

**“BAG A FAG” OPERATIONS IN MICHIGAN**  
**POLICE MISCONDUCT, ENTRAPMENT AND**  
**CRIMES AGAINST GAY MEN**

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*A newer version will be available soon includes updates with respect  
to the US Supreme Court decision in June 2004  
striking down every sodomy law in the nation.*

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# **“BAG A FAG” OPERATIONS IN MICHIGAN**

## **POLICE MISCONDUCT, ENTRAPMENT AND CRIMES AGAINST GAY MEN**

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Gay men in Michigan continue to be the targets of illegal undercover police operations intended and designed to deprive them of recognized constitutional, civil and human rights. The operations involve the decision to selectively target places where it is known that gay men contact other consenting adult men. This deliberate, selective entrapment is significant misconduct and should be halted.

Reliable sources inform the Triangle Foundation that officers have an “inside” slang for these decoy projects. They call them “bag-a-fag” operations.

Often the men who are victimized by special attention from the police are not aware that dozens of other men were similarly prosecuted. Even if a defendant raises the defense of entrapment, the abusive operation goes on. Entrapment is a defense of fact (U.S. v Foster, 835 F Supp 360 (E.D. Mich. 1993)). It applies only to the case at hand. Even repeatedly proving that defendants were entrapped does nothing to halt the on-going police campaign.

Even while acquittals are handed-out, new defendants are arrested. Most plead guilty to something. These continuing covert maneuvers against the gay community are motivated by anti-gay animus. They are rationalized as “tough on crime.” Abusive police misconduct can be among the most dangerous for a community or a defendant to challenge. To stop these police-crimes against gay men, government intervention is required.

Entrapment operations against gay men are unjustified. Most of the people arrested during such operations profess interest only in private, non-commercial, adult sexual encounters. In some cases, the behavior that occurred may be illegal (for example, sex that occurs in a “public place” is prosecuted as “public sex” even if there is no witness) but there is no crime “victim.” Law enforcement agencies routinely claim that their entrapment operations are in response to citizen complaints. Just as routinely, when requests are made to produce these complaints (under the Freedom of Information Act), no legitimate complaints are provided.

A clear ongoing pattern of activity is evident in Michigan. This reflects a nation-wide pattern. The number of under-cover projects now operating tends to confirm an election year “tough on crime” political motivation as well. This constitutes political persecution of gay men. One popular magazine reported the “celebrity entrapment” of George Michael and noted that:

“Policing of gay cruising areas is on the rise across the country...Except in cases of obvious prostitution, heterosexuals engaged in the kind of public conduct that would guarantee two men at least a ticket, if not a pair of handcuffs and a night in jail, are simply cautioned, told to move along, or even ignored...the number of acquittals when these cases have proceeded to trial is astoundingly high...the police maintain that they are simply responding to complaints. As yet, not one item which could be construed as a complaint has materialized.” Genre May, 1998, p 42.

Law enforcement agencies throughout the state determine where gay men go to find competent, consenting, noncommercial, private adult sex partners. Even if no one has complained, they then send in undercover officers. Establishments that clearly cater to sexual interests (such as adult theaters) are included as targets.

Even business establishments that are widely known to cater to an exclusively gay clientele (such as gay bars) are targeted. The officers *pretend* to be interested in private, noncommercial sex with another competent, consenting adult. When the target responds to this interest, an arrest is made. Usually, the offense consists of spoken words. Often the arrest includes seizure of a motor vehicle, false claims that the defendant offered or requested payment, and immediate pressure on the accused person to plead guilty.

Opportunities for abuse, harassment and other police misconduct are rampant. There are already reports that State Troopers are conspicuously taking down license plate numbers of anyone who stops at certain rest areas. Openly gay men are threatened and told not to return. Innocent people, using the “rest area” for “resting” (to avoid falling asleep while driving) are harassed and charged with loitering.

Undercover police “vice” operations are not new, but they are obsolete. They represent a gross misallocation of tax resources, and no longer reflect “community morals.” Most Americans believe it is immoral to target gay men, and that they should be left alone. A fair operation would include both male and female decoys, and would target defendants of all sexual orientations. The police in Michigan do not target similar behavior in a gay context that they target in a similar “straight” context. Comments that a heterosexual female could make freely in a “singles bar” will get a gay male hauled to jail.

An evenhanded vice operation would be directed only at clearly illegal conduct, such as “prostitution” or activity with minors. The current crusade, however, routinely exploits archaic misdemeanor laws that forbid “lewd” or “immoral” activity or “disorderly conduct.” Officers are invited to apply their own personal, subjective moral opinions in determining whether a criminal act (sin) has occurred. Since the charges are “only” misdemeanors, defendants are not entitled to all the usual procedural safeguards, such as appointed counsel. Large numbers of defendants simply plead guilty. Eventually, such pleas can result in lifelong registration as a “sex offender.”

The police rationalize their campaigns by claiming that they are trying to prevent or curtail public sexual activity. This excuse is transparent. Authorities recognize that there are a variety of effective ways to stop public sexual activity. The selective use of covert personnel has never been one of them. The facts surrounding many of the arrests belie the police justification. See 82 Iowa Law Review 1007, cited on page 10, *infra*.

This report is based on information available to a single member of the State Bar. Other attorneys could detail dozens of similar cases. The problem set forth is, if anything grossly understated.

EXAMPLE:

The DETROIT EAGLE Case

Anthony Lem (fictitious name) is retired from Detroit Edison and works part-time as a security guard. He is an openly gay citizen, and is involved in several gay social clubs which patronize "The Detroit Eagle" (a well-known gay "leather" bar located at 1501 Holden).

On Thursday, October 26, 1995, Lem went to The Detroit Eagle and met two newcomers. He asked them if they were police officers, and they both said "no." Both men claimed that their names were "Jim." One claimed to be recently retired from the Navy and stated that the other was his lover. Lem claims to have talked with the men most of the evening, and that "everything was very sociable and friendly." Witnesses confirm that both men were in the bar on Thursday night.

On Friday, October 27th, Lem returned to the Eagle and found Jim and Jim both in the upstairs portion of the bar. Typically, all patrons are required to pay a "cover charge" for entry on a Friday night. When he approached, a third man (who introduced himself as Mark) joined in. Mark talked with Lem for an hour, and claimed to be an out-of-work journalist who was working as a painter with Jim. Lem introduced several of his friends to the three, and reports that he "tweaked" Mark's rear-end at one point, drawing no objection.

Around the time of "last call" (1:45 a.m.) Lem said to Mark "You're really nice looking. I wouldn't mind chomping on your crotch for a while" and Mark responded by suggesting they exchange phone numbers.

Lem told a friend that he was leaving the bar to get a phone number. There was no direct request for, or offer of sex, and no present intent to commit any immediate sexual act. As far as any reasonable observer could tell (and there were numerous "observers"), these were two openly gay men who had met at a gay bar and decided to contact one another again in the future. Doing so is no crime.

The social context gave defendant affirmative evidence that sexual interest from another man would be welcome. First Amendment law requires that speech be considered in its context. At 1:45 a.m. on a Friday night at The Detroit Eagle, a reasonable man would expect direct requests for sexual

contact from other men. No member of the public was forced to endure unexpected or shocking behavior. Indeed, the members of the public who were present were there because they were positively seeking and encouraging the target behavior. The establishment “markets” this conduct.

Lem never made any request for sex, nor did he offer to perform any sexual act. His statement was a truthful and accurate report of his state-of-mind. Under the circumstances presented here, even a direct request for immediate sexual contact could not be defined as "disorderly" unless the person making the request refuses to take "no" for an answer.

“Solicitation” generally refers to prostitution or commercialized sex. A “solicitation” made to others who are presumptively enthusiastic about *being* solicited cannot be characterized as “disorderly.” To conclude otherwise would implicate the behavior of millions of heterosexual Americans who use “swinger’s ads”, dating services, and single’s bars in furtherance of the same conduct.

One need not morally approve of the behavior to recognize that the law still permits it. Diverse moral standards are respected. Freedom of speech allows at least some freedom to speak about sex. Sexual “speech” is widely practiced. Freedom of association authorizes gays to congregate, communicate and engage in intercourse with one another.

“Disorderly conduct” generally requires behavior that would disrupt the ordinary pursuits of a reasonable third party in the area. Black’s Law Dictionary, 5<sup>th</sup> ed., p 422 defines the offense as:

“A term of loose and indefinite meaning (except when defined by statutes) but signifying generally any behavior that is contrary to law, and more particularly such as tends to disturb the public peace or decorum, scandalize the community, or shock the public sense of morality.”

By definition, the phrase is inherently vague, and cannot be left to individual police officers or other individuals (even if government officials) to define. The Model Penal Code, Sec. 250.2 defines the offense this way:

“A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (a) engages in fighting or threatening or in violent or tumultuous behavior, or (b) makes unreasonable noise or offensively course utterance, gesture or display, or addresses abusive language to any person present; or (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.”

A willing participant in this environment (even a police officer) cannot claim that their pursuits were shockingly interrupted by the conduct they were mutually committing, and which they paid a cover charge to participate in.

