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Challenging Solicitation Statues as Unconstitutional: Appellate Brief in Support of Defendant-Appellant in *Ypsilanti v. Patterson*

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CHALLENGING SOLICITATION STATUTES AS UNCONSTITUTIONAL: APPELLATE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT IN *YPSILANTI v. PATTERSON*

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INTRODUCTION

On July 28, 1990, Ms. Willie Mae Patterson and her fiancé, Mr. Carlton Burks, were driving home after enjoying the summer weather at Frog Island Park in Ypsilanti, Michigan. On the way into town, the car they were driving began to sputter and then broke down in front of a church on North Adams Street.[1] Mr. Burks attempted to re-start the car, without success. He then looked under the hood to try to locate the source of the problem, again without success.[2] Finally, Mr. Burks managed to push the car to the side of the curb where he and Ms. Patterson began discussing what they should do.[3] Ms. Patterson decided to try to flag some help.[4]

Ms. Patterson got out of the car and walked down the street to find a friend who might be able to help start the car.[5] On her way back down the street toward the car, she saw two male friends driving by, one an old classmate.[6] She waved to them to get them to stop, and

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1. Record at 24, People of the City of Ypsilanti v. Willie Mae Patterson, No. CR-14A-2-90-1478 (Mich. Dist. Ct. July 15, 1991).
2. Record at 25.
3. Record at 25–26.
4. Record at 26, 34.
5. Record at 34.
6. Record at 40.

asked if they had jumper cables.[7] The men did not have cables, and continued on their way after speaking briefly with Ms. Patterson.[8] After returning to the car for a brief rest, Ms. Patterson walked down Adams Street to call her father, who lived a few blocks away, for assistance with the car.[9] Her father was not home at the time, so Ms. Patterson walked back toward the car.[10] Soon after that, Ms. Patterson recognized her brother driving on Michigan Avenue, coming toward Washington Street.[11] Ms. Patterson waved to her brother, but before she could get his attention, she was surrounded by five or six police cars.[12]

Ypsilanti Police Officer Mutchler arrested Ms. Patterson for loitering for the purposes of soliciting sexual acts for hire. This arrest occurred as Officer Mutchler carried out his assigned task for the evening: doing surveillance in "the downtown area" for general crimes and prostitution.[13] His supervisor had directed him there to clamp down on "an influx of known prostitutes working in the area."[14]

Prior to the arrest, Officer Mutchler had been sporadically watching Ms. Patterson and Mr. Burks with binoculars while in a squad car "hidden" away, sometimes in an alley, sometimes in a church parking lot.[15] Both the alleyway and the lot were at least a half-block's distance from Ms. Patterson.[16] Officer Mutchler was unable to hear any conversations between Ms. Patterson and Mr. Burks or between Ms. Patterson and her friends who stopped to assist her.[17] Further, Mutchler's surveillance of Ms. Patterson was not constant.[18] Between the hours of seven and nine o'clock p.m., Mutchler "wasn't stationary," but "kept circling the block."[19] At times during that two hour period, Mutchler was "watching other people," so that "[t]here were some periods of time

7. Record at 34.
8. Record at 34.
9. Record at 36.
10. Record at 36.
11. Record at 34.
12. Record at 40.
13. Record at 7.
14. Record at 7.
15. Record at 18.
16. Record at 18.
17. Record at 16, 17.
18. Record at 12.
19. Record at 16.

she [Ms. Patterson] was out of sight."[20]

Officer Mutchler was prompted to arrest Ms. Patterson by his alleged observation of her "type of walk, the manner of dress, the behavior entering and exiting vehicles, leaving and coming back with different men" and based on the fact that he had previously arrested Ms. Patterson for soliciting.[21]

Based on this evidence, the trial judge found Ms. Patterson guilty of violating Ypsilanti's law prohibiting loitering for the purpose of soliciting sexual activity for hire.

The following argument from Defendant-Appellant's Brief on Appeal presented a facial and an "as applied" constitutional challenge to Ypsilanti's "Loitering for Purpose of Engaging in Prostitution" ordinance.[22] Section 9.138 of the Ypsilanti City Code provided:

> (1) For purposes of this section:
> (a) [*Public place*] means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways or entrance ways to any building which fronts on any of the aforesaid places or a motor vehicle in or on any such place.
> (b) [*Known prostitute or panderer*] means a person who, within a year previous to the date of arrest for a violation of this section, has, within the knowledge of the arresting officer been convicted of violating this section or any other section of the City Code or the State Statutes relating to prostitution, solicitation or procurement.
> (2) No person shall remain or wander about in a public place and repeatedly beckon to, or repeatedly attempt to engage passersby in conversation, or repeatedly stop or attempt to stop motor vehicles, or repeatedly interfere with the free passage of other persons, *for the purpose of engaging in, soliciting, or procuring sexual activity for hire.* The circumstances which may be considered in determining whether such purpose is manifested are: That such person is a known prostitute or panderer, repeatedly beckons to, stops or attempts to stop, or engages passersby in conversation, or repeatedly stops or attempts to stop motor vehicle operators

20. Record at 12.

21. Record at 14.

22. YPSILANTI, MICH., CITY CODE § 9.138 (1990–91).

by hailing, waving of arms or any other bodily gestures.[23]

Appellant successfully contended that the ordinance, on its face, violates both the Michigan and Federal Constitutions and thus was void and unenforceable. Further, Appellant contended that her arrest and conviction under the ordinance was unconstitutional. In this regard, it is important to understand the elements of this ordinance and what it did and did not prohibit. This particular ordinance did not criminalize the actual act of soliciting or engaging in sexual activity for hire. Rather, this ordinance prohibited being in a public place with the purpose or intent of soliciting or engaging in a sexual act for hire.

