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Brown Bill Contains Some No-No's

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Now that the Brown Bill has survived a repeal referendum effort, and will become law on Jan. 1, it's time to ask what it accomplished.

Many observers are saying it is mainly a symbolic victory for Gay Liberation—that law enforcement officials have long since stopped trying to prevent the private acts which the new law okays.

However, questions linger as to what the bill forbids, and what changes in other laws and in the courts might come about as "rippling effects." There are certain to be court tests over the solicitation laws and what is meant by "privacy." And the mere decriminalization of homosexuals—"We're not felons any more"—may ultimately affect employment, marriage laws and child custody.

Bad News for Chicken Queens

As far as the Brown Bill is concerned, having sex with a minor can still get one in a heap of trouble. An act of oral copulation or sodomy with any person under 18 is punishable by up to 15 years imprisonment under the new law.

However, the Brown Bill also gives the option of prosecuting sex acts with teenagers as a misdemeanor, punishable by not more than one year in a county jail. Most prosecutions of such cases are likely to take the milder course, especially for first offenders.

The Brown Bill definitely lowers the boom on any person who orally copulates or impregnates a partner under 14 years of age who is also 10 years younger than he. That's automatically punishable as a felony, with a prison sentence of "not less than three years" under the Brown Bill.

Mutual Masturbation

Apparently the wisest course for inveterate "chicken" enthusiasts to follow is to limit the sexual activity to mutual masturbation in private. That has never been a crime in California.

Nor does the Brown Bill repeal a relatively liberal provision which has always curtailed the prosecution of sex offenses involving minors. Under California law, a *consenting* partner 14 years of age or older is deemed an "accomplice" to the act. His testimony, by itself, is not sufficient to convict. Prosecutors in such cases must present corroborating evidence. As the saying goes, "They have to have a witness."

That's why most "chicken" trials involve youths under 14. State law deems persons under 14 to be incapable of giving their "consent." They can't be disqualified from testifying as "accomplices."

Compared to the other 11 states which have legalized consenting sex, California's age of adult consent, 18, is high. In most of the other states, it is 16. And in Maine and Hawaii, consenting persons of 14 or older may do almost anything in bed with total impunity.

What About the Majority?

For the hundreds of thousands of California gays who prefer adults, however, the practical question is: Will there be fewer arrests?

Many attorneys experienced in the handling of gay cases, such as Al Gordon, believe the activities of vice police in public places will, if anything, increase. He predicts, though, that privacy itself will become the central issue in some landmark cases, and that the courts will decide that some places where gays have been arrested—for example, a bathhouse cubicle—are actually private.

Tom Coleman, another Los Angeles attorney and publisher of the SexuaLawReporter, thinks the Brown Bill will give adult "offenders" better plea bargains.

Coleman noted that the bill specifically repeals the oral copulation and sodomy laws as they pertain to persons 18 years of age and older. Thus, adult acts of oral copulation and sodomy in public will have to be prosecuted under the "lewd conduct" law.

According to Coleman, most California prosecutors in recent years have routinely offered a reduced charge such as "trespassing" in lewd conduct cases. If that practice continues, Coleman says, many arrests for oral copulation and sodomy—even in the public view—will wind up being prosecuted as comparatively mild misdemeanors.

The Problem of Asking

One logistical problem still facing gays, even under the Brown Bill, is obtaining consent in gay bars and other public places. Section 647(a) of the Penal Code, part of the lewd conduct law, "soliciting," prohibits making a public invitation for sexual activity, whether or not the acts would be performed in private.

In the other years in which he introduced his bill, Assemblyman Willie Brown had called for repeal of the solicitation statute. This year, in order to finally get his measure passed, he took that portion out.

Indeed, many state legislators who had opposed the Brown Bill in the past voted for it this time precisely because they thought its amended version preserved the solicitation law.

One such legislator, Dixon Arnett (R-Redwood City), Assembly minority whip, sent a letter to the Rev. Troy Perry in which he made that understanding clear.

"I had voted against the measure in past years," wrote Arnett, "because there was a legal question about whether or not the solicitation of an act, which would become lawful under Mr. Brown's bill, would itself be illegal.

"I wanted to make certain," he continued, "that those citizens who feel that their privacy is invaded by unwarranted solicitations would feel protected. Mr. Brown did amend the bill this year so as to remove that question. Therefore, I voted for the measure."

Official Opinion

And Frances Dorbin, state legislative analyst, sent the lawmakers a document assuring them that the amended Brown Bill would, in fact, protect citizens from the "unwarranted solicitations" to which Assemblyman Arnett referred.