Disorderly conduct requires a context. When officers go to a bar because they know that the patrons of the bar welcome sexual interest from men, they cannot call an expression of sexual

interest by a man “disorderly.” In Lem’s case there was no implication of a commercial nature (no request or offer of money or rewards) and no present intent to act.

Defendant exercised his right of freedom to expression by factually reporting his state of mind. He did so after two nights of long, sociable conversations with two gay lovers, and the young friend they brought to the Eagle. He did so after having made physical contact with "Jim" on one night, and "Mark" on the next, drawing no protest other than "jealousy" from the other "Jim.” The police entrapped Defendant by convincing him that they welcomed sexual interest. They waited until 1:45 in the morning, after Defendant had been drinking. They even purchased alcohol for the Defendant and accepted his buying drinks for them.

This entire two-night enterprise, involving three-to-nine cops, yielded Mr. Lem’s "disorderly conduct" arrest. Toni Lem was held by the Detroit Police for 17 hours (until after 7:00 p.m. on Saturday). No one else was taken into custody. He was repeatedly told he would be "20 minutes to an hour.” Mr. Lem reports that he was never read his Miranda rights, but that he was given an "Advice of Rights" form to sign at arraignment. Lem had no prior arrests.

This episode is stark and irrefutable proof that openly gay people and businesses are improperly and affirmatively selected for “special” attention by the police in order to stigmatize, victimize and abuse them for being gay. Such selectivity is a constitutional violation.

“If the solicitation statute is discriminatorily enforced against gays, e.g., by police officers frequenting gay bars to make arrests without commensurate efforts at heterosexual bars, the selective enforcement may be subject to attack on equal protection grounds. See Yick Wo v Hopkins, 118 US 356, 373-374; 6 S Ct 1064, 30 L Ed 220 (1886).” Prosecution & defense of Sex Crimes, Ch. 7, Sec. 7.05.

Additional Equal Protection authority is set forth below. A pretrial in the Eagle case was held on December 15, 1995. After expending thousands of dollars, and wasting dozens of hours, the charges against Mr. Lem were dismissed because the police agency refused to provide its evidence.

#### OTHER EXAMPLES:

The Eagle case is not unique. At least ten additional recent cases (some on going) are detailed below. Both the professional literature and the lay media confirm that law enforcement agencies in Michigan continue to selectively choose areas for surreptitious enforcement schemes based upon whether the area is known as a “cruising” area for gay men. There is a vast amount of professional literature that undermines the excuses proffered by the police, and that condemns the practices they admit.

The Triangle Foundation reports that there are several current, active entrapment enterprises on-going in this jurisdiction. Parks and rest areas are prominent locations. Dozens of area men have been criminalized and stigmatized before and since the Eagle case.

The police use the gay media, the Internet and other sources to learn where men meet others for sexual liaisons. They target those areas, and instead of using a uniformed presence or overt surveillance to discourage petty crimes, they actively encourage and entice men to discuss sexual activity. Then they make an arrest. This abuse is lucrative. Fines, impoundment fees, probation supervision fees and other costs can be extracted from the victim.

On some occasions, the police encourage men to perform some arguably sexual act before they announce their identity. In most of the cases, it is clear that the victim was led to believe that there was another sexually active, competent, consenting, interested gay adult. It is also clear that steps were taken to assure some form of privacy. In many of the cases, such as Lem's, the defendant is arrested for mere speech.

During the Summer of 1997, at least four Defendants were arrested in a public rest room located at Boulan Park in the City of Troy. Defendant 1 was given a ticket for indecent exposure and disorderly conduct on September 25, 1997. Defendant 2 was entrapped on October 21, 1997. The disposition of the other two defendants is unknown, and they are not included here as examples of entrapment. The problem is much larger than this report can convey.

In both Troy cases, police reports asserted that plainclothes officers were at the park "on complaint of indecent activity between males at the park." In response to this claim, a Freedom of Information Act request was made. In reply, the police produced four complaints. None of them supported the fabricated justification offered by the Troy police.

Two of the four so-called "complaints" were the result of the entrapment of Defendants 1 and 2. The third alleged "complaint" involved another Defendant who was entrapped at the rest room but apparently pled guilty. The fourth report involved a male "flasher" who exposed himself "in the bushes" to a passing female.

The reply to the FOIA request proves that there were no complaints "of indecent activity between males at the park" until *after* the police began to systematically entrap people. The only legitimate "complaint" (the flasher) did not involve activity "between males" and did not occur near the rest room.

If citizen complaints really motivated the Troy police, they would be using undercover females to detect heterosexual "flashers." They do not do so because of the conscious choice to target gay males. Doing so involves a greater stigma, more embarrassment, and more likelihood of being able to intimidate a "guilty plea" out of the defendant.

Four officers, each earning \$46,364.00 per year, were employed for an unknown number of hours in each Troy entrapment. Officers Salter, Bjork, Piltz and MacAtee were employed in all the arrests. In their reply to the FOIA request, the Troy Police Department wrote that "this department

does not require ‘justification’ to enforce ordinances and statutes within its jurisdiction.” The department also claimed it had anonymous complaints of which “no record was maintained.”

Both Troy defendants pled guilty. This decision neither justifies the entrapment, nor does it genuinely establish that the defendants had actually committed any criminal act.

Defendant 2 was a married person who was excessively fearful of publicity. He reported that he had a conversation with another male who was seated in a nearby car while he (Defendant 2) was seated in his own car. He asserts that he entered the park rest room for legitimate purposes, and that the officer struck up a conversation, and asked him if he wanted to talk in the car. Defendant declined, but then suggested they move their vehicle so they could talk while separated.

Defendant claims the conversation lasted 30 to 40 minutes, included “many statements that could be taken as having a double meaning (but) was never at any time directly sexual.” At age 57, and suffering from a prostate condition, Defendant re-entered the rest room after the 30 to 40 minute conversation. According to Defendant:

“The young man appeared at the next urinal. He had his penis in his hand and he was shaking it and said ‘it won’t work.’ I said ‘maybe it’s too cold.’ He then said ‘I think this ruse, sir, has gone on long enough’ and identified himself as a police officer. Then we went outside and three or four other officers approached.”

Although the police claimed that Defendant was “masturbating” in the rest room, he denies that any such conduct ever occurred. He concedes that his penis was “exposed” while he was utilizing the urinal. It is impractical to do so otherwise. The claim that the entrapment victim was “masturbating” is common, easy to assert and difficult to disprove without surveillance tapes<sup>1</sup>.

Defendant 2 also pled guilty. He is generally openly gay, and does not deny that he responded with sexual interest after an undercover Troy officer repeatedly verbally encouraged him to perform more and more “sexual” conduct.

According to the police report, the officer merely sat in the adjacent stall when “after 4 minutes, the officer could hear the Defendant start to breathe hard. A few minutes later he could observe him kneeling on the floor of his stall with his pants down.” The report is pointedly silent about what was being said during the “four minutes” and “a few minutes later.”

Even the police report appears to admit that the officers initiated the contact by making eye contact “intently” with the defendant, leading the way into the rest room, and sitting for an extended period of time after Defendant entered the adjacent stall. According to defendant, the officer was verbally suggesting and encouraging particular actions all the while.

In an operation such as the one in Troy, it is troubling that no video or other recording was used. The Defendant had a reasonable expectation of at least some amount of privacy in the locked



stall of his toilet. See People v Austin, Ingham Cir. Ct. Docket No. 86-57441-AR where the court observed that “people are entitled to expect such privacy as the design of the public facility may afford.”

The police knew in advance that some cases might come down to their word against that of the Defendant using a toilet. Why would a municipality invest the time of four officers, over days of under-cover operations, and not be prepared enough to view and record the conduct, which they claim, is illegal? Certainly, the police will avoid documentation if the conduct for which men are being arrested is innocent or innocuous.

In both Troy cases, the Pre-sentence report demonstrated a remarkable pre-conceived certainty that each Defendant had engaged in this conduct before (a very explicit presumption of guilt). Defendant 2's report said, “It is more than likely that the Defendant has engaged in some sort of this type of behavior prior to his arrest.” The pre-sentence report recommended requiring “mental health counseling” and “no consumption of any alcohol or drugs with random testing.” These abusive recommendations were made even though neither Defendant used alcohol or drugs.

In the case of defendant 2, the police report pointedly omits the details. The officer was verbally “directing” defendants actions at every step, telling him to pull his pants down, kneel and do other (apparently invited) acts. Such “directing” should result in charges being brought against the officer, for it was he who “solicited” the acts, and not the compliant defendant. The police report records the fact that Defendant felt he was entrapped, and that there appeared to be mutual interest.

At sentencing, the District Judge (Dennis Drury) made noteworthy statements to Defendant 2, telling him he was “not worth it” and berating him for suggesting that the ongoing covert operation was entrapment. In contrast, Judge Bolle (who sentenced Defendant 1) rejected the probation department’s suggestion of drug testing and conveyed no overt hostility. Judge Drury questioned the very human value (“worth”) of the defendant.

Jeff Clague (Defendant 3) was an insurance executive who attended a gay “adult theater” in The City of Detroit. The theater exhibited heterosexual pornography (movies) on the first floor, and gay pornography (movies) in the basement. When the Detroit Police conducted a raid, they never even sent an officer into the upstairs area. Two men were arrested for having sex in the darkened theater, but all the people present were “poked” by an officer who called each a liar.

