

**University of Arkansas, Fayetteville**

---

**From the Selected Works of Jordan Woods**

---

August 8, 2012

# Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs

Jordan Woods, *University of Arkansas, Fayetteville*



Available at: <https://works.bepress.com/jordan-woods/6/>

# Don't Tap, Don't Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations

*Jordan Blair Woods\**

## I. INTRODUCTION

Many men complain of being propositioned to have illegal sex in public locations, such as restrooms and parks, by handsome, aggressively flirtatious, and provocatively dressed undercover officers. Some of these men have no prior intentions of having illegal public sex<sup>1</sup> and are arrested well before they have engaged in any public sex act.<sup>2</sup> For instance, undercover officers commonly arrest men who they believe are cruising<sup>3</sup> for public sex because they tap their feet in restroom stalls,<sup>4</sup> make flirtatious

---

\* J.D. Candidate, UCLA School of Law, 2009; A.B., Harvard College, 2006. Thanks to Professor Fran Olsen for her guidance, feedback, and encouragement. I am grateful for the suggestions of Professor Douglas NeJaime and Professor Russell Robinson. Thanks also to the board and staff of *The Journal of Gender, Race & Justice* for their hard work and careful review.

1. Matt Krasnowski, *Gay-Rights Advocates Say Stings Are Unfair; Lewd-Conduct Law's Enforcement At Issue*, SAN DIEGO UNION-TRIB., June 18, 2000, at A3 (“[T]hey’ve had clients who went to the beach or a park with anything but sex on their minds only to find themselves being propositioned by handsome, provocatively dressed undercover cops.”).

2. Brian Theobald, *Caught! How Bathroom Stings Entrap Gay Men*, EDGE S.F., Nov. 28, 2007, <http://www.edgesanfrancisco.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&tid=52974> (“But instead of lying in wait for the proper signs . . . plainclothes policemen conducting sting operations will often bait men by smiling at them, looking them up and down and engaging in sexually explicit dialogue.”).

3. Cruising is a commonly used term used to describe men who are looking for casual sex. See StonewallCYMRU.org.uk, Reporting Public Sex Location (cruising) Stories, [http://www.stonewallcymru.org.uk/cymru/english/look\\_out/resources\\_for\\_journalists/briefing\\_note\\_s/448.asp](http://www.stonewallcymru.org.uk/cymru/english/look_out/resources_for_journalists/briefing_note_s/448.asp) (last visited Mar. 28, 2008) (defining cruising as “looking for casual sex. Not all men who cruise identify as gay. Some may be in a heterosexual relationship and are looking for casual sex with other men.”).

4. See, e.g., Lynne Duke & DeNeen L. Brown, *Tapping Into The Secrets Of the Stall—Experts Say Anonymous Sex In Public Places Is A Compulsive Behavior*, WASH. POST, Aug. 30, 2007, at C1 (“If you are in the stall, you tap your foot, and if the person next to you taps a foot, you keep going back and forth until one person makes a move . . . Someone will then stick their hand underneath. Or they will pass a note on paper. Or . . . when they think it’s safe, they will move on to sexual contact in the space beneath the partition.”).

eye contact, or make comments communicating sexual attraction. Police have even arrested some men for agreeing to have legal consensual private sex,<sup>5</sup> such as in a bedroom or hotel, or have arrested men when it was unclear whether they agreed to have sex in a public place.<sup>6</sup>

The purpose of this Article is to demonstrate that the execution and design of gay sting operations jeopardize free speech and equal protection guarantees under the First and Fourteenth Amendments and that the legal defenses available to men who are victims of illegitimate stings are severely limited. I contend that law enforcement officials are punishing men for constitutionally permissible expressive conduct conveying messages of sexual attraction and desire, and are therefore executing gay sting operations in ways that violate First Amendment free speech guarantees. Moreover, despite the fact that people of all sexual orientations have public sex, gay sting operations are only being targeted against men who have sex with other men.<sup>7</sup> I argue that the selective enforcement of lewd conduct laws and other morals legislation<sup>8</sup> raises doubts about the legality of gay sting operations under the Equal Protection Clause of the Fourteenth Amendment.

I also critique the accessibility and effectiveness of the entrapment defense, which is the primary legal defense available to male victims of illegitimate gay sting operations. More specifically, I posit that the entrapment defense is inadequate because many victims of illegitimate gay sting operations waive their right to invoke the defense by accepting plea bargains due to fears of losing their jobs, being registered as sex offenders, and facing ostracism from the public, their families, and communities. Men from disadvantaged economic backgrounds are especially unable to invoke the entrapment defense because litigants must fully pursue claims against law enforcement in order to raise the defense, which often results in lengthy and expensive litigation. Moreover, since entrapment is a defense in fact, it only applies to individual defendants, and thus cannot provide compensation to victims for systemic patterns of homophobic police conduct and discrimination.

Prominent queer scholars, such as Michael Warner, advocate public sex

---

5. After *Lawrence v. Texas*, 539 U.S. 558 (2003), the government cannot criminalize private consensual sex, and thus may not criminalize invitations to have consensual private sex in public places.

6. See, e.g., Posting of Dan Savage to Slog, [http://slog.thestranger.com/2007/09/another\\_toilet\\_cruiser\\_busted](http://slog.thestranger.com/2007/09/another_toilet_cruiser_busted) (Sept. 18, 2007, 10:32 PST).

7. See *infra* Part IV.B.

8. "Morals regulations" is defined as "regulations used to prohibit public sexual expression or conduct, including offenses such as lewd conduct and public lewdness and other behavior seen as offending public morals." AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE U.S. 21 (2005), available at <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>.

as a “civil liberty” and emphasize the role of public sex in the development of queer identities and culture.<sup>9</sup> In his recent article, *Privacy, Property, and Public Sex*, Carlos Ball builds upon the work of queer theorists to argue that the constitutional right to sexual liberty should include the right to engage in public sex when the sexual actors’ expectations of privacy are reasonable.<sup>10</sup> Unlike these scholars, in this Article, I am not arguing that there is an affirmative right to engage in public sex. Thus, I do not challenge the legality of statutes that outlaw sexual activity in public bathrooms or other public places.<sup>11</sup> Rather, my argument is that the executions of many gay sting operations are negatively interfering with established constitutional guarantees independent of the unsettled constitutional right to engage in public sex.

Part II provides background information on sting operations and the opposing viewpoints on whether these operations are legitimate tactics to investigate and deter crime. Part III contextualizes the stigma of modern gay sting operations through historical reflection by revisiting the gay sting operations during the 1950s and 1960s. These sting operations targeted gay and lesbian bars and bathhouses<sup>12</sup> and employed similar discriminatory tactics as those used to effectuate modern sting operations. Part IV focuses on the unconstitutionality of modern gay sting operations under the First

---

9. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX POLITICS AND THE ETHICS OF QUEER LIFE* 172 (1999) (“[a] public sexual culture is not just a civil liberty . . . but a good thing, and queer politics should make it a priority.”); *see also* Lauren Berlant & Michael Warner, *Sex in Public*, 24 *CRITICAL INQUIRY* 547, 553–54 (1998).

10. *See* Carlos A. Ball, *Privacy, Property, and Public Sex* 6 (Feb. 9, 2008) (unpublished manuscript, available at <http://ssrn.com/abstract=1091526> (follow “Download” hyperlink; then follow “SSRN” Icon hyperlink)).

11. Some litigants have challenged the legitimacy of such laws on overbreadth and vagueness grounds. For instance, on June 11, 2007, Senator Larry Craig was arrested under MINN. STAT. § 609.72(1)(3) (2003) by an undercover officer during a sting operation in a public restroom at the Minneapolis-St. Paul International Airport for allegedly inviting the officer to have public sex. *See* Brief of American Civil Liberties Union and American Civil Liberties Union of Minnesota as Amici Curiae supporting Appellant Larry Edwin Craig, *State of Minnesota v. Larry Edwin Craig*, No. A07–1949, (Minn. Ct. App. Jan. 15, 2008), 2008 WL 206295, at \*6. The ACLU, who filed an amicus brief in support of Senator Craig, challenged the law as impermissibly overbroad and vague. *Id.* at \*13.

12. Ira Tattleman, *Speaking to the Gay Bathhouse: Communicating in Sexually Charged Spaces*, in *PUBLIC SEX/GAY SPACE* 71 (William L. Leap ed., 1999)

Gay bathhouses . . . provide a public place where a wide mix of strangers can come together. Men from vastly different emotional, sexual, and physical worlds arrive at the baths wanting to make connections with other men. Tolerant of difference, open to a diversity of uses, the public territory of the bathhouse gives men the space to define, support, or flaunt their sexual interests . . . . As one factor in the development of a gay identity, the baths offer variety and opportunity, and propose new ways to explore relationships with other men.

*Id.*

and Fourteenth Amendments. Part V criticizes the effectiveness and accessibility of the entrapment defense, the primary defense available to victims of illegitimate gay sting operations. Part VI concludes by offering concrete suggestions on how law enforcement, the general public, and lesbian, gay, bisexual, transgender (“LGBT”) communities can collaborate to eliminate illegal public sex acts through legal and non-stigmatizing means.

## II. WHY STING AT ALL?

A sting operation is an “undercover operation in which law-enforcement agents pose as criminals to catch actual criminals engaging in illegal acts.”<sup>13</sup> These operations contain four basic elements: (1) an opportunity or enticement to commit a crime which is either created or exploited by the police; (2) a targeted offender or group of offenders who are likely to commit a type of crime; (3) a third party surrogate, an undercover or hidden police officer, or some other form of deception; (4) a “gotcha” climax when the operation ends.<sup>14</sup> Police have used sting operations since the middle of the twentieth century<sup>15</sup> to target a range of misdemeanors and felonies, including public lewdness,<sup>16</sup> prostitution,<sup>17</sup> drug dealing,<sup>18</sup> fencing and stolen property,<sup>19</sup> child pornography,<sup>20</sup>

---

13. BLACKS LAW DICTIONARY, “Sting,” (8th ed. 2004); see also Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387, 388 (2005) (“The defining feature of a sting operation is that through covert means, the authorities create or facilitate the very offense of which the defendant is convicted. Normally this is done by having an undercover agent hold out some sort of bait, or opportunity, to commit a crime, and then punishing the person who takes the bait.”).

14. GRAEME R. NEWMAN, U.S. DEP’T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, *STING OPERATIONS* 3 (Oct. 2007).

15. *Id.* at 1 (“Sting operations have been part of the modern police response to crime for over 40 years . . .”).

