

Original

*Journal of*  
**American  
Studies**

VOLUME 30 PART I APRIL 1996

Special Issue:

X<sup>TH</sup> The American Past  
151 and Popular Culture

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hat they could carry out limited mergers with impunity. As a result, many industries came to be dominated by large combinations. These firms frequently lacked the capacity of older trusts, such as Standard Oil, to dominate industries unilaterally. But the new combinations were able through joint action to stabilise prices and quell competition. Antitrust might have prevented American industry from being dominated by monopolies, but it did little to stem the rise of oligopolies.<sup>77</sup>

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Thus Brandeis and other Progressives played a complex, even contradictory role in shaping popular perceptions of, and public policies towards, big business. Contrary to the claims of New Left historians, the overwhelming majority of reformers were hostile to the trusts and convinced that they had only acquired their power through ruthless and unscrupulous tactics. And, ferociously denouncing the misconduct of these firms, Progressive antitrusters succeeded in alerting the public to the evils of monopoly. But, ironically, the very arguments that heightened public sentiment against monopolies also led reformers to adopt ineffective antitrust measures. Believing that the primary threat came from the egregious misdeeds of robber barons, Progressives assumed that the solution was to make big business good, rather than to make it small. Although clamping down on unethical tactics, they did little to challenge the domination of big business: the first two decades of the twentieth century witnessed no sustained attempt either to break up existing trusts or to prevent future mergers. In short, despite their clear resolve to revitalise competition, a weakened antitrust policy was to be one of the 'progressives' major legacies.

<sup>77</sup> See Carl Eis, "The 1919-1930 Merger Movement in American Industry," *Journal of Law and Economics*, 12 (1969), 284-296; George Stigler, "Monopoly and Oligopoly by Merger," *American Economic Review/Supplement*, 40 (1950), 31-33; Leslie Hannah, "Mergers," in Glen Porter, ed., *Encyclopedia of American Economic History* (New York: Charles Scribner's, 1980), vol. 2, 644-645; Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880-1990* (Cambridge: Cambridge University Press, 1992), 197-203; Eichner, *The Emergence of Oligopoly*, 227-228.

# Private Acts/Public Policy: Alfred Kinsey, the American Law Institute and the Privatization of American Sexual Morality

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Alfred Kinsey has long been recognized for his crucial role in the history of American sexual science.<sup>1</sup> Kinsey's massive studies of American sexual behavior changed the way social scientists studied sexuality by breaking from the accepted social hygienic, psychoanalytic, psychiatric and physiological approaches. Scholars have noted that Kinsey's efforts paved the way for the work of Masters and Johnson and contributed to a post-war climate of "openness" about sexual behavior. In effect, Kinsey's studies signaled the final triumph of scientific candor over the nineteenth century "conspiracy of silence." Furthermore, Kinsey's quantitative approach advanced what Paul Robinson has called the "modernization of sex," and Kinsey's discussion of homosexuality inspired both the homophile movement of the 1950's and the anti-homosexual moral panic of the same decade.<sup>2</sup> Yet for all of Kinsey's significance, his part in

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<sup>1</sup> I would like to thank Donald Fleming, Allan Brandt, Stephan Thernstrom, Henry Abelow, Peter Kuznick and Jennifer Allyn for their comments on this paper. I would also like to thank the Charles Warren Center at Harvard University and the Rockefeller Archive Center for providing grants that made much of this research possible. An early draft of this paper was presented at the 1995 Cheiron Conference on the History of the Behavioral and Social Sciences as part of a special symposium on Alfred Kinsey.

<sup>2</sup> For discussions of Kinsey, see Paul Robinson, *The Modernization of Sex* (New York: Harper, 1977), 42-119; Janice Irvine, *Disorders of Desire: Sex and Gender in Modern American Sexology* (Philadelphia: Temple University Press, 1990), 31-66; Wardell

shaping the social policies of the 1950's and the "sexual revolution" of the 1960's has received surprisingly little historical analysis.

In the following paper, I hope to show how Kinsey's 1948 study *Sexual Behavior in the Human Male* played a critical role in the mid-century privatization of morality. In the post-WWII era, experts abandoned the concept of "public morals," a concept which had underpinned the social control of American sexuality from the 1870's onward.<sup>3</sup> In the 1950's and 60's, however, sexual morality was privatized, and the state-controlled, highly regulated moral economy of the past gave way to a new, "deregulated" moral market. A number of factors were significant in this change: the failure of public regulatory programs like prohibition, the social dislocations caused by World War II, the rise of "situationist ethics" (an Americanized version of existentialism), the liberalization of mainline Protestantism, and the triumph of secular individualism. But Alfred Kinsey's *Sexual Behavior in the Human Male* (1948) served as a critical declaration of independence from what we might call the "mercantilist" moral economy of the early twentieth century.<sup>4</sup> Like the *Declaration of Independence* itself, Kinsey's *Sexual Behavior in the Human Male* argued against government interference in private life.<sup>5</sup>

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Pomeroy, *Dr. Kinsey and the Institute for Sex Research* (New Haven: Yale University Press, 1972); Regina Markell Morantz, "The Scientist as Sex Crusader: Alfred C. Kinsey and American Culture," *American Quarterly* 29 (1977), 563-89; Estelle Freedman and John D'Emilio, *Intimate Matters: A History of Sexuality in America* (New York: Harper & Row, 1988), 285-95; Jeffrey Weeks, *Sexuality and Its Discontents: Meanings, Myths and Modern Sexualities* (London: Routledge & Kegan Paul, 1985); John D'Emilio, *Sexual Politics/Sexual Communities: The Making of a Homosexual Minority in the United States* (Chicago: University of Chicago Press, 1983), 33-37, 42-43, 93-95; Vern Bullough, *Science in the Bedroom: A History of Sex Research* (New York: Basic, 1994), 168-85.

<sup>3</sup> Even the largely successful social hygiene campaign of the early twentieth century, committed to informing the citizenry about the dangers of syphilis, had held onto a notion of public morality, which made it impossible to promote the use of prophylactics in the prevention of venereal disease. See Allan Brandt, *No Magic Bullet: A Social History of Venereal Disease in the United States Since 1880* (New York: Oxford, 1987). The papers of Ben Reitman at the University of Illinois at Chicago Center vividly illustrate the resistance of social hygienists to prophylactic measures. Reitman, Emma Goldman's lover, tirelessly promoted prophylaxis as a means of venereal disease prevention, but he was rebuffed and rebuked by social hygiene and government agencies.

<sup>4</sup> I think that the term "mercantilist" serves as a useful description of the moral economy of the United States from the 1870's to World War II, a period in which the state actively encouraged certain forms of sexual exchange and discouraged others.

<sup>5</sup> See Robinson, 42-119 for the most thorough analysis of Kinsey's work. In particular, Robinson points out Kinsey's democratic impulse.

*Sexual Behavior in the Human Male* undermined the assumptions of the dominant moral economy in two ways. First, it drew a sharp opposition between science and sexual morality, between realism and idealism. Kinsey made it clear that many American moral values were grounded in false assumptions about human behavior. Because American private behavior did not conform to public expectations, Kinsey suggested that such expectations were therefore unrealistic. Second, I would argue, Kinsey's text aided the privatization of morality in a more subtle manner by down-playing the problem of *public* sexual expression. The text gave the impression that sexual behavior only occurred in the private space of the home. *Sexual Behavior in the Human Male* was virtually silent when it came to questions of public sexuality; this silence served Kinsey's deregulatory ends.