After being sent home, Clague drove to the precinct to lodge a complaint against the defending officer. The same officer came to the precinct desk and then arrested Clague, charging him with “lewd and obscene behavior, to wit, watching.”

A police disciplinary board sanctioned the officer, and Clague sued the city for civil rights violations. Being charged with “watching” lewd behavior at a pornographic theater, in response to a complaint of police misconduct, is obviously improper. Such unusual charges are not uncommon. To excuse their recent closing of the Melody Adult Theater in Inkster, police claimed there had been

complaints from neighbors. A cursory ride by the site reveals that the theater was surrounded by an industrial plant and had no real “neighbors.”

In another recent case (Defendant 4), an openly gay man was cited for “indecent exposure” while wearing a “thong” bathing suit and sunbathing seated on a blanket in a public park. An officer first ordered the tanner to stand, and then he denied the defendant the opportunity to more fully clothe himself before doing so. Then, a charge of indecent exposure was lodged.

The district court dismissed indecent exposure charges. He noted that since there was no “exposure” of genitals, the “exposure” element was not met. Since indecent exposure requires both exposure and indecency, mere nudity is not enough. Both elements were absent and the case was dismissed. Black’s Law Dictionary 5<sup>th</sup> ed., p 691 defines “indecent exposure” as:

“Exposure to sight of the private parts of the body in a lewd and indecent manner in a public place.”

This definition makes it clear that the “in a lewd and indecent manner” is a distinct element. The dictionary goes on to explain that:

“Exposure of person becomes indecent when it occurs at such time and place where reasonable man knows or should know his act will be open to observation of others.”

In the case of defendant 4, the park rules defined the area where sunbathing is “open to observation of others” by prohibiting the activity within twenty-five feet of the road right-of-way. Nothing described by the officer in this case qualified defendant’s conduct as “lewd” or “obscene” or “indecent.” The law does not countenance allowing the individual police officer to arbitrarily define the offense based upon subjective tastes.

In another case (Defendant 5, one of dozens of Summer ‘98 “busts” at an I-275 rest area near Plymouth) a man was given a ticket for “loitering” when he fell asleep in his car at the rest area. In yet another 275 rest area charge, a man (Defendant 6) claims he was innocently using a toilet when another man attempted unsuccessfully to open the stall door. Both were arrested. The police have claimed that surveillance tapes were used, and these have been demanded.

This narrative could go on with more cases demonstrating the “special attention,” i.e., selective enforcement, that gay men receive from law enforcement agencies. No empirical compilation exists, although The Stonewall Bar Association has repeatedly petitioned the Michigan Supreme Court to comply with an ABA recommendation to study sexual orientation discrimination.

Exceedingly creative, extravagant and often illegal methods are used by officers to bust gay people. The cases set forth above are literally only “the tip of the iceberg.” They demonstrate a relentless, determined and persistent choice to target gay men, their bars and public “cruising” areas, for special harassment and expensive undercover “decoy” operations. This is especially ominous

now that three misdemeanor convictions can result in a life-long sentence of public registration as a sex-offender.

In addition to being selectively targeted and enticed, the men whose arrests are discussed here experienced far more “special attention” (in the form of mandatory “counseling” and other unusual consequences) than other offenders. Requiring “counseling” for acknowledging one’s homosexuality is highly revealing. The Troy District Court Probation Department evidently ascribes to the proposition that homosexuality is a mental disorder. No recognized psychological authority shares this opinion.

In another recent case (Defendant 7), the Wayne Circuit Court had to order the release of a Defendant’s car after the Wayne county prosecutor tried to get Ford Leasing to refuse to ever finance a defendant again. The attorney from Ford expressed great consternation over the improper contacts and demands made by the Assistant Prosecutor.

The police and sheriff’s departments in southeastern Michigan are increasingly exploiting forfeiture and nuisance laws to increase revenues to their departments, and their favored contractors, while causing inconvenience, deprivation of property and vexation to openly gay men. Although the Defendant’s leased car in the above case has been returned (after 45 days and a cost of \$1500 in impoundment fees alone) the Defendant has still not heard about the disposition of the charges against him.

It is not an exaggeration to complain that undercover officers deliberately misrepresent themselves as interested adult gay men in order to accomplish entrapment. The ability to do so is documented in professional literature. The police victimize the men who go through elaborate non-verbal interactions to make certain that the other party is also a sexually interested gay man, and not an inadvertent observer.

“It is not true that the majority of homosexuals are recognizable on sight by the uninitiated. It is often true, however, that they can recognize each other. This is not because of any distinguishing physical characteristics, but, rather, because when cruising, they engage in behavioral gestures which immediately identify themselves to each other. A large part of cruising is done with the eyes...”  
Gayspeak: Gay Male and Lesbian Communication, 1981, p 65.

In several current cases (Defendants 8, 9, 10 and 11) openly gay men freely admit that they were interested in potential, future, private, consensual sex with apparently competent and interested adult men they encountered in a public park. They deny any discussion, request or offer of money. Nevertheless, they are charged with offering to engage the services of another for prostitution.

When the absence of any commercial elements is accepted by the City Attorney’s office, the men are then prosecuted under the phrase “or some other lewd or immoral act.” One commentator

calls this phenomenon “transformation.” The state takes otherwise legal speech about a sexual act, and transforms speaking about the act into an actual offense itself.

“These courts treat an admission of same-sex orientation as a type or species of incipient same-sex conduct. Having transformed an admission of same-sex orientation into at least the beginning stages of same-sex conduct, the courts then apply the conduct case analysis and reach the inexorable result...” 43 Wayne State Law Review 11, p 32, 1996.

Defendants 8 and 9 were having a picnic in the park together. The two were friends, and never sex-partners. One was African-American, and the other Caucasian. Both claim that their conversations with the undercover officer included numerous “double meaning” remarks, but that neither offered nor requested a sex act, and neither one offered or suggested payment. The officer’s inquiry “what does it cost?” produced their answer that “it’s a free park.” The two claim that the officer then drew his weapon and handcuffed both Defendants.

Defendants 10 and 11 admit that they are sexually active, openly gay men. They admit that they responded to sexual interest expressed by decoy officers. Both deny any commercial elements. The City Attorney has suggested that “other lewd or immoral act” applies.

Defendants 12 and 13 were arrested as part of a decoy operation in Flint that netted at least twelve men. They report that they were arrested because two officers happened upon them while they were smoking a cigarette and walking in the woods near a rest area. Both assert that if they had been conducting any “immoral activity” the officers would have been too far away to observe it. Both confirm that the officers simply claimed that they “know what was going on” and made an arrest anyway. Both Defendants 12 and 13 have been cited for the felony of gross indecency.

The Triangle Foundation posits that private, non-commercial sexual acts between two competent, consenting adults, regardless of their gender, does not constitute a ‘lewd or immoral act.’ Oral sex in private between competent consenting adults is not a crime in Michigan. Furthermore, it is a clear denial of recognized rights to privacy, freedom of association, freedom of speech and other rights to target, prosecute, persecute, impound, cite, jail, drug-test and otherwise burden openly gay men for acknowledging their sexual interest in other men.

One other case is notable for the demonstration of unequal treatment, even though it did not involve overt entrapment. In *People v Marshall* a Grand Rapids teen was prosecuted for “accosting and soliciting a minor” when another openly gay teen (J.J.Lindke) confided to his parents that he was “in love” with the 19 year old defendant.

Marshall and Lindke never had sex, and their only discussion of sex was a decision to refrain from any physical contact until Lindke was at least 18. Repeated demands for proof of accosting, soliciting or immoral purposes were made. The prosecutor responded to these by accusing defense counsel of being “blinded by his homosexual agenda.” The evidence produced by the prosecution

uniformly proved that there was no accosting, no soliciting and no immoral purpose. Contrary to the position implied by the prosecution, gay relationships are not, per se, immoral.

Marshall was acquitted by a jury in a case that would never have been presented if either party had been of the opposite sex. Even with acquittal, the innocent teen expended thousands of dollars on counsel, missed time from work and was terrorized by police agents. Even when cases are dismissed, the improperly accused defendants incur considerable injury.

The government should stop the entrapment operations of citizens who are gay and protect the rights to privacy, association and other interests involved in cases like those set forth above. This report notes several actual, current, stealth campaigns to “bag a fag.” Often the same officers are involved in arrest after arrest. An officer who illegally entraps one defendant is probably engaged in multiple chronic acts of misconduct. In People v Fike, 577 NW2d 903, 908 (June 30, 1998) the Court discussed the need for a new law requiring the police to record certain activities. The court noted that:

“A recording requirement discourages unfair and psychologically coercive police tactics and thus results in more professional enforcement. Note 5: In this regard, I note that defendant was interviewed by Sgt. John Palmatier of the Michigan State Police. In People v DeLisle, 83 Mich App 713, 455 NW 2d 401 (1990) this court held that defendant DeLisle’s statement, which was made during a nearly three and one half hour interrogation by Sgt. Palmatier, was inadmissible because it was, among other things, the product of coercive police activity.”

