SEXUAL LAW REPORTER

INDEX TO VOLUME TWO — 1976

A

B

C

Compiled by Don Gaudard

D

E

T

V

Z

TABLE OF CASES

A

B

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C

D

E

F

G

H

J

K

L

M

N

P

Q

R

S

T

U

V

W

Y

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SEXUAL LAW REPORTER

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LOOKING BACK: A SURVEY OF SEXUAL LAW CONSIDERED IN 1975

New laws affecting sexual conduct support the privacy rights of consenting adults, due process rights of the victims of sexual assault, and equal protection rights of those discriminated against on grounds of sex or sexual preference. Hundreds of bills were introduced in 1975, in legislatures across the country, directed toward changes in the areas of sexual assault, prostitution, family law, private sexual behavior, and discrimination.

Sexual Assault:

Aside from the decriminalization of consensual sex acts, probably no area of sex-related law is changing as rapidly as that dealing with *sexual assault.* The use of the term—broader than the previous *rape* classification, which was difficult to apply to both sexes—has itself been an important feature of legislation in several states.

In no less than fifteen states, laws were proposed limiting testimony concerning a victim's sexual conduct prior to the assault. Most of these proposals provided that such testimony be restricted to acts committed with a person other than the accused, though most enacted legislation followed the pattern of the more comprehensive reform, barring practically all such testimony. In Minnesota, for example, "evidence of the complainant's previous sexual conduct shall not be admitted nor shall any reference to such conduct be made in the presence of the jury, except by court order . . . and only to the extent that the court finds that any of the following proposed evidence is material to the fact at issue . . . and that its inflammatory or prejudicial nature does not outweigh its probative value."

Laws stipulating that no corroboration be required of the victim's account of sexual assault were proposed in five states, becoming law in three: New Mexico, Texas, and Washington.

In the Kansas and Wisconsin Legislatures, laws are in the works which, if passed, would allow for prosecution of sexual assault between marriage partners.

Legislation prohibiting the common-law practice of cautionary jury instructions in sex crime cases (a goal long sought by women's groups) was advanced in three states in 1975: California, Iowa, and Minnesota. In California the new law came in the wake of a state supreme court decision, *People v. Leonard Rincon-Pineda,* 14 C. 3d 864 (July 31, 1975). There, the court altered its previously-held position, finding that the judge's omission of the instruction did not constitute prejudicial error. (See 1 Sex.L.Rptr. 40).

While the changes reported above assist the victim, other action addressed itself to those convicted of sex crimes. If a Colorado proposal becomes law, those found guilty of certain sex crimes would be directed to hospital care, rather than to the state penitentiary. This law would also reduce the time from twelve to six months served before one becomes eligible for parole. Two related Florida bills would

□ *continued on page 6*

Courts Now Concede Gays May Meet Moral Standards Under Naturalization Law

Naturalization cases (i.e., petitions for citizenship) offer a unique, if limited study in the evolution of American moral standards. Because an applicant is required to show "good moral character" under 8 U.S.C.A. § 1427 (a), and because his sexual history and practices are considered in light of contemporary standards, one can "read" significant cultural and legal trends in a relatively small number of decisions.

Many more naturalization cases have considered the circumstances of adultery and fornication than have considered homosexual behavior. Here, in order to sketch the background of a recently decided case involving homosexuality, discussion is restricted to those cases in which same-sex behavior is the issue.

This recent decision is favorable toward those whose homosexual conduct is private. For the first time, the "social and sexual behavior" of a gay man has been judicially recognized as consistent with "good moral character" —without negative qualifying remarks. *In re Petition for Naturalization of Paul Edward Brodie,* 394 F.Supp. 1208 (D. Oregon 1975). Applying the rule that current ethical standards provide the measure of character, the U.S. district court for Oregon has concluded that "the community regards homosexual behavior between consenting adults with tolerance, if not indifference." Community standards thus validate Brodie's life-style, and his petition has been granted.

Judge Burns' opinion in the case is notable for the absence of any expression of personal distaste or disap-

□ *continued on page 8*

INSIDE

Features:

Reviews and Articles:

Court Cases:

IN THE COURTS...

Supreme Court finds "crimes against nature" not too vague

Tennessee's "crimes against nature" law (Tenn. Code Ann. § 39-707) has been held by the U.S. Supreme Court to give sufficient warning that cunnilingus is a criminal act. *Rose v. Locke,* ____ U.S. ____ (Nov. 17, 1975). The law established a five-to-fifteen-year penalty for "Crimes against nature, either with mankind or any beast".

The 6th Circuit Court of Appeals had found the statute unconstitutionally vague and had decided that, since no Tennessee opinion had previously applied the statute to cunnilingus, the defendant had not had fair warning that his acts were proscribed. (This holding was summarized at 1 Sex. L. Rptr. 24).

The Supreme Court reversed the Appeals Court holding on the grounds that the phrase " 'crime against nature' . . . has been in use among English-speaking people for many centuries" and that "Anyone who cared to do so could certainly determine what particular acts have been [so considered]." Furthermore, the Court said, a 1955 Tennessee opinion had construed the phrase to include fellatio—and had there cited a Maine decision of 1938 which had established cunnilingus as a "crime against nature":

"Thus we think the Tennessee Supreme Court had given a sufficiently clear notice that § 39-707 would receive the broader of two plausible interpretations . . ."

Justice Brennan, dissenting, responded:

"I simply cannot comprehend how the fact that one State court has judicially construed its otherwise vague criminal statute to include particular conduct can, without explicit adoption of that state court's construction by the courts of the charging State, render an uninterpreted statute of the latter State also sufficiently concrete to withstand a charge of unconstitutional vagueness."

Justices Marshall and Stewart also dissented.

Oregon court grants citizenship to gay veteran

A federal district court has ruled that, although homosexuals may be excluded from admission to the United States under 8 U.S.C.A. § 1182 (a)(4), the Immigration and Naturalization Act does not automatically deny citizenship to homosexuals lawfully in the country. *In re Petition for Naturalization of Paul Edward Brodie,* 394 F.Supp. 1208 (D. Oregon 1975).

Where the applicant's admission to the country was based on U.S. Army service, and where he established "good moral character" to meet the requirements of 8 U.S.C.A. § 1427 (a), his petition for naturalization was granted.

The court's decision in Brodie is discussed further at page one of this issue: *Courts Now Concede Gays May Meet Moral Standards Under Naturalization Law*

The government's appeal in this case was recently dismissed *In re Petition for Naturalization of Paul Edward Brodie v. United States of America,* Ninth Circuit Court of Appeals, number 75-2903 (Nov. 7, 1975).

Federal court upholds Virginia sodomy law

Stating that "the issue centers not around morality or decency, but the constitutional right of privacy", U.S. District Judge Merhige has dissented from a three-judge court's decision which holds the Virginia sodomy law constitutional on its face and as applied to adult males who regularly engage in private, consensual homosexual relations.

In *Doe v. Commonwealth's Attorney for City of Richmond,* ____ *F.Supp.* ____ (E.D.Va., Oct. 24, 1975), the court has ruled that § 18.1-212 (Code of Virginia, 1950, as amended)—"Crimes against nature"—has a rational basis of State interest".

The majority rejected the plaintiffs' reliance on *Griswold v. Connecticut,* 381 U.S. 479 (1965), reasoning that the *Griswold* ruling "was put on the right of marital privacy" and "on the sanctity of the home and family". *Poe v. Ullman,* 367 U.S. 497 (1961) is quoted extensively (by way of Justice Harlan's dissent) for the view that homosexual acts and other "extra-marital sexual immorality" are "intimacies which the law has always forbidden and which can have no claim to social protection." The court concludes that the State has proved its legitimate interest in the regulation of sodomy, stating:

"It is enough for upholding the legislation to establish that the conduct is likely to end in a contribution to moral delinquency."

Judge Merhige, dissenting, sees the majority as having "misapplied the precedential value [of Griswold] through an apparent over-adherence to its factual circumstances." Citing *Roe v. Wade,* 415 U.S. 113 (1973) and *Eisenstadt v. Baird,* 405 U.S. 430 (1972) for the doctrine that sexual privacy is not restricted to the marriage relationship, he contends that:

". . . intimate personal decisions or private matters of substantial importance to the well-being of the individuals involved are protected by the Due Process Clause. The right to select consenting adult sexual partners must be considered within this category."

As to the issue of compelling state interest, Judge Merhige concludes:

"To suggest, as defendants do, that the prohibition of homosexual conduct will in some manner encourage new heterosexual marriages and prevent the dissolution of existing ones is unworthy of judicial response."

State courts rule on public indecency

Reviewing the "public indecency" laws of their respective jurisdictions, two appellate courts have reached contrary holdings on whether "obscenity" is a necessary element of indecency.

State v. Brooks, ____ Or.App. ____, 537 P.2d 574 (1975) and *Dominguez v. City of Tulsa,* ____ Okl.Cr. ____, 539 P.2d 758 (1975) present similar facts: in each case, female dancers had been convicted of "public indecency" (*Brooks*) or "outraging public decency" (*Dominguez*), for exposure of the genitals.

The Oregon Court of Appeals viewed the issue as "whether the trial court could constitutionally find that the

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defendants' dancing violated the public indecency statute without first finding that the dancing was obscene and thus not protected by the First Amendment." Citing *City of Portland v. Derrington,* 253 Or. 289, 451 P.2d 111, cert. denied 396 U.S. 901 (1969), the court based its ruling on the proposition that prohibition of topless or nude dancing does not violate First Amendment "communication" rights, because the elements of communication are not "significant enough." Therefore, no specific finding of obscenity is required under ORS 163.465, where the offense is the act of exposing the genitals with intent to sexually arouse oneself or another.

In the Oklahoma case (construing 21 O.S. 1971, § 1021), where the prosecution had argued that indecency is prohibited *conduct* and therefore not subject to obscenity standards, the Court of Criminal Appeals said: "This contention is void of any logical reasoning."

But the court did not offer any citations for its view that: ". . . case law squarely places the act complained of as one which falls within the form of conduct which fits within the category of offenses which must be tried on basis of obscenity standards."

The case was reversed and remanded for a new trial in which the jury would be instructed to apply the *Miller v. California* test of obscenity.

Husband's consent unnecessary for wife's sterilization

Ruling on the constitutional right of a married woman to be sterilized without her husband's consent, the Superior Court of New Jersey, Chancery Division, has found that:

". . . a hierarchy of rights is evolving which includes the rights of the mother, the rights of the father and the rights of the fetus. The right of a woman to determine whether or not to bear children has been consistently given priority within this hierarchy."

The court in *Ponter v. Ponter,* 135 N.J.Super. 50, 342 A.2d 574 (1975) has held that the plaintiff-wife's right to sterilization without her husband's consent is "a natural and logical corollary" of the rights adjudicated in *Doe v. Bolton,* 410 U.S. 179 (1973) and *Roe v. Wade,* 410 U.S. 113 (1973), the abortion cases which established a woman's right to control of her child-bearing functions.

Here, the New Jersey court also cites *Murray v. Vandevander,* 522 P.2d 302 (Okl. App. 1974) and *Karp v. Cooley,* 493 F.2d 408 (5th Cir. 1974) for the proposition that "the right of a competent person to control his or her body is paramount to his or her spouse's desires"—and *Doe v. Doe,* 314 N.E. 2d 128 (Mass. 1974) for the elimination of "the distinction between surgical operations in general and abortions or sterilizations."

Judith Ponter's gynecologists participated as plaintiffs in this action to determine the constitutionality of her position and to enjoin the defendant-husband and the doctors' malpractice insurers from proceeding against them. The court found injunctive relief unnecessary.

Because of space limitations, some features announced for this issue could not be included, but will run in subsequent issues. We appreciate your comments and suggestions. — Ed.

Enforcement patterns affect prostitution decisions

The alleged discriminatory or erratic enforcement of prostitution laws is the basic legal issue in a number of recent decisions.

In *Blake v. State,* 344 A.2d 260 (Sup.Ct.Del. 1975), the statute (11 Del.C. 1342) was attacked, first on the ground that it invades the privacy rights of those prohibited from acts of prostitution and, for that reason, must be reviewed under the strict scrutiny test. In rejecting this argument, as well as the argument that "sex" is the basis of a suspect classification under the prostitution statute, the court said:

"This Court would be constrained by logic and common sense from saying that those personal rights implicit in these [personal privacy] cases are the same or can be of the same order as the public sale of sex and the human body. The comparison cannot even be sustained with the right to use contraceptives. *[Griswold v. Connecticut] (Supra).* In one, the right involves the governmental intrusion into the marital decision of procreation. In the situation sub judice, the question involves the right, if there be a right, to publicly solicit and sell one's body which necessarily involves other members of the public. to be sure, the question surrounding each issue involves sex. But there is no logical nexus between the two."

With respect to a further argument that the statute was being discriminatorily enforced, the court ordered a future hearing but cautioned:

"The appellants must understand, however, proof that only women have been prosecuted under 11 Del.C. 1342 standing alone shall not be enough. It could be that the opportunity to arrest men was not as propitious, apparent or extant."

In contrast, a municipal court in *City of Las Vegas v. Kessler* (Mun.Ct., Clark City, Nev., Aug. 27, 1975) has overridden that city's prostitution ordinance because (1) it is vague and overbroad in that it fails to define the conduct prohibited, (2) it is overbroad because it prohibits conduct not intended to be included, and (3) by its vagueness and overbreadth it tends to encourage arbitrary and erratic arrests.

When an ordinance provides that "No female shall prostitute herself or use any indecent or lascivious language, gestures, or behavior to induce any other person to illicit sexual intercourse" (General City Code of Birmingham, Sec. 43-1), the Court of Criminal Appeals of Alabama, in *Holloway v. City of Birmingham,* 315 So.2d 535 (1975) has reversed the female appellant's conviction, which was based on a complaint that she "did prostitute herself by making an offer to indiscriminate lewdness". The arrest having taken place before she entered the car of the officer-complainant to whom the offer was made, the court held that the "proposition" alone did not constitute prostitution.

"The emphasized portion of the Complaint . . . simply does not constitute the crime of prostitution. Here appellant made a solicitation to perform a natural and an unnatural sex act for a named sum of money. The proposition got no further than that. There was no bedroom affair, no disrobing, no touching of the bodies, no money paid, and no sexual activity. In short, the crime of prostitution was not committed."

After an extensive discussion of prior sex discrimination cases and law review articles, the court apparently con-

□ *continued on page 7*

SEXUAL ORIENTATION AND CIVIL RIGHTS COMMISSIONS —WHAT ARE THE AVAILABLE LEGAL REMEDIES?

(Editor's Note: The following article discusses two theories that may be used to include homosexuals within the protection of existing civil rights statutes: one is within the scope of "sex discrimination", another is that all arbitrary discrimination is prohibited.)

Civil rights in their full sense cover a wide field of individual rights accorded to every member of a community. In a more restricted sense the term "civil rights" refers to guarantees found in the Civil Rights Amendments to the U.S. Constitution and federal statutes enacted pursuant thereto, and in similar state constitutional and statutory provisions designed to prevent discrimination in the treatment of one person by another.

Most attempts by gays to obtain legal recognition of their civil rights have been attempts to amend existing civil rights laws through the legislative process. On the local level, this procedure has met with varying degrees of success. However, in those regions where there is no protection, other avenues are open to gays. Although no state civil rights statute specifically includes sexual orientation or homosexuality as one of the classes of people who come under the provisions of the statute, a gay person may still have a cause of action for discrimination in the areas of employment, public accommodations, housing, etc. The *Sex.L.Rptr.* here will present several possible remedies which may be available to a gay person aggrieved by the violation of an existing civil rights statute which does not specifically mention homosexuality, or more commonly, "affectional or sexual preference."

To utilize these remedies it is usually necessary first to attempt to file a complaint with the appropriate civil rights commission, human relations commission, fair employment practices commission, etc. These bodies have consistently refused to accept a complaint filed by a gay person, alleging that they lack jurisdiction to entertain such a complaint; it is still usually necessary, however, to make the attempt.

The *first possible remedy* is an alternative writ of mandamus. This writ, if granted by the court, will force the commission to set aside immediately their decision not to assume jurisdiction over complaints by homosexuals or in the alternative to show cause why they have not done so. Anyone aggrieved by the violation of a civil rights statute may maintain mandamus to enforce his rights, notwithstanding that the statute does not expressly provide for mandamus, at least where no other adequate remedy is available. *Stone v. Pasadena,* 118 P. 2d 866 (1941); *Raison v. Board of Education,* 135 A. 847 (1927).

A major argument in support of the writ is that the applicable civil rights statute, despite spelling out certain areas such as race or religion, actually covers any invidious discrimination. The courts have held that civil rights acts are not limited in the application to racial or religious discrimination; discrimination which is based on other impermissible classifications is as much within the condemnation of civil rights acts as discrimination based on a classification derived from color, race or religion. *Wakat v. Harlib,* 253 F.2d 59 (7th Cir., 1958); *Bonano v. Thomas,* 309 F. 2d 320 (9th Cir., 1962); *Basista v. Weir,* 340 F.2d 74 (3rd Cir., 1965); *Nanez v. Ritger,* 304 F.Supp. 354 (E.D. Wis., 1969); *Stoumen v. Reilly,* 234 P.2d 449 (1951).

This argument can be buttressed with the following examples. In a public accommodations case, the California Supreme Court, in *In re Cox,* 3 Cal. 3d 205, 474 P.2d 992 (1970) held that under the California civil rights act, the specified kinds of discrimination—color, race, religion, ancestry and national origin—serve only as illustrative, rather than restrictive, indicia of the bases of discrimination condemned. The court came to the conclusion that the design of the act was to interdict all arbitrary discrimination by a business enterprise.

The Michigan Supreme Court, in *City of Ypsilanti v. Civil Rights Commission,* 393 Mich. 254, 224 N.W. 2d 281 (1974), affirmed a Court of Appeals decision which held that extending the jurisdiction of the Civil Rights Commission beyond the expressed grant of jurisdiction (religion, race, color or national origin) embodied within the state constitution was constitutionally valid.

If the existing civil rights statute against which the discrimination is being charged has a provision banning discrimination on the basis of sex, additional arguments may be employed. One argument is that a policy of discrimination against homosexuals in general results in a discrimination of a much higher percentage of males than of females.

Although few surveys agree on the actual incidence of homosexuality in the United States, virtually all agree that the ratio of male to female overt homosexuals is at least two to one. Kinsey, *Sexual Behavior in the Human Male* (1948); Kinsey, *Sexual Behavior in the Human Female* (1953); National Institute of Mental Health, *Task Force on Homosexuality: Final Report and Background Papers* (1972). Consequently, any attempt to discriminate against homosexuals generally would necessarily discriminate against a significantly greater percentage of males than females. See *Andrews v. Drew School Dist.,* 371 F.Supp. 27, 35 (N.D. 1973), aff'd on due process grounds, 507 F.2d 611 (5th Cir., 1975).

Moreover, any discrimination which is based on sexual preference constitutes pure sex discrimination against both males and females, irrespective of any statistics. For example, if a homosexual male and a non-homosexual female apply for a job with an employer who discriminates against gays, it is clear that both have the same sexual preference—men. Yet, the male will be summarily rejected because his gender coincides with that of his sexual partners. Likewise, when a homosexual female and a non-homosexual male apply, the female will be eliminated because of the gender of her sexual partners. In both cases, the employer will have used one policy for men and another for women. In both instances, he may have violated the ruling of the Supreme Court in *Phillips v. Martin-Marietta Corp.,* 400 U.S. 542, 544 (1971).

It can also be argued that any policy which is neutral on its face, but which has a discriminatory impact based on sex, violates the civil rights statute, independent of the discriminator's intentions or motives. In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), the Supreme Court held that facially neutral policies which resulted in discrimination violated the Civil Rights Act. Moreover, the court asserted that neutral intent was no defense, and that arti-

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ficial, arbitrary, and unnecessary barriers had to be removed if those barriers operated to discriminate invidiously on the basis of a racial or other impermissible classification. Clearly, then, a practice which may not appear to discriminate directly against a class may still be unlawful if it has a disparate impact on any class.

For example, if an employer demanded information regarding military service from prospective male employees, but not female, male homosexuals discharged from or not accepted by the service could be eliminated for employment consideration whereas female homosexuals never would for that reason. Again, if an employer inquired into arrest records, albeit of both homosexual males and females, and it was shown that more male than female homosexuals were arrested, the disparate effect on males would be shown. See 13 U.C.L.A. L. Rev. 647, 740 n. 329 (1966). *Gregory v. Litton Systems, Inc.,* 316 F.Supp. 401 (C.D. Cal. 1970), aff'd 472 F.2d 631 (9th Cir. 1972). finally, it can be argued that American society, including employers, more readily accepts fraternization between women than between men before attaching a homosexual label to the conduct. A. Karen, *Sexuality and Homosexuality; A New View* (1971). Bowman and Engle, *A Psychiatric Evaluation of Laws of Homosexuality,* 29 Temp. L. Q. 273, 294 (1956).

A *second possible remedy* begins with an attempt to negotiate with the commissioners of the appropriate civil (human) rights commission. After attempting to file a complaint with this commission, write to each commissioner stating the facts of the case, the refusal by the commission to entertain the complaint, and the reason for this refusal. Then point out that the refusal to accept the complaint is (1) in violation of the federal civil rights statute 42 USCA § 1983, (2) violates the 14th Amendment of the U.S. Constitution, (3) results from a misuse and abuse of power possessed by virtue of state law and made possible only because the commission is clothed with the authority of state law, and (4) that the commissioners, by not entertaining the complaint, are abusing their official discretion, acting unreasonably, and in bad faith.

". . . Intolerance of the unconventional halts the growth of Liberty."

If these attempted negotiations fail, it is then appropriate to file a civil suit in state or federal court against each of the commissioners in their individual capacities for violation of 42 USCA § 1983 which is commonly referred to as the Federal Civil Rights Statute or the Civil Rights Act of 1871. This act provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The arguments to support a civil suit filed under 42 USCA §1983 are the same arguments which are used for an alternative writ of mandamus. Recovery, however, involves many complex issues.

To state a claim under this statute, the elements which must be proven are: (1) there was a deprivation of a constitutional right or a right secured by a law of the U.S. to which the person is entitled, (2) the violator was acting under color of state law, and (3) the violation resulted from a misuse of power possessed by virtue of state law. These elements should be set forth with specificity, including acts and conduct of those individuals which worked an infringement of the civil right. It is requisite that the suit be brought against administrative offices in their individual capacities; a city is not a "person" unless only equitable relief is being sought. *Steffel v. Thompson,* 415 U.S. 452 (1974).

It is not necessary to exhaust state remedies before filing suit. Although the exhaustion of administrative remedies may be required, it is not necessary to exhaust remedies which would be futile. The doctrine of *respondeat superior* is not applicable; the individual must have actual knowledge of the challenged actions and acquiesce in them. Negligence is actionable only if bad faith and oppressive motives are shown.

As a rule, good faith is not a defense to civil rights actions; however, good faith coupled with reasonable grounds to believe one is acting within the law, may be sufficient to preclude liability for damages. State officials can also successfully defend against action for damages under this statute if they believed that their conduct was constitutionally permissible and that such belief, given the state of the law at the time of the incident, was reasonable. Personal involvement must be alleged to substantiate a claim for money damages; damages against individual commissioners are a permissible remedy in some circumstances notwithstanding the fact that they hold public office. Proof of wrong in violation of this statute is taken as sufficient proof for nominal damages. Punitive damages are warranted in civil rights actions only if there is a showing of bad faith or some indication of deterrent impact; liability for both compensatory and punitive damages is entirely personal and only against the individual. *Monroe v. Pape,* 365 U.S. 167 (1961). The judgment, however, may be voluntarily paid by the governmental unit. And the governmental unit may be held directly liable under state statutes waiving immunity, although not 42 U.S.C. § 1983.

Appropriate remedies should be fashioned for any constitutional violations ascertained. A city may be subject to equitable relief. Injunctive relief may not be appropriate unless a class suit has been filed; if it has, it is important that the relief requested benefit not only the petitioner, but all others similarly situated. Preliminary injunctions are permissible, but a showing must be made that such is necessary to prevent irreparable injury and that there is reasonable likelihood that the party seeking the injunction will ultimately prevail on the merits of the cause. Courts may, in their discretion, award attorneys' fees where actions of the commissioners are unreasonable and obdurately obstinate, where private petitioners have aided in effecting important congressional and public policies, or when appropriate under a policy to encourage pro bono publico litigation. 14 C.J.S. Civil Rights Supplement.

A *third possible remedy* is to file a civil suit against the violator directly for violating the state civil rights statute. The same arguments which were used in the writ of mandamus would be applicable here. See also *Society for Individual Rights v. Hampton,* 63 F.R.D. 399 (N.D. Ca., 1973); *Morrison v. State Board of Education,* 1 Cal. 3d 214, 461 P.2d 375.

The court held in *Acanfora v. Board of Education,* 359 F. Supp. 843, 851 (1973) affirmed 491 F. 2d (4th Cir., 1974) that "the time has come for private, consenting, adult homosexuality to enter a sphere of constitutionally protectable interests. Intolerance of the unconventional halts the growth of liberty."

—Don Gaudard

LEGISLATION ...

continued from page 1

Looking Back: A Survey of Sexual Law Considered in 1975

set new guidelines for proceedings involving the mentally-disordered sex offender and would provide funding for treatment and rehabilitation of the sex criminal, as well as research.

Family:

Proposals to repeal *adultery* and *cohabitation* laws surfaced in five states in 1975, making this the most commonly considered subject in family law. These new provisions would improve the standing of those who prefer to live together outside of marriage or engage in extra-marital sexual activity.

But what of the rights of those who wish to associate in a legally sanctioned relationship and find their way blocked by a specific governmental prohibition? Arizona and Virginia examined legislation this year that would expressly prohibit same-sex marriage. The only action to the contrary came in a Wisconsin bill that contains a provision acknowledging homosexual marriage, among other possible reforms.

Although no positive trends developed in the area of juvenile law, there were several noteworthy bills dealing with children. A Massachusetts law would require notice be given fathers of children born out of wedlock before the child is put up for adoption. A proposed law in Colorado would prohibit the sexual-orientation of the custodial parent or guardian from being a factor in determining child custody. California law would add probation officers to the list of those required to report evidence of child abuse, sexual or otherwise.

Prostitution:

Most of the proposals for modification of prostitution laws were geared toward removing statutory gender distinctions in wording or content. Such proposals are based on the recognition that, if laws are to afford equal protection, their prohibitions must apply to *both* sexes.

With the exception of the Wisconsin bill that would include prostitution in a blanket repeal of all consensual sex acts, the decriminalization of prostitution has found little support from legislators. Similarly, the American Bar Association House of Delegates found little merit in such a proposal and voted not to support repeal of prostitution statutes.

In a further effort to regulate "pleasure for compensation", some states are following the example of city ordinances controlling the activities of massage-parlors and technicians. Both California and South Carolina examined bills this year that would disallow massages by a person of the customer's opposite sex.

Decriminalization:

In 1975, proponents of decriminalization introduced a total of nineteen bills which would remove state prohibitions from various sexual activities, both public and private. A limited effort was made to look into the more controversial area of public sexuality, for example, a California bill which would have removed all legal penalties for soliciting or engaging in lewd conduct in a public place.

For the most part, these bills dealt with the fundamental right of consenting adults to engage in any private sexual act, in or outside the bounds of state-recognized marriage. To date, thirteen states have adopted legislation which decriminalizes all private sexual acts between consenting adults. This type of legislation was introduced in a total of sixteen states in 1975, with passage accomplished in California, Maine, New Mexico, Washington and Arkansas.

The task of getting these five state legislatures to confront such a sensitive area was not an easy one, oftentimes met by heated opposition. In an attempt to counter the decriminalization bill in California, another bill was introduced which, had it not been defeated, would have re-established prohibitions against sodomy and oral copulation except by man and wife. An unsuccessful attempt at a referendum (to bring the issue to the electorate the following year) was also tried.

In line with the decriminalization of consensual sex, there has been a growing acceptance of lowering the age of consent. Many bills have included provisions to lower the age to sixteen and some, like Maine, set the age at fourteen. The right of sexual privacy of adolescents is beginning to emerge.

Two methods were used (about equally as often) to introduce *decriminalization:* special bills and general penal code revisions. Use of a special bill created many problems, the greatest being the acute focus on a very sensitive issue. And this focus is magnified when a bill specifies a particular sexual act such as *consensual sodomy,* primarily thought of in terms of homosexual conduct. This is the

. . . For the most part, these bills dealt with the fundamental right of consenting adults to engage in any private sexual act in or outside the bounds of state-recognized marriage.

problem that faced California's "Brown Bill" (so-called for its legislative creator, William Brown), which successfully sought to decriminalize all consensual adult sex, but was often labeled the "Homosexual Bill of Rights", causing much public attention and reactionary concern.

Wisconsin's Omnibus Sex Bill offers repeal of prohibitions against not only consensual sodomy but also incest, prostitution, obscenity, and homosexual marriage.

The most successful method of introduction seems to have been the use of a general penal code reform bill. Chances of passage are greater when this method is used, because the sexual provisions lie buried among hundreds of other criminal revisions, and public attention is virtually non-existent.

Discrimination:

Civil rights legislation covering public accommodations, employment, housing, and education has been well established. Recently, more sensitive issues such as same-sex marriage and the tax-rate status of singles have been springing up. The basis of such legislation has been expanding from the criteria of race or national origin into the areas of sex, marital status and, more controversially, sexual orientation. In 1975, forty-five examples of such legislation were introduced in twenty-one states across the country and in the U.S. Congress. A majority of these dealt with sex or marital status. They were usually the result of efforts of the women's movement to change attitudes so that women and single people could have the same rights now afforded married couples. In both California and in

□ *continued on facing page*

Congress, bills have been introduced to give single people tax-rate benefits equal to the benefits given married couples.

Beyond gender-based issues, increasing efforts have been made to introduce legislation based on "affectional or sexual preference", or a sexual orientation. Sixteen such bills were introduced in nine states, as well as in the Congress, but none have passed, the majority having been killed.

Most of these special bills have approached the problem by dealing with discrimination in a particular category, such as employment. Another approach entails adding *sexual orientation* (or other similar terminology) to already existing *anti-discrimination* statutes. While this method has failed in all state legislatures, a number of cities, including Minneapolis, Madison, Columbus, Detroit, Ann Arbor, East Lansing, Portland, and several cities in California have adopted such terminology into their existing anti-discrimination ordinances. A bill to amend the 1964 Civil Rights Act to include sexual orientation is still pending in the U.S. Congress. *—Tim Sullivan and Darryl Kitagawa*

Prostitution *continued from page 3*

cluded that the ordinance, because applying only to females, also violates the equal protection clause of the 14th Amendment, and that the term "offer to indiscriminate lewdness" is void for vagueness.

Meanwhile, the California Court of Appeals has reversed pending further hearing a preliminary injunction issued by the lower court in February, 1975, enjoining enforcement of the state's prostitution statute by Alameda County officials. In *Jensen v. The Superior Court in and for the County of Alameda,* (Cal.Ct.App., 1st Dist., 4th Div., Sept. 29, 1975), the Court of Appeals pointed out that even though an injunction against enforcement might be proper, it must be specific in its prohibition and sustained by the record, which was absent in this case. The lower court had restrained police from enforcing the statute by any method which systematically results in a greater likelihood of arrest of women as a class than of men, restrained petitioners from subjecting women to full custodial arrest on the basis of criteria which are not applied equally to men in relation to the same type of offense, and restrained them from "engaging in any conversational activity, device or scheme which encourages or aids the commission of the offense of solicitation." The Court of Appeals left in force, however, the lower court's restraining of petitioners from imposing quarantine restrictions on women for violation of the prostitution statute unless men arrested for violation of the same section are subjected to the same restrictions.

'Decriminalization' *continued from page 11*

attorneys generally disagreed with the homosexuals when asked if they had noticed any change in the number of arrests for non-sex related offenses such as loitering, jaywalking, vagrancy, disorderly conduct and disturbing the peace. 12% of the police and 11% of the prosecuting attorneys thought this practice had continued, compared to 75% of the homosexuals who concurred.

Results of the survey suggest that decriminalization will neither solve all homosexual problems nor create a serious affront to the general public. As one homosexual respondent stated: "The law is necessary and good, but it doesn't change society's prejudices, fears and ignorance."

—Thomas B. Garrett and Richard Wright

LEGAL STRATEGY...

Legal strategy sometimes requires a willingness to take detours. In a case against the Minneapolis Civil Rights Commission, where possible discrimination against a gay man is at issue, two hearings have been conducted already (litigating jurisdiction and costs, respectively)—neither of which reached the substantive question of homosexuality or, indeed, of discrimination.

The city's Civil Rights Ordinance offers protection against "any and all discriminatory practices based on race, color, creed, religion, ancestry, national origin, sex, affectional or sexual preference . . . with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations, or public services."

When Gary Johnson found that his application to be a "Big Brother" was handled differently from others' because he is gay, he filed a complaint alleging discrimination. The Director of the Commission rejected Johnson's allegation—that is, refused to investigate the facts behind Johnson's complaint—on the basis of the City Attorney's opinion that Big Brothers, Inc. does not fall within the definition of a "public accommodation", since it is a non-profit organization.

Attorney Jack Baker, whose primary interest has been the extension of civil rights to gays, decided to challenge the Director's action on the narrowest grounds possible —to take "one step at a time"—to ask the state district court to find that Big Brothers is a public accommodation or a public service, without regard to the nature of Johnson's complaint. Baker's objective was a writ of mandamus which would require the Commission to determine whether there existed probable cause to believe discrimination had occurred.

