<sup>200</sup> MARTIN HOFFMAN, *THE GAY WORLD: MALE HOMOSEXUALITY AND THE SOCIAL CREATION OF EVIL* 3 (1968).

<sup>201</sup> Doty, *supra* note 59, at 1.

<sup>202</sup> *Homosexuality in America*, LIFE, June 26, 1964, at 66. *Look* titled its copycat feature on male homosexuality *The Sad "Gay" Life*. See Star, *supra* note 97, at 31.

<sup>203</sup> Doty, *supra* note 59.

<sup>204</sup> Helmer, *supra* note 147, at 87.

<sup>205</sup> Paul Welch, *The 'Gay' World Takes to the City Streets*, LIFE, June 26, 1964, at 68, 71.

<sup>206</sup> Helmer, *supra* note 147, at 87-88.

<sup>207</sup> See Star, *supra* note 97, at 32.

<sup>208</sup> *Kelly v. United States*, 194 F.2d 150, 154 (D.C. Cir. 1952).

with six children, was arrested in 1964 in a YMCA men's room in the District of Columbia for having sexual contact with another man, the story was extraordinary only because Jenkins was President Lyndon Johnson's most trusted aide, and because Jenkins and his family were unusually popular figures in Washington — close friends, for example, with the family of Justice Clark.<sup>209</sup> None of this stopped the arrest from blowing his life apart: within days he had resigned his White House position, forfeited his court bond, and (in a step stage-managed by Johnson's legal advisor, Abe Fortas) entered a hospital for a nervous breakdown. His career in politics and his life in Washington were over.<sup>210</sup>

Minus the connections to the Washington power circuit, stories like Walter Jenkins's were common. They hit close to home for many Americans — for those hiding their own homosexuality, obviously, but also for those who were largely or exclusively heterosexual. The repeated, public disgrace of apparently "normal" men — upstanding husbands, fathers, and community members — gave credence to Kinsey's findings about the prevalence of homosexuality. They resonated, too, with the frequently expressed worry that overzealous or corrupt vice officers were prone to arrest innocent men on morals charges — the worry motivating decisions like *Kelly v. United States*.<sup>211</sup> And they reinforced the special concern Llewellyn had voiced in the late 1940s, and that *Advise and Consent* echoed in the late 1950s and early 1960s: the concern for the situational offender.<sup>212</sup> Those concerns were re-echoed throughout the 1960s, in the popular press and in scholarly work. The American Bar Foundation's influential study of criminal justice practices, for example, warned that the use of decoy officers could pose acute problems in the context of sodomy enforcement — far more so than in the policing of prostitution — because "a homosexual with a minimum of self-control might be induced by the encouragement to express a desire for a homosexual encounter though he would not have done so except for the encouragement."<sup>213</sup> This was a risk even when decoys were sent to

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<sup>209</sup> See LEE EDELMAN, *Tearooms and Sympathy; or, The Epistemology of the Water Closet*, in *HOMOGRAPHESIS: ESSAYS IN GAY LITERARY AND CULTURAL THEORY* 148, 148 (1994); JOHNSON, *supra* note 125, at 197-99; MURDOCH & PRICE, *supra* note 119, at 107-10.

<sup>210</sup> See LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 224-27 (1990); Al Weisel, *LBJ's Gay Sex Scandal*, OUT, Dec. 1999, at 76, available at <http://home.nyc.rr.com/alweisel/outwalterjenkins.htm>.

<sup>211</sup> 194 F.2d at 153-54; see *supra* text accompanying notes 182-83.

<sup>212</sup> See, e.g., EDELMAN, *supra* note 209, at 149-50, 161-65.

<sup>213</sup> LAWRENCE P. TIFFANY, DONALD M. MCINTYRE, JR. & DANIEL L. ROTENBERG,

areas, like particular public washrooms, well known as sites of gay cruising, for "[s]ome homosexuals who are 'under control,' in the sense that they do not publicly solicit, may frequent public restrooms so as to gain certain intangible benefits — for example, surreptitious glances from other homosexuals or renewed confidence from joining the group for a moment."<sup>214</sup>

All of this — the link between gay-baiting and anti-intellectualism; the awful disgrace, repeatedly witnessed, of sympathetic, solid citizens arrested on charges of homosexuality; the related sense that even "normal," heterosexual men could fall victim to that fate — all of this made the policing of homosexuality a matter of anxiety even, and in some ways especially, for many Americans who found homosexuality itself repulsive, or claimed to find it so. Gay men and lesbians remained objects of fear, ridicule, and contempt throughout the 1960s and beyond. But even (and sometimes particularly) among the fiercest homophobes, there was broad uneasiness about the policing of homosexuality. In 1966, for example, *Time* ran a venomous essay on *The Homosexual in America*, reacting in part to somewhat more sympathetic pieces that had appeared elsewhere.<sup>215</sup> Homosexuality, the editors insisted, was "a pernicious sickness" and "a pathetic little second-rate substitute for reality." It deserved "no encouragement, no glamorization, no rationalization, [and] no fake status as minority martyrdom."<sup>216</sup> The essay warned that mainstream values were under "vengeful, derisive" attack from "[h]omosexual ethics and esthetics"; in some areas of the arts, "deviates" were "so widespread" they sometimes appeared "to be running a kind of closed shop."<sup>217</sup> Nonetheless the editors at *Time* had little good to say about police efforts to suppress homosexuality. At best, the essay suggested, those efforts might be useless; at worst they provided "a constant opportunity for blackmail and for shakedowns by real or phony cops."<sup>218</sup>

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DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 236 (1967). On the ABF study and its impact, see, for example, Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953-1969*, 9 JUSTICE Q. 47 (1992).

<sup>214</sup> TIFFANY, MCINTYRE & ROTENBERG, *supra* note 213, at 237 n.18.

<sup>215</sup> *The Homosexual in America*, TIME, Jan. 21, 1966, at 40. For examples of earlier, more sympathetic treatments, see Helmer, *supra* note 147, at 85; *Homosexuality in America*, *supra* note 202.

<sup>216</sup> *The Homosexual in America*, *supra* note 215, at 41.

<sup>217</sup> *Id.* at 40. On the "high-profile frenzy," peaking in the 1960s, about male homosexuals in the arts, see MICHAEL S. SHERRY, GAY ARTISTS IN MODERN AMERICAN CULTURE: AN IMAGINED CONSPIRACY 105-55 (2007).

<sup>218</sup> *The Homosexual in America*, *supra* note 215, at 41.