In the 1950's, the American Law Institute attempted to shape its model penal code in accordance with Kinsey's scientific discoveries - by privatizing most moral questions. But as the ALI sought to privatize morality, the problem of public sexual expression plagued the law-makers. They wished to deregulate only the private sphere and were forced to draw elaborate distinctions between "private" and "public" sexual expression.<sup>6</sup> This theoretical opposition allowed the Supreme Court to produce two seemingly contradictory lines of argument in *Roth v. The United States* (1957) and *Griswold v. Connecticut* (1965). The first upheld the criminality of pornography while the second established the sexual rights of married couples. Both cases drew on the American Law Institute's model penal code's distinction between public and private sexual expression, which, in turn, drew on the work of Alfred Kinsey.

<sup>6</sup> Eventually intellectuals and experts would abandon this effort to distinguish between the two; for a brief moment in the early 1970's they would embrace all forms of sexual expression, public and private alike. But this enthusiasm was quickly challenged by both the right and the left. The right demanded a return to private sexuality and public morals. The left, on the other hand, greeted the laissez-faire enthusiasm of the seventies with suspicion, noting the monopolization of the moral economy by heterosexual interests. Radical feminists offered a "socialist" alternative to the laissez-faire model: in which public sexual expression would be promoted, but carefully regulated by public opinion. For examples of socialist moral and sexual economics see Shulamith Firestone, *The Dialectic of Sex* (New York: William Morrow, 1970) and Andrea Dworkin, *WomanHating* (New York: E. P. Dutton, 1974). Disagreement over what constitutes the private and public continue to shape American debates over "outing," sex clubs, and the Internet.

## II

The study of American sexual behavior had its roots in the nineteenth century. In the late 1800's, Clelia Duel Mosher, a professor of personal hygiene at Stanford University conducted a statistical survey of female sexual behavior, but she never published her data. In 1884 Dr. Ely van de Warker examined sexual practices at the Oneida colony, where John Humphrey Noyes encouraged "complex marriage" and "stirpiculture," in the *American Journal of Obstetrics and Gynecology*.<sup>7</sup> Efforts to increase knowledge about American sexuality were stymied in the 1890's, however, by the purity campaigns of Anthony Comstock and John Sumner. In 1899 when one prominent physician urged the American Medical Association to discuss the "hygiene of the sexual act," the famous Catholic gynecologist Howard Kelly responded with disgust: "The discussion of the subject is attended with filth and we besmirch ourselves by discussing it in public."<sup>8</sup> It was not long, however, until "hygiene" became an issue of major social importance. Rising rates of syphilis infection and the discovery that syphilis was leading to divorce prompted social reformers to declare a war against syphilis and prostitution. This war was fought with social science, a favorite tool of progressive reformers. In 1910, John D. Rockefeller, Jr. acquired an interest in both social hygiene and sex research when he chaired a New York City jury investigating the problem of "white-slavery." Rockefeller formed a Bureau of Social Hygiene in 1911. Katherine B. Davis, a board member of the newly formed organization, began a six-year study of prostitutes and their sexual behavior. In 1922 Davis published *Factors in the Sex Life of Twenty-Two Hundred Women*, the first major study to be published on the sociology of sex in America.<sup>9</sup> Two years before she published her results, several leading figures of the social hygiene movement persuaded the National Research Council to set up a Committee for Research in Problems of Sex. The Committee, funded first by the Bureau of Social Hygiene and then by

<sup>7</sup> Sophie Aberle and George Washington Corner, *Twenty-Five Years of Sex Research: History of the National Research Council for Research in Problems of Sex 1922-1947* (Philadelphia: Saunders, 1953), 3. On Oneida, see Carl J. Guarneri, *The Utopian Alternative: Fourierism in Nineteenth Century America* (Ithaca: Cornell University, 1991) and Maren Lockwood Carden, *Oneida: Utopian Community to Modern Corporation* (New York: Harper, 1971).

<sup>8</sup> John Burnham, "The Progressive Era Revolution in American Attitudes Towards Sex," *Journal of American History* 59 (March 1973), 886.

<sup>9</sup> An earlier study was conducted by Stanford University professor Clelia Duel Mosher but was never published. On the social hygiene movement, see Allan Brandt, *No Magic Bullet: A Social History of Venereal Disease in the United States since 1880* (New York: Oxford University Press, 1987).

the Rockefeller Foundation, encouraged and financially supported sex research.

As the Committee for Research in Problems of Sex doled out grants to zoologists, physiologists and social hygienists, sexual science flourished. Most of the Committee's grants, however, supported research on reproductive biology and physiology rather than behavior.<sup>10</sup> Furthermore, American sexual science was enveloped within the social hygiene movement on the one hand and psychiatry on the other. In the summer of 1939 one advocate of sexual science wrote in a letter to gynecologist Robert Latou Dickinson, "America [has] only a handful of voices crying in the wilderness - the wilderness of committees, bureaucracy, careerism, and sexophobic purse-string clutched. Sexual science has come upon dark days and seems to be coming on darker."<sup>11</sup> Presumably the writer did not know of the pioneering work of Alfred C. Kinsey.

Kinsey, a professor at Indiana University who had built his academic reputation collecting and studying wasps, had begun in 1938 to gather information on human sexual behavior. In 1941 Kinsey received a \$1,600 grant from the Committee for Research in Problems of Sex. The following year he received almost seven times as much. By 1943, Kinsey was the major recipient of Committee funds with annual grants of over \$20,000 to conduct major studies of human sexual behavior.<sup>12</sup> In 1948 he published the results of his first survey - on the sexual behavior of white, American males - and it became an instant best-seller. *Sexual Behavior in the Human Male* caught the attention of both the research community and the general public.

Alfred Kinsey was born on June 23, 1894 in Hoboken, New Jersey. Raised in a deeply religious home, he was known as a teenager for never having a girlfriend. Though he abandoned his religious heritage as a college freshman at Bowdoin, he spent four years of college without ever dating. He graduated from Bowdoin in 1916 with a B.S. degree and then began advanced studies at Harvard, where he stayed until 1920. After finishing his graduate work he took a teaching job at Indiana University in Bloomington. There he met his first love, indeed his first girlfriend, Clara McMillen, whom he married in June of 1921. They had their first child the following year, and three more shortly thereafter.<sup>13</sup> In his earliest years at Indiana, Kinsey was recruited to teach a course for high school

<sup>10</sup> Aberle and Corner, 92-101.

<sup>11</sup> Gersham Legman to R. L. Dickinson, Summer, 1939, Dickinson Papers, Countway Medical Library.

<sup>12</sup> Aberle and Corner, 121.

<sup>13</sup> Wardell Pomeroy, *Dr. Kinsey*, 25-38.

biology instructors. The course led him to compile and publish three high school biology textbooks.<sup>14</sup> But it was not human anatomy that most interested Kinsey in his early professional years. Instead, Kinsey took to studying the gall wasp. A taxonomist by both nature and training, Kinsey collected hundred of thousands of varieties of the insect from around the world.

