Illicit Sex within the Justice System

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Using Weak Power to Legislate, Regulate and Enforce Morality

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INTRODUCTION

Illicit Sex within the Justice System: Using Weak Power to Legislate, Regulate, and Enforce Morality argues that the state's power to regulate morality by using the law and law enforcement appears to have been diluted, in part, by immoral behavior occurring within the justice system (Durkheim, 2008). This dilution results from two entropies. First, immorality skews decision-making causing members of the justice system selectively to enforce laws that protect their secrets, excuse their indiscretions, promote their agendas, and deregulate or decriminalize conduct and activities that satisfy their desires. Second, exposure (e.g. media coverage) of immoral conduct within the justice system may suggest to the public that the state's reasons for regulating morality are not genuine or important; and that enforcement of morality laws against the people may be hypocritical of justice members (e.g. government officials) or perhaps unconstitutional. "Traditional *sexual* mores are in deep decline," which may explain why the government has relinquished some power—in order to accommodate immorality indulged in by its own members and leaders; for example, by decriminalizing adultery and failing to implement heart balm statutes (Grossman & Friedman, 2011, p. 104). "Chastity is no longer the issue. But fairness is….This might well be the lesson" (Grossman & Friedman, 2011, p. 104). With relenting public interests in morality, the government appears increasingly to have responded to progressive notions of sexuality and equality. However, the two phenomena may seldom directly correlate. Yet, some members of the justice system and society may blame certain groups, such as women and homosexuals, for deregulation of morality (e.g. secondary victimization) (Reddington & Kreisel, 2009). These groups may benefit from or be harmed by decaying tradition and "moral" structure in some regards as much as hegemonic beneficiaries in other regards. In some cases, immorality breaches tradition or social expectations, but not the law; and some political groups advocate for stricture or tolerance (Durkheim, 2008, p. 314).

Thomas Hobbes (2013) was a political philosopher from the 16th century upon whose work American founders relied for political and philosophical guidance while framing the Constitution (Merrymen, 2007). In his Introduction of *Leviathan,* Hobbes (2013) grounded governmental

power in nature, and explored the concept of natural law as a basis for outlawing crimes against nature, such as unnatural sex acts (e.g. bestiality and incest) (RS 14:89, 2016). Most illicit (i.e. deviant) types of sexual intercourse (e.g. adultery) are not crimes against nature.

Hobbes (2013) claimed that human law aspires to manifest God's will when it models the State after living organisms.

> Nature (the art whereby God hath made and [governs] the world) is by the art of man, as in many other things, so in this also imitated, that it can make an Artificial Animal. For seeing life is but a motion of Limbs, the [beginning] whereof is in some [principal] part within; why may we not say, that all Automata (Engines that move themselves by springs and [wheels] as doth a watch) have an [artificial] life? For what is the Heart, but a Spring; and the Nerves, but so many Strings; and the [Joints], but so many [Wheels], giving motion to the whole Body, such as was intended by the Artificer? Art goes yet further, imitating that [Rational] and most excellent [work] of Nature, Man. For by Art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE, (in [Latin] CIVITAS) which is but an [Artificial] Man; though of greater stature and strength than the [Natural], for whose protection and [defense] it was intended; and in which, the [Sovereignty] is an [Artificial] Soul, as giving life and motion to the whole body; The Magistrates, and other Officers of Judicature and Execution, [artificial Joints]; Reward and Punishment (by which [fastened] to the seat of the [Sovereignty], every [joint] and member is moved to [perform] his duty) are the Nerves, that do the same in the Body [Natural]; The Wealth and Riches of all the particular members, are the Strength; Salus Populi (the Peoples Safety) its [Business]; Counsellors, by whom all things [needful] for it to know, are suggested unto it, are the Memory; Equity and [Laws], an [artificial] Reason and Will; Concord, Health; Sedition, [Sickness]; and [Civil] War, Death. Lastly, the Pacts and Covenants, by which the parts of this Body [Politic] were at first made, set together, and united, resemble that Fiat, or the Let Us Make Man, pronounced by God in the Creation (Hobbes, 2013, p. 32).

By embodying humanity, state and federal governments seize authority to reinforce and perpetuate their power over their constituents. They can empower people to instill in society a duty to the government that serves to define, promote, and enforce morality.

> They also that have authority to teach, or to enable others to teach the people their duty to the [Sovereign] Power, and instruct them in the knowledge of what is just, and unjust, thereby to render them more apt to live in [godliness], and in peace among themselves, and resist the [public] enemy, are [Public] Ministers: Ministers, in that they [do] it not by their own Authority, but by [another]; and [Public], because they [do] it (or

> should [do] it) by no Authority, but that of the [Sovereign]. The Monarch, or the [Sovereign] Assembly only hath immediate Authority from God, to teach and instruct the people; and no man but the [Sovereign, receive] his power Dei Gratia simply; that is to say, from the [favor] of none but God: All other[s], receive theirs from the [favor] and providence of God, and their [Sovereigns]; as in a Monarchy Dei Gratia & Regis; or Dei Providentia & Voluntate Regis (Hobbes, 2013, p. 199).