Several factors, beyond those already mentioned, fueled public concerns about the policing of homosexuality in the 1960s, and in the 1970s as well. To begin with, homophile groups and early gay rights activists did much to publicize police harassment of gay men and lesbians, particularly in the late 1960s and early 1970s. Homophile groups increased their focus on issues of law enforcement tactics as the 1960s wore on,<sup>219</sup> and the Stonewall Riots, themselves triggered by a vice raid, fixed police harassment firmly at the center of the gay rights movement from 1969 onward.<sup>220</sup> Public uneasiness about the policing of homosexuality drew also, throughout the 1960s and 1970s, on steady and consistent criticism of sodomy enforcement by lawyers, judges, and legal scholars.<sup>221</sup> Much of this criticism stemmed from a liberal commitment that sex between consenting adults was none of the state's business, a commitment defended famously — and, most readers thought, successfully — by H.L.A. Hart in his extended written debate in the early 1960s with Patrick Devlin.<sup>222</sup> So flagrantly did morals statutes violate the “harm principle” that by 1968 their legitimacy had become, as Herbert Packer put it, “the *locus classicus* of modern interest in the limits of criminal law.”<sup>223</sup> And a disproportionate share of the discussion about sex offenses, “both in learned journals and in the popular press, was addressed specifically to the crime of consensual sodomy.”<sup>224</sup> The Hart-Devlin debate itself was an outgrowth of the 1957 recommendation by the Wolfenden Committee that Britain decriminalize private consensual acts of homosexuality between adults, a recommendation Parliament largely followed ten years later.<sup>225</sup> The Model Penal Code, finalized by the American Law Institute in 1962, similarly treated consensual, adult sex as outside the purview of the criminal law, and the State of Illinois

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<sup>219</sup> See D'EMILIO, *supra* note 57, at 149-96; Eskridge, *supra* note 13, at 836-42; Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960-1980*, 12 COLUM. HUM. RTS. L. REV. 159, 168-72 (1980-1981).

<sup>220</sup> On the riots and their aftermath, see, for example, DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2004); MARTIN DUBERMAN, *STONEWALL* 181-280 (1993).

<sup>221</sup> See, e.g., D'EMILIO, *supra* note 57, at 144-46.

<sup>222</sup> Compare H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963), with PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

<sup>223</sup> PACKER, *supra* note 97, at 301; see also, e.g., Jeffrey Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 74-75 (1995).

<sup>224</sup> WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980*, at 202 (2001).

<sup>225</sup> See, e.g., Mary Ann Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 123-24.

took the ALI's advice on this score when it adopted the Model Penal Code, then still in draft, in 1961.<sup>226</sup> These developments — the Wolfenden recommendations, the British statutory reform, the position of the ALI, and the Illinois legislation — all received broad attention, not only among lawyers and scholars, but in the popular press as well.<sup>227</sup>

Sodomy laws were unpopular with judges, lawyers, and scholars in the 1960s not just on philosophical grounds, but also because of the ways in which the laws were enforced. The policing and prosecution of homosexuality was the “nadir of criminal justice.”<sup>228</sup> Vice squad officers used “an amalgam of unsavory . . . techniques” to catch homosexuals — “spy” tactics that were “abhorrent to the democratic way of life.”<sup>229</sup> The drafters of the Model Penal Code took approving note of the District of Columbia Circuit's decision in *Kelly v. United States* and stressed the “special problems” that sodomy enforcement raised for “police morale,” given the “entrapment practices” on which it seemed to rely, and the “temptation to bribery and extortion.”<sup>230</sup> Herbert Packer, writing in the late 1960s, thought the “notorious” police strategies of spying on washrooms and luring men to make homosexual advances were “well-known evils, plainly degrading to the administration of criminal justice, at best undignified, at worst morally repulsive.”<sup>231</sup> They imposed a “qualitative” burden on the legitimacy and civility of law enforcement “quite out of proportion” to the percentage of police resources they consumed.<sup>232</sup> This was virtually the unanimous view of scholars at the time, and of the organized bar as well.<sup>233</sup>

The “unsavory,” “degrading,” “repulsive” nature of sodomy enforcement had much to do with the toll it seemed to take on

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<sup>226</sup> See MODEL PENAL CODE § 2.075 cmts. at 276-81 (Tentative Draft No. 4, 1955); Eskridge, *supra* note 13, at 842.

<sup>227</sup> See, e.g., VANCE PACKARD, *THE NAKED SOCIETY* 260 (1964); Rosen, *supra* note 219, at 167; Doty, *supra* note 59; Helmer, *supra* note 147, at 91; *The Homosexual in America*, *supra* note 215, at 41; Star, *supra* note 97, at 32; Welch, *supra* note 205, at 74.

<sup>228</sup> Slovenko, *supra* note 112, at 81.

<sup>229</sup> EDWIN M. SCHUR, *CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY* 79-80 (1965).

<sup>230</sup> MODEL PENAL CODE § 2.075 cmts. at 279 (Tentative Draft No. 4, 1955).

<sup>231</sup> PACKER, *supra* note 97, at 305-06.

<sup>232</sup> *Id.* at 303, 312.

<sup>233</sup> Justice Marshall relied obliquely on the extraordinarily low repute of sodomy enforcement in his dissent in *Adams v. Williams*, 407 U.S. 143, 156-57 (1972) — the only reference to the policing of homosexuality in a Burger-era criminal procedure opinion. See *supra* note 118.

individual privacy and dignity, and with the specter it raised of omnipresent police spying — the specter of the police state. Then, too, there was the longstanding concern that “normal” men might be swept up in the net, that “otherwise innocent bystanders could be trapped into compromising statements.”<sup>234</sup> But there was also, in this rhetoric, more than a whiff of something else: the sense that the police were dirtying themselves. What did it say about the police when their “squalid hunting ground” was “the public urinal”?<sup>235</sup> What was one to make of officers who donned tight clothing, swished provocatively, and trolled for trysts with other men? Or who spent hours peering into toilet stalls, hoping to glimpse an act of sodomy? What many people said or suggested, of course, was that the officers themselves might be sexually attracted to their work — essentially the same charge advanced in the 1950s against the congressional investigators fomenting and capitalizing on the Lavender Scare.<sup>236</sup> There is a fair amount to be said about this kind of table-turning, both as rhetoric and as psychoanalysis, and we will return to it later. But the sense that the police dirtied themselves by patrolling men’s rooms or gay bars did not depend entirely on the suggestion that the cops themselves might be homosexual. Some of it stemmed simply from the revulsion triggered in many if not most Americans by the very thought of homosexuality, particularly male homosexuality. It is a familiar feature of disgust that it works associatively: “Contact with the disgusting makes one disgusting.”<sup>237</sup> Martha Nussbaum may exaggerate in calling “male loathing of the male homosexual” the

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<sup>234</sup> SCHUR, *supra* note 229, at 79-80.

<sup>235</sup> *Id.* at 80.

<sup>236</sup> Thus, for example, when Justice Douglas’s law clerk recommended a grant of certiorari in *Smayda v. United States*, 352 F.2d 251, 253 (9th Cir. 1965), he argued that although the defendants’ conduct was “unappealing,” so was “the peeping-tomism” of the park rangers. See Memorandum to Justice Douglas, *supra* note 75. The dissent Justice Douglas circulated soon thereafter from the Court’s expected denial of certiorari in *Lewis v. United States*, 385 U.S. 206 (1966), similarly complained that “[r]angers of the National Park Service have been converted to ‘peeping Toms’ leading to close surveillance of public toilets for the detection of homosexual acts.” Draft Opinion of Justice Douglas at 1-2, *Lewis*, 385 U.S. 206 (No. 811) (original in Papers of William O. Douglas, Library of Congress, Box 1388) (photocopy on file with author); see *supra* note 83. There was some of this, too, in reactions to Senator Larry Craig’s arrest last year for a men’s room solicitation at the Minneapolis-St. Paul Airport. See, e.g., Nick Coleman, *Potty Police Must Have Better Things to Do at MSP*, MINN. STAR-TRIB., Sept. 5, 2007, at 1B.