At least a dozen men were arrested by State troopers at a rest area near Plymouth. Ten men were arrested at an I-75 rest area in Flint, including local and out-of-state clergymen. More men were arrested in Rouge Park and Hines Park, and still others at various adult theaters in the region. This “special attention” to known gay cruising sights is offensive, unfair and illegal.

#### STANDARDS:

There is a vast and growing body of literature confirming the central propositions of this report. (See, for example, the review in 76 Michigan Bar Journal 9, Sept. 1997, pp 948 - 954). Gay men are selectively targeted by Michigan law enforcement agents for covert decoy operations. These operations target and prosecute behavior that is not criminal for heterosexuals and, under existing laws, are also not illegal for competent, consenting gay adults in private, non-commercial relationships. Usually the justification is a vague reference to “morals.”

Selectively targeting gay men is a violation of accepted human, civil and constitutional rights.

“Failing to meet (the) criteria (of ‘strict scrutiny’) government, under the pressure of equal protection requirements, would have to choose between acting against sexual conduct broadly without respect to sexual orientation or acting not at all...”

‘Governments must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of the regulation. This equality is not merely abstract justice. There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.’ 43 Wayne State Law Review, 11, (1996) p 38, citing 336 US 106 (1949) at 112-113.

Gay and lesbian people, like all Americans, enjoy a recognized right to freely associate together. “Citizens of the United States are jealous of their individual rights and of their freedom to create communities through voluntary association with like-minded others.” Sexual Justice, Kaplan, J.D., 1997, p 25.

Sometimes, this encompasses the freedom to associate for sexual purposes. The state cannot deny this right to gays and lesbians unless it denies the same right to heterosexuals. It is the position of the Triangle Foundation that under existing Michigan law, voluntary, non-commercial, private, consensual sex between competent adults is not a crime. International authorities suggest that if this interpretation of the law is inaccurate, it is the law that needs to be changed to assure that the interpretation *becomes* accurate.

In their 1994 report, “Breaking the Silence”, Amnesty International criticized the United States, citing specific anti-gay hate crimes, police abuse, entrapment, sodomy laws, and the Supreme Court opinion in Bowers v Hardwick. Amnesty International said:

*“Many countries have laws that enable officials to imprison gay men and lesbians for consensual sexual acts in private between adults...Twenty eight of the fifty United States have repealed their criminal sodomy statutes since 1962...Amnesty International would consider persons imprisoned under these laws as a prisoner of conscience...in 1993, a Virginia court denied Sharon Bottoms, a lesbian, custody of her two-year-old son. It is reported that the court referred to the state’s criminal sodomy statute in declaring her an ‘unfit parent.’ These laws have been upheld by the U.S. Supreme Court (in Bowers v Hardwick)...In the United States, lesbians and gay men are struggling to repeal sodomy laws in six states.”*

Iran, Mauritania, Yemen, Saudi Arabia, Pakistan, Sudan and Oman were all categorized with the U.S. as nations which unfairly persecute gays and lesbians.

18 USC 242 states:

“Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any

rights, privileges or immunities secured by the Constitution or laws of the United States...shall be fined not more than \$1000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or life.”

Each of the eleven cases cited above included official state action to deprive gay men of their freedom of association, freedom of speech, and right to due process, and equal protection.

In each case, a government agency made a value judgement; deciding that it was worth investing considerable tax resources to target an area where men contact others for sex, and to entice, encourage, entrap and arrest some of the men. “Morals” do not justify such operations. This decision is based upon anti-gay animus and is, therefore, invidious discrimination.

The stated justification for police entrapment schemes is a pretense.

“The stated intent of the law was to discourage sexual inverts from soliciting other men and engaging in sodomy, but there is little if any evidence that the law had that effect...the laws discouraging same-sex intimacy were contributing to a subterranean, thug-infused culture of sexual risk. The outlaw status of male inverts contributed to a sexuality that was furtive, fleeting and fraught with danger. For some men, the risk became part of the sexual excitement...the law contributed to the institution of sexual blackmail.” 82 Iowa Law Review 1007, Eskridge (1997).

There is no reliable data to support the supposition that covert enforcement measures reduce the target behavior. They do, however, foster an atmosphere in which men are more readily victimized. The Triangle Foundation has documented dramatic annual increases in reported hate crimes against gays and lesbians, some of which were perpetrated by police. In our locality, hate crimes have included several recent murders, assaults resulting in permanent disabilities and other injuries and property damage.

In order to be protected by 18 USC 242, action by the United States is required. An individual cannot institute criminal proceedings under the statute (Dixon v State of Md. By Carter, D.C. Md., 261 F Supp 746 (1966)) and it does not create a civil cause of action (Sinchak v Parente, D.C. Pa., 281 F. Supp. 79 (1966)).

The history of the civil rights movement shows that decades passed while African Americans pled for federal intervention to halt lynching, arson, police harassment, entrapment and other hate crimes. Opponents of federal intervention pointed to the immorality, indolence, sexually transmitted diseases and “uncleanness” of ghetto communities to rationalize frigid inaction. It was not until the 1960's that the federal government finally acted to stop the state-sponsored oppression of blacks.

The gay community in Michigan is in much the same situation today. Narrow interest groups in state government benefit from the ability to continue to selectively force puritan sex codes on a

gay community that rejects the reactionary, anti-sex hysteria being pressed. Surveys show that societal tolerance of a more liberal sexual standard is high. A majority of Americans reject discrimination against gays and lesbians.

Commentators complain that our culture is permeated with sex. Newspapers include pages of “Personal Ads” that openly solicit kinky sex, and sex is exploited to sell everything from shoes to long distance phone plans<sup>2</sup>. Nevertheless, an openly gay man can allegedly be arrested for verbally propositioning another male.

Situation comedies (Dharma & Greg) garner ratings over plots involving heterosexual sex in public places. Recently, a straight high school student who had intercourse with a minor was permitted to plead to “conspiracy to contribute to the delinquency of a minor.” Meanwhile, Jason Marshall (discussed above) who did *not* have sex with a minor was prosecuted for “accosting and soliciting.” Gay men who engage in sex that is private (i.e. there are no witnesses) but in a “public place” (such as an enclosed “video booth” a locked rest room stall, or another location that is considered “open to the public”) have committed a felony. Heterosexuals who engage in sexual intercourse in a baseball stadium (Chicago) during a televised game get a ticket for indecent exposure. A double standard is clear.

In Stemler v City of Florence, 126 F3d 856 (10-8-97), reh. denied (11-13-97), the Sixth Circuit held that animus against homosexuals can never be a legitimate governmental purpose. Like the city of Troy, above, the City of Florence claimed that it needed no justification to target gays and lesbians for special police attention. The court said:

“...they decided to arrest and prosecute her because they perceived her to be a lesbian. They do not attempt to assert any justification whatsoever for this decision; instead they argue that as a blanket matter, it is always constitutional to discriminate on the basis of sexual orientation, citing Bowers v Hardwick, 478 US 186, 106 S. Ct. 2841, 92 L Ed.2d 140 (1986). However, Bowers held only that there is no substantive due process right to engage in homosexual sodomy, and expressly declined to consider an equal protection claim. 478 US at 196 n.8, 106 S. Ct. At 2847 n.8. It is inconceivable that Bowers stands for the proposition that the state may discriminate against individuals on the basis of sexual orientation, solely out of animus to that orientation. ‘If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.’ Romer v Evans, 517 US 620, 116 S. Ct. 1620, 1627, 134 L Ed.2d 855 (1996) (quoting US Dept. Of Agriculture v Moreno, 413 US 528, 93 S. Ct. 2821, 37 L Ed.2d 782 (1973)...stated differently, **since governmental action ‘must bear a rational relationship to a legitimate governmental purpose, (Romer, 116 S. Ct. at 1629) and the desire to effectuate one’s animus against homosexuals can never be a legitimate governmental purpose, a state action based upon that animus alone violates the equal protection clause.’** 126 F.3d 856 at 873.



The above case sets forth the current position of Michigan law. The decision to target, stake-out, watch, approach, entice and encourage men to talk about sex, based upon the belief and perception that the men are homosexual (i.e. sexually attracted to those of the same gender) is a violation of the rights of gay men in Michigan. The police knowingly target men who will respond to sexual interest from another man. By definition, this means they actively and selectively target gay men.

“Complaints of illegal entrapment frequently arise out of the employment of plainclothes police personnel in enforcement of solicitation and lewdness statutes. Police continue to harass many persons suspected of making same-sex propositions even when prosecutors do not prosecute.” Prosecution and Defense of Sex Crimes, Ch. 7,

Courts in other jurisdictions have enjoined entrapment enterprises such as those now occurring in the Detroit area. In People v Reyna (Lesbian/Gay Law Notes, Summer, 1998, p 111) the Stanislaus County (California) Superior Court (Judge Al Ghirolami) on June 11, 1998:

“Threw out a prosecution against a gay man who had evidently been enticed by an undercover officer to violate a statute that prohibits ‘lewd behavior’ defined as touching the buttocks, genitals or female breast in a public place where the participants have not taken reasonable precautions to prevent being observed by passers-by. The court relied on Baluyut v Superior Court of Santa Clara County, 50 Cal Rptr.2d 101, 911 P.2d 1, an equal protection challenge to a police operation using undercover decoys to entrap gay men into sexual acts outside a targeted adult book store...unless the police are ready to start using the same tactics to lure heterosexuals into making unlawful solicitations for sex, they cannot use undercover officers to deliberately entice gay men into violating the law.”