Total control over the people may be accomplished by a government that regulates and criminalizes private moments, expressions of love, and bodily pleasure (e.g. sadomasochism, incest, and prostitution) (Cusack, 2015; Cusack, 2016; Cusack, 2016).

United States Supreme Court Justice Antonin Scalia acknowledged this in his dissent in Obergefell v. Hodges (2015), which gave homosexuals the right to marry same-sex partners thereby further allowing private homosexual conduct to be regulated by the government (e.g. bigamy) (Cusack, 2013).

> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,' I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie (Obergefell v. Hodges, 2015, p. 2630).

His stunning retort to the majority elucidated the standard used to justify the government's control over intimate expression.

Justice Scalia complained that the judiciary usurped the people's power to "self-rule" by ruling that morality-based bans on gay marriage were unconstitutional (Obergefell v. Hodges, 2015, p. 2627).

> The Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments. Forbidden are laws 'impairing the Obligation of Contracts,' denying 'Full Faith and Credit' to the 'public Acts' of other States, prohibiting the free exercise of religion, abridging the freedom of speech, infringing the right to keep and bear arms, authorizing unreasonable searches and seizures, and so forth. Aside from these limitations, those powers 'reserved to the States respectively, or to the people' can be exercised as the States or the People desire. These cases ask us to decide whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same

> sex. Does it remove *that* issue from the political process (Obergefell v. Hodges, 2015, p. 2627)?

He answered his rhetorical question with disapproval for the majority in this case.

> Of course not. It would be surprising to find a prescription regarding marriage in the Federal Constitution since, as the author of today's opinion reminded us only two years ago (in an opinion joined by the same Justices who join him today):
> '[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.'
> '[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.'
>
> But we need not speculate. When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it comes to determining the meaning of a vague constitutional provision—such as 'due process of law' or 'equal protection of the laws'—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification. We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue (Obergefell v. Hodges, 2015, p. 2627).

He challenged judicial activism that famously observed "penumbras" and "emanations" of privacy in the Bill of Rights and has expanded protections for one hundred years (Griswold v. Connecticut, 1965, p. 484; Pierce v. Society of the Sisters, 1925; Whitman, 1855). He chastised social movements that seek to tear down the establishment by destroying traditional marriage. He compared the gay rights movement to the 1960s hippies, who also contended for freedom and recognition outside traditional, monogamous, lifelong, and patriarchal marriage.

> 'The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.' (Really? Who ever thought that intimacy and spirituality [whatever that means] were freedoms? And if intimacy is, one would think Freedom of Intimacy is abridged rather than expanded by marriage. Ask the nearest hippie. Expression, sure enough, *is* a freedom, but anyone in a

> long-lasting marriage will attest that that happy state constricts, rather than expands, what one can prudently say.) Rights, we are told, can 'rise…from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.' (Huh? How can a better informed understanding of how constitutional imperatives [whatever that means] define [whatever that means] an urgent liberty [never mind], give birth to a right?) And we are told that, '[i]n any particular case,' either the Equal Protection or Due Process Clause 'may be thought to capture the essence of [a] right in a more accurate and comprehensive way,' than the other, 'even as the two Clauses may converge in the identification and definition of the right.' (What say? What possible 'essence' does substantive due process 'capture' in an 'accurate and comprehensive way'? It stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes. And the Equal Protection Clause, as employed today, identifies nothing except a difference in treatment that this Court *really* dislikes. Hardly a distillation of essence. If the opinion is correct that the two clauses 'converge in the identification and definition of [a] right,' that is only because the majority's likes and dislikes are predictably compatible.) I could go on. The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law (Obergefell v. Hodges, 2015, p. 2630).

Justice Scalia then directed his dissent toward his colleagues. "It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so. Of course the opinion's showy profundities are often profoundly incoherent" (Obergefell v. Hodges, 2015, p. 2630). He summarized his point that the Court had committed a *coup d'état* because it ended a democratic "debate" "in an opinion lacking even a thin veneer of law" (Cusack, 2014; Obergefell v. Hodges, 2015, p. 2628).

The government has often claimed that it does not have an interest in regulating healthy, "normal," and traditional sexual conduct (Cusack, 2013; Cusack, 2013; Cusack, 2013; Cusack, 2017). Unhealthy and harmful conduct consistently has been regulated by the government. Definitions of "unhealthy" and "harmful" have changed as women, homosexuals, and others have emerged into powerful political arenas. For example, laws criminalizing HIV transmission have had greater penalties than laws criminalizing sexual transmission of other diseases; and some gay rights activists have described these laws as being bigoted and unfair (Cohen, 2015; Cusack, 2013). Another example is that seduction was previously a crime because a woman was seduced with a false promise of marriage. However, in many jurisdictions (e.g. Texas) a defendant could in good faith promise to marry a prosecutrix; and remain wed for two years. Then,

his indictment would be dismissed. “Debauchery and carnal intercourse without seduction” was “no offense” (Cusack, 2012; Neal, 2009, p. 44). “The offenses” at which these laws were “aimed” were “the seduction and debauchery accomplished by the promises and blandishments the man” offers “in effecting the ruin and disgrace of the female; and where the seduction and debauchery is accomplished by promises of marriage, upon which the female relies, and thus surrenders her person, and gives to the man the brightest jewel in the crown of her womanhood” (Neal, 2009, p. 44). “It is the broken promise which the law will regard as the [essence] of the offense” (Neal, 2009, p. 44). Female chastity is no longer emphasized as the crux of a woman’s person or the essence of her virtue. Women’s rights activists consider those laws to have been sexist and patriarchal. Yet, as in both examples, when progressive strides against inequality are made against the *status quo* and law, each minority population may suffer when laws designed to provide greater safety and security become unenforced. As these types of political, cultural, social, and legal debates unfurl, members of the justice system may seek to institute public morality while privately participating in immoral, deviant, and nontraditional conduct.