<sup>237</sup> Susan Miller, *Disgust Reactions: Their Determinants and Manifestations in Treatment*, 29 CONTEMP. PSYCHOANALYSIS 711, 711 (1993); see also WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 5, 12 (1997).

“central locus of disgust in today’s United States,”<sup>238</sup> but there is no doubt that abhorrence of homosexuality, and homosexuals, remains common,<sup>239</sup> nor that it was commoner in the 1960s and 1970s. Inevitably, that disgust was transferred, at times, to police officers who immersed themselves in the gay world — and, in a more attenuated way, to their colleagues. If policing is a “tainted occupation” because officers spend so much time with people who are poor, disorderly, and dangerous,<sup>240</sup> police forces tainted themselves further, and more sensationally, by the “notorious” practices they employed against homosexuals in the twenty years surrounding Stonewall — even, and in some ways especially, among those Americans most fearful of homosexuality.

### B. *Homosexuality and Criminal Procedure*

To summarize: The Sixties were a time of considerable uneasiness not only about homosexuality, which was discussed with new but still limited frankness, but also about the tactics the police employed against homosexuals, especially the use of undercover decoys and the secret surveillance of public washrooms. Many men, of all occupations and social classes, regularly engaged in precisely the conduct the police were hoping to detect; the aggressive tactics of vice officers constantly threatened them with arrest and public disgrace. These men had the strongest and most direct reasons for concern about the policing of homosexuality, but others shared their anxiety. Some of this stemmed from a degree of sympathy for homosexuals, who were increasingly viewed as more pitiful than sinister. Some of it stemmed from a widespread sense that anti-homosexual policing could easily ensnare “normal” men, either because they gave into temptations they would ordinarily resist, or because the police framed them. Beyond all this, there was a broad feeling that the tactics the police employed in combating homosexuality were degrading and abhorrent: partly because they violated the privacy and dignity of

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<sup>238</sup> MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 113 (2004).

<sup>239</sup> In this regard, as in others, reactions to Senator Craig’s arrest for a men’s room solicitation in 2007 were telling. Critics went beyond calling him lawless, immoral or irresponsible: his conduct was “repulsive,” “disgraceful,” and “[f]rankly . . . disgusting.” Hendrik Hertzberg, *Offenses*, NEW YORKER, Sept. 17, 2007, at 31 (quoting, respectively, Hugh Hewitt, Mitt Romney, and John McCain).

<sup>240</sup> EGON BITTNER, *The Functions of the Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models*, in *ASPECTS OF POLICE WORK* 89, 96 (1990).

suspects; partly because they raised the specter of the police state; and partly, no doubt, because disgust for the world of homosexuality — its physical practices, its venues, and its rituals — rubbed off on the police.

The Sixties were also, of course, when the Supreme Court created modern criminal procedure. The Justices virtually never mentioned sodomy enforcement when fashioning rules for the police,<sup>241</sup> and that silence has been taken at face value. But the silence is not particularly telling: there was more frankness about homosexuality after 1960 than before, but the subject still made people uncomfortable, and the Supreme Court, in particular, strove to avoid it.<sup>242</sup> Thoughts about homosexuality often went unspoken, and discussions of homosexuality were often hushed or coded. That the Justices avoided writing about homosexuality hardly proves that the subject preoccupied them, but neither does it show the opposite. What it does mean is that, regardless of the role that homosexuality and its policing played in the shaping of criminal procedure, direct evidence will be hard to come by.

Rather than search for telltale proof of influence, it is more productive to look for features of modern criminal procedure that resonate with the concerns about homosexuality and its policing prevalent in the 1960s — aspects of criminal procedure that these concerns can help us to understand. I want to suggest there are at least three such aspects. The first is the pervasive focus on protecting a particular kind of privacy. The second is the view of the police as proto-fascists: the belief that police officers had “authoritarian personalities,” and that these deep character structures were the key to understanding their behavior. The third, related to the first and second, is the strong commitment to controlling police discretion through judicial oversight.

### 1. Protecting Secrets

A central puzzle of modern criminal procedure — particularly Fourth Amendment law, but to a lesser extent the Fifth Amendment privilege against compelled self-incrimination — is the great emphasis placed on protecting what William Stuntz calls “informational privacy”: “the individual’s ability to keep some portion of his life

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<sup>241</sup> The rare exceptions were the dissent Justice Douglas filed in *Osborn v. United States*, 385 U.S. 323, 340-53 (1966), and arguably Justice Marshall’s dissent in *Adams v. Williams*, 407 U.S. 143, 153 (1972). See *supra* notes 82-83, 118 and accompanying text.

<sup>242</sup> See *supra* notes 119-24 and accompanying text.

secret, at least from the government."<sup>243</sup> *Katz*, with its focus on "reasonable expectations of privacy," is a prime example of this emphasis. But the emphasis runs throughout Fourth Amendment law, as Professor Stuntz has shown.<sup>244</sup> It finds reflection, for example, in the principle that nothing counts as a search unless it reveals new information to the police,<sup>245</sup> and in the relatively lax rules for seizures as opposed to searches.<sup>246</sup> It also finds expression, albeit less strongly, in the case law interpreting the Fifth Amendment privilege against compelled self-incrimination. That privilege attaches to compelled statements that "disclose information"<sup>247</sup> by virtue of their "content."<sup>248</sup> As Stuntz acknowledges, the exclusive focus on "testimonial" as opposed to physical evidence is hard to explain in terms of informational privacy, and so is the way that a grant of immunity lifts all Fifth Amendment protection.<sup>249</sup> Nonetheless the privilege is often understood and defended as protecting "something akin to informational privacy" — an interest, that is to say, "in keeping a category of information secret."<sup>250</sup> So Stuntz seems fully justified in finding "one fairly well-defined and fairly narrow interest, the interest in secrecy," lurking behind much of modern criminal procedure.<sup>251</sup>

Stuntz also seems right to find the focus on secrets difficult to reconcile with customary assumptions about the purposes of criminal procedure law.<sup>252</sup> He notes that informational privacy seems to have "little to do with the worst aspects of police misconduct" — that is to

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<sup>243</sup> Stuntz, *supra* note 44, at 1016, 1034.

<sup>244</sup> *Id.* at 1020-25.

<sup>245</sup> See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 324-46 (1987); *United States v. Knotts*, 460 U.S. 276, 281-83 (1983); cf. *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (reaffirming that sniffing by police dog trained to detect only illegal narcotics "generally does not implicate legitimate privacy interests" and therefore "is not a search subject to the Fourth Amendment"); Stuntz, *supra* note 44, at 1022-23.

<sup>246</sup> See, e.g., *Illinois v. McArthur*, 531 U.S. 326, 331-33 (2001); *Horton v. California*, 496 U.S. 128, 140 (1990); *id.* at 147 (Brennan, J., dissenting); Stuntz, *supra* note 44, at 1023-24.

<sup>247</sup> *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004); *Doe v. United States*, 487 U.S. 201, 210 (1988).

