STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No. 92352
Court of Appeals No. 114967

v.

LUCIANO LINO,

Defendant-Appellee.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 95687
Court of Appeals No. 150311

v.

EDWARD MATTHEW BRASHIER,

Defendant-Appellant.

BRIEF ON APPEAL OF *AMICI CURIAE*
SPECTRUM INSTITUTE, TRIANGLE FOUNDATION,
and AMERICAN ASSOCIATION FOR PERSONAL PRIVACY

(Oral Argument Requested)

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STATEMENT OF QUESTIONS PRESENTED

Three questions are involved in the cases of *People v. Lino*, No. 92352, and *People v. Brashier*, No. 95687, one of which involves the interpretation of the statute under which the defendants were prosecuted and the other two questions involve the outcome of each of the cases.

The question that is common to both appeals is:

> Should the crime of gross indecency be defined in the manner suggested by the plurality opinion in *People v. Howell*, 396 Mich. 16 (1976), with some further clarification by this Court?
>
> Defendant Lino answers, "No."
> Defendant Brashier answers, "Yes."
> Ingham County Prosecutor answers, "Yes."
> Oakland County Prosecutor answers, "No."
> Amici Curiae answer, "Yes."

The unique question posed in *People v. Lino* is:

> Should the conviction be reversed?
>
> Defendant Lino answers, "Yes."
> Ingham County Prosecutor answers, "No."
> Amici Curiae answer, "A Qualified Yes."

The unique question posed in *People v. Brashier* is:

> Should the order denying the motion to quash be reversed?
>
> Defendant Brashier answers, "Yes."
> Oakland County Prosecutor answers, "No."
> Amici Curiae answer, "No."

EXECUTIVE SUMMARY

Before this Court are two cases in which the Court has an opportunity to interpret the term "gross indecency" and to define the scope of various statutes that prohibit such conduct.[1] Considering the history of the gross indecency statutes and the numerous and often conflicting appellate decisions interpreting them, this is no small task. However, *amici curiae* believe that this Court can meet the challenge and that it can decide these cases in a manner that comports with ordinary rules of statutory construction, that advances sound public policies, and that avoids unnecessary conflict with constitutional principles.

As the Ingham County Prosecuting Attorney has aptly pointed out to this Court that laws against gross indecency originally were ecclesiastical offenses in England. People's Brief on Appeal, at p. 11.[2] Three laws against gross indecency were codified in Michigan in the early part of this century -- a time when the sensibilities of lawmakers inhibited them from describing in statutes what was

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[1] *Amici curiae* are filing only one brief in the *Lino* and *Brashier* cases. Many of the arguments herein are equally applicable to both appeals, although the arguments regarding the "public" aspect of gross indecency are applicable only to *Lino* and the arguments regarding sex with minors are relevant only to *Brashier*.

[2] It is common knowledge that religious doctrines in that era declared that the only form of acceptable sex was that occurring within a recognized marriage and which could lead to procreation. This remains the doctrine of some religious groups today, although many members of American society have formulated religious and personal standards that respect freedom of choice in matters involving private and consensual adult sexual behavior. (See Exhibit A, attached hereto at pp. 40-44, which contains excerpts from various public opinion polls on the subject of human sexual behavior.)

prohibited and when judges were reluctant to be any more specific in case books.

Much has changed over the years. Enforcement by the state of religious laws is now repugnant to constitutional principles of separation of church and state and freedom of religion. There is no longer any "common sense of society" as to the secular impropriety of private sexual conduct of consenting adults in a noncommercial setting.[3] An implicit constitutional right of privacy has been recognized by many courts. Due process now requires specificity in statutes. Explicit descriptions of sexual behavior are common occurrences in the print media and other forms of public communication.

Despite these legal and sociological changes, Michigan residents remain strapped by three gross indecency statutes that leave potential offenders guessing as to what is prohibited, that place unfettered discretion in the hands of law enforcement officers, that force jurors to look to their own subjective notions of propriety to determine whether to convict or acquit, and that sweep within their ambit conduct and speech that many legal scholars and jurists would consider constitutionally protected. In deciding the two cases under review, this Court has an opportunity to correct these serious problems.

What has not changed over the years, however, are public policies against sex

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[3] This observation is supported not only by public opinion polls but also by the fact that in nearly half of the states, private sexual conduct between consenting adults is no longer criminal. (See Appendix B, attached hereto at pp. 45-50, for a Survey of State Laws Regulating Noncommercial Private Sexual Behavior of Consenting Adults.)

by force, sex involving minors, sexual conduct that is intentionally or recklessly exposed to public view, commercial sexual activity, and solicitations to commit criminal sexual conduct. There is still a consensus in society that such behavior should remain criminal. Laws that advance these public policies are not subject to constitutional criticism so long as they promote legitimate secular values, specifically define what is prohibited, and are enforced in an evenhanded manner.

As argued within, the so-called "common sense of society" standard used by some appellate courts to define "gross indecency" must be replaced with more workable and detailed definitions. The plurality opinion in *People v. Howell*, 396 Mich. 16, 238 N.W.2d 148 (1976), was on the right track. With further clarification by this Court, the *Howell* definition of "gross indecency" would be both practical and constitutional.

Amici curiae trust that our brief will assist this Court as it formulates guidelines that will govern the conduct and speech of Michigan residents for years to come. We hope that our analysis of constitutional, statutory, and case law in Michigan and in several other states will provide this Court with the legal tools that are necessary for a constitutional solution to these difficult problems.[4]

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[4] This Court should build on the *Howell* foundation, but provide additional specificity by defining gross indecency to prohibit "oral and manual sexual acts (i.e., fellatio, cunnilingus, or masturbation) by force or involving persons under the age of consent, or any ultimate sex act (i.e, fornication, sodomy, fellatio, cunnilingus, or masturbation) committed in public view (i.e., under circumstances where the actor knows or should know that persons are present who may be offended by viewing such conduct)." The same age of consent now used to proscribe "statutory rape" of a minor should apply to the gross indecency statutes. (See pp. 26-37, infra, for the origins of these suggestions.)

ARGUMENT

I

THE GROSS INDECENCY STATUTES ARE UNCONSTITUTIONALLY VAGUE

A. The Statutes Are Impermissibly Vague on Their Face

In *People v. Brashier*, 197 Mich.App. 672, 496 N.W.2d 385 (1992) and in *People v. Lino*, 190 Mich.App. 715, 476 N.W.2d 654 (1991), each defendant was prosecuted under the statute that prohibits "gross indecency" between male persons. MCLA § 750.338; MSA § 28.570. Specifically, the statute says:

> "Any male person who, in a public place or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of an act of gross indecency with another male person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five years, or by a fine of not more than $2,500.00."

Michigan has two related statutes. One prohibits "gross indecency" between female persons (MCLA § 750.338(a); MSA § 28.570(1)) and another makes "gross indecency" between male and female persons a crime. MCLA § 750.338(b); MSA § 28.570(2).

In *People v. Howell*, 396 Mich. 16, 238 N.W.2d 148 (1976), a five-member majority of this Court concluded that the term "**'act of gross indecency' standing alone fails to give adequate notice of the conduct prescribed . . . .**" *Id.*, 396 Mich., at pp. 21-22, 238 N.W.2d, at p. 150. (Emphasis added) However, a majority of the Court was unable to agree on a definition to cure the constitutional defect. As a result, various panels of the Court of

Appeals have issued conflicting opinions on the definition of "gross indecency" thereby making the statute unconstitutionally vague as interpreted.

As argued below, the decision of the special panel of 13 judges of the Court of Appeals in *People v. Brashier*, 197 Mich.App. 672, 496 N.W.2d 385 (1992), has resolved the definitional conflict. However, in doing so it felt bound to adhere to an archaic and impermissibly vague standard that was suggested by this Court's dicta in *People v. Carey*, 217 Mich. 601, 187 N.W. 261 (1922). As a result, these statutes, as interpreted, remain unconstitutionally vague.

A history of the interpretation and application of the gross indecency statutes is necessary to understand the constitutional problem and for a proper formulation of a constitutional solution.

B. The So-Called "Common Sense of Society" Test Was First Developed by This Court in *People v. Carey* and Was Later Used by Several Panels of the Court of Appeals to Rebut Challenges of Constitutional Vagueness

In *People v. Carey*, 217 Mich. 601, 187 N.W. 261 (1922), the defendant was arrested for violating the statute prohibiting gross indecency between males after he engaged in some unspecified type of sexual conduct with a boy. The defendant complained on appeal that the information was defective because it did not spell out the particulars of any act of gross indecency but merely followed the language of the statute.

Noting that the term "gross indecency" is not defined in the statute, this Court concluded that the information was sufficient without any particulars. Relying on *People*

v. Hicks, 98 Mich. 86, 56 N.W. 1102 (1893), the Court stated:

> "The information in the language of the statute informed defendant of the crime for which he was to be tried. It should not state the evidence by which it is to be proved, nor should it describe the particular act charged. The gross indecency of the subject forbids it." *Carey, supra*, 217 Mich.App. at p. 602, 217 Mich. 601, 187 N.W. at p. 262.

In *Hicks*, the defendant, a 62 year-old man, was not charged under one of the "gross indecency" statutes. Rather, he was prosecuted for taking "indecent and improper liberties" with a female under the age of 14 years old. On appeal, this Court was required to construe the phrase "indecent and improper liberties with the person of such child." The defendant urged the Court to limit the scope of the statute to require a touching of the private parts of a child. The Court rejected this suggestion, explaining that it would be indecent for a man to place his hands upon certain other parts of the body of a female child, with intent to take liberties with her. The Court then construed the phrase "indecent and improper liberties with the person of such child" to mean such liberties "as the common sense of society would regard as indecent and improper." *Hicks, supra*, 98 Mich., at p. 90, 56 N.W., at p. 1104. (Emphasis added) It is the adaptation of this phrase to the gross indecency statutes that lies at the heart of the conflict of the two cases now before this Court.

In *People v. Dexter*, 6 Mich.App. 247, 148 N.W.2d 915 (1967), the defendant was prosecuted for engaging in an act of gross indecency and an act of sodomy in a private place with another male. On appeal, the defendant alleged that he should not have been convicted of the gross indecency count because it should have merged with the sodomy count. The appellate court disagreed, noting that the scope of the sodomy statute is limited

to anal intercourse but that the gross indecency statute prohibits fellatio. Citing the decisions in *Hicks* and *Carey*, the appeals court also rejected the defendant's contention that the gross indecency statute was unconstitutionally vague. Quoting *People v. Szymanski*, 321 Mich. 248, 252, 32 N.W.2d 451, 453 (1948), the court said the gross indecency statute was not bereft of guidelines because it penalizes "conduct that is of such character that the common sense of society regards it as indecent and improper. " 6 Mich.App., at p. 253.

In *People v. McCaleb*, 37 Mich.App. 502, 195 N.W.2d 17 (1972), the defendant was convicted of violating the statute that prohibits gross indecency between a male and a female. On appeal, the defendant complained that he was deprived of his right to have a jury determine each element of the crime because the trial judge instructed the jury that penetration of the male penis into the mouth of a female constitutes the offense of gross indecency whether by force or by consent or agreement. Finding error, the appellate court stated:

> "The jury's function in this case as the trier of fact was to determine that (1) defendant had engaged in fellatio with a female, and (2) fellatio between a male and a female is conduct which the common sense of society regards as indecent and improper. The effect of the trial judge's charge was to eliminate the second element of the crime, 'whether the conduct was indecent' from the purview of the jury. In doing so, defendant was effectively denied a trial by jury on this count." *McCaleb, supra*, 37 Mich.App., at p. 507, 195 N.W.2d at p. 19.

C. A New Standard Was Proposed by a Plurality of This Court in *People v. Howell* When It Rejected the *Carey* Definition

In *People v. Howell*, 396 Mich. 16, 238 N.W.2d 148 (1976), this Court was asked to

decide whether the gross indecency statute was unconstitutionally vague as applied to a prosecution of forced fellatio (defendant Howell) or that of fellatio with a minor (defendant Helzer).

On appeal, a five-member majority of this Court affirmed the principle that a statute may be challenged on vagueness grounds for three reasons: (1) failure to provide potential offenders of fair notice of the conduct proscribed; (2) failure to give objective standards to the trier of fact, thereby allowing unstructured and unlimited discretion to determine whether an offense has been committed; and (3) failure to limit the reach of a statute so that it does not impinge on First Amendment freedoms. *Id,* 396 Mich., at p. 20, 238 N.W.2d, at pp. 149-150.

Concluding that the statute was not unconstitutionally vague as to Howell and Helzer, Justice Levin, also speaking for the majority, wrote:

> "In deciding whether the term 'act of gross indecency' is constitutionally vague as applied to forced fellatio or fellatio with a minor, it is appropriate to note that the statutes have long been applied in the courts of this state to acts of forced fellatio and fellatio with a minor. Viewed in that context we conclude that while **the term 'act of gross indecency' standing alone fails to give adequate notice of the conduct prescribed,** neither Howell nor Helzer can be heard to say that they were not forewarned that the conduct they allegedly engaged in was subject to prosecution under the statutes." *Id,* 396 Mich., at pp. 21-22, 238 N.W.2d, at p. 150.[5] (Emphasis added)

However, Justice Levin was only able to muster a three-member plurality when he suggested a specific definition that could be used to determine what sexual conduct of

[5] Justices Kavanagh, Williams, Coleman, and Fitzgerald all concurred in this portion of Justice Levin's opinion.

consenting adults was prohibited by the gross indecency statutes. The plurality rejected the "common sense of society" definition formulated by the courts in *Hicks, Carey, Dexter, and McCaleb.*[6] In this regard, Justice Levin wrote:

> "While it no doubt would be the 'common sense of society' to regard as 'indecent and improper' the commission of an act of fellatio with a person under the age of consent or the forcible commission of such an act, there is no consensus regarding fellatio or other sexual acts between consenting adults in private. Some persons regard any ultimate sexual act other than intercourse between married persons for procreation as indecent and improper. However, a substantial segment of society believes it is neither indecent nor improper for consenting adults to engage in whatever sexual behavior they desire. Some would take that view only where the conduct is between persons of the opposite sex, while others would agree only if the persons were married.
>
> "There being no 'common sense of society' regarding sexual behavior between consenting adults in private, that test leaves the trier of fact 'free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.' *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403, 86 S.Ct. 518, 521, 15 L.Ed.2d 447 (1966). **Accordingly, we reject the construction of the Court of Appeals in *Dexter* and construe the term 'act of gross indecency' to prohibit oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public."** *Id.*, 396 Mich., at pp. 23-24, 238 N.W.2d, at p. 151.[7] (Emphasis added)

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[6] Justice Levin could not muster a four-member majority because Justices Coleman, Fitzgerald and Lindemer did not concur in that section of his opinion that rejected the "common sense of society" standard, and Justice Ryan did not participate in the case.

[7] The conclusion of the plurality that there is no common sense of society that consenting adults sex in private is immoral or should be criminal as of 1976 is borne out by numerous recent public opinion polls of which this court may take judicial notice. *Shavers v. Kelley*, 402 Mich. 554, 267 N.W.2d 72, 94. See Appendix A to this Brief, "Public Opinion on Family Issues: Compilation of Public Responses to Hundreds of Questions Asked in More Than 60 National Surveys Conducted between 1971 and 1991," 1992 Policy Report No. 2, Family Diversity Project, Spectrum Institute, at pp. 40. This lack of consensus is further demonstrated by the fact that in nearly half of the states, (continued...)

Thus, a majority of this Court has concluded that sex with minors and forcible sex acts violate the gross indecency statutes. However, a majority of justices has not yet narrowed the statute to exclude private sexual conduct between consenting adults. As a result, police officers, prosecutors, judges and juries have been left without adequate guidance on this subject.

D. Several Decisions of the Court of Appeals Have Accepted the Definition of "Gross Indecency" Suggested by the *Howell* Plurality

Several panels of the Court of Appeals have accepted the plurality opinion of Justice Levin in *Howell.*

The first such case was *People v. Emmerich*, 175 Mich.App. 283, 437 N.W.2d 30 (1989). In that case the defendant was charged with gross indecency after he was arrested by an undercover police officer. The defendant and the officer met at a roadside park and struck up a nonsexual conversation. Each then drove his own vehicle to a relatively secluded location four miles away. They got out of their cars and began making small talk. Each questioned the other about "what he liked." Then, when the defendant rubbed the officer's crotch area over his clothing, he was arrested.

On appeal, the defendant argued that the touching did not constitute a violation of the gross indecency statute. Noting the differing standards adopted in *Dexter, supra,* and

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[7](...continued)
all forms of noncommercial sex in private between consenting adults is no longer criminal. See Appendix B to this Brief, Survey of State Laws Regulating Private Sexual Conduct Between Consenting Adults", Spectrum Institute, 1993, at pp. 45.

Howell, supra, the court concluded that the defendant's conduct did not violate the statute under either standard. Under *Howell*, the panel concluded that a crime had not been committed because the officer was a consenting adult and because the conduct did not involve an ultimate sexual act. Utilizing the *Dexter* standard, the court noted that a previous appellate panel in *People v. Myers*, 161 Mich.App. 215, 409 N.W.2d 788 (1987) had ruled that such conduct did not violate the statute. Calling the *Dexter* test an "anachronism," the judges in *Emmerich* said it was time to lay to rest the attitude that the indelicacies of the subject forbid a more precise definition of the crime. *Id.*, 175 Mich.App., at pp. 287-288, 437 N.W.2d, at pp. 32-33.

Moreover, the panel agreed with the *Howell* plurality that the imprecision of the *Dexter* standard leaves a trier of fact without adequate guidance. Finally, the court noted that unlike *Dexter*, the *Howell* definition avoids serious constitutional questions such as "whether the Legislature may constitutionally proscribe sexual conduct in private between consenting adults, or make distinctions regarding such conduct based on marital status or sexual orientation." *Id.*, 175 Mich.App., at pp. 288-289, 437 N.W.2d, at p. 33.

In *People v. Lynch*, 179 Mich.App. 63, 445 N.W.2d 803, the appellate panel noted that a "majority of our Supreme Court has already determined that the term 'act of gross indecency' standing alone fails to give adequate notice of the conduct proscribed by the statute." *Id*, 179 Mich.App., at p. 65, 445 N.W.2d, at p. 805. Rejecting its previous opinion in *People v. Gunnett*, 158 Mich.App. 420, 404 N.W.2d 627 (1987) in which it had accepted the "common sense of society test" and for the reasons set forth in *People v. Emmerich*, 175 Mich.App. 283, 437 N.W.2d 30 (1989), the panel in *Lynch* reviewed the conflicting cases on

the definition of "gross indecency" and concluded that "we are convinced that the better view is that set forth by the decision in *People v. Howell, supra*." *Ibid.* The panel indicated that it understood why some appellate panels had rejected the *Howell* definition, namely, that they had "been faced with a situation that instinctively would appear to be an act that would not be tolerated in public and therefore should come under the statute, but that would not come under the *Howell* test" and as a result, many of these panels had lined up behind the catch-all *Dexter* standard. *Id.*, 179 Mich.App., at p. 66, 445 N.W.2d, at p. 806. However, the unanimous panel in *Lynch* concluded:

> "We are convinced that to follow the *Dexter* standard would leave the statute unconstitutionally vague because it leaves the trier of fact free to decide, without any legally fixed standard, both what the prohibited act is and whether it has been committed." *Id.*, 179 Mich.App. at p. 68.

Using the *Howell* test, the panel in *Lynch* ruled that mutual masturbation of exposed penises by two males in the common area of a public rest room along a public highway was not immune from prosecution as a matter of law. Although the court held that such activity was an "ultimate sexual act," it indicated that a jury would have to decide whether the act was committed in public. *Id*, 179 Mich.App., at p. 70, 445 N.W.2d, at p. 806.

Most recently, in *People v. Lino*, 190 Mich.App. 715, 476 N.W.2d 654 (1991), one of the cases currently before this Court, the defendant was arrested about 12:30 a.m. when a police officer observed him performing fellatio on another male in the back seat of a car parked in a lot that was enclosed by a six-to-eight-foot-tall wooden fence. In order to observe the defendant's conduct, one officer had to stand up on a portion of the fence that was three feet off the ground. On appeal, the defendant argued that his conduct did not

violate the gross indecency statute because it occurred in a place that was not truly "public" within the *Howell* definition.

After reviewing the confused state of the law in Michigan on the definition of "gross indecency," the court in *Lino* concluded:

> "We agree with the *Emmerich* and *Lynch* panels that it is time that the Legislature acted in this area. Until such time as it does, however, we are convinced that the better definition of gross indecency is that expressed in the *Howell* opinion." *Id.*, 190 Mich.App., at p. 720, 476 N.W.2d, at p. 657.

The court in *Lino* overturned the defendant's conviction because "the prosecutor presented insufficient evidence to establish beyond a reasonable doubt that the act the defendant was convicted of occurred in a public place." *Ibid.*

E. Other Decisions of the Court of Appeals Have Rejected the *Howell* Definition, Adhering Instead to the Standard Suggested in *Carey*

In *People v. Clark*, 68 Mich.App. 48, 241 N.W.2d 756 (1976), the defendant was convicted of gross indecency between a male and a female in violation of MCLA § 750.338(b); MSA § 28.570(2). At trial, the prosecution introduced evidence showing that after the defendant gained entry into the victim's apartment through a ploy, he attempted to rape her and forced her to perform fellatio. On appeal, he alleged that the statute was unconstitutionally vague because it does not give a definite standard for the ascertainment of guilt. The appellate court summarily rejected the argument, citing *Dexter, supra*, noting that the *Dexter* standard was still viable because the new definition suggested in *Howell* was the product of only three of the six justices who participated in that case. Of course, the

court could have, but did not, go on to say that forced fellatio would be illegal even under the *Howell* standard.

In *People v. Kalchik*, 160 Mich.App. 40, 407 N.W.2d 627 (1987), the defendant and another male were arrested under the gross indecency statute for engaging in oral sex and masturbation with each other. On appeal, the defendant contended that the gross indecency statute was unconstitutional as applied to private, consensual conduct. Rather than ducking the issue by holding that the defendant lacked standing to complain because his conduct was not sufficiently private to receive constitutional protection, the appellate court ruled on the issue. Observing that this Court was equally divided on Justice Levin's opinion in *Howell* regarding the constitutionality of the statute, the court cited several cases that had upheld the statute as applied to private conduct of consenting adults, stating:

> "Until the Supreme Court reaffirms Justice Levin's position in Section II of *Howell*, we are required to follow Michigan authority holding that convictions under the gross indecency statute are proper even where the proscribed conduct occurs between two consenting adults." *Id.*, 160 Mich.App., at p. 44, 407 N.W.2d, at p. 629.

The defendant in *Kalchik* also argued that the statute was unconstitutionally vague. In responding to this argument, the court noted that the activity had taken place below the partitions separating two stalls and therefore could have been observed by anyone in the common area of the rest room by looking under the doors which were fourteen inches off the floor. The appellate court ruled that the statute was not unconstitutionally vague as applied to the defendant's conduct, holding that since the activity took place in public it was proscribed under either *Howell* or *Dexter*. *Id.*, 160 Mich.App., at p. 46, 407 N.W.2d, at p. 630.

In *People v. Myers*, 161 Mich.App. 215, 409 N.W.2d 788 (1987), the defendant was convicted of gross indecency based on evidence that he had touched the clothing over the groin area of an undercover police officer. On appeal, the defendant argued that his conduct, as a matter of law, did not constitute a violation of the gross indecency statute. The appellate court agreed and therefore reversed the conviction.

The court in *Myers* noted that a conflict existed between the definition adopted in *Dexter* and that espoused by the plurality in *Howell*. However, the *Myers* court said that because *Howell* was approved of by only three justices, it was of no precedential value. Therefore, it decided to follow *Dexter* and its progeny. *Id.*, 161 Mich.App., at p. 219, 409 N.W.2d, at p. 790. Reviewing those cases, the court said that only had found cases in which convictions were affirmed for acts of oral sex. The court cited two precedents in which consensual sexual acts between adults, other than fellatio, had been held not to constitute gross indecency as a matter of law. In *People v. Danielac*, 38 Mich.App. 230, 195 N.W.2d 922 (1972), an appellate panel found that sexual intercourse between a male and a female in the presence of others did not constitute gross indecency. In *People v. Holland*, 49 Mich.App. 76, 211 N.W.2d 224 (1973), the touching of an exposed penis by a female was held not to be gross indecency. Using the *Dexter* standard, as interpreted by these previous decisions, the *Myers* court declined to apply the statute to the defendant's touching of another's genital area over clothing. *Id.*, 161 Mich.App., at pp. 220-221, 409 N.W.2d, at p. 790. The court specifically added, however, that it was not commenting on whether the conduct might constitute a violation of some other statute.

In *People v. Trammell*, 171 Mich.App. 128, 429 N.W.2d 810 (1988), the defendant was

a prisoner in a correctional facility. From behind a two-way mirror, a prison guard observed a female in the visiting room take the defendant's penis out of his sweat suit pants and stroke it with her hands. On appeal, the defendant argued that the statute was unconstitutionally vague and that, on the basis of *Danielac* and *Holland*, the conduct for which he was convicted was not a violation of the gross indecency statute as a matter of law.

The appellate panel in *Trammell* declined to abandon the "common sense of society" standard in favor of that enunciated in *Howell. Id.*, 171 Mich.App., at p. 135, 429 N.W.2d 810, 813. The court said that the decisions in *Danielac* and *Holland* were aberrations and therefore it declined to follow them, adding that "the allegedly grossly indecent behavior must be assessed by the trier of fact on a case-by-case basis as tested against the touchstone of the community's sense of morality and propriety." *Id.*, 171 Mich.App., at p. 134, 429 N.W.2d, at p. 812. The court affirmed the conviction, declaring that the evidence was sufficient for the jury to convict. However, this Court later summarily reversed that decision "[b]ecause the evidence of gross indecency in this case was not sufficient." *People v. Trammel*, 433 Mich. 866 (1989).

In *People v. Austin*, 185 Mich.App. 334, 460 N.W.2d 607 (1990), 26 defendants challenged the constitutionality of the statute prohibiting gross indecency between males. The cases arose from state police electronic surveillance of a men's public rest room at a highway rest stop. A circuit court judge dismissed the cases and the state appealed. On appeal, the prosecution argued that the trial court erred in concluding that the gross indecency statute is unconstitutionally vague as it applies to consensual acts of fellatio and masturbation in a public rest room when no other members of the public are actually

present. The appellate court agreed with this argument.

The appellate panel in *Austin* adhered to the "common sense of society" standard established by the *Dexter-Carey-Hicks* line of decisions. *Id.*, 185 Mich.App., at p. 338, 460 N.W.2d, at p. 607. The court ruled that "the question whether defendants' actions in the present case constitute gross indecency is a question left to the discretion of a jury utilizing the 'common sense of society' standard." *Ibid.* The court in *Austin* cited three cases to support its conclusion that the defendants were given sufficient notice that their conduct was prohibited by the gross indecency statute.[8]

F. A Special Panel Convened in *People v. Brashier* Has Resolved the Conflict Among Appellate Panels, But It Did Not Cure the Statutes of Their Unconstitutional Vagueness

In the recent case of *People v. Brashier*, 197 Mich.App. 672, 496 N.W.2d 385 (1992), a special 13-member panel of the Court of Appeal was convened to resolve the conflict over:

> "Whether the definition of gross indecency . . . is the 'common sense of society' definition from *People v. Dexter*, 6 Mich App 247; 148 NW2d 915 (1967), or the definition in *People v. Lino*, 190 Mich App 715; 476 NW 2d 654 (1991), adopted from *People v. Howell*, 396 Mich 16; 238 NW2d 148 (1976)." 194 Mich.App. 413; 487 N.W.2d 479.

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[8] In *People v. Masten*, 96 Mich.App. 127, 292 N.W.2d 171 (1980), rev'd on other grounds 414 Mich. 16, 322 N.W.2d 547 (1982), the Court of Appeals concluded that a verbal solicitation that attemped to procure the commission of a private act of fellatio between consenting adult males was prohibited by the gross indecency statute. In *People v. Dauer*, 131 Mich.App. 839, 346 N.W.2d 599 (1984), the Court of Appeals held that the gross indecency statute applies to conduct occurring between two consenting adults. And in *People v. Livermore*, 9 Mich.App. 47, 155 N.W.2d 711 (1967), the Court of Appeals approved of the application of a gross indecency statute to consensual sexual conduct of two women which occurred inside their tent at a camping ground.

The special panel resolved the conflict in favor of the *Dexter* definition, because it found that *Howell* did not overrule binding Supreme Court precedent defining gross indecency in *People v. Carey, supra. Id.*, 496 N.W.2d, 386. Although the special panel acknowledged that *Carey* was not binding precedent because it did not involve a challenge to the statute based on vagueness, it nonetheless found that *Carey* contained sufficiently authoritative dicta that three-judge panels of the Court of Appeal were not free to reject it. The panel further noted that in *Carey* the Supreme Court had cited with approval the statement in *Hicks* that "the common sense of the community, as well as the sense of decency, propriety, and morality which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it." *Brashier, supra*, 197 Mich.App., at p. 679, 496 N.W.2d, at p. 388. It therefore concluded that the panel in *Lino, supra*, was not free to adopt the definition suggested by the plurality in *Howell*. Three of the justices wrote a concurring opinion in *Brashier* to express their belief that *Carey* was wrongly decided. *Id.*, 197 Mich.App., at p. 679 (Connor, Brennan, and Neff, Judges (concurring)) It is noteworthy that the other ten justices did not express an opinion as to whether *Carey* was based on good reasoning. They simply rested their decision on their opinion that *Carey* was authoritative dicta that bound the hands of lower courts.

Although *Brashier* resolved the conflict among appellate panels, the opinion did not cure the statute of its constitutional defect. Because the "common sense of society" standard is itself unconstitutionally vague, this Court must either invalidate the statute in its entirety or narrowly construe the statute in a constitutional manner.

II

THIS COURT SHOULD NARROWLY CONSTRUE THE GROSS INDECENCY STATUTES BY ADOPTING THE DEFINITION SUGGESTED BY THE PLURALITY OPINION IN *HOWELL* OR BY FORMULATING A SIMILAR DEFINITION THAT PASSES CONSTITUTIONAL MUSTER

One solution to overcome the vagueness of these statutes would be for this Court to invalidate the gross indecency statutes and thereby require the Legislature to cure the definitional problems. However, a more appropriate course of action would be for this Court to give the statutes a narrowing construction.[9]

Courts have a duty to construe a statute so as to avoid constitutional difficulties and in a manner that comports with a finding of constitutionality. *Fritts v. Krugh*, 354 Mich 97, 114, 92 N.W.2d 604 (1958); *People v. Barnes*, 146 Mich.App. 37, 43, 379 N.W.2d 464, 466

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[9] The situations before this Court in *Lino* and *Brashier, supra*, are unlike that involved in *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936 (1980), cert. den., *New York v. Onofre*, 101 S.Ct. 2323 (1981). The New York Court of Appeals in that case was faced with a constitutional challenge to a statute that was very specific. It prohibited consensual sodomy between unmarried persons. The prohibited conduct was defined in specific detail. The constitutional challenge, therefore, rested entirely on privacy and equal protection grounds. The court agreed with both constitutional arguments. With respect to the privacy argument, the court found that personal decisions to engage in such conduct would be protected from state interference "so long as the decisions are voluntarily made by adults in a noncommercial, private setting." *Id.*, 415 N.E.2d, at p. 941. Onofre had been convicted of engaging in consensual oral sex with a 17 year-old male. Although the Legislature in New York had not recognized an age of consent for sodomy, it is noteworthy that the age of consent for heterosexual fornication in New York is 17. The adult defendants in two consolidated cases decided the same day as *Onofre* were convicted under the consensual sodomy statute for engaging in oral sex inside vehicles during early morning hours while it was still dark outside. The court referred to their conduct as "private" and "discreet." *Id.*, at p. 941. The court found such conduct to be protected by the right of privacy because it was not commercial, did not involve force, did not involve minors, and did not intrude "on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others." *Onofre, supra*, 415 N.E.2d, at p. 941.

(1985). When a statute is susceptible of two constructions, one consistent with the constitution and the other inconsistent, the one consistent with the constitution is preferred as that presumptively intended by the Legislature. *People v. Neumayer*, 405 Mich. 341, 275 N.W.2d 230 (1979); *People v. Gilliam*, 108 Mich.App. 695, 700, 310 N.W.2d 843, 845 (1981).

The application of these basic rules of statutory construction to the issue at hand should result in the rejection of the "common sense of society" definition of gross indecency in favor of the construction suggested by the plurality opinion in *Howell*. This approach would result in a statute that gives fair notice of what is prohibited, that provides objective guidelines to judges and juries, and that satisfies other constitutional considerations such as the rights of privacy, due process, equal protection, freedom of religion, freedom of speech, and the right to be tried by an impartial jury.[10]

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[10] Any construction of the gross indecency statutes that does not remove the current vagueness of the "common sense of society" standard would cause a clash with due process clause of Article I, Sec. 17 of the state Constitution due to lack of notice. Failure to cure these statutes of their vagueness would also infringe on a defendants right to trial by an impartial jury as guaranteed by Art. I, Sec. 20, since a jury can hardly be considered impartial if each juror must decide a case on the basis of his or her preconceived notions of what is decent and improper. It would also cause a conflict with the equal benefit provision of Art. I, Sec. 1 and the equal protection clause of Art. I, Sec. 2 to the extent that conduct could be judged criminal or noncriminal depending on the sense of propriety from one local community to another. To the extent that a limiting construction is not placed on the statute to exempt private sexual behavior of consenting adults in a noncommercial setting, the gross indecency statutes would violate the right of privacy implicit in the Michigan Constitution. *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich. 465, 504-505. Since the gross indecency statutes originate from religious dictates (see People's Brief on Appeal in *People v. Lino*, at p. 11), and since there is no longer a consensus in society regarding the immorality of private sexual conduct of adults under secular notions of morality (see *People v. Onofre*, 51 N.Y.2d 476, 415 N.E.2d 936, 941, and see Appendix A, infra), use of the criminal law to enforce the religious views of one segment of society rather than those of others with differing moral values would violate the freedom of religion clause found in Art. I, Sec. 4 of the Michigan Constitution. Furthermore, to criminalize a verbal suggestion by one adult to another to engage in private consensual sexual activity of a noncommercial nature would violate the protection of freedom of speech.

A. The "Common Sense of Society" Standard is Impermissibly Vague

In *People v. Dexter, supra*, the Court of Appeals rejected a vagueness challenge to the statute prohibiting gross indecency between males. That court said the statute was not without sufficient guidelines because it prohibits "conduct that is of such character that the common sense of society regards it as indecent and improper." This definition should be soundly repudiated by this Court because it possesses all of the vices of unconstitutional vagueness, namely, lack of adequate notice, lack of objective standards to judge guilt or innocence, and overbreadth.

As to lack of notice, the *Dexter* standard does not give potential offenders adequate notice of what is prohibited so they can conform their conduct to the requirements of law. That standard has produced absurd and arbitrary results as to what conduct the statute does or does not prohibit.

For example, in *People v. Danielac, supra*, the Court of Appeals ruled that, as a matter of law, sexual intercourse between a male and a female in the presence of others is not an act of gross indecency. This holding was affirmed and further expanded in *People v. Holland, supra.* In that case, the Court of Appeals reversed the defendant's conviction, stating that if an act of intercourse is not gross indecency it could not see how the consensual act of a woman touching the exposed penis of a man in an automobile could possibly constitute a violation of the statute. *Holland, supra*, 49 Mich.App., at p. 79, 211 N.W.2d, at p. 226. In *People v. Myers, supra*, the Court of Appeals discussed the precedents in *Danielac* and *Holland*, indicating that the results in those cases were based on the "common sense of society" standard. *Myers, supra*, 409 N.W.2d, at p. 790. The court

affirmed those decisions and expanded them even further so as to exclude from the scope of the statute, as a matter of law, an act of one male groping the covered groin area of another male in a public rest room. *Ibid.*

If the conduct in *Danielac, Holland,* and *Myers* is not of "such character that the common sense of society regards it as indecent and improper" than how is a potential offender to know what conduct would be? What is the objective criteria that distinguishes criminal from noncriminal conduct? Apparently the sexual orientation of the conduct is not a critical factor since some homosexual and some heterosexual conduct has been excluded from the statute. Furthermore, the fact that the conduct occurs in a place that is technically public is not what triggers criminality. Even the presence of observers does not automatically satisfy the *Dexter* standard. To further confuse matters, the court in *Trammell, supra*, criticized the decisions in *Danielac* and *Holland* as aberrations and declined to follow them, while this Court reversed without an adequate explanation.

The Court of Appeals in *People v. Austin, supra*, adhered to the *Dexter* standard and concluded that potential offenders have been given adequate notice that oral sex between consenting adults in private is prohibited by the gross indecency statutes.[11] *Austin, supra*, 185 Mich.App., at p. 339, 460 N.W.2d, at p. 610.

This Court should disapprove of any further use of the *Dexter* standard since it has produced results that have caused more confusion than enlightenment. The arbitrariness of that standard is underscored by precedents that have excluded sexual intercourse done

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[11] *Austin* held that the *Masten, Dauer,* and *Livermore* cases "established sufficient notice to defendants." Each of those cases affirmed the principle that the gross indecency statutes proscribe private sexual conduct between consenting adults or verbal requests to engage in such conduct.

in view of observers but have included consenting sexual conduct between two adults in private or where the participants have a reasonable expectation of privacy.

An additional reason to reject the "common sense of society" test is that it does not provide objective standards to guide triers of fact. In a jury trial, for example, each juror must individually decide whether the defendant's conduct is of such a character that the "common sense of society regards it as indecent and improper." This requires the jury to make several determinations. According to *Hicks*, which has been cited with approval by *Carey* and most recently by the special appellate panel in *Brashier*, the "common sense of the community, as well as the sense of decency, propriety, and morality which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it." *Brashier, supra*, 197 Mich.App., at pp. 674-675, 496 N.W.2d, at p. 388.

To which community does this definition refer? The neighborhood in which the alleged crime took place? Or is it the city or county in which the prosecution occurs? Or might it be the statewide community? Of course, if it is intended to be a local geographic area, the result will be that conduct considered acceptable in some areas will be considered criminal in others, thus running afoul of state constitutional provisions designed to secure uniform operation of the law. Mich. Const., Art. I, Sec. 1 and Art. I, Sec. 2.[12]

Also, what criteria will be used to decide what is "indecent and improper" as required by *Dexter*? The "sense of decency, propriety, and morality which most people entertain" as

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[12] Article I, section 1 declares that government is instituted for the equal benefit, security, and protection of the people. Article, I, section 2 provides that no person shall be denied equal protection of the laws.

mentioned by *Hicks* and most recently by the special panel in *Brashier* certainly adds no further clarity. In effect, the "common sense of society" standard leaves jurors legally rudderless.

Finally, that standard is so vague and encompassing that it renders the gross indecency statutes overly broad. As argued below, the gross indecency statutes, as defined by the "common sense of society standard" sweep so broadly as to encompass within their ambit fundamental rights of intimate association and freedom of speech.

B. The *Howell* Definition or an Appropriate Adaptation Would Satisfy Relevant Constitutional Standards

Although it may not be the ultimate model of clarity because it needs some slight elaboration, the *Howell* definition of "gross indecency" passes constitutional muster. It not only gives ample notice to potential offenders and gives objective standards to triers of fact, but it also solves the serious overbreadth problem created by the current vagueness of the statutes.[13]

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[13] The gross indecency statutes currently suffer from constitutional overbreadth because their vagueness has permitted interpretations that criminalize sexual conduct in private between consenting adults or verbal conversations between adults designed to secure consent to engage in such noncommercial behavior in private (see *Masten, supra, Dauer, supra, Livermore, supra,* and *Austin, supra*). Although the overbreadth doctrine has traditionally been associated with behavior protected by the First Amendment, is also has been applied to any state abridgement of constitutionally protected fundamental rights. *People v. Hicks*, 149 Mich.App. 737, 742, 386 N.W.2d 657, 660 (1986); *In re Forfeiture of 719 N. Main*, 175 Mich.App. 107, 113, 437 N.W.2d 332, 335.

So far, Michigan appellate courts have managed to avoid squarely deciding whether the right of privacy protects noncommercial and private sexual conduct between consenting adults. *People v. Gunnett*, 158 Mich.App. 420, 404 N.W.2d 627 (1987); *State v. H.C. Mesk*, 333 N.W.2d 184 (1983); *People v. Penn*, 70 Mich.App. 638, 247 N.W.2d 575 (1976); *People v. Howell, supra*.

Noncommercial sexual intimacy of consenting adults in private is protected by the right of privacy. This Court has long recognized privacy to be a highly valued right. *Demay v. Roberts*, 46 (continued...)

As for giving notice to potential offenders and providing triers of fact with objective guidelines, the *Howell* definition clearly informs that the scope of the statute includes, and is limited to, "oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public." *Howell, supra*, 396 Mich., at p. 24. While this definition is not airtight, it provides reasonable certainty. That is all the constitution requires.

The *Howell* plurality apparently concluded that the Legislature did not intend for the gross indecency statute to be a catch-all to prohibit sexual activity that was already covered by other, more specific statutes. Thus, the *Howell* definition attempted to eliminate some redundancy from the law. For example, *Howell* does not include anal sex by force or with a minor, since that is encompassed by the sodomy statute (MCLA § 750.158; MSA § 28.355) and the criminal sexual conduct law. (MCLA § 750.520(a); MSA § 28.788(1))[14] Nor does it include sexual intercourse by force or with a minor because such conduct is punishable

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[13](...continued)
Mich. 160; 9 N.W. 146 (1881). Furthermore, this Court has indicated that the right of privacy has underpinnings in various provisions of Article I of the Michigan Constitution. *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 465, 504-505, 242 N.W.2d 3 (1976). The Michigan Constitution is not unlike other state constitutions which have been interpreted to prohibit the criminalization of private sexual conduct between consenting adults. (See *City of Dallas v. England*, __ S.W.2d __ , No. 3-92-243-CV, (Tex.App. 1993); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *State v. Saunders*, 75 N.J. 200 (1977); *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976). Also, if such conduct is constitutionally protected, then a discreet invitation by one adult to another adult to engage in such conduct must be protected by the free speech clause of the Michigan Constitution.

However, this Court can avoid a clash between the gross indecency statutes and constitutional protections of privacy, association, and free speech, and other constitutional provisions by adopting a construction similar to that proposed in *Howell*.

[14] Although the sodomy statute is not presently before this Court, *amici curiae* are of the opinion that it would also be unconstitutional as applied to private sexual conduct between consenting adults in a noncommercial setting.

under the criminal sexual conduct law. MCLA § 750.520(a); MSA § 28.788(1).[15]

There is room, however, for further clarification from this Court as to several aspects of the standard proposed by the plurality in *Howell*. Several questions need answers.

What specific "oral and manual sexual acts" are prohibited by force or with minors?[16] Does sex "with" a person under the age of consent include sexual activity in the presence of a minor even if the minor is not actually touched?[17] What "age of consent" governs the gross indecency statutes?[18] What "ultimate" sexual acts are prohibited in public and what constitutes a "public" place for purposes of these statutes?[19]

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[15] The *Howell* court did, however, acknowledge that some overlap would occur with respect to sexual touchings, since the criminal sexual conduct law does prohibit sexual contact and sexual penetration with a minor or by force. *Howell, supra*, fn. 10. Although the *Howell* definition does not eliminate all redundancy from the criminal law, it does promote specificity while furthering public policies against sex by force, with minors, or that cause offense to members of the public.

[16] Since previous reported decisions involving prosecutions for oral sex under the gross indecency statutes have been limited to fellatio and cunnilingus (see cases listed in *Myers, supra*, 409 N.W.2d at p. 790), it would appear that the *Howell* plurality had only those two forms of oral sex in mind when it formulated the limiting construction of the gross indecency statutes.

[17] The concurring opinion of three judges in *Brashier* suggested the answer to this question by concluding that the *Howell* definition included defendant Brashier's conduct. A reasonable construction of the phrase "with a person under the age of consent" could include not only oral and manual sex performed on a minor but also oral sex, solitary masturbation, or mutual masturbation occurring in the immediate presence of a minor. Perhaps a slight modification of the *Howell* definition from its present requirement of sexual conduct "with" a minor to such conduct "involving" a minor would solve this problem. (See discussion, infra, of *Schmidt v. State*, 590 So.2d 404 (1991). Or, this Court could relegate prosecution of sex with minors to other statutes that specifically focus on conduct with minors.

[18] It would seem that the state constitutional provisions protecting equal benefit of the law and equal protection of the law would require that the same age of consent that governs an act of sexual intercourse between a male and a female in private would also apply to the gross indecency statutes.

[19] The term "ultimate" suggests an act that, if completed, would lead to ejaculation by at least one of the parties, i.e., fornication, sodomy, fellatio, cunnilingus, and masturbation. This should be spelled out to avoid unnecessary ambiguity. Precedents in other jurisdictions that have defined the term "public" indicate that the use of the term "public" in such statutes is aimed at curbing conduct

(continued...)

While these are the types of questions that are usually resolved by the Legislature, the formulation of answers to them also fall within the jurisdiction of this Court as it fulfills its duty to construe statutes, resolve ambiguities, and interpret laws to avoid constitutional infirmities. Reasonable answers to these definitional questions can be found by resorting to normal rules of statutory construction.

Criminal statutes are to be strictly construed and any ambiguity is to be resolved in favor of leniency. *People v. Whetstone*, 131 Mich.App. 669, 346 N.W.2d 845 (1984). Courts require clarity and explicitness in the defininition of a crime. *People v. Reese*, 363 Mich. 329, 335, 109 N.W.2d 868 (1961). These rules not only insures adequate notice to potential offenders, but strict construction also serves to guard against the dangers of arbitrary and discriminatory application of otherwise vague legislative enactments. *People v. Jones*, 142 Mich.App. 819, 822, 371 N.W.2d 459, 461 (1985). Furthermore, statutes should be construed so that absurd consequences are avoided. *In re Meeboer*, 350 N.W.2d 868 (1984).

The answers suggested in the footnotes corresponding to the questions posed above are consonant with these general rules of statutory construction. They should also be adopted because they support and advance legitimate public policies against sex by force, sex with minors, and sex in public view that may offend unsuspecting viewers. They are also consistent with state constitutional provisions protecting intimate association and free speech.[20]

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[19](...continued)
that is exposed to public view and is therefore likely to offend unsuspecting viewers. An extended discussion of case law in several jurisdictions where courts have interpreted such statutes is found infra, at pp. 28-37.

[20] As argued elsewhere in this brief, the freedom of intimate association would protect the personal choice of consenting adults to engage in private sexual activity in a noncommerical setting. (continued...)

C. Precedents in Other Jurisdictions Dealing with Similar Problems of Statutory Construction are Helpful

This Court should be guided by case law in Massachusetts, California, Maryland, Florida, Indiana, and New Jersey where appellate courts have been faced with interpreting statutes prohibiting public indecency or indecent acts with children.

Massachusetts

In *Commonwealth v. Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974), the defendant was convicted of committing an "unnatural and lascivious" act. G.L. c. 272, § 35. He raised two issues on appeal. He alleged that the statute was unconstitutionally vague and he also argued that it violated the right of privacy because it could be applied to private sexual conduct between consenting adults.

The Supreme Judicial Court of Massachusetts agreed that the words "unnatural and lascivious" were sufficiently vague to present a serious constitutional defect in the statute. The court noted that in a previous case it had interpreted the words "unnatural and lascivious act" to mean "irregular indulgence in sexual behavior, illicit sexual relations, and infamous conduct which is lustful, obscene, and in deviation of accepted customs and

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[20](...continued)
The freedom of intimate association emanates from various provisions of the Declaration of Rights of the Michigan Constitution. Even though the constitution does not expressly mention the right of privacy or the freedom of intimate association, these protections are implicit in various provisions of the Declaration of Rights. Such an interpretation of the constitution is further butressed by Art. I, Sec. 23 which declares that the enumeration of specific rights in the state charter "shall not be construed to deny or disparage others retained by the people." Also, as argued elsewhere, freedom of speech, if it means anything, must include the right of one adult to engage in a verbal conversation with another adult that is designed to seek consent to engage in private sexual behavior.

manners." *Jaquith v. Commonwealth*, 331 Mass. 439, 442, 120 N.E.2d 189 (1954).

In *Jaquith*, the court had declared -- much like appellate courts in Michigan have -- that "the common sense of the community, as well as the sense of decency, propriety, and morality which respectable persons usually entertain, is sufficient to apply the statute to a situation and determine what particular kinds of conduct offends." *Id*, at p. 443. The court in *Jaquith* also concluded that further specification beyond the language of the statute would itself be an offense against common decency. *Id*, at p. 443. All of this, of course, seems reminiscent of the history and construction of the gross indecency statutes in Michigan.

Seizing on the bottom line of the standard previously adopted in *Jaquith*, the court in *Balthazar* observed that the statute had already been limited by judicial construction to proscribe only that "sexual conduct which virtually all members of the community have regarded as offensive." *Balthazar*, 366 Mass., at p. 301, 318 N.E.2d, at p. 480. The court then interpreted the statute, in that light, so as to exclude sexual conduct between consenting adults in private, stating:

> "In the years since the *Jaquith* case, a new factor has appeared with the articulation of the constitutional right of an individual to be free from government regulation of certain sex-related activities. [footnote omitted] First Amendment rights of free speech now permit even patently offensive portrayal of sexual conduct in a work which has some 'serious literary, artistic, political, or scientific value.' [citations omitted]
>
> "In light of these changes and in light of our own awareness that community values on the subject of permissible sexual conduct no longer are as monolithic as the *Jaquith* case suggested they were in 1954, we conclude that § 35 must be construed to be inapplicable to private, consensual conduct of adults. We do so on the ground that the concept of general community disapproval of specific sexual conduct, which is inherent in § 35, requires such an interpretation. We do not

> decide whether a statute which explicitly prohibits specific sexual conduct, even if consensual and private, would be constitutionally infirm." *Id*, 366 Mass., at pp. 301-302, 318 N.E.2d, at p. 481.

The decision in *Balthazar* left open the question of what would be considered "public" within the meaning of its new interpretation of the statute. However, it was not long before it had to squarely address that issue.[21]

In *Commonwealth v. Ferguson*, 384 Mass. 13, 422 N.E.2d 1365 (1981), the court ruled that under § 35 which prohibits unnatural and lascivious conduct, mere proof that the public has theoretical access to a place does not necessarily support a finding that the place is public within the meaning of the law against unnatural and lascivious conduct. The court observed that a place may be public at some times and under some circumstances, and not public at others. It said that the essential query is whether the defendant intended public exposure or recklessly disregarded a substantial risk of exposure to one or more persons. With these principles in mind, the court concluded that the prosection must prove the likelihood of being observed by a casual passerby must have been reasonably foreseeable to the defendant or that the defendant acted under an unreasonable expectation that his conduct would remain secret. This approach, or something similar to it, should be adopted

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[21] The prosecutor in *Lino, supra*, in its brief before this Court, has appropriately suggested that this Court should forthrightly deal with this issue in the case at hand. (People's Brief on Appeal, p. 19) The prosecutor has suggested that a workable standard would be something along the lines of that contained in the Model Penal Code. This would require proof that the defendant knows that his conduct is likely to be observed by others who would be affronted or alarmed. As the Ingham County Prosecuting Attorney points out in her excellent brief, the New Jersey Supreme Court used this standard when it narrowly construed a statute prohibiting private lewdness. *State of New Jersey v. J.O. and F.C.*, 355 A.2d 195, 196-197 (1976). The same could be done by this Court. Or, the Court could borrow from the approach used by the California Supreme Court and require proof of actual knowledge or constructive knowledge, i.e., that the defendant knows or should know of the presence of persons who may be offended by his conduct. *Pryor, infra*, 25 Cal.3d, at pp. 256-257.

by this Court in its interpretation of the gross indecency statutes.[22]

California

In *Pryor v. Municipal Court, supra*, 25 Cal.3d 238, the Supreme Court narrowed an otherwise unconstitutionally vague statute that prohibited "lewd" and "dissolute" conduct in a public place and that also prohibited solicitations to commit such conduct. The lengthy and scholarly opinion of Justice Tobriner should be helpful to this Court as it grapples with a similar problem of vagueness in the statutes prohibiting gross indecency and attempts to procure such criminal sexual conduct.

After analyzing case law in California and other jurisdictions, the Court concluded: "Clearly, the statute cannot be construed to ban all sexually motivated public conduct, for such a sweeping prohibition would encompass much innocent and nonoffensive behavior. A constitutionally specific definition must be limited to conduct of a type likely to offend."