If members of the justice system (i.e. rulers) can hide the harm they cause, as defined by the law and to some extent culture, then they can control the people without being controlled by their own systems or the people, thereby intentionally implementing a broken system that results in a zero-sum game against the people, who unknowingly, naively, or regretfully forfeit trust and freedom to members of a sexual oligarchy rather than a representative democracy (Cusack, 2012). For example, under the premise that every male has experienced lifetime rape or sexual abuse, victimization correlated in many cases with systemic acceptance, secrecy, and tolerance that fostered obedience to patriarchy. “This monopolization may be effected either legally or conventionally” (Gerth & Mills, 1946, p. 193). Patriarchy that represses free speech, threatens safety, and unnecessarily restricts liberty is an affront to the purpose of government, the Leviathan, and society (Cusack, 2014).

If the people believe that the government is comprised of individuals, who benefit from patriarchy in professional, social, or personal capacities, then they will be unwilling to attempt to enforce their rights or advocate for change. “Individuality is in this way organized as a basis of knowledge that can be deployed as an instrument of regulation” (Brown, 2006, p. 41). “Organic social ethics, where religiously sub-structured, stands on the soil of ‘brotherliness,’ but, in contrast to mystic and acosmic love, is dominated by a cosmic, rational demand for brotherliness. Its point of

departure is the experience of the inequality of [moral or] religious charisma" (Gerth & Mills, 1946, p. 338). For the absolute charisma of virtuoso" morality, "this relativization is indeed objectionable and estranged" (Gerth & Mills, 1946, p. 339). Males, who complain about rape and sexual abuse, may be dubbed "emasculated," "homosexual," or "turned-out" (Cusack, 2015). This classification places the onus of sexual power on the victim to reinstall patriarchal control, demonstrate male might, and distinguish male victims from complainant female victims of sexual assault and rape, who have been portrayed by law and society as losing power, being ruined by men, and being "sluts" (McAfee, 2015; Slut Leanne, 2011).

> Understanding contemporary political life pertains to tracing of the formation and regulation of the modern subject through a discursive equation of certain beliefs and practices…[B]ehaviors or beliefs…are in turn regulated…as a means of ordering, classifying, and regulating individuals in the…mass society….[T]his kind of…construction of the homosexual in modernity through the convergence of various scientific, administrative, and religious discourses…., medicine, psychiatry, pedagogy, religion, and sexology…[is] increasingly constitutive of identity such that homosexual *acts* come to be seen as expressions of the homosexual *subject.* Homosexual acts become signs of the core truth of this subject, which is now also reduced to its desires; its sexual desires are the truth of this subject. No longer is one defined by being of this village or that family, this language group or that vocation, but rather by a particular and fundamental sexual or other persona—an identity rooted in desire and behavior (Brown, 2006, p. 41).

These domineering, oligarchical, objectifying, and oppressive mental and sociosexual constructs are imbedded into governance, law, politics, and the justice system (Aiken, 1962). They may harm members of minority and hegemonic groups and protect a sexual oligarchy.

Sexual oligarchy defies the American notion of governance.

> There be other names of Government, in the Histories, and books of Policy; as Tyranny, and Oligarchy: But they are not the names of other [Forms] of Government, but of the same [Forms] misliked. For they that are discontented under…Tyranny; and they that are displeased with Aristocracy, called it Oligarchy: so also, they which find themselves grieved under a Democracy, call it Anarchy, (which signifies want of Government;) and yet I think no man believes, that want of Government, is any new kind of Government: nor by the same reason ought they to believe, that the Government is of one kind, when they like it, and another,

> when they mislike it, or are oppressed by the [Governors] (Hobbes, 2013, p. 159).

A sexual oligarchy is formed by numerous anarchistic members of the justice system, who participate in public enforcement of morality, but break the law by committing sexual deviance in their private lives and in the course of their public duties.

When the oligarchy persecutes sex crimes, they may opportunistically distill obscenities through investigations, interviews, depositions, courtroom testimony, and the press. Salacious speech and tawdry details are unveiled at the government's command, perhaps giving rise to public perception that the government may be a gateway for moral corrosion and perversion. For example, during the 1900s, locals congregated in courtrooms to indulge in sexual details described by witnesses, attorneys, and judges. In the 1900s and presently, despite strict regulations on sexual speech, the government's power to force sexually explicit speech at trial has caused the government to seem intentionally or unintentionally to have monopolized and made available obscenity. To victims, this may feel like racketeering or prostitution because sexual details describing their bodies are conscripted by the government in exchange for protection, sold by the press, and consumed by sex-crazed members of the public, some of whom are thrilled and others, who are repulsed by sexual immorality and interested in prosecution.