16. See, e.g., *Baluyut v. Superior Court*, 12 Cal. 4th 826 (Cal. 1996) (involving a dismissal of charges filed after a gay sting operation under a statute prohibiting soliciting or engaging in lewd conduct in public cases).

17. See, e.g., Stan Oklobdzija, *73 Arrested in Watt Ave. Prostitution Sweep*, SACRAMENTO BEE, Jan. 29, 2009, at B2.

18. See, e.g., Dawn Bormann, *25 Indicted in Drug Sting*, KAN. CITY STAR, Jan. 31, 2009, at B2.

19. See, e.g., Robbyn Mitchell, *Sting Nets 140 Thieves and \$1.4M in Goods*, ST. PETERSBURG TIMES (FL), Sept. 18, 2008, at 1B.

20. See, e.g., Ben Pershing, *Aide to Boxer Fired After Being Charged in Child Pornography Sting*, WASH. POST, Nov. 14, 2008, at A5.

pedophilia,<sup>21</sup> fraud and corruption,<sup>22</sup> and vehicle-related crime.<sup>23</sup>

Sting operations further two fundamental law enforcement goals: investigation and deterrence.<sup>24</sup> Police conduct a majority of their sting operations for investigative purposes.<sup>25</sup> Stings are especially useful to police for investigatory purposes when used to penetrate complex fraud schemes and collect evidence on organized illicit activities involving large groups.<sup>26</sup> Stings can last from hours to several years, and frequently necessitate cooperation from local businesses, community organizations, and governmental organizations.<sup>27</sup> For example, in 1978, the FBI recruited con artist Melvin Weinberg to direct a sting offering bribes to U.S. congressmen and other government officials in exchange for favors to an unknown person named Abdul.<sup>28</sup> By 1980, the sting had successfully enticed numerous members of the U.S. House of Representatives and one member of Congress to engage in corrupt acts.<sup>29</sup> A number of politicians resigned and several were arrested and later convicted.<sup>30</sup>

Besides facilitating investigation and furthering deterrence, sting operations have the potential to produce other benefits. They may enhance

---

21. See, e.g., Anne Marie Apollo, *Sex Sting Nets 24 Arrests, 6 from Here—Enticed by Group whose Members Pose as Children Under 16, Men from All Over the State Lured to Decoy House in Fort Myers*, NAPLES DAILY NEWS (FL), Apr. 25, 2006, available at [http://www.setanchor.com/news/2006/apr/25/sex\\_sting\\_nets\\_24\\_arrests\\_6\\_here/](http://www.setanchor.com/news/2006/apr/25/sex_sting_nets_24_arrests_6_here/).

22. See, e.g., *83 Arrested in Marriage Fraud Sting*, CHI. TRIB., May 11, 2008, at 9; Casey Ross, *Springfield Raid Nets Dozen Illegals in Mail Fraud Sting*, BOSTON HERALD, June 9, 2006, at 20; Bruce Lambert, *Chiropractors and Lawyers Are Indicted in Insurance Fraud Sting*, N.Y. TIMES, May 22, 1997, at B8; Ronald Smothers, *Former Mayor of a Monmouth County Town is Sentencing to 43 Months in a Corruption Case*, N.Y. TIMES, Oct. 12, 2006, at B6.

23. See, e.g., Christine Hauser & Ann Farmer, *A Car-Fraud Sting With a Long Arm*, N.Y. TIMES, Jan. 18, 2008, at 3.

24. NEWMAN, *supra* note 14, at 11. Some scholars argue that the goals of deterrence and investigation are sometimes in tension with one another, which potentially hinders the effectiveness of sting operations. See Hay, *supra* note 13, at 415–419.

25. NEWMAN, *supra* note 14, at 11 (“The majority of sting operations fall under the investigative category.”). The U.S. Supreme Court has affirmed law enforcement’s use of deception for investigative purposes. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 441 (1932) (“Artifice and stratagem may be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design . . .”).

26. NEWMAN, *supra* note 14, at 11 (“Police will conduct a sting essentially to uncover a suspected extensive or complex fraud involving many people, usually those who hold offices of trust in a community or government organization.”).

27. *Id.* at 12.

28. *Id.* at 11.

29. *Id.*

30. *Id.*

public relations and police image,<sup>31</sup> improve collaboration between police and prosecutors,<sup>32</sup> significantly increase conviction records,<sup>33</sup> and increase partnerships between the police and business community organizations.<sup>34</sup>

Sting operations, however, have many potential drawbacks.<sup>35</sup> They may not have any deterrent effect and may even increase crime by creating it.<sup>36</sup> Stings may also implicate privacy and entrapment concerns, and can harm the public's image of law enforcement if the public view stings as unethical.<sup>37</sup> Additionally, stings are expensive to design and execute, and thus resource constraints may prevent law enforcement from using more effective crime-solving techniques.<sup>38</sup> Therefore, sting operations by no means provide uniformly positive results.

### III. A STINGING HISTORY: CONTEXTUALIZING MODERN GAY STING OPERATIONS

Sting operations targeting gay men and men who have sex with men (MSM) are not recent phenomena. During the 1950s and 1960s, the police frequently raided gay and lesbian bars and bathhouses.<sup>39</sup> A comparative

31. NEWMAN, *supra* note 14, at 25 (“[F]rom the often spectacular revelations resulting from a sting that snares high-profile people, to the mundane publicity of catching drunk drivers during a holiday season, the police department stands to receive considerable positive publicity because sting operations are often perceived as clever ways of catching otherwise elusive criminals who deserve punishment.”).

32. *Id.*

33. *Id.* at 26.

34. *Id.* at 27.

35. The empirical literature on the success of sting operations is very limited. Hay's *Sting Operations, Undercover Agents, and Entrapment* provides the first systematic economic analysis of undercover sting operations. See generally Hay, *supra* note 13. Some researchers have critiqued sting operations as unsuccessful and thus not worthy of being used by law enforcement. See, e.g., Robert H. Langworthy, *Do Stings Control Crime? An Evaluation of a Police Fencing Operation*, 6 JUST. Q. 27 (1989). More recent studies have focused on the success of online sting operations involving pedophiles. See, e.g., Joseph S. Fulda, *Do Internet Stings Directed at Pedophiles Capture Offenders or Create Offenders? And Allied Questions*, 6 SEXUALITY & CULTURE 73 (2002).

36. NEWMAN, *supra* note 14, at 29–30; see also Hay, *supra* note 13, at 397 (“The great danger of sting operations is that they may lure generally law-abiding individuals into committing offenses they otherwise would not commit.”).

37. NEWMAN, *supra* note 14, at 30.

38. See generally *id.* at 32–33.

39. See Bryant Simon, *New York Avenue: The Life and Death of Gay Spaces in Atlantic City, New Jersey, 1920–1990*, 28 J. URB. HIST. 300, 308 (2002) (describing police raids of gay clubs in Atlantic City, New Jersey during the 1950s and 1960s); see also Steven A. Rosen, *Police Harassment of Homosexual Women and Men in New York City 1960–1980*, 12 COLUM. HUM. RTS. L. REV. 159, 166–67 (1981) (describing police raids of gay bars in New York City during the 1960s); Allan Berube, *The History of Gay Bathhouses*, 44 J. HOMOSEXUALITY 33, 38 (2003)

analysis between historical and modern gay stings illustrates that the stigmatizing effects of modern gay sting operations cannot be disassociated from their history.

During the late nineteenth and early twentieth centuries, most states criminalized sex acts between individuals of the same sex as “crimes against nature.”<sup>40</sup> Despite these laws, many men risked having sex in public places,<sup>41</sup> such as public bathrooms and parks.<sup>42</sup> For instance, men in San Francisco often cruised for sex on the balconies of theaters and movie houses on Market Street, in bathrooms of all-night cafeterias, the Ferry Building, the YMCA, and other public locations.<sup>43</sup> Many men sought these places to engage in sexual activity with other men because “the severe stigma caused by homosexual activity [was] profoundly ‘asocial’—that is, it had few social institutions and existed outside mainstream society.”<sup>44</sup>

During the middle of the twentieth century, the places where men sought illicit gay sex changed significantly. Bathhouses began to cater exclusively to homosexual clientele<sup>45</sup> and isolated gay bars flourished, creating opportunities for men to socialize, bond, and find intimacy and sex from other men.<sup>46</sup> Police officers often turned a blind eye and tolerated these establishments as “practical solutions to difficult law enforcement problems of controlling sex in public places.”<sup>47</sup> The controlled ghettoization of gay sex to underground bathhouses and isolated bars was viewed as the

---

(“Despite the stepped-up attacks on gay baths and bars during the 1950s, which one local newspaper called a ‘war on homosexuals’ . . .”).

40. Berube, *supra* note 39, at 34.

41. *Id.* at 35.

42. *Id.* at 35–36.

43. *Id.* at 36.

44. JEFFREY ESCOFFIER, *AMERICAN HOMO: COMMUNITY AND PERVERSITY* 69 (1998). “In the vast majority of cases, male homosexuals engaged in sexual relationships with other isolated men in private or anonymous social spaces (such as restroom), whereas lesbians often formed isolated couples or small social circles.” *Id.*

45. Berube, *supra* note 39, at 38.

46. ESCOFFIER, *supra* note 44, at 71–72.

The bifurcation of homosexual life, along with the need for ‘protection,’ often meant that gay and lesbian bars, bathhouses, or other businesses sought to be as inconspicuous as possible—their outside appearances were often muted, their signs cryptic or insignificant . . . Bars, adult bookstores, and bathhouses maintained a certain degree of anonymity. Therefore, they were located in neighborhoods that were segregated from everyday businesses and residential activities—industrial areas, red-light districts, waterfront bars catering to sailors, or isolated roads in rural areas.

*Id.*

47. Berube, *supra* note 39, at 41.



solution to having men engage in sex acts in public or semi-public places.<sup>48</sup> Some establishments even paid law enforcement and organized crime bodies for protection.<sup>49</sup>

Not all police officers, however, turned a blind eye to gay bars and bathhouses. As fears of communism swept America during the 1950s, politicians and law enforcement waged moral crusades aimed to protect the morals, health, and safety of the American public.<sup>50</sup> Gays and lesbians found themselves labeled as sexual psychopaths, deviates, and communists.<sup>51</sup> This anti-homosexual panic caused gay bathhouses and bars to become primary targets of police sting operations in order to preserve public morale.<sup>52</sup> Police used stings to harass gay men and lesbians and to increase law enforcement's public image by preserving public morality.<sup>53</sup>

The tactics that police used to execute gay bar and bathhouse stings during the 1950s and 1960s are strikingly similar to the tactics used to effectuate modern gay sting operations. During that period, undercover officers would go to gay bars wearing clothes fashionable to gay men at the time, such as fuzzy sweaters and tennis shoes.<sup>54</sup> The officers would then stand at the bar and make sexual advances in order to entice solicitations from male patrons.<sup>55</sup> For many men, gay bars and bathhouses were the only places where they could meet and display affection toward other men. Therefore, police knew that targeting these establishments would be an effective means to target men who wanted engage in immoral and illicit gay sex acts.<sup>56</sup>

---

48. In fact, historical evidence demonstrates that the number of illicit public sex incidents decrease the more the police allow gay bathhouses to operate. *See, e.g., id.* at 39.

