

Disorderly Conduct: an Interrogation of Residual Sodomy Laws Five Years after Lawrence v. Texas.

By James Keller

In Aug. 2007, Senator Larry Craig was arrested in the men's room at the Minneapolis Airport and was booked for violation of privacy and disorderly conduct for making sexual overtures toward an undercover police officer investigating complaints of lewd and lascivious behavior. The arresting officer observed Craig staring at him through the crevices in the bathroom stall, tapping his foot and sweeping his hand underneath the stall dividers. Craig swiftly pled guilty, hoping that the incident would remain concealed. After all, such charges seem rather innocuous. When his indiscretion was revealed, he initially elected to resign his Senate seat; however, the public denunciations by his colleagues and the media's obsession with the subject compelled him to change his mind and fight to overturn his guilty plea, which he claims was made under duress, all along vehemently denying in the media that he is gay and simultaneously parading his wife around in front of the news cameras. Craig's indiscretion was a sensation, inspiring the jokes and parodies of comedians, both professional and amateur and even a novelty toy, representing a bathroom stall with the Senator's feet protruding beneath the plastic partitions.

Much of the related mirth seems justified because the Senator's persistent opposition to Gay Rights legislation, which includes voting for the 1997 Defense of Marriage Act that defined marriage as a bond between one man and one woman. Craig also hypocritically chastised Bill Clinton for his participation in the Monica Lewinski scandal, calling the embattled President a "bad boy" and supporting the Republican Congress's efforts to impeach the popular president. Craig's conservative and even prudish legislative record was antithetical to the recurring accusations that the Senator himself was engaging in homosexual activities, allegations dating back to the Reagan administration. Craig had even been unofficially implicated in the Congressional Page molestation scandal that destroyed the career of his Republican colleague from Florida.

Craig's hypocrisy was as gross as earth, and his downfall seemed a well earned comeuppance for his homophobic agenda, and while it is true that few progressives would wish any better for him and while his efforts to peer into the privacy of a presumed traveler in an adjoining toilet seem indefensible, the law enforcement tactic that ensnared the Senator has a sordid history, one long dedicated to the entrapment, public humiliation, and personal and professional destruction of gay men. Thus it is difficult for those of us conscious of the continued aggressive persecution/prosecution of homosexuals by law enforcement all over the country to find much humor or justice in the fall of Senator Larry Craig.

Craig's debacle reveals some recurring themes in the struggle of gay men for equal rights under the law. Despite the U.S. Supreme Court's repeal of sodomy laws some years ago, police harassment intended to interdict homosexual activity has scarcely diminished. Indeed, the *Lawrence v. Texas* decision seems to have had little effect save to preclude police from prosecuting same sex partners engaged in homosexual activity in their own homes. Law enforcement officers continue to masquerade as willing sexual partners of gay men only to arrest, charge, and publicly disgrace the latter when they take the bait, charging them with soliciting a police officer, lewd and lascivious conduct, disorderly conduct, and even disturbing the peace. Amazingly, requesting the very sex act rendered legal by the courts is in itself a crime in many states; thus it is not a crime to commit sodomy, but it is a crime to request it, which would seem to constitute a broad cultural application of the military's "Don't ask; don't tell; don't pursue" policy. However, just as many have reported in the military, the promise not to pursue is specious. The activities of the police have been exacerbated by the continued complicity of the news media and the business sector of our culture. As was the case with Craig, the media picks up on the arrest stories, and under the pretense of reporting "all the news fit to print" and "the public deserve to know," parades the presumed indiscretion of law enforcement's prey across the public stage, resulting in humiliation and often loss of employment, thus effectively eliminating the individual as a productive member of society. The discretion need not be as intrusive as Craig's voyeuristic disturbance since merely asking for male sex is considered "solicitation" if the recipient is a policeman, a

charge that in the public mind implies the exchange of sexual favors for remuneration, yet law enforcement's continued legal pursuit of gay men is not motivated by the effort to interdict prostitution, but to drive any manifestation of homosexuality out of the public eye and to generate a community in which heterosexual men can be free of the threat of homosexual overtures while the same continue to harass unwilling women with impunity. The same tough cops would not arrest a woman if she offered sex but did not ask for money, nor would they prosecute men pursuing sexual favors from women outside of the home since it would effectively shut down heterosexual pairing.

The Craig incident also reveals some of the more complex attributes of any sting operation intended to interdict homosexual activities in public spaces. These operations frequently net a large number of ostensibly heterosexual men (Humphreys 33) whose mainstream credentials include lengthy marriages and children, attributes which are generally received as confirmations strong of the subject's hegemonic masculinity and his heavy investment in heterosexual/heterosexist institutions. Public and anonymous sex is attractive to married men because it requires little or no time to produce gratification, nor does it involve the emotional attachments or reciprocity generally required by the long term illicit romance or financial expenditure demanded by the hooker; it is "much less personal than other forms of sex" (Humphreys 33). In addition, these straight men report that the sense of guilt over infidelity is reduced by the absence of a female sex partner; the illicit contact cannot be construed as love or as an emotional attachment to another woman that rivals the marital sentiment: they are not really cheating if they are not having sex with a woman. Often this type of contact takes place within adult movie houses and peep shows, but by some mysterious calculus, other places less (or sometimes more) discrete become the locus of such congregations—public bathrooms and rest areas, locker rooms, parks, and wooded or wilderness areas—potentially any secluded and largely male environment where the participants might congregate alone and find a modicum of privacy.

Of the many sights where such transgressive behaviors occur, certainly the public toilet (in airports, train, bus and gas stations, malls or department stores) is the most troublesome and dangerous as there is generally a high amount of foot traffic that can or

will include the occasional child or unwitting and subsequently scandalized adult. But while the numerous loci for illicit sex offer varying degrees of discretion and seclusion, they are often policed with equal ferocity and vigor once identified by the police. And the activities of law enforcement in these areas reveal a general persecutory bias against homosexual contact, since the relative seclusion and privacy of the area does not seem to impact the police presence nor mitigate the judicial recriminations against those apprehended. In his study *Public Sex/Gay Space*, William L. Leap succeeds in deconstructing the binary structure of public/private sex, demonstrating that the concept of public is locally and inconsistently constructed (5), Pat Califia has argued that public sex invariably involves an effort to attain a small amount of privacy within a communal space, and these liminal spots, straddling the line between public and private, have subsequently been dubbed “quasi-public” spaces (76).

If one considers the efforts of love struck teenagers, the fluidity of this public/private dialectic becomes clear. The teenage couple who has no house to use, since they are occupied by disapproving parents, nor sufficient money or maturity to rent a hotel room is forced into the public domain to gratify their desires—back rows of movie houses or the backseat of the family car, parked in back alleys, parking lots, or lonely country roads. Yet how frequently does one hear of these youthful couples being arrested for public indecency and paraded through the press to the humiliation of themselves and their families? For that matter one never hears of heterosexual couples (young or old) experiencing this type of police persecution unless the couple has willfully made a public spectacle of themselves or the coupling is directly related to prostitution. Indeed, many heterosexual teenagers have their first sexual experience in the back seat of a car; it is considered a rite of passage for young males in our culture, lionized in the movies and the public imagination. The interdiction and prosecution of public sex is focused with great intensity on sex between men, and this in spite of the repeal of sodomy laws which at least offered a pretext for the harassment, as draconian, unfounded, and unjust as that may have been.

One of the among the legion of locations upon which the apparatus of the state has sought to mount its campaign to maintain sodomy laws or prohibitions against homosexual activity is both literally and metaphorically relevant to our discussion. In the 1960s and 70s, the anticipation of a massive influx of new residents into Southwest Florida led to enormous land development projects by companies such as General Development (now long gone) who created hundreds of miles of city streets in wilderness or undeveloped areas. Rather than adopt the familiar grid pattern, the developers laid out a multitude of interlocking subdivisions, creating a veritable maze of circle drives with cross streets and cul-de-sacs scoring the center. The low and wet areas were drained into canals and retention ponds shaped only as human ingenuity can accomplish—ovals, circles, squares, and rectangles with perfectly straight and steady lines.

These shapes are burned into the landscapes of lower Sarasota, Charlotte, and Lee counties; however, the much anticipated land rush did not occur, development transpiring at a much slower pace, and much of the work of the land developers has been reclaimed by the Florida scrub and brush lands. To offer a creative paraphrase of Frost, I would say, ‘Something there is that does not love a road...that sends the ground swell under it.’ More than twenty years ago these areas were already considered wasted. In the intervening twenty years, some of these areas have been populated, particularly in Cape Coral, but others, such as those in Charlotte and southern Sarasota counties, have remained largely undeveloped and have deteriorated substantially. Most of these properties have never made accessible to local utilities so they have not even been available for settlement. The extensive road work has become irrelevant in many places as the grasses have begun to encroach upon the fringes of the pavements and peek through the legion of cracks and swells, a process which renders the surface obsolete, and in places the pavement has been reduced to a single lane or to a pair of parallel tire tracks saved from the intruding green. At such a point of dilapidation, the roads have to be completely resurfaced. The retention ponds have become so over grown with water foliage that they are sometimes scarcely recognizable as manmade structures and sometimes even as bodies of water. The pavements now segment and portion out large

stretches of raw Florida scrub lands, structuring the slovenly wilderness, imposing order onto a veritable riot of vegetation and wildlife, the latter including, but not limited to wild hogs.

Paralleling and infiltrating the unclaimed city streets is an elaborate network of dirt trails created by a combination of land developers, local youth on dirt bikes and four wheelers, and wild hogs. These pathways, known as the “Hog Trails,” were made notorious by the operations of a serial killer Daniel Conahan, who in the 1990s murdered gay men by tying them to trees, torturing, photographing, and strangling them. The victims had willingly allowed themselves to be restrained after Conahan told them that he wanted to take kinky photographs. The killer was not particularly efficient in his labors, allowing more than one person to escape who had struggled with him at length. These people of course testified at his trial, and he was convicted and sentenced to death. Within the past couple years a gruesome discovery of secret bone yard in Lee county has led authorities to believe that Conahan may have had a killing field near Fort Myers as well.

Conahan’s selection of the (un)developed areas of Charlotte and perhaps Lee Counties to operate as his killing ground was not entirely accidental; these areas were already being used for illicit homosexual encounters and offered a legion of secluded pathways and hiding places where one may secrete his/her salacious or murderous agenda as the case may be. Despite the notoriety of the place and the potential for danger, it is still a very busy hub of anonymous sex between men both gay and straight, who spend a few minutes indulging their lusts before returning to the ordered and disciplined world of work, wives, families, girlfriends, etc. It seems to consist primarily of ostensibly heterosexual men, seeking gratification, men who seek out an anonymous sex that does not require names or telephone numbers, promises to meet again, or standard dating practices of dinner and movies. The semi-wild environment is the locus of a semi-wild sexual scene that ruptures the discrete and overly simplistic structure of sexuality within the ordered and civilized confines of the city or town. The boundary between homosexual and heterosexual is deconstructed and not necessarily by the equally simplistic bisexual classification, but by a queer sexuality, one that is determined by social status, by a

placement outside of mainstream sexual binaries. The participants may have specific sexual roles to which they are addicted, but the designation of partners as male/female, gay/straight, married/unmarried, top/bottom is irrelevant and unspoken in the instinctual clash of aroused bodies. The liminality of the environment hovering between wild and tame, city and wilderness, disorder and order, nature and culture, animal and human is imposed upon the sexual encounters which defy mainstream heterosexist assumptions and categories.

It should be noted that the areas in question are not government lands, but the object of a real estate boom in the 1990s when a person could buy property in the area for only \$3000 an acre, and by 2004 shortly after Hurricane Charlie devastated the area, the same land had risen to around \$25,000 an acre. The real estate is privately owned and very little of it is posted either by realtors or by “No Trespassing” signs. There is now little or no real estate traffic through the area, and in all probability many of the owners have never laid eyes on the investment land since there is no chance of its being developed anytime soon. Thus the illicit activities that occur in the area are taking place on private property where there can be no expectation of damage since there is nothing to destroy or harm, save trees and bushes; the value lies latent in the land itself waiting for a future push of the city margins, across county lines and into the neglected region.

As has probably become evident, the previous section prepares the ground for a discussion of the vigorous campaign of police harassment aimed at the visitors to the [un]tamed region along the Charlotte and Sarasota county lines, an area patrolled by the police of tiny North Port whose margins are co-terminus with the county line, exceeding the limits of actual settlement by many miles. The North Port police scrutinize, infiltrate, defend, and investigate the region as though it was a wealthy and insular gated community. The efforts at interdiction in the region are wildly disproportionate to the potential for transgression or harm and can be explained only by residual resentment and homophobia following the repeal of sodomy laws with *Lawrence v. Texas*. Indeed, one might assume that the law enforcement officers of North Port had never even heard of

Lawrence v. Texas and that the open season on homosexuals remained unchecked by any judicial review. The police presence involves vehicles of varying manifestations such as squad cars and parks and recreations trucks. In addition, there are undercover cars with blacked out windows in which the officers in full uniform are concealed—SUVs and sedans of varying colors.

The efforts to interdict homosexual activity in the undeveloped regions of Sarasota County involve more than the happenstance discovery of two men blissfully consummating a momentary union before returning to their quotidian lives. They involve entrapments, provocations, harassments, and threats. Unmarked cars attempt to induce suspected homosexual subjects to follow them into remote or hidden areas in order to confound reasonable explanations for subject's presence and behavior. What follows is a minor interrogation in which the police officer attempts to coerce or bully a confession out of the subject to the effect that he is searching for male sex, a confession that is difficult to believe the officer ever receives. In one incident, an undercover cop approached a subject sitting in his car at the end of a cul-de-sac. Obviously expecting the subject to follow, the policeman turned off the paved road and followed a dirt trail along a retention pond. When the subject did not follow, the officer, evidently disappointed that he had failed to provoke the desired response, returned to the idle vehicle where he impeached the driver, demanding an explanation for his presence in the isolated area and informing him that he was trespassing on private property. The driver, unruffled, indicated that he likes to sit and read in the area because it is a peaceful and aesthetically pleasing environment. He politely added that he was sitting on a public street and, therefore, was not trespassing on anyone's property. Undaunted by logic, the police officer informed the driver that he had better stay clear of the region or he would get in "big trouble."

In another incident, a single vehicle was travelling behind an undercover SUV along a circle drive, when the police car turned on its veiled lights and braked suddenly. A furious middle aged policeman emerged from the front vehicle and demanded to know why the driver was following him, to which the latter responded that he was simply following a circle drive and that there were only two potential directions in such an

environment. The still fuming officer interrogated the subject, demanding to know the reason for the civilian's presence. With the driver gradually lapsing into silence, the policeman concluded his rant with a warning that the driver had better not return to the region again or he will get into "big trouble."

The two above incidents reflect a pattern of harassment of apparently gay men, one that would seek to exclude the same from public streets under the pretense that they may engage in activities deemed unacceptable by local authorities. The purpose of the essay is not to defend the transgressions of those who might engage in sex acts outdoors, but to discuss the implications of motorists being profiled and singled out for exclusion from a public space based upon their perceived sexual inclinations, a differentiation that is always already problematized by the fluidity of human erotic expression. It is difficult to imagine law enforcement mobilizing such resources to interdict and discourage the copulation of heterosexual couples secreted in tents and trailers around our national parks or wilderness areas, undercover cops posing as swingers only to arrest the potential sex partners and/or transgressors after the unsuspecting heterosexuals have been teased and cajoled into making a proposition, and since the act of heterosexual copulation is not illegal, the charge would be veiled as "Disorderly Conduct" with an explanation sufficiently lurid to evoke the requisite humiliation after the subject's name has been listed in the police beat section of the local paper or, as is often the case with men pursuing male sex, plastered across the front page.

The forgoing analogy may seem hyperbolic, but in reality, it is a fairly accurate description of the continued persecution of ostensibly gay men in rural regions in spite of the Supreme Court decision of 2003. Law Enforcement has retained many of its previous tactics for the entrapment, public humiliation, and professional destruction of homosexual men and has transmogrified others, bending the law to accommodate personal or community prejudices. In a 1996 article, "Tennessee Williams Doesn't Live Here Anymore: Hypocrisy, Paradox, and Homosexual Panic in the New/Old South," I wrote about the practices of Law Enforcement in Lowndes County, MS where the harassment of gay men included a prolonged campaign to chase away potentially sexually transgressive men from an area known as the Lock and Dam. Those people caught in the

dragnet (many of whom were family men) were charged with solicitation for male sex (which to the reading public implied a financial arrangement), publicly exposed on the front page of the paper, fined, and banished from the public area for an indeterminate period. During the same crusade, individuals were lured to local hotels where they were surprised by concealed law enforcement officers who swiftly arrested them, charging them with attempted sodomy, which at the time was a felony in Mississippi. The laws in Lowndes County may have change since Lawrence v. Texas, but the practices and the desire to destroy the lives of homosexual men via unjust and prejudicial legal operations has not diminished.