Not just active entrapment is subject to injunction. Both “crime against nature” and “gross indecency” statutes have been struck down in many jurisdictions. This includes Wayne County Michigan.

In MOHR v Kelley, Wayne Circuit Case Number 88-815820-CZ, the Court found that the sodomy and gross indecency statutes were “unconstitutional to the extent that they prohibit activities between consenting adults taking place in the privacy of one’s home.” The court enjoined the enforcement of both statutes and the ruling was never appealed. As a result, Michigan is cited in the literature as a state where there is an “unchallenged lower court decision invalidating the sodomy laws.” Despite the injunction, Wayne county residents continue to get threatened and charged with the felonies of sodomy and gross indecency.

In 1974 Michigan adopted the Michigan Criminal Sexual Conduct Code. The State Bar Task Force on gender Issues (Report p. 34) calls these statutes “A model for the rest of the country” and

says that “Michigan law provides a viable and valuable tool for the successful prosecution and conviction of sexual offenders.” The report goes to say, however, “laws can only be effective if they are consistently applied.”

Michigan has the tools needed for fair and equitable enforcement of sex-crime laws without discrimination based on sexual orientation. The Sexual Conduct Code makes the gross indecency and sodomy statutes unnecessary, and highlights just how obsolete they are.

Other cases, considered together with *MOHR v Kelley*, make it clear that private sexual acts between competent, consenting adults in non-commercial and voluntary association with one another are not criminal offenses in Michigan. The court decisions and statutes are examined further below. Before that examination, it is important to understand the nature of the rights that are at issue.

All citizens have a right to reasonableness in the allocation of law enforcement resources. The investment of hundreds of thousands of dollars in the annual effort to entrap innocent people into petty misdemeanor convictions is a misallocation of tax dollars. Many of the alternatives to entrapment schemes are both less expensive and more effective deterrents to inappropriate public sexual activity.

Signs which indicate that restrooms are continuously monitored would deter public sexual behavior. Actual monitoring by video (with notice to users) would also eliminate infractions. The use of private security guards (often available at minimum wage) or restroom monitors, or even the posting of uniformed officers or the use of marked cars would all effectively stop what the police claim is taking place.

Signs stating that “inappropriate activity” will be prosecuted would be a deterrent, and would be more effective than entrapment tactics. Signs would apprise any potential offender who entered the area, and would do so in a way that was inoffensive and positively reassuring to the public. In contrast, random arrests serve only to harass and embarrass the isolated men who are arrested. Signs involve no risk to the civil rights of any group. Random arrests make legitimate rest area patrons wary, fearful and insecure. Even infrequent arrests signal that the area is a haven of crime and danger.

It is important to understand that current status of Michigan law. In *People v Brashier* and *People v Lino*, 447 Mich 567; 527 NW2d 434 (1994) the Supreme Court struck down the old “common sense of society” definition of gross indecency. The court preserved the gross indecency statute by, once again, narrowing its application. Under *Lino/Brashier*, “gross indecency” can be charged only in cases involving a minor, force, payment, or public activity.

Five of the seven justices wrote separate opinions, making it difficult to discern the status of the law. The confusion is increased because at least one current Michigan authority<sup>3</sup> still cites *Brashier* in a passing reference to the “common sense” definition of gross indecency. In addition, the lay media reported that the *Brashier* decision “upholds the gross indecency law<sup>4</sup>” without mentioning

the enormous change the case makes in that law. Brashier/Lino must be read together with earlier cases (such as Howell) construing the gross indecency and sodomy statutes.

Under Brashier/Lino there can be no charge of gross indecency against consensual sex between competent adults in a non-commercial and private setting. By changing the definition of the offense, the Supreme Court made an important change in Michigan law.

A number of state High Courts have responded to the U.S. Supreme Court decision in Bowers v Hardwick<sup>5</sup> by striking down obsolete sex laws on state constitutional grounds. It is reported that even former Justice Powell came to disavow his support of the Bowers majority a “mistake.”<sup>6</sup> Kentucky,<sup>7</sup> Massachusetts<sup>8</sup> and Montana<sup>9</sup> have struck down their sodomy and gross indecency laws altogether. Other state courts have held similar measures to be hopelessly religious in language and intent, and thus invalid.

Other states have also dealt with more troublesome misdemeanor laws. In State v J.O. 69 NJ 574, 355 A.2d 195 (1976) the court construed the New Jersey “lewdness” statute in a case involving adults who were found having sex in a parked car. The court held that because the parties were consenting adults, the activity could not legally qualify as “offensive,” explaining that:

“Our decision today centers not upon the prevalent view as the offensiveness of the conduct, but rather upon the question as to whether the parties involved in the questionable conduct, or witnessing its occurrence would find the exposure offensive. Clearly, a private act of exposure between consenting adults - as occurred here - is not offensive to the participants. Thus, we find that such conduct is not indecent exposure.” 355 A.2d at 196.

Michigan’s gross indecency statute is grossly obsolete. Except for penalties, MCL 750.158; MSA 28.355; PA 73, 1952, Sec. 158, it is a verbatim recital of the 19<sup>th</sup> century Labouchere amendment (1861). It says: “Any person who shall commit the abominable and detestable crime against nature, either with mankind or with any animal, shall be guilty of a felony punishable by imprisonment in the State Prison for not more than 15 years.”

The phrase “abominable and detestable crime against nature” is exclusively religious in origin. “Sodomy” could include any sexual act that did not have the male on top, and also encompassed heresy, demon worship and witchcraft<sup>10</sup>. “Sodomy” became so “abominable” that it could not be mentioned by name, and so was called the “crime against nature.” The name displays the 17<sup>th</sup> century religious dogma that only reproductive sex is “natural” sex.

The sodomy statute is an attempt to punish “sin” and should be struck down as a violation of the constitutional ban on establishing a state religion. The State Bar of Michigan Open Justice Goal Group has already recommended action to delete the sodomy instruction from the criminal jury instructions, as well as other action to abrogate the sodomy and gross indecency laws. Both statutes codify one religion’s doctrine about which private, non-commercial adult sexual acts are morally

acceptable, and which are not. This is a private moral issue for the individual's conscience, and not a matter for state regulation.

Recently, a comprehensive survey of sexual behavior by the University of Chicago reported that "a quarter of American men and women have had anal sex in their life time and nearly 10% in the past year."<sup>11</sup> In a 1998 survey of more than 1600 gay men in Michigan "one fourth" (or more than 400 openly gay citizens) said "they had used bookstores, parks or restrooms in the past two years to find a sex partner." 83 Between The Lines, 17 September 1998, p 11. This number suggests a "community" of "moral interest" that is dramatically diverse. A criminal law which would incarcerate 25% of the population (for anal sex) is unenforceable. One writer noted that "the statutes make illegal some of the most common sex acts engaged in by American adults, and thus make the majority of these states' residents and visitors unconvicted criminals."<sup>12</sup>

Historically, Draconian laws calling for the execution of sodomites or homosexuals are the products of a clear misunderstanding of a few Biblical passages.<sup>13</sup> When the state must resort to a lame "moral" justification for a criminal law, without some evident policy or secular interest, the courts should immediately be suspicious of religious discrimination triggering heightened scrutiny. Indeed, "morals" were used to justify the ban on inter-racial marriage, just as they are now the last resort to oppose same sex marriage. "Morality" is a weak justification for discrimination, and the resort to the morality argument may be proof of animus.

"What distinguishes queer citizens from the members of other minority groups that have asserted their civil rights in recent decades is that lesbians and gays alone have been told that their freedom must be limited to accord with the moral standards of the community. The criminalization of harmless consensual sexual activity between adults should not be conceived as striking a balance between symmetrical interests in individual liberty and community morality. The question must be recast to focus on the morality of using the coercive apparatus of the state to enforce homogeneity of sexual conduct among those who neither cause nor threaten harm to others." Sexual Justice, Morris Kaplan, J.D., Prof. Philosophy SUNY (1997) pp 22-24.

The "police power" of the state is typically described as encompassing health, safety and morals, yet the wildly inconsistent application of the "morals" justification is readily discerned. Although there may be a philosophical (or "moral") consensus with respect to easier issues, such as violence, when it comes to sexual conduct, our society recognizes and respects widely diverse standards.

We know that 2,856,000 Americans live together in unmarried couple households. Yet

"Unmarried cohabitation alone does not constitute immorality under the Child Custody Act. Truitt v Truitt, 172 Mich App 38, 431 NW2d 454 (1988)...Snyder v Snyder, 170 Mich App 801, 429 NW2d 234 (1988), a visitation case, also held that, by itself, unmarried cohabitation does not constitute immorality under the Child

Custody Act...A parent's life-style cannot be the only factor by which his or her morality is judged." Michigan Family Law, 4<sup>th</sup> ed., p 11-23.