San Francisco's Embarcadero YMCA, along with many YMCAs in other cities, had earned reputations as 'favorite spots' for sexual activity at least as early as World War II. By the 1960s, according to men who were early frequenters of the Y, sexual activity there began to decline. Many of these men attribute this decline to the opening of gay baths during the same period.

*Id.*

49. ESCOFFIER, *supra* note 44, at 72.

50. Simon, *supra* note 39, at 308.

51. *Id.*

52. *Id.*

53. *Id.* at 309.

54. Rosen, *supra* note 39, at 166.

55. *Id.*

56. *Id.* at 166–67 (“Harassment [at] gay bars, the only public places where gay people could meet with relative safety during this period, was a particularly effective means of victimizing gay people.”).

Moreover, the harassing circumstances under which the police arrested men for “crimes against nature” during the 1950s and 1960s were also similar to the circumstances under which police are currently arresting men for violating morals regulations. For instance, statistics from the New York City Department of Correction indicate that hundreds of men and women were arrested on sodomy charges during the 1960s.<sup>57</sup> In all but one year of the compilation, less than ten percent were ultimately sentenced, and in half of the years studied, fewer than five percent were ultimately arrested.<sup>58</sup> These statistics suggest that the police detained many gays and lesbians as a harassment tactic and often had insufficient evidence to obtain convictions.<sup>59</sup> Statements from police officers illustrate that modern gay sting operations are also attempts to harass gay, lesbian, bisexual, and transgender people in order to drive them away from inhabiting public places.<sup>60</sup> Furthermore, many arrestees are detained for perfectly legal behavior, and thus convictions for violating the law are unlikely.<sup>61</sup>

The consequences of arrest for male arrestees of historical and modern gay sting operations are also strikingly similar. During the 1950s, even if the police had insufficient evidence to obtain a conviction, a mere arrest “often resulted in the loss of jobs and credit, as well as diminished opportunities for future employment.”<sup>62</sup> Some arrestees were required to disclose information about their arrests on employment applications, government forms, and insurance questionnaires.<sup>63</sup> Similarly, the economic risks and social embarrassment of being arrested for lewd conduct today influences many gay men and MSM who are arrested during gay sting operations to plead guilty in order to prevent their crimes from becoming public or tainting their permanent criminal record.<sup>64</sup>

---

57. *Id.* at 162–63.

58. *Id.*

59. *Id.* at 163–64 (“These statistics suggest that the police detained many persons for whom they had insufficient evidence to obtain convictions.”).

60. For instance, one San Antonio Park Ranger testified in a trial against a gay man charged with lewd conduct that he had arrested at least 500 gay men and no women because he “wanted to rid the park of gays.” See AMNESTY INT’L, *supra* note 8, at 21 (quoting Matt Lum, *Where is the Outrage? Recent Allegations Uncover History of Abuse in San Antonio*, The Texas Triangle, posted Aug. 2, 2001).

61. For further discussion on this point see *infra* Part IV. It is important to note that many men arrested during gay sting operations accept plea bargains, which eliminates the possibility that their charges will be dismissed due to insufficient evidence.

62. Rosen, *supra* note 39, at 164; R. SIMPSON, FROM THE CLOSETS TO THE COURTS 138–39 (1976).

63. Rosen, *supra* note 39, at 164.

64. See *infra* Part V.A.

#### IV. THE CONSTITUTIONALITY OF GAY STING OPERATIONS

This Part focuses on the constitutionality of modern gay sting operations. Part IV.A argues that gay sting operations are being executed in ways that violate free speech guarantees under the First Amendment. Part IV.B posits that the selective execution of gay sting operations against gay men and MSM implicates and potentially violates equal protection guarantees under the Fourteenth Amendment.

##### *A First Amendment*

The First Amendment prevents the government from interfering with individuals' abilities to express their ideas, emotions, and viewpoints in a manner that suits them.<sup>65</sup> In *Texas v. Johnson*,<sup>66</sup> the U.S. Supreme Court held that "[the First Amendment's] protection does not end at the spoken or written word . . . [C]onduct may 'be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'"<sup>67</sup> When the government seeks to regulate conduct because of the message it communicates to others, its regulation is treated as a prohibition on speech and implicates the First Amendment.

Consequently, in order for a gay sting operation to implicate the First Amendment, the conduct of the men that are the subjects of the sting must have an expressive component. In *Spence v. Washington*,<sup>68</sup> the Supreme

65. Scholars have put forth three specific purposes of free speech. First, some scholars advocate free speech as a means of democratic self-governance. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 17 (1948). In *New York Times v. Sullivan*, the Supreme Court stated that the "central meaning of the First Amendment" is the ability to criticize the government and its affairs. 376 U.S. 254, 273 (1964). Second, scholars have advocated free speech as a means of discovering truth. See J.S. MILL, *ON LIBERTY* 98–99 (Gertrude Himmelfarb ed., 1974). Justice Brandeis affirmed this view in his *Whitney v. California* concurrence. 274 U.S. 375, 377 (1927) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."). Third, some scholars argue that free speech is necessary for the development of individual autonomy. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 *LAW & SOC. INQUIRY* 521, 544 (1977):

The basic idea here is not that speech leads to truth or a stable society or some other social value, but rather that certain speech activities are valuable because they are integral to the process by which persons consciously choose from among alternatives, a process which is regarded as valuable in of itself because it figures prominently in our vague notions of what it means to be human.

*Id.*

66. *Texas v. Johnson*, 491 U.S. 397 (1989).

67. *Id.* at 404.

68. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (holding that displaying a flag upside down with a peace symbol constituted symbolic expression where "[a]n intent to convey a

Court adopted a two-part test to determine if conduct qualifies as expressive conduct. First, courts should assess whether the speaker intended to convey a message.<sup>69</sup> Second, courts should look to context in order to determine if the message would be understood by its audience.<sup>70</sup>

Foot-tapping, hand-waving, flirting, and agreeing to engage in private sexual relations are communicative activities that may convey mutual attraction or sexual desire. In fact, law enforcement officers have admitted that they view these activities as secret signals that convey messages to solicit sex. For instance, in June 2007, Senator Larry Craig was arrested in a Minneapolis airport bathroom for “moving his foot next to a police officer’s foot and tapping it in a way that indicated he wanted sex.”<sup>71</sup> Senator Craig was also accused of sending a signal to solicit illegal public sex by swiping his hand under the divider between the stalls and peering into the officer’s stall.<sup>72</sup> The officer who arrested Craig wrote in his report that he “recognized a signal used by persons wishing to engage in lewd conduct.”<sup>73</sup>

The Supreme Court has concluded that there are categories of expression that the government can prohibit or punish. Three of these categories are the incitement of illegal activity,<sup>74</sup> fighting words,<sup>75</sup> and obscenity.<sup>76</sup> As the following analysis demonstrates, men are being arrested during gay sting operations after engaging in conduct that may express sexual desire, such as foot tapping, flirting, or smiling, and well before they agree to, or engage in, public sex acts. Therefore, the pertinent question is whether expressive conduct that conveys mutual attraction or sexual desire falls under one of these three categories. I argue that it does not, and therefore arresting or punishing men based on these communicative activities violates the First Amendment.

---

particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”).

69. *Id.*

70. *Id.*

71. The Associated Press, *ACLU: First Amendment Protects Sen. Craig’s Bathroom Behavior*, GRAND FORKS HERALD (N.D.), Sept. 18, 2007, at C04.

72. *Id.*

73. *Secret Signals: How Some Men Cruise for Sex*, ABC NEWS, Aug. 28, 2007, available at <http://abcnews.go.com/US/story?id=3534199&page=1>.

74. *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

75. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

76. *See* *Roth v. United States*, 354 U.S. 476 (1957).

## 1. Incitement of Illegal Activity

The doctrine of incitement deals with the difficult question of when speech should no longer be protected in the interest of preserving social order. The Supreme Court has used different tests to perform this difficult balance,<sup>77</sup> but since the late 1960s the Court has defined incitement narrowly to maximize free speech.<sup>78</sup> Under the test defined by the sentinel case *Brandenburg v. Ohio*,<sup>79</sup> “constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>80</sup> Thus, in order for the government to limit speech under the incitement doctrine it must prove (1) an express intent advocating illegality; (2) a call for immediate violation of the law; and (3) that immediate violation of the law is likely to occur as a result of the speech.<sup>81</sup> The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.<sup>82</sup>

---

77. For an overview on the development of the law of incitement, including a description of the previous tests used before *Brandenburg v. Ohio*, see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 988–98 (3d ed. 2006).

78. *Id.* at 999 (“*Brandenburg* clearly seems to be the Supreme Court’s most speech protective formulation of the incitement test.”).

79. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

80. *Id.* at 447. In *Brandenburg*, the police arrested the defendant, who was a leader in the Ku Klux Klan (KKK), under Ohio’s criminal syndicalism law after he gave a speech at a KKK rally. One of the speeches made reference to the possibility of “revengeance” against “niggers,” “Jews,” and those who supported them. Another speech claimed that “our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race,” and announced plans for a march on Washington to take place July 4. The statute prohibited “advocat(ing) . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” OHIO REV. CODE ANN. § 2923.13 (West 1969).

81. Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, 19 (2002) (“The Supreme Court’s most recent pronouncement on the subject of incitement came in 1969. *Brandenburg v. Ohio* established the principle on which courts continue to rely.”). The *Brandenburg* test is more speech protective than other tests. See CHERMERINSKY, *supra* note 77, at 999 (“None of the earlier tests had contained an intent requirement. Also, none had so clearly stated a requirement for a likelihood of imminent harm.”).

