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REPRESSIVE SEXUAL REGULATIONS IN OKLAHOMA: AN ANALYSIS

The *National Committee for Sexual Civil Liberties* has appeared as *Amicus Curiae* in a case before the Oklahoma Court of Criminal Appeals. The case involves defendants charged under Title 27, Section 154b, of the revised ordinances of the City of Tulsa.

The ordinance in question reads:

"It shall be an offense for any person to . . . (b) solicit, induce, intice, or procure another to commit an act of lewdness, assignation, or prostitution with himself or herself."

The complaints alleged solicitation for "an act of lewdness by unnatural act, oral copulation." The defendants are challenging the constitutional validity of the statute on vagueness and overbreadth grounds based on the lewdness portion of the ordinance; the case does not involve challenges to the prostitution portion.

The Tulsa ordinance defines "lewdness" as follows:

"The term 'lewdness' shall be construed to include the making of any appointment or engagement for prostitution, or lewdness, or any act in furtherance of such appointment or engagement." Title 27, Section 151.

These ordinances are identical to the statutes of the State of Oklahoma (see Title 21, Section 1029(b) and Section 1030 of the Oklahoma statutes).

As a result of the challenge, the Municipal Court declared the ordinance unconstitutional and dismissed the cases. The City of Tulsa has appealed.

The following is from the BRIEF OF AMICUS CURIAE ON BEHALF OF APPELLEES which brief was prepared by Thomas F. Coleman, co-chairman of the *National Committee for Sexal Civil Liberties.* It is being reprinted here because it reviews the due process, privacy, and overbreadth problems universal to these types of statutes throughout the country. It also gives a complete survey of the law and all precedents in the State of Oklahoma as well as setting forth valuable and citeable authorities from other jurisdictions.

DUE PROCESS ARGUMENTS

"The threshold consideration in reviewing a statute which has been challenged as unconstitutionally vague, is whether that statute requires or forbids an action in terms which are so ambiguous that 'men of proper intelligence must guess at its meaning and differ as to its application.' *Connelly v. General Construction Company,* 269 U.S. 375, 391 (1926). Statutes or ordinances that do not give proper notice of proscribed activity violate the Due Process clause of the Fourteenth Amendment of the Constitution of the United States since 'no one may be required at peril of life, liberty, or property to speculate as to their meaning.' *Lanzetta v. New York,* 306 U.S. 451 (1939).

"Statutory clarity is also necessary to prevent arbitrary exercise of power and discretion by courts and law enforcement officials. *Grayned v. Rockford,* 408 U.S. 104, 110 (1972). The United States Supreme Court has held that vaguely worded statutes are constitutionally defective, because they fail not only to provide adequate notice to potential offenders, but they also provide inadequate standards for law enforcement officials, thereby encouraging discriminatory enforcement by the police. *Papachristu v. City of Jacksonville,* 405 U.S. 156 (1971).

"Furthermore, if a legislative body passes an extremely vague statute or ordinance, and if the courts are unable to satisfactorily construe and limit the definition,

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JUDICIAL RULINGS

Military told by U.S. Court to define policy on gays

The United States Court of Appeals for the District of Columbia ordered the Air Force and Navy to fully explain its policy on the exclusion of homosexuals from the military, specifically ordering an explanation of a policy of retention in the military of homosexuals in "exceptional circumstances."

Matlovich v. Secretary of the Air Force, No. 76-2110, decided December 6, 1978, and companion case *Berg v. Secretary of the Navy*, No. 77-1785, decided the same day.

The facts of the Matlovich case were set forth in detail in the court's opinion and so the portion of that opinion setting forth the facts will be reprinted here:

> In March 1975, apellant Leonard P. Matlovich, after some twelve years of excellent service in the military, wrote to the Secretary of the Air Force, through his commanding officers, that he had concluded that his "sexual preferences are homosexual as opposed to heterosexual." He added that in his view his sexual preferences would in no way interfere with his Air Force duties and that he considered himself fully qualified for further military service. He asked that the provision in AFM 39-12 (Change 4) Oct. 21, 1970, para. 2-103, relating to the discharge of homosexuals be waived in his case.
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> This regulation provided for a general policy of discharging Air Force members determined to have performed homosexual acts. Exceptions to the policy were contemplated if "the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised." At that time Matlovich was a Technical Sergeant assigned to the 4510th Support Squadron, Tactical Air Command, Langley Air Force Base, Virgina. His letter triggered an investigation by the Air Force Office of Special Investigation during which appellant provided information concerning his homosexual experiences since 1973; he stated that these were all consensual and occurred in private, while he was off-duty and off-base, with males over twenty-one. He also said that he had such relations with two other members of the Air Force (one of whom had been discharged by that time), neither of whom had worked for him (he added that "as any responsible NCO [non-commissioned officer] I would always refrain from such a relationship").
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> As a result of the investigation, involuntary administrative discharge proceedings were begun against Matlovich on the ground of his homosexual activity. An Administrative Discharge Board met in September 1975 and held a four-day hearing at which appellant was represented by counsel. In addition to general testimony on homosexuality, appellant presented evidence on his own service in the Air Force and his ability to continue to give effective service. It was stipulated that he had committed homosexual acts during his current enlistment period. The Board so found and recommended that he be given a general discharge for unfitness, based on his homosexual acts.
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> Matlovich's commanding officer at Langley Air Force Base accepted the Board's recommendation of discharge but determined that the discharge should be honorable. The Secretary of the Air Force then declined to waive the provisions of AFM 39-12, *supra*, and directed that the honorable discharge be executed. This was done on October 22, 1975.
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> On the day before, October 21st, appellant filed the present action seeking to enjoin the discharge as invalid and for a declaratory judgment to that effect. A temporary restraining order was denied by the District Court and the discharge was then effected.
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> Appellant immediately applied to the Air Force Board for the Correction of Military Records (AFBCMR) to overturn his discharge and also amended his complaint below (see note 3) to seek reinstatement, as well as a declaratory judgment that the discharge was invalid. The AFBCMR refused to correct appelant's records and the Secretary of the Air Force adopted that tribunal's findings and recommendations.
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> Thereafter both sides filed motions for summary judgment in the court below. It was stipulated, among other things, that the Air Force had in the past retained Air Force members on active duty who had engaged in homosexual activity.
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> After judgment, Judge Gesell granted appellees' motion for summary judgment in an oral opinion. He held, first, that there is no constitutional right to engage in homosexual activity: second, that under the standards he deemed to govern judicial review of military determinations there is a rational basis for the Air Force policy of separating airmen found to have engaged in homosexual conduct; and, third, that appellant had not proved that an exception had to be made in this case. At the same time the judge recognized the superior quality of Matlovich's service and expressed his personal view that "it would appear that the Armed Forces might well be advised to move toward a more discriminatory and informed approach" to the problem of homsexuality—"to approach it in perhaps a more sensitive and precise way."

On appeal Matlovich argued that private sexual acts between consenting adults is constitutionally protected. The Court of Appeals declined to decide that issue, instead reversing the district court and remanding the case for further clarification of certain other issues.

The Court drew attention to the military's general policy of discharging homosexuals. It noted, however, that the military has an exception that a homosexual may be retained in the service under "unusual circumstances." Matlovich asked the military to allow him to stay under that exception. This the Air Force refused to do. The Court of Appeals noted there appears to be no criteria as to when "unusual circumstances" exist so as to retain a homosexual in the service of the military. Therefore, the Court stated that it was unable to review whether or not this exception had been properly or improperly refused to Matlovich. As a result, Matlovich could not be afforded effective appellate or judicial review of the military policy and exception.

The Court reversed the district court decision and remanded the case back to the district court with directions that it order the Secretary of the Air Force to set forth with particularity that service's guidelines on retention or expulsion of homosexuals. The Court specifically ordered that the policy of rentention under "unusual circumstances" be fully explained. After that explanation is forthcoming, the district court was instructed to review the policy and exception again and if Matlovich was dissatisfied with the district court decision he could, of course, again seek appellate review.

The Berg decision was basically the same.

Thus it appears that it will be several more years until the United States Court of Appeals for the District of Columbia will review, on the merits, the policy of the Navy and Air Force in discharging homosexuals.

It should be noted, however, that there are other military cases presently under the submission to the United States Court of Appeals for the Ninth Circuit in which similar issues are at stake. As soon as those cases are decided by the Ninth Circuit the SLR will review them and report them to our readers.

Lesbian child custody case divides Washington court

Two cases were consolidated because they involved factually related divorces. *Schuster v. Schuster* and *Isaacson v. Isaacson*, Wash., 585 P.2d 130 (1978).

> *The respondent women separated from their husbands and lived together in a lesbian relationship with their children of their marriages. The appellant fathers filed for divorces from their respective spouses. Each mother was given custody of her children. However, the mothers were ordered to live separate and apart and were prohibited from removing the children from the state. Those decrees were not appealed.*
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> Later, each of the fathers filled modification petitions seeking custody of their children. Subsequently, motions for contempts were filed charging violations of the original decrees. The alleged violations by the mothers were: (1) renting separate apartments in the same building but in fact living together along with all the children; and (2) taking the children out of state. The mothers filed counter petitions seeking modification of the original decrees by deleting the prohibition against their living together.
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> *The two modification proceedings were joined for hearing. An attorney was appointed to represent the children's interests. The findings and conclusions resulted in the custody of the children remaining with the mothers and the deletion of the prohibition against the mothers living together in an open and publicized lesbian relationship.*

The fathers of the children appealed to the Washington Supreme Court. The lower court order was affirmed because the Supreme Court was unable to muster a majority of judges as to any given issue.

Four justices were of the opinion that there was no change in circumstances since the original decree awarding custody to the mothers and with the limitation regarding their living together. As a result, these four justices would have affirmed the lower court order keeping custody of the children with the mothers, but it would have reversed the lower court order deleting the prohibition on the women living together.

Three dissenting justices would have reversed the lower court order keeping custody of the children with the mothers. These justices discussed the recent decision of the Washington Supreme Court in *Gaylord v. Tacoma School District*, 559 P.2d 1340 (1977) in which that court affirmed the dismissal of a school teacher simply because he admitted to being a homosexual. They also stated:

> The respondents have been engaged in publicizing the homosexual cause in general and their lesbian relationship. They have given a series of lectures and granted interviews where they discussed their own homosexual lifestyle. The children have accompanied respondents at some of these engagements, and the respondents and their children participated in making a movie which depicts the lifestyle of two families bound together by homosexual parents.
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> They have advertised in a brochure entitled "The Gay Family A Valid Lifestyle" in which they offered interested persons a booklet, "Love is for All", and information about a film entitled "Sandy and Madeleine's Family", and also offer to make personal appearances. An article in the San Francisco Chronicle with the headline "The Lesbian Love of Two Mothers" explained the appearance of the two women visiting the Bay Area publicizing their film.
>
> From such publicizing it can be readily seen that they are not content to pursue their lifestyle but are also using their children for the purpose of advocating and proselytizing that style.
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> *I am unable to understand how the court can declare that a school teacher who only admitted to his preference as a homosexual and did not engage in any overt act, is guilty of immorality, and yet, in the instant case, can find perfectly moral the conduct of the respondents.*

Two other justices voted to uphold the lower court's order in its entirety.

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ADMINISTRATIVE RULINGS

Pennsylvania Governor's executive order is expanded

Prior to his leaving office, former Pennsylvania Governor Milton Shapp amended his Executive Order regarding sexual orientation discrimination. In 1975, Governor Shapp issued an Executive Order prohibiting discrimination by state agencies under his jurisdiction for reasons of sexual orientation. This was the first Executive Order of its kind ever issued by any Governor.

As originally signed by the Governor in 1975, the order merely acknowledged his commitment ending discrimination for reasons of sexual orientation. That order instructed state agencies to cooperate with representatives of the Governor in monitoring the situation and in making recommendations for change. In 1976 the order was amended to create a Council on Sexual Minorities and it instructed state agencies to cooperate with the Council.

As amended in 1978, the order, for the first time, actually prohibits discrimination by any state agency under the jurisdiction of the Governor from discriminating on the basis of sexual orientation in employment, housing, credit, contracting, provisions of services or in any other matter whatsoever.

In January of this year, Richard L. Thornburgh, a republican, took office as Governor of Pennsylvania. He has pledged his support for the Council and will not rescind the order signed by the former Governor.

Pennsylvania Attorney General's opinion on professional licensing of gays

On December 28, 1978, Gerald Gornish, Attorney General for the Commonwealth of Pennsylvania delivered his legal opinion to the Secretary of the Commonwealth on the licensing of homosexuals in professional occupations.

The Attorney General stated:

"In my opinion, a licensing board may not deny licensure solely on the basis of sexual preference. This opinion only applies to persons who meet all qualifications and who are homosexuals. This opinion does *not* apply to persons who have been convicted of any crime under the Pennsylvania Crimes Code, sexual or otherwise. Such persons who have been convicted of crimes would have to be dealt with on a case-by-case basis.

"[I]t is the clear policy of this administration that persons shall not be discriminated against because of their "sexual or affectional preferences," and therefore such a person may not be denied licensure.

"Govenor Shapp first enunciated this policy of non-discrimination against sexual minorities in Executive Order 1975-5. Since that time, this Executive Order has been revised and was subsequently codified in 4 Pa. Code §5.95 (see the Pennsylvania Bulletin, Volume 6, No. 46, October 39, 1976, page 2732). I further call your attention to the regulations of the Executive Board, specifically 4 Pa. Code §36.32:

> No agency shall, in any personnel action, . . . discriminate against any person on account of race, color, religious creed, *life style, affectional or sexual preference*, handicap, ancestry, national origin, union membership, age or sex.

This policy was reiterated as late as September 18, 1978, in an amendment to Executive Order 75-5, 'Commitment Toward Equal Rights.' In sum, the policy of this administration in regard to discrimination against homosexuals is clear: it is prohibited. This policy was challenged in the case of *Robinson v. Shapp*, 23 Pa. Commonwealth Ct. 153, 351 A.2d 464 (1976). The case was dismissed by unanimous vote of the Commonwealth Court, and that dismissal was unanimously upheld per curiam by the Pennsylvania Supreme Court. 473 Pa. 315, 374 A.2d 533 (1977).

"See also *Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498 (45h Cir. 1974) in which the Court ruled:

> We hold, therefore, that Acanfora's public statements were protected by the First Amendment and that they do not justify either the action taken by the school system or the dismissal of his suit.

"In conclusion, it is both the legal opinion of the Justice Department and the policy of this administration that an otherwise qualified individual may not be denied licensure in a professional occupation merely because of his or her admission of homosexuality."

New York City school position on gay teachers

In a letter to Mayor Edward I. Koch which was made public this January, Education Chancellor Frank J. Machiarola clarified the position of the New York City public schools regarding employment practices as they relate to sexual orientation.

The letter states:

> "We make every effort to examine carefully the qualifications of our staff. We have, particularly when licensing is involved, very strict requirements for certification and very high standards for selecting staff. In addition, we have a clear sense of due process in all of our personnel practices, in large part reinforced by the actions of collective bargaining unions.
>
> In no instance has sexual orientation been raised as a bar to entrance into our service. In no cases are employees subject to disciplinary action of any kind on account of sexual orientation.
>
> The New York City Public Schools judge each and every one of our students and teachers on an individual basis. We do not discriminate because of the attitudes of our employees in matters that are personal and private.
>
> In addition, you should know that I have received no complaints alleging the violation of any teacher's rights with regard to sexual orientation.

Rape laws are the subject of judicial scrutiny

Despite the First Circuit's decision in *Meloon v. Helgemoe*, 564 F.2d 602 (1st Cir. 1977), cert. denied __U.S.__, 98 S.Ct. 2858 (1978), which held that the New Hampshire statutory rape law punishing "only male perpetrators" and protecting "only female victims of the crime" violated equal protection, both Maine and Texas have upheld their statutory rape laws.

In the case of *State v. Rundlett*, 391 A.2d 815 (Me. 1978), the Supreme Judicial Court of Maine refused to overturn a rape conviction under the state's statutory rape statute (subsequently repealed) and challenged on the ground that it denied equal protection. The statute in question, M.R.S.A. §3151, was interpreted by the court as protecting only females as the victims and punishing only males as the perpetrators. It thus created a classification based on sex, and, following the standard in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1977), a "classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."

Such a standard was met when the Maine court found that the purpose of the law was to protect young females from pregnancy and physical injury, citing with approval from the opinion in *Hall v. McKenzie*, 537 F.2d 1232 (4th Cir. 1976), that "being the subject of carnal knowledge for a female of 13 is not the same as being the subject of carnal knowledge for a male of 13. . . . The possible consequences for the young female are quite different from those for the young male and the differences provide a persuasive rationale for defining the respective crimes of carnal knowledge of a male and female separately and making different the consequences of conviction . . . It is obvious that there is a far greater likelihood of physical injury to a sexually immature female of 13 than to a sexually immature male of 13. More important, a possible consequence of carnal knowlege of a 13 year old female may be to cause her to become pregnant—a physiological impossibility for a male."

The *Meloon* decision was distinguished by the finding that Maine's *true* purpose was the prevention of pregnancy and physical harm to young females, whereas the First Circuit in *Meloon* rejected such an argument advanced by the state for lack of supporting evidence.

A similar challenge was made by the defendant on appeal in *Ex Parte Richard Groves*, 571 S.W.2d 988 (Tex. 1978), to his conviction for statutory rape under V.T.C.A., Penal Code §21.09.

§21.09 provides, in part, that "a person commits an offense if he has sexual intercourse with a female not his wife and she is younger than 17 years."

The defendant appealed on the ground that the statute was unconstitutional in that it denied him equal protection, basing his challenge on the First Circuit's decision in *Meloon*.

The Texas Court of Criminal Appeals first noted that it was not compelled to follow *Meloon*. It then proceeded to uphold the statute on equal protection grounds based on (1) the same argument used by the state in *Rundlett*, and alternatively (2) by applying §2.02(c) of the Code Construction Act which provides that "words of one gender shall include the other genders" to the Penal Code. Thus, all the gender words in §21.09 could be used interchangeably to apply to both males and females, in effect doing away with any gender based classification.

> **Absent circumstances which enhance its probative value, evidence of a rape victim's unchastity, whether ... concerning her general reputation or ... specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or her consent to the intercourse with the defendant ... to outweigh its highly prejudicial effect.**

The few states allowing a reasonable mistake of fact as a defense to a charge of statutory rape have been joined by Alaska whose Supreme Court, in *State v. Guest*, 583 P.2d 838 (1978), held that a charge of statutory rape is defensible "where an honest and reasonable mistake of fact as to the victim's age is shown."

The court's rationale was based upon the principle of "basing serious crimes upon a general criminal intent as opposed to strict criminal liability which applies regardless of intention."

However, it did state that a reasonable mistake was not an absolute defense but should only serve to reduce the offense to what it might have been had the facts been as the offender believed them to be.

. . .

Also under recent attack have been the constitutionality of "rape shield" statutes.

The Eighth Circuit in *U.S. v. Kasto*, 584 F.2d 268 (8th Cir. 1978), upheld a rape conviction challenged on the ground that it was error to prohibit the introduction of evidence concerning the victim's prior reputation and prior sexual activity with men other than the defendant. Overruling *Packineau v. U.S.*, 202 F.2d 68a (8th Cir. 1953), the court held that "absent circumstances which enhance its probative value, evidence of a rape victim's unchastity, whether . . . concerning her general reputation or . . . specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or her consent to the intercourse with the defendant . . . to outweigh its highly prejudicial effect."

The defendant also contended that the exclusion of such evidence denied him his 6th Amendment right to confront the witnesses against him.

The court held that both the 6th Amendment right to confrontation and the 5th Amendment right to due process of law required only the introduction of all *relevant* and admissible evidence. Thus, if the evidence excluded is irrelevant to the charge, no constitutional rights have been infringed.

A similar analysis was used in *Roberts v. Indiana*, 373 N.E.2d 1103 (1978) to uphold Indiana's "rape shield" statute. See also *People v. Mckenna*, 585 P.2d 275 (Col. 1978); and *State v. Commonwealth*, (Kentucky Ct. Appeals, March, 1978); and *State v. Mastropetre*, (Conn. Supreme Ct. Aug. 1978), rejecting challenges to "rape shield" statues.

Somewhat of a reverse situation occured in *U.S. v. Woolery*, 5 M.J. 31 (CMA 1978), where the rape conviction of an army sergeant was reversed. The court held that the prejudice arising from the admission into evidence of testimony of two prior incidents of rape for which the defendant was never charged more than outweighed its possible probative value and that it was error to have admitted such evidence.

The Maryland Court of Special Appeals has limited the application of Maryland's rape shield statute to heterosexual conduct only.

In *Lucado v. State*, 40 Md.App. 25, 389 A.2d 398 (1978), the court affirmed the defendant's conviction for commiting sexual offenses upon another male and rejected the defendant's contention that, under Md.Annot. Code art. 27, §461A, it was error to permit into evidence testimony concerning the victim's lack of reputation as a homosexual.

§461A provides, in part, that "evidence relating to a victim's reputation for chastity . . . [is] not admissible in any prosecution for commission of a rape or sexual offense . . . "

The issue was whether the testimony relating to the victim's non-homosexuality related to his reputation for "chastity." The court determined that the word "chastity" referred only to heterosexual conduct and, therefore, the evidence was admissible.

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Two decisions from Iowa and Maryland have carved exceptions to the doctrine of interspousal immunity or privilege.

In *Lusby v. Lusby*, 390 A.2d 77 (1978), the Maryland Court of Appeals permitted a wife to sue her husband for damages in the case of an "outrageous, intentional tort."

The plaintiff wife's automobile had been forced off the highway by her husband and two companions. The husband forcibly had sexual intercourse with his wife, who was subsequently raped by his two companions.

The court cited at length both Maryland cases which had consistently refused to permit a wife to sue her husband in tort on the theory that such a change must emanate from the Legislature, not the courts, and cases in other jurisdictions which had either abandoned or modified the doctrine of interspousal immunity.

The court did not overrule the Maryland precedent but limited its holding to the facts involved, stating that "nothing in our prior cases . . . indicate that under the common law of Maryland a wife was not permited to recover from her husband in tort when she alleged and proved the type of outrageous conduct here alleged."

In *State v. Hubbs*, 268 N.W.2d 188 (1978), the Supreme Court of Iowa affirmed the defendant's conviction for the statutory rape of his stepdaughter.

The defendant had appealed his conviction contending, inter alia, that the testimony of his wife, the victim's mother, was inadmissible under the I.C.A. §622.7, which prohibits one spouse from testifying against the other except "in a criminal prosecution for a crime committed by one against the other."

The court cited prior cases holding that this prohibition did not apply when the charge was incest "because incest is a crime committed against the wife," and extended this rationale to encompass the situation involved, noting that the fact that the victim was the defendant's stepdaughter, rather than natural daughter, did not change the character of the act as far as the mother was concerned and was "just as much an offense against her in one case as in the other."

—Marilyn Cochran-Canin

District of Columbia courts review a multitude of sex cases

Sexual Solicition - Intent. The District of Columbia Superior Court ruled, in *United States v. Hare*, Sup. Ct. D.C. Crim. No. M-1904-78, May 17, 1978, that a defendant is not guilty of sexual solicitation where a police officer initiated the conversation and it was determined that the two dollars offered by defendant was patently insufficient to secure the services of a prostitute.

At trial, the testimony showed that defendant was engaged in conversation with a plainclothes police officer. The officer asked the defendant what he wanted to do and how much he would pay. The defendant replied that he would give two "buckeroos" and indicated that he believed the officer to be "polices". Whereupon, he was arrested and charged under a statute making it "unlawful" for any person to invite, entice, persuade or address for the purpose of prostitution."

The Court rejected the notion that the pivotal question was who makes the first contact or overture and who first broaches the subject of money. Instead, it applied a "totality of the circumstances" approach to liability under the statute. The Court held that defendant's conversation with the officer was so vague, non-commital, and ridiculous regarding sexual interaction with the officer as to belie any real effort on his part to "invite, entice, or persuade" the officer to engage in prostitution.

Administrative Segregation - Homosexuals in Jail. *In Smith, et al v. Washington, et al*, U.S. App. D.C. No. 76-1370, Aug. 23, 1978, the U.S. Court of Appeals for the District of Columbia Circuit, in a unanimous decision, held that a complaint alleging unconstitutional deprivation of liberty meets the jurisdictional amount of $10,000 as required by 28 USC 1331 (a).

The action was filed by prisoners in the D.C. jail, for injunctive relief, contesting the constitutionality of segregating alleged or confessed homosexuals without a hearing. The prisoners alleged that by being segregated, they were placed in overcrowded, vermin infested cells, made ineligible for work detail (which would preclude accumulation of "good time"), denied access to a library, restricted in visiting rights, had inferior medical treatment, and were publicly branded as homosexuals.

In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), it was held that in order for a case to be dismissed for want of jurisdiction, it must appear "to a legal certainty" that the claim does not amount to $10,000. The Court here ruled that in view of the allegations made by the prisoners, for jurisdictional purposes, the requisite amount had been established.

Carnal Knowledge - Corroboration. The type of corroboration neccessary where there is carnal knowledge of a minor was delineated recently in the Superior Court of the District of Columbia. In the case of *United States v. Beaner,* Sup. Ct. D.C. Crim. No. 2241-78, Nov. 21, 1978, the defendant was found guilty of five counts of carnal knowledge; to wit: having sexual intercourse with the complaining witness, his 13 year old daughter, on five separate occasions.

The court conceded that corroboration is required where the complaining witness is a child or immature female. However, Chief Justice Moultrie ruled that (a) the complaining witness' entries in her diary of "I did it again", and (b) her subsequent report to her mother of her sexual relationship between herself and the defendant was sufficient corroboration to support a guilty verdict.

Child Custody - Presumptions. The issue of whether, in child custody disputes between natural parents, there is a valid presumption that the interest of a child of tender years is best served in the custody of the mother was considered, en banc, by the District of Columbia Court of Appeals. *Bazemore v. Davis,* D.C. App. No. 12093, Dec. 1, 1978.

At common law in the District of Columbia, the father, as a matter of right, was entitled to the custody of his children. At the end of the 19th Century this rule began to give way, and a standard evolved giving preference for the mother. The Court noted that there has never been an explanation of the rationale behind this presumption, and further, that it focused more attention upon the mother's needs than those of the child.

In rejecting the presumption favoring the mother, the court held that what a child needs is not a mother, but someone who can provide "mothering", i.e., the giving of consistent and predictable affection, acceptance, approval, protection, care, control and guidance. Mothering does not necessarily correspond to the gender of the parent. The Court concluded: the rule, in a dispute, in the District of Columbia, between the biological parents over custody, the sole consideration is the best interest of the child (be it legitimate or illegitimate).

Sexual Solicitation - Corroboration. The District of Columbia Court of Appeals, in *Griffin v. United States,* D.C. App. No. 13312, Dec. 19, 1978, held that corroboration was necessary for a conviction of solicitation for lewd and immoral purposes, D.C. Code 22-2701.

In this case, the solicitation was of a covert police officer who stopped his car and was approached by the defendant. Only the officer testified for the government. The government argued that under *Arnold v. United States,* 358 A.2d 335 (1976), corroboration was not required for rape and its lesser included offenses.

The Court agreed that this was still good law but neld that solicitation was not a lesser included offense within the meaning of *Arnold.* In reaffirming the decision of *Kelly v. United States,* 194 F.2d 150 (1952), the Court insisted that corroboration of the officer's testimony is required and entered a judgment of acquittal for the defendant.

Sexual Solicitation - Free Speech. On a motion for judgment notwithstanding the verdict following a conviction of sexual solicitation, the D.C. Superior Court in *United States v. Blanton,* Sup. Ct. D.C. Crim. No. M-6718-78, Jan. 5, 1979, held that the solicitation statute does not conflict with Ms. Blanton's First Amendment right of free speech. Ms. Blanton was arrested when she offered to give "half and half" (oral sodomy and sexual intercourse) to a plainclothes officer in return for twenty dollars.

Although the solicitation statute was specifically upheld against a First Amendment challenge in *United States v. Moses,* 339 A.2d 46 (1975), the claim here is that the *Moses* decision permitted the regulation of sexual solicitation solely on the basis that solicitation involved commercial speech, which at the time of *Moses* was unprotected. The defendant argued that the situation changed when the Supreme Court, in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976) abolished the commercial speech exception to the First Amendment.

The defendant further argued that because prostitution per se is not a crime in the District of Columbia, a defendant has a right to be a prostitute, and, thereafter speech relating to prostitution cannot be regulated consistent with the First Amendment. Not agreeing, the Court held that *Virginia Pharmacy* should not be construed to mean that commercial speech could not be regulated in any way.

That is, the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. The rules prohibiting solicitation are prophylactic measures whose objective is prevention of harm before it occurs.

Since there are significant public interests in preventing solicitation by prostitutes, and because solicitation for prostitution is commercial speech entitled to less First Amendment protection, the Court felt it should use a balancing test to decide this case. Balanced against the public interests, is the defendant's interest in soliciting customers to engage in commercial sexual activity, which if consumated would constitute criminal acts, i.e., fornication, sodomy or adultery. The Court held that defendant "clearly does not have a First Amendment right to solicit persons to commit illegal acts even if she intends to charge money for them."

Sexual Assault - Corroboration. The District of Columbia Court of Appeals, in a question of first impression, has had to decide if corroboration is required to sustain a conviction of simple assault upon a victim of the opposite sex who is a minor, and if the element of "force and violence" necessary to a conviction is supplied by the "sexual nature" of the touching. It answered in the negative. *In The Matter of L.A.G.,* D.C. App. No. 12458, Jan. 10, 1979.

JUDICIAL RULINGS
CONTINUED

The assault was by a 13 year old boy who placed his hand upon the vagina of a 12 year old girl for a few seconds while they were walking to their math class at the junior high school. The boy was charged with and convicted of simple assault.

The court ruled that it was not bound by several previous cases involving simple assaults of a sodomitical nature wherein it was held that corroboration was required to sustain a conviction. This result is proper, the Court reasoned, because the homosexual nature of an assault gives rise to a greater degree of scrutiny in light of the difficulties that face a person accused of such conduct. This being a heterosexual assault, corroboration is not necessary, and the conviction was upheld.

Justice Mack, dissenting, said that the Court had put itself in a position where if the complaining witness had been a 12 year old boy, instead of a 12 year old girl, the conviction would have to be reversed for lack of corroboration. He felt that the testimony of any victim-witness should be carefully scrutinized in sexual situations, relative to an act which by its nature left no traces and to which there were no other witnesses.

—Leonard Graff. J.D.
Washington, D.C. Correspondent

PERIODICAL REVIEW

Annotated resource guide to periodicals in human sexuality

Researched and Edited by: David A. Shore, 1978. 39 pp., paper, $3.00 payable to: David A. Shore, Director, Sullivan House, 1525 E. 53rd St., Suite 1102a, Chicago, IL 60615, (312) 493-2968.

This publication brings together infomation on over 50 journals and newsletters covering the entire range of topics in human sexuality.

"If indeed necessity is the mother of invention, then this Guide was both inevitable and overdue. The literature in the field of human sexuality is enormous and burgeoning, the people involved perhaps as diverse as the subject matter itself. While attempts are presently underway to unify many aspects of the profession known as sexology, those professionals presently involved often find themselves immersed in the plethora of materials being generated . . . .

"The purpose of this Guide . . . is to acquaint those people interested and/or involved in the field of human sexuality with a sample of existing resources which will be essential to them."—*from the introduction to the Guide.*

The following infomation about each periodical listed in the Guide is provided: title, editor, frequency of publication, cost, subscription address, manuscript address, and a brief abstract and/or statement of purpose.

Also included is a listing of major organizations in the field of human sexuality.

Thank you, David Shore, for this contribution to the field of sexuality.

—Thomas F. Coleman

LEGISLATION

'Maressa Bill' to recriminalize sodomy in New Jersey is withdrawn

In late July, 1978, the New Jersey Legislature passed a bill to revise the entire penal code of that state. As part of that reform, the Legislature decriminalized private sexual acts between consenting adults.

Later that year, State Senator Joseph Maressa introduced a bill to reinstate criminal penalties for homosexual acts in private. The bill would have allowed private heterosexual acts to remain decriminalized.

The so-called "Maressa Bill" caused a major political and moral controversey in New Jersey, not unlike the furor which was created in California over the "Briggs' Initiative." The *Gay Coalition of New Jersey* worked to defeat the "Maressa Bill." Because of the work of the Coalition with religious, political and civil rights organizations throughout the state and because of the educational efforts of that organization, Senator Maressa withdrew his bill from the Legislature on January 22, 1979.

Maressa told the Judiciary Committee, "I've grown to know a lot of homosexuals since I got involved with this bill. They are a lot of fine individuals." Of his change of position regarding his former attempts to make homosexuals "go underground" and "into the closet", Maressa stated he made those statements "when I was a lot less educated about homosexuality;" he now believes "they are entitled to their lifestyle as long as they don't try to impose it on anybody else."

This is the fourth time there has been an attempt to recriminalize private sexual acts after a state legislature has passed a bill to decriminalize such acts. The first attempt was in Idaho in the early 1970's when the Legislature reinstated criminal penalties before the new penal code package went into effect. The second was an unsuccessful attempt to have the voters in California repeal the consenting adults act which was passed by the Legislature in mid-1975. A referendum and an initiative attempt were both unsuccessful when insufficient signatures were collected and those measures failed to qualify for the ballot. The third was a successful move by the Arkansas Legislature. Although that Legislature decriminalized private sex in a penal code revision package in 1976, and private sex was decriminalized for nearly a year, that Legislature reinstated criminal penalties in 1977 for homosexual acts in private.

Troy, New York and Detroit, Michigan enact gay rights ordinances

The Troy City Council has passed a measure which prohibits discrimination for reasons of marital status or sexual preference in that city's hiring practices. Over 40 cities in the United States have adopted similar legislation over the past several years.

In Detroit, Michigan, the City Council passed an Omnibus Human Rights Ordinance which includes specific protections in areas of employment, medical care, housing, education, and public accomodations for reasons of sexual orientation.

In 1974 the Detroit City Charter was amended by the voters with a mandate to the City Council to adopt provisions protecting persons against discrimination on the basis of sexual orientation. Five years later the Detroit City Council has complied with that mandate. The passage of this bill makes Detroit the largest city in the United States to prohibit discrimination against gays.

California Briggs' initiative is law in Oklahoma

Although the California voters overwhelmingly defeated the "Briggs Initiative" pertaining to the employment of teachers who encourage or engage in homosexual conduct, the Oklahoma Legislature has enacted a bill virtually identical to Briggs' California proposal.

Gay and non-gay teachers in Oklahoma are fearful of reprisals if they attempt to challenge this law in the courts. Because of the political climate in Oklahoma, most teachers fear that, even if they won a lawsuit, the careers of the plaintiffs would be destroyed in the process. Some civil libertarian lawyers have suggested that a lawsuit in federal court with anonymous plaintiffs is the only real remedy.

The full text of the law, which was passed by the Legislature in April, 1978, and signed by the Governor that same month, follows:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
   a. committed with a person of the same sex, and
   b. indiscreet and not practiced in private;
2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teachers' aide has:

1. Engaged in public homosexual conduct or activity; and
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors shall be considered in making determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties;
3. Any extenuating or aggravating circumstances; and
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

Michigan enacts first statewide protection for 'sexual preference'

In December, 1978, Govenor William Milliken signed the "Nursing Home Licensing Act" (SB-659). The bill provides for the licensure, certification and regulation of nursing homes in Michigan. It protects the rights of nursing home clients and patients regardless of sexual preference, marital status, sex, and a number of other factors. These rights include the right of association with persons of one's own choosing, confidentiality of records, privacy, and reception of unopened mail.

This legislation takes on added significance because it is the first time legislation prohibiting discrimination specifically on the basis of sexual preference has actually been enacted by any state legislature, although many such bills have been introduced in various legislatures.

Private sex decriminalized in Vermont

Section 2603 of Title 13 of the Vermont Codes was repealed in 1977 as part of the legislative package enacted along with a special sexual assault bill. Section 2603 had prohibited oral sexual conduct even when performed in private between consenting adults. Since Vermont did not have a sodomy law (anal sexual conduct) on the books, this repeal actually decriminalized all private sexual acts between consenting adults.