In an opinion and order setting aside the conviction, Judge Melinda Morris of the circuit court for Washtenaw County found the ordinance was "a short-cut which violates constitutional rights."[24] Holding that it is within the police power of the state to proscribe conduct that has as its goal the completion of criminal acts such as prostitution and solicitation, the court nevertheless found that such a goal must be accomplished through the laws of attempt. As a result, the ordinance was found unconstitutional on its face as overbroad and vague. Further, the circuit court held that the circumstances to be used in determining the purpose of the conduct, a prior conviction, is inadmissible evidence under the Michigan Rules of Evidence.[25]

ARGUMENT

I. THE YPSILANTI ORDINANCE IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT CREATES AN UNJUSTIFIABLE PRESUMPTION OF GUILT AND PUNISHES A PERSON BASED ON HIS/HER STATUS, IN CONTRAVENTION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ART. I, SEC. 17 OF THE MICHIGAN CONSTITUTION.

There are two circumstances recited in the Ypsilanti ordinance which "may" be considered in determining whether a purpose to solicit or engage in prostitution has been manifested by someone in a public

23. *Id.* (emphasis added).

24. City of Ypsilanti v. Willie Mae Patterson, No. 91-26138-AR, slip op. at 13 (Mich. Cir. Ct. Feb. 4, 1993).

25. City of Ypsilanti v. Willie Mae Patterson, No. 91-26138-AR, slip op. at 13 (Mich. Cir. Ct. Feb. 4, 1993).

place: 1) the person is a "known prostitute or panderer";[26] and 2) the person repeatedly beckons to or attempts to stop or engage passers-by in conversation or repeatedly stops or attempts to stop motor vehicle operators.[27] If this provision of the ordinance is read literally, then these are the *only* circumstances which may be considered in determining whether or not a person is in a public place with the purpose of engaging in or soliciting prostitution.

The ordinance does not expressly state that other circumstances may be considered or that the enumerated circumstances are by way of example only. Rather, the ordinance states, "*[t]he* circumstances which may be considered in determining whether such purpose is manifested are . . . ."[28] It does not say "*[a]mong* the circumstances which may be considered,"[29] as was the case in the ordinance at issue in *Short v. City of Birmingham*,[30] nor does it say "[c]ircumstances which may be considered *include but are not limited to*,"[31] as did the ordinance which was under consideration in *Christian v. Kansas City*.[32] In those two cases, it was clear that the legislative body which passed those ordinances intended that the enumerated circumstances would not be exhaustive or inclusive. However, the Ypsilanti ordinance is significantly different from those ordinances. The only conclusion which can be drawn is that the Ypsilanti City Council intended that these *circumstances* be the only circumstances which may be considered in determining whether this crime has been committed, i.e., whether a person is in a public place with the purpose of soliciting or engaging in prostitution.

A. The Ypsilanti Ordinance Creates an Unjustifiable Presumption of Guilt.

If the ordinance is construed as allowing an officer, judge, or jury to find that a person in a public place is gesturing for the purpose of engaging in or soliciting prostitution, based solely on whether the person is a "known prostitute or panderer" who is in a public place or who repeatedly beckons or gestures to passers-by or motor vehicles,

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26. YPSILANTI, MICH., CITY CODE § 9.138 (1990–91).
27. *Id.*
28. *Id.*
29. BIRMINGHAM, ALA., GENERAL CODE § 11-7-33(b) (1980) (emphasis added).
30. 393 So. 2d 518, 520 (Ala. Crim. App. 1981).
31. KANSAS CITY, MO., REVISED ORDINANCES § 26.161(c)(1977) (emphasis added).
32. 710 S.W.2d 11, 12 (Mo. Ct. App. 1986) (per curiam).

then the ordinance is unconstitutional on its face. This construction creates an unjustifiable presumption of guilt based on a prior arrest or conviction for prostitution.[33]

In the instant case, the ordinance effectively makes it criminal for a "known prostitute" (i.e., one who has been convicted of prostitution within the previous year) to stand in a public place and gesture to others. The City denies that this is the result or the purpose of the ordinance, contending that the ordinance does not make it illegal to gesture, but makes it illegal to gesture to others with a specific purpose. However, the only elements which may be considered in determining whether the criminal purpose exists are the status of the person and the act of gesturing. Accordingly, the dispositive element in determining whether or not such a purpose has been manifested is the status of the person (since gesturing is already a separate element of the offense). Thus, the status of the person as a known prostitute or panderer becomes the element of the crime. For the purposes of the ordinance, the "act" plus the "status" equals a "violation."

An ordinance making the status of a prostitute an element of a crime was struck down as unconstitutional by the Michigan Court of Appeals in *City of Detroit v. Bowden*.[34] In *Bowden*, the court was presented with a constitutional challenge to a City of Detroit ordinance which provided as follows:

> It shall be unlawful for a known prostitute or panderer to repeatedly stop or attempt to stop any pedestrian or motor vehicle operator by hailing, whistling, waving of arms or any other bodily gesture in or upon any public sidewalk, street, alley, park or public place.
>
> And [sic] person violating the provisions of this section shall be deemed a disorderly person and shall, upon conviction, be punished as herein provided. For purposes of this section "a known prostitute or panderer" is any female or

33. The trial court did rule that evidence that a person arrested under the ordinance was a "known prostitute" was not admissible at trial unless otherwise admissible under the Michigan Rules of Evidence. However, the trial court implicitly held that the ordinance could be constitutionally construed to allow an arresting officer and the trier of fact to consider as evidence of guilt circumstances which are not enumerated in the ordinance. Since this Court may determine that the ordinance may not be construed in that manner, Appellant continues this argument in order to preserve it on appeal.

34. 149 N.W.2d 771, 776 (Mich. Ct. App. 1967).