In 1938 the faculty of Indiana University elected to offer a course in marriage. Kinsey began asking his students questions about their sexual experiences. Within one year he had collected information on over 300 students.<sup>15</sup> In addition to teaching the marriage course and collecting data, Kinsey began dispensing advice to students with personal and sexual difficulties. Soon, however, Kinsey's marriage course was a center of controversy on campus. Kinsey believed in being forthright in his discussions of sex. He disdained euphemisms and oblique references. Kinsey wrote, "As for the frank treatment of the biological aspects of marriage, I of course, feel anything else than this is not honest. Moreover, the experience over the country has indicated that the students seriously object to Marriage Courses that are not frank. On this subject we are undoubtedly franker in our treatment here at Indiana University than at a majority of the institutions."<sup>16</sup> Kinsey's class aroused the suspicion and ire of fellow professors. Under pressure from faculty and religious leaders, the President of the University forced Kinsey to choose between teaching the marriage course and conducting his own research on sexual behavior. In 1940 Kinsey chose the latter.<sup>17</sup>

With several associates Kinsey began collecting data on American sexual behavior. In *Sexual Behavior in the Human Male*, published in 1948, Kinsey drew on interviews he and his staff conducted with 5300 white American males.<sup>18</sup> In order to quantify his data, Kinsey counted the

<sup>14</sup> Pomeroy, 52-3. The titles of the textbooks are *Introduction to Biology*, *Workshop in Biology* and *Methods in Biology*.

<sup>15</sup> Pomeroy, 54. For a discussion of mid-century marriage education courses, see Beth Bailey, *From Front Porch to Back Seat: Courtship in Twentieth Century America* (Baltimore: Johns Hopkins, 1989), 119-140.

<sup>16</sup> Pomeroy, 57.  
<sup>17</sup> Although the authors of *Sexual Behavior and the Human Male* were Alfred Kinsey, Wardell Pomeroy and Clyde Martin, I will refer to Kinsey as the primary author of the text. This is customary practice and reflects the fact that Kinsey was the director of, and leading force behind, the project.

<sup>18</sup> Kinsey was roundly criticized for employing the grandiose title *Sexual Behavior in the Human Male*, when he systematically excluded Negro subjects from his survey of North American sexual behavior. I believe Kinsey's goal of highlighting American hypocrisy would have been undermined by including a Negro sample, given contemporary beliefs about Negro promiscuity. By studying only white males, Kinsey could accentuate the apparent hypocrisy of white America.

number of alleged orgasms of his subjects. Kinsey was well aware that scholars who study sex faced two problems: sex did not seem to be worthy of serious investigation, yet paradoxically, various forms of sexual behavior were often denounced as evidence of serious psychological, social or moral decay. Kinsey wished to defend the study of sexual behaviour but he also wished to present himself as an objective scientist. He accomplished these two goals by illuminating the stark contrast between American moral ideals and sexual reality. As a 765 page study of American hypocrisy, the scholarly value of *Sexual Behavior in the Human Male* could not be denied. Furthermore, Kinsey was not only able to distinguish between scientific objectivity and unscientific morality, he could call into question the very legitimacy of public morality itself.

"The present study," Kinsey wrote in the introduction to the *Male* volume, "represents an attempt to accumulate an objectively determined body of fact about sex which strictly avoids social or moral interpretations of the fact. Each person who reads this report will want to make interpretations in accordance with his understanding of moral values and social significances; but that is not part of the scientific method and, indeed, scientists have no special capacities for making such evaluations."<sup>19</sup> Kinsey's modesty poorly hid his belief in the superiority of science over morality, a belief which became apparent when he discussed psychology. "The prominence given to classifications of behavior as normal or abnormal [by psychologists], and the long list of special terms used for classifying such behavior, usually represent moralistic classifications rather than any scientific attempt to discover the origins of such behavior, or to determine their real social significance."<sup>20</sup> Kinsey posited two distinct worlds, one of fact and one of value.

Many of Kinsey's facts were surprising, even disturbing, to his readers. He found, for example, that 37 percent of adult men said that they had engaged in homosexual activity to orgasm and that 85 percent of adult males admitted to having had premarital intercourse. Sixty-nine percent of his male subjects stated they had intercourse with a prostitute on at least one occasion and 17 percent of farm boys revealed that they had had sex with animals. Unlike his predecessors in the social hygiene movement, Kinsey refrained from calling for measures to decrease or prohibit such

<sup>19</sup> Alfred Kinsey, Wardel Pomeroy and Clyde Martin, *Sexual Behavior in the Human Male* (Philadelphia: W. B. Saunders, 1948), 5. Hereafter referred to as SBHM.

<sup>20</sup> Alfred Kinsey, Wardel Pomeroy, Clyde Martin and Paul Gebhard, *Sexual Behavior in the Human Female* (Philadelphia: W. B. Saunders, 1953), 646. Hereafter referred to as SBHF.

sexual behavior. Instead, Kinsey hinted that it might be better to adjust the prescriptions of sexual morality to the reality of behavior.

Kinsey turned the tables on the moral logic of mid-twentieth century America. Moralists criticized certain practices because they were apparently rare and therefore not "natural." Kinsey showed that many practices thought to be rare were in fact altogether common. In his conclusion on homosexual behavior in the male, for example, Kinsey remarked, "In view of the data... it is difficult to maintain the view that psychosexual reactions between individuals of the same sex are rare and therefore abnormal or unnatural." In fact, if anything, Kinsey suggested, such practices were quite normal. He gently ridiculed those who would incarcerate homosexuals regardless of their number in society ("Whether such a program is morally desirable is a matter on which a scientist is not qualified to pass judgment; but whether such a program is physically feasible is a matter of scientific determination.")<sup>21</sup> Where previous social scientists accumulated data in order to promote behavioral reform, Kinsey implicitly pointed to the need for the reform of American morals.

In discussing boys who had sexual contact with animals, Kinsey dismissed "the age-old judgment that animal intercourse must evidence a mental abnormality." Instead, he said, any mental abnormalities shown by men, who as boys had sex with animals, were caused by the constant fear of discovery. Kinsey blamed moral censure as the source of this fear and its psychological effects. He offered his own data as therapy for both the individual and society. "The clinician who can reassure these individuals that such activities are biologically and psychologically part of the normal mammalian picture... may contribute materially toward the resolution of these conflicts."<sup>22</sup> Kinsey used data drawn from the real world of behavior to combat the fanciful idealism of moralists.<sup>23</sup>

Despite the statistical normality of such sexual behaviors as homosexuality and premarital intercourse, psychoanalysis, religion and the law continued to treat them as behaviors to be controlled and condemned. In one of his most famous statements, Kinsey reasoned that 95 percent of

<sup>21</sup> Kinsey, SBHM, 659-665.

<sup>22</sup> Kinsey, SBHM, 677.

<sup>23</sup> There were contradictions within Kinsey's own logic that he did not recognize, or at least acknowledge. While Kinsey pitted his realism against American moralism, he used social constructionist arguments when it suited him. In order to chastise moralists for being self-righteous and lacking in proper humility, he argued, "the scientific data which are accumulating make it appear that, if circumstances had been propitious, most individuals might have become conditioned in any direction, even into those activities which they now consider quite unacceptable." Kinsey did not acknowledge that such a social constructionist view of human nature may be used to justify moral idealism. Kinsey, SBHM, 678.

American men were guilty of committing sexual crimes under American law in 1948 - because the law penalized all sex other than heterosexual coitus in marriage.<sup>24</sup> In addition, Kinsey argued that those who opposed extramarital sex often had engaged in such activity themselves.<sup>25</sup> Kinsey's point was clear: American morality was hypocritical and in need of reform.

Early twentieth century advocates of moral regulation did not doubt that illicit sexual behavior was common, indeed prevalent. Anthony Comstock and his allies knew that contraception and pornography had wide appeal, but that only increased the purity reformers determination to wipe them out. In fact, in his books, Comstock, portrayed a nation under siege by sexually explicit materials and immoral behavior.<sup>26</sup> Thus he called upon the government to regulate morality and police the public sphere. Kinsey overtly rejected this social purity approach as well as the more sophisticated approach of the Progressive era social hygiene movement. More subtly, *Sexual Behavior in the Human Male* shifted attention away from the potentially public nature of sexuality and emphasized instead its more private aspects. The Kinsey volume was virtually silent on a wide range of sexual expression that Comstock and his fellow reformers decried.