This change in the law was accomplished without publicity or fanfare, and the full importance of the bill is just recently coming to national attention; Dr. Franklin E. Kameny brought the information to the attention of the *SexuaLaw Reporter.*

Twenty-two state legislatures have now decriminalized private sex between consenting adults. A list of those states and the method by which this result was accomplished follows (PCR = penal code revision package, SP = special bill specifically to decriminalize, SP-Rape = special bill to revise rape laws).

Although Arkansas decriminalized in 1976, criminal penalties for private homosexual conduct were reinstituted by their Legislature in the 1977 legislative session. The Idaho Legislature decriminalized in the early 1970's but reinstated criminal sanctions before the new code went into effect.

LIST OF STATES WHICH HAVE DECRIMINALIZED PRIVATE SEX

Alaska (PCR), California (SP), Colorado (PCR), Connecticutt (PCR), Delaware (PCR), Hawaii (PCR), Illinois (PCR), Indiana (PCR), Iowa (PCR), Maine (PCR), Nebraska (PCR), New Hampshire (PCR), New Jersey (PCR), New Mexico (SP-Rape), North Dakota (PCR), Ohio (PCR), Oregon (PCR), South Dakota (PCR), Washington (PCR), West Virginia (PCR), Wyoming (SP-Rape), Vermont (SP-Rape).

there may be an unconstitutional delegation of power from the legislative body to the police (the executive branch). This may constitute a flagrant violation of the concept of Separation of Powers.

" 'It is established that a law fails to meet the requirements of the Due Process clause if it is so vague and standardless that it leaves the public uncertain as to conduct it prohibits, or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.' *Giacco v. Pennsylvania,* 382 U.S. 399, 402-403. In *Jellum v. Cupp,* 475 F. 2d 829 (Ninth Cir., 1973), the court applied this standard to an Oregon statute prohibiting 'acts of sexual perversity.' The court looked to the statute itself, court interpretations, and dictionary definitions, and finding no acceptable standards, stated:

When the factors not appropriate for consideration in these cases are stricken from the 'definition', we are left with the enlightenment that lewdness is the making of an appointment for lewdness.

> It is not enough to say that the prosecutor, judge and trier of fact may exercise their own common sense and good judgment in determining what is 'unnatural conduct' and 'abnormal sexual satisfaction.'

"As will be discussed later in this brief, the Oklahoma Legislature, the Tulsa City Council, and the Oklahoma Court of Criminal Appeals has never come to a single definition of the term 'lewdness' as it has been used in the Tulsa ordinance or the state statute. Whether certain conduct or certain language has been considered a violation of this ordinance or the equivalent state statute seems to have been determined on an ad hoc basis. However, as will be discussed in more depth later in this brief, the analysis of these appellate decisions seems to cause more confusion than enlightenment.

"The opinion of presiding Judge Lawrence A. Yeagley quite properly states that 'the terminology of the ordinance would meet the constitutional test if its meaning was fairly ascertainable by reference to similar statutes, prior judicial determination, if the questioned word has a common and generally accepted meaning, or if there are attendant definitions to the ordinance to support its understanding.'

"What does the ordinance say that 'lewdness' means? Again, Judge Yeagley succinctly points out 'when the factors not appropriate for consideration in these cases are stricken from the 'definition' (which reads word for word as the state law), we are left with the enlightenment that lewdness is the making of an appointment for lewdness.'

"As this court stated in *Landrum v. State,* 255 P. 2d 525, 529 (Okl. Cr., 1953) 'it will be noted that no attempt is made to specifically define the term 'lewdness' or limit the definition, but it is merely specified that the term shall be construed to *include,* etc.' Because the legislative authorities have failed to define the heart of the crime, we must resort to prior judicial decisions in order to ascertain whether the ordinance (or state statute) has been constitutionally interpreted.

"The first reported appellate opinion on this subject is *Landrum v. State,* supra. In that case, the defendant was charged with a violation of the Oklahoma lewdness statutes, Sections 1029, 1030. The information filed against him alleged that he did unlawfully and wrongfully commit an act of lewdness. After noting that the legislative body had failed to define the term, this court resorted to *Roget's International Thesaurus,* New Edition, and, stated 'the term "lewdness" as used in Title 21, O.S. 1951, 1029, 1030, means unlawful indulgence in lust, sensuality, passion, eager for sexual indulgence whether public or private.' *Landrum v. State,* supra, at page 526. The court went on at page 531 and stated, 'two persons meeting and kissing, or lovers arm in arm and petting, but showing high respect each for the other is one thing, and sensual acts as shown by the evidence in the within case is another.' Now just what did the evidence show in this case? A black man was holding the breast of a white woman, and was caressing and kissing her on the neck. This conduct occurred behind closed doors in a law office. The police were called to the scene, not because this conduct was seen by a member of the public, but merely because a white woman and black man were seen on the street with their arms around each other. The Court of Appeals stated, 'to see a white woman and Negro man on the street with their arms around each other and staggering about, as the evidence disclosed in this case, could be calculated to cause shock, consternation, and chagrin to well up in many persons of the public, and more so than if the parties were of one race.' It might also be noted that while the black man was charged with lewdness, the court said that 'it would seem that the woman was more at fault in willingly permitting herself to be the recipient of the lewd attentions of the defendant than the defendant. It does not appear that she was charged.' *Landrum v. State,* supra, at page 531. Although the court did not reverse his conviction, the court reduced his sentence to six months in the County Jail.

To see a white woman and Negro man on the street with their arms around each other and staggering about, as the evidence disclosed in this case, could be calculated to cause shock, consternation, and chagrin to well up in many persons of the public, and more so than if the parties were of one race.

"The next relevant reported case is *Bayouth v. State,* 294 P. 2d (Okl. Cr., 1956). In that case, the defendant was prosecuted under Title 21, Section 1029 of the Oklahoma statutes, alleging that he did entice a woman to commit an act of lewdness with him. The evidence showed that the prosecuting witness was a thirty-six-year-old woman, a mother of five children, who lived with her husband. She complained that she had received several telephone calls from the defendant. In the course of these telephone calls, the defendant became aware of the fact that the complaining witness was a married woman who lived with her husband. On one occasion, it was alleged that the defendant said to her on the telephone, "If I could meet with you, could we have intercourse?' On another occasion, the defendant was

alleged to have asked if the complaining witness would have intercourse with the defendant in front of his wife. On a third occasion, it was alleged that the defendant made another offer to have sexual relations with the woman, and in furtherance of his effort to entice her, offered to furnish her money if she would do so. The defendant was not charged, in the information with the first two telephone calls requesting sexual intercourse (without the offer of money). However, in the information, he was charged with asking her to have sexual intercourse with him and promising her money if she would. At the trial, testimony was allowed to go before the jury about all three conversations. On appeal, the defendant claimed that it was error for the trial court to fail to instruct the jury concerning 'the admission of evidence of other crimes in connection with the identity of the accused.' In response to that claim of error, the Court of Appeals stated:

> And although the defendant had one time prior to December 2, 1954, asked Mrs. Hamilton by telephone to have intercourse with him, it was not until the second day of December, 1954, that he offered her money to lure her on. He denied this, but the jury did not believe him. Although the telephone calls prior to December 2, 1954, might have amounted to a breach of the peace, they did not violate the terms of Section 1029, of Title 21, O.S.A., as defined by Section 1030 of the same Title, as he had not previously, as an allurement, offered her money. *Bayouth v. State,* supra, at page 865.

Lewd behavior is by its very nature offensive to the community. There is no need for a separate finding as to whether the act was offensive, or whether anyone in particular saw it, or was offended by it.

"From the foregoing analysis of the *Bayouth* case, and from the court's holding at page 865, it appears that a solicitation to commit an act of adultery is not considered a violation of Section 1029. This, even though adultery was, and still continues to be, a crime in Oklahoma. See Title 21, Section 871, of the Oklahoma statutes, which states that adultery is the voluntary sexual intercourse of a married person with a person of the opposite sex. Both parties to the sexual act are considered guilty.

"The next reported case dealing with the lewdness statute is *Griffin v. State,* 357 P. 2d 1040 (Okl. Cr., 1961). In that case, the defendant was charged with the crime of soliciting and enticing a female to commit an act of lewdness. He was tried before a jury, found guilty, and his punishment was to be imprisonment in the County Jail for twelve months. The testimony showed that the defendant made a telephone call to a sixteen-year-old girl at her home. The girl lived with her mother. When the first telephone call was made, the mother was not at home. The defendant asked the girl, 'How would you like to make $10.00? The defendant further stated, 'All you have to do is to go down the street and meet me.' The telephone call soon ended. The girl telephoned her mother and also phoned the police. There was also testimony that the defendant later offered her $50.00 if she would go to a hotel with him. At one point in a conversation, he asked her to have on a negligee. This was the extent of the evidence for the State. On appeal, one complaint was that the information did not allege that the complaining witness was a minor. The Court of Appeals stated, 'It would not matter what the age of the prosecuting witness or person involved might be.' Another argument on appeal was that there was no evidence that the defendant requested the girl to commit a lewd act. This court stated, 'Still, what did he say to her that was lewd? This is the question. He wanted to see her down at the corner. The girl asked him what for, but apparently never got an answer. He offered her $10.00, or $50.00 if she would go to a hotel with him, but still did not say for what purpose. We could reasonably speculate that it must be for some sexual play. But that is speculation. This court allowed the conviction to stand, even though there was no evidence that the defendant solicited the girl to commit an act of lewdness. Instead of reversing the conviction, the court stated, 'Here, by weakness of the information in the first instance, and the weakness of the evidence to support the charge in the second instance, justice demands that the sentence be reduced from twelve months to thirty days in the County Jail.' In essence, the court allowed a conviction of soliciting for lewdness to be based upon *speculation* that the defendant, if prompted to continue his requests, might have requested the girl to commit an act of lewdness.

"Some seventeen years elapse between the decision of the court in *Griffin* and the next relevant reported opinion dealing with lewdness, or solicitation to commit lewdness. In *Profit v. City of Tulsa,* 574 P. 2d 1053 (Okl. Cr., 1978), the defendant was charged with soliciting a person to commit an act of lewdness or prostitution, in violation of Tulsa revised ordinances, Title 27, Section 154. The defendant challenged the sufficiency of the information for two reasons. One was that the information alleged that she solicited another to commit an act of lewdness or *prostitution,* and that charging in the alternative was improper. The court rejected this claim. The second reason she stated the information was deficient was on the ground that the ordinance was unconstitutional for vagueness, overbreadth, and a status crime. The court, on appeal, stated that 'the information specified the particular act of lewdness which the defendant allegedly committed.' For this reason, the court held that the information was sufficient. The evidence showed that the defendant, while in the privacy of a bedroom of her own home, asked a stranger to expose himself to her, and to urinate in her presence. The defendant argued that the act of exposure or urination should not be considered lewd under the circumstances of this case because the act was to occur behind closed doors. The court stated, 'This solicitation was not laved of its lewdness by the mere fact that the door was closed.' *Profit,* supra, at page 1056. The court went on to say, at page 1057, 'Lewd behavior is by its very nature offensive to the community. If a person is found to have committed a lewd act, then there is no need for a separate finding as to whether the act was offensive, or whether anyone in particular saw it, or was offended by it.' From this case, and the language of the court, it appears that the court is holding that exposure of a penis and/or urination of a man in the presence of a consenting woman, in private, is lewd.

"The *Landrum, Bayouth, Griffin,* and *Profit* cases appear to be the only relevant reported appellate decisions in Oklahoma with respect to what does or does not constitute lewdness, or solicitating for lewdness within the state statute or the Tulsa City ordinance.

"Since the statute and ordinance do not define the term lewdness, it is the language of the court in these four opinions which must be the subject of critical inquiry as to whether constitutional standards have been met. Just what is 'lewdness' in Oklahoma? Are citizens given adequate notice so that they may conform their conduct or speech to the requirements of the law? Are the police being given objective standards so that they may enforce the law in a fair and impartial manner? Are judges and juries being given adequate guidance and objective standards so that they may fairly judge whether a person's speech or conduct is or is not a violation of the law? What do these cases tell us?

"Lewdness is . . . 'unnatural indulgence in lust, sensuality, passion, eager for sexual indulgence, whether public or private.' *(Landrum,* at page 526). However, whether kissing or petting violates the law is determined by whether or not there is also a showing of 'high respect for each other in the performance of said kissing or petting.' *(Landrum,* at page 531).

"Lewdness is . . . behavior that 'is by its very nature offensive to the community.' *(Profit,* at page 1057) However, whether behavior is offensive—whether it may cause shock, consternation, and chagrin to the public—may be affected by the difference in races of the participants.

"Lewdness is . . . a man touching a woman's breast and kissing her on the neck, even in private. *(Landrum,* at page 529 and 530).

"Lewdness . . . is not . . . soliciting for the criminal act of adultery, unless accompanied by an offer of money. *(Bayouth,* at page 865). However, offering money for an undetermined act is lewd if a reasonable speculation is that the act would involve sexual play. *(Griffin,* at page 1046.

The alleged definition of lewdness set forth by the court in *Landrum,* supra, is really nothing more than a string of equally vague synonyms. These synonyms do not seem to limit the definition of lewdness, but instead, seem to expand and confuse the issue.

"Lewdness is . . . exposure of a penis and/or urination in front of a consenting woman in private. *(Profit,* at page 1056).

"From these pronouncements, does a citizen have notice of what activity he must refrain from in order to keep from violating the law? Does he have notice of what activity *is legal* and for which he need not exercise prior restraint? Are the cases consistent enough and complete enough to satisfy due process?

"It is submitted that the alleged definition of 'lewdness' set forth by the court in *Landrum,* supra, is really nothing more than a string of equally vague synonyms. These synonyms do not seem to limit the definition of lewdness, but instead, seem to expand and confuse the issue.

"When we turn to the courts of other jurisdictions, we see a wide variety of differing definitions as to the meaning of 'lewdness.' The opinion of Judge Yeagley in the court below sets forth, at page 2 of that opinion, numerous decisions. There seems to be no generally accepted definition of the term 'lewd.'

"Amicus Curiae would like to illustrate how 'reasonable judges may differ' as the the meaning of 'lewdness'. California has a statute, Section 647(a) of the Penal Code, which prohibits soliciting or engaging in lewd or dissolute conduct. For many years, the standard jury instruction on the meaning of 'lewd or dissolute' as used in that subdivision read as follows:

> The terms lewd and dissolute are synonymous, and mean lustful,' lascivious, unchaste, wanton, or loose in morals and conduct.

"This was not a definition established by the California legislature. As in Oklahoma, the California Legislature failed to define the terms 'lewd or dissolute' as used in that statute. The California appellate courts, in attempting to construe those terms, referred to the dictionary in arriving at this standard jury instruction. Then, in 1974, in an attempty to ward off continuing challenges of vagueness, the First District Court of Appeal, in the case of *Silva v. Municipal Court,* 115 Cal. Rptr. 479 (1974), held that in order to avoid constitutional vagueness, those terms would hereafter be constued to mean 'obscene.' That court then went on to define the term "obscene" as meaning grossly repugnant and patently offensive to what is generally accepted to be appropriate and decent under statewide contemporary community standards. The National Committee for Sexual Civil Liberties was amicus in that case. Then, two years later, the Second District Court of Appeal, in the case of *People v. Williams,* 130 Cal. Rptr.460 (1976) refused to follow the reasoning of the First District Court of Appeal, and instead, held firm to the traditional definition and the traditional jury instruction. The Second District Court of Appeal criticized the First District Court of Appeal and held that the First District was incorrect in its reasoning.

While Judge Yeagley himself last year felt the ordinance was not unconstitutional, this year, after further reflection, he now feels that it is unconstitutionally vague.

"These conflicting and inconsistent decisions in California are an example of the problems created by the use of a word such as 'lewd' to define what conduct must be avoided to conform to the law; even the appellate courts can not agree.

"The four Oklahoma cases seem to indicate no consistency from which the public may even infer what the law requires. A further example of the confusion created by the ordinance and the fact that men of reasonable intelligence *do* differ as to meaning and application, is found in the *Profit* case. Not only did one of the Court of Appeals justices dissent, but, even more noteworthy, Judge Yeagley felt in that case that the statute was *not* unconstitutionally vague—just one year before he declared the opposite ruling in the case presently before the court. If a reasonable judge finds the statute confusing or vague and has difficulty making up his own mind, how can the general public be held to have notice of what the statute means?

"Although on many occasions, the District of Columbia Court of Appeals had held that the 'lewd, obscene and indecent act' statute of that jurisdiction was not unconstitutionally vague, in the case of *District of Columbia v. Walters*, 219 A.2d 332 (1974), that court reversed its position and declared that statute unconstitutionally vague.

"Similarly, although the Iowa courts had upheld the constitutionality of their lewdness law on numerous occasions, in the case of *State v. Kueny*, 215 NW 2d 215 (1974), the Supreme Court of Iowa unanimously declared that statute as unconstitutionally vague.

The Supreme Court of New Jersey has, on several occasions, recognized the lack of precision in the term 'lewdness,' remarking, 'Lewdness has been described as conduct of a lustful, lecherous, lascivious or libidinous nature. This definition is pleasantly alliterative, but not especially revealing.

"In the case of *Morgan v. City of Detroit*, 389 F. Supp. 922 (1975) the Federal District Court in Michigan held a portion of the City of Detroit ordinance regulating 'lewd and immoral acts' as unconstitutionally vague. That decision was not appealed by the City of Detroit. As a result, in the case of *Steponaitis v. City of Detroit*, Civil Action 76-614-365-CZ, in the Wayne County Circuit Court, Judge John H. Hausner entered a declaratory judgment to the effect that the 'lewd and immoral act' portion of the City of Detroit ordinance was unconstitutionally vague.

"Also, in the case of *Miami Health Studios v. City of Miami Beach*, (S.D. Fla., 1973) 353 F. Supp. 593, reversed on procedural grounds only, 491 F. 2d 98 (1974), the Federal District Court heid unconstitutional the portions of a Florida statute which prohibited lewdness and prostitution. The court specifically held that the use of the words 'lewd' and 'lewdness' rendered such portions unconstitutionally vague. The Federal Court refused to accept any of the language defining 'lewdness' which appears in a state court opinion and in the 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 the criminal offense.

"As Judge Yeagley did in the case below, the Federal Court in Florida then went on to order that the words 'lewdness' and 'lewd' be deleted from the lewdness-prostitution statute. The Federal Judge held that the lewdness portion was severable from the prostitution portion.

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

> Lewdness has been described as conduct of a lustful, lecherous, lascivious or libidinous nature. This definition is pleasantly alliterative, but not especially revealing.

"In conclusion on the vagueness argument:

1) The Tulsa ordinance fails to properly define the term 'lewdness';

2) The state statute, upon which the Tulsa ordinance is based, likewise fails to define the term 'lewdness';

3) The decisions of this court in *Landrum, Bayouth, Griffin,* and *Profit,* fail to develop objective standards and appear to create conflicts and inconsistencies in the law as previously outlined above;

4) As outlined in Judge Yeagley's opinion in the Municipal Court below, the courts of various jurisdictions outside of Oklahoma have failed to establish a uniform or commonly accepted definition of the word 'lewdness';

5) While Judge Yeagley himself last year felt the ordinance was not unconstitutional, this year, after further reflection, he now feels that it is unconstitutionally vague;

6) State and Federal Courts in various jurisdictions have held that similar statutes or ordinances which fail to properly define 'lewdness' are unconstitutionally vague.

Therefore, this *Committee* urges the Oklahoma Court of Criminal Appeals to sustain the opinion and judgment of presiding Judge Lawrence A. Yeagley, and to declare the Tulsa ordinance, insofar as it fails to define the term 'lewdness,' unconstitutionally vague.

FIRST AMENDMENT OVERBREADTH AND RIGHT OF PRIVACY ARGUMENTS

" 'Under the common law, it was not a crime for men and women to engage in fornication, prostitution, or other immoral practices in private.' *Landrum v. State*, 255 P. 2d 525, 529.

"Nothing is against the law in Oklahoma unless it is made so by statute, *Griffin v. State*, 357 P. 2d 1040 (Okl. Cr., 1961). It therefore appears that at common law, people had a certain amount of breathing space and leeway to engage in various forms of private sexual behavior. That is not to say that social pressures or religious pressures did not influence their behavior. However, the state did not interfere in many forms of private sexual behavior.

"Since Oklahoma has become a state, the Oklahoma Legislature has enacted a multitude of laws regulating private sexual behavior between consenting adults. However, it has not outlawed all private sexual acts between consenting adults. Section 871 of Title 21 of the Oklahoma statutes prohibits adultery. Adultery is defined as voluntary sexual intercourse of a married person with a person of the opposite sex. At least one of the parties to the act of sexual intercourse must be married. However, both parties are culpable. Prosecution may only be instigated by a complaining spouse, unless the adultery is 'open and notorious.' If it is 'open and notorious,' anyone may bring the complaint. To be open and notorious adultery, the accused persons must engage in sexual intercourse with each other *habitually,* and must live together, and must hold themselves out to the public in a manner in which the public is aware that sexual relations exist between them. *Hargan v. State*, 121 P. 2d 315 (Okl. Cr., 1942).

"The Oklahoma Legislature has never enacted a fornication statute. Fornication is traditionally defined as sexual intercourse between two unmarried persons. One instance in which fornication in private appears to be illegal is when each of the parties are within the degrees of consanguinity for void marriages. Then the crime is not considered fornication, but incest. See Section 85 of Title 21. The only other instance in which fornication apepars to be illegal is when the female participant to the act of sexual intercourse is under sixteen, or if she is between the ages of sixteen and eighteen, and of previous chaste character. See Section 1111 of Title 21. Thus it appears that sexual intercourse between a man and a woman, in private, and with consent, is generally, not illegal in Oklahoma unless it falls within the prohibitions of the incest law or the statutory rape law.

"Section 886 of Title 21, the 'crime against nature' statute, prohibits both anal intercourse and oral copulation between a man and a man, a man and a woman, and woman and a woman. The statute provides for no exceptions. See *Warner v. State,* 489 P. 2d 526 (Okl. Cr., 1971). It appears that this prohibition against oral or anal intercourse would apply to a husband and a wife. The legislature did not provide for a spousal exception to the crime against nature law. In contrast, when we look to Section 1111 of Title 21, the rape statute, the legislature specifically provided for a spousal exception to that law, both in cases where the female is under sixteen, and in cases where the act of sexual intercourse is perpetrated by force. From this we must assume that, had the legislature intended to provide for a spousal exception to the crime against nature statute, it would have done so by express language. However, it chose not to create such an exception.

On the one hand, the legislature seems to be concerned in preserving marriage and marital privacy by enacting an adultery law, and in creating a spousal exception to the statutory rape and forcible rape law. On the other hand, it appears that the legislature has evidenced no concern for marital privacy in that it has not provided for a spousal exception to the sodomy law. There seems to be no common theme of public policy or morality surrounding these statutes.

"From the analysis of the foregoing statutes and cases, it appears that the following consensual sexual acts in private are specifically outlawed by state statutes:

1) Acts of sexual intercourse when one of the parties is married;

2) Acts of sexual intercourse when the participants are closely related by blood;

3) Acts of sexual intercourse where the female is under sixteen years old, or between the ages of sixteen and eighteen and of a previous chaste character (except if the parties are married to each other);

4) Any and all acts of anal intercourse or oral copulation regardless of whether the participants are married to each other, unmarried, or whether the acts are of a homosexual or a heterosexual nature.

"It also appears that the first man to engage in an act of sexual intercourse with a female between the ages of sixteen and eighteen is guilty of a crime. However, the second man to engage in an act of sexual intercourse in private with a female between the ages of sixteen and eighteen is not guilty of a crime.

"By not passing a specific statute on fornication, it appears that the Oklahoma Legislature has decided not to criminalize voluntary acts of sexual intercourse performed in private unless those acts of sexual intercourse fall within the provisions of the statutory rape law or the incest law.

"It is extremely difficult to ascertain the legislative intent in either criminalizing or not criminalizing various forms of private sexual acts between consenting adults. On the one hand, the legislature seems to be concerned in preserving marriage and marital privacy by enacting an adultery law and in creating a spousal exception to the statutory rape and forcible rape law. On the other hand, it appears that the legislature has evidenced no concern for marital privacy in that it has not provided for a spousal exception to the sodomy law.

Further, there is no punishment for having sexual intercourse with a woman over the age of sixteen if she has had sex at least once before.

"There seems to be no common theme of public policy or morality surrounding these statutes. They seem to be piecemeal efforts by the legislature to outlaw certain sex acts in private and not to outlaw others. These statutes seem to be inharmonious with each other. They allow for conduct that would be proscribed if the legislature were concerned about traditional morality issues such as pre-marital sex or sex between teenagers; there is no 'fornication' law, and a specific defense to the statutory rape law is that the male is under the age of 18 at the time of the sexual intercourse. Further, there is no punishment for having sexual intercourse with a woman over the age of sixteen if she has had sex at least once before.

"In 1943, the state legislature enacted Section 1029 and Section 1030 of Title 21. These sections apply to acts of 'lewdness' whether committed in public or in private. Unfortunately, the legislature chose not to define the term 'lewdness,' or to limit the definition. *Landrum v. State,* 255 P. 2d 525, 529. The legislature specifically defined what it outlawed in the statutory rape law. The legislature specifically defined what it outlawed in the incest law. In the case of the crime against nature law, while the legislature did not specifically define what it meant by that phrase, the courts have construed and limited the definition to acts of anal intercourse and acts of oral copulation. As so construed, citizens, police, judges, and juries are on notice and are given objective guidelines as to what does or does not constitute a violation of the crime against nature statute. However, with respect to the lewdness statute (or for that matter, the Tulsa lewdness ordinance), the legislature has not defined the term 'lewdness', and, as is evidenced by the cases of *Landrum, Bayouth, Griffin,* and *Profit,* the courts have been unable to come up with an objective and specific definition. Furthermore, those cases appear to have no common denominator.

"Notwithstanding the benevolent dicta of this court in *Profit v. City of Tulsa,* supra, at page 1056, that lewdness could not reasonably be interpreted to extend to the acts of married persons in the privacy of their own home, it appears that the purported definition of 'lewdness' is so broad and ambiguous that this statute *could* reasonably be interpreted to extend to acts of sodomy and/or oral copulation between married persons in the privacy of their own home. Certainly the legislature has determined that those acts are unlawful by failing to provide for a spousal exception to the sodomy laws. This court has never specifically held that the crime against nature statute may not be constitutionally applied to acts of anal intercourse or oral copulation between a man and a wife in the privacy of their bedroom. In *Warner v. State,* 489 P. 2d 526 at page 528, this court briefly discussed the case of *Griswold v. State of Connecticut,* 381 U.S. 479 (1955), but it did not hold that the Oklahoma crime against nature statute would be unconstitutional as applied to married couples. The court stated, 'we are of the opinion that the United States Supreme Court, in the landmark case of *Griswold v. State of Connecticut,* supra, does not prohibit the state regulation of sexual promiscuity or misconduct between non-married persons.' *Warner,* supra, at page 528. It should be noted that the *Warner* case was decided by this court in 1971.

"In 1972, the United States Supreme Court, in the case of *Eisenstadt v. Baird,* 405 U.S. 438, extended the doctrine of *Griswold* to unmarried persons. The court specifically held that the right of privacy that it was discussing in *Griswold* was not limited to a marital right of privacy, but was an individual right of privacy. Again, in 1973, in the case of *Roe v. Wade,* 410 U.S. 113, the United States Supreme Court emphasized that the right of privacy was an individual right and not a marital right. In *State v. Pilcher,* 242 N.W. 2d 348 (Iowa, 1976), the Iowa Supreme Court recognized these principles and therefore voided the sodomy law in that state as violating the rights of privacy of both married and unmarried participants to an act of sexual intercourse in private. In *State v. Saudners,* 75 N.J. 200 (1977), the Supreme Court of New Jersey declared that state's fornication statute as unconstitutional in violation of the right of privacy.

This ordinance appears to be overbroad in that it attempts to prevent one adult from obtaining consent from another adult to engage in an act of fornication in private. It also could be applied to a husband's request to his wife to engage in an act of oral or anal sex in private.

"So we see that the legislature has not specifically outlawed all private sexual acts between consenting adults, unless the lewdness law could be construed in that manner. We simply do not know the legislative intent in passing a law which prohibited both public and private lewdness. However, it would appear that an attempt to outlaw all forms of sexual conduct between consenting adults in private would run afoul of the United States Constitution. *Griswold v. Connecticut,* supra, *Eisenstadt v. Baird,* supra, and *Roe v. Wade,* supra.

"Insofar as the lewdness statute or ordinance, regulates private sexual acts in the vaguest terms, it would appear that this statute and ordinance are unconstitutionally overbroad. The First Amendment should protect a friendly and polite invitation of a man to a *willing* woman he happens to meet and converse with in a nightclub or a bar, to go home and have sexual play in private; it should protect the girl who anxiously invites her boyfriend home for sexual activity; and it should also protect a husband's request to his wife that the two engage in oral sex in private.

"It is also a violation of the right of privacy to have whatever private acts *are* regulated specified in such vague terms that the citizens have inadequate notice of what they may or may not do in private.

"The Tulsa ordinance in question punishes speech alone, and regulates the content of that speech, regardless of whether the words are uttered in a public place or in a private place, and regardless whether the words are uttered between a man and a woman, or a man and a man, or a woman and a woman. It prohibits all speech calculated to obtain consent to engage in a 'lewd act.' It then fails to define what is 'lewdness.' This court has held that when an ordinance punished speech alone, the defendant has standing to attack the overbreadth of that ordinance, although the words he used might have been constitutionally punishable under a narrow, precisely drawn provision. *Conchito v. City of Tulsa,* 521 P. 2d 1384, 1386 (Okl. Cr., 1974). In that case, this court stated:

> The overbreadth doctrine is founded upon the principle of substantive due process which forbids governments to prohibit certain freedoms guaranteed by the Constitution. A penal provision violates this doctrine when, as drafted or construed, it is susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments.

This court went on to say:

> Therefore, an ordinance which undertakes to punish speech may be upheld only by the showing of a compelling state interest, and the words made punishable by such a provision must come within certain specific and 'narrowly limited classes of speech.' *Conchito,* supra, at page 1387.

This ordinance is no narrowly drawn provision. The language proscribed need not be loud or boisterous or uttered in public. There is no requirement that it be uttered with the knowledge that someone is within hearing who might be offended. The ordinance has only two elements: first, that the conversation should be calculated to solicit or entice another person, and second, that it be calculated to produce an act of lewdness with another person either in public *or in private.*

"This ordinance appears to be overbroad in that it attempts to prevent one adult from obtaining consent from another adult to engage in an act of fornication in private. It also could be applied to a husband's request to his wife to engage in an act of oral or anal sex in private.

"This ordinance is not limited to fighting words, obscene speech, public utterances, or solicitations to commit criminal acts.

"In the case of *Conchito v. City of Tulsa,* supra, this court stated, 'we do not confuse the power to construe with the power to legislate.' The legislative body did not limit the application of this ordinance. It appears to be vague, not susceptible of a limiting and constitutional interpretation, and may apply to both lawful and unlawful sexual acts in private.

"The *National Committee For Sexual Civil Liberties* is not suggesting that the City of Tulsa is without power to adopt a solicitation ordinance which might be constitutional. However, it has not done so. It has enacted the broadest of all possible ordinances. This court should not attempt to save the ordinance, but instead, should void the ordinance on its face, and allow the City of Tulsa to draft one which is in the furtherance of a compelling state interest and which is narrowly drawn.

"Again, it should be emphasized that voiding the ordinance because of the 'lewdness' provision will not prevent the police from making arrests for prostitution solicitations. 'Prostitution' has a separate definition of 'sexual intercourse for hire.'

"It should also be noted that solicitations of minors are separately punished by 1021(5) of Title 21 of the Oklahoma Statutes. Voiding the 'lewdness' portion of the Tulsa ordinance (and by implication the same portion of the state statute) will have no effect on prosecutions involving solicitations of minors.

"Dated: March 30, 1979"

PENDING LITIGATION

The editorial staff of SLR is pleased to announce its new national project of monitoring the progress of ongoing litigation which may result in landmark decisions. The results of our research will be reported, for the first time in any publication, in this new department called Pending Litigation. *Readers are invited to participate in and contribute to this department. See page 19 for mailing address.*

Sexual solicitation law under review in California

Pryor v. Municipal Court, California Supreme Court, Case No. L.A. 30901, argued June 6, 1978.

Don Pryor was arrested on May 1, 1976, for a violation of subdivision (a) of Section 647 of the California Penal Code which prohibits soliciting a person to engage in, or engaging in lewd and dissolute conduct in a public place. That provision has been interpreted by California appellate courts to prohibit a public solicitation to commit a lewd act, even if the sexual act is intended to occur in a private place. Pryor was arrested for soliciting a plainclothes vice officer to engage in an act of oral sex. At trial, Pryor admitted to a conversation with the officer regarding possible sexual conduct, but claimed that the conduct was intended to occur in private. Private sexual acts between consenting adults were decriminalized by the California Legislature effective January 1, 1976. The trial judge instructed the jury that even if the sexual conduct would have been considered lawful, it was still "lewd" and that a solicitation to commit oral sex was a violation of the statute. The jury was unable to reach a verdict (voting 7 to 5 for acquittal) and the case was scheduled for a re-trial.

Pryor petitioned the California Supreme Court for a writ of prohibition to stop the impending re-trial. He argued that the statute was unconstitutionally vague, violated the First Amendment, and was inconsistent with the enactment of the consenting adults act. The Supreme Court issued an alternative writ, ordering the prosecutor to dismiss the case or to show cause why the case should not be dismissed. The prosecutor filed a brief in which he admitted that, as presently interpreted, the statute is unconstitutionally overbroad. However, he urged the Supreme Court to give the statute a narrowing interpretation.

The case was argued on June 6, 1978, and a decision by the California Supreme Court is expected in the coming months.

The *National Committee for Sexual Civil Liberties* entered the case as amicus and filed a brief with the Supreme Court. See: Warner, "Non-Commercial Sexual Solicitation/The Case for Judicial Invalidation," 4 *Sex.L.Rptr.* 1 (Jan./Mar., 1978).

Pryor is represented by Thomas F. Coleman, 1800 N. Highland, Suite 106, Los Angeles, CA 90028, (213) 464-6666.

Sexual solicitation law under review in Ohio

State v. Phipps,, Ohio Supreme Court, Case No. 78-554, argued March 6, 1979.

Kenneth Phipps was prosecuted for a violation of an Ohio Statute which prohibits solicitation of a person of the same sex to engage in sexual activity with the offender, when the offender knows that the solicitation is offensive to the other person, or is reckless in that regard. Phipps was convicted at a jury trial, based upon evidence that he solicited a plainclothes vice officer to engage in a homosexual act with him.

After the Court of Appeal declared the statute unconstitutionally vague and in violation of the First Amendment, the state sought a hearing in the Ohio Supreme Court. For the full text of the Court of Appeal opinion, see 4 *Sex.L.Rptr.* 25, and 4 *Sex.L.Rptr.* 64. The Ohio Supreme Court granted a hearing.

The *National Committee for Sexual Civil Liberties* entered the case as amicus in the Supreme Court. The case was briefed and came up for oral argument in the fall of 1978. At the time of oral argument before the Supreme Court, there were two vacancies on that court. One vacancy had been filled by a temporary assignment of a Court of Appeal judge. Therefore, at the time of oral argument, only 6 justices considered the appeal. It has been reported to the *Sexual Law Reporter* that the court voted 3 to 3 and was therefore unable to reach a decision. Since that time, the vacancies have been filled by permanent appointments, and so the court now has a full complement of 7 judges. The case was resubmitted to the full court and oral argument was held for the benefit of the two new judges on March 6, 1979. A decision is expected in the coming months.

The Columbus Ohio Chapter of the *National Lawyers Guild* joined in filing the amicus brief. The *Lawyers Guild* was represented by Columbus attorney John Quigley. The *National Committee* was represented by attorney Thomas F. Coleman.