82. *Stanley v. Georgia*, 394 U.S. 557, 566–67 (1969) (rejecting that the state may limit possession of obscene material on the ground that it may lead to antisocial conduct or crime); see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236 (2001) (rejecting the notion that virtual child pornography should be banned because it encourages pedophiles to engage in illegal activity). For lower courts’ application of this principle see *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (rejecting that the government could justify a policy that threatened to punish a physician for recommending a patient to use marijuana for medical purposes on the grounds that this recommendation could encourage illegal conduct by the patient) and *U.S. v. Stevens*, 533 F.3d 218

Under what circumstances is the connection between expressive acts conveying sexual attraction and illegal lewd conduct strong enough to withstand constitutional scrutiny under the *Brandenburg* test? To meet the *Brandenburg* test, the expressive acts targeted by gay stings must undoubtedly indicate intent and likelihood to engage immediately in sexual activity in a public bathroom or another public place.<sup>83</sup> For instance, the test would be met if a man told an officer in a public bathroom that he wished to go into an unoccupied bathroom stall and have sex, and it was clear that he intended to follow through with the sex act if the officer accepted his proposition.

Some men have been arrested during gay sting operations simply because they smiled, stared, or flirted with a police officer in a public restroom. For instance, consider the story of Alejandro Martinez.<sup>84</sup> Martinez was on his way to work when he entered the bathroom at the Port Authority of New York.<sup>85</sup> An undercover officer stared at Martinez and smiled at him.<sup>86</sup> Martinez looked at the officer, ignored him, and went to the urinal.<sup>87</sup> When Martinez went to wash his hands, the man stood between him and the sink.<sup>88</sup> Martinez quickly left the restroom.<sup>89</sup> The man followed himself outside, called him back, and said, "You know you are under arrest."<sup>90</sup>

---

(3d Cir. 2008) (rejecting the notion that the government could limit depictions of animal cruelty on the ground that such a prohibition would decrease actual incidents of animal cruelty). It is important to note that this principle does not apply to government regulation of commercial speech. For instance, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), the Supreme Court held that the government may ban commercial speech related to illegal activity. As the Court noted in *Central Hudson*, the justification for this prohibition is rooted in the special characteristics of commercial speech:

In most other contexts, the First Amendment prohibits regulation based on the content of the message. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.

*Central Hudson*, 447 U.S. at 564 n.6 (internal quotations omitted).

83. See *Brandenburg*, 395 U.S. at 444.

84. AMNESTY INT'L, *supra* note 8, at 25.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. AMNESTY INT'L, *supra* note 8, at 25.

90. *Id.*

Another officer stated, "Wow, look at how fast you got the first one," and the undercover officer responded, "Yeah, I did a good trap."<sup>91</sup>

The officer in Martinez's case surmised that Martinez wanted to engage in illegal public sex based on brief mutual eye contact between the two men.<sup>92</sup> Martinez, however, ignored the police officer after the two made eye contact. Consequently, Martinez' expressive activity conveys the message that he wanted to uphold the law by not engaging in public sex acts, not break it. The *Brandenburg* test would still not be met, even if Martinez had smiled, winked, or said hello in a flirtatious fashion to the officer. These expressive behaviors indicate mutual sexual attraction or desire, not intent to engage in public sex acts. In fact, these expressions occur on a daily basis without government sanction between heterosexual individuals and partners in public establishments, such as bars, restaurants, and supermarkets. Consequently, the *Brandenburg* test is not met by smiling, staring, or flirting.

The *Brandenburg* test requires an express intent advocating illegality. Therefore, agreements made in bathrooms, parks, or other public places to have sex do not meet the *Brandenburg* test unless they clearly indicate that the sexual activity is to take place in a public place. After *Lawrence v. Texas*,<sup>93</sup> the government cannot criminalize private consensual sex, and thus cannot punish invitations made in public to have consensual private sex. A man who communicates to an undercover officer that he wants to have sex may not intend for the sex to occur in public; he may only desire for the sex to occur in a private place, such as a bedroom or a hotel room.

For instance, on June 12, 2004, John was on his way home from work when he stopped at a rest area to use the bathroom.<sup>94</sup> In his own words, John states, "[t]his guy cruised me in the rest room. I didn't pay attention. I went to buy a soda, and he cruised me again. I went to my car and he cruised me a third time. He was very attractive, so I stopped to talk to him. I asked if he wanted to go have a drink, because I don't cruise rest areas."<sup>95</sup> While they talked, "John touched the man's thigh in the parking lot."<sup>96</sup> John was arrested despite the fact that he explicitly rejected the officer's

---

91. *Id.*

92. *See id.*

93. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

94. *See* Jason Mikula, *The Two Sides of the Holt Rest Stop Sting Operation*, CITY PULSE, July 28, 2004, at 1, available at <http://www.lansingcitypulse.com/lansing/archives/040728/coverstory/index.asp>.

95. *Id.*

96. *Id.*

proposition.<sup>97</sup> Even if John touched the officer's thigh as a sign of attraction, John's behavior in no way indicated intent to engage in public sex acts specifically.

Or, consider a man who was arrested in a restroom at Boulan Park in Troy, Michigan.<sup>98</sup> According to the arrestee, a young man appeared at the urinal next to him.<sup>99</sup> The man put his penis in his hand, shook it, and said, "it won't work."<sup>100</sup> The arrestee said, "maybe it's too cold."<sup>101</sup> The undercover officer then said "I think this ruse, sir has gone long enough," identified himself as a police officer, and took the man outside where three or four other officers approached.<sup>102</sup> The arrestee never indicated intent to engage in sexual acts in the bathroom; he simply made a joke about the officer's inability to urinate. Even if the arrestee had indicated that he was aroused by the officer's exposed penis, it was unclear whether the arrestee would have agreed to engage in sex acts in the bathroom. He may have only agreed to engage in sex acts in the privacy of a home or hotel room.

The *Brandenburg* test is also not met by foot-tapping in bathroom stalls. Many men tap their feet in bathroom stalls for reasons completely unrelated to communicating a desire to engage in public sexual activity. Bathroom occupants may tap their feet in bathroom stalls because of an inability to sit still, or, they may tap their feet to a music beat.<sup>103</sup> Moreover, foot-tapping in the next stall may simply indicate a bathroom user's poor manners or a user's wide stance.<sup>104</sup>

97. *See id.*

98. RUDY SERRA, THE TRIANGLE FOUNDATION, "BAG A FAG" OPERATIONS IN MICHIGAN: POLICE MISCONDUCT, ENTRAPMENT AND CRIMES AGAINST GAY MEN 8 (2000), available at [http://www.hawaii.edu/hivandaids/Bag\\_A\\_Fag\\_Operations\\_In\\_Michigan\\_Police\\_Misconduct\\_Entrapment\\_and\\_Crimes\\_Against\\_Gay\\_Men\\_Last\\_updated\\_May\\_3\\_2000.pdf](http://www.hawaii.edu/hivandaids/Bag_A_Fag_Operations_In_Michigan_Police_Misconduct_Entrapment_and_Crimes_Against_Gay_Men_Last_updated_May_3_2000.pdf).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* Posting of Flying Elvis to FreeRepublic.com, <http://www.freerepublic.com/focus/f-news/1888654/posts> (Aug. 29, 2007 22:15 CDT) ("Wow, I guess I won't be tempted to tap my foot while listening to my I-pod on the crapper, or engage in dueling foottapping with my neighbor . . ."); Posting of Douglas in Manama to Beth Frerking, *Sex Scandals Hit Conservatives Hardest* at Politico.com, <http://www.politico.com/news/stories/0807/5550.html> (Aug. 29, 2007 7:19 EST) ("I know nervous energy types who tap their foot all day long. And, many people in airports are listening to music via earphones and I would bet that quite a lot of them tap their feet in a stall.")

104. *See Wide-Stanced Foot Tapper Now Uneasy in Public Bathroom*, NASHVILLE SCENE, Sept. 13, 2007, <http://www.nashvillescene.com/2007-09-13/news/wide-stanced-foot-tapper-now-uneasy-in-public-bathroom/>:

Jake Pepper of Joelton says that the publicity surrounding the arrest of U.S. Sen. Larry Craig in the men's room of the Minneapolis airport has made him uneasy whenever he



Finally, under the last prong of the *Brandenburg* test, it must be likely that the expressive conduct will result in an immediate violation of the law. Consequently, even if the police are aware that illicit public sex occurs frequently in a particular bathroom, a man who tries to communicate with his neighbor in the next stall that he is interested in having illicit sex often has no idea whether his neighbor will respond affirmatively to his signals. To say that foot-tapping or other signals are sufficient to meet this prong of the *Brandenburg* test is tantamount to saying that all men who sit down in a stall are likely to respond affirmatively to solicitations for sex from men in the next stall.

## 2. Fighting Words

The government could avoid liability for violating the First Amendment by proving that the speech of men arrested during gay sting operations meets the “fighting words” doctrine. In *Chaplinsky v. New Hampshire*,<sup>105</sup> the Supreme Court held that “fighting words” define a category of speech that is not afforded First Amendment protection.<sup>106</sup> The Court defined “fighting words” as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>107</sup> The Court reasoned that “fighting words” are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>108</sup>

Since *Chaplinsky*, the Supreme Court has reversed every conviction under the “fighting words” doctrine, although it has consistently upheld the doctrine itself.<sup>109</sup> The Supreme Court has also narrowed the application of

---

enters a public bathroom.

‘I’m kind of a nervous guy, and I tap my feet and jiggle my legs all the time,’ he says. ‘Until I read about that senator getting arrested for tapping his feet and waving his hands around, I had no idea that stuff was a signal of anything . . . [Now] when I go into a bathroom, especially at the airport, with my tapping feet and wide stance, I’m making myself a target. I may be so nervous I can’t even go, if you know what I mean.’

*Id.*

105. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

106. *Id.* at 573–74.

107. *Id.* at 571–72 (citation omitted).

108. *Id.* at 572.

109. CHEMERINSKY, *supra* note 77, at 1002 (“[I]n the more than half century since *Chaplinsky*, the Court has never again upheld a fighting words conviction. Every time the Court has reviewed a case involving fighting words, the Court has reversed the conviction, but without overruling *Chaplinsky*.”).

the “fighting words” doctrine to speech that is “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”<sup>110</sup> In *California v. Cohen*,<sup>111</sup> the Court further refined the definition of “fighting words” to speech that is directed to a specific person and likely to incite a violent response. In *Texas v. Johnson*,<sup>112</sup> the Court affirmed this requirement by stating that “[n]o reasonable onlooker would have regarded [the] generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.”<sup>113</sup> In *R.A.V. v. St. Paul*,<sup>114</sup> the Supreme Court clarified that speech does not equate to “fighting words” merely because it is offensive.<sup>115</sup>

Expressive conduct conveying mutual attraction or sexual desire does not constitute “fighting words.” Staring, flirting, foot tapping, and hand signals communicating sexual attraction are not direct personal insults; they are also not likely to incite violent responses.<sup>116</sup> In fact, undercover officers often signal that messages of sexual desire and attraction are entirely welcome in order to ensure that the sting is executed successfully. Therefore, the “fighting words” exception does not apply to the type of

110. *Street v. New York*, 394 U.S. 576, 592 (1969) (citing *Chaplinsky*, 315 U.S. at 574).