<sup>248</sup> *Pennsylvania v. Muniz*, 496 U.S. 582, 599, 612 (1990).

<sup>249</sup> See Stuntz, *supra* note 44, at 1024.

<sup>250</sup> *Id.* at 1025.

<sup>251</sup> *Id.*

<sup>252</sup> Stuntz also argues that the focus on informational privacy is inconsistent with jurisprudential developments outside criminal procedure. Assessing that claim is beyond the scope of this Article.

say, with police coercion, police violence, and police racism.<sup>253</sup> Moreover, the people who tend to care most about informational privacy today are propertied members of the upper and middle class, not the urban, minority poor — the primary intended beneficiaries of the criminal procedure revolution. Informational privacy matters most to people who lack strong reason to fear for their physical safety around the police, and who have a lot of privacy to lose. Minority residents of impoverished urban neighborhoods are likely to care much more about coercion, violence, and racism at the hands of the police.<sup>254</sup> The upshot, Stuntz argues, is that modern criminal procedure, as constructed in the 1960s and 1970s, protects “the wrong interest” and “the wrong people.” Fourth Amendment law, in particular, focuses “on an interest that is at the periphery of policing, not at the core,” and, largely because of this emphasis, serves chiefly to protect people who do not need judicial protection — people who can “protect themselves reasonably well without the need of judicial intervention.”<sup>255</sup>

What could explain this perverse, misguided attention to an issue that is of distinctly secondary importance, and that matters mostly to the well off? Stuntz suggests it may be an accident of history. The emphasis on informational privacy, he argues, traces to criminal procedure decisions from the late 1800s and early 1900s — the era of *Lochner v. New York*.<sup>256</sup> The leading criminal procedure decision of that period, *Boyd v. United States*, used the Fourth and Fifth Amendments, and the “privacies” they protected, in much the same way that *Lochner* used the concepts of due process and liberty: to put brakes on the expanding regulatory state.<sup>257</sup> *Boyd* was a civil forfeiture proceeding, not a criminal case; at the time, there were relatively few federal criminal prosecutions, and the Fourth and Fifth Amendment had not yet been held applicable to state prosecutions. In the early decades of the twentieth century, the Supreme Court began hemming in the application of the Fourth and Fifth Amendment in cases that, like *Boyd*, fell outside the area of conventional criminal prosecutions. Because there were still relatively few criminal prosecutions in federal court, the specific protections provided by *Boyd* and its progeny therefore had little practical impact. But a critical first step in the

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<sup>253</sup> See Stuntz, *supra* note 44, at 1078.

<sup>254</sup> See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1289 (1999).

<sup>255</sup> *Id.*

<sup>256</sup> 198 U.S. 45 (1905).

<sup>257</sup> 116 U.S. 616, 630 (1886).

criminal procedure revolution of the 1960s was extending the Fourth and Fifth Amendments to the states, by deeming their protections part of the due process of law guaranteed against the states by the Fourteenth Amendment. Stuntz suggests that when the Supreme Court took this step, it brought *Boyd's* antiquated approach to the Fourth and Fifth Amendment into modern criminal procedure at the ground level — and, he contends, we have been living with the consequences ever since.<sup>258</sup>

The main problem with this account is not that it is implausible but that it explains too little. Why did the Court, which changed so much about criminal procedure in the 1960s, preserve the privacy orientation of *Lochner*-era criminal procedure? More importantly, why did the Court in the 1960s *increase* the emphasis that criminal procedure placed on *informational* privacy? Because the fact is that Fourth Amendment law focuses much more single-mindedly on informational privacy today than it did in the late 1800s and early 1900s. As Stuntz himself points out, the earlier cases linked their concern for the "privacies of life" with a powerful defense of property rights.<sup>259</sup> Property, much more than secrecy, was the paramount value protected by *Boyd* and its progeny. Witness, for example, the Court's refusal in *Olmstead v. United States* to apply the Fourth Amendment to wiretaps not involving physical trespasses.<sup>260</sup> Or consider the rule against searching for, or seizing, "mere evidence" in which the government holds no possessory interest — another property-based doctrine promulgated by the Court in the early twentieth century and

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<sup>258</sup> See Stuntz, *supra* note 44, at 1049-60, 1078; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 434 (1995). Elsewhere Stuntz has suggested that criminal procedure's focus on informational privacy may stem from its reliance on the exclusionary rule: when the remedy is disallowing information, one naturally focuses on violations for which that remedy seems appropriate. See William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 448-51 (1997). But it seems at least as likely that the focus on informational privacy has fostered reliance on the exclusionary rule, rather than the other way around. Only with regard to violations of informational privacy, after all, can one say sensibly what is so often said in defense of the exclusionary rule: that the rule simply blocks the police from benefiting from their illegality. "The officer loses the very thing he gained from the illegal search, and no more." *Id.* at 446; see also, e.g., *Nix v. Williams*, 467 U.S. 431, 443 (1984); cf. *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006) (holding exclusionary rule inapplicable to violations of knock-and-announce requirement, in part because that requirement does not protect "one's interest in preventing the government from seeing or taking evidence").

<sup>259</sup> See Stuntz, *supra* note 44, at 1049.

<sup>260</sup> 227 U.S. 438, 466 (1928).

discarded in the 1960s.<sup>261</sup> Fourth Amendment law before the 1960s was “property-based,” not secrecy-based.<sup>262</sup>

Stuntz notes that modern Fifth Amendment law, unlike modern Fourth Amendment jurisprudence, has moved away from, rather than toward, an emphasis on keeping secrets.<sup>263</sup> But that process began in the mid-1970s, well after the peak of the criminal procedure revolution. In contrast, *Miranda v. Arizona*,<sup>264</sup> the linchpin of the Warren Court’s Fifth Amendment jurisprudence, was “of a piece with privacy-protective Fourth Amendment law” — at least until the Burger Court began narrowing and reinterpreting it.<sup>265</sup>

Particularly as originally articulated, then, modern criminal procedure law showed a strong and pervasive concern for informational privacy. That concern was not simply an unexamined inheritance from the *Lochner* era; to a considerable extent, it was new and distinctive. And it fit poorly with the set of practical concerns often assumed to lie behind the criminal procedure revolution — concerns, that is to say, about racial inequity. The simplest explanation is that the criminal procedure revolution was shaped in part by concerns other than law enforcement racism. Race may have been the most important subtext of criminal procedure law in the 1960s and 1970s, but it was not the only subtext.

This should not be controversial. However strongly concerns about race shaped, say, the *Miranda* doctrine, or the rules the Supreme Court promulgated for investigatory stops and pat-downs,<sup>266</sup> it is difficult to see those concerns lurking in the background of a decision like *Katz*. This is not to deny that race crept into the controversy over surreptitious police surveillance; race crept into everything. It comes as no shock that the most important surveillance case of the early 1970s — the case in which the Court extended *Katz* to national security investigations — arose because the FBI wiretapped the Black

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<sup>261</sup> Compare *Gouled v. United States*, 255 U.S. 298, 309-11 (1921), with *Warden v. Hayden*, 387 U.S. 294, 304, 307 (1967).

<sup>262</sup> Cloud, *supra* note 42, at 11.