For further information contact the *Sexual Law Reporter.*

Richmond solicitation law is challenged.

Pedersen v. City of Richmond. Supreme Court of Virginia, Case No. 7808031, argued February, 1979.

Kenneth Pedersen was driving in his car in Richmond, Virginia on January 5, 1978. He stopped his car at the curbside and rolled down his window to speak to a man standing on a corner. It was nearly midnight. The man who got into the car turned out to be a plainclothes vice officer. After driving around for a short time, Pedersen told the man he would like to see him naked. They pulled down a dead end street and parked. After the officer asked Pedersen what he liked to do, Pedersen said just about anything, and further stated that he would like to have sex. The officer asked if Pedersen wanted to see him naked and have sex with him, and Pedersen answered affirmatively. Pedersen was then placed under arrest.

Pedersen has appealed from his conviction for violating the Richmond ordinance which prohibits soliciting by word, sign, or gesture an act which is lewd, lascivious or indecent. Pedersen argued, on appeal, that he was a "respondent" and not a "solicitor." He also argued that Virginia should follow the example of the District of Columbia and Maryland and interpret the solicitation law in a manner which requires the solicitation to be for an unlawful sexual act. Since Pedersen did not specify the type of sexual act to be performed, it is argued, the prosecution failed to prove that this was a solicitation to commit an unlawful sexual act. Finally, it is argued that this ordinance is unconstitutionally vague and overbroad.

The case was argued in February, 1979. The Supreme Court should decided in the case in the coming months.

Pedersen is represented by Stepehn W. Bricker, 701 E. Franklin Street, Suite 1505, Richmond, VA 23219, (804) 644-1804.

Sodomy law challenged in New York

People v. Ronald Onofre, County Court, County of Onondaga, State of New York, Case No. 77-181-1.

Ronald Onofre was charged with sodomy in the first degree, sexual abuse in the first degree, sexual abuse in the third degree, and consensual sodomy. It was alleged that he committed sexual acts with, and against the will of, a male over the age of sixteen. After the criminal proceedings were instituted, the sixteen-year-old recanted his statements as to the forcible nature of the acts and acknowledged that all sexual relations with the defendant were voluntary. As a result, the prosecutor dropped all charges except the one alleging consensual sodomy.

Penal Law §130.38 provides that, "A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person." "Deviate sexual intercourse" is defined as " . . . sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vagina."

Onofre challenged the sodomy law in the County Court proceeding as being unconstitutional and in violation of the right of privacy. In a ten page opinion, Judge Orman Gale denied the motion to dismiss. The judge noted that each year since 1967 one or more bills have been introduced in the New York Legislature proposing to repeal this crime, but none have been successful. The judge went on to state, "This Court does not believe that it should usurp the function of the New York State Legislature."

Onofre has appealed the denial of the motion to dismiss. The case appears to be the perfect test case and possibly the type of case the New York Court of Appeals indicated in *People v. Rice & Mehr,* 41, N.Y. 2d 1018, 363 N.E.2d 1371 (1977) it was looking for as a vehicle to scrutinize this law.

The *National Committee for Sexual Civil Liberties* will enter the case as amicus curiae.

Onofre is represented by Bonnie Strunk, 415 University Building, Syracuse, NY 13202, (315) 422-0144.

D.C. Transit Authority sued for discrimination

Gay Activist Alliance of Washington, D.C. Inc. v. Washington Metropolitan Area Transit Authority, U.S. District Court, D.C. Case No. 78-2217

On December 15, 1978, the Gay Activist Allliance ("GAA"), through counsel, filed a complaint in the United States District Court for the District of Columbia against the Washington Metropolitan Area Transit Authority ("WMATA"), alleging that WMATA violated GAA's rights under the District of Columbia Human Rights Act of 1977 and the United States Constitution when it denied GAA's request for advertising space in WMATA's transit facilities.

On March 21, 1978, GAA filed a written request for public service advertising space in WMATA transit facilities to display GAA's Public Awareness Project poster. The request was later enlarged to include a request for commercial space. The GAA poster contains a six-word message, "Someone in *Your* Life is Gay," and several photographs of Washingtonians displayed against a family photograph album page. Having received no response to its request, on September 15, 1978, some six to seven months after the GAA had originally submitted its ad request, counsel for GAA wrote WMATA's general manager a letter stating that if WMATA did not made a decision soon concerning GAA's ad request, it would file a lawsuit to require that a decision be made. On September 25, 1978, WMATA communicated to GAA that its ad request had been denied and the ad was rejected because it was "inappropriate." GAA requested that WMATA reconsider its decision to reject the GAA's ad. On November 2, 1978, the GAA was informed by letter that upon reconsideration, WMATA had again reached a decision to reject the GAA's ad. Based upon this decision, GAA, through counsel, filed the above mentioned complaint. The ACLU Fund entered the case as *amicus curiae*, filing a Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Motion.

GAA, through counsel, filed its Motion for Partial Summary Judgment on March 9, 1979. GAA seeks, *inter alia*, to enjoin WMATA from refusing to accept its advertisement arguing that said refusal is violative of GAA's rights under the D.C. Human Rights Act* and the First, Fifth and Fourteenth Amendments of the United States Constitution. Noting that WMATA rejected the GAA's ad solely because the advertisement related to homosexuality, GAA charged that WMATA's decision constituted arbitrary discrimination. It was further argued that WMATA had created a public forum in its transit facilities by accepting advertising for all manner of social, religious and political thought. Accordingly, WMATA engaged in content-related censorship in violation of the First Amendment when it decided the GAA poster to be "in appropriate" and when it stated that WMATA policy required it to limit access on WMATA facilities to "innocuous and less controversial" advertisements. Finally, it was argued that under the Equal Protection Clause, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. Having failed to state a rational basis in furtherance of a legitimate governmental interest or a grave and present danger to interests which the state may lawfully protect to explain its denial of advertising space to GAA, WMATA's rejection of the GAA ad is in violation of the Fourteenth Amendment.

Memoranda in Opposition to WMATA's Motion for Summary Judgment were filed on March 23, 1979. WMATA requested, and was granted, an extension of time for submission of its opposition memorandum to GAA's Motion for Summary Judgment in a motion filed with the Court on March 26, 1979. An opposition memorandum was filed with the Court by GAA on March 27, 1979. This case is now before Judge John H. Pratt. GAA is represented through its counsel, Leonard Graff, P.C. and Andrew Jay Schwartzman, Media Access Project, both of Washington, D.C.

* Under the Human Rights Act, it is unlawful to deny any person the full and equal employment of the goods, services, facilities, privileges, advantages, and accomodations of any place of public accomodation for a discriminatory reason based on, among other reasons, the sexual orientation or preferences of the person.

Students sue for recognition in Oklahoma

University of Oklahoma Gay People's Union v. Board of Regents of the University of Oklahoma, et. al, U.S. District Court, W.D. Oklahoma, Case No. Civ. 78-01203-E, filed Nov. 9, 1978.

The Gay People's Union, a student group, filed suit in federal court seeking damages and asking for an injunction ordering defendants to recognize the student group as an official student organization at the university.

According to the official regulations of the university, a student group may be formed and may receive official recognition as such under the following circumstances: at least 10 students must apply for recognition to the state Attorney General; the Attorney General shall recommend action to the Student Congress; a faculty advisor must be obtained; the group must be formed for a lawful purpose. A student group becomes an official student organization when it is approved by the Student Congress. Recognition does not apply either approval or disapproval of the goals of the organization.

The G.P.U. was organized by 10 students. It was recommended by the Attorney General to the Student Congress for recognition. It obtained a faculty advisor. On October 11, 1978, the Student Congress recognized the G.P.U. as a student organization.

On October 19, 1979, the president of the university, at a meeting of the Board of Regents, recommended that the Regents override the decision of the Student Congress. The Board voted unanimously to deny recognition of the G.P.U.

This denial of recognition means that the G.P.U. will not be allowed to use university facilities for meetings, open a bursar's account, use the univerisity postal system, maintain student offices on campus, and will be denied other privileges. The G.P.U. is the only student organization to be denied recognition which met official requirements.

Motions for dismissal and for summary judgment which were made by the Board of Regents have been denied by the court. The court has ordered the Regents to answer the complaint.

The G.P.U. is represented by Rawdon, Salem & McCoy, 2215 W. Lindsey, Suite 112, Norman, OK 73069, (405) 360-1302.

Gay teacher sues for reinstatement in Hawaii

Arnold A. Sciullo v. Sane Moikeha and Board of Regents, University of Hawaii, U.S. District Court, D. Hawaii, Case No. Civ. 78-0056, filed February 21, 1978.

Alleging that he had been denied reemployment at Maui Community College solely because of his sexual orientation (homosexual), Sciullo filed a lawsuit against the provost of the college and the Board of Regents. He seeks damages and reinstatement.

Sciullo was a non-tenured lecturer in the Language Arts Division during the 1976-77 academic year. He charged that the provost had his name removed from a "pool" of lecturers being considered for posts during the 1977-78 academic year, solely because she believed Sciullo was a homosexual and that she stated "There will be no homosexuals teaching at Maui Community College as long as I am provost." The provost is a member of the Mormon Church, and it is alleged that her actions were based upon her religious beliefs.

Depositions have been taken of the provost and the division chairman. The provost admits she took plaintiff's name off the list because of the rumor he was involved in a gay rights group. Both the provost and the division chairman admit that plaintiff's homosexuality had not adversely affected his job performance.

Plaintiff's deposition is scheduled for the first week of April, after which plaintiff will file a motion for summary judgment.

Sciullo is represented by John J. Baker, 55 N. Church St., Suite 8, Wailuku, Maui, Hawaii 96793, (808) 572-9084.

County appeals reinstatement of gay employee in Texas

Gary Van Ooteghem v. Hartsell Gray, U.S. Court of Appeals for the Fifth Circuit, Case No. 78-3711.

Van Ooteghem was hired on June 13, 1975, as an assistant treasurer for Harris County, Texas. On July 28, 1975, he told his supervisor that he was gay and that he would soon be appearing before the County Commissioners to speak about a gay rights issue. On July 29, 1975, Van Ooteghem was given a letter by his supervisor ordering him to stay in the office between the hours of 9-5 and not to engage in any public speeches. He was told to accept this order or he would be fired. He refused to accept the order, and he was fired on July 31, 1975.

Van Ooteghem made his speech to the County Commissioners and then filed this lawsuit seekng damages and reinstatement. On March 20, 1978, District Court Judge Ross Sterling (in case no. Civ. 75-H-1501) held that the First Amendment rights of the plaintiff had been violated. On September 29, 1978, Judge Sterling entered a final judgment which ordered the plaintiff to be reinstated and which ordered defendants to pay him back wages.

The County has appealed. Judge Sterling denied a request that his judgment be stayed pending appeal. The Fifth Circuit also denied a request that the judgment be stayed pending appeal. All briefs have been submitted to the Court of Appeals but no date has been set for oral argument.

Van Ooteghem is represented by attorney Larry Sauer, 4803 Montrose, Suite 11, Houston, TX 77006, (713) 526-5235.

Police dispatchers sue for reinstatement in Idaho

Baker v. Church, U.S. District Court, District of Idaho, Case No, Civ. 77-1082. Complaint filed April, 1977.

Plaintiffs are women in their late 20s to mid-30s. They were permanent employees of the Boise Police Department. Each of them had been employed as a police dispatcher by the department for one or more years. Plaintiffs were terminated from their employment in March, 1977. Defendants include the Chief of Police, various other officials in the police department, the City Attorney, the Mayor, the City Council, and the Civil Service Commission.

After hearing rumors that these women were lesbians, various officials of the police department secretly installed electronic equipment and engaged in wire-tapping of private telephone conversations of these women. Employees were told that one phone in the dispatch room was not connected to recording devices and that they should use that phone for personal calls. It was to this phone that the wire-tapping device was attached in order to monitor their personal calls. The wire-tapping continued for over one month. The contents of these calls were later disclosed by police officials to various community leaders. After further investigation of the personal lives of these women, the plaintiffs were summarily discharged by the police department, without receiving a hearing at which they could confront their accusers and present evidence on their own behalf.

Plaintiffs sought, among other things, declaratory relief that they were denied due process because of the summary manner in which they were discharged, declaratory relief that the wire-tapping was illegal, damages for lost wages, and reinstatement to their former positions.

On November 27, 1978, Chief Judge Ray McNichols entered an order granting summary judgment in favor of plaintiffs on their first issue of action, holding that they were denied due process by the manner in which they were terminated. Further, the judge held that they should be paid back wages. The amount of damages for back pay is yet to be resolved. The additional issues of illegal wire-tapping and reinstatement also have yet to be finally resolved.

Michael E. Donnelly of the firm of Skinner, Donnelly & Fawcett is attorney for the plaintiffs. His address and phone are: 603 W. Franklin Street, P.O. Box 124, Boise, Idaho 83701. (208) 345-2654.

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Seminarian sues for degree in Kentucky

Vance v. Lexington Theological Seminary, Kentucky Court of Appeal, Case No. 78-CA-1172MR, argued March 21, 1979.

David Vance enrolled at the seminary, and in 1976, he completed all the requirements for a Master of Divinity degree. Upon discovering that he was gay, the school refused to award the degree.

Vance sued the seminary in the Fayette County Circuit Court for breach of contract, seeking specific performance and damages. Judge Charles Tackett ruled that he was entitled to the degree because the seminary failed to make it sufficiently clear to students what is expected of them or what conduct will result in the denial of a degree. The judge ruled that if the institution intends to deny degrees to students it considers morally unfit, such as homosexuals, adulterers, agnostics, thieves, or others, it must say so in its catalog so that the students know the rules in advance.

The seminary has appealed the ruling to the Kentucky Court of Appeals. Oral argument on the appeal was originally scheduled for March 20, 1979, but had to be postponed one day after one appellate judge disqualified himself because of his friendships with trustees of the seminary. The Court of Appeals has not yet filed its opinion.

The attorney for Vance is Richard N. Rose, 337 E. High Street, Lexington, KY 40507, (606) 233-0121.

Attorney sues for admission to bar in Virginia

Bonnie C. Cord v. Duncan C. Gibb, Supreme Court of Virginia, Record No. 780823, argued February 27, 1979.

Bonnie Cord, a 1975 graduate of Georgetown University Law School, was denied permission to take the Virginia bar examination. She was admitted to practice in the District of Columbia in 1975, and in 1977 filed her application to take the Virginia bar exam.

Virginia law provides that the Circuit Court Judge in the county in which the applicant resides must issue a certificate of good moral character before an applicant may take the bar exam. Circuit Court Judge Gibb appointed three attorneys to conduct an investigation required by statute. They recommended, 2 to 1, that the judge issue the certificate. The judge then notified her that he would conduct a formal hearing on the matter. The hearing was held in January, 1978. On March 17, 1978, the judge issued a final order refusing to issue the certificate on the grounds that she was "morally unfit" because she was living out of wedlock with a man.

Cord is seeking a writ of mandate from the Virginia Supreme Court to order Judge Gibb to issue the required certificate. She argues that the standard of "good moral character" is unconstitutionally vague, there is insufficient evidence to support the denial of the certificate, and that the denial of the certificate constitutes a violation of her right of privacy. There was no evidence that Cord was guilty of violating the Virginia fornication statute, although it appears that Judge Gibb entertained such speculation. Furthermore, she argued that it was unfair to deny her a certificate, when cohabitors in other counties in the Commonwealth were receiving certificates from other judges.

Attorney's disbarment challenged in Florida

Harris L. Kimball v. The Florida Bar, et al., U.S. District Court, S.D. Florida, Case No. 74-668-Civ-NCR.

Plaintiff, Harris Kimball, was charged by the Florida Bar on June 21, 1956, with behavior contrary to good morals and in violation of state law. The charge stemmed from a consensual homosexual act engaged in by Kimball with another man. A referee recommended that the Board of Bar Examiners should ask the Florida Supreme Court to disbar Kimball, an attorney. Upon recommendation from the Board of Bar Examiners that Kimball be disbarred, the Supreme Court of Florida approved the disbarment on September 6, 1957. Kimball did not challenge his disbarment as being unconstitutional at the time he was disbarred, and he did not seek a review of his disbarment by the United States Supreme Court.

In May, 1974, Kimball filed a complaint in the federal court seeking declaratory relief that his disbarment was unconstitutional. He challenged the criteria under which he was disbarred (conduct contrary to good morals) as being unconstitutionally vague and overbroad. The district court, however, stayed proceedings in federal court, on the grounds that the challenged rule was subject to an interpretation in state court that might narrow the criteria and thus render federal constitutional litigation unnecessary and that abstention was therefore the proper course for the federal court to pursue. Kimball appealed from the abstention order and the federal district court was reversed in *Kimball v. Florida Bar,* 537 F.2d 1305 (5th Cir., 1976). The Court of Appeals ruled that in the almost 20 years since Kimball was disbarred the Florida Supreme Court has not limited the definition and that since no state court interpretation so limiting it can be expected, the order of abstention was improper.

The case was remanded and proceeded through a maze of additional pre-trial litigation, discovery, and a change of venue. In late 1978 the defendants filed a motion to dismiss, and on January 19, 1979, that motion was granted by Judge Norman C. Roettger. Judge Roettger held that the court lacked subject matter jurisdiction. The judge held that Kimball should have petitioned the United States Supreme Court for review of his case after his disbarment. The judge stated, "He did not do so and he cannot now collaterally attack the disbarment decision here in the United States District Court." The judge further ruled that the doctrine of *res judicata* applied on the ground that a "judgment is conclusive as to all matters which were litigated *or might have been litigated* in the first action." The judge held that although Kimball did not raise the constitutional objections in his disbarment proceeding, he could have, and thus he is now barred from collaterally attacking that disbarment.

Kimball filed a motion for reconsideration of the dismissal, in which he pointed out to the court how the court did have subject matter jurisdiction and how the doctrine of *res judicata* did not apply. That motion was denied. Kimball has appealed the decision to the Fifth Circuit Court of Appeals, noting that, at the rate things are going, "[T]his lawsuit has the potential to become eternal."

Harris L. Kimball may be contacted at 200 Mamaroneck Ave., White Plains, NY 10601, (914) 948-0908.

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NEW YORK ATTORNEY GENERAL SPEAKS OUT ON GAY RIGHTS ISSUES

The Honorable Robert Abrams, Attorney General of the State of New York, gave the keynote address at a recent conference at New York University School of Law. The conference was entitled "Law and the Fight for Gay Rights." It was attended by over 200 participants, lawyers and law students, from around the country.

The following is the transcript of the Attorney General's remarks (edited for publication). The SLR is reprinting the speech because of the unusually strong statements made by the Attorney General on behalf of gay rights.—Ed.

This is one of my first public appearances as Attorney General of the State of New York and therefore I am pleased to open this National Conference on Law and the Fight for Gay Rights. Nothing pleases me more, as the chief legal officer of New York State, to address you on a subject that is important, I think, to the very fabric of the concepts that are held in the constitution and in the principles that were at the cornerstone of the founding of our nation. I have long served as an advocate within the public arena for the rights of lesbians and gay men. I have supported legislation prohibiting discrimination on the basis of sexual orientation and have testified in public hearings to urge passage of these bills. My commitment to building a society which provides equal opportunity for all, which protects the civil rights and civil liberties of every citizen, has always meant doing everything in my power to advance the cause and interests of gay people. In my role as Attorney General I will continue to be a firm and open supporter of that cause.

Today, in this gathering of colleagues and of friends, I wish to specifically address my remarks to the role of the law and the lawyer in achieving the goal of full civil rights for lesbians and gay men. And I wish to offer my thoughts about some of the underlying considerations in reaching that goal.

The framework and purpose of government in our society is based upon the concept of balance. The legislative, executive and judicial powers are separated from each other, yet interrelated in order to function as a whole. Although in some ways this is a conservative approach, this separation of powers is, from a sociological and an historical perspective, a radical concept for governing a society and for maintaining its vitality. In forming this society one of the primary precepts was to protect the rights of the individual and the integrity of divergent groups. Though the commitment to this principle has often been sorely strained and all too often forgotten, it remains central to the concept and the pluralistic structure of American society. The balance established between the branches of government reflects the balance between the rights of each individual and the rights of society as a whole. And it is this balance which, in a society composed of a multiplicity of cultures, attitudes and perceptions, best promotes the viability of the government and the vitality of individual lives.

The balance is an extremely delicate one, as the framers of our constitution well understood. In the *Federalist Papers* they expressed their concern that, "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." Thus, while attempting to provide representation for everyone there must be a constant guard against a tyranny emerging from either a majority or a minority. And the vigilance necessary to prevent the oppression of one part of the society from the injustices of another part is an essential task within the role of the judiciary. It is the one branch which has the mandate to maintain our basic constitutional principles and which is also given, at a certain level, absolute autonomy from political and partisan forces which often counter those very principles.

We are now at a point in time where the balance in government is being severely threatened and the courts must be particularly invoked to restore that balance. Tyranny

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JUDICIAL RULINGS

JUDICIAL RULINGS

San Diego nudity ordinance upheld

The following appellate opinion is being reprinted in full by the SexuaLaw Reporter *because it involves important constitutional questions and because it was not published in the official court reporter. The case,* People v. Guepin, et al., *San Diego Superior Court Appellate Department No. CR 45099, was decided April 27, 1979. In a 2/1 decision, the Appellate Department upheld the constitutionality of the ordinance in question. The Appellate Department then certified the case to the Court of Appeal on the grounds that the case involved an important legal question which should be decided by a higher appellate court. The Court of Appeal, however, declined to accept the case on May 16th, thereby leaving the opinion of the Appellate Department as the final decision in the case. That Appellate Department Opinion follows.*

OPINION

Appeal from judgements of the Municipal Court, San Diego Judicial District, County of San Diego, State of California. The Honorable Manuel L. Kugler, Judge. Affirmed.

John W. Witt, City Attorney, by Patricia S. Rosenbaum, appearing for plaintiff and respondent.

Joseph Chirra, David K. Kroll and Shelton D. Sherman, appearing for defendants and appellants.

The defendants were charged in the Municipal Court for the San Diego Judicial District with violating Section 56.53 of the San Diego Municipal Code, which makes it a misdemeanor for a person to be nude and exposed in public. The defendants were found guilty by a jury and appeal from their judgments of conviction on the grounds that Section 56.53 of the San Diego Municipal Code is unconstitutional on its face and as applied.

This section provides, in the portion salient herein, that no person over the age of ten years shall be nude and exposed to public view in or on any public right-of-way, public park, public beach or waters adjacent thereto, or other public land or in or on any private property open to public view from any public right-of-way, public beach, public park, or other public land.

Appellants contend the unconstitutionality of the section arises from the following:

1) it denies to appellants a personal liberty right protected by the Fifth Amendment to the United States Constitution and Article 1, Section 7(a) of the California Constitution;

2) it denies to appellants the right of freedom of association protected by the First Amendment to the Unites States Constitution;

3) it is an attempt to legislate in a field pre-empted by the State of California;

4) it denies to appellants the free exercise of religion protected by the First Amendment to the United States Constitution;

5) it denies the equal protection of the law to the female appellants in violation of the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the California Constitution.

DISCUSSION

The fundamental rule of statutory construction is that the court should ascertain the intent of the legislature so as to effectuate the purpose of the law. Moreover, every statute should be construed with reference to the whole system of the law of which it is a part so that all may be harmonized and have effect. In addition, statutes must be construed in a reasonable manner and common sense manner in accordance with the apparent purpose and intention of the lawmakers. In construing a statute the courts will do so with a view to promoting rather than to defeating its general purpose and the policy behind it. *Civil Service Commission v. Superior Court,* 63 Cal App. 3d 627, 634-635 (1976).

PERSONAL LIBERTY RIGHT

Individual rights, such as the right to the pursuit of happiness, the right of privacy, and other personal liberty rights do not extend so far as to override validly enacted legislation. *Cox v. Louisiana,* 379 U.S. 536, 554-555; 13 L.Ed. 2d 471, 483-484; 85 S.Ct. 453 (1965). The City Council in enacting the section expressed the legislative intent to be for the purpose of securing and promoting the public health, morals and general welfare of all persons in the City of San Diego. While appellants primarily direct attention toward sunbathing at beaches, the ordinance regulates appearances in any public park, or playground or other public gathering places set aside by the citizens of the city for use and enjoyment by all citizens, including young people and families. A city in the proper exercise of the police power can reasonably regulate the matter of nudity on public places of the city in furtherance of the general welfare. *Eckl v. Davis,* 51 Cal.App. 3d 831, 847 (1975).

FREEDOM OF ASSOCIATION

Public exposure of their private parts by a male or female or the female breast per se has nothing whatsoever to do with the great constitutional freedoms of free speech and association. Appellants have failed to cite a single case which has held that public nudity, as such, is a constitutionally protected freedom. In each of the cases which have upheld the freedom of unrestricted nudity as an incident to a method or means of expression, the nudity is not forced upon the viewer or the public generally, but rather the place and the circumstances of the nudity necessarily involves and requires the exercise of a free and conscious choice by either a viewer or a participant to immediately withdraw from the place of exposure to the public domain, if the viewer finds the nudity to be offensive, however portrayed. There is a considerable difference between the ability to walk out of an offensive theatrical production, or a topless and bottomless bar, and the giving up of a right to use a public, beach, street or park in order to be free of exposure to offensive nudity which has never been sanctioned, even under common law. Even assuming the ordinance imposes a restriction on the freedom of association of certain individuals, the City Council of San Diego has found that the maximum utilization and enjoyment of the public areas in question can be achieved only by certain regulations affecting those who choose to use such areas. Appellants have not shown the regulation is unreasonable under the circumstances, nor that the regulation is manifestly not essential to further the avowed interest of the ordinance, i.e., the use of public facilities by the greatest number of people. See *Crownover v. Musick, 9 Cal.3d 405 (1973).*

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Gay magazine acquitted by Canadian court

An Ontario Provincial Court Judge has found a non-profit corporation Pink Triangle Press, publisher of the gay liberatit n magazine *The Body Politic,* and three of its officers, not guilty on a charge of unlawfully making "use of the mails for the purpose of transmitting indecent, immoral or scurrilous matter."

The publisher corporation and its three officers had been charged in relation to the December, 1977/January, 1978 issue of *The Body Politic,* which contained an article entitled "Men Loving Boys Loving Men" under the by-line of one of the individual co-accused. Judge Sydney M. Harris cited extensive excerpts from the article in his 45-page judgment and found that, while the article "discusses pedophilia and pedophilic acts and persons" and "forcefully argues in favour of a particular attitude of non-condemnation of pedophiles," "it is not written in a prurient style nor does it have the typical hall-marks of hard-core pornography—it is not lascivious, sexually stimulating nor titillating. It does not use gross explicit language calculated to cause sexual arousal or stimulation."

Judge Harris found that the section of Canada's *Criminal Code*, (a uniform national code enacted by the federal Parliament, which has the constitutional responsibility for the substantive criminal law in Canada) under which the defendants had been charged, "was not aimed at the distribution by mail of magazines or journals to subscribers."

Section 164 reads, in part:

164. Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous . . .

The court found that the section was "designed to catch the sick individual who, rather than indulge in obscene telephone calls, indulges in obscene, indecent, immoral or scurrilous mailings," "a trap set . . . for the secret 'flasher'." The Court went on to declare that it was not prepared "to have the Crown use section 164 as a last refuge in objectionable language cases . . . ."

The original "Information," the sworn written complaint which alleges the offence and forms the starting point for proceedings, i.e. the laying of a charge, had included an allegation that the particular issue of *The Body Politic* was "indecent," "immoral" or "scurrilous" matter, but failed to include an allegation that it was "obscene." At the opening of the trial the Crown (the prosecution) sought to amend the Information by adding the word "obscene." The motion to amend was denied on two grounds: that it was not requested until a year after the Information was sworn, on the very day fixed for trial and would add a new issue at the last moment; and, that, if the Crown was not prepared to charge the accused directly under the obscenity provisions of the *Criminal Code* it would not be proper to allow the Crown to do so indirectly through section 164.

Although the charge related to the whole of the particular issue of the magazine, the Crown concentrated almost exclusively on the article "Men Loving Boys Loving Men." While finding that it "must consider the whole issue and not just part of it," the Court's judgment concluded that neither the issue as a whole nor the article primarily objected to by the Crown could be found to be either "immoral," "indecent" or "scurrilous," on either a "community standard of permissibility" test or an "ordinary meaning of the words" test.

An exhaustive survey of the expert testimony is presented in the judgment, but the Court concludes: "Professors, journalists, a police officer, psychiatrists, psychologists and ministers of some religions are not representative of the community as a whole . . . ." The judgment states that: " . . . all in all the evidence adduced from the majority of both Crown and Defence witnesses establishes nothing which really assists the Court in ascertaining the limits of community tolerance, that is, the community standard, in this area." Thus, the Court finds, the Crown failed to satisfy the Court, beyond a reasonable doubt, on the community standard test, that the magazine taken as a whole is indecent, immoral or scurrilous. The Court suggests, in the judgment, that: "It would have been more helpful to have had evidence of competently conducted public opinion surveys of community opinion."The Court goes on to state that the description of indecent or immoral acts does not per se make a publication indecent or immoral nor does it implicitly expressed approval or endorsement of the acts detailed. "Intention does not determine decency," says the Court. As to the ordinary meaning of the words, the Court adopts a test of indecency which is based on "the nature of the *treatment*, as distinct from the nature of the *subject matter* itself." In adopting that test, the Court cites Fullagar, J. in *Close* [1948] V.L.R. 445 (Aust.) as approved by Judson, J. in *Brodie* [1962] S.C.R. 682 at 705: "The question is a question less of the nature of the material than of the handling of the material." On that test the Court goes on to find that the issue of the magazine is not indecent as a whole.

Defining scurrility in its modern usage as connoting the use of coarse or foul language to attack in a mean or vicious way, the Court could not find the magazine scurrilous, since it did not have before it "any evidence as to the actual existence of any person, group or entity allegedly abused or insulted."

Finding no definition or interpretation of the word "immoral" in the *Criminal Code* the Court takes the unusual step, for a Canadian court, of refusing to determine or assign meaning to statutory language. Introducing something akin to a "void for vagueness" concept, Judge Harris declares: " . . . I find it impossible to determine as a matter of law what is moral or immoral—and I think that any attempted proscription based on immorality calls into play factors that cannot be determined with legal precision in the absence of a legislated definition of what Parliament intended. There is not a definition or interpretation of the word 'immoral' in the statute. I find the term so ambiguous and indefinite that were 'immorality' the only offence alleged here I would dismiss the charge without hesitation, for no one can be expected to govern his conduct, (particularly if the result may be criminal charges) according to such an imprecise standard."

Acknowledging that "tenable and credible arguments exist on both sides of each of the issues of community standards and the ordinary meanings of immorality, indecency or scurrility" and, that "this case, if nothing else, is close to the borderline," the Court indicates that it has been guided by the comments of Freedman, J. in *Dominion News* [1964] 3 C.C.C. 1, [1964] S.C.R. 251:

> " . . . in cases close to the borderline, tolerance is to be preferred to proscription . . . to suppress the bad is one thing; to suppress the not so bad, or even the possibly good, is quite another."

—Peter Maloney
Canadian Correspondent

Judicial and legislative examination of *Marvin v. Marvin* issues

Since the California Supreme Court handed down its landmark decision in *Marvin v. Marvin,* 18 Cal.3d 660, 134 Cal. Rptr. 815 (1976), several other states have considered the question of division of property following the breakup of a meritricious relationship. [*For a complete review of the* Marvin *decision, see Kelber and Horner, "Contract and Equity Protection Extended to Unmarried Couples*[3]," Sex.L.Rptr. *13 (March/April 1977).—Ed.*]

In *Hinkle v. McColm,* 89 Wash. 2d 769, 575 P.2d 711 (1978), plaintiff brought suit for partition of property acquired during the four years she and defendant had cohabited together. Defendant appealed the judgment which awarded him all of the property accumulated during the relationship except for a boat, trailer and citizen band radio, which were awarded to plaintiff.

The Washington Supreme Court affirmed the trial court's decision, following the well-established rule of *Creasman v. Boyle,* 31 Wash. 2d 345, 196 P.2d 835 (1948), which holds that "property acquired by a man and a woman not married to each other . . . is not community property, and, *in the absence of some trust relation,* belongs to the one in whose name the legal title to the property stands."

The court, however, noted that the *Creasman* rule had been "vigorously attacked" and cited its own statement in *In Re Estate of Thornton,* 81 Wash. 2d 72, 499 P.2d 864 (1972), that "[a]rguably, *Creasman* should be overruled and its archaic presumption invalidated." Because the evidence in *Hinkle* indicated that "the relationship developed from circumstances other than a deep emotional attachment between the parties," the court felt that this case was not the proper vehicle for a full review of the *Creasman* rule.

The Utah Supreme Court, in *Edgar v. Wagner,* 572 P.2d 405 (Utah 1977), sidestepped the issue.

In 1969, plaintiff had married defendant knowing he was already married. For the four years they lived together, she helped him with the management of his orthopedic supply business, receiving no salary for her services except for a period of five months when she was placed on a salary of $310 per month, the total of which ($1,550) had to be reinvested in the business. They also bought a house along with a third party, taking title as joint tenants.

After plaintiff moved out of the house in 1973, she brought an action for partition of the house and for an account and distribution of defendant's business, or, in the alternative, to recover the value of her services to the business. She subsequently filed a second action alleging a void marriage and seeking apportionment of the assets accumulated while she and defendant had lived together.

The cases were consolidated for trial and the trial court declared the marriage to be void and awarded plaintiff a one-third interest in the house and $1,550 as her share of the business. Defendant appealed the judgment (except the decelaration as to the void nature of the marriage), alleging that the trial court's awrad to plaintiff "necessarily gave recognition to an illegal, meretricious relationship in violation of public policy."

The Utah Supreme Court affirmed, noting that the trial judge had adopted a contract theory rather than following *Maple v. Maple,* 556 P.2d 1229 (Utah 1977), which provides for an equitable division of property upon an annulment of marriage.

The court, in its opinion, sustained the award of the real property by noting that there had been valid consideration for its conveyance, and sustained the monetary award, but noted that it was "merely a restoration of earnings" and not plaintiff's "share of the business." It did not touch upon the issue of apportionment of the assets.

In New Hampshire, the Supreme Court, in *Humiston v. Bushnell,* 394 A.2d 844 (1978), upheld a cause of action based upon a meretricious relationship.

Plaintiff and decedent had lived together from 1970 to 1975, during which time they had operated a joint farming venture. The relationship terminated in 1975 and decedent died in 1976.

Upon appeal, the Georgia Supreme Court affirmed, stating that "it is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or *immoral consideration.* [Citations omitted] . . . The parties being unmarried and the [plaintiff] having admitted the fact of cohabitation . . ., this would constitute immoral consideration under Code Ann. §20-501 . . ."

The Illinois Supreme Court, on May 23, 1979, heard arguments in its "Marvin" case, *Hewitt v. Hewitt,* Case no. 51264, and its decision is still pending.

The California Court of Appeal decided a case on June 25, 1979, which refused to extend the *Marvin* rule "into arenas totally removed from the property rights setting . . . Particularly in a case involving marital communication privileges, since privileges in general are looked on with disfavor." In *People v. Delph,* Court of Appeal No. 2 Crim. 33396, __ Cal.Rptr. __, appellant sought to have the marital communications privilege and the privilege of the spouse not to testify expanded judicially to cover situations where there is not a valid marriage but where the couple lives together "with all the trappings of a marriage, except the formalities of a marriage."

It appears from the foregoing that there is a trend in the courts to accept the *Marvin* rationale. However, six state legislatures—Illinois, Minnesota, New York, New Mexico, Virginia and California—have introduced bills to counter this trend.

In Minnesota a bill was introduced (SF 1295) which provides that a contract between a man and a woman who are living out of wedlock is enforceable only if the contract is written and signed by the parties and enforcement is sought after termination of the relationship.