> male who, within two years from date of arrest for violation of this section, has been convicted of prostitution, accosting and soliciting, receiving and admitting, abetting and abiding, maintaining and operating or pandering, as those crimes are defined by the laws of the State.[35]

The Court of Appeals struck down this ordinance on due process grounds, holding that its definition of known prostitute or panderer created an unjustifiable presumption of guilt which denied persons with a past conviction a fair opportunity to rebut the charges against them.[36] The court stated:

> The ultimate issue in a violation of the ordinance is whether the accused was, in fact, soliciting when she waved. The plaintiff argues that it is difficult to produce evidence of street solicitation without the language which amended this ordinance. This difficulty of proof without the "conclusive presumption" that one who has been convicted of such a crime within the last two years is a "known prostitute," will not justify the amendment. *Neither will calling the proof of this conviction an element of the crime cure the constitutional infirmity.* As it is not permissible to shift the burden of proof to the defendant, so it is also not permissible to strip her of all defense because of her prior conviction. The amendment to the ordinance fails to meet the test of due process under both the Michigan and the United States Constitutions.[37]

The holding in *Bowden* is controlling with respect to the Ypsilanti ordinance at issue in the instant case. As noted above, the Ypsilanti ordinance effectively makes being a known prostitute or panderer an element of the crime. The court in *Bowden* expressly held that an ordinance with such an element must be struck down as unconstitutional. Accordingly, the Ypsilanti ordinance must be struck down as being violative of an individual's due process rights.

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35. DETROIT, MICH., ORDINANCE ch. 39, art. I, § 52 (1965).

36. *Bowden*, 149 N.W.2d at 776.

37. *Bowden*, 149 N.W.2d at 776 (emphasis added).

B. The Ypsilanti Ordinance Unconstitutionally Penalizes a Person Because of His/Her Status.

Additionally, or alternatively, Ypsilanti's ordinance is unconstitutional because it punishes a person based on his or her status as a known prostitute or panderer. In *Robinson v. California*,[38] the United States Supreme Court struck down a law which made it a crime to be a drug addict, holding that such a law was violative of an individual's Fourteenth Amendment due process rights.[39] While the Ypsilanti ordinance does not expressly make it a crime to be a known prostitute or panderer, it does make it a crime to be a known prostitute or panderer who gestures to others in a public place. Such an ordinance was found to be unconstitutional in *Profit v. City of Tulsa*[40] where the court held:

> Status alone is generally insufficient to constitute a crime. It is clear from a careful reading of the ordinance that mere status as a prostitute or pimp is not made criminal by this ordinance. *It is equally clear, however, that the ordinance does make criminal certain acts, innocent in and of themselves, if done by a "known prostitute or known pimp."* Although the ordinance tends to regard "status" as a circumstance indicating the intent of a person loitering, *plainly the circumstance can control whether the ordinance has been violated. In this sense, "status" becomes not the offense but, rather, an element of the offense.*
>
> Whether status is the offense or whether it is merely an element thereof is irrelevant. The ordinance suffers from the same constitutional infirmities in either case. A person should be convicted only for what he does, not for what he is.[41]

The reasons stated by the court in *Profit* are equally applicable here, particularly in light of the Michigan Court of Appeals' ruling in *Bowden*. Ypsilanti's "loitering for purposes of prostitution" ordinance attempts to punish people for what they are, not what they do. For this reason, Ypsilanti's ordinance must be found unconstitutional, since it punishes the *status* of the offender, rather than any actual *criminal acts*

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38. 370 U.S. 660 (1962).
39. *Robinson*, 370 U.S. at 667.
40. 617 P.2d 250 (Okla. Crim. App. 1980) (emphasis added) (citations omitted).
41. *Profit*, 617 P.2d at 251.

performed by the offender.

II. THE YPSILANTI ORDINANCE IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT IS OVERBROAD AND VAGUE AND RESTRICTS FREEDOM OF SPEECH AND ASSEMBLY.

A. Ypsilanti's Ordinance is Overly Broad in Scope and Threatens Innocent Conduct.

In *Johnson v. Carson*,[42] the United States District Court struck down as unconstitutional a city ordinance which made it unlawful "for any person to loiter in or near" any public place under circumstances manifesting the purpose of engaging in or soliciting prostitution.[43] In so holding, the court held that such an ordinance clearly involved and inhibited the First Amendment freedoms of the public, specifically stating:

> The ordinance appears to prohibit various activities such as a "known prostitute" loitering on a street corner, anyone repeatedly engaging passers-by in conversation and anyone repeatedly attempting to stop cars by waving their arms. Thus, in the present case, as in *Sawyer*:
>
> > The "protected freedom" involved in this case is the first amendment guarantee of freedom of association. This right to freely associate is not limited to those associations which are "political in the customary sense" but includes those which "pertain to the social, legal, and economic benefit of the members." "*The rights of locomotion, freedom of movement, to go where one pleases, and to use the public street in a way that does not interfere with the personal liberty of others" are implicit in the [F]irst and [F]ourteenth [A]mendments.*
>
> The *Sawyer* court went on to conclude that even associating on the street corner is constitutionally protected. . . . Loitering, loafing, and habitually wandering at night are also constitutionally protected. Since [the Jacksonville ordinance] prohibits these rights in certain circumstances, the first

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42. 569 F. Supp. 974 (M.D. Fla. 1983).

43. *Id.* at 976 (construing JACKSONVILLE, FLA., MUNICIPAL ORDINANCE § 330.107 (1991)).

> amendment is involved in the present case. Although speech incident to soliciting for prostitution is not protected by the first amendment . . . [the Jacksonville ordinance] does not appear to stop at prohibiting such speech. In fact, to violate [the Jacksonville ordinance], a person need not actually solicit or speak to anyone.[44]

As in *Johnson*, the Ypsilanti loitering for purposes of prostitution ordinance under consideration indisputably involves and restricts First Amendment freedoms. Significantly, the ordinance makes it a criminal act to engage passers-by in conversation or to beckon to passers-by or attempt to stop motor vehicle operators, if such is for the purpose of soliciting an act of prostitution or engaging in prostitution. As in *Johnson*, a person need not actually solicit someone in order to be found to have violated the ordinance. Rather, all a person need do is engage in gesturing, talking, or other modes of communication—all behavior which is typically innocent and which is protected by the free speech provisions of the Federal and Michigan constitutions.[45]

It is one of the strong tenets of constitutional law that a statute which restricts or burdens the exercise of First Amendment freedoms must be carefully scrutinized:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. . . .
> . . . Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations.[46]

In analyzing a claim of overbreadth, i.e., that the Ypsilanti ordinance unconstitutionally restricts or burdens First Amendment freedoms, this court first must determine whether a limiting construction can be placed on the ordinance so that there is not a burden on a

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44. *Johnson*, 569 F. Supp. at 976 (quoting Sawyer v. Sandstrom, 615 F.2d 311 (5th Cir. 1980) (alteration in original) (citations omitted)).

