A Case Against Sex Stings and the Disclosure of Arrestees’ Personal Information

Alternative Ways to Address Public Sex-Related Activity Without Unfairly Targeting Gay Men

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SEXUALITY AND GENDER LAW CLINIC

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A middle-aged man, married with two young children, walks into a bathroom in a public park. Growing up in a rural town, he was always embarrassed to discuss his sexual interests. But on occasion he goes to a local public restroom looking for other men who might be interested in a sexual encounter. He knows the signals. Sometimes he signals one of the men, sometimes one of the other men will signal him. If the signal is returned, they leave to find a place to hook up.

Today the man waits for someone else to make the first move. After he gets the signal, he follows the signaler out of the bathroom and towards his car. He expects a casual encounter, but instead he is swiftly handcuffed and placed in the back of a patrol car. The man has been arrested for lewd conduct.

He is processed and released on minimal bail after promising to return for a court hearing a few weeks later. On his way home, he wonders how he will ever tell his wife and young kids. He plans to sleep on it and tell them in the coming days after seeking advice from a therapist.

But he is too late. The next morning he wakes up to his wife throwing the newspaper at him. His photo, home address, and name are plastered on the front page along with a story about his arrest. He tries to explain to his wife, but she refuses to talk to him.

The following day, his son comes home from school with a black eye and says that he has been in a fight. The man asks what happened, and the son explains that the kids at school beat him up after taunting him and calling his dad a “faggot.”

The man is angry with himself for letting this happen. He is especially upset about the effects of the arrest on his wife and children. But he is also angry with the police. He believes he was wrongly targeted because of his perceived sexual orientation. He files a lawsuit seeking damages for the violation of his constitutional right to equal protection.
INTRODUCTION

This Report explores how sex sting practices employed by some police departments to combat public sex-related activity cause harm both to the community and to the police departments themselves. It urges departments to cease these practices and, if necessary, find other ways to address the problem of public sex-related activity.

In particular, this Report shows that the practice of arresting men through sex stings and then releasing their personal information (i.e. photos, names, and home addresses) to the media causes three serious problems:

- First, selective public release of personal information can lead to legal liability for police departments, including lawsuits from arrestees who feel they have been targeted because of their perceived sexual orientation and believe their constitutional rights have been violated.
- Second, releasing personal information is inefficient because it create additional, more severe crime in the form of anti-gay attacks.
- Third, sex stings themselves can create the appearance of impropriety on the part of police departments, in part because of the nature of the stings and in part because officers risk being accused of entrapping arrestees.

The Report’s first part addresses these problems in depth.

The second part of this Report explores alternative strategies for communities that have concerns about public sex-related activity. The Report identifies practices recommended by the U.S. Department of Justice, campus policing departments, and police departments in the United Kingdom. Below, these practices are compiled into lists below that can serve as a quick reference guide for police departments interested in pursuing effective alternatives to sex stings.

Because the current use of sex stings by many police departments is both ineffective and harmful, the Report aims to spark conversations between police departments and members of the lesbian, gay, bisexual and transgender (LGBT) community and help create new ways of addressing public sex-related activity.
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SEX STINGS ARE HARMFUL TO THE COMMUNITY AND TO POLICE DEPARTMENTS, PARTICULARLY WHEN THEY INVOLVE THE RELEASE OF AN ARRESTEE'S PERSONAL INFORMATION

The practice of sex stings, along with the associated public release of arrestees’ personal information, has many negative consequences.

A. Legal Liability

The selective release of information about men who are accused of public sex-related activity may violate the Constitution because men who are arrested in these stings are often gay or perceived to be gay. The Constitution’s Equal Protection Clause says that the government, including law enforcement officers, cannot treat people differently based on actual or perceived sexual orientation unless that treatment is at least rationally related to a legitimate government interest. This means simply that the police cannot punish men arrested for public sex-related offenses more than other arrestees just because the men are perceived to be gay.

On September 30th, 2008, Lambda Legal, a prominent civil rights organization, filed suit in federal court claiming that the selective release of personal information of men charged with public sex-related offenses violated the men’s right to fair treatment under the law. Any police department that selectively discloses information about men arrested for public sex-related crimes runs the risk of similar legal action. Not only can this litigation be embarrassing to the department, but it can be extremely costly as well.

Police departments can avoid getting sued for these types of claims simply by not selectively targeting gay men or selectively disclosing the personal information of sex sting arrestees perceived as gay. In addition, by adopting some of the practices outlined in section two of this Report, departments can work to stop public sex-related activity without exposing themselves to legal liability, embarrassment, and expensive litigation costs.

B. Inefficiency

When police departments release personal information about men arrested for public sex-related offenses to newspapers or other media outlets, they give those who wish to harm gay men and lesbians a target for their aggression. Hate crimes against gays and lesbians are all too real and widespread. According to the National Coalition of Anti-Violence Programs (NCAVP), “[t]he total number of victims reporting anti-Lesbian, Gay, Bisexual, and Transgender violence to NCAVP in 2007 was 2,430 which represents a 24% increase over the total number of victims reported in 2006.”

Publishing
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names, photos, and home addresses of men accused of having committed public sex-related offenses with other men can enable and spur these hate crimes.

In addition to harming members of the LGBT community, hate crimes put additional stress on police departments by draining financial and human resources and threatening good will in the community. Simply by not publicly releasing arrestees’ personal information, police departments may conserve these valuable resources.

C. Appearance of Police Department Impropriety

Individuals who are arrested as part of a sex sting can, in some circumstances, allege that the police entrapped them. Even if the arrestee fails to prove he was in fact entrapped, the allegation itself – that officers acted improperly – may harm the department’s reputation.

The line between appropriate police conduct and entrapment is often blurry. Good officers trying to provide a public service can mistakenly step over this line. A U.S. Department of Justice guide makes this very point, stating that sex sting operations, “particularly when conducted improperly, leave the police vulnerable to entrapment claims.” When entrapment occurs, not only does the arrestee go free, but the police department and the individual officers involved may lose credibility, impacting their ability to properly investigate future crimes. By adopting alternative strategies as discussed in the next section of this Report, police departments can avoid entrapment concerns and the other problems discussed above, and better serve the community’s needs.

EFFECTIVE AND EFFICIENT STRATEGIES EXIST FOR DETERRING PUBLIC SEX-RELATED ACTIVITY

Police departments interested in preventing public-sex related offences have strategies available to them that are far more effective than sex stings and the public release of arrestees’ personal information. Indeed, as the U.S. Department of Justice recently observed, “[l]aw enforcement responses alone are seldom effective in reducing or solving the problem [of public sex]” and “focusing solely on arresting those engaging in public sexual activity is unlikely to reduce the overall scope of the problem.”

Instead of sex stings, the Department of Justice, through its Office of Community Oriented Policing Services (COPS), recommends several different strategies in its recently released policing guide, Illicit Sexual Activity in Public Places. (The COPS guide is attached at the end of this Report.)
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These suggestions for responding to sex-related activity in public places fall broadly into three categories: communication, environment, and enforcement. Each response featured below has been suggested by the COPS guide and found effective by university policing services and U.K. police departments, as reported in Guidance on Policing Public Sex Environments from the Association of Chief Police Office of England, Wales, and Northern Ireland (APCO Guidance), which is also attached to this Report.

A. Communication-Based Responses

Communication is central to deterring public sex-related activity and maintaining community safety. Specifically, the COPS guide recommends working with the media to release articles and news reports that stress the possible consequences of improper behavior and aim to deter offenders from frequenting locations regularly associated with public sex-related conduct. The APCO Guidance also reinforces the problems associated with releasing personal information about arrestees.

In discussing techniques for working with the media to deter public sex, the APCO Guidance specifically addresses the importance of maintaining a fair and unbiased approach. It counsels that all cases should be handled with sensitivity, and goes on to note “that there is considerable LGBT community concern when PSEs [Public Sex Environments] are publicised in the media, as there is a fear that this could lead to an increase in homophobic incidents and crime. The general principle should be that with press releases there is no reference to the LGBT community or that a particular venue is a PSE unless it is absolutely essential for operational reasons.”

Another communication-based strategy is to request that website managers and guidebook editors remove references to locations where public sex-related activity occurs. Campus policing services
have found this strategy extremely effective, and often monitor websites and other forms of communication that advertise locations where public sex occurs, such as www.cruisingforsex.com. When they find specific references to locations in their community, they regularly ask for these locations to be removed. If the sources refuse to remove references, police departments can also place their own postings about enforcement activities to deter people from using these locations for illicit purposes.

Campus policing services have also successfully employed techniques such as posting fliers about bathroom “etiquette” and displaying highly visible signage advertising the illegality of public sex. This provides an immediate reminder to potential offenders of the possible illegality of their behavior.

In addition, informing potential offenders of the dangers of public sex-related activity may dissuade their participation. The APCO Guidance suggests using health outreach workers to provide information about safer-sex practices, displaying posters warning of these dangers, and conducting an awareness campaign via the local press.

Developing partnerships with local leaders of the LGBT community and involving them in problem-solving is another important communication strategy. This collaboration allows police departments to learn about the causes of public sex-related activity and craft more targeted responses. It also allows police departments to demonstrate that they are committed to helping all segments of the local community.

Law enforcement groups emphasize that partnerships with LGBT groups can also help build trust with a group of people that might feel marginalized or vulnerable. A large policing jurisdiction in the U.K. recently emphasized this point:

[T]he reasons why men engage in [public sex-related activity] are several and complex, in many cases reflecting personal experiences of homophobia. There is therefore a need to build trust with local Lesbian, Gay, Bi-Sexual and Transgender (LGBT) Communities as there is little doubt that men who engage in such activities run the risk of falling victim to homophobic crime.
B. Environment-Based Responses

Environment-based responses involve changing physical structures and landscapes or reducing access to certain areas to deter public sex-related activity. Examples include designating geographic boundaries where different behaviors may be acceptable (as with a nude beach), improving lighting and cutting back bushes and other vegetation to reduce perceived privacy, redesigning restrooms, relocating remote facilities to areas where they will be more actively used for legitimate purposes, limiting the location’s hours of operation, or closing the problem facility, street, or area.¹⁰

University police departments have recognized that remodeling or landscaping can effectively reduce the appeal of areas to people considering public sex-related activities. For example, Southern Methodist University replaced partitions in its bathrooms with bulkier metal-and-plastic dividers to further inhibit sexual conduct.¹¹

The APCO Guidance also recommends situational prevention and reduction measures, including closure of facilities, restricting hours of access to facilities, use of park patrols or bathroom attendants, signage and use of warning notices, landscaping and cutting back of shrubbery, lighting and other structural alterations, overt surveillance, staff vigilance and guidance, and altering environmental design.

C. Enforcement-Based Responses

The COPS guide describes enforcement-based responses as being particularly effective for addressing activities that may be considered acceptable unless police demonstrate a commitment to controlling them. Some examples of enforcement-based responses include posting notices advertising the illegality of a certain action, issuing warnings, creating the illusion of surveillance, establishing highly visible patrols, shifting enforcement responsibility to private security firms, and imposing orders denying access to certain locations.
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The APCO Guidance recommends enforcement-based responses similar to those found in the COPS guide. It proposes first posting notices or posters. Only as a last resort does it condone the use of uniformed officers to police locations where public sex-related activity is known to occur.

The COPS guide makes clear that using undercover decoys and harassing or intimidating suspects has limited utility in the prevention of public sex-related activity, noting that “[a]t best, [undercover decoys in sting operations] temporarily displace the activity to other locations, and the activity usually returns to prior levels once the operations have ceased.”

As both reports conclude, enforcement-based responses should only be employed if all available communication-based and environment-based responses addressing the problems of sex-related activity in public locations have been exhausted.

**CONCLUSION**

By conducting sex stings and publicly releasing personal information about the arrestees, police departments expose themselves and the community to a variety of harmful consequences. The alternative strategies suggested here not only avoid these problems of liability, inefficiency, and impropriety, but also provide an efficient and effective way to address the concerns of both the department and the surrounding community.
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ENDNOTES

ix For an example of a police department effectively using landscaping techniques and closing problem areas, see Becky Campbell, “Update on charges from Johnson City police sex sweep at Winged Deer Park.” Times News. February 27, 2008.