Illinois House Bill 507 states that as a consequence of two persons living together while unmarried, "there can be no recovery under any theory of law, including but not limited to, express oral contracts, implied contracts, constructive trust, joint venture, misrepresentation, or quantum meruit, unless there is a legal written contract between the parties specifying the obligations and expectations of the parties based on the relationship." This prohibition does not apply if the services are performed independent of the relationship, such as the providing of services to a business which are normally compensable. This bill would repeal the *Marvin* rule except in situations involving a written contract between the parties.

California Assembly Bill 564 states that an agreement between cohabiting persons not married to each other as to the ownership or division of real or personal property acquired by either of them during the period of cohabitation is void unless such agreement is in writing. On May 9, 1979 the Assembly Judiciary Committee voted to hold this bill for interem study.

As of this writing it appears that none of the other legislatures which have considered similar legislation have yet enacted such a law.

—Marilyn Cochran-Canin

New Jersey Supreme Court adopts Marvin rule

[*Because of the importance of this opinion, the full text of the Supreme Court decision in* Kozlowski v. Kozlowski, *New Jersey Supreme Court No. A-172 decided June 25, 1979, is being reprinted below. —Ed.*]

The opinion of the Court was delivered by Halpern, P.J.A.D. (Temporarily Assigned).

The primary issue on appeal is whether a man and a woman who are not married to each other, and who live together without a promise of marriage, may enter into a contract which, if otherwise valid, is enforceable by our courts. The trial judge, in a detailed and well-reasoned opinion, decided the issue in favor of plaintiff, and we certified the appeal then pending unheard in the Appellate Division ____ *N.J.* ____ (1978).

The essentially undisputed facts are fully set forth in the trial judge's opinion:

> In 1962 plaintiff, a Polish immigrant with little knowledge of the English language and little social contact outside of her own family and ethnic community, met defendant, a personable, sophisticated, apparently well-to-do business man who immediately exhibited an amorous interest in her. She was then 48 years old, married and mother of two children. He was six years younger than she, also married and father of two children. He quickly expressed his love for her and before long insisted that they leave their families and set up a new household together. After about four months of vacillating and agonizing, she capitulated. Together the loving couple moved into an apartment and later a house, in which they lived in what may be fairly characterized as the illicit equivalent of marital bliss. Three of the four children of their prior marriages joined them during the early years of their new relationship and grew up in an atmosphere [sic] not dissimilar to that of a normal family unit. The last child reached adulthood and left the household in about 1970, after which defendant sold the original house and purchased a smaller one for himself and plaintiff alone. The parties lived together for a total of 15 years, continuously except for two brief separations.
>
> His wealth appears to have increased during that 15-year cohabitation, but he kept his business affairs to himself. Title to all of his assets, including the residences, remained solely in his own name. She knew little about his business affairs, was unaware of the extent of his assets and income and was completely dependent upon him for all of her needs, maintenance and support. She had no possessions other than clothing, personal effects and his gifts of jewelry and furs. In addition, he provided support and maintenance for all three children in the household, hers and his own.
>
> She, on her part, provided substantial services, including housekeeping, shopping, acting as mother to the children, escorting and accompanying defendant as he desired, and serving as hostess when necessary for his customers and business associates. The latter took her to be his wife although there is no doubt that relatives and close friends on both sides were fully aware of the

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Opinion of Justice Marshall in Marvin case

After rendering a landmark decision, the California Supreme Court remanded the case of Marvin v. Marvin *to the Los Angeles Superior Court for trial.*

After trial, Superior Court Judge Arthur K. Marshall found that actor Lee Marvin's former mistress was not entitled to a share of Marvin's property based on any contract or trust theory. However, he awarded her $104,000 pursuant to a footnote in the Supreme Court decision authorizing whatever "equitable" relief the court might find "proper."

Marshall's memorandum opinion is reprinted below as it appeared in the Metropolitan News, a Los Angeles based legal newspaper, without correction of the numerous grammatical and punctuation errors contained therein.

—Assoc. Ed.

The Supreme Court in *Marvin v. Marvin* (1976) 18 C.3d 660, 665, 134 Cal.Rptr. 815, 557 P.2d 106, decided that an unmarried person may recover from a person, with whom the former had lived, in accordance with any written contract between them unless the agreement "rest(s) on an unlawful meretricious consideration." (p. 684.) That court also determined that a nonmarital partner may recover if the conduct of the couple was such that a trial court could imply therefrom either "an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties." (pp. 665, 682.) Lacking evidence which would support any such finding, "(T)he courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case." (pp. 665, 677, 682, 684.)

Finally, the Supreme Court declared that a nonmarital partner may recover in quantum meruit for the reasonable value of household services less the reasonable value of support received. (p. 684). The action was remanded to the Superior Court where evidence has been taken in implementation of the above described decision. The last mentioned rememdy, quantum meruit, need not be considered here inasmuch as the plaintiff has dismissed her fourth and fifth causes of action based on such ground.

The first three causes of action, amended to reflect the remedies described by the Supreme Court, allege contractual, express and implied and equitable bases for judgment in favor of plaintiff.

In order to comply with the Supreme Court mandate, the trial court collected all available evidence which might bear on the relationship established after defendant allegedly promised plaintiff half of his property or which might serve as a basis for a tacit agreement or for equitable relief.

FACTS

In June, 1964, the parties met while they both were working on a picture called "Ship of Fools," he as a star and she as a stand-in. (She also was employed as a singer at the "Little Club" in Los Angeles.) A few days after their first meeting, they lunched together, then dined together. In a short time they saw each other on a daily basis after work. Sexual intimacy commenced about 2 weeks after their first date. During these early meeting, there was much conversation about their respective marital problems. The defendant said that, although he loved his wife and children, communication between him and his spouse had failed and he was unhappy. Plaintiff said that her marriage had been dissolved but her husband sought reconciliation.

Plaintiff testified that defendant told her that as soon as

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by a majority, which seeks to restrict or completely deny the rights of those who are seen as different, is still a threat in our society. As all of us in this room today know, lesbians and gay men have experienced many recent defeats from this growing threat. A mindless hysteria has all too often taken over the legislative and electoral forums, a hysteria that is based on and fueled by people's ignorance and fear of those who are different. It is exactly this kind of uninformed and biased exercise of governmental power which the judiciary has the potential and, as many of us believe, the obligation to counter. It is certainly the role of the courts to prevent tyranny of any sort and to restore the balance of government to our fundamental principles of equality and justice.

The focus of this weekend is not only on the issues of discrimination faced by gay people, but also on the role of the legal profession in advancing the interests of gays. The courts have the unique mission of protecting political or otherwise controversial minorities in their viewpoints. In conjunction with this mission a special interest bar of those attorneys who are involved with the concerns of lesbians and gay men has a particular role and responsibility beyond the traditional role of the attorney as advocate for individual litigants. The attorney who seeks to assert the rights of gay people must recognize that the outcome of a particular case is of direct concern to a large number of people. The attorney must also recognize that it is usually necessary to educate the bench, other members of the bar, and very often the general public about the realities of the gay community in order to prevail on the merits in a particular case. The information and ideas to be discussed throughout the next couple of days will undoubtedly enhance all of your abilities to perform this special role.

A mindless hysteria has all too often taken over the legislative and electoral forums ... fueled by ... ignorance and fear of those who are different. It is ... the role of the courts ... to restore the balance of government to our fundamental principles of equality and justice.

While discussing special issues and litigation strategies in workshops I think it could be useful to consider a conceptual framework within which this litigation might best proceed. To my thinking, one main concept unifies the issues of gay rights and that is the right of privacy. This right, conceptually, encompasses control over one's body, and control over one's decisions about personal lifestyle and choices as well. It is a right already recognized as a fundamental right by the United States Supreme Court in such cases as *Eisenstadt v. Baird* and *Doe v. Bolton.* And, as indicated in a footnote in the *Carey v. Population Services* case, the court has not yet determined whether or not the right of privacy protects private sexual activity between consenting adults. The footnote indicated that the court did not view its summary affirmance in *Doe v. Commonwealth's Attorney* as deciding that precise issue.

Before the police power of the state can be evoked to justify an intrusion in an individual's personal decisions, compelling reasons to do so must be shown. The state clearly has a legitimate interest in protecting its citizens from violence and other clearly defined harm. The state must certainly be involved in protecting children from violence, and from situations in which their inability to make mature judgements is manipulated or used against them. But justifications for discrimination against lesbians and gay men which are based on personal sensibilities, prejudices, religious dogma, or unsubstantiated, unfounded and false presumptions are not compelling. It is not justifiable to continue criminal sanctions against private sexual activity between consenting adults because the majority of people is outraged at the thought. Nor is it justifiable to deny employment or housing or other basic rights to people known to be gay because of this sensibility. Nor can such rights be denied because of a presumption that homosexuals molest children when the facts indicate overwhelmingly that it is young girls who are sexually molested and that they are molested by adult men who are heterosexuals, all too often members of the girl's immediate family or household.

Before the police power ... can be evoked to justify an intrusion in an individual's personal decisions, compelling reasons ... must be shown ... (J)ustifications ... based on personal sensibilities, prejudices, religious dogma, or unsubstantiated ... presumptions are not compelling.

The right of privacy protects not only activities which are private acts between consenting adults but conceptually reaches much further and protects private and personal decisions, even if publicly acknowledged.

Having briefly discussed the concept of privacy I would like to offer some thoughts suggested by that discussion. The issue of privacy, when broadly defined, should encompass the right to live one's life unhindered no matter how controversial or conventionally unacceptable that life style is. Defined this way, the right of privacy is a central issue for the gay community. It is a central issue for racial, ethnic, and religious communities and for women. Intense opposition to all of these groups often focuses on the right of individual members to make personal life style decisions unacceptable to the majority. The right of women to control their own bodies has been a source of vehement and often violent opposition around the issues of abortion, contraception and sterilization. The underlying arguments against passage of the Equal Rights Amendment or the actualization of equal opportunity principles are that the social fabric of the country would be destroyed by legitimizing unstereotypical behavior or lifestyles. And the opposition to lesbian and gay men is ultimately based on a prejudice against a particular life style decision. Thus, this broadly defined privacy right is of concern to each of these groups. It is a common interest in which all are linked and around which all could join forces to achieve the basic rights that each is seeking.

Next, the central nature of privacy to the cause of gay rights suggests that litigation should particulary seek to establish protection of both private activities and personal decisions. I, of course, do not mean that arguments resting on equal protection, due process, freedom of speech and association, and other bases are not to be vigorously pursued. But rather, that the focus that I am placing on the issue of privacy is meant to highlight a concept and arguments that I view as present in any issue of gay rights.

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PRE-EMPTION UNDER STATE STATUTES

The principles governing the pre-emption doctrine are that an intent to occupy the entire field is a matter which cannot properly be decided upon the basis of any single, precise test. Rather, the courts must rely upon broad general principles which are flexible enough to embrace our varied and rapidly expanding body of legislation. Determination of the question depends primarily upon an analysis of the statute and a consideration of the facts and circumstances upon which it was intended to operate, and the intent of the legislature is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. *Eckl v. Davis, supra.* In the case of *In re Lane,* 58 Cal.2d 99, 102 (1962), the court concluded that the state had adopted a general scheme for the regulation of the criminal aspects of sexual activity and that the state had occupied the field to the exclusion of all local regulation. See also *Lancaster v. Municipal Court,*[6] Cal.3d 805 (1972). Mere nudity does not constitute a form of sexual "activity." Thus, absent additional conduct intentionally directing attention to parts of the body for sexual purposes, a person who simply sunbathes in the nude does not engage in sexual activity. *In re Smith,* 7 Cal.3d 362, 366 (1972). The various cases cited by the appellants all deal with sexual "activity" or sexual "conduct." Section 56.53 merely regulates public nudity, and sexual conduct or activity is nowhere therein mentioned. It does not purport to regulate or punish obscenity, obscene conduct, sexual or lewd activity. It simply makes defined public nudity, and nothing more, a crime. Since the legislature has not occupied the field of exposure of persons in public where no sexual activity is involved, it is an area that is of municipal or local concern.

FREE EXERCISE OF RELIGIOUS BELIEFS

For conduct to be protected by the free exercise clause, it must be more than a way of life, it must be rooted in a religious belief. Although a determination of what is a religious belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberties precludes allowing every person to make his own standard of conduct in which society as a whole has important interests. *Wisconsin v. Yoder,* 406 U.S. 205, 215; 32 L.Ed.2d 15; 92 S.Ct.Rep. 1526 (1972).

Morever, Ordinance 56.53 does not prohibit speech or expression or religion, it merely precludes nudity in public, which has been deemed harmful to public welfare or morals. This question was previously determined adversely to appellants in *Eckl v. Davis, supra,* wherein the court unanimously determined that an ordinance regulating nudism did not violate the religious provisions of the First Amendment.

EQUAL PROTECTION

The female appellants contend that the ordinance denies women equal protection of the law because they are not granted the privilege accorded men to sunbathe and swim with their breasts uncovered. They principally rely upon the reasoning of *Sail'er Inn, Inc. v. Kirby,* 5 Cal.3d 1 (1971), in which the court held that legislation regulating the employment of women as bartenders was invalid. The ordinance challenged in the present case, however, does not deal with a classification based upon sex with relation to a fundamental right such as the right to pursue a lawful profession. As stated in *Eckl v. Davis, supra.*

"Nature, not the legislative body, created the distinction between that portion of a woman's body and that of a man's torso. Unlike the situation with respect to men, nudity in the case of women is commonly understood to include the uncovering of the breasts. Consequently, in proscribing nudity on the part of women it was necessary to include expressed reference to that area of the body. The classification is reasonable, not arbitrary, and rests upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarily circumstanced are treated alike."

We conclude that the ordinance meets constitutional requirements. Accordingly, the judgments of conviction are affirmed.

DISSENT

I dissent

We close our eyes when we look upon the local ordinance in question as a broad attempt to " . . . regulate the matter of nudity on public places of the city in furtherance of the general welfare . . . " as the majority opinion states. It had no such purpose. It had a very limited purpose. If ever legislative intent was clear, it was clear here. The City Council in passing the ordinance was purely and simply applying a so-called majority mandate of 55% of the electorate who voted favorably on Proposition D as the reason for the express and limited purpose of taking away a privilege that had existed at Black's Beach for a substantial segment of the population for a period of some three years.

If there was a constitutional right at all acquired to use Black's Beach as a swimsuit optional area, it must be clear that a majority vote by the public had no power, directly or indirectly, to erase that right. One of the glories of our constitutional society is that certain rights cannot be taken from the few because the many disagree with them. Some people assume that by putting a constitutional question to a vote it must be changed if a majority say so. That is of course not true. How many times have we seen the fallacy of that proved by the use of the petition process of putting an unconstitutional issue to vote, having it receive a majority only to be overruled by the courts because of its patent invalidity. It is clear that a majority of the individual members of the Council opposed the very action they took, taking it, nevertheless, because they felt they had a public mandate which they must follow. If a constitutional right existed it could not be removed so cavalierly. The protectable rights of individuals and minorities are at the very heart of the Constitution's basic premise.

I do not propose that nude bathing along all the beaches of this state is a constitutional right. We agree that reasonable limits can be imposed, even to protect the sensitivities of the very sensitive. Constitutional rights are in part measured by the culture of the society in which they exist. Those whose eyes are burned by the sight of nude human bodies in a public place may be entitled to a certain amount of protection against such exposure when it occurs in public places indiscriminately open to the public, forcing them against their wishes, against their standards of morality and perhaps their religion, to look upon the undraped human form. Subcultures do exist within majority cultures, however, and they too have at least limited rights. While individuals and minority groups have no right to force their standards and practices upon an unwilling majority they do have the right to enjoy that culture when it is not imposed upon the majority to whom it is an anathema.

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This we think is what the court was saying in *Williams v. Hathaway,* 400 F. Supp. 122 (D.C. Mass. 1975), when it dealt with the question of nude bathing at beaches located within the Cape Cod National Seashore. There the court rejecting the claims that nude bathing was protected by the First Amendment's guarantees of free speech and association held nevertheless that the traditional practice of nude bathing at Brush Hollow could be considered a personal liberty right entitled to protection under the due process clause of the Fifth Amendment. While the court in Hathaway did find governmental interests in controlling traffic, parking and environmental problems justified the National Park Service's total ban on nudity, it is clear that the governmental interests and reasons for doing so must be real and compelling before the personal liberty rights could be abrogated. The action by the City Council in adopting Section 56.53 does not meet the tests suggested by Hathaway. The reasons argued for it were inadequate to the remedy. They recited a need that was not real, a need that by the evidence did not exist. By couching the language of the ordinance in broad reasonable sounding language banning nudity in public parks, on playgrounds or other public gathering places set aside by the citizens of the City for use and enjoyment by all citizens the City Council was not seeking to regulate nudity in Balboa Park, nor in the Presidio, nor in Mission Bay Park, nor at La Jolla Cove, nor at any such place. They were not trying to free the beaches for more broad public use. The evidence suggests a diametrically opposite effect. Purely and simply the City Council was seeking to regulate Black's Beach, a place where nude bathing had been a popular fact for a large segment of the public for three years. The ordinance had one function only and that was to stop nude bathing at Black's Beach. It wasn't happening anywhere else to be stopped or controlled. While the legislative language was broad the legislative intent was single-minded.

At and before the time the ordinance was adopted there existed a right to nude bathing at Black's Beach, a right that was widely exercised by a significant segment of the public. That use had ripened into a constitutionally protectable right. The function of the legislation was to take that right away. It had no other purpose. It was a right "subject to reasonable intrusions by the (government) in furtherance of legitimate (governmental) interests." (*Williams v. Hathaway, supra.)* No such governmental interest was shown as the basis for the ordinance. There was not one shred of evidence that the general welfare of the community suffered by this continued use of Black's Beach or that the general welfare would be justifiably enhanced by its prohibition.

No one was exposed to the nudity of others at Black's Beach except by their own choice. The history of the use of Black's Beach shows that its wide use by the public came about precisely because it was a swimsuit optional area. After it became an optional area its use by the public multiplied many fold. It was a stimulating rather than an inhibiting force in the public use of the beach. Those who were offended, because after knowingly negotiating the difficult paths of ingress to the beach, found themselves surrounded by nude bodies which they knew were going to be there and nowhere else, have no cause to complain. There were numerous other beaches with easier access for them to enjoy. As to those who were offended because nude bodies were clearly visible in their binoculars, they need only to take their binoculars to places more gentle to their searching eyes. Members of the public were not exposed to nudity on Black's Beach unless they made it a matter of deliberate choice. In free speech matters, a constitutional right we all understand a little better, we say, if you are offended by the language of the speaker, choose your own forum, don't ask him to stop talking. He has a right to talk and others have a right to listen even though it is uncomfortable to you. You need but to walk away.

We think a protectable right to the use of Black's Beach as a swimsuit optional area had been vested in that segment of the public who chose to use it for that purpose. Since it was sufficiently isolated it could hardly be said to be offensive to those members of the general public who might be offended by it since they had but to choose a different "forum." They had many such "forums" open to them. There were many more miles of swimsuit covered beaches to go to, all much easier to reach. No legislation was needed to protect them nor to afford to them a generous use of the beaches of the area sans nudity. The swimsuit optional public on the other hand had no other place to turn. The rights they had acquired and were exercising could be expressed no place else. It was an all or nothing proposition. The 55% who voted favorably on Proposition D became 100%. The percentage who used Black's Beach or didn't object to its nude bathing use, as evidenced by their 45% vote against Proposition D, though not reduced in numbers were in terms of their rights reduced to 0%.

The ordinance denies to appellants a personal liberty right protected by the Fifth Amendment to the U.S. Constitution and Article 1, Section 7(a) of the California Constitution and therefore the trial court should be reversed.

The majority state that "Individual rights, such as the right to pursuit of happiness, the right of privacy, and other personal liberty rights do not extend so far as to override validly enacted legislation." The statement begs the question: What is validly enacted legislation? Legislation which overrides any of these rights is invalid unless it serves a compelling public purpose within a constitutional power. I find no such compelling need for the exercise of public power here. Purely and simply, the ordinance is an attempt to impose what may or may not be a majority standard of morality upon others for 100% of the time and in 100% of the places. The constitution did not create a society of absolute majority rule. It did not empower the majority, either by Proposition D or by vote of the City Council, to take away an existing personal liberty right. When it does it is the function of the Court to tell the public—this you cannot do.

Appellants further argue that Section 56.53 infringes upon appellant's First Amendment right of freedom of association. In the context of the history of Black's Beach use and this ordinance I agree with their premise. The cases cited by appellants on pages 8 through 12 of appellants' opening brief support their position. It may be true, in the broadest sense of the language of Section 56.53, that this legal premise would be seriously suspect. On its face Section 56.53 is not unconstitutional. It's intent, however, is not disclosed by its face. Its intent is disclosed by its history and its history discloses that its design was to deny to a significant number of the public a right to continue to freely associate at Black's Beach in a manner that the right had been exercised for three years. We learned in law school that constitutional rights which might otherwise be limited by reasonable classification cannot be denied for improper purposes. No governmental need was shown sufficient to overcome the existence of the right of the users of Black's Beach to continue the freedom of association that had vested in them.

Another premise of appellants is that the City is attempting to legislate in a field preempted by the State. They say that the State occupies the field of regulation of sexual activity and that therefore the ordinance is in conflict with general law and is invalid. I agree. The majority disagrees with this premise. They state that while the State has undertaken to regulate sexual activity mere nudity does not constitute a form of sexual activity. They say that a person who simply sunbathes in the nude does not engage in sexual activity. They go on to say that Section 56.53 merely regulates public nudity, and that sexual conduct or activity is nowhere therein mentioned. The ordinance does not purport, they state, to regulate or punish obscenity, obscene conduct, sexual or lewd activity . . . it simply defines public nudity, and nothing more, as a crime.

It has been said that nudity is not conduct but merely a status . . . The last time nudity was a status and not conduct with any individual human was at the point of birth.

With all due respect to my colleagues, the argument borders on sophistry. The legislation does not seek to ban nudity per se. It does not ban nude backs, nude stomachs, nude legs, nor bald heads. It seeks to ban nudity, i.e., unclothed exposure of the human body only when the sexual or excretory areas of the body are uncovered.

The only area of the body where the rule is different for men and women is the chest, or breast, as you may choose. The clear legislative reason is of course that the breasts have a sexual identification in the eyes and minds of many. There can be no other basis. This is further accentuated by the ordinance's age distinction at ten years, since we must suppose that little girls are much like little boys in the chest area up to that age and that aspect of their sex has yet to distinguish them from their male counterparts. In its wisdom, the City Council tells us that the age of ten is the age of distinction as to the human breast for the protection of society.

However else it may be characterized, what the legislation does is regulate sexual conduct, not the mere fact of the unclothed exposure of the human body. That conduct in simple terms is the disrobing in a public place thereby exposing the private sexual parts of the disrobed person. If the legislation does not have that purpose then all arguments for its validity fall. It would be just as valid, if that were not true, to require men as well as women to wear tops, or to require skirts and ban bikinis.

It has been said that nudity is not conduct but merely a status and that since it is mere status the State has not occupied and preempted the legal field. The last time nudity was a status and not conduct with any individual human was at the point of birth. Anyone who is nude, from the age for the expression of individual will on, is nude by active choice. It takes personal conduct to become nude. It is a volitional thing. It is not a status that is, it's a status that is created. It is created by the conduct of the nude person. To be nude on a beach exposing the sexual organs of the human body requires intent and conduct to carry out that intent. Since it is the exposure of the sexual part of the human which is sought to be regulated, and since that exposure does not occur absent conduct to do so the legislation is then in fact regulating sexual conduct. I agree with appellants that the precise areas of the law in question have been occupied and preempted by the State and that, therefore, the local legislation evidenced by Section 56.53 is invalid.

While I have serious misgivings about the constitutionality of the ordinance's intent to impose a distinction between men and women wherein women may not expose their upper bodies while men may this dissent is not based on that ground. There is a serious constitutional question here, however, perhaps more fundamental than any other issue raised by the case and it should be discussed. I would hope that this serious legal premise could be dealt with more profoundly at some later stage of proceedings than that given to it by this court. The argument in *Eckl v. Davis* cited by the majority to the effect that "nature, not the legislative body, created the distinction . . . " between men and women, can be just as cogent an argument for the premise that making the distinction is a denial of equal protection of the laws as the argument made to support the ordinance as a basis for reasonable classification. After all, each sex was made what it is by nature. It is man that chooses to place the meaning on the classification given by this case. One begins to see more clearly a certain additional cogency in the arguments now being made for more precisely worded constitutional language defining the equal status of women. I believe there is a denial of equal protection under this ordinance but do not premise my dissent on this ground since it would only reach a portion of the invalidity which I believe exists in this ordinance.

The trial court should be reversed and the complaints dismissed to all parties.

—Judge Lindsley

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Finally, the strength of the opposition to the right of gay people to live their lives as well as the rationality of that opposition requires an organized approach to counter it. While it is the judicial role to adjudicate issues, even novel or controversial ones, within constitutional guidelines, the members of the bench are also not immune from the prevailing attitudes and biases of the larger society in which they live and in which they work. Most cases should be prepared with extensive documentary evidence and expert testimony which conveys information that is not only directly on point but that also counters any unspoken presumptions that a judge may have about lesbians and gay men. For this reason, particularly, I referred earlier to the concept of the special interest bar. Considering yourselves as part of a structure, no matter how loosely defined, allows for the development of additional ways to share information, to define coordinated strategies, and to centralize resources and contacts—all of which will facilitate litigation of a particular case.

The underlying premise of this weekend acknowledges that just such a structure is already developing. The participants in this conference, on both sides of the podium, are from all parts of the country and arrive with experience and information and ideas about litigating gay rights issues. The purpose of the weekend is to share and expand that expertise in order to further that cause. I wish to take this opportunity to reaffirm my own commitment to advancing the cause of gay people. And as the chief legal officer of the State of New York, and for all the people of this state, I will continue my pledge to work in whatever ways are possible and to use whatever powers and resources are available to me in the courts and as an advocate before the legislature to seek recognition of the rights of all people in this state.

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true relationship of the parties. Interestingly, however, her use of the name Kozlowski provides no evidence that would be of assistance in resolving this controversy. By remarkable coincidence, her first husband had precisely the same surname though unrelated to defendant. Her continued use of the name Kozlowski was, therefore, entirely proper and provides no clue as to the intentions of the parties.

She asked him about marriage from time to time. During the early years his responses were evasive. In or about 1958 the parties had a serious disagreement and separated for a week or so. Before plaintiff left, defendant had her sign a release in consideraton for which she acknowledged receipt of the sum of $5,000 in full satisfaction of all claims she might have against him. That consideration consisted of $2,000 in cash delivered to plaintiff when she signed the release and cancellation of an obligation of plaintiff's daughter to return $3,000 previously advanced by defendant for her educational expenses.

Within a week after that separation defendant sought out plaintiff and pleaded for her to return. He insisted that they would be happy together for the rest of their lives, that he needed her, that he would take care of her and provide for her if she would only come back and resume her functions in the household as she had performed them in the past.

I find as a fact that at this juncture she again asked him about the prospects of marriage. He was no longer evasive—he made it clear that he did not intend to marry her nor did he indicate any desire to free himself from his preexisting marriage. On the contrary, he responded to her marital suggestions by declaring that a marriage license is only a piece of paper and that "it's what is in the heart that really counts."

She moved back into the house they had previously shared and resumed the same relationship as theretofore, but did so knowing that he refused to take steps toward marriage. She proceeded to again perform services of value to defendant, including housekeeping, cooking, food shopping, serving as his escort and company and entertaining his business associates and customers as he desired. The parties, it may be assumed, also indulged in a meretricious relationship.

In July 1977 it became obvious that defendant had another romantic interest, no longer loved plaintiff and wanted to be rid of her. She was crushed and hurt and left in a huff. Without her knowledge he had recently instituted a suit for divorce against his wife of so many years, and a divorce judgment was ultimately rendered dissolving that marriage, after the parties hereto separated. He has since married; the bride is at least 30 years younger than plaintiff.

I am satisfied, based upon the evidence produced, that Kozlowski originally promised to divorce his wife in order to be free to marry plaintiff. He went even further: he sought out plaintiff's then husband and demanded that he permit or arrange for a divorce for her. In fact, a divorce was obtained for plaintiff within the early years of the relationship between the parties hereto. On the other hand, defendant's then existing marriage was not dissolved until 1977 after he and plaintiff had separated and severed their relationship. No explanation for the delay in attempting to dissolve his prior marriage was offered. [164 *N.J. Super.* at 167-169]

...(W)e believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case.

We are satisfied from a review of the record that the trial judge could reasonably have reached his factual and legal determinations on sufficient credible evidence present in the record as a whole, giving due regard to his ability to judge the credibility of the witnesses. *Nat'l Newark & Essex Bank v. American Insurance Co.*, 76 *N.J.* 64, 78 (1978); *Rova Farms Resort, Inc. v. Investors Inx. Co.*, 65 *N.J.* 474, 483-484 (1974); *State v. Johnson*, 42 *N.J.* 146, 162 (1964).

Because the issues presented are novel in New Jersey and have potentially far-reaching effects, we deem it advisable to comment briefly on the parameters of Judge Polow's decision.

I

The contract between the parties hereto, entered into in 1962 under a promise of marriage, was not a partnership or a joint venture entitling plaintiff to a share of defendant's accumulated assets. Relief predicated upon a promise of marriage has been barred since 1935 by the Heart Balm Act, *N.J.S.A.* 2A:23-1, *et seq.*

Plaintiff is not entitled to alimony or equitable distribution. Alimony may be awarded only in actions for divorce or nullity, and equitable distribution is awarded only in actions for divorce. *N.J.S.A.* 2A:34-23, *et seq.*

II

In 1968, following their separation of one week's duration, it became clear that defendant had no intention of marrying plaintiff and he advised her of that fact. Despite the sharp factual dispute on the subject, Judge Polow found that at that time defendant expressly agreed to support plaintiff for the rest of her life. Thereafter, their relationship continued until 1977 when defendant caused plaintiff to leave his home shortly before he married another woman.

Whether we designate the agreement reached by the parties in 1968 to be express, as we do here, or implied is of no legal consequence. The only difference is in the nature of the proof of the agreement. Parties entering this type of relationship usually do not record their understanding in specific legalese. Rather, as here, the terms of their agreement are to be found in their respective versions of the agreement, and their acts and conduct in the light of the subject matter and the surrounding circumstances. *Martin v. Campanaro*, 156 *F.* 2d 127, 129 (2 Cir.), *cert.* den. 329 *U.S.* 759 (1946); *St. Paul Fire, etc.*,

Co. v Indemnity Ins. Co. of No. America, 32 *N.J.* 17, 23 (1960); *West Caldwell v. Caldwell*, 26 *N.J.* 9, 28-29 (1958); 1 *Williston, Contracts* (3 ed. 1957), § 3 at 8-12; 1 *Corbin, Contracts* (1963), §18 at 39-43.

The trial judge, in finding that an express agreement was made by defendant to support plaintiff for life, believed the testimony of plaintiff and the testimony of plaintiff's daughter, son-in-law and niece. After weighing all the testimony concerning what occurred following the reconciliation in 1968, he stated in his oral conclusions:

> However, the defendant did not let it lie there. Once again there has been no contradiction. It was the testimony of the plaintiff that very shortly after she left [1968], he came to her. He again pleaded his love for her. He again urged her to live with him and run his household and insisted that they would live happily forever after, again urged her to let him take care of her, that he would provide for her for the rest of her life.
>
> Once again this is an area of some conflict in the testimony. I reject his testimony. I observed his demeanor on the witness stand. I listened to his answers. I not only reject counsel's characterization of this man as sensitive. I do not believe him. I'm perfectly satisfied that he did promise to take care of her the rest of her life as she testified. I find also that when she indicated concern about what would happen to her if he died first, he reassured her by telling her he would see that she was taken care of, and again I find that as a fact.

His findings are amply supported in the record.

The decision to cohabit without marriage represents each partner's voluntary choice as to how his or her life should be ordered—a choice with which the State cannot interfere.

Such agreements by adult nonmarital partners which are not explicitly and inseparably founded on sexual services are enforceable. *Marvin v. Marvin*, 18 *Cal.* 3d 660, 557 *P.* 2d 106, 134 *Cal. Rptr.* 815 (1976); Comment, 90 *Harv. L. Rev.* 1708, 1709 (1977); see also *Mannion v. Greenbrook Hotel, Inc.*, 138 *N.J. Eq.* 518, 521 (E. & A. 1946). The agreement here involved, as made in 1968 and thereafter performed, is therefore enforceable. We are in accord with the following views expressed on this subject in *Marvin, supra:*

> Although the past decisions hover over the issue in the somewhat wispy form of the figures of a Chagall painting, we can abstract from those decisions a clear and simple rule. The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services. *Thus the rule* asserted by defendant, that a contract fails if it is "involved in" or made "in contemplation" of a nonmarital relationship, cannot be reconciled with the decisions. [18 *Cal.* 3d at 669]

In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.

We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period, preliminary to marriage, serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties. We are aware, as we have stated of the pervasiveness of nonmarital relationships in other situations.

The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many. Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.

We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed. As we have explained, the courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious consideration. [18 *Cal.* 3d at 831]

The philosophy expressed in *Marvin* which refuses to condemn cohabitation by a man and woman who are unmarried as being "meretricious" and, therefore, so tainted as to deny them any relief by the courts, is not generally contrary to our own public policy. In *State v. Saunders*, 75 *N.J.* 200 (1977), we held the fornication statute *(N.J.S.A.* 2A:110-1), as applied to adults, to be unconstitutional because it improperly invaded the parties' right to privacy—thus indicating such conduct is not criminal. An unconstitutional statute is wholly void, and is as inoperative as if it had never been passed. 16 *Am. Jur.* 2d, *Constitutional Law*, §177; *State v. Guida*, 119

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two people sign "a piece of paper," (meaning a marriage certificate) they waved that paper at each other whenever any problem arose instead of attempting to settle the problem. Defendant allegedly said that a license is a woman's insurance policy and he did not like that. Defendant further stated to plaintiff that when two people loved each other, there is no need for a license. Plaintiff declared that she told him that she did not necessarily agree with him.

Plaintiff testified that she hoped to secure a part in "Flower Drum Song" and was to journey to New York City for that purpose, but defendant did not want her to go as, he said, it was hard to conduct a romance at long distance. She did not go to New York. She rented an apartment for approximately one month. Defendant stayed with her from time to time.

In October, 1964, the plaintiff rented and moved into a house. The defendant moved in with her although he also maintained a room at a nearby hotel and occasionally stayed at the home where he had lived with his wife and children. Plaintiff told defendant that they were not "living together." His response was, "What does it mean when your blouse and my suit come back (from) to the cleaners together?" He inquired, "Does it mean that I live here?" She testified that she replied, "Well, I guess it does."

Defendant allegedly repeated again and again, his opinion that a piece of paper, a marriage certificate, is not needed by people in love. Plaintiff testified that at first she thought he was crazy and asked him to explain. She did not think it would work without the "paper." Defendant responded that marriage was lacking in communication and that he was unhappy about it.

The defendant went to San Blas, Mexico in November or December of 1964 for sport fishing. He later invited plaintiff to join him, which she did. There the defendant allegedly told her that he was unhappily married, that he might be terminating his marriage, and that he and plaintiff could be together. She testified that she doubted his words. He declared again that a woman does not need a piece of paper, a marriage certificate, for security. He repeated his belief that whenever there was a misunderstanding, each waved the paper at each other instead of working hard at clearing up the misunderstanding. He allegedly said that he would never marry again because he did not like that kind of arrangement. He declared that he was almost positive that his marriage was not going to mend and asked whether plaintiff and defendant could share their lives. She inquired as to his meaning. He replied that after the divorce he would be left with only "the shirt on his back (and alimony)" but would she like to live on the beach. She initially responded she was going to New York. Two days later she asked defendant if he really thought living together without marriage would work out. He said that it would and she agreed to live with him.

Then defendant allegedly uttered the words which plaintiff contends constitute a contractual offer. He said,"what I have is yours and what you have is mine." She then accepted the alleged offer but declared that she had her own career and she did not want to depend on anyone. Defendant said that he had no objection to her career, that they still could share and build their lives. She told him that she loved him, that she would care for him and their home, and that she would cook and be his companion. She offered to learn how to fish, a sport of which he was quite fond, although she got seasick. He said that she would get over her seasickness.