Judge Jonathan Lebedoff phrased "the crucial question" as: "whether the discretionary acts of the Director . . . were arbitrary or capricious or were in abuse of his power." The judge concluded *(1) the Commission failed to exercise its mandatory duty to promulgate rules and regulations which would guide the Director in making a meaningful determination as to whether or not an organization falls within the contemplation of the Ordinance, (2) the Director abused his discretion . . . when he, alone, interpreted the Ordinance . . . without setting out with specificity the factors the Commission considers relevant, and (3) Johnson was entitled to a writ of mandamus ordering and directing the Commission to promulgate standards regarding "those factors and the weight to be given them which are to be considered" in the Commission's determination.*

The City Attorney, in compliance with the judge's order, has now suggested that the Ordinance be amended to include "without limitation all services or facilities . . . offered to the public . . . which are generally open or offered to the public or which generally solicit public patronage or usage, whether operated for profit or not." Baker, in turn, has asked that "activities" be added to "services" and "facilities." The new wording would have the effect of explicitly including non-business activities within the category of "public accommodations", and the word "activities" would assure the inclusion of volunteers to service-related organizations. The original

□ *continued on page 9*

continued from page 1

Courts now concede Gays may meet moral standards under naturalization law

proval of the petitioner's sexual preference. The opinion is also interesting for the variety of sources used to determine community attitudes. The judge cites Oregon's decriminalization of acts between consenting adults (1971), the Portland City Council's resolution to end employment discrimination based on sexual orientation (1974), the American Psychiatric Association's removal of homosexuality from its list of mental disorders (1974), and the "responsibly" conducted political activities of gay rights groups.

The position taken by Judge Burns is more positive than that of Judge Mansfield in the most closely related case, *In re Labady,* 326 F.Supp. 924 (S.D.N.Y. 1971). Though the outcome of *Labady* was the same (the petition granted), and though Judge Mansfield also found "relative complacency" in the public's view of private homosexual conduct, he explicitly stated that he did not condone the petitioner's conduct and said that "if the criterion were our own personal moral principles, we would deny the petition, subscribing as we personally do to the general 'revulsion' or 'moral conviction or instinctive feeling' against homosexuality" — citing language from the Wolfenden Report to the British Parliament, 1957.

The rule prohibiting the court from invoking its own concept of sexual morality in naturalization cases was formulated by Judge Learned Hand in a case involving adultery, *Posusta v. U.S.,* 285 F.2d 533 (2d Cir. 1961):

". . . the test is not the personal moral principles of the individual judge or court before whom the applicant may come; the decision is to be based upon what he or it believes to be the ethical standards current at the time."

Applying the test in *Brodie,* Judge Burns said:

"I have little difficulty finding that Brodie's conduct is acceptable by the ethical standards of the year 1975. Although his partners have been men, his social and sexual behavior has not otherwise differed from that of many other persons 28 years old. Like most people, he is not sexually involved with minors. He does not use threat or fraud. He does not take or give money. Nor does he engage in sexual activities in parks, theaters, or any public places . . . In short, he has been neither a public nuisance nor a private danger."

Judge Burns' description of Brodie's behavior (that is, its private, consensual nature) indicates reliance on the criteria previously used to decide *Labady.* (In addition, Judge Mansfield had commented in *Labady* that there was "no suggestion that his homosexual activities could harm a marriage relationship.")

The fact of private, consensual sexual behavior did not give support to the petitioner in the first of these naturalization cases. *In re Olga Schmidt,* 289 N.Y.S. 2d 89, 56 Misc. 456 (1968) is the first to have considered whether homosexuality is necessarily incompatible with good moral character. Schmidt's sexual history during the relevant period (i.e., within five years prior to the filing of the petition) included successive relationships with six women, each of whom lived with her at the time of the relationships. Her good character was otherwise unquestioned.

In denying Schmidt's petition, Justice Hoyt relied exclusively on the statement that "Few behavioral deviations are more offensive to American *mores* than is homosexuality" —a statement derived from Kinsey Report statistics, which had been used to justify a New Jersey man's divorce action against his lesbian wife. The judge in *Schmidt* reasoned that this "opinion" best satisfied the *Posusta* requirement that the court "improvise the response that the ordinary man or woman would make, if the question were put whether the conduct was consistent with a 'good moral character.' " The judge concluded:

"While changes may have been wrought in the common view in the decade that followed those [Kinsey's] works, there is no reason to believe that the practice [of homosexuality] is now generally accepted."

The facts in *Labady,* supra, are essentially the same as the facts in *Olga Schmidt.* Both petitioners had good employment records, neither had ever been arrested, both had become active homosexuals at an early age (prior to immigration), and both conducted their sexual activities privately. Labady's petition was granted, while Schmidt's failed, primarily because the judge in *Labady* made ethical considerations subordinate to the "privacy" considerations which were the subject of *Griswold v. Connecticut,* 381 U.S. 479, (1965):

"In short, private conduct which is not harmful to others, even though it may violate the personal moral code of most of us, does not violate public morality which is the only proper concern of § 1427."

Though Judge Mansfield, too, quoted the "Kinsey statement" ("Few behavioral deviations are more offensive . . ."),

As Judge Burns indicates in the *Brodie* opinion, alien "sexual deviates" (a class construed to include homosexuals), remain subject to exclusion from the United States under 8 U.S.C.A. 1182 (a)(4) —and are deportable if their homosexuality was an undisclosed but existing "affliction" at the time of entry. The most extensive judicial discussion of the law may be found at *Boutilier v. Immigration and Naturalization Service,* 387 U.S. 118 (1976).

he countered its effect by reference to Civil Service policy which "no longer excludes all homosexuals from government service" and which recognizes that homosexuals may be "useful to society and law-abiding."

Two years after *Labady, In the Matter of Kovacs,* 476 F. 2d 843 (2dCir. 1973) dealt with a petition denied for "lack of candor under oath" in regard to homosexual activities, such lack of candor being sufficient to show lack of good moral character. The record revealed that Kovacs had been arrested twice for homosexual acts in public restrooms (in 1959 and 1962); that during naturalization proceedings he denied such acts, although he had previously admitted them formally; and that these inconsistencies had not been satisfactorily explained. In fact, the hearing examiner who had originally recommended the petition be granted, based on the *Labady* ruling, found Kovacs' denials "incredible indeed."

Judge Smith, in *Kovacs,* left no doubt that the Court of Appeals saw *Labady* as "the law":

"We pause to note what we are not holding. Petitioner is not being denied naturalization for his sexual activities— but rather for his lack of candor under oath . . . Had Kovacs testified truthfully about his past, the petition might well have been granted."

□ continued on facing page

The *Brodie* case can now be seen as supporting and strengthening the position established in *Labady* and essentially reaffirmed in *Kovacs;* that private, consensual, non-criminal homosexual acts are consistent with good moral character. Clearly, "the common conscience" (Judge Hand's term) is increasingly receptive to the idea that homosexuality *per se* is morally neutral. It is likely that courts will continue to find expressions of this idea in new legislation—and that this legislation will, in turn, serve to satisfy the "current ethical standards" test. On the other hand, it has been argued that the test should be abandoned:

"The test is a convenient shield, for it permits a judge to deny a petition merely upon his personal evaluation of present morality. Meanwhile, the test cannot be used as a sword by the alien since it is impractical for him to produce an alternative version of current ethical standards to a degree sufficient to overcome the court's conjecture." *(Naturalization and the Adjudication of Good Moral Character: An Exercise in Judicial Uncertainty,* 47 N.Y.U.L.Rev 545, June 1972)

The writer of the N.Y.U. Law Review article points out that, in fact, a New York court by-passed the consideration of homosexuality in moral terms, relying instead on medical opinion which labelled homosexuality an "involuntary sickness", and granted citizenship to the petitioner. *In re Belle,* No. 681,121 (E.D.N.Y. 1969). Of course, *Belle* was decided prior to the American Psychiatric Association position cited in *Brodie.*

Regardless of whether homosexuality remains acceptable under "current moral standards", and regardless of medical opinion, it is probable that homosexuals lawfully admitted to the country will continue to meet the standards of citizenship through the force of the *Griswold* "privacy of the bedroom" argument. Judge Mansfield's statement in *Labady* that "the most important factor to be considered is whether the challenged conduct is public or private" and Judge Burns' emphasis in *Brodie* on the petitioner's private conduct together suggest that the *Posusta* test has already become secondary, in a sense, to *Griswold*—although it may technically be treated as primary.

In other words, the legal philosophy which recognizes a constitutional "zone of privacy" in sexual matters tends to "edge out" the rule that the ordinary person's opinion (as perceived by the court) provides the standard of good moral character.

—*Susan Bonine*

Transsexual denied Title VII protection

A federal court has ruled that transsexuals are not protected by the proscription of sex-discriminatory employment practices under Title VII of the 1964 Civil Rights Act. *Voyles v. Davies Medical Center,* ____ F. Supp. ____ (N.D. Calif., Oct. 21, 1975).

The plaintiff, a medical technician, was discharged on the grounds of "a potentially adverse effect" on patients and co-workers, after notifying the defendant medical center of the intended sex-change.

The court in *Voyles* has found that "discrimination on the basis of sex has not here occurred" and that the legislative history of 42 U.S.C. § 2000e-2(a)(1) shows:

"Situations involving transsexuals, homosexuals or bisexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions."

Legal Strategy *continued from page 7*

Ordinance does not *exclude* such activities; however, the examples cited are, in fact, limited to businesses.

The Commission is now about to act on the proposed changes in wording, and the substantive rights of the parties remain to be determined.

—*S.B.*

Zone of privacy protects husband

The Arizona Court of Appeals has held that, in the absence of a statute criminalizing sexual assault between husband and wife, the state may not constitutionally apply to a married couple laws prohibiting sodomy and fellatio.

In *State v. Bateman,* 540 P.2d 732 (1975), where the defendant husband had been charged with forced "crimes against nature" and "lewd and lascivious acts," the appellate court has dismissed the complaint on the grounds that the state may not abridge the fundamental marital-privacy rights recognized in *Griswold v. Connecticut,* 381 U.S. 479 (1965) — regardless of the use of force. The court also ruled that, because consent was not a defense under the statute, it was error for the trial court to have instructed the jury that consent was a defense, because the court "cannot judicially supply what has legislatively been omitted".

Judge Jacobson's opinion, which provides extensive commentary on the implications of *Griswold,* as well as on traditional attitudes toward sodomy and other "unnatural" acts, concludes that although the State may not constitutionally criminalize the private consenting sexual behavior of a married couple:

". . . The State does have a compelling interest [which has not here been enacted into law] in protecting its citizens from force and violence, even if that citizen happens to be married to the perpetrator of the violence."

Wetherbee and Bonine to Head SLR Editorial Staff

Minneapolis attorney R. Michael Wetherbee has been appointed Editor of the SLR, replacing Joel Tlumak, who will remain a contributing writer to this publication while continuing his academic studies.

Wetherbee's background includes three-and-a-half years as legal counsel for the Minnesota branch of the American Civil Liberties Union, as well as extensive experience in cases involving sexual civil liberties while in private practice. He is a member of the National Committee for Sexual Civil Liberties.

Susan Bonine, Wetherbee's assistant in private practice, has been appointed Associate Editor. She is a member of the Board of Directors of MCLU and has gained experience in sexual law issues through preparation of SLR's *In the Courts* feature.

Both will operate from the SLR Midwest Editorial Office, Suite 412 Loring Park Office Building, 430 Oak Grove, Minneapolis, Minnesota 55403.

REVIEWS & ARTICLES... RESUMING A REGULAR FEATURE

Study on prostitution urges decriminalization of private contracts between adults

Seen in human terms, criminal sanctions for prostitution have the effect of keeping those convicted from leaving the profession, because of the job opportunities closed by a criminal record and the financial requirements of bail and fines. Seen in societal terms, enforcement of these sanctions is a drain of police resources and tax money used for prosecution of the prostitutes.

With these premises at its foundation, this comment sets out the various constitutional attacks with potential for invalidating the statutes covering prostitution. The article lists three categories of statutes, divided according to the focus of each: the *status* of being a prostitute, the *act* of sexual intercourse for hire, and the *solicitation* of the act.

Kansas City, the sample jurisdiction, has a solicitation statute that is neutral on its face. The comment outlines three constitutional attacks on that statute: under the Equal Protection Clause, the "penumbral" right of privacy, and free speech protection.

The Equal Protection Clause has been used to defeat laws neutral in their wording but enforced in an arbitrary and discriminatory manner against a class of persons. District of Columbia courts have used this argument against that jurisdiction's solicitation statute. The right of privacy, which was first found in the Constitution in the 1965 *Griswold* case, can be applied to the private arrangements of adults to which they have mutually agreed. This right covers both the act and the solicitation for the act, while the free speech protections apply to solicitation so long as it has not offended any person, contributed to a breach of the peace, or been accompanied by unlawful behavior.

PROSTITUTION AND THE LAW: Emerging Attacks of the "Women's Crime"

by Daniel E. Wade

University of Missouri-Kansas City Law Review
43:413-428, Spring, 1975

The comment concludes strongly that in light of the other constitutional arguments against the prostitution statute, simply enforcing such statutes equally would still be objectionable, while leaving the status quo would also be unacceptable. The only alternative, both constitutionally and in regard to the considerations laid out at the beginning, is the decriminalization of these "private contracts between consenting adults". —*Steven Bell*

John Park Custis Press issues quality gay literary journal

Because regular markets are generally closed, and because there has been a desire to provide a place for honest, well-written artistic works on Gay themes, the John Park Custis Press in Fresno currently issues a high quality literary journal under the title *Gay Literature.*

Edited by Daniel Curzon and Tom McNamara, it is an attractive compilation of fiction and essays, reviews, poetry and photographs. One issue reviewed contained an amusing one-act play. The journal is bound in stiff board covers, thoughtfully edited and well designed. The libraries of Harvard, Yale, Stanford, UCLA, among others, make it available.

It is published quarterly at two dollars per issue. Orders and inquiries: c/o Daniel Curzon, English Department, State University of California, Fresno, CA 93740.

Law Review articles of special interest

"Artificial Insemination — A Model Statute." *Cleveland State Law Review;* 24:341, Spring 75

"The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge That Can No Longer Be Denied." *San Diego Law Review;* 12:799, July 75

"Becoming Prostituted." *British Journal of Criminology;* 15:251-263, July 75

"Evidence, Rape Trials, Victim's Prior Sexual History." *Baylor Law Review;* Vol. 27, #2, Spring 75

"Forum: Equal Protection and the Burger Court." *Hastings Constitutional Law Quarterly;* 2:645-680, Summer 75

"Homosexuality and Validity of Matrimony — A Study in Homo-Psychosexual Inversion." John Rogg Schmidt. *The Catholic Lawyer;* 21:85, Spring 75

"Indecency and Obsenity — Indecent Exposure." *The Criminal Law Review;* 1975-413, (British) August 75

"Legal Rights of Minors to Sex-Related Medical Care." *Columbia Human Rights Law Review;* 6:357-378, Fall-Winter 74-75 (Rights of Choice in Matters Relating to Human Reproduction Part I of a Symposium On Law and Population).

"Legal Rights and Responsibilities of Homosexuals in Public Education." *Journal of Law and Education;* 4:449, July 75

"Merger of Sex-Segregated Unions: The Denouement of the Doctrine of 'Separate But Equal.'" *Howard Law Journal;* 18:834-842, 1975

"A Program of Behavior Treatment for Incarcerated Pedophiles." *American Criminal Law Review;* 13:69-83, Summer 75

"Prostitution — Prosecution Limited to Women Offenders." *Southern University Law Review;* Vol. 1, #2, Spring 75

"The Right to Privacy: A Sceptical View." Geoffrey Marshall. *McGill Law Journal;* 21-242, Summer 75

"Sex Discrimination and Title VII." *UMKC Law Review;* 43:273, Spring 75

"Sex Discrimination in the Military." Major Harry Beans. *Military Law Review;* 67:19. 1975

"Sexual Sterilization — Constitutional Validity of Involuntary Sterilization and Consent Determinative of Voluntariness." *Missouri Law Review;* 40:509, Summer 75

POLICE, PROSECUTORS, AND HOMOSEXUALS FIND 'DECRIMINALIZATION' IS WORKING

This article summarizes the findings of Thomas B. Garrett and Richard Wright, as they reported the results of a survey sponsored by the Social Ecology Program at the University of California (Irvine), in which Wright is a graduate student. Garrett is a law student at the University of San Diego. The survey was discussed in an article they wrote which appeared on the editorial page of the Los Angeles Times *(October 16, 1975) and is reprinted here, in part, with supplementary statistics they provided to SLR.*

Seven states—Colorado, Illinois, Delaware, Oregon, Hawaii, Ohio and Connecticut—have already decriminalized all forms of sexual behavior between consenting adults. [*] We directed our inquiry to police officials, prosecuting attorneys and homosexual groups in these states. Questionnaires were sent to 140 police officials in 70 cities of more than 50,000 population, 160 to prosecuting attorneys, and 235 to members of homosexual groups.

We received replies from 26 police officials, 21 prosecuting attorneys, and 27 homosexuals. Despite this small sample, all the answers came from interested and involved parties, whose views warrant attention.

An analysis of the responses indicates that, in the period after revision of the law in each state, no changes were evident in the use of force by homosexuals, in their involvement with minors or in the amount of private homosexual behavior.

Police officials and prosecuting attorneys in particular believed that the use of force by homosexuals had not increased. Indeed, more police officials (87%) and prosecuting attorneys (85%) than homosexuals (67%) had come to such a conclusion. Moreover, a majority of both police officials and prosecuting attorneys—60% and 72% respectively—thought the involvement of homosexuals with minors was no more prevalent now than before the change (a view shared by 96% of the gays).

Similarly, 63% of the homosexuals concurred with 54% of the police officials and 60% of the prosecuting attorneys that, despite decriminalization, the incidence of private homosexual behavior had not increased. However, when questioned about public displays of homosexual behavior, 59% of the homosexuals agreed with 81% of the police and 35% of the prosecuting attorneys that an increase had occurred. Along these same lines, 50% of the homosexuals, 58% of the prosecuting attorneys, and 62% of the police reported growth in the number of gay bars.

The survey also showed, not surprisingly, that the vast majority of the homosexual respondents (88%) were in favor of decriminalization when it took place. Prosecuting attorneys also generally favored the revision, with 84% noting approval. However, only a minority of police officials (40%) endorsed the action. Yet, when asked about their attitudes after the changes went into effect, the police and homosexuals offered a more positive evaluation of the revised law. The homosexuals had come to approve unanimously and police approval had risen to 57%. The prosecuting attorneys, on the other hand, were now slightly less in favor of the change, with 77% now in favor.

The police and the prosecuting attorneys, however, were in decided disagreement with the homosexuals as to whether public solicitation by homosexuals had increased. Only 12% of the homosexuals, compared to 59% of the police and 85% of the prosecuting attorneys, believed that such behavior had increased.

A sizeable proportion of all groups thought social condemnation had decreased after the laws were revised—44% of the homosexuals, 50% of the prosecuting attorneys, and 57% of the police officials. Just two police officers, two prosecuting attorneys, and one homosexual felt that social condemnation was greater, and only one person (a police chief) noted an increase in blackmail of homosexuals. In fact, 38% of the homosexuals, 20% of the prosecuting attorneys, and 23% of the police noted an apparent decrease in blackmail.

Predictably, the police officials and the prosecuting

□ *please turn back to page 7*

Actually, six other states have more recently decriminalized such conduct: Arkansas, California, Maine, New Mexico, North Dakota, and Washington. These states were not included in the survey because their laws were either changed this year or only went into effect this year. The states included within the survey have operated under the new laws for over one year. — Ed.

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—ARYEH NEIER, *Executive Director, American Civil Liberties Union*

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GOVERNOR'S LEADERSHIP ON EQUAL RIGHTS BRINGS GAINS TO GAYS IN PENNSYLVANIA

A storm of legislative, judicial, and administrative action has been the response to Pennsylvania Governor Shapp's commitment to end discrimination based on affectional or sexual preference.

A wide range of issues has been introduced. There are big legal and social issues — like the constitutionality of legislation that would discriminate against gays (and others) who may violate criminal sex laws; like the judiciary's authority (or lack of authority) to rule on matters of public policy; like the relationship between "immoral" conduct and equal rights.

And there are the more concrete issues: the pattern of arrests of gays by state police, the availability of special welfare and health programs for gays, the inclusion of gays under affirmative action programs.

In short, the governor's executive order ("Expansion of the Commitment Toward Equal Rights") has generated a nearly year-long confrontation between and among the powers of government and the power of organized activists.

Gov. Milton J. Shapp issued his order on April 23, 1975, instructing state departments and agencies to cooperate with his staff and with the state Community Advocate Unit "in the effort to obtain equal rights for all persons in Pennsylvania." Executive Order No. 1975-5 has been challenged in various forms, including proposed legislation to prohibit the employment of homosexuals in certain occupations, and court action to enjoin implementation of that order. To date, these challenges have been essentially nullified, while the Governor's Council on Sexual Minorities (formerly the Governor's Gay Task Force) has met regularly to coordinate the members' negotiations with state personnel, as well as to coordinate lobbying and policy-making.

Primarily because of the governor's leadership, and through the dedication of local and state-wide gay-rights organizations, *official* discrimination has been largely eliminated. For example, state personnel regulations now prohibit discrimination based on "differing sexual orientations"—a first-in-the-nation achievement for Pennsylvania.

Gay activists in the legal profession have been very interested in the Pennsylvania experience because the strategies utilized there may influence (or foreshadow) the course of action taken in other states — by both supporters and opponents of equal rights for gays.

What has been learned?

• First, *a strong executive policy is vital* — if the effort is to withstand popular apathy, general criticism or legislative opposition. Governor Shapp's original statement of his "commitment to provide leadership" was backed up by his veto of the legislation which would have negated the executive order.

Senate Bill 196 (the first and most publicized of anti-gay bills) would have barred the employment of certain persons in correctional institutions and police departments — and would have prevented such persons from working with the mentally-ill or -retarded or with juveniles. Coverage would have extended to any person convicted of violating state laws relating to "deviate sexual intercourse" and to any person who has admitted to acts that would constitute deviate sexual intercourse.

The governor's veto message characterized the bill as *unfair, vindictive, demagogic, reactionary,* and "a setback for the cause of fair and equal opportunity." Shapp also criticized the bill's language ("practically meaningless") and its over-broad drafting, pointing out that "this bill would apply to anyone, heterosexual or homosexual, who has ever had the temerity to engage in what is loosely referred to as 'deviate sexual intercourse'."

• Next, *a serious commitment of governmental staff and resources is clearly needed.* "Without that," said Mark Segal, a Council member, "we wouldn't be able to do a damn thing." Barry Kohn of the state justice department and Terry Dellmuth of the governor's office were named in the executive order as responsible for reviewing and monitoring the governor's policy. Other governmental agents who have worked with the task force include representatives of the human rights commission and the departments of education, correction, health, welfare, insurance, and the state police.

□ *continued on page 21*

INSIDE

IN THE COURTS...

Arizona court finds sodomy laws void

Holding that "the right of sexual privacy between consenting adults is fundamental", the Arizona Court of Appeals for Division 2 has reversed convictions of *sodomy* and *lewd and lascivious acts in unnatural manner* — even though the evidence in *State v. Callaway,* 542 P.2d 1147 (1975) indicated the acts were non-consensual. (The victim of these heterosexual acts was subjected to anal and oral intercourse — and sustained bruises and a black eye.)

The court's decision in *Callaway,* voiding A.R.S. §§13-651 and 13-652, is an extension (to unmarried persons) of the holding in *State v. Bateman,* 540 P.2d 732 (1975) [summarized at 2 Sex.L.Rptr.9] where the court's Division 1 found the same statutes unenforceable against married couples.

Where the *Bateman* decision relied on the doctrine that the state may not abridge the fundamental marital-privacy rights recognized in *Griswold v. Connecticut,* 381 U.S. 479 (1965), the *Callaway* decision relies further on the view that "the right of privacy is a right of all persons, whether married or not," citing dictum in *Lovisi v. Slayton,* 363 F. Supp. 620 (E.D. Va, 1973), and *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

Here, in *Callaway,* despite the jury's finding of non-consent, the court allowed the appellant to assert the rights of consenting adults for the reason given by the New Mexico Court of Appeals in *State v. Elliot,* 539 P.2d 207 (1975) [summarized at 1 Sex.L.Rptr. 34], that:

"[Although] a litigant cannot attack a statute's constitutionality based on the rights of third parties not before the court if the statute is constitutional as applied to him," an exception to the rule is permitted "where a denial of standing would impair the rights of third parties who have no effective way to preserve those rights. [Thus] as the Court said in *Elliot,* 'Because consenting adults are not, in practice, subject to prosecution for sodomy, they are denied a forum in which to assert their own rights. . . .' "

As to the evidence that the sexual acts involved *force,* the *Callaway* court has taken the position that:

"Division 1 held in *Bateman* that it could not salvage [the statutes] by engrafting on them a requirement that the state prove lack of consent. . . . We agree that the statutes cannot be [so construed]."

Solicitation law is struck down

The City of Columbus (Ohio) solicitation ordinance has been held unconstitutional because it "makes a criminal offense of the social interrelationships and protected free speech rights of otherwise consenting adults." *City v. Scott* (Court of Appeals of Franklin County, Dec. 23, 1975).

§2307.04(B) of the city code provides that: *"No person shall solicit . . . sexual activity . . . when the offender knows such solicitation is offensive to the other person, or is reckless in that regard."* (In the *Scott* case, both the complainant and the "offender" are male.)

The trial court had dismissed the complaint on the grounds that "the 'reckless' portion of the ordinance . . . is an unconstitutional attempt to punish speech." The appellate court affirmed, stating:

". . . the United States Supreme Court has consistently held that, regardless of taste, tradition, or common acceptance, free speech is protected unless it falls into the category of " 'fighting words' " [citing *Gooding v. Wilson.* 405 U.S. 518 (1971), and *Cohen v. California,* 403 U.S. 15 (1971), et al]. The appellate court also found the ordinance *vague* and *lacking definite standards,* and quoted the trial court's finding that a sexual solicitation is not necessarily obscene and that:

" 'In the same way in which invitations to engage in sexual activity are not, necessarily, obscene, those invitations are not, necessarily, fighting words. In fact those invitations could easily be classified as loving words.' "

Federal court voids *lewd exposure* law

The Arizona statute used to arrest and prosecute topless dancers has been declared unconstitutional by a three-judge federal court. *Attwood v. Purcell,* 402 F.Supp. 231 (D.C. Ariz., 1975). The court has held A.R.S. §13-531 impermissibly vague and overbroad — and has also found enforcement of the statute a form of unlawful prior restraint.

§13-531 prohibits a person from *"willfully and lewdly expos[ing] his person or the private parts thereof in any public place or in a place where there are present other persons to be offended or annoyed thereby."* (Regarding the last clause, the court observed that patrons of the theater "were probably highly offended and annoyed when the officer bared his badge and interrupted the performance.")

Citing *California v. Larue,* 409 U.S. 109 (1972) and *Doran v. Salem Inn, Inc.,* __ U.S. __ (1975) for the proposition that nude dancing " 'might be entitled to First and Fourteenth Amendment protection under some circumstances'," the three-judge court proceeded to apply Constitutional standards affecting expressive communication.

The terms *willfully* and *lewdly* were struck down as vague, lacking the "specificity required of statutes that intend to regulate expression"; and the statutory reference to *persons offended or annoyed* was held equally vague. In addition, the court found the statute overbroad in its failure to define the scope of *any public place* or *a place where there are present other persons to be offended* . . . .

The court notes that "Immediate arrest and detention puts emphasis on the pure conduct nature of the offense and precludes by its nature the assumption that such dancing is in any way protected by the First Amendment." In this context, the police officers' practice of arresting dancers during a performance (at the time when "the baring of the breasts is combined with what the officer subjectively conceives to be suggestive conduct") was characterized as *censorship* and a violation of the rule that restraint of expression must be preceded by an independent adversary hearing and judgment.

[The dancers in the instant cast perform between film showings in adult theaters where no liquor is served. Citing *Miller v. California,* 413 U.S. 15 (1973), the *Attwood* court points out: "The facts under consideration in this action do not raise the problems unique to the power of the state to control the liquor licensing process."]

City may prohibit opposite-sex massage

Massage-parlor technicians may constitutionally be prohibited from treating customers of the opposite sex, according to a recent U.S. Court of Appeals ruling. *Colorado Springs Amusements, Ltd. v. Rizzo,* 524 F.2d (3rd Cir. 1975).

The decision is a reversal of the district court's ruling [at 387. F.Supp. 690] which had found the Philadelphia ordinance unconstitutional as 1) establishing a gender-based classification, 2) having no rational relationship between the prohibition and the objective, and 3) creating an irrebuttable and unreasonable presumption that illicit sexual behavior would occur in the absence of the law.

In over-ruling the lower court, the appeals court accepted the city's arguments that the ordinance does not deny equal protection, because it treats both sexes alike — and that, because the ordinance "merely" *regulates* rather than *prohibits* massage, there is no denial of due process as to livelihood or property.

Hicks v. Miranda, U.S. (1975), is relied on for the position that "we [the appellate court] are not free to disregard three dismissals by the Supreme Court, for want of a substantial federal question, of challenges to ordinances identical in all material respects to the one in question here" — since such dismissals are, based on *Hicks,* adjudications on the merits.

Obscenity statute vague under "Miller" test

The Supreme Court of Pennsylvania has rejected the state's argument that the constitutionality of one subsection of the obscenity law could be saved by construing it through reference to another subsection. *Commonwealth v. MacDonald,* 347 A.2d 290 (1975).

"At first glance," the court said, "this suggested use of a definition in one subsection [regarding sales to minors] to give the necessary definiteness to another [regarding sales to adults] . . . has considerable attraction. . . . However, on more careful consideration, the suggested construction proves unacceptable."

The *MacDonald* case involves a criminal complaint against exhibitors of "Deep Throat" and "The Devil in Miss Jones" — and a second complaint seeking to enjoin future showings of the films. The appellate court affirmed the lower court's findings 1) that the statute in question is unconstitutionally vague under the *Miller v. California* standard, and 2) that "the First Amendment forbids issuance of any injunction . . . unless and until an adequate definition [of obscenity] is supplied by the General Assembly."

18 Pa.C.S. §§5903 (a) and (b), which prohibit the sale or exhibition of "obscene" materials to persons over 17, comply with all of the *Miller* criteria *except for* the requirement that the sexual conduct depicted " 'must be specifically defined by state law as written or authoritatively construed.' "

The state had pointed to §5903 (c), which proscribes the selling or showing of obscene materials to minors, and which clearly specifies the sexual conduct that may not be depicted or described. But the court said: "We cannot presume that the General Assembly would wish to restrict adults to receiving materials fit for children."

Also rejected was the possibility of *adopting* (as the definition of "obscene") the wording of other jurisdictions' laws — or the examples suggested in *Miller.*

Where, in addition to the *obscenity* count, the defendants had been charged under the *public and common nuisance* law (§6504), the court surveyed the background of the *nuisance* concept, and called it too vague a standard to restrict expression.

Further, citing *Grove Press, Inc. v. City of Philadelphia,* the court concluded that "the sprawling doctrine of public nuisance . . . may not be used . . . both to define the standards of protected speech and to serve as the vehicle for its restraint.' " Therefore, the state would not be entitled to an injunction "under a theory of common law public nuisance."

"Discrimination" defense fails in prostitution cases

Where the female defendant had raised "discriminatory enforcement" as a defense to prostituion charges, the Minnesota Supreme Court has ruled that "conscious selectivity" need not be unconstitutionally discriminatory. *City of Minneapolis v. Buschette,* __ N.W. 2d __ (*Finance and Commerce,* Jan. 24, 1976).

The prosecution had testified that, over a period of approximately a year and a half, 189 of 210 prostitution arrests (90%) were of women, but that "it is the current intention of the morals squad to continue apprehension of males as well as females". Based on this statement, as well as the fact that the Minneapolis ordinance is facially sex-neutral and may be applied to both customers and prostitutes, the court said:

"We give great weight to this testimony as it indicates to us the defendant failed in carrying her burden of affirmatively showing intentional and purposeful discrimination against one person or a class of people."

In determining that selective enforcement is valid under the *rational basis* standard (and that the U.S. Supreme Court would not here require the *strict scrutiny* test), the court accepted the state's contention that " 'in light of current resources, a concentration on the sellers of sexual services, rather than on the buyers, is more efficient and thus is more likely to achieve the end sought by [the ordinance]. It is quite clear [according to the state's argument] that, in many instances, the arrest of one seller will prevent more occurrences of the behavior proscribed . . . than the arrest of a number of buyers . . . [because] a single seller may service a number of customers in a short period of time.' "

As to the efficacy of arresting the (female) seller rather than the (male) buyer, the California Court of Appeal in *Leffel v. Municipal Court of Fresno County,* __ C.A.3d __ (1976), reached a conclusion contrary to that of the Minnesota Court. Interpreting a subdivision of the penal code which criminalizes solicitation, the court in *Leffel* said: "Subjecting the customer to prosecution will further the legislative purpose — *probably more so* than any other legislative remedy." (Emphasis added) The statute was construed as applicable to the appellant-customer, whose petition for a writ of prohibition was therefore denied. Further, because *every person* who solicits any act of prostitution is included under the law, the court held that "the statute itself gives fair notice that customers are included."