<sup>263</sup> See Stuntz, *supra* note 44, at 1025.

<sup>264</sup> 384 U.S. 436 (1966).

<sup>265</sup> See Stuntz, *supra* note 44, at 1069-70. *Miranda* characterized the Fifth Amendment privilege as in part protecting the individual’s “right to a private enclave where he may lead a private life.” 384 U.S. at 460 (quoting *United States v. Grunewald*, 233 F.2d 556, 579, 581-82 (1956) (Frank, J., dissenting), *rev’d*, 353 U.S. 391 (1957)).

<sup>266</sup> See *Terry v. Ohio*, 392 U.S. 1, 29-31 (1968).

Panthers without a warrant.<sup>267</sup> But *Katz* and its progeny were not race cases. They were driven by other concerns.

Among those concerns was the fear of a kind of creeping totalitarianism, the slow emergence, as Justice Douglas put it, of "a society in which government may intrude into the secret regions of a man's life at will."<sup>268</sup> The specter of the modern police state loomed large in the 1960s and early 1970s, and the primary evil, the enabling sin, of the modern police state was the elimination of any truly private sphere, beyond the reach of government. Privacy violations therefore became, as the critic Deborah Nelson has written, not just personal matters but "a measure of the state of democracy, the health of American culture, and the future of the free world."<sup>269</sup>

It would be silly to trace all this to worries about sodomy enforcement. In the middle decades of the twentieth century, Americans had witnessed the rise of real police states, and the sins of those regimes included but also ran considerably beyond persecution of homosexuals. The scandals that arose in the late 1960s and early 1970s over COINTELPRO and other homegrown programs of police spying had little to do, overtly, with homosexuality; it was the surveillance and harassment of political opponents that got the most press and caused the most concern. Police spying was feared, first and foremost, as an abuse of power. It threatened to squelch debate, dissent, and oppositional organizing.<sup>270</sup> The focus on informational privacy in 1960s criminal procedure requires an explanation other than racial inequity, but it does not necessarily require the explanation of sodomy enforcement.

Still, it is striking how strongly the focus on informational privacy in Warren Court criminal procedure resonated with the period's pervasive anxiety about homosexuality and its policing. Protecting secrets was at best a roundabout remedy for police racism (notwithstanding the infamous abuses associated with government spying on black militants and civil rights leaders), but it made much more sense as a response to the lingering excesses of the Lavender Scare. Lots of homosexuals and suspected homosexuals were beat up by the police, but what homosexuals were thought to fear most from the police — and what they had strong reason to fear — was

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<sup>267</sup> *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 312-15 (1972); see Sklansky, *supra* note 12, at 251.

<sup>268</sup> *Osborn v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting).

<sup>269</sup> NELSON, *supra* note 173, at 4.

<sup>270</sup> See, e.g., DAVID CUNNINGHAM, *THERE'S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE* (2004).

disclosure. Discovering and divulging secrets was the very essence of the policing of homosexuality. (The policing of homosexuality, moreover, was itself an important tactic in police harassment of dissidents; the FBI, in particular, repeatedly sought to tar political radicals as homosexuals. Probably the worst case of this was the Bureau's smear campaign against David Dellinger, who had been arrested in a men's room in 1949.<sup>271</sup>) By protecting informational privacy, the Court was addressing, among other things, the chief injury the police were visiting on homosexuals and suspected homosexuals, and the chief set of public anxieties about sodomy enforcement.

Perhaps not incidentally, protecting informational privacy also addressed public anxiety about homosexuality itself, by helping to keep the practice closeted. In the field of sexuality, Warren Court criminal procedure amounted to an early version of "Don't Ask, Don't Tell." More precisely, it was a form of what Kenji Yoshino calls "enforced covering": a demand that gay men and lesbians keep their sexuality subdued and unobtrusive.<sup>272</sup> Gay sex was shielded from the police, but only when carried out with a reasonable expectation of privacy. As Herbert Packer pointed out, this was another way of saying that homosexuals would be left alone as long as they were discreet, conducting their relations in settings where, aside from the police, no one "who might reasonably have been expected to observe it would have been offended by what he saw."<sup>273</sup>

Legislative reform proposals like the Wolfenden report and the Model Penal Code aimed at the same bargain, more or less, by decriminalizing sex between consenting adults "in private." But experience in Illinois, which adopted this proposal along with the rest of the Model Penal Code, demonstrated what should have been obvious all along: decriminalizing sex in "private" had little practical importance as long as "private" meant at home. The overwhelming majority of sodomy enforcement took the form of arrests for solicitation or indecency in "quasi-private" areas<sup>274</sup> — precisely the areas where the reformulation of privacy in *Katz*, that cornerstone of

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<sup>271</sup> See *id.* at 120-21.

<sup>272</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 781 (2002). Yoshino classifies "Don't Ask, Don't Tell" as a demand not for "covering" but for "passing" — a demand that gay men and lesbians actively hide their sexual orientations rather than simply downplaying them. *Id.* at 772, 827-36.

<sup>273</sup> PACKER, *supra* note 97, at 311.

<sup>274</sup> *Id.* at 303, 306; see also, e.g., Gallo et al., *supra* note 51, at 689; Star, *supra* note 97, at 32.

the Warren Court's approach to the Fourth Amendment, promised to make the most difference.

## 2. The Police as Proto-Fascists

The idea that there is something psychologically wrong with police officers, something that predisposes them to act like fascist thugs, can now seem such a dated piece of hippie paranoia — rarely advanced in respectable company, even by people who at some level may still believe it — that it can be difficult to recall how seriously the idea was taken in the 1960s and 1970s, and how strongly it contributed to the criminal procedure revolution. The 1950s and 1960s saw an "explosion of research" into the psychological underpinnings of prejudice and authoritarianism.<sup>275</sup> It was widely thought that some people had a fundamentally authoritarian mindset — a cluster of deep-seated characteristics, inclinations, and preoccupations that predisposed them to violence, intolerance, and blind obedience to authority. The wellspring for much of this work was an enormously influential and heavily Freudian treatise on "the authoritarian personality" published in 1950, which elaborated the "character structure" of authoritarianism and provided an off-the-shelf tool for detecting and measuring it — the "F-scale," with F standing for fascism.<sup>276</sup> By the late 1960s the ordinary police officer was widely portrayed in social science literature as "almost a classic example of the authoritarian personality."<sup>277</sup> This analysis reinforced and in turn drew strength from the emerging popular perception, especially on the Left, that the police had a distinctive, antidemocratic mentality: rigid, insecure, inclined toward violence, and hostile to anyone "different." And it was part of the reason that by the mid-1960s, the Court and the legal academy tended to view the police as "suspect" and, in particular, became "unconvinced that the police regard[ed] the

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<sup>275</sup> Fred I. Greenstein, *Personality and Political Socialization: The Theories of Authoritarian and Democratic Character*, 361 ANNALS AM. ACAD. POL. & SOC. SCI. 81, 82 (1965); see also, e.g., Dean A. Allen, *Antifemininity in Men*, 19 AM. SOC. REV. 591, 591 (1954).

<sup>276</sup> T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950). On the book's background and influence, see, for example, MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950*, at 219-52 (2d ed. 1996); Greenstein, *supra* note 275, at 82-85; Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1724-27 (2005).