The defendant was intoxicated in San Blas a "few times" to the point of losing control. She said that in subsequent years, 1965 and 1966, he lost control whenever he drank. She testified that she asked him to stop drinking and that he did not do so.

Defendant vigorously denies telling plaintiff, "what I have is yours and what you have is mine;" he declared that he never said he would support her for life and that he never stated "I'll take care of you always." He further denies saying that a marriage license is a piece of paper which stood in the way of working out problems. He testified that he decided to get a divorce from his wife after he arrived at his beach house, many months after his return from San Blas. During the examination of defendant under Evidence Code, Section 776, counsel for plaintiff read from defendant's deposition wherein defendant declared that he wanted a relationship of no responsibility and that the plaintiff agreed thereto.

The defendant rented and later purchased a house on the Malibu beach. Plaintiff moved in, bringing a bed, stereo equipment and kitchen utensils. A refrigerator and washing machine were purchased. She bought food, cooked meals for defendant, and cleaned house (after the first year, she had the periodic help of a cleaning woman). On occasion, the couple had visitors and they in turn went together to the homes of friends. In the circle of their friends and their acquaintances in the theatrical world, the plaintiff was reputed not to be defendant's wife.

In the six years of their relationship, they did considerable traveling, over 30 months away from the beach house, for the most part on various film locations. Plaintiff usually accompanied the defendant except for the seven months devoted to the filming of "Dirty Dozen" in England (she visited him for about a month) and an exploratory trip to Micronesia preliminary to filming "Hell in the Pacific."

Plaintiff testified that her acquaintance with the theatre began in 1957 as a dancer. She danced with several troupes. She states that she was a featured dancer in a group organized by Barry Ashton, who produced shows in Las Vegas. She further alleges that she was also a singer from about 1957 and appeared in nightclubs in several states and abroad. Her compensation was usually "scale," ranging from $285 to $400 a week. As to motion pictures, she served as a "stand-in" or in background groupings until her appearance in "Synanon" (shortly after working in "Ship of Fools" where she met defendant) in which she spoke some lines but was not a featured performer.

After the parties moved into the beach house, plaintiff continued to have singing engagements, encouraged by the defendant who would frequently attend, bringing friends and buying drinks for them to lengthen their stay and thereby increase plaintiff's audience.

A decorator was hired to work on the beach house and, after some structural changes, a substantial amount of furniture was purchased. Plaintiff worked with the decorator; both consulted defendant on occasion as to the purchases and alterations.

In 1966, defendant contacted a friend in Hawaii and secured a singing engagement for plaintiff. Before she left for Hawaii Santana Records, Inc., was organized by defendant and defendant paid for the recordation of four songs by plaintiff under the Santana label. With the assistance of her manager, Mimi Marleaux, plaintiff visited disc jockeys in Hawaii and promoted the record.

In that same year, 1966, defendant went to London to make a picture entitled, "Dirty Dozen." During his stay in England he wrote eight letters to plaintiff wherein he expressed affection for the plaintiff and looked forward to her coming to London. In one letter, Exhibit 13, he portrays an imaginary scene wherein he was "found guilty of robbing a 33-year-old cradle" and he answers the judge, "absolutely guilty, your honor . . . Yes sir, I accept life with her, thank you your honor and the court. Will the jury please get out of that cradle!"

After the filming of "Dirty Dozen" and the parties' return to Malibu, Miss Marleaux allegedly was present in the Malibu house when defendant said, after plaintiff told Marleaux she was sorry she let her (Marleaux) down (by the slump of her career), "I don't know what you're worrying about. I'll always take care of you . . . ."

While in Hawaii, plaintiff alleges that there was a ninth letter wherein defendant demanded that she give up her career, cut short her promotion of her record in Hawaii and come to London and if she did not, the relationship would be ended. At one point in the suit, plaintiff declared that she could not locate the letter. She now contends that it was destroyed by defendant. Miss Marleaux recollects a telephone call by defendant to the same effect but defendant introduced bills which indicate he made no such call.

In March of 1967, defendant testified that he told plaintiff that she would have to prepare for separation and that she should learn a trade. The plaintiff responded that if he left her, she would reveal his fears, his worries to the public and his career would be destroyed. She also threatened suicide.

In 1967, the plaintiff accompanied defendant to Baker, Oregon, where the latter made a film called "Paint Your Wagon." The parties rented a house in Baker and established a joint bank account. Plaintiff signed most of the checks drawn on that account.

The plaintiff returned to Los Angeles while "Paint Your Wagon" was still being filmed in Oregon in order to confer with one of the defendant's attorneys, Louis L. Goldman. She asked him whether it would be any trouble to change her name to "Marvin" as their different names were embarrassing to her as well as defendant in a place like Baker. Goldman said if the change was approved by defendant, it was agreeable with him. She then requested him to arrange with defendant for the placement of some property or a lump sum in her name. She declared to him that she did not know whether the relationship would last forever, that she had talked to defendant about conveying the house to her but that he had said absolutely no. She requested Goldman to persuade defendant to do something for her. Goldman later telephoned plaintiff to inform her that defendant had refused to agree to any of her requests.

Goldman testified that plaintiff told him that neither she nor defendant wanted to get married, that each wanted to be free to come and go as they pleased and to terminate the relationship if they wished. The subject of defendant's frequent intoxication was discussed.

On cross-examination, plaintiff testified that they were "always very proud of the fact that nothing held us. We weren't—we weren't legally married." After the breakup she declared to an interviewer: "We used to laugh and feel a great warmth about the fact that either of us could walk out at any time."

Following the completion of "Paint Your Wagon" (after additional work in Los Angeles), defendant made a picture entitled, "Hell in the Pacific" on the island of Palau in Micronesia. The parties again opened a joint account on location and drew funds therefrom for payment of food, clothing, etc. The plaintiff issued the greater number of checks.

She alleges that defendant introduced her as "Mrs. Marvin" although most of the American community on the island knew that they were not married, including the crew filming the picture and the cast. The defendant denies that he so introduced her.

The parties returned to Palau for a second sojourn. The parties enjoyed the fishing and the defendant supervised and assisted in the completion of a fishing boat which he hoped would vitalize the Palauan fishing industry. The parties talked to an architect about building a house, part of which they could occupy and part of which could be rented to visitors on Palau for the fishing.

Marriage was far from the thoughts of the parties. On the second visit to Palau plaintiff testified that defendant asked her to marry him but she thought he was joking and laughed. A few weeks later plaintiff allegedly asked defendant to marry her and he laughed.

On Palau, the parties met Richard Doughty, a member of the Peace Corps fishery department. Doughty testified that he had sexual relations with plaintiff approximately twenty times, on the island, and additional times later in Los Angeles and Tucson. Plaintiff vigorously denied this and claimed that Doughty was a homosexual, offering supporting witnesses. This in turn was vigorously denied by Doughty who also offered witnesses who would rebut such a charge. Doughty's testimony was corroborated by Carol Clark who testified that plaintiff admitted to her that she (plaintiff) had "an affair" with him.

Doughty's testimony is weakened by his denial of such relationship when defendant's counsel. A. David Kagon, first questioned him prior to the trial. He explained that he decided to tell the truth at the trial because he did not wish defendant to be railroaded and because he now was more willing to accept responsibility after he had recovered from a serious illness.

La Verna Hogan, wife of the production manager of "Hell in the Pacific," accompanied plaintiff on a trip from Palau to Hawaii. They stayed overnight in Guam where plaintiff told Mrs. Hogan that she was to meet two men in Hawaii. Mrs. Hogan asked plaintiff why she was going to meet them in view of her relationship with defendant and plaintiff responded, "We (plaintiff and defendant) have an understanding. He does his thing and I do mine." Plaintiff denies any such Hawaiian meeting.

In 1969, defendant filmed "Monte Walsh" on locations approximately two hours from Tucson. He rented a house in Tucson for the ten to twelve weeks of shooting. Doughty secured employment in "Monte Walsh" as a dialogue coach and lived with the parties. A joint bank account was again opened and funded by Edward Silver, defendant's business manager. Plaintiff signed most of the checks.

At the end of the shooting of the pictures, "Hell in the Pacific," "Paint Your Wagon" and "Monte Walsh," the Palau, Baker and Tucson joint bank accounts were closed and the balances transferred to defendant's account.

Plaintiff had a separate account in Malibu in which defendant's business manager, deposited $400 per month for her personal use.

The plaintiff testified that in May, 1970, defendant left the Malibu beach house upon her request. Later, she was told by defendant's agent, Mishkin, that defendant wished that they separate (Mishkin had referred to a "divorce" but testified that he was mistaken in his use of the term). The plaintiff

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later sought and found defendant in La Jolla. There he told her, plaintiff alleges, that he would not give up drinking, that it was part of his life and that his relationship with plaintiff was no longer enjoyable because of her frequent admonitions as to his drinking.

In May, 1970, plaintiff went to the office of defendant's attorney, Goldman. He informed her that defendant wanted her out of the house and out of his life and that defendant would pay her $833 per month (net after deduction of taxes from a gross of $1050) for five years. Plaintiff testified that she told Goldman she could not exist on such a stipend. Goldman responded that defendant could not afford to pay more because of the alimony which he paid to his former wife. Plaintiff testified that she replied that defendant had promised to take care of her for life. Goldman, however, testified that she had simply thanked him for the arrangement and said that $833 would be enough for her needs.

She returned to the beach house but finally departed after an emotional confrontation with defendant and his attorneys, Goldman and Kagon. Checks for $833 each began to arrive. According to defendant, the payments were made on condition that she removed herself from his life and not discuss with anyone anything she learned about defendant during their relationship. Defendant said that plaintiff thought this was fair. According to the plaintiff, the checks were stopped when defendant saw an item about him in one of the Hollywood columns. Defendant did send one more check but again stopped payment because, plaintiff declares, defendant was angered by her suit against Roberts. She told her attorney (then Howard L. Rosoff) to dismiss the action but, when no more checks came, she reversed her instructions. According to Goldman, plaintiff said she had nothing to do with the item in the column (re defendant's marriage to Pamela breaking up). He testified that she also said that she would not do it again and to give her another chance. Goldman replied that defendant "was at the end of the road."

The plaintiff filed an application dated March 26, 1970 to change her name to Michelle Triola Marvin. The verified application declared that she had been known professionally as "Marvin" and that she used the name in her acting and singing career.

Plaintiff stated in her deposition [1] that she never used the name "Marvin" professionally. She now declares that she meant (in her application) that she used "Marvin" during her career but only socially.

The plaintiff also declared in her deposition[2] that she had asked for a written agreement as to property shortly after moving into the beach house. Defendant allegedly said an agreement was being prepared but they did not need any papers. The plaintiff said they did. Plaintiff said nothing further about the nonappearance of any agreement during 1968, 1969 and 1970.

The defendant stated in his deposition[3] that he wanted a relationship of no responsibility and that the plaintiff agreed with him.

On trips out of town, plaintiff was introduced on occasion as Michelle Marvin to avoid embarrassment in hotels, but defendant contends he never introduced her as Mrs. Marvin. Bills were rarely addressed to Mrs. Lee Marvin, but rather to Michelle Marvin. In the Malibu community and the actor-producer circles in which they moved, the couple's relationship was known not to be that of husband and wife.

The plaintiff testified that she never told the defendant that she would hold herself out as his wife, that the parties never used the terms "husband and wife," those words were not in their vocabulary and that they never used the word "homemaker."[4]

Defendant testified that in the winter of 1969 plaintiff wanted him to finance a European trip at $10,000-$15,000 per month as the price for separation. Later, she offered to "get out of your (his) life for $50,000" and he would never hear from her again. Still later, she requested $100,000. Plaintiff denies that she made any such offer.

Rather than review the great number of allegations by plaintiff as to defendant's drinking to excess, it is enough to observe that defendant admits that he was frequently intoxicated. It is a reasonable inference therefrom that in such condition he needed care and that plaintiff provided it.

TESTIMONIAL INCONSISTENCIES

The weight of the testimony of the plaintiff is lessened by several inconsistencies.[5]

Plaintiff claims to have had considerable help from Gene Kelly in the procurement of employment in "Flower Drum Song" in New York City. He, however, denied that he hired plaintiff. He further testified that he never talked to plaintiff about "Flower Drum Song" in 1963 or 1964 and that at that time the play was not being performed in New York City. In later testimony plaintiff altered her allegation of employment by Kelly to an offer of letters of introduction by him. She also modified her declaration that she was going to New York City to appear in "Flower Drum Song" to say that she did not know whether it was than being performed on Broadway.

Plaintiff's contention of many weeks of employment in Playboy clubs in Chicago, Phoenix, Miami, New York City, San Francisco and three other clubs and repeated in Chicago, Phoenix and San Francisco is countered by evidence from Playboy records of only one engagement, in Phoenix, and then for only two weeks. In fact, Noel Stein testified that the San Francisco club did not open until years after plaintiff's alleged engagement there. As for her allegation of employment by "Dino's Lodge" for 24 weeks in 1961 and 1962, its manager from 1958 on, Paul Wexler, declares that he recollects no employment of her by "Dino's Lodge" before 1965.

The testimony of plaintiff as to her right to compensation from Bobby Roberts, the producer of Monte Walsh, contains three variations as to the type of compensation sought. At first she was to receive a Rolls Royce, then a 10 percent finder's fee and lastly 50 percent of the producer's fee in return for informing Roberts as to the availability of the Monte Walsh script. Also, she testified that she met Roberts and Landers in their offices on or about March 15, 1968[6] whereas she was in Palau from Christmas of 1967 to April or May of 1968.[7]

According to the records of Sears Roebuck, an account had been opened in the name of Lee Marvin (Exhibit 117; the application was signed by Betty Marvin, defendant's former wife). Plaintiff testified, however, that an account was opened by her with defendant present in the name of "Mr. and Mrs. Marvin" or Lee Marvin. Sears records do not list her on any application nor as an authorized signator (Exhibit 119).

Plaintiff testified that she "never had an apartment while I was with Lee." However, Exhibit 161 dated May 1, 1965 and signed by plaintiff is a lease of an apartment at 8633 West Knoll Drive, West Hollywood. Plaintiff contends she signed the lease on behalf of her manager, Mimi Marleaux, and that she, the plaintiff, had no belongings there nor did she make any rent payments. Yet, testimony by Marleaux reveals that

plaintiff did have some clothes in the apartment and that she, Marleaux, had only stayed a month or two in the apartment. On cross-examination, plaintiff admitted that she may have paid the rent and on direct rebuttal she testified that she did pay the rent two or three times. Exhibit 186 indicates that a Continental Bank signature card signed on December 28, 1965 bore the West Knoll address as plaintiff's residence. At a later time, that address was crossed off and that of the Malibu Beach house was inserted.

Plaintiff testified that she asked defendant for a written agreement to protect her rights. The defendant responded that it was not necessary and she believed him. In her deposition, however, she stated that she continued to request such agreement.[8]

LAW

Is There an Express Contract?

An express contract must be founded on a promise directly or indirectly enforceable at law. (1 Corbin on Contracts, Sec. 11.) Every contract requires, inter alia, the mutual consent of the parties. (Civil Code Secs. 1550, 1565.)

A review of the extensive testimony clearly leads this court to the conclusion that no express contract was negotiated between the parties. Neither party entertained any expectations that the property was to be divided between them.

Further, before mutual consent can exist, an intent to contract must be present. Also, the meaning of the agreement must be ascertainable and both parties must have the same understanding of its meaning. (See *Peerless Glass Co. v. Pacific Crockery & Tinware Co.,* (1898) 121 C. 641, 647, 54 P. 101; *Apablasa v. Merritt & Co.* (1959) 176 C.A. 2d 719, 1 Cal.Rptr. 500. The basic statement on which plaintiff relies is the one which she says (and defendant denies) was made by defendant at San Blas— "What I have is yours and what you have is mine."

Considering the circumstances from which it allegedly sprung, the lack of intent to make a contract is immediately apparent. In 1964-1965 defendant was married; he had considerable unresolved financial problems; he had repeatedly informed plaintiff that he did not believe in marriage because of the property rights which a wife thereby acquires. Plaintiff could not have understood that phrase to accord the same rights to one who was not defendant's wife. If those words had been spoken, they were not spoken under circumstances in which either party would be entitled to believe that an offer of a contract was intended. (See *Fowler v. Security Pacific Bank* (1956) 146 C.A.2d 37, 47, 303 P.2d 565.)

In addition, the meaning of the phrase is difficult to ascertain. Does it mean a sharing of future as well as presently owned property? Does it mean a sharing of the *use* of property or is title to be extended to both parties? Does it mean that all property is shared even though the relationship may be terminated in a week or weekend? These are all unanswered questions. It is more reasonable to conclude that the declaration is simply hyperbole typical of persons who live and work in the entertainment field. It was defendant's way of expressing his affection for the plaintiff. As the defendant testified, in his business terms of affection are bandied about freely; one "loves" everyone and calls everybody "sweetheart."

Also, after hearing defendant's views on marriage and noting his antagonism against a person acquiring any rights by means of a certificate of marriage, it is not reasonable to believe that plaintiff understood that defendant intended to give her such rights even without a certificate. Without intent to contract and with no clearly ascertainable meaning of the contractual phrase, no express contract exists.

During a meeting with Marleaux in the fall of 1966 and in the presence of the defendant, the plaintiff told Marleaux that she (plaintiff) was sorry she had let Marleaux down by not pursuing her career. Defendant then allegedly stated, "I don't know what you're worrying about. I'll always take care of you."

Corbin has this to say about remarks of that sort: "The law does not attempt the realization of every expectation that has been induced by a promise; the expectation must be a reasonable one. Under no system of law that has ever existed are all promises enforceable. The expectation must be one that most people would have, and the promise must be one that most people would perform." (Corbin on Contracts, p.2 (West Pub. Co. 1952).) Surely plaintiff had no expectation that defendant would extend such care to her after separation, remembering defendant's antagonism to such automatic rights in a wife if the relationship failed (and to which she testified).

In addition, the phrase "I'll always take care of you" leaves many questions unanswered: Does defendant mean that plaintiff has the right to care even if separation is caused by plaintiff? What level of care? What if plaintiff marries, does the care continue? An offer as indefinite as this cannot be the basis of an enforceable contract *(Apablasa, supra* at 723).

Further, the alleged promise lacks mutuality; the plaintiff made no enforceable promise in response. Even if, *arguendo,* she had promised to forego her career, defendant could not have legally enforced such promise. (See *Mattei v. Hopper* (1959) 51 C.2d 119, 122, 330 P.2d 625.) Actually, plaintiff's career, never very brisk-paced, was sputtering and not because of any act of defendant; it came to an end unmourned and unattended by plaintiff who made no attempt to breathe life into it.

Doubt is cast upon the Marleaux testimony as to the alleged promise. The statement was allegedly made in the presence of Marleaux. The plaintiff testified that she remembers the event very clearly and that it was very important in her life. Yet in plaintiff's deposition of October, 1978, she was asked whether anyone other than the defendant was present and she responded, "I can't recall if anyone was present." (Deposition, p. 66, lines 19-23, read into the trial record at Vol. 30, p. 5490, lines 25-28, p. 5491, lines 1-3).

The phrase, "Yes sir, I accept life with her, thank you, Your Honor, and the court" contained in Exhibit 13 (a letter written from London in 1966) adds no legal basis for a contract. It was a letter portraying an imaginary court scene from which one can infer the affection of defendant for plaintiff but from which one certainly cannot believe an offer of a contract was intended. (See *Fowler v. Security Pacific Bank, supra.*)

Is There an Implied Contract?

The conduct of the parties after the San Blas conversation certainly does not reveal any implementation of any contract nor does such conduct give rise to an implied contract. No joint bank accounts were established and no real property was placed in joint tenancy or tenancy in common. Plaintiff used a separate bank acocunt for her allowance of $400 per month, her earnings from the Hawaii engagement and her settlement of the Roberts suit. When defendant bought real property, he placed it in his own name. Their tax returns were separate.

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In plaintiff's letter to defendant dated November 2, 1971, (Ex. 67) she describes her activities after their separation, thanks defendant for his "financial help" (monthly payments for five years) and says nothing about any contract or agreement. In Ex. 155, a page from a book by plaintiff's counsel, he declares that plaintiff only asked him how to enforce defendant's promise to make payments pursuant to the five-year arrangement. Nothing was said then to counsel about any agreement to divide property. Plaintiff's attorney sent a letter to defendant's attorney, demanding recommencement of the payments for the give-year period. Plaintiff was quoted in an interview recorded in the Brenda Shaw article (Ex. 37) as follows: "We were always very proud of the fact that nothing really held us. We both agreed, and we were really pleased with the fact that you work harder at a relationship when you know that there is nothing really holding you." This evidence bars the finding of any contract.

The very fact that plaintiff pursued a claim for compensation from Roberts makes it plain that she expected no part of any earnings of defendant from the picture. Otherwise, why would she commence a lawsuit to recover a finder's fee or half of a producer's fee when she would have rights to half of the million dollars paid to defendant for the picture?[9]

Proof of introductions of plaintiff as Mrs. Marvin, and the occasional registrations at hotels as Mrs. Marvin and evidence of a relationship wherein plaintiff furnishes companionship, cooking and home care do not establish that defendant agree to give plaintiff half of his property.

The evidence does not support plaintiff's contention that she gave up her career in order to care for defendant and on his demand that she do so.

She claimed that defendant demanded that plaintiff give up her career and join him in London or else the relationship would end. Looking at the facts, she did go to London but remained ony a few weeks. She declares that she returned because defendant was drinking heavily, and it was then too late to resume promotion of her record, yet in her 1978 deposition she stated that she returned because her manager wanted her to come home to promote her record and in fact she did attempt to do so, but discovered that the radio stations were not interested. As for the loss of momentum, in the promotion of her record by reason of her London trip, witnesses for defendant as well as one for plaintiff testified that no loss occurred. Contrary to any ultimatum, a witness for defendant declared that the letter expressed hope that she would have a successful career.

Plaintiff testified that the ultimatum was delivered to her by letter.[10]

However, her witness, Marleaux, declared that it came by way of telephone. One must doubt that the defendant issued an ultimatum (allegedly in the missing letter) demanding that plaintiff come to London when he writes in Ex. 12, "only a month and a half to go, w(h)oopee," indicating that plans for her coming to London had already been made by the parties.

The plaintiff's testimony as to defendant's drinking habits would indicate that he was virtually awash with alcohol. Yet during this same period, defendant starred in several major films, all demanding of him physical stamina, a high degree of alertness and verbal as well as physical concentration. Her portayal of large-scale and all pervasive inebriation raises doubt as to her accuracy of observation.

An implied as well as an express agreement must be founded upon mutual consent. Such consent may be inferred from the conduct of the parties. Proof of introductions of plaintiff as Mrs. Marvin, and the occasional registrations at hotels as Mrs. Marvin and evidence of a relationship wherein plaintiff furnishes companionship, cooking and home care do not establish that defendant agreed to give plaintiff half of his property. Those services may be rendered out of love or affection and are indeed so rendered in a myriad of relationships between man and woman which are not contractual in nature. They may be consideration for a contract to receive property but the other elements of such contract remain to be established. Discussion of an equitable basis for an award because of homemaking services is to be found in a later portion of this opinion.

The change of name to Marvin appears to have had one motivation, to avoid embarrassment when traveling. It ended the awkwardness occurring when, for example, plaintiff's passport was examined in customs. Coming at a time so close to the date of separation after some indication of difficulties between the parties, the change of name does raise a question whether plaintiff sought relief from embarrassment or whether she wished to acquire the right to use defendant's name after separation.

The evidence of a contract as to property may be imputed from a change in the manner of holding, such as joint tenancy bank accounts, but not such joint accounts as were set up on the various filming locations (Tucson, Baker, Palau). There accounts were transient, employed solely for the convenience of attending to current needs away from California. The disposition of funds remaining after the film was completed underlined the single purpose of the accounts: upon completion the funds were placed not in a joint account in Los Angeles but in defendant's separate account.

Plaintiff's use of charge accounts certainly does not establish that defendant by his alleged consent to such use intended that half of his property be given to plaintiff.

Registering at hotels as Mr. and Mrs. Marvin does not indicate that defendant intended to give plaintiff one-half of the property. Such evidence may assist in proving a relationship which on its surface resembles marriage in areas away from home, but relationships resembling marriage may exist without any property arrangements. Hence more must be proved by a preponderance of evidence, that is, that plaintiff used the charge accounts because defendant had agreed to give her half of the property.

Plaintiff proved that she acted as companion and homemaker, that she prepared a number of defendant's meals and that she cleaned house or supervised a cleaning woman. That she did so in consideration of a contract, express, implied, or tacit, with respect to disposing of property, remains unproved. The existence of such property agreement has not been established by the requisite preponderance of the evidence. The decision of *In re Marriage of Cary* (1973) 34 Cal.App. 3d 345, 109 Cal.Rptr. 862 and *Estate of Atherley* (1975) 44 Cal.App. 3d 758, 119 Cal.Rptr. 41 afford no comfort to the plaintiff as their facts distinguish them from the instant case. In *Cary,* the disputed property was placed in the joint names of both parties, *joint income tax* returns were filed, money was borrowed and business was conducted as husband and wife. In *Atherley,* both parties pooled earnings accumulated for 13 years and bought property as joint tenants. Both worked and contributed funds to

the construction of improvements on land bought with such earnings. None of these facts were established in this case; there was no pooling of earnings, no property was purchased in joint names, and no joint income tax returns were executed. Joint accounts set up on filming locations were only used as convenient and returned to the separate account of the defendant when the film was completed.

As for pooling of earnings, the bulk of plaintiff's compensation for singing was used to pay her musician and arrangers. When she did achieve a net income in the Hawaiian engagement, she placed the money in her separate account. Defendant's income was deposited in his own bank account and used to buy property in his own name. This case therefore bears little resemblance either to *Cary* or *Atherley*.

Finding no contract, the testimony of Doughty is not evaluated as that relates to an alleged breach of contract.

It is clear that the parties came together because of mutual affection and not because of mutual consent to a contract. Nothing else, certainly no contract, kept them together and, when that affection diminished, they separated.

EQUITABLE REMEDIES

If no contract, express or implied, is to be found, the Supreme Court adjures the trial court to ascertain whether any equitable remedies are applicable. The high court suggests constructive and resulting trusts as well as quantum meruit. The court also declares: "Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies may be determined in later cases in light of the factual setting in which they arise."[11]

The plaintiff has, by her dismissal of her fourth and fifth causes of action—both for quantum meruit—removed that remedy from the court's consideration.

If a resulting trust is to be established, it must be shown that property was intended by the parties to be held by one party in trust for the other and that consideration was provided by the one not holding title to purchase the property. As Witkin puts it, there must be "circumstances showing that the transferee (holder of title) was not intended to take the beneficial interest."[12]

No evidence has been adduced to show such consideration having been provided by the plaintiff to buy property.[13] It may be contended that as the defendant did not need to expend funds to secure homemaking services elsewhere, she thereby enhanced the financial base of the defendant and enabled him to increase his property purchases. (See Bruch, *supra,* p. 123.) Such alleged enhancement, however, would appear to be offset by the considerable flow of economic benefits in the other direction. Those benefits include payments for goods and services for plaintiff up to $72,900 for the period from 1967-1970 alone (Ex. 194). Exhibit 196 indicates that living expenses for the parties were $221,400 for the period from 1965 to 1970. Among such benefits were a Mercedes Benz automobile for plaintiff, fur coats, travel to London, Hawaii, Japan, Micronesia, and the pleasures of life on the California beach in frequent contact with many film and stage notables. Further, defendant made a substantial financial effort to launch plaintiff's career as a recording singer. No equitable basis for an expansion of the resulting trust theory is afforded in view of this evidence.

A constructive trust, pleaded in the second cause of action, is "equity's version of implied-in-law recovery" (see *Bruch, supra,*p.125) based on unjust enrichment. This is a trust imposed to force restitution of something that in fairness and good conscience does not belong to its owner. (See *Bruch, supra,* p.125). However, the defendant earned the money by means of his own effort, skill and reputation. The money was then invested in properties now held by him. It cannot be said in good conscience that such properties do not belong to him.

As Witkin points out, such a trust is an equitable remedy imposed where a person obtains property by fraudulent misrepresentation or concealment or by some wrongful act.[14] No such wrongdoing can be elicited from the facts of this case.

Plaintiff contends that the Supreme Court by its opinion in *Marvin v. Marvin, supra,* requires that plaintiff receive a reasonable proportion of the property in defendant's name because of her performance of the homemaker-companion-cook and other wife-like functions even though no contract, express or implied, exists and even though no basis for a constructive or resulting trust can be found. To accede to such a contention would mean that the court would recognize each unmarried person living together to be automatically entitled by such living together, and performing spouse-like functions, to half of the property bought with the earnings of the other nonmarital partner. This is tantamount to recognition of common law marriages in California. As they were abolished in 1895, the Supreme Court surely does not mean to ressurrect them by its opinion in *Marvin v. Marvin,*[15] The trial court's understanding of *Marvin v. Marvin* is that if there is mutual consent or proof of the mutual intent of the parties, by reason of their conduct or because of surrounding circumstances, to share the property or if the plaintiff directly participated in the procurement of or the nurturing of investments, or if there has been mutual effort (which will be discussed later) the property should be divided. None of these conditions pertains here.

The trial court's understanding of *Marvin v. Marvin* is that if there is mutual consent or proof of mutual intent of the parties, by reason of their conduct or because of surrounding circumstances, to share the property or if the plaintiff directly participated in the procurement of or the nurturing of investments, or if there has been mutual effort ... the property should be divided.

While the Supreme Court directs under certain circumstances a fair apportionment of property even though there is no express or implied contract, it has imposed a condition, that such property be "accumulated through mutual effort." (p. 682.) Plaintiff declares that her work as homemaker, cook and companion constituted "mutual effort."

The two cases cited as examples of mutual effort, *In re Marriage of Cary* (1973) 34 Cal.App. 3d 345, 109 Cal.Rptr. 862 and *Estate of Atherley* (1975) 44 Cal.App. 3d 758, 119 Cal.Rptr. 41, reveal considerably more involvement on the part of the woman in the accumulation of property. In the first place, Paul Cary and Janet Forbes (in *Cary, supra*) held themselves out to be husband and wife. That is not the case

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here. The reputation of the parties in the community in which they settled was not that they were a married couple. Not only did Cary and Forbes purchase a home, but they also borrowed money, obtained credit, and filed joint income tax returns. Four children were born to the couple. The children's birth certificates and school registration recorded them as Paul and Janet Cary. None of these facts are present in the instant case.

In *Atherley,* the parties, Harold and Annette, lived together for 22 years; after 14 years Harold divorced a prior wife *ex parte* in Juarez, Mexico and then married Annette in Reno, Nevada. Both were employed and pooled their earnings in various bank accounts. They had been advised by a Los Angeles attorney that the Mexican divorce was valid. Both contributed services to the construction of improvements on land purchased by them. Funds used to purchase both land and materials can be traced to their accumulated earnings. Two bank accounts were established with funds accumulated by Harold and Annette. Upon the sale of an improved parcel, a promissory note representing part of the sales price was held in joint tenancy. None of these facts is present in the instant case.[16]

In this case we have all assets bought solely with the earnings of the defendant. The plaintiff had no net earnings except from the Hawaiian engagement and those funds went into her own account. Plaintiff secured $750 from the settlement of her suit against Roberts and those funds also did not go into defendant's account. There were, on the other hand, funds that were expended by defendant to further plaintiff's career. The defendant also persuaded a friend to employ plaintiff in Hawaii. He brought people to hear her sing and bought drinks to keep them in attendance. It was the plaintiff who stopped trying to sell her record and get singing engagements. The evidence does not establish that such cessation was caused by defendant.

It would be difficult to deem the singing career of plaintiff to be the "mutual effort" required by the Supreme Court. Certainly, where both wanted to be free to come and go without obligation, the basis of any division of property surely cannot be her "giving up" her career for him. It can then only be her work as cook, homemaker and companion that can be considered as plaintiff's contribution to the requisite "mutual effort." Yet, where $72,000 has been disbursed by defendant on behalf of plaintiff in less than six years, where she has enjoyed a fine home and travel throughout the world for about 30 months, where she acquired whatever clothes, furs and cars she wished and engaged in a social life amongst screen and stage luminaries, such services as she has rendered would appear to have been compensated. Surely one cannot glean from such services her participation in a "mutual effort" between the parties to earn funds to buy property as occurred in *Cary* and *Atherley, supra.*

The Supreme Court doubtless intended by the phrase "mutual effort" to mean the relationship of a man and woman who have joined together to make a home, who act together to earn and deposit such earnings in joint accounts, who pay taxes together, who make no effort to gain an advantage by reason of the association, (such as informing a producer of a script for a fee and taking his name without defendant's consent), who have children if possible and bring them up together. *Cary* and *Atherley* in fact demands more of the partners; they require participation in money earning activities. Plaintiff's fund raising put money in her own account.

To construe "mutual effort" to mean services as homemaker, cook and companion and nothing else[17] would be tantamount to the grant of the benefits of the Family Law Act to the nonmarital partner as well as to the married person. This the Supreme Court has refused to do. Therefore, one must seek and find in each case those additional factors which indicate the expenditure of "mutual effort," such as those present in *Cary* and *Atherley.* Such factors are not present in this case.

The court is aware that Footnote 25, *Marvin v. Marvin, supra,* p. 684, urges the trial court to employ whatever equitable remedy may be proper under the circumstances. The court is also aware of the recent resort of plaintiff to unemployment insurance benefits to support herself and of the fact that a return of plaintiff to a career as a singer is doubtful. Additionally, the court knows that the market value of defendant's property at time of separation exceeded $1,000,000.

In view of these circumstances, the court in equity awards plaintiff $104,000[18] for rehabilitation purposes so that she may have the economic means to re-educate herself and to learn new, employable skills or to refurbish those utilized, for example, during her most recent employment[19] and so that she may return from her status as companion of a motion picture star to a separate, independent but perhaps more prosaic existence.

NOTES

1. P. 79, lines 24-25; p.81, lines 1-8.
2. P. 64, line 10-p. 72, line 19.
3. P. 22, line 14-p. 24, line 28; p. 25, lines 1-18; p. 26 lines 1-16.
4. P. 720, lines 3-28; p. 722 lines 6-8, Transcript.
5. Defendant's closing brief lists a number of alleged inconsistencies, pp. 1 and 2.
6. Exhibit 41, pp. 13-15.
7. V. 10, p. 1312, lines 12-13; upon the refusal of Roberts to make any payment, plaintiff sued him but settled the case for $750; this sum did not go into any account of the defendant.
8. 1972 Deposition, p. 67, line 28; p. 68, lines 1-12.
9. After plaintiff and defendant separated, plaintiff testified she heard from Roberts many times. In her deposition (April 15, 1972. p. 44, lines 9-15) she said she never heard from Roberts after separation. Another inconsistency.
10. The letter has been allegedly destroyed by defendant although at first the plaintiff declared it was missing.
11. *Marvin v. Marvin, supra,* p.684, footnote 25.
12. 7 Witkin, Summary of Calif. Law. Sec. 123 p. 5481.
13. Such establishment must be by clear and convincing proof. (G.G. Bogert and G.T. Bogert, Handbook of the Law of Trusts, Sec. 74 at p. 279 (5th edition 1973); *Moulton v. Moulton* (1920) 182 Cal. 185, 187 P. 421; Bruch, Property Rights of DeFacto Spouses, 10 Family Law Quarterly, p. 101.)
14. Civil Code, Secs. 2223, 2224; 7 Witkin, Summary of Calif Law, Secs. 131, 132, pp. 5487, 5488.
15. Footnote 24 of *Marvin v. Marvin,* supra, expressly denies any intent to revive the relationship: "We do not seek to resurrect the doctrine of common law marriage, which was abolished in California by statute in 1895. (See *Norman v. Thomson* (1898) 121 Cal. 620, 628 (54 P. 143); *Estate of Abate* (1958) 166 Cal.App. 2d 282, 292 (333 P. 2d 200).) Thus we do not hold that plaintiff and defendant were "married," nor do we extend to plaintiff the rights which the Family Law Act grants valid or putative spouses; we hold only that she has the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as does any other "unmarried person." (Emphasis added).
16. Mere possession of property or the holding of title is not a determinant if standing alone. See *Marvin v. Marvin,* supra, footnote 21, p. 682.
17. This is not to gainsay that an express or implied contract may be valid and enforceable where the consideration is ordinary homemaking services. (*Marvin v. Marvin,* supra, footnote 5, p. 670).
18. Plaintiff should be able to accomplish rehabilitation in less than two years. The sum awarded would be approximately equivalent to the highest scale that she ever earned as a singer, $1,000 per week, for two years.
19. While part of the funds may be used for living expenses, the primary intent is that they be employed for retraining purposes.