In contrast, as soon as a litigant acknowledges a minority sexual orientation, their "life-style" usually becomes the definitive determinant of any moral assessment.

MCL 750.388; MSA 28.570 (the Gross Indecency statute) states: "Any person who, in public or in private, commits or is party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male shall be guilty of a felony." MCL 750.388a et seq.; MSA 28.570(1) et seq., applies the same language to females and opposite-sex couples.

These enactments purport to make conduct which may occur in private, as between husband and wife, a felony. In his dissent in *Bowers*, Justice Blackmun wrote that "all individuals have a fundamental interest in controlling the nature of their intimate associations with others." One expert states that "sodomy statutes by their mere existence wreak great harm on many people, particularly lesbians and gay men. See, e.g., Mississippi Gay Alliance v Goudelock, 536 F 2d 1073, 1975 (5<sup>th</sup> Cir. 1976, cert denied 430 US 982 (1977))."<sup>14</sup>

The great weight of accepted legal authority agrees that anachronistic statutes should be repealed. Rather than repealing them, however, Michigan has repeatedly limited the application of the statutes to avoid a constitutional clash.

In *People v Howell*, 396 Mich 16 (1976) the Michigan Supreme Court had already indicated that "sex with minors and forcible sex acts violate the gross indecency statute." Justice Levin wrote a concurrence setting forth what does not constitute gross indecency. He wanted to explicitly hold that private sexual conduct between consenting adults" is not illegal, but the majority of justices declined to be this specific. Howell is cited in the literature as limiting Michigan's sexual offenses statute to "acts in public, with minors or without consent."<sup>15</sup>

Construed together with Brashier; Lino, it is clear from Howell that gross indecency includes oral sex in a public place, any sexual activity involving a minor, and any act of paid or forcible sex. This standard can be applied without regard to sex or sexual orientation. After Lino, there remains a need to analyze the difference between "oral sex in a public place" (which may not be seen by any third party) and "oral sex in public" (which implies that others saw the perpetrators in the act).

By standards of reasonableness, "oral sex in a public place" is innocuous unless some innocent third party observes the act and is offended thereby. The same comprehensive survey cited above (the University of Chicago, 1994) noted, by the way, that "68% of all women have engaged in active oral sex at some time in their lives, that 73% had engaged in passive oral sex, 81% of white men have had oral sex and 66% of black men...75% of white women have performed oral sex on a man."

In their book Heterosexuality (1994) p. 493 Masters and Johnson discuss a straight couple who “have sex in public places - at the baseball stadium during a game, in the stacks of the public library, or under a blanket on the beach, surrounded by hundreds of other couples - and the only worry either had was that they would run into their mates...” Other sources confirm that such “public sex” is not exclusive to the gay community. Enforcement action, however, appears to be.

Michigan’s sex laws have been confused for some time, and large numbers of innocent citizens (not just gays) are affected. In MOHR v Kelley<sup>16</sup> the plaintiff’s included disabled persons and single heterosexual domestic partners. In that case, the Attorney General refused to appeal the grant of a declaratory judgement that the sodomy and gross indecency statutes were unconstitutionally vague, violated privacy rights, and was invalid. The Attorney General expected to lose any such appeals, and refused to pursue the matter in an attempt to limit the impact of the Wayne County Circuit Court’s declaration.

Amnesty International criticized the use of sodomy and gross indecency statutes to criminalize gay sex, and stigmatize all gay men as “criminal” as a human rights abuse. Statutes like the sodomy and gross indecency laws are typically exploited to target gay and lesbian people. Their continued existence is an international embarrassment. In some states, gay sex is a felony. In others, it is completely innocent. This violates basic fairness and raises problems with notice.

When faced with a felony of gross indecency or sodomy, the accused often willingly pleads guilty to disorderly conduct, lewd and obscene behavior, indecent exposure or some other misdemeanor.

Experts charge that “in practice, loitering, public lewdness and solicitation statutes, not sodomy laws, provide the primary basis for the regulation of gay sexual activity, while sodomy laws create an atmosphere of oppression that results in anti-gay discrimination in a host of other contexts, including child custody.” A variety of constitutional violations occur due to the abuse of these misdemeanor laws. Many defendants plead guilty in a desperate effort to end the public attention as quickly and privately as possible. Meanwhile, some of the accused men lose their jobs, are divorced, commit suicide or suffer other trauma.

Four Bar Associations have now undertaken studies about bias against gays and lesbians in the legal system. All four concluded there was widespread, overt bias. This includes overt bigotry by judges, police, prosecutors, court personnel and others. Many gays felt the legal system offered only unequal access and treatment<sup>17</sup>. “Degrading and corrupting conduct is common among police officers dealing with gay men and lesbians.” See Hearings on Anti-Gay Violence, House Subcommittee on Criminal Justice, Judiciary Comm., 99<sup>th</sup> Cong., 2d session. 26 (1986).

Luciano Lino was arrested during a prostitution sweep in Lansing. He was known to the local police as a transvestite and was arrested when police observed him having oral sex in a parked car in a restaurant parking lot. An officer had to stand on a crossbar support to look over a privacy fence in order to observe Lino’s activity. For this reason, Lino argued that his actions were not public.

Edward Brashier was arrested for procuring minors (all male) to sexually abuse a third party. Brashier would recruit young men who, for pay, would go to a local motel, urinate on and verbally and otherwise abuse a second man. The man would masturbate while being abused. Brashier argued that none of the minors actually engaged in any sexual act so there was no gross indecency.

The Court identified the issues as follows: “(1) whether the gross indecency statute is unconstitutionally vague, (2) whether the common sense of the community definition of gross indecency should be overruled, (3) whether oral sex in a public place constitutes gross indecency and (4) whether the specific sexual conduct alleged in Brashier constitutes gross indecency because it was committed with a person under the age of consent.”

The court determined that Lino was in public when he had oral sex with the other party. Accordingly, the Court said the statute was not unconstitutionally vague as applied to the conduct of Lino. Similarly, the court ruled that a reasonable person in Brashier’s position would have known that his conduct was criminal because minors were involved. As it was applied to the conduct of Brashier, therefore, the law was not unconstitutionally vague. The court held that the “common sense of the community” definition of gross indecency was error and that definition was overruled.

The court made it clear that (1) oral sex in public is gross indecency and (2) that paying a minor to engage in sexual activity of any kind was gross indecency.

In Lino, defense counsel requested a directed verdict on the grounds that the acts were not “public.” The court determined that oral sex in a parked pick-up truck, even if parked inside a fenced area enclosed with privacy fence, is “public.” In Brashier the court made it clear that even without “direct physical contact between” the minor and the defendant, it is gross indecency to involve any person under 16 in any kind of sexual activity. One who does so commits a felony. This is true even if the behavior occurs in private.

Justice Levin’s concurrence states that “Lino is subject to prosecution (for) a sexual act committed in public, not because oral sex between consenting adults is itself grossly indecent...it does not constitute gross indecency for adults to engage in oral sex, anal sex (or) manual sex...as long as the activity is consensual and in private.”

Justices Boyle and Brickley wrote separately and protested that they were not authorized to create a felony by interpretation. They stated that “gross indecency” should apply only to fellatio between males. They were apparently undisturbed that the conduct might be consensual, non-commercial and occur in private. Some question why fellatio between males should be a felony, but the same act involving a male and female should be treated as trivial. Neither Justice offers a justification.

Justices Riley and Griffin dissent on the grounds that it is laudable to keep statutes vague, since by doing so the court is free to apply the statute to any behavior its caprice might decide is

‘immoral.’ They claim the purpose of the gross indecency statute is to outlaw any sexual act which is “offensive to the community.” The term “community” may be a euphemism for the preferences of the judges.

The community has no business (the state has no legitimate interest) passing judgement about what consensual, non-commercial, private adult sexual acts are “offensive.” The fact that some citizens “disapprove” is not a relevant consideration.

“(There is a) general constitutional principle that government may not use private bias to justify denying access to status on the basis of class characteristics that are not rationally related to a person’s fitness for the function at hand. In other words, the biases of private persons do not transform an otherwise irrational classification into a rational classification.” 43 Wayne Law Review 11 (1996), p 43.

Continued “narrowing” by means of interpretation allows continued misunderstanding. When “interpretation” has so narrowed a statute that it’s application is beyond reasonable recognition; it is time simply to strike down the enactment.

“When authorities modernize the justifications for old-fashioned exclusions and punishments, they thereby strengthen those exclusions and punishments.” 82 Iowa Law Review at 1095.

The repeated limitations, interpretation and construction of the sex statutes have increased confusion and uncertainty.

As one commentator asserts:

“Sexuality is a central component of a person’s personality, identity and pursuit of happiness. Continuing attempts by enforcement agencies in several states to suppress the sexuality, expression and association of gay people through antiquated sodomy laws, selective enforcement of lewdness laws, harassing arrests, fabricated charges and schemes, victimization and similar police tactics obviously still require correction and reform.”<sup>18</sup>

Halting on-going entrapment projects would greatly enhance civil rights protection for openly gay men.