> Women who allowed themselves to be stripped naked before windows or who agreed to intimacy on the mere pretext of an errand-run were hardly ordinary specimens of the fairer sex. In the world outside the courtroom, these articulated cultural markers of difference afforded narrator and listeners a bit of amusement and pleasure as well as alerting the listeners to potential leads for their own future sexual pursuits. Inside the courtroom, these tales of sexual intrigue also provided entertainment to all participants, save the prosecuting witness herself. But more importantly, when expressed in the principal forum for social and political decision making, intimate narratives and the practice of sexual storytelling took on qualities of necessity, even legitimacy (Hayes, 2014, p. 193).

Repeatedly, throughout history and in the present, the government's parameters for acceptable speech, depictions, and conduct have been contextualized and legitimized by the government's desire to have command and control over sexual behavior, identity, intimacy, and refrain. The government's purposes and methods may appear to be self-serving, rather than protective of the people, and marginalizing of people's sexual autonomy. This phenomenon has occurred simultaneously with the sexual

liberation movement and establishment of rights for children, animals, women, and gay people, with the latter two frequently questioned in light of moral decomposition (Cusack, 2012).

Fig. 0.1, Site where Larry Flynt was shot when he was tried for obscenity, Lawrenceville, Georgia.

Fig. 0.2, Site where Larry Flynt was shot when he was tried for obscenity, Lawrenceville, Georgia.

The effect of sexual liberation on culture and law has been evident in how society has responded to pornographic materials (Attorney General v. "Tropic of Cancer," 1962; Miller, 1994; Roth v. U. S., 1957; U.S. v. One Package of Japanese Pessaries, 1936). In 1965, *Memoirs of a Woman of Pleasure* was considered to be obscene in a civil equity suit made by the Attorney General of Massachusetts (*Memoirs of a Woman of Pleasure* v. Attorney General, 1966). The U.S. Supreme Court carefully distinguished obscenity from material that possesses redeeming value, yet is exploited for sexual use (Cusack, 2016; *Memoirs of a Woman of Pleasure* v. Attorney General, 1966; U.S. v. Dost, 1986). Today, Playboy fundraises for the Democratic Party and Larry Flynt is considered by some people to be a hero of free speech because he was shot by a racist serial killer after he published interracial pornography. However, others believe that he is a pervert. For example, Bob Guccione, editor of the pornographic magazine *Penthouse*, said of Flynt, "He is a sick, demented character. He is no hero" (*New York Times Magazine,* 1997).

Negative effects of pornography's influence on society are evident to legislators, who have successfully implemented zoning bans against adult

establishments (Barnes v. Glen Theatre, 1991; Hudson, 2002; Los Angeles v. Alameda Books, 2002; McCullen v. Coakley, 2014; Paris Adult Theatre v. Slaton, 1973; Renton v. Playtime Theatres, 1986; Ward v. Rock Against Racism, 1989; Young v. American Mini Theatres, 1976). Municipalities may form parameters to keep specific kinds of businesses certain distances from schools, churches, residential neighborhoods, and other places that may be sensitive to consequences of sexual arousal, drunkenness, and randy behavior (i.e. secondary effects). For example, zoning laws may regulate pornography theaters and massage parlors.

Municipalities have overcome First Amendment challenges by stipulating that prohibitions are not against the content of speech exhibited, sold, or promoted by establishments. The laws protect property value, family-life, and other interests from secondary effects. A series of cases challenged the secondary effects doctrine by distinguishing particular effects, such as prostitution, sexual assault, and public intoxication, and claiming that laws were irrational and unconstitutional. The U.S. Supreme Court uses an intermediate-level scrutiny to analyze a law that is content neutral on its face. If too a great a burden is placed on speech by time, place, and manner regulations that are not sufficiently tailored, then laws are unconstitutional prior restraints on speech. An undue burden is one that limits the exact kind of speech proscribed by the time, place, or manner regulations. Anti-skid row zoning regulations pass intermediate scrutiny.

Pornography and immorality negatively impact the private lives of justice system members, some of whom have sought sex addiction treatment (Cusack, 2014). Sex addiction is "everywhere" "and it's" affecting people of "all ages" (LeBlanc, 2017). Many seek therapeutic and communal intervention through moral organizations, such as the Catholic Church (U.S. Conference of Catholic Bishops, 2006). Attendees may escape institutional culture by attending a men's group where they overcome addiction using a 12-step program. For example, My House Men's Group discusses addiction to internet pornography. Almost all members have histories of abuse that are "connected to addiction;" however, the group does not discuss abuse as a cause of addiction (LeBlanc, 2017). They view pornography addiction as being a neurological problem akin to heroin addiction; yet, a priest attends the meetings each month to have confession. A group leader described their problem as an addiction to lust that is capable of destroying families, jobs, and lives. Although, they discuss related philosophies, such as their beliefs that sex should be "unitive" and "fruitful"; and they "feel bad" for "sex slaves," "who are in captivity," the group focuses on recovery (LeBlanc,

2017). They believe that lawmakers would need to ban all pornography to end lust addiction, but they do not view anti-pornography laws as being morality-based. They believe that pornography is a threat to public safety and general well-being.