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N.J.L. 464, 465 (E. & A. 1937); *In re Rose,* 122 *N.J.L.* 507, 508-509 (Sup. Ct. 1939). Effective September 1, 1979 fornication is no logner designated as a crime under *N.J.S.A.* 2C:1-1, *et seq.* Therefore, the cohabitation by the parties after 1968 cannot be termed "meretricious" because they engaged in sexual relations. Moreover the relationship between the parties hereto, as entered into in 1968 at a time when plaintiff was divorced, was not tainted by the fact that defendant was married at that time. A male, married or unmarried, can be guilty of adultery only if he has sexual relations with a married woman. See *State v. Lash,* 16 *N.J.L.* 380 (Sup. Ct. 1838);[1] *Crim. Laws of New Jersey 3d,* §15.1 (1970); Perkins, *Criminal Law,* at 377 (2 ed. 1969). Therefore, in the instant case, leaving aside one's moral or religious beliefs, there was no legal impediment to the parties cohabiting in 1968. Thus any lawful agreement made by them is enforceable.

III

To dispel any misunderstanding, we emphasize that our decision today has not judicially revived a form of common law marriage which has been proscribed in New Jersey since 1939 by *N.J.S.A.* 37:1-10. We do no more than recognize that society's mores have changed, and that an agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law, or on a promise to marry. What was said in *Hewitt v. Hewitt,* 62 *Ill. App.* 3d 861, 380 *N.E.* 2d 454 (App. Ct. 1978), a case quite similar to the case at bar, expresses a philosophy with which we agree:

> We conclude that the reasoning followed in *Marvin* is particularly persuasive upon the allegations here pleaded wherein plaintiff has alleged facts which demonstrate a stable family relationship extending over a long period of time.
>
> It would be superficial to conclude that by this determination this court has revived or restored a form of common law marriage now forbidden by statute. It is apparent that the matters to be alleged and the facts to be proved here are substantially, if not enormously, different.
>
> The value of a stable marriage remains unchallenged and is not denigrated by this opinion. It is not realistic to conclude that this determination will "discourage" marriage for the rule for which defendant contends can only encourage a partner with obvious income-producing ability to avoid marriage and to retain all earnings which he may acquire. One cannot earnestly advocate such a policy. [at 460]

IV

We find no error in Judge Polow's refusing to permit defendant to testify concerning plaintiff's alleged "alcoholism and habitual drunkenness." Her end of the agreement was, in general terms, to take care of defendant, his children and his home; to cook and keep house for him, and to help entertain his friends and business associates. There was no indication that the under-

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standing of the parties required plaintiff to abstain from drinking alcoholic beverages. At best, the judge's ruling was discretionary, and we find no abuse of that discretion. See *Wimberly v. Paterson*, 75 *N.J. Super.* 584, 608-609 (App. Div. 1962), certif. den. 38 *N.J.* 340 (1962); *Evid. R.* 4.

V

While the damages flowing from defendant's breach of contract are not ascertainable with exactitude, such is not a bar to relief. Where a wrong has been committed, and it is certain that damages have resulted, mere uncertainty as to the amount will not preclude recovery—courts will fashion a remedy even though the proof on damages is inexact. *Albemarle Paper Co. v. Moody, 422 U.S.* 405, 418-419 (1975); *Tessmar v. Grosner,* 23 *N.J.* 193, 203 (1957). Accordingly, plaintiff is entitled to a one-time lump sum judgment in an amount predicated upon the present value of the reasonable future support defendant promised to provide, to be computed by reference to her life expectancy as shown by the tables referred to in *R.* 1:13-5.

This was the approach adopted by Judge Polow in entering judgment for plaintiff on July 31, 1978 for $55,000. The judgment, however, further provided that "said sum shall be paid as this Court, on motion, shall determine." While the record is unclear, it would appear that on August 4, 1978 Judge Polow granted plaintiff's motion and ordered a limited new trial on damages and reserved decision on defendant's cross-motion for a method of payout of the $55,000 judgment. Thereafter by letter to counsel of September 18, 1978, Judge Polow advised them that he would proceed no further with the motions in view of the pending appeal.

Accordingly, we affirm the judgment below as entered; and remand the matter for such further proceedings as Judge Polow, in his sound discretion, determines should be held on the issues of damages and payout.

Pashman, J.,concurring.

I join fully in Judge Halpern's majority opinion. In recent years, cohabitation between unmarried adults has become an increasingly prevalent phenomenon. To label such conduct as "meretricious"—that is, as akin to prostitution—would ignore the realities of today's society. It is likely true that all such understandings between nonmarital partners involve in some way a mutual sexual relationship or at least contemplate its existence. This, however, does not make their conduct the equivalent of prostitution—whatever might be one's view as to its "morality." Many persons have accepted this type of living arrangement as an alternative to, or a preliminary step en route to, formal marriage. In other instances, such relationships provide the parties with companionship and a means of defraying household expenses, as well as allow each to benefit from any particular skills that the other might possess.

The decision to cohabit without marriage represents each partner's voluntary choice as to how his or her life should be ordered—a choice with which the State cannot interfere, *see State v. Saunders,* 75 *N.J.* 200 (1977). As in the case of any other individuals, these partners remain free to enter into valid and enforceable agreements concerning their earnings and property rights. *See, e.g., Marvin v. Marvin,* 18 *Cal.*3d 660, 134 *Cal.Rptr.* 815, 557 *P.*2d 106 (Sup. Ct. 1976); *Hewitt v. Hewitt,* 62 *Ill. App.* 3d 861, 20 *Ill. Dec.* 476, 380 *N.E.* 2d 454 (Ct.App. 1978); *Carlson v. Olson,* 256 *N.W.* 2d 249 (Minn. Sup.Ct. 1977); *Beal v. Beal,* 282 *Ore.* 115, 577 *P.*2nd 507 (Sup.Ct. 1978).

As the majority emphasizes, these agreements may be express or implied. See *ante* at (slip opinion at 6). At bottom, courts must determine the intent or understanding of the parties as to whether, and to what extent, their assets and income are to be divided. This intent may be discerned from their explicit language, as in the present case, or from their conduct and actions interpreted in light of all the surrounding circumstances. Regardless of the precise manner in which the parties manifest agreement, however, it is their reasonable expectations that must be honored. And the Court may look to a variety of remedies to protect that expectation. *See, e.g., Marvin, supra,* 557 *P.*2nd at 122-123; *Hewitt, supra,* 380 *N.E.* 2d at 459-460; *Carlson, supra,* 256 *N.W.* 2d at 253-255; *Beal, supra* 577 *P.*2d at 510.

The question which remains is whether quasicontractual and equitable remedies should also be available to the parties upon dissolution of their relationship. Most unwed persons who choose to cohabit likely do so "in ignorance of the [financial] consequences of either marriage or nonmarriage" and "with absolutely no thought given to the legal consequences of their relationship." Bruch, "Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services," 10 *Family L.Q.* 101, 135 (1976). Consequently, an agreement such as is here present may not exist in the vast majority of cases.

Given this circumstance, it would be unwise to require some form of contract as a prerequisite to relief in the courts. Rather, we should presume "that the parties intend[ed] to deal fairly with each other" upon dissolution of the relationship, *Marvin, supra,* 557 *P.*2d at 121, and consequently, in the absence of agreement, "employ the doctrine of *quantum meruit,* or equitable remedies such as constructive or resulting trusts" in order to insure that one party has not been unjustly enriched, and the other unjustly impoverished, on account of their dealings, *id.,* 557 *P.*2d at 110. *See, e.g., Hewitt, supra,* 380 *N.E.*2d at 459-460.

Since such remedies are grounded in equity, their applicability would depend upon the facts and circumstances of each particular case. The factors to be weighed by a trial judge would include, as examples only, the duration of the relationship, the amount and types of services rendered by each of the parties, the opportunities foregone by either in entering the living arrangement, and the ability of each to earn a lving after the relationship has been dissolved. These remedies may be cumulative or exclusive. Decisions concerning the complexities that might arise upon application of these principles must be determined on a case by case basis.

In the present case, no resort need be had to such remedies inasmuch as an explicit agreement did exist. I therefore concur fully in the majority's opinion.

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SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT

A review of legislative, administrative, and judicial developments this year in Calfornia

During his second inaugural address in January of this year, California Governor Edmund G. Brown Jr. announced that he would support an amendment to that state's Fair Employment Practices Act, which would prohibit discrimination on the basis of sexual orientation. His *State of the State* message later that month reiterated that support.

Such an amendment has been introduced in the State Assembly in the form of a bill (A.B.1) by Assemblyman Art Agnos, a liberal democrat from San Francisco. In part, this bill would prohibit all public *and private* employers from discriminating against homosexuals. In early July, the Assembly Labor Committee approved the Agnos Bill by a narrow vote of 7-6. That bill will next be heard by the Assembly Ways and Means Committee. A corresponding Senate bill (S.B.3) was also introduced, but has been rejected by the Senate Labor Committee, although another bill (S.B.18), which would accomplish the same result, is still pending in that Committee.

What is the necessity of these bills? *First,* the Fair Employment Practices Commission has taken the position that it does not have jurisdiction to investigate or remedy instances of discrimination by private employers for reasons of an employee's sexual orientation. Consequently, employees fired or experiencing other discrimination because of homosexual orientation have had no recourse. *Secondly,* although the legal community assumed that government employees are afforded job protection under the state and federal constitutional protections of Due Process and Equal Protection, at the time A.B. 1 was introduced, the California Supreme Court had never directly so held.

In March of this year, the National Committee for Sexual Civil Liberties requested Governor Brown to issue an Executive Order prohibiting agencies under his jurisdiction from discriminating against employees because of their sexual orientation. This request received support from the Speaker of the Assembly and other influential people throughout the state.

Last year, Governor Milton Shapp of Pennsylvania became the first governor in the country to issue such an Executive Order. On April 4, 1979, Governor Brown became the second, issuing Executive Order B-54-79, which reads as follows:

"Whereas, Article I of the California Constitution guarantees the inalienable right of privacy for all people which must be vigorously enforced; and

"Whereas, California must expand its investment in human capital by enlisting the talent of all members of society;

"Now, therefore, I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power and authority

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California court holds being a "manifest gay" is protected political activity

Gay Law Students Association v. Pacific Telephone and Telegraph
Filed May 31, 1979. S.F. 23625; Super. Ct. No. 691-750

In this nation's most far-reaching appellate court decision on employment discrimination against gays, the California Supreme Court has held that a public utility, although privately owned, must avoid sexual orientation discrimination in the area of employment. Even more important, the Court equated "coming out," acknowledging sexual preference, and associating with others in working for equal rights for gays with "political activity" protected against employer interference under the California Labor Code. Thus, the prohibition against such discrimination has been recognized to extend to private as well as state and state-protected and state-enfranchised employers.

The procedural facts and principal holdings of the case are discussed in the article on Sexual Orientation Discrimination in Employment, above. One portion of the Court's opinion is so significant in its rationale and language that it merits reprinting here in full:

> Over 60 years ago the California Legislature, recognizing that employers could misuse their economic power to interfere with the political activities of their employees, enacted Labor Code sections 1101 and

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JUDICIAL RULINGS

California Supreme Court redefines "lewd conduct"

On September 7, 1979, over fifteen months after hearing oral argument, the California Supreme Court issued its opinion in the case of Don Barry Pryor v. Los Angeles Municipal Court. *The opinion analyzes California Penal Code section 647, subdivision (a), the state's sexual solicitation and "lewd conduct" statute, declaring the language of the statute per se, as well as the last seventy years of judicial interpretations, unconstitutional. Instead of deferring to the legislature to redefine the crime, however, the Court adopted the approach suggested by the Los Angeles City Attorney's office and reconstructed the statute, redefining "lewd," "dissolute," "private," and "solicitation" to meet its own constitutional tests.*

The Pryor *case has national importance, and the opinion promises to be far reaching, since most other states have similar statutes, and many look to the California Court for leadership in judicial matters. It is especially interesting to note the differences in approach between the California Court as expressed in* Pryor *and the Supreme Court of Ohio as expressed in* State v. Phipps *(pertinent parts reprinted in this issue).*

As of the date of this printing, the Pryor *decision is not final. The Los Angeles City Attorney has petitioned the Court for modification of its opinion, and the Court has given the parties until November 6, 1979, to submit additional materials for consideration. The opinion, either in the form printed below, or in a modified version, will most likely be final sometime in November of this year. Any changes in the opinion will be reported in the next issue of the* SexuaLaw Reporter.

The new elements of the offense which must be proved by the People beyond a reasonable doubt are: (1) the touching of the genitals, buttocks, or female breast (thus eliminating from criminality public affectional behavior such as kissing, hugging, holding hands, or close dancing); (2) specific intent to sexually arouse, gratify, annoy, or offend; (3) the actor knows or should know of the actual presence of someone likely to be offended (thus preserving privacy and reinforcing the primary purpose of the statute, which is, the Court held, to protect onlookers who might be offended); and (4) the act occurs in a public place, a place open to the public, or a place exposed to public view (although the Court held that there is no state interest if no one is around to be protected even if the conduct occurs in a technically public place). Only public *solicitations of conduct encompassed by these elements or the conduct itself is criminalized. The statute specifically no longer prohibits even offensive public solicitations for* private *sexual acts. The retroactive provision of the opinion may affect thousands of persons previously convicted under the unconstitutional interpretation of the statute.*

The Pryor *opinion is especially significant in that it departs from the previous notion that all sex in public is automatically illegal. It also brings into constitutional question all California statutes using the terms "lewd" or "dissolute," all California statutes regulating public consenting sex not containing the requirement of the presence of someone who may be offended, and statutes proscribing possession and dissemination of obscenity to consenting adults, absent a requirement of "thrusting." Years of litigation in these areas and others will be necessary to clarify the implications of the tremendous reform of the law mandated by the* Pryor *decision.*

The attorney for Mr. Pryor was Thomas F.Coleman (Los Angeles). Of critical importance to the decision was the Amicus Curiae *brief submitted to the Court on behalf of the National Committee for Sexual Civil Liberties by Dr. Arthur C. Warner of Princeton, New Jersey, which brief was reprinted in the* SexuaLaw Reporter *(4 Sex.L. Rptr. I, Jan/March 1978).*

—Assoc. Ed.

Defendant Don Pryor seeks prohibition to bar his trial on a charge of violating Penal Code section 647, subdivision (a). This section declares that a person is guilty of disorderly conduct, a misdemeanor, "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." (Emphasis added.) We agree with defendant that the phrase "lewd or dissolute conduct" as construed by past decisions is unconstitutionally vague. If, however, we can reasonably construe the statute to conform with the mandate of specificity, we should not, and will not declare the enactment unconstitutional. Consequently, rejecting prior interpretations of this statute, we adopt a limited and specific construction consistent with the present function of section 647, subdivision (a), in the California penal statutes; we construe that section to prohibit only the solicitation or commission of conduct in a public place or one open to the public or exposed to public view, which involves the touching of the genitals, buttocks, or female breast, for purposes of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presence of persons who may be offended by the conduct. As so construed, section 647, subdivision (a), complies with constitutional standards; we therefore deny defendant's petition for writ of prohibition.

On May 1, 1976, defendant solicited an undercover police officer to perform an act of oral copulation. He was arrested; a search incident to that arrest revealed defendant's possession of less than one ounce of marijuana. Defendant was charged with violating Penal Code section 647, subdivision (a), by soliciting a lewd or dissolute act, and with violating Healthy and Safety Code section 11357, subdivision (b), by possession of less than one ounce of marijuana.

Defendant moved to suppress the introduction of the marijuana, contending that section 647, subdivision (a) was unconstitutional on the ground of vagueness, and hence that the search was not incident to a lawful arrest. When that motion was denied, defendant pled guilty to the marijuana charge. He subsequently appealed that conviction under Penal Code section 1538.5, but the appellate department affirmed the conviction.

Defendant proceeded to trial on the charge of soliciting a lewd or dissolute act in violation of section 647, subdivision (a). At trial, the officer testified that he parked

his car a few feet from where defendant was standing. Defendant came over, and after a brief conversation, suggested oral sex acts. Looking at a nearby parking lot, defendant said "We could probably sit and park in the parking lot." The officer suggested instead that they go to his home. Defendant agreed, entered the car, and was arrested.

Defendant's version of the incident differs only in that he denies making any statement about the parking lot, but maintains instead that the only situs discussed was the officer's home. Thus both defendant and the officer agree that defendant, while in a public place, solicited an act of oral sex; they disagree only whether defendant suggested that the act itself occur in a public place.

Over defendant's objection, the trial court instructed the jury that oral copulation between males is "Lewd or dissolute" as a matter of law. The court further instructed over objection that "If the solicitation occurred in a public place, it is immaterial that the lewd act was intended to occur in a private place." (CALJIC No. 16.401.) Despite these instructions, which virtually compelled the jury to find defendant guilty, the jury deadlocked and the court declared a mistrial.

Defendant then filed the instant petition for writs of prohibition and mandate with this court, raising various points in connection with the marijuana conviction and the pending retrial for solicitation of lewd or dissolute conduct. We issued an alternative writ of prohibition "limited to the proceedings in the municipal court related to retrial of the charge of violating section 647, subdivision (a) of the Penal Code . . . ." Thus no issue respecting the marijuana conviction is presently before this court.

With respect to the approaching retrial, defendant first seeks to prohibit the court from instructing the jury that public solicitation of an act to be performed in private is criminal and that oral copulation between males is lewd and dissolute as a matter of law. Because the writ of prohibition does not lie to prevent merely anticipated error (see 5 Witkin, Cal. Procedure (2d ed. 1971) p. 3810 and cases there cited), defendant's objection to anticipated jury instructions states no basis for present relief. Defendant's further contention that section 647, subdivision (a) is unconstitutionally vague, however, states a basis for issuance of prohibition since a court lacks jurisdiction to proceed to trial under a facially unconstitutional statute. (Dillon v. Municipal Court (1971) 4 Cal.3d 860, 866, fn. 6; see In re Berry (1968) Cal.2d 137, 145; In re Cregler (1961) 56 Cal.2d 308, 309.)

Past decisions of the Court of Appeal and the appellate department of the superior court have held that section 647, subdivision (a), is not unconstitutionally vague.' That issue, however, reached this court on only one prior occasion. In In re Giannini (1968) 69 Cal.2d 563, a topless dancer was charged with violating section 647, subdivision (a). Reasoning that her dance was presumptively a communication protected by the First Amendment and that such communications lose protection only if they are "obscene," we equated the statutory term "lewd or dissolute" with obscenity. So interpreted, we stated that the vagueness objection to the statute was not tenable. (69 Cal.2d at p.571, fn. 4.)

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Ohio solicitation law held not vague or overbroad

On March 29, 1978, the Ohio Court of Appeals for the First Appellate District declared that state's sexual solicitation law to be unconstitutional. In a two to one decision, the majority held that the statute in question was unconstitutionally vague and violated the First Amendment to the United States Constitution in that the statute was overbroad.

The statute under review, R.C. 2907.07(B), reads as follows:

> "No person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows that such solicitation is offensive to the other person, or is reckless in that regard."

The full text of the majority opinion was reprinted at 4 *Sex.L. Rptr.* 25. The dissenting opinion was reprinted in full at 4 *Sex.L. Rptr.* 64.

The State of Ohio appealed that decision to the Ohio Supreme court. On June 6, 1979, the Ohio Supreme court, in the case of *State v. Phipps,* 58 Ohio St. 2d 271, reversed the Court of Appeals and held that the statute was not unconstitutional for the reasons stated in the majority opinion of the Court of Appeals.

The Supreme Court case was previously reported in the "Pending Litigation" column at 5 *Sex.L. Rptr.* 16.

Also on June 6th the Ohio Supreme Court reversed a decision of the Ohio Court of Appeals in *State v. Faulk,* Supreme Court No. 78-1443. The order of the Supreme Court in *Faulk* stated, "The judgment of the Court of Appeals reversed and cause remanded to the Hamilton County Municipal Court on authority of *State v. Phipps.*" The import of this order reversing the Court of Appeals decision in *Faulk* is not clear in that the Court of Appeals held in *Faulk* that the statute violated Equal Protection because it only punished homosexual solicitation and not heterosexual solicitation. Since the Supreme Court decision in *Phipps* did not discuss or decide the Equal Protection issue one could question how the Supreme Court could summarily reverse *Faulk* without a hearing upon the authority of the Supreme Courts opinion in *Phipps.*

A verbatim transcript of the most significant portions of the Supreme Court's opinion in the *Phipps* case follows:

The operative words of the statute are "sexual activity," "knows," "offensive" and "reckless." The phrase "sexual activity" and the word "knows" are clearly defined in the Revised Code.

The phrase "sexual activity" is defined in R.C. 2907.01(C) as "sexual conduct or sexual contact, or both." R.C. 2907.01(A) defines "sexual conduct" as "vaginal intercourse between a male and a female and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(B) defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such a person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

The word "knows" is precisely defined in R.C. 1301.01(Y), which states, in part:

"A person 'knows' or has knowledge of *** [a] fact when he has actual knowledge of it. 'Discover' or 'learn' or a word

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Sexual privacy in Virginia: Two recent cases

On April 20, 1979 the Supreme Court of Virginia decided two unrelated cases which had presented two issues of sex law for decision. In *Cord v. Gibb* (No. 780823), the court in a *per curiam* opinion reversed a state circuit court judge's refusal to issue a certificate of honest demeanor or good moral character which a prospective member of the Virginia State Bar had to submit with her application to take the bar examination. In *Pederson v. City of Richmond* (No. 780831), the court in a unanimous opinion upheld a male's conviction for non-commercial solicitation in violation of a municipal ordinance. *Cord* is a sensible, unperturbed opinion; *Pedersen* is an irrational, hysterical opinion. While it is true that *Cord* focused the court's attention on a heterosexual living arrangement and *Pedersen* required the court to look at a failed homosexual liaison, dismissal of the *Pedersen* opinion as merely another example of juidical homophobia ignores the lesson which this pair of cases presents.

Cord was a member in good standing of the District of Columbia Bar, the Bar Association of the District of Columbia, and the American Bar Association. She had practiced law with a law firm and at a federal agency. Unmarried, she had purchased and shared a home with a male in a suburban Virginia county and had applied to the local judge for the required certificate of honest demeanor or good moral character which she had to submit with her application to take the Virginia bar examination, the first step toward becoming a licensed attorney in her local community. The judge reviewed the report of three attorneys who had investigated Cord's moral character and fitness to practice law and who recommended her, 2-1. He convened a hearing, took both oral and written testimony from neighbors, professional colleagues, and employers, and denied her the certificate, "on the grounds that the living arrangement of Applicant would lower the public's opinion of the Bar as a whole." Slip opinion at 3.

The Virginia Supreme Court took the position that the denial must have a "rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 (1957). Not surprisingly, the court found nothing in the record, apart from Cord's living arrangement, which might reflect unfavorably on her competence, honest demeanor, and good moral character. The court concluded:

> While Cord's living arrangement may be unorthodox and unacceptable to some segments of society, this conduct bears no rational connection to her fitness to practice law. It can not, therefore, serve to deny her the certificate required . . . [Slip opinion at 4.]

One can only hope that the conservative judiciary of Virginia will view other "unorthodox and unacceptable" living arrangements so rationally when, for example, one member of a gay couple seeks the same certificate. The court in *Cord* discusses the evidence it must have to reverse an irrational local judge and makes no allowances for any *factors* which lack the "rational connection with the applicant's fitness or capacity to practice law." And then that same court issues the irrational *Pedersen* opinion.

The only evidence at Pedersen's trial came from a plainclothes member of "a Selective Enforcement Unit" who was wearing jeans and standing on a sidewalk on a block that was "a known area for homosexuals" at 11:35 p.m. Pedersen offered the man a ride, and he got into Pedersen's car. When asked where he was going, Pedersen stated that he was just riding. He complimented his passenger on his appearance, said he would like to see him naked, discussed his gay male roommate with whom he admitted having sex, and finally parked the car thirty minutes later on a dead-end street. He asked the passenger if he were a member of the vice squad, and "the officer replied truthfully that he was not." Slip opinion at 7. He asked what the officer liked to do and received vague replies. He said he wanted to have sex, and the officer arrested him for violation of the following Richmond ordinance:

> It shall be unlawful for any person, within the limits of the city, to solicit another by word, sign or gesture, to commit any act which is lewd, lascivious, or indecent, or to solicit for the purpose of prostitution.

The court had no trouble upholding the conviction. In response to Pedersen's vagueness challenge, the court reasonably decided to "follow the common principle that the acts encompassed by the solicitation ordinance must be criminal in nature." Slip opinion at 3. The court then unreasonably concluded that "a person of even limited intelligence is on notice from the provisions . . . that solicitation of sodomy is thereby forbidden." Slip opinion at 4. The court found no First Amendment protection for statements made in the solicitation of criminal acts and no standing for Pedersen to assert a right to privacy. In conclusion, the court noted:

> Pedersen also argues that the evidence fails to show that he solicited Palmer [the officer] for a criminal rather than a noncriminal act. He suggests that the evidence is susceptible of the reasonable inference that the officer was solicited for one of such noncriminal forms of deviant sexual behavior between two males as kissing, fondling, or what his counsel on oral argument referred to as "partner masturbating." We agree that it could reasonably be inferred that Pedersen, who was ready to try almost anything, had one or more acts of noncriminal sexual perversion in mind. However, the evidence that he wanted to see Palmer unclothed and desired to have sex with him showed beyond a reasonable doubt that, regardless of what other incidental sexual activities Pedersen may have hoped to experience with Palmer, Pedersen's principal objective was to persuade Palmer to engage in an act of sodomy as defined in Code § 18.2-361. We hold, therefore, that the evidence was sufficient to support Pedersen's conviction. [Slip opinion at 7-8.]

The court overlooked Pedersen's failure to solicit for any particular sexual act, legal or illegal. The court overlooked the officer's conduct, which, if not legally entrapment, was at least enticement. The court overlooked Pedersen's expectation of privacy within the closed interior of his parked car after midnight on a dead-end street. It is true, however,

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LEGAL ANALYSIS

Securing gay rights through constitutional litigation: Procedure and strategy

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The following is a transcript of Mr. Coleman's remarks made recently at New York University School of Law before the conference entitled "Law and the Fight for Gay Rights." The conference was well attended by over two hundred law students and practicing attorneys from around the country.

—Assoc. Ed.

This morning we heard Cary Boggan, chairperson of the A.B.A. Section of Individual Rights and Responsibilities, discuss the right to privacy as a matter of substantive constitutional law. Again this afternoon, the previous speaker on this panel, Professor David Richards, spoke about the right to privacy as a matter of substantive law. I too will speak about constitutional law, but from a different perspective.

I will focus on some practical aspects involving constitutional litigation—strategy and procedure. I would like to do this by analyzing the way in which two important sodomy cases have been handled within the past several years. Each of those cases involved an attempt to have the federal courts recognize the principle that private sexual conduct between consenting adults is constitutionally protected. Although each case was handled differently, each was ultimately rejected by the United States Supreme Court. These cases had the same objective—a recognition of a constitutional right to privacy for consenting adult behavior. However, the different procedural tactics and strategy used in these cases are worthy of our closest attention and analysis.

In the first case, *State of Texas v. Buchanan,*[1] the defendant was prosecuted under the Texas sodomy law. Rather than exhausting his remedies in the state courts by facing trial and then appealing to the state Court of Appeal after conviction, the defense decided to file a lawsuit in federal district court. The federal court was requested to issue an injunction against the pending state prosecution and to declare the Texas sodomy law unconstitutional. The then Texas sodomy law prohibited all forms of sodomy, even if the sexual acts were performed in private between consenting adults. Texas law prohibited both homosexual and heterosexual sodomy even if performed between husband and wife. Mr. Buchanan was not the sole plaintiff in his federal lawsuit. Others were granted permission to intervene as plaintiffs. These intervenors included a heterosexual married couple, a heterosexual unmarried couple, and a homosexual couple. These couples claimed that this law infringed on their right to privacy and so, they too requested injunctive and declaratory relief. In this case, *Buchanan v. Batchelor,*[2] a three-judge district court panel declared the Texas sodomy law unconstitutional and granted the requested injunctive relief. The State of Texas took a direct appeal to the United States Supreme Court, *Wade v. Buchanan.*[3] The Supreme Court vacated the judgment and remanded the case to the district court, with directions to reconsider its injunction against this pending state prosecution in light of a recent pronouncement by the Supreme Court regarding federal abstention in *Younger v. Harris.*[4] The *Younger* case basically held that, except in the rarest of circumstances, the federal courts should not interfere with pending state prosecutions. The defendant should first exhaust his state remedies of trial and appeal before seeking federal relief. The injunction was lifted, the state prosecution resulted in a conviction, and the Texas Court of Criminal Appeals affirmed the conviction.[5] The defendant petitioned the United States Supreme Court for a writ of certiorari, and on February 22, 1972, the petition for cert. was denied.[6]

In the second case, *Doe v. Commonwealth's Attorney for the City of Richmond,*[7] entirely different strategy and procedure were used by the plaintiffs. The plaintiffs were residents of Virginia. Rather than disclosing their identity, they used fictitious names for this litigation. They claimed that they were practicing homosexuals and that they engaged in sexual acts in private with other consenting adults. They said they feared possible prosecution under the Virginia sodomy law, which they argued was an unconstitutional violation of their right to privacy. The plaintiffs asked a three-judge federal district court for injunctive and declaratory relief. The majority opinion of that court upheld the statute and recognized the right of the state to regulate private homosexual activity. It should be noted that heterosexual intervenors were not used in this case, and only one expert witness, a gay activist, testified before the district court.

Rather than petitioning the Supreme Court for a writ of certiorari, the plaintiffs *appealed* to that Court from the adverse judgment of the district court. The Supreme Court refused to grant plenary consideration to the appeal, instead summarily affirming the judgment of the district court.[8]

At this point, we should consider the significance between petitioning the Supreme Court for a writ of *certiorari,* and *appealing* to that Court. In *Hicks v. Miranda,*[9] the Supreme Court discussed the difference between a denial of certiorari and a summary disposition of an appeal to that Court. Basically, the Court held that if a federal constitutional question is properly presented and if it is within the Court's appellate jurisdiction under 28 U.S.C. § 1257(2), the Court may not avoid adjudicating the case on the merits, as would be true had the case been brought to the Court under its certiorari jurisdiction. Although the Court need not grant plenary consideration to every appeal, the Court must deal with every such appeal on the merits. In *Hicks,* the Supreme Court stated that lower courts are bound by summary decisions of the Supreme Court until such time as the Court informs them that they are not.

So what does the summary affirmance by the Supreme Court in *Doe v. Commonwealth's Attorney* actually mean? First, it means that the United States Supreme Court was not ready to give plenary consideration to the issues presented in the appeal. Second, it means that the Supreme Court agreed with the result, although not necessarily the reason-

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ing, of the district court. Third, it seems that, under the doctrine of *Hicks v. Miranda*, lower courts are bound by that summary affirmance, at least with respect to the issues which were actually decided by the district court. *Doe* would not be binding on issues which were neither raised nor discussed by the district court in its opinion. The Supreme Court itself has stated that the summary affirmance in *Doe v. Commonwealth's Attorney* did not *definitively* decide the constitutional issues concerning private sexual activity between consenting adults.[10] The Court could have dismissed the appeal for want of a substantial question, thereby branding the constitutional issue presented to it as insubstantial, but it did not. Apparently, the Court was not yet ready to tackle these controversial questions by granting plenary review, and so it took the least drastic measure that it could—summary affirmance.

It seems that several lessons can be learned about securing gay rights through constitutional litigation by analyzing the strategy and procedures used in the *Buchanan* case and in the *Doe* case. I would like to offer some suggestions regarding the handling of future cases based upon my analysis of these two cases. But before I do that, I would like to give you some additional information about the track record of the United States Supreme Court in cases involving sexual civil liberties issues, such as private sexual behavior, employment rights of persons with unconventional sexual lifestyles, and the rights of gay activists.

I have reviewed nineteen cases involving such issues which have eventually found their way to the United States Supreme Court during the past 12 years. In only three cases did the court grant plenary consideratin and write an opinion.[11] In the remaining cases, the Court either denied certiorari, or summarily disposed of an appeal. Reviewing the votes of the justices may give us a hint as to the current position of members of the Court, and the prospects of a favorable ruling in the near future. Although this may be an oversimplification, I have attempted to categorize any particular vote as being either positive or negative with respect to sexual civil liberties.

Here is what I have found. Justices Brennan and Marshall each have cast seven positive votes. Justices Stevens and Stewart have each cast two positive votes. Justice Powell has cast a positive vote only once, and that was at the request of the Solicitor General. Justices Rehnquist, White, and Burger have never cast a positive vote; in fact, they have joined in at least two rather vigorous dissents, and have even opposed a request by the Solicitor General to summarily reverse an anti-gay lower court ruling. Justice Blackmun voted favorably only once, and that too was at the request of the Solicitor General. He also voted negatively once, along with Rehnquist and Burger, in what may have been an attempt by the conservative members of the Court to put a halt to the growing body of federal case law which has been favorable to gay student organizations.

From this tally, I feel that, at this time, we can count on two solid votes on the Court—Justices Brennan and Marshall. Justice Stevens might rule favorably given the right factual situation. Justices Stewart and Blackmum seem to be borderline. At this time, I do not think we can put much hope in Justice Powell, and I think that Justices Burger, White, and Rehnquist are against gay rights or sexual civil liberties.

From this information about the Supreme Court and from an analysis of the *Buchanan* and *Doe* cases, along with my experiences over the past several years in handling sexual civil liberties litigation (in large measure at the appellate level) and publishing the *SexuaLaw Reporter*, I would like to offer some suggestions.

CERTIORARI V. APPEAL

In sexually-oriented cases, there appears to be no good reason at this time to appeal to the Supreme Court from an adverse ruling of a lower court. If the Court wants to take a case, it may do so by granting a hearing on a peittion for a writ of certiorari. We are not going to force the Supreme Court to give plenary consideration to a case simply because an appeal was filed instead of a petition for certiorari. Since a summary disposition of an appeal is a decision on the merits, but a denial of certiorari is not, it seems that litigants should use the Court's certiorari jurisdiction whenever possible. This will avoid foreclosing lower courts from developing constitutional issues because of a plethora of summary dispositions of appeals to the United States Supreme Court. We already have enough summary dispositions by that Court on sexual civil liberties issues without adding to this problem any further.

ANONYMOUS PLAINTIFFS

Although there may be instances where the use of anonymous plaintiffs would be appropriate, litigants should be cautious about using this approach. Many judges do not seem to be very sympathetic to a case when it seems to be an attempt to secure an advisory opinion from a court. An anonymous plaintiff seeking declaratory relief against potential future prosecution may not receive the same treatment by a judge as a person who has actually been prosecuted, or has actually suffered some demonstrable damage. Judges avoid serious consideration of hypothetical cases or controversies. However, the use of an anonymous plaintiff may be appropriate where a person has suffered actual harm, but further harm would result from being named as a plaintiff as a matter of public record. For example, a teacher in Oklahoma who wants to challenge a statute restricting the rights of gay teachers may win a lawsuit at the expense of irreparable social and economic harm if he were to be named as a plaintiff. A court could well understand the need to use a fictitious name under such circumstances.