111. *California v. Cohen*, 403 U.S. 15, 20 (1971).

112. *Texas v. Johnson*, 491 U.S. 397 (1989).

113. *Id.* at 409.

114. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

115. *Id.* at 414 (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”).

116. The existence of the gay panic defense does not undercut the validity of this claim. Traditionally, under the gay panic defense, a defendant asserts that he or she was the subject of sexual advances by the victim. To invoke the defense, the defendant must find the propositions so offensive and frightening that they brought about a psychotic state characterized by violence. See Victoria L. Steinberg, Book Review, *A Heat of Passion Offense: Emotions and Bias in “Trans Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 501 (2005) (“Traditionally, gay panic defenses used a diminished capacity argument, claiming that a defendant’s latent homosexuality caused his violent reaction to a gay man’s advance.”) (citations omitted). *But see* David L. Annicchiarico, *Consistency, Integrity, and Equal Justice: A Proposal to Rid California Law of the LGBT Panic Defense*, 5 DUKE MINIER AWARDS 121, 126 (2006) (“Today, the provocation justification has come to be used by those who kill primarily gay men and transgender women in order to receive a lesser punishment for their crimes by arguing that a sexual advance, or the revelation of the victim’s birth sex, caused the defendant to lose control.”). This defense has become less successful as homosexuality is now more accepted and judges often only permit defendants to invoke the defense if the defendant can establish a genuine belief that a victim’s propositions caused an imminent risk of sexual assault. See Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 339 n.134 (2003) (“The answer should presumably be ‘no,’ given the usual rejection of ‘gay panic’ defenses asserted by non-psychotic individuals who claim they killed when homosexual advances by the victim brought out repressed homosexuality that results in violence.”) (answering the question “Is it justifiable to kill people who are trying to turn one into a homosexual?”).

expressive conduct targeted during gay sting operations.

### 3. Obscenity and Indecency

In *Roth v. United States*,<sup>117</sup> the Supreme Court held that obscenity is a category of speech unprotected by the First Amendment.<sup>118</sup> Later, in *Miller v. California*,<sup>119</sup> the Court affirmed that obscene material is not afforded protection under the First Amendment and adopted a three-prong test that it continues to apply today.<sup>120</sup> The Court held that:

[t]he basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>121</sup>

The expressive conduct targeted by gay sting operations does not meet the *Miller* test. This standard clearly states that the government’s authority to regulate obscene material is limited to works that depict or describe sexual conduct. Flirtatious eye contact, body language, foot tapping, and agreements to have sex are not works that depict or describe sexual conduct. Furthermore, this conduct does not communicate messages of sexual attraction in a patently offensive way as specifically defined by applicable state law. Flirtatious eye contact, body language, and smiling are candid and legal communications of sexual attraction that occur daily between opposite-sex singles and partners in public. As Attorney Rudy Serra explains, “Comments that a heterosexual female could make freely in a ‘singles bar’ will get a gay male hauled to jail.”<sup>122</sup>

If the government cannot punish this expressive conduct under the obscenity doctrine, can it punish this expression as profane or indecent language? Generally, the Supreme Court has held that profanity and indecent language are afforded First Amendment protection. The only exceptions have been in specific forms of media, such as broadcast

---

117. *Roth v. United States*, 354 U.S. 476 (1957).

118. *Id.* at 485.

119. *Miller v. California*, 413 U.S. 15, 36 (1973).

120. *Id.* at 36–37.

121. *Id.* at 24 (internal citations omitted).

122. SERRA, *supra* note 98, at 3.

media,<sup>123</sup> and particular constitutional niches, such as public schools.<sup>124</sup>

The sentinel case on the First Amendment protection of profanity and indecent language is *Cohen v. California*.<sup>125</sup> In *Cohen*, a man was convicted of disturbing the peace for being in a courtroom wearing a jacket that said “Fuck the Draft.”<sup>126</sup> In overturning the conviction, the Court held that “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>127</sup> *Cohen* affirms the basic tenet that the government cannot punish speech merely because others might find it offensive.<sup>128</sup>

Foot tapping, suggestive comments, flirtatious eye contact, and hand gestures are by no means indecent speech. Rather, these expressive behaviors are punished based on law enforcement’s and society’s belief that public displays of same-sex attraction and sexual activity are offensive and immoral and not based on the inherent offensiveness of the communication. This problem is compounded by the fact that the police have vast discretion to define behavior that is lewd and offensive under morals legislation.<sup>129</sup> For instance, consider one San Antonio Park Ranger who arrested at least 500 men for lewd conduct during gay sting operations.<sup>130</sup> The ranger stated publicly that he initiated the stings because he “wanted to rid the park of gays.”<sup>131</sup> Law enforcement’s deliberate targeting of this expressive conduct can be conceptualized as an attempt to regulate positive gay-sex values that run afoul of an officer’s or society’s disgust towards homosexuality, and

123. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978). The Court has not been willing to extend this doctrine to other forms of media, such as telephones. See *Sable Comm’n v. FCC*, 492 U.S. 115, 131 (1989). The Court has been more conflicted about other forms of media, such as cable television and the Internet, but has generally been protective of these forms of media. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 760 (1996) (Cable); *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (Internet); *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (Internet).

124. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

125. *Cohen v. California*, 403 U.S. 15 (1971).

126. *Id.* at 16.

127. *Id.* at 26.

128. The Supreme Court also upheld this principle in *Texas v. Johnson*. 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

129. AMNESTY INT’L, *supra* note 8, at 21 (“Such regulations . . . are often vaguely worded so as to allow for significant discretion on the part of law enforcement officers . . .”).

130. *Id.*

131. *Id.*

especially gay sex. Therefore, punishing men for merely communicating mutual attraction or a desire to engage in sexual activity with other men is undoubtedly antithetical to the principle affirmed in *Cohen* and *Johnson* that the government cannot punish speech merely because it disagrees with the message or finds it offensive.

### *B. The Fourteenth Amendment*

The Equal Protection Clause of the Fourteenth Amendment mandates that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws”<sup>132</sup> and thus prohibits discriminatory state action. Lewd conduct laws are facially neutral laws; these laws do not mention sexual orientation, gender, race, or other identity-based classifications.<sup>133</sup> The Supreme Court held in *Yick Wo v. Hopkins* that the selective enforcement of a facially neutral law can result in an equal protection violation.<sup>134</sup> Since *Yick Wo*, circuits have adopted differently worded requirements for the selective enforcement doctrine,<sup>135</sup> but these variations

132. U.S. CONST. amend. XIV, § 1.

133. For instance, Senator Larry Craig was charged under MINN. STAT. § 609.746(1)(c) (2003) for allegedly soliciting sex from an undercover officer during a sting operation in a public restroom at the Minneapolis-St. Paul International Airport. The disorderly conduct statute provides:

Whoever does any of the following in a public or private place . . . knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: . . . Engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

MINN. STAT. § 609.746(1)(c) (2003). This statute does not mention sexual orientation, gender, or other identity-based classifications.

134. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

135. For instance, the Second Circuit has held in order to support a showing of selective prosecution, the defendant must show:

(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against [the defendant], he has been singled out for prosecution, and (2) that the government’s discriminatory selection of [the defendant] for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

*United States v. Fares*, 978 F.2d 52, 59 (2d Cir. 1992) (alterations in original). The Sixth Circuit has held that to support a showing of selective prosecution, the defendant must prove three elements:

First, [an official] must single out a person belonging to an identifiable group, such as those of a particular race or religion, or a group exercising constitutional rights, for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations. Second, [the official] must initiate the prosecution with a discriminatory purpose. Finally, the prosecution must have a discriminatory effect on

have two common elements. First, a litigant must prove that the allegedly violated law has not been enforced against individuals similarly situated to the defendant (discriminatory impact). Second, the litigant must prove that the decision to enforce the law against the defendant was based on an impermissible motive (discriminatory motive).<sup>136</sup>

To meet the discriminatory impact prong, litigants must show that gay sting operations are being enforced against gay men and MSM, yet not heterosexual men or women. Although empirical data on this issue is limited, existing data highlights that lewd conduct laws are being selectively enforced against gay men and MSM. Amnesty International reports that in Los Angeles, between August 2000 and July 2001, eighty-eight percent of 649 arrests under California's disorderly conduct law were of men.<sup>137</sup> When arrests involving sex work are excluded, ninety-nine percent of arrests were of men.<sup>138</sup>

Public opinion polls also support that men and women of all sexual orientations have illicit public sex.<sup>139</sup> A 2006 MSNBC.com survey found that twenty-two percent of Americans had sex in public during the previous year.<sup>140</sup> In an informal survey conducted by *New York Magazine*, almost

the group which the defendant belongs to.

Gardenhire v. Schubert, 205 F.3d 303, 319 (6th Cir. 2000) (quoting United States v. Anderson, 923 F.2d 450, 453 (6th Cir. 1991)). In the Ninth Circuit, to prevail on a discriminatory selection claim, defendants must prove that "(1) others similarly situated have not been prosecuted (disparate impact) and (2) the prosecution is based on an impermissible motive (discriminatory motive)." Am.-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1062-63 (9th Cir. 1995) (internal quotations omitted).

136. See also Chris K. Visser, Comment, *Without A Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving A Car?*, 35 HOUS. L. REV. 1683, 1714 (1999) ("Essentially, there are two elements to prove in a selective enforcement claim: (1) that enforcement of the traffic law had a discriminatory effect; and (2) that there was a discriminatory purpose or animus.") (internal citations omitted).

137. AMNESTY INT'L, *supra* note 88, at 21 n.122.

138. *Id.* Of course it is possible that some of these men were not arrested during gay sting operations, but rather were arrested for engaging in other lewd acts, such as indecent exposure. Relying upon this data assumes that most of the men arrested under lewd conduct laws have in fact been arrested during gay sting operations. This assumption is based on the fact that gay sting operations are common and involve sweeping arrests, whereas many indecent exposure arrests are isolated occurrences. Naturally, more targeted research needs to be done in this area. I simply want to highlight that the disproportion of men targeted under these laws is likely a viable point supporting the disproportionate impact argument.

139. Diane Carman, Op-Ed, *Was Adams County Sting Anti-Crime, or Anti-Gay?* DENVER POST, Oct. 7, 2004, at B05 ("After all, surreptitious public sex has been going on since forever. If it wasn't for the drive-in movies, dark corners under high school bleachers and, yes, public parks, a lot of us wouldn't be here today.")

140. Em & Lo, *Public Displays of Affection: Sex in the Park, on the Street, in a Cab, at the Bar; Exhibitionism isn't Just a Fantasy in New York*, N.Y. MAG., Apr. 1, 2007, available at <http://nymag.com/nightlife/mating/29981/>.

one hundred percent of the people interviewed in New York had a tale of public or semi-public lewdness.<sup>141</sup> According to one opposite-sex twenty-something couple interviewed by *New York Magazine*, “[w]e’ve done it on rooftops, in empty subway cars, in the backseat of cabs, *in bar and restaurant bathrooms*, in our offices, *under a blanket in Central Park*.”<sup>142</sup> Many of these locations are primary targets of stings directed exclusively against men who engage in public sex acts with other men. In fact, some books encourage this behavior by offering specific instructions to heterosexual couples on how to spice up their sex lives by turning their fantasies of having public sex into reality.<sup>143</sup>

Opposite-sex sexual partners who are caught engaging in public sex acts are rarely arrested. For instance, Don Mueller, an LASD sergeant revealed upon being interviewed that, “[w]hen officers are working in areas where people have sex in their cars, if it’s a man and a woman or even two women, the officers usually check to make sure there is not a serious crime occurring (such as rape) and then send them on their way. The parties are told to take it to a hotel or take it home.”<sup>144</sup> Law enforcement’s refusal to crack down on heterosexual public sex acts has led to complaints that “[t]here’s (sexual) conduct going on with straight couples all the time in the park, but that’s being ignored.”<sup>145</sup> Conversely, Sergeant Mueller reveals that “if there are two men consensually involved in the car, officers arrest them more often than not.”<sup>146</sup> An illegitimate double standard exists when police aggressively enforce the laws against men engaged in sex acts with other men but seldom arrest opposite-sex sexual partners for similar behavior.

The discriminatory motive prong of the selective enforcement doctrine requires defendants to prove that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ an identifiable group.”<sup>147</sup> Discriminatory motive can possibly be inferred from police responses that legitimize the public’s homophobic biases. Sting

---

141. *Id.*

142. *Id.* (emphasis added).

143. *See, e.g., VIOLET BLUE, THE ULTIMATE GUIDE TO SEXUAL FANTASY: HOW TO TURN YOUR FANTASIES INTO REALITY* 127–42 (2004).

144. AMNESTY INT’L, *supra* note 8, at 21.

145. Greg Hardesty & Tony Saavedra, *Lewd-Acts Suspects Sue Police—Crime: Plaintiffs Say Santa Anna Officers Discriminated Against Gays During A Sting Operation In A Park*, ORANGE COUNTY REG., Nov. 30, 2000, at 1.

146. AMNESTY INT’L, *supra* note 8, at 21 (“When a police officer sees a [heterosexual] couple making love, they are left alone on most occasions, but if gays are involved, they [police] are on them.”) (quoting Andrew Thomas, Attorney in San Antonio).

147. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (clarifying the “discriminatory purpose” requirement of the selective enforcement doctrine).

operations are formed in response to public complaints, which are often explicitly homophobic or have homophobic undertones. These complaints are often vague and may not relate specifically to public sexual activity, but rather to the general presence of openly identified gay men in public spaces.

In order to maintain their public legitimacy, police officers are persuaded to respond to these complaints. Officials in San Antonio have stated that “most of this work is complaint driven”<sup>148</sup> and if “complaints come in often enough, we have to deal with it.”<sup>149</sup> Some police officers have stated publicly that “the bottom line is, we get complaints from citizens that they see men lingering in the woods, touching each other and having sex . . . This would be a crime regardless of gender or sexual orientation.”<sup>150</sup> However, when pressed to produce these complaints under the Freedom of Information Act, many police departments have refused or cannot produce them.<sup>151</sup> The lack of cooperation from police departments to produce these complaints raises skepticism over their legitimacy.

Overt acts of homophobia within police departments also provide evidence indicating that police officers selectively choose gay men or MSM as the targets of gay sting operations in part “because of” sexual orientation. For instance, Michigan police officers used the phrase “bag a fag” operations as slang to refer to a series of gay sting operations performed in Michigan during the late 1990s and early 2000s.<sup>152</sup> The common use of the phrase supports the inference that these operations were driven by police officers’ animus and disgust toward homosexuality.

Or, revisit the story of Alejandro Martinez, who was arrested during a gay sting operation outside of a bathroom in the New York Port Authority.<sup>153</sup> When Martinez objected to his arrest, the undercover officer clenched his fist in front of Martinez’s face and said “You calling me a liar? You want me to break your teeth?”<sup>154</sup> As he was being processed at the

---

148. AMNESTY INT’L, *supra* note 8, at 27.

149. *Id.*

150. *Gay Rights Group Calls Police Stings Unfair*, FLINT J., Nov. 18, 2007, at FO06.

151. SERRA, *supra* note 98, at 2 (“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.”).

152. *Id.* The American Civil Liberties Union (ACLU) of Michigan filed suit on behalf of the six men and the Triangle Foundation to challenge the constitutionality of these gay sting operations in Michigan. In 2002, the City settled the lawsuit and agreed to pay \$170,000 in damages and attorney’s fees. Am. Civil Liberties Union (ACLU), *Detroit Settles ACLU Lawsuit Challenging Police Sting Operation Against Gay Men*, <http://www.aclu.org/lgbt/discrim/12010prs20020723.html> (last visited Feb. 8, 2009).

153. AMNESTY INT’L, *supra* note 8, at 25.

154. *Id.*



police station, Martinez heard another officer refer to him and six other men arrested that morning as “faggots” and “queers.”<sup>155</sup> When one of the men complained about his arrest, an officer reportedly stated, “I can’t do anything about that. I’ve got a quota to fill.”<sup>156</sup> Martinez was held for eighteen hours, during which he endured homophobic police harassment.<sup>157</sup> These statements support the notion that animus towards homosexuals drove Martinez’s arrest and that officers of the New York Police Department deliberately sought to arrest gay men during public sex stings because their sexual orientations made them exploitable targets to fulfill arrest quotas.

Finally, consider a statement by Stuart Dunnings, III, a top prosecutor in Ingham County, Michigan:

The Michigan State Police were told the problem was when the suspect wasn’t specifically indicating that the sexual conduct was going to take place then and there . . . [t]he state troopers thought, if we can’t get them because they’re soliciting sex here and now, we can get them for soliciting an immoral act, because they’re soliciting for a homosexual act.<sup>158</sup>

Despite the fact that *Lawrence v. Texas* overturned all laws criminalizing private consensual sex,<sup>159</sup> these officers sought to arrest gay men because they considered all homosexual acts immoral. Consequently, these officers targeted gay men and MSM during gay stings in part “because of” sexual orientation; the primary motivations underlying arrests were officers’ discriminatory beliefs regarding the morality of homosexuality. This problem is further compounded by the fact that police have vast discretion to determine behavior that is lewd or offensive.<sup>160</sup> In defining lewd conduct, officers are invited to apply their own subjective moral opinions, which may be imbued with homophobia, in order to determine whether a lewd criminal act has occurred.<sup>161</sup>

Sometimes police officers’ behavior during gay sting operations are overt acts of police brutality. Such brutality demonstrates that police officers target and intentionally harm men who they perceive to be gay because of animus on the basis of sexual orientation. For instance, two men

---

155. *Id.*

156. *Id.*

157. *Id.*

158. Mikula, *supra* note 94.

159. *Lawrence v. Texas*, 539 U.S. 558 (2003).

160. *See* AMNESTY INT’L, *supra* note 8, at 21.

161. *Id.* at 3.

in San Antonio were reportedly beaten when they were arrested for lewd conduct.<sup>162</sup> Allegedly, the officers kicked, beat, and punched one man.<sup>163</sup> While this occurred, his partner fled to the woods and waited for the police to leave; when he came back for his car, police patrolling the area saw him and beat him as well.<sup>164</sup>

Police have also shown discriminatory motive by demonstrating that they are willing to capitalize on the vulnerabilities of gay men and MSM who may not wish to have their sexual orientation made public. Police are well aware that many men are afraid to challenge charges under morals regulations for fear of public embarrassment.<sup>165</sup> As a result, police officers have exploited these vulnerabilities as blackmail opportunities. For instance, in Illinois, an officer caught two men having sex in a suburban wooded area.<sup>166</sup> The officer told the men that he would not charge them if they painted his home and got him a good deal on a computer.<sup>167</sup>

Law enforcement's discrimination against gay men and MSM may also be fueled by a sheer desire for profit, in addition to homophobia. The ability for law enforcement departments to generate profit from gay sting operations fuels the high potential for abuse and exploitation. Local police departments receive a percentage of fines, impoundment fees, probation, supervision fees, and other costs for effectuating a successful morals regulation arrest.<sup>168</sup> For instance, the Detroit Police Department executed an unprecedented wave of sex sting operations in a small area of a local park in 2002.<sup>169</sup> A leaked memorandum revealed that the police department had boasted a \$2.4 million dollar increase after effectuating "some 770 arrests, and rubber-stamped 770 identical police reports in order to justify it."<sup>170</sup> The prosecutor's office was able to claim one-third of the redemption fees, which allowed a head prosecutor to use hundreds of thousands of forfeiture dollars to give his employees raises.<sup>171</sup>

---

162. *Id.* at 27.

163. *Id.*

164. *Id.*

165. This point is developed in more detail *infra* Part V.A.

166. Steph Smith, *Gay Pair Blackmailed by Cook County Sheriff's Deputy*, 365GAY, July 16, 2003, <http://www.chicagoprime.com/news/pdf.cfm/articleID/701524>.

167. *Id.*

168. SERRA, *supra* note 98, at 7.

169. Brian Theobald, *Caught! How Bathroom Stings Entrap Gay Men*, EDGE S.F., Nov. 28, 2007, <http://www.edgesanfrancisco.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&id=52974>.

170. *Id.*

171. Amber Arellano, *Quizzed On Sting, Cop Evasive City Council Seeks Answers After Gay*

Profits are not only lucrative for law enforcement departments; they also benefit individual officers. Trial courts have found that police officers have organized undercover sting operations to manipulate gay men for personal advancement within the police force. For instance, one court found that an “officer implemented. . . [a gay sting operation] because he knew that such an operation would lead to easy arrests, which would apparently be of value to him in advancing within the ranks of the police department.”<sup>172</sup> Since most men plead guilty to avoid having to publicly litigate lewd conduct charges, individual police officers and departments use gay sting operations as a way to increase their arrest rates and improve their public image.<sup>173</sup>

Despite these sources of support for discriminatory effect and motive, courts may not rule in favor of arrestees that pursue equal protection claims. The elements of the selective enforcement doctrine are difficult to establish and courts may defer to police officers’ judgments regarding the types of programs that are necessary to implement in order to prevent crime. The preceding analysis, however, highlights that the execution of gay sting operations at the very least implicates equal protection guarantees under the Fourteenth Amendment and that an alternative theory besides the First Amendment may be a viable option for arrestees who wish to challenge the constitutionality of gay sting operations.