<sup>277</sup> Robert W. Balch, *The Police Personality: Fact or Fiction?*, 63 J. CRIM. L. CRIMINOLOGY & POL. SCI. 106, 107 (1972); see also, e.g., Sklansky, *supra* note 276, at 1731-33.

rights of the accused as anything but a nuisance and an impediment."<sup>278</sup>

Many factors gave credence to the view of the police as proto-fascists, but not the least of these factors was the sordid involvement of the police in the detection and suppression of homosexuality. The first serious scholarship on police violence, by William Westley in the 1950s, blamed the problem in part on what officers learned from their involvement in suppressing sexual deviancy. In a widely influential article, Westley argued that the police correctly understood the citizenry to approve "extremely rough treatment" in these cases, but to want that treatment carried out unofficially and out of public view. Complying with these implicit directives, Westley suggested, left the police embittered, cynical, and prone "to use violence as a general resource."<sup>279</sup>

But the perceived connection between authoritarianism and the policing of sexuality went deeper. One element of the F-scale was a preoccupation with sex, and more particularly an "exaggerated concern with sexual 'goings-on.'"<sup>280</sup> This element was measured by testing agreement with four statements, the first and most specific of which was, "Homosexuality is a particularly rotten form of delinquency and ought to be severely punished."<sup>281</sup> The devisers of the F-scale explained that a "strong inclination to punish violators of sex mores (homosexuals, sex offenders) may be an expression of a general punitive attitude based on identification with ingroup authorities, but it also suggests that the subject's own sexual desires are suppressed and in danger of getting out of hand."<sup>282</sup> The paradigmatic authoritarian was a "repressed homosexual[]," whose "fear of homosexual attack" prevented "friendly, egalitarian relations with men" and resulted, instead, in relations based on dominance and submission.<sup>283</sup> In the words of a later researcher, "a paranoid-like sexual conflict," characteristic of "the latent homosexual male," appeared "fundamental to authoritarianism."<sup>284</sup>

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<sup>278</sup> Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POL. SCI. 238, 241 (1966).

<sup>279</sup> Westley, *supra* note 134, at 38; cf. Gallo et al., *supra* note 51, at 719 (noting that seven of 15 law enforcement agencies interviewed by authors admitted engaging in organized, extralegal harassment of homosexuals).

<sup>280</sup> ADORNO ET AL., *supra* note 276, at 228.

<sup>281</sup> *Id.* at 240.

<sup>282</sup> *Id.* at 241.

<sup>283</sup> *Id.* at 798.

<sup>284</sup> Allen, *supra* note 275, at 593. On reflections of this notion in 1960s popular culture, see SHERRY, *supra* note 217, at 114-18.

The view of police as proto-fascists thus fed on and drew strength from the widespread suspicion, which we touched on earlier, that the police themselves, and vice officers in particular, were repressed homosexuals.<sup>285</sup> It helps to explain, for example, the uncritical acceptance given, on quite weak evidence, to the story that J. Edgar Hoover was a closeted homosexual who pranced about in drag and had sex at parties with teenage boys.<sup>286</sup> Despite the paucity of proof, the story has seemed "too good . . . to disbelieve."<sup>287</sup> There is always, of course, a degree of satisfaction associated with the unmasking of moralistic hypocrisy. But more has been involved in Hoover's rumored homosexuality becoming "unquestioned Truth."<sup>288</sup> The story has rung true in part because it fits the decades-old suspicion that law-and-order zealotry, especially in the policing of sexuality, is typically driven by repressed homosexuality. That suspicion is not the only reason that judges and scholars became so preoccupied in the 1960s and 1970s with the distinctive mindset of the police, but it is part of the explanation.

### 3. Judicial Control of Police Discretion

The suspicion that the police had authoritarian personalities was linked to two even more pervasive themes of criminal procedure jurisprudence in the 1960s and 1970s: anxiety about the scope of police discretion, and a commitment to reining in that discretion through judicial oversight.<sup>289</sup> *Katz* itself illustrated these themes: the Supreme Court threw out Charlie Katz's conviction not, ultimately, because federal agents had eavesdropped on his telephone calls, but because they had done so without first obtaining a judicial warrant.<sup>290</sup>

Several factors contributed to the "discretion skepticism"<sup>291</sup> of the criminal procedure revolution, including, as scholars have frequently noted, concerns about police racism.<sup>292</sup> But discomfort with the characteristic tactics of sodomy enforcement likely played a role here, too. Abuses associated with the policing of homosexuality were so well known, and hit so close to home for so many people, especially

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<sup>285</sup> See *supra* notes 235-36 and accompanying text.

<sup>286</sup> See THEOHARIS, *supra* note 169, at 11-55.

<sup>287</sup> *Id.* at 13.

<sup>288</sup> *Id.* at 14.

<sup>289</sup> See Sklansky, *supra* note 276, at 1736-41.

<sup>290</sup> See *Katz v. United States*, 389 U.S. 347, 357-59 (1967).

<sup>291</sup> Meares, *supra* note 111, at 1345.

<sup>292</sup> See, e.g., Kahan & Meares, *supra* note 6, at 1156-57.

among the liberal intelligentsia, it could not but have contributed to the widespread uneasiness with unbridled police discretion.

Take, for example, *Papachristou v. City of Jacksonville*,<sup>293</sup> perhaps the most iconic of the Supreme Court's attacks on police discretion. *Papachristou* struck down a traditional vagrancy statute on the ground that it was overly vague. Conference notes by Justice Douglas, who wrote the Court's opinion, suggest that the Justices were bothered from the start not so much by the lack of notice to potential violators (usually the first concern of vagueness doctrine), but by the license that vagrancy laws gave the police "to go after anyone they do not like."<sup>294</sup> Justice Douglas hit this theme hard in his opinion for the Court. He made reference to the difficulty that an average person would have understanding the boundaries of a traditional vagrancy prohibition, but he spent more time condemning "the unfettered discretion it places in the hands of the . . . police."<sup>295</sup> It was tantamount, he explained, to a "direction . . . to arrest all 'suspicious' persons" — a kind of blank-check law enforcement "long common in Russia," but "not compatible with our constitutional system" or, more fundamentally, with "[t]he rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich . . . ."<sup>296</sup>

*Papachristou* is commonly understood to have been a response to police racism. The decision "is all about low-level interactions between police and the policed in urban areas — and about interactions between police and minorities, in particular."<sup>297</sup> There are grounds for this reading: the defendants were "two interracial couples arrested in a parked automobile,"<sup>298</sup> the Court's opinion twice refers pointedly to the interests of "minorities" and the "the poor,"<sup>299</sup> and, of course, the case was decided against the backdrop of the civil rights movement. But the case was also decided three years after Stonewall, at a time when it was becoming more and more common to recognize that, in every pertinent respect, gay men and lesbians were "minorities," too. And the opinion Justice Douglas wrote in *Papachristou* spent a good bit of time on a theme with little direct

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<sup>293</sup> 405 U.S. 156 (1972).

<sup>294</sup> William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2230 (2002) (quoting conference notes by Justice Douglas).

<sup>295</sup> *Papachristou*, 405 U.S. at 168.