One of the misdemeanor statutes routinely used against gay men in Michigan is MCL 750.448. The “accosting and soliciting” law says:

“Any person, male or female, 17 years of age or older, who shall accost, solicit or invite another in any public place, or in or from any building or vehicle, by word,



gesture or any other means, to commit prostitution or to do any other lewd or immoral act, shall be guilty of a misdemeanor.”

When a local ordinance rather than a state statute is applied, The Detroit Code of Ordinances (1964), Vol. 2, Sec. 39-1-53, p 2681 is typical. It states:

“It shall be unlawful for any person to receive or admit or offer to receive or admit any person into any place, structure, house, building or vehicle for the purposes of prostitution, fornication, lewdness or assignation or to knowingly permit any person to remain in such place for any such purpose.”

Another statute makes it a misdemeanor to accost or solicit a person under 16 for immoral or lewd purposes.

“Any person who shall accost, entice or solicit a child under the age of 16 with intent to induce or force said child to commit an immoral act, or to submit to an act of sexual intercourse, or an act of gross indecency, or any other act of depravity or delinquency, or shall suggest to such child any of the aforementioned acts, shall on conviction thereof be deemed guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 1 year.”

The continuing theme of “immorality” pervades the enactments. Recognized guarantees of religious freedom must prevent allowing any one person’s (or even one jury’s) arbitrary and subjective moral opinions to form the standard of “morality” for an entire pluralistic community. Aside from First Amendment implications, equal protection forbids the imposition of prejudices, even if they are cloaked as “moral” opinions, on those who do not share those prejudices.

“A cardinal principle of equal protection law is that the federal government cannot discriminate against a class in order to give effect to the prejudices of others. The government has discriminated against Colonel Cammermeyer solely on the basis of her status as a homosexual and has failed to demonstrate a rational basis for doing so.” *Cammermeyer v Perry*, 850 F Supp 910, 926 (W.D. Wash. 1994) dismissed and remanded sub. nom 97 F.3d 1235 (9<sup>th</sup> Cir. 1996).”

Majority morality opinions alone, without some secular justification, are not generally an adequate basis for imposing criminal liability.

“Under Bowers a specious argument could be made that if majority notions of morality include the notion that same-sex orientation is, by itself, immoral, government may rationally advance that notion by imposing civil and criminal disabilities on the trait of same-sex orientation. While a given majority might want to act upon its notion that the trait of same-sex orientation is, by itself, immoral, ‘there are limits to the extent to which a legislatively represented majority may

conduct experiments at the expense of the dignity and personality of the individual.’ Skinner v Oklahoma, 316 US 535, 546 (1942). With respect to a trait that is, if not immutable, ‘extremely difficult to alter’...and that bears no relation at all to the individual’s ability to contribute to society, the moral notions of the majority should be regarded as an inadequate basis for the imposition of criminal and civil disabilities...government, even under the lenient standards of rational basis review, should not be allowed to use the biases of private persons as a justification for the imposition of civil and criminal disabilities. This rule should apply even in those instances in which a particular bias represents the moral notions of the majority.” 43 Wayne Law Review 11, (1996) at p 45.

When a statute proscribes an “immoral act” some legal standard is required to define that phrase. The “common” or “common sense” view is not a sufficient standard (See People v Lino and Brashier). “Morality cannot be simply identified with the sentiments of a majority; neither the intensity nor the longevity of such sentiments immunize them from constitutional scrutiny.” Sexual Justice, Kaplan, p 26.

The most recent Michigan appellate court cases to consider the phrase have established that an “immoral act” must also be an “illegal act.” This construction is imperative. Unless a secular, “legal” standard exists to define an “immoral act” enforcement of the law is inherently subject to caprice, vagueness, selectively and uncertainty.

The phrase “immoral purpose” was construed in Stopera v DiMarco, 218 Mich App 565, 554 NW2d 379 (8-30-96) Lv. Denied. 567 NW2d 242 (1997). The panel relied on the Michigan Supreme Court’s holding in Orzel v Scott, 449 Mich 550; 537 NW2d 208 (1995). In that case, the Supreme Court dealt with the “wrongful conduct rule” that bars a plaintiff from bringing a civil action based in whole or in part on “his own illegal or immoral conduct.” The Supreme Court held that to qualify as “immoral conduct” the “conduct must be prohibited or almost entirely prohibited under a penal or criminal statute.”

Applying Lino and Brashier, it is clear that non-commercial, consensual adult sex in private (even if it involves persons of the same sex) is not “prohibited or almost entirely prohibited” under the gross indecency statute. That statute applies only to acts in public, or involving force, payment or a minor. Accordingly, unless an openly gay defendant offered or requested payment for a sex act, or it involved a minor, or force, or public sex, no crime was committed. Associating together and acknowledging a sexual interest is not a crime.

Religious objections to “sin” cannot be used to justify “morality” laws. “Religious teaching alone cannot be used to justify state action: the moral principles underlying the criminal law require justification in secular terms acceptable to a community of diverse religious and moral beliefs and varieties of unbelief as well. A constitutional morality must recognize the priority of individual liberty in moral matters. Recognition of the right of individuals freely to determine their conduct is itself an element of the ethics that sustain democratic politics.” Sexual Justice, Kaplan, p 27.

Despite the limitations and interpretations imposed on the various enactments considered in this report, they continue to be used and applied against consenting adult gay men. The continued selective application of misdemeanor laws to gays causes considerable harm and is completely ineffective as a tool of control.

Other reported cases illuminate important details of the procedures used. People v Myers, 161 Mich App 215; 409 NW2d 788 (1987) reports conduct that is typically the cause of felony charges against openly gay men. Although the conduct certainly can be characterized as ‘aggressive’ if it had occurred between an opposite sex couple it is unlikely that criminal charges would arise (unless one party failed to “take ‘no’ for an answer”).

“On October 25, 1985, at approximately 2:45 p.m., a state trooper acting in an undercover capacity, was at the entryway of a toilet stall in a public restroom at a highway rest area. Defendant entered the restroom and struck up a conversation with the trooper. After they exchanged small talk the trooper advised defendant that he had an appointment to keep and had to leave. Defendant leaned across the entryway and continued talking to the trooper. Defendant then began stroking himself in the groin area and stated that he wanted to play with the trooper.”

It is not unreasonable for an openly gay person, at this point, to conclude that the other party must be gay as well. A reasonable person would expect an uninterested individual to make their disinterest known in response to an unabashed non-verbal sexual overture. When accompanied by the invitation to “play” the message is not inherently suggesting anything more than a private, non-commercial, consensual act. The report continues:

“When the trooper asked what defendant meant, defendant put his arm around the trooper’s shoulder and with his other hand grabbed and began to massage the trooper’s groin area. According to the trooper, defendant again states ‘let’s play.’ The trooper advised defendant of his official capacity and placed the defendant under arrest.”

A trooper in uniform might have prevented the defendant from undertaking this interaction altogether. A normal citizen not interested in a sexual encounter would have responded differently from the trooper. Allowing physical contact without protest in this culture is a virtual invitation to continued contact.

The reported case went on to dismiss “gross indecency” charges against the defendant on the grounds that touching the trooper’s genitals though clothing was not grossly indecent.

In People v Kalchik, 160 Mich App 40, 407 NW2d 627 (1987) the court said

“A bathroom stall such as at issue herein, does not afford complete privacy, but an occupant of the stall would reasonably expect to enjoy such privacy as the design affords, i.e., to the extent that defendant’s activities were performed beneath a partition and could be viewed by one using the common area of the rest room, the defendant had no subjective expectation of privacy, and even if he did, it would not be an expectation that society would recognize as reasonable. On the other hand, defendant did have an actual subjective expectation that he would not be viewed from overhead. We find this expectation to be a reasonable one. Here, even though defendant’s expectation of privacy may only be partial, it is nevertheless entitled to constitutional protection.

In concurrence, Judge Shepherd wrote:

“...approximately twenty innocent people were not only observed by the police using the toilets but their activities were recorded on video tape...the court condemned the officers’ general exploratory search, during which both the guilty and the innocent were viewed...It is one thing for police to set up surveillance cameras in an area open to the general public; it is quite another to surreptitiously view innocent members of the general public using toilet facilities where these innocent citizens obviously had a more than reasonable expectation of privacy. The conduct of the police constituted an unreasonable interference with the most intimate private activities of innocent members of the public...In cases such as this, the court must balance the need to prosecute criminal activity against the need to preserve the rights of innocent members of the public. While I condemn the activity of the defendant, society must forego the ability to prosecute him with the aid of videotaped evidence in exchange for preserving the right of innocent citizens to use toilet facilities without the fear of being videotaped, particularly when alternative methods of surveillance were clearly available to the police.”

In People v Austin, 185 Mich App 334; 460 NW2d 607 (1990) the court dealt with cases consolidated to challenge the gross indecency statute after state police surveillance of a rest area on U.S. 127. The court said:

“The prosecution alleges that the trial court erred in concluding that the gross indecency statute is unconstitutionally vague as it applies to consensual acts of fellatio and masturbation in a public rest room where no other member of the public is actually present. We agree and reverse...Michigan State Police installed two cameras in the rest room. (They saw) twelve different males performing different sexual acts within the field of vision of the two cameras...This court in People v Masten, 96 Mich App 127, 292 NW2d 171 (1980) rev’d on other grounds 414 Mich 16, 322 NW2d 547 (1982) applied the gross indecency statute to consensual adult activity. In Masten, defendant was charged with attempting to procure an act of gross indecency when he approached three police officers and offered to perform acts of

fellatio for the sum of \$25. The Masten court concluded that defendant was amply warned that the act of attempting to procure commission of a private act of fellatio between consenting adult males was prohibited by the gross indecency statute. Likewise, this court in *People v Dauer*, 131 Mich App 839; 346 NW2d 599 (1989) held that the gross indecency statute applies to conduct occurring between two consenting adults...after reviewing these cases we find that the defendants were forewarned that the conduct in which they engaged was prohibited by the gross indecency statute.”

This construction (that gross indecency applies to private, consensual adult sex) was undermined by Lino and Brasher.

Michigan recognizes the value of equal protection. Article I, Section 2 of the Michigan Constitution (1963) states that “no person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin.” Among the “civil and political rights” enjoyed by gay men are the right to privacy and to freedom from arbitrary state intrusion as set forth in international enactments.

In 1976, President Carter signed the “International Covenant on Civil and Political Rights,” General Assembly resolution 2200A (XXI). 21 U.N. GAOR Supp (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171 [hereafter cited as “ICCPR”]. The treaty entered into force on March 23, 1976. In 1992, the U.S. Senate ratified the treaty. See: US Senate Executive Report 102-23 (Recommended by the Foreign Relations Committee) 102<sup>nd</sup> Congress, 2d session, January 30, 1992 and March 24, 1992. PP. 21-23, Resolution of Ratification. The ICCPR is now fully enforceable against the United States and the State of Michigan.

As an international treaty signed by the U.S., ICCPR is the supreme law of the land and creates legal obligations of observance and enforcement in the U.S. by the U.S. government. The Vienna Convention on the Law of Treaties (4) Article 26 states “Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.” The Inter-American Commission on Human Rights of the Organization of American States (OAS), of which the U.S. is a member, recognizes its jurisdiction to issue interpretive statements regarding the ICCPR. Such interpretive statements are considered binding upon the U.S. as a member.

In *Asakura v Seattle*, 265 US 332, 342 (1924) The U.S. Supreme Court stated that “treaties are to be construed in a broad and liberal spirit and when two constructions are possible, one restrictive of rights which may be claimed under it, and the other favorable to them, the latter is to be preferred.”

In *Rodriguez-Fernandez v Wilkerson* 645 F2d 1388 the 10<sup>th</sup> Circuit held that “It is proper to consider international law principles for notions of fairness as to propriety in holding aliens in

detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary detention.”

ICCPR Article 9, Section 1 states: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

ICCPR Article 9, Section 5 states: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” ICCPR Article 12, Sec. 1 gives “Everyone lawfully within the territory of a state the right to liberty of movement” within that state. ICCPR Article 14 imposes a presumption of innocence and a right against self-incrimination in criminal proceedings in any member state.

ICCPR Article 16 states: “Everyone shall have the right to recognition everywhere as a person before the law.” ICCPR Article 17 protects against “arbitrary or unlawful interference with his privacy, family, home or correspondence.” ICCPR Article 26 states: “All persons are equal before the law and are entitled without any discrimination to the equal; protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

In Toonen v Australia, UN Human Rights Committee, 50<sup>th</sup> Session, Communication Number 488/1992, adopted 31 March 1994, the treaty was interpreted to encompass protection against discrimination based upon “sexual orientation.” The Committee held that: “In respect of the alleged violation of Article 26, the state party seeks the Committee’s guidance as to whether sexual orientation may be subsumed under the term “...or other status” in Article 26. In this context, the Tasmanian authorities concede that sexual orientation is an “other status” for the purposes of the Covenant.” On that basis, the sodomy statute in the Province of Tasmania was struck-down as violating of the international covenant.

The Human Rights Committee treatment of various arguments is relevant. According to the Communication:

“The state party takes issue with the argument (claiming) that the challenged laws do not discriminate between classes of citizens, but merely identify acts which are unacceptable to the Tasmanian community...While they specifically target acts, their impact is to distinguish an identifiable class of individuals and to prohibit certain of their acts. Such laws are clearly understood by the community as being directed at male homosexuals as a group...they constitute a discriminatory interference with privacy.”

The Communication goes on to say that:

“In response to the argument that moral considerations must be taken into account when dealing with the right to privacy...Australia is a pluralistic, multi-cultural society whose citizens have different, and at times conflicting moral codes. In these circumstances it must be the proper role of criminal laws to entrench these different codes as little as possible...In spite of the gender neutrality of the law against ‘unnatural sexual intercourse’ this provision has been enforced far more often against men engaged in homosexual activity than against men or women who are heterosexually active. The provision criminalizes an activity practiced more often by men sexually active with other men than by men or women who are heterosexually active...The Human Rights Committee itself has accepted the notion of ‘indirect discrimination.’

The Committee recognized “the link between the existence of anti-gay criminal legislation” and “‘wider discrimination’, i.e. harassment and violence against homosexuals as well as anti-gay prejudice.” The stated that it was “undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’” and that the Tasmania statutes “‘interfere’ with the author’s privacy, even if those provisions have not been enforced...”

The U.N. Committee also held that the criminalization of homosexual practices “cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV.” On the contrary, it was found that such statutes “impede public health programs.”

The ICCPR is a “non-self-executing” treaty. This means that a private citizen cannot bring a civil action for damages or enforcement of the treaty. Good faith compliance requires governmental action. Toonen establishes that vulnerability to continued entrapment and other invasions is a sufficient assault on the right to privacy to justify action to enjoin the assault. The international community recognizes the inherent injustice in “special” police activity to target and entrap gay men. The gay community requires federal intervention to acquit internationally recognized human rights and to secure constitutional rights under federal and state law.

## End Notes

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1. In another case not detailed here, a man was cited for disorderly contact when an undercover officer peaked through the cracks in a bathroom stall located in a shopping mall and saw the subject masturbating. Private masturbation is not an illegal act, and it is not a crime to use an apparently private bathroom for this purpose.
2. A recent print advertising for Sprint's "Foncard" came in the form of a card made to appear to be a pair of jeans that one opened by breaking the "dotted line" that ran down the zipper. To the left of the zipper the words "Not so fast..." appear in white print. When the consumer tears open the zipper, the inside message says "Can't we get acquainted first? Get to know Sprint on an intimate basis and start by getting \$5.00 worth of free calls." This ad not only uses sex to sell, but it appeals explicitly to society's increased acceptance of "casual sex."
3. Michigan Family Law, 4<sup>th</sup> ed., Vol 1, Sec. 2.3, p 2-4 cites the court of appeals opinion in Brashier (No. 150311 Mich Ct. Apps. Dec. 29, 1992)
4. Lansing State Journal (1-8-95).
5. 478 U.S. 186 (1986).
6. See New York Law Journal, Oct. 26, 1990 "Powell Concedes Error in Key Privacy Ruling"
7. Kentucky v Wasson, No. 86-X-48 (Criminal Bench, Fifth Div. Ky., 1990)
8. Commonwealth v Balthazar, 318 NE 2d 478, 481 (Mass. 1974)
9. Associated Press, July 2, 1997,
10. See The Invention of Sodomy In Christian Theology, Prof. Mark Jordan, Medieval Institute, Notre Dame, University of Chicago Press, 1997.
11. Sex in America: A Definitive Survey (1994) University of Chicago
12. The Defense of Consensual Sodomy, p 7-5 note 5.
13. The word "homosexual" does not exist in any of the original Biblical languages. Neither Greek, Hebrew, Aramaic nor Syriac includes such a word. The word "homosexual" did not exist in English until almost 1900. It is ludicrous, therefore, to suggest that the Bible talks about homosexuals. The Bible does not talk about germs as the cause of disease, and it does not talk about homosexuals. No English Bible translated any word as "homosexual" until 1946. Up until 1946, the words now translated "homosexual" in some English Bibles were applied to masturbation. Some fundamentalists claim Paul talked about homosexuals, but he was probably talking about male pagan temple prostitutes. There are six Biblical passages which some fundamentalists claim apply to modern homosexuals. Biblical experts (Boswell,



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Scroggs, Mellencott and others) say the passages do not apply. There are dozens of passages which state or imply that slavery is an acceptable institution.

14. Defense of Consensual Sodomy, p 7-6, note 12.
15. See “The Defense of Consensual Sodomy, Public Lewdness and Related Criminal Cases” Nisonoff, J.D., and Wolfson, J.D., Matthew Bender, 12-20-90, Sec. 7.01, p 7-4, note 4.
16. *Mohr v Kelley*, Wayne County Circuit Ct. 1990, is repeatedly cited in legal literature as an unchallenged lower court decision striking down the sodomy and gross indecency statutes. See Defense of Consensual Sodomy, *supra*, at p 7-3, note 1.
17. See Fighting for Sexual orientation Fairness In The Courts, Lambda Legal Defense, 1997.
18. Defense of Consensual Sodomy, p 7-27, Sec. 7.07