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[22] Although the defendant in *Brashier* would not be affected by this construction since his conviction may be upheld under the sex-with-minors portion of the *Howell* definition, the defendant in *Lino* should get the benefit of any amplification by this Court as to what is "public" versus what is "private." It is clear from the record that the jury in the *Lino* case struggled for some time with this very issue but was not given amplifying instructions such as that suggested by amici curiae here. Although the trial judge may have properly denied the motion for a directed verdict because there was sufficient evidence on the "public" element of the crime to allow the case to proceed to the jury, amici curiae believes that the defendant should be afforded a new trial at which the jury is instructed according to whatever new guidelines are formulated by this Court to explain what the term "public" means in the context of the gross indecency statutes. As the Supreme Court of Massachusetts has observed, where evidence of the public or private nature of an act is susceptible to conflicting interpretations, it is for a jury to determine whether the offense was committed in a public place. *Commonwealth v. Scagliotti*, 373 Mass. 626, 371 N.E.2d 726 (1977). (But see *Commonwealth v. Ferguson*, 384 Mass. 13, 422 N.E.2d 1365, 1367-1369 (1981) where that court reversed a conviction with facts very similar to those in *Lino* because the state's case required "piling inference upon inference" that the defendant "recklessly disregarded a substantial risk of exposure to one or more persons.")

Pryor, supra, 25 Cal.3d, at p. 256. The court observed that "even if conduct occurs in a location that is technically a public place, the state has little interest in prohibiting that conduct if there are no persons present who may be offended." *Ibid.* Finally, the court concluded:

> "For the foregoing reasons, we arrive at the following construction of section 647, subdivision (a): The terms 'lewd' and 'dissolute' are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast, for the purpose of sexual arousal, gratification, annoyance, or offense, if the actor knows or should know of the presence of persons who may be offended. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view." *Id*, 25 Cal.3d, at pp. 256-257. (Accord: *Commonwealth v. Sefranka*, 382 Mass. 108, 117-118, 414 N.E.2d 602, 608 (1980)).

Although the portion of the gross indecency statute that prohibits procuring or attempting to procure such conduct is not presently before this Court in either *Brashier* or *Lino*, law enforcement officials and triers of fact also need guidance as to that portion of the statute since it would appear that, in its present form, the statute may be unconstitutionally overbroad.[23] If this Court interprets the gross indecency statute so as not to include private sexual conduct between consenting adults, then a solicitation of an adult to engage in such conduct in private should not be criminal if the solicitation is noncommercial in nature. The prostitution laws would govern commercial solicitations.

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[23] In *People v. Masten, supra*, 96 Mich.App. 127, this portion of the statute formed the basis of the defendant's conviction. Continued validity of the holding in *Masten* would render the statute constitutionally overbroad in violation of the free speech clauses of the state and federal constitutions to the extent that it might be applied to a verbal request designed to secure consent from an adult to engage in private sexual behavior that is lawful.

The judicial experience in other jurisdictions is particularly helpful in interpreting vague statutes that purported to criminalize verbal invitations from one adult to another to engage in a lawful sexual act. Cases from several jurisdictions are summarized in *Oregon v. Tusek*, 52 Or.App. 997, 630 P.2d 892, 894 (1981). There, the court observed:

> "The statutes involved various forbade acts that were 'unnatural and lascivious,' 'lewd or dissolute,' 'indecent', or 'immoral.' In each case, the statutes were challenged as vague. In each case, the court interpreted the statute only to prohibit solicitations to perform acts which would in themselves be punishable as crimes." *Tusek, supra*, 630 P.2d, at p. 894.

Because the statute in Oregon was not vague, the court in *Tusek* found itself in a different position that the previously cited cases from other jurisdictions. The court's task was not to construe the statute but to decide the constitutionality of an explicit and specific law. It struck the law down as overbroad, finding itself in agreement with the Supreme Court of Virginia which has stated that it would "be illogical and untenable to make solicitation of a noncriminal act a criminal offense." *Pederson v. City of Richmond*, 219 Va. 1061, 254 S.E.2d 95, 98 (1979). (Accord: *People v. Uplinger*, 58 N.Y.2d 936, 447 N.E.2d, 62 (1983), *cert. granted*, 464 U.S. 812 (1983), *cert. dismissed as improvidently granted*, 467 U.S. 246 (1984).

Maryland

Judicial experience in Maryland is also helpful. In *State v. Schochet*, 580 A.2d 176 (1990), Maryland's highest court narrowed the scope of a statute prohibiting "unnatural or perverted sexual practices." That court acknowledged that when a statute lends itself to alternative constructions, the court should embrace an interpretation that avoids

constitutional questions.

After reviewing case law on the right of privacy of consenting adults, and noting that cases have come down on both sides of the issue, the court adopted a construction that exempted private sex between consenting heterosexuals. Since the conduct of the defendant in Schochet did not involve homosexual conduct, the court was not faced with a decision about the application of the statute to consensual and private homosexual conduct.

Florida

A decision by the Florida Supreme Court in *Schmidt v. State*, 590 So.2d 404 (1991), is also useful, especially with respect to this Court's interpretation of the gross indecency statute to conduct involving minors, such as that in the *Brashier* case. In *Schmidt*, the defendant was arrested pursuant to a warrant. The affidavit in support of the warrant alleged that Schmidt had been taking nude photographs of his 12-year-old daughter for several years and that he had her take nude photographs of him. Even though there was no evidence that any sexual contact had occurred between father and daughter, the magistrate issued a warrant after concluding that such conduct violated two Florida statutes. Section 827.071, in pertinent part, prohibited the knowing possession of any depiction known to include "sexual conduct" by a child, which, as further defined, included "lewd exhibition of the genitals." Section 800.04 prohibited "any lewd or lascivious act in the presence of any child under the age of 16 years." *Schmidt, supra*, 590 So.2d, at p. 408. When they served the warrant, sheriff deputies seized various photographs and videotapes that later formed the basis of the state's case against Schmidt. Schmidt pled no contest to

several of the charges and then appealed. On appeal, he claimed that the warrant was not based on probable cause and that the statutes in question were unconstitutional.

The Florida Supreme Court construed the statutes narrowly so as to overcome Schmidt's vagueness challenge. The court indicated that simple nudity in the presence of a child, especially such conduct by a parent within the confines of the family's home, if done without a lewd or abusive intent, was not a crime under either statute. *Schmidt, supra*, 590 So.2d at p. 410. The court observed that if such *mens rea* were not required by the statute, "too many entirely innocent situations would be criminalized." *Ibid.* The court recognized that families and home-dwellers have a legitimate privacy interest that the law must respect. *Ibid.* On the other hand, the court indicated its awareness that child exploitation was a particularly pernicious evil that is sometimes concealed behind the zone of privacy that normally shields the home and that the state has a very compelling interest in preventing such conduct. *Ibid.* Balancing these interests, the court upheld the relevant portions of the statutes that required a showing of "lewd" conduct. As construed, the court held that lewdness required the state to show "an intentional act of sexual indulgence or public indecency when such act causes offense to one or more persons viewing it or otherwise intrudes upon the rights of others." *Ibid.* The court emphasized that lewdness means "something more than a negligent disregard of accepted standards of decency, or even an intentional but harmlessly discreet unothordoxy. (citation omitted) Acts are neither 'lewd' nor 'lascivious' unless they substantially intrude on the rights of others." *Ibid.* The court then concluded that "it is evidence beyond all doubt that any type of sexual conduct involving a child constitutes an intrusion upon the rights of the child, whether or not the

child consents and whether or not that conduct originates from a parent." *Schmidt, supra*, 590 So.2d, at pp. 410-411. Applying these principles to the case then under consideration, the Supreme Court ruled that Schmidt's conduct toward his daughter included the "lewdness" element and that the overall focus of Schmidt's conduct tended to show a lewd intent. *Schmidt, supra*, 590 So.2d at p. 411.

Indiana

Lasko v. State, 409 N.E.2d 1124 (Ind.App. 1980), involved a conviction under Indiana's public indecency statute. In that case, a vice squad officer entered a massage parlor, requested a massage, and was escorted into a private room. The masseuse instructed him to remove his clothing. She then closed and locked the door. The officer asked the masseuse to disrobe. She told him that would cost him an extra $10.00, which he paid her. She undressed and gave him a massage, during which she fondled his genitals. Subsequent to the massage, she was arrested for public indecency and prostitution. At trial, she was found not guilty of the prostitution charge but was convicted of public indecency. On appeal, she argued that her conviction should be overturned because there was insufficient evidence that the conduct occurred in a "public place" within the meaning of the statute. The appellate court reversed her conviction, concluding:

> "A private locked room in which two consenting adults engage in promiscuous conduct is not a 'public place' within the meaning of the Public Indecency Statute, Ind. Code § 35-45-4-1." *Lasco, supra*, 409 N.E.2d, at p. 1128.

Noting that sexual conduct of adults might be punishable under other statutes prohibiting sexual activity, the court concluded, that "what two consenting adults do in

private is not 'public' indecency." *Lasco, supra*, 409 N.E.2d, at p. 1128. The court added:

> "Our case law supports the theory that public indecency, when only two consenting persons are involved in the act, is made punishable in order to protect the non-consenting viewer who might find such a spectacle repugnant." *Id*, 409 N.E.2d, at p. 1128.

The court in *Lasco* also examined the case law of sister states in Texas, Georgia, Maryland, New Jersey, and California, and concluded that when only two persons are involved, "the cases seem to focus on whether the conduct is likely to be witnessed by other persons." *Lasco, supra*, 409 N.E.2d, at p. 1129. The court therefore reversed the conviction because "neither actual nor potential view by others was possible." *Ibid.*

New Jersey

In *State v. J.O. and F.C.*, 355 A.2d 195 (N.J. 1976), the state Supreme Court narrowly interpreted a statute prohibiting acts of "lewdness" whether in public or in private, thereby finding it unnecessary to squarely decide if the statute, as applied to private consensual conduct of adults would violate the right of privacy.

Noting that it had already narrowed the statute to acts of indecent exposure, sex by force, and acts tending to subvert the morals of minors, the court then clarified when an act of consensual private lewdness would constitute "indecent exposure." It ruled that conduct would be criminal under the statute if it is offensive to persons who are present or is likely to be offensive to such victims. The court reversed the conviction of the defendants who had committed an act of consensual oral sex in a vehicle parked at a highway rest area because it was not observed by members of the public who might have been offended.

CONCLUSION

For all of the reasons articulated above, this Court should reject the "common sense of society" standard as unconstitutionally vague. It should adopt the intent and spirit of the definition formulated by the plurality opinion in *Howell*. However, it should further define the offense of gross indecency in the following specific terms:

> "'Gross indecency' means oral and manual sexual acts (i.e., fellatio, cunnilingus, or masturbation) by force or involving persons under the age of consent, or any ultimate sex act (i.e, fornication, sodomy, fellatio, cunnilingus, or masturbation) committed in public view (i.e., under circumstances where the actor knows or should know that persons are present who may be offended by viewing such conduct)."