<sup>296</sup> *Id.* at 168-69, 171.

<sup>297</sup> Meares, *supra* note 111, at 1345.

<sup>298</sup> Kahan & Meares, *supra* note 6, at 1157.

<sup>299</sup> *Papachristou*, 405 U.S. at 162, 171.

connection to the issue of police racism: the threat that vagrancy laws posed to "nonconformists" and people of "high spirits."<sup>300</sup> Invoking Walt Whitman's *Song of the Open Road*, Justice Douglas called "wandering and strolling" one of the historical amenities of American life, an amenity "in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity."<sup>301</sup>

Robert Post plausibly reads this part of *Papachristou* as attacking the use of the criminal process to enforce "the norms of middle-class virtue."<sup>302</sup> The well-known use of vagrancy statutes and other equally vague prohibitions to enforce one particular set of those norms — the set concerning sexuality — may not have been far from the minds of the some of members of the *Papachristou* Court, in particular Justice Douglas, who earlier had written scathingly about the tactics employed in sodomy enforcement.<sup>303</sup> All the more so because Justice Douglas borrowed some of the language and ideas of the wandering-and-strolling part of *Papachristou* from a short essay by Yale law professor Charles Reich, then at the peak of his celebrity. Reich's essay, *Police Questioning of Law Abiding Citizens*, argued that a decent society "must have its hiding places — its protected crannies for the soul," because "independence, boldness, creativity, [and] high spirits" were constantly threatened by pressures "toward sameness and safety."<sup>304</sup> The heart of the essay was Reich's description of the many times he himself had been stopped and questioned by police officers, often while walking at night. "If I choose to take an evening walk," Reich wrote, "to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight."<sup>305</sup> Douglas quoted that sentence in *Papachristou*.<sup>306</sup> It may well have occurred to him that Reich, a "confirmed bachelor" and a good friend

<sup>300</sup> *Id.* at 164.

<sup>301</sup> *Id.*

<sup>302</sup> Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 498 (1994).

<sup>303</sup> See *supra* note 83 and accompanying text.

<sup>304</sup> Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1172 (1966). Justice Douglas himself previously had criticized vagrancy laws on the ground that "wanderers" and "men of the 'open road'" were "the heroes of much of our great literature . . . whose way of life has been glorified and envied by others for generations." William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 2-3 (1960). But the emphasis on nonconformity and "high spirits" was Reich's.

<sup>305</sup> Reich, *supra* note 304, at 1172.

<sup>306</sup> 405 U.S. at 164 n.6.

of Douglas, might have had particular reasons to want privacy on his nighttime walks.<sup>307</sup>

There is one other way in which concerns about the policing of homosexuality may have influenced the "discretion skepticism" of the criminal procedure revolution. Early decisions curbing the excesses of sodomy enforcement may have served as a template for the later, broader restrictions the Supreme Court placed on freewheeling police discretion. This is particularly true of *Kelly v. United States*, the 1952 decision by the District of Columbia Circuit reining in the use of decoys to arrest men for making homosexual solicitations.<sup>308</sup> It was novel at the time for courts to address themselves directly to particular police practices; a dissenting judge noted that "[d]uring the history of this court, some 58 years, it has not originated a single rule prescribing the quantity or character of evidence to prove a particular crime."<sup>309</sup> *Kelly* was widely noted and well received, both by commentators and by the organized bar. The drafters of the Model Penal Code, for example, cited the decision with approval.<sup>310</sup> And

<sup>307</sup> See CHARLES A. REICH, *THE SORCERER OF BOLINAS REEF* 59-61 (1976); Roger D. Citron, *Was Bill Douglas as Bad as Bruce Murphy's New Biography Makes Him Out to Be?*, HIST. NEWS NETWORK, May 5, 2003, <http://hnn.us/articles/1428.html>. Reich recalls that being gay in the 1960s "had the dubious distinction of being at the same time a police matter, a loyalty matter, and an employment disqualification if known. But a 'bachelor' who had 'never met the right girl' and was 'married to his work' was accepted without the kind of questions that might be asked now . . . As long as he did not take too many lonely nighttime walks . . . ." Email from Charles A. Reich to author (May 3, 2006) (on file with author) (ellipses in original). Reich notes in his memoir that Justice Douglas "never made inquiries into my personal life." REICH, *supra*, at 60. This may have reflected "mere indifference," but it is also possible that, "for a young man who saw a psychiatrist five days a week to discuss why his homosexual feelings were a sign of 'immaturity,' Douglas's failure to pry demonstrated sensitivity." Citron, *supra*. Justice Douglas's warm, decades-long correspondence with Reich can be found in Box 366 of the Papers of William O. Douglas at the Library of Congress.

It may be telling that Douglas saved, in his *Papachristou* files, an essay describing how the author's father, working as an errand boy in a government office in 1865, had been warned to steer clear of Walt Whitman, who was then a clerk in the same office: "After a bit of sputtering the bookkeeper said, 'Look, you're too young for me to explain it to you, but Mr. Whitman is a BAD MAN. Keep away from him.'" Joel Sayre, *How I Became a True Whitmanite*, WASH. POST BOOK WORLD, Dec. 26, 1971, at 6 (copy in Papers of William O. Douglas, Library of Congress, Box 1558) (photocopy on file with author).

<sup>308</sup> 194 F.2d 150, 151-54 (D.C. Cir. 1952); see *supra* text accompanying note 183.

<sup>309</sup> 194 F.2d at 156 (Proctor, J., dissenting).

<sup>310</sup> MODEL PENAL CODE § 2.075 cmts. at 279 n.179, 281 n.183 (Tentative Draft No. 4, 1955). For similarly favorable reactions to *Kelly*, see, for example, Gallo et al., *supra* note 51, at 695, 797; Slovenko, *supra* note 112, at 83.

Kelly and its progeny were paralleled by a contemporaneous series of decisions by the New York Court of Appeals, effectively decriminalizing homosexual encounters in private between consenting adults.<sup>311</sup> Decisions of this kind in the 1950s served as a successful dry run for the criminal procedure revolution, helping to show the feasibility of reforming the police by bringing their practices under closer judicial supervision.

### CONCLUSION

The emphasis on informational privacy, the view of the police as proto-fascists, and the commitment to constraining police discretion through judicial oversight may not be the only features of criminal jurisprudence influenced by concerns about homosexuality and its policing. Those concerns also resonate in intriguing ways with, for example, the Warren Court's approach to the criminal punishment of drug addicts and alcoholics: prohibiting punishment for the "status" of being addicted, but condoning punishment for "behavior," such as public inebriation, that "offends the moral and aesthetic sensibilities of a large segment of the community."<sup>312</sup> There may be connections, too, with the law of entrapment, which since the early twentieth century has focused on whether the defendant had a "predisposition" to commit the crime or was, instead, an "unwary innocent" "seduced" by undercover agents.<sup>313</sup>

I will not pursue these issues here, in part because, as aspects of substantive criminal law, they are peripheral to my main interest in this Article: homosexuality as a suppressed subtext of criminal procedure. I have tried to make the case, necessarily circumstantial, that anxieties about homosexuality and its policing helped to shape modern criminal procedure. This is a second connection between the criminal procedure revolution and the early struggle for gay rights, layered over and intersecting with a simpler connection, for which there the evidence is more secure: the practical contributions that criminal procedure protections made to the gay rights movement, before and after Stonewall.

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<sup>311</sup> See NELSON, *supra* note 224, at 202-05; Eskridge, *supra* note 47, at 779-80.

<sup>312</sup> *Powell v. Texas*, 392 U.S. 514, 532 (1968) (plurality opinion); see also *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>313</sup> *United States v. Russell*, 411 U.S. 423, 427, 429, 434 (1973); see also, e.g., *Sherman v. United States*, 356 U.S. 369, 372-73 (1958); *Sorrells v. United States*, 287 U.S. 435, 445 (1932).

In many quarters the taboo against public discussion of homosexuality, already waning in the 1960s and 1970s, has by now largely disappeared.<sup>314</sup> Gay lives, gay experience, and gay concerns command wide acceptance and respect — to the point where a disgraced politician can seek redemption by announcing that he is “a gay American.”<sup>315</sup> Queer studies are a fixture on university campuses, so securely established that worries are voiced about success spoiling the field.<sup>316</sup> Openly gay and lesbian police officers are increasingly commonplace<sup>317</sup> — although law enforcement remains a notoriously homophobic occupation,<sup>318</sup> and gay male officers, in particular, continue to face harassment and ostracism in many if not most departments.<sup>319</sup> In 2003 even the Supreme Court finally acknowledged that same-sex couples “are entitled to respect for their private lives,” and that therefore criminal prohibitions of private, homosexual relations between consenting adults cannot be justified.<sup>320</sup> Gay men and lesbians can still face police harassment, but far less than they used to face, and anxieties about homosexuality and its policing no longer play the role they once did in shaping attitudes toward law enforcement. The secret subtext of criminal procedure is retreating into history.

Recognizing and recovering that subtext is nonetheless important, in part because it has lessons to teach. It reminds us, in particular, that the powers of the police are unavoidably a threat to intimate privacy, and that one function of criminal procedure law has been controlling that threat and keeping its dimensions acceptable. Nor is

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<sup>314</sup> Cf. Eskridge, *supra* note 13, at 826 (“The love that dare not speak its name in the 1950s became a love that would not shut up in the 1980s, saturating American culture with homophile ideas such as the positive values of sex, consent as the dividing line between good and bad sex, equality of the sexes and deconstruction of gender, and benign sexual variation.”).

<sup>315</sup> See, e.g., Adam Nagourney, *A Conflicted Pol and Public*, N.Y. TIMES, Aug. 15, 2004, at D1.

<sup>316</sup> See, e.g., JAGOSE, *supra* note 17, at 1, 127-29.

<sup>317</sup> See, e.g., David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1222-23 & n.19 (2006).

<sup>318</sup> See, e.g., JAMES W. MESSERSCHMIDT, *MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY* 174-86 (1993); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 796 (2000).

<sup>319</sup> See, e.g., DAVID E. BARLOW & MELISSA HICKMAN BARLOW, *POLICE IN A MULTICULTURAL SOCIETY: AN AMERICAN STORY* 275-76 (2000); Susan L. Miller, Kay B. Forest & Nancy C. Jurik, *Diversity in Blue: Lesbian and Gay Police Officers in a Masculine Occupation*, 5 MEN & MASCULINITIES 355, 356 (2003).

<sup>320</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

this simply a matter of honoring personal modesty. Because invading intimate privacy is such a simple and powerful way to discredit, to coerce, and to control, and therefore such an attractive tool of political power, there is and likely always will be a strong link between intimate privacy and democracy. This remains especially true for gay men and lesbians, who continue to face prejudice, fear, and open hostility.

Recovering the secret subtext of criminal procedure is important for another reason. It is one step in rectifying the broad, stultifying, and demeaning silence that can still surround the subject of homosexuality, one step in making gay men and lesbians fully visible and in affirming their entitlement to equal dignity and respect. The critic D.A. Miller identifies "two complementary maneuvers through which our culture's general discourse promotes the negation of what, to respect its specific texture, one might call *gay material* when the latter threatens to migrate from the marginality where it normally makes its home: a *faux-naïf* literalism to whose satisfaction gay material can never be conclusively 'proven' to exist; and a prematurely sophisticated allegorization that absorbs this material under so-called larger concerns."<sup>321</sup> Criminal procedure is not "gay material," but it does have gay dimensions. Denying those dimensions does some of the same damage as playing dumb to the homoeroticism in, say, *Leaves of Grass* or *Billy Budd*: it perpetuates the unspoken assumption that gay experiences and gay lives are shameful, unimportant, or both.<sup>322</sup>

Miller also warns that "[i]n a culture that without ever ceasing to proliferate homosexual meaning knows how to confine it to a kind of false unconscious, as well in collectivities as in individuals, there is hardly a procedure for bringing out this meaning that doesn't itself look or feel like just more police entrapment."<sup>323</sup> Partly for this reason, and partly because my argument has turned less on the subjective experiences of gay men and lesbians than on public ideas about homosexuality, I have downplayed the sexualities of scholars who themselves helped to shape modern criminal procedure law: the "personal deficiency," for example, that plagued Karl Llewellyn,<sup>324</sup> or the "homosexual phase" that Herbert Packer described in a letter to

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<sup>321</sup> D.A. MILLER, BRINGING OUT ROLAND BARTHES 12-13 (1992).

<sup>322</sup> Cf. *id.* at 16-17 ("For in the guarding of that Open Secret which is still the mode of producing, transmitting, and receiving most discourse around homosexuality, the knowledge that plays dumb is exactly what permits the abuses of an ignorance that in fact knows full well what it is doing.").

<sup>323</sup> *Id.* at 18.

<sup>324</sup> See *supra* note 154 and accompanying text.

his son,<sup>325</sup> or Charles Reich's struggle to suppress his own sexual identity.<sup>326</sup> By avoiding biographical matters of this kind, though, I have risked not only reinforcing the same, damaging patterns of silence I have just described, but also slighting the agency of gay and bisexual individuals themselves in the story I have told. I believe those risks have been justified by the costs that would be entailed in personalizing the story more than I have done. But the tradeoffs are inevitable, and I want to acknowledge them.

The secret subtext of criminal procedure itself reflects a different tradeoff, which may have been tactical. Protecting gay men and women by placing procedural limitations on the police, and more particularly by imposing restrictions focused on preserving "reasonable expectations of privacy," contributed to what Eskridge calls "the apartheid of the closet": the tacit deal that gay men and lesbians would be left alone so long as they kept their sexuality entirely out of view.<sup>327</sup> This may have been the best practical course for protecting the interests of gay men and women in the 1960s and 1970s, given the rampant homophobia of that era. But it carried significant costs, similar to the costs that lingering strategies of silence about homosexuality carry today. Criminal procedure law in the 1960s and 1970s was a response, in part, to concerns about the policing of homosexuality. That does not mean it was the right response.

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<sup>325</sup> See PACKER, *supra* note 171, at 284.

<sup>326</sup> See REICH, *supra* note 307, at 68-95.

<sup>327</sup> Eskridge, *supra* note 13, at 825, 835.