#### V. LIMITS OF THE ENTRAPMENT DEFENSE

One common misconception about gay sting operations is that male arrestees of illegitimate stings have an easily accessible legal defense: the entrapment defense. Scholars and courts disagree over the legal standard that should govern the entrapment defense. This Part does not advocate one position over another, but rather illustrates that the defense is often ineffective and inaccessible to male victims of illegitimate gay stings regardless of the governing standard.

The progenitor case for the entrapment defense is *Sorrells v. United States*.<sup>174</sup> The majority and concurring opinions in *Sorrells* dictate the two

---

*Bias Is Alleged*, DETROIT FREE PRESS, July 7, 2001, at 3A.

172. Brief of Bay Area Lawyers for Individual Freedom as Amicus Curiae Supporting Petitioners, *The Superior Court of Santa Clara County v. People of the State of California*, 1995 WL 17036317, \*1 (Cal. Aug. 11, 1995) (No. S045419).

173. Stan Oklobdzija, ‘*Cruising Targeted*’ *Police Are Cracking Down To Oust Gay Encounters From Citrus Heights Parks*, SACRAMENTO BEE, Jan. 17, 2008, at G1 (“Frequently, departments do this when they are trying to get their arrest rate up.”); *Secret Signals: How Some Men Cruise for Sex*, ABC NEWS, Aug. 28, 2007, <http://abcnews.go.com/US/story?id=3534199> (“[O]fficers involved in such stings tend to be young and . . . local arrest rates increase around the time of elections or when media attention focuses on the issue.”).

174. *Sorrells v. United States*, 287 U.S. 435 (1932).

main tests of the entrapment doctrine: the subjective test and the objective test.<sup>175</sup> The *Sorrells* majority adopted the subjective test, under which the defendant must first prove that he was induced to commit the offense by a preponderance of the evidence.<sup>176</sup> The burden then shifts to the prosecution to show that the defendant was “predisposed” to commit the crime.<sup>177</sup> Upon adopting the subjective test, the *Sorrells* majority held that the purpose of the entrapment doctrine was to protect otherwise innocent people from being induced to commit crime.<sup>178</sup> The *Sorrells* concurrence favored the objective test, which asks whether law enforcement’s actions would have induced otherwise innocent people to commit the crime.<sup>179</sup> In support of the objective test, the concurrence asserted that the entrapment doctrine served to govern police conduct.<sup>180</sup> Later, in *Sherman v. United States*<sup>181</sup> and *United States v. Russell*,<sup>182</sup> the Supreme Court refused to adopt the objective test to govern the entrapment defense. Although a majority of jurisdictions have adopted the subjective test, several states and localities have adopted a mixed test which contains both subjective and objective components.<sup>183</sup>

Under the subjective test, the defendant must first prove that he was induced to commit the offense by a preponderance of the evidence.<sup>184</sup> The burden then shifts to the prosecution to show that the defendant was

175. Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1394 (2004).

176. Andrew Carlon, Note, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1087–88 (2007).

177. *Id.* at 1088.

178. *Sorrells*, 287 U.S. at 448 (“We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them.”).

179. *People v. Barraza*, 23 Cal. 3d 675, 689–90 (1979), *en banc*, (“[We] hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?”).

180. *Id.*

181. *Sherman v. United States*, 356 U.S. 369 (1958).

182. *United States v. Russell*, 411 U.S. 423 (1973).

183. Colquitt, *supra* note 175, at 1402:

Several jurisdictions have adopted a mixed test which contains both subjective and objective components. Under an amalgamated approach, to support an entrapment defense, the evidence generally must show both that 1) the conduct of the police would induce an ordinary, law-abiding person to commit the crime, and 2) that the defendant was so induced. Thus the test is objective with respect to the police conduct and subjective with regard to the defendant’s response.

*Id.*

184. Carlon, *supra* note 176, at 1087–88.

“predisposed” to commit the crime.<sup>185</sup> The definition of “predisposed” is inherently vague. Consequently, one circuit court has adopted a five factor test to determine predisposition: (1) the character or reputation of the defendant; (2) whether the suggestion of the criminal activity was originally made by the government; (3) whether the defendant was engaged in criminal activity for profit; (4) whether the defendant evidenced reluctance to commit the offense, overcome by government persuasion; and (5) the nature of the inducement or persuasion offered by the government.<sup>186</sup> These factors essentially help jurors assess whether a defendant harbors preexisting criminal intent.<sup>187</sup>

The vagueness of the definition of predisposition raises numerous complications for male gay sting litigants who wish to raise the entrapment defense in jurisdictions governed by the subjective test. The most pressing complication is whether a jury will conclude that a male litigant is predisposed to commit illegal public sex acts merely because the jury is aware that the male litigant is gay, bisexual, queer, or MSM. Under the first prong of the five-prong standard above, reputation and character is a relevant consideration to assess predisposition to crime. If a man has a reputation of being sexually promiscuous with other men, even though he has the right to engage in private consensual relations, will a jury consider him to be predisposed to commit illicit lewd acts? Or, if jurors are homophobic, will they discount an arrestee’s allegations that he refused an officer’s proposition to engage in illicit public bathroom sex simply because of their animus towards gays and lesbians?<sup>188</sup> Given these possibilities,

---

185. *Id.* at 1088.

186. *United States v. Fusko*, 869 F.2d 1048, 1052 (7th Cir. 1989).

187. *People v. Barraza*, 23 Cal. 3d 675, 686 (Cal. 1979); Colquitt, *supra* note 175, at 1394 (“The central holding of *Sorrells* was that law enforcement officers can only create an opportunity for an already predisposed person to engage in a proscribed act or conduct.”).

188. There is limited empirical data on evidence of discrimination on the basis of sexual orientation in the judiciary. One report released by the Judicial Council of California in 2001, however, supports the existence of pervasive discrimination on the basis of sexual orientation in the judiciary. JUDICIAL COUNCIL OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS: FINAL REPORT OF SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE OF THE JUDICIAL COUNCIL’S ACCESS AND FAIRNESS ADVISORY COMMITTEE (2001), *available at* <http://www.courtinfo.ca.gov/programs/access/documents/report.pdf>. The report surveyed 5500 court employees and 2100 gay and lesbian court users from focus groups in San Jose, San Francisco, San Diego, Sacramento, and Los Angeles, of which 1525 employees and 1225 court users responded. *Id.* at 1–2. The report found that “the experience of many gay men and lesbians in the courts is much less favorable when gays and lesbians have more contact with the courts and when sexual orientation becomes an issue in the court contact.” *Id.* at 3. More specifically, the report found that a majority of lesbian and gay court users believed that they were treated the same as everyone else by those who knew their sexual orientation. *Id.* at 25. Fifty-six percent of those respondents, however, reported that when their sexual orientation was an issue in their contact with the court, they heard derogatory comments or actions towards gay men or lesbians. *Id.* These negative comments or actions were most frequently made by a lawyer or court employee. *Id.*

attorneys who are risk averse may persuade their clients not to invoke the entrapment defense in order to avoid conviction.<sup>189</sup> This is especially a concern in jurisdictions where defendants must admit their guilt to the underlying offense before raising the entrapment defense.<sup>190</sup>

The objective test, which is followed by the Model Penal Code and minority jurisdictions,<sup>191</sup> asks whether otherwise innocent people would have been induced to commit the crime by law enforcement's actions.<sup>192</sup> The primary purpose of the objective test is to serve as a check on law enforcement abuse and bars over-involvement of the state in inciting crime.<sup>193</sup> Application of the objective test weighs in an arrestee's favor by shifting attention away from an arrestee's state of mind and towards the reasonability of the officers' actions.<sup>194</sup> In contrast, under a purely subjective approach, even if a jury takes issue with how law enforcement went about creating an opportunity for an arrestee to commit a crime, it still must convict if the arrestee was predisposed to commit the crime.

Unfortunately, the objective test raises similar complications for men who are arrested during gay sting operations and wish to invoke the entrapment defense. Under the objective test, the jury is forced to assess the reasonability of law enforcement's actions. However, if members of the jury believe that public gay sex incidents are serious matters of public concern, then they may be more willing to defer to police officers' judgments about what is reasonable to deter illicit gay sex acts in public locations. Homophobia among jury members could also result in a lack of sympathy

---

189. Cf. Colquitt, *supra* note 175, at 1427 ("Because entrapment becomes an issue only if a defendant raises it as a defense, it is not as effective as it might otherwise be. This aspect of the doctrine discriminates against pro se defendants and risk-averse attorneys and clients."); NEWMAN, *supra* note 14, at 31:

The subjective test asks whether the offender had a predisposition to commit the act . . . The objective test asks whether the government's encouragement exceeded reasonable levels, thus it focuses on the government's actions in constructing enticements—whether it went 'too far.' How each of these is assessed, of course, is the subject of legal wrangling, and may in the long run depend on a jury.

*Id.*

190. Colquitt, *supra* note 175, at 1427 ("In some jurisdictions, to raise the entrapment defense, the defendant must admit the offense and then argue that 'but for' inappropriate actions by the police the defendant would not have committed the crime.").

191. Carlon, *supra* note 176, at 1090.

192. *People v. Barraza*, 23 Cal. 3d 675, 689–90 (1979), *en banc*, ("[W]e hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense?").

193. Colquitt, *supra* note 175, at 1389.

194. NEWMAN, *supra* note 14, at 31.

towards men who are arrested during gay sting operations.<sup>195</sup> Given these possibilities, attorneys who are risk averse may persuade their clients not to raise the entrapment defense to avoid conviction.<sup>196</sup> This is especially a concern in jurisdictions where defendants must admit their guilt to an offense in order to raise the entrapment defense.