45. U.S. CONST. amend. I; MICH. CONST. art. I, § 5.

46. Broadrick v. Oklahoma, 413 U.S. 601, 611–12 (1973) (citations omitted).

person's First Amendment rights.[47] In the instant case, no such construction is possible, since the ordinance clearly and intentionally includes as an element of the crime acts of expression which are innocent in and of themselves.

In *Christian v. Kansas City*,[48] the Missouri court was faced with an ordinance virtually identical to the Ypsilanti ordinance. That court struck down the Missouri ordinance as unconstitutionally overbroad, stating:

> If the circumstances which allegedly reflect one's illicit intentions were held to be well grounded in constitutional jurisprudence, this court would have to condone potential arrests and convictions for behavior that Americans freely and innately enjoy: window shopping, waiting on the corner for a bus, waving to friends, or hailing a taxi cab. . . .
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> . . . This court cannot visualize a "substantial number" of fact patterns where this ordinance would be constitutionally applicable preventing an attack based on facial overbreadth. Nor can this court devise a limiting construction to cure its deficiencies.[49]

Similarly, in *Johnson*, the court ruled that the Jacksonville ordinance which prohibited loitering for purposes of prostitution was unconstitutionally overbroad.[50] Likewise, in *Profit*, the court did not hesitate to find that a loitering for the purposes of prostitution ordinance was unconstitutionally overbroad:

> Under the present ordinance the act or acts required to be done in conjunction with being a known prostitute or pimp are otherwise not criminal in most situations. *The ordinance reaches beyond conduct which is calculated to harm and could be used to punish conduct which is essentially innocent. We find this ordinance is overbroad. It could be used to punish the mere act of waving or calling out to a friend.*[51]

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47. *Johnson*, 569 F. Supp. at 977.

48. 710 S.W.2d 11 (Mo. Ct. App. 1986) (per curium).

49. *Christian*, 710 S.W.2d at 13–14 (construing KANSAS CITY, MO., REVISED ORDINANCES § 26.161 (1911) (citations omitted)).

50. *Johnson*, 569 F. Supp. at 980.

51. Profit v. City of Tulsa, 617 P.2d 250, 251 (Okla. Crim. App. 1980) (emphasis added) (citation omitted). *See also* Hayes v. Municipal Court of Oklahoma City, 487 P.2d 974, 978–81 (Okla. Crim. App. 1971) (discussing and applying the

The fact that an innocent person who is arrested might ultimately be found "not guilty" does not raise the Ypsilanti ordinance to a constitutional level with respect to scope and breadth. In *Johnson* the court noted that simply the *possibility* of arrest is an unconstitutional deterrent to the free exercise of first amendment freedoms:

> Even if a person explains his or her conduct and the trial court ultimately believes the explanation and a lawful purpose is disclosed, the person's first amendment rights have, nonetheless, been chilled by the arrest. In *Papachristou*, the Jacksonville ordinance made it unlawful for certain types of persons to wander or stroll "around from place to place without any lawful purpose or object." The Supreme Court stated that "[t]he qualification 'without any lawful purpose or object' may be a trap for innocent acts." . . .
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> Similarly, in the present case, the possibility of arrest deters the free exercise of first amendment rights.[52]

In sum, the Ypsilanti ordinance unreasonably burdens the lawful exercise of the First Amendment rights of speech and association. Because it does so, it must fall.

B. The Ypsilanti Ordinance is Unconstitutionally Vague.

In *Grayned v. City of Rockford*,[53] the Supreme Court provided a concise discussion of the grounds on which laws will be found to be vague and violative of an individual's due process rights:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented,

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overbreadth doctrine to a general loitering statute).

52. *Johnson*, 569 F. Supp. at 979 (construing Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (citations omitted)).

53. 408 U.S. 104 (1972).

> laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead . . . citizens to " 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."[54]

Thus, in order for the Ypsilanti ordinance to be constitutional, it must:

1) give a person reasonable notice of what acts are prohibited;
2) provide explicit standards for application and enforcement; and
3) not infringe upon the exercise of First Amendment freedoms.

In the instant case, Ypsilanti's loitering for purposes of prostitution ordinance violates all three requirements.

1. The Ypsilanti Ordinance Does Not Provide Reasonable Notice of What Acts Might Subject a Person to Arrest and Conviction.

The elements of Ypsilanti's ordinance are: 1) loitering and gesturing; and 2) with the purpose of soliciting or engaging in prostitution.[55] The City argues that this ordinance is not vague, because a person of ordinary sense knows whether or not he or she is loitering or gesturing with an "intent" or "purpose" of engaging in prostitution. Such an argument has some surface-level appeal, but it misses the point. The problem with the ordinance is that the purpose which makes the activity unlawful is determined solely by the acts or the status of the person subject to the ordinance—acts or status which are just as likely to be innocent of wrongdoing as they are to be manifestations of guilt.

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54. *Id.* at 108–09 (citations omitted).