The same age of consent that is currently used to distinguish lawful from unlawful acts of sexual intercourse in private with a minor also should apply to the gross indecency statutes. The Court should further clarify that the portion of these statutes that prohibits procuring or attempting to procure an act of gross indecency must be limited to procurement of acts that are criminal under its clarified definition of gross indecency. If this specific narrowing construction is not given to these statutes, then guidelines that are very similar should be formulated.

The standard adopted by this Court should then be used to evaluate the criminality of the conduct of the defendants in *Lino* and *Brashier*. Application of this construction to these pending cases should not offend principles of due process since the Court will have narrowed rather than broadened the statute under which these defendants were prosecuted.

In the *Lino* case, the Court should consider granting a retrial because, with a limiting instruction, it is reasonably probable that the jury in that case would have reached a result

more favorable to the defendant. This is evidenced by the jury's questions and its apparent difficulty in deciding whether the defendant's conduct was truly "public" within the meaning of the statute.

In the *Brashier* case, the adoption of a construction such as that proposed above should result in an affirmance of the order denying the defendant's motion to quash since the evidence established that the defendant engaged in, or procured, or attempted to procure, a manual sex act involving minors.

Dated: November 12, 1993

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APPENDIX A

**Excerpts from a 1992 Report of
Spectrum Institute Entitled**

**"PUBLIC OPINION ON FAMILY ISSUES:
Compilation of Public Responses
to Hundreds of Questions Asked
in More Than 60 National Surveys
Conducted Between 1971 and 1991"**

Sex between unmarried couples is wrong.

	1981	1986	1987
Agree	44%	49%	41%
Disagree	51%	48%	57%
Don't know/No opinion	5%	3%	2%

(ABC News/Washington Post, National Adults, 1981--1533, 1986--1148, #35, 36; ABC News, 1987, National, 852 Adults, #37)

Do you think it is a sin, or not, for unmarried people to have sexual relations?

Always	39%
Often	10%
Seldom	19%
Never	25%
Not sure/Refused	7%

(Los Angeles Times, 1987, National, 2040 Adults, #24)

Do you think unmarried men and unmarried women who have sexual relations with each other can still be good Catholics?

Yes	78%
No	17%
No opinion	5%

(CBS News/New York Times, 1987, National, 1480 Adults, #33)

Do you personally think that homosexual relationships between consenting adults are morally wrong or not a moral issue?

Morally wrong 53%

Not a moral issue 38%

Not sure 9%

(Yankelovich, Skelly & White, Time, 1978, National, 1044 Voters, #11)

What is your attitude toward homosexuality and homosexual relations between consenting adults?

Approve 6%

OK for others 40%

Oppose it for everyone 50%

Not sure 3%

(Los Angeles Times, 1985, National, 2308 Adults, #297)

What do you think about sexual relations between two adults of the same sex?

Always wrong 73%

Almost always wrong 5%

Wrong only sometimes 6%

Not wrong at all 12%

Don't know 5%

(Nat'l Opinion Resesarch Center, General Social Survey 1990, 1990, National Adults, #319)

Please tell me how you think *homosexual relations in private between consenting adults* should be treated.

	1978	1990
Left to the Individual	70%	63%
Allowed but regulated by law	5%	8%
Totally forbidden by law	20%	27%
Not sure	5%	1%

(Louis Harris & Associates: Sentry Insur., 1978, 1513 Nat'l Adults, #312; Equifax, 1990, 2254 Nat'l Adults, #309)

The Supreme Court recently ruled that the Constitution does not give consenting adults the right to have private homosexual relations. Do you approve or disapprove of this ruling?

Approve	51%
Disapprove	41%
No opinion	8%

(Gallup Organ., Gallup Report, 1986, National, 1538 Adults, #311)

There is now (after the Supreme Court decision) some question as to the legality of state laws against the same sexual practiced engaged in privately by *heterosexuals*. Thinking about people you know and your community, do you think these sexual practices between men and women are commonplace or not?

Commonplace	42%
Not commonplace	33%
Don't know	25%

(Gallup Organ., Newsweek, 1986, National, 611 Adults, #7)

In general, do you think that states should have the right to prohibit particular sexual practices conducted in private between:

Consenting adult men and women

No	74%
Yes	18%
Don't know	8%

Consenting adult homosexuals

No	57%
Yes	34%
Don't know	9%

(Gallup Organ., Newsweek, 1986, National, 611 Adults, #7, 349)

Some people feel that homosexuality should be illegal. Do you:

Respondants	Agree	Disagree	Don't Know
U.S. Straight			
Liberal	13%	80%	6%
Middle of the Road	15%	76%	9%
Conservative	27%	63%	10%
Bay Area Gay/Bisexual			
Men	3%	97%	*
Women	19%	81%	*

(Teichner & Assoc., San Francisco Examiner, 1989, National--3748 Heterosexuals, 400 Gay/Bisexuals; Bay Area--1871 Heterosexuals, 400 Gay/Bisexuals)

APPENDIX B

Results of a 1993 Survey of Spectrum Institute on State Laws Affecting the Privacy Rights of Consenting Adults

SURVEY OF STATE LAWS REGULATING PRIVATE SEXUAL CONDUCT BETWEEN CONSENTING ADULTS

STATE	*Cohabitation* of an Unmarried Man & Woman is Criminal**	Consensual *Fornication* of an Unmarried Man & Woman is Criminal***	Consensual Sodomy of a *Same-Sex* Couple is Criminal****	Consensual Sodomy of an *Unmarried* Man & Woman is Criminal****	Consensual Sodomy of a *Married* Couple is Criminal****
Alabama	no	no	yes	yes	no
Arizona	yes	no	yes	yes	yes
Arkansas	no	no	yes	no	no
Florida	yes	no	yes	yes	yes
Georgia	no	yes	yes	yes	no†
Idaho	yes	yes	yes	yes	yes
Illinois	no	yes	no	no	no
Kansas	no	no	yes	no	no
Louisiana	no	no	yes	yes	yes
Massachusetts	no	yes	yes*	yes*	yes*
Maryland	no	no	yes	yes*	yes*
Michigan	yes	no	yes	yes	yes
Minnesota	no	yes	yes	yes	yes
Mississippi	yes	no	yes	yes	yes
Missouri	no	no	yes	no	no
Montana	no	no	yes	no	no
New Mexico	yes	no	no	no	no
North Carolina	yes	no	yes	yes	no
North Dakota	yes	no	no	no	no
Oklahoma	no	no	yes	no	no
Rhode Island	no	no	yes	yes	no
South Carolina	no	yes	yes	yes	yes
Tennessee	no	no	yes	no	no
Utah	no	yes	yes	yes	yes
Virginia	yes	yes	yes	yes	no
West Virginia	yes	yes	no	no	no
District of Columbia	no	yes	no	no	no

(Rev. 7-20-93)

† Although the Supreme Court did not rule on the issue, the Attorney General conceded the law would be unconstitutional if it were applied to married couples. (*Bowers v. Hardwick* (1986) 478 U.S. 186, 218, fn. 10 (Stevens, J., dissenting))

* By decisions of the highest courts in these states, oral sex in private by heterosexuals or by homosexuals is not illegal in Massachusetts, and oral sex by opposite-sex couples is not illegal in Maryland. However, anal sex is illegal in both states.

** Cohabitation laws prohibit an unmarried man and woman from openly and notoriously living together in a sexual relationship.

*** Fornication laws make it a crime for an unmarried man and woman to have consenting sexual intercourse even in private.

**** Sodomy laws prohibit consenting adults from engaging in oral sex or anal sex or both even in the privacy of their home.

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HOW THE STATES REGULATE NONCOMMERCIAL PRIVATE SEXUAL BEHAVIOR OF CONSENTING ADULTS

ALABAMA

Sodomy. So-called "deviate sexual intercourse" is criminal in Alabama even if it is between consenting adults in private. Under section 13A-6-65(a)(3) of the Code of Alabama, any act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another is punishable by up to one year in jail. In *State v. Woodruff* (Ala.Cr.App. 1984) 460 So.2d 325, the court declined to rule whether this statute violated the right of privacy of consenting adults.

ARIZONA

Cohabitation. Under section 13-1409 of the state Criminal Code, a person who lives in a state of "open and notorious cohabitation" is guilty of a class 3 misdemeanor. This offense was reduced from a felony to a misdemeanor in 1978.

Sodomy. Under section 13-1411, a person who engages in the infamous crime against nature (anal intercourse) with an adult is guilty of a class 3 misdemeanor. In *State v. Quinn* (Ariz.App. 1979) 592 P.2d 778, the appellate court ruled that consent is not a defense.

Lewd and Lascivious Acts. Under section 13-1412, a person who commits a lewd or lascivious act upon another adult, in any unnatural manner, is guilty of a class 3 misdemeanor. In *State v. Pickett* (Ariz. 1978) 589 P.2d 16, the court ruled that oral sex is prohibited by this statute. According to *State v. Mortimer* (Ariz. 1970) 467 P.2d 60, even consensual homosexual masturbation is prohibited by this law.

ARKANSAS

Sodomy. Under section 1813 of the Arkansas Criminal Code, it is a misdemeanor for persons of the same sex to engage in oral and anal sex even if it is consensual. Offenders can be punished by up to one year in jail.

FLORIDA

Cohabitation. Under section 798.02 of the Criminal Code, it is a misdemeanor for a man and a woman who are not married to each other to "lewdly and lasciviously cohabit together." In *Luster v. State* (Fla. 1887) 2 So. 690, the court said that the purpose of the statute is to prohibit the public scandal and disgrace of unmarried cohabitation and to prevent such evil and indecent examples that tend to corrupt public morals.

Unnatural and Lascivious Acts. Section 800.02 of the Criminal Code makes it a misdemeanor for any two persons to engage in any "unnatural and lascivious act." The Florida Supreme Court narrowed the scope of a similar statute, however, in *Schmitt v. State* (Fla. 1991) 590 So.2d 404, when it declared that sexual conduct is not "lewd" or "lascivious" if it is "harmlessly discreet" and that to be a crime, the conduct must "substantially intrude on the rights of others."

GEORGIA

Fornication. Under section 16-6-18 of the Code of Georgia, it is a misdemeanor for an unmarried person to have voluntary sexual intercourse with another person.

Sodomy. Under section 16-6-2, oral and anal sex between consenting adults is punishable from one year to 20 years in prison. The United States Supreme Court upheld the constitutionality of this statute in *Bowers v. Hardwick* (1986) 478 U.S. 186.