□ *continued on page 23 / more court cases on following page*

...IN THE COURTS

continued from page 15

Virginia court upholds "disorderly house" law

In *Hensley v. City of Norfolk,* 218 S.E. 2d 735 (1975), the Virginia Supreme Court has identified four elements which constitute the offense of "keeping and maintaining a disorderly house":

"The defendant must keep, maintain or operate it for himself or another; it must be in fact a disorderly house; the activities must be continuing in nature; and the defendant must have had knowledge of the illegal practices carried on in the establishment."

Both *Hensley and Flannery v. City of Norfolk,* 218 S.E. 2d 73 (1975), are challenges to the *disorderly house* ordinance, which the court has upheld. Both cases involve massage parlors in which oral sodomy and masturbation of the (male) customer are performed by the masseuse. Solicitation for intercourse also occurs, and both establishments involved are known locally as brothels. Defendants in both cases (announced on the same day) include operators of the houses.

In *Flannery,* the court rejected the defendant's charge of *vagueness,* applying the rule that a law is not constitutionally ambiguous or vague 1) if the words have "a constitutional common law definition" and/or 2) if the state's case law "has been judicially narrowed." The court concluded that the ordinance (City Code §31-18) meets both tests — at least in the separable portion under which Flannery was charged. Cited are *Harris v. U.S.,* 315 A.2d 569 (D.C. Ct.App. 1974), and *Price v. Travis,* 140 S.E. 644 (1927).

The court in *Hensley* found *Flannery* controlling on the issue of vagueness. In addition, it rejected as "completely frivolous" the defense of the massage parlor operator that the ordinance abridges the right of assembly.

Hensley herself, a masseuse at the above defendant's establishment, was charged with *frequenting a house of ill fame, soliciting, immoral conduct,* and *soliciting for immoral purposes,* each offense being under another section of the code. The court denied her argument that the language of those sections (including the words "immoral", "lewd", and "lascivious") is vague. *Black's Law Dictionary* and *Webster's Third* are cited for "clear and specific meanings."

Suit against Shapp's executive order dismissed

Pennsylvania Governor Shapp's executive order on equal rights has been characterized by the Commonwealth court as "merely a statement of policy, wise or otherwise." *Robinson v. Shapp,* __ A.2d __ (1975).

In an action seeking to enjoin enforcement of the order in which Shapp committed his administration "to work towards ending discrimination . . . solely because of . . . affectional or sexual preference", the court dismissed the complaint on the grounds that an executive order is "a broad statement of public or political policy . . . within the sole discretion of the elected Executive" and therefore not a matter for judicial interference.

In a concurring opinion, joined by three other judges, President Judge Bowman defined the issue as "whether the proclamation itself sanctions unlawful conduct" in that it calls for recognition of the rights of those who may violate the criminal statute proscribing *voluntary deviate sexual intercourse.*

While concluding that "the Governor's proclamation is not, per se, beyond his lawful authority", Judge Bowman warned that implementation of the executive order — "in whatever form" — might very well involve the Governor in an unlawful extension of his power.

Court vacates sentence of unmarried father

Reviewing the paternity statutes of Massachusetts, the Supreme Judicial Court (Bristol) has found "no permissible legislative goal which rationally is achieved by making a father, but not a mother, guilty of conceiving a child out of wedlock." The section construed in *Commonwealth v. MacKenzie,* 334 N.E.2d 613 (1975), provides that: *"Whoever, not being the husband of a woman, gets her with child shall be guilty of a misdemeanor."*

The court has ruled that the criminal conviction and (suspended) sentence could not constitutionally be imposed.

However, despite the statutory denial of equal protection regarding the *criminality* of the father, the court has found that the law (M.G.L.A. c273, §11) "is not similarly defective to the extent that it is used to establish paternity and oblige the father to contribute toward pregnancy and childbirth expenses" and child support. The complaint filed against MacKenzie was therefore valid — and his motion to dismiss was therefore properly denied by the trial court — in that such a complaint *may* be used "to initiate a proceeding to adjudicate paternity."

In a footnote, the court points out that a proceeding under the section is a criminal proceeding, in which paternity must be established beyond a reasonable doubt and the alleged father may not be compelled to testify. "In light of this opinion," the court says, "the Legislature may wish to review all of the Commonwealth's paternity statutes and to consider whether determinations of paternity should be made in the context of a criminal proceeding."

"Prior act" admissible in Wisconsin rape case

The Supreme Court of Wisconsin has considered an appeal of a rape conviction in which the principal issue was "whether testimony concerning alleged prior acts of the defendant should have been excluded from evidence". *Hough v. State,* 235 N.W.2d 534 (1975).

The testimony of a 15-year-old girl, who had been threatened by the defendant a year before, was admitted because it showed "some particular quirk in the assailant's makeup", thereby taking on "a significance that it would not otherwise warrant."

The incident for which the defendant was convicted, as well as the prior threat, revealed *"sufficient uniqueness"* to *constitute probative value on the issue of identify.* The court reasoned that: "There is . . . no question that an articulated preference for virgins is an identifying characteristic."

The conviction was upheld.

Commitment procedure reviewed in Illinois

Ruling on the standard of proof required to commit a sex offender to treatment, the Appellate Court of Illinois (Fourth District) has decided that the *preponderance of the evidence* — regarding the offender's criminal sexual propensities — is sufficient. *People v. Oliver,* 336 N.E. 2d 586 (1975).

The court's 2-1 decision is based on its conclusion that the statute involved, the Sexual Dangerous Persons Act, "is expressly stated to be civil in nature [and] it is our opinion that the proceedings are, in fact, civil . . ." Therefore, the court said, proof beyond a reasonable doubt (the standard for criminal proceedings) is not necessary.

The dissenting opinion by Presiding Justice Trapp cites *In re Winship,* 397 U.S. 358 (1970), a case on delinquency proceedings, for the proposition that "despite a 'civil' label, [where there is a potential] loss of liberty comparable in seriousness to a felony conviction", proof beyond a reasonable doubt is required to insure due process.

The majority rejected Oliver's reliance on *People v. Burnick,* 535 P.2d 352 (1975), in which the California Supreme Court held that the *mentally disordered sex offender* proceedings in California are subject to proof beyond a reasonable doubt.

The defendant here had previously been convicted of attempted rape and burglary with intent to commit a deviate sexual assault. The instant proceedings arose when he was charged with threatening sexual advances at knifepoint. The trial court found — and the appellate court agreed — that the preponderance of the evidence showed the defendant to be sexually dangerous, although the psychiatric testimony introduced was inconclusive as to whether Oliver's *threats* of sexual assault would develop to "actual completion."

"Jet set" morality scored by N.Y. court

Stating that "never has so strange a defense [to adultery] been presented" before him, a New York State Supreme Court justice has rejected a wife's claim that her marital-separation agreement should be construed as allowing her to engage in legally-acceptable sexual relations with a third party. *Schlachet v. Schlachet,* __ N.Y.S. 2d __ *(New York Law Journal,* Jan. 21, 1976). The plaintiff-husband had moved to dismiss his wife's defenses, which also included the allegation that he, too, had committed adultery.

The defendant-wife had admitted her cohabitation with another man, her defense being that the separation agreement " 'did not exclude sexual relations with third parties.' "

The court characterized this defense as "bizarre" and cited the penal law which makes adultery a class B misdemeanor — "[D]espite the socalled 'enlightened' and liberal' regard for the life-styles of our current twentieth century 'jet set.' "

The applicable law defines adultery as " *'engag[ing] in sexual intercourse with another person at a time when [one] has a living spouse, or the other person has a living spouse.'* "

ADMINISTRATIVE RULINGS...

Insurer's must end sex-bias

California insurance carriers are now prohibited from discrimination based on *sex, marital status,* or *sexual orientation.* The state insurance commissioner has adopted the regulations proposed by the designated hearing officer, following a two-day hearing in September, 1975.

The amended code (effective Jan. 1, 1976) provides that: "No person or entity engaged in the business of insurance in this State shall refuse to issue any contract of insurance or shall cancel or decline to renew such contract because of the sex, marital status or sexual orientation of the insured or prospective insured. The amount of benefits payable, or any term, condition or type of coverage shall not be restricted, modified, excluded or reduced on the basis of [such classifications]."

The issue of *sex discrimination* had been raised by civil libertarian and consumer groups, and the hearings were set up to include, as well, testimony regarding unfair practices based on "marital status, unconventional life styles, and sexual orientations differing from the norm."

The new regulations rely on wide-ranging evidence of unfair practices. Task force reports were introduced, describing sex-discriminatory practices in other states (New York, Pennsylvania, Michigan, Colorado, Iowa), and a report by the California Committee on the Status of Women was also received. Representatives of the insurance industry testified, after appearances by members of the general public, various special-interest groups (e.g., the Pride Foundation), and the petitioners themselves (the American Civil Liberties Union, Public Advocates, Inc., and Consumers Union, for and on behalf of Women Organized for Employment, et al.).

To eliminate *sex discrimination,* the new regulations prohibit, for example, "requiring female applicants to submit to medical examinations while not requiring males to submit to such examinations for the same coverage" or establishing different age or occupational classifications for females and males.

As to *marital status,* insurance carriers may not discriminate by denying coverage to unmarried mothers or their dependents.

The *sexual orientation* provision is exemplified by reference to prohibiting discrimination "because the insured or prospective insured is residing with another person or persons not related to him or her by blood or marriage."

On the sensitive issue of voluntary abortion, the Commission found "most persuasive" the argument that "although California law recognizes the right of the individual to terminate an unwanted pregnancy, it does not confer on that person the right to impose on others its financial and moral burden." However, miscarriage and complications of pregnancy are included under the *minimum benefits standard* on individual disability policies.

□ *continued on page 21*

A Survey of Recent California Appellate Decisions Involving Sexual-Legal Issues Has Revealed What the Writer Considers Shocking Abuse of Judicial Discretion — This Article Discusses the Impact That the *California Rules of Court* Has Had on the Development and Direction of Sexual Law

TO PUBLISH OR NOT TO PUBLISH—*THAT IS THE QUESTION!*

The California Supreme Court, through the *California Rules of Court* [Rule 976(b)] has given the Court of Appeal the power to decide whether or not a particular opinion of the Court of Appeal should be published. Pursuant to this rule, an opinion shall not be published unless a majority of the Court rendering the opinion decides that it meets one of three criteria: 1) it establishes a new rule of law, or alters or modifies an existing rule; or 2) it involves a legal issue of continuing public interest; or 3) it criticizes existing law.

To further complicate matters, if an opinion is *not* published, it cannot be cited to any court as authority [Rule 977].

After reviewing many appellate opinions pertaining to homosexuality or to sexual matters generally, I have concluded that as a general rule the Court of Appeal publishes those decisions which restrict or retard the growth of sexual civil liberties and refuses to publish those opinions which recognize or advance such rights.

Opinions of the Court of Appeal Published Since 1971

The following are appellate decisions in sexually oriented cases involving a substantial issue of law which have been published by the California Court of Appeal since 1971.

In *People v. Baldwin*, 37 C.A. 3d 385 (1974), the Court held that the statute prohibiting oral copulation did not violate the non-establishment clause of the state or federal constitutions.

In *People v. Parker*, 33 C.A. 3d 842 (1973), the Court stated that the oral copulation statute did not involve a "suspect classification" and was therefore to be tested by the traditional equal protection standard of "rationality" rather than the "strict scrutiny" test. The Court then held that the statute was rational.

In *People v. Brocklehurst*, 14 C.A. 3d 473 (1971), the Court interpreted the oral copulation statute, holding that it is not a crime requiring proof of a specific intent.

In *Board of Education v. Calderon*, 35 C.A. 3d 490 (1973), the defendant, a teacher, had been arrested for an act of oral copulation. He was acquitted in the criminal proceeding but was notified by the school board that he would be terminated, not-with-standing his acquittal. Defendant demanded a court review and the school board initiated proceedings in superior court. The trial court made findings that defendant did engage in the acts of oral copulation and that this conduct was indicative of corruption, indecency, depravity, etc., holding that the board could dismiss him. The Court of Appeal held that the teacher's acquittal did not establish that the sex acts were not committed and that the defense of res judicata or collateral estoppel would not apply.

The statute prohibiting solicitation to engage in "lewd or dissolute conduct" is not unconstitutionally vague and does not violate the First Amendment freedom of speech. *Silva v. Municipal Court*, 40 C.A.3d 733 (1974).

A physician's act of lewd conduct (touching an officer's pants around his private parts) was an offense involving moral turpitude warranting revocation of his license to practice medicine. *McLaughlin v. Board of Medical Examiners*, 35 C.A. 3d 1010 (1973).

The education code section providing for the automatic revocation of a teaching credential, without a hearing, upon conviction of a sex offense, did not deny due process on the theory of lack of a hearing, since the teacher was accorded a hearing in the criminal proceeding, *Purifoy v. State Board of Education*, 30 C.A. 3d 187 (1973).

In *Slater v. Pitches*, 33 C.A. 3d 720 (1970), the plaintiff represented a class of adult persons who committed and who wished to continue committing, in private and with consenting adults, the acts prohibited by the oral copulation and sodomy statutes. The defendants were heads of law enforcement agencies charged with enforcing such statutes. The suit sought a declaration that those statutes were unconstitutional as applied to consenting adults in private. In upholding the dismissal of the suit, the Court of Appeal stated: "By refraining from doing the proscribed acts, there would be no possible criminal liability. We see no useful purpose in foisting upon the civil side of the courts the duty to give advisory opinions on criminal statutes."

In a lesbian mother custody case, *Chaffin v. Frye*, 45 C.A. 3d 39 (1975), the Court of Appeal upheld the order of the trial court denying Ms. Chaffin the custody of her two children. In so holding the Court said: "In exercising a choice between homosexual and heterosexual households for purposes of child custody, a trial court could conclude that permanent residence in a homosexual household would be detrimental to the children and contrary to their best interests."

The foregoing group of cases have at least two things in common: 1) they reflect a *negative* attitude about human sexuality and tend to retard the development of sexual civil liberties, and 2) *they were published* in the official reports by the Court of Appeal.

Opinions of the Court of Appeal Since 1971 Which Were Certified for Non-Publication

The following is a summary of cases decided by the Court of Appeal since 1971 which were determined to be unfit for publication in the official reports pursuant to rule 976(b) of the *California Rules of Court.*

Amundson v. State Board of Education, (1 Civ. No. 37942, 12/17/71), involved a proceeding by the Department of

. . . *"As a General Rule, the Court of Appeal Publishes Those Decisions Which*

Education to revoke petitioner's teaching credential. The Department alleged that petitioner committed acts of "moral turpitude" and that he was unfit for service in the public school system. The court was presented with a single issue of law: "[W]hether solicitation in a public place to participate in a criminal homosexual act can, without any independent evidence of unfitness to teach be found to constitute 'unprofessionalism' or 'moral turpitude' within the meaning of section 13202 of the Education Code." The court followed the holding of *Morrison v. State Board of Education*, 1 C. 3d 214 (1969), that the Board of Education must show a nexus between the conduct charged and fitness to teach. The nexus may not be considered a self-evident proposition. The Board argued that an expressed desire for a homosexual contact had a bearing on such fitness, simply because it was expressed on public premises, contemplated execution on such premises and was condemned by law. The Court held that "These factors, in themselves, appear to have a neutral effect on ability to teach." The Court then reversed the trial court's refusal to grant a writ of mandate ordering the Board's action set aside.

In another case involving revocation of a teaching credential, *Petit v. State Board of Education*, (2nd Civ. No. 39637, 9/28/72), the petitioner lost her credential because of certain sexual conduct. Petitioner was arrested for engaging in three acts of oral copulation at a party at a private residence. The acts were performed with adult male consenting partners. The Court stated, "In brief, we hold that there is nothing in the administrative record to show that the retention of appellant in her profession of teaching poses a significant danger of harm to either students, school employees, or others who might be affected by her actions as teacher." The Court then set aside the order revoking petitioner's teaching credential.

In *People v. Reeves*, (1 Crim. 12437, 1/22/75), the defendant was convicted for oral copulation and sodomy with another consenting adult in private. After refusing to reach the constitutionality of these statutes as applied to such private acts, the Court reversed the conviction on other grounds. The prosecutor, on several occasions throughout the trial, attempted to inject "homosexuality" into the case and inferred to the jury that "sexual orientation" was at issue. In reversing, the Court held, "The reality is that, once the fact of appellant's homosexuality had been unmistakably disclosed to the jury, it became the dominant theme of the trial, pervaded it throughout, and was emphasized in the prosecutor's argument to the jury. Under these circumstances, counsel's failure to object on some occasions is of no significance; the necessarily prejudicial impact on the entire subject was such that, once it surfaced and was pursued, objection by counsel or admonition by the court could not have corrected matters." Citing *People v. Giani*, 145 C.A.2d 539 (1956), the Court held that injecting the issue of homosexuality into the trial in an attempt to show the defendant's predisposition to commit the offense is prejudicial error.

Jensen v. Riemer, (1 Civ. No. 36818, 9/29/75), was a taxpayers' suit wherein petitioners asked the court to restrain defendants from expending public funds to enforce California's prostitution law in an unconstitutionally discriminatory manner against women. The trial court issued a preliminary injunction which enjoined defendants from "1. Enforcing Penal Code Section 647(b) by any method which systematically results in greater likelihood of arrest of women as a class than of men. 2. Engaging in any conversational activity device or scheme which encourages or aids the commission of the offense of solicitation in violation of said section. 3. Subjecting women to full custodial arrest on the basis of criteria which are not applied equally to men in relation to the same type of offense. 4. Imposing quarantine restrictions on women for violation of Section 647(b) unless men arrested for violation of said section are subjected to the same restrictions." The trial court made a finding that "Defendants have enforced Penal Code Section [647(b)] by methods which systematically and deliberately discriminate among persons on the basis of sex. The evidence does not provide any justification for this discriminatory classification. There is neither a rational basis nor a compelling state of interest for this discrimination." The Court of Appeal issued a writ of prohibition against the enforcement of the injunction because it was too vague, but none-the-less held that "A detailed review of the record in this case convinces us that these findings are supported by substantial evidence. Under familiar principles of appellate review, we are therefore required to uphold the determination of the trial court that petitioners are enforcing section 647(b) in a manner which discriminates against women on the basis of their sex."

Subsequently the lower court clarified the language in its preliminary injunction. The Court of Appeal has denied a writ of prohibition attacking the new injunction.

In *Gayer v. California Department of Motor Vehicles*, (1 Civ. No. 34290, 12/2/74), plaintiff applied to the Department of Motor Vehicles for a personalized license plate bearing the letters *GAYLIB*. His application was denied on the ground that the slogan carried connotations offensive to good taste and decency. Plaintiff sought an injunction ordering the D.M.V. to issue the plate, but his suit was dismissed for failing to state a cause of action.

On appeal, Gayer argued that the statute authorizing the D.M.V. to issue or deny plates was "unequally applied to him and thereby resulted in an invidious discrimination in its implementation." To this the Court of Appeal responded that "Appellant's point is well taken." The Court concluded that a complaint alleging intentional or purposeful discrimination against homosexuals would constitute a cause of action and therefore the complaint should not have been dismissed.

The cases reviewed in this section appear to have at least two things in common: 1) they establish what would be considered precedent *helpful* to those who struggle for the advancement of sexual civil liberties, and 2) they were ordered by the Court of Appeal *not to be published* in the official reports.

Results of a Recent Survey of Appellate Decisions

After the Court of Appeal decided not to publish its opinion in *Gayer v. D.M.V., supra,* Richard Gayer presented arguments to the Court as to why they should publish his case. Gayer studied all decisions published by the First District Court of Appeal, Division Two (the Division that decided the Gayer case), from November, 1972 to June, 1973. Of the thirty cases analyzed, all but one were published because they met the criteria of involving a legal issue of continuing public interest [Rule 976(b)(2)].

☐ *continued on following page*

continued from page 19

TO PUBLISH OR NOT — *THAT IS THE QUESTION!*

Gayer then argued to the Court that:

"The *legal* issue in *Gayer v. D.M.V.* is the scope of the application of the equal protection clause to homosexuals. It is *not* whether "GAYLIB" may appear on a license plate; that is just the controversy. And who can deny that the subject of equal protection for gay people is of continuing interest to a substantial portion of the public? That public opinion is divided on this issue only increases its significance. This is especially so where, as here, the prevailing opinion is against gay rights, but the *trend* is toward greater rights for homosexuals. Because the present decision is part of this trend, the need for its publication is even more pressing.

"In addition," Gayer argued to the Court of Appeal, "if the equal protection clause applies to the publication of opinions, then gay people deserve something positive to balance all the distasteful and negative opinions that presently appear in the official reports. The instant case is a suitable one for Division Two of the First District to make its entry into the gay arena, especially since your opinion is unique in the area of gay civil rights. We hope you will follow the teaching of Matthew 5:15 *[Nor do men light a lamp and put it under a bushel, but on a stand, and it gives light to all in the house.]* and decide to certify *Gayer v. D.M.V.* for publication."

> It should be published so that it may serve as a building block for future gay victories of much greater significance. Why hide a good work under a basket? Let it be displayed for all to read and cite!
>
> —RICHARD GAYER
> Plaintiff, *Gayer v. D.M.V.*

Gayer's plea to the Court failed, and the Court certified the case for non-publication, thereby insuring that it could never be cited for precedent.

Reactions of the California Supreme Court

Soon after the decision in *Slater v. Pitchess, supra,* was decided by the Court of Appeal, the Supreme Court [*] denied a petition for a hearing in the case. However, the Supreme Court ordered that the opinion of the Court of Appeal be deleted from the official reports. So today, when one looks up 33 C.A.3d 720, all that appears is a statement that the opinion has been ordered deleted by the Supreme Court by an order dated 10/24/73.

After the decision of *Chaffin v. Frye, supra,* was handed down, the Supreme Court denied a petition for a hearing, two Justices dissenting. When gay activists and civil libertarians realized that another negative opinion could now be used to deprive lesbian mothers of child custody, many groups petitioned the Supreme Court to order the opinion certified for non-publication. The response of the Supreme Court came in a letter signed by G.E. Bishel, Clerk of the Court, which stated:

> "Please be advised that your request for non-publication of the Court of Appeal opinion in the above appeal was discussed by the full court at its regular conference held this date. Subsequent to that conference this office was directed to inform you that an order for non-publication will not issue. A petition for hearing was filed and received by this court. That petition was denied. You are now, in effect, asking the court to shape the constitutional law by suppressing publication of an opinion. It appears to so act would be law by elimination rather than by elucidation."

Obviously, this statement by the Supreme Court was inconsistent with its previous action in ordering non-publication of the Court of Appeal opinion in *Slater v. Pitchess, supra.*

Remedies to Correct Judicial Abuse

Pursuant to the California Constitution, the Legislature must provide for the prompt publication of such opinions of the Court of Appeal as the Supreme Court deems appropriate. The Supreme Court, through Rule 976(b) of the *California Rules of Court,* has delegated the responsibility of deciding whether or not to publish an appellate opinion to the Court of Appeal. The Court of Appeal, as has been reviewed earlier in this article, has consistently abused its power with opinions relating to homosexuality or sexual civil liberties. To correct this abuse, at least two possible remedies exist: 1) corrective action by the Supreme Court, or 2) constitutional amendment.

On March 19, 1975, Senator David Roberti (D/Los Angeles) introduced Senate Constitutional Amendment No. 25 which, if enacted by the voters, would have required the Legislature to provide for the prompt publication of *all* opinions of the Court of Appeal. Corresponding Senate Bill No. 597 provided that all opinions which are not published in the official reports must be published in the memorandum reports under the general supervision of the Supreme Court. Furthermore, any opinion of a Court of Appeal could be cited by any court or party regardless of whether it is published in the official reports.

S.C.A. 25 and S.B. 597 were defeated in the Senate Judiciary Committee several weeks ago. Senator Roberti, who states that he feels strongly about the subject, has promised to re-introduce the legislation.

Apparently recognizing that a problem exists, the Honorable Donald Wright, Chief Justice of the California Supreme Court, recently established an Advisory Committee for Study of Unpublished Appellate Opinions. This committee will investigate allegations of abuse of the publication rules and will make recommendations for corrective action.

Allegations of judicial abuse of the rules on publication of appellate opinions are beginning to emerge and effect the conscience of the bench, bar, and public. When will the problem be remedied? —*Thomas F. Coleman*

> *Editor's Note:* Readers who come across unpublished sexual related decisions in California or elsewhere are urged to submit them to the *SexuaLawReporter.* As space permits, we hope to publish such decisions since they will not be found in the West Reporting System. — *R.M.W.*

[*] *References to Supreme Court are California State only.*

continued from page 13

GOVERNOR'S LEADERSHIP ON EQUAL RIGHTS BRINGS GAINS

Basically, "the Pennsylvania system" involves continuous monitoring of administrative actions taken to comply with the executive order. "In-house task forces" include representatives of the organized gay community, who work with state officials. The Governor's Council provides over-all leadership, supervision, and review, functioning as liaison between the community at large and government agencies. Under this system of operation, the state insurance department has eliminated sexuality-based discrimination in the provision of all types of insurance coverage. In another problem area, where the gay community feels that aversion therapy is cruel and dangerous (some call it "legalized torture"), the in-house task force for the welfare department has gained access to department files — and serious consideration of the gay point of view.

The Council has also considered the needs of gays for special attention under the state's V.D. program, the questionable police practice of arresting gays on the pretext of protecting them from those who might attack them physically, the problems encountered in regard to gay bars and the liquor control board, and the status of gays under human relations and affirmative action departments.

• Equal-rights advocates have learned that *the opposition never sleeps.* A bill currently in the House labor relations committee, one of about half a dozen introduced since the issuance of the executive order, may be passed. In addition, a complaint was filed in state court seeking an injunction against Shapp's order. Although the court sustained the governor's objections to the complaint (agreeing that it lacks jurisdiction " 'to adjudicate the propriety of an Executive Order' "), the court's position appears ambiguous — if not actually threatening — on the issue of enforcement of the policy. A (concurring) opinion by President Judge Bowman called Shapp's order "a masterpiece of obscuration" and warned:

"Granted that it is not criminal conduct nor a crime to *have* an affectional preference, it is criminal conduct, however, to *practice* a sexual preference if such sexual preference involves deviate sexual intercourse, conduct which our society has declared unacceptable. [Furthermore] it is not within the power or authority of the Governor to end 'discrimination' against [convicted or unconvicted sex criminals or] those who acknowledge that they continue to engage in deviate sexual intercourse by way of preference or otherwise."

• Activists in Pennsylvania have learned that a comprehensive organizational approach is essential: cooperation among individuals and groups throughout the state — including rural areas — has been basic to the Council's success. Without this first level of cooperation, the Council's efforts could be undermined.

• On a very practical level, Council members have been advised that lobbying on "positive" legislation, such as amending the human rights act to include sexual orientation, is more effective than lobbying efforts *against* anti-gay legislation.

• Further, gays in Pennsylvania are learning that they have achieved political sophistication at least equal to other minorities — and that the men and the women of the movement are able to work on the same side of the street.

□ continued on page 23

...ADMINISTRATIVE RULINGS

continued from page 17

Insurer's sex-bias

The Commission noted "considerable confusion" on the matter of group policies, and pointed out that such policies "are largely determined by collective bargaining" and other circumstances which create differing results at different times and places. "As long as the benefits selected are based on a rational choice", the Commission concluded, "no unfair discrimination exists." Thus, the denial of maternity benefits under a group policy would not necessarily constitute discrimination.

Nor are maternity benefits *required* under individual policies issued to females, since "such a requirement would be unfairly discriminatory vis-a-vis non-childbearing females", who would have to absorb a share of the cost. (But maternity benefits *must* be included in individual policies *if* comparable family contracts offer such benefits.)

In response to a question raised by SLR, counsel to the state insurance department commented on whether *rates* would be affected by the anti-discrimination ruling:

"Our Department and the Insurance Departments of several other states are studying the question of rating discrimination at length and we hope to issue regulations later this year. . . . However, we do not forsee that we will require insurers to ignore sex, marital status or sexual orientation in the setting of premium rates. In any event, it is unlikely that sexual orientation will be rated for in most instances, since most insurers do not know which of their policyholders are homosexual and would thus be unable to amass the statistics required to establish such a rating category."

EEOC rejects charges filed by gays

In two recent decisions, the Equal Employment Opportunities Commission has disclaimed jurisdiction over alleged Title VII violation, where charges of discrimination had been filed by gay men.

The Commission finds that the intent of Congress — in enacting anti-discriminatory legislation under Title VII — was to cover *only* "disparities in employment opportunities between males and females."

Homosexuality is characterized by the Commission as "a condition which relates to a person's sexual proclivities or practices, not to his or her gender." Concluding that the concepts of *sexual proclivity* and *gender* are "in no way synonomous [sic]", the EEOC decisions state that, therefore, "There is not reasonable cause to believe" violations of the statute, i.e., *sex discrimination,* have here occurred.

Co-chairman of the National Committee for Sexual Civil Liberties, Arthur Warner, has asked the Commission to reconsider the two rulings. Warner's letter states, in part:

□ continued on page 23

"IT SHALL BE AN UNLAWFUL EMPLOYMENT PRACTICE for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . ."

— Title VII

BOOK REVIEW...

SEX DISCRIMINATION AND THE LAW is a book about the American Woman: her traditional place in society and under the law — and her developing affirmation of the view that "American life would be immensely improved were women to enjoy a social, economic, and legal status truly equal to men's."

This is an excellent and important book: comprehensive, authoritative, exciting to read.

Primarily a casebook intended as a law school text, *Sex Discrimination* is also a documentary history of the feminist movement, a treatise on the doctrine of Equal Protection, a definitive statement of current feminist ideology, and a guide to the implications of the Equal Rights Amendment. It is a reference book — a basic source-book for students,

SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES

by: Barbara Allen Babcock *(Stanford Law School)*, Ann E. Freedman *(Philadelphia attorney)*, Eleanor Holmes Norton *(Chairperson, New York City Commission on Human Rights)*, and Susan C. Ross *(New York attorney)*. Little, Brown & Company, 1975

for practicing attorneys, and especially for political activists, whose credibility in the long run really depends on their understanding the historical and legal foundations of contemporary feminist philosophy.

Conceding the "explicit bias inherent in [their] approach", the authors apparently adopt the "Declaration of Sentiments" of the first women's rights convention (1848), the position that " 'The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her.' " To support this proposition, *Sex Discrimination* considers the legal disabilities of the American woman in her fundamentally sex-based roles (as wife, divorcee, or single woman; as mother or *non*-childbearer) — as well as the legal disabilities she faces in the social settings where she competes with men or is dominated by them: in the household, in the labor market, in the welfare office, in the university, in the day care center, in courts and in prisons, in public places — even in law firms.

Sex Discrimination is organized in five super-chapters: Constitutional Law and Feminist History, Employment Discrimination, Sex Role Discrimination in the Law of the Family, Women and the Criminal Law, and a final chapter which covers Women's Rights to Control Their Reproductive Capacities, Obtain Equal Education, and Gain Access to Places of Public Accommodation. Generally, a subchapter includes an introductory essay, a selection of cases, excerpts from law review articles, notes on the special problems in a given field of law, a presentation of the feminist position, a model penal code, a discussion of remedies, a summary of relevant Constitutional arguments for legal reform, and a sampling of sociological or "popular" material.

For example, the section on *prostitution* (which appears in Chapter Four, along with *rape* and *women and girls under sentence)* is about 40 pages long. It includes (in the following sequence) a law review article identifying and describing the female and the male prostitutes, the panderer, the pimp, "those who facilitate prostitution" (operators of houses, holders of liquor licenses, taxi drivers), and the customer. A section entitled *The patterns of law enforcement* presents a working paper by the American Bar Foundation on "the harassment arrest," the opinion in *State v. Perry* (a 1968 Oregon case) on "the decoy arrest," and notes on the problems in evaluating testimony at trial. Under *The federal attempt to regulate prostitution,* there is an annotated discussion of the Mann Act, and the opinion in *Wyatt v. United States,* a 1960 U.S. Supreme Court case holding that it is " 'not an allowable choice for a prostituted witness-wife "voluntarily" to decide to protect her husband by declining to testify against him.' " Next, *Decriminalization of prostitution* includes the reminiscence of a former prostitute (" 'I didn't feel I was taking nearly so much shit when I was in the life as I do now that I am a teaching assistant' ") and the journalistic account of prostitution in New York's Hell's Bedroom: " 'The code on the street is simple: survival of the fastest. The police are genuine competition but rather sporting, as a rule.' "

An article called "The Crisis of Overcriminalization" presents the view that the " 'inevitable conditions of social life unfailingly produce the supply to meet the ever-present demand' " — and that " 'to exert . . . some measure of control over the social environment . . . is an alternative [to overcriminalization] worth pursuing.' " Comments to the model penal code, which retains criminal penalties, stress the conventional arguments in favor of controlling prostitution: because of veneral disease, the association of prostitution with other criminal activities, and the affect of prostitution on marriage and other social institutions.

The feminist position is summarized: " 'As long as prostitution exists we want it as free as possible from any male regulation and laws that would punish women for it.' " And further sections deal with experiments in legalization and reduction of penalties, the problems of rehabilitation, the invalidation of laws which subject females only to prosecution, and the impact of the "right to privacy" cases on prostitution law.