Kinsey organized his study around six classifications of sexual conduct: spontaneous nocturnal emission, masturbation, heterosexual, homosexual, petting and animal contacts.<sup>27</sup> Kinsey presented these groupings as comprehensive. On close inspection, it becomes clear that these classifications were not mutually exclusive, however. Petting, for example, could be either heterosexual or homosexual. Similarly, masturbation could involve fantasies of animal contact. Nor were Kinsey's classifications exhaustive. Noticeably absent from Kinsey's list of categories were group sex and sexual contact with inanimate objects, like shoes and clothing. In fact, if Kinsey's list is examined carefully, it becomes apparent that Kinsey

<sup>24</sup> Kinsey, SBHM, 392. Connecticut even criminalized heterosexual coitus in marriage if it involved the use of contraception. For an extensive discussion of this subject, see David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York: Macmillan, 1994).

<sup>25</sup> Kinsey, SBHM, 584.

<sup>26</sup> Anthony Comstock, *Traps for the Young* (Cambridge: Harvard University Press, 1967, reprint). See Heywood Broun, *Anthony Comstock: Roundsman of the Lord* (New York: 1927); Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius* (New York: Vintage, 1992); Paul S. Boyer, *Purity in Print: The Vice-Society Movement and Book Censorship in America* (New York: Scribner's 1968); David Pindar, *Purity Crusade: Sexual Morality and Social Control 1868-1900* (Westport: Greenwood Press, 1973). Pindar uses "regulation" in the narrow sense of regulating rather than criminalizing prostitution; whereas, I use the term in its broader sense of state control over sexual exchange.

<sup>27</sup> Kinsey, SBHM, 678.

excluded from his discussion of male sexual behavior the more public aspects of sexual expression.

Many of Kinsey's contemporary reviewers criticized Kinsey for omitting various aspects of human sexuality from his study. They indicted him for ignoring love, emotion, and the qualitative analysis of sexual activity. In his defense, Kinsey argued that he was concerned only with documenting sexual behavior from a statistical point-of-view. To do this he measured sexual "outlet," defined in terms of orgasms. But as we shall see, Kinsey did not count, or offer statistical information on, orgasms resulting from a variety of activities.

Kinsey elided the issue of pornography, for example. Social purity campaigners and social hygienists alike cited pornography as a major social evil. In 1948, various forms of "pornography" existed. Underground publishers sold illegal copies of illicit texts like *Fanny Hill*, *Lady Chatterly's Lover*, and *Tropic of Cancer*. Pin-up calendars proliferated during the War years, and nudist magazines, with photos of nude men, women and children, could also be obtained. Stag films, depicting men and women having actual intercourse, were available through mail order and were frequently shown by men's groups in gatherings open to the male public.<sup>28</sup> In fact, in 1952 the House of Representatives allocated \$25,000 to investigate American pornography. In 1955 the FBI seized a single shipment of 87,960 erotic photographs in Baltimore.<sup>29</sup> Despite the popular consumption of pornography, however, Kinsey made no effort to document its sale or use. Kinsey offered no analysis of contemporary sexual representation nor any insight into male patterns of erotica consumption.

Also absent from the male volume was any discussion of burlesque. Burlesque was still a popular form of public entertainment in mid-century America, one that relied upon sexual titillation and provocation. Similarly, Kinsey overlooked the sensuality of the American cinema. Although males did not normally experience orgasm in movie houses, American films fed the fantasy life of mid-century audiences. The films of Mae West and the animated cartoons of Betty Boop played with sexual humor and innuendo. Despite the regulatory moral system of the Hollywood

<sup>28</sup> The Institute for Sex Research collections, in fact, contain examples of stag films dating from 1915. For a history of the stag film, see Al Di Lauro and Gerald Rabkin, *Dirty Movies: An Illustrated History of the Stag Film 1915-1970* (New York: Chelsea House, 1976).

<sup>29</sup> Testimony of Peter N. Chumbris, Associate Counsel, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee of the Judiciary of the United States Senate, 84th Congress, 1955, 57.

Production Code, audiences could still see erotic imports like the 1933 Czech film *Ecstasy* at one of the 200 existing art theaters. Meanwhile, *Gone With the Wind*, *The Postman Always Rings Twice* and Howard Hughes's *The Outlaw* pushed the limits of acceptable screen sensuality. But there was no reference to these or other Hollywood movies anywhere in *Sexual Behavior in the Human Male*.

Other forms of public sexuality were also omitted from the first volume's wide-ranging analysis. Kinsey and his colleagues offered no data on adult male exhibitionism, nor voyeurism. There was slight mention of exhibitionism among prepubescent boys,<sup>30</sup> but the Male volume was silent regarding the number of adult exhibitionists and voyeurs. As for rape, there was a brief mention of the problem on one page of the book, but no statistical data.<sup>31</sup> Kinsey did intend to compile a volume on sex offenders, but it is nonetheless interesting that he excluded these non-consensual types of activity from his major study, especially given his argument that rates of criminal conviction could not adequately measure illicit sexual activity.

The most striking omission from *Sexual Behavior in the Human Male* was the lack of data on public gay male sex. Kinsey had numerous gay informants, like Samuel Steward, who put the researcher in touch with hundreds of other gay men, so Kinsey was well aware of the high frequency of gay male sexual activity in public rest rooms and parks. (Steward himself contributed erotica to the European magazine *Der Kreis*, participated in the s/m subculture, and eventually published several novels about gay life.<sup>32</sup>) In fact, his biographer describes how Kinsey timed men having sex in urban washrooms.<sup>33</sup> Kinsey had many contacts in the gay underworld and he presumably knew a great deal about gay bars, baths and prostitution. In New York City, gay bathhouses had been in existence since the late 19th century.<sup>34</sup> Poorer gay men often had sex in New York's public parks and the rest rooms of the city subway system.<sup>35</sup>

<sup>30</sup> Kinsey, SBHM, 165-173, 501.

<sup>31</sup> Kinsey, SBHM, 237.

<sup>32</sup> Samuel Steward papers, Mugar Memorial Library, Boston University and John Preston papers, John Hay Library, Brown University. Kinsey had his photographer film Steward having sex with another male. See Samuel Steward, "Dr. Kinsey Takes a Peak at S/M: A Reminiscence," in *Leatherfolk* (Boston: Alyson Publications, 1991), 81-90. It is, of course, interesting that Kinsey did not include a discussion of s/m in SBHM.

<sup>33</sup> Pomeroy, *Dr. Kinsey*, 232-233. Kinsey waited with Paul Gebhard outside the men's room at Grand Central Station and measured the amount of time men spent in the washroom. Kinsey wished to illustrate to Gebhard the extent of the gay male underworld in New York.

<sup>34</sup> George Chauncy, *Gay New York: Gender, Urban Culture and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994), 207-225. <sup>35</sup> Chauncy, 195-201.

Despite Kinsey's extensive knowledge about and interest in gay male culture, and his determined effort to show the high frequency of homosexual contacts in the male population, he offered no descriptions of, or data on, public gay sex.