Dorbin's opinion cited the case of *California vs. Mesa* (1968), in which a state appeals court said that 647(a) prohibits public solicitations "regardless of whether the solicitated acts are to be performed in private."

Dorbin further advised the legislators that the term "lewd conduct" is "broad enough to include the consensual acts permitted by the Brown Bill."

Thus, the nation's most populous state appears to be left with a contradictory legal situation concerning homosexual activity. It is okay if performed by consenting adults in private. But one may not *seek* such consent in a public place.

To be sure, there is a possibility that the courts will eventually rule that the Brown Bill has the effect of nullifying the solicitation law, no matter what the legislators or their analysts believe. Courts in Colorado have declared that state's solicitation law unconstitutional on the grounds that one cannot be punished for soliciting a *legal* act. Colorado legalized consenting adult sex in 1973.

At present, the best advice for cruising gays is to make their propositions "with discretion." As one attorney put it, "Ask the person to come over for a cup of coffee or a beer. Don't be specific about the sex you have in mind."

Meantime, it is certain that the Brown Bill won't save anyone from the snares of 647(b), known as the "prostitution law." It forbids solicitation of sexual acts for monetary purposes. Hustlers will still be busted by the thousands.

Far-Reaching Positive Effects

On the other hand, all observers agree that the Brown Bill can create far-reaching legal and symbolic reverberations, no matter what happens to the solicitation laws.

A recent case in Ohio, where consenting adult sex became legal last Jan. 1, illustrates the point. A high school teacher admitted to having had sexual relations with

a student, but kept his job when a court ruled that the youth consented to the liaison. In Ohio, the adult age of consent is 16.

Such foes of the Brown Bill as Sen. H.L. Richardson (R-Arcadia) and George Deukmejian (R-Long Beach) continually raised the spectre of "homosexual school teachers" during the abortive referendum campaign.

Yet, the survival of the Brown Bill may have also removed the best argument of homophobes for the exclusion of gays from *any* occupation—namely, that they are "admitted felons" by the very nature of their sexual activities.

That has been the lone consistent point raised by the Los Angeles Police Department in opposing the employment of gay policemen. The Brown Bill clearly kills that argument.

In two other areas of the law—marriage and child custody—attorney Gordon foresees long-range changes of benefit to gays. Gordon explained, "the courts and the county clerks refused to issue marriage licenses to gay couples because they saw it as a legal approval of criminal sexual activity.

"The same has been true in countless child custody cases," he continued. "The judge would say to the mother, 'You and this other woman are engaging in illegal acts. I can't assign your child to such a home.'"

To be sure, most of the predicted side benefits of the Brown Bill are pure speculation. In fact, the instances of the Ohio teacher who saved his job, and of the Colorado court decisions striking out the solicitation laws, are exceptions to the rule.

Of the eight states with consenting adult sex legislation already in effect, Oregon is the only one where any city—Portland—has legally protected gays in fair employment statutes. Michigan, Minnesota and New York, with no consenting sex law, each have three cities which protect the job rights of homosexuals. Seven California municipalities, all in the San Francisco area, outlawed job discrimination on the basis of "sexual orientation" before the Brown Bill passed the legislature.

In Colorado, moreover, the "rippling effect" failed a test in Boulder, when that city added gays to the list of those protected by a fair employment ordinance. Not only was the ordinance repealed by a referendum, but the mayor also barely escaped a companion recall vote.

Fate of Other Bills Uncertain

In California, the controversy raised by the Brown Bill has apparently caused the sponsors of two major gay rights measures to withdraw them for the current legislative season.

One such bill, by Sen. George Moscone (D-San Francisco), would have struck the word "solicitation" from the lewd conduct law. It was dropped before it even reached committee. The other, a fair employment bill sponsored by Assemblyman John Foran (D-San Francisco), was placed on the inactive file after being passed by a healthy margin in the Assembly Ways and Means Committee.

More than one gay activist is now saying, however, that the ignominious defeat of the Brown Bill repeal referendum by perhaps 60,000 signatures is reason enough to press for immediate reactivation of both bills.

The whole question of whether the Brown Bill is, in fact, a "homosexual freedom law" may have been best answered during a recent NewsWest interview with Harry Hay, whom gay historian Jim Kepner calls the Father of Gay Liberation because he founded the Mattachine Society a quarter-century ago.

"The Brown Bill is a very good thing if *gays* insist on its enforcement," Hay declared. "Gay persons will have to go to court and demand their rights. Gay persons will have to make appointments with the legislators. Some of them will lose, but some of them will win.

"No law, including the Brown Bill, has any meaning until it is actually tested," Hay continued. "The worst mistake that gays can make is to rely on heterosexuals to do their work for them."