

## LEWD STINGS: EXTENDING *LAWRENCE V. TEXAS* TO DISCRIMINATORY ENFORCEMENT

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### ABSTRACT

*Ongoing police undercover lewd conduct sting operations directed at LGBTQ people reveal entrenched law enforcement bias against sexual minorities. The lewd stings are largely pretextual, based upon non-existent complaints and non-provable harm. The resulting arrests and convictions often lead to devastating consequences, including lengthy prison terms, life-long sex offender registration, anti-gay violence, and even suicide. Legal challenges to these operations have proven largely futile, however. Such challenges have relied upon existing doctrines, including entrapment and equal protection, that are too limited, or too difficult to prove, in the context of lewd stings. This article posits that the constitutional criminalization principles articulated in *Lawrence v. Texas* provide a more effective basis for challenging lewd stings. In *Lawrence*, the Supreme Court plainly held that majoritarian morality principles do not justify criminal laws. Instead, crimes must be directed at provable harms. Our empirical research on the policies of the Los Angeles Police Department reveals, however, that during lewd stings police target conduct that they believe to be morally offensive rather than objectively harmful. This morality-based exercise of enforcement discretion is unconstitutional under *Lawrence*, which applies with equal force to both criminalization and enforcement decisions.*

### INTRODUCTION

Entrenched, morality-based law enforcement discrimination against sexual minorities persists nationwide. One of the most visible discriminatory practices is police targeting of LGBTQ people when conducting sting operations directed at “vice” crimes such as lewd conduct, indecent exposure, and

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prostitution.<sup>1</sup> Consider one such sting operation, conducted in Palm Springs California, a city known for its progressive attitude towards LGBTQ people.<sup>2</sup> After police arrested a number of gay men during the sting, the Palm Springs Police Chief described the arrestees as “a bunch of filthy mother-fuckers” and told the officers that “you guys should get paid extra for [these arrests].”<sup>3</sup> The language—describing the arrestees as “filthy”—reveals the driving force behind the stings: moral disapproval of same-sex conduct. And the nature and circumstances of the stings show that it is not public sexual behavior that police target; it is the arrestees themselves.<sup>4</sup>

A large percentage of lewd sting arrestees include people of color, immigrants, and others who are without the means to challenge their arrests or who feel pressure to accept a plea to avoid the public humiliation of a trial.<sup>5</sup> The effects upon the arrestees can be devastating, ranging from public and personal humiliation to lengthy prison terms, life-long sex offender registration, suicide,<sup>6</sup> anti-gay violence, and harassment.<sup>7</sup> Despite rapid advances in LGBTQ rights in civil contexts, such as samesex marriage, and in the decriminalization of sodomy and in the enactment of criminal hate crimes statutes, those advances generally have failed to protect against such discriminatory police actions and their substantial consequences.<sup>8</sup>

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1. We refer to the larger community of sexual orientation and gender identity minorities as LGBTQ (lesbian, gay, bisexual, transgender, and queer/questioning). For an overview of discriminatory police practices, see AMNESTY INT’L, UNITED STATES OF AMERICA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. (2005), <https://www.amnesty.org/download/Documents/84000/amr511222005en.pdf>; CHRISTY MALLORY ET AL., THE WILLIAMS INST., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY (2015); SEXUALITY & GENDER LAW CLINIC, COLUMBIA UNIV. SCH. OF LAW, A CASE AGAINST SEX STINGS AND THE DISCLOSURE OF ARRESTEES’ PERSONAL INFORMATION (2009) (discussing alternative ways to address public sex-related activity without unfairly targeting gay men).

2. See Jim Powers, *Palm Springs Ranks as No. 1 Gay Friendly City*, PALM SPRINGS LIFE (May 31, 2013), <https://www.palmspringslife.com/palm-springs-ranks-as-no-1-gay-friendly-city/>; Press Release, Nat’l Center for Lesbian Rights, NCLR in Palm Springs Event Celebrates Progress Made in the Movement for LGBT Equality (Mar. 19, 2014), <http://www.nclrights.org/press-room/press-release/nclr-in-palm-springs-event-celebrates-progress-made-in-the-movement-for-lgbt-equality/>. The current Palm Springs City Council is composed entirely of LGBTQ members. Javier Panzar, *Palm Springs Elects an All-LGBTQ City Council, Showing the Power of Gay Politics*, L.A. TIMES (Nov. 15, 2017, 5:00 AM), <http://www.latimes.com/politics/la-me-palm-springs-lgbt-council-20171115-story.html>.

3. *Palm Springs Police Chief Apologizes for Calling Gays “Filthy Mother F—,”* LGBTQ NATION (Dec. 29, 2010), <http://www.lgbtqnation.com/2010/12/palm-springs-police-chief-apologizes-for-calling-gays-filthy-mother-fl>. The police chief subsequently resigned. *Palm Springs Police Chief Resigns*, ADVOCATE (Jan. 5, 2011, 7:10 PM), <https://www.advocate.com/news/daily-news/2011/01/05/antigay-palm-springs-police-chief-resigns>.

4. See *infra* Section III.

5. AMNESTY INT’L, *supra* note 1, at 39–41.

6. See *id.* at 41.

7. See SEXUALITY & GENDER LAW CLINIC, *supra*, note 1, at 3–4.

8. See *infra* Section I; Jordan Blair Woods, *LGBT Identity and Crime*, 105 CALIF. L. REV. 667, 673 (2017) (“Some scholars and advocates have criticized the mainstream LGBT social movement for neglecting criminal justice issues beyond sodomy criminalization and hate crime victimization.”).

Such discriminatory sting operations are constitutionally invalid under the constitutional limitations on criminalization articulated in *Lawrence v. Texas*.<sup>9</sup> In *Lawrence*, the Supreme Court struck down Texas's sodomy law, holding that criminal laws resting upon majoritarian morality principles are unconstitutional.<sup>10</sup> As explained in Section II(C) below, the decision is grounded primarily in the substantive due process right to privacy, but also has deep Equal Protection Clause underpinnings. Under our approach, these underlying constitutional law principles also apply to law enforcement determinations of when to enforce vice crimes.<sup>11</sup> In this context, the oft-proffered rationales for discriminatory undercover stings—that they are necessary to protect public morality—will fail.<sup>12</sup>

To support the case for *Lawrence*-based challenges to undercover stings, this article shows that these operations are largely morality-based. Our interviews with multiple law enforcement officials at various levels and LAPD civilian supervisors that we conducted from 2012 to 2017 expose the bias determinates that drive lewd stings. These stings are typically directed at LGBTQ people and arise under “morals” statutes,<sup>13</sup> such as lewd conduct, indecent exposure, and prostitution laws. In our interviews, we strove to understand the motivations behind the stings. And we found explicit and coded answers indicating endemic unintentional and intentional discrimination in sting operation arrest and charging decisions.<sup>14</sup>

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9. 539 U.S. 558 (2003); see also J. Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41 (2011).

10. *Lawrence*, 539 U.S. at 577–78.

11. See Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 544–62 (2000) (discussing the discretion that police have given the nature of the law and their duty to enforce it).

12. This article does not address constitutional challenges to the laws themselves. That topic has been extensively examined elsewhere. See, e.g., Nan D. Hunter, *Reflections on Sexual Liberty and Equality: “Through Seneca Falls and Selma and Stonewall,”* 60 UCLA L. REV. DISCOURSE 172 (2013); Dannia Altetimei, *Prostitution and the Right to Privacy: A Comparative Analysis of Current Law in the United States and Canada*, 2013 U. ILL. L. REV. 625 (2013); Eric Berger, *Lawrence's Stealth Constitutionalism and Same-Sex Marriage Litigation*, 21 WM. & MARY BILL RTS. J. 765 (2013); Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016); Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905 (2015) (discussing the constitutionality of criminalizing polygamy). Instead, we focus on the constitutionality of the statutes' enforcement through lewd stings.

13. See AMNESTY INT'L, *supra* note 1, at 30 (“[M]orals regulations’ [refers] to regulations used to prohibit public sexual expression or conduct, including offenses such as lewd conduct and public lewdness and other behavior seen as offending against public morals.”).

14. See also AMNESTY INT'L, *supra* note 1; Tara Parker-Pope, *Gay Teenagers Face Harsher Punishments*, N.Y. TIMES: WELL (Dec. 6, 2010, 5:58 PM), <https://wellblogs.nytimes.com/2010/12/06/gay-teens-face-harsher-punishments/>; MALLORY ET AL., *supra* note 1; Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. OF PUB. HEALTH 234 (2017); *People v. Moroney*, No. 4LG03026, slip op. at 12–15 (Cal. Super. Ct. Apr. 29, 2016) (holding that the court was compelled to grant the defendant's motion to dismiss for discriminatory prosecution given that the Long Beach Police Department (LBPD) targeted homosexual lewd conduct even though there are complaints of both homosexual and heterosexual conduct (which goes against LBPD policy of engaging all complaints), a lack of actual evidence of complaints for the Recreation Park area, the actions of the undercover officers during the operation is only targeted at homosexual men, and how the reports of each arrest involved false boilerplate language of nonexistent complaints).

Simply put, many of the sting operations are homophobia/transphobia in disguise. Because “vice” crimes such as lewd conduct are statutes so broadly and vaguely defined,<sup>15</sup> the police have enormous discretion in deciding whether to arrest and whom to target.<sup>16</sup> This discretion allows explicit and implicit bias to drive enforcement decisions. Essentially, many law enforcement officers and agencies target unpopular groups because those groups engage in activity that some law enforcement officials find to be inherently offensive—immoral. This is an unconstitutional practice under *Lawrence*’s harm principle, which holds that a criminal statute must address tangible harms rather than perceived moral harms

Measured against their effectiveness, the harm lewd stings create reveals their constitutional illegitimacy.<sup>17</sup> Lewd stings are rarely based upon verifiable public concerns. And even when such concerns do exist, law enforcement agencies have recognized that there are more effective ways to deter the behavior, such as conducting regular patrols by uniformed officers in the targeted areas.<sup>18</sup> The continuing prevalence of lewd stings, despite more effective alternatives and the dearth of public complaints, manifests the inherent bias in such operations. In this light, the failure of lewd sting challenges is both tragic and unjustifiable.

Such stings are invalid under *Lawrence*’s substantive due process and equal protection criminalization requirement. The time is ripe for such a challenge, with the recent shifts in public opinion in general, and in many law enforcement agencies in particular, toward LGBTQ rights and discrimination issues.<sup>19</sup>

Section I of this article provides a brief overview of undercover stings directed at sexual minorities. Section II analyzes the *Lawrence* decision’s significance for the enforcement of “morals” laws such as lewd conduct. Section III examines lewd conduct statutes to provide the context for issues arising from lewd stings. Section IV provides a template for *Lawrence*-based constitutional challenges to these discriminatory stings.

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15. See Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 424–25 (2002).

16. See Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1186 (2011); Ekow N. Yankah, *Legal Vices and Civic Virtue: Vice Crimes, Republicanism and the Corruption of Lawfulness*, in ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE AND JUSTICE 203, 220 (Liesbeth Hupperts-Cluysenaer & Nuno Coelho eds., 2013).

17. In *Lawrence*, Justice O’Connor recognized that the harms suffered by those arrested for morals offenses should factor into the constitutional analysis. *Lawrence v. Texas*, 539 U.S. 558, 581–82 (2003) (O’Connor, J., concurring) (emphasizing loss of employment, loss of housing, family disruption, and sex registration as consequences beyond that of conviction).

18. See *infra* Section IV.

19. See Hailey Branson-Potts & James Queally, *The Handsome Undercover Cop Smiles. Is He Entrapping Gay Men or Cleaning Up a Park?*, L.A. TIMES (May 27, 2016, 10:52 a.m.), <http://www.latimes.com/local/lanow/la-me-gay-stings-police-20160527-snap-story.html> (“The [lewd stings] issue has been debated for decades. But in recent years, critics of the stings have gained traction as public attitudes about homosexuality and gay rights have shifted.”).

## I. UNDERCOVER LEWD STINGS

Police undercover sting operations directed at sexual minorities are ubiquitous nationwide.<sup>20</sup> This is true even in the wake of substantial progress in many areas of LGBTQ rights and even in jurisdictions where law enforcement agencies have enacted specific policies prohibiting discrimination against sexual minorities.<sup>21</sup> It is also true even in the wake of *Lawrence*'s transformation of constitutional criminal law underpinnings.<sup>22</sup> This Section provides a summary of recent, high-profile sting operations and of the consequences for those arrested.

### A. Overview of Lewd Stings

To provide the context for constitutional challenges to police stings, this section provides an overview of some notable stings in recent years.<sup>23</sup> Many of these share common characteristics, including law enforcement behavior that raises entrapment concerns.

As detailed below, most stings occur in public places such as restrooms and parks. Many stings also occur in business establishments such as movie theatres and gyms.<sup>24</sup> The stings lead to arrests for various crimes, depending on the jurisdiction. Most arrests occur for such vaguely defined offenses as lewd conduct, indecent exposure, and disorderly conduct.<sup>25</sup>

Police generally justify the stings by citing public complaints and departmental enforcement policies. Some complaints are certainly legitimate. In a disturbing number of cases, however, the evidence of such complaints is sparse or non-existent.<sup>26</sup> And even in jurisdictions that expressly limit lewd stings, police continue to conduct stings in circumstances that violate express departmental policies.<sup>27</sup>

Many stings tread uncomfortably close to entrapment. In one case, for example, police officers wore provocative clothing such as gay pride tshirts and speedos to a public park. There, the officers lured sting targets into bushes along a jogging trail and arrested them when they approached.<sup>28</sup> Such stories are sadly common. For reasons explained more fully below in Section III(D), it is extremely difficult to

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20. See Mark Joseph Stern, *The Stingers Get Stung*, SLATE (May 4, 2016, 4:36 PM), <https://slate.com/news-and-politics/2016/05/long-beach-police-rebuked-for-illegal-anti-gay-stings.html> (“Gay cruising stings still occur across the country, from Delaware and Louisiana to Texas and even New York.”).

21. 1 LAPD MANUAL §§ 270.25, 345, [http://www.lapdonline.org/lapd\\_manual/](http://www.lapdonline.org/lapd_manual/).

22. See Strader, *supra* note 9, at 78.

23. The Appendix provides a more complete overview of these sting operations.

24. See *infra* Appendix.

25. See *infra* Section III.

26. See *infra* Appendix.

27. See *infra* Appendix.

28. Megan Smith, *Activist Questions Memorial Park Arrests of More Than Twenty Men (Update)*, OUTSMART MAG. (Aug. 7, 2013), <http://www.outsmartmagazine.com/2013/08/activist-questions-memorial-park-arrests-of-more-than-twenty-men/>.

prevail on an entrapment defense; these operations therefore largely go unchecked.<sup>29</sup>

Stings continue to occur even when the targeted activity is not criminal but indeed is constitutionally protected. In one case, for example, undercover officers engaged with gay men in a public park and encouraged them to discuss having sex.<sup>30</sup> When officers suggested having sex in private dwellings,<sup>31</sup> and the targets agreed, the officers arrested the targets for “soliciting” private sexual acts that violate the state’s sodomy statute<sup>32</sup>—a statute that, while still on the books, is plainly invalid under *Lawrence*.<sup>33</sup> Approximately a dozen men were arrested, none of whom engaged or offered to engage in public sex or prostitution.<sup>34</sup>

### B. Lewd Stings’ Consequences

These are just a few examples. Lewd conduct sting operations directed at gay and bisexual men continue to occur regularly across the country. Those who are targeted in these operations often are particularly vulnerable to police abuse. The arrestees frequently are closeted, and the fear of exposure leads them to plead guilty to avoid the embarrassment of a public trial.<sup>35</sup> Many are also men of color, who may face special stigmatization within their own communities.<sup>36</sup> These operations thus often proceed unchallenged, either by individual defendants or by community activists. And because most stings go unchallenged, most do not lead to press reports or judicial decisions. The sting operations of which we are aware are the tip of the iceberg.

Similarly, police departments often target transgender and transsexual people when enforcing vice crimes, particularly prostitution laws.<sup>37</sup> Once again, a large proportion of arrestees are people of color, including immigrants and others who lack the economic means or political resources to fight discriminatory enforcement practices.<sup>38</sup>

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29. See *infra* Section III(D).

30. Meredith Bennett-Smith, *Louisiana Police Sting Targets, Arrests Gay Men for Sex Using Unconstitutional Anti-Sodomy Law*, HUFFINGTON POST: QUEER VOICES (Feb. 2, 2016), [https://www.huffingtonpost.com/2013/07/29/louisiana-police-sting-gay-men-anti-sodomy-law\\_n\\_3668116.html](https://www.huffingtonpost.com/2013/07/29/louisiana-police-sting-gay-men-anti-sodomy-law_n_3668116.html)

31. See *id.*

32. See LA. STAT. ANN. § 14:89 (2018) (prohibiting “the unnatural carnal copulation by a human being with another of the same sex or opposite sex”).

33. *Sodomy Laws Still Enforced in East Baton Rouge*, MSNBC: THE MADDOWBLOG (Oct. 7, 2013, 6:18 AM), <http://www.msnbc.com/rachel-maddow-show/sodomy-laws-still-enforced-east-baton>.

34. *Id.*; see also Bennett-Smith, *supra* note 30.

35. See Jordan Blair Woods, *Don’t Tap, Don’t Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. GENDER RACE & JUST. 545, 553 (2009).

36. See Kimberly F. Balsam et al., *Measuring Multiple Minority Stress: The LGBT People of Color Microaggressions Scale*, 17 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 163, 164 (2011).

37. See AMNESTY INT’L, *supra* note 1, at 22 (“[s]ubjective and prejudiced perceptions of transgender women as sex workers often play a significant role in officers’ decisions to stop and arrest transgender women.”).

38. See *id.* at 50–51; see also Woods, *supra* note 35, at 546, 575 (describing the reasons why arrestees often lack the resources to challenge lewd stings).

The human toll from such discriminatory practices has attracted relatively little attention from courts, scholars, and activists. The consequences of such sting operations are severe. There are also reports of suicides among closeted LGBTQ people arrested for vice crimes.<sup>39</sup> Some arrestees lose their jobs, and many suffer profound embarrassment and damage to family and other personal relationships. And convictions for crimes such as lewd conduct and related offenses both produce prison sentences and can require the defendants to register as sex offenders for life in many jurisdictions.<sup>40</sup>

## II. *LAWRENCE*'S HARM PRINCIPLE

Despite the apparent injustices from discriminatory sting operations, legal challenges have been few and generally unavailing even in the wake of *Lawrence*.<sup>41</sup> Over time, however, the *Lawrence* Court's rejection of *Bowers*'s morality-based view of criminalization began to place the case squarely in the line of the Court's most important criminal law decisions.<sup>42</sup> At this point, *Lawrence* has assumed sufficient significance that its underlying principles can and should be extended beyond criminalization issues to also encompass enforcement issues such as undercover lewd conduct stings.<sup>43</sup>

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39. See AMNESTY INT'L, *supra* note 1, at 41 n.174; James Rainey, *Coverage of Undercover Sting, Arrests of Gay Men Draws Protest*, L.A. TIMES: L.A. NOW (Apr. 9, 2012, 7:08 PM), <https://latimesblogs.latimes.com/lanow/2012/04/coverage-of-undercover-sting-arrests-of-gay-men-draws-protest.html>; Branson-Potts & Queally, *supra* note 19.

40. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1085–86 (2011); Stephen R. McAllister, "Neighbors Beware": *The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 104 (1998).

41. See, e.g., 1 KAREN MOULDING & NAT'L LAWYERS GUILD: LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMM., *SEXUAL ORIENTATION AND THE LAW* § 14:107 (2015); RODNEY A. SMOLLA, *FEDERAL CIVIL RIGHTS ACTS* § 1:46 (3d ed. 2016); Jessica A. Gonzalez, *Decriminalizing Sexual Conduct: The Supreme Court Ruling in Lawrence v. Texas*, 35 ST. MARY'S L.J. 685 (2004); Christopher R. Leslie, *Lawrence v. Texas as the Perfect Storm*, 38 U.C. DAVIS L. REV. 509 (2005) (criticizing the desire of moving the *Lawrence* decision from one of due process into one of equal protection); Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237 (2005).

42. SMOLLA, *supra* note 41, § 1:46. For a history of the debate over *Lawrence*'s significance as a substantive criminal law decision, see J. Richard Broughton, *The Criminalization of Consensual Adult Sex After Lawrence*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125, 128–29 (2014).

43. See, e.g., *People v. Moroney*, No. 4LG03026, slip op. at 13 (Cal. Super. Ct. Apr. 29, 2016) (holding that the operation was intentionally targeting homosexual men considering how the undercover officers engaged in conduct designed to engage and entice men interested in those advances); *Brown v. County of San Joaquin*, No. CIV. S04 2008 FCD PAN., 2006 WL 1652407, at \*7–8 (E.D. Cal. June 13, 2006) (finding that the use of undercover decoy operations "is designed to ensnare only those individuals interested in engaging in illegal homosexual acts"); *Hope v. City of Long Beach*, No. CV 04-4249 DT (RZX), 2005 WL 6009954, at \*6 (C.D. Cal. Aug. 15, 2005) (holding the application of the lewd conduct law was a violation of due process by practice because while the law itself was neutral, the police were only targeting homosexuals when there were complaints of heterosexuals also engaging in similar acts of lewd conduct).

### A. Lawrence's Rejection of Majoritarian Morality

Relying on due process and equal protection principles, *Lawrence* clearly rejected *Bowers*'s emphasis on majoritarian morality.<sup>44</sup> The Court in *Bowers* opined that the constitutional issue before it was whether there was "a fundamental right" to engage in same-sex sodomy.<sup>45</sup> The *Bowers* majority and concurring opinions focused upon sodomy laws' purported historical underpinnings<sup>46</sup> and upon principles of Judeo-Christian morality.<sup>47</sup> The Court thus concluded that "majority sentiments about the morality of homosexuality"<sup>48</sup> are an adequate basis for criminalizing private, consensual, noncommercial sexual acts. Morality controlled, and the absence of harm was an inadequate basis upon which to challenge a criminal law.

The *Lawrence* decision turned *Bowers*'s morality-based approach on its head. The Court, relying on the Model Penal Code's rejection of sodomy statutes criminalizing private conduct, stated that such conduct should not be criminalized "absent *injury to a person* or abuse of an institution the law protects."<sup>49</sup> The Court then stated that "[o]ur obligation is to define the liberty of all, not to mandate our *own moral code*."<sup>50</sup> Finally, the Court concluded that "the fact that the governing majority in a State has traditionally viewed a particular practice as *immoral* is not a sufficient reason for upholding a law prohibiting the practice," noting that traditional moral views" did not provide a basis for laws prohibiting inter-racial marriage.<sup>51</sup> Justice O'Connor's concurrence, grounded in equal protection,<sup>52</sup> also found that morality-based criminalization principles are constitutionally invalid:

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44. See Strader, *supra* note 9, at 43; Murray, *supra* note 12, at 603.

45. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

46. *Id.*; see also *Lawrence v. Texas*, 539 U.S. 558, 568, 570 (2003) (holding that the *Bowers* argument of upholding "ancient roots" is invalid because "early American sodomy laws were not directed at homosexuals . . . but instead sought to prohibit nonprocreative sexual activity more generally," and that the laws did not target homosexuals directly until the late twentieth century.); William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1046–47 (2004) (citing Brief for the Cato Institute as Amicus Curiae in Support of Petitioners at 9–17, 22–30, *Lawrence* (No. 02-102), 2003 WL 152342 (U.S. 2003); Brief of Amici Curiae Professors of History in Support of Petitioners at 3–19, *id.*, 2003 WL 152350 (U.S. 2003)) (reviewing how the historical record cited by the *Lawrence* court clearly disproves the "ancient roots" mentality of the *Bowers* court because the record clearly shows how the laws were not applied just to homosexuals until the late nineteenth century and was meant as a general rule against all nonprocreative sexual activity).

47. *Bowers*, 478 U.S. at 196–97 (Burger, C.J., concurring).

48. *Id.* at 196 (majority opinion).

49. *Lawrence*, 539 U.S. at 567 (emphasis added).

50. *Id.* at 571 (emphasis added); Michael P. Allen, *The Underappreciated First Amendment Importance of Lawrence v. Texas*, 65 WASH. & LEE L. REV. 1045, 1065 (2008) (*Lawrence* "requires that [legislative] bodies think about something other than their own members' (or the majority of their constituents') views of what is 'right' or 'wrong.' Instead, the legislature will have to develop a rationale for acting that does not focus (at least dominantly) on such moral concerns.").

51. *Lawrence*, 539 U.S. at 577–78 (emphasis added) (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

52. Strader, *supra* note 9, at 52–53.



O'Connor framed the issue as whether "moral disapproval [was] a legitimate state interest."<sup>53</sup>

In *Lawrence*, a clear majority of the Court explicitly or implicitly acknowledged that criminalization principles must focus on tangible, provable harm. Nonetheless, as we have examined in detail elsewhere, for years lower courts largely rejected *Lawrence*'s criminal law implications.<sup>54</sup> This occurred largely because those courts continued to rely upon *Bowers*'s now-discredited morality-based approach.<sup>55</sup>

One reason why it has taken lower courts some time to come to terms with *Lawrence* may be the language in that decision that some have interpreted as a limitation on the holding.<sup>56</sup> The majority wrote that "[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution."<sup>57</sup> From this, for example, one might conclude that *Lawrence* has no application to any person under the age of eighteen.<sup>58</sup> Other courts have interpreted "public conduct" to exclude all activities that do not occur within private spaces such as homes,<sup>59</sup> and the reference to prostitution to conclude that *Lawrence* does not apply to any commercial activities.<sup>60</sup> So at

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53. *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) ("[W]e have never held that moral disapproval [alone] is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."). O'Connor made the point yet again later in the opinion: the state's "invocation of moral disapproval as a legitimate state interest proves nothing more than [the state's] desire to criminalize homosexual sodomy." *Id.* at 583.

54. Strader, *supra* note 9, *passim*.

55. *See, e.g.*, *Reliable Consultants Inc. v. Earle*, 538 F.3d 355, 362 (5th Cir. 2008) (Garza, J., dissenting from denial of rehearing *en banc*) (stating that legislative judgments "may and should express the moral judgment of the majority") (emphasis added); *Williams v. Morgan*, 478 F.3d 1316, 1318 (11th Cir. 2007) ("Because we find that public morality remains a legitimate rational basis for the challenged legislation even after *Lawrence*, we affirm.").

56. *See* Anna K. Christensen, *Equality with Exceptions? Recovering Lawrence's Central Holding*, 102 CAL. L. REV. 1337 (2014).

57. *Lawrence*, 539 U.S. at 578.

58. *See, e.g.*, *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008) ("It is undeniable that the government has a compelling interest in protecting children from improper sexual expression."); *People v. Downin*, 828 N.E.2d 341, 348 (Ill. App. Ct. 2005) (holding that the due process rights of *Lawrence* do not apply because the decision was "carefully crafted . . . to apply only to the private consensual activity of adults"); *Crooks v. State*, No. 93,759, 2006 WL 90104, at \*10 (Kan. Ct. App. Jan. 13, 2006) (holding that since *Lawrence* did not extend its due process protection to minors, the Defendant's due process argument fails to hold up); *Fleming v. State*, 455 S.W.3d 577, 583-84 (Tex. Crim. App. 2014) (Alcala, J., concurring) (arguing that the majority's opinion against the Defendant follows Supreme Court precedent because, as is stated in *Lawrence*, due process protection does not cover acts with minors); *McDonald v. Commonwealth*, 645 S.E.2d 918, 922 (Va. 2007) (holding that the protections of *Lawrence* do not apply for minors by looking to the limiting language of *Lawrence* to make the point that reversing *Bowers* when "no legitimate state interest which can justify its intrusion into the personal and private life of the individual" did not include an issue involving minors).

59. *See* Strader, *supra* note 9, at 58.

60. *See Williams*, 478 F.3d at 1322 ("Unlike *Lawrence*, the activity regulated here is neither private nor non-commercial. . . . 'There is nothing "private" or "consensual" about the advertising and sale of a dildo.'") (quoting *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1237 n.8 (11th Cir. 2007)); *People v. Graves*, 368 P.3d 317, 327

least one court has expanded on the limiting language to narrow the *Lawrence* decision even further.<sup>61</sup>

This language from *Lawrence* cannot rationally be read to limit the decision in such a drastic way. The decision's constitutional law underpinnings in substantive due process and equal protection contain no such limitations. Nor is *Lawrence*'s underlying policy rationale requiring some proof of harm to justify criminal laws limited to a narrow category of claimants.<sup>62</sup> In essence, then, the quoted "limiting" language from *Lawrence* was simply a way for the majority to state that the case was an easy one and did not involve the issues that the Court essentially said were not before it.<sup>63</sup>

### B. *Lawrence's Substantive Due Process*

The *Lawrence* majority struck down the Texas sodomy statute principally by relying upon the substantive due process right-to-privacy. The Court stated that the Due Process Clause encompasses an individual liberty interest resting on "an autonomy of self," which according to the Court includes "certain intimate conduct."<sup>64</sup> Lower courts have struggled to define the nature and scope of *Lawrence*'s liberty interest.<sup>65</sup> Despite this struggle, the decision has come to be a bedrock privacy case.

Before describing *Lawrence*'s current significance, it is important to acknowledge the decision's weaknesses. First, as commentators have noted, the Court in *Lawrence* never clearly articulated the nature of the interest at stake.<sup>66</sup> The Court never stated whether a fundamental right was involved that would trigger strict scrutiny.<sup>67</sup> Lower courts have generally found that a rational basis test

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(Colo. 2016) (holding that the Defendant's due process rights are not violated since the lewd conduct statute only covers acts done in public, and *Lawrence* only protects acts conducted in private); *State v. Romano*, 155 P.3d 1102, 1110 (Haw. 2007) (holding that the Defendant's and dissent's argument that *Lawrence* confirmed that individual decisions of intimate physical relationships are a form of liberty protected by the Due Process Clause are invalid because *Lawrence* specifically excluded prostitution); Strader, *supra* note 9, at 58. Some commentators have also read the "limiting" language as a bar to an expansive interpretation of *Lawrence*. See, e.g., Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas*, 54 DEPAUL L. REV. 671, 692–97 (2005).

61. See *People v. Groux*, No. F059366, 2011 WL 2547022, at \* 11 (Cal. Ct. App. June 28, 2011) (holding that the defendant's due process rights were not violated by the statute because "nothing in *Lawrence* [suggests] that prisoners have the right to sexual privacy").

62. In fact, after *Lawrence* was decided, the Court reversed and remanded a case involving a challenge to the sentence imposed on a defendant who had same-sex relations with a minor, demonstrating that the holding is not limited to activities involving adults. *State v. Limon*, 122 P.3d 22, 24 (Kan. 2005).

63. Notably, the Fourth Circuit in *MacDonald v. Moose* applied *Lawrence* when invalidating a conviction involving sexual activities with a minor. 710 F.3d 154, 163 (4th Cir. 2013).

64. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

65. See, e.g., *Reliable Consultants, Inc. v. Earle*, 538 F.3d 355, 359–60 (5th Cir. 2008); *Williams*, 478 F.3d at 1323 (holding that *Lawrence* did not find a fundamental right and that the Court applied a rational basis test to the Texas sodomy law).

66. See, e.g., Strader, *supra* note 9, at 55 n.84.

67. *Id.* at 56.

applies,<sup>68</sup> though what form of rational basis we will examine in more detail in the next section. The *Lawrence* decision's doctrinal murkiness has undermined, to some degree, the decision's precedential impact.<sup>69</sup>

Still, court federal and state courts have begun to apply *Lawrence*'s substantive due process holding in a variety of contexts. These decisions are examined more fully in Section IV below, in connection with lewd conduct sting operations.

### C. *Lawrence's Equal Protection*

Although the *Lawrence* majority rested its holding on substantive due process principles, much of the analysis appears grounded in the Equal Protection Clause; as Cass Sunstein famously observed, "*Lawrence's* words sound in due process, but much of its music involves equal protection."<sup>70</sup> Simply put, the *Lawrence* decision not only expanded the substantive due process right to privacy but also reinforced the Court's evolving approach to rational basis review. The Court essentially held that the asserted justification for the statute must be truly rational, not just rational in name only—i.e., the word "rational" has meaning and requires close analysis.

Much scholarship, including our previous work,<sup>71</sup> has focused on *Lawrence's* equal protection underpinnings.<sup>72</sup> In this article, we focus on the rational basis prong of equal protection analysis because this prong dovetails with *Lawrence's* harm analysis. In this context, at the very least, a "rational basis" for a criminal statute requires some searching analysis. Divining the scope of this analysis,

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68. See, e.g., *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir.) (concluding that *Lawrence* did not apply strict scrutiny), *cert. denied*, 546 U.S. 988 (2005); *State v. Limon*, 122 P.3d 22, 30 (Kan. 2005) ("Typically, a search for a legitimate interest signifies a rational basis analysis.").

69. As an example, consider the federal circuit courts' sex toy split. See *Williams*, 478 F.3d at 1318. But see *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008). In *Williams*, Eleventh Circuit rejected *Lawrence's* doctrinal underpinning. The court framed the issue underlying the challenge to a law banning the sale of sexual devices as "whether public morality remains a sufficient rational basis for the challenged statute after the Supreme Court's decision in *Lawrence v. Texas*." *Williams*, 478 F.3d at 1318. On the other hand, in *Earle*, the Fifth Circuit rejected the state's alleged state interests in the statute, which were "'morality based' [interests] . . . includ[ing] 'discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex.'" *Earle*, 517 F.3d at 745. "[I]nterests in 'public morality' cannot constitutionally sustain the statute after *Lawrence*." *Id.* The court continued, "To uphold the statute would be to ignore the holding in *Lawrence* and allow the government to burden consensual private intimate conduct simply by deeming it *morally offensive*." *Id.* (emphasis added). See also Strader, *supra* note 9, at 55–56 (discussing how a large amount of commentary came after the decision to discuss (1) whether the interest at stake was one of privacy or liberty, (2) whether to treat *Lawrence* as a case of due process or equal protection, and (3) whether the right that the court discussed was a "fundamental" right for purposes of substantive due process). For an overview, see Manuel Possolo, *Morals Legislation After Lawrence: Can States Criminalize the Sale of Sexual Devices?*, 65 STAN. L. REV. 565 (2013).

70. Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 30 (2003); see also Possolo, *supra* note 69, at 580 ("[T]he Court was unabashed in concluding that the two types of inquiry (equal protection and due process) are in fact largely connected.").

71. See Strader, *supra* note 9.

72. See Adil Ahmad Haque, *Lawrence v. Texas and the Limits of Criminal Law*, 42 HARV. C.R.-C.L. L. REV. 1, 43 (2007) (arguing that *Lawrence* can be read to hold "only that the enforcement of popular morality is not a legitimate state interest in the important but limited context of criminal legislation").

however, is made more difficult by *Lawrence*'s lack of constitutional clarity. Under substantive due process case law, a statute that infringes upon a "fundamental" right must meet strict scrutiny. Under this approach, the challenged law must be narrowly tailored to meet a compelling state interest.<sup>73</sup> In all other cases—i.e., those not involving fundamental rights—the statute must have a rational basis. This test is generally much easier to meet than the strict scrutiny test.

The *Lawrence* majority, however, never defined the nature of the right as fundamental and never used the terms "strict scrutiny" or "rational basis." The *Lawrence* Court did state that "the Texas statute furthers no 'legitimate state interest,'"<sup>74</sup> a test that some courts have interpreted as signaling "rational basis" review.<sup>75</sup>

Assuming that *Lawrence* did apply a rational basis test,<sup>76</sup> the decision can be read in the context of a line of cases that have required a more demanding review than simply requiring a showing as some basis or any basis.<sup>77</sup> The Court very clearly held that simply asserting a "basis"—without supporting analysis—will not suffice.<sup>78</sup> This comports with the Court's earlier decision in *Romer v. Evans*.<sup>79</sup> That case presented a challenge to a Colorado constitutional amendment ("Amendment 2") that prohibited governmental entities in the state from adopting measures that barred discrimination against sexual minorities.<sup>80</sup> A lawsuit was filed against the amendment's constitutionality by "homosexual persons, some of them government employees . . . three municipalities whose ordinances [were invalidated by 'Amendment 2'], and certain other governmental entities which [protected] homosexuals from discrimination."<sup>81</sup> The Court struck down the amendment, finding that it violated the Equal Protection Clause by being both "too narrow and too broad," since "[i]t identifies persons by a single trait and then denies them protection across the board."<sup>82</sup> Although the Court did not apply strict scrutiny, it did find that the

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73. Under substantive due process, strict scrutiny is applied to laws that burden fundamental rights, and the law must be necessary to further a compelling government interest; under equal protection, strict scrutiny is applied to laws that affect a suspect class (i.e., race, national origin). See *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 545 (1977) (White, J., dissenting).

74. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (internal quotation marks added).

75. See *Moore*, 431 U.S. at 498; *Williams*, 478 F.3d at 1321.

76. Some have asserted that *Lawrence* did indeed recognize a fundamental right. See Dale Carpenter, *Is Lawrence Libertarian?*, 88 MINN. L. REV. 1140, 1155 (2004).

77. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 433, 446 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973).

78. See Michael K. Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature after Lawrence v. Texas*, 43 WAKE FOREST L. REV. 155, 193 (2008) (arguing that rational basis analysis can no longer rely upon the "not-insane-therefore-o.k." view).

79. *Romer*, 517 U.S. at 625–26; see also Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357 (1999) (explaining that the Court invalidated the Colorado rule on the basis of rationality review, rather than exploring questions about the appropriate level of scrutiny).

80. *Romer*, 517 U.S. at 624.

81. *Id.* at 625.

82. *Id.* at 633.

amendment did not meet the rational basis test, which requires that the challenged law must bear a rational relationship to a legitimate governmental purpose.

Under *Lawrence*, the rational basis test, particularly in the criminal law context, has real meaning.<sup>83</sup> Whatever we term the newly-evolved version of rational basis—“meaningful” rational basis, “rational basis with bite,”<sup>84</sup> and so on—the substance of the concept is clear.<sup>85</sup> Rational basis analysis requires courts to engage in meaningful, substantive review; and, in the context of criminal laws, the moral views of the majority absent proof of actual harm will never suffice. Unsupported “public health” arguments,<sup>86</sup> assertions about the psychological effects of different types of sexual activities,<sup>87</sup> and other amorphous but unsubstantiated claims will simply not suffice in the post-*Lawrence* world. Meaningless tests such as any “conceivable legitimate purpose”<sup>88</sup> are no longer valid, especially in the criminal law context.<sup>89</sup>

Some lower courts have correctly understood *Lawrence*’s significance. For example, the Kansas Supreme Court in *State v. Limon* overturned a law that punished sexual activities between people of the same sex more harshly than activities between people of the opposite sex.<sup>90</sup> The court asserted that the statutory scheme must “bear a rational relationship to an independent and legitimate legislative end” and that safeguarding “the traditional sexual mores of society” is no longer a rational basis, post-*Lawrence*.<sup>91</sup> Significantly for present purposes, the court in *Limon* read *Lawrence* as not limited to criminalization issues but also to sentencing. Likewise, nothing in *Lawrence*’s holding or reasoning would limit the decision’s application to criminal enforcement issues.

The *Lawrence* decision fundamentally shifted the ground beneath constitutional criminalization issues, as a number of courts have recognized. No longer will assertions of majoritarian morality to support the enactment or enforcement of a criminal law suffice. Instead, the government must show at least the possibility of

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83. See Possolo, *supra* note 69, at 589 (arguing that *Lawrence* requires “a more searching level of constitutional scrutiny than traditional rational basis review would otherwise afford.”).

84. See Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–21 (1972).

85. Strader, *supra* note 9, at 72–74. It is likely that the rationales that Texas used to support the statute would be adequate under traditional, limited rational basis review. See WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA: 1861–2003 344 (2008).

86. See *Reliable Consultants Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008); Brief for Texas Legislators, Representative Warren Chisum, et al. as Amici Curiae, Supporting Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470181, at \*2, \*15–20 [hereinafter Brief of Amici Curiae].

87. Brief of Amici Curiae, *supra* note 86, at \*17.

88. See, e.g., *Earle*, 517 F.3d at 746.

89. See ESKRIDGE, *supra* note 85, at 344 (arguing that under *Lawrence* the state has the burden to prove the rational basis of laws, a burden that is especially meaningful in the context of criminal laws that burden personal relationships).

90. *State v. Limon*, 122 P.3d 22, 24 (Kan. 2005).

91. *Id.* at 30, 33; Strader, *supra* note 9, at 85–93.

concrete, provable harm. As the next Section shows, lewd stings in California rarely if ever meet this requirement.<sup>92</sup>

### III. LEWD STINGS AS DISCRIMINATORY ENFORCEMENT

Legal challenges to discriminatory sting operations, principally relying on traditional equal protection principles, have largely proven unavailing because the claimants are unable to prove the discriminatory intent required by traditional equal protection doctrine;<sup>93</sup> disproportionate impact alone is insufficient.<sup>94</sup> Other possible avenues for challenging such arrests, including the entrapment defense, are notoriously difficult to prove.<sup>95</sup> Lewd stings occur regularly,<sup>96</sup> even in jurisdictions with large communities of sexual minorities and even where departments, such as the LAPD, have undertaken enormous strides to alleviate discrimination against sexual minorities.<sup>97</sup> This Section examines police lewd conduct sting operations by focusing on the LAPD.

#### A. Defining Lewd Conduct

Lewd conduct statutes are notoriously broad and vague. California's lewd conduct statute, set forth in California Penal Code § 647 (disorderly conduct), is representative. The statute makes it illegal to engage in "lewd or dissolute conduct in any public place, or solicit someone else to do so."<sup>98</sup> Lewd conduct is defined as touching one's private parts (or another's private parts) for the purpose of sexual gratification, or to annoy or offend someone else.<sup>99</sup> In order to prosecute someone for violating the lewd conduct law, the government must prove five elements:

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92. We focus on California law and lewd stings in California because the LAPD has an extremely progressive anti-bias policy, and yet discriminatory enforcement is pervasive; our research indicates, however, that similar stings and enforcement choices are made nation-wide.

93. *People v. Aldequa*, No. APP1100063, slip op. at 15 (Cal. App. Dep't Super. Ct. Jan. 3, 2013).

94. See Christopher J. Schmidt, *Analyzing the Text of the Equal Protection Clause: Why the Definition of "Equal" Requires A Disproportionate Impact Analysis When Law Unequally Affect Racial Minorities*, 12 CORNELL J. L. & PUB. POL'Y 85 (2002).

95. Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses*, in *Federal Court*, 27 WAKE FOREST L. REV. 829 (1992) (describing the historic and current state of entrapment law's substantive and procedural components); Woods, *supra* note 35, at 546, 575.

96. See *infra* Appendix.

97. See LAPD MANUAL, *supra* note 21, §§ 270.25, 345 (indicating that sections of the LAPD Manual have been specifically written to reduce the number of discriminatory instances against sexual minorities by officers).

98. CAL. PEN. CODE § 647 (2018). The statute reads, in relevant part:

[E]xcept as provided in paragraph (5) of subdivision (b) and subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(a) An individual who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view. . . .

(d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act. . . .

*Id.*

99. See *Pryor v. Mun. Ct.*, 599 P.2d 636, 639 (Cal. 1979).

1. The defendant willfully engaged in the touching of defendant's own or another person's genitals, buttocks, or a female breast;
2. With the intent sexually to arouse or gratify the defendant or another person, or to annoy or offend another person;
3. In a public place or a place open to the public or to public view;
4. Someone else who might have been offended was present; *and*
5. Defendant knew or reasonably should have known that another person who might have been offended was present.<sup>100</sup>

It is not illegal under this statute, then, to engage in sexual activity in public. Such conduct only becomes illegal when a person knows or reasonably should know of the presence of someone who is likely to be offended. As the California Supreme Court explained:

[Penal Code 647a] serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct. . . . [E]ven if conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, the state has little interest in prohibiting that conduct if there are no persons present who may be offended.<sup>101</sup>

Enforcement of lewd conduct laws, resting entirely on the policies and preferences of any local police department, seems to have evolved into selective enforcement of what is offensive *to the police* rather than to a potential onlooker.<sup>102</sup> This is neither the intent of the law nor a constitutionally defensible means of choosing against whom and how to enforce the law. Further, it is no secret that “vice” crimes are so broadly defined that the police have enormous discretion in deciding whether to arrest and whom to target.<sup>103</sup> This means that lewd conduct and other vice statute remain susceptible to morality-based enforcement decisions, as the next section shows.

### *B. Bias Determinants in Lewd Stings*

Selective police enforcement of lewd conduct laws against men engaged in sex acts with other men but not against opposite-sex partners for similar behavior necessarily raises equal protection concerns. Indeed, challenges to lewd conduct prosecutions have largely rested on equal protection grounds. In these cases, the challengers argue that police are selectively targeting same-sex sexual activity for arrests, while ignoring similar violations by opposite-sex couples.<sup>104</sup>

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100. *See id.*

101. *Id.* at 646–47.

102. 5 CAL. CRIM. PRACTICE: MOTIONS, JURY INSTRUCTIONS & SENTENCING § 64:17 (4th ed. 2018).

103. *People v. Aldequa*, No. APP1100063, slip op. at 15 (Cal. App. Dep't Super. Ct. Jan. 3, 2013).

104. Notice of Motion and Motion to Dismiss for Discriminatory Prosecution at 4–6, *People v. Aldequa*, No. INM199539, (Cal. App. Dep't Super. Ct. Nov. 30, 2010); *Brown v. Cty. of San Joaquin*, No. CIV. S-04 2008 FCD PAN., WL 1652407, at \*3 (E.D. Cal. June 13, 2006).

The California constitution, unlike the federal constitution, makes sexual orientation a protected class.<sup>105</sup> State action that discriminates against someone based on his or her sexual orientation, then, triggers strict scrutiny under California law but not under federal law or the vast majority of state constitutions.<sup>106</sup> In this sense, the difficulty that challengers have to selective stings in California highlights the even greater difficulties that challengers have in other jurisdictions.

In order to survive strict scrutiny under California law, the government must have a compelling interest that justifies differential treatment on the basis of sexual orientation, and that differential treatment must be necessary to advance that interest.<sup>107</sup> This principle applies to facially discriminatory laws—those that discriminate against a protected class in the law itself,<sup>108</sup> such as a law prohibiting African Americans from purchasing property. The principle also applies to the unequal enforcement of facially neutral laws. This category includes lewd conduct laws, which are facially neutral because they do not discriminate between classes of people; rather, it is their enforcement that is discriminatory.<sup>109</sup>

To prove an equal protection violation based on unequal enforcement in California, a challenger must first establish that there has been a discriminatory impact.<sup>110</sup> In the case of lewd stings, the challenger must show that the sting operations are being enforced against gay men and not against heterosexual men or women. Second, the challenger must show that the government has a discriminatory intent when enforcing the statute.

In a major lewd sting case, *Baluyut v. Superior Court*,<sup>111</sup> the California Supreme Court declined to create an additional barrier when challenging allegedly discriminatory stings. The court held that it was not necessary, when challenging such stings, to prove that the police had the specific intent to punish defendants for their membership in a particular class. There must be discrimination, and that discrimination must be intentional and unjustified, but the intent need not be to punish the defendant for membership the class.<sup>112</sup>

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105. *Civil Rights Laws*, STATE OF CAL. DEP'T OF JUSTICE, <https://oag.ca.gov/civil/lawleg> (last visited Feb. 7, 2019).

106. *Strauss v. Horton*, 207 P.3d 48, 78 (Cal. 2009) (“[S]exual orientation constitutes a suspect classification and that statutes according differential treatment on the basis of sexual orientation are constitutionally permissible only if they satisfy the strict scrutiny standard of review”).

107. *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008).

108. *See, e.g., id.*

109. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding that even if the law allowing for the issuing of laundry licenses was itself facially neutral, officials only approving Caucasians and rejecting Chinese applicants in practice was a violation of due process); *Hope v. City of Long Beach*, No. CV 04-4249 DT (RZx), WL 6009954, at \*6-7 (C.D. Cal. Aug. 15, 2005).

110. As noted above, disproportionate impact will not suffice to support an equal protection claim under federal law, but California and some other states do allow such claims based on disproportionate impact. *See Schmidt, supra* note 94, at 114.

111. 911 P.2d 1 (Cal. 1996).

112. *Id.* at 5.



Thus, under California law, the challenger must prove: (1) that he has been deliberately singled out for prosecution based on some invidious criterion; and (2) that the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities. The court defined “invidious” as “unrelated to legitimate law enforcement objectives.”<sup>113</sup> The more relaxed *Baluyut* standard should, theoretically, make proving an equal protection violation easier for a plaintiff under California law than under the federal constitution or under the constitutions of the vast majority of states. And yet, even in California, and despite some notable exceptions, these challenges have routinely failed.

In the Palm Springs case, for instance, fourteen of the defendants asserted equal protection challenges to their convictions. They cited numerous examples of when the police ignored complaints of opposite-sex sexual conduct in public. At the same time, the police launched an expensive four-day resource-draining operation targeting only gay men in a gay neighborhood known as Warm Sands. The operation included night vision technology and employed fifteen officers (a substantial portion of the city’s police force), including the chief of police.<sup>114</sup>

The evidence of discriminatory intent seemed overwhelming. Although one officer admitted he had seen opposite-sex couples engaged in lewd conduct so many times that he “wouldn’t be able to tell you a limit to it,” not one such couple was ever arrested in the two years leading up to the Warm Sands operation.<sup>115</sup> Another member of the police force stated that in his twenty-six years as a police officer, he had never heard of a single arrest of an opposite-sex couple for lewd conduct.<sup>116</sup>

And yet, despite overwhelming evidence of discriminatory enforcement, the trial judge upheld the convictions of the fourteen men arrested in the sting.<sup>117</sup> The judge stated that he believed the police officers’ testimony that they were not acting to intentionally target gay men.<sup>118</sup> This case vividly illustrates the difficulty in asserting equal protection challenges to stings. If the trier of fact credits police testimony in such cases, then the challenger will have failed to prove discriminatory intent.

The Long Beach case discussed above provides an important exception to the overall difficulty in challenging lewd stings. In that case, the judge dismissed the charges against the defendant, citing discriminatory prosecution and unconstitutional practices.<sup>119</sup> Remarkably, this outcome is the exception, not the norm. Equal protection challenges have largely failed. The elements of the selective

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113. *Id.*

114. Brief for Lambda Legal Defense and Education Fund as Amici Curiae Supporting Defendant-Appellant at 17, *People v. Aldequa*, No. APP1100063 slip op. at 2 (Cal. App. Dep’t Super. Ct. 2013) (per curiam).

115. *Id.*

116. *Id.* at 18.

117. Eric Sandoval, *Judge Refuses to Dismiss Sex Sting Charges in Palm Springs*, KESQ NEWS (Aug. 25, 2016, 8:11 PM), <http://www.kesq.com/news/judge-refuses-to-dismiss-warm-sands-sex-sting-charges-in-palm-springs/59388487>.

118. *Id.*

119. See Stern, *supra* note 20.

enforcement doctrine are difficult to establish because they rely on proof of invidious targeting, and courts often defer to police officers' judgments and testimony regarding the types of programs that are necessary to prevent crime.<sup>120</sup>

Even if a person convicted of violating § 647a in an impermissible lewd sting operation could successfully challenge his conviction on equal protection grounds, such a process is prohibitively expensive for most. In addition, often worse than the economic risk is the potential social embarrassment of being arrested for lewd conduct. This stigma influences many gay and bisexual arrestees, particularly those who are closeted, to plead guilty to prevent their arrests from becoming public.<sup>121</sup>

### C. Harm Determinants in Lewd Stings

As we have seen, police discrimination is intrinsic to lewd stings. Even though systemic bias generally drives these stings, such bias rarely gives rise to successful equal protection challenges. Under *Lawrence*, however, the focus shifts from bias to proof of harm. This section examines how police officers view the "harm," if any, from public sexual activities.

In our qualitative research, then, we sought to understand what motivates law enforcement officials to engage in vice sting operations in the first instance. As described more fully below, these sting operations are often driven by feelings of "disgust" at gay sex, even when that sex occurs in remote parts of public parks when there are no witnesses other than undercover vice officers who are prowling through the bushes. The officers express similar feelings with respect to the transgender prostitutes whom they often target. Implicit and explicit homophobia and transphobia are rampant, we believe, and need to be revealed to the broader public and scholarly community.

We asked a number of questions designed to flesh out the police officers' motivations when initiating and conducting lewd stings. For example, do these actors accept the widely publicized but now largely discredited "broken windows" theory that "quality of life" crimes can lead to more serious offenses?<sup>122</sup> Or do they believe that those who commit these offenses are causing tangible harm? Do they

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120. Woods, *supra* note 35, at 565 n.136 (citing 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)); see *Coldwell v. County of Fresno*, No. CV-F-07-1131 LJO SMS, 2009 WL 179686 at \*11 (E.D. Cal. Jan. 26, 2009) (holding defendants "provided evidence that no male/female lewd conduct occurred in the park during the Operation," justifying the arrests of only gay men despite proof of complaints of opposite-sex couples having sex in the park).

121. AMNESTY INT'L, *supra* note 1, at 40-41.

122. See Giovanna Shay & J. Kelly Strader, *Queer (In)Justice: Mapping New Gay (Scholarly) Agendas*, 102 J. CRIM. L. & CRIMINOLOGY 171, 180 (2013) (reviewing JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011)). "Broken windows" describes a "quality of life" philosophy of policing that in practice leads to the abuse of minorities. See AMNESTY INT'L, *supra* note 1, at 50 ("Quality of life" regulations such as loitering, disorderly conduct and noise violations are frequently vague, thereby affording individual police officers considerable discretion when enforcing such regulations. Such statutes are prone to abuse by individual officers who may be motivated by their own prejudice or acting on complaints from members of the public motivated by homophobia, transphobia and racism.").

believe that this activity is simply immoral? Finally, how do street level officers and law enforcement leaders reconcile these stings with policies and procedures in some departments explicitly barring discriminatory enforcement?

To date, we have focused on law enforcement in the city of Los Angeles. We have interviewed various participants in the law enforcement process, including high-level civilian supervisors, vice department commanders, and street level vice officers. Many of the interviews have yielded telling results. For example, when asked about the harm from sexual activities in remote areas of public parks, one vice officer complained about finding dirty tissues and used condoms: “I don’t want that in my park. It’s disgusting.”<sup>123</sup> We have uncovered similar sentiments in press reports from around the country.<sup>124</sup>

Lewd conduct prosecutions have largely been the result of sting operations conducted by police departments, wherein plainclothes “decoy” officers cruise areas known for public sex, posing as gay men and soliciting sex before arresting those who are willing to comply. In other cases, police simply show up at such a place, surveil it, and arrest anyone they can find who is engaging in public sexual activity.<sup>125</sup>

As a threshold issue, in both types of operations, the targeted man has no reason to believe a third party who would be offended is present. In the first case, the officer is the only other person present, and has made the first advance. In the second, the targets have chosen a discreet location for the very purpose of concealing their activities from view. Therefore, no actual violation of § 647a has even occurred, and yet arrests are routinely made on such facts.<sup>126</sup> Even more troubling is that the vast majority of people arrested pursuant to such operations are gay and bisexual men, or heterosexual-identified men seeking sex with men.

As Jordan Blair Woods points out, most sting operations are formed in response to public complaints—which themselves are often explicitly homophobic in that they may not even relate to public sexual activity, but rather to the general presence of openly gay men congregating in public spaces.<sup>127</sup> The police, in turn, are under

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123. Interview by J. Kelly Strader and Molly Selvin with Sergeant, LAPD Division Vice Unit, in Los Angeles, Cal. To maintain the anonymity of our interview subjects, we have identified them by title rather than by name. We have also omitted the dates of the interviews because providing the dates would effectively identify many of our subjects. All interview notes are on file with the authors.

124. See *infra* Appendix.

125. See *Brown v. County of San Joaquin*, No. CIV. S-04 2008 FCD PAN, 2006 WL 1652407, at \*2 (E.D. Cal. June 13, 2006) (describing arrest in which an officer in plain clothes walked behind the plaintiff in a public restroom, observed the plaintiff at a urinal, and arrested him shortly with the belief that the plaintiff was masturbating when in fact he was trying to urinate but the officer’s actions made him bladder-shy); *Hope v. City of Long Beach*, No. CV 04-4249 DT (RZx), 2005 WL 6009954, at \*3 (C.D. Cal. Aug. 15, 2005) (describing arrest an officer observed one of the plaintiffs through a bathroom stall and arrested him under the belief he was masturbating, when in fact the plaintiff was trying to urinate but was bladder-shy due to the officer’s conduct).

126. *Brown*, 2006 WL 1652407, at \*4–5 (determining there was no way to indicate that the plaintiff knew the officer would take offense, considering how the officer kept pacing behind him and trying to see his groin area); see also *Sodomy Laws Still Enforced in East Baton Rouge*, *supra* note 33.

127. Woods, *supra* note 35, at 567.

pressure to respond to these complaints.<sup>128</sup> Officers have defended the use of sting operations by stating 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>129</sup>

There is substantial reason to believe, however, that the alleged complaints are either non-existent or are used as a pretext for discriminatory enforcement. When pressed to produce these complaints under the Freedom of Information Act, many police departments have refused or cannot produce them.<sup>130</sup> For instance, a man in Louisiana was arrested for propositioning an undercover officer in a park, proposing sex later, in the privacy of his home.<sup>131</sup> The case was not pursued because no lewd or otherwise illegal act had been committed.<sup>132</sup>

Responding to public outcry about the event, the East Baton Rouge Sheriff’s Office defended its actions by stating, “When we receive calls from the public about lewd activity near our children, we have to respond. Our park operations, conducted at the specific request of the BREC Park’s Ranger, were an attempt to deter or stop lewd activity occurring in the park near children.”<sup>133</sup> Putting aside that no such activity occurred, the Baton Rouge Recreation and Park Commission denied that such public complaints were being lodged. It issued a statement that “the parks have ‘not had a number of complaints on this issue,’ which suggests the over-zealous local police weren’t responding to public outcry at all.”<sup>134</sup> The “complaint” rationale seemed plainly pretextual.

The recent case in Long Beach, California, summarized in Section I above, highlights this issue to an even more alarming degree: police there actually falsified citizen complaints to justify their gay sting operations.<sup>135</sup> After a man arrested for lewd conduct fought his arrest, his attorney sought the police department’s records regarding their lewd conduct stings.<sup>136</sup> After fighting the request and losing, the department turned over its files—which revealed that records “falsely stat[ed] that citizens had complained about lewd same-sex conduct where they had set up their stings when no such complaints were ever lodged.”<sup>137</sup> Not only did the police falsify their own records to justify their targeting of gay men, the files also

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128. AMNESTY INT’L, *supra* note 1, at 40.

129. Woods, *supra* note 35, at 567.

130. Jason Parsley, ‘Bag-A-Fag’ Tactics Not Acceptable, *Lawyers Say*, S. FLA. GAY NEWS (Feb. 28, 2012, 2:07 PM), <http://southfloridagaynews.com/Local/bag-a-fag-tactics-not-acceptable-lawyers-say.html>.

131. Bennett-Smith, *supra* note 30; *Sodomy Laws Still Enforced in East Baton Rouge*, *supra* note 33.

132. See Bennett-Smith, *supra* note 30. For example, officials in San Antonio, Texas have stated that “‘most of this work is complaint driven’ and if ‘complaints come in often enough, we have to deal with it.’” See AMNESTY INT’L, *supra* note 1, at 40.

133. *Sodomy Laws Still Enforced in East Baton Rouge*, *supra* note 33. In none of our research did we find a single instance of a child witnessing lewd conduct.

134. *Id.*

135. *People v. Moroney*, No. 4LG03026, slip op. at 3, 4 n.4, 12–13 (Cal. Super. Ct. Apr. 29, 2016).

136. Stern, *supra* note 20.

137. *Id.*

revealed that although complaints had been lodged against opposite-sex couples, officers had “followed up on exactly zero of these complaints.”<sup>138</sup>

Even if such complaints were legitimate, strictly relating to observed incidents of public sex—and there is no proof that they are—the response by police, in the form of sting operations targeting only same-sex couples and gay men, is not. The problem with this “response to complaints” justification of same-sex sting operations relied on by the police is twofold. First, there is little evidence to suggest that these complaints outnumber opposite-sex complaints, as noted above. Without proof that such complaints actually exist to justify the resources engaged to crack down on same-sex public sexual behavior, we are left with the impermissible police targeting of same-sex couples engaging in behavior in which opposite-sex couples also engage. If the complaints do exist but implicate both same- and opposite-sex couples, the enforcement against only the same-sex couples is similarly impermissible.

The second problem underlying the “complaints” approach is that of the possible bias driving the complaints (if they exist) in the first place. Members of communities are, of course, free to complain about same-sex sexual activity in their local parks—the Constitution protects their right to find such activity distasteful and to lodge complaints about it. When law enforcement steps in to respond, however, there is now governmental action, which implicates constitutional protections. And, if that action is discriminatory, it violates the Equal Protection Clause.

More saliently, if community complaints are entirely focused on same-sex activity when opposite-sex activity also occurs, the complaints are surely driven by discomfort with same-sex activity rather than sex activity generally. The common homophobic refrain that “I don’t care what they do behind closed doors, I just don’t want to see it” undoubtedly underlies such complaints.<sup>139</sup> The police, in turn, can fall back on their “complaints” argument: if they are responding to complaints of a specific behavior and that behavior is against the law, there is no constitutional violation in their enforcement of the law. But this position amounts to state-sanctioned discrimination by the community—individuals not governed by constitutional restraints. The law, and its enforcement, should protect against such discrimination. If the police can hide their own bias behind that of the community, then the protections of the law are meaningless.

Arrest statistics lead to an inference of bias. Although recent data are lacking, previous studies demonstrate patterns that continue to exist according to the overwhelming weight of anecdotal evidence. In one significant study, Amnesty International reported that in Los Angeles, between August 2000 and July 2001,

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138. *Id.*

139. See, e.g., *I have nothing against gay people. I do not care what they do behind closed doors. But their public displays of affection and some of gay guys acting like queens make me sick. Am I anti-gay?*, QUORA, <https://www.quora.com/I-have-nothing-against-gay-people-I-do-not-care-what-they-do-behind-closed-doors-But-their-public-displays-of-affection-and-some-of-gay-guys-acting-like-queens-make-me-sick-Am-I-anti-gay> (last visited Feb. 7, 2019).

eighty-eight percent of 649 arrests under California's disorderly (lewd) conduct law were of men.<sup>140</sup> When arrests involving sex work are excluded, ninety-nine percent of arrests were of men.<sup>141</sup> Yet public opinion polls demonstrate that men and women of all sexual orientations have illicit public sex.<sup>142</sup> In a 2006 MSNBC.com survey, twenty-two percent of Americans admitted they had had sex in public during the previous year.<sup>143</sup> These opposite-sex couples caught engaging in public sex acts are rarely arrested.<sup>144</sup>

Our research confirmed this pattern, as shown in the 2009 Palm Springs sting discussed above. The sting gained widespread attention when the chief of police, David Dominguez, was caught on tape during the operation calling gay men “filthy motherfuckers.”<sup>145</sup> The police department had claimed the sting, conducted in a known gay cruising area, was designed to address complaints about drug use and prostitution, but the comments of the chief and other officers suggested that gay men were being unfairly singled out and targeted. No similar opposite-sex cruising areas were targeted by the sting, although such areas existed and were widely known; instead, nearly two dozen gay men were arrested, and no women or opposite-sex couples were arrested.<sup>146</sup>

While the Palm Springs incident received a large amount of press due to the chief's comments and subsequent resignation, it is far from an isolated incident. Rather, it seems to reflect the policies—spoken or not—of police departments across the state and country.

Despite substantial efforts to lessen bias against sexual minorities,<sup>147</sup> the LAPD continues to conduct biased stings. The LAPD Vice Division generally conducts the department's lewd stings.<sup>148</sup> The LAPD Vice Division covers crimes such as human trafficking (prostitution), animal cruelty, “ABC” crimes (alcohol beverage control), and gang-related crimes.<sup>149</sup> Decisions about enforcement, both from a

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140. AMNESTY INT'L, *supra* note 1, at 30 n.122. For more evidence of systemic bias, see MALLORY ET AL., *supra* note 1.

141. AMNESTY INT'L, *supra* note 1, at 30 n.122. Since that time, disorderly conduct arrests have dropped significantly in California, along with every other kind of arrest; police attribute the drop-in arrest rates to decreased manpower and public scrutiny as a result of racial incidents. See James Queerly et al., *Police Arrests are Plummeting Across California, Fueling Alarm and Questions*, L.A. TIMES (Apr. 1, 2017, 8:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-police-slowdown-20170401-story.html>.

142. Diane Carman, Opinion, *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.”).

143. 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., N.Y. MAG. (Apr. 1, 2007), <http://nymag.com/nightlife/mating/29981/>.

144. See AMNESTY INT'L, *supra* note 1, at 29.

145. *Palm Springs Police Chief Resigns*, *supra* note 3; *Palm Springs Police Chief Apologizes for Calling Gays “Filthy Mother F—,”* *supra* note 3.

146. *Palm Springs Police Chief Resigns*, *supra* note 3.

147. Interview with Sergeant, LAPD Division Vice Unit, *supra* note 123.

148. Interview by J. Kelly Strader and Molly Selvin with a Lieutenant of the LAPD Special Enforcement Section, in Los Angeles, Cal.

149. *Id.*

policy standpoint and an on-the-street level, are made by each station commander, under the authority of division commander. In the LAPD, these decisions are governed by what it calls the “3 Cs”: the police target alleged criminal acts if there has been a complaint, if commercial activity (such as bookmaking) is involved, or if the behavior is conspicuous.<sup>150</sup>

As do other departments, the LAPD routinely cites the first “C,” complaints, as its reason for targeting gay men in sting operations. Even accepting the dubious claim that the police commonly receive complaints about public gay sex but not straight sex,<sup>151</sup> how does *Lawrence*’s harm principle factor in? Given that prostitution (even underage prostitution) and public sex by heterosexuals routinely occur, and that sting operations target only lewd conduct by gay men, we interviewed members of LAPD’s vice squads to learn what harms they are claiming to prevent.

According to one LAPD Lieutenant in the Special Enforcement Section (which oversees many vice operations),<sup>152</sup> vice crimes are enforced largely to prevent other types of crime—a sort of “broken windows” argument.<sup>153</sup> For instance, according to the Lieutenant, prostitution often leads to drug use and homelessness; street walkers are often extorted by gangs (MS-13 taxes prostitutes for use of their territory, for instance); johns are often the victims of robbery and identity theft; women and girls are often forced against their will to perform as prostitutes.<sup>154</sup> All are tangible harms arising from prostitution, according to the Lieutenant. Of course, this analysis assumes that the harms are caused by the prostitution itself—rather than the criminalization of prostitution. But that much-debated subject<sup>155</sup> is the topic for another paper.

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150. *Id.*

151. See *People v. Aldequa*, No. APP1100063, slip op. at 7 (Cal. App. Dep’t Super. Ct. Jan. 3, 2013) (per curiam); *Brown v. County of San Joaquin*, No. CIV. S-04 2008 FCD PAN., 2006 WL 1652407, at \*7–8 (E.D. Cal. 2006); *People v. Moroney*, No. 4LG03026, slip op. at 3–4, 12–13 (Cal. Super. Ct. 2016).

152. See *Special Enforcement Section*, L.A. POLICE DEP’T, [http://www.lapdonline.org/inside\\_the\\_lapd/content\\_basic\\_view/51922](http://www.lapdonline.org/inside_the_lapd/content_basic_view/51922) (last visited Feb. 7, 2019).

153. See Reed Collins, *Strolling While Poor: How Broken-Windows Policing Created a New Crime in Baltimore*, 12 GEO. J. ON POVERTY L. & POL’Y 419 (2007) (arguing that broken windows “quality of life” policing principally targets people based on their socio-economic status and may increase the rates of more serious crime because police resources have been diverted to minor, “quality of life” crimes); George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC (March 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> (presenting the popular “broken windows” theory of policing—the first article to do so); Interview with Lieutenant, LAPD Special Enforcement Section, *supra* note 148.

154. Interview with Lieutenant, LAPD Special Enforcement Section, *supra* note 148.

155. See Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313 (2015) (arguing it is the criminalization of prostitution itself that causes harm to juvenile sex workers); Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47 (2016) (recommending that decriminalizing prostitution and instead handle the human rights issues of prostitution with more robust civil laws and holistic approaches to support safety and an option to leave the sex-work industry); Carol H. Hauge, *Prostitution of Women and International Human Rights Law: Transforming Exploitation into Equality*, 8 N.Y. INT’L L. REV. 23 (1995) (presenting an international law analysis of prostitution as both a criminal and legal activity); Susan E. Thompson, *Prostitution – A Choice Ignored*, 21 WOMEN’S RTS. L. REP. 217 (2000) (presenting a critique of the laws that criminalize prostitution, and their implementation).

As for lewd conduct, the Lieutenant cites to the possibility that a child might enter a public bathroom and see the conduct taking place inside,<sup>156</sup> even we were unable to identify a single instance of a child's exposure to lewd conduct. Sting operations at MacArthur Park and Dockweiler Beach relied on this justification, though the LAPD's efforts at having stall doors in those bathrooms removed belies this reasoning<sup>157</sup>—if stall doors were removed, children would be more, not less, likely to observe behavior taking place in the bathroom, lewd or otherwise.

If the harm these arrests seek to prevent is as nebulous as “protecting children,”—and indeed, as discussed below, other vice divisions in the city rely on even flimsier harm justifications—how can we be sure it is not simply systematic homophobia that drives these sting operations? We asked the Special Enforcement Section Lieutenant how to ensure that vice officers do not act or choose when to enforce a law from based upon bias against the LBGT community. The Lieutenant responded, “It's not possible.”<sup>158</sup>

We also interviewed an experienced LAPD Sergeant in charge of the LAPD division vice unit that conducts the most lewd stings of any LAPD division.<sup>159</sup> That division includes areas where bathrooms are known cruising spots for gay men.<sup>160</sup> The Sergeant believes that bias within the LAPD has decreased over time, and that education about LGBTQ issues has been effective in improving officers' understanding of that population. In fact, the Sergeant believes the LAPD to be one of the most accepting and progressive police departments in the country in dealing with the LGBT community.<sup>161</sup> Even so, the Sergeant admits that “very poor” attitudes towards transgender people are commonplace, and that officers often refer to transgender people as “he/she” or “it.” On this issue, she said, officers are “ill-equipped, lacking in training, and insensitive.”<sup>162</sup>

In response to the question of the harm that lewd conduct stings seek to address, the Sergeant's answers were illuminating. First, the Sergeant stated that the “environmental impact is huge”—piles of condoms, dirty tissues, needles, and even mattresses sully the park.<sup>163</sup> If litter is the primary harm, however, then enforcement of littering statutes should be the remedy. The Sergeant could not explain why the criminal law is the proper remedy for littering only when it is done by gay and bisexual men targeted in undercover stings but not by numerous other park litterers.

The second harm that the Sergeant identified was that of gang members robbing men of their keys and wallets. The gang members can take advantage of these men

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156. Interview with Lieutenant, LAPD Special Enforcement Section, *supra* note 148.

157. *Id.*

158. *Id.*

159. Interview with Sergeant, LAPD Division Vice Unit, *supra* note 123.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*



because, since many live as straight men, they fear their wives or communities learning about their behavior and so they do not report the thefts.<sup>164</sup> Somehow, though, the solution to this kind of crime is to arrest the men— not the gangs that victimize them. Once again, the targeted use of lewd conduct statutes to address tangential harms seems pretextual at best.

The third harm that the Sergeant identified is the rise in HIV resulting from same-sex activity in her division: “Many of these guys [in the parks] don’t use condoms” (what, then, of the “huge” environmental impact of littered condoms?), and have wives and families at home.<sup>165</sup> A growing number of straight-identified or closeted Latinos from are engaging in this behavior.<sup>166</sup> As a result, the Sergeant said, they’re likely transmitting HIV to their wives, and the families of the men arrested “are destroyed.”<sup>167</sup>

The idea that arresting men for lewd conduct in parks could have any effect whatsoever on the spread of HIV seems baseless; will these men simply stop having sex with other men? Will they use a condom the next time, because of their arrests? There is no rational reason to think that these sting operations will curb the transmission of HIV. More revealing, however, is the Sergeant’s morality-based concern for the families of these men, and how that factors into her analysis of which crimes to target.<sup>168</sup>

We also interviewed a high-ranking LAPD officer within a division that has conducted a number of lewd stings. The officer, a Captain, told us that the vice unit under the Captain’s command devotes more resources to enforcing liquor laws (approximately seventy-five percent) than to targeting prostitution or lewd conduct.<sup>169</sup> Officers also move against counterfeit merchandise and gambling; if officers happen to be driving by the local Home Depot and “see a bunch of guys waiting for work in a circle throwing dice and losing their rent money,” they will probably arrest them.<sup>170</sup> Enforcement in vice, therefore, remains largely at the discretion of its officers.

In terms of harm, the Captain stated that generally vice crimes are only considered serious when linked to other crimes, such as assault and robbery; the exception is that vice officers are also deployed in response to the “We Tip” system, a community complaint repository—the complaint prong of the “3 Cs.”<sup>171</sup> The Captain believes the LAPD is moving away from “wrong morally” enforcement of crime, but that there is still a long way to go.<sup>172</sup> Sting operations targeting lewd

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164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. Interview by J. Kelly Strader and Molly Selvin with LAPD Captain, in Los Angeles, Cal.

170. *Id.*

171. *Id.*

172. *Id.*

conduct among gay men, which make the Captain “nervous and uncomfortable,” are probably done as a result of bias in the community, as discussed in detail above, if the public complains, vice responds.<sup>173</sup>

These public complaints are often themselves the result of discomfort with gay men congregating in one place, rather than any illegal behavior or harm.<sup>174</sup> And the decision whether to respond to those complaints, and how, rests with individual vice departments. The morals of one police sergeant, beat cop, or entire police force should be entirely irrelevant to the decision whether to enforce a criminal statute, and against whom to enforce it. And yet that is exactly what is happening.

#### D. *The Entrapment Defense*

Undercover lewd conduct sting operations often trigger the possibility of an affirmative entrapment defense, another way to challenge such a conviction. To successfully assert this defense, the defendant must satisfy either an objective or a subjective standard, depending on the law in the state where the defendant was charged. Under an objective standard, the defendant must prove that the actions of law enforcement would have induced any law-abiding citizen to commit a crime.<sup>175</sup> The focus under this standard, then, is on the actions of law enforcement rather than on the defendant’s predisposition to commit the crime. Under a subjective standard, the defendant must prove that the defendant did not have a predisposition to commit the crime, regardless of the actions of the police.<sup>176</sup>

California follows the objective approach. The defendant’s intent, criminal history, and/or character are not relevant to whether the defendant was, in fact, entrapped.<sup>177</sup> Many of these sting operations, where the officers themselves attempt to induce the defendants to commit a lewd act, smack of entrapment. In the Long Beach case, for instance, the court was blunt in this regard:

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173. *Id.*

174. *See, e.g.,* *People v. Aldequa*, No. APP1100063, slip op. at 5–7 (Cal. App. Dep’t Super. Ct. Jan. 3, 2013) (per curiam) (noting that a particular neighborhood, even though there were complaints about heterosexuals engaging either in public sex or men harassing women, the complaints of homosexual public sexual activities caught the attention of the police department); *Brown v. County of San Joaquin*, No. CIV. S-04 2008 FCD PAN, 2006 WL 1652407, at \*8 (E.D. Cal. June 13, 2006) (noting that most complaints were about men harassing women on the park trails, but the police chose to target the little homosexual activity that was occurring).

175. *See, e.g.,* *United States v. Evans*, 924 F.2d 714, 717 (7th Cir. 1991); *United States v. Johnson*, 872 F.2d 612, 620 (5th Cir. 1989) (holding that an inducement is shown if government created “a substantial risk that an offense would be committed by a person other than one ready to commit it”); *United States v. Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984) (holding that an inducement is shown only if government’s behavior was such that “a law-abiding citizen’s will to obey the law could have been overcome”).

176. *See* *People v. Barraza*, 591 P.2d 947, 955 (Cal. 1979) (“For all the foregoing reasons 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?”).

177. CAL. JURY INSTRUCTIONS CRIM. § 4.61 (West 2018) (“Matters such as the character of the defendant, [his] [her] predisposition to commit the crime, and [his] [her] subjective intent are not relevant to the determination of the question of whether entrapment occurred.”).

[G]iven that the crime of lewd conduct requires the presence of another person who may reasonably be offended by the conduct, it appears that *the presence and tactics of the decoy officers actually caused the crimes to occur . . . .* The notion of the undercover officers being offended by the conduct that they encouraged and explicitly sought to observe is bizarre.<sup>178</sup>

To prevail under this standard, however, the jury must put aside any homophobia or preconceived notions about the character and proclivities of gay men and focus only on the actions of the officers. Further, if the jurors believe that public gay sex is so distasteful or such an issue of public concern, they may be more willing to defer to police officers' judgments about what kind of conduct is reasonable or necessary to deter such behavior.

Just as launching an equal protection challenge can raise insurmountable economic and social hardships, an entrapment defense poses the same issues. Additionally, in many jurisdictions a defendant must admit guilt to the underlying offense before he can raise the entrapment defense.<sup>179</sup> And even if a defendant does successfully assert entrapment, the defense has serious limitations. Since entrapment is a defense of fact, it only applies to the case at hand; the individual defendant is acquitted, yes, but systematic sting operations that unfairly target gay men go unaddressed.<sup>180</sup> Courts rarely punish law enforcement for entrapping defendants, so even in the unlikely event that a defendant pursues and then prevails under the defense, such an outcome does nothing to disincentivize law enforcement from continuing to use such methods.<sup>181</sup>

Individual acquittals will also not reduce the enormous pressure many men feel to plead guilty to lewd conduct to avoid public exposure. Public lewdness convictions carry severe repercussions. Closeted and married men may be outed as gay, jobs and social standing may be threatened, and worse. Men have committed suicide after their names, photos, and charges for indecent exposure or lewd conduct were published in newspapers.<sup>182</sup> In some jurisdictions, men risk being registered

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178. *People v. Moroney*, No. 4LG03026, slip op. at 16 (Cal. Super. Ct. Apr. 29, 2016) (emphasis added).

179. Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1427–28 (2004).

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

181. See Colquitt, *supra* note 179, at 1390. Many lewd sting cases involve police conduct that appears to border on entrapment. See, e.g., *Alman v. Reed*, 703 F.3d 887, 899 (6th Cir. 2013) (“[W]ithout more probative facts to work from, no reasonable officer could have interpreted [the arrestee’s] actions . . . as an invitation to commit a lewd or immoral act in public.”); *McCumons v. Marougi*, 385 F. App’x 504, 508 (6th Cir. 2010) (“On this record, if believed, it was [the officer] who ‘invited’ [the arrestee] to engage in sexual behavior, not the other way around.”). Still, in neither of these cases did the defendants successfully argue entrapment. For an overview of the difficulties with the entrapment defense, see Woods, *supra* note 35, at 546 (“[T]he 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.”).

182. 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> (“A respected official in

as lifetime sex offenders for lewd conduct convictions, particularly where the charge is coupled with an indecent exposure charge. Registration has dire and far-reaching consequences beyond social stigma.

So long as the specter of public exposure remains a worst-case scenario for men targeted by these sting operations, law enforcement will remain unfettered in its approach to lewd conduct: selectively targeting gay men, often entrapping them, arresting them in many cases when the elements of lewd conduct have not even been met, and relying on public shame and systemic homophobia to keep challenges from being successfully raised.

#### IV. *LAWRENCE*-BASED CHALLENGES TO LEWD STINGS

Both public reports and our law enforcement interviews show that police departments have long engaged in and continue to engage in lewd stings despite anti-bias policies and despite the absence of concrete harm.<sup>183</sup> These stings are partly due to the amorphous nature of lewd conduct and related statutes, which provide police with nearly unfettered enforcement discretion. And given that police officers necessarily remain influenced by societal attitudes, homo- and transphobia—hold-overs from *Bowers*-era criminalization justifications—remain central motivating factors in these statutes' enforcement. Requiring proof of concrete harm, as *Lawrence* requires, provides the path away from discriminatory enforcement.

The time is ripe for such challenges. Courts have begun to recognize that *Lawrence* is not limited to the sorts of acts underlying that case, but instead articulates an animating constitutional criminalization principle. And police departments and other law enforcement entities have attempted to reduce bias in many jurisdictions. Even in those jurisdictions, however, biased enforcement continues. As we set forth more fully in the Appendix, the LAPD alone has initiated at least eleven lewd stings since 2014, even as it has adopted policies that supposedly strictly limit the use of such stings.<sup>184</sup> A new approach to challenging lewd stings is urgently needed. This Section establishes a framework for this approach. The section first examines broad law enforcement discretion in enforcing vague lewd laws. It then examines continuing law enforcement bias when engaging in lewd stings. Finally, the section sets forth the harm justification that *Lawrence* requires for lewd stings.

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a Connecticut town committed suicide after a Providence, R.I., newspaper published his name along with several others nabbed in a video-store raid.”); *Giles v. City of Johnson City, et al.*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/giles-v-city-of-johnson-city> (last visited Feb. 7, 2019) (case filed in September of 2008, and settled in January of 2010); *Lambda Legal Files Federal Lawsuit Charging Johnson City Police Department with Bias*, LAMBDA LEGAL (Sept. 30, 2008), [https://www.lambdalegal.org/news/tn\\_20080930\\_lambda-files-fed-suit-charging-johnson-city-pd](https://www.lambdalegal.org/news/tn_20080930_lambda-files-fed-suit-charging-johnson-city-pd) (reporting the suicide of a Tennessee man after his photo and name were published in a newspaper as an arrestee during a gay sting operation).

183. See Woods, *supra* note 35, at 551–53 (describing history of lewd stings).

184. See Branson-Potts & Queally, *supra* note 19.

### A. *Broad Statutes and Police Discretion*

Police undercover stings lead to charges under lewd conduct and related statutes; other charges often include indecent exposure and disorderly conduct, along with assault and battery. But the essence of all these charges is the same: that the defendant has engaged in public behavior that is offensive or otherwise harmful to others. Because the boundaries of such crimes are inherently vague, the police can determine what is or is not offensive based upon their own beliefs and values.<sup>185</sup> In addition, the nature of the charged offenses, during which only the arresting officer and arrestee are typically the only persons present, opens the door to pretextual or false police reports.<sup>186</sup>

Recent cases illustrate that stings often result in arrests even when the elements of the charged crime are plainly not met. In *United States v. Lanning*,<sup>187</sup> the defendant was convicted of disorderly conduct for behavior that occurred on federal land. According to the court, “[i]n the context of a sting operation specifically targeting gay men, an undercover ranger approached Defendant, initiated a sexually suggestive conversation with him, and then expressly agreed to have sex with him.”<sup>188</sup> The ranger arrested the defendant when he “[v]ery briefly’ touched the ranger’s fully-clothed crotch.”<sup>189</sup> The defendant was arrested and convicted under 36 C.F.R. § 2.34, which criminalizes conduct that is (1) “obscene,” (2) “physically threatening or menacing,” or (3) “likely to inflict injury or incite an immediate breach of the peace.”<sup>190</sup>

In reversing the conviction, the Fourth Circuit held as to the first prong of the regulation that the term “obscene” was unconstitutionally vague as applied to the case before it. This statute, the court found, is “so vague and standardless that it

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185. See AMNESTY INT’L, *supra* note 1, at 23 (“[V]aguely worded regulations lend themselves to discriminatory application since these laws and regulations leave almost entirely to an officer’s judgment not only the determination of suspicion, but also the definition of offending conduct.”). The use of sodomy laws against sex workers especially invites bias. See Christensen, *supra* note 56, at 1358 (“[The] potential for discretion and discrimination that characterizes the use of antisodomy laws raises constitutional concerns in that it enables law enforcement officers and prosecutors to penalize sex workers based upon their own moral judgments about whether, and to what extent, a particular sex worker’s sexuality should be criminalized.”); see also Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 189 (2017) (“[T]he broad net of excessive criminal law gives incredible discretion to police and prosecutors.”).

186. See AMNESTY INT’L, *supra* note 1, at 38 (“AI is concerned about reports from advocates alleging that arrests are frequently based on misrepresentation of events by undercover police officers, who often are the only witnesses to the alleged offense. Allegations have been made that police officers in Los Angeles ‘embellish or fictionalize aspects of a police report to justify the arrest’ in such cases. Advocates also charge that the standard language used in police reports is rarely amended to reflect the individual circumstances of the incident, raising concerns about their veracity. In Detroit and Los Angeles, advocates with access to a representative number of arrest reports have noted that the reports bore a remarkable similarity. AI reviewed several reports in San Antonio and observed the same pattern.”).

187. 723 F.3d 476 (4th Cir. 2013).

188. *Id.* at 478.

189. *Id.*

190. *Id.* (quoting 36 C.F.R. § 2.34(a)(2)).

leaves the public uncertain as to the conduct it prohibits . . . .”<sup>191</sup> The court concluded that a reasonable person would not know “that by engaging in such conduct under the circumstances of this case, he would be subjecting himself to criminal liability.”<sup>192</sup> Further, citing *Lawrence*, the court concluded that the defendant may have intended for any sexual activity to occur in a private place—activity that *Lawrence* explicitly protects.<sup>193</sup>

Next, under the second prong of the regulation, the court found that the defendant’s conduct did not meet the element of being “physically threatening or menacing.”<sup>194</sup> The court described the arresting officer as a young and physically fit man who initiated flirtatious behavior with the defendant, a retired man in his 60s.<sup>195</sup> When the defendant suggested a sexual act, the officer readily agreed.<sup>196</sup> Under these circumstances, the defendant’s brief touching of the officer, without further proof, failed to show that the officer experienced pain or injury.<sup>197</sup> As the court stated, the disorderly conduct regulation requires “physically threatening or menacing” conduct<sup>198</sup>; under the applicable objective test, this was clearly not the case. Even using the officer’s subjective reaction, the court held, “even if [the officer’s] subjective reaction were relevant to our inquiry (it is not), it defies logic that [the officer] was shocked by Defendant’s touch when it was, in fact, precisely what [the officer] had been ‘string[ing Defendant] along’ to do—to cross a certain line.”<sup>199</sup>

The court also found the evidence insufficient under the third prong, which covers conduct “done in a manner that is likely to inflict injury or incite an immediate breach of the peace.”<sup>200</sup> The defendant’s brief touching of the officer occurred only after the officer had expressly consented to a specific sexual act. As the court stated:

Applying the law to the circumstances of this case, even when viewing the evidence in the light most favorable to the government, we fail to see how any

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191. *Id.* at 482 (citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)). The court summarized the elements of the vagueness doctrine:

A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). As the Supreme Court has noted, “perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement” *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

*Id.*

192. *Id.* at 483–84.

193. *Id.* at 482 n.3 (citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

194. *Id.* at 485.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 486 (quoting 36 C.F.R. § 2.34(a)(2)).

rational finder of fact could deem Defendant's conduct "fighting words," or anything else "likely" to result in a "clear and present danger" of violence" or "riot,"

as the regulations required.<sup>201</sup>

In reaching this conclusion, the court expressly relied upon a similar Sixth Circuit case, *Alman v. Reed*.<sup>202</sup> In that case, an officer approached a gay man and initiated conversation as part of an undercover sting operation in a public park.<sup>203</sup> At one point, the target of the operation briefly touched the zipper on the officer's pants, prompting the officer to arrest the target.<sup>204</sup> The arrestee was charged with multiple offenses, including disorderly conduct, battery, and "criminal sexual conduct."<sup>205</sup> After the charges were dismissed at the state level, the arrestee initiated a civil rights action, which the district court dismissed.<sup>206</sup>

The Sixth Circuit reversed and reinstated the claim, holding that there was no probable cause to arrest for any of the charged offenses.<sup>207</sup> The court held that "a reasonable officer 'would have needed more evidence of [the arrestee's] intentions before concluding that he was inviting [the undercover officer]' to do a public lewd act" or any of the other charged offenses.<sup>208</sup>

These cases are significant for two reasons. First, the decisions show that police stings continue to occur around the country. Second, the decisions show that courts, post-*Lawrence*, are willing to examine the elements of charged offenses more carefully and will not rely solely on unsupported assertions of offense or harm.

Nor are courts confining the *Lawrence* holding to its "limiting" language.<sup>209</sup> For example, the Fourth Circuit overturned the Virginia Supreme Court and invalidated Virginia's sodomy statute in 2013, holding it facially unconstitutional.<sup>210</sup> The court reached this conclusion even though the alleged victim was a minor. The court thus plainly rejected *Lawrence*'s limiting language as a bar to constitutional challenges not involving private consensual sexual activities between adults. The Kansas Supreme Court held likewise in a case involving minors.<sup>211</sup>

At this point, it is helpful to reconsider California law, and the policies and conduct of the LAPD. The LAPD is a study in contrasts between stated policy goals and actual, on the street practices. Although the LAPD has adopted highly-

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201. *Id.* (internal citations omitted).

202. 703 F.3d 887 (6th Cir. 2013).

203. *Id.* at 892.

204. *Id.* at 893.

205. *Id.* at 894–95.

206. *Id.* at 895.

207. *Id.* at 900.

208. *Id.* at 899.

209. See *supra* notes 57–64 and accompanying text.

210. *MacDonald v. Moose*, 710 F.3d 154, 167 (4th Cir. 2013).

211. See *State v. Limon*, 122 P.3d 22, 24 (Kan. 2005).

publicized anti-LGBTQ bias policies,<sup>212</sup> bias continues to drive lewd stings, as the next section shows.<sup>213</sup> There is simply no question that lewd stings have been disproportionately used against LGBTQ people, as discussed above.<sup>214</sup> And although the department has adopted “protocols” to limit lewd sting operations, vice officers continue to conduct stings—including in a private athletic club and a library—even in violation of the those very protocols.<sup>215</sup> This is not an isolated example; in the *Alman* case, the arrests contradicted policies prohibiting lewd undercover sting prosecutions when, as occurred in *Alman*, when “the officer’s conduct was designed to make the individual believe the act was invited or consensual.”<sup>216</sup>

The issues with lewd stings extend to other areas of the law as well. Vagueness is a characteristic of many “morals” offenses and other crimes when it is difficult to identify victims and tangible harm.<sup>217</sup> Broad and vague offenses also invite law enforcement to target unpopular groups based upon such factors as race, socio-

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212. LAPD policy provides:

**285. SEXUAL ORIENTATION DISCRIMINATION.** It is the policy of the Los Angeles Police Department that discrimination in the workplace on the basis of an individual’s sexual orientation, gender identity or gender expression is unacceptable and will not be tolerate . . .

**345. POLICY PROHIBITING BIASED POLICING.** . . . Department personnel may not use race, religion, color, ethnicity, national origin, age, gender, gender identity, gender expression, sexual orientation, or disability (to any extent or degree) while conducting any law enforcement activity, including stops and detentions, except when engaging in the investigation of appropriate suspect-specific activity to identify a particular person or group. Department personnel seeking one or more specific persons who have been identified or described in part by their race, religion, color, ethnicity, national origin, age, gender, gender identity, gender expression, sexual orientation, or disability may rely in part on the specified identifier or description only in combination with other appropriate identifying factors and may not give the specified identifier or description undue weight. Failure to comply with this policy is counterproductive to professional law enforcement and is considered to be an act of serious misconduct. Any employee who becomes aware of biased policing or any other violation of this policy shall report it in accordance with established procedure. . . .

LAPD MANUAL, *supra* note 21, §§ 285, 345.

213. Interviews by J. Kelly Strader and Molly Selvin with LAPD Civilian Supervisors, in Los Angeles, Cal.

214. AMNESTY INT’L, *supra* note 1, at 30 (“AI has found that gay men are disproportionately affected by discriminatory enforcement of ‘moral regulations.’”). Similarly, some have observed that laws criminalizing teen sex are disproportionately applied to same-sex activities. *See* Godsoe, *supra* note 185, at 219.

215. *See* AMNESTY INT’L, *supra* note 1, at 184. *See also* Branson-Potts, *supra* note 19 (“In 2007, the agency revamped its lewd conduct policy to tell officers that stings should be used only ‘as a last resort.’”). These activities and other similar ones have led to the filing of a class action civil rights law suit against the LAPD. *Christie v. Los Angeles*, CV12-1466 (C.D. Cal. June 4, 2012) (copy on file with authors).

216. *Alman v. Reed*, 703 F.3d 887, 894 (6th Cir. 2013) (“An unsolicited sexual act or exposure to a member of the public or an undercover police officer will bring a misdemeanor charge of indecent exposure pursuant to MCL 750.335a or disorderly person-obscene conduct pursuant to MCL 750.167(f). Charges will not be pursued by this office if the officer’s conduct was designed to make the individual believe the act was invited or consensual.”).

217. *See* Godsoe, *supra* note 185, at 175–76 (“Statutory rape law makes consensual sexual activity among minors illegal in almost every state. At the same time, sex among minors is extremely widespread . . . . The law’s immense scope and requisite underenforcement give police and prosecutors the power to virtually define the crime.”).



economic status, and sexual orientation and identity.<sup>218</sup> The next section examines police bias in lewd stings.

### B. *Morality-Based Police Bias*

When even progressive police departments continue to engage in targeted lewd stings, the issue of endemic bias cannot be ignored. Simply adopting enlightened policies, without follow through and consistency in applying those policies, does not sufficiently reduce police discretion to engage in biased lewd stings.<sup>219</sup> And the very vagueness of lewd conduct and related statutes invites police to impose their own moral views on every-day exercises of police discretion.<sup>220</sup>

Further, the continued existence of sodomy laws, even those that are plainly unconstitutional under *Lawrence*, shows that legislative and societal attitudes towards sexual minorities remain deeply biased based upon conventional views of morality.<sup>221</sup> Indeed, as others have observed, majoritarian morality animates many existing criminal laws, such as fornication and adultery and laws criminalizing sex between minors.<sup>222</sup> And majoritarian morality continues to drive sex registration

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218. See AMNESTY INT'L, *supra* note 1, at 2–3 (“AI’s findings strongly indicate that police abuse and the forms this takes are often specific to the different aspects of the victim’s identity, such as sexual orientation, race, gender or gender identity, age or economic status. . . . The targeting of lesbian, gay, bisexual and transgender people for discriminatory enforcement of laws and their treatment in the hands of police needs to be understood within the larger context of identity-based discrimination, and the interplay between different forms of discrimination—such as racism, sexism, homophobia, and transphobia—create the conditions in which human rights abuses are perpetuated.”); Godsoe, *supra* note 185, at 178 (“Just as race and poverty have driven vagrancy and marijuana possession prosecutions, peer statutory rape prosecutions are sometimes based on the similarly illegitimate criteria of traditional gender roles and an ongoing distaste for same-sex intimacy.”). LGBTQ youth are particularly susceptible to discriminatory enforcement. See *id.* at 219 (“LGBT minors are also disproportionately represented in the juvenile and criminal justice systems and punished for sexual conduct.”).

219. See AMNESTY INT’L, *supra* note 1, at 5 (“Most of the U.S. police departments surveyed do provide some form of LGBT training . . . . However, many police departments do not have well-developed policies and do not train their officers adequately on how to respond appropriately to crimes committed against LGBT individuals.”); Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL’Y REV. 77, 78 (2016) (“[E]ven well-developed police guidelines could not anticipate the complexity of the situations officers often encounter; responding to these multifaceted and varied encounters therefore requires that police officers exercise considerable discretion in the course of their everyday activities.”).

220. See AMNESTY INT’L, *supra* note 1, at 16 (“AI believes that some laws are particularly prone to discriminatory enforcement—for example vague statutes which do not clearly define prohibited behavior and allow for significant discretion on the part of law enforcement officers. As police officers make decisions about who to stop, question or detain, discrimination may come into play and may determine both the initiation and outcome of interactions.”).

221. See Christensen, *supra* note 56, at 1339–41; ESKRIDGE, *supra* note 85, at 77; Godsoe, *supra* note 185, at 188 (“The sanctioning of ‘morals’ offenses, such as consensual sexual activity, is a particularly troublesome symptom of criminalization.”); see also JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 129–30 (2014) (“Although they are probably unconstitutional violations of privacy under *Lawrence v. Texas*, adultery and fornication laws persist. Almost twenty states currently have statutes criminalizing adultery, fornication, or both.”).

222. Godsoe, *supra* note 185, at 184–85 (“While twenty to thirty percent of fourteen to sixteen-year-olds have had intercourse, sixty-six percent of adults believe that sex at this age is ‘always wrong.’ This public morality runs counter to medical expertise that peer sexual exploration is developmentally normal, even at young ages. . . .

laws, many of which discriminate against sexual minorities even in states with ostensibly progressive courts, such as California.<sup>223</sup>

Police bias against LGBTQ people is well-documented. William Eskridge has shown the extent and depth of historical discrimination against LGBTQ people in the enforcement of lewd conduct laws, particularly in California.<sup>224</sup> From the beginning of the Twentieth century, officials justified lewd sting directed at men seeking sex with other men as part of an effort to “rid the city of a dangerous class which threatened the morals of the youth of the community.”<sup>225</sup> One commentator noted that the California lewd conduct statute “was purposefully enacted to help ‘cure’ the ‘homosexual problem.’”<sup>226</sup> Members of the United States Supreme Court explicitly recognized that lewdness statutes are disproportionately enforced against gay men,<sup>227</sup> emphasizing that the lewdness standard “furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’”<sup>228</sup>

The largest research study, conducted by Amnesty International and published in 2005, contains findings of police bias that continue to resonate today. And, as our interviews confirmed, much of the bias is morality-based.<sup>229</sup> The AI study focused in part on the sorts of “morals regulations” at issue in this paper, 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 against public morals.”<sup>230</sup> The study simply confirmed what we learned from our interviews and from press reports and judicial decisions: “[L]aw enforcement officers profile LGBT individuals, in particular gender variant individuals and LGBT individuals of color, as criminal in a number of different contexts, and selectively enforce laws relating to ‘morals regulations’ . . . .”<sup>231</sup> This bias is all the more striking because there is clear evidence that public

Just as the use of vagrancy by ‘the establishment to keep the untouchables in line’ was impermissible, so is the use of peer statutory rape by prosecutors and parents to police minors’ sexual conduct that displeases them.”).

223. See Laura Arnold, *The “Romeo & Juliet” Scenario in the Aftermath of Johnson v. Superior Court*, 45 SW. L. REV. 959, 973–76 (2016) (examining anti-LGBTQ bias in recent California sex registration ruling).

224. See William N. Eskridge, Foreword: *The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CAL. L. REV. 1785, 1789–96 (2009).

225. See Branson-Potts & Queally, *supra* note 19.

226. Pamela Sirkin, Comment, *The Evanescent Actus Reus Requirement: California Penal Code § 647(d)—Criminal Liability For “Loitering with Intent . . .” Is Punishment For Merely Thinking Certain Thoughts While Loitering Constitutional?*, 19 SW. U. L. REV. 165, 168 (1990).

227. See *Osborne v. Ohio*, 495 U.S. 103, 137–38 n.12 (1990) (Brennan, J., dissenting) (“Sadly, evidence indicates that the overwhelming majority of arrests for violations of ‘lewdness’ laws involve male homosexuals.”).

228. *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 360 (1983)).

229. See, e.g., Interview with Sergeant, LAPD Division Vice Unit, *supra* note 123.

230. AMNESTY INT’L, *supra* note 1, at 4 n.14.

231. *Id.* at 4.

heterosexual sexual activities occur regularly, and are regularly ignored by law enforcement.<sup>232</sup>

To give one specific example, some police candidly admitted that they treat same-sex behavior different from opposite sex behavior when it comes to public acts.<sup>233</sup> And the AI report found strong evidence that “the vagueness of morals regulations lead to arbitrary arrest and detention of gay men because of the discretion granted to officers in determining what is considered ‘offensive,’ rendering the enforcement of such regulations prone to homophobia, racism and sexism.”<sup>234</sup> Courts have reached similar conclusions. In *People v. Moroney*, for example, the trial court flatly held that the Long Beach Police Department stings “demonstrated [the department’s] intent to discriminate against the defendant and other [men seeking sex with other men].”<sup>235</sup> To reiterate what we learned during our interviews, vice officers often express “disgust” at same-sex sexual activities.<sup>236</sup>

Despite widespread evidence of bias,<sup>237</sup> however, it remains difficult to challenge lewd stings as invalid discriminatory enforcement under the Equal Protection Clause. Under that doctrine, the challenger must first demonstrate that the lewd stings had a discriminatory impact—that such stings have not been conducted against opposite-sex targets. Second, the challenger must show discriminatory intent—that law enforcement officials were motivated by bias when conducting the lewd sting. As we showed above, most challenges to stings fail

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232. See Woods, *supra* note 35, at 565 (“Public opinion polls also support that men and women of all sexual orientations have illicit public sex. A 2006 MSNBC.com survey found that twenty-two percent of Americans had sex in public during the previous year.”); Em & Lo, *supra* note 143.

233. AMNESTY INT’L, *supra* note 1, at 29 (“When 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. However, if there are two men consensually involved in the car, officers arrest them more often than not. This is discriminatory enforcement.”) (quoting AI interview with Don Mueller, LASD Sergeant (Jan. 27, 2004)); *id.* (“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 AI interview with Andrew Thomas, Attorney, in San Antonio, Tex. (Dec. 4, 2003)).

234. *Id.* at 31; see also Christopher R. Leslie, *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 WIS. L. REV. 29, 84 (2001) (noting that “[m]any police departments employ undercover operations designed to entrap gay men into offering or requesting oral sex. . . . Although most sodomy laws apply equally to heterosexual and homosexual sodomy, police departments do not expend resources in search of heterosexuals willing to give or receive oral sex (or other forms of sodomy).”).

235. *People v. Moroney*, No. 4LG03026, slip op. at 16 (Cal. Super. Ct. Apr. 29, 2016). See *supra* Section I(A)(3) for a discussion of the Long Beach lewd stings.

236. See *supra*, notes 158–72 and accompanying text. Courts have begun to take notice that targeted stings are inherently discriminatory. See *United States v. Lanning*, 723 F.3d 476, 483 (4th Cir. 2013) (“[T]he facts of this case illustrate the real risk that the [law] may be ‘arbitrar[ily] and discriminator[ily] enforce[d]. The sting operation that resulted in Defendant’s arrest was aimed not generally at sexual activity . . . rather, it specifically targeted gay men. Perhaps not surprisingly, then, the all-male undercover rangers arrested only men on the basis of disorderly homosexual conduct.”); *Moroney*, No. 4LG03026, slip op. at 14–15.

237. See generally AMNESTY INT’L, *supra* note 1; Woods, *supra* note 35, at 564–65; see *infra* Appendix.

because proof of discriminatory motive does not exist in many cases.<sup>238</sup> Instead of relying solely on this argument, courts should apply *Lawrence*'s harm-based justification requirement to lewd stings.

### C. Towards Harm-Based Enforcement

To return to our central argument, under *Lawrence*, morals-based enforcement of criminal laws is unconstitutional. Courts have begun to apply this central *Lawrence* holding, albeit in fits and starts. California courts, applying the state's expansive equal protection doctrine, have in some instances limited discriminatory enforcement.<sup>239</sup> And, as the discussion of the *Lanning* and *Alman* cases above shows, federal courts have at last begun to rein in lewd stings targeting gay men.<sup>240</sup> These cases, however, do not go nearly far enough in requiring proof of concrete harm. The *Lawrence* decision plainly requires proof of tangible harm; bare, unsupported assertions will not suffice. This section examines what such proof might entail.

#### 1. Complaints as Pretext

As discussed above,<sup>241</sup> law enforcement agencies usually justify targeted lewd stings by citing public complaints and concomitant public harm. According to this reasoning, the public is offended by public sexual displays. The focus of the harm is usually on the harm that children would suffer if exposed to this activity. This line of reasoning, we believe, is largely pretextual; the police act out of feelings of "disgust" at gay sex, not out of any actual proof that any person or persons were exposed to or offended by the activity. Moreover, none of the police or press reports of lewd stings state that lewd conduct actually occurred in view of a child.

Simply put, the complaints rationale does not bear scrutiny, for three reasons. First, when asked to produce proof of such complaints, the law enforcement agencies often are unable or unwilling to do so.<sup>242</sup> For example, in *Moroney*,<sup>243</sup> the trial court explicitly found that:

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238. *People v. Aldequa*, No. APP1100063, slip op. *passim* (Cal. App. Dep't Super. Ct. 2013) (per curiam) (affirming trial court denial of the defendants' motion to dismiss on the grounds of malicious prosecution, despite overwhelming evidence of discriminatory impact and intent); see also *Woods*, *supra* note 35, at 570 ("Despite [evidence of] 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.").

239. See, e.g., *Pryor v. Mun. Ct.*, 599 P.2d 636, 648 (Cal. 1979); *Baluyut v. Super. Ct.*, 911 P.2d 1, 8–9 (Cal. 1996).

240. See *supra* notes 187–208 and accompanying text.

241. See *supra* Section I(A).

242. *People v. Moroney*, No. 4LG03026, slip op. at 12–13 (Cal. Super. Ct. Apr. 29, 2016); see also *Brown v. County of San Joaquin*, No. CIV. S-04 2008 FCD PAN, 2006 WL 1652407, at \*7 (E.D. Cal. June 13, 2006); *Woods*, *supra* note 35, at 567 ("[W]hen pressed to produce [lewd conduct] complaints under the Freedom of Information Act, many police departments have refused or cannot produce them. The lack of cooperation from police departments to produce these complaints raises skepticism over their legitimacy.").

243. *Moroney*, No. 4LG03026, slip op. at 16; see *supra* Section I(A)(3).

By utilizing undercover officer decoys in a pre-planned, lewd conduct sting operation designed to ensnare men who engage in homosexual sex *without any relationship to citizen complaints*, . . . the Long Beach Police Department has demonstrated its intent to discriminate against the defendant and other members of this group.<sup>244</sup>

The court further rejected the LBPD's attempt to cite unsupported claims of harm to children:

The only other way the prosecution could justify the discriminatory prosecution in this case would be to show that the singled out group, men who engage in homosexual sex, constitute a "criminal organization" or "gang of lawbreakers" with certain "criminal proclivities." This position only finds support in the rhetoric of homophobia that seeks to portray homosexual men as sexual deviants and pedophiles. To the extent that the Long Beach Police Department has tried to appeal to this view by gratuitously referencing school children in the reports of their lewd conduct investigation, the court rejects it wholeheartedly.<sup>245</sup>

This decision is not based on unusual facts. Lewd stings often rest on plainly non-existent reports of complaints.

Second, even if complaints do exist, they are often a product of society's homophobic attitudes.<sup>246</sup> In the *Alman* case, for example, the purported "complaints" apparently came from sanitation workers who found condom wrappers and pornographic materials when emptying trash cans. None of the crimes charged in that case encompassed placing offensive materials in trash cans. It is more likely that real "offense" was the workers' moral offense at homosexual pornography.<sup>247</sup> In fact, when the law enforcement officers followed up on the complaints, they found litter in the park but did not observe any sexual activity. Nonetheless, they initiated a large-scale undercover lewd sting.

Was the real motivation to protect the public, when no law enforcement officers or members of the public had complained about observing sexual behavior? Or rather was it the possibility that same-sex sexual activities were occurring that offended the sanitation workers and the officers? The facts indicate the latter; the unit that conducted the stings was aptly named the "morality unit."<sup>248</sup>

The Fourth Circuit in *Lanning* made this point explicitly. Responding to the proffered justification based on complaints, the court stated that it is "entirely plausible that the public in and around [the area where the sting occurred] subjectively finds homosexual conduct, even relatively innocuous conduct such as that at issue here, particularly 'morally repulsive,' and 'grossly indecent,' and therefore

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244. *Moroney*, No. 4LG03026, slip op. at 16 (emphasis added).

245. *Id.* at 16–17 (internal citation omitted).

246. See *supra* notes 138–41 and accompanying text.

247. *Alman v. Reed*, 703 F.3d 887, 892 (6th Cir. 2013).

248. *Id.*

complains.”<sup>249</sup> Examining public attitudes, the court noted that “[i]f the public is, by contrast, not similarly troubled by [similar heterosexual activity], there would exist no citizen complaint and no related sting, even for otherwise identical heterosexual conduct.”<sup>250</sup> The court concluded that “[s]imply enforcing the disorderly conduct regulation on the basis of citizen complaints therefore presents a real threat of anti-gay discrimination.”<sup>251</sup>

Third, even if legitimate complaints existed, they are often just an excuse for discriminatory enforcement. Let us return to the LAPD; what to make of the LAPD undercover sting in a private health club, allegedly prompted by two single complaints a year apart? Or the LAPD sting at a public library? The operations did not follow the LAPD’s own policy concerning undercover stings. That policy is explicitly designed to curtail the use of lewd stings: “[i]nvestigative techniques used to eliminate complaints of lewd conduct activity should focus on solving the problem and include, but are not limited to” environmental redesign, enhanced security, and uniformed patrols.<sup>252</sup> Most important, the policy declares that the “deployment of plainclothes personnel to eliminate complaints of lewd conduct activity appears to have limited effectiveness and *shall be utilized as a last resort* and only upon pre-approval by the concerned geographic bureau commanding officer.”<sup>253</sup> In two recent stings mentioned above, the LAPD failed to follow the prescribed alternative methods and initiated stings based upon the barest of complaints.<sup>254</sup>

Posting uniformed officers at complaint locations is, according to law enforcement sources,<sup>255</sup> a much more effective way to deter lewd conduct than undercover stings. The LAPD’s own lewd conduct enforcement policy makes this very point.<sup>256</sup> Biased stings continue across the country, however, even in jurisdictions where law enforcement agencies have adopted anti-bias policies and policies designed to curtail the use of lewd stings. This practice will continue so long as enforcement decisions fail to abide by *Lawrence*’s harm requirement.

## 2. Proof of Harm

The asserted “harm” from public sex is a matter of substantial debate.<sup>257</sup> We will assume for now that the government could offer proof of such harm. Proof in

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249. *United States v. Lanning*, 723 F.3d 476, 483 (4th Cir. 2013) (emphasis added) (internal citations omitted).

250. *Id.*

251. *Id.* (emphasis added).

252. L.A. Police Dep’t, Office of Operations, Operations Notice No. 10, Lewd Conduct Enforcement—Revised (Nov. 30, 2007) (copy on file with authors).

253. *Id.* (emphasis added).

254. Interviews with LAPD Civilian Supervisors, *supra* note 213.

255. *Id.*; see AMNESTY INT’L, *supra* note 1, at 42.

256. Interviews with LAPD Civilian Supervisors, *supra* note 213.

257. See Strahilevitz, *supra* note 60, at 692–97 (providing an overview of this debate).

the abstract, though, does not suffice under *Lawrence*. Instead, law enforcement must show that the criminalized activity resulted in tangible, provable harm.

Law enforcement sometimes assert harm arguments that are facially implausible. As discussed, one LAPD Sergeant in a vice unit argued that the lewd stings are justified by the littering—tissues and condoms—that men leave behind in parks.<sup>258</sup> In the *Alman* case, the police used a similar justification.<sup>259</sup> It is difficult to imagine that arrest, imprisonment, and possible sex registration are proportionate punishments for littering. It seems clear that arguments of relatively inconsequential harms—such as littering—are simply pretexts for morality-based discrimination.

Some courts have examined the alleged harm with greater scrutiny. In *Alman*, for example, the alleged harm was to the officer who initiated a flirtatious conversation with the lewd sting target.<sup>260</sup> When the target briefly brushed against the zipper on the officer's pants, the officer arrested the target. The charges included disorderly conduct, battery, and "criminal sexual conduct."<sup>261</sup>

In finding lack of probable cause to arrest, the Sixth Circuit appropriately focused on the lack of harm to the alleged "victim"—the arresting officer. For the criminal sexual conduct charge, the court found that the element of "force or coercion" was plainly missing: "There is no indication that Alman achieved the contact in question by power or compulsion, and there is nothing in the record describing circumstances that would be sufficient to create a reasonable fear of dangerous consequences."<sup>262</sup> Nor was the element of "concealment or surprise" met:

The contact occurred in a secluded area in the midst of a flirtatious encounter . . . . A reasonable person in the situation presented in this case could expect some sort of sexual contact to occur. . . . [I]t cannot be said that there was probable cause to believe that Alman achieved sexual contact by concealment or surprise.<sup>263</sup>

As discussed above in Section III, some California courts have strictly applied the harm requirement to lewd conduct prosecutions.<sup>264</sup> Courts have held that, in the absence of a third party who might be offended, sexual conduct does meet the definition of lewd conduct. This is for a simple reason: the purported harm from the crime is the offense that members of the public might feel by observing this

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258. Interview with Sergeant, LAPD Division Vice Unit, *supra* note 123.

259. *Alman v. Reed*, 703 F.3d 887, 892 (6th Cir. 2013).

260. *Id.* at 893.

261. *Id.* at 894.

262. *Id.* at 897.

263. *Id.* at 898–99.

264. See Branson-Potts & Queally, *supra* note 19 ("Courts also have raised questions about the stings, invalidating a number of prosecutions in various parts of the state. In some cases, judges found no crime had occurred because the undercover officer conveyed sexual interest to the target and no one else was present to be offended by the lewd conduct.").

activity.<sup>265</sup> Absent the possibility for even this harm, there is no crime. And the other proffered rationales, such as reducing the spread of HIV or preventing crime against the lewd sting targets, are almost laughably unsupportable.<sup>266</sup>

The “harm” from activities such as public sex and nudity has been the subject of a great deal of debate.<sup>267</sup> Some scholars argue that these activities serve important expressive functions, particularly for sexual minorities, and should therefore be valued and not criminalized.<sup>268</sup> Others assert that the “offense” or “upset” that members of the public, especially children, might feel justifies criminalizing this behavior.<sup>269</sup>

This article does not take sides in the debate over whether lewd conduct statutes are justified under the harm principle. We assume, without analysis, that the criminalized behavior could at least theoretically cause harm to others. We argue, instead, that theoretical harm must be proven. Mere assertions of “offensiveness” or “immorality” will not suffice.

What articulable, provable harms might flow from activities such as public sex or nudity? One author posits three possible harms: harm to a child or an adult who is an observer; harm flowing from resulting public disruptions, such as traffic jams or fights; and purely aesthetic harms.<sup>270</sup> This author does not offer psychological studies or other proof, but simply asserts that “it is a problem” if a child observes and a “nuisance” if an adult observes.<sup>271</sup> Acknowledging *Lawrence*’s adoption of the harm principle, this author further posits that under that principle, “the state retains authority to regulate aesthetics but loses any authority to regulate morality.”<sup>272</sup> Although this suggests a necessary move from morality-based crimes, it introduces another indefinable standard based on “aesthetics.”

To be plain: proof of harm requires proof of harm; aesthetic offense can hardly be sufficient for enforcement of a criminal law—as opposed to a civil regulation—given how subjective and widespread aesthetic offenses are today. These conclusions may or may not be based upon provable facts, but bare assertions do not constitute facts. As the *Lawrence* majority stated, “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a

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265. *Id.* Moreover, as one commentator noted, truly public sex acts “are rare, and even when they do occur, the participants ordinarily will take enough precautions to prevent the naïve passerby from noticing.” Strahilevitz, *supra* note 60, at 696.

266. *See supra* notes 165–68 and accompanying text.

267. *See* JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW VOL. 2: OFFENSE TO OTHERS* 17 (1985) (“The disquietude caused in casual observers by public nudity and sexual behavior is a complicated psychological phenomenon[.]”); *see also* Strahilevitz, *supra* note 60, at 692–97 (providing an overview of this debate in light of *Lawrence*).

268. *See* MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX POLITICS AND THE ETHICS OF QUEER LIFE* 24–33 (1999).

269. *See* Jeffrey C. Narvil, *Revealing the Bare Uncertainties of Indecent Exposure*, 29 COLUM. J.L. & SOC. PROBS. 85, 101 (1995).

270. Strahilevitz, *supra* note 60, at 689–90.

271. *Id.* at 689.

272. *Id.* at 677.



sufficient reason for upholding a law prohibiting the practice.”<sup>273</sup> Claims of offensiveness—themselves just a form of morals justification—simply do not satisfy Lawrence’s criminal law requirements.<sup>274</sup>

In this light, law enforcement should be required to prove, at a minimum, that others were present when the activity occurred and that those persons were offended or upset. Further, courts should not accept assertions of offense that are simply based on bias toward sexual minorities. As the court in *Lanning* recognized,<sup>275</sup> complaints rooted in bias rather than harm are not sufficient. Other plainly pretextual justifications—that stings are needed to reduce litter or to protect married women from STDs that their husbands might contract—can never justify a lewd sting.

Harm analysis should also consider the harm caused by criminalizing the activity.<sup>276</sup> In lewd stings, the purported primary harm—seldom documented, much less subject to rigorous analysis—seems easily outweighed by the collateral consequences that arrestees may suffer. These include jail or prison, fines, public humiliation, loss of jobs, damage to family and other personal relationships, loss of property, even suicide.<sup>277</sup>

In addition, there may be other harms from lewd stings. As one commentator wrote regarding other “morals” legislation, “from a harm reduction point of view, the active intervention of the criminal justice system is often counterproductive and a source of damage.”<sup>278</sup> For example, if policed aggressively, drug use and sex work may be pushed into more and more dangerous places. This may leave those who engage in those behaviors even more vulnerable to physical assault and other dangers.

The same observations apply to men arrested in lewd stings. In public parks, for example, the stings may simply drive the targets into more remote areas, where they may be vulnerable to crime. Conversely, the stings may drive men to take more risks, be less prone to engaging in safer sexual activities. Law enforcement officials may cite public health concerns as a justification for lewd stings,<sup>279</sup> but it is at least as likely that the stings encourage rather than discourage risky

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273. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

274. See Strahilevitz, *supra* note 60, at 687 (“It seems uncontroversial to assert that when many people view a practice as immoral, they will sincerely say they suffer disutility from the continuation of that practice, and they may attempt to restrict the practice as a way of increasing their own utility. The *Lawrence* majority probably would concede this point. But [*Lawrence*] suggests that these forms of disutility do not ‘count’ as harms.”); Strader, *supra* note 9, at 75 (“[H]arm to society is not provable and, under the approach advocated here, would therefore not suffice”).

275. *United States v. Lanning*, 723 F.3d 476, 487 (4th Cir. 2013).

276. See JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW VOL. 1: HARM TO OTHERS* 19–25 (1987) (arguing that the criminalization of acts can create harms independent of any incurred by the acts themselves).

277. See *supra* note 181 and accompanying text.

278. Beckett, *supra* note 219, at 86.

279. Interview with Sergeant, LAPD Division Vice Unit, *supra* note 123.

behavior.<sup>280</sup> This is a clear example of a purported “harm” that is just a bare, unsupported assertion. Absent testimony from public health officials or other, credible evidence, mere assertions do not qualify as the proof of “harm” that *Lawrence* requires.

Further, lewd stings on their face cause more harm than they prevent. Other means of deterring the targeted conduct are likely far more effective than the occasional lewd sting—the existence of which is apt to be unknown to much of the targeted population. LAPD policy, admittedly not always followed, requires the use of other methods, such as uniformed patrols, to combat lewd conduct and uses lewd stings only as a last resort.<sup>281</sup> The marginal benefits from lewd stings pales in comparison to the enormous human toll from arrests for morals offenses, a toll that the *Lawrence* concurrence recognized is salient when analyzing the constitutionality of such arrests.<sup>282</sup> The lewd stings are unjustifiable based upon a simple balancing of the harms.

#### CONCLUSION

Sexual minorities continue to be terrorized at the hands of law enforcement. This occurs despite broad gains in LGBTQ rights and despite law enforcement’s adoption of anti-discrimination policies. Now, nearly fifteen years after *Lawrence*, courts increasingly recognize and apply the fundamental criminalization shift that the decision effected. No longer can lewd stings be justified by notions of disgust or other morals-based rationales. The time has come for discriminatory lewd stings to end, and *Lawrence* provides the avenue.

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280. See Beckett, *supra* note 219, at 86 (“Harm reduction advocates therefore argue that many forms of risky behavior should be defined not primarily as matters of criminal justice, but of public health. Absent an immediate threat to public safety, arrest and punishment are, from the harm reduction point of view, inappropriate responses to these behaviors.”).

281. See *supra* note 212.

282. See *supra* note 17 (discussing Justice O’Connor’s *Lawrence* concurrence).

## APPENDIX – SELECTED STING OPERATIONS, 2009–2017

*Los Angeles, California, 2012–2017*

The Los Angeles Police Department engaged in multiple recent undercover lewd conduct sting operations directed at men who seek sex with other men, including ongoing stings in three large public parks and other locations.<sup>283</sup> These operations occurred even though the LAPD has adopted progressive policies prohibiting discrimination against members of the LGBTQ community.<sup>284</sup>

These operations display ongoing anti-LGBTQ discrimination among members of the police force. For example, in 2016 undercover police officers waited in the steam room of a local gym, arresting men who made sexual advances. The police engaged in this operation even though the department did not follow its own mandatory screening procedures for such stings and even though the gym had reported only two single complaints, one year apart.<sup>285</sup> These sting operations continue despite the statements of top LAPD officials asserting that the department disfavors such operations.<sup>286</sup>

*Volusia County, Florida, 2017*

In mid-2017, the Volusia County, Florida, Sheriff's Department conducted an undercover lewd conduct sting operation lasting four days in six different public parks.<sup>287</sup> The operation yielded the arrests of 17 men, ages 28 to 78, primarily for lewd conduct and indecent exposure. The general method, according to the sheriff's department, was for undercover deputies to sit on park benches and then arrest the men when they approached and exposed their genitals or made other sexual contact. The department made public the arrestees' personal information, including cities of residence and ages, along with mug shots. The information and photos remain publicly available.<sup>288</sup>

*Long Beach, California, 2012–14*

From 2012 to 2014, the Long Beach, California, Police Department (“LBPD”) carried out lewd conduct stings in a public restroom in response to purported public complaints.<sup>289</sup> The operation led to the arrests of two dozen men for lewd conduct and related offenses. Most of the arrestees were openly gay or closeted “straight”

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283. Interviews with LAPD Civilian Supervisors, *supra* note 213.

284. *Id.*

285. *Id.*

286. *Id.*

287. See Seth Robbins, *18 Men Arrested in Four-Day Sex Sting at Volusia Parks*, DAYTONA BEACH NEWS-JOURNAL (June 5, 2017, 3:09 PM), <http://www.news-journalonline.com/news/20170603/18-men-arrested-in-four-day-sex-sting-at-volusia-parks>; Chelsea Todaro, *NEW: 18 Men Arrested in Sex Sting at Florida Parks, Police Say*, PALM BEACH POST (June 5, 2017, 3:03 PM), <http://www.palmbeachpost.com/news/crime-law/new-men-arrested-sex-sting-florida-parks-police-say/hDo5tkCMG9XMnUPYpRElhO/>.

288. Robbins, *supra* note 287.

289. Branson-Potts & Queally, *supra* note 19.

men, although some were simply arrested for being present during the sting.<sup>290</sup> As discussed above, one court found that this operation was the result of ongoing, deliberate bias on the part of the LBPB.<sup>291</sup>

*Houston, Texas, 2013*

In 2013, undercover police in Houston, Texas, conducted regular stings in a public park.<sup>292</sup> Press reports stated that the officers, wearing provocative clothing such as gay pride T-shirts and speedos, lured sting targets into bushes along a jogging trail and arrested them when they approached.<sup>293</sup> The police department stated that it was responding to public complaints.<sup>294</sup> Seven men were arrested and charged with indecent exposure.<sup>295</sup>

*Baton Rouge, Louisiana, 2012–13*

In 2013, Baton Rouge, Louisiana, sheriff's officers conducted an undercover sting operation targeting gay men in a public park. During the sting, undercover officers engaged with gay men and encouraged them to discuss having sex.<sup>296</sup> The standard sting method was for an officer to approach a sting target who was sitting in a car. After initiating a conversation, the officer and target would move the conversation to a park picnic table, where the officer would suggest having sex in a private dwelling.<sup>297</sup> When the target agreed, the officer would arrest the target for "soliciting" the undercover officers to have sex in the private dwelling in violation of the state's sodomy statute.<sup>298</sup> Approximately a dozen men were arrested, none of whom engaged or offered to engage in public sex or prostitution.<sup>299</sup> This sting operation occurred even though *Lawrence* held that there is a constitutional right to such private, consensual, noncommercial acts between adults. Ultimately, the local district attorney did not pursue the cases, noting that solicitation of private sexual acts is not criminal.<sup>300</sup>

*Manhattan Beach, California, 2012*

Police in Manhattan Beach, California, initiated a sting operation in a public restroom in 2012. In conducting the operation, the police stated that they

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290. Robbins, *supra* note 287.

291. Stephanie Rivera, *Judge Calls LBPB Arrest Discriminatory, Dismisses Case Against Man Accused of Lewd Conduct*, LONG BEACH POST (Apr. 30, 2016), <https://lbpost.com/news/2000008719-case-against-long-beach-man-accused-of-lewd-acts-dismissed-by>.

292. *Houston PD Says Gay Sex Sting Netted 7 Arrests, Won't Discuss Officers' Attire*, DALLASVOICE (Aug. 8, 2013), <https://www.dallasvoice.com/houston-police-sex-sting-resulting-7-arrests-frequent-occurrence>.

293. Smith, *supra* note 28.

294. *Id.*

295. *Id.*

296. Bennett-Smith, *supra* note 30.

297. *Id.*

298. *Sodomy Laws Still Enforced in East Baton Rouge*, *supra* note 31.

299. *Id.*; see also LA. STAT. ANN. § 14:89 (2014) (prohibiting "the unnatural carnal copulation by a human being with another of the same sex or opposite sex"); Bennett-Smith, *supra* note 30.

300. Bennett-Smith, *supra* note 30.

were responding to lifeguards' reports of loitering and vandalism in the restroom.<sup>301</sup> The operation led to the arrests of dozens of men, ages 21 to 59, most of whom were men of color. Charges included lewd conduct and indecent exposure.<sup>302</sup> Before any determination of guilt, the police circulated public photos of the arrestees, along with their names, birthdates, and cities of residence. This information quickly became widely available on the internet.<sup>303</sup> As a result, at least one of the arrestees committed suicide.<sup>304</sup>

*Palm Springs, California, 2009*

The Palm Springs Police Department ("PSPD") conducted an undercover sting operation targeting men meeting in hidden areas of a gay Palm Springs neighborhood, leading to a number of arrests.<sup>305</sup> The police also explicitly sought to charge many of the men with offenses that would require lifetime sex offender registration, although many of the arrestees ultimately pleaded guilty to lesser offenses.<sup>306</sup> As discussed more fully above, the sting operation led to a public outcry and to the eventual resignation of the police chief.<sup>307</sup> Legal challenges to the sting were generally unsuccessful.<sup>308</sup>

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301. See Branson-Potts & Queally, *supra* note 19.

302. *18 Men Arrested in Sex Sting at Manhattan Beach Public Restroom*, CBS LOS ANGELES (Apr. 3, 2012, 1:18 PM), <http://losangeles.cbslocal.com/2012/04/03/18-men-arrested-in-sex-sting-at-manhattan-beach-public-restroom/>.

303. *Id.*; Branson-Potts & Queally, *supra* note 19.

304. *18 Men Arrested in Sex Sting at Manhattan Beach Public Restroom*, *supra* note 299.

305. *People v. Aldequa*, No. APP1100063, slip op. at 2 (Cal. App. Dep't Super. Ct. Jan. 3, 2013) (per curiam).

306. Greg Wagner, *Most Defendants in Palm Springs Sex Stings Expected to Accept Plea Deals*, NBC LOS ANGELES (Mar. 11, 2011), <https://www.nbctv.com/news/local/Most-Defendants-in-Palm-Springs-Sex-Sting-Expected-to-Accept-Plea-Deals-117836733.html>

307. Phil Willon, *Palm Springs Police Chief Resigns Over Gay Sex Sting*, L.A. TIMES (Jan. 11, 2011), <http://articles.latimes.com/2011/jan/11/local/la-me-palm-springs-20110111>.

308. See, e.g., *Aldequa*, No. APP1100063, slip op. at 14, 15–17.