USING HETEROSEXUAL CASES

One goal of gay activists is to have the courts recognize that private homosexual acts between consenting adults are constitutionally protected. Reaching that goal without major setbacks and without undue delay is certainly desirable. However, we must also consider the present state of the law with respect to heterosexual conduct when we develop our strategy in securing gay rights. The United States Supreme Court has not yet declared that private heterosexual conduct is constitutionally protected. Is it likely that the Supreme Court would rule favorably in a gay case before it acknowledged such a constitutional right for heterosexual conduct? This question is even more sobering when we consider the current makeup of the Supreme Court.

No state supreme court has yet declared that private homosexual conduct is constitutionally protected. However, the highest courts of two states have recognized sexual

privacy rights in the context of heterosexual cases.[12] The pronouncement of the New Jersey Supreme Court became the basis, some two years later, for the recognition of the sexual privacy rights of homosexuals by an intermediate New Jersey appellate court. In short, it is often easier for judges to create precedent in a heterosexual case, and then for gay rights to be recognized shortly thereafter.

Often, a lawyer may not choose a heterosexual case to pave the way because a homosexual case presents itself first, and the client needs representation. The client simply cannot wait for the rights of heterosexuals to be decided first. In such a situation, I would suggest using heterosexual intervenors or amici such as was done in the *Buchanan* case. This affords a judge an opportunity to decide the rights of both heterosexual and homosexual persons at the same time.

CREATING A RECORD FOR APPEAL

When it comes to litigation involving gay rights, we must recognize that judges are human beings and have their own prejudices and attitudes concerning homosexuality. They may adhere to many of the myths concerning homosexuals; e.g., gays are child molestors, gays are oversexed, gays are mentally ill, homosexuality is unnatural, etc.

Expert witnesses should be used, whenever possible, to educate trial judges. Simply presenting legal arguments, no matter how eloquent, will usually not be enough. The time to create a record for a possible appeal is at the trial court level. Appellate courts do not hear testimony from expert witnesses for the first time on appeal. Furthermore, appellate courts are usually bound by the factual record created in the trial court. Having expert witnesses testify in the trial court enables one to argue from that testimony in an appellate brief. A transcript of such expert testimony may then be considered by the reviewing court as a part of the record on appeal.

Further duplication of the *Doe v. Commonwealth's Attorney* approach should be avoided. The testimony of one gay activist, no matter how well intended, is just not the same as testimony from a battery of experts from a variety of disciplines.

We should remember that the record created in a trial court may very well be the record that is presented to the United States Supreme Court when it is requested to give plenary consideration to a gay case. Do we want that record to be devoid of expert testimony?

STATE COURTS AND STATE GROUNDS

With decisions of the United States Supreme Court in cases such as *Younger v. Harris,* limiting intervention by federal courts in pending state prosecutions, and *Stone v. Powell,*[13] restricting collateral attacks on convictions in state courts, litigants are being forced to pay more attention to the state courts as a forum for raising federal constitutional issues. Also, with the current make up on the Supreme Court, it is likely that substantive federal constitutional protections will be very slow to expand beyond their current scope. As a result of these procedural and substantive considerations, litigants should consider using state constitutional provisions for attacking unfair statutes which regulate sexual behavior or speech. The United States Supreme Court has acknowledged that states are free to confer more freedoms on their citizens under their state constitutions than are currently afforded under the federal constitution. A decision concerning sexual privacy rights which is decided by a state court under *both* state and federal constitutions, as was done by the New Jersey Supreme Court in *State v. Saunders,*[14] insulates that decision from reversal by the United States Supreme Court. The doctrine of "adequate and independent state grounds" was expounded by Mr. Justice Brennan in *Henry v. Mississippi*[15] when he stated, "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds even where these judgments also decide federal questions."

It is suggested that attorneys analyze the state constitutions very closely to see what additional protections may be available under them. Furthermore, avoid raising only federal constitutional provisions if there may be a corresponding state protection which applies. This will give a state court the option of deciding the case strictly on the state constitutional provision or on both state and federal grounds.

PRIORITIES AND TEST CASES

Appealing to the United States Supreme Court from a judgment of a state supreme court which refused to recognize a constitutional right for same-sex marriages seems to be putting the cart before the horse.[16] When it comes to cases involving marriage or child custody, the Supreme Court is very unlikely to recognize the rights of gay persons, at least at this time in history. When it comes to this area of the law, the Supreme Court will probably follow the popular trend rather than take a leadership role. An officer of the Supreme Court told my law associate recently that the Court was more interested in what state legislatures were doing in this area than what state courts were doing.

After the Supreme Court has recognized sexual privacy rights or First Amendment rights of gays, it is more probable that other rights will be recognized. We should provide the Court with opportunities to grant plenary consideration in cases involving private sexual behavior or freedom of speech and association before seeking plenary review of more sensitive areas.

I feel that, at this time, we can count on two solid votes on the Court—Justices Brennan and Marshall. Justice Stevens might rule favorably given the right factual situation.

I suggest that one of our best chances for a favorable decision by the Supreme Court would be in a gay student organization case. The federal courts have developed a significant body of progressive decisions in cases involving the right of gay student groups on state university campuses to organize and receive university recognition.[17] If the Supreme Court were to take such a case for full review, our chances of obtaining a favorable ruling from that Court would be significantly greater than if the Court reviewed a gay case involving military or tax law. Even the conservative members of the Court are likely to vote for a full review of such a student case.[18]

CONCLUSION

What I have attempted to do today is to demonstrate that securing gay rights through constitutional litigation involves much more than merely having a grasp on substantive constitutional principles. The procedures and strategy used

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in each case are equally important as the legal principles raised in briefs. Gay people have received little recognition of their constitutional rights. If we are going to secure that recognition in the near future, we must be more selective in our test cases, prepare our cases more thoroughly, use expert witnesses more often, and place more emphasis on state courts and constitutions.

Eventually, we will succeed in having the United States Supreme Court take a gay case, allow oral argument, and write an opinion. Whether that opinion is favorable or not to gay rights may depend, in large part, upon what cases we present to that Court and how thoroughly those cases have been prepared.

NOTES

1. *Buchanan v. State of Texas*, 471 S.W.2d 401 (1971).
2. *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Texas, 1970).
3. *Wade v. Buchanan*, 401 U.S. 989, 91 S.Ct. 1221 (1971).
4. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971).
5. *State of Texas v. Buchnan, supra*, note 1.
6. *Buchanan v. Texas*, 405 U.S. 930, 92 S.Ct. 984 (1972).
7. *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F.Supp. 1199 (E.D. Va., 1975).
8. *Doe v. Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489 (1976).
9. *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281 (1975).
10. *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010 (1977).
11. *Boutilier v. INS*, 387 U.S. 118, 87 S.Ct. 1563 (1967), *Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190 (1973), *Rose v. Locke*, 423 U.S. 48, 96 S.Ct. 243 (1975).
12. *State v. Pilcher*, 242 N.W.2d 348 (Iowa, 1976), *State v. Saunders*, 75 N.J. 200 (1977).
13. *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037 (1976).
14. *State v. Saunders, supra*, note 12.
15. *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965).
16. *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (1972).
17. *Wood v. Davidson*, 351 F.Supp. 543 (D.Ga., 1972), *Gay Students Organization of University of New Hampshire v. Bonner*, 367 F.Supp. 1088 (D.N.H., 1974), aff'd 509 F.2d 652 (1st Cir., 1975), *Gay Alliance of Students v. Matthews*, 544 F.2d 848 (4th Cir., 1976), *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir., 1977), cert. denied 98 S.Ct. 1276 (1978).
18. See dissent in *Gay Lib v. University of Missouri*, 98 S.Ct. 1276 (1978).

"MANIFEST" GAY PROTECTED ACTIVITY

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1102 to protect the employees' rights. Labor Code section 1101 provides that "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics. . . . (b) Controlling or directing, or tending to control or direct the political activities of [sic] affiliations of employees." Similarly, section 1102 states that "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." (Footnote) These sections serve to protect "the fundamental right of employees in general to engage in political activity without interference by employers." (Citations)

These statutes cannot be narrowly confined to partisan activity. As explained in Mallard v. Boring (1960) 182 Cal.App.2d 390, 395: "The term 'political activity' connotes the espousal of a candidate *or a cause*, and some degree of action to promote the acceptance thereof by other persons." (Emphasis added by Court) The Supreme Court has recognized the political character of activities such as participation in litigation (Citation), the wearing of symbolic armbands (Citation), and the association with others for the advancement of beliefs and ideas. (Citation) (Footnote)

Measured by these standards, the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. Indeed the subject of the rights of homosexuals incites heated political debate today, and the "gay liberation movement" encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities. (Citations)

A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.

In light of this factor in the movement for homosexual rights, the allegations of plaintiffs' complaint assume a special significance. Plaintiffs allege that PT&T discriminates against "manifest" homosexuals and against persons who make "an issue of their homosexuality." The complaint asserts also that PT&T will not hire anyone referred to them by plaintiff Society for Individual Rights, an organization active in promoting the rights of homosexuals to equal employment opportunities. These allegations can reasonably be construed as charging that PT&T discriminates in particular against persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations. So construed, the allegations charge that PT&T has adopted a "policy . . . tending to control or direct the political activities or affiliations of employees" in violation of section 1101, and has "attempt[ed] to coerce or influence . . . employees . . . to . . . refrain from adopting [a] particular course or line of political . . . activity" in violation of section 1102.

While the decision was 4 to 3 (written by Associate Justice Tobriner and concurred in by Chief Justice Bird and Associate Justices Mosk and Newman), there was unanimous concurrence, even among the three dissenters (Associate Justices Richardson, Clark, and Manuel), in the concern "toward homosexuals who have suffered the detriment, trauma, or indignity of employment discrimination. They are entitled to all of the rights, protections, and privileges of other citizens, no less and no more."

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vested in me by the Constitution and the statutes of the State of California, do hereby issue this order to become effective immediately:

"The agencies, departments, boards and commissions within the Executive Branch of state government under the jurisdiction of the Governor shall not discriminate in state employment against any individual based solely upon the in-

dividual's sexual preference. Any alleged acts of discrimination in violation of this directive shall be reported to the State Personnel Board for resolution."

It is worthy of note that, under the limitations of this order, employees in the private sector and employees of state agencies not under the jurisdiction of the Governor would have to look elsewhere for protection.

On May 30, 1979, the City of Los Angeles adopted an ordinance prohibiting discrimination for reasons of sexual orientation in the areas of public and private employment, housing, public accommodations, city services, and educational practices. Similar ordinances were adopted last year in Berkeley and San Francisco. These ordinances afford remedies, but are limited to the particular cities mentioned.

The following day, May 31, 1979, the California Supreme Court issued a landmark ruling regarding sexual orientation discrimination in employment in the case of *Gay Law Students Association, et al. v. Pacific Telephone and Telegraph Company, et al.*, Supreme Court Case No. S.F. 23625. The lawsuit began in June 1975, when four individuals and two organizations which promote equal rights for homosexual persons filed a class action lawsuit against the telephone company and against the Fair Employment Practices Commission. The complaint alleged that the telephone company discriminated against homosexuals in the hiring, firing, and promotion of employees. It also alleged that the Fair Employment Practices Commission had improperly refused to take action to remedy sexual orientation discrimination.

The Supreme Court held that the Superior Court had been correct in dismissing the case against the Fair Employment Practices Commission (F.E.P.C.). Justice Matthew Tobriner, writing for the majority, noted that the Lesiglature had not yet added "sexual orientation" to the jurisdiction of the F.E.P.C.; therefore, the Court upheld the Commission's claim that it lacked jurisdiction over cases involving sexual orientation discrimination. As a result of this ruling, until A.B. 1 or similar legislation is enacted, the F.E.P.C. may continue to refuse to investigate or remedy grievances alleging such discrimination by private employers.

The Supreme Court also held, in its 4 to 3 ruling, that the Superior Court had been wrong in dismissing the case against the telephone company. The Court emphasized that the state and federal Equal Protection clauses prohibit the state or any governmental entity from arbitrarily discriminating against any class of individuals in employment cases. In the first such definitive pronouncement by a supreme court in the country regarding the status of government employees with homosexual orientations, the Court stated, "(T)he state may not exclude homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him unfit for the job from which he has been excluded."

The Court then extended the protection to employees of a public utility such as the telephone company, which is subject to the Equal Protection clause because of special support and privileges granted to it by the government.

Finally, in the most groundbreaking portion of its holding, the Court extended protection to employees of private employers under Sections 1101 and 1102 of the California Labor Code. These sections prohibit any employer from adopting or enforcing any rule or policy which prevents employees from engaging in politics or which tends to control or direct the political activities or affiliations of employees. The Court held that "political activity" includes the "struggle of the homosexual community for equal rights, particularly in the field of employment . . . A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and fellow workers. Consequently, one important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' acknowledge their sexual preference, and to associate with others in working for equal rights." The Court then stated that the allegations that the telephone company discriminated against persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations, if proved at trial, would be sufficient to show a violation of these Labor Code sections. The remedies for such Labor Code violations would be a private lawsuit, investigation by the Labor Commissioner, or criminal prosecution by the District or City Attorney.

—Thomas F. Coleman

Sexual orientation discrimination is thus banned in California as follows:

PUBLIC DISCRIMINATION

1. *Governor Brown's Executive Order applies to government agencies under jurisdiction of the governor.*
2. *Supreme Court's holding in the Pacific Telephone case applies to all government agencies and public utilities.*

PRIVATE DISCRIMINATION

3. *Municipal ordinances in Los Angeles, Berkeley, and San Francisco apply to private employers in those cities.*
4. *Pacific Telephone case interpretation of Labor Code Sections 1101 and 1102 applies throughout California and protects open or activist gays as well as supporters.*

REMEDIES

1. *State Personnel Board enforces Governor's Executive Order.*
2. *Public Utilities Commission investigates and remedies situations involving public utility.*
3. *State Labor Commissioner may investigate violations of Labor Code.*
4. *Criminal prosecutions by District Attorney or City Attorney are authorized for violations of the Labor Code.*
5. *Private lawsuits are mandated under the municipal ordinances.*
6. *Private lawsuits may allege Labor Code violations.*

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We do not regard *Giannini* as controlling in the present case. In the first place, we expressly limited our interpretation of "lewd or dissolute" as "obscene" only to the "present purpose of determining the alleged obscenity of a dance performed before an audience for entertainment," (p. 571, fn. 4) an activity which, we reasoned, involved "communication of ideas, impressions and feelings" (p. 570) and could not be banned unless it were obscene. Defendant Pryor, by way of contrast, is not charged with a lewd, dissolute or obscene *communication*, but with soliciting a lewd or dissolute act; the *Giannini* definition of the statutory terms thus does not apply to the present case. Moreover, the reasoning which led this court to apply an obscenity test to reverse the conviction in *In re Giannini* was itself repudiated by a majority of this court in Crownover v. Musick (1973) 9 Cal.3d 405.

We therefore turn afresh to the issue whether the language of section 647, subdivision (a), is sufficiently specific to meet constitutional standards. In analyzing this issue, we look first to the language of the statute, then to its legislative history, and finally to California decisions construing the statutory language. (See In re Davis (1966) 242 Cal.App.2d 645.)

The statutory terms "lewd" and dissolute" are not technical legal terms, but words of common speech. (Cf. In re Newbern (1960) 53 Cal.2d 786, 795.) In ordinary usage, they do not imply a definite and specific referent, but apply broadly to conduct which the speaker considers beyond the bounds of propriety. Thus, speaking of the term "lewd," the court in Morgan v. City of Detroit (E.D. Mich. 1975) 389 F.Supp. 922, 930, observed that all definitions of that term in ordinary usage are "subjective," dependent upon the speaker's "social, moral, and cultural bias." The term "dissolute" is, if anything, even less specific; while "lewd" implies a sexual act, "dissolute" can refer to nonsexual acts which exceed subjective limits of propriety. (Edelman v. California (1953) 344 U.S. 357, 365 (Black, J. dis.); see People v. Jaurequi (1956) 142 Cal.App.2d 555, 560-561 (narcotics addict a "dissolute person").)

The facial language of section 647, subdivision (a) is not sufficiently certain to bring the statute into compliance with due process standards.

Finding, therefore, that the facial language of section 647, subdivision (a) is not sufficiently certain to bring the statute into compliance with due process standards, we turn to examine legislative history as a guide to its construction. The Legislature enacted present section 647, subdivision (a) in 1961 to replace former section 647, subdivision 5, which provided that "Every lewd or dissolute person . . . is a vagrant, and is punishable [as a misdemeanant]." That earlier enactment formed part of California's vagrancy law, a venerable but archaic form of status crime which dates from the economic crisis occasioned by the Black Death in early 14th century England. (See 3 Stephen, History of the Criminal Law of England (1883) pp. 266-275.) As Justice Frankfurter noted, vagrancy statutes were purposefully cast in vague language; "[d]efiniteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution . . . ." (Winters v. New York (1948) 333 U.S. 507, 540.)[2]

Our 1960 decision in In re Newbern, *supra*, 53 Cal.2d 786, holding the "common drunk" provision (Pen. Code, § 647, subd. 11) of the California Vagrancy Law void for vagueness, and an analysis of vagrancy statutes by Professor Arthur Sherry (Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision* (1960) 48 Cal.L. Rev. 557) prompted the 1961 revision of section 647. That revision changed the criminal proscription from status ("lewd or dissolute person") to behavior ("lewd or dissolute conduct"). It also added, for the first time, a specific proscription against solicitation; decisions under the former law treated solicitation simply as evidence that the solicitor was leading a lewd or dissolute life. (See People V. Woodworth (1956) 147 Cal.App.2d Supp. 831;[3] cf. People v. Bayside Land Co. (1920) 48 Cal.App 257 (red light abatement act case).)

The legislative history, however, suggests no intent to change the definition of "lewd or dissolute" established by the decisions under the former vagrancy statute. (See 22 Assem. Interim Com. Rep. No. 1, Crim. Procedure, 2 Appen. Assem.J (1961) Reg. Sess.); Sherry, op. cit. *supra*, 48 Cal. L. Rev. 557, 569.) According to People v. Dudley, *supra*, 250 Cal.App.2d Supp. 955, 958, new Penal Code section 647, subdivision (a), "was designed to cover acts of the kind usually committed by persons falling within the old 'vag-lewd' concept as theretofore set forth in 647, subdivision 5."

The legislative history thus reveals section 647, subdivision (a), to be the lineal descendant of the archaic vagrancy statutes which were designedly drafted to grant police and prosecutors a vague and standardless discretion. Under these circumstances, we cannot look to legislative history to supply section 647, subdivision (a), with a clear and definite content; such construction must come, if at all, from judicial interpretation of the statute.

Turning to the cases which have construed section 647, subdivision (a) and its predecessor is like opening a thesaurus. The cases do not define "lewd or dissolute" by pointing to specific acts, but by pejorative adjectives. "[T]he words 'lewd' and 'dissolute' are synonymous, and mean lustful, lascivious, unchaste, wanton, or loose in morals and conduct." (CALJIC (misdemeanor) No. 16.402, quoted in People v. Williams (1976) 59 Cal.App.3d 225, 229; see People v. Babb (1951) 103 Cal.App.2d 326, 330.)[4] "Dissolute" behavior is that which is "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched." (People v. Jaurequi, *supra*, 142 Cal.App.2d 555, 561; People v. Scott (1931) 113 Cal.App. Supp. 778, 783.) A dissolute person is one who is "indifferent to moral restraint" and "given over to dissipation. . . ." (People v. Jaurequi, *supra*, 142 Cal.App.2d 555, 560.)

The terms "lewd" and "dissolute" ordinarily include conduct found "disgusting, repulsive, filthy, foul, abominable [or] loathsome" under contemporary community standards. (Silva v. Municipal Court (1974) 40 Cal.App.3d 733, 741.)[5]

This impressive list of adjectives and phrases confers no clarity upon the terms "lewd" and "dissolute" in section 647, subdivision (a). Indeed, "the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than to clarify those terms." (State v. Kueny (Iowa 1974) 215 N.W. 2d 215, 217 (holding the phrase "open and gross lewdness" unconstitutionally vague).) To instruct the jury that a "lewd or dissolute" act is one which is morally "loose," or "lawless," or "foul" piles additional uncertainty upon the already vague words of the statute. In short, vague statutory language is not rendered more precise by defining it in terms of synonyms of equal or greater uncertainty.

This impressive list of adjectives and phrases confers no clarity upon the terms "lewd" and "dissolute" in section 647, subdivision (a). Indeed, "the very phrases and synonums through which meaning is purportedly ascribed serve to obscure rather than clarify those terms."

Only one California decision, Silva v. Municipal Court, *supra*, 40 Cal.App.3d 733, has attempted to refine the uncertainty of the statutory language. Relying on In Re Giannini, *supra*, 69 Cal.2d 563, in which we equated "lewd" and "dissolute" with "obscene," *Silva* attempted to adapt an obscenity test to section 647, subdivision (a). Section 647, subdivision (a), *Silva* concluded, prohibits "that sort of sexual conduct which is 'grossly repugnant' and 'patently offensive' to 'generally accepted notions of what is appropriate' and decent according to statewide contemporary community standards." (40 Cal.App.3d 733, 741.)

The test proposed by *Silva*, however, rests on a misunderstanding of our language in *In re Giannini*, and adds little certainty to the meaning of section 647, subdivision (a). As we explained earlier, *Giannini* defined "lewd or dissolute" as obscene only in a context in which a presumptively protected communication was itself charged with being a "lewd or dissolute" act (see, *ante*, at p. ____;* we did not provide a definition applicable to all solicitations or conduct, which might fall within the ambit of section 647, subdivision (a). The obscenity test as developed in Supreme Court decisions was not framed to measure non-communicative conduct; with no audience to be aroused pruriently or redeemed socially, all that is left of the test is its appeal to contemporary community standards. That appeal is the vaguest part of the test (see Bloom v. Municipal Court (1976) 16 Cal.3d 71, 89-90 (Tobringer, J., dis.)), and, standing alone, does not provide a sufficient standard to judge the criminality of conduct. Indeed in Miller v. California (1972) 413 U.S. 15, which established the current test of obscenity, the court insisted that a viable obscenity statute must spell out in specific terms the sexual conduct whose depiction it proscribes. (413 U.S. at p. 24.) The test set out in *Silva* does not comply with this standard.

Moreover, subsequent California decisions have not consistently followed the lead of *Silva*. Although People v. Rodrigues, *supra*, 63 Cal.App.3d 1, 4, applied the *Silva* test generally to lewd and dissolute conduct, in People v. Williams (1976) 59 Cal.App.3d 225, the Court of Appeal held that *Silva's* test applies only when the conduct in question involved a theatrical performance. People v.Deyhle, *supra*, 76 Cal.App.3d Supp. 1 agreed with *Williams*.

Thus the California cases to date have produced neither a clear nor a consistent definition of the term "Lewd or dissolute conduct" in section 647, subdivision (a). The decisions have also failed to adopt possible interpretations of the statute which would narrow its scope and in that manner increase its specificity. Refusing to confine the phrase "lewd or dissolute conduct" to sexual conduct, the courts have applied the term "dissolute" to sustain the conviction under former section 647, subdivision 5, of a defendant who was addicted to narcotics (People v. Jaurequi, supra, 142 Cal.App.2d 555, 560), of a defendant who gave inflammatory speeches (see Edelman v. California, *supra*, 344 U.S. 357; *id.*, at p. 365 (Black, J., dis.), and to sustain juvenile court jurisdiction over a minor who sold marijuana (In re Daniel R. (1969) 274 Cal.App.2d 749) on the ground that he was "in danger of leading a dissolute life." Courts also have rejected invitations to limit the statute to public conduct (People v. Mesa, *supra*, 265 Cal.App.2d 746, 750-751; People v. Dudley, *supra*, 250 Cal.App.2d Supp. 955, 957-958) or to conduct otherwise illegal (Silva v. Municipal Court, *supra*, 40 Cal.App.3d 733; In re Steinke (1969) 2 Cal.App.3d 569, 573). Thus the statute as construed by prior California decisions appears to reach any public conduct, or public solicitation to public or private conduct, if that conduct might be described as "lustful," "loose in morals," "disgusting," or by other epithetical adjectives.[6]

In short, vague statutory language is not rendered more precise by defining it in terms of synonyms of equal or greater uncertainty.

We conclude that California decisions do not provide a specific content for the uncertain language of section 647, subdivision (a). Such vague statutory language, resulting in adequate notice of the reach and limits of the statutory proscription, poses a specially serious problem when the statute concerns speech, for uncertainty concerning its scope may then chill the exercise of protected First Amendment rights. (See Lewis v. City of New Orleans (1974) 415 U.S. 130, 133-134; Gooding v. Wilson (1972) 405 U.S. 518, 521.) Section 647, subdivision (a), we observe, does not proscribe lewd, dissolute, or obscene solicitations; it bans any public solicitation, however discreet or diffident, of lewd or dissolute conduct. Cases have extended that ban to solicitations seeking

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private, lawful, and consensual conduct. (People v. Mesa, *supra*, 265 Cal.App.2d 746; People v. Dudley, *supra*, 250 Cal.App.2d Supp. 955.)

One could not determine what actions are rendered criminal by reading the statute or even the decisions which interpret it.

But what private, consensual, lawful sexual acts are nonetheless lewd or dissolute, such that public solicitation of them is criminal? The answer of the prior cases—such acts as are lustful, lascivious, unchaste, wanton, or loose in morals and conduct—is no answer at all. Some jurors would find that acts of extramarital intercourse fall within that definition; some would draw the line between intercourse and other sexual acts; others would distinguish between homosexual and heterosexual acts. Thus one could not determine what actions are rendered criminal by reading the statute or even the decisions which interpret it. He must gauge the temper of the community, and predict at his peril the moral and sexual attitudes of those who will be called to serve on the jury.[7]

As we noted in *In re Newbern*, *supra*, 53 Cal.2d 786, 796, vague statutory language also creates the danger that police, prosecutors, judges and juries will lack sufficient standards to reach their decisions, thus opening the door to arbitrary or discriminatory enforcement of the law. The danger of discriminatory enforcement assumes particular importance in the context of the present case. Three studies of law enforcement in Los Angeles County indicate that the overwhelming majority of arrests for violation of Penal Code section 647, subdivision (a), involved male homosexuals.[8] People v. Rodriguez, *supra*, 63 Cal.App.3d Supp. 1, presents another striking illustration of discriminatory enforcement of section 647, subdivision (a). Such uneven application of the law is the natural consequence of a statute which as judicially construed measured the criminality of conduct by community or even individual notions of what is distasteful behavior.

Court decisions have struck down laws as unconstitutionally vague which contained language similar to section 647, subdivision (a). In Perrine v. Municipal Court (1971) 5 Cal.3d 656, we considered an ordinance mandating denial of a bookseller's license to one who had permitted "acts of sexual misconduct" in his business operations; we held the quoted phrase unconstitutionally vague. (Accord, Sanita v. Board of Police Comnr. (1972) 27 Cal.App.3d 993, 997-998.) In Gonzalez v. Mailliard (N.D. Cal. 1971) (No. 50424SAW) a three-judge federal court held that Welfare and Institutions Code section 601, which then authorized a wardship over a juvenile in danger of leading "an idle, dissolute, lewd or immoral life," void for vagueness.[9] Finally, In re Davis, *supra*, 252 Cal.App.2d 645, invalidated Penal Code section 650-1/2 which declared it criminal to "wilfully and wrongfully" commit any act "which outrages public decency"; the Court of Appeal observed that the statute was drafted in deliberately vague terms so as to grant excessive discretion to the prosecutor and the jury.[10]

Supported by the foregoing decisions, we conclude that section 647, subdivision (a), as construed by prior California decisions, does not meet constitutional standards of specificity. That conclusion, however, does not dispose of this case. The judiciary bears an obligation to "construe enactments to give specific content to terms that might otherwise be unconstitutionally vague." (Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 598.) Thus we have declared that "A statute will not be held void for vagueness if any reasonable and practical construction can be given its language." (American Civil Liberties Union v. Board of Education (1963) 59 Cal.2d 203, 218.) If by fair and reasonable interpretation we can construe section 647, subdivision (a), to sustain its validity, we must adopt such interpretation (see Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145; San Francisco Unified School District v. Johnson (1971) 3 Cal.3d 937, 948), even if that course requires us to depart from prior precedent which fastened an unconstitutionally broad interpretation on the statute. We believe that such a construction can be derived from analysis of the role of section 647, subdivision (a), in the structure of the California penal law.

Such uneven application of the law is the natural consequence of a statute which as judicially construed measured the criminality of conduct by community or even individual notions of what is distasteful behavior.

We begin with the portion of the statute proscribing "solicitation" of lewd or dissolute conduct. The term "solicitation" itself is not unconstitutionally vague. (People v. Superior Court [Hartway] (1977) 19 Cal.3d 338, 346.) Instead our difficulties stem from the decisions in People v. Mesa, *supra*, 265 Cal.App.2d 746 and People v. Dudley, *supra*, 250 Cal.App.2d Supp. 955, holding that public solicitation of private conduct falls within the statutory compass. *Mesa* and *Dudley*, however, were decided at a time when many forms of private consensual sexual acts were illegal. With the enactment of the Brown Act (Stats. 1975, chs. 71 and 877), however, most such acts are no longer within the purview of the criminal law. Thus, as the Los Angeles City Attorney states in a brief filed in this case, we conclude that *Mesa* and *Dudley* are inconsistent with the protection of private conduct afforded by the Brown Act and are no longer viable; we believe section 647, subdivision (a), must be limited to the solicitation of criminal sexual conduct. (See Silva v. Municipal Court, *supra*, 40 Cal.App.3d 733, 742 (Sims, J., conc.).) More specifically, we hold that this section prohibits only solicitations which propose the commission of conduct itself banned by section 647, subdivision (a), that is, lewd or dissolute conduct which *occurs* in a public place, a place open to the public, or a place exposed to public view.

By so limiting the reach of the statute, we avoid two substantial constitutional problems. First, we need not attempt the probably impossible task of defining with constitutional specificity which forms of private lawful

conduct, protected by the Brown Act, are lewd or dissolute conduct, the solicitation of which is proscribed by this statute. Second, we avoid the First Amendment issues which, as we noted earlier, attend a statute which prohibits solicitation of lawful acts. (See ante at p. ____.)* A statute which by judicial construction prohibits only the solicitation of criminal acts does not abridge freedom of speech. (See Silva v. Municipal Court, *supra*, 40 Cal.App.3d 733, 737-738; cf. Dennis v. United States (1951) 341 U.S. 494, 504-508; Goldin v. Public Utilities Comm., ante p.____.**)"

Turning to the portion of the statute banning "lewd or dissolute conduct," we hold that the terms "lewd" and "dissolute" are synonymous (see People v. Williams, *supra*, 59 Cal.App.3d 225, 229; People v. Babb, *supra*, 103 Cal.App.2d 326, 330) and refer to sexually motivated conduct (see In re Birch (1973) 10 Cal.3d 314, 318-319, fn. 4; Silva v. Municipal Court, *supra*, 40 Cal.App.3d 733, 739; People v. Swearington (1977) 71 Cal.App.3d 935, 944). We recognize that in People v. Jaurequi, *supra*, 142 Cal.App.2d 555, the Court of Appeal held that a narcotics addict was a "dissolute person," and that the Assembly Committee Report recommending enactment of section 647, subdivision (a), cited *Jaurequi* with approval. Against that indicia of legislative intent, however, we must weigh the legislative determination that all persons convicted of violating section 647, subdivision (a), must register as sex offenders. (Pen. Code, § 290.) It is inconceivable that the Legislature intended that narcotics addicts, or other persons who, in *Jaurequi's* language, engage in "unashamed, lawless, [or] abandoned" behavior of a nonsexual character should so register. Whatever the situation in 1955 when *Jaurequi* was decided, it is apparent that section 647, subdivision (a), does not presently serve the function of controlling nonsexual conduct. The next step in constructing a constitutionally specific interpretation of section 647, subdivision (a), thus is to narrow its reach to sexually motivated conduct.

Vague statutory language also creates the danger that police, prosecutors, judges and juries will lack sufficient standards to reach their decisions, thus opening the door to arbitrary or discriminatory enforcement of the law.

The final step is to define specifically the sexually motivated conduct proscribed by the section. (Cf. Miller v. California, *supra*, 413 U.S. 15, 24-26.) We proceed by deriving the function of this section in the penal statutes pertaining to sexual conduct. Section 647, subdivision (a), unlike statutes which ban sexual assault or exploitation of minors, is limited to conduct in public view. The statute thus serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct.

Two other statutes partially serve that same purpose. Penal Code section 314, subdivision (1), prohibits indecent exposure "in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . ." Section 311.6 prohibits "obscene live conduct to or before an assembly or audience in any public place or in any place exposed to public view, or in any place open to the public or to a segment thereof . . . ." Neither statute, however, is directed at sexual conduct, as distinguished from indecent exposure, when such conduct is not intended to arouse the prurient interest of an audience. Section 647, subdivision (a), we believe, serves the function of filling this gap in the penal law.
the penal law.

The statute thus serves the primary purpose of protecting onlookers who might be offended by the proscribed conduct.

Clearly, the statute cannot be construed to ban all sexually motivated public conduct, for such a sweeping prohibition would encompass much innocent and nonoffensive behavior. A constitutionally specific definition must be limited to conduct of a type likely to offend. Although the varieties of sexual expression are almost infinite, virtually all such offensive conduct will involve the touching of the genitals, buttocks, or female breast, for "purposes of sexual arousal, gratification, or affront." The quoted phrase, taken from In re Smith, *supra*, 7 Cal.3d 362, 366, serves not only to define the reach of the law but also to add a requirement of specific intent, a feature which has often served to avert a determination that a statute is unconstitutionally vague. (See, e.g., In re Cregler, *supra*, 56 Cal.2d 308.)

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Finally, in In re Steinke, *supra*, 2 Cal.App.3d 569, 576, the court stated that "the gist of the offense proscribed in [Penal Code section 647] subdivision (a) . . . is the presence or possibility of someone to be offended by the conduct." We agree; even if conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, the state has little interest in prohibiting that conduct if there are no persons present who may be offended.[12] The scope of section 647, subdivision (a), should be limited accordingly.

For the foregoing reasons, we arrive at the following construction of section 647, subdivision (a): The terms "lewd" and "dissolute" in this section are synonymous, and refer to conduct which involves the touching of the genitals, buttocks, or female breast for the purpose of sexual arousal, gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view.[13]

Under the construction we have established in this

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*/ Typed opinion, *ante* pages 16-17

**/ Circulating opinion at pages 17-22.

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opinion, section 647, subdivision (a), prohibits only the solicitation or commission of a sexual touching, done with specific intent when persons may be offended by the act. It does not impose vague and far-reaching standards under which the criminality of an act depends upon the moral views of the judge or jury, does not prohibit solicitation of lawful acts, and does not invite discriminatory enforcement. We are confident that the statute, as so construed, is not unconstitutionally vague.

In addition to the charge of vagueness, defendant attacks the constitutionality of section 647, subdivision (a), on other grounds: he contends that the statute abridges his freedom of speech and association, invades his right to privacy, and denies him the equal protection of the laws. Those contentions rest upon the vague and sweeping interpretation which past decisions have given this section, and upon the manner in which courts and law enforcement officials, acting pursuant to such decisions, have enforced the statute. Nothing in defendant's argument suggests that the statute as construed in this present opinion invades constitutionally protected rights.[14]

Even if conduct occurs in a location that is technically a public place, a place open to the public, or one exposed to public view, the state has little interest in prohibiting that conduct if there are no persons present who may be offended.

In determining whether to give retroactive effect to our holding in this case, we look to three considerations: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of retroactive application of the new standards." (Stovall v. Denno (1967) 388 U.S. 293, 297; People v. Hitch (1974) 12 Cal.3d 641, 654.) We have also stated that "the factors of reliance and burden on the administrative [sic] of justice are of significant relevance only when the question of retroactivity is a close one after the purpose of the new rule is considered." (In re Johnson (1970) 3 Cal.3d 404, 410; People v. Kaanehe (1977) 19 Cal.3d 1, 10.)