In a recent incident, an individual was ticketed by a parks engineer fixing a drinking fountain (many parks workers have been deputized in the wake of 911), who claimed the alleged transgressor had made a suggestive gesture, which the engineer interpreted as a sexual invitation. Since the parks regulations include no legal restrictions regarding the solicitation of engineers, the ticket charged “Disorderly Conduct” and listed as an explanation that a park ranger had been solicited and also included a summons to appear in court rather than a fine. Park regulations included no legal justification for alleging “Disorderly Conduct” based upon a presumed sexual proposition, so the charge was on its surface an effort to cut and paste materials in order to invent a law that had been violated. While there can be no certainty that the parks employee understood the indefensible nature of the charge, there is ample evidence that the charge was bias based and was intended to manufacture public disgrace--the insistence that the charge be addressed in court, the effort to manipulate existing regulations to construct a violation, and the fact that the original confrontation between the engineer and the so-called perpetrator included the former charging the latter’s vehicle, adopting an aggressive deportment, and offering veiled threats of violence. Clearly there has been very little progress in Lowndes Co. MS in the five years following Lawrence v. Texas. Indeed, the behavior of the establishment suggests a legal impotence that would fling itself against the inevitability of social progress, a subject unwilling or unable to abandon individual prejudice in the interests of legal advancement and rectitude.

The residual sodomy laws succeed by playing upon the shame associated with sexual transgression; thus they operate within a network of interrelated cultural processes regulating behavior. Sexual transgression invokes the interest and participation of the media, and squeamish employers in both the government and private sectors recoil from scandal claiming an institutional embarrassment, which, of course, necessitates that the perpetrator be dismissed, the result of which is often a dramatic degradation in financial and by extension class status. The cumulative effect of the event rolls through the familial institutions as well. As observed previously, the men caught in these homophobic machinations are frequently married men operating within the liminal space between gay and mainstream straight cultures. Such individuals are not at liberty to embrace a gay identity for a variety of reasons, which include the probability that they will lose their families, yet the compulsion for same sex encounters finally proves irrepressible. Moreover, few relatively minor legal transgressions carry as much stigma as a misdemeanor charge of solicitation for male sex. An act that in the eyes of the law could constitute little more than a nuisance transgression can be devastating to the individual subjected to the whimsical and often haphazard application of petty directives.

As Larry Craig argued in the appeal of his conviction, he only signed the guilty plea because he was embarrassed and wanted the potentially explosive situation to disappear as quickly as possible, a declaration that may be the only truthful statement he has made about the incident. Nevertheless, he failed to anticipate the press's fascination with sex scandals and public officials, particularly during an election year. The incident in the Minneapolis Airport men's room raises some troublesome questions about privacy, veracity, and aggressive police subterfuges. First, operations like that which ensnared Senator Craig actually manufacture and construct the transgressions that they seek to interdict and prosecute. An undercover officer in a men's room waiting for a hapless homosexual to proposition him is not an analogue to the innocent bystander, who enters the men's room, relieves himself, and leaves. The undercover cop lingers, peering and gazing, and in some cases (such as is alleged by singer George Michaels in his own arrest scenario) grabbing his crotch and/or exposing himself, thus soliciting the solicitation.

A cop may have to wait hours in an airport bathroom stall before he is able to garner any captive transgressors, a behavior which is as much an enticement to sexual dalliance than anything that Senator Craig may have done—peering through the crack in the stall, tapping his foot, brushing up against the officer’s foot with his own, and/or sweeping his hand under the partition. The cop’s own loitering could be construed as an invitation or provocation. Moreover, the policeman would have had to be peering right back through the crack in the stall in order to see the Senator’s blue eyes which he reports as evidence of Craig’s intrusion. All the time that the Senator spent soliciting the officer, the latter did not protest, which could only be construed as a reciprocal interest. Consider by analogy the way the law protects heterosexual men from false rape allegations by insisting that a woman articulate her disapproval and offers mitigation when the woman engages in behavior that can be construed as provocative. A woman who is a victim of male sexual aggression is obliged to express her outrage and displeasure if she is to have any legal case against a perpetrator. Yet the policeman in the Minneapolis Airport men’s room allowed Senator Craig to peer through the crevice in the stall for what he describes as two minutes without ever telling the Senator to “piss off”; this too could be understood as an encouragement of the former Senator’s actions. It is difficult to imagine that any unwitting visitor to the men’s room would endure the alleged abuses inflicted by Craig on the police officer without saying “forebear”; after all, heterosexual men are not generally shy about expressing their often ferocious disdain and contempt for homosexuals and their proclivities. In short, the undercover policeman who lingers in a public men’s room cannot be said to be protecting the unsuspecting public from exposure to lewd invitations and behaviors since the typical individual in an airport restroom spends only a few moments performing the urgent bodily functions and then moves on to his/her destination, and protecting the public space may be the only justification that would not infringe the rights of the so-called perpetrator since the activities themselves are not illegal.

However, additional issues hinge upon problematic implications of the term “public” in the legal discourse of such cases. Indeed, the public/private distinction is completely dismantled within the Craig debacle: the space is both public and private for

the arresting officer, but only public for the Senator. The charges against the Senator alleged that he not only committed disorderly conduct, but also “interfered with privacy,” and Judge Edward Toussaint, Chief of the Appellate Court that rejected Craig’s effort to overturn his guilty plea, argued that Craig had “invaded the ‘privacy interest’ of a ‘captive audience’” (Pershing A03). The court assumes that the individual has a right of privacy within a public space and that the officer’s own behavior is indicative of one who is attempting to avail himself of this right. However, by necessity the officer’s purpose within the restroom undermines any but a fraudulent desire for privacy since privacy would undermine his goal which is to attract the interest of would be sexual perpetrators. The undercover policeman did not come to the airport men’s room because he needed to urinate, defecate, groom, or clean himself; he came to perpetrate a fraud or deception, an act that necessitates an audience and is, therefore, very public. Even though he may be concealed within a cubicle, he wants and thereby elicits an intrusion.

If the space is private for the officer, why is it not private for the Senator or for anyone in the Senator’s predicament? The privacy of the officer should inadvertently legitimize sex in a public restroom. The stall is now private, thus, the acts of consenting adults are outside the jurisdiction of the law. Yet while the cop sits comfortably within his personal space, Craig is evidently on public display. The officer charges that Craig placed his bag in front of his feet, an act which within the former’s extensive understanding of gay symbolism constitutes an effort to attain privacy within the stall by obscuring the view of the impending illicit activities otherwise subject to detection through the gap at the bottom of the partition. Here the officer’s observations dismantle his own claim to privacy. If the officer has privacy, so does Craig, and he need not cover the gap in the door for more. Moreover, the officer was, according to his own observations, invading the solitude of the Senator, having carefully observed the movement of his subject’s hands, feet, and eyes. Moreover, when the policeman, by his own admission, twice shoved his hand under the partition, showing his badge and pointing to the door, thus ordering the Senator outside, did he not twice intrude upon the Senator’s own privacy in much the same way alleged against his subject who swept his hand under the partition? It is easy to conclude that Craig has earned the intrusion with

his own behavior; however, the disturbance of the Senator's right to public restroom privacy is not what is most disturbing about the operation; it is the idea that the officer no doubt sat in the stall for hours each day observing the actions of countless unsuspecting travelers, carefully policing their bathroom etiquette for inappropriate behaviors. The sting operation is itself a repulsive violation of the public's privacy, and what about the desperate travelers who needed to use that stall when the room was full?

Clearly the space of the bathroom stall is only private when it is convenient for the judicial system to claim it so for the purposes of prosecution of homosexual activities. Thus the category of "private" becomes incoherent, "a fiction" (11) "locally constructed" according to Leap (5). There are many instances of authorities placing hidden cameras in public restrooms to scrutinize and prosecute washroom violations. In Naples, FL in the 1980's, a police operation involving a camera in a public restroom recorded homosexual activities and led to the arrest and prosecution of numerous men, and much more recently in the Mill Stream Run Reservation Metropark restroom in Strongsville, OH, a hidden camera helped police arrest 27 men, including a police officer, for indecent exposure (Puente). (Now there is a slippery slope—indecent exposure in a washroom. How will we trust and/or tolerate the urinal facility ever again?) Moreover, workers at Consolidate Freightways, a large trucking company in California, were told by the courts that hidden cameras mounted in terminal restrooms were not a violation of their privacy (Brooks C-2). When the government or the corporation decide to peep into the public washroom, the space is as accessible as it needs to be even to the extent that recorded materials can be presented in the public spectacle of the courtroom or the front page of the local newspaper, but when Senator Craig goes spying, the subject of his interest occupies a place of integrity and serene isolation. How do we view those washroom settings in public parks and roadside rest areas where cubicle doors have been removed to deter homosexual and illicit drug activities? Is anyone who enters a restroom when a person is occupying one of these exposed toilets and who intentionally or inadvertently witnesses an act of excretion guilty of infringing the occupant's privacy or is the said occupant indecently exposed? Long ago, Pat Califia warned the gay community that there is much

to be feared in too narrow a definition of private space, which could infringe the rights of homosexuals to engage in sex acts in places such as hotel rooms (71).

Most would conclude with little hesitation that sex in a public restroom is indefensible, and indeed, it is a complicated issue, but the collapse of the public/private binary renders these activities less obviously wrong so long as the coupling remains within a stall. Since the arresting officer in the Larry Craig debacle had an expectation of privacy despite his own probing interest in the actions of the people around him, it seems both reasonable and legally defensible that a couple could engage in sex acts in a similar space without the intrusion of the law. The placement of the bag in the front of the stall (I am not sure where else one could put a bag in a toilet cubicle, but evidently those who do not have anything to hide find another spot.) further obscures the activities within that space, which according to the officer in the Craig case increases rather than diminishes guilt. The discovery of sex in a bathroom cubicle could only be achieved by peering through the gaps in the partitions, the same act that was construed to be a violation of the undercover cop's privacy. If privacy is the requisite condition for legal sex following *Lawrence v. Texas*, then by the judicial system's own admission in the Craig case, a bathroom stall meets the appropriate conditions for legitimacy. The discovery of a sexual dalliance in a bathroom may also be achieved by observing that there is more than one pair of feet protruding below the partition of a single toilet cubicle, but one may not necessarily be able to assume that people were having sex just because they were occupying a single cell (although it is difficult to imagine what else they might be doing). Any additional inquiry into the activity in the stall would require a clear invasion of privacy, but despite arguments in the Craig case, the contemporary public bathroom model in America is calculated to preclude privacy. Otherwise, the partitions would be solid extending all the way from the floor to the ceiling, and the cubicle entrance would not have wide gaps between the door and the frame. The reason for the current design, aside from the reduced cost and the avoidance of potential water damage in the event of an overflow, must be directly related to the effort to interdict illicit activities in such places. The minimization of privacy (scarcely sufficient barriers between individuals in some of the most private acts) in the public toilet signals that the state does not consider

the space private. Otherwise, they could easily stipulate the construction of fully enclosed cubicles eliminating any effort to infringe the privacy of another. If the occupant of a bathroom stall decided to compulsively masturbate while eliciting moans that draw attention to his activity, it is difficult to imagine that a police officer in attendance would allow the activity to continue unabated. The ecstatic would very rapidly find himself under arrest. And yet the only way that the officer could confirm his suspicions would be to gaze through the crevices in the toilet partition. It seems highly improbable that the transgressor could successfully defend his activities on the basis of a privacy claim. Even if the lewd and lascivious charge were defeated, the prosecutors would get him on disturbing the peace. In homage to Foucault's analysis of Bentham's panopticon, the state and its agents clearly desire to observe without being observed, survey without mutual scrutiny (195-228).

Fully enclosed cubicles in public restrooms would signal complete privacy which could be problematic in the prosecution of public sex. Paradoxically, the state stipulates a privacy that is always already infringed, a privacy that can be repudiated or denied whenever convenient for the state in enforcing its residual sodomy laws. This liminal circumstance has been previously dubbed "quasi public" (Califia 76). Sex in a public toilet is generally only public because the architectural forms of the facility will not allow privacy, and within that environment, public/private seems to be defined as much by a residual or perhaps inadvertent prurience as by the exposure of human genitalia. Indeed, an excretion/copulation duality seems to be operative in such spaces. Sex in a bathroom cubicle would reveal little more of the individual than would defecation or urination. In any of these actions, the exposure of the genitalia or buttocks of the individual involved is requisite, but it is the knowledge of those outside of the cubicle that seems to matter in the juridical circumstance. The law enforcement personnel and hapless traveler have an idea of what may be happening behind the closed door of the cubicle, and it is this knowledge that generates indecency. If the passerby has an idea that the stall occupant is engaged in a bodily excretion, s/he thinks no more of the matter; indeed the mind recoils from imagining the act and its aftermath, but it is the allure of sexual activity that draws the imagination of the "blind witness" (if you will). While the mind recoils from the

physical process of defecation, it may be drawn to imagine the details of sexual activity, even if those details are morally repellant to the witness. Sex in a toilet cubicle may not expose the act of copulation so much as suggest it, and mainstream culture does not want to be reminded. Indeed privacy is defined as the absence of a witness and public is conceived as any place where there is a reasonable assumption that a third party might observe (Califia 73).

The word “imply” above captures another problematic feature of the public/private variance of the “public restroom,” and here I brush up against the subject of my previous article—veracity and mendacity. What can be known of the activities in a public restroom stall with certainty since the actions are occluded by the makeshift partitions? If one perceives two pair of legs protruding from beneath a bathroom stall, can one assume that sex is taking place even if the image is accompanied by sound. Certainty would be further undermined by a bag placed in the front of the stall obscuring the view of the feet. Thus sex can only be presumed, and should a legal conviction be rendered on the basis of presumption, particularly when the veracity of the arresting officer is at best problematic as in the case of undercover sting operations. Moreover, if we were to assume that the officer in the case of Larry Craig had indeed cracked the secret code used by gay men to negotiate sexual congress in public (i.e. shoe tapping, hand swiping etc.), does it necessarily follow that the officer can assume the invitation is to have sex in public. The assumption is based upon stereotypes of men who have sex with men and is energized by a judicial bias and inequality that considers men who have sex with men the singular targets for zealous interdictions and prosecutions. Consider as an analogue the privileged status of heterosexual relations. If a heterosexual man propositions a woman in a club, the authorities do not assume that they will copulate in the bathroom stall or in a car in a parking lot, yet there can be no doubt that such indiscretions occur on a regular basis and that the locations for these encounters are not haphazard, but are used and reused persistently. Consider the cultural tradition of the lover’s lane. How frequently do we hear of the police mounting an undercover sting operation to arrest and make a public spectacle of those who have chosen such a space to copulate. Still further there is little precedent for presuming that those who are occupying the same car in a lover’s lane are

assumed to be engaged in public sex. And it is even less probable that such a sting operation would be leveled to interdict heterosexual copulation before it occurs, rendering a proposition disorderly conduct. Only the public revelation of writhing naked bodies is assumed sufficient to legitimize an indecency charge. The principal exceptions here would be the interdiction of prostitution and child molestation, those two old chestnuts with which the gay community has long been inaccurately associated, an association that has been overturned first by the rule of reason and second by the 2003 supreme court decision. The judicial system clearly still considers gay sex indecent no matter where it occurs, and the mere suggestion that gay sex may be taking place is sufficient to warrant arrest. If a police officer pulled two gay men out of a car groping each other in a lover's lane, it would not matter whether they were fully clothed; charges would no doubt ensue. The discrepancy between the treatment of gay public/private sex and heterosexual public/private sex reveals the project within our judicial institutions to make gay sex (in)visible, constantly scrutinized to ensure it is permanently unseen. While hetero-sex can be tolerated (to a certain extent) or at least given the benefit of the doubt, gay sex must be forced into the cloister of the bedroom or prosecuted because it is always already obscene, illicit, and public. Paradoxically, even as the establishment ostensibly tries to make gay sex invisible, it engages in a particularly energetic effort to investigate, discover, and expose the same, rendering the invisible visible long enough to persecute and prosecute the activities forced into the public consciousness by the processes of surveillance, interdiction, and suppression.

Gay sex straddles a line between public and private. As Foucault has taught us, our social institutions apply subtle pressure, encouraging us to confess our inner most secrets so that we can be situated within the various professional discourses that construct our place as subjects within society. Despite an ostensible desire to remove homosexuality from public view and public discourse, the operation of the establishment serves to make it the constant subject of scrutiny, to identify, stigmatize, pathologize, and institutionalize the homosexual subject. This stigmatization is a public enterprise. In its harassment of the gay community, law enforcement regularly strives to make the private public. The "cruising" in the men's room of the Minneapolis Airport may have been the

subject of complaint from a few weary travelers who were offended by what they could only assume was male sex, but the revelation of Larry Craig's indiscretion made these semi-private indiscretions public on a global scale, exposing not only the Senator's actions, but also the codes, conducts, and processes of "tearoom" sex. The result is a spectacle of loathing, an abjection in which the pagentry simultaneously allures and repels. The public desires to know so that they can be scandalized by knowing and can complain about the public nature of an impropriety that the subject would have done anything to keep concealed. In a manner of speaking, the public indiscretion is actually perpetrated by law enforcement and the media. The revelation of an alleged transgression comes in advance of a conviction for any crime or misdemeanor, the arrest itself reported in the papers before there is any full disclosure or assessment of the evidence and the arresting officer immune from any civil action by virtue of his job description. Thus there is great opportunity for abuse; the arresting officer can pursue his charge with impunity and recklessness, indulging his biases and hostilities. The revelation of the matter is sufficient to ruin the reputation, career, or personal life of the subject, and there is a tendency for the public to assume the guilt of those arrested or charged with sex related crimes.

However, there is a major problem with the assumption of law enforcement's veracity in a sex sting operation, and I am not referring to the high profile cases in which law enforcement officers have been involved in criminal activity and other high jinks, although such matters must give us pause. Instead, I am referring to the paradox that is at the center of any undercover vice operation, which is that the arresting officer is awarded the greater portion of credibility and veracity by virtue of having played false throughout the operation. If the public did not make such assumptions, there would often be no way to distinguish between policeman and perpetrator. The insincerity of the police officer is central if he solicits a hooker and arrests her for prostitution or if he solicits or makes himself available for solicitation by gay men and then arrests them for some residual sodomy offense, such as disorderly or lewd conduct. Otherwise, the officer is just another perpetrator since the case often hinges upon the exchange of words, codes, and/or gestures rather than actions such as touching. But just how believable or reliable is the

arresting officer in such a case, particularly in the case of Larry Craig. The officer perpetrates a fraud and is studied in deception and dissimulation, pretending to be an unsuspecting visitor to an Airport men's room or even a willing participant in gay sex, who is just waiting for the appropriate signal from a likeminded individual. Here the line between entrapment and interdiction, solicitation and incitement could hinge upon the subtleties of the officer's promptings and responses to presumed overtures. If the Senator stares intently through the crack in the partition for over two minutes without the officer ever giving any signal that the advances are unwelcome, then it seems the officer has crossed the line into incitement and entrapment, perhaps not in the eyes of the law but certainly from the perspective of reason. Any of the subsequent actions that the Senator took soliciting the officer would seem to defy charges of invasion of privacy or disorderly or lewd conduct as the undercover cop has offered a non-verbal signal as clear as any of the Senator's. In the absence of physical evidence, the case should come down to a contest between one individual's word against another's. A presumption of greater honesty based upon professional credibility here is also problematic. Whereas one would like to believe that the veracity of each individual based upon his professional affiliation is beyond reproach, in actuality a presumption of dishonesty prevails in both—a feather would turn the scale. Both professions advocate the use of duplicity, fabrication, and falsehood in the interests of an often constructed and/or imaginary public good. However, in the case of the Minneapolis Airport men's room, can we know that the law enforcement officer is the only one actually putting it into practice? If in both professions, practicing dissimulation is a matter of principle, should we assume that only the officer is perpetrating a fraud in the men's room? Should Craig also be considered every bit as dishonest and, by virtue of that dishonesty, innocent of a sincere appeal for queer sex in a "quasi-public" location? Perhaps Craig should instead have been charged with lying to a police officer for making insincere gestures of affection.

In the evaluation of one's veracity, quite often the extent to which the individual can be considered unbiased is a crucial measure. Consider the impact that the revelation of Mark Furman's occulted racial bias had upon the O.J. Simpson trial. With what confidence can the public or the gay community assume that the officer in the Larry

Craig debacle was acting without prejudice against homosexual activity in general, since homophobia—even homosexual panic—is still widely acceptable within American culture and even expected, condoned, and celebrated in some of the country’s most venerated social institutions—i.e. the church and most patriarchal social organizations. The repeal of sodomy laws certainly does not signal the end of prejudice, which is still codified in a variety of laws, such as those banning same sex marriage and those denying equal protection against discrimination in housing and hiring to gays and lesbians. Not only can we not assume that the officer in the Larry Craig case was unbiased, we can reasonably assume that he was and the law is. Not only do these kinds of sting operations by their very nature signify a judicial bias against homosexual activity, but they indicate that there has been little social or judicial progress as a result of *Lawrence v. Texas*. Indeed, even the most fundamental principles of the Supreme Court decision still have not had a lasting impact on law enforcement activities in some areas of the country. In June 2007, a priest nabbed in a Waynesville N.C. sting operation for asking an undercover officer to go home with him, was charged with “soliciting for a crime against nature.” The priest’s lawyer argued that the law was “brazenly unconstitutional,” yet by that time the principal damage was already done, the event having trumpeted throughout the media (“Bathroom Sting”). In this case you can also see that the charge was not for public sex but was leveled against a speech act, a proposition to engage in a presumably legal activity

The role of the “disorderly conduct” charge in residual sodomy prosecutions is worthy of a more careful examination. Initially, it is a show of resolution, signaling the length to which law enforcement will go in order to continue to enforce regulations forbidding homosexual activity. As there are no more sodomy laws, law enforcement must resort to a catch all category, which despite its lack of specificity and its innocuous status as a misdemeanor, nevertheless, achieves the desired outcome as it necessitates that an explanation for the charges be placed in the judicial record where all of the lurid details can be laid out for the purposes of eliciting public disgrace along with all of the attendant indignities--loss of reputation, professional ruin, financial insolvency, and often divorce. The charge is disorderly conduct for some behavior; it is not an empty category.

Senator Craig was given the option of pleading guilty to “disorderly conduct” immediately or be charged with the more serious and explicit crime of “lewd conduct.” As he explained later, he had hoped to put the traumatic event behind him as rapidly as possible, so he injudiciously elected to plead guilty. The false dilemma represented by the respective charges seems to offer anonymity versus humiliation, privacy versus publicity, and preservation versus ruin; however, both charges offer the latter category in each of the forgoing pairings. The judicial deal making was even more of an entrapment than the washroom dissimulation since both charges guaranteed notoriety; however, the charge that seemed to offer the most hope to rectify the situation quietly also contained a clause which barred any appeal based upon legal innocence. What person, after enduring the trauma of arrest in a public place, would not plead guilty or no contest to the lesser charge, hoping that the ordeal would not ruin his/her life, particularly when the lesser charge holds out the false hope of deliverance? The devastated individual actually elects order over disorder. He acquiesces for sake of an imaginary secrecy and self-preservation to an agreement that guarantees the continuation of an unjust prosecution of male sex.

Disorderly conduct also operates as an interesting metaphor in the scenarios presented here. The structure of the public restroom with its flimsy partitions operates to produce orderly and discrete bodies, offering only enough privacy to keep genitalia carefully concealed, but not enough to encourage infringement of propriety. Indeed the so-called privacy of the space is always already infiltrated by spying eyes, but not the eyes of authorities (although, as we have already seen, there are many examples of the same). But the only partially concealed spaces are structured so the individual subject will remain self-regulating, believing, as do the denizens of Foucault/Bentham’s panopticon, that there may be someone watching any given time. The space that offers the most promise of privacy is then a place that inspires the greatest expectation of oversight and intrusion. The various partitions between stools and urinals direct the vision downward, offering only blank walls and dissuading peripheral sight that may contribute to the discomfort of others. The public washroom is the place where one is watched but is never permitted to watch. Disorderly conduct occurs when one occupant breaches the quiet and solitude of the discretely regulated stalls, stalls which invite and

facilitate oversight by the regulating gaze of authority but foreclose the gaze of associates; it occurs when one refuses to obey the dictates of the architectural machine which functions to tame or dissuade indulgence of men's sexual impulses, to repress the pleasure principle. The liminality of the status between public private, the flimsy partition in the bathroom signals the liminality of homosexuality within the law, within America—it is inside and outside.

In the case of the cruising grounds of southwest Florida, the charge of disorderly conduct seems metaphorical and ironic. The idea that a sexual transgressor could be disorderly is highly paradoxical, considering the untamed aspect of the region itself where nature breaches all order, restraint, and structure. The free reign of all bodily appetites would seem to be completely apropos in a location where fertility and growth riot unchecked, making war on human structures. There can be no expectation that a third party might witness the act of gratification in a nature setting so vast. As in the Minneapolis Airport restroom, law enforcement and other social institutions are attempting to impose order upon biological pulse and impulse, trying unsuccessfully to order and discipline nature, but nature's inclination continually violates the integrity of these structures, whether spreading its verdant arms across the neglected pavement or crawling over the partitions in the public facilities; copulation and generation will thrive. The efforts to impose order on South Florida's hog trails operate as a convenient metaphor for the endeavors to interdict homosexual activities there and elsewhere. The structures of compulsory heterosexuality cannot restrain the still greater impulse to indulge those sexual expressions to which the individual is inclined. The effort to tame the wilderness then becomes an analogue to the attempt to structure and channel cravings, to construct subdivisions and partitions, portioning, taming, restraining, and ordering human desire.

It is easy to despise and condemn a man like Senator Larry Craig for his hypocrisy and to make well-deserved jokes about his indiscretion in the Minneapolis Airport men's room. It seems like poetic justice that he should be caught in a police sting that signifies the continued persecution and prosecution of gay men by law enforcement more than five years after the *Lawrence v. Texas*, particularly since the Senator has

persistently voted against legal protections for gays and lesbians and has even supported aggressive efforts to guarantee that the same never have equal rights. However, there are some more important issues at stake in the incident than revenge can accommodate. The queer communities cannot afford to tolerate the kind of police entrapments and harassments that ensnared Larry Craig. Keep in mind that the people who have found the incident so scandalous and/or amusing—late night comedians, political commentators—are in all probability heterosexual or merely oblivious to the way in which such operations have worked to humiliate and destroy men who have sex with men, and those who believe that such operations are undertaken with anything but malice and ill will for the queer community are quite simply naïve. These operations have not changed in decades save insofar as they no longer actually operate within gay bars. It was not long ago that a person could be arrested for soliciting a police officer inside the queerest club in town, and if the current interpretation of *Lawrence v. Texas* continues, an interpretation that still makes it illegal to proposition an undercover policeman, there is nothing stopping law enforcement from resuming such practices.

While it may be a kneejerk impulse to distance oneself from those who allegedly troll for sex in public spaces, we cannot afford to dismiss these sting operations as something that happens to other men, or reject the victims because they make the gay community look bad and hinder the struggle for equal rights. The police who arrest such men are not objective, applying the law equally to all members of the population; they are singling out homosexual activity for special attention. Until the gay community can be certain, the laws enforced against Senator Craig are being applied equally to the entire population or not at all, we cannot afford to be indifferent or entertained or happy at his downfall, and it is particularly myopic to argue that only gay men are having so-called public sex. The dominant culture simply sees the instances of gay male public sex as particularly brazen, repellent, and threatening since such encounters often take place within the same spaces in which exclusively heterosexual men function, offering up the possibility that straight men may be subject to propositions or alternatively witness an act between others.

Gay and bisexual men have an obligation to fight the continued prosecution of residual sodomy laws by refusing to plead guilty to a lesser charge, thereby perpetuating such police tactics. The operations need to be examined by the court system beyond the local level. They cannot be so easily defended against legal challenge. Craig was right when he said that his mistake was pleading guilty. The will of the local government to bankroll a complicated prosecution that could result in a federal lawsuit alleging discrimination and unconstitutionality may be very limited. The victims of these operations need to hire a lawyer. Such reactions will certainly make the sting operations more costly than they are advantageous for local government and law enforcement. The cost for the queer communities of doing nothing is too high to be countenanced, and those costs are measured in profession, families, and lives. Not long ago, the Coroner in a nearby Kentucky county was arrested for presumably exposing himself to an undercover police officer in a local park. Unless the man was a flasher, it is difficult to believe that he exposed himself without the seeming consent and encouragement of the policeman. His indiscretion was the subject of headlines all over the region. Shortly thereafter he disappeared only to be found a week later dead from an apparent suicide in a hotel room only a few blocks from my home.

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