Prisons, discussed in Chapter Four, are an archetypal example of how government institutions may disintegrate morality. A serious danger for inmates is prison staff's sexual immorality. American prisons' brutality and immorality has raised concerns throughout the world. Although concerns may be justified under a retributive theory of justice, prisons' corrosive effects on society are inexcusable (Dressler & Garvey, 2012).

Prison staff may rape, coerce, pimp, or unfairly barter with inmates; others may participate in voluntary sexual contact (Cusack, 2014). All sexual contact with inmates is prohibited, thus voluntary acts are nonconsensual. Society may want inmates and staff to be coercive to worsen prisons' reputations to deter crime. However, institutions tend to claim that sexual violations mostly affect homosexuals and juveniles (Schmitz, 2017). Although this is untrue, abuse of homosexuals, juveniles, and transgender inmates is a serious problem (Taylor & Fritsch, 2011). Members of the justice system seem unable or unwilling to regulate morality within prisons sufficiently to prevent deviance and protect victims. Recent studies of institutional deviance suggest that researchers may have problematically adopted sexist attitudes that potentially perpetuate sexual deviance. Rather than blaming institutional settings, culture, and paradigmatic shifts in consciousness, some research has blamed women for working as prison guards.

Deleterious moral vortices in other justice environments are similar to sociosexual degeneration experienced in prisons. However, not every example of an individual employee serves this argument; and the majority of justice system members may functionally serve the people and competently perform duties assigned to them by the Leviathan. Nevertheless, an overwhelming pattern emerges from numerous examples of uncovered sexual deviance within the justice system suggesting to the public that moral corrosion is sponsored by or tolerated within the government. The people may conclude that laws regulating morality are unfairly imposed on them, but not the oligarchy. As the press reports sexual misconduct within the justice system, the public, comprised of deviants, moralists, liberationists, and other groups, is confronted, enticed, threatened, offended, perplexed, and put in a position to doubt and challenge the government's authority.

For many individuals, political views spring from or may be the basis for their moral compasses. Partisanship evident in institutional culture and

speech may influence structure, morals, and deviance. It may be particularly difficult to train justice members to alter or suspend their political views while at work (Cusack, 2015; DiFranco, 1993; DiFranco, 2012; Madonna, 2015).

Democrats and Republicans have differing views about crime and punishment (Lerman & Page, 2016). These views affect their political power, which reciprocally alters how the public interprets and implements justice. For example, imprisonment rates directly increase with the strength of the Republican Party. Candidates claim to be tough on crime. In office, Republicans fund prison expansion; support increased capital sentences; and legalize various methods for capital punishment. Crime control is a top priority for Republican voters, who believe in punishment and enforcement, not prevention or rehabilitation, like Democrats. Republican voters are likelier than Democrats to want increased sentences. Democrats believe more often than Republicans that poor people, African Americans, and Hispanics are likelier to receive disproportionately higher sentences (Cusack, 2014; Lerman & Page, 2016). One reason may be that they are targeted by lawmakers, who engage in deviance. For example, a Republican state representative sponsored a bill to increase proscriptions against public sex, but was arrested after he offered oral sodomy to a male undercover police officer in exchange for $20 (Cusack, 2014; Fox News, 2007).

Partisan politics differently affect regions throughout the country (Lerman & Page, 2016). For example, incarceration and sentencing debates have been cores of California politics for decades; but, similar issues have been irrelevant in Minnesota's penal development. California Democrats would like to limit incarceration to allocate prison beds to serious offenders, not drug users, non-violent offenders, or other similar types of criminals (Okorocha, 2013). They advocate for reform and rehabilitation. Republicans in California have wanted to incarcerate drug-users, who may receive education and access to specialized programs (e.g. labor) (Harvin, 2016; Lerman & Page, 2016). In Minnesota, the Republican Party tends to follow typical Party platforms, but penology is essentially a non-issue. The Democratic-Farm-Labor Party appears to be disinterested in political issues relating to corrections. They advocate for prevention, law enforcement, reform, education, and treatment. They believe that prisons should be designed to punish violent criminals, not provide them with recreation.

Politicization shapes members' attitudes, identities, professional orientation, and relationships (Lerman & Page, 2016). This effect is particularly salient in prison guards' attitudes toward rehabilitation as a

predominant purpose of incarceration in California and Minnesota. Politicization may be less likely to affect which rehabilitative programs officers believe to be valuable in California and Minnesota. Guards' beliefs about the general purpose of incarceration may be guided by politicized attitudes; yet, result in similar deviant conduct. For example, a Republican may believe that inmates (e.g. sex offenders) should suffer. A Democrat may become sexually involved with an inmate, who appears to deserve forgiveness and a second chance. Worldviews influence institutional definitions and willingness to enforce rules using morality as a guide. Institutional integrity, which may be corrupted by sex and monetary gain, is a touchstone.

