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Essay

WHAT CAN WE EXPECT?

THE SUPREME COURT

HEARS A GAY APPEAL

BY THOMAS F. COLEMAN

The United States Supreme Court may soon decide the legal fate of "homosexual cruising" when it hands down a decision this spring—perhaps as early as late March—in the case of *New York* v. *Uplinger*. Even more disturbing is the prospect that the court will rule on the authority of state legislatures to pass laws prohibiting private sexual conduct between consenting adults. Twenty-five states still have such laws on the books.

This article explains the background of the case, discusses strategy involved in the litigation, and assesses some ramifications of the impending "final judgment."

The Supreme Court heard oral argument in the case on Jan. 18, 1984. The courtroom was packed with observers, many of whom were lesbians and gay men who came from all parts of the country for the historic event. At issue is the accuracy of the conclusion of New York's highest court overturning the loitering conviction of Robert Uplinger. Actually, the New York Court of Appeals not only vindicated Uplinger's rights but in the process it struck down the statute used to prosecute him. As a result, police in New York may no longer use the loitering law to make arrests for "gay cruising," unless the United States Supreme Court overrules the state court decision in *Uplinger*.

Uplinger's arrest followed a 15-minute conversation at 2 a.m. in a well-known cruising area in Buffalo. The arrest was triggered when Uplinger invited another man to go home to engage in oral sex. As luck would have it, the other man turned out to be a plainclothes vice officer. The statute used against Uplinger prohibited public loitering for the purpose of soliciting an act of consensual sodomy (oral or anal sex).

On appeal following Uplinger's conviction, the New York Court of Appeals invalidated the loitering provision. In a 6-1 decision which characterized the loitering law as a "companion statute to the consensual sodomy statute"—a section of the penal law judicially invalidated in 1980—the majority said: "We held in *People* v. *Onofre* that the state may not constitutionally prohibit sexual behavior conducted in private between consenting adults. The object of the loitering law is to punish conduct anticipatory to the act of consensual sodomy. Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the state may continue to punish loitering for that purpose. This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute."

Erie County District Attorney Richard Arcara, whose office prosecuted Uplinger, immediately asked the United States Supreme Court to intervene. On Oct. 3, 1983, the nation's high court issued a writ of certiorari. A writ of certiorari is one method appellate courts use to review lower court opinions for error. Ironically, Uplinger was arrested only weeks after the United States Supreme Court had refused to issue a writ of certiorari to review the *Onofre* decision. Therefore, Uplinger was arrested for inviting another man to his home to engage in a now-legal sex act.

In a brief filed with the Supreme Court, Arcara asked the justices not only to reverse the solicitation decision in *Uplinger* but also to seize the opportunity to reverse the previous ruling in *Onofre*. Arcara said: "To the extent that the decision in the present case was predicated upon *People* v. *Onofre* . . . and represents an improper extension of unfounded decision, petitioner requests that in the event certiorari is granted with respect to the loitering statute, that review also be granted with respect to the consensual sodomy provision."

A shiver of fear swept nationally through the sexual privacy movement when sexual civil libertarians heard about the Supreme Court's decision to review *Uplinger*. Not only was the "freedom to ask" at stake but so was the "freedom of intimate association."

Since the "Burger" court is not predisposed to rule favorably on consenting adult issues, the movement faces the possibility of a serious setback if the Supreme Court upholds the authority of state legislatures to punish verbal requests to engage in consenting adult sex in private.

William A. Gardner, Uplinger's attorney, enlisted the support of sexual privacy specialists on both coasts to insure that all critical bases were covered by the briefs to be filed. Many gay and lesbian organizations as well as professional associations immediately began marshaling their own resources in an effort to supplement the approach developed by Gardner and associates. The Gardner team developed a variety of approaches: broaden the "community of interest" by enlarging the focus of concern, enlist a coalition of prestigious organizations, and guarantee the filing of briefs containing arguments on the most crucial issues.

Additional briefs—filed by the American Psychiatric Association, American Psychological Association, American Public Health Association, American Civil Liberties Union, New York City Bar Association, Lambda Legal Defense Fund, National Lawyers Guild, and the Center for Constitutional Rights—put the court on notice that there was a broad base of support in this country for sexual privacy rights. This type of cooperation among gay and nongay organizations and individuals bodes well for a maturing sexual privacy movement.

Concentrated efforts by the Gardner team went into the preparation of four "key" briefs which were aptly called the "no matter what" brief, the "most significant" brief, the "insurance policy" brief and the "escape hatch" brief.

The primary focus of attention was the main brief. The Supreme Court surely would read Bill Gardner's brief "no matter what" happened. Although the court can refuse to consider friend-of-the-court briefs submitted by interested organizations, it has an obligation to review those filed by the litigants. The "most significant" brief one could imagine would be that bearing the name of the chief law enforcement officer of New York. Fantasy became reality—New York Attorney General Rob-

ert Abrams welcomed suggestions and eventually filed an amicus curiae brief on behalf of Uplinger—much to the chagrin of the Erie County District Attorney. In fact, Arcara was so upset that he filed a lawsuit against the attorney general in state court in an attempt to compel Abrams to withdraw his brief from the Supreme Court. That suit was unsuccessful.

Just in case the court would peer through the solicitation controversy to review the ultimate "bedroom" issue, New York University law professor David Richards was engaged to file an "insurance policy" brief supporting sexual privacy rights. The American Association for Personal Privacy, Sex Education and Information Council of the United States, Society for the Scientific Study of Sex, and National Coalition on Sex and Disability lent their names to Richards' brief.

Hoping that a sorely divided Supreme Court might seek to defer a "bottom-line" decision for a few more years, an "escape hatch" brief was filed by a team of Los Angeles attorneys: Sam Rosenwein, Laurence Sperber, Jay Kohorn and David Goodwin. This gem suggested that "certiorari was improvidently granted" and urged the court to dismiss the case without addressing the constitutional issues. It was filed on behalf of the National Association of Business Councils, Federation of Parents and Friends of Gays, Los Angeles Lawyers for Human Rights and a host of other organizations and prestigious individuals.

Thus, all critical bases were covered.

Unbeknownst to many, we are presently midstream in a transformation of public policies and laws governing matters sexual. Whereas in 1960 all 50 states had laws against private sexual conduct between unmarried consenting adults, today the states are evenly split—half have "reformed" their sodomy laws and half have not. Illinois, the first state to decriminalize, broke the ice in 1961. Connecticut, the second state to join the ranks of the "reformed," enacted legislation in 1968 decriminalizing homosexual and heterosexual sodomy.

Most legislative reform occurred in the 1970s when many states updated their penal codes. Sodomy decriminalization was usually hidden in "penal code revision packages" containing hundreds of other changes in the law. Legislative reform slowed to a snail's pace at the end of the 1970s. A near stalemate was broken in the early 1980s when the Pennsylvania Supreme Court declared that state's sodomy law unconstitutional. New York's Court of Appeals soon followed suit by voiding that state's sodomy law in *People v. Onofre*. The *Onofre* decision represents a watershed in this nation's sexual privacy movement because now, for the first time in history, a majority of people live in "reformed" jurisdictions.

By granting review in *Uplinger*, the Supreme Court has threatened to decelerate the momentum generated during the so-called sexual revolution of the post-Kinsey era. At this juncture it is worth exploring some implications of a Supreme Court precedent in *Uplinger* since they could be described as enormous.

Were the Supreme Court to accept the arguments advanced in Gardner's brief, the tedium of piecemeal reformation of state criminal laws affecting unmarried consenting adults would be avoided. The sodomy and sexual solicitation laws remaining on the books in so-called unreformed jurisdictions would be invalidated by implication—in one fell swoop. Since criminalization of sex between consenting adults forms the nucleus of a wide range of discriminatory laws affecting employment, housing, immigration, child custody and the like, an acknowledgment of the "freedom of intimate association" and the "right to ask" in a criminal law context would give a tremendous boost to the movement's civil litigation efforts.

On the other hand, if the Supreme Court renders a full-blown opinion scoffing at these constitutional claims, the movement may be forced to alter its course. If the Supreme Court rejects the notion of constitutional protection for consenting adult sex in the privacy of a home, this surely would pose a problem for those seeking judicial intervention in other areas of concern. Would the high court be likely to intercede in military cases or child custody disputes? Having received instruction from above, the federal and state judiciary might fall into line. This could shift the sexual civil liberties battleground to legislative and executive arenas.

It could be said that an opinion on the merits of the ultimate issues posed in *Uplinger* presents a clear and present danger to our national expectations of sexual privacy and equality.

A negative decision in *Uplinger* could haunt us for decades. It may come as no surprise to some, but the Supreme Court prizes consistency more than it values accuracy. Generations can pass before the court will acknowledge that one of its written opinions contained an error of constitutional dimension. This point can be illustrated by the "separate but equal" phase the court imposed on the national civil rights movement. Too many years passed before the court acknowledged its error. In the meantime, the erroneous decision was "the law of the land."

A homophobic opinion by the Supreme Court could also generate sociological fallout contaminating the political sphere. Such an opinion could spark recriminalization movements in presently "reformed" jurisdictions. After all, history has a tendency to repeat itself. Sodomy once was decriminalized in Arkansas only to be recriminalized by bible-quoting legislators who suddenly realized what they previously had done when they passed a so-called penal code revision package. Near-successful attempts to recriminalize erupted in California and New Jersey only a few years ago.

There is yet another potential consequence of an adverse decision in *Uplinger*. The resurrected loitering law could become "model" legislation in the hands of prosecutorial zealots who prefer to see openly gay people vanish from the public streets. For example, when the Supreme Court placed its imprimatur on Detroit's method of zoning adult-oriented businesses, thereby making it difficult for such businesses to remain in operation, we witnessed a proliferation of similar ordinances in cities from coast to coast.

In the *Uplinger* case, delay would maintain the status quo. Sexual privacy proponents could consider it a victory if the Supreme Court opted for the "escape hatch" route, thereby postponing "final judgment" on some thorny constitutional questions. With New York as a "reformed" jurisdiction, privacy rights advocates will have created a national expectation of sexual privacy, if one counts heads to determine national expectations.

Generally speaking, the Supreme Court follows rather than leads—it usually acknowledges what already exists. Given the continuing success of the state-by-state approach of the sexual privacy movement, in a few more years the Supreme Court may be more receptive to the whole concept.

Several indicators suggest a prognosis of dismissal. The questions posed by the justices at oral argument, the "state's rights" philosophy of the moderate and conservative court members, and the court's own track record in consenting adult cases all support a prediction that the "Burger" court will maintain its traditional stance on gay rights issues: avoid rather than articulate.

Opening Space

In this issue of *The ADVOCATE*, beginning on page 32, is an analysis of a case before the United States Supreme Court. The author of the article, attorney Tom Coleman of Los Angeles, is the former executive director of the California Commission on Personal Privacy. He is extremely knowledgeable about the legal issues at stake in this case.

The case, *Uplinger* v. *New York*, is extraordinarily important for all of us. It involves the arrest of a man in a Buffalo park by an undercover vice officer. Uplinger was convicted of asking the officer to go home with him to have oral sex. Uplinger was convicted for his speech!

Make no mistake about the solicitation laws of this country under which most gay men are arrested when they are arrested: Most statutes involve asking someone to have sex, not having it. Gay men and prostitutes are "controlled" by making such speech unlawful.

The New York Court of Appeals, the highest court in the state, in a one-page decision threw out Uplinger's conviction on the grounds that the law was unconstitutional because the act for which the vice cop was being solicited was no longer illegal in New York.

A short time before, the act making "deviate" (read "gay") sex in private illegal had been declared unconstitutional by the New York Court of Appeals in the famous *Onofre* case. *Onofre* is one of the most important legal precedents we have. It held that the New York law had been a violation of our rights in two particulars. First, it violated our constitutional right to equal protection of the laws because it prosecuted us for something that was legal for heterosexuals. (In most states where sodomy and oral copulation are illegal in private as well as in public, heterosexuals are at risk too; New York was unusual. Elsewhere, however, the law is hardly ever enforced against heterosexuals.) Second, and more important, in *Onofre* the New York Court of Appeals held that the law violated our rights to privacy, which it held to be constitutionally protected.

The district attorney of Erie County (Buffalo), N.Y., Richard Arcara, wants the *Onofre* decision overturned by the United States Supreme Court. The attorney general of New York state, Robert Abrams, supports the opinion of the state's highest court. Abrams is a brave and honorable man to have done so, for he was under considerable pressure to support the Erie County district attorney.

The United States Supreme Court does not have to declare *Onofre* incorrect in order to declare the New York solicitation law valid, but it might. That is why gay legal eagles are so frightened by this matter. Me too. According to people who attended the oral arguments before the court on Jan. 18, our friends got a very chilly reception from the justices.

The ADVOCATE has tried to follow *Uplinger* since the Supreme Court (surprisingly) agreed to hear it, so its importance is probably better known to you than to most gay people in America. What most surprises everyone about the court's hearing the case is two things. One is that the case does not raise a substantial federal question; all the law involved is New York law. Usually, the Supreme Court leaves interpretation of state law to state courts. The second surprise is that for the last few years, the Supreme Court seemed to have been avoiding hearing cases involving gay rights. That they decided to hear this one instead of many others is ominous.

The decision in the last case they heard, *Roe* v. *Wade*, could have been interpreted to say that our bedrooms, unlike nongay people's bedrooms, are not private. It is hard to imagine anything more private than one's bedroom, but the arrogance and foolishness of lawyers and judges are notoriously boundless. Knowledgeable people, therefore, are nervous that in *Uplinger* the Supreme Court will specifically say that our bedrooms are not protected by our right to privacy. Such a holding would be dangerous because it could give our enemies license to raid our houses and apartments.

By the way, some of us in California asked the attorney general of California to file an amicus curiae brief in this case, pointing out that traveling Californians in New York would like our privacy respected while there. Attorney General John K. Van de Kamp refused. He didn't even reply to a careful letter from me asking him to support the *Onofre* holding even if he couldn't support the *Uplinger* holding of the New York court. You can be sure that I will remember this the next time he asks me for a campaign contribution. I hope the solons at Municipal Elections Committee of Los Angeles and other California givers will also remember. It is common knowledge that Van de Kamp has political ambitions and that many of us supported his election in 1982.

An opinion on the merits of the ultimate issues posed in Uplinger *presents a clear and present danger to our national expectations of sexual privacy and equality. . . . A homophobic decision by the Supreme Court could haunt us for decades and generate sociological fallout contaminating the political sphere.*

[*As we await the decision, contributions are needed to offset the deficit incurred in the* Uplinger *case and to prepare for other cases which are waiting in the wings. Tax-deductible contributions should be made payable to the Institute for the Study of Human Resources and mailed to: Amicus Brief Fund, Box 6383, Glendale, CA 91205.*

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