IDAHO

Fornication. Under section 18-6603, sexual intercourse between an unmarried man and woman is a crime even if it is consensual.

Cohabitation. Under section 18-6604, it is a crime for an unmarried man and woman to "live and cohabit together" or to "lewdly and notoriously associate together."

Sodomy. Under section 18-6605, consensual oral and anal sex are punishable by not less than 5 years in prison.

ILLINOIS

Fornication. Under section 5/11-8 of the Criminal Code, sexual intercourse between unmarried adults is a misdemeanor if the behavior is "open and notorious." Merely cohabiting out of wedlock is no longer a crime due to a 1990 amendment to the code. In the case of *In re Marriage of Olson* (Ill.App. 1981) 424 N.E.2d 386, the court ruled that a conviction may not be based on mere reputation but may rest on the words or actions of the accused.

KANSAS

Sodomy. Under section 21-3505, homosexual sodomy is a misdemeanor. Sodomy includes oral and anal sex.

LOUISIANA

Sodomy. Under section 89 of Title 14 of the Revised Statutes, oral and anal sex between consenting adults are punishable by up to five years in prison. In *State v. McCoy* (La. 1976) 337 So.2d 192, the state Supreme Court ruled that the statute is not unconstitutional. However, on June 1, 1993, District Judge Calvin Johnson declared that the statute violated the state constitution's right of privacy in *State v. Baxley*. The prosecution has appealed the decision.

MARYLAND

Sodomy. Under section 27-553, anal sex (gay or straight) is punishable by up to 10 years in prison. In *State v. Schochet* (1990) 580 A.2d 176, the state's highest court ruled that section 27-554, which prohibits oral sex, does not apply to consenting heterosexual adults who engage in such conduct in private.

MASSACHUSETTS

Fornication. Under section 18, sexual intercourse in private between an unmarried man and woman is a misdemeanor. In *Petition of R* (D.C. 1944) 56 F.Supp. 969, a couple were found in violation of this law because the man's previous marriage had not been validly dissolved.

Sodomy. Under section 34, anal intercourse is punishable by up to 20 years in prison. In *Commonwealth v. Balthazar* (Mass. 1974) 318 N.E.2d 478, the state Supreme Court ruled that another statute that prohibited unnatural and lascivious conduct could not be applied to private sexual conduct between consenting adults. However, this was done because the statute was too vague. The court stated that it was not deciding "whether a statute which explicitly prohibits specific sexual conduct, even if consensual and private, would be constitutionally infirm."

MICHIGAN

Cohabitation. Under section 28.567 of the Penal Code, it is a misdemeanor for a man and woman who are not married to each other to "lewdly and lasciviously associate and cohabit together." According to the court in *People v. Smith*, 231 Mich. 221, it is not necessary to prove that the cohabitation was "open and notorious." Offenders can be sent to jail for up to one year.

Sodomy. Under section 750.158, homosexual and heterosexual anal intercourse are punishable by up to 15 years in prison. (See *People v. Schmidt* (Mich. 1936) 267 N.W. 741 and *People v. Askar* (Mich.App. 1967) 153 N.W.2d 888.) The court in *People v. Coulter* (Mich.App. 1980) 288 N.W.2d 448 sidestepped the issue of whether the law violated the constitutional rights of consenting adults who engage in sodomy in the privacy of the home.

Gross Indecency. Michigan prohibits gross indecency between males (§ 750.338), between females (§ 750.338(a)) and between a male and a female (§ 750.338(b)). A violation may be punished by up to 5 years in prison. In *People v. Howell* (Mich. 1976) 238 N.W.2d 148, the state Supreme Court came close to removing private sexual conduct between consenting adults from punishment under the gross indecency statutes. However, only three justices voted to exclude private sexual conduct. Since four votes are necessary to create binding precedent, some subsequent decisions of the Court of Appeals have declined to exempt private conduct between consenting adults from the statute. The constitutionality of the gross indecency statutes is presently before the Supreme Court in *People v. Brashier*, No. 95687, and *People v. Lino*, No. 92352. Oral argument in those cases occurred in December 1993.

MINNESOTA

Fornication. Under section 609.34, it is a misdemeanor for "any man and a single woman to have sexual intercourse with each other."

Sodomy. Under section 609.293, anyone who voluntarily engages is oral sex or anal sex may be sent to prison for up to one year. In *State v. Gray* (Minn. 1987) 413 N.W.2d 107, the state Supreme Court declined to hold the statute unconstitutional in a case involving sex for compensation, but left open the question as to whether it would violate the privacy rights of consenting adults if no money was involved. The court has indicated however that the privacy provision of the Minnesota Constitution provides more protection to its citizens than the privacy provision of the federal Constitution. (See *Jarvis v. Levine* (Minn. 1988) 418 N.W.2d 139, 147-149; *State v. Davidson* (Minn. 1992) 481 N.W.2d 51, 58.) The recent enactment of a state law prohibiting sexual orientation discrimination would appear to increase the likelihood that a future judicial decision would recognize the privacy rights of consenting adults.

MISSISSIPPI

Cohabitation. Under section 97-29-1, it is a crime for a man and woman to unlawfully cohabit, whether in adultery or fornication. It is not necessary to prove that the parties dwelled together publicly as husband and wife. The offense may be proven by circumstances which show habitual sexual intercourse.

Sodomy. Under section 97-29-59, acts of oral and anal sex, whether homosexual or heterosexual, are punishable by up to 10 years in prison.

MISSOURI

Sodomy. Under section 566.090(3), it is a misdemeanor for persons of the same sex to engage in any sexual act involving the genitals of one person or the mouth, tongue, hand, or anus of the other person. The state Supreme Court upheld the constitutionality of this statute in *State v. Wash* (Mo. 1986) 713 S.W.2d 508.

MONTANA

Sodomy. Under section 45-2-101(20), oral sex, anal sex, or any sexual touching between persons of the same sex is punishable by up to 10 years in prison.

NEW MEXICO

Cohabitation. Under section 30-10-2, it is illegal for an unmarried man and woman to cohabit as man and wife. The most a judge can do on a first conviction is to warn the couple to stop such cohabitation. Under a second or subsequent conviction, the offenders can be jailed for up to six months. In *Estate of Bivians* (N.M.App. 1982) 652 P.2d 744, the state Court of Appeals cited this statute and ruled that unmarried cohabitation is against public policy.

NORTH CAROLINA

Sodomy. Oral and anal sex committed between unmarried persons are punishable by up to 10 years in prison according to section 14-177 of the General Statutes. Consent is not a defense. (See *State v. Adams* (N.C. 1980) 264 S.E.2d 46; *State v. Poe* (N.C.App. 1979) 252 S.E.2d 834.)

Cohabitation. Under section 14-184, it is a misdemeanor for any man and woman not married to each other to lewdly "associate, bed, and cohabit together."

NORTH DAKOTA

Cohabitation. Under section 12.1-20-10, it is a misdemeanor for an unmarried man and woman to live together "openly and notoriously" as a married couple. The law is violated if the couple do not conceal the fact they are having intercourse and it becomes generally known in the community. (See *State v. Hoffman* (N.D. 1938) 282 N.W. 407.)

OKLAHOMA

Sodomy. Under section 21-866, oral and anal sex may be punished by up to 10 years in prison. The scope of the statute was narrowed in *Post v. State* (Okla.App. 1986) 715 P.2d 1105 where the court ruled that the right of privacy would prevent application of the law to the private conduct of consenting

adults of the opposite sex. The court said it was not reaching the issue of homosexuality since that was not involved in the case.

RHODE ISLAND

Sodomy. Under section 11-10-1, oral and anal sex are punishable by not less than 7 years nor more than 20 years in prison. In *State v. Santos* (R.I. 1980) 413 A.2d 58, the state Supreme Court ruled that the right of privacy does not apply to "private unnatural copulation between unmarried adults." The court's decision seemed to imply that married couples would be protected by the right of privacy. Rhode Island repealed its law against fornication in 1989.

SOUTH CAROLINA

Fornication. Under section 16-15-60, an unmarried man and woman who have sexual intercourse with each other may be punished by up to one year in jail.

Sodomy. Under section 16-15-120, "buggery" may be punished by a term of 5 years in prison. The term "buggery" is not defined by statute or by any published court decision in that state. Blacks Law Dictionary defines the term to include "carnal copulation against nature; a man or a woman with a brute beast, a man with a man, or a man unnaturally with a woman."

TENNESSEE

Sodomy. Under section 39-13-510, it is a misdemeanor for persons of the same sex to engage in oral or anal sexual conduct.

UTAH

Fornication. Under section 76-7-104, any unmarried person who shall voluntarily engage in sexual intercourse with another is guilty of a misdemeanor.

Sodomy. Under section 76-5-403, oral and anal sex are misdemeanors regardless of the gender of the sexual partners.

VIRGINIA

Fornication. Under section 18.2-344, sexual intercourse between an unmarried man and woman is a misdemeanor.

Cohabitation. Under section 18.2-345, any persons who are not married to each other who lewdly and lasciviously associate and cohabit together are punishable by up to one year in jail. In *Doe v. Duling* (E.D. Va. 1985) 603 F.Supp. 960, a federal judge ruled that the cohabitation and fornication laws violated the privacy rights consenting adults. The decision was reversed by the U.S. Court of Appeals in *Doe v. Duling* (4th Cir. 1986) 782 F.2d 1202. The appeals court ruled that the male and female plaintiffs lacked standing to challenge the constitutionality of the statute since they did not show even a remote chance that they were threatened with prosecution. The court declined to render an advisory opinion, one way or the other, on the constitutionality of these statutes.

Sodomy. Under section 18.2-361, oral and anal sex are punishable by up to five years. In *Doe v. Commonwealth's Attorney* (E.D. Va. 1975) 403 F.Supp. 1199, the court ruled the statute was constitutional as applied to homosexual conduct. The Supreme Court affirmed that decision, 425 U.S. 901 (1976). However, in *Lovisi v. Slayton* (4th Cir. 1976) 539 F.2d 349, a federal Court of Appeals indicated that private sexual conduct of a married couple could not be punished.

WEST VIRGINIA

Fornication. Under section 61-8-3, fornication is only punishable by a fine of $20.

Cohabitation. Under section 61-8-4, it is a misdemeanor for unmarried persons to lewdly and lasciviously associate and cohabit.

DISTRICT OF COLUMBIA

Sodomy. Private acts of sodomy between consenting adults was decriminalized by the city council on May 5, 1993. The new law went into effect on September 14, 1993, when, after a 60 day review period expired, Congress did not override the council's action.

Fornication. Under section 22-1002, intercourse between an unmarried man and woman is a misdemeanor. The district did not repeal this law when it revised the sodomy law on May 5, 1993. As a result, heterosexual intercourse remains a crime in the district although homosexual sex is no longer criminal.