CHAPTER ONE

POWER, SEX, AND THE JUSTICE SYSTEM

Morality is the basis for laws criminalizing allegedly deviant sexual depictions and activities, such as child pornography, bestiality, and public indecency (Slifkin, 2006). States' use of police power to enforce moral legislation has been challenged, and by some accounts, diminished by superseding doctrines and constitutional requirements for laws (Haberfeld & Cerrah, 2008; Lawrence v. Texas, 2003). Equal protection, substantive due process, free speech, and the establishment clause are a few constitutional requirements that have stamped out states' ambitions to regulate private and public sexual behavior. The state's power to regulate public sexual behavior may be invoked under their authority to maintain safety and order, and in many cases, this power has been used to implement widespread regulation of private activities. One example was states' longstanding regulation of public and private acts of sodomy on the grounds that total bans deterred male prostitution, cottaging (i.e. closeted use of public spaces), public indecency, voyeurism, and exploitation of minors. Although female-female cunnilingus was prosecuted, sodomy laws were typically enforced to punish female fellators and homosexual males. Labeling victimless sex crimes, such as cottaging, with sexual abuse demonstrated animus against homosexual adult males. Crimes against nature laws, which presumably correlated humans' physical actions with spiritual consequences in nature or in the wild, communicated that the most debased components of each crime were somehow congruent (Durkheim, 2008, p. 259). For example, they have "convey[ed]" that "all the worst elements of homosexuality and bestiality" "could possibly" be related; and "[i]t is not enough…to represent homosexuality fused with bestiality, but indeed" to "convey *all the very worst* elements of both" (Morrissey, 2013, p. 244). Yet, many male homosexuals sought companionship and sex in bathhouses and other public places as oases because homosexual men have been oppressed by domestic life that suppresses their genuine interests, pressures them to restrict their sex drives, and forces them to work within a construct that does not satisfy their urges (i.e. heterosexual married life) (Skiba, Hoppus, & Barker, 1999; Skiba, Hoppus, & Barker, 2001).

According to legislators, their goals to maintain public safety and decorum were legitimate, yet their means were not because they unreasonably criminalized a substantial amount of private conduct. Decades later, society began to view some prohibitions against sodomy as violating equal protection and due process. Because the government could not demonstrate that these laws were reasonably, substantially, or necessarily related to rational, important, or compelling state interests, the laws were stricken and the government was forced to narrowly tailor laws that directly prevented behavior that could be outlawed (Cusack, 2012; Kahneman, 2011).

Tradition is a guiding principle in law; for example, it is the basis for substantive due process rights and case law precedence. "The most obvious and generally accepted element of tradition is what T.S. Eliot has called its 'pastness'….The problem is finding an alternative" that continues to be suitable today (Glenn, 2004, p. 5). In addition to tradition, members of the justice system may rely on personal discretion, cronyism, and cultural influences to interpret and formulate laws that regulate which sexual conduct (e.g. pornographic depictions) ought to be illegal. Political commitments, religion, philosophies, and political dialectics (e.g. patriarchy) may motivate the government to label acts and speech as "bad" or "good" (Schaeffler, 1999).

Thomas Hobbes (2013) idealized relationships between legislative labels and implicit forfeiture of power by the people in exchange for protection from anarchy and tyranny.

> But whatsoever is the object of any [man's] Appetite or Desire; that is it, which he for his part [called] Good: And the object of his Hate, and Aversion, [evil]; And of his contempt, Vile, and Inconsiderable. For these words of Good, [evil], and Contemptible, are ever used with relation to the person that [used] them: There being nothing simply and absolutely so; nor any common Rule of Good and [evil], to be taken from the nature of the objects themselves; but from the Person of the man (where there is no Common-wealth;) or, (in a Common-wealth,) From the Person that [represented] it; or from an Arbitrator or Judge, whom men disagreeing shall by consent set up, and make his sentence the Rule thereof (Hobbes, 2013, pp. 58-59).

To maintain tradition, leaders appointed by the people ought to be the individuals with the greatest amount of experience, foresight, or reason.

> [B]ecause in Deliberation the Appetites and Aversions are raised by foresight of the good and [evil] consequences, and sequels of the action whereof we Deliberate; the good or [evil] effect thereof [depends] on the

> foresight of a long chain of consequences, of which very [seldom] any man is able to see to the end. But for so far as a man [sees], if the Good in those consequences be greater than the [evil], the whole chain is that which Writers call Apparent or Seeming Good. And contrarily, when the [evil exceeds] the good, the whole is Apparent or Seeming [Evil]: so that he who hath by Experience, or Reason, the greatest and surest prospect of Consequences, Deliberates best himself; and is able, when he will, to give the best counsel unto others (Hobbes, 2013, p. 65).

Hobbes' explanation of entitlement to rule suggests that virtue, foresight, and authority may be developed through trial and error possibly involving immoral experiences (Hobbes, 2013). Members of the justice system may use their positions to achieve notoriety or increase their own pleasure and aggrandize their own egos.

> The POWER of a Man, (to take it Universally,) is his present means, to obtain some future apparent Good. And is either [Original], or [Instrumental].
> [Natural] Power, is the eminence of the Faculties of Body, or Mind: as extraordinary Strength, [Form], Prudence, Arts, Eloquence, Liberality, Nobility. [Instrumental] are those Powers, which acquired by these, or by fortune, are means and Instruments to acquire more: as Riches, Reputation, Friends, and the Secret working of God, which men call Good Luck. For the nature of Power, is in this point, like to Fame, increasing as it proceeds; or like the motion of heavy bodies, which the further they go, make still the more hast (Hobbes, 2013, p. 81).