*Sexual Behavior in the Human Male* did address one form of public sexual behavior – intercourse with prostitutes.<sup>36</sup> But the text made it clear that prostitution was an insignificant form of sexual activity. According to Kinsey, “in the United States, the number of males who go to prostitutes is not so high as is generally believed, and the frequencies with which they go are very much lower than almost anyone has realized.” In his data on prostitution, Kinsey was careful to point out that most men who reported having intercourse with prostitutes only did so once or twice in their lifetimes. Kinsey inverted his data to show the infrequency rather than the frequency of prostitution. “Ultimately, something between 3½ and 4 percent of the total outlet of the total male population (single and married) is drawn from relations with female prostitutes. This is not a very large portion of the total male outlet. Nocturnal emissions are more important, and the homosexual accounts for two or three times as many orgasms among males. Only petting to climax and animal intercourse account for smaller parts of the outlet.” In case anyone missed his point, Kinsey added, “Law enforcement officers, the reports of vice societies, popular sex books and pamphlets, novels, and even the best literature written in this country have made prostitution appear much more significant than it actually proves to be in the total sexual life of the American male.”<sup>37</sup> As far as Kinsey was concerned, prostitution was an inflated social problem.<sup>38</sup>

A careful reading of *Sexual Behavior in the Human Male* reveals that Alfred Kinsey did more than document American sexual behavior. He challenged the legitimacy of public regulation of sexual conduct through

<sup>36</sup> Kinsey, SBHM, 593–609. Compare these fourteen pages on prostitution with the fifty-six pages on homosexuality.

<sup>37</sup> Kinsey noted more specifically, “Many groups interested in controlling non-marital sexual activities have centered their attention upon prostitution when, in actuality, it accounts for less than a tenth of the non-marital outlet of the male population,” SBHM, 597.

<sup>38</sup> Kinsey's logic here contradicts his logic in other places in the Report. Whereas Kinsey argues that the statistical prevalence of homosexuality should deter officials from trying to control it, here he argues that the statistical infrequency of prostitution should make authorities ignore it. Presumably, if prostitution were common, then social hygiene agencies would be justified in using a great deal of resources to attack it. But Kinsey explicitly states that it would be futile to attack the common phenomenon of homosexuality. Kinsey's logical contradiction indicates his commitment to the deregulation of all sexual activity.

morality. Perhaps more importantly, he claimed to present a comprehensive view of American sexual behavior while quietly leaving out a large piece of the picture. *Sexual Behavior in the Human Male* left the reader with the impression that sex was an almost entirely private activity. Kinsey's subtle process of inclusion and exclusion, whether it was conscious or unconscious, intentional or accidental, had a significant impact on America's moral economy in the early 1950's. Kinsey's text provided a two-fold justification for the deregulation of the moral economy system. Kinsey showed that moral regulation was both hypocritical and unnecessary. American men were having premarital, extramarital and homosexual sex but it was apparently being done in the privacy of one's home. Concern about public sexual expression – be it pornography, prostitution, cinematic suggestion, non-consensual sex or homosexual activity in public – found no support from the first Kinsey volume.<sup>39</sup> If, as the text suggested, sexual behavior was simply a private matter without public consequences, then the state had no business attempting to control it.

It is striking that none of Kinsey's critics ever noticed the missing theme of public sexuality from *Sexual Behavior in the Human Male*. His critics decried his reliance on interviews, his anti-psychoanalytic prejudice, his reluctance to include any discussion of emotion, his concept of the “normal,” his exclusive focus on the orgasm as a unit of measurement, his confidence in the truth of his subjects' statements, his unconventional statistical methodology, his grandiose choice of title despite the fact that his work surveyed only the practices of North American white males, and the over-representation of Northeastern males in his total sample, but not one noticed the systematic exclusion of public sexuality from the purview of the text. In effect, the “shocking” nature of Kinsey's revelations about private life was what made the text exciting in the public mind. Discussion about public sexuality such as that seen in Hollywood film would have detracted from the provocative, revelatory nature of the book and weakened the deregulatory animus. Americans were bombarded with information about the dangers of public sexuality prior to World War II.<sup>40</sup> After the War, those same Americans were eager to learn about the secret world of America's private life. As Albert Deutsch vividly described it,

<sup>39</sup> When Kinsey published his second report, *Sexual Behavior in the Human Female*, in 1953 he did address question of public sexual expression. But he did so only in order to illustrate the fact that American women were entirely uninterested in pornography, voyeurism, exhibitionism, sex with male or female prostitutes and other public activities. Kinsey, SBHF, 649–671.

<sup>40</sup> See Brandt, *No Magic Bullet*.

"Imagine a total stranger trying to question you about the most intimate details of your sex history. Imagine him actually prying these details out of many thousands of run-of-the-mill Americans, ranging through the whole gamut of our social life, from the underworld to the blue-blooded 400." Deutsch knew the potential impact of Kinsey's work, "Brace yourselves, fellow Americans, for the most revolutionary assault on our sex morality since Sigmund Freud stripped us naked a half-century ago."<sup>41</sup> In fact, Kinsey's publisher, W. B. Saunders, was so concerned about the possible impact of the book, he planned on restricting its sale to professionals in medicine, law and the sciences, but the Director of the Rockefeller Foundation warned him that such a policy would smack of hypocrisy.<sup>42</sup>

Kinsey's own concern with creating a private sexual sphere can be seen in the effort Kinsey made to protect the anonymity of his subjects. He developed a complex code to prevent others from identifying the names of those who gave their sex histories, going so far as to make it impossible for future researchers to re-analyze the Kinsey data without knowledge of the code. When the National Research Council proposed keeping the code and other information in a locked safety deposit box, Kinsey opposed the plan because judges or law enforcement officials might justify breaking into the box to conduct criminal investigations. Instead, Kinsey and his associates committed the code to memory, where it was presumably safe from public inspection.<sup>43</sup>

### III

When it was released in 1948, *Sexual Behavior in the Human Male* had an immediate and wide-ranging impact. As Robert Yerkes, chair of the Committee for Research in Problems of Sex, sensed in 1946, "Alfred Kinsey is in the midst of an epoch-making socio-biological inquiry."<sup>44</sup>

<sup>41</sup> Albert Deutsch, "Daring Pioneer Conducts First Mass Study of Human Sex Habits," clipping, 7 Jan. 1947; "Epic Survey of American Sex Life Will Shock Nation's Morals" clipping, 6 Jan. 1947, Series 200, Box 40, RG 1.1 Projects, Folder 458, Rockefeller Archive Center.

<sup>42</sup> Lloyd Potter, VP and Editor W. B. Saunders to Alan Gregg, Director, Rockefeller Foundation 28 May 1947; Alan Gregg to Lloyd Potter, VP and Editor W. B. Saunders, 2 June 1947, Series 200, Box 40, RG 1.1 Projects, Folder 458, Rockefeller Archive Center.

<sup>43</sup> Yerkes to Alan Gregg, 17 July 1945, National Research Council, Series 200, Box 40, RG 1.1 Projects, Folder 457, Rockefeller Archive Center.

<sup>44</sup> Robert Yerkes to Dr. L. H. Weed, Division of Medical Sciences, 26 Jan. 1946, National Research Council, Series 200, Box 40, RG 1.1 Projects, Folder 457, Rockefeller Archive Center.