There are also many other factors that prevent male arrestees from raising the entrapment defense independent of concerns that arise from the doctrinal specifics of the subjective and objective tests. Public lewdness convictions carry severe repercussions. They can cause embarrassment and threaten marriages, friendships, jobs, reputations, and social standing.<sup>197</sup> Lewd conduct convictions expose the fact that closeted gay men and MSM engage in sex with other men.<sup>198</sup> In some jurisdictions, men risk being registered as sex offenders for lewd conduct convictions.<sup>199</sup> Some men have even committed suicide after their names, photos, and charges for indecent exposure or lewd conduct were published in newspapers.<sup>200</sup>

Consequently, many men are afraid to fight lewd conduct charges. Andrew Thomas, a civil attorney in San Antonio, Texas explains that “[t]he biggest problem we are having from the standpoint of wrongfully charged defendants is that [ninety-five] percent of them are so embarrassed by the charge, either indecent exposure, lewd behavior, or assault [sexual] on an officer, they are afraid to fight.”<sup>201</sup> As a result, many men accept plea bargains or pay fines to make the charge disappear.<sup>202</sup> Some officers even

195. See *supra* note 188 and accompanying text.

196. See Colquitt, *supra* note 175, at 1427–28.

197. Kelly Dedel Johnson, U.S. Dep’t of Justice, Office of Community Oriented Policing Services, *Illicit Sexual Activity in Public Places*, Problem-Oriented Guides for Police: Problem-Specific Guides No. 33, Apr. 2005, at 4, available at <http://www.popcenter.org/problems/PDFs/IllicitSex.pdf>; see also AMNESTY INT’L, *supra* note 88, at 28.

198. Johnson, *supra* note 197, at 4.

199. *Id.*

200. Brian Theobald, *Caught! How Bathroom Stings Entrap Gay Men*, EDGE S.F., Nov. 28, 2007, <http://www.edgesanfrancisco.com/index.php?ch=news&sc=gibt&sc2=news&sc3=&id=52974> (reporting that “a respected official in a Connecticut town committed suicide after a Providence, R.I., newspaper published his name along with several others nabbed in a video-store raid.”); Lambda Legal, *Lambda Legal Files Federal Lawsuit Charging Johnson City Police Department with Bias*, <http://www.lambdalegal.org/news/pr/lambda-legal-files-federal-lawsuit-in-tenn.html> (last visited Feb. 8, 2008) (reporting the suicide of a Tennessee man after his photo and name were published in a newspaper after charges resulting from a gay sting operation were filed against him); AMNESTY INT’L, *supra* note 8, at 28 (“Benny Hogan was arrested as part of a sting operation by the San Antonio Police Department. Soon after, his name appeared in a local media account of the park arrests. Three days after the article appeared, Hogan went into his garage and hanged himself.”).

201. AMNESTY INT’L, *supra* note 8, at 27.

202. *Id.* (“Because they’re so humiliated, they’ll plead down to anything or pay any fine to make it go away.”); Carman, *supra* note 139, at B05 (“Most of them negotiated plea bargains,

scare men into accepting plea bargains by capitalizing upon the severe ramifications of lewd conduct convictions.<sup>203</sup>

Lewd conduct charges severely impact immigrants in the United States who could face deportation as a result of the charges<sup>204</sup> because moral turpitude charges negatively affect immigration proceedings.<sup>205</sup> It is also extremely difficult for men from disadvantaged economic backgrounds to invoke the entrapment defense. In order to pursue the defense, defendants must fully pursue their claims in litigation, which can be lengthy and expensive. Many men risk unemployment by having to take off of work. Moreover, insufficient income often results in ineffective counsel for men from disadvantaged economic backgrounds who may wish to pursue their claims.<sup>206</sup> This problem is compounded by the fact that since “the [lewd conduct] charges are only misdemeanors, defendants are not entitled to all the usual procedural safeguards, such as appointed counsel.”<sup>207</sup>

Even if a trial court acquits a defendant after determining that he was entrapped, the defense still has serious limitations. Since entrapment is a defense of fact, it only applies to the case at hand; the result is an acquittal for an individual defendant.<sup>208</sup> It is unlikely that single entrapment victories will rectify systemic patterns of illegitimate police conduct. Individual acquittals will also not reduce the pressures felt by many men to plead guilty for lewd conduct in order to avoid public exposure.<sup>209</sup> Moreover, courts rarely impose punitive measures against law enforcement after acquitting a defendant who successfully raises the entrapment defense. The entrapment defense does not provide a disincentive to prevent law enforcement officers from using entrapment techniques, and is thus insufficient to eliminate systemic patterns of homophobia in law

---

hoping to keep the incidents from becoming public so they could keep jobs and marriages intact. They wanted as little attention as possible.”).

203. Carman, *supra* note 139, at B05; *see also* John Stossel & Patrick McMenamin, *When Sex Is Not as Private as You Expect*, ABC NEWS, July 18, 2008, available at <http://abcnews.go.com/TheLaw/Story?id=5390158> (reporting that a man arrested during a gay sting operation was told to plead guilty by police officers and do so in order to avoid harsher punishment that would have ensued had he pled innocent and then been found guilty).

204. AMNESTY INT’L, *supra* note 8, at 26, 32.

205. *Id.*

206. AMNESTY INT’L, *supra* note 8, at 28 (“[M]any of those arrested are unable to afford the costs of mounting a defense. This exacerbates the climate of impunity. As a result, individuals may be wrongfully convicted of a criminal offense, carrying potentially significant consequences.”).

207. SERRA, *supra* note 98, at 3.

208. *Id.* at 1; Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 162 (2008) (“As a regulatory system, it [the entrapment defense] depends on an ex post mechanism: the acquittal of defendants who were wrongly entrapped.”).

209. SERRA, *supra* note 98, at 1.



enforcement.<sup>210</sup>

## VI. CONCLUSION

This Article has demonstrated that gay sting operations are currently being designed and executed in ways that violate free speech and equal protection guarantees of the First and Fourteenth Amendments. This Article has also illustrated the inaccessibility and limitations of the entrapment defense for men who are victims of illegitimate gay sting operations. I conclude by offering some reasonable, executable, and non-stigmatizing measures to respond to illicit sex incidents in public locations.

Before providing these recommendations, it is important to recognize that in addition to executing gay sting operations, many localities are taking unreasonable and extreme measures to respond to public sex incidents. For instance, in 2007 Fort Lauderdale Major Jim Naugle proposed to install Robo-toilets in the city to prevent “homosexual activity” in public restrooms.<sup>211</sup> Each Robo-toilet costs \$250,000.<sup>212</sup> The “robotic toilets . . . allow occupants to stay inside for only a short time before the door automatically opens.”<sup>213</sup> When the door opens, the toilet automatically cleans itself by spraying toxic chemicals.<sup>214</sup> These bathrooms have been installed in San Francisco, Seattle, Atlanta, and New York.<sup>215</sup>

Colleges and universities are also taking extreme measures in response to bathroom sex incidents. For instance, after hearing reports of men masturbating and having sex with each other in bathrooms, the University of Pittsburgh decided to install bathroom stalls without doors in the men’s bathroom.<sup>216</sup> Every male who used these stalls was forced to go to the bathroom while others could see him exposed.

One practical recommendation is to post signs in public bathrooms and

---

210. Cf. Colquitt, *supra* note 175, at 1390 (“Chief among the flaws of entrapment is that it provides no effective disincentive to prevent law enforcement from using entrapment techniques.”).

211. *Robo-Toilets Proposed To Stop ‘Gay’ Cruising*, WORLDNETDAILY.COM, July 7, 2007, [http://www.wnd.com/news/article.asp?ARTICLE\\_ID=56562](http://www.wnd.com/news/article.asp?ARTICLE_ID=56562).

212. *Id.* Some “modular units play music and can be accessed for a fee or for free, depending on each city’s policies.” *Id.*

213. *Id.*

214. *Id.*; see also Posting by GottaGoGirl to ThePoopReport, [http://www.poopreport.com/Bmnewswire/seattle\\_public\\_toilets.html](http://www.poopreport.com/Bmnewswire/seattle_public_toilets.html) (Oct. 13, 2006).

215. *Robo-Toilets Proposed To Stop ‘Gay’ Cruising*, *supra* note 211.

216. Mac Booker, *Rationale Behind Doorless Bathroom Stalls Is Grossly Inadequate*, THE PITT NEWS, Mar. 30, 2001, <http://media.www.pittnews.com/media/storage/paper879/news/2001/03/30/Opinions/Rationale.Behind.Doorless.Bathroom.Stalls.Is.Grossly.Inadequate-1784524.shtml>.

locations that inform all bathroom occupants that lewd behavior is prohibited.<sup>217</sup> These signs should be in both Spanish and English. Men could be deterred from having illicit public sex if these signs list the potential fines and criminal sentences for lewd conduct charges. Moreover, these signs could have a deterrent effect if they direct all bathroom occupants to call law enforcement when they notice illicit sexual behavior.

Another practical recommendation is to make bathroom architecture improvements. For instance, some bathroom stalls have glory holes that enable men to engage in sexual relations with other men without revealing their faces. The resources spent on executing gay sting operations would be better spent on refurbishing bathroom stall partitions with non-penetrable steel.

Federal, state, and local governments should also continue to devote resources to law enforcement sensitivity trainings on lesbian, gay, bisexual, and transgender issues. Many law enforcement departments currently collaborate with local LGBT community members and advocacy groups to increase awareness about sexual orientation and gender identity issues.<sup>218</sup> LGBT sensitivity training helps to combat police abuse and homophobic and sexist stereotypes that result in the negative treatment of LGBT employees, victims, witnesses, and perpetrators in law enforcement departments.<sup>219</sup> These trainings are particularly useful given that one factor influencing the illegitimate executions of gay sting operations is homophobic responses to perfectly legal displays of same-sex affection and desire.

Finally, to prevent constitutional rights violations, legislatures should release advisory guidelines that articulate the specific conduct that can and cannot be constitutionally targeted by gay sting operations. Law enforcement departments should also issue, communicate, and distribute similar guidelines to law enforcement officers. For instance, to settle a lawsuit filed by the Gay and Lesbian Advocates and Defenders on behalf of a gay man who was targeted by a gay sting operation, the Massachusetts State Police issued a set of guidelines in March 2001 clarifying that “socializing and expressions of affection” should not be considered sexual conduct.<sup>220</sup> Such guidelines will help to prevent law enforcement officers from infringing the constitutional rights of men targeted by gay stings by

---

217. Hilary White, *ACLU Backs Gay Sex in Public Toilets Under 'Privacy' Provisions*, LIFESITENEWS.COM, Jan. 16, 2008, <http://www.lifesitenews.com/ldn/2008/jan/08011606.html>.

218. See, e.g., Gay and Lesbian Officers League of New England, *Goals and Objectives*, <http://goalne.org/index.php?/final/> (last visited Apr. 1, 2008).

219. *Id.*

220. Andrew Estes, *New Rules Ease Line Drawn on Public Sex*, BOSTON GLOBE, Mar. 2, 2001, at B1.

informing them of the behavior that gay sting operations can constitutionally target.