55. YPSILANTI, MICH., CITY CODE § 9.138 (1990–91).

The former prostitute-turned-streetside-preacher, the graduate student conducting research, or the woman repeatedly asking passers-by if they have seen the friend she is waiting for, are all subject to arrest under this ordinance.[56] *They* may know they are not acting for the purpose of soliciting/engaging in prostitution, but they have no way of anticipating or knowing what the police will surmise. An opinion from the Michigan Court of Appeals in a search and seizure case aptly describes the flaw in the Ypsilanti ordinance:

> The difficulty is that from the viewpoint of the *observer*, an innocent gesture can often be mistaken for a guilty movement. He must not only perceive the gesture accurately, he must also interpret it in accordance with the actor's true intent. But if words are not infrequently ambiguous, gestures are even more so. Many are wholly nonspecific, and can be assigned a meaning only in their context. Yet the observer may view that context quite otherwise from the actor: not only is his vantage point different, he may even have approached the scene with a preconceived notion—consciously or subconsciously—of what gestures he expected to see and what he expected them to mean. The potential for misunderstanding in such a situation is obvious.[57]

Under the Ypsilanti ordinance, the ordinary person must guess as to what behaviors he/she must adopt, or what gestures and acts he/she must avoid and in what areas, in order to prevent an overzealous police officer from arresting them under the ordinance. In *Johnson* the court ruled that a virtually identical Florida ordinance was unconstitutionally vague for this very reason:

> Florida courts construe [the ordinance] to include two elements—loitering and behavior manifesting a purpose related to prostitution. The ordinance goes on to specify what

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56. To the extent that the City's response is: "Nonsense! Our police know a prostitute when they see one," or, "The police will be relying on other well-known criteria for determining intent, beyond that which is set out in the ordinance," then the City's response only further serves to demonstrate the vagueness of the ordinance under the second standard discussed in *Grayned*, 408 U.S. at 108–09. For further discussion see *infra*, part II.B.2.

57. People v. Young, 282 N.W.2d 211, 214 (Mich. Ct. App. 1979) (quoting People v. Super. Ct. of Yolo County, 478 P.2d 449 (Cal. 1970)), *cert. denied*, 445 U.S. 927 (1980).

> conduct satisfies the second element. Thus it is arguable that the ordinance is specific in what it proscribes. *But can it say with certainty that a person convicted in any state within the past year of a prostitution-related offense would know that he could be arrested under [the ordinance] for merely wandering aimlessly? Would a political candidate, a motorist in distress, or a member of a religious group realize that repeatedly waving to cars passing by could subject him or her to arrest?* [58]

For this reason, Ypsilanti's loitering for purposes of prostitution ordinance is unconstitutionally vague and may not be enforced.

2. The Ypsilanti Ordinance is Subject to Arbitrary and Discriminatory Enforcement.

A law "must provide explicit standards for those who apply them."[59] In *Papachristou v. City of Jacksonville*,[60] the United States Supreme Court struck down a loitering statute (which made unlawful, among other things, loitering "without any lawful purpose"), noting:

> We allow our police to make arrests only on "probable cause," a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government. Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system, even when the arrest is for past criminality. . . .
>
> A direction by a legislature to the police to arrest all "suspicious" persons would not pass constitutional muster.[61]

The Ypsilanti ordinance effectively allows police to arrest persons on suspicion, rather than on probable cause. The whole tenor of the ordinance appears to be: "If we can't catch them in the act of soliciting, then we'll catch them for being in the area for the *purpose* of soliciting." This nip-it-in-the-bud approach to law enforcement is the antithesis of due process.

> A presumption that people who might walk or loaf or

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58. Johnson v. Carson, 569 F. Supp. 974, 980 (M.D. Fla. 1983) (emphasis added).
59. *Grayned*, 408 U.S. at 108.
60. 405 U.S. 156 (1972).
61. *Id.* at 169 (citations omitted).

> loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. Of course vagrancy statutes are useful to police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application.[62]

Of additional importance is the Supreme Court's recognition in *Papachristou* that laws like the Ypsilanti ordinance are most likely to affect those who are least able to understand it or to defend themselves against it:

> Those generally implicated by the imprecise terms of the ordinance—poor people, non-conformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."[63]

The Ypsilanti ordinance allows individual officers to pick and choose whom they will arrest, without restriction (particularly if the ordinance is construed such that the two enumerated circumstances are not the only factors which may be considered in determining the criminal purpose). It is this very opportunity for arbitrary enforcement which renders a law unconstitutionally vague.[64] Virtually identical loitering for prostitution ordinances in other jurisdictions have been struck down for vagueness. In *Brown v. Municipality of Anchorage*,[65] the court held:

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62. *Papachristou*, 405 U.S. at 171.

63. *Papachristou*, 405 U.S. at 170 (citation omitted).

64. *See generally Papachristou*, 405 U.S. 156 (1972).

65. 584 P.2d 35 (Alaska 1978).

> A fair reading of [the ordinance] discloses that the ordinance on its face gives enforcement officials excessive discretion, inviting by its inexactitude arbitrary enforcement and uneven application. We can think of no construction which will save the statute from this infirmity. Therefore, we hold that [the ordinance] is void for vagueness.[66]

Likewise, in *Christian v. Kansas City*,[67] the court held: "Based on this ordinance, this court cannot permit the city to leave the task of differentiating between 'casual street encounters' from 'obvious' acts reflecting the state of mind needed for solicitation to the law enforcement officers and the courts."[68]

Because the Ypsilanti ordinance "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis,"[69] it is unconstitutionally vague and cannot be enforced.

3. The Ypsilanti Ordinance Unconstitutionally Inhibits the Exercise of First Amendment Freedoms.

A law is unconstitutionally vague when its uncertain language requires a person to forego or modify the exercise of his/her First Amendment freedoms in order to avoid the possibility of being arrested or penalized. As noted in the discussion regarding overbreadth, the Ypsilanti ordinance has *exactly that effect.* Because an ordinary citizen cannot know what gestures, speech, or behavior might be interpreted by a police officer as suspicious, such persons must modify, or forego entirely, constitutionally protected gestures and speech in order to avoid the risk of arrest. The ordinance thus is vague and cannot be enforced.