Three weeks after it was published on 3 January *Sexual Behavior in the Human Male* was on the *New York Times* best-seller list.<sup>45</sup> While W. B. Saunders initially intended to print only 10,000 copies, in ten days there was public demand for 180,000.<sup>46</sup> The volume earned almost \$200,000 in royalties in its first two years of publication.<sup>47</sup> Professionals in medicine, social work and the law gathered to discuss the book at hundreds of conferences and meetings.<sup>48</sup> To Robert Latou Dickinson, the nation's foremost gynecologist and a pioneer in sex research, Kinsey's report was a major breakthrough. As a result of the Report, Dickinson wrote to Kinsey, "The word 'sex' is becoming free of hush-up... one thing more you have done, in months, where like achievements took years."<sup>49</sup> The headlines and public discussion focused on Kinsey's surprising statistics about the high frequency of homosexual contacts, premarital sex, extramarital sex and masturbation in the male population. Albert Deutsch in *Harper's* magazine wrote, "Implicit in the revolutionary Kinsey report is a plea for greater public and private tolerance of the vast differences in the sex habits of Americans. Such terms as abnormal, unnatural, oversexed, and undersexed, as used in our legal and moral codes, have little validity in the light of Professor Kinsey's revelations." *Life* magazine noted "the wide gap between moral standards based on America's Puritan tradition and the actual behavior of Americans," while in London the *Lancet* concluded, "It is time that legislation on sexual misdemeanors was revised."<sup>50</sup> At the Republican National Convention in Philadelphia, some delegates sported buttons reading, "We want Kinsey, the people's Choice."<sup>51</sup>

Kinsey's greatest critics were psychoanalysts who felt that Kinsey and his associates lacked a basic understanding of the unconscious. Psychoanalysts demanded to know how researchers could trust at face value statements made by subjects about their sexual histories when Freud had shown how the unconscious repressed and distorted memory. Psycho-

<sup>45</sup> Pomeroy, 282.

<sup>46</sup> Alfred Kinsey to Robert Latou Dickinson, 20 Jan. 1948; Institute for the Study of Sex, Gender and Reproduction, Indiana University. See also Pomeroy, 265.

<sup>47</sup> Natl. Research Council Research in Problems of Sex Report, 4 April 1951, Series 200, Box 28, RG 1.1 Projects, Folder 436, Rockefeller Archive Center.

<sup>48</sup> Pomeroy, 304.

<sup>49</sup> Robert Latou Dickinson, 27 May 1948; Institute for Research on Sex, Gender and Reproduction, Indiana University.

<sup>50</sup> "Excerpts from Reviews of Kinsey, Pomeroy and Martin's *Sexual Behavior in the Human Male*, Showing Sociological Impact of Book," National Research Group, 1.1 Projects, Series 200, Rockefeller Archive Center.

<sup>51</sup> Albert Deutsch, "What Dr. Kinsey is Up to Now!" *Look*, 8 May 1957.

logists and psychiatrists furthermore resented Kinsey's disparaging attitude toward their profession and his own claims to objectivity. One psychiatrist wrote, "Kinsey, of course, does not advocate libertinism. He doesn't 'advocate' anything. He allows his figures to do that for him. But his figures are like puppets and he pulls the strings."<sup>52</sup> Lawrence Kubie, Yale University Professor of Psychiatry and Mental Hygiene, wrote one of the only truly condemnatory reviews of the Kinsey Report; he argued that Kinsey had ignored all psychological factors in his study and that this mistakenly led him to equate statistical normality with psychological normality.<sup>53</sup> But other psychiatrists were enthusiastic about the Report. Karl Menninger, a leading psychologist, told a friend he believed that Kinsey's critics "ought to be spanked."<sup>54</sup> Manfred Guttmacher, chair of the Group for the Advancement of Psychiatry, met with Kinsey for two days to discuss a GAP paper. Kinsey's influence was apparent in the published paper: GAP psychiatrists noted that most sex offenders were neither socially dangerous nor psychopathic. "The preponderance of persons who carry out sex offenses for which they are punishable by our current laws are not involved in behavior fundamentally different from that commonplace in the population," stated the GAP report.<sup>55</sup> The psychiatrists further urged a general decriminalization of illicit sexual behavior: "some laws should be revised and perhaps some entirely abandoned." As Manfred Guttmacher noted, "Kinsey's findings were the points by which we steered. The debt that society will owe to Kinsey and his co-workers for their researches on sexual behaviour, will be immeasurable."<sup>56</sup> On the one hand, psychiatrists and psychologists were eager to curtail the power of the penal system in order to expand their own professional jurisdictions. Yet, some psychologists came out in full favor of moral deregulation, even if it involved reducing the role of the

<sup>52</sup> Iago Goldston, "So Noble an Effort Corrupted," in Donald Porter Geddes, ed., *An Analysis of the Kinsey Reports on Sexual Behavior in the Human Male and Female*, (New York: New American Library, 1954), 41-48. Goldston wrote his article review after the publication of the second volume, *Sexual Behavior in the Human Female*, but his remarks apply equally to the first.

<sup>53</sup> Lawrence S. Kubie, "Psychiatric Implications of the Kinsey Report," *Psychosomatic Medicine* 10, (March-April 1948).

<sup>54</sup> Karl Menninger to Albert Deutsch, 12 May 1948; Institute for the Study of Sex, Gender and Reproduction, Indiana University.

<sup>55</sup> "Psychiatrically Deviated Sex Offenders," Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry, Report No. 9, May 1949, National Research Group, 1.1 Projects, Series 200, Rockefeller Archive Center.

<sup>56</sup> Manfred Guttmacher, "The Kinsey Report and Society," *Scientific Monthly* 70, (May 1950), 291-294.

psychotherapist in social life. Albert Ellis, a New York psychologist, agreed with Kinsey that mental abnormalities were likely to be the result of moral prescriptions: "many sex outlets, such as sporadic homosexuality, are largely 'neurotic,' 'compulsive,' or 'unhealthy' because, by arbitrarily banning them, our society tends to make them so."<sup>57</sup> Ellis blamed psychoanalysis and psychiatry, as much as law and religion, for this state of affairs. Ellis conceded that Kinsey's report included certain value judgments about sexuality, but unlike Kinsey's detractors, Ellis defended Kinsey's reasoning. "Why the Kinsey studies should not include moral evaluations is difficult to see," wrote Ellis. "Not only is it well that the Kinsey volumes express moral interpretations on human sexuality; but Dr. Kinsey and his associates are to be commended that their particular interpretations are invariably on the side of human dignity, sanity and physical and emotional well-being."<sup>58</sup> Many in the behavioral sciences were willing to stand firmly behind Kinsey's ideas regarding moral deregulation.<sup>59</sup>

Legal experts also rallied behind Kinsey's conclusions. In 1951 Morris Ploscowe, a New York Magistrate who had worked with the Rockefeller Foundation on the administration of state liquor laws and had consulted for the New Jersey Juvenile Delinquency commission, published *Sex and the Law*. At the time, Ploscowe was the director of the American Bar Association's Commission on Organized Crime. The book itself was a call for the decriminalization of most sexual activities, with the notable exception of prostitution and public sex. Unlike Kinsey, Ploscowe called attention to public homosexual activity and demanded the suppression of male as well as female prostitution. But he felt the law had no business regulating the private conduct of adults. He ridiculed statutory rape laws, pointing out that in Tennessee the legal age of marriage was sixteen while

<sup>57</sup> Albert Ellis, *Sex Life of the American Woman and the Kinsey Report* (New York: Greenberg, 1954), 14.

<sup>58</sup> Ellis, *Sex Life*, 19. When Alan Gregg, director of the Rockefeller Foundation, read Ellis's first review of SBHM in the *Journal of General Psychology*, he wrote to Ellis, "Of all the reviews I have read it is the most discriminating, judicious, fair-minded and intelligent - indeed the quality of your review makes it extremely likely that no subsequent criticism will surpass it." Alan Gregg to Albert Ellis, 3 Jan. 1949, Series 200, Box 40, RG 1.1 Projects, Folder 461, Rockefeller Archive Center.