Throughout the book (1070 pages), the cases are well-chosen: the landmarks are here (generally full-length) and so are many other cases which provide both continuity of theme within a given chapter and elucidation of the larger issues. The footnotes are excellent, and the index is good. The balance between cases and other material is rational and appropriate; it allows the teacher, the student, or the general reader to design his own course in sex discrimination. The only flaw is the use of *one* type-style for all categories of material. I would have felt more comfortable if case-law, feminist commentary, and law review articles had somehow been made visually distinguishable. (On the other hand, the type-style used is notably attractive and easily readable.)

Clearly, the time had come for a book which could relate feminist thinking to the legal trends which have crystallized in the 1970's. And now that book is here. In a sense, *Sex Discrimination and the Law* will never become obsolete. Even when the controversy over the E.R.A. has been resolved one way or the other, when the woman's movement has fragmented and re-formed itself innumerable times more, and when babies born since *Griswold* (—or in spite of *Griswold*) have become lawyers themselves, the book will still be valuable as a very interesting statement of Where We Were, three-quarters of the way through the twentieth century.

—*S.B.*

A thorough memorandum reviewing most procedural and substantive legal issues involved in raising discriminatory enforcement in a criminal case can be obtained by mailing $5.00 to cover postage and reproduction of this 37-page brief to the Los Angeles office of the SexuaLawReporter c/o BDE-1.

EEOC *continued from page 21*

"There are presently no definitive legal rulings on the subject [whether homosexuals may be covered] from the Federal courts, but . . . in interpreting similar statutes, the Supreme Court of California has declared that the classes or categories which are specifically included in such statutes are to be considered illustrative only, and that it is not to be inferred from such a listing that other classes or categories are outside the law's purview."

The same position has been taken by SLR publisher Thomas F. Coleman, in his role as coordinator of the California Committee for Implementation of Gay Rights. In a letter to California Governor Brown, arguing that the state Fair Employment Practices Commission could legally accept jurisdiction of homosexuals' complaints — and urging that the Governor appoint to the Commission individuals "inclined to adopt a liberal interpretation of their grant of jurisdiction" — Coleman cites a 1975 California Attorney General's opinion which indicates that the state Civil Rights Act uses terms that are illustrative but not restrictive. Thus, Coleman concludes, the FEPC could adopt the same view as the Attorney General.

Regarding the legal validity of the EEOC decisions, Warner's contention is that the Commission's acceptance of jurisdiction "would place the burden of seeking a judicial interpretation upon the discriminating employer, where it belongs, rather than upon a victim. . . ."

Pennsylvania *continued from page 21*

Recognizing the value of executive leadership — and the accomplishments it has made possible in Pennsylvania — Californians have already secured a promise from Governor Shapp to write to Governor Brown, explaining what has been done in Pennsylvania and indicating how similar action could be taken in other states. Out-of-staters have attended meetings of the Gay Task Force (before it was formalized as the Governor's Council), activists from other states have watched developments there closely, and the Pennsylvania experience is now regarded as exemplifying the most viable means to the achievement of equal rights for sexual minorities. — *Susan Bonine*

Prostitution *continued from page 15*

Where an enforcement policy similar to that used in Minneapolis was challenged in another California decision, the Court of Appeal for the Third Appellate District (San Joaquin) has upheld the trial court's ruling that " 'the mere fact that fewer men are arrested . . . does not necessarily show a deliberate bias along sex lines.' " *In the matter of Elizabeth G.*, __ C.A.3d. __ (Los Angeles *Daily Journal*, Jan. 20, 1976).

From 1973 to 1975, yearly arrests for prostitution in Stockton were 95%, 98%, and 72% female, respectively.

Although sex-based classifications are treated as suspect in California, requiring a showing of compelling state interest [*Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1 (1971), is cited], the appellate court has nevertheless concluded that the exclusive use of males as decoys, being "a rational way" to control prostitution, is permissible and does not constitute systematic "intentional and invidious discrimination." Such *invidious* discrimination could only be proved, the court said, if the defendant had been able to show that "she would not have been prosecuted except for such invidious discrimination against her." *continued adjoining column*

Elizabeth G. and *Buschette* (together with those cases summarized at 2 Sex.L.Rptr. 3, and others) seem to typify the current trend in prostitution decisions: where an ordinance or statute *may* be applied to males, and where the law *may* be used to prosecute either the solicitor or the solicitee (as well as others who engage in any aspect of a prostitution transaction), the courts are allowing the defense of discriminatory enforcement — and then denying that such "selectivity" is in violation of the equal protection clause.

SLR Bulletin Board...

Lesbian legal meeting

Lesbian legal workers, law students and lawyers may request application/resignation forms for a national meeting to be held in Chicago, April 9-11. Stamped, self-addressed envelopes should be sent to: *R. Hanover*, 54 W. Randolph St., Chicago, IL 60601

Film producers seek info on child custody cases

The producers of a forthcoming film about lesbians and child-custody have issued a press release in which they ask to hear from women who have been personally involved in such custody cases. Possible contributors of funds are also asked to contact: IRIS FILMS, P.O. Box 26463, Los Angeles, CA 90026.

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SEXUALAWREPORTER

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Advocacy Of Gay Rights Is The Issue In Dismissal Of Civil Service Employee

The American Civil Liberties Union has filed a petition for a writ of certiorari, seeking Supreme Court review of the decision in *Singer v. United States Civil Service Commission,* 12 FEP Cases 208, __ F. 2d __ (9th Cir. 1976).

In *Singer,* the Ninth Circuit Court of Appeals has upheld the Commission's dismissal of a clerk-typist who had publicly identified himself as gay—and as a gay rights activist—and who had further been identified by the media as a federal employee. Ironically, Singer's position had been with the Equal Employment Opportunity Commission (in Seattle), a federal agency responsible for investigating complaints of discrimination against members of minority groups.

The case is significant because of the First Amendment rights at issue—and because it involves the scope of the Civil Service Commission's discretion to determine when an employee's outside activities affect "the efficiency of the service."

The ACLU petition points out that the Supreme Court "has been sensitive to the First Amendment rights of government employees, and this case presents an opportunity to reinforce those decisions by holding that an employee's advocacy of a socially unpopular cause may not be grounds for discharge. Moreover, a favorable decision in this case would demonstrate a sensitivity to the problems of homosexuals, who form a substantial minority of American citizens." (Petition, p. 11)

Singer's dismissal was based on the Commission's findings that he had "flaunted and broadcast" his homosexual activities, that he was an advocate for "a socially repugnant concept" and "a controversial lifestyle"—and that such advocacy constitutes *immoral and notoriously disgraceful conduct* under Section 731.201 of the Commission's Rules and Regulations.

The Commission's decision to dismiss Singer cites as *pertinent factors:* "potential disruption of service efficiency because of the possible revulsion of other employees to homosexual conduct and/or their apprehension of homosexual advances and solicitations; the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among youth; the possible use of Government funds and authority in furtherance of conduct offensive to the mores and law of our society; and the possible embarrassment to, and loss of public confidence in, [this] agency and the Federal civil service."

There was no evidence that any of the "potentials" or "possibles" had occurred.

□ *continued on page 32*

BACKGROUND REPORT:

American Bar Association Positions on Sex Laws

In the struggle to achieve full legal recognition of and protection of the civil rights of gay people, attempts have been made over the past few years to obtain resolutions and policy statements from various professional associations in support of various aspects of gay rights. The theory behind this effort has been that such resolutions and policy statements could be used to convince legislatures and courts that society's views on the issue of homosexuality had changed to the point that even conservative, respectable national organizations now believe that repressive laws should be eliminated and affirmative legislation guaranteeing the civil rights of gay people should be enacted.

Since the law itself has always been one of the chief instruments of gay oppression, it was quite natural that attempts would be made to obtain statements supporting changes in the law from the American Bar Association, the national organization of the legal profession.

The primary goal of the movement for gay legal rights has always been to obtain either legislative repeal or judicial invalidation on constitutional grounds of statutes prohibiting

□ *continued on page 35*

INSIDE

IN THE COURTS...

Arizona court reverses holdings on privacy

Addressing the interest of the state in regulating "sexual misconduct," the Arizona Supreme Court has held that the private, consensual sexual activity of adults "is not a matter of concern for the State *except insofar as the legislature has acted to properly regulate the moral welfare of its people, and has specifically prohibited sodomy and other specified lewd and lascivious acts.*" (Emphasis added). The court in *State v. Bateman and Callaway,* __ P. 2d __ (March 10, 1976) thus vacates the judgments of the state Courts of Appeals in *State v. Bateman,* 540 P.2d 732 (1975), 2 Sex.L.Rptr. 9, and *State v. Callaway,* 542 P. 2d 1147 (1975), 2 Sex.L.Rptr. 14.

Both cases involved alleged forcible acts between heterosexual partners: a married couple in *Bateman* and unmarried sexual partners in *Callaway.* Despite evidence of force, the defendants in both cases had been granted standing to assert the rights of consenting adults. Division 1 of the Court of Appeals had ruled ARS §13-651 and §13-652 unconstitutional as applied to married couples, based on the *Griswold* doctrine of marital privacy, and Division 2 had used the doctrine of equal protection to find the statutes correspondingly inapplicable to the unmarried.

Here, in the consolidated appeal, the state Supreme Court reversed these holdings on various grounds, in a 3-2 decision.

As to possible vagueness, *Wainwright v. Stone,* 94 S.Ct. 190 (1973) and *Rose v. Locke,* 96 S.Ct. 243 (1975), 2 Sex.L.Rptr. 2, are cited, respectively, for the principles that "Previous applications of a statute to a set of facts precludes a constitutional attack on the basis of vagueness" and "It can be easily determined what constitutes lewd and lascivious activity and sodomy in this state".

The Arizona Supreme Court acknowledges the right of sexual privacy established in *Griswold v. Connecticut,* 85 S.Ct. 1678 (1965) and *Eisenstadt v. Baird,* 92 S.Ct. 1029 (1972)—but states that "in neither of those opinions did [the U.S. Supreme Court] determine that the State could not regulate sexual misconduct. In fact, the contrary was noted by Justice Goldberg in his concurring opinion in *Griswold* [and by Justice Harlan in his dissent in *Poe v. Ullman,* 81 S.Ct. 1752 (1961)] . . . The Arizona statutes may thus be properly construed to prohibit nonconsensual sexual conduct and remain constitutional.

". . . The State may also regulate other sexual misconduct in its rightful concern for the moral welfare of its people [citing Harlan's dissent in *Poe*]. The right of privacy is not unqualified and absolute and must be considered in the light of important state interests [citing *Roe v. Wade,* 93 S.Ct. 705 (1973)]."

The court refers to the Bible, to traditional English sources and to Arizona legislation for the view that "Sodomy and lewdness have been considered wrong since early times", adding that "This type of activity has not been discussed by the United States Supreme Court" and concluding that "Whatever our personal predilections in the area of sex may be, this is not the time to voice them, for the public policy of the State in this and other areas of concern is articulated by the legislature."

The dissenting opinion by Justice Frank X. Gordon, Jr. remarks that the reasoning of the majority "highlights the failure to directly state the logical result of the holding,—that the police power of the state may legitimately intrude into the bedrooms of consenting adults." Gordon adds:

"I am baffled as to how the majority can acknowledge that '[t]he right [of privacy] exists within the context of the intimate sexual relations between consenting adults in private,' whether single or married, and then can conclude that the Legislature may separate certain of these relations it finds distasteful, label them as misconduct and make the participants felons subject to a prison term of up to twenty years in the state penitentiary. By declining to afford the protection of privacy to 'activity (which) has not been discussed by the United States Supreme Court' the majority implies that sexual activity for purposes other than having children may be prohibited by the Legislature."

Private act of fellatio is not "indecent exposure"

The Supreme Court of New Jersey has affirmed a reversal of conviction for *private lewdness,* where the male defendants had committed fellatio in a parked vehicle at a highway rest area. *State v. J.O. and F.C.,* __ A. 2d __ (1976). N.J.S.A. 2A:115-1 prohibits *open lewdness* as well as *private lewdness or carnal indecency* which tends "to debauch the morals and manners of the people."

The court ruled the defendants' conduct "is not indecent exposure within the meaning of [the statute] in that a private act of exposure between *consenting* adults is not offensive to the participants."

The decision in *J.O. and F.C.* relies on *State v. Dorsey,* 316 A. 2d 689 (1974), a case of sexual assault, in which the court had commented on the difficulty of defining "private lewdness." The *Dorsey* court confined that crime "to acts of indecent exposure and to acts tending to subvert the morals of minors." Here, the court added:

"We believe the proper standard for ascertaining whether a privately committed act is one of indecent exposure within the meaning of the criminal statute is whether under the circumstances, the conduct is offensive, or has the likelihood of being offensive, to the persons who are present." The court acknowledged the reasonable presumption that "the vast majority of the public would find such conduct offensive were it to occur in their presence. [But] The point is that it did not . . . . Nor did it occur under circumstances in which the defendants could reasonably be deemed to have intended, or known, that their conduct was likely to be seen by the public." The conduct here had been witnessed by a police officer—not a member of "the public."

The court found it "unnecessary" to decide whether the *lewdness* statute is unconstitutional as violating the privacy rights of consenting adults.

In a previously decided case, *State v. DeLellis,* 349 A. 2d 73 (1975), where three male defendants had been indicted for rape and related offenses—and where DeLellis had forced the female complainant to commit fellatio—the Superior Court of New Jersey said his act "necessarily involved 'indecent exposure' . . . and is thus proscribed by the lewdness statute even under the limiting construction of *Dorsey.*"

Courts rule on transsexual issues

CHANGE OF NAME: The New York Supreme Court has dismissed a petition in which an alleged transsexual had requested a change of name from "Linda" to "Michael." *Matter of Fernandez,* __ N.Y.S. 2d __ (1976). The decision is based on the court's view that:

"Implicit in asking court approval for a change of name from one commonly denoting a female to that of one commonly associated with a male, is a request for a judicial determination of the sex of the petitioner." In *Fernandez,* where the petitioner's doctor considered the petitioner "a true transsexual" because of mastectomy surgery and continuing hormone treatments, the court said that, without additional facts as to the petitioner's sexual functioning, it "is not prepared to make a determination that could be interpreted as ratifying the petitioner's claimed change of sex."

The *Fernandez* decision relies heavily on a New York Academy of Medicine study which regards transsexuals as psychologically ill and transsexualism itself as a questionable phenomenon.

Also cited are *In re Anonymous,* 293 N.Y.S. 2d 834; *In re Anonymous,* 314 N.Y.S. 2d 668; and *Anonymous v. Weiner,* 270 N.Y.S. 2d 319.

EMPLOYMENT: The dismissal of a male-to-female transsexual teacher has been affirmed by a federal district court in New Jersey. *Grossman v. Bernards Township Board of Education,* 11 FEP Cases 1196, __ F. Supp. __ (D.C.N.J. 1975).

The state commissioner of education, upholding the school board's action, had ruled that Paul (subsequently *Paula)* Grossman, having undergone sex-reassignment, "render[ed] himself incapable to teach children . . . because of the potential . . . psychological harm to the students. . . ."

The court found it lacked subject matter jurisdiction and denied each of the plaintiff's contentions of unlawful discrimination, ruling 1) that the Taft-Hartley Act is inapplicable because the school board is not an *employer* under the Act, 2) that the Civil Rights Act of 1866 is inapplicable because no racial discrimination was alleged, 3) that the Civil Rights Act of 1871 is inapplicable because the school board is not a *person,* and 4) that the Civil Rights Act of 1964 (i.e., Title VII) is inapplicable in that Grossman was discharged *"not* because of her status as a female, but rather because of her change in sex . . . ." The school board had denied the allegation of *sex discrimination* on the grounds of its position that Grossman, in fact, remained a male.

BIRTH CERTIFICATE: The U.S. District Court for Connecticut has dismissed a motion for summary judgment made by the Commissioner of Health in a case in which a transsexual requested that the sex recorded on her birth certificate be changed from "male" to "female." *Darnell v. Lloyd,* 395 F. Supp. 1210 (1975). The court stated that:

"The Plaintiff was yclept male at birth but later had a 'sex change' operation. The Plaintiff's exact anatomical condition at birth and all of the details of her operation and present circumstances are not clear from the record at present."

Darnell claimed that a birth certificate is a government-issued identification card that has a significant impact on many phases of one's life. For example, Darnell claimed that she would be unable to obtain a license to marry a man unless she can produce a birth certificate proclaiming her to be female. In addition she felt that carrying a passport declaring her to be of other than her apparent sex would be extremely humiliating.

The court felt that at least one of Darnell's theories stated a cause of action and may, if the record (as more fully developed) establishes that she is presently *female,* prove successful. Therefore, the court felt that it could not issue a summary judgment for the Commissioner of Health.

Moreover, the court stated that ". . . The Commissioner must show some substantial state interest in his policy of refusing to change birth certificates to reflect current sexual status unless that status also obtained at birth."

Iowa court upholds prostitution law

The Iowa Supreme Court has reversed a lower court opinion declaring the state prostitution law unconstitutional, in *State v. Price,* 237 N.W. 2d 813 (1976). The defendant had been charged with prostitution and lewdness. The trial court found the term *lewdness* to be unconstitutionally vague, and found further that the prostitution law was enforced unequally against women in violation of the equal protection clause.

The high court reversed. It held that the statute, Iowa Code Section 724.1, which proscribes any "person" from engaging in prostitution or lewdness, is non-discriminatory on its face; and that even though the common law definition of prostitution pertained only to women, the crime of lewdness (for the comparable act) applied to men; therefore the law is not discriminatory. As to the female defendant's claim that the term *lewdness* is unconstitutionally vague, (relying on the earlier Iowa decisions of *State v. Kueny,* 215 N.W. 2d 215 (1974) and *State ex rel. Faches v. N.D.D. Inc.,* 228 N.W. 2d 191 (1975)), the court ruled that since this defendant had not been charged with lewdness, but rather prostitution, she lacked standing to challenge the term on vagueness grounds.

The court also held that the prostitution law does not violate defendant's right to privacy, distinguishing *Griswold v. Connecticut,* 85 S. Ct. 1678, *Eisenstadt v. Baird,* 92 S. Ct. 1029, and *Roe v. Wade,* 93 S. Ct. 703, and citing *Paris Adult Theatre I v. Slayton,* 93 S. Ct. 2628.

Circuit court upholds dismissal of gay clerk

The dismissal of a gay clerk-typist has been upheld by the Ninth Circuit Court of Appeals, in a decision which allows advocacy for "a socially repugnant concept"—homosexuality—as grounds for termination under civil service law. *Singer v. U.S. Civil Service Commission,* 12 FEP Cases 208 __ F. 2d __ (9th Cir. 1976).

John Singer, while a probationary employee of the Seattle Equal Employment Opportunity Commission office (as well as prior to that time) had publicly identified himself as gay —and as an active supporter of gay rights.

The *Singer* case is discussed further at 2 Sex.L.Rptr. 25 (this issue): "Advocacy of Gay Rights Is the Issue in Dismissal of Civil Service Employee."

□ *more Court News on following page*

...IN THE COURTS

continued from page 27

Commitment procedure modified in Illinois

In contrast to an opinion by the Illinois Court of Appeals in *People v. Oliver,* 336 N.E. 2d 586 (1975), 2 Sex.L.Rptr. 17, the Seventh Circuit U.S. Court of Appeals has ruled that a person is entitled to the *beyond a reasonable doubt* standard in a commitment hearing under the Illinois Sexually Dangerous Persons Act. *U.S. ex rel Stachulak v. Coughlin,* 520 F. 2d 931 (7th Cir. 1975).

The *Oliver* court ruled that the standard of proof should be a *preponderance of the evidence.* The *Coughlin* court disagreed, however, saying that even though this was a civil proceeding:

"Here, the loss of liberty is as great, if not greater, than the loss in [In re] Winship [90 S. Ct. 1068]. The violator of the criminal law—be he an adult or juvenile—is imprisoned, if at all, in almost all cases for a definite term. The person found to be sexually dangerous, in stark contrast, is committed for an indeterminate period and is unable to attain his freedom until he can prove that he is no longer sexually dangerous." The U.S. Supreme Court has denied certiorari. 44 LW 3492.

Without mention of *Oliver,* the Illinois Supreme Court subsequently overruled it *sub silentio* in *People v. Pembrock,* 342 N.E. 2d 28 (1976), following the reasoning of *Coughlin.* Also citing *Winship,* the court held that simply because the proceedings under the Act are civil in nature is not dispositive of a defendant's rights, and that the proper standard of proof before commitment is *beyond a reasonable doubt.*

Police unit ordered to re-hire gay employee

The Washington State Patrol has been ordered to re-hire a civilian employee who had been dismissed from his position after voluntarily informing a departmental officer of his homosexuality. *Wyman v. Washington State Patrol* (King County Superior Court, February 3, 1976).

Judge Edward E. Henry, in an oral opinion, referred to the *rational connection* doctrine, specifically citing *Gaylord v. Tacoma School District,* 85 Wn. 2d 348. He concluded: "The test is: Because Mr. Wyman informed [the sergeant] that he was a homosexual, did that affect his ability to perform the technical services he was performing as a technician in the communications department where he worked? *There is no evidence that that did affect his work."* (Emphasis added).

Judge Henry said, "I don't want anyone to feel that this Court condones that activity of being a homosexual, but I understand that is a problem that I think modern society is beginning to recognize." He cited three additional examples of "the modern trend": the state legislature's decriminalization of sodomy, the 1975 federal civil service rules stating that homosexual conduct may not be used as the sole basis for disqualification from federal employment, and the Seattle ordinance prohibiting dismissal on grounds of homosexuality *per se.*

"Crimes against nature" seen as antiquated law

In a "narrow and limited" decision affirming only that cunnilingus constitutes a *crime against nature* under state law, the Tennessee Supreme Court has suggested that the legislature re-evaluate that law "in the light of modern mores and morality".

T.C.A. §39-707—"crimes against nature"—was recently held *not impermissibly vague* by the U.S. Supreme Court, in *Rose v. Locke,* 96 S. Ct. 243 (1975), 2 Sex.L.Rptr. 2. Both *Locke* and the instant case involved forcible acts of cunnilingus.

Here, in *Young v. State,* 531 S.W. 2d 560 (1975), the state court qualifies its acceptance of the holding in *Locke,* stating: "[W]e make no judgment with respect to the constitutionality of the application of this statute to private consensual acts engaged in by adults, nor such practices pursued in private and within the framework of the marital relationship." Re-evaluation of the 1828 statute, the court said, "would be in the public interest and would be of substantial assistance in the administration of criminal justice."

N.C. sterilization law provides due process

The North Carolina Supreme Court has reversed a lower court ruling that state statutes providing for the sterilization of mentally ill or retarded persons are unconstitutional. *In re Sterilization of Moore,* 221 S.E. 2d 307 (1976). The high court reversed on the ground that, contrary to respondent's contention, G.S. 35-50 did not violate his due process rights. Pointing out that the court had previously declared a similar statute unconstitutional in *Brewer v. Valk,* 167 S.E. 638 (1933), because it failed to provide prior notice and a hearing, the court said that the statute's revision corrected that defect. The statute also provides for right to counsel and cross-examination throughout the proceedings. As to his right to a medical expert on his behalf, the court said that it was discretionary with the trial judge but "We know of no constitutional mandate that requires more."

As to respondent's claim that the law violated his right to privacy, the court distinguished *Roe v. Wade,* 93 S.Ct. 705, *Loving v. Virginia,* 87 S.Ct. 1817, *Griswold v. Connecticut,* 85 S.Ct 1678, *Eisenstadt v. Baird,* 92 S.Ct. 1029, and *Skinner v. Oklahoma,* 62 S.Ct. 1100, saying, "The right to procreate is not absolute but is vulnerable to a certain degree of state regulation," that "the interest of the unborn child is sufficient to warrant sterilization of a retarded individual," and that "The people of North Carolina also have a right to prevent the procreation of children who will become a burden on the State."

A thorough memorandum reviewing most procedural and substantive legal issues involved in raising discriminatory enforcement in a criminal case can be obtained by mailing $5.00 to cover postage and reproduction of this 37-page brief to the Los Angeles office of the *SexuaLawReporter.*

□ more Court news on page 33

"MILLER" TEST CONSIDERED IN COLORADO, MISSISSIPPI, AND CALIFORNIA

COLORADO: In a number of cases handed down on January 5, 1976, the Colorado Supreme Court has ruled that the state obscenity statute and the Denver city and county obscenity ordinance are unconstitutional. The main case, *People v. Tabron,* 544 P. 2d 372, involved a lower court conviction for "promoting" the movie "Deep Throat." Without examining the movie itself, the court traced the history of obscenity laws through the English common law and colonial, post-colonial, *Roth,* and *Miller* periods, concluding that the current law does not conform to the specificity required by *Miller.* C.R.S. 1963, 40-7-101(1) defines "obscene" as:

". . . that which, considered as a whole, predominantly appeals to prurient interest, i.e., a lustful or morbid interest in nudity, sex, sexual conduct, sexual excitement, excretion, sadism, masochism, or sado-masochistic abuse, and which goes substantially beyond customary limits of candor in describing, portraying, or dealing with such matters and is utterly without redeeming social value."

The court said that "The most apparent defect in the above definition of 'obscene' is that it incorporates the 'utterly without redeeming social value' test of *Roth-Memoirs,* which was rejected in *Miller v. California,* supra."

The court also rejected the prosecution's urging to judicially redraft the statute, reasoning that for the instant defendant it would constitute an *ex post facto* act, and that at any rate such a move is a legislative function.

Two companion cases, *People v. Tabron,* 544 P. 2d 380, and *People v. Hildebrandt,* 544 P. 2d 384, were decided in accordance with the first *Tabron* case; and in *Menefee v. City and County of Denver,* 544 P. 2d 382, the court struck down a similar Denver ordinance.

MISSISSIPPI: Similarly, the Mississippi Supreme Court, by a 5-4 vote, has reversed a conviction in which the movie "The Exorcist" had been found obscene under the state law. *ABC Interstate Theatres, Inc. v. State,* 325 So. 2d 123 (1976). That statute, Miss. Code Ann. section 97-29-33, simply prohibited the showing of an "obscene, indecent, or immoral" moving picture. Although the state did not "seriously argue" that the statute was constitutional on its face since clearly not conforming to the *Miller* specificity requirements, it did urge the court to "authoritatively construe" the law to save it. The court declined to place such a construction on the law, however, since such an action would constitute an *ex post facto* law and would invade the legislative function. The court also interpreted the statute relative to the Mississippi Constitution, Article 3, Section 13, by stating:

"It is there provided that 'the freedom of speech and of the press shall be held sacred' . . . We are of the opinion, without deciding, that Article 3, Section 13, *supra,* by modern-day standards, appears to be more protective of the individual's right to freedom of speech than does the First Amendment since our constitution makes it worthy of religious veneration."

The dissenters argued that the *Miller* opinion itself allowed the courts to construe obscenity statutes to conform to its *(Miller's)* holding, and that this was a proper case for such a construction.

CALIFORNIA: In contrast to the Mississippi decision, the California Supreme Court, by a 5-2 vote, has decided to construe the state's obscenity law to conform to *Miller. Bloom v. Municipal Court,* __ P. 2d __ (1976). At issue was Penal Code Section 311.2(a) which prohibits sale or distribution of any obscene matter. "Obscene matter" is defined as "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

Although acknowledging that the definition lacks sufficient specificity, the court invoked *Hamling v. United States,* 94 S. Ct. 2887 (1974).

" 'We the U.S. Supreme Court made clear in Miller, 413 U.S. at 24 n.6, that our decision was not intended to hold all state statutes inadequate, and we clearly recognized that existing statutes "as construed heretofore or hereafter, may well be adequate." That recognition is emphasized in our opinion in United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973).' "

Buttressed with the authority to do so, the court in *Bloom* proceeded to construe the statute: "Section 311 has been and is to be limited to patently offensive representations or descriptions of the specific 'hard core' sexual conduct given as examples in *Miller I,* i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.' (413 U.S. at p. 25.) As so construed, the statute is not unconstitutionally vague."

In a long dissent, Justice Tobriner questioned the whole concept of regulation of obscenity for consenting adults in light of the First Amendment and the California Constitution.

"Three state interests are generally proffered to support governmental suppression of the acquisition of obscenity by consenting adults: (1) prevention of anti-social behavior assertedly caused by viewing such material; (2) protection of the individual's morality by restricting his access to it; and (3) preservation of the quality of life and community environment by eradicating public sanction of obscenity. *Stanley [v. Georgia]* explicitly rejected as incompatible with the First Amendment the first two of these purported state interests; I believe the third is equally inadequate to sustain an invasion of fundamental rights."

"Ultimately, the proponents of censorship must rely, almost exclusively, upon a vague if vigorously asserted state interest in the preservation of a 'desirable' moral tone and climate in society. Yet this proferred governmental purpose is equally incompatible with the First Amendment, for it suggests that the right to receive information and ideas is limited to expression found acceptable by the majority."

"Congress shall make no law . . . abridging the Freedom of Speech, or of the Press . . ."

ADMINISTRATIVE RULINGS...

U.S.C. Law School adopts anti-discrimination policy

The University of Southern California Law Center has become the first educational institution to include *sexual orientation* under its non-discrimination policy. The new policy applies to the selection of students and the employment of faculty and staff — and also prohibits the use of Law Center facilities by recruitment personnel whose organizations discriminate against gays.

The issue arose in connection with recruitment by the Marine Corps, which disqualifies homosexuals from induction.

Professor Donald C. Knutson, who proposed that *sexual orientation* be added to the classes of *race, color, religious creed, sex,* and *national origin,* was asked by the Dean's Advisory Committee to prepare a brief in support of his proposal. In a response which provides legal, "humanitarian" and educational reasons for the policy, Knutson added:

"We should also adopt this posture to demonstrate as lawyers, and as legal educators, that we are in fact committed to the proposition that discrimination which ignores an applicant's educational, occupational, or professional qualifications is intolerable; that the Law School respond and that we should lead, not follow, in formulating that response."

Previously, Knutson had set forth this position, stating: "Whether compelled by the present status of the law or not . . . it appears to me that the Law School has a particular obligation to play a leading role in the fight against arbitrary discrimination and oppression. It should not rely upon leadership and direction from Congress in this area—it must give leadership."

The faculty adopted the policy without dissent.

Marital status case decided in New York

The City of New York Commission on Human Rights has awarded damages to a victim of marital status discrimination in housing. The ruling is based on §B1-7.0-5a(1) of the city's Administrative Code, Chapter 1, Title B, which provides that it is an unlawful discriminatory practice "to refuse to sell, rent, lease, or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color, national origin, sex or marital status of such person or persons." This was the first marital status case in the state to reach public hearing.

The complainant in *Marans v. Oriental Blvd. Co.,* a man separated from his wife at the time he applied for an apartment lease, had been rejected by a rental agent who contended that separated persons are unreliable tenants. The Commission said this contention was "a misconception of what is an appropriate defense to a showing of discrimination against a member of a class protected by antidiscrimination legislation. The only defense which could have prevailed would be adverse evidence as to the particular class member who brought the action."

The agent's decision—in the Commission's view—"was not the exercise of legitimate business discretion."

Marans' compensation includes the differential in rent between the rate for the apartment he was denied and the (higher) rate he paid for alternative accommodations. He also was awarded $500 for the "pain, suffering and mental anguish" he experienced when reporting the rental agent's rejection to friends and relatives.

Oregon task force studies rights of gays

Following the model of Pennsylvania's Council for Sexual Minorities (formerly known as the Ad Hoc Gay Task Force), Oregon has become the second state to create an official governmental committee addressing itself specifically to examination of the civil rights of homosexuals.

The Department of Human Resources' Ad Hoc Task Force on Sexual Preference is presently composed of fifteen members, though the structure allows for a maximum of eighteen. Participants, selected as a cross-section of governmental and occupational backgrounds, are also representative of various regions within the state.

The Department of Human Resources has pledged to provide clerical and staff assistance, while the Portland Town Council will serve in an advisory capacity.

Upon completing its one-year assignment to assess the status of gay men and women in Oregon, the task force will submit a report of its findings, along with recommendations for legislation, to the governor, the legislature, the Department of Human Resources, and the general public.

Wisconsin insurance code protects singles and gays

The Wisconsin Commissioner of Insurance has ordered adoption of a rule prohibiting discrimination based on *marital status, sexual preference,* or *"moral" character.* Other newly protected circumstances are the applicant's (or insured's) past criminal record, physical or developmental disability, past mental disability, and age.

The new rule—Section Ins 6.54 of the Wisconsin Administrative Code—provides that:

"No insurance company shall refuse, cancel or deny insurance coverage to a class of risks solely on the basis of any of the [above] factors . . . nor shall it place a risk in a rating classification on the basis of any of [these] factors without credible information supporting such a classification and demonstrating that it equitably reflects differences in past or expected losses and expenses. . . ."

The rule is applicable to automobile insurance and certain contracts covering real and personal property.

A hearing has been held regarding proposed rule 6.55, which would prohibit the sex-discriminatory practices of "1. denying coverage to females gainfully employed at home, employed part-time, or employed by relatives when coverage is offered to males similarly employed [and] 2. denying benefits offered by policy riders to females when the riders are available to males."

LEGISLATION...

Decriminalization and Anti-Discrimination Laws Passed in Recent State Sessions

Recent penal code revision in SOUTH DAKOTA and INDIANA has increased to *fifteen* the number of states in which legislation has been enacted to decriminalize all private, consensual (adult) sexual acts. South Dakota's new code—effective April 1, 1977—sets the age of consent at eighteen. In Indiana, where the law becomes effective on June 1, 1977, the age of consent will be sixteen.

The passage of penal code "packages" has been the most common vehicle for decriminalization, and has been successfully used in a majority of the states where decriminalization has passed.

ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, INDIANA, MAINE, NEW MEXICO, NORTH DAKOTA, OHIO, OREGON, SOUTH DAKOTA, and WASHINGTON have all enacted laws decriminalizing private sexual acts between consenting adults.

ARKANSAS, CALIFORNIA, and NEW MEXICO have accomplished decriminalization through specialized bills, but this approach raises problems in that the proposed legislation attracts the attention of the news media and conservative elements of the community, making passage more difficult.

In MICHIGAN, both general and special bills are likely to be acted on. It is expected that a general penal code revision will soon be introduced (including decriminalization of private sexual acts), and a special bill (HB 5624) which would achieve the same result is currently pending in the House Judiciary Committee.

Last year the IOWA Senate passed a general criminal code revision which would decriminalize private sex acts between persons over the age of sixteen. The bill (S.F. 85) recently passed the House and is presently in a Joint Conference Committee.

The attempt made in VERMONT (H 419), another general penal code revision, failed when the bill died in the Senate Judiciary Committee on March 27, 1976, because the session ended. That bill had passed the House of Representatives last year.

NEW JERSEY has a penal code revision package which is pending in the Assembly Judiciary Committee. This bill would decriminalize private sexual acts between persons over the age of sixteen.

Although a number of states considered legislation last year which would have prohibited discrimination on the basis of sexual orientation in employment, housing, and public accommodations, none of those bills was enacted. To date there are no states which afford such protections to homosexuals or to other sexual minorities. This year, again, a number of bills have been introduced, with varying degrees of success.

The House of Representatives of HAWAII recently passed (44-7) a bill that would prohibit discrimination on the basis of sexual orientation in public and private employment as well as in real estate transactions. If the bill passes the state Senate, Hawaii would become the first state in the country in which such discrimination would be outlawed on a state-wide basis.

After being reported favorably out of committee, a MASSACHUSETTS state Senate bill (H. 2541) was defeated 16-23. The bill would have prohibited discrimination on the basis of sexual orientation in public employment. Last year a similar bill was defeated. The Massachusetts legislature has likewise refused, over the past several years, to decriminalize private sexual acts between consenting adults.

The CONNECTICUT House of Representatives voted down a bill (62-84) which would have added the term "sexual orientation" to that state's anti-discrimination laws. Last year the vote on the same issue was 60-87.

Having been introduced well over a year ago, NEW YORK bill A-3211 has finally been reported out of the Assembly Committee on Governmental Operations. The bill would prohibit discrimination on the basis of sexual orientation or marital status in housing, employment, and public accommodations. If the bill passes, New York could be the first state to prohibit discrimination on the basis of sexual orientation while retaining criminal penalties for private sexual acts between unmarried persons. The legislature has continually refused to decriminalize private sexual acts between *unmarried* persons.

On the local level, CHICAGO is considering an ordinance, introduced in February, which would ban discrimination against gays in housing and public accommodations. The Board of Aldermen of CHAPEL HILL (North Carolina) approved a provision which would prohibit discrimination in city employment on the basis of sexual orientation. A bill prohibiting discrimination against homosexuals has been enacted recently in HOWARD COUNTY (Maryland). The City Council of AUSTIN (Texas) passed an ordinance prohibiting discrimination based on sexual orientation in public accommodations; that city had already passed an ordinance protecting gay people in employment.

In addition to the direct protection these ordinances provide, their passage is important for the indirect impact on other developments affecting the rights of gays. For example, this issue of SLR notes that the PORTLAND (Oregon) Town Council will serve in an advisory capacity to the state Department of Human Resources, in the department's study of the civil rights of gays. Presumably, the city's experience will guide the state. Also, it is noted that a Washington state judge has cited SEATTLE's anti-discriminatory ordinance as an example of "modern" attitudes toward homosexuality. That ordinance was thus directly involved in the judge's order that a gay employee be re-hired by the state patrol which had previously assumed he was unsuitable for employment.

—Thomas F. Coleman

The following municipalities have passed ordinances prohibiting discrimination on the basis of sexual orientation—in housing, employment or public accommodations.

CALIFORNIA: Berkeley, Cupertino, Mountain View, Palo Alto, San Francisco County, San Jose, San Mateo County, Santa Barbara, Santa Cruz County, Sunnyvale. IDAHO: Lantana County, Moscow. INDIANA: Bloomington. MARYLAND: Howard County. MICHIGAN: Ann Arbor, Detroit, East Lansing. MINNESOTA: Hennepin County, Marshall, Minneapolis, St. Paul. NEW YORK: Alfred, Ithaca, New York City (by executive order). NORTH CAROLINA: Chapel Hill. OREGON: Portland. OHIO: Columbus, Yellow Springs. TEXAS: Austin. WASHINGTON: Seattle. WISCONSIN: Madison. Also DISTRICT OF COLUMBIA.

continued from page 25

Advocacy of Gay Rights Is the Issue in Dismissal of Civil Service Employee

Background of the Case

Singer was hired in August, 1971, by the Seattle EEOC office. After he and another man applied (unsuccessfully) for a marriage license in September, 1971, he received "extensive" publicity on radio and television and in the press. He was a member of the board of directors of the Seattle Gay Alliance, and further expressed his interest in gay rights through radio talk-show appearances and through a letter to the Commission in which he protested the exclusion of gays from a training program designed to sensitize federal employees to the problems of minorities.

Singer denied that he had authorized the use of his name and his ideology in connection with his position as a federal employee.

His job performance had been rated "superior" or "very good", and his co-workers described their experience with him as "educational and positive".

The dismissal—a finding of Singer's *unsuitability*—was effected by the Chief of the Investigations Division of the local Civil Service office; and affirmed by a regional hearing officer, by the federal appeals board, and by the district court for the western district of Washington. Judge Walter T. McGovern, in an unreported opinion, ruled (without additional commentary) that "there is substantial evidence in the administrative record to support the findings and conclusions of the defendant Civil Service Commission".

On appeal, "the sole question" addressed by the Ninth Circuit court was "whether the action of the Commission . . . was arbitrary and capricious, an abuse of discretion, and in violation of appellant's constitutional rights."

The ACLU contends that Singer's discharge "because of his non-criminal public activities seeking recognition of the rights of homosexuals was in violation of the First Amendment [and] in violation of his constitutional right of privacy guaranteed by the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments." (Petition, p. 2)

The Circuit Court's Decision

The appellate court noted that "[t]he scope of judicial review is narrow"—particularly in regard to probationary (i.e., first-year) employees, who have "no 'right' *per se* to continued employment." However, the court also noted its obligation "to arrive at the proper balance between the interests of the employee, as a citizen, and the interest of the Government, as an employer"—in terms of the efficiency of public service.

As to case-law in which the employment rights of homosexuals have been adjudicated, the court cites *Norton v. Macy,* 417 F. 2d 1161 (D.C. Cir. 1969) for the principle that the agency must demonstrate a *rational basis* for concluding that discharge would promote *the efficiency of the service.* " 'A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service.' "

Gayer v. Schlesinger, 490 F. 2d 740 (D.C. Cir. 1973) is cited for its affirmation of *Norton* and its conclusion that "some deference must be accorded the decision of the agency; and that the 'degree of this deference must be the result of a nice but not easily-definable weighing of the ingredients of which the particular case is comprised.' "

Also cited is *Society for Individual Rights, Inc. v. Hampton,* 63 F.R.D. 399 (N.D. Cal. 1973), a challenge to the then-current rule that: *Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment.*" The California court ruled there that "immoral behavior" constitutes grounds for dismissal only if the Commission shows that " 'that behavior actually impairs the efficiency of the service' ". In a footnote, the *Singer* court notes that, following the *S.I.R.* case, Commission "suitability" standards were modified to include the position that an employee's homosexuality *per se* does not justify the conclusion that his employment would "bring the public service into public contempt"—but that a person may be dismissed "where the evidence establishes that such person's homosexual conduct affects job fitness—excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service."

[Commission guidelines have since been amended further, as discussed below.]

In response to Singer's contention that his First Amendment rights had been violated, the Ninth Circuit court distinguished the two cases on which he relied for that contention. In *Gay Students Organization of University of New Hampshire v. Bonner,* 509 F. 2d 652 (1st Cir. 1974), organization of gay students was regarded as representing " 'the associational activity unequivocally singled out for protection in the very "core" of association cases decided by the Supreme Court". And in *Acanfora v. Board of Education of Montgomery County,* 491 F. 2d 498 (4th Cir. 1974), the appellant-teacher's public statements were regarded as protected by the First Amendment in that " 'There is no evidence that the interviews disrupted the school, substantially impaired his capacity as a teacher, or gave the school officials reasonable grounds to forecast that these results would flow from what he said.' "

The *Singer* court has declared *Bonner* and *Acanfora* "factually distinguishable" in that "[n]either involved the open and public flaunting or advocacy of homosexual conduct."

Although the Civil Service Commission had argued that a *rational basis* for Singer's dismissal was supplied, in part, by the "substantial publicity in which he was identified as an employee of EEOC", the court's opinion does not deal with this allegation as distinct from the advocacy of his social philosophy.

In short, the *Singer* court has ratified the administrative decision to dismiss this employee, without specifically deciding which aspects of his conduct constitute a sufficient basis for the conclusion that his continued employment would impair the efficiency of the agency. The court has failed to provide a framework for a determination of unsuitability—and has failed even to draw lines in this particular case.

The Ninth Circuit court's opinion lists eight "specific acts" which constitute the Commission's evidence of *immoral and notoriously disgraceful conduct,* without indicating which of these acts might justify dismissal.

Item (7), for example, includes the statement that Singer

□ continued on facing page

"displayed homosexual advertisements on the windows of his automobile" and Item (5) states that he received extensive publicity as a result of his application for a marriage license. Item (1) includes the information that, at a previous job in San Francisco, Singer had kissed another male in the company cafeteria.

The court does not indicate which of these acts, individually or in combination with any of the other acts, would supply grounds for termination — or whether it is the *cumulative* effect of the eight items that supplies the necessary grounds.

By calling attention to the limited employment rights of probationers, by emphasizing the "narrow" scope of judicial review, by stressing the difficulty of balancing the competing claims of government efficiency and First Amendment rights of expression, by reading the Commission's evidence of advocacy in a more favorable light than Singer's denial that such advocacy implicated the agency—the court has taken the easy way out, passively affirming the actions of other adjudicators, and failing to come to terms with any rational standard for determining "suitability."

Having acknowledged the principles of *Norton, Gayer,* and *S.I.R.,* the court has affirmed that there must be a "reasonably foreseeable, specific connection" between an employee's "potentially embarrassing conduct" and the efficiency of the service. In fact, the *Singer* court quotes Norton for the rule that an "unparticularized and unsubstantiated conclusion that such possible embarrassment threatens the quality of the agency's performance is an arbitrary ground for dismissal."

Here, however, although the Commission has extensively "particularized" its conclusion, it does not appear to have documented the "specific connection" which must be shown.

The Current Status of Employees' Rights

Under new guidelines issued on July 3, 1975, disqualification from federal employment, when based on *notoriously disgraceful conduct,* "is warranted only when the notoriety accompanying the conduct can reasonably be expected to adversely affect the person's ability to perform his or her job or the agency's ability to carry out its responsibilities."

According to a *United States Law Week* summary (44 LW 2032), "the guidelines define notoriously disgraceful conduct as that conduct which is shameful in nature and is generally known and talked of in a scornful manner. In most instances, the presence of notoriety and public censure would be the prime consideration in making an adverse finding rather than the shameful conduct itself."

These guidelines, announced after the *Singer* case had been decided by the district court, officially recognize that the courts "require that persons not be disqualified . . . solely on the basis of homosexual conduct . . . [and that] . . . while a person may not be found unsuitable based on unsubstantiated conclusions concerning possible embarrassment to the Federal service, a person may be dismissed or found unsuitable . . . where the evidence established that such person's sexual conduct affects job fitness."

The "new" guidelines thus essentially re-state the rulings in the cases cited by the *Singer* court. The court realized this, commenting: "We do not imply that the amended regulations and guidelines would require a different result under the facts of this case." □ *continued adjoining column*

"The facts of this case" are diverse and complex, as First Amendment cases are likely to be. However, as ACLU Legal Director Melvin L. Wulf has stated, the petition for review "gives the [Supreme] Court the opportunity to announce that, no matter what the constitutional status of actual sexual conduct, the First Amendment still protects the right of homosexuals to try peacefully to secure public support for their views about homosexuality, to influence public attitudes toward homosexuals, and to advocate changes in the law." —*Susan Bonine*

...IN THE COURTS

continued from page 29

Filmmaker found in violation of Mann Act

The Tenth Circuit Court of Appeals has ruled that, where a filmmaker transports a woman across state lines for the purpose of committing filmed sexual acts for pay, his action constitutes a violation of the Mann Act. *U.S. v. Roeder,* 526 F. 2d 736 (10th Cir. 1975). The court rejected Roeder's argument that the nature of the interstate trip—to make a movie, rather than to promote "the white slave business"—exempted his action from liability under the Act.

The Mann Act (18 U.S.C.A. §2421 et seq.) prohibits the knowing interstate transportation of "any woman or girl for the purpose of prostitution or debauchery or for any other immoral practice . . . ."

Distinguishing this case from *Mortensen v. U.S.,* 64 S. Ct. 1037 (1944), in which prostitution was not "an integral part" of a vacation trip provided for two prostitutes, the court here said "the acts could not be divorced from the movie making [and that] This makes it sufficient to bring appellant within the Act."

(The trial court had defined *other immoral purposes,* the term used in the indictment, as having "no broader meaning than the term 'prostitution'.")

Federal court upholds state marriage law

The 1971 marriage of two Minneapolis men has been declared invalid by a federal district court. *McConnell v. Nooner,* et al, __ F. Supp. __ (D. Minn., April 19, 1976). The court's opinion affirms the decision in *Baker v. Nelson,* 191 N.W. 2d 185 (1971), in which the Minnesota Supreme Court held that state law " 'does not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited' ".

The instant case is based on the claim by petitioners James Michael McConnell and Richard John (Jack) Baker that their marriage entitled McConnell to Veterans Administration benefits allowed to a dependent spouse. The case also involves the petitioners' contention that the Internal Revenue Service should permit their filing of joint income tax returns.

Judge Earl R. Larson has ruled that, because the validity of the marriage was denied in *Baker v. Nelson,* supra, "the plaintiffs are collaterally estopped from attempting to relitigate that contention in the present action."

□ *continued on page 35*

REVIEWS...

Comment:

SEX OFFENDER REGISTRATION FOR SECTION 647 DISORDERLY CONDUCT CONVICTIONS IS CRUEL AND UNUSUAL PUNISHMENT

13 San Diego Law Review 391 (1976)

California law provides for police surveillance of sex-crime offenders in fifteen categories—through mandatory registration procedures dictated by §290 of the Penal Code. The list of registrable offenses, which does not distinguish sexual acts in terms of their severity or the circumstances in which they occur, has been challenged as *lacking a rational basis, having a chilling effect* on certain guaranteed freedoms, and—as applied to disorderly conduct convictions—*constituting cruel and unusual punishment.*

Jerry D. Blair's law review "comment" focuses on the *unusual punishment* aspect of the argument for abolition of mandatory registration of §647(a) offenders: those individuals, primarily homosexual, convicted of "lewd or dissolute conduct."

Blair's thesis relies on the *incongruity*—or disparity—between the registration requirement itself and a number of legislative and judicial developments in present-day California law, specifically: a) the fact that private, consensual homosexual conduct has been decriminalized; b) the judicial recognition that §290 serves a punitive rather than a "public safety" function; and c) the *Anderson-Lynch* "doctrine," which requires a close look at sanctions for criminal conduct.

"... *People v. Anderson* [100 Cal. Rptr. 152, *cert. denied,* 406 U.S. 958 (1972), a capital punishment case] and *In re Lynch* [105 Cal. Rptr. 217 (1972), striking down the penal code's recidivist provision] establish California's analytic framework for determining whether a sanction violates the cruel or unusual proscription of article 1, section 6. *Anderson* permits the party to argue that the sanction offends contemporary standards of decency. . . . *Lynch* allows a party to claim that the punishment is disproportionate to the offense committed."

Blair applies each of the *Lynch* "disproportionality" standards to the case of §647(a) offenders.* Where *Lynch* requires an examination of "the nature of the offense and the offender with regard to the degree of danger both present to society", Blair points out that §647 offenses are victimless, non-violent acts. "The solicitation portion of 647(a) is no more than a 'request' which has been deemed undeserving of first amendment protection."

Where *Lynch* provides for a comparison "with other penalties for different offenses in the same jurisdiction", Blair shows that prostitution offenses under §647(b) are not covered by §290. Generally, he concludes, although solicitation is equally an element of prostitution, police officers have "reserved" §647(a) for homosexuals—in part, *because* it entails registration. Thus, abuses in police discretion and prosecutorial discretion combine with legislative discrimination, in placing a more severe sanction on the homosexual than on other sex offenders—including those convicted of forcible oral copulation and of sexual misconduct with children.

Finally, regarding the *Lynch* criterion of comparison "with the punishments prescribed for the same offense in other jurisdictions"—to determine what punishment might be considered *usual*—Blair reports that only Arizona has a comparable registration requirement.

Blair's analysis is a thorough and lucid presentation of the view that §290 is constitutionally defective, at least as applied to *disorderly conduct* offenses. For attorneys committed to demonstrating the extent to which gay people are legally harassed, the view that §290 constitutes cruel and unusual punishment is an important collateral argument to the position that §647(a) violates the right to due process on *vagueness* grounds.

* *"Every person who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view is guilty of a misdemeanor."*

THE FORGOTTEN SEX: LESBIANS, LIBERATION AND THE LAW

by Susan Elizabeth [Reese]

11 Willamette Law Journal 354 (1975)

The basis of lesbian-feminism is the view that lesbians are doubly victimized: by the phenomenon Reese calls "institutionalized homophobia" — and by "the lower value placed upon women" in society and under the law.

At the core of "The Forgotten Sex" is Reese's resentment that "society often avoids the fact that lesbians exist at all, much less that they should be considered seriously." Her article demonstrates that, indeed, legal acknowledgement of the lesbian has been slow to develop, and that it has developed primarily in the context of the women's movement—*despite the fact* that the lesbian's social position is unique: "Her life fundamentally excludes men, freeing her from the roles and behavior patterns assumed by women who see their lives principally in relationship to men."

Reese accounts for lesbians' "invisibility" in a number of ways, including the suggestion that "while many sociologists regard male homosexuality as an observable sociological phenomenon, they tend to view lesbianism as the emotional problem or maladjustment of a particular individual and do not regard it as an occurrence of sociological significance."

The increasing divorce rate appears, in Reese's discussion, to be a major reason for the increasing legal visibility of "the forgotten sex" (women) and of lesbians in particular, because divorces involving children lead to custody disputes in which the parents' sexual morality — especially the mothers' — may be at issue. Reese concludes that "the majority of courts handle [such cases] with awkwardness, hostility and distaste". her survey of the opinions in these custody cases is most interesting. —*S.B.*

—In the next issue of the SLR, the *Reviews and Articles* feature will present a bibliography of law review articles of special interest to those studying or involved in the area of sexual law.

—Throughout the year we will alternate this feature with occasional *Book Reviews* or *Summaries* of law articles or comments.

continued from page 25

American Bar Association Positions on Sex Laws

consensual sodomy. These laws are repeatedly cited to justify discrimination against and harassment of gay people, even when they are not directly enforced themselves. In the early 1970's, therefore, various persons and groups began working within the various divisions—called "Sections"—of the American Bar Association for the adoption of resolutions urging the repeal of laws prohibiting any form of private, adult consensual sexual conduct. The first

New York Attorney *E. Carrington Boggan* is the Chairperson of the Equal Protection Committee of the American Bar Association Section of Individual Rights and Responsibilities. He will be a regular contributing writer to the *SexuaLawReporter.*

ABA Section to adopt such a resolution was the Young Lawyers Section. Subsequently, similar resolutions were adopted by the Law Student Division; the section of Individual Rights and Responsibilities; and the Criminal Justice Section. In 1973, a similar resolution was also adopted by the Assembly of the ABA, which is the body composed of all members attending the annual meeting.

Before the Criminal Justice Section would adopt the resolution, it had amended it to include the phrase "non-commercial" before the words "consensual sexual conduct," so that prostitution would not be included within the scope of the resolution. This amendment was incorporated in the version of the resolution adopted by the Assembly and by the Section of Individual Rights and Responsibilities, the two divisions which presented the resolution to the ABA House of Delegates, the official policy-making body of the Association. The resolution was adopted at the ABA 1973 Annual Meeting in Washington, D.C. As finally adopted, it reads as follows:

> *Resolved,* that the legislatures of the several states are urged to repeal all laws which classify as criminal any form of non-commercial, consensual sexual conduct between adults, saving only those portions which protect minors or the public decorum.

While the 1973 resolution excluded from its scope commercial sexual conduct—prostitution—subsequently, a resolution which would urge decriminalization of prostitution has twice been presented to the ABA House of Delegates by the Section of Individual Rights and Responsibilities, and the resolution has also been supported by the Criminal Justice Section. It has failed so far to pass in the House of Delegates, *although by only two votes* at the 1976 ABA Midyear Meeting in Philadelphia.

On the question of affirmative legislative protection against discrimination for gay people, the ABA Section of Individual Rights and Responsibilities has adopted a resolution calling upon Congress and the state and municipal legislative bodies to enact legislation prohibiting discrimination against homosexuals. This resolution will not become official ABA policy, however, until it is adopted by the ABA House of Delegates. The proposal is scheduled to be presented to the House of Delegates at the 1976 ABA Annual Meeting in Atlanta this August.

A resolution directed more specifically at the legal profession, which would urge that there be no discrimination based on sexual preference in admission to law schools and to the bar, was adopted several years ago by the ABA Law Student Division and the ABA Section of Individual Rights and Responsibilities, but has not yet gone to the ABA House of Delegates. The resolution was referred to the Section on Legal Education and Admission to the Bar, which has not yet acted upon it.

—E. Carrington Boggan

Marriage law *continued from page 33*

"The plaintiffs," he said, "are *a fortiori* foreclosed from their assertion of a valid marriage under Minnesota law, since they were the plaintiffs in the State action which settled the issue adversely to their present claim" — and which found, at the same time, no violation of constitutional rights in the state's prohibition of same-sex marriage, under M.S.A. chapter 517.

The judge stressed the finality of the state supreme court's decision, stating: "Respect for one definitive ruling that the plaintiffs cannot be married — at least in Minnesota — is as necessary as respect for one definitive ruling that a given patent is invalid."

SEXUALAWREPORTER

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EDITOR'S COLUMN

The Supreme Court's disposition of the Virginia sodomy law case is a retreat from its commitment to the right of privacy. It is also a retreat from the Court's obligation to provide direction to lower courts, to law enforcement agencies, to legislative bodies, and to the public.

The March 29th action, in which the U.S. Supreme Court affirmed a lower federal court's decision upholding the Virginia sodomy statute, was clearly a disappointment to the gay community and to those of us who have labored for reform of antiquated and repressive laws restricting the sexual freedom of consenting adults.

The Court's action was also a jolt to many who have never seriously thought of homosexuality in legal terms, but who now recognize that the Court's failure to confront the issue is a disservice to everyone. The *New York Times,* for example, published three major features within five days, in which the Court's position was criticized. National news commentators gave the decision "prime time" attention, yet were unable to say exactly what the *Doe* case really means, beyond the conclusion that states are not required by the decision to pass or enforce similar laws.

Doe v. Commonwealth's Attorney, 403 F.Supp. 1199, 2 Sex.L.Rptr. 2, was an action commenced in Virginia to restrain prosecution of that state's sodomy law on the grounds that, as applied to active and regular homosexual relations between adult males, the statute violates Fifth and Fourteenth Amendment rights to due process, the First Amendment right to freedom of expression, First and Ninth Amendment rights to privacy, and the Eighth Amendment proscription of cruel and unusual punishment. The lower court majority held that "[I]f a State determines that punishment therefor, even when committed in the home, is appropriate in the promotion of morality and decency, it is not for the courts to say that the State is not free to do so"; that the law is "simply directed to the suppression of crime" and thus rationally supportable; that the State is "not required to show that moral delinquency actually results from homosexuality"; and that "the longevity of the Virginia statute does testify to the State's interest and its legitimacy."

Some observations are in order. The Supreme Court had four options regarding the appeal: to summarily reverse, to hear oral argument and decide the case on its merits, to summarily affirm, and to refuse to hear the matter for lack of a substantial federal question. It chose the third option and thus, even though the inaction will undoubtedly place a "chilling effect" on future cases in the lower courts, I do not believe it constitutes binding precedent.

In addition, it must be kept in mind that the action was a civil one, seeking a declaratory judgment and restraint of enforcement of the law. No party to the case had been prosecuted for sodomy. Thus, the urgency of an immediate pronouncement by the Court, one way or the other, was not present.

Yet, it is strange that the Court should forestall deciding a question the answer to which is so important in the lives of so many, including at least twenty million gay Americans whose sexual conduct remains legally questionable. And it is disturbing that none of the three high Court dissenters chose to issue a judicial statement as to why the Court should have heard the case.

The Court's abdication of its primary authority and responsibility for adjudging and enforcing the freedom of the people means that the state courts and lower federal courts will continue to make unguided and conflicting rulings on a variety of sexual issues.

It appears that the *Doe* lawyers will petition the Court for a rehearing. We hope that the Court will respond to the widespread strong feeling that the case should be decided on its merits.

—R.M.W.

In the course of preparing an index to SLR's Volume One (1975), we've necessarily realized the extent of incomplete and inconsistent citations which have appeared in our first year's issues. We apologize for any inconvenience caused by editorial negligence, and we hope that the index *(to be available later this summer),* will correct previously-published inconsistencies and will make the cases cited more accessible to our readers.

Because consistency is important—yet space is restricted—we have decided to limit our citations, in this and future issues to those used by the West Publishing Company's National Reporter System. U.S. Supreme Court cases will therefore be cited as, for example, 85 S.Ct. 1678 (1965) rather than 381 U.S. 479 (1965).

Where West citations are not yet available, we will indicate the primary source of our information (*U.S. Law Week* or *Criminal Law Reporter*) and/or the date of the decision. For unreported opinions, we will provide the name of the court and the date of the decision. The annual index will include citations which may not have been available at the time of our first report on a particular case.

Please note, also, that while we call ourselves "SLR" in editorial announcements and subscription notices, we are now *citing* ourselves as __ Sex.L.Rptr. __ .

PUBLISHER'S MEMO

PLAYBOY vote of confidence

The staff of the *SexuaLawReporter* would like to acknowledge and express our appreciation to the *Playboy Foundation* for its recent committment to us. Because it recognizes the substantial contribution our publication makes to the field of Sexual Civil Liberties, the *Playboy Foundation* has agreed to print this and subsequent issues of the SLR.

We thank the *Playboy Foundation,* particularly Mr. Burton Joseph and Ms. Margaret Standish, for this vote of confidence and accord.

New brochure available

Through the generosity of the *Playboy Foundation,* a four-page brochure indicative of the articles published during the SLR's first year is now available and will be distributed free of charge. Subscribers are invited to submit names and addresses of anyone they feel would be interested in subscribing to the *SexuaLawReporter.* Contact Circulation Manager at our Los Angeles office.

Ending discrimination against lesbians and gay men —A Report

The publisher recommends a 111-page report containing a collection of eighteen ordinances now in effect in municipalities around the nation which prohibit discrimination on the basis of sexual orientation. Available at $5.00 from *Gay Community of Concern,* P.O. Box 8265, Stanford, CA 94305, this document also contains letters and statements by various religious, professional and educational organizations in support of equal protection for gay persons.

SEXUALAWREPORTER

Volume Two, Number 4 ISSN 098-2423 July / August 1976

"Lewdness" What Does It Mean? Survey and Analysis

LEWDNESS IS A LEGAL CONCEPT, derived from the common law. It is characteristic of certain sexual conduct — difficult to specify — which may be unlawful under a given criminal code, anti-social in the eyes of a particular judge, immoral in the experience of an individual police officer, all of these — or "none of the above."

A cynic, having read dozens of opinions which construe the term, is likely to suggest that *lewdness* is merely what's left over after the "real" sexual offenses have been identified and codified. For example, *adultery, prostitution,* and *crimes against nature* are usually specified as distinct criminal offenses and are therefore prosecuted as such, rather than as *lewdness.*

Even when lewdness is linked with roughly synonymous terms such as *lascivious, indecent, obscene,* or *unnatural,* its meaning remains problematical. On the one hand, the word has little vernacular use (except perhaps in a humorous context); on the other hand, it carries the weight of its common law origins and the multiple connotations acquired through interpretation by the courts.

In fact, lewdness has no universally accepted definition. "Open lewdness" — the offense in most of the cases cited below — has been defined as "conduct which, by its openness and notoriety, tends to affront the public conscience and debase the community morality." *Everett v. Commonwealth of Virginia,* 200 S.E.2d 564 (1973). But such a definition only defines *openness,* leaving the concept of *lewdness* unclear.

On many occasions, lewdness has been described as a quality "relating to" or "involving" certain sexual acts, but it is not an act itself. Particularly when it relates to nothing more tangible than the word *conduct,* the issue of unconstitutional vagueness is frequently raised by defense attorneys.

In the report which follows, we examine several patterns of judicial response to the contention that laws proscribing *lewdness* or *lewd conduct* are void for vagueness.

Sexual Conduct and Due Process

VAGUENESS IS ONE OF A NUMBER OF GROUNDS commonly relied on for the assertion that a given statute is unconstitutional. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.,* 46 S.Ct. 126 (1926). Thus, the contention that a particular lewdness law is *vague* would be based on the argument that the defendant in a given case could not have known that his solicitation for sodomy, for

□ *continued on page 42*

In the Courts:

USE OF NUISANCE LAWS IS WIDELY DISPUTED

The scope of public nuisance laws — specifically, their application to the exhibition of adult magazines and films — has been reviewed in several state courts within the past year. Most recently, the decision of the Alabama Supreme Court (upholding such application) has been denied certiorari by the U.S. Supreme Court (44 LW 3544); the California Supreme Court has *approved* the regulation of obscene material under nuisance laws; and the Michigan Supreme Court has *reversed* a finding that nuisance law is applicable to films portraying sexual acts.

In Alabama, the proceedings occurred under the Red Light Abatement Act (Tit. 7, §1091 et seq., Code of Alabama 1940, Recompiled 1958) — which defines as a public nuisance any place where "lewdness, assignation, or prostitution is conducted, permitted, continued, or exists". The court in *General Corporation v. State ex. rel. Sweeton,* 320 So.2d 668 (1975) has found that "from the broad language of [the statute] there is no indication of any legislative intent to either include or exclude its application to obscene material. Controlling here is the fact that the [Red Light law] has been construed as being merely declaratory of the common law ... and, as previously noted, acts at common law contrary to public morals were considered as public nuisances and subject to abatement as such."

Under a nearly identical law, the Michigan Supreme Court has held that the state's nuisance statute "was intended to apply to houses of prostitution and not motion

□ *continued on page 48*

INSIDE

Administrative Rulings:

Court Cases:

Features:

IN THE COURTS...

Court denies privacy rights where onlooker is admitted

The U.S. Court of Appeals for the Fourth Circuit has ruled that the right of marital privacy is waived, relinquished, or dissolved, when a couple "admits strangers as onlookers" to sexual activity between them. Accordingly, in *Lovisi v. Slayton,* __ F.2d __ (4th Cir., May 12, 1976), the petitions for writs of habeas corpus have been denied and the convictions of sodomy affirmed.

Where Margaret Lovisi had performed fellatio upon her husband in the presence of another man who had engaged in sexual activity with them on three occasions, the Lovisis were charged with violation of the Virginia "crimes against nature" law (Va. Code Ann. §18.1-212). As indicated by Judge Craven's dissenting opinion, "In order to deny the Lovisis their constitutional right to be let alone in their conduct with each other, the court has amended the indictment in the state court so as to charge the Lovisis with lewd and lascivious behavior in the presence of another and indecent exposure." Judge Craven adds: "I agree that they are guilty of both offenses, but I believe this court has not the power to validate convictions of offenses not charged."

The lower court's ruling, at 363 F.Supp. 620 (E.D. Va. 1973), was based on the judge's finding that the Lovisis' right of privacy had been relinquished through the "careless" exposure — to Margaret Lovisi's young daughters — of erotic photographs in which the couple appeared.

The appellate court has ruled that "[w]hat the federal constitution protects is the right of privacy in circumstances in which it may reasonably be expected, but that once onlookers have been accepted . . . they [the married couple] may not exclude the state as a constitutionally forbidden intruder."

In an "addendum" note regarding the U.S. Supreme Court's summary affirmation of the decision in *Doe v. Commonwealth's Attorney,* __ S.Ct. __ (March 29, 1976), the court of appeals majority opinion (by Chief Judge Haynsworth) has concluded that "[i]n upholding the statute as applied to homosexual acts between consenting adults in private places, the Supreme Court necessarily confined the constitutionally protected right of privacy to heterosexual conduct, probably even that only within the marital relationship."

Judge Winter's dissent argues, however, that "the basis for the Supreme Court's conclusion [in *Doe*] is necessarily obscure because it was unarticulated" — adding: "Of course, we would apply the holding in a case in which Virginia sought to punish consensual homosexual acts between adults, but we decline to go further and speculate whether it constitutes an adjudication, confirming or detracting from the principles on which we and the majority rely, or indicating what we should decide here."

In his dissent, Judge Winters explores the proposition that "existence of the right [of marital privacy] is not conditioned upon secrecy" — despite "connotations of secrecy" carried by the term "marital right of privacy."

Judge Craven also notes the awkwardness of that terminology, stating that "[t]his freedom might be termed more accurately 'the right to be let alone,' or personal autonomy, or simply 'personhood.' " Judge Craven's dissent — in this 5-3 decision — asserts that "it is dangerous to withdraw from any citizen the protection of the Constitution because he or she is amoral, immoral or just plain nasty . . . It is . . . unclear to me why the Lovisis forfeit their right to be let alone in their conjugal relationship because they allowed a third person to be present. The only valid reason I can think of is a moral value judgment that deviant sex is so odious that not even the Constitution may be successfully interposed to protect a husband and wife so despicably disposed. However right the court may be as to morals, I do not believe it to be a proper principle of constitutional law."

New Jersey court rules on gender identity

In a case involving the sexual identity and marital status of a post-operative transsexual, the Superior Court of New Jersey (Appellate Division) has ruled that "where sex differentiation is required or accepted, such as for public records . . . other tests in addition to genitalia may also be important." *M.T. v. J.T.,* __ A.2d __ (March 22, 1976).

The plaintiff, a post-operative male-to-female transsexual, had married the male defendant who was fully aware of the sex-change and who later deserted her, defending his non-payment of support and maintenance on the grounds that she was actually male and their marriage was accordingly void.

The appellate court, affirming the trial court's decision, reviewed evidence and testimony leading to the conclusion that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."

The lower court had relied on expert testimony by the plaintiff's physician, by a psychologist from the Johns Hopkins University Hospital gender identity clinic, and by a specialist in behavioral therapy and sexual dysfunctions. The testimony established that transsexualism is "probably a combination of neurological, chromosomal and environmental factors"; that "a person's sex or sexuality embraces an individual's gender, that is one's self-image, the deep psychological or emotional sense of sexual identity and character"; and that a transsexual "in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which will coincide with the person's gender".

The ruling in *M.T. v. J.T.* is founded on the "tacit but valid assumption [that] for purposes of marriage under the circumstances of this case, it is the sexual capacity of the individual which must be scrutinized. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female."

Where these conditions are fulfilled, the court said, "we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's

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identification at least for purposes of marriage to the sex finally indicated.... In so ruling, we do no more than give legal effect to a *fait accompli,* based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality."

Employee found victim of sex discrimination

In a decision which expands the application of the Equal Employment Opportunity Act, a federal district judge has ruled that "the retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII". *Williams v. Saxbe,* __ F.Supp. __ (D.C.D.C., April 20, 1976).

Judge Charles R. Richey reasoned that "the conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."

In a much-discussed footnote, the judge ruled that "a finding of discrimination could be made where a female supervisor imposed the criteria of the instant case upon only the male employees in her office. So could a finding of discrimination be made if the supervisor were a homosexual. And, the fact that a finding of discrimination could not be made if the supervisor were a bisexual and applied this criteria to both genders should not lead to a conclusion that sex discrimination could not occur in other situations outlined above."

Sexual solicitations held to constitute "harassment"

A series of requests for cunnilingus has been held by the Superior Court of Pennsylvania (Philadelphia District) to constitute *harassment* under 18 Pa.C.S. §2709. Charges of *criminal solicitation* and *criminal trespass* had previously been dismissed, in *Commonwealth v. Duncan,* (March 29, 1976).

The episode occurred during early morning hours at a university dormitory lounge where the defendant, not a student, approached the prosecutrix with three or four requests which she refused.

Where the law proscribes "a course of conduct [or repeated acts] which alarm or seriously annoy [another] person and which serve no legitimate purpose", the court found that "[h]ad appellant accepted the initial rebuttal and not persisted in his efforts to persuade the young woman, clearly no crime would have been committed".

Colten v. Kentucky, 92 S.Ct. 1953 (1972) — a disorderly conduct case — is cited for circumstances in which the petitioner "had not been undertaking to exercise any constitutionally protected freedom, but rather appeared to have as his purpose causing inconvenience and annoyance."

Here, said the *Duncan* court, the harassment law was enacted "to extend to the *individual* the protections which have long been afforded the general public under disorderly conduct and breach of the peace statutes.

In three dissents, the majority's interpretation of the statutory phrase "course of conduct" is disputed.

Discriminatory enforcement found unconstitutional in prostitution case

Where the Oakland (California) Police Department has been shown to systematically arrest substantially more females than males under the state prostitution law, the First Appellate District of the state Court of Appeal (Division 2) has found "invidious discrimination which is prima facie invalid under the equal protection clause." *People v. Superior Court,* __ Cal. Rptr. __ (March 26, 1976). The decision here—in an extraordinary writ proceeding—affirms the finding of the Alameda County Superior Court which was (in turn) based on a municipal court proceeding against Cynthia Hartway, et al, real parties in interest.

The issue has been, first, whether sex-discriminatory prosecution of females is shown and, second, whether such discrimination has a rational basis and/or is required by a compelling state interest.

Preliminarily, each of the courts has found §647(b) of the California Penal Code facially sex-neutral (and constitutional) in that it applies to *every person* who engages in prostitution.

At a municipal court hearing on a pretrial motion to dismiss, testimony had indicated "a substantial statistical imbalance in arrests, quarantine and noncustody cases" — involving the use, for example, of 20 times more male decoys than females.

The prosecution had countered these statistics with the argument that the discrimination had a rational basis involving a permissible distinction between *prostitutes* and *customers,* rather than an impermissible distinction between the sexes.

"It is apparent," said the Court of Appeal, "that the municipal court fell into error in accepting the prosecution's argument that an enforcement emphasis on the person profiting from the crime did not create a suspect classification. The superior court, on the other hand, in viewing the same evidence, recognized that in commerce there are buyers as well as sellers, and in looking beyond the label of profiteer, perceived that the label could not obscure the result of the enforcement practice, which, in a statute directed to every person, clearly amounted to discrimination against women on the basis of their sex.

"Once the suspect classification has been demonstrated, the justification which must be shown by the prosecution for its enforcement practices is not a reasonable relationship between the classification and the permissible objects of the statute ... but a compelling interest that necessitated the discriminatory enforcement.... Nothing in the record supports such a contention."

Finally, the Court of Appeal overruled the Superior Court's finding that the word "solicits" — as used in the statute — is unconstitutionally vague.

Massage parlor law is found valid

In *Cullinane v. Geisha House, Inc.* __ A.2d __ (March 22, 1976), the District of Columbia Court of Appeals has ruled that a statutory prohibition of cross-sexual massage is constitutional. The appellate decision is a reversal of the trial court's finding that D.C. Code 1973, §47-2311 violates due process and equal protection rights.

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continued from 39

Cullinane relies on a number of recent cases in which similar ordinances have been challenged, with the U.S. Supreme Court dismissing for want of substantial federal questions. Cited are *Smith v. Keator,* 95 S.Ct. 613 (1974); *Rubenstein v. Cherry Hill,* 94 S.Ct. 3165 (1974); and *Kisley v. City of Falls Church,* 93 S.Ct. 237 (1972). The court points out that its action here parallels the decisions in *Colorado Springs Amusements, Ltd. v. Rizzo,* 524 F.2d 571 (3rd Cir. 1975), 2 Sex.L.Rptr. 13, and in *Hogge v. Johnson,* __ F.2d __ (4th Cir. 1975) — petition for certiorari filed in each of these cases.

The instant ruling implies that no "fundamental right to pursue a legitimate occupation" is infringed by the statute; that no suspect gender-based distinction (between male and female operators) has been created; that there is no impermissible and irrebuttable presumption created as to criminal activity resulting from cross-sexual massage; and that the statute does not discriminate invidiously through its application to employees of licensed massage parlors only, while other masseurs and masseuses are excluded from coverage.

Florida and Pennsylvania construe "lewdness" laws

The Florida Supreme Court has held that "there must be more to constitute 'open and gross lewdness and lascivious behavior' " than the fondling of one man by another, in a gay bar. *Campbell v. State,* __ So.2d __ (March 31, 1976). The appellant, a waiter, had "fondled the fully-clothed [customer] in the pubic area for some five seconds with his right hand while holding aloft a tray full of glasses with his left hand."

The incident was witnessed by two local police officers assigned to visit gay establishments during a Fourth of July "homosexual enclave" in Pensacola.

Ruling that "the conviction cannot stand because the proven conduct does not constitute a crime" under the *open lewdness* portion of the statute (Section 798.02), the court found "it is not necessary to reach the issue of constitutionality [on vagueness grounds]."

Based on the construction of the law as applied in *Pitchford v. State,* 61 So. 243 (1931), the trial judge here had instructed the jury that the conduct alleged — to constitute the crime of open and gross lewdness — " 'must be extremely indecent, immoral, and offensive' ".

The appellate court, in reversing, said: "The term 'indecent' is difficult enough of precise definition, but the term 'extremely indecent' must certainly refer to an act more outrageous than that perpetrated by the appellant. Additionally, who in the dark and crowded recesses of the YumYum Tree at 2:00 a.m. on July 6, 1974, was 'offended'?"

Concurring, Justice England "would not only reverse . . . but invalidate" the law because the statutory terms "necessarily cast a net of potential arrests so broad that contemporary persons of common understanding cannot know whether their behavior is permitted or criminal. . . . For example, a lone male who endeavors to relieve the strain of tight undershorts while standing in a public place and being observed by a keen-eyed law official cannot be sure whether he has committed a criminal offense or not."

Dissenting from the view that the law is vague and overbroad, Justice Boyd cites Webster's Dictionary, prior Florida decisions (under other statutes), and the common-law background of lewdness laws. Further, he states, "In my opinion, homosexual activity does not acquire 'constitutional immunity' because it is committed in places frequented by consenting adults."

The Supreme Court of Pennsylvania (Western District) has ruled that the state's *open lewdness* law is constitutionally valid — not vague — as applied to an act of masturbation committed within a car at a parking lot. *Commonwealth v. Heinbaugh,* __ A.2d __ (March 22, 1976). The trial court had granted a motion to quash the indictment, finding the statute (18 C.P.S.A. §5901) unconstitutionally vague.

The statutory offense is "any lewd act which [the actor] knows is likely to be observed by others who would be affronted or alarmed."

The majority of the appellate court ruled, preliminarily, that "when an ascertainable standard is present in a statute, the violator whose conduct falls clearly within the scope of such standard has no standing to complain of vagueness." Next, the court reasoned that "statutes which embody common law definitions have generally survived attacks on the grounds of vagueness." The court noted that the open lewdness statute is a verbatim adoption of the corresponding provision of the American Law Institute Model Penal Code, and that the comment to that section of the model code "make[s] it clear that the drafters intended to codify the pre-existing common law" by prohibiting " 'gross flouting of community standards in respect to sexuality or nudity in public.' "

Dissenting, Justice Manderino has asserted that "[t]he result of the majority's analysis is that a vague statute, one which gives no reasonable notice of the prohibitive conduct, is held constitutional through the application of a vague common law standard, which gave no reasonable notice of the prohibitive conduct. . . . The majority . . . has not construed the word lewd in the light of any past judicial decisions which can be said to have converted that which was vague in the beginning to that which is now clear."

Anal searches may violate inmates' rights

In ruling on the permissibility of anal searches at Trenton (New Jersey) State Prison, a federal court has considered "the extent to which [security] interests are furthered by anal (rectal) examinations and the extent to which the inmate's limited but nevertheless existent constitutional rights should be protected." *Hodges v. Klein* __ F.Supp. __ (D.C.N.J. April 30, 1976).

Following the issuance of a temporary restraining order enjoining anal searches within the maximum security area, the court conducted hearings which have resulted in findings of fact and conclusions of law applicable to the entire prison population.

Judge Clarkson S. Fisher's opinion cites *Bonner v. Coughlin,* 517 F.2d 1311 (7th Cir. 1975) for the proposi-

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tion that a prisoner's "surrender of privacy is not total and that some residuum meriting the protection of the Fourth Amendment survives the transfer into custody." The court here thus concludes that "prisoners are protected against *unreasonable* search and seizures and do have a qualified right to privacy."

"Strip searches" *without* anal inspection are held within the discretion of prison officials — and may clearly be reasonable after contact with visitors (when contraband may have been passed). However, there is "no doubt that the state has no interest in requiring anal examinations before or after a segregated inmate is moved within the segregation area of anywhere in the prison while under escort or observation."

The court notes as "significant" the fact that there had been no wide-spread anal secreting of contraband (such as narcotics or bullets). Also noted is inmates' testimony that anal inspection is "degrading, dehumanizing and abusive."

The opinion in *Hodges* provides useful citations to cases on prisoner's rights, generally. As to body searches, *Daughtery v. Harris,* 476 F.2d 292 (10th Cir. 1973), *cert. denied* 94 S.Ct. 112 (1973) is cited for particular circumstances in which rectal searches were held "necessary and reasonable" and conducted under sanitary conditions by medical personnel.

Evidence rule upheld in appeal of rape conviction

Upholding 1974 amendments to the Evidence Code, a California appellate court has concluded that the "relevance of past sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of her consent to a particular act of sexual intercourse with the defendant is slight at best. The historical rule allowing the evidence may be more a creature of a one-time male fantasy of the 'girls men date and the girls men marry' than one of logical inference." *People v. Blackburn,* __ Cal. Rptr. __ (Court of Appeal, Second Appellate District, Division 1, March 29, 1976).

The defendant argued that Evidence Code section 1103 deprived him of his due process rights in making inadmissible *reputation* evidence and evidence of *specific instances* of sexual conduct with others — unless these issues are raised by the prosecution or the victim's testimony. The court ruled such evidence — as used to prove consent — would be of "limited probative value", and that the new evidence code provision is no more restrictive than rules regarding hearsay, opinion evidence, and privileged communications. These exclusions from admissibility, the court said, "are deemed incorporated within the definition of a fair trial."

Furthermore, the provision is applicable only to the question of *consent* and "does not bar evidence of sexual conduct of the victim or her cross-examination concerning that conduct to attack her credibility".

The court also rejected Blackburn's contention that E.C. section 782 — regarding offers of proof — is unconstitutionally vague in lacking a standard of "sufficiency" of the offer — thereby denying privilege against self-incrimination. Here, where the proof offered concerned only evidence unrelated to the alleged rape, it "could not conceivably have tended to incriminate defendant."

☐ *more Court News on page 47*

Administrative Rulings...

Illinois insurance rule forbids sexual discrimination

A new rule of the Illinois Department of Insurance Regulations places a ban on discrimination based on sex, sexual preference or marital status in state insurance practices. Rule 26.04, effective July 1, 1976, prohibits discriminatory treatment in terms and conditions of insurance contracts as well as in underwriting criteria of insurance carriers.

Prohibited practices include among others: treatment of married persons that contrasts with that of those who reside with another person of either sex not related by blood; denial of policy riders because of sex, sexual preference or marital status; and offering dependent coverage to wives of male employees while denying such coverage to husbands of female employees.

This action follows recent adoptions of similar regulations by insurance commissioners in the states of California (2 Sex.L.Rptr.17) and Wisconsin (2 Sex.L.Rptr.30).

L.A. Civil Service Commission updates job criteria

On May 7, 1976, the City of Los Angeles Civil Service Commission unanimously approved an amendment to the city's hiring standards which, among other things, removed homosexuality as a disqualifying factor under the city's employment medical criteria. The section which was deleted formerly read: "The causes for rejection [include]: Overt homosexuality or other forms of sexually deviant practices such as exhibitionism, transvestism, voyeurism, etc."

The Commission's action comes almost a year after Burt Pines, Los Angeles City Attorney, advised the Commission in a formal opinion that discrimination against homosexuals in city employment was unconstitutional.

In a related action, on May 10, 1976, the Los Angeles City Council, by a 12-1 vote, amended the city's employment policies to include "sexual preference" as a protected classification.

Executive order protects gays in Boston

The term "sexual preference" has been added to the protected classifications in the City of Boston's official policies regarding equal employment opportunity and affirmative action programs.

In an order issued by Mayor Kevin White on April 12, 1976, the city's existing affirmative action guidelines were amended to read: "Immediate action must be taken to assure that salaries and benefits are the same for all employees doing essentially similar work and that sex, race, religion, age, national origin, and *sexual preference* are not factors in placing employees."

☐ *continued on page 47*

continued from 37

"Lewdness" What Does It Mean? Survey and Analysis

example, or his presence at a massage parlor would constitute the offense of lewdness. The defense would include the argument that the challenged statute "subjects [the defendant] to criminal liability under a standard so indefinite that police, court and jury are free to react to nothing more than what offends them" and that the statute "impermissibly delegates to them [police, court and jury] basic policy matters to be resolved on an *ad hoc*, after-the-fact basis with the attendant dangers of arbitrary and discriminatory application." *District of Columbia v. Walters*, 319 A.2d 332 (1974) — citing *Smith v. Goguen*, 94 S.Ct. 1242 and *Grayned v. City of Rockford*, 92 S.Ct. 2294.

The other side of the coin is the principle that, once a statute has been authoritatively construed as applicable to certain conduct, it is no longer "vague" within that jurisdiction. In sex-related law, the leading case is probably *Wainwright v. Stone*, 94 S.Ct. 190 (1973), in which the U.S. Supreme Court considered the challenge to a Florida statute proscribing "the abominable and detestable crime against nature." The court of appeals there had affirmed the granting of writs of habeas corpus (following conviction) on the grounds that the defendants had not had adequate notice that oral and anal copulation were covered by the statute. The Supreme Court said:

"For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940). When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light. *Winters v. New York*, 333 U.S. 507, 514 (1948). This has been the normal view in this Court." *Wainwright* therefore holds that oral and anal copulation constitute "crimes against nature" under Florida law, in that the Florida Supreme Court had so held, since 1921.

Likewise, in the case of lewdness laws, past decisions (within a given jurisdiction) have been held to control current challenges on vagueness grounds. An example can be seen in the evolution of lewdness laws in the District of Columbia.

"Lewdness" in the District of Columbia

In a succession of related decisions, the District of Columbia Court of Appeals has ruled that the phrase *lewd, obscene and indecent* (or *lewd and immoral*) is constitutional when found in a specific context — but unconstitutionally vague when no such context (identifying the offense) is provided.

D.C.Code 1973, § 22-1112(a) established that "[i]t shall not be lawful, for any person . . . to make any obscene or indecent exposure . . . or to make any lewd, obscene, or indecent act". In *District of Columbia v. Walters*, supra, where the defendants had been charged with committing a "lewd, obscene and indecent act" — mutual, homosexual masturbation at a commercial establishment — the court of appeals affirmed the trial court's finding of vagueness. That final clause, it said, "betrays the classic defects of vagueness in that it fails to give clear notice of what conduct is forbidden and invests the police with excessive discretion to decide, after the fact, who has violated the law." As to this defect, the court cites *Papachristou v. City of Jacksonville*, 92 S.Ct. 839 (1972), in which the U.S. Supreme Court held unconstitutional a vagrancy ordinance punishing (among others) "lewd, wanton, and lascivious persons" and "dissolute persons."

The *Walters* court rejected the government's reliance on various cases in which other courts had upheld *lewd or indecent conduct* laws, pointing out that each of the statutes involved in those cases (with one exception) "provided a context in which the words could be given meaning" — e.g., indecent exposure in the presence of a minor, permitting the use of one's sexual parts in a lewd or lascivious manner, etc.

The finding of vagueness in *Walters* is in contrast to two frequently-cited solicitation cases heard by that court — one preceding *Walters* and one following — in which similar language was challenged but upheld.

In *Riley v. U.S.*, 298 A.2d 228 (1973), the court ruled on D.C.Code 1967, § 22-2701, which proscribed solicitations "for the purpose of prostitution, or any other immoral or lewd purpose". In rejecting the charge of vagueness, the court reasoned: a) that solicitation to request another to commit a crime against public decency was a common law offense, b) that the application of the statute must therefore be "limited to solicitations of acts which if accomplished would be punishable as a crime," c) that lewdness has traditionally included homosexual acts and that sodomy is a punishable crime, d) that the statute "has been uniformly and exclusively applied to solicitations for sodomy", and that *therefore*, e) "[b]ecause of our past decisions, appellant had notice that solicitations for 'lewd and immoral purposes' included at the least his solicitation [of a plainclothes policeman] for sodomy. The clarification provided today," the court said, "by expressly limiting 'lewd and immoral' to solicitations for sodomy resolves any remaining vagueness issue for the future."

> "The combination of the two adjectives 'lewd' and 'immoral' does not supply the requisite definiteness to the proscription so that men of ordinary intelligence will know what acts are prohibited." *Morgan v. City of Detroit*, 389 F.Supp. 922 (1975).

Because of a new solicitation law, however, and because of the intervening decision in *Walters*, the possible vagueness of "any lewd, obscene, or indecent sexual proposal" was raised soon after, in *District of Columbia v. Garcia*, 335 A.2d 217 (1975), 1 Sex.L.Rptr. 23.

Relying on the Walters decision that the phrase "any other lewd, obscene, or indecent act" is unconstitutionally vague, the defendants in *Garcia* argued for invalidation of the similarly worded "proposal" clause. The appeals court — reversing the trial court's finding that the two cases were " 'utterly indistinguishable' " — ruled instead that

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"the two clauses are, in our view, clearly distinguishable in terms of constitutional clarity and validity ... [because] the words 'lewd', 'obscene' and 'indecent' ... here are joined with the term 'sexual proposal,' thereby providing a definite context in which the words can be given meaning."

The court determined, preliminarily, that the "proposal" clause should be limited to lewd acts "which if accomplished would be punishable as a crime", then surveyed a variety of sexual offenses which the D.C. Code makes unlawful (adultery, indecent exposure, incest, fornication, seduction, indecent liberties with children, and sodomy) — concluding that three of these, *sodomy, indecent exposure,* and *indecent acts with children,* are "inherently abhorrent" as well as "unnatural and perverted" under all circumstances — and (therefore) "can reasonably be deemed 'lewd, obscene or indecent.' " The proposal clause was thereby construed to be limited in application to solicitation for these three offenses.

The *Garcia,* court, then, saves the constitutionality of the District's solicitation law through a unique rationale which combines elements of the common law with obscurely-articulated principles of judicial interpretation. Conceding that "the common law gives no precise meaning to the words lewd, obscene and indecent but uses them as adjectives of general description", the court has contrived to transfer these adjectives from their legitimate syntactical place in the statute — as modifiers of "sexual proposal" — to a new position in which they function as modifiers of the unidentified acts proposed. On this basis, the court concludes that "[w]hat matters is that the sexual acts proposed are lewd, obscene or indecent and lawfully prohibited by statute, *not the character of the particular words in which the proposal is framed.*" (Emphasis added) Given this rationale, the prior striking down (in *Walters)* of the phrase "any other lewd, obscene, or indecent act" appears a meaningless ruling.

A Survey of Other Jurisdictions

Regardless of the decision ultimately reached in a given case, most courts reviewing lewdness laws have seriously considered the possibility that *lewdness* and *lewd conduct* are terms too vague to meet constitutional standards. When there is no previous ruling to establish meaning (as there was in *Wainwright v. Stone,* supra, on "crimes against nature"), the process of construing the terms usually includes reference to common-law terminology, comparison of the word "lewd" with synonyms appearing in the same statute, and citation to cases in which other courts have attempted to establish a definite meaning for lewdness.

Most often, when a lewdness law is challenged on vagueness grounds, the court exploits that challenge as an opportunity to recite quotations from Black's Law Dictionary and from Webster's — to "prove" the specificity of the word *lewdness.*

Alternatively, or in addition, the court may attempt to justify the uncertainty of the term through the rationalization that "statutes which embody common law definitions have generally survived attacks on the grounds of vagueness." *Commonwealth v. Heinbaugh,* __ A.2d __ (Penna., 1976).

Although a number of recent opinions indicate that the judicial mind is open to change on the question of "lewdness," the fact remains that each finding of an accepted and constitutional meaning tends to increase the likelihood that courts of other jurisdictions will uphold similarly worded statutes as meeting the requirement that "[a]ll are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey,* 59 S.Ct. 618 (1939).

Appellate courts in Illinois, for example, have consistently rejected the contention that the state's lewdness laws are impermissibly vague. Where the Disorderly Conduct Act prohibits the keeping of "a house of ill fame ... for the practice of prostitution or lewdness" — and where the Public Nuisance Act covers "all buildings ... used for purposes of lewdness, assignation or prostitution" — the courts have held that the word "lewdness" is more comprehensive than "prostitution," citing the California case of *People v. Arcega,* 193 P. 264 (1920). The lewdness/prostitution statutes have accordingly been applied, with the courts' approval, to gay baths and to (heterosexual) massage parlors.

The key case in Illinois is *People v. Lackaye,* 109 N.E.2d 390 (1952), a challenge to the "lewdness" portion of the Disorderly Conduct Act, in which the defendant argued that the statutory reference to "prostitution or lewdness" is a reference limited to male-female prostitution, and that homosexual acts in a bath house are not within the scope of the law. The court disagreed, commenting: "Cases cited by the defendant do hold that prostitution is lewdness, but none holds that lewdness is confined to prostitution." The court in *Lackaye* then adopted a part of Black's definition of lewdness — "It includes immoral and degenerate conduct between persons of the same sex" — further equating lewdness with *lust* as defined by Webster's: sexual acts "induced by a degrading passion."

> " ... although the words 'lewdness' and 'indecent' have often been defined, the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than clarify those terms." *State v. Kueny,* 215 N.W.2d 215 (1974).

Lackaye's conviction for *keeping a house of ill fame or place for the practice of lewdness* was upheld on the additional grounds that the sexual acts practiced there were "of the same general class as the illicit acts included in the term 'prostitution.' " The case thus represents the Illinois courts' view that *lewdness* has a meaning which is certain; that it means sexual conduct, either heterosexual or homosexual, which is immoral and degenerate and induced by a degrading passion — which is related to prostitution but which need not include intercourse.

This "definition" of lewdness has been essentially sustained, in Illinois and elsewhere, and the principal holding in *Lackaye* — that lewdness includes homosexual acts — has been relied on in a number of important decisions on the same question: e.g., in *Harris v. U.S.,* 315 A. 2d 569 (1974), finding that a "homosexual health club" is similar to a "bawdy house" under District of Columbia nuisance law; in *State v. Mortimer,* 467 P. 2d 61 (1970), upholding an Arizona law against "lewd and lascivious acts"; and in *State v. Trombley,* 206 A. 2d 482 (1964), upholding a Connecticut lewdness statute.

The Supreme Court of New Jersey has, on several occasions, recognized the lack of precision in the term *lewdness,* remarking in *State v. Dorsey,* 316 A. 2d 689 (1974):

□ *continued on following page*

continued from 43

"Lewdness" What Does It Mean? Survey and Analysis

"Lewdness has been described as conduct of a lustful, lecherous, lascivious or libidinous nature. This definition is pleasantly alliterative but not especially revealing." The court there limited the crime of "private lewdness" to "acts of indecent exposure and to acts tending to subvert the morals of minors."

However, other courts have accepted a looser standard. For example, the Supreme Court of Virginia has adopted Black's definition of lewdness as a common-law offense signifying " 'gross and wanton indecency in sexual relations.' " *Hensley v. City of Norfolk,* 218 S.E. 2d 735 (1975), 2 Sex.L.Rptr. 16. And the same definition appears in *Riley v. U.S.,* supra, where the District of Columbia Court of Appeals adds that:

"A further insight into the common-law meaning of lewd or immoral is given by the definition of a house of ill fame, also known as a bawdy house . . . a place for the convenience of people of both sexes in resorting to lewdness." Thus, where none of the terms involved has a precise statutory meaning of its own, courts may resort to the device of construing various terms *in relation to each other,* as a defense against the charge of vagueness. On this basis, "lewdness" is apparently whatever happens at a "bawdy house" — and a bawdy house is a place where lewdness occurs.

A more critical view of "lewdness" was taken by the federal district court in *Miami Health Studios, Inc. v. City of Miami Beach,* 353 F.Supp. 593 (S.D. Florida 1973), reversed on procedural grounds 491 F.2d 98 (1974), a proceeding under the law prohibiting prostitution, lewdness, and assignation. The federal court ruled there that Florida Supreme Court opinions "have provided no enlightenment with respect to construction of the statute in question, nor has there been authoritative interpretation of the particularly offending phrase ["any indecent or obscene act"]."

> "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." *Grayned v. City of Rockford,* 92 S.Ct. 2294 (1972).

The federal court refused to accept any of the language defining *lewdness* which appears in Florida opinion (and in statute), holding that "the legislature [must] refrain from using such broad language as 'lewdness shall include any indecent or obscene act' when it tells the people of Florida what conduct constitutes a criminal offense" — and ordering that the words *lewdness* and *lewd* be deleted from the lewdness/prostitution statute.

Further support for the vagueness of the word *lewd* came from another federal district court in *Morgan v. City of Detroit,* 389 F.Supp. 922 (E.D. Mich., S.D. 1975), 1 Sex.L.Rptr. 12. After citing a number of decisions in which *lewd* had been defined in such terms as *lustful, dissolute, indecent,* involving *unlawful sexual desire,* or relating to *sexual impurity,* the court concluded that neither "lewd" nor "immoral" has a commonly accepted definition. "[W]hatever definition is accepted," the court said, "the standard is subjective in that whether an act is 'lustful', 'dissolute', 'libidinous', or 'lascivious' depends on the actor's social, moral, and cultural bias. There are no objective standards to measure whether proposed conduct is 'lewd' ".

Perhaps the most important of the court's findings in Morgan, a massage parlor case, lies in the statement that, where "lewd" and "immoral" are each regarded as vague, "[t]he combination of the two adjectives . . . does not supply the requisite definiteness to the proscription so that men of ordinary intelligence will know what acts are prohibited." Thus, in effect, this court would preclude the legislature from using the device most frequently resorted to in *lewdness* legislation: the linking of a series of terms which are essentially synonymous and correspondingly indefinite.

The Supreme Court of Iowa has ruled similarly, in *State v. Kueny,* 215 N.W.2d 215 (1974), noting that "although the words 'lewdness' and 'indecent' have often been defined, the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than clarify those terms." The court continues: "State's argument to the effect the terminology in question is commonly used and has a generally accepted meaning is without merit. . . . [C]ommon usage of the terms has been so generalized as to encompass an infinite variety of behavioral patterns. This in turn has eroded the effective employment of such terms in any statutory enactment, absent an attendant specific definition thereof, as descriptions of proscribed ultimate criminal conduct."

"Lewd Conduct" in California

Section 647, subdivision (a), of the California Penal Code (hereinafter referred to as 647(a)), prohibits both soliciting and engaging in "lewd or dissolute conduct" in a public place. The judicial interpretation of "lewd conduct" in California has taken a different turn from that encountered in most other jurisdictions.

Recent cases have been controlled by *Silva v. Municipal Court,* 115 Cal. Rptr. 479 (1974). The petitioner in that case was charged with "soliciting another to engage in a lewd or dissolute act" and that such solicitation occurred in a public place. Other than the allegation in the complaint just mentioned, for procedural reasons, the First District Court of Appeals knew nothing else of the facts surrounding the alleged solicitation. When faced with the argument that the complaint should be dismissed because the words "lewd or dissolute conduct" rendered it unconstitutionally vague, the court rejected that challenge. Relying upon *In re Giannini,* 446 P.2d 535 (1968), a topless dancer case in which the prosecution used 647(a) to prosecute rather than using an obscenity statute, the *Silva* court held that "lewd or dissolute conduct" as used in 647(a) meant "obscene conduct". The court then held that since it could find no authority that "obscene conduct" was unconstitutionally vague, that this statute and the criminal complaint which incorporated the language of the statute, were not void for vagueness. This was a novel approach for the California appellate courts.

□ continued on facing page

The Petitioner in *Silva* requested a hearing in the California Supreme Court arguing that the *Silva* decision amounted to judicial legislation, that the *Silva* definition of "obscene conduct" was itself unconstitutionally vague, and that the statute was overbroad. Although Justices Mosk and Tobriner were of the opinion that a hearing should be granted, the petition was denied. Thus, the *Silva* standard of "obscene conduct" became the controlling law in California 647(a) cases.

The *Silva* reasoning has been called into question by the Second District Court of Appeal in California in *People v. Williams*, __ Cal. Rptr. __ (2d Crim. No. 28563, June 17, 1976). That case involved a prosecution for *engaging* in "lewd or dissolute conduct" in violation of 647(a). When he instructed the jury, the trial judge stated that: "As used in [647(a)], the words 'lewd' and 'dissolute' are synonymous and mean 'lustful, lascivious, unchaste, wanton, and loose in morals and conduct.' " The municipal court jury returned a verdict of guilty and the defendant appealed to the Appellate Department of the Los Angeles Superior Court. That court reversed the conviction on the ground that the trial court should have instructed the jury using the *Silva* definition of lewd. On its own motion the Second District Court of Appeal reviewed the case, and relying on *People v. Loignon*, 325 P.2d 541 (1958) and *People v. Babb*, 229 P.2d 843 (1951) held that the trial court in *Williams* had given the correct definition of the crime.

> "The people are entitled to know, as specifically and as clearly as possible, what acts they can perform without the threat of criminal prosecution." *Miami Health Studios, Inc. v. City of Miami Beach*, 353 F.Supp. 593 (1973).

The *Williams* court then goes on to explain why it considers *Silva* to be bad law: "In declaring that the phrase 'lewd or dissolute' conduct was not vague or uncertain, the Court of Appeal relied, and we think unnecessarily, on the language to be found in *In re Giannini* (citation omitted), to the effect that the terms 'lewd' and 'dissolute' are synonymous with 'obscene'.

"Of course *Giannini* was in turn dealing with a performance by a dancer and the thrust of *Giannini* was that the performance of a dance before an audience constituted a method of expression which is presumptively protected by the First Amendment and thus must be judged in terms of whether it is 'obscene'."

The *Williams* court goes on to note how the California Supreme Court had itself only two years after *Giannini* overruled that case in *Barrows v. Municipal Court*, 464 P.2d 483 (1970) when it recognized that the California legislature had never intended 647(a) to be utilized by prosecutors in prosecuting such performances. Furthermore, the *Williams* court took exception of the *Silva* definition of "obscene": "The Silva court in equating 'lewd and dissolute' with 'obscene' used the phrases 'grossly repugnant,' 'patently offensive,' 'disgusting,' 'repulsive,' 'filthy,' 'foul,' 'abominable,' or 'loathsome.' All are good descriptive words of 'lewd or dissolute,' but no more precise than those used in *People v. Babb, supra.*"

At this writing petitioner's request for a hearing in the California Supreme Court is in preparation and whereas the petition for a hearing was denied in *Silva*, no doubt the court will grant the hearing in *Williams* in order to resolve the conflict between the First and Second District Courts of Appeal. It seems that the California Supreme Court will ultimately have three options: 1) accept the definition of either *Silva* or *Williams*, or 2) create a new definition to satisfy due process standards, or 3) declare 647(a) unconstitutionally vague.

Conclusion

The Supreme Court of Pennsylvania has commented, in *Commonwealth v. Heinbaugh*, supra, that:

"The broadening of sexual permissiveness which is an undeniable aspect of contemporary American society may have served to shrink the perimeters of community morality, but we have not as yet been reduced to an amoral society totally bereft of standards of common decency. Man is still capable of performing actions which, even by contemporary mores, must be deemed, as at common law, 'indecencies which tend to corrupt the morals of the community.' "

Because "the perimeters of community morality" have changed — while the potentiality for "indecency" remains — it is essential that legislation allow for both of these phenomena. Although the common law may be relied on for the proposition that there exist acts of sexuality which are contrary to the public interest, statutory law should name these acts, specify their context, and provide for enforcement procedures which meet the demands of due process. Failure of the legislature to meet this obligation should result in the courts refusing to re-write the law. Many courts have taken just that position in post-*Miller* opinions, thus forcing the legislatures to act.

— Susan Bonine

LEGISLATION...

Iowa decriminalizes private sexual acts

Iowa has become the sixteenth state in which private sexual acts between consenting adults has been decriminalized. This was accomplished on June 28, 1976 when the Governor signed the general penal code revision (S.F. 85) after two years of debate by the Legislature.

The bill sets the age of consent at fourteen, which is one of the most liberal in the nation. Although the new law will retain penalties for prostitution, bigamy, incest, and indecent exposure, there will be no prohibition of non-commercial sexual solicitations of persons 14 years of age or older.

The law will not, however, become effective until January 1, 1978.

The following states have all enacted laws decriminalizing private sexual acts between consenting adults: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, New Mexico, North Dakota, Ohio, Oregon, South Dakota and Washington.

CORRECTION:

The Legislation article in the last issue (2 Sex.L.Rptr. 31) was inaccurate when it stated that Arkansas had accomplished decriminalization through a specialized bill. Actually, the sodomy repeal in that state occurred when the *general penal code revision* was adopted. — *Ed.*

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—Compiled by Darryl Kitagawa

Court News continued from 41

Homosexuality held cause for discharge

Stating that the Navy "would do well to re-evaluate its stance regarding homosexual conduct in the same manner that other governmental concerns have", a federal district court has nevertheless denied injunctive relief to prevent the *unfitness* discharge of an enlisted man whose service had been "exemplary." An *honorable discharge* (based on unfitness) had been recommended. *Beller v. Middendorf*, __ F.Supp. __ (N.D. Calif., April 15, 1976).

Naval personnel policy calls for mandatory processing for discharge of those "involved in" homosexuality. Secretary of the Navy Instruction [SECNAVIST] 1900.9A provides that "members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential."

The complaint in the instant case alleged breach of Beller's enlistment contract and violation of his rights to privacy and substantive due process. The court found it could not issue an injunction 1) because there had been no showing that Beller's discharge would constitute "irreparable injury," since . . . "he can be fully compensated for his losses if he eventually prevails on the merits of his claim;" 2) because "the law does not support a finding of stigmatization under [the circumstances of an *honorable* discharge]"; and 3) because Beller had not presented proof in support of his contention that his job opportunities would be jeopardized by an unfitness discharge based on homosexuality.

If Beller does *not* succeed on the merits, the court said, "then he can complain of no legal injury by reason of his discharge, since his challenge is to the *fact* rather than the characterization [i.e., unfitness because of homosexuality] of his discharge."

The court noted that "[p]laintiff does not challenge the authority of the Navy to adopt and enforce regulations pertaining to administrative discharge for members engaged in homosexual conduct. Plaintiff's attack . . . is limited to the allegation that the [relevant] definition of proscribed homosexual conduct . . . includes isolated and innocuous conduct . . ."

continued from 48

Use of nuisance laws is widely disputed

In addition to the possible complications already indicated, the *Busch* majority points out that law enforcement officers "are vested with wide discretion to decide whether or not to initiate the kind of formal proceedings such as those instituted in the matters before us." Particularly where the First Amendment is involved, "wide discretion" suggests legal challenges to come.

Finally, it would seem that neither the Alabama nor the California court has come to terms with the frequently-quoted statement in *Grove Press, Inc. v. Philadelphia*, 418 F.2d 82 (3rd Cir. 1969) that "the common-law doctrine of public nuisance . . . may not be used both to define the standards of protected speech and to serve as a vehicle for its restraint."

— Susan Bonine

Executive order *continued from 41*

In an accompanying statement, the mayor guaranteed that: "All employees will be afforded equal opportunity in terms and conditions of employment without regard to sexual preference or personal lifestyle."

White's action is the third such executive order to be issued in this country. New York's former Mayor John Lindsay issued the first executive prohibition of discrimination against gays in 1972. Last year, in a much publicized and controversial order, Pennsylvania's Governor Milton Shapp issued a directive forbidding any discrimination against gays or other sexual minorities by any state department or agency. In all three cases, these executive orders have been issued in jurisdictions in which the state legislatures have specifically refused in recent years to decriminalize private sexual acts between consenting adults. These rebuffs by the legislatures have perpetuated the stigma of criminality which has been the basis and justification for much of the discrimination against gays. The gay community has been forced, therefore, to seek protection in the executive and administrative branches of government, and sometimes, as in the instant case, has been successful.

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continued from 37

USE OF NUISANCE LAWS IS WIDELY DISPUTED

picture theaters where sexual acts are not committed but are portrayed on the screen." *Michigan ex rel. Cahalan v. Diversified Theatrical Corp.*, __ N.W.2d __ (April 1, 1976), reversing the court of appeals decision at 229 N.W.2d 389 (1975), 1 Sex.L.Rptr. 13.

M.S.A. 27A.3801 provides for the abatement of "[a]ny building . . . used for the purpose of lewdness, assignation, or prostitution". The Michigan court surveyed a number of similar nuisance laws, relating these to the Red Light Abatement Acts of the early 1900's — and citing a Nebraska case, *State v. Fanning*, 149 N.W. 413 (1914) for the conclusion that these laws were enacted in order " 'to provide an efficient and prompt means for suppressing the so-called "red light district" in communities that are unwilling to tolerate such a nuisance.' "

The principal issue — as viewed by the Michigan court — is whether the nuisance law, being based on the common law means of suppressing prostitution, is limited to sexual *acts* as distinct from sexual material. It is merely the use of the word "lewdness" — which appears in *both* nuisance and obscenity laws — that opens the door to these recent actions. The Michigan court has now aligned itself with the Illinois court in *People v. Goldman*, 287 N.E.2d 188 (1972), with the New Mexico court in *State v. Morley*, 317 P.2d 317 (1957), and with the Pennsylvania court in *Commonwealth v. MacDonald*, 347 A.2d 290 (1975), 2 Sex.L.Rptr. 15, in deciding against the application of nuisance laws to obscenity.

California law involves a somewhat different set of considerations in that the state penal code includes both "red light" and "public nuisance" provisions which are not (as in most jurisdictions) one and the same.

In *Busch v. Projection Room Theater*, __ P.2d __ (March 4, 1976), the California Supreme Court has ruled that "although the Red Light Abatement Law was not intended to apply to the exhibition of obscene magazines or films, nevertheless the complaint herein does state a cause of action under the general public nuisance statutes." The nuisance statutes do not allude to sexual activity or sexual material, but relate to "[a]nything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons".

In denying the applicability of the Red Light laws, the court cited *Morley*, and *Goldman*, supra, *Gulf States Theaters v. Richardson*, 287 So.2d 480 (La., 1973), and *Southland Theatres v. State*, 492 S.W.2d 421 (Ark., 1973). The court also cited the Michigan case, *Cahalan*, supra — which had not yet been reversed — noting that "[o]n the other hand, the most recent case on the point holds that the term 'lewdness' in Michigan's 'red light' act is broad enough to include the exhibition of films which are obscene under the standards set forth in Miller v. California".

Thus, while the California Supreme Court would agree that abatement of obscene exhibitions is not justified by the traditional nuisance/red light law, it would allow for *exactly the same result* under a different standard, holding in *Busch*, the instant case, that:

" . . . the exhibition of obscene magazines and films is a form of activity which may be characterized as 'indecent' or 'offensive to the senses' interfering with the comfortable enjoyment of life of a 'considerable number of persons' within the contemplation of Penal Code section 370".

Harmer v. Tonlyn Productions, Inc., 100 Cal. Rptr. 576, (Calif., 1972) appears to be a crucial decision. Cited in *Cahalan* as authority for the Michigan Supreme Court's decision, it is also cited by both the majority and the dissenters in *Busch*. The majority has ruled *Harmer* distinguishable "since it involved an action *by private citizens* to enjoin a particular film being shown at the premises in question." Justice Tobriner, dissenting, in a 4-3 decision, has argued:

"The majority contends that *Harmer* improperly analyzed the character of the state interest in regulating the exhibition of obscene matter . . . [in recognizing] a legitimate state interest in regulating the distribution of obscene material to consenting adults. But those decisions [on which *Harmer* was based, e.g., *Paris Adult Theatre I v. Slaton*, 93 S.Ct. 2628 (1973)] merely testify to the outer limits of constitutional state regulation; they do not testify to the actual ambit of California's public nuisance laws. *Harmer* correctly construed the California statutes. The majority cannot rebut that construction by merely noting that, under prevailing constitutional doctrine, the Legislature stands *empowered* to draft more expansive statutes."

Justice Tobriner contends that the nuisance statutes "do not embrace conduct whose tangible effects are limited to a small group of consenting adults" — and that "[b]y permitting . . . a remedy designed for those rare cases where any delay would concretely imperil the public interest — the majority endangers freedom of expression to an extent never before contemplated in this state."

— The fundamental issue raised in these cases should not be obscured by the variations found in the reasoning of the several courts. The issue is whether the civil procedure of abatement is an appropriate remedy to the violation of (criminal) obscenity laws for which other remedies exist. The courts' opinions in these cases, long and complicated opinions, reveal the difficulties involved in establishing procedures to insure that "obscenity" is proved before abatement is permitted. If Justice Tobriner is correct in his judgment that nuisance laws were enacted "for those rare cases where any delay would concretely imperil the public interest", and if the Michigan Supreme Court is correct in citing the view that nuisance laws were enacted to provide "efficient and prompt means" for dealing with public nuisances, then the time element involved in proving obscenity would seem to speak for the argument that the procedure is too cumbersome for the result intended — and that it is unlikely that any legislature *would* have intended the nuisance laws to be applied to the suppression of obscenity.

Furthermore, the finding of obscenity is dependent on whether the given state obscenity law conforms to the *Miller* standards — and whether the *Miller* standards have been properly applied to the nuisance law in question. The fact that no legislature has specifically engrafted *Miller* standards to nuisance (or red light) statutes also speaks for the lack of legislative intent to use the nuisance laws as Alabama and California would now have them used.

□ *please turn back to page 47*

SEXUALAWREPORTER

Volume Two, Number 5 ISSN 098-2423 September / October 1976

Rulings On Abortion Affirm Women's Rights

Characterizing its decision as "a logical and anticipated corollary" to the *Roe* and *Doe* abortion cases of 1973, the U.S. Supreme Court has struck down various sections of a Missouri statute which would have restricted the rights of women seeking first- and second-trimester abortions — and which would have inhibited the professional conduct of physicians treating such women. *Planned Parenthood of Central Missouri v. Danforth,* 96 S.Ct. 2831 (1976).

Provisions requiring spousal consent — or parental consent for minors — were found unconstitutional. In addition, *prohibition* of saline amniocentesis (the most common abortion procedure) was found arbitrary and unconstitutional; and the statute was found to *impermissibly* require preservation of "the life and health of the fetus, whatever the stage of pregnancy" [in the court's wording].

The statutory definition of fetal viability was held acceptable, and a provision requiring consent of the patient was upheld: "The decision to abort, indeed, is an important and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." consequences."

Record-keeping provisions were also upheld.

Justice Blackmun's opinion reiterates the Court's conclusion in *Roe v. Wade,* 93 S.Ct. 705 that the Fourteenth Amendment's "concept of personal liberty and restrictions upon state action" encompass the right of a woman to decide whether to terminate a pregnancy. *Roe* is also cited for the view that: " 'For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician,' without interference from the state."

As to the spousal consent provision, the Court has held that "since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period."

Similar reasoning applies to parental consent for minors, with the Court declaring that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.... Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." Here the Court has emphasized that the invalidation of the consent provision "does not suggest that every minor, regardless of age or maturity, may give effective consent.... The fault with [this section] is that it imposes a special consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction."

Next, in striking down the statutory prohibition of the saline amniocentesis technique, the Court has concluded that "the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks. As such, it does not withstand constitutional challenge."

Finally, where H.C.S. House Bill 1211 required the exercise of "that degree of professional skill, care and diligence to preserve the life and health of the fetus which ... would be required ... in order to preserve the life and health of any fetus intended to be born and not aborted", the Court has ruled this section invalid because it "does not specify that such care need by taken only after the stage of viability has been reached." *(Viability* is here defined as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems".)

In *Bellotti v. Baird,* 96 S.Ct. 2857 (1976), announced the same day as *Danforth,* the Court vacated a federal district court judgment on a Massachusetts abortion law, holding that the district court "should have abstained pending construction of the statute by the Massachusetts courts."

□ *continued on page 59*

INSIDE

IN THE COURTS...

State courts review sodomy laws

The constitutionality of criminal sodomy laws remains a live and frequently litigated issue. State supreme courts in Iowa, New Mexico, and Wisconsin have recently considered challenges to statutes prohibiting sodomy or "sexual perversion."

Each of these decisions involves a conflict between the alleged privacy rights of (unmarried) consenting adults and the validity of state regulation. However, each of the cases is complicated by a fact-situation which includes possible force, i.e., lack of consent.

Thus, the fundamental issue is whether consent may be asserted as a defense under laws which penalize unmarried persons but which would not be applicable to married persons, because of the "marital privacy" doctrine enunciated in *Griswold v. Connecticut.*

Homosexual activity is not addressed directly in any of these decisions, although the U.S. Supreme Court's summary affirmation of *Doe v. Commonwealth's Attorney,* 96 S.Ct. 1489 (1976) has been cited for the proposition that state regulation *is* permissible, except as applied to "the sanctity of the home or the nurture of family life."

Most recently, in *State v. Elliot,* __ P.2d __ (June 25, 1976), the New Mexico Supreme Court has reversed the state Court of Appeals holding at 539 P.2d 207 (1975), 1 Sex.L.Rptr. 34. In reversing, the court has approved various lower court decisions, including *Washington v. Rodriguez,* 483 P.2d 309 (1971), in which "the court expressly and correctly observed that the right of privacy protected by the decision in *Griswold v. Connecticut* [citations omitted] was that of 'the right of privacy of married persons.' " Citing *Doe,* supra, Chief Justice Oman states:

"The United States Supreme Court in a recent case has now resolved the contention repeatedly made in New Mexico and other states that private sexual conduct between consenting adults may not be proscribed by the criminal law of the states . . . . That case involved the constitutionality of a Virginia statute, which, insofar as the question of consent is concerned, is identical with our statute." The Virginia three-judge court's majority is quoted for the view that " 'we cannot say that the statute offends the Bill of Rights or any other of the Amendments and the wisdom or policy is a matter for the State's resolve.' "

The statute upheld in *Elliot* had been repealed prior to the Court of Appeals decision. The New Mexico legislature decriminalized private sexual conduct between consenting adults, in April of 1975, through a bill specifically addressed to the issue.

In *Gossett v. State,* 242 N.W.2d 899 (1976), the Wisconsin Supreme Court has affirmed a conviction of sexual perversion (oral sex), where the defendant was acquitted of rape. Responding to his argument that consent to oral sex must be implied through the rape acquittal, the court said that the jury "could well have found that the act of sexual intercourse did not occur, thereby precluding a conviction on the charge of rape, without finding that the activities occurred with the consent of both parties." In fact, the defendant did not raise the issue of consent at trial, and the court ruled that he had waived the opportunity to do so as a matter of right. "While this court may, in its discretion, review the questions raised, we decline to do so."

Finally, the Iowa Supreme Court, in *State v. Pilcher,* 242 N.W. 2d 348 (1976), has ruled that "the rationale expressed in *Eisenstadt* [equal protection regardless of marital status] extends to protect the manner of sexual relations performed in private between consenting adults of the opposite sex not married to each other." The Iowa court concludes that:

"Before the state can encroach into recognized areas of fundamental rights, such as the personal right of privacy, there must exist a subordinating interest which is compelling and necessary . . . . The State has not shown the existence of any such interest here."

The court has therefore held the sodomy statute unconstitutional as applied to private acts of sodomy "between consenting adults of the opposite sex. We do not intimate any view of the constitutionality of the statute as applied in any other factual situation."

Writing for four dissenting judges, Justice Reynoldson notes that *Doe,* supra, and *State v. Bateman,* 547 P.2d 6 (1976), 2 Sex.L.Rptr. 26, have both been ignored by the decision in the instant case, and that the Iowa court has pursued "a rationale which no other court of last resort in any jurisdiction has adopted."

Disagreeing with the majority's reliance in *Griswold* and *Eisenstadt,* he argues that "the question of the State's burden here logically resolves itself, *not* into the question whether there is an abstract right of privacy present in this case, but instead whether the right of consenting nonspouses to engage in sodomitical activity is *fundamental* in a constitutional sense." [Emphasis in the original.]

(Legislative decriminalization will be effective in Iowa on January 1, 1978. 2 Sex.L.Rptr. 45 — *Ed.*)

Personnel board reversed on dismissal for immorality

The California Court of Appeal has ruled that "the arbitrary rejection [of a hearing officer's findings], by a Board that had neither seen nor heard the significant testimony constituted a decision not supported by the whole record." Thus, in *Taylor v. State Personnel Board,* __ Cal. Rptr. __ (Court of Appeal, Second Appellate District, Division 4, May 29, 1976), the court affirmed the superior court's granting of a writ of mandate to vacate the Board's action of dismissing Taylor from his position as a deputy attorney general. Grounds for the Board's action were: commission of a misdemeanor involving moral turpitude, immorality, and other failure of good behavior which discredited the state agency.

Taylor had been arrested for lewd conduct at a gay bar in Los Angeles, charged with "kissing another male and massaging his crotch." A hearing officer found the allegations untrue, but the Personnel Board reversed those findings.

The court of appeal noted that "if the allegations of misconduct are true, [Taylor] was guilty of immorality" as charged. But "[t]he case for and against petitioner rested entirely on whether the police officer's account of petitioner's conduct was true, or whether the denial of that conduct by petitioner and the alleged other male was true. Not only was there that square

□ *continued across*

conflict between two versions of the events, but the testimony as to the entire background of the alleged conduct and petitioner's arrest was confused."

Where Taylor had pleaded nolo contendre to a charge of *trespass,* following dismissal of the *lewd conduct* charge, the court found the plea "adds nothing to the Board's case. Apart from the present doubt as to the use of a nolo contendre plea as a basis for disciplinary action . . . the plea was not to an offense involving moral turpitude. The first charge [commission of a misdemeanor involving moral turpitude] is not supported by the record. . . ." And further: "If [the charges of misconduct] are not true, the foundation for the third charge [failure of good behavior] also falls."

Committee wins endorsement re: First Amendment rights

The U.S. District Court for Rhode Island has ruled that the state Bicentennial Commission erroneously rejected endorsement of a proposal to include "Gay Pride" activities on the schedule of events at the Old State House in Providence. In *The Toward a Gayer Bicentennial Committee v. The Rhode Island Bicentennial Foundation,* __ F.Supp. __ (D.C.R.I., June 9, 1976), Chief Judge Raymond J. Pettine concluded: "I cannot help but note the irony of the Bicentennial Commission expressing reluctance to provide a forum for the plaintiffs' exercise of their First Amendment rights because they might advocate conduct which is illegal [when] from the perspective of British loyalists, the Bicentennial celebrates one of history's greatest illegal events."

The Gayer Bicentennial Committee, representing a number of gay organizations, had contended that their First Amendment rights were infringed by the Commission's decision — and that they were denied equal protection, in that other "special groups" (such as blacks and women) had been granted the endorsement they sought. Endorsement is governmental recognition of Bicentennial projects.

"The key to the plaintiffs' case," the court said, "is whether or not the Commission's refusal to endorse the plaintiffs' proposal and consequent denial of their request to use the Old State House constitutes a denial of access to a type of public forum. If it does, the close scrutiny and rigid standards of First Amendment analysis must be applied to an examination of the Commission's criteria for restricting access to the forum."

Citing a number of cases including *Gay Students Organization v. Bonner,* 509 F.2d 652 (1st Cir. 1974), 1 Sex.L.Rptr. 19, the court decided that "in light of these precedents, the [Commission] has created in the Old State House a public forum for activities related to Bicentennial themes. Such a forum can be characterized as a 'limited public forum.' " Accordingly, the Commission would be required to apply the rigid standards appropriate to "restraint on free speech."

On June 9, the defendant Commission was granted one week in which "to either endorse the plaintiffs' proposal and grant them all the rights and privileges attendant to endorsement . . . or promulgate in writing, in clear and precise terms capable of even-handed application, the standards to be used in evaluating the plaintiffs' request for endorsement." The court explained in a footnote that "I would not ordinarily impose such rigid time constraints. . . . However, the plaintiffs have scheduled their proposed activities for June 26. . . . That date is important to them because it falls during Gay Pride Week."

Reversal is ordered in solicitation cases

Ruling that "the trial judge erred in dismissing these informations because of what he perceived to be unfair enforcement practices", the District of Columbia Court of Appeals has reversed orders of dismissal in four consolidated cases of sexual solicitation under D.C. Code 1973, §22-2701, *U.S. v. Kenyon,* 354 A.2d 861 (1976).

The trial judge had characterized the arrests of transsexuals — by undercover officers — as *cruel and unusual punishment* and *denial of due process,* reasoning that "[t]he transsexual depends for his sexual engagements on brief, impersonal street encounters; the government provides him with such encounters . . . [which] . . . may be his only real opportunities. . . . We must all agree that there is a point of unfairness beyond which the government cannot constitutionally go." [1 Sex.L.Rptr. 12.]

The Court of Appeals has reversed on the grounds that "[t]he statute is being applied against [the defendants'] conduct, not their individual status" — and that "[t]here is no legitimate issue in these cases respecting cruel and unusual punishment."

Milwaukee court finds loitering law overbroad

A Wisconsin statute which allows for the prosecution of "a prostitute who loiters on the street" has been declared both vague and overbroad — and therefore unconstitutional — by the Milwaukee County Court, Branch 3. In *State v. Jackson* (May 21, 1976), Judge Terence T. Evans has found that Section 947.02(3)(1) "fails to precisely define the distinction between criminal and noncriminal 'loitering' and thus may be used to brand as criminal conduct which is beyond the legitimate reach of the state's police power."

In this case of first impression, Judge Evans has surveyed the history of *vagrancy* law from the 14th century in England, observing that, by the 19th century, "the 'evil' sought to be controlled was the 'idle' person." He concludes that "[t]he objective of the newer vagrancy laws were [sic] clearly to control 'probable criminals' " and that substantive due process standards must now be made applicable to such laws: "Strictly speaking, the 'history' of a statute is irrelevant to its constitutionality. . . . Extreme obsolescence, however, might violate substantive due process. Obsolescence can render a penal statute too vague to give fair notice of what it prohibits."

The statute in question is also criticized because it criminalizs *status* — that is the status of having been convicted of prostitution. "Two women . . . could be doing the same type of 'loitering on the street' yet only one would be committing a crime." Judge Evans points out that *Papachristou v. City of Jacksonville,* 92 S.Ct. 839 (1972) "renders suspect any statute which makes one a vagrant purely on the basis of status, reputation or activity which, standing alone, is innocuous."

In addition, Judge Evans finds that "[s]uch a potentially large area [as *on the street*] does not [adequately] particularize the location of the law's applicability."

"This quaint law," he says, "should be allowed to slip quietly into the sunset." □ *more Court News on following page*

...IN THE COURTS

continued from page 51

"Gross indecency" is construed in Michigan

The Michigan Supreme Court has found that the phrase *act of gross indecency* "standing alone fails to give adequate notice of the conduct proscribed" under M.C.L.A. §750.85, M.S.A. §28.280 and M.C.L.A. §750.338, M.S.A. §28.570. In *People v. Howell and Helzer,* 238 N.W. 2d 148 (1976), the statutes have nevertheless been upheld against these defendants' claims of vagueness, since they "have long been applied in the courts of this state to acts of forced fellatio and fellation with a minor."

In a previous challenge to the constitutionality of these laws, *People v. Dexter,* 148 N.W. 2d 915 (1967), the state Court of Appeals has ruled that "[s]tatutes of the indecent liberties or gross indecency type penalize 'conduct that is of such character that the common sense of society regards it as indecent and improper.' " Here, Justice Levin and two concurring justices have declared that the *Dexter* construction "vests unstructured discretion in the trier of fact to determine whether a crime has been committed." Thus, they have rejected the "common sense of society" standard — holding that the statutory phrase should be construed simply "to prohibit oral and manual sexual acts committed without consent or with a person under the age of consent or any ultimate sexual act committed in public."

In a footnote, Justice Levin has added: "This construction makes it unnecessary either to determine whether the Legislature may constitutionally proscribe sexual conduct between consenting adults in private or to make distinctions regarding such conduct between married persons, persons living with each other, dating couples, and between persons of the same sex."

The judge notes that "[s]ome persons regard any ultimate sexual act other than intercourse between married persons for procreation as indecent and improper. However, a substantial segment of society believes it is neither indecent nor improper for consenting adults to engage in whatever sexual behavior they desire." Thus, *the common sense of society* is a phrase without useful meaning.

Arizona judge finds *Bateman* decision illogical

In an opinion criticizing the Arizona Supreme Court's holding in *State v. Bateman and Callaway,* 547 P.2d 6 (1976), 2 Sex.L.Rptr. 26, Chief Judge Howard of the state Court of Appeals (Division 2) has declared, "There is no doubt that our statute [A.R.S. §13-652] is, in fact, unconstitutional." The statute prohibits *lewd and lascivious acts* committed in an "unnatural manner." The court in *Bateman and Callaway* had found the law constitutional — neither vague nor a violation of privacy rights — on the grounds that the legislature may act "to properly regulate the moral welfare of its people".

Here, in *State v. Baker,* 547 P.2d 1055 (1976), a case involving armed kidnapping and forcible fellatio, Judge Howard concurs in the affirmation of the defendant's conviction "only because I am bound to do so as a judge of an intermediate appellate court." Judge Howard has found the *Bateman and Callaway* decision "illogical" in that it recognizes "the right of privacy in sexual relations, whether the parties are single or married" — yet holds that "this right does not exist when the legislature has declared [certain] acts to be unlawful".

Jellum v. Cupp, 475 F.2d 829 (9th Cir. 1973) is cited for raising a " 'serious question' " about the constitutionality of a statute relating to "unnatural" acts. Judge Howard states further:

"I do not believe that the case of *State v. Mortimer,* 105 Ariz. 472, 467 P.2d 60 (1970) can be relied upon as a constitutionally acceptable definition of the words 'unnatural manner'. There the court stated that sexuality for purposes other than having children is 'unnatural'. What does this mean? If one has sexual intercourse with his pregnant wife is he engaging in a lewd and lascivious act since it is not for the purpose of having children? . . . The definition suggested in *Mortimer* is vague, overbroad, and cannot pass constitutional muster."

Also cited is *State v. Valdez,* 534 P.2d 449 (1975), 1 Sex.L.Rptr. 24, in which JudgeHoward previously stated his view that A.R.S. 13-652 is unconstitutional.

Florida court upholds law prohibiting "unnatural" acts

The Supreme Court of Florida has upheld the constitutionality of that state's law making a second degree misdemeanor of "any unnatural and lascivious act". In *Thomas v. State,* 326 So. 2d 413 (1975), the court has ruled that "these words are of such a character that an ordinary citizen can easily determine what character or act is intended." Alleged forcible oral copulation (between a female and the male defendant) was the act at issue.

Section 800.02, Florida Statutes, had previously been found constitutional — not void for vagueness — in *Witherspoon v. State,* 278 So. 2d 611 (1973) and in *State v. Fasano,* 284 So.2d 683 (1973).

Dissenting, Justice England states: ". . . I believe there exist compelling reasons to overrule [those two cases] and to hold that Section 800.02 is unconstitutional on its face." He cites *Franklin v. State,* 247 So. 2d 21 (1971) for "the *Franklin* standard," which requires that legislation be suited to the "changes in society's experiences, expressions, and understanding as to sex activities and offenses". In *Franklin,* the court had struck down Section 800.01 on the ground that the phrase *abominable and detestable crime against nature* was "devoid of understandable meaning to today's average citizen." Section 800.02 was impliedly upheld in *Franklin,* but the court there called for " 'immediate legislative review and action' " regarding "other vintage sex offense statutes — presumably including the statute challenged here, which was enacted in 1917.

"I believe the time has come," said Justice England, "to relax the restraint which the Court exercised with respect to this law in *Franklin,* and to test Section 800.02 against the *Franklin* standards which we applied to Section 800.01." He finds "parity" in that both statutes "require some notion of a contemporaneous standard for what is either natural or unnatural."

Gay Sergeant's Discharge Upheld

Editor's Note — The following oral opinion was rendered on July 16, 1976 by U.S. District Court Judge Gerhard A. Gesell, D.C. D.C., in the case of *Matlovich v. Secretary of the Air Force,* Civ. No. 75-1750. Since there was no written opinion, and therefore it will likely not be reported in the Federal Supplement, and because of the national publicity given to the case, the *SexuaLawReporter* has reprinted below the full text of the Judge's decision from a transcript taken by his court reporter.

THE COURT: As I am sure counsel know, this case has been exhaustively briefed. We have had several Court appearances and an extremely detailed record has been developed. The Court has been over most of these papers many times. The case has been pending for a substantial period here because of various delays, some incident to discovery, others incident to the decision of Plaintiff to pursue various administrative remedies within the military.

The Court feels it would be useful to decide the case today. A judge is always presented with a difficult choice as to whether one's duties are best performed by careful and detailed opinions or whether one's duties are more appropriately performed by making the hard decision and getting the case on its way.

After considerable deliberation, I have decided what I am going to do is decide the case now, aided by these arguments and the materials before me. In reaching a decision to give an oral statement of reasons, inadequate as that may prove to be, the Court is satisfied and I feel sure that counsel on both sides are relatively satisfied that the record here is of sufficient completeness to warrant an intelligent appellate review; just as much as the Court is entirely satisfied that no matter what the Court here decides, this case is going to a higher court.

Since the suit was originally filed, there have been highly relevant decisions clarifying and hardening the law in a number of respects. In view of that and in view of these other considerations which the Court has mentioned, summary judgment, the Court believes, can be resolved on the basis of undisputed stipulated facts which have been carefully developed.

Of course, initially, this was a constitutional case in large part. Much of the record reflects various materials developed in support of the basic constitutional claim initially advanced which was thoroughly and ably ventilated by counsel for the Plaintiff in the administrative proceedings.

It is now clear, however, from recent cases, that there is no constitutional right to engage in homosexual activity. These decisions remove from the litigation one matter which was of very definite concern at the time this case began. I cite *Doe v. Commonwealth*'s Attorney for the City of Richmond, 403 F. Supp. 1199, affirmed by the Supreme Court at 96 Supreme Court Reports 1489, rehearing denied in May of this year.

The Court also refers to *Singer v. United States Civil Service Commission,* 530 F. 2d 247, a decision of the Ninth Circuit, together with a substantial accumulation of cases cited therein. The Court would refer also to *State v. Bateman,* 547 P. 2d 6, Arizona Reports.

The issue, therefore, as the Court sees it, is a much narrower one. The Court clearly has jurisdiction and is called on to review the honorable discharge which Sergeant Matlovich received and which the Board for Correction of Military Records and the Secretary have refused to set aside to grant reinstatement.

It is well, I think, to recall the policy at the outset which the Air Force has had in effect, which closely mirrors policies in effect in the other branches of the Service, policies that have been in effect in various forms but with the same general direction over an extremely long period of time.

The policy states, in pertinent part:

> "Homosexuality is not tolerated in the Air Force. There is no distinction between duty time and off-duty time as the high moral standards of the service must be maintained at all times.
>
> "It is the general policy to discharge members of the Air Force who fall within the purview of this section. Exceptions to permit retention may be authorized only where the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised."

Sergeant Matlovich's position, of course, involves both his conduct and his qualifications. He concedes that he has engaged in homosexual acts in Florida, Louisiana, Virginia and Washington, D.C. These acts have included mutual masturbation, anal intercourse and fellatio. His partners have all been persons of his age or slightly younger, never younger than twenty-one, to his knowledge. His partners have included doctors, dentists, lawyers and without exception respectable citizens. He has met these people in private, off base and off duty, in hotel rooms or other places of abode. Other persons have never been present.

He has had a most commendable, highly useful service in the military over a long period of time, starting with the Air Force in 1963. The record fully discloses his qualifications and need only be briefly mentioned by the Court for purposes of this decision. □ *continued on page 56*

". . . I hope it will be recognized that after months of intense study of this problem, matters within and without the record, the Court, individually, for what it is worth, has reached the conclusion that it is desirable for the military to re-examine the homosexual problem, to approach it in perhaps a more sensitive and precise way."

THE STATUS OF ABORTION LITIGATION

A Special Report by Judy Mears
Legal Counsel to the Reproductive Freedom Project of the American Civil Liberties Union

Since the Supreme Court decided *Roe v. Wade,* 410 U.S. 113 [93 S.Ct. 703] and *Doe v. Bolton,* 410 U.S. 179 [93 S.Ct. 739] (brought by the ACLU in 1973), the ACLU has been responsible for most of the lawsuits brought to secure the right to have an abortion. The ACLU's central role has given pro-choice litigation a coherence and force it would otherwise not have.

Since *Roe* and *Doe,* the lower federal courts have extended the rulings of these cases to several related issues and in the process have transformed the original principle that the state cannot interfere with a woman's right to abortion (within the first two trimesters) into the principle that the state must affirmatively provide a woman with the means by which (or the setting in which) she can exercise her right to an abortion.

The three basic categories of abortion litigation can be summarized thus:

HOSPITALS

— We have conclusively established the rule that a public hospital which has an ob-gyn service may not refuse to permit/perform elective abortions. The only remaining legal question is whether such a hospital is obliged affirmatively to provide staff, facilities and equipment for abortion services. The leading case from St. Louis (*Planned Parenthood v. Danforth,* 392 F.Supp. 1362) answers this question favorably, but the hospital has appealed the decision to the U.S. Supreme Court which has held the case for months without deciding whether or when it will hear full argument on it.

In states where indigent women are getting Medicaid coverage for abortions, they show a marked preference for obtaining their abortions at free-standing clinics where the care is better, the atmosphere more supportive and the hassles fewer. These women are, in effect, voting with their feet when they prefer clinic over hospital abortions, and to this extent, more than one abortion litigator has wondered why s/he worked so hard to "open up" public hospital facilities for abortions when nobody (who had any other options) wanted to go there anyway. If, however, Medicaid coverage for abortions is ever restricted or ended, all these indigent women will be thrown back onto the public (county) hospitals for services, which will probably result in chaos. The real need that public hospitals should be meeting, but are not, is for second trimester services. Often they impose a quota system or there are long waiting lists or staff opposition makes the treatment climate unbearable. We need more litigation specifically on this issue.

With one anomalous exception, we have lost every lawsuit brought against private hospitals which prohibit or restrict abortions. (Even though a private hospital receives Hill Burton monies, Medicaid funds and tax exemptions, it is not necessarily a public hospital.) Such suits should not be filed because chances of success are so miniscule. Naturally, this means that areas exclusively served by private hospitals probably have little access to abortion services. If the population of the area is insufficient to support a free-standing clinic and if doctors have neither the incentive nor the training to perform office procedures, then most likely women in that area will have to travel to obtain abortions. Remedying this situation would involve either subsidies to a clinic or specific and intensive encouragement to a few local physicians. As childbirth rates continue to drop and hospitals find their maternity sections unprofitable, two or more institutions may decide to merge. In such cases one might take all the cardiac care for the area, another will have a specialized burn unit, and another will take all the obstetrics and gynecology. If a denominational hospital takes the latter and excluded abortion services, the facts of the case will probably justify a lawsuit, especially if a public hospital was among those which merged and gave up it ob-gyn service in the process.

MEDICAID

— Virtually every state in the union now pays for Medicaid abortions, either voluntarily or under court order. We have been litigating this issue since Roe and Doe with two basic arguments — that the Social Security Act requires the states to pay for elective abortions for Medicaid recipients, and in the alternative, if the Act does not so require, the U.S. Constitution does, because it is a violation of equal protection for a medical benefits system to pay for women who choose to terminate their pregnancies by childbirth but not for women who choose to terminate their pregnancies by abortion. The lower federal courts have split on the first argument but have ruled favorably on the second argument in every case except one. The Supreme Court now has three or four of these cases jockeying for plenary review before it and an amicus brief filed by the federal government which states that neither the Social Security Act nor the Constitution requires states to pay for elective abortions for poor women. A definitive answer will probably not come from the Supreme Court until next year, and the more time we [proponents of the ACLU position] gain on this issue, the better.

The Medicaid question has its analog in state statutes which prohibit any state funds from being spent on abortion. Idaho just passed such a statute, which took effect July 1, 1976. A lawsuit based on the constitutional guarantee of equal protection will have to be filed there in order to get any change. Even where states are not openly or officially opposed to abortions for poor women, frequently problems arise on the local level where county officials or social workers fail either to process the necessary paperwork, make appropriate referrals, or authorize the expenditures necessary for poor women to obtain abortions. It is more difficult to find, document and challenge these kinds of obstacles than an outright funding cut-off, but their effect is equally serious. The case law based on equal protection which we have developed in the latter area is so strongly favorable, however, that we should not hesitate to take on issues of this kind.

SUBSTANTIVE RESTRICTIONS ON ABORTION

— This category most typically includes spousal and parental consent requirements for abortion, or restrictions on the manner or timing of the abortion procedure itself. With one exception, pro-choice forces have won all the third-party consent cases and are now waiting for the Supreme Court to rule on that one exceptional case *(Planned Parenthood v. Danforth).* There is a very good possibility that the Court will render a less than conclusive decision on the issue of minors' rights to abortion. Indeed, it might even leave standing the principle that states may impose a parental consent requirement when coupled with a procedure whereby the pregnant minor could go into state court to get a judge's consent for the abortion if her parents refused. If this happens, the timeliness, fairness and sufficiency of such a state court procedure might well have to be challenged in every state that adopted it. Even in the Supreme Court conclusively invalidated parental consent statutes, many physicians would continue to require such consent because of a mistaken fear that they need it to protect themselves against dire liability. No civil case has been won against doctors or hospitals for performing abortions after a competent minor or married woman has given her consent.

When the Supreme Court issues its decisions this June in the *Danforth* and *Baird* cases, it will write much of the pro-choice scenario for the next few years. I believe that the Court will not retrench from its *Roe* and *Doe* decisions (1) because the medical and social gains made possible by and since those rulings are too substantial to overlook or reverse and (2) equally important, if not binding, the Court has consistently and vigorously extended the right to an abortion. In short, the Supreme Court would have to undo not only *Roe* and *Doe* but also a large corpus of cases decided since then if it were to retrench at this time.

We have won virtually all the legal battles to implement the right to choose abortion, but educational and community organizing efforts have lagged far behind. In the Right-to-Life newspaper, the whole country is depicted as a beehive of anti-abortion activities — fairs, conventions, marches, coffee klatches, speeches, etc. As much as we all would like to dismiss this activity as persuasion directed at the already committed, it's not clear we can do so and who knows what public fallout results from these activities? In at least four ways, pro-choice forces have inadequately responded to the Right-to-Life pressure:

There is no analogous beehive of pro-choice activity around the country. . . . A network of sophisticated and effective pro-choice lobbyists has not been established in every state. . . . We have failed miserably with regard to teenagers. . . . The appeal of Ellen McCormack's campaign has taken everybody by surprise. . . .

[On the other hand] there is little likelihood of significant abortion activity in Washington, D.C. in the year ahead. All this fall, legislators will have their minds on re-election and will be loath to take decisive action on controversial topics. All anti-abortion proposals (like all other pending legislation) expire as of December 31 unless President Ford specifically renews them, which he is unlikely to do. Once Congress reconvenes after the Inauguration, legislators will not be in a hurry to propose serious anti-abortion bills, especially if abortion never made it as a sexy issue in the national elections.

The system for delivering abortion services has not yet caught up with the demand for such services, especially in an interior swath of this country from Canada to Mexico. Povery, ignorance and lack of mobility from rural areas are still problems. Also, hospitals out in the country tend to be Catholic, and those hospitals which do permit/perform abortions charge high fees. Private physicians do not practice "new" procedures in their offices because there is no financial incentive to do so and often a social incentive not to do so. We need to continue to remind county attorneys, social workers, hospital officials and local women that *Roe* and *Doe* are the law of the land and abortion services should be available wherever and whenever pre-natal and delivery care is available.

RELEVANT *ACLU* POLICY

The ACLU asserts that a woman has a right to have an abortion — that is, a termination of pregnancy prior to the viability of the fetus — and that a licensed physician has a right to perform an abortion, without the threat of criminal sanctions. In pursuit of this right the Union asks that state legislatures abolish all laws imposing criminal penalties for abortions. The effect of this step would be that any woman could ask a doctor to terminate a pregnancy at any time. In turn, a doctor could accede to the woman's request in accordance with the physician's professional judgment without fear of criminal prosecution. Thus, the decision of whether or not to continue a pregnancy would become one of the woman's personal discretion and the doctor's medical opinion. Both would be free to follow their private consciences in determining whether their religious or moral standards were being violated. No fear of criminal punishment would enter into the decision.

The ACLU holds that every woman, as a matter of her right to the enjoyment of life, liberty, and privacy, should be free to determine whether and when to bear children. The Union itself offers no comment on the wisdom or the moral implications of abortion, believing that such judgments belong solely in the province of individual conscience and religion. We maintain that the penal sanctions of the state have no proper application to such matters.

The discriminatory effect of the prohibition of abortion involves another area of civil liberties interest, that of equality. The rich can circumvent or violate the law with impunity, but the poor are at the law's mercy. This treatment is simply too unequal for civil libertarians to accept. Moreover, the very tendency of the law to be so arbitrarily applied and so widely ignored itself weakens the principle of the rule of law which is essential to the protection of civil liberties.

Although the social and medical problems created by prohibition of abortion are without □ *continued on page 59*

Ms. Mears prepared this memorandum for presentation and discussion at the ACLU Biennial Conference, held in early June of 1976. Some weeks later, the U.S. Supreme Court announced its decision in *Planned Parenthood v. Danforth,* summarized at 2 Sex.L.Rptr. 49 (this issue).
As editors of SLR, we are pleased to reprint this timely report, which highlights a number of issues beyond the scope of the recent Danforth decision, while it provides an overview of ACLU policy and strategy.

- R.M.W. and S.B.

continued from page 53

GAY SERGEANT'S DISCHARGE UPHELD

Here is a man who volunteered for assignment to Viet Nam, who served in Viet Nam with distinction, who was awarded the *Bronze Star* while only an Airman First Class, engaged in hazardous duty on a volunteer basis on more than one occasion, wounded in a mine explosion, re-volunteered, has excelled in the Service as a training officer, as a counseling officer and in the various social action programs and race-relation programs of the military, and has at all times been rated at the highest possible ratings by his superiors in all aspects of his performance, receiving in addition to the *Bronze Star,* the *Purple Heart,* two *Air Force Commendation Medals* and a *Meritorious Service Medal.*

The standard governing judicial review of a discharge from public employment on the ground of homosexuality is, the Court believes, one of due process, which requires that the person challenging the Government action show that there is no rational relation or nexus between the regulations under which the dismissal occurred and any legitimate state interest. In particular judicial scrutiny is narrowly limited in the context of the Armed Forces where, as counsel well know, appellate courts have repeatedly and insistently shown, in the Court's judgment, undue deference to the judgments of the military. The Court, however, must confront this case having in mind such decisions as *Kelley v. Johnson,* 96 Supreme Court Reports 1440, *Quinn v. Muscare,* 96 Supreme Court Reports 1752, and a host of other decisions, some of which are cited in those cases.

Repeatedly efforts have been made to establish standards for review of military action which are commensurate with those that are applicable to civil governmental action and have not been successful.

Accepting these standards, as the Court must, the Armed Forces, including the Air Forces, of course, have a legitimate interest in assuring full readiness for combat and can, of course, act to protect recruitment, security of military information where applicable and over-all efficiency. It may establish standards of acceptable behavior when conduct impinges directly or indirectly on discipline and the fullest achievement of appropriate military objectives.

Not only is this legitimate state interest apparent here but a review of the record shows that the policy was fairly presented to the Administrative Discharge Board of Officers with adequate explanation and instructions as to the law.

All relevant information relating to Sergeant Matlovich's conduct and qualifications was fully presented with extensive background material indicating the nature of his homosexual conduct, medical, sociological, military data concerning the possible effects of his situation upon his ability to perform.

The hearing, so far as examination of the record discloses, was held in an atmosphere of open, fair discussion and the Board determined not to apply an exception in the case. There is ample evidence in the record that no more precise standard explicative of the exception could have been stated or was required than that presented. The guidelines were sufficient and the action taken has been reviewed now by two separate Secretaries of the Air Force and confirmed.

It cannot be said that the Air Force regulation at issue here is so irrational that it may be branded arbitrary and, therefore, a deprivation of Plaintiff's liberty, interest in freedom to choose his own sexual preference, or the like. I cite both *Kelley v. Johnson* and *William v. Lee Optical Company.*

Plaintiff simply has not on this record met his burden factually or legally and as a matter of law, accordingly, the Court is required to grant summary judgment for Defendants and does so at this time.

This is a distressing case. It is a bad case. It may be that bad cases will make bad law. Having spent many months dealing with aspects of this litigation, it is impossible to escape the feeling that the time has arrived or may be imminent when branches of the Armed Forces need to reappraise the problem which homosexuality unquestionably presents in the military context.

The Services are admittedly involved in matters of immediate and clear importance. They not only have problems with respect to performing the obvious military task but there are moral, religious and privacy overtones that cannot and should not be overlooked.

We all recognize that by a gradual process there has come to be a much greater understanding of many aspects of homosexuality. Public attitudes are clearly changing. Some state legislatures have already acted to reflect these changing public attitudes, moving more in the direction of tolerance. Physicians, church leaders, educators and psychologists are able now to demonstrate that there is no standard, no preconceived stereotype of a homosexual which, unfortunately, some of the Air Force knee-jerk reaction to these cases would suggest still prevails in the Department.

Homosexuality is more prevalent than generally believed and takes many different forms, some overt and disruptive, some wholly private and of minimal significance under differing conditions.

In the light of increasing public awareness and the more open acceptance of what is in many respects essentially a matter of private sexual conduct, it would appear that the Armed Forces might well be advised to move toward a more discriminatory and informed approach to these problems, as has the Civil Service Commission in its treatment of homosexuality within the civilian sector of Government employment.

This appears to the Court to be particularly desirable given the fact that more and more civilians in the Civil Service and people in uniform mingle together in the work of the common missions of the military.

The courts have, I think, correctly placed great emphasis upon the crucial role that the Armed Services play in our national security but there is another factor of which the Court wishes to remind counsel in these brief remarks.

□ continued across

"... There are many problems in this world that can't be resolved by litigation and can't be resolved by statutes. The Armed Forces have shown they can lead the way on matters of discrimination; and I simply suggest that this is an area that deserves its more intense and immediate study."

The Armed Forces have been in many ways leaders in social experimentation and in their adaptability to changing community standards. No one, for example, who has studied the civil rights movement and the striving of blacks for opportunity will ever fail to recognize that the Armed Forces, more than any branch of Government and far ahead of the private sector in this country, led to erasing the stigma of race discrimination. It is one of the great high points of military accomplishment.

Here another opportunity is presented. While the Court has reached its conclusions, as a judge must do, on the law, I hope it will be recognized that after months of intense study of this problem, matters within and without the record, the Court, individually, for what it is worth, has reached the conclusion that it is desirable for the military to reexamine the homosexual problem, to approach it in perhaps a more sensitive and precise way.

It seems to the Court a tragedy that we must confront — as I fear we will have to unless some change takes place — an effort at reform through persistent, insistent and often ill-advised litigation.

There are many problems in this world that can't be resolved by litigation and can't be resolved by statutes. The Armed Forces have shown they can lead the way on matters of discrimination; and I simply suggest that this is an area that deserves its more intense and immediate study.

In the Courts continued from 52

Photographer guilty of 'pandering'

Commenting that "[a] criminal act is not made any the less criminal by pictorial recordation of the act", the California Court of Appeal has affirmed convictions of pandering — and conspiracy to violate the pandering statute — of a photographer and his editor. The defendant-appellants had hired a 14-year-old girl, among other models, to perform sexual acts while being photographed for pictures to be published by American Art Enterprises.

In *People v. Fixler and Utterback,* 128 Cal. Rptr. 363 (1976), the court *rejected* defendants' contention that "because their intent was to publish some of the photographs in a magazine their conduct in procuring [the girl] to engage in lewd conduct for money is somehow clothed with First Amendment protection and that they cannot be convicted of pandering without proof that use of the photographs in the magazine would violate the obscenity statutes."

Penal Code section 266(i) relates to "the procuring of another person for the purpose of prostitution . . ." and the court found that the activity of the female model would constitute *prostitution* (lewdness or sexual intercourse for money) under definitions in Penal Code section 647(b), Black's Law Dictionary, and the Random House Dictionary.

Cited are *Barrows v. Municipal Court,* 464 P.2d 483 (1970); *People v. Drolet,* 105 Cal. Rptr. 824 (1973); and *People Ex Rel. Hicks v. Sarong Gals,* 103 Cal. Rptr. 414 (1972) for the holding in *Barrows* that "acts which are independently prohibited by law cannot be consummated without sanction merely because they occur in a theatrical setting".

The opinion in *Fixler* is in accord with the holding in *U.S. v. Roeder,* 526 F.2d 736 (1975), 2 Sex.L.Rptr. 33 — in which the (federal) Mann Act was held applicable to a filmmaker under similar circumstances.

ADMINISTRATIVE RULINGS...

L.A. police advised on status of transsexuals

The Los Angeles City Attorney has issued an opinion stating that post-operative transsexuals, when booked and processed for custody, should be regarded in accordance with their "sexual gender" after surgery.

In Opinion No. 75-147, Deputy City Attorney James M. Hodges has replied to questions raised by L.A. Police Chief Davis, in connection with procedures used by the Hollywood Operations Division. Davis had indicated that, in the course of booking, a person claiming to be a transsexual would be examined by a doctor for determination of his or her sex; separation of male and female prisoners is required by Penal Code Section 4002.

Hodges' opinion recognizes that "[a] person legally becomes a member of the opposite sex once that person has undergone surgical sex reassignment . . . [which is] the removal of the existing genitalia and the creation of new genitalia." Since a post-operative transsexual would be carrying miscellaneous identification papers reflecting the sex-change, "that person will need no further confirmation of the claimed sexual status."

However, "[i]f a question arises as to the presence or absence of male genitalia, a physical examination should be given by either the jail doctor or another physician, as is currently done by the Hollywood Division."

The city attorney's opinion cites *Transsexualism and Sex Reassignment* by Richard Green and John Money, *Clinical Sexuality* by John F. Oliven, *The Transsexual Phenomenon* by Harry Benjamin, and *Sex and Gender* by Robert J. Stoller.

LEGISLATION...

New Hampshire Legislature Repeals Sodomy Law

With the addition of New Hampshire, eighteen states have repealed their laws against consensual sex in private R.S.A. 632:2:II, effective August 6, 1975, revised that state's entire rape section (Chapter 632) and deleted sodomy from its proscription. Also decriminalized were acts of non-monetary solicitation and fornication. Adultery remains a crime.

The repeal became known only recently as a result of a release by Dr. Franklin E. Kameny, Mattachine Society, District of Columbia, sent to the *SexuaLawReporter,* the *Advocate* and *NewsWest.*

The other states which have repealed their sodomy laws are reported at 2 Sex.L.Rptr. 45.

BOOK REVIEW...

Military Counselors Offer Advice for Gays in New Handbook

SLR HAS BEEN ASKED TO PARTICIPATE in publicizing "The Gay Military Counselor's Manual," a loose-leaf reference-manual produced by the San Diego Gay Center for Social Services. We are pleased to note the availability of this handbook — and to recommend its acquisition by university libraries, community service agencies, and civilian attorneys who are unfamiliar with military policy, regulations, and procedures. Individuals pursuing (or considering) military careers would also benefit from the experience of the San Diego GCSS military counseling staff.

The manual includes both legal information and practical advice for emotional survival under difficult circumstances. Although some counselees may ultimately require the services of a military lawyer or civilian specialist, any conscientious reader of the manual can prepare himself for applying "first aid" treatment, at least, and for evaluating the severity of the counselee's problem — whether discharge or continued service is the issue. The manual points out, for example, that investigative agents "have no authority to make deals, and could not keep their end of a bargain if they wanted to." Regarding possible discharge for homosexuality, where the serviceperson is unsure if it is in his interest to cooperate with his interrogators, the manual advises silence: "The more investigators think they can get from someone, the longer they'll keep him around to pump for more information, and the more likely the serviceperson will trip up and end with a General or Undesirable Discharge," although an Honorable Discharge may be in order.

Thus, the first person approached by the serviceman or -woman in trouble — whether or not qualified to offer continuing legal assistance — may be in a position to prevent more serious complications and to minimize the negative consequences of an on-going investigation into allegations regarding the counselee's sexual orientation and/or activities.

IN ADDITION TO SPECIFIC INFORMATION on the status of homosexuals, "The Gay Military Counselor's Manual" provides a survey of serviceperson's rights in general, including the right to legal counsel for certain proceedings (under Article 27 of the Uniform Code of Military Justice); the right to be informed of charges (Article 31); the right to confidentiality of — and access to — most military records (Privacy Act of 1974); and the right to a hearing in most administrative discharge situations. Pertinent sections of the UCMJ are attached as an appendix, as are relevant regulations promulgated by the Army, the Air Force, the Navy, and the Marine Corps. (Differences between one service branch and another are regarded as relatively minor, except that the Marines are identified as most strongly hostile toward gays.)

The basic text of the manual, *general counseling guidelines,* advances the proposition that gays in service should be counselled to "live their lives in a manner with which they are comfortable. Otherwise, they're liable to end up in a psychiatric ward, in disciplinary trouble, or both."

The San Diego counselors are scrupulous in urging that the individual counselee's needs be explored and promoted: "the objectively honest counselor must be able to counsel for those for whom a military career might be most rewarding as well as for those for whom it might not." For those seeking long-term military careers, "avoiding discovery" may be regarded as quite feasible, when *moderate discretion* is used. For example, "One should not . . . [h]ave sex with anyone in their own unit . . . [p]ark their vehicle with base decal or other military identification in the neighborhood of a 'gay' establishment" and so on.

Even after charges of homosexuality have been made, the serviceperson should not assume that an unwanted discharge is inevitable: "It is nearly impossible for the military to justify discharge without a signed statement admitting homosexual activity or tendencies, unless they have at least two witnesses to an act who are willing to testify under oath. . . . The military should be forced to prove its case beyond a reasonable doubt. They can seldom do so without the cooperation of the person being investigated."

The foregoing advice, as well as advice for those seeking discharge — is based on the fundamental fact that homosexuality in the military is officially "intolerable" — involving compromise of moral standards and/or of reliability, and requiring prompt separation from the service. Thus, homosexual conduct — or the existence of homosexual tendencies — warrants administrative discharge procedures.

Discharge may be based on coercive acts or acts with a minor (Class I homosexuality), non-coercive acts or solicitation (Class II), "tendencies" (Class III), or pre-enlistment acts or tendencies (Class IV). Generally, only those in Class III are eligible for the honorable discharge (based on "unsuitability"), whereas the others are subject to punitive, undesirable, or general discharges, with consequent loss of V.A. benefits and/or personal stigma. It is essential, therefore, that the gay client be advised of procedures leading to Class III discharge.

The San Diego group provides a sample form letter which might be used by those seeking Class III discharge, stating: "Although I was unaware of these tendencies at the time I entered the military service, I find it increasingly difficult to live with them while subject to present military rules and regulations. In order to prevent any possible violation of rules to which I am now subject, I wish to be discharged immediately for reasons of Unsuitability. . . . My record of performance and good behavior as reflected in my Service Record amply demonstrates that I have served honorably, and therefore merit an Honorable Discharge in accordance with DOD Directive 1332.14 VI.A. and VII.G." Variations for the several service branches are included.

In addition to addressing the problems of those currently in service, the GCSS manual also covers procedures for upgrading discharges and for obtaining benefits previously denied.

THE "GUIDELINES" SECTION OF THIS MANUAL runs to nearly forty pages. A short appendix (A) provides several forms, including the sample letter stating homosexual tendencies and a sample complaint for redress of grievances under Article 138, UCMJ. Appendix B is a directory of other military counseling agencies; Appendix C is a bibliography of available publi- □ *continued on page 59*

continued from page 55

Status of abortion litigation

doubt extremely serious (for example, the physical, psychological, and social costs of backstreet abortions, and the consequences to the mother, her unwanted child, and the rest of her family when not even a criminal abortion is available), in pressing for legislative abolition of the abortion laws the Union is guided by its desire to protect and promote the civil liberties of all citizens. We believe that the abortion laws [as existing in 1968] violate civil liberties in the following specific ways:

(1) They deprive women of the liberty to decide whether and when their bodies are to be used for procreation, without due process of law.

(2) They infringe upon the right to decide whether and when to have a child, that is, the marital right of privacy.

(3) They deny to women in the lower economic groups the equal protection of the laws guaranteed by the Fourteenth Amendment, since abortions are now freely available to the rich but unobtainable by the poor.

(4) They are unconstitutionally vague.

(5) They impair the right of physicians to practice in accordance with their professional obligations in that they forbid doctors to perform what their professional judgment may dictate as a necessary medical procedure. In many cases their failure to perform this medical procedure would, but for the statutory prohibitions on abortion, amount to malpractice.

Total repeal of all such laws will meet these civil liberties criteria.

continued from page 49

Rulings on abortion affirm women's rights

The statute in question — Stat. 1974, c. 706 §1, amended Mass. Gen. Laws Ann., c. 112, §§12H-12R — requires parental consent for abortions performed on women under 18, or (in the case of parental refusal) consent "obtained by order of a judge of the superior court for good cause shown".

The majority had found the statute unconstitutional [393 F.Supp. 847] because "in the present area the individual rights of the minor outweight the rights of the parents, and must be protected." The dissenting opinion had argued, however, that no impermissible veto power had been given the parents and that "[i]f the state courts find that the minor is mature enough to give an informed consent . . . and that she has been adequately informed about the nature of the abortion and its probable consequences to her, then we must assume that the courts will enter the necessary order permitting her to exercise her constitutional right to the abortion."

The Supreme Court has decided: "It is sufficient that the statute is susceptible to the interpretation offered by appellants, and we so find, and that such an interpretation would avoid or substantially modify the federal constitutional challenge of an authoritative construction, it is impossible to define precisely the constitutional question presented."

Military handbook

continued from page 58

cations serving counselors; and Appendix "D" offers nearly one hundred pages of material selected from Defense Department policy statements and service regulations.

This is an ambitious project — and a successful one. Some readers may be irritated, on occasion, by syntactical errors and spelling mistakes, which should have been avoided. Also, the use of quotation marks to set off the word *gay* (every time the word is used) is puzzling. And the attempt to be non-sexist, by alternating *he's* and *she's* and *persons,* is unnecessarily awkward.

But these are quibbles, not intended to discourage anyone whose personal or professional interests require a knowledge of military custom, law, and procedure.

The *Manual* can be ordered through: Gay Center for Social Services, 2250 "B" Street, San Diego, CA 92102. A "donation" of $9.00 is requested. ***—Susan Bonine***

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COURT BRIEFS...

• *Unmarried cohabitation okayed*

The California Court of Appeal (Fifth Appellate District) has invalidated a county housing authority policy which prohibits tenancy by unrelated adults of opposite sexes, in that such a policy "automatically presumes immorality, irresponsibility and the demoralization of tenant relations from the fact of unmarried cohabitation. . . . [T]he policy creates an unconstitutional *irrebutable presumption* and must be held to be invalid as a denial of due process." *Atkisson v. Kern County Housing Authority,* 130 Cal. Rptr. 375 (1976).

• *Sex for money dangerous*

Upholding the constitutionality of Delaware prostitution statutes, the Superior Court for New Castle County has concluded that "the context in which a particular communication or activity takes place will determine the extent to which the State may constitutionally control that particular conduct. The more public the context, the more permissible the control." The court ruled, further, that "[t]he State could reasonably conclude that a woman or man who performs sexual conduct for money is a greater danger to society than a woman or man performing the same act free of charge." *State v. Hicks* (June 24, 1976).

• *Body searches: to be untraumatic*

Where a rectal search (for concealed narcotics) had been conducted without a warrant and in a manner causing "anxiety, discomfort and humiliation", the Ninth Circuit Court of Appeals has ruled: "Any body search, if it is to comport with the reasonableness standard of the fourth amendment, must be conducted with regard for the subject's privacy and must be designed to minimize emotional and physical trauma." *United States v. Cameron* (June 21, 1976).

• *Theatre is "not a public place"*

The Supreme Court of Oregon has ruled that a theater is not "a public place" under state law, and that "if the legislature had intended the definition of *a public place* to include an obscene performance performed before an audience it would have so indicated in ORS 161.015(9)." The court has concluded that "where patrons are forwarned and viewing is limited to those patrons", the criterion of a *public place* is not satisfied. *State v. Brooks,* 550 P.2d 440 (1976). See also 2 Sex.L.Rptr. 2.

• *Supreme Court upholds zoning*

The United States Supreme Court has upheld the constitutionality of Detroit zoning ordinances which regulate the location of adult theaters and other adult establishments. In reversing the decision of the Court of Appeals [at 518 F.2d 1014], the Supreme Court said: "We are not persuaded that [these ordinances] will have a significant deterrent effect on the exhibition of films protected by the First Amendment. . . . The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young v. American Mini Theatres, Inc.,* 96 S.Ct. 2440 (1976).

• *Massage prohibition upheld*

A Roanoke (Virginia) ordinance — prohibiting opposite-sex physical contact by massage parlor operators — has been upheld by the U.S. District Court (W.D. Virginia, Roanoke Division). The court has found that "the associational activities of plaintiffs are purely commercial and do not come within the core protection of the right to associate" and that "[i]t is the commercial aspect of the act of massage which removes it from the ambit of a potential right to engage in such an act without interference from the state." *Brown v. Haner,* 410 F.Supp. 399 (1976).

• *Cohabitation no consent*

The Minnesota Supreme Court, reviewing a conviction for rape, has ruled that "[i]solated instances of cohabitation as distinguished from evidence of promiscuity, do not in themselves lend credence to a claim of consent. . . ." *State v. Hill* (June 25, 1976).

• *Porno vs: community standards*

In a decision involving the alleged obscenity of *Private* magazine, the U.S. District Court (S.D.N.Y.) has commented: "[T]he problem with [defendant-sellers'] argument is that it equates community standards with the most pornographic items available for sale. Were this true, a community would never be able to purge itself of obscene items currently in existence, and any practical or legal difficulties involved in the enforcement of obscenity laws would have to be interpreted as evidence of community acceptance. The demand for pornography, whatever its economic significance, is not an adequate measure of the standards of a community which extends far beyond the confines of Times Square." *U.S. v. Various Articles of Obscene Merchandise,* 411 F.Supp. 1328 (1976).

• *Common law wife denied benefits*

In a case involving the scope of an insurance policy's coverage, the California Court of Appeal has ruled that a common-law wife has no legitimate claim to benefits payable to a spouse. An insurance company, said the court, "is entitled to rely upon the usual meaning to be given the words that they have used in their standard form insurance policies. In this respect, the word 'spouse' . . . has been defined as . . . 'a legal wife or husband.' " *Menchaca and Lara v. Hiatt,* 130 Cal. Rptr. 607 (1976).

According to the trial court's findings of fact, the plaintiffs "had been living together in the same household [in] an actual family relationship with cohabitation and mutual recognition and assumption of the usual rights, duties and obligations attending marriage." The trial court therefore concluded that Lara qualified as Menchaca's spouse, despite there having been no formal marriage ceremony. [Common-law marriage is unrecognized in California.]

The appellate court has reversed that conclusion, distinguishing *In Re Marriage of Cary,* 109 Cal. Rptr. 862 (1973), a decision concerning community property rights: "We find that the rights under an insurance policy and the rights in jointly acquired property are sufficiently distinguishable to preclude our consideration and application of *Cary.*" The court reasoned that "[s]ince the [insurance] statute is obviously designed to cover those individuals who would be likely to use the insured motor vehicle, the term 'spouse' was used no doubt to insure the permanency of the relationship which would also obtain if one were the named insured's 'relative.' "