III. THE YPSILANTI ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Although the Ypsilanti ordinance, unlike some of its counterparts in other states, does not expressly condition an arrest or conviction on whether the suspect provides a satisfactory explanation of why he/she is

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66. *Id.* at 38.

67. 710 S.W.2d 11 (Mo. Ct. App. 1986) (per curium).

68. *Id.* at 13 (citations omitted).

69. Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

in a certain place or what he/she is doing, such a condition is implicit in the statute. The natural step for an officer to take upon observing conduct which, under the ordinance, supposedly manifests the criminal purpose, is to ask the suspect what he/she is doing.[70]

To the extent this ordinance requires people to explain or justify their presence in a certain area in order to avoid arrest, it violates the constitutional privilege against self-incrimination.[71] Even though the ordinance struck down in *Bowden*—like the Ypsilanti ordinance—did not expressly condition arrest or conviction on the presence or absence of a satisfactory explanation, the court noted in *Bowden* that this was an implicit requirement of the statute:

> *[T]here are valid arguments for striking it down on the ground that it violates the privilege against self-incrimination,* which the Cleveland municipal court employed recently to strike down an ordinance which punished the failure of "suspicious persons" to give a satisfactory account of themselves to police. The court said:
>
> > "This provision places the burden upon the citizen of justifying his presence on the public streets. Any citizen may desire to maintain his purpose for being upon the public streets a matter of privacy for business, personal or family reasons. [sic]
> >
> > "To require a citizen to reasonably and satisfactorily account for his presence upon the public streets offends the right to silence guaranteed by the Fifth Amendment as applied to the states through the Fourteenth Amendment to the Constitution of the United States."
>
> The Detroit ordinance can similarly be held to offend the right to silence.[72]

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70. Even the City recognizes the existence of this implicit condition in the ordinance. In a memo titled "Prostitution Loitering Ordinance," the City Attorney's Office notes that guidelines for determining whether an arrest should be made include determining whether there are "other explanations" for the suspicious "conduct," such as "hitchhiking," "asking for a ride to Eastern Michigan University," or "car broke down." Memo by Monika H. Sacks, Ypsilanti City Attorney (March 1, 1990) (on file with author).

71. City of Detroit v. Bowden, 149 N.W.2d 771, 776 (Mich. Ct. App. 1967).

72. *Bowden*, 149 N.W.2d at 776–77 (emphasis added) (citation omitted).

Since Ypsilanti's ordinance effectively requires a person to account for his/her presence upon the public streets, it offends the "right to silence guaranteed by the Fifth Amendment,"[73] and must be ruled unconstitutional.

IV. DEFENDANT-APPELLANT'S ARREST AND SUBSEQUENT CONVICTION UNDER THE YPSILANTI ORDINANCE WAS UNCONSTITUTIONAL AND MUST BE REVERSED.

Even if one assumes that Ypsilanti's loitering for purposes of solicitation ordinance can be construed narrowly such that it is not unconstitutional on its face, it was unconstitutionally applied to Appellant in the instant case.

A. Officer Mutchler's Arrest of Appellant Was Based on Her Previous Arrest for Solicitation and Was Unconstitutional.

Appellant's arrest by Officer Mutchler clearly was based on only two things: Appellant's status as a known prostitute, and acts by Appellant which were otherwise innocent in and of themselves and which are constitutionally protected. Officer Mutchler testified that he previously had arrested Appellant for soliciting and that he arrested her on the evening in question based upon the prior arrest he had made:

> Q. . . . at what point did you determine to arrest Miss Patterson and on what factors; could you enunciate those for the court?
>
> A. The type of walk, the manner of dress, the behavior entering and exiting the vehicles, leaving and coming back after a short period of time with different men, *and I have to say based on the prior arrest I made on her myself.*[74]

As noted earlier, it is unconstitutional to penalize a person based on his or her status: "Status alone is generally insufficient to constitute a crime."[75] Yet Officer Mutchler arrested Appellant based on her status.

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73. *Bowden*, 149 N.W.2d at 776–77.

74. Record at 14 (emphasis added).

75. Profit v. City of Tulsa, 617 P.2d 250, 251 (Okla. Crim. App. 1980) (citation

If Officer Mutchler had not considered Appellant's status, he clearly would not have had probable cause to arrest her, since the other circumstances he supposedly relied on to support the arrest (wearing a bright pink dress, walking at a slow pace, making small hand gestures at vehicles passing by, getting into two vehicles with single male occupants) were otherwise innocuous and were constitutionally protected.[76]

Under the Fourteenth Amendment[77] and under the due process clause of Michigan's constitution[78] police are allowed to make arrests only on probable cause, not on mere suspicion.[79] The "non-status" circumstances involved here *at most* give rise to only a suspicion of loitering for purposes of solicitation, which is not enough to substantiate an arrest. Appellant's status was the crucial element on which Officer Mutchler based his arrest, and as such, the arrest and subsequent conviction were unconstitutional.

B. Appellant's Conviction Was Unconstitutional Because It Was Based on Acts Which Are Protected Under the First and Fourteenth Amendments of the United States Constitution and Article I, Sections Three and Five, of the Michigan State Constitution.

The trial court ruled that evidence of Appellant's status as a known prostitute was inadmissible for purposes of establishing guilt under the ordinance. Given that Appellant's status as a so-called known prostitute cannot be considered in determining guilt, then the only basis for her arrest and conviction was her behavior, as recited by Officer Mutchler in his testimony. That behavior amounted to nothing more or less than being in a public place, and gesturing to and meeting with others on the street—expressive and communicative activity which is clearly protected under the federal and state constitutions.[80]

The United States Supreme Court has recognized the importance of free speech as the cornerstone of democracy by carving out an area deserving of special protection under the First Amendment: the "public

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omitted).