<sup>59</sup> The backing of the Rockefeller Foundation may have had much to do with the way in which *Sexual Behavior in the Human Male* was received. As one person wrote to the director of the Foundation, "Its formidable sponsorship seems to have intimidated the reviewers of the book. It were as if any adverse criticism would immediately brand one as Victorian." Herbert Ratner, MD to Alan Gregg, 10 Feb. 1948, National Research Council, Series 200, Box 40, RG 1.1 Projects, Folder 459, Rockefeller Archive Center.

the legal age of consent for intercourse was twenty-one. Ploscowe argued that the states never intended to criminalize private sexual behavior, only public manifestations of such behavior, like open cohabitation. On this point he noted that English common law only forbade public sexual acts (or acts with a minor) and ignored private sexual acts (with the exception of rape, sodomy and bestiality). Though Ploscowe conceded the fact that private sexual conduct could be punished by the English ecclesiastical courts, he made it clear that such courts had no place in a secular democracy like the United States. For Ploscowe the distinction between private and public was essential. Marriage he saw as a public act, and he therefore wished to make it more difficult for individuals to enter into marital contracts. He recommended giving parents the right to legally prevent their children from marrying, outlawing marriages for the "mentally incompetent," and abolishing the principle of common-law marriages, among other deterrents. Ploscowe's book urged legislators to take marriage more seriously and sex less so.<sup>60</sup> *Sex and the Law* translated the sociological contents of the Kinsey Report into legal principles for the reform of America's moral economy.

As policy makers turned to Kinsey's work, the National Research Council stepped up funding. Kinsey received seven annual grants of \$40,000 from 1947 to 1954. When *Sexual Behavior in the Human Female* was published in 1953, however, the Rockefeller Foundation pulled back its support. The Female volume was subjected to relentless criticism. Kinsey's second report was a direct indictment of the double standard, demonstrating that women, indeed white American women, were almost as sexually active before and outside of marriage as men were. Some reviewers, like Reinhold Niebuhr, explicitly defended the double-standard as socially beneficial for women.<sup>61</sup> Others admitted its ethical limitations, but implored Americans to embrace a single standard of restraint rather than one of permissiveness. A number of critics attacked the statistical methodology of the Kinsey team. Meanwhile many voiced anxiety about the moral economy suggested by Kinsey's work. Millicent McIntosh, President of Barnard College, wrote that "the evidence as he presents it makes claims for a completely new moral code." McIntosh expressed her wish that the books had never been made available to younger readers. Her sentiments were widely echoed. The anthropologist Margaret Mead suggested that the book ought not to be sold to minors because "the

<sup>60</sup> Morris Ploscowe, *Sex and the Law* (N): Prentice-Hall, 1951).

<sup>61</sup> Reinhold Niebuhr, "Kinsey and the Moral Problem of Man's Sexual Life," in Geddes, 62-70.

sudden removal of a previously guaranteed reticence has left many young people singularly defenseless in just those areas where their desire to conform was protected by a lack of knowledge of the extent of non-conformity."<sup>62</sup> Shortly after it was published, the female volume inspired political reaction and efforts to suppress it. Representative Louis Heller of Brooklyn demanded that the U.S. Postmaster General block all shipments of the book (though Heller stated that he himself had not read it.) Heller blasted Kinsey for "hurling the insult of the century against our mothers, wives, daughters and sisters." Threatening to call for a Congressional investigation of Kinsey's Institute, he contended that Kinsey was "contributing to the depravity of a whole generation, to the loss of faith in human dignity and human decency, to the spread of juvenile delinquency, and to the misunderstanding and the confusion about sex."<sup>63</sup> In addition, Kinsey was attacked by Catholic Archbishop Paul Shurtle of Indiana, Professor Clement Mihanovich of St. Louis University, Chicago gynecologist William Kroger, and Rabbi Julius Mark of Temple Emanu-el in New York City.<sup>64</sup>

At a 1954 conference, the American Medical Association charged Kinsey with creating a "wave of sex hysteria."<sup>65</sup> Committee members at the National Research Council were also concerned about the work of the Kinsey team. One Committee member wrote in an internal memorandum, "Many of their most interesting statements are not based on the tables or any specified evidence, but are nonetheless presented as well-established conclusions. Statements based on data presented, including the most important findings, are made much too boldly and confidently. In numerous instances their words go substantially beyond the data presented and thereby fall below our standard for good scientific writing."<sup>66</sup> Apart from such academic concerns, the Rockefeller Foundation faced political pressure from conservatives in Congress to terminate Kinsey's funding. Representative B. Carroll Reece ordered an investigation of the Foundation's finances.<sup>67</sup> In 1954, the Foundation cut off virtually all money for the Kinsey Institute's research.

Despite the criticism of the second volume and the Rockefeller Foundation's decision to terminate funding of the Institute for Sex Research, the Kinsey reports continued to influence the making of public

<sup>62</sup> Pomeroy, *Dr. Kinsey*, 283-306.

<sup>63</sup> Albert Ellis, "From the First to the Second Kinsey Report," *International Journal of Sexology* 7, 64-72. <sup>64</sup> *Ibid.* <sup>65</sup> Janice Irvine, *Disorders of Desire*, 64.

<sup>66</sup> Natl. Research Council Research in Problems of Sex Report, 7 April 1954, Series 200, Box 38, RG 1.1 Projects, Folder 436, Rockefeller Archive Center.

<sup>67</sup> Pomeroy, 380; Irvine, 66.

policy. In the mid-1950's the American Law Institute, with funding from the Rockefeller Foundation, drafted a model penal code to make state criminal laws uniform throughout the nation. An important aspect of the model code concerned laws regarding sexual behavior. The authors of the code were clearly influenced by Kinsey's work. They decided to recommend that the states decriminalize all "private" sexual activity between consenting adults. This was a landmark decision, as, at the time, every state in the union had laws on its books criminalizing various forms of consensual sexual behavior.

Louis B. Schwartz was the man responsible for drafting the model penal code's sections relating to sex offenses. Schwartz decided that the model code should only penalize behavior universally condemned by morality: "Areas of controversial morals should be left to non-criminal controls." In particular, Schwartz hoped to distinguish between private and public sexual behavior. In a confidential report to other members of the American Law Institute, Schwartz wrote, "We adopt as our objective the prevention of behavior that, if engaged in publicly, would undermine cherished conventions of sexual behavior and speech. This means that 'private' behavior will not be punished. Contrary to existing law we recognize as private any behavior participated in by small groups of consenting adults. Also behavior is private even if it occurs in a 'public' place, e.g. a car parked on a rural highway."<sup>68</sup> Schwartz recognized the slippery nature of the categories public and private but felt that any behavior which might somehow be classified as private could be successfully deregulated.<sup>69</sup>

When members of the American Law Institute met in Philadelphia in 1955, the city in which the Kinsey Reports were published, Louis Schwartz explained to those present, "We have tried to base the criminal law with regard to sex offenses on danger to society rather than moral indignation."<sup>70</sup> Schwartz defended his position by appealing to the authority of the social sciences. "If we have changed a lot here," he told his audience, "we have not done so just on our authority as lawyers." he

<sup>68</sup> Memorandum for the ALI Advisory Committee, Re: Material on Sex and Family Offenses, unpub., 16 Jan. 1955, Rare Books and Manuscripts, Harvard Law School Library.

<sup>69</sup> For a discussion of British attempts to elaborate public and private distinctions in the Wolfenden Report, see Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800* (New York: Longman, 1981), 239-244.