The purpose underlying our adoption of a new construction of Penal Code section 647, subdivision (a), is not to deter improper police action (compare In re Lopez (1965) 62 Cal.2d 368, 377-379), but to establish a specific, constitutionally definite test of what conduct does or does not violate that section. That purpose implicates questions of guilt and innocence, for conduct which a trier of fact might have found criminal under the older vague definition may clearly fall beyond the scope of the statute as construed in the present case. "Given this critical purpose, neither judicial reliance on previous appellate endorsements of [the prior statutory construction] nor any effects on the administration of justice require us to deny the benefits of this rule to cases now pending on appeal." (People v. Gainer (1977) 19 Cal.3d 835, 853.) A defendant whose conviction is now final, however, will be entitled to relief by writ of habeas corpus only if there is no material dispute as to the facts relating to his conviction and if it appears that the statute as construed in this opinion did not prohibit his conduct. (People v. Mutch (1971) 4 Cal.3d 389, 396 and cases there cited.)

Since section 647, subdivision (a), is constitutional as construed, defendant is not entitled to a writ of prohibition to bar his trial on the charge of violating that provision.[15] Accordingly, the alternative writ of prohibition is discharged and the petition for a preemptory writ is denied. Because defendant Pryor by this proceeding secured a favorable interpretation of section 647, subdivision (a), he shall recover costs in the matter.

TOBRINER, J.

WE CONCUR:

BIRD, C.J.
MOSK, J.
NEWMAN, J.

WE CONCUR IN THE JUDGMENT:

RICHARDSON, J.
MANUEL, J.

CONCURRING AND DISSENTING OPINION BY CLARK, J.

I concur only in discharging the alternative writ of prohibition and in denying the petition for peremptory writ, and specifically dissent from giving retroactive effect to the majority's holding.

Retroactive application of the narrow construction of Penal Code section 647, subdivision (a), announced today provides a windfall to defendants validly convicted under the statute. The injustice of so applying today's decision may be illustrated by the following example. Prior to the enactment of the Brown Act (Stats. 1975, chs. 71 and 877), one man solicits another, publicly, to commit sodomy, the act to be performed privately, and is convicted of violating section 647, subdivision (a). At that time the Legislature unquestionably intended such solicitation to be punishable under the statute. Then, as now, legislative prohibition of such conduct was constitutional. (See Doe v. Commonwealth's Attorney for City of Richmond (1976) 425 U.S. 901, affirming 403 F. Supp. 1199.) Nevertheless, the criminal would be entitled to "relief" under today's holding.

The majority create a remedy for which there is no wrong.

CLARK, J.

1/ People v. Williams (1967) 59 Cal.App.3d 225, 231; Silva v. Municipal Court (1974) 40 Cal.App.3d 733, 736-737; People v. Mesa (1968) 265 Cal.App.2d 746, 750-751;

People v. Deyhle (1977) 76 Cal.App.3d Supp. 1; People v. Rodrigues (1976) 63 Cal.App.3d Supp. 1, 4; People v. Dudley (1967) 250 Cal.App.2d Supp. 955; cf. In re McCue (1908) 7 Cal.App. 765 (upholding former Pen. Code, § 647, subd. 5).

[2]/ Although courts initially upheld vagrancy statutes against constitutional challenge (see, e.g., In re McCue, *supra*, 7 Cal.App. 765), in 1972 the United States Supreme Court finally resolved that vagrancy statutes cast in the classic mode are unconstitutionally vague. (Papachristou v. City of Jacksonville (1972) 405 U.S. 156.)

[3]/ The *Woodworth* court asserts vaguely that "the approach and subsequent conduct [of defendant] was that of a homosexual." (147 Cal.App.2d Supp. at p. 831.) It does not state that his offense was solicitation. In People v. Dudley, *supra*, 250 Cal.App.2d Supp. 955, the court by reference to the record on appeal in *Woodworth* determined that the evidence in *Woodworth* related to a homosexual solicitation. (See 250 Cal.App.2d Supp. 955, 958, fn. 4.)

[4]/ See also In re Smith (1972) 7 Cal.3d 362, 365 (construing the word "lewdly" in Pen. Code, § 314); People v. Loignon (1958) 160 Cal.App.2d 412, 419 (construing "lewd" in Pen. Code, § 288); People v. Deibert (1953) 117 Cal.App.2d 410, 419 (construing "lewd" and "dissolute" in former Welf. & Inst. Code, § 702).

[5]/ The earliest decision, In re McCue, *supra*, 7 Cal.App. 765, 766, defined "lewd or dissolute" behavior as the "unlawful indulgence of lust, whether in public or private." Since the issue is generally whether defendant's behavior is "lawful," the *McCue* definition is circular. Another earlier decision, People v. Bayside Land Co., *supra*, 48 Cal.App. 257, a red light abatement act case, defined "lewdness" as "immoral or degenerate conduct or conversation between persons of opposite sexes. . ." (48 Cal.App at p.260.)

[6]/ Decisions of other jurisdictions construing similar statutes offer little help. Some simply add additional adjectives to our list. Others have held statutes with wording similar to section 647, subdivision (a), unconstitutionally vague. (District of Columbia v. Walters (D.C. Ct. App. 1974) 319 A.2d 332 ("to commit any . . . lewd, obscene, or indecent act" unconstitutionally vague); Jellum v. Cupp (9th Cir. 1973) 475 F.2d 829 ("act of sexual perversity" unconstitutionally vague); Morgan v. City of Detroit, *supra*, 389 F. Supp. 922 ("to do any . . . lewd immoral act" unconstitutionally vague); Balthazar v. Superior Court of Com. of Mass. (D. Mass 1977) 428 F.Supp. 425, affd. (1978) 23 Crim. L. Rptr. 2113 ("unnatural and lascivious" acts unconstitutionally vague); State V. Kueny, *supra*, 215 N.W.2d 215 ("open and gross lewdness" unconstitutionally vague). Finally, a few courts have adopted narrow definitions which supply specificity to their statute (see Riley v. United States (D.C. Ct. App. 1972) 298 A.2d 228 ("lewd purpose" defined as sodomy); State v. Dorsey (N.J. 1974) 316 A.2d 689 ("act of lewdness" means indecent exposure or child molestation), but any similarly limited construction of section 647, subdivision (a), would violate legislative intent and render that statute superfluous.

[7]/Recognizing the First Amendment problems with the solicitation provision in section 647, subdivision (a), courts have upheld that provision on the ground that such solicitations are necessarily obscene (Silva v. Municipal Court, *supra*, 40 Cal.App.3d 733, 737) or that they constitute "fighting words," words which may incite an immediate breach of the peace (People v. Mesa, *supra*, 265 Cal.App.2d 746, 751; People v. Dudley, *supra*, 250 Cal.App2d Supp. 955,959). Neither theory is adequate. It is possible—in fact, commonplace—to solicit sexual activity in language which itself is not obscene. (See Willemsen, *Sex and the School Teacher* (1974) 14 Santa Clara Law. 839, 859-860.) Similarly, in the right context and to an apparently receptive listener, a solicitation is unlikely to provoke a breach of the peace. (See City of Columbus v. Scott (Ohio App. 1975) 353 N.E.2d 858, 861.)

[8]/A perusal of those studies suggests both that the police selected techniques and locations of enforcement deliberately designed to detect a disproportionate number of male homosexual offenders, and that they arrested male homosexuals for conduct which, if committed by two women or by a heterosexual pair, did not result in arrest. (See Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County* (1966) 13 UCLA L.Rev. 643; Copilow & Coleman, Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department (1972); Toy, Update: Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department (1974).) The 1972 and 1974 studies were privately printed, and are attached as exhibits to the amicus curiae brief of the National Committee for Sexual Civil Liberties.

The city attorney's brief in response to the petition for writ of prohibition states that since January of 1977 the city attorney's office has followed specific guidelines in deciding whether to prosecute cases under section 647, subdivision (a). The guidelines indicate that solicitation seeking private conduct will form the basis of a prosecution only if the solicitation is offensive, or the person solicited is under 18. Although these guidelines represent a substantial improvement in even-handed law enforcement when compared to past practices, their very detail and the extent to which they depart from judicial decisions construing section 647, subdivision (a), emphasizes the vast discretion granted the prosecutorial authorities under the statute.

[9]/ The district court decision was vacated and remanded by the United States Supreme Court for reconsideration of the appropriateness of granting injunctive relief. (Mailliard v. Gonzalez (1974) 416 U.S. 918.) The federal district court decision is not reported in the Federal Supplement, but appears in full in 1 Pepperdine L. Rev. 12 (1973).

The Legislature amended Welfare and Institutions Code section 601 in 1974 to remove the language found vague by the district court decision.

[10]/ Decisions of other jurisdictions holding statutes similar to section 647, subdivision (a), unconstitutionally vague are cited in footnote 6 page ____,* *ante.*

[11]/Under this construction, the statute does not pro-

*/ Typed opinion, *ante* page 15.

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hibit-offensive public solicitations proposing private lawful acts. Some such solicitations could be punished under Penal Code section 415, subdivision (3), which prohibits the use of "offensive words in a public place which are inherently likely to provoke an immediate violent reaction." It is questionable whether the state could constitutionally punish nonobscene solicitations of lawful acts which are not inherently likely to provoke a breach of the peace. (Cf. Cohen v. California (1971) 403 U.S. 15, 20.)

[12] In re Steinke, *supra*, which involved sexual acts in a closed room in a massage parlor, suggested that a closed room made available to different members of the public at successive intervals was a place "open to the public" under section 647, subdivision (a). (See 2 Cal.App.3d at p.576; People v. Freeman (1977) 66 Cal.App.3d 424, 428-429.) We do not endorse that interpretation, which would render a fully enclosed toilet booth (cf. Bielicki v. Superior Court (1962) 57 Cal.2d 602), a hotel room (cf. Stoner v. California (1964) 376 U.S. 483), or even an apartment a place "open to the public" under this section.

[13] Prior decisions construing section 647, subdivision (a) and its predecessor statute have, as this opinion explains, interpreted the statutory language so broadly as to render the statute vulnerable to the charge of unconstitutional vagueness. Accordingly, language in the following decisions inconsistent with the present opinion is disapproved: People v. Freeman, *supra*, 66 Cal.App.3d 424; People v. Williams, *supra*, 59 Cal.App.3d 225; Silva v. Municipal Court, *supra*, 40 Cal.App.3d 733; In re Steinke, *supra* 2 Cal.App.3d 569; People v. Mesa, *supra*, 265 Cal. App.2d 746; People v. Jaurequi, *supra*, 142 Cal.App.2d 555; People v. Babb, *supra*, 103 Cal.App.2d 326; In re McCue, *supra*, 7 Cal.App. 765; People v. Deyhle, *supra*, 76 Cal. App.3d Supp. 1; People v. Rodriques, *supra*, 63 Cal.App.3d Supp.1; People v. Dudley, *supra*, 250 Cal.App.2d Supp. 955.

[14] Defendant's attack on the constitutionality of Penal Code section 290, the sex registration law, is premature; he has not yet been convicted and is not presently subject to registration.

[15] In view of the narrowing construction given to the statute by this opinion, we do not believe that defendant can properly maintain that he was not on notice that conduct which violates the statute as construed herein was subject to criminal sanction. Although we have held that section 647, subdivision (a), as interpreted in prior judicial authorities, was not sufficiently clear or specific to pass constitutional muster, we believe that it was clear under those authorities that conduct proscribed by the statute as now interpreted would be criminal. Accordingly, defendants who committed such "hardcore" conduct cannot claim a denial of due process in having their conduct judged under the present, narrowly construed provisions of the statute. (See e.g., Screws v. United States (1945) 325 U.S. 91; see generally Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court* (1960) 109 U.Pa. L.Rev. 67, 85-88.)

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or phrase of similar import refers to knowledge rather than to reason to know. *** "

Similarly, the words "offensive" and "reckless," while not defined in the Revised Code, are words commonly understood by men of common intelligence. Webster's Third New International Dictionary defines the word "offensive" as that which is disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness," and that which "calls forth a determination to resist, rebel ***." Also, "reckless" is defined as "lacking in caution" or "irresponsible, wild." Black's Law Dictionary (Rev. 4 Ed.) defines "reckless" as "careless, heedless, inattentive; indifferent to consequences."

With these definitions in mind, it is difficult to conceive of a more clearly and precisely written statute. If a defendant has actual knowledge that the solicitation will be outrageous to the taste and sensibilities of the person solicited, which may cause the person to resist, or the defendant acts heedlessly and indifferently to the consequences, then he has violated R.C. 2907.07(B).

The example given by Presiding Judge Palmer, in dissenting to the appellate court's majority opinion, is instructive with regard to reckless solicitation. He stated:

"*** If an individual stands outside a church on Sunday morning and solicits sexual activity from each person exiting from the portals, he may not 'know' that the solicitations are offensive to these strangers, but he is certainly acting with heedless indifference to the consequences by perversely disregarding a known risk that such solicitations will be offensive."

II.

The defendant-appellee sucessfully asserted in the Court of Appeals that R.C. 2907.07(B) is overbroad in that it could conceivably be applied unconstitutionally to others in situations not then before the court. Standing in First Amendment cases to challenge the constitutionality of statutes in such a manner is an exception to traditional standing doctrine and is designed to insulate all individuals from the "chilling effect" that overbroad statutes have upon the exercise of our First Amendment freedoms. *Freedman v. Maryland* (1965), 380 U.S. 51, 56-57; *Dombrowski v. Pfister* (1965), 380 U.S. 479, 486-487. The consequences of such a departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute challenged on the ground of overbreadth is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. *Broadrick v. Oklahoma, supra* (413 U.S. 601), at page 613. Specifically, if this court finds the statute to be overbroad, it may not be applied to the appellee herein until a satisfactorily limiting construction is placed on legislation. *Gooding v. Wilson* (1972), 405 U.S. 518, 521-522.

Our inquiry here, therefore, is to determine if R.C. 2907.07(B) is susceptible to application to speech protected by the First Amendment. If we find that it is, we must then determine if the statute is capable of being authoritatively construed so as to apply only to unprotected speech.

The state argues that R.C. 2907.07(B) does not attempt to regulate speech at all but, rather, regulates only solicitation,

whether it be by speech, writings, or gestures that make it manifest to the person offended. Such sexual solicitation, the state contends, constitutes verbalized conduct, not verbalized ideas protected by the First Amendment.

In its brief, the state relies on *District of Columbia v. Garcia* (D.C. App. 1975), 335 A. 2d 217, and *United States v. Moses* (D.C. App. 1975), 339 A. 2d 46. These cases are not helpful in that they are distinguishable from the facts in this cause. *District of Columbia v. Garcia* dealt with solicitation to engage in sexual activity which was unlawful. Here, however, the act solicited was not unlawful. (Footnote omitted.—Ed.) *United States v. Moses* dealt with a statute which proscribed solicitation for prostitution. While prostitution *per se* was not unlawful, the court found, at pages 52-53, that, because the solicitation dealt with a straightforward business proposal, which may be regulated under the standards applicable to "purely commercial advertising," the statute did not prohibit protected speech. Since this cause does not involve commercial speech and because, in any event, the Supreme Court has substantially dismantled the "commercial speech" exception in *Bigelow v. Virginia* (1975), 421 U.S. 809, and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), 425 U.S. 748, we find this case particularly inappropriate.

We find it impossiblv to separate conduct from speech in this instance. It must, therefore, be determined if R.C. 2907.07(B), on its face, proscribes protected or unprotected speech, or both. There are categories of speech which are said to be unprotected *per se*. These categories are: (1) libel *(Beauharnais v. Illinois* [1952], 343 U.S. 250); (2) calculated falsehoods *(Time, Inc., v. Hill* [1967], 385 U.S. 374); (3) obscenity in "works" *(Miller v. California* [1973], 413 U.S. 15); and (4) "fighting" words *(Chaplinsky v. New Hampshire* [1942], 315 U.S. 568; *Cincinnatti v. Karlan* [1974], 39 Ohio St. 2d 107; and *State v. Hoffman* [1979], 57 Ohio St. 2d 129).

Such restriction of the right of free speech is justified when the statute prohibits a substantial evil that rises far above public inconvenience, annoyance and unrest.

There is another category of speech that is protected by the First Amendment, but can nevertheless be regulated if there is a compelling reason for doing so. *Herndon v. Lowry* (1937), 301 U.S. 242, 258; *Shelton v. Tucker* (1960), 364 U.S. 479, 488; *Grayned v. Rockford, supra* (408 U.S. 104), at pages 116-117. Such restriction of the right of free speech is justified when the statute prohibits a substantial evil that rises far above public inconvenience, annoyance and unrest. See *E.g., Terminiello v. Chicago* (1949), 337 U.S. 1, 4; *American Communications Assn. v. Douds* (1950), 339 U.S. 382.

In addressing this latter category, we must examine the state's interest in enacting R.C. 2907.07(B) to determine if it is significantly compelling to justify a restriction of speech. One of the obvious purposes of the enactment of R.C. 2907.07(B) is to protect the privacy of citizens; *i.e.* the statute is designed to shield our citizens from language which is personally offensive and violates what has been called "the most comprehensive of rights and the right most valued by civilized men"—the right to be let alone. (Footnote omitted.—Ed.)

It is beyond cavil that this is a legitimate exercise of the police power, the exercise of which is justified by the interest of the state in achieving a workable degree of social organization and harmony. Those who would have this court believe that the average citizen would not find homosexual solicitations of the nature proscribed in R.C. 2907.07(B) to be injuriously offensive are guilty of murky thinking. The type of expression proscribed in the statute may have been acceptable in a more barbarous age when human dignity had not reached the level expected by citizens in our modern society.

Those who would have this court believe that the average citizen would not find homosexual solicitations of the nature proscribed in R.C. 2907.07(B) to be injuriously offensive are guilty of murky thinking.

Even the furtherance of such an important state interest, however, is not sufficiently compelling when the statute infringes on otherwise protected speech. The expression of ideas or emotions cannot be prohibited, on this basis alone, to protect unwilling hearers without "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California* (1971), 403 U.S. 15, 21. *Cf. Rowan v. Post Office Dept.* (1970), 397 U.S. 728. Here, since "the special plight of the captive auditor" is not involved, the Constitution requires those who are displeased by such solicitations, without more, to "avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California,* at pages 21-22. *Cf. Pub. Util. Comm. v. Pollak* (1952), 343 U.S. 451, 469; *Lehman v. Shaker Heights* (1974), 418 U.S. 298, 305 (Douglas J., concurring). Therefore, we hold that, even though important privacy interests of citizens are involved, the solicitor's constitutional right to free speech is paramount, absent a showing that his speech is otherwise unprotected.

We find that, while the statute, on its face, sweeps too broadly, it can be narrowly construed to proscribe only the "fighting" words category of unprotected speech.

Therefore, unless R.C. 2907.07(B), on its face, proscribes only unprotected speech *per se* or can be narrowly construed to do so, the statute must be struck down as being unconstitutionally overbroad. We find that, while the statute, on its face, sweeps too broadly, it can be narrowly construed to proscribe only the "fighting" words category of unprotected speech. "Fighting" words are those "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire, supra* (315 U.S. 568), at page 572. See *Cantwell v. Connecticut* (1940), 310 U.S. 296, 310; *Terminiello v. Chicago, supra* (337 U.S. 1), at page 3; *Cohen v. California, supra,* at page 20; *Gooding v. Wilson, supra* (405 U.S. 518); *Lewis v. New Orleans* (1974), 415 U.S. 130; *Cincinnati v. Karlan, supra* (39 Ohio St. 2d 107); and *State v. Hoffman, supra* (57 Ohio St. 2d 129.)

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When a person "knows" that the person solicited will be offended, or the person does so "reckless[ly]" and heedlessly without regard to the consequences, such solicitations are likely to provoke the *average* person to retaliation and thereby cause a breach of the peace. See *Street v. New York* (1969), 394 U.S. 576, 592; *Bachellar v. Maryland* (1970), 397 U.S. 564. Stated differently, solicitations of the type proscribed by the statute are, as a matter of common knowledge, often likely to provoke violent reaction. *Cohen v. California, supra,* at page 20.

Indeed, according to the Technical Committee's report, this is what was contemplated when the statute was enacted. The Committee Comment, in addressing division (B) of R.C. 2907.07, states:

" *** The rationale for prohibiting indiscreet solicitation of deviate conduct is that the solicitation in itself can be highly repugnant to the person solicited, and *there is a risk that it may provoke a violent response."* (Emphasis added.)

Furthermore, Justice Powell of the United States Supreme Court, in dissenting to an order to vacate and remand *Rosenfeld v. New Jersey,* No. 71-1044, for consideration in light of *Cohen v. California, supra* intimated, at 408 U.S. 905, that the definition of "fighting" words may be read broadly enough to cover the speech proscribed by the statute, stating:

" *** [T]he exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. *It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience."* (Emphasis added.)

See *Williams v. District of Columbia* (1969), 136 U.S. App. D.C. 56, 64, 419 F.2d 638, 646.

Harkening back to the condemnation in *Chaplinsky* of words "which by their very utterance inflict injury ***" (315 U.S., at page 572), Justice Powell contended, at page 906 (408 U.S.) that "a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription ***." Justice Powell felt that such language should be treated as a public nuisance whether or not it constitutes "fighting" words.

We feel that solicitations of the type proscribed by the statute are often "grossly offensive and emotionally disturbing." They are very likely to cause injury in a very real, if only emotional sense.

Similarly, we feel that solicitations of the type proscribed by the statute are often "grossly offensive and emotionally disturbing." They are very likely to cause injury in a very real, if only emotional, sense. Many times the shock to one's sensibilites and the sense of affront, resulting in injury to one's mind and spirit, are as great from such speech as from a physical assault.

Therefore, we hold that a person may be punished under R.C. 2907.07(B) if the solicitation, by its very utterance, inflicts injury or is likely to provoke the average person to an immediate breach of the peace.

The judgement of the Court of Appeals is reversed, and the cause is remanded to the Municipal Court for a new trial in order to have the criminality of appellee's speech specifically determined, pursuant to the narrowing construction contained herein.

Judgement reversed and cause remanded.

Celebrezze, C.J., Herbert, W. Brown, P. Brown and Holmes, J.J., concur.

Sweeney,J., dissenting. While I agree with the majority's analysis that R.C. 2907.07(B) is facially overbroad, I must dissent from their attempt to "authoritatively construe" the statute so as to save it from a First Amendment attack. By simply adding the catch-phrase, "unless the solicitation, by its very utterance, inflicts injury or is likely to provoke the average person to an immediate retaliatory breach of the peace," the majority opinion attempts to limit the application of R.C. 2907.07(B) to the "fighting words" exception to protected speech. However, this attempt seriously blurs the long-standing distinction between fighting words and merely offensive speech.

The United States Supreme Court has distinguished between speech which, though vulgar or offensive, is protected, and unprotected fighting words, on the basis that the latter is limited to "those personally abusive epithets which, when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California* (1971), 403 U.S. 15, 20. This court recognized the distinction when we stated in *Cincinnatti v. Karlan* (1974), 39 Ohio St. 2d, 107, 110; "[N]o matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobrious spoken words may seem to be, their utterance may not be made a crime unless they are fighting words, as defined by *** [the United States Supreme Court]." Yet, this crucial distinction disappears when the majority declares that, "[w]hen a person 'knows' that the person solicited will be *offended,* or the person does so 'reckless[ly]' and heedlessly without regard to the consequences, such solicitations are likely to provoke the *average* person to retaliation and thereby cause a breach of the peace." (Emphasis partially added.) Thus, this court now seems willing to equate offensive speech with fighting words. To this writer the majority's stance appears as a dangerous narrowing of First Amendment freedoms.

The majority is using the concept of "authoritative construction" as a vehicle for salvaging constitutionally deficient legislation. Here, they have not so much construed, as they have contorted the meaning of R.C. 2907.07(B). To equate a deviant sexual proposal, no matter how crude or tasteless, with a "personally abusive epithet" exceeds the limits of rational statutory interpretation.

In conclusion, I cannot join in the majority's freewheeling use of the concept of "authoritative construction" to re-draft this facially unconstitutional statute. I believe that the privacy interests the majority seeks so strenuously to safeguard are adequately protected by R.C. 2917.11 which we recently construed in *State v. Hoffman* (1979), 57 Ohio St. 2d 129.

Accordingly, I would affirm the judgement of the Court of Appeals on the basis that R.C. 2907.07(B) is an unconstituional infringement upon freedom of speech.

Pacific Telephone employment discrimination suit dismissed

DeSantis v. Pacific Telephone & Telegraph Co. (No. 77-1109); *Strailey v. Happy Times Nursery School, Inc.* (No. 77-1204); *Lundin v. Pacific Telephone & Telegraph Co.* (No. 77-1662); all consolidated in the United States Court of Appeals for the Ninth Circuit, Opinion filed May 31, 1979.

The three cases reviewed here were consolidated in the Court of Appeals because of their similarity of issues. Two of the cases alleged sexual orientation discrimination by Pacific Telephone & Telegraph Company. The opinion of the Court of Appeals, affirming the dismissal by the U.S. District Court (Northern District of California) of the complaints, was filed the same day the California Supreme Court issued its landmark decision against Pacific Telephone for such discrimination. (See the two cover articles of this issue of the SexuaLaw Reporter.*) The state and federal remedies, as well as the approaches of the respective courts, are worthy of comparison. —Assoc. Ed.*

The Ninth Circuit Court of Appeals has affirmed three lower court decisions dismissing complaints brought by gays for discriminatory employment practices. The suits alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, and conspiracy to violate the civil rights of the plaintiffs under 42 U.S.C. Section 1985(3).

The *DeSantis* case involved males who were allegedly not hired, were forced to quit, or were not rehired because they were homosexuals. The plaintiffs first sought relief from the Equal Employment Opportunity Commission (EEOC) which relief was denied because the EEOC refused to accept jurisdiction in sexual orientation discrimination cases under its interpretation of Title VII. *Lundin* involved lesbians who were insulted by P.T.&T. employees and discriminated against and eventually fired by the company because of their homosexual relationship. Lundin also alleged inadequate representation by the union handling her grievances. The third case, *Strailey,* involved a male allegedly fired by a nursery school after two years' service as a teacher because he wore a small gold earring. Strailey had also ben unsuccessful in obtaining relief from the EEOC.

The cases were dismissed by the District Court, and the dismissals affirmed by the Court of Appeals, for failure to state a claim. The Court held that Title VII's prohibition of "sex" discrimination applies only to discrimination on the basis of gender resting upon the Court's perception of Congressional intent, "and should not be judicially extended to include sexual preference such as homosexuality." Congressional intent, the Court said, was shown by the original purpose of the statute, namely, "to place women on an equal footing with men;" by the fact that several bills introduced to amend the Civil Rights act to prohibit discrimination against "sexual preference" have not passed; and by the fact that "Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning."

The Court rejected the contention that, because the discrimination against homosexuals disproportionately affects men, Title VII would apply to the cases under the

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SEXUAL PRIVACY IN VIRGINIA

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that the ordinance prohibits all such solicitations within the city, whether in public or private. The court overlooked Pedersen's reasonable expectation that his offer to have sex, of whatever variety, was addressed to someone who wished to hear it, sitting as the officer was in his parked car on a dead-end street after a half-hour ride from a known male homosexual cruising area. The court overlooked the absence of any innocent bystander who must be protected from similar solicitations. Unknowing heterosexual males do not, as a rule, stand on streets at 11:35 p.m. accepting invitations from strange men to go for a ride to nowhere in particular. In short, the court's perception of the facts varied remarkably from the reality of this particular sequence of events.

The court decided to protect the populace from Pedersen's behavior but to permit Cord to become an attorney in the state. Even without examining the potential social consequences of this decision, we can probably determine why the court decided as it did. As I have suggested earlier in these pages, if sexual privacy cases are to be won, for both *Cord* and *Pedersen* are sexual privacy cases, the argument must direct courts' attention to the nature of the Constitutional right to privacy as it now exists and then to the nature of the protection it deserves. *See* "A Constitutional Right to Sexual Privacy/Recent Word from Above," 3 *Sex. L. Rptr.* 59 (Nov./Dec., 1977).

Cord more clearly was alleging an invasion of a right to privacy than was Pedersen. Her living arrangement was within the zone of privacy which the Supreme Court created in *Griswold v. Connecticut,* 381 U.S. 479 (1965), and extended in cases like *Stanley v. Georgia,* 394 U.S. 557 (1969); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Roe v. Wade,* 410 U.S. 113 (1973); and *Carey v. Population Services International,* 431 U.S. 678 (1977). Pedersen's attempted sexual liaison was only arguably within that zone of privacy. Cord's claim clearly involved her home life. Pedersen's claim did not, at least within the context of his criminal conviction. Cord's claim concerned domestic values like seclusion, personal intimacy, and the pleasure of association with one particularly close friend. Pedersen's claim concerned less emotional, less domestic values. Cord's claim centered on her right to personal autonomy to order her life as she chose, both privately and professionally. Pedersen's claim, while important to him, was not so central to his private and professional happiness. Cord's loss on appeal would have had broad, long-term consequences for her life. Pedersen's misdemeanor conviction does not necessarily change his life at all. Cord's claim rests on values which underlie portions of the Bill of Rights, for example, the security and seclusion in the home guaranteed by the Third and Fourth Amendments. Pedersen's claim, of course, does not.

The Virginia Supreme Court accepted Cord's arguments because, without so identifying it, it found a fundamental right of privacy at stake. The burden of the state regulation would have destroyed either her personal or professional autonomy for no rational reason. After *Cord,* there must be a rational connection between the applicant's fitness or capacity to practice law and the personal, as opposed to professional, factors involved in determining that fitness. A future Pedersen will prevail, but only after more cases like *Cord* have sensitized the courts of Virginia to sexual privacy issues.

—Thomas B. DePriest
Virginia State Bar

PACIFIC TELEPHONE

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authority of various "disproportionate impact" decisions (usually involving blacks). The Court held that attempting to secure protection for homosexuals under the guise of protecting men generally was a "bootstrap" device which would not be allowed. "It would achieve by judicial 'construction' what Congress did not do and has consistently refused to do . . . It would violate the rule that our duty in construing a statute is to 'ascertain . . . and give effect to the legislative will.' "

The Court held that Title VII's prohibition of "sex" discrimination applies only to discrimination on the basis of gender resting upon the Court's perception of Congressional intent, "and should not be judicially extended to include sexual preference such as homosexuality."

Another "bootstrap" device was also rejected by the Court. The appellants characterized the hiring policies of the employers as being different for women from those for men in that women are allowed to prefer male partners while men are not. The Court, on the other hand, characterized the policies as simply refusing to hire "or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes."

Finally, the Court held that Freedom of Association is not violated by such policies because there is no allegation of "discrimination against employees because of the gender of their friends." The Court thus distinguished between "friends" and "relationships." Discrimination because of "effeminacy, like discrimination because of homosexuality . . . or transsexualism . . . " also remains unprotected by Title VII.

The Court held that attempting to secure protection for homosexuals under the guise of protecting men generally was a "bootstrap" device which would not be allowed. "It would achieve by judicial 'construction' what Congress did not do and has consistently refused to do. . . ."

The conspiracy allegation (42 U.S.C. Section 1985 (3)) was also dismissed by the Court. The United States Supreme Court has held that "Section 1985(3) applied only when there is 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action.' " However, the Court of Appeals stressed that, while blacks and women may be afforded special federal assistance in protecting their civil rights, the "courts have not designated homosexuals a 'suspect' or 'quasi-suspect' classification so as to require more exacting scrutiny of classifications involving homosexuals." Thus the federal courts continue to deny a remedy to a wrong which may have to be corrected primarily in the state courts.

SEXUALAWREPORTER

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ERRATA

The following four paragraphs should be inserted at 5 Sex.L.Rptr. 24 (Volume 5, Number 2, April-June 1979), in the second column after the ninth line of text (ending with "died in 1976"):

The court, besides awarding plaintiff various property based on contract principles, held that plaintiff has "a cause of action in quantum meruit for the years of intimate, confidential, and dedicated personal and business service which she gave decedent." The court stated that she had performed the services with the expectation of being ultimately compensated and the case was remanded to determine the fair value of plaintiff's services to decedent during the years they had lived together.

The Georgia Supreme Court, on the other hand, in Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977), refused to recognize a contract based upon services rendered during a meretricious relationship.

Plaintiff, upon the termination of her relationship with defendant, brought an action seeking $100 per month for the eighteen years she had "cooked for, cleaned for, and in general cared for the comforts, needs and pleasures of the [defendant] . . . while they cohabited together," as well as exclusive title to the home they had jointly purchased. Plaintiff further alleged that on numerous occasions defendant had told her that he would take care of and support her for the rest of her life.

Defendant moved for and was granted summary judgment on the ground that plaintiff's claims were based upon a meretricious relationship and that to permit plaintiff recovery would be contrary to state public policy.

Our sincere apologies to the author of this article.

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STATUTORY RAPE LAW NARROWLY UPHELD

Michael M. v. Superior Court of Sonoma County, California Supreme Court Number S.F. 23929, filed November 5, 1979.

In the case of *Michael M. v. Superior Court of Sonoma County*, case number S.F. 23929, filed November 5, 1979, the California Supreme Court upheld the so called statutory rape law against constitutional challenge.

Section 261.5 of the California Penal Code defines the offense of "unlawful sexual intercourse" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of eighteen years." Although the statute creates classifications based on sex, the Supreme Court in a four to three decision held that there was a compelling state interest which justified the discriminatory classifications.

The defendant was a male, seventeen and one-half years old, who had engaged in sexual intercourse with a sixteen-year-old girl after what the court termed "an amorous interlude on a park bench." After the defendant's unsuccessful motion to have the case dismissed in Superior Court on constitutional grounds, he sought a writ of prohibition from the Supreme Court to compel the Superior Court to dismiss the charges against him on the ground that the statute in question violated the equal protection clauses of the United States and California Constitutions, because only females are protected by the statute and only males may be prosecuted under it.

The California Supreme Court referred to its earlier case of *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, in which the court held that sex was a suspect classification, thereby requiring strict scrutiny in judging the constitutionality of a statute. In that earlier case, the Supreme Court held that such a statute will be declared unconstitutional unless the state can show a compelling interest which justifies the law and that the distinctions drawn by the statute are necessary to further the statute's purpose.

With respect to the statute in question in the instant case, the Supreme Court stated, "There can be no doubt that Section 261.5 discriminates on the basis of sex because only females may be victims, and only males may violate the section. However, this obviously discriminatory classification scheme is readily justified by an important state interest. Unlike the sex-based classification which we invalidated in *Sail'er Inn*, and which reflected overbroad social generalizations regarding the appropriate roles of males and females, the law herein challenged is supported not by mere social convention but by the immutable, physiological fact that it is the female exclusively who can become pregnant. This changeless physical law, coupled with the tragic human cost of illegitimate teen-age pregnancies, generates a compelling and demonstrable state interest in minimizing both the number of such pregnancies and their disastrous consequences. Accordingly, the Legislature is amply justified in retaining its historic statutory rape law because of the potentially devastating social and economic results which may follow its violation."

The Court referred to various statistics showing the number of illegitimate children born to teenage girls. The Court also referred to statistics which show that

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INSIDE

Single family zoning law is unconstitutional in New Jersey

State of New Jersey v. Dennis Baker (1979) A. 2d

Defendant Dennis Baker is the owner of a house in Plainfield, New Jersey. His house is situated in a zone restricted to single family use. On three occasions during the fall of 1976, he was charged with allowing more than one family to reside in his home in violation of Section 17:11-2 of the Plainfield Zoning Ordinance.

That ordinance defines "family" as follows: "One or more persons occupying a dwelling unit as a single nonprofit house-keeping unit. More than four persons . . . not related by blood, marriage, or adoption shall not be considered to constitute a family."

At his trial, the evidence showed that the home was shared by nine individuals: Mr. and Mrs. Baker and their three daughters, and Mrs. Conata and her three children. The Bakers and Conatas lived together in what defendant termed an "extended family." The two groups view each other as part of one large family and have no desire to reside in separate homes. The defendant is an ordained minister of the Presbyterian church and he testified that the living arrangