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A BOY OF BOISE: IN DEFENSE OF IDAHO'S MOST FAMOUS TOE-TAPPER

*Alana Chazan**

*"This is an airport—they're supposed to watch out for terrorists and bombs, not sit in a bathroom eight hours a day."*¹

In 1961, the first sodomy statute was repealed in Illinois.² Not until 2003, under *Lawrence v. Texas*,³ were the last sodomy statutes overturned. In June 2007, Republican United States Senator Larry Craig of Idaho was arrested for conduct which the arresting officer believed was intended to convey a desire to engage in sodomy in an airport bathroom. This arrest highlights how, post-*Lawrence*, penal statutes such as disorderly conduct and invasion of privacy are being used to curtail the symbolic speech of people who wish to engage in consensual sex in places that are known as "tearooms"⁴—public spaces where men have historically met for casual, impersonal sex.⁵

The historical stigma and legal repercussions of being homosexual led to the development of an intricate code of rules and roles among tearoom participants.⁶ This code is a form of symbolic speech that functions like a courtship ritual.⁷ While the code serves many purposes, the ultimate purpose is for the fulfillment of consensual private sex.⁸ Since consensual private sex is no longer illegal, statutes used to punish actions taken in anticipation of pri-

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¹ Duff Wilson, *Sting Charges Against Craig Harsher Than Some*, N.Y. TIMES, Sept. 10, 2007, at A24, available at <http://www.nytimes.com/2007/09/10/washington/10craig.html?emc=eta1> (quoting Defense Attorney Jonathan Burris, an attorney representing five men arrested in the bathroom of the St. Paul Minneapolis International Airport during the summer of 2007).

² American Civil Liberties Union, *History of Sodomy Laws and the Strategy That Led Up to Today's Decision*, (June 16, 2003), <http://www.aclu.org/lgbt/discrim/11895res20030616.html> (last visited Apr. 17, 2008).

³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴ LAUD HUMPHREYS, *TEAROOM TRADE: IMPERSONAL SEX IN PUBLIC PLACES* 2–3 (Aldine De Gruyter ed., 1975) (1970).

⁵ *Id.* at 2.

⁶ *Id.* at 2–3, 13, 81–82.

⁷ *Id.* at 13.

⁸ *Id.* at 2–3.

vate sex must be more narrowly construed to prevent infringing upon the tearoom participants' free speech rights under the First Amendment.

This Comment begins by examining the history of sodomy statutes in the United States and the danger and stigma attached to being homosexual. Part I examines the role of tearooms, past and present, and the intricate codes of speech that occur within them. Part II examines the arrest of Senator Craig in a public restroom, the specific bodily movements for which he was arrested, and the Minnesota court's denial of his attempt to withdraw his guilty plea. Finally, Part III argues that the court's interpretation of protected speech under Minnesota's disorderly conduct statute was inconsistent with precedent.⁹ This section argues that Craig's actions constituted neither "fighting words"¹⁰ nor the solicitation of unlawful activity,¹¹ but rather protected symbolic speech. This section will also examine analogous cases of protected expressive conduct and show why the First Amendment should protect symbolic speech of the "tearoom trade."

I. THE DEVELOPMENT OF A SILENT SPEECH IN THE FACE OF REPRESSIVE HOMOPHOBIA AND LEGAL RAMIFICATIONS FOR SODOMY

A. *A History of Homophobia: Sodomy Statutes and Witch-Hunts*

A high-profile politician, who was a loyal aide to the President, a family man, and a father of six, was arrested for disorderly conduct after being found with another man in a public restroom. The politician pled guilty without first consulting an attorney. A local newspaper uncovered the arrest, and the President's attorney put pressure on the paper to not run the story. The newspaper ran the story and, upon further investigation, discovered that this was not the politician's first arrest for disorderly conduct. The politician was forced to resign from his position, leave Washington, and subsequently had a nervous breakdown. His name was not Larry Craig, but instead Walter Jenkins. He was the top aide to President Lyndon Johnson, and the year was 1964.¹²

Two years after Walter Jenkins's arrest in a YMCA bathroom and the subsequent publicity surrounding it, a doctoral student named Laud Humphreys began a sociological study of men who

⁹ See *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1103 (W.D. Ark. 2000); *In re S.L.J.*, 263 N.W.2d 412, 415 (Minn. 1978); *State v. Bryant*, 177 N.W.2d 800 (Minn. 1970).

¹⁰ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

¹¹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹² Martin F. Nolan, *Low Falls From High Places*, Sep. 1, 1996, BOSTON GLOBE, at D1.

engaged in casual sex in public tearooms.¹³ Generally, tearooms are public places where homosexual activity takes place in semi-privacy, such as restrooms, dressing rooms, bus stations, or hotel rooms.¹⁴ In light of the historical uses of sodomy laws and the stigmas attached to homosexual conduct generally, people who engage in homosexual conduct stayed hidden from mainstream view in pre-Stonewall America.¹⁵ To protect themselves from violence, arrest, harassment, and social ostracism, people seeking to meet others who wanted to engage in homosexual sex developed their own language, signals, and codes.¹⁶ They found meeting places—tearooms—which ideally were both public and private.¹⁷ On a sociological level, the ideal place should be public enough to be identifiable and to provide a significant number of participants, but not so identifiable as to attract the “uninitiated” or those that could be violent or hostile.¹⁸ At the same time the space should also provide enough privacy that some form of sexual activity can take place, while maintaining a certain level of anonymity.¹⁹

When Humphreys’ study took place in 1966, nearly all forms of gender or sexual “deviancy” outside of state-sanctioned heterosexual marriage were subject to some form of legal constraint.²⁰ The few places where explicitly homosexual activity existed, such as gay bars or tearooms, operated covertly since one risked arrest and possible police brutalization for dancing with someone of the same sex, cross-dressing, propositioning another adult homosexual, possessing a homophile publication, writing about homosexuality without disapproval, displaying pictures of two people of the same sex

¹³ HUMPHREYS, *supra* note 4, at 2–3. According to Humphreys, “the only true tearoom is one that gains a reputation where homosexual encounters occur They are accessible, easily recognized by the initiate, and provide little public visibility. Tearooms thus offer the advantages of both public and private settings.” *Id.*

¹⁴ *Id.*

¹⁵ See generally MARTIN DUBERMAN, *STONEWALL* (1993). On the evening of June 27, 1969, gay and transgender people fought back against the New York Police Department which was attempting to conduct a raid against the Greenwich Village gay bar, the Stonewall Inn. See, e.g., Ralph Randazzo, *Elder Law and Estate Planning for Gay and Lesbian Individuals and Couples*, 6 MARQUETTE ELDER’S ADVISOR 1, 8 n.4 (2004). The Stonewall Rebellion is commonly regarded at a watershed moment in gay civil rights history. DUBERMAN, *supra* note 15, at xv (“‘Stonewall’ is the emblematic event in modern lesbian and gay history.”).

¹⁶ HUMPHREYS, *supra* note 4, at 12.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 819 (1997).

in intimate positions, operating a lesbian or gay bar, or actually having sex with another adult homosexual.²¹ Every state in the United States had either a common law or codified sodomy statute by 1960.²² Sodomy was generally defined as any non-procreative sexual act including masturbation, oral sex, and anal sex.²³ Many states carried lengthy prison sentences, including life sentences for engaging in sodomy.²⁴

When people were arrested for felony sodomy, or even lesser charges of misdemeanor sodomy, sex-related vagrancy, or disorderly conduct, the subsequent repercussions were often similar to what happened to political aide Walter Jenkins. Local papers commonly printed the names of the people arrested with the accompanying charge, the shame and stigma of which often lead to one losing their job, their marriage, or their entire social standing.²⁵ In some states a convicted homosexual could lose their driver's license,²⁶ face mental institutionalization for being a "sexual psychopath,"²⁷ or be discharged from the military.²⁸ Licensed professionals such as lawyers, doctors, and school teachers could lose their certification,²⁹ and a non-citizen could face deportation, among other penalties.³⁰ In their personal lives, people often lost their families, friends, and community, even leading an unknown number of people to commit suicide.³¹ The cumulative effect of the legal repercussions—as well as the social stigmas of being "out" as a homosexual³²—was an intense shame and fear that kept most people deep in the "closet."³³ The legal consequences of being "out" have effectively "sealed that closet shut for most gays and lesbians, while at the same time, outing others in state-sponsored witchhunts."³⁴

²¹ *Id.*

²² *Lawrence*, 539 U.S. at 572 ("[B]efore 1961 all 50 States had outlawed sodomy.").

²³ *Id.*

²⁴ See GA. STATE BOARD OF PARDONS AND PAROLES BIENNIAL REP. 11 (1943).

²⁵ Eskridge, *supra* note 20, at 819.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ HUMPHREYS, *supra* note 4, at 81.

³² The same stigmas and legal repercussions that attach to "out" individuals may also apply to those who occasionally engage in homosexual conduct but do not identify as homosexual. In this paper, I try not to classify all people who engage in homosexual sex as necessarily homosexual, but rather to differentiate between homosexual conduct and homosexual identity.

³³ Eskridge, *supra* note 20, at 819.

³⁴ *Id.*

The most famous “witch-hunt” of homosexuals actually occurred in Senator Larry Craig’s home state of Idaho, in the infamous “Boys of Boise” scandal.³⁵ On October 31, 1955, three men were arrested in Boise, Idaho, and charged with having sex with teenage boys.³⁶ Boise at the time was a relatively small city with less than 40,000 residents.³⁷ The arrests rocked the city with scandal and became front page news in *The Idaho Statesman*, a local newspaper, which ran numerous editorials calling for police, prosecution and community action to “[c]rush the monster” supposedly taking over the city.³⁸ Over the next two years, more than 1500 men, many of whom were prominent members of the town, were interrogated and sixteen were arrested under the state’s sodomy law.³⁹ The city “was caught up in panic; one of the boys involved murdered his father; the chief of police was fired, as was the local probation officer; and the son of a city council member was discharged from West Point.”⁴⁰ Of the sixteen charged, only one, who steadfastly denied any involvement throughout, beat the charges,⁴¹ while nine were convicted of sodomy and sentenced from the state penitentiary, with sentences ranging from five years to life.⁴² The legacy of the witch-hunt in Boise affected not only the city for years to come, but also created fear in homosexuals all over the country.⁴³ Indeed, Idaho’s felony “crime against nature” sodomy statute, which carried a penalty of five years to life,⁴⁴ re-

³⁵ The term “Boys of Boise” comes from the book of the same name. JOHN GERASSI, *BOYS OF BOISE: FUROR, VICE AND FOLLY IN AN AMERICAN CITY* (1966).

³⁶ Seth Randal & Alan Virta, Op-Ed., *Idaho’s Original Same-Sex Scandal*, N.Y. TIMES, Sept. 2, 2007, at 10. The scandal sparked a civil case in response to criminal charges against the men in which after summary judgment was rendered dismissing an action for invasion of privacy and intentional infliction of emotional distress, appellant sued the defendant daily newspaper for printing, in 1995, a photograph of a nearly forty-year-old handwritten statement given to police naming plaintiff as a party to homosexual activity. *Uranga v. Federated Publications, Inc.*, 67 P.3d 29, 30 (Idaho 2003). The supposed homosexual activity was to have occurred with another young man, F.J., the son of a city council member. *Id.* at 31. Neither F.J. nor Uranga were ever charged; however, F.J. was expelled from Westpoint Academy as a result of the investigation. *Id.* The article in *The Idaho Statesman* was about the effects of the “Boys of Boise” witch-hunt on the people put under investigation. *Id.* at 30–31.

³⁷ Randal & Virta, *supra* note 36, at 10.

³⁸ *Id.*

³⁹ *Uranga*, 67 P.3d at 30.

⁴⁰ HUMPHREYS, *supra* note 4, at 168.

⁴¹ Randal & Virta, *supra* note 36, at 10.

⁴² HUMPHREYS, *supra* note 4, at 168.

⁴³ Randal & Virta, *supra* note 36, at 10.

⁴⁴ *Ex Parte Miller*, 129 P. 1075, 1076 (Idaho 1913). In *Miller*, the Idaho Supreme Court ruled that the state’s sodomy law, which sets a minimum—but no maximum—penalty, contemplates a sentence of life imprisonment, but found the legislature left

mained in place until it was overturned by *Lawrence v. Texas* in 2003.⁴⁵

Senator Larry Craig was raised on a farm in Idaho and was ten years old when the 1955–56 scandal in Boise occurred.⁴⁶ He was a student at the University of Idaho when the subsequent book, *The Boys of Boise*, was published in 1966.⁴⁷ What exact impact the scandal of 1955–56 had on Senator Craig is unknown; however, generally speaking, “[t]he lesson of the 1955 scandal was clear: sexual misconduct—or even the mere perception that one is gay—could ruin a man’s reputation. But steadfast, straight-in-the-eye denial just might get him off the hook.”⁴⁸

B. *Expressive Language in Tearooms*

I am primarily concerned with the grieving family in my parish, with the fact that we have lost such a wonderful man, and the news media played such an important part in driving him to suicide. There is no question but that his learning that his name had been published was the direct cause of his jumping off the bridge. While I agree with those who have told me that men who need to search for their sexual outlet in public men’s rooms are sick people, I would wonder whether these same people would approve of our listing the names of people going into mental hospitals. I also would say very strongly that a society that pays its policemen to spend hours on their haunches or lying prostrate on the top of a building peering through a spy hole to spy on men is a very sick society.⁴⁹

Tearooms have a long and broad history in the United States and constitute a substantial part of the free sex market for both homosexual men and those who may never identify with homosexuality or any gay identity, society, or subculture.⁵⁰ In Humphreys’ study of men who engage in impersonal sex in public places with other men, 54% were married and living with their wives.⁵¹ However, Humphreys’ study was conducted in 1966, when being in the

the determination of maximum punishment at the discretion of the court. *Id.* This decision was followed in 1992 by an appellate court that found the possibility of life imprisonment for private consensual activity to be reasonable. *State v. Hayes*, 824 P.2d 163, 166 (Idaho Ct. App. 1992).

⁴⁵ *Lawrence*, 539 U.S. at 558.

⁴⁶ Randal & Virta, *supra* note 36, at 10.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Humphreys, *supra* note 4, at 81 (citing anonymous letter in 26 CHRISTIANITY AND CRISIS 10, June 13, 1966, at 135).

⁵⁰ *Id.* at 21.

⁵¹ Christopher Hitchens, *So Many Men’s Rooms, So Little Time: Why Men Like Larry*

“closet” was not just the norm but also a necessity for many gay men. In a post-*Lawrence* era, why would gay men still need to use tearooms and coded call-and-response signals to find gay sex? Of the men surveyed in Humphreys’ study, 38% did not identify as homosexual or bisexual even though they participated in homosexual sex. What many of these men appreciate is “a sexual encounter that was quick and easy and didn’t involve any wining and dining.”⁵² For others it is the very essence and danger of potentially being caught that may make secretive sexual encounters appealing. Humphreys uses the term “breastplate of righteousness” to describe this mixture of repression and denial that many closeted men experience.⁵³ In order to hide or compensate for their homosexual activity, many of the men surveyed put forth a public persona of extreme conservatism and concern with family values.⁵⁴

In an era before the news media was rife with examples of well-known religious and politically conservative figures being routinely “outed” as engaging in homosexual escapes,⁵⁵ Humphreys observed that “[a]s anticipated sanctions increase and autonomy decreases, the more elaborate and encompassing will be the breastplate of righteousness the deviant assumes for his overt performances in life.”⁵⁶ When one’s reputation and career is built on an image of conservatism, family values, and morality, emboldened

Craig Continue to Court Danger in Public Places, SLATE, Sept. 03, 2007, <http://www.slate.com/id/2173112/>.

⁵² *Id.*

⁵³ HUMPHREYS, *supra* note 4, at 145.

⁵⁴ *Id.* at 146.

⁵⁵ In 2006, Reverend Ted Haggard, the former head of the National Association of Evangelicals and a well known anti-gay “moral crusader” was exposed as having had sexual liaisons with a gay male escort. See Mel Seesholtz, *Rev. Ted Haggard: Still Playing the Game*, ONLINE JOURNAL, Nov. 8, 2006, http://www.onlinejournal.com/artman/publish/article_1406.shtml. In 2006, ABC news also exposed Republican Congressman Mark Foley who was sending sexually explicit emails to a young former congressional page. See Maddy Sauer, *Former Page Says He Sent Foley’s Sexually Explicit IM to Rep. Kolbe in 2001*, ABC NEWS.COM, Dec. 6, 2006, http://blogs.abcnews.com/theblotter/2006/12/former_page_say.html. And in 2007, Senator Larry Craig was arrested for disorderly conduct in a bathroom in Minnesota. While Senator Craig has continuously denied ever engaging in homosexual sex, *The Idaho Statesman*, as well as many other newspapers, has reported many allegations that the Senator had previous homosexual liaisons. See Dan Popkey, *Men’s Room Arrest Reopens Questions About Sen. Craig*, THE IDAHO STATESMAN, Aug. 28, 2007, available at <http://www.idahostatesman.com/larrycraig/story/143801.html>. The “outing” of public figures and politicians, particularly those who vote for anti-gay legislation has become so predominant, that one blogger, Mike Rogers, has devoted an entire website to the practice of exposing politicians who may engage in homosexual conduct, since July 2004. Mike Rogers, BlogActive, <http://www.blogactive.com/> (last visited Apr. 3, 2008).

⁵⁶ HUMPHREYS, *supra* note 4, at 146–47.

by a publicly anti-gay persona, the notion of getting caught becomes all the more dangerous. In fact, for some this is the appeal.

One man from the House of Commons in England, who participated in tearoom encounters, noted that the continued appeal of meeting someone in a bathroom or other public place—a meeting leading to a casual sexual encounter—was that “[t]he thrills were twofold. First came the exhilaration of danger: the permanent risk of being caught and exposed. Second was the sense of superiority that a double life could give.”⁵⁷ Given both the thrill and the stakes of being caught, there exists now as much as in the past a need for a coded message system for men seeking to meet other men discreetly.

A defining characteristic of a tearoom is silence.⁵⁸ Humphreys explains, “One may spend many hours in these buildings and witness dozens of sexual acts without hearing a word.”⁵⁹ Of the fifty systemic observations of tearoom encounters that Humphreys observed and took notes, only fifteen included vocal utterances, which generally consisted of nothing more than a whispered “thanks” at the conclusion of a sex act.⁶⁰ The silence of a tearoom serves multiple purposes. It arises out of a practical fear of incrimination as well as a desire for privacy, while also serving to guarantee anonymity, and to “assure the impersonality of the sexual liaison.”⁶¹ It is precisely this lack of personal involvement that creates the appeal of tearoom encounters for many men. The appeal of quick and anonymous relations is what drives many men to desire sex that may carry so many ramifications, even post-*Lawrence* where one may now legally engage in private sodomy. Taking the action to a bedroom in many respects destroys the anonymity, the lack of physical and emotional involvement, and the pure physical nature of a tearoom encounter.

Despite the silence that characterizes a tearoom, there is abundant communication occurring. Humphreys regularly refers to tearooms as “games of chance” where every person has a role and

⁵⁷ Hitchens, *supra* note 51.

⁵⁸ HUMPHREYS, *supra* note 4, at 20.

⁵⁹ *Id.*

⁶⁰ *Id.* at 12–13.

⁶¹ *Id.* at 13. Humphreys defines this “impersonality” of a tearoom encounter in a bathroom: “[S]imply, there is less emotional and physical involvement in restroom fellatio [than in more private settings such as a car or room]. . . . Often, in tearoom stalls, the only portions of the players’ bodies that touch are the mouth of the insertee and the penis of the insertor; and the mouths of these partners seldom open for speech.” *Id.*

every movement carries significance.⁶² In this game the sexual encounter focuses on an eventual reward.⁶³ He observed that “[t]he tactics are determined by the players’ calculations of how best to maximize profit, the primary reward being sexual pleasures under preferred circumstances and the chief cost being possible exposure to a hostile community.”⁶⁴ Like other games of chance, the tearooms have prescribed roles,⁶⁵ and carry a set of rules⁶⁶ that operate as a protective code. These rules serve as a set of norms “common to all ephemeral encounters of a homosexual nature, which no ritual performer may violate.”⁶⁷ While the roles of tearoom participants are fluid and may change instantaneously, the rules governing the actions are not.⁶⁸

As discussed, silence reigns in a tearoom. So the communication of rules and roles occurs with rarely a word ever said. Signals are made with bodily movements, and even the passing of notes is generally considered too risky.⁶⁹ Communication occurs through an intricate system of signals and bodily movements, which constitute an expressive language.⁷⁰ The coded language has an array of

⁶² *Id.* at 45.

⁶³ *Id.* at 46.

⁶⁴ *Id.*

⁶⁵ *Id.* at 49. Humphreys categorizes five participant roles in tearoom encounters, with sub-roles within each category. The basic categories and sub-roles include: 1) “Players” to the action, who are subdivided into the “insertee” and the “insertor”; 2) “Lookouts” who are subdivided into “waiters,” waiting to take part in an action, “masturbators,” and “voyeurs”; 3) “straights” who do not participate in the action; 4) “Teenagers” (or “chicken”) who are subdivided into four subgroups: a) “straights”; b) “enlisters” who may want to get in on the action and may act as “waiters” or “lookouts,” but are generally “too feared” to be let in on an action; c) “toughs” who harass and sometimes attack tearoom participants; and d) “hustlers” who generally demand payment to be an “insertor,” and if not paid may act as “toughs.” *Id.* The last category is: 5) “Agents of social control” which are subdivided into three types: a) vice squad members; b) local policemen; c) other employees of the area being used, such as park employees. *Id.*

⁶⁶ *Id.* at 47–48. Humphreys identifies the “universal and protective rules, which are standard for all situations of homosexual casual sex encounters as: 1. Avoid the exchange of biographical data, to the point of silence if in a public setting; 2. Watch out for ‘chicken’ [teen-agers]—they’re dangerous game; 3. Never force your intentions on anyone; 4. Don’t knock [criticize] a trick [sex partner]—he may be somebody’s ‘mother’ [homosexual mentor]; 5. Never back down on trade agreements. [‘Trade’ are ‘tricks’ who do not, as yet, consider themselves homosexual. This group includes most of the male prostitutes, ‘hustlers.’ Trade agreements, then, include paying the amount promised, if a financial transaction is involved, and no kissing above the belt, because most ‘trade’ think kissing is ‘queer.’]” *Id.*

⁶⁷ *Id.* at 48.

⁶⁸ *Id.*

⁶⁹ *Id.* at 20.

⁷⁰ *Id.*

meanings such as ascertaining whether someone knows the language, gaining consent, role identification, and determining whether one would like to relocate.⁷¹ “Sex necessitates collective action; and all collective action requires communication. Mutually understood signals must be conveyed, intentions expressed, and the action sustained by reciprocal encouragement.”⁷²

The first step in this collective action is positioning.⁷³ Positioning refers to the manner in which a party identifies their location within the bathroom. For example, whether a party is located at a urinal or in a stall may indicate what type of sex they are looking for and what position they prefer in a sexual partner.⁷⁴ The next step is signaling, which may be done using eyes, hands, feet, or through other bodily motions.⁷⁵ Toe-tapping is a form of this type of signaling:

[The toe-tapping] signal has been around for decades in the United States and Europe. Generally, one person initiates contact by tapping his foot in a way that’s visible beneath the stall divider. If the second person responds with a similar tap, the initiator moves his foot closer to the other person’s stall. If the other person makes a similar move, the first will inch closer yet again. The pair usually goes through the whole process a few times, just to confirm that the signals aren’t an accident.

Next, one of the men will slide his hand under the divider. This usually means he’s inviting the other person to present himself, as if to say, “Show me what you got.” The partner can respond by kneeling on the floor and presenting his penis or rear end underneath the divider. Or he can swipe his own hand under the divider, as if to say, “You go first.” Some married men make a point of displaying their wedding band to . . . make themselves more alluring.⁷⁶

Once the signals have been reciprocated, maneuvering sometimes occurs, if needed, to indicate “which men wish to serve as insertees.”⁷⁷ As soon as positions have been taken and signals have been made and responded to, the most crucial part of the exchange occurs if there is to be public sex—contracting.⁷⁸

⁷¹ *See id.*

⁷² *Id.* at 59.

⁷³ *See id.* at 62.

⁷⁴ *Id.*

⁷⁵ *Id.* at 64.

⁷⁶ Christopher Beam, *Bathroom Sex FAQ: Cruising Signals, Legal Issues, and Larry Craig’s “Wide Stance,”* SLATE, Aug. 29, 2007, <http://www.slate.com/id/2173033/>.

⁷⁷ HUMPHREYS, *supra* note 4, at 65.

⁷⁸ *Id.* at 66.

Tearoom trades are non-coercive in nature and consent is essential.⁷⁹ Players signal their consent through bodily movements, which set both the terms of the forthcoming sexual exchange, as well as mutual consent.⁸⁰ At this point one party generally exposes themselves to the other party, moves into the other party's stall, or touches the other's penis.⁸¹ If the move is not rejected by either party, then the contract has been executed.⁸² The parties' intentions have already been made in the positioning and reciprocated signaling phase, so this contracting phase exists there to "formalize the agreement."⁸³ Furthermore, in Humphreys' extensive observations, no physical overtures were ever made to men who had not already shown consent by exposing their erect penises.⁸⁴ As Humphreys noted, "[u]nder normal circumstances, such communication is ritualized in those patterns of word and movement we call courtship and love-making."⁸⁵ In normal situations people are also not arrested for expressing courtship rituals or flirtation made publicly. Unless the contracting phase has completed, and there has been an actual legal violation due to public exposure or public sex, to preemptively arrest someone for engaging in a courtship ritual within a tearoom is to infringe upon that person's mode of expression in violation of the First Amendment.

Although one may think of the abuses and the stigma of homosexuality as a relic of the past, the harassment of people who engage in homosexual conduct in tearooms has not ceased. Private consensual sodomy has been legalized, yet arrests for disorderly conduct, invasion of privacy, and public indecency in tearooms are still common practice. Such arrests, when made before any public nudity or sexual act occurs, violate the free speech rights of the men who occupy tearooms. While this article does not advocate the legalization of public sex, it does argue that the intricate modes of expressive conduct that are used to create a courtship ritual within a tearoom are forms of speech that should be protected by the First Amendment.⁸⁶

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 67. Usually, Prior to the contracting phase, none of the communications that have occurred violate a law since generally, up to this point, there has not been any public exposure or public sex.

⁸⁴ *Id.* at 88.

⁸⁵ *Id.* at 59.

⁸⁶ While in theory disorderly conduct statutes may be used to arrest heterosexual people as well, the operations are generally set up to target homosexual men. This

II. THE CASE AGAINST CRAIG FROM ARREST TO THE COURT'S
DENIAL OF HIS MOTION TO WITHDRAW

*“Underneath the libertine, the pervert . . . forcing them into hiding so as to make possible their discovery. . . Wherever was the chance they might appear, devices of surveillance were installed; traps were laid for compelling admissions.”*⁸⁷

Between May 31 and August 13, 2007, forty men were arrested at the Minneapolis–St. Paul International Airport bathroom for various forms of lewd and disorderly conduct, indecent exposure, or loitering.⁸⁸ The arrests were the result of a large-scale sting operation by the Minneapolis Police Department at the world’s fifteenth busiest airport. In fact, the airport had become known in some circles as a site for homosexual hook-ups. One man told the police after he was arrested that that the airport was “[a] busy place for lewd conduct.”⁸⁹ Of these arrests, one has become well known—that of United States Senator Larry Craig. Senator Craig’s actions on June 11, as described by the police, were less blatant than those of some men with lesser charges.⁹⁰ Nonetheless, of the forty men arrested, Senator Craig was the only one⁹¹ charged with both disorderly conduct⁹² and interference with privacy.⁹³ The other men

Comment focuses on potential violations of First Amendment speech that occurs when disorderly conduct statutes are applied in sting operations. However, the Fourteenth Amendment implications of the arbitrary enforcement of such statutes, and whether the required showing of animus in such enforcement violates the holding of *Romer v. Evans*, 517 U.S. 620 (1992), are beyond the scope of this Comment.

⁸⁷ 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 39, 42 (Vintage Books 1990) (1978).

⁸⁸ Wilson, *supra* note 1.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² MINN. STAT. § 609.72(1)(3) (2007):

Whoever does any of the following in a public or private place, including on a school bus, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: (3) Engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

Id.

⁹³ MINN. STAT. § 609.746(1)(c) (2007):

A person is guilty of a gross misdemeanor who:(1) surreptitiously gazes, stares, or peeps in the window or other aperture of a sleeping room in a hotel, as defined in section 327.70, subdivision 3, a tanning booth, or other place where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts, as defined in section 609.341, subdivision 5, or the clothing covering the

were charged with either disorderly conduct, interference with privacy, indecent exposure, or loitering.⁹⁴

According to the police arrest report,⁹⁵ Senator Craig entered the men's bathroom at 12:13 p.m. on June 11, 2007. He proceeded to walk towards the back stalls where he stopped and then peered into the stall where Police Officer Karsnia, who was in plain clothes, was located.⁹⁶ The Senator then entered the stall to Karsnia's left, and placed a roller bag in front of the stall, a move the police officer says is often done by individuals engaging in lewd conduct in order to block the view from the front of the stall.⁹⁷ Senator Craig then began to tap his right foot and moved it close to Karsnia's.⁹⁸ It was this movement of Craig's foot which the officer identified "as a signal used by persons wishing to engage in lewd conduct," despite the fact that the officer admitted that there were several other people in the public restroom.⁹⁹ After interpreting the toe-tap as an established signal for sexual solicitation, the officer replied by tapping his own foot.¹⁰⁰ Craig then touched his right foot to the officer's left foot. Next, Craig "swiped his hand under the stall divider for a few seconds," and repeated this motion two more times.¹⁰¹ Craig and the officer disagree as to whether it was Craig's right or left hand, with the officer insisting it was Craig's left hand under the divider and that he saw Craig's wedding ring.¹⁰² Karsnia then placed his police identification by the floor where Craig could see it and pointed to the exit, at which point they had their first verbal exchange, with Craig responding, "No."¹⁰³

Senator Craig has resisted this interpretation of events from

immediate area of the intimate parts; and (2) does so with intent to intrude upon or interfere with the privacy of the occupant.

Id.

⁹⁴ Wilson, *supra* note 1.

⁹⁵ Airport Police Department, Minnesota Report Form, Arrest Report, *available at* http://media.idahostatesman.com/smedia/2007/08/28/14/craig_police_report_source.prod_affiliate.36.pdf (last visited Sept. 21, 2008) [hereinafter Arrest Report].

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Investigative Sergeant Dave Karsnia and Detective Noel Nelson Interview with Larry Craig, *available at* <http://www.idahostatesman.com/1264/story/343210.html> (follow "Minneapolis police officer interview of Sen. Craig" hyperlink) [hereinafter Interview with Larry Craig].

¹⁰³ Arrest Report, *supra* note 95.

the beginning, and continues to insist it was a misunderstanding.¹⁰⁴ Prior to being read his *Miranda* rights, when the officer told Craig that he would not bring him to jail, Craig responded, “[y]ou solicited me.”¹⁰⁵ In an interview between Officer Karsnia and Senator Craig, conducted after the arrest, Craig again insisted that the officer solicited him, that he has a “wide stance,” and that their feet merely “bumped.”¹⁰⁶ Craig specifically explained that he reached down with his right hand on which he did not have a wedding band, in order to pick up a piece of paper.¹⁰⁷ Nowhere in the police report or interview does the officer inform the Senator of the exact charges against him or the applicable penalties.¹⁰⁸ An interesting part of the transcript is when Senator Craig and Officer Karsnia have a disagreement about what occurred in the bathroom, Craig states “I am not gay, I don’t do these kinds of things,” to which the officer replies, “It doesn’t matter. I don’t care about sexual preferences or anything like that.”¹⁰⁹ Craig then responds, “I know you don’t. You’re out to enforce the law But you shouldn’t be out to entrap people either.”¹¹⁰ Throughout the transcripts the Senator denies the officer’s account of what happened, yet as time goes on the officer makes statements such as, “I don’t call media,”¹¹¹ “I’m not gonna take you to jail as long as your [sic] cooperative,”¹¹² and “I’m gonna say I’m just disappointed in you sir. I just really am. I expect this from the guy that we get out of the hood. I mean people vote for you . . . embarrassing, embarrassing. No wonder why we’re going down the tubes.”¹¹³ Eventually Craig stops arguing with the officer and, before leaving, makes the following final statement: “[a]ll right, you saw something that didn’t happen.”¹¹⁴ It is never clear in the transcript that Craig agrees with the officer’s interpretation of events. What is clear,

¹⁰⁴ Interview with Larry Craig, *supra* note 102.

¹⁰⁵ *Minnesota v. Craig*, 27 CR 07-043231, at *3-4 (Minn. Dist. Ct. Oct. 4, 2007) (order denying defendant’s motion to withdraw plea), *available at* <http://www.mncourts.gov/district/4/?page=1981> (follow “Order” pdf hyperlink).

¹⁰⁶ Interview with Larry Craig, *supra* note 102.

¹⁰⁷ *Id.*

¹⁰⁸ Motion to Withdraw Plea, *Minnesota v. Craig*, 27-CR-07-043231, at *5 (Minn. Dist. Ct. Sept. 10, 2007), *available at* <http://www.mncourts.gov/district/4/?page=1981> (follow “Motion by Larry Craig to Withdraw Plea” pdf hyperlink) [hereinafter Motion to Withdraw Plea].

¹⁰⁹ Interview with Larry Craig, *supra* note 102, at 2.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 3.

¹¹² *Id.*

¹¹³ *Id.* at 6.

¹¹⁴ *Id.*

however, is that Craig feels entrapped because the officer knows that Craig is a United States Senator and that the arrest would be an item of interest to the media and to voters.

Ultimately, Senator Craig signed a petition to plead guilty to the misdemeanor charges, which included an acknowledgement that he reviewed the charges against him on August 1, 2007.¹¹⁵ The shame and possible publicity of the arrest were there just as they had been for the men in Boise when Craig was growing up. Craig's "breastplate of righteousness"¹¹⁶ had been pierced, and "Senator Craig felt compelled to grasp the lifeline offered him by the police officer; namely that if he were to submit to an interview and plead guilty, then none of the officer's allegations would be made public."¹¹⁷ That, of course, did not happen and on August 27, 2007, *Roll Call*, a newspaper covering activities on Capitol Hill, reported the Senator's arrest.¹¹⁸ The *Idaho Statesman*, the same paper that led the "Boys of Boise" exposé in 1955, had been investigating allegations of possible homosexual activity by the Senator prior to the June arrest and had asked the Senator in May if he had ever engaged in homosexual conduct.¹¹⁹ The day after *Roll Call* ran its item, the *Idaho Statesman* ran the story on their front page.¹²⁰ Craig's arrest immediately became a national news story, particularly in light of the Senator's very conservative and anti-gay public views and voting record.¹²¹

A. *Craig's Motion to Withdraw His Guilty Plea*

On September 10, 2007, the Senator entered a motion to withdraw his guilty plea. The trial court denied this motion on October 4.¹²² The court noted that "[i]n Minnesota, a criminal defendant does not have an absolute right to withdraw a guilty plea."¹²³ A Minnesota court may only allow a defendant to with-

¹¹⁵ Motion to Withdraw Plea, *see supra* note 108, at 5.

¹¹⁶ HUMPHREYS, *supra* note 4, at 145.

¹¹⁷ Motion to Withdraw Plea, *supra* note 108, at 2.

¹¹⁸ John McArdle, *Craig Arrested, Pleads Guilty Following Incident in Airport Restroom but Says He Did Nothing Wrong*, ROLL CALL, Aug. 27, 2007, available at <http://www.rollcall.com/news/19764-1.html>.

¹¹⁹ Popkey, *supra* note 55.

¹²⁰ *Id.*

¹²¹ *See, e.g.*, Tomas Alex Tizon, *Idaho is Red-faced Over Scandal; In the Conservative State, the Craig Incident Elicits Outrage, Shame and a Sense of Betrayal*, L.A. TIMES, Aug. 30, 2007, at A1; Jill Zuckerman, *'Deeply Sorry' Senator Resigns Amid Scandal*, CHI. TRIB., Sept. 2, 2007, at C1.

¹²² *Craig*, 27 CR 07-043231, at *27.

¹²³ *Id.* at *9 (citing *Shorter v. State*, 511 N.W.2d 743, 746 (Minn. 1994)).

draw a plea he submitted after sentencing if the motion to do so “is timely made and ‘withdrawal is necessary to correct a manifest injustice.’”¹²⁴ To demonstrate a manifest injustice, the defendant must show that the plea was “not accurately, voluntarily, or intelligently made,”¹²⁵ and that the evidence is insufficient to support a guilty plea as a matter of law.¹²⁶ This high standard reflects a public policy that “favors the finality of judgments” and does not “encourage accused persons to ‘play games’ with the court by setting aside judgments of conviction based upon pleas made with deliberation and accepted by the court with caution.”¹²⁷

Senator Craig argued that his plea had not been made voluntarily but had been “coerced by the promises or threats of the investigating officer,”¹²⁸ and that he had maintained his innocence throughout the trial.¹²⁹ The court rejected these arguments, particularly the contention that “if one ignore[d] the contents of the plea petition, [Craig had] consistently maintained his innocence.”¹³⁰ The judge noted that disorderly conduct is a general intent crime and that even if Craig had not intended to offend he could still be liable for the criminal behavior of entry into an occupied stall with his eyes, hand, and foot.¹³¹ There had also been a two-month lapse between Craig’s arrest and his plea, and during this time he had spoken several times with the prosecutor, who encouraged him to consult an attorney, which the Senator did not do.¹³² In the court’s view these facts negated any reasonable conclusion that the officer’s interrogation had overridden Craig’s free will and coerced him into pleading guilty to avoid media scrutiny and jail.¹³³ The court also noted that the Senator did not challenge his sentence or the “legal validity of the conviction or the fairness or appropriateness of the negotiation.”¹³⁴ Finally, the court stated that Craig was an intelligent, college-educated man who “knew what he was saying, reading, and signing” when he reviewed, executed, and mailed his plea of guilty.¹³⁵ Therefore the

¹²⁴ *Id.* (citing 49 MINN.S.A. RULES CRIM. PROC. § 15.05(1)).

¹²⁵ *Id.* (citing *Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002)).

¹²⁶ Motion to Withdraw Plea, *supra* note 108, at 12.

¹²⁷ *Craig*, 27 CR 07-043231, at *9 (citing *Kaiser*, 641 N.W.2d at 903).

¹²⁸ *Id.* at *2.

¹²⁹ *Id.* at *7.

¹³⁰ *Id.* at *7.

¹³¹ *Id.* at *8, 25.

¹³² *Id.* at *17.

¹³³ *Id.* at *17.

¹³⁴ *Id.* at *10.

¹³⁵ See *id.* at *17-18.

court held that Craig had made his plea accurately, voluntarily and intelligently and that the evidence supported the conviction; the court subsequently denied the motion to withdraw.¹³⁶

B. The American Civil Liberties Union's Amicus Brief in Support of Craig

The American Civil Liberties Union ("ACLU") requested permission to file an amicus brief in support of Craig's motion.¹³⁷ The State opposed the motion on a trial court level and asked that the brief be stricken.¹³⁸ The judge granted permission to the ACLU to file a brief, noting that the "the area of privacy rights is an important one, and [that the] Court appreciates the guidance provided by the ACLU brief."¹³⁹

The ACLU argued that Minnesota's disorderly conduct statute is unconstitutionally broad and restricts free speech, and that a conviction on the facts of the case would violate the free speech guarantee of the First Amendment, in light of the Minnesota Supreme Court's ruling in *S.L.J.*:¹⁴⁰

The First Amendment and the Due Process Clause of the Constitution require that a law which covers both protected and unprotected speech: . . . not be so overbroad as to pose a real and substantial threat of ensnaring protected as well as unprotected speech; . . . provide clear standards, to law enforcement and to the public, about where it may be legitimately applied and where it may not; . . . [and] be well crafted to serve the legitimate regulation of speech and not to ensnare protected speech.¹⁴¹

In *S.L.J.*, the Minnesota Supreme Court upheld the constitutionality of the disorderly conduct statute by construing it narrowly to refer only to "fighting words."¹⁴² The court however rejected the ACLU's argument saying that the *S.L.J.* holding focuses only on the verbal language portion of the disorderly conduct statute and that the Defendant was charged under the "conduct" portion of the statute. Further, the court stated that the holding of *S.L.J.*, "does not address or place any constitutional limitation on the

¹³⁶ *Id.* at *27.

¹³⁷ *Id.* at *26.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978).

¹⁴¹ Memorandum of Law for American Civil Liberties Union, et. al. as Amici Curiae Supporting Defendant, *State v. Craig*, No. 27 CR 07-043231, at 1–2 (Minn. Dist. Ct. Oct. 4, 2007) [hereinafter ACLU Memorandum].

¹⁴² *In re S.L.J.*, 263 N.W.2d at 419.

non-verbal conduct portion of the statute.”¹⁴³ The court dismissed the ACLU’s argument that the conviction is void because of a reasonable expectation of privacy for consensual sex in a public restroom under *State v. Bryant*.¹⁴⁴ The court reasoned that the defendant was arrested not for soliciting sex, but for the “criminal behavior . . . [of] entry into an occupied stall with his eyes, hands and foot.”¹⁴⁵

The court in *Minnesota v. Craig* misinterpreted the holding of *S.L.J.* when it asserted that Craig’s “entry into an occupied stall with his eyes, hand and foot” was “criminal behavior”¹⁴⁶ rather than the defendant’s language. This language is protected under the holding of *S.L.J.* and under the First Amendment. The next section will show that Craig’s conduct was symbolic speech, analogous to other forms of symbolic speech that have been recognized by the Eighth Circuit Court of Appeals. It will also show that Craig’s symbolic speech does not constitute “fighting words” nor does it constitute the solicitation of an unlawful activity since solicitation of consensual non-commercial private sex between adults is legal. Even accepting the police report’s interpretation of events as read and accepted by Senator Craig, the actions for which he was arrested are constitutionally protected by the First Amendment.

III. CRAIG’S “TOE-TAPPING” WAS EXPRESSIVE CONDUCT THAT SHOULD BE PROTECTED UNDER THE FIRST AMENDMENT

A. Was Craig’s Conduct Speech?

Expressive conduct and symbolic speech involve conduct that imparts communication or some type of message.¹⁴⁷ Furthermore, “it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”¹⁴⁸ In general, expressive conduct is protected from government regulation under the First and Fourteenth Amendments.¹⁴⁹ Even expressive conduct which may be morally disapproved of by many has often found protection, or at least recognition, as expressive conduct that may be afforded the protection of the First Amendment, such as the burn-

¹⁴³ *Craig*, 27 CR 07-043231, at *26.

¹⁴⁴ *State v. Bryant*, 177 N.W.2d 800 (Minn. 1970).

¹⁴⁵ *Craig*, 27 CR 07-043231, at *26.

¹⁴⁶ *Id.*

¹⁴⁷ See *Schacht v. United States*, 398 U.S. 58 (1970); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

¹⁴⁸ *Street v. New York*, 394 U.S. 576, 592 (1969).

¹⁴⁹ *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1103 (W.D. Ark. 2000).

ing of flags,¹⁵⁰ the burning of crosses,¹⁵¹ and nude dancing.¹⁵² “[E]ven crudity of expression may be constitutionally protected.”¹⁵³ However, the Court has acknowledged a limit on what it accepts as expressive conduct.¹⁵⁴ In *Spence v. Washington*, the Supreme Court established a test that required a determination of whether there is intent to communicate a specific message and, given the context, whether it is likely that an audience would understand the message.¹⁵⁵

Every movement a participant makes upon entering a tearoom is embedded with meaning.¹⁵⁶ “Sex necessitates collective action; and all collective action requires communication. Mutually understood signals must be conveyed, intentions expressed, and the action sustained by reciprocal encouragement.”¹⁵⁷ The communications for which Craig was arrested was a form of courtship designed to gain consent of the person whom Craig did not know was an undercover officer. If his signals had not been reciprocated, then no offense would have been made for which he could be arrested, since no illegal nudity or unlawful solicitation of an illegal sexual act was ever made. The conduct for which Craig was arrested served to position, signal, and maneuver in order to gain the other’s parties consent for private sex. The actions were embedded with meaning and should be protected by the First Amendment.

The conduct for which Craig was arrested under the disorderly conduct statute included his first acts of positioning. When Craig entered the bathroom the officer was already in a stall.¹⁵⁸ In tearoom parlance, “those who occupy a stall upon entering are playing what might be called the Passive-Insertee System. By mak-

¹⁵⁰ *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

¹⁵¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003).

¹⁵² *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

¹⁵³ *State v. Drake*, 325 A.2d 52, 55 (Me. 1974) (citing *Hess v. Indiana*, 414 U.S. 105 (1973)).

¹⁵⁴ *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

¹⁵⁵ *Spence v. Washington*, 418 U.S. 405, 409–411 (1974); *see also* *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (citing *Spence v. Washington*, 418 U.S. 405 (1974)) (“It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.”).

¹⁵⁶ *HUMPHREYS*, *supra* note 4, at 60.

¹⁵⁷ *Id.* at 59.

¹⁵⁸ *Arrest Report*, *supra* note 95.

ing such an opening bid, they indicate to other participants their intention to serve as fellator.”¹⁵⁹ By already occupying a stall in a known tearoom the officer was positioned in a manner that other participants may have “read” him as a participant. In such instances “a man who knows the rules and wishes to play will stand comfortably back from the urinal, allowing his gaze to shift from side to side or to the ceiling”¹⁶⁰ which is exactly what Craig did and what the officer was looking for a party to do in this sting operation. The officer notes that Craig was looking into the officer’s stall through the crack in the door, looking at his hands, fidgeting, looking into the stall again, and repeating this pattern of conduct.¹⁶¹ When the officer did not move his position from the stall, Craig then entered the stall to the left of the undercover officer’s stall and placed his bag against the stall door.¹⁶² In his police report of the incident Officer Karsnia wrote, “[m]y experience has shown that individuals engaging in lewd conduct use their bags to block the view from the front of their stall.”¹⁶³ Now that both Craig and the officer were positioned in a manner consistent with the rules and roles of the tearoom, the signaling began.

When Craig tapped his right foot, the Officer “recognized this as a signal used by persons wishing to engage in lewd conduct.”¹⁶⁴ Rather than make clear that the officer did not want to engage in the conduct, the officer returned the signals moving his foot up and down slowly,” to which Craig then “mov[ed] his right foot so that it touched the side of [the undercover officer’s] left foot which was within [the undercover officer’s] stall area.”¹⁶⁵ In order to further gain consent, Craig then began to maneuver his body so that his left hand showed his wedding ring,¹⁶⁶ which appeals to many in tearooms and could be seen as another signal by the officer. According to the arrest report,¹⁶⁷ Craig began swiping his hand underneath the stall divider with his palm facing up toward the ceiling, enabling the undercover officer to see the tips of his fingers on the officer’s side of the divider. Craig repeated the swiping in the same motion for a few seconds, enabling the officer to see that it was his left hand, due to the position of his thumb and

¹⁵⁹ HUMPHREYS, *supra* note 4, at 62.

¹⁶⁰ *Id.*

¹⁶¹ Arrest Report, *supra* note 95.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ ACLU Memorandum, *supra* note 141, at 3.

¹⁶⁶ Arrest Report, *supra* note 95.

¹⁶⁷ *Id.*

his gold wedding ring.¹⁶⁸ Clearly, Craig's actions were not just the generic actions of a man using a public restroom, but rather were embedded with expressive meaning following the rules and roles of the tearoom, and as noted, understood, and reciprocated by the arresting officer.

Even a study published in the *UCLA Law Review* in 1966 at a time when homosexuality was both illegal and socially stigmatized, and cited by Humphreys in *Tearoom Trade*, showed the entrapment nature of sting operations of tearooms:

Empirical data indicate the utilization of police manpower for decoy enforcement is not justified. Societal interests are infringed only when a solicitation to engage in a homosexual act creates a reasonable risk of offending public decency. The incidence of such solicitations is statistically insignificant. The majority of homosexual solicitations are made only if the other individual appears responsive and are ordinarily accomplished by quiet conversation and the use of gestures and signals having significance only to other homosexuals. Such unobtrusive solicitations do not involve an element of public outrage. The rare indiscriminate solicitations of the general public do not justify the commitment of police resources to suppress such behavior.¹⁶⁹

Given the nature of the call initiated by Craig and the response by the officer who was familiar with such positioning and signaling, it is clear that there was in fact an intent to communicate a specific message of sexual interest, and it continued because it was reciprocated. Since the aim of the conduct is to attract those who know the rules and roles as opposed to those who do not, it is clear that Craig's conduct was aimed to send a message that would ensure consent from those who understood any such action. In an airport known for gay cruising, one that specifically was being targeted by the police as such, there was a substantial audience. Therefore, Craig's conduct satisfies the elements of expressive conduct.

B. Was Craig's Conduct Protected by the First Amendment?

Senator Craig's conduct on June 11, 2007 constituted expressive conduct that is protected by the First Amendment, which is a categorically protected form of speech that does not qualify as "fighting words" or obscene speech. In *S.L.J.*, the Minnesota Su-

¹⁶⁸ *Id.*

¹⁶⁹ HUMPHREYS, *supra* note 4, at 88 (emphasis omitted) (citing Jon J. Gallo et al, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 *UCLA L. REV.* 643, 795-96 (1966)).

preme Court held that the criminal statute under which Craig was arrested is a constitutional proscription against the use of “fighting words.”¹⁷⁰ In this case two fourteen-year-old girls were convicted under Minnesota’s disorderly conduct statute¹⁷¹ for saying “fuck you pigs” to police from fifteen to thirty feet away.¹⁷² The case reached the Minnesota Supreme Court, which analyzed both the constitutionality of the statute and whether the defendants’ speech fell within the constitutional constraints of the statute. In *Chaplinsky v. New Hampshire*¹⁷³ and *Cohen v. California*,¹⁷⁴ in which the Supreme Court examined a First Amendment challenge to a New Hampshire statute that prohibited the use of “offensive, derisive or annoying” language in a public place,¹⁷⁵ offensive speech statutes like Minnesota’s were found to be constitutional only if criminal prosecution is permitted solely for “fighting words.”¹⁷⁶ The term “fighting words” has been defined as those “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction,”¹⁷⁷ or “words ‘which by their very utterance inflict injury or tend to incite an immediate breach of the peace.’”¹⁷⁸ Words that do not fit this definition, no matter how offensive they may be, are not subject to criminal sanctions. If the statute being scrutinized punishes more than “fighting words,” it must either be struck down as facially overbroad, or if possible, construed narrowly to make it constitutional.¹⁷⁹

The Court held that the language of the statute as a whole is both overly broad and vague since it applies not only to language that could be construed as “fighting words,” but that it also prohibits speech deemed “offensive, obscene or abusive” language.¹⁸⁰ As long as the statute could be narrowed to contemplate punishment for speech that is protected under the First and Fourteenth Amendments, the Court upheld its constitutionality by construing

¹⁷⁰ *In re S.L.J.*, 263 N.W.2d at 418–419.

¹⁷¹ MINN. STAT. ANN. § 609.72 (1) (3) (2007).

¹⁷² *In re S.L.J.*, 263 N.W.2d at 415.

¹⁷³ *Chaplinsky*, 315 U.S. at 572.

¹⁷⁴ *Cohen v. California*, 403 U.S. 15, 26 (1971).

¹⁷⁵ *Chaplinsky*, 315 U.S. at 569.

¹⁷⁶ *Id.* at 572.

¹⁷⁷ *Cohen*, 403 U.S. at 20.

¹⁷⁸ *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (citing *Chaplinsky*, 315 U.S. at 572).

¹⁷⁹ *Chaplinsky*, 315 U.S. at 571–72.

¹⁸⁰ *In re S.L.J.*, 263 N.W.2d at 418–19.

it narrowly to refer only to “fighting words.”¹⁸¹

The conduct engaged in by Craig—the intricate courtship rituals of positioning, signaling and maneuvering before gaining consent to participate in any sexual activity—does not constitute “fighting words,” nor is it obscene, offensive, or abusive language that is restricted by *S.L.J.* However, the trial court judge ruled that because Craig was arrested under the conduct portion of the disorderly conduct statute, *S.L.J.* was inapplicable; that case only places limitations on verbal “language” and does not place any limitation on the conduct portion of the statute.¹⁸² However, such an interpretation ignores the “symbolic speech” significance of Craig’s conduct. It ignores that his speech expressed an idea reasonably understood by a significant portion of the public, including the arresting officer who reciprocated the mode of speech. Craig’s actions were not merely conduct, but rather also symbolic speech. As a result, the *S.L.J.* holding should apply to the constitutionality of the state’s disorderly conduct statute as applied to those who participate in using the symbolic speech.

C. *Fighting Words and Symbolic Speech*

An analogous form of nonverbal conduct considered to be constitutionally protected symbolic speech was analyzed in *Nichols v. Chacon*.¹⁸³ The two issues presented in this case were whether the plaintiff’s constitutional rights were violated when he was charged with disorderly conduct for having “flipped off” the defendant, a state trooper; and whether at the time this incident occurred, the state trooper could reasonably have believed plaintiff’s action constituted disorderly conduct under the applicable state criminal statute.¹⁸⁴

As a rule, retaliation based on the exercise of First Amendment rights has long been recognized as a basis for liability.¹⁸⁵ In general, expressive conduct is protected from government regulation under the First and Fourteenth Amendments. As has oft been said, “even crudity of expression may be constitutionally protected.”¹⁸⁶ Further, “[n]onverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it,

¹⁸¹ *Id.* at 419.

¹⁸² *Craig*, 27 CR 07-043231, at *26.

¹⁸³ *Nichols v. Chacon*, 110 F. Supp. 2d 1099 (W.D. Ark. 2000).

¹⁸⁴ *Id.* at 1101.

¹⁸⁵ *Id.* at 1103.

¹⁸⁶ *Id.* at 1103 (citing *State v. Drake*, 325 A.2d 52, 55 (Me. 1974)).

regardless of whether it is actually understood in a particular instance in such a way.”¹⁸⁷ In addition, “[s]peech is often provocative and challenging . . . [but it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”¹⁸⁸

The officer argued that even if the plaintiff’s speech is protected under the First Amendment, “a reasonable official is not expected to understand the subtleties of First Amendment law,”¹⁸⁹ and based on his knowledge of the state’s disorderly conduct statute he reasonably believed that the Plaintiff had violated the statutes.¹⁹⁰ He further argued that a reasonable person would describe giving the “middle finger” as an obscene gesture.¹⁹¹ The court noted that missing from this argument was any suggestion as to whether the action caused “any public inconvenience, annoyance, or alarm.”¹⁹² The officer was the only one to witness the gesture and experience annoyance because of it; therefore, the conduct did not satisfy the public inconvenience, annoyance or alarm requirement under the disorderly conduct statute, even if it was not constitutionally protected First Amendment speech.¹⁹³ The court noted that statutes proscribing the use of abusive or obscene language or the making of obscene gestures in public places have repeatedly been struck down as unconstitutionally overbroad if they prohibited a substantial amount of constitutionally protected expression, but that “fighting words” were not protected.¹⁹⁴

In precisely the same manner as Minnesota in *S.L.J.*, the Arkansas disorderly conduct statute at issue in *Nichols* was found to be constitutional by the Arkansas Supreme Court premised on a limiting construction of the statute to the “fighting words” rule of *Chaplinsky*.¹⁹⁵ However, unlike the court in *Minnesota v. Craig*, the court in *Nichols* extended the definition of speech to include non-verbal conduct that functioned as symbolic speech, and thus extended the “fighting words” limitation to symbolic non-verbal conduct. The Arkansas court held that while the plaintiff’s middle-

¹⁸⁷ *Id.* at 1104 (citing *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1967)).

¹⁸⁸ *Id.* (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)).

¹⁸⁹ *Id.* at 1102 (citing *Burnham v. Ianni*, 119 F.3d 668, 673–674 (8th Cir. 1967)).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1104.

¹⁹⁵ *Id.* at 1110.

finger gesture to the officer may have been crude, insensitive, offensive, and disturbing to the officer, it was not obscene nor did it constitute “fighting words,” although it was non-verbal it was protected as “free speech” under the First Amendment.¹⁹⁶ The court said that as a matter of law the officer was not entitled to qualified immunity and that his arrest of the plaintiff under the disorderly conduct statute violated his First and Fourth Amendment rights.¹⁹⁷ Although on appeal *Nichols* was subsequently affirmed by the Eighth Circuit Court of Appeals, where Minnesota is situated, constitutional issues were neither raised nor considered.¹⁹⁸

Given these rulings, if the holding of *Nichols* were to apply in Minnesota, Craig’s conduct would not constitute “fighting words.” It does, however, constitute symbolic speech via recognizable bodily movements embedded with meaning—similar to the manner in which giving someone the “finger” is symbolic speech through non-verbal, easily recognizable bodily movements. Further, even if the state did not recognize Craig’s conduct as speech—since the only person who encountered Craig’s speech was the arresting officer—the only public offense was to him and not the general public, because it did not provoke the requisite “alarm, anger, or resentment in others,”¹⁹⁹ it was not a public inconvenience, and thus still fails to qualify as disorderly conduct. If, on the other hand, the holding of *Nichols* were to be accepted and Craig’s conduct was rightly found to be symbolic speech deserving of First Amendment protection, then like in *Nichols*, Craig’s First and Fourth Amendment rights were violated by the officer. The officers in both *Nichols*’ and Craig’s cases understood the meaning of symbolic speech and despite a lack of offense to the general public, they both arrested the other party for disorderly conduct. In *Nichols*, the court said that as a matter of law by violating the plaintiff’s fundamental right to free speech, his Eleventh Amendment immunity was waived and he could be held liable.²⁰⁰ If the officer in Minnesota also understood Craig’s speech and arrested him in violation of his free speech constitutional guarantee, perhaps he should be held liable as well.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Nichols v. Chacon*, No. 00-3331, 2001 U.S. App. LEXIS 21062 (8th Cir. 2001).

¹⁹⁹ MINN. STAT. ANN. § 609.72(Subd. 1)(3) (2007).

²⁰⁰ *Id.*

D. *The Solicitation of Consensual Private Sex Between Adults Does Not Constitute Unlawful Activity*

Just as with “fighting words,” the state may regulate the solicitation of unlawful activity.²⁰¹ In *People v. Uplinger*,²⁰² the court recognized that a statute prohibiting loitering “in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature”²⁰³ was a companion statute to anti-sodomy statutes between consenting adults. The court had previously held in *People v. Onofre* “that the state may not constitutionally prohibit sexual behavior conducted in private between consenting adults.”²⁰⁴ The court said that the clear purpose of “the loitering statute [was] to punish conduct anticipatory to the act of consensual sodomy,”²⁰⁵ and since the ultimate conduct—consensual sex in private between adults—was now legal, that conduct contemplating this act could not be criminal. The New York statute was “devoid of a requirement that the conduct proscribed be in any way offensive . . . to others.”²⁰⁶

Since consensual sodomy between adults is not a crime post-*Lawrence*, it logically follows that an invitation to engage in private sex should not be a crime. Applying *People v. Onofre*, a statute designed to punish conduct anticipatory to the act of consensual sodomy should also be invalid. While one may argue that public sex is an unlawful activity, it is not clear as to whether sex in a bathroom would be considered private or public given that many courts have gone different ways on this issue. If sex occurs in a stall silently and no one else knows it is happening, does it actually cause public offense?

In *State v. Bryant*,²⁰⁷ the Minnesota Supreme Court ruled that two men engaged in sexual activity in a department store restroom with the stall door closed had a reasonable expectation of privacy.²⁰⁸ They were, the court held, acting in a private, not public space.²⁰⁹ Craig was charged with invasion of privacy by violating a “place where a reasonable person would have an expectation of

²⁰¹ ACLU Memorandum, *supra* note 141, at 5 (citing *Brown v. Hartlage*, 456 U.S. 45, 55 (1982)).

²⁰² 58 N.Y.2d 936 (N.Y. 1983).

²⁰³ *Id.* at 937.

²⁰⁴ *Id.* at 938 (citing *People v. Onofre*, 51 N.Y.2d 476, 434 (N.Y. 1980)).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *State v. Bryant*, 177 N.W.2d 800 (Minn. 1970).

²⁰⁸ ACLU Memorandum, *supra* note 141, at 8.

²⁰⁹ *Bryant*, 177 N.W.2d at 206.

privacy” when he put his hand and foot under the divider of the two stalls.²¹⁰ Therefore, breaking the public–private boundary only occurred after Craig thought that he had obtained consent because of the officer’s reciprocated signals. Even in charging Craig with violating the officer’s privacy, however, the court is implicitly acknowledging that the bathroom stall is a place where one would have an expectation of privacy, as held in *Bryant*.

Even in Craig’s home state of Idaho, which has been known for having stringent sodomy laws prior to *Lawrence*, in *State v. Limberhand*,²¹¹ the defendant was arrested for masturbating in a closed toilet stall by police searching without a warrant for “homosexual activity” at a rest stop. The court there found that the defendant had a legitimate expectation of privacy in a closed toilet stall and that a police officer’s warrantless observation of him from an adjoining stall violated his privacy interests.²¹² Solicitation to have sex in a stall would be a lawful invitation to have consensual sex between two adults in a private setting, so long as there is actual consent and so long as no officer is using the signals of courtship to entrap people.

IV. CONCLUSION

Gay rights have come a long way since Humphreys’ studies of tearoom participants in 1966 America. However the appeal of the tearoom has remained for many. For some it is the appeal of casual anonymous sex even though they may be able to live their life as an “out” gay man. For others it is still the only release they may have in a life where they feel that they have to remain in the “closet” due to social, religious, community or family pressure. For those who may not even identify as homosexual, it is just a way to have casual or anonymous sex. No matter the reason, it does not look as though tearooms will be disappearing any time soon.

While I am not advocating for the legalization of public sex, it seems that the intricate language developed as part of the tearoom culture serves to create a code of consensual sex and privacy that will not interfere with others in the tearoom. The language used to express one’s desires in a tearoom is symbolic speech that functions in a manner similar to conduct that people use daily at work, in bars, and in all other public spaces to meet people, flirt, and have sex or relationships. Given that private, consensual sodomy

²¹⁰ MINN. STAT. ANN. § 609.746(c)(1)(2006).

²¹¹ *State v. Limberhand*, 788 P.2d 857 (Idaho Ct. App. 1990).

²¹² *Id.*

between adults is no longer illegal, arresting people for expressive conduct to engage in a lawful act does nothing more than infringe upon individuals' First Amendment free speech rights and maintain the stigma of homophobia in America.