76. Record at 9–11. For further discussion, see *infra*, part IV.B.

77. U.S. CONST. amend. XIV.

78. MICH. CONST. art. I, § 17.

79. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

80. U.S. CONST. amend. I, amend. XIV; MICH. CONST. art I, §§ 3, 5.

forum."[81] Those places "historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums."[82] The public forum doctrine recognizes that while certain property may be publicly owned, an individual has the right to use such property for the purpose of exercising the freedoms of speech, press, assembly, and petition.[83] The right to stand on a street and speak one's mind is the foundation of freedom and democracy:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.[84]

Appellant's acts of gesturing to others on the street, and meeting with other persons in cars on the street, are classic examples of speech and assembly in a public forum which are constitutionally protected. Further, Appellant had a fundamental constitutional right to use the public sidewalks and streets as she pleased, provided that her use did not interfere with use by others. "The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others" are implicit in the First and Fourteenth Amendments.[85]

Convicting Appellant of a crime based on these activities is a blatant violation of her constitutional rights. The conviction below

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81. United States v. Grace, 461 U.S. 171, 177 (1983).

82. *Grace*, 461 U.S. at 177 (citing Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Hudgens v. NLRB, 424 U.S. 507, 515 (1976); Cox v. New Hampshire, 312 U.S. 569, 574 (1941); Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939)).

83. *Grace*, 461 U.S. at 177; *see also* Schneider v. New Jersey, 308 U.S. 147 (1939) (finding regulation of public property must not abridge constitutional liberties of those who are rightfully on the streets); *Hague*, 307 U.S. 496 (finding unconstitutional an ordinance which interfered with the communication of individuals' views on the streets).

84. *Hague*, 307 U.S. at 515.

85. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975), *aff'd without opinion*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976).

must be reversed.

V. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

Appellant contends that the evidence introduced at trial was insufficient to establish beyond a reasonable doubt that she was guilty of loitering for purposes of soliciting sexual acts for hire. In reviewing this claim, this Court must consider the evidence in a light most favorable to the prosecution. It then must "determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[86] In order to uphold the conviction, the Court must find that "the evidence was ample to warrant a finding of guilty beyond a reasonable doubt of the crime charged."[87]

In the instant case, the evidence introduced by the prosecution (and presumably relied on by the trial court in convicting Appellant) was as follows: Officer Mutchler saw Willie Mae Patterson on the evening in question walking at a slow pace up and down the sidewalk.[88] She was wearing a bright pink dress of mid-thigh length.[89] While she was walking, Ms. Patterson was making small hand gestures at vehicles passing by with male occupants.[90] On two occasions, she got into a car with a single male occupant and left for a short period of time, then came back.[91] About forty-five minutes before her arrest, she entered a black Chevrolet and sat there until males drove by, at which point she got out of the car and resumed walking slowly.[92] Finally, while Officer Mutchler was taking her photograph after her arrest, Ms. Patterson allegedly "made an utterance that she was sorry, that she promised not to work the block anymore, and that if I would let her go, she . . . would go straight home."[93]

The elements of the crime which had to have been proven beyond

86. People v. McNeal, 393 N.W.2d 907, 909 (Mich. Ct. App. 1986); People v. Thomas, 337 N.W.2d 598, 601 (Mich. Ct. App. 1983) (utilizing same language as *McNeal*).

87. People v. Williams, 118 N.W.2d 391, 395 (Mich. 1962), *cert. denied*, 373 U.S. 909 (1963).

88. Record at 9.

89. Record at 9.

90. Record at 10.

91. Record at 11.

92. Record at 10.

93. Record at 16.

a reasonable doubt in the instant case are twofold: (1) loitering in a public place; and (2) for the purpose of soliciting acts of prostitution.[94] There must be evidence which proves beyond a reasonable doubt each element of the offense.[95] If one looks at the evidence in the light most favorable to the prosecution, one might determine that there was sufficient evidence to find the existence of the first element—that Appellant was loitering. However, loitering in and of itself is not a crime, and proof of it cannot also be used to prove illegal intent or purpose:

> The word "loiter" has no sinister meaning and, by itself, implies no wrongdoing or misconduct or engagement in prohibited practices. Only where the statute or ordinance clearly distinguishes between conduct calculated to harm or the prohibited activity on the one hand, and essentially innocent conduct on the other hand, can a conviction be upheld; and only where such distinctions have been made have convictions been sustained.[96]

In *Hodges*, the defendant was charged with violating a Detroit code provision which made it a crime to "knowingly" loiter in any place where narcotic drugs or equipment for same were sold, furnished, or stored. The defendant testified that she had come to the premises in question to borrow hair rollers, had been there for about five to seven minutes before the police raided the premises, and saw no narcotic implements on the premises. An arresting officer testified that he saw narcotic paraphernalia in every room of the premises.[97]

Based on that evidence, the trial court in *Hodges* found the defendant guilty of violating the ordinance, concluding that knowledge of the presence of narcotics and/or implements could be inferred from the other evidence.[98] The Court of Appeals reversed the conviction, holding that the defendant's conduct was "patently innocent" and that the prosecution had failed to introduce evidence from which guilty knowledge could be found.[99]

The evidence found insufficient in *Hodges* is strikingly similar to

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94. YPSILANTI, MICH., CITY CODE § 9.138 (1990–91).
95. City of Detroit v. Hodges, 164 N.W.2d 781, 782 (Mich. Ct. App. 1968).
96. *Hodges*, 164 N.W.2d at 782-83 (citations omitted).
97. *Hodges*, 164 N.W.2d at 782.
98. *Hodges*, 164 N.W.2d at 782.
99. *Hodges*, 164 N.W.2d at 783.

the evidence introduced at trial in the instant case and on which Appellant's conviction is based. In the case before this Court, Appellant's conduct was "patently innocent." She was walking on the street, wearing a brightly colored dress, gesturing to passers-by who happened to be male. This behavior is consistent with any number of perfectly legitimate and lawful activities, including that which Appellant testified to—that she had a car breakdown and was looking for assistance.