<sup>70</sup> American Law Institute, *Model Penal Code*, 1985. The following quotations are taken from a transcript of the draft committee's meetings, compiled by the American Law Institute annually. References to the 1955 transcript are to be found in pages 86-133.

called attention to the distinguished Advisory Committee. "Included are experienced trial judges, a number of leading psychiatrists and sociologists of the country," he pointed out. Those psychiatrists and sociologists included Sanford Bates, Manfred Guttmacher, Morris Ploscowe, all with a thorough knowledge of the Kinsey Reports. "Everyone agrees -," Schwartz said, "the Advisory Committee and the Council - that there ought not to be a penal law against illicit intercourse between unmarried adults." Schwartz knew that half the states in the Union had laws prohibiting even a single act of heterosexual intercourse outside of marriage.

Schwartz met some, but not much, opposition from the draft committee, especially about decriminalizing unmarried cohabitation. One member appealed to the "public interest" and maintained that "illicit cohabitation is illegal and against the order of society... it would greatly shock the American people if illicit cohabitation, openly and notoriously, is relieved of any of its criminality." The lawyer's comment annoyed Morris Ploscowe, the New York judge and author of *Sex and the Law*. "May I state that I think it is even more shocking that there are thousands upon thousands of such cases which presently exist, which are never prosecuted." (Ploscowe, of course, did not hope that they would be prosecuted, only that the law would be reformed to reduce the number of "fictitious liabilities.") But a lawyer from Nebraska remained indignant about the proposed decision to decriminalize adultery in the model penal code. "I come from a section of the country," he told his fellow committee members, "where we still try to preserve the home and sanctity of the marriage."<sup>71</sup> In response, Ploscowe demanded to know how many citizens of Nebraska had actually been convicted of adultery under Nebraska law. The attorney admitted that the number was very low.

The committee voted with Ploscowe to eliminate adultery from the model penal code. In fact, by the time the code was published in 1960, it closely matched Schwartz and Ploscowe's original intentions, which were based on the logic of the Kinsey Reports.<sup>72</sup> It contained no provision for the punishment of private, consensual activity, including homosexual activity, but was tough on public indecency, prostitution, the public sale

<sup>71</sup> The transcription of the proceedings reads "marriate," but I assume this to be a misprint.

<sup>72</sup> Arguably Kinsey himself would have called for the decriminalization of both public and private sexual expression, but through a process of omission, his texts nevertheless established an implicit opposition between the two.

of obscenity (not the private production or non-commercial dissemination of obscenity, however), rape, sex with minors, indecent exposure, bigamy, incest, and abortion. Repeatedly, the authors of the code stressed that "none of the provisions ... purports to regulate sexual behavior generally. Instead, each is limited to the affront to public sensibilities occasioned by public or commercial sexual misconduct." Regarding homosexuality, Schwartz cited the Kinsey Reports as evidence of the frequency of homosexual activity and the senselessness of trying to control it. Although Schwartz and Ploscowe tried to distinguish between public and private activity, the chair of the committee challenged this distinction. "I have a little difficulty in deciding what is a 'public' place," he said, pointing out that most solicitations for homosexual activity were likely made "where people wouldn't overhear" them. Ploscowe corrected the chairman, "I think as a magistrate this is something you see all the time. A subway toilet, a theater toilet, a barroom." But Louis Schwartz stressed that it was not merely the locale which had to be public, it was the relationship between the partners in the sexual exchange.

Some members of the drafting committee feared that proposals to decriminalize homosexuality would "discredit" the rest of the model code. Judge Learned Hand confessed that he originally had fears about undermining the authority of the model code, but ultimately concluded that it was inappropriate to criminalize private conduct. "I think it is a matter of morals, a matter very largely of taste, and not something people should be put in prison about." One member of the committee acknowledged that the Institute would be criticized regardless of its decision on homosexuality, but he stated, "if we are going to be criticized as we are, I prefer to be criticized by people who I think represent an outmoded and unsound viewpoint, rather than be criticized by the more modern and up to date." In the end, the majority of committee members agreed with this sentiment. When the American Law Institute's model penal code was published, it proposed a major reconstruction of the law of sexual behavior. The suggested reconstruction was made possible by the first and second Kinsey Reports. In 1962, Illinois became the first state to adopt the recommendations of the model penal code. The state decriminalized all forms of private sexual behavior between consenting adults.<sup>73</sup>

The ALI's model penal code directly informed two major Supreme Court decisions of the 1950's and 60's: *Roth v. the United States* and

<sup>73</sup> The state did not decriminalize abortion.

*Griswold v. Connecticut*. In the first case, Justice William Brennan developed the Court's definition of obscenity by referring to the ALI's model penal code.<sup>74</sup> Brennan ruled that obscenity lay outside the bounds of free speech. In *Griswold*, the Court enacted the ALI's recommendations into law by overturning Connecticut's anti-contraceptive statute.<sup>75</sup> William O. Douglas's decision turned on "notions of privacy surrounding the marriage relationship." While these cases may seem contradictory, the first more "conservative" and the second more "liberal," when we examine the emphasis on private versus public expression in the ALI's code, the contradiction disappears. *Roth* was a clear attempt to regulate public sexuality while *Griswold* was a repudiation of state control over private sexual expression.

The efforts of the ALI were counterbalanced by 1950's Congressional hearings on pornography and juvenile delinquency. In televised hearings and published reports, Congress denounced pornography and promiscuity and called for renewed efforts at public moral regulation.<sup>76</sup> But the efforts of Congress could not stop the privatization of American morality. Slowly but surely, intellectuals and government representatives decriminalized and deregulated "private" sexual expression. Eventually, they even abandoned efforts to distinguish between private and public sexual expression. In 1970 Episcopal minister Laud Humphreys defended sex in public bathrooms in his award-winning sociological study *Tearoom Trade: Impersonal Sex in Public Places*. He instructed police to ignore the practice.<sup>77</sup> The same year the President's Commission on Obscenity and Pornography recommended the whole-scale decriminalization of public sexual expression.<sup>78</sup>

In the late 1940's and early 1950's, social scientists, led by Alfred

<sup>74</sup> *Roth v. United States*, 352 US 964, footnote 20. In his concurrence, Justice Harlan challenged Brennan's interpretation of the model penal code, but this is not relevant to our discussion.

<sup>75</sup> *Griswold v. Connecticut*, 381 US 479.

<sup>76</sup> Hearings Before the Select Committee on Current Pornographic Materials, House of Representatives, 82nd Congress, 1952; Report of the Select Committee on Current Pornographic Materials, House of Representatives, 82nd Congress, 1952; Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Committee of the Judiciary of the United States Senate, 84th Congress, 1955; Report of the Subcommittee to Investigate Juvenile Delinquency of the Committee of the Judiciary of the United States Senate, 84th Congress, 1955.

<sup>77</sup> Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* (New York: Aldine, 1970). It won the 1970 C. Wright Mills award for "the best published book on a critical issue" in sociology.

<sup>78</sup> *The Report of the Commission on Obscenity and Pornography* (New York: New York Times Books, 1970). The conclusions of the Report were rejected by President Richard Nixon, but the Report itself signified the influence of deregulatory views.

Kinsey, reevaluated the moral economy of the early twentieth century. Kinsey revealed the wide gap between moral idealism and sociological reality. His implicit suggestion – to revise moral codes rather than struggle hopelessly to change behavior – guided psychiatrists and legal experts as they sought to make American society more rational. These experts were beneficiaries of the progressive tradition in social thought, but they colored progressivism with a new concern about the value of deregulating private activity. Carefully they elaborated distinctions between private and public sexual conduct. These distinctions enabled the privatization of morality in the 1950's, which further allowed the transition from the public regulation of the early twentieth century to the laissez-faire enthusiasm of the late sixties and seventies. Alfred Kinsey and the American Law Institute played crucial roles in furthering that transition.