People in power, who use public power for personal gain (i.e. anarchists) may consolidate their personal power (i.e. oligarchy) by surrounding themselves with likeminded people, fanatics, and morally complicit people (e.g. packing the court).

> The Greatest of humane Powers, is that which is compounded of the Powers of most men, united by consent, in one person, [Natural], or [civil], that has the use of all their Powers depending on his will; such as is the Power of a Common-wealth: or depending on the wills of each particular; such as is the Power of a Faction, or of divers factions leagued. Therefore to have servants, is Power; To have Friends, is Power: for they are strengths united.
>
> Also Riches [joined] with liberality, is Power; because it [procures] friends, and servants (Hobbes, 2013, p. 81).

When members' deviance is discovered, their reputations may be tarnished and cause the government to appear to be blemished, unreliable, weak, or useless.

Members of the government are endorsed and elected because of their reputations for being able to provide, defend, and protect; and people rely on the government's reputation for punishing lawbreakers in order to deter criminals.

> Reputation of power, is Power; because it [draws] with it the [adherence] of those that need protection.
>
> So is Reputation of love of a [man's] Country, (called Popularity,) for the same Reason. Also, what quality [whatsoever makes] a man beloved, or feared of many; or the reputation of such quality, is Power; because it is a means to have the assistance, and service of many. Good [success] is Power; because it [makes] reputation of [Wisdom], or good fortune; which makes men either [fear] him, or rely on him.
>
> Affability of men already in power, is [increase] of Power; because it [gains] love.
>
> Reputation of Prudence in the conduct of Peace or War, is Power; because to prudent men, we commit the government of our selves, more willingly than to others.
>
> Nobility is Power, not in all places, but [only] in those Commonwealths, where it has [Privileges]: for in such [privileges consists] their Power (Hobbes, 2013, pp. 81-82).

Thus, coalitions of personal power may usurp the government's power.

Many members of the justice system participate in sexual oligarchy. For example, politicians, courts, and members of law enforcement consistently have surrounded themselves with people, who support, benefit from, and are entertained by their misuse of power. Sometimes, they directly abuse power to control and indulge in sex and obscenity. For example, law enforcement officers have abused victims by inappropriately ordering victims to exhibit their bodies to document evidence of rape (Cusack, 2014). Some of these officers have been disciplined and occasionally prosecuted. Others have pruriently utilized for gratification evidence (e.g. photos) of dead and living adult, child, and animal victims.

Testimony may be used to titillate; however, this effect is not necessarily prosecutable or actionable under civil remedies. A tragic example occurred in Cox Broadcasting v. Cohn (1975). Seventeen year-old Cynthia Cohn was raped and killed on April 10, 1972 by six juvenile males. The press passionately discussed details of the crime and the prosecution of one defendant, who did not plead guilty to attempted rape or rape, like the other five defendants. A reporter used documents made available in open court to publish through Cox Broadcasting the details of the victim's identity. Under Georgia law it was a misdemeanor for any person to broadcast or publish the name of a rape victim (Ga. Code Ann. §

26-9901, 1972). The victim's father sued under the criminal statute for damages resulting from a violation of his right to privacy. Cox made a novel claim that the information was privileged under Georgia law and under the federal Constitution's First Amendment protection of the press and the Fourteenth Amendment right to privacy. The trial court found that Cox was liable under the criminal statute and could not defend under the federal Constitution.

Fig. 1.1, Cox Broadcasting Building, Fulton County, Georgia.

Georgia's Supreme Court held that the criminal statute did not provide a civil remedy for invasion of privacy (Cox Broadcasting v. Cohn, 1975). The court also held that the defendant could find no relief in tort law. To receive damages for the tort of public disclosure, the father's zone of privacy had to have been wilfully or negligently violated without regard for the extreme offense that would have been experienced by a reasonable person. Intrusions under the First Amendment may be balanced against abrogation of the right to privacy. The Georgia court reheard the argument that the victim's identity was a matter of public interest that superseded the criminal statute, which applied when the victim's name was not a matter of public interest.

The U.S. Supreme Court reversed. The Court held that freedom of the press is protected under the First and Fourteenth Amendments (Cox Broadcasting v. Cohn, 1975). “In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion” (Griswold v. Connecticut, 1965, p. 483). However, public records contained the victim’s name (Cox Broadcasting v. Cohn, 1975). The victim’s father did not have a privacy interest in her name. The state government of Georgia “stoutly defend[ed]” it’s position, which the Court upheld because “[i]ts claims are not without force” (Cox Broadcasting v. Cohn, 1975, p. 487). It may be ultimately defined” that “there *is*” no “zone of privacy surrounding” public records (Cox Broadcasting v. Cohn, 1975, p. 487). However, it surrounds “every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity” (Cox Broadcasting v. Cohn, 1975, p. 487). The dead victim could not assert a privacy interest.

The U.S. Supreme Court quoted verbiage stating that “[t]o satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life” “have rendered necessary,…under the refining influence of culture,” “solitude and” “essential…enterprise and invention” (Cox Broadcasting v. Cohn, 1975, p. 487). “[T]hrough invasions upon…privacy,…mental pain and distress, far greater…harm” has been created (Cox Broadcasting v. Cohn, 1975, p. 487). However, “such invasions” are “confined to the suffering of those… subjects of journalistic” interest (Cox Broadcasting v. Cohn, 1975, p. 487).

> [A]s in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things (Cox Broadcasting v. Cohn, 1975, p. 487).

“[T]hus” minimizing “the thoughts and aspirations of” the state and its “people” “[w]hen personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder” “the ignorant and thoughtless mistake” of “its relative importance. Easy of comprehension” “that weak side of human nature…is never wholly cast down by the misfortunes and frailties” (Cox Broadcasting v. Cohn, 1975, p. 487). “More compellingly, the century has

experienced a strong tide running in favor of the so-called right of privacy. In 1967, [the Court] noted that…at common law in 30 States plus the District of Columbia," "the right of privacy [was] by this time recognized and accepted in all but a very few jurisdictions" (Cox Broadcasting v. Cohn, 1975, p. 488). "Nor is it irrelevant here that the right of privacy is no recent arrival in the jurisprudence of Georgia, which has embraced the right in some form since 1905" (Cox Broadcasting v. Cohn, 1975, pp. 488-489). "These are impressive credentials for a right of privacy, but" no "tangible intrusion" was at issue (Cox Broadcasting v. Cohn, 1975, p. 489). Therefore, the state's credentials were worthless. It was its forcible argumentation, mentioned by the Court, which originally prevailed in this matter. The argument "in which the plaintiff claim[ed] the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities" failed because the Supreme Court of Georgia dismissed the state's interest in and power to protect the victim's father's privacy right. This all but sealed the case for Cox, which was able to exploit the rape and death of a teenager because Georgia's highest court found sufficient proof that because public records contained her name, the press could publish it in contravention of precedence and law. Georgia's law could not prevent Cox from capitalizing on her name despite her father's privacy interest.

> Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent (Cox Broadcasting v. Cohn, 1975, p. 489).

The Court went further and held that "the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities" (Cox Broadcasting v. Cohn, 1975, 489). This holding diminished traditional respect (i.e. privacy) granted by society to living or murdered rape victims, and fortified the press' ability to sexually humiliate women and arouse audiences with vivid specifics.

Courts have openly aired garish details of sex crimes, such as statutory rape or sodomy, to the delight of the press and attendees, including jurors. Sexual exploitation of victims has often been sexist and served to control participants with gender roles.

> In this way, courtroom narrations of sex—those given by individuals directly involved in the act *and* those supplied by peeping Toms—offered

> actual sexual incidents a vicarious life beyond the experience itself, and in the decorous public setting of the courthouse, no less. The young men's salacious testimony proved a source of titillation to court spectators. [For example, in] the days after their appearance on the witness stand, several local residents filed into the defendant's barn to judge the placement of the bed and the location of the window, all in hopes of ascertaining the kinds of sinful activity the youth might have engaged in during that moonlit night. There is some evidence to suggest that sexual storytelling was not an entirely masculine pastime. This proof yet again originates from the courtroom disclosures of character witnesses (Hayes, 2014, p. 189).

"Battles" have been waged over which lurid descriptions could be uttered in the "public sphere" (Hayes, 2014, p. 151). "[C]ontests that pitted moralists against both sex reformers and obscene print publishers… represent a narrow accounting of a public sexual culture full of eroticization" (Hayes, 2014, p. 151). In the 19th century, those seeking "titillation" turned to "venues," such as courthouses in Illinois for "regularly authorized candid sexual storytelling" (Hayes, 2014, p. 151). Quixotic attraction to "eroticized fanfare" was satisfied by tales of illegal "seduction, breach of promise of marriage," and "disputes in domestic law" (Hayes, 2014, p. 152). Courthouses were hospitable to "erotic sensationalism, voyeurism, sexual boasting, and bawdy humor," which "flourish[ed]" and "command[ed] authority" (Hayes, 2014, p. 153). Dirty descriptions "shucked the archaic clothing of" a legitimate legal "action," and attracted deviants to the legal realm (Grossman & Friedman, 2011, p. 95). Reactions from "prurient spectators" fueled "salacious headlines" (Hayes, 2014, p. 153).

> Instead of seeing the era of Comstock [laws] as a time in which public discourse about sexuality went underground….amative spectacles of rural and small-town courthouses….infused all levels of the juridical process—from the examination of litigants and witnesses to the closing arguments directed at the jury to the briefs that provided appellate judges with the facts and arguments of the trial. Nineteenth-century courts were not simply spaces to regulate print obscenity or to police sexuality, rather the courts themselves, in their examinations of 'illicit sex,' produced 'obscenity' (Hayes, 2014, pp. 153-154).

Acknowledging the "erotic underbelly" of "legal order fundamentally reshapes" interpretations of American power and the regulation of sex (Hayes, 2014, p. 154).

Media outlets, witnesses, litigants, attorneys, law enforcement officers, and judges have publicly disclosed intimate details that shamelessly promoted obscenity and braggadociously explored and controlled sex.