There was absolutely no evidence introduced at trial which demonstrated the requisite intent or purpose of soliciting sexual acts in exchange for payment.[100] The officer did not hear anything that was said by Appellant or by others with whom she spoke. He did not see any exchange of money or property from which one arguably could infer that Appellant was offering sexual acts in exchange for payment. In fact, the officer did not see any communicative behavior by Appellant which even remotely suggested that she was there to solicit sexual activity at all, much less for pay; he did not report that she made any sexually suggestive gestures to the all-important single males passing by. Under these circumstances, it cannot be said that there was ample evidence to warrant a finding that Appellant was guilty beyond a reasonable doubt of being in the area for the purpose of soliciting sexual acts for hire.

Cases decided in other jurisdictions under essentially the same statutes have held such evidence to be insufficient to sustain conviction. In analogous fact circumstances, the District of Columbia Court of Appeals reversed the conviction of a woman who had been found guilty of "inviting for the purposes of prostitution," because the evidence did not prove the criminal purpose beyond a reasonable doubt.[101] In *Graves v. United States*,[102] the government adopted the same argument that the prosecution adopted in the case at bar. As summarized by the *Graves* court:

> The government replies that the totality of the observed events—appellants' presence in an area known for prostitution, their repeated beckoning to passing motorists and

100. In this regard, one must keep in mind that it is not sufficient for the prosecution to show only that Appellant was soliciting sexual activity, for it is not a crime under the ordinance to loiter for the purpose of engaging in non-compensable sexual activity. The prosecution's burden was to prove that Appellant was there in order to solicit sexual acts for payment.

101. Graves v. United States, 515 A.2d 1136, 1148 (D.C. Cir. 1986).

102. 515 A.2d 1136 (D.C. Cir. 1986).

> pedestrians, their focus exclusively on males, and their jointly impeding a male pedestrian whom [one of appellants] grabbed in the groin while [the other appellant] stood next to her—can create only one legitimate inference: that appellants were soliciting for the purpose of prostitution. We disagree. Absent appellants' prior convictions, the totality of the circumstances reasonably implies, at most, that [one appellant] was, and [the other appellant] may have been, soliciting sexual acts. *However, absent evidence of consideration—e.g, an overheard conversation with language implying sex for money, or an observation of money tendered or exchanging hands—the evidence is insufficient to prove beyond a reasonable doubt that appellants' conduct was for a commercial purpose.*[103]

The one difference between the facts in *Graves* and the facts in the instant case actually mitigates against a finding of guilt in the instant case. In *Graves*, one of the defendants made a sexually suggestive gesture from which an observer might conclude that the defendant was seeking to engage in sexual activity.[104] Even the presence of that factor, however, was not enough to sustain a finding that the defendant was seeking sexual activity for hire. Where, as here, there is *no* such sexually suggestive gesture, the evidence clearly cannot sustain a conviction of loitering with an intent to solicit prostitution.

Likewise, in *Dickerson v. City of Richmond*,[105] the Court of Appeals of Virginia held that circumstantial evidence of a male defendant's intent to solicit prostitution is insufficient to support conviction if it only creates a "suspicion of guilt":[106]

> That Dickerson appeared to be dressed in female attire, as the detectives and the trial court concluded, and seemed to be drawn to only those vehicles with male occupants create a suspicion that his purpose in loitering was sexual in nature. Unlike the "direct statements, indirect suggestions, and salacious innuendoes" made by the defendant in *Pederson*, however, the City's evidence does not prove beyond a reasonable doubt that Dickerson's intent was prostitution or

103. *Graves*, 515 A.2d at 1146 (emphasis added).

104. *Graves*, 515 A.2d at 1146.

105. 346 S.E.2d 333, (Va. Ct. App. 1986).

106. *Id.* at 335.

> other conduct of a lewd, lascivious or indecent nature. The evidence, however, must prove that Dickerson's specific intent was to engage in prostitution. . . .
>
> We conclude that the evidence, when viewed in a light most favorable to the City, did not prove beyond a reasonable doubt that Dickerson's actions manifested the purpose of engaging in prostitution or soliciting or engaging in other lewd, lascivious or indecent acts. Because one of the two elements of the ordinance was not proved, the evidence was not sufficient and the conviction must be reversed.[107]

In the instant case, the prosecution argued that the fact-finder could infer the criminal intent from the circumstantial evidence recited by Officer Mutchler. In the absence of any direct evidence of intent, such an inference was impermissible. "An inference of criminality may be drawn from circumstantial evidence only if it follows 'as an impelling certainty.' "[108] The circumstantial evidence in the case before this Court, as noted earlier, is at least as consistent with innocent conduct as it is with criminal conduct. Under these circumstances, it cannot be said that an inference of criminal intent arises with impelling certainty. Accordingly, a finding of criminal intent or purpose was not justified by the evidence. Appellant's conviction must be reversed.

CONCLUSION

The loitering for purposes of prostitution ordinance enacted by the City of Ypsilanti is grossly violative of the constitutional guarantees of free speech, due process, and the right of silence. If allowed to stand, it will result "in a regime in which the poor and the unpopular are permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.' "[109] The City of Ypsilanti cannot be allowed to solve its perceived law-enforcement problems by trampling on the constitutional rights of persons who find themselves within its jurisdiction. Further, the manner in which this ordinance was applied to Appellant was

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107. *Id.* at 336–37 (distinguishing Pederson v. City of Richmond, 254 S.E.2d 95 (Va. 1979) from case at point (citations omitted)).

108. People v. Young, 282 N.W.2d 211, 215, (Mich. Ct. App. 1979) (quoting People v. Davenport, 197 N.W.2d 521 (Mich. Ct. App. 1972)), *cert. denied*, 445 U.S. 927 (1980).

109. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (citation omitted).

unconstitutional. Finally, the evidence admitted at trial was insufficient to support a finding of guilty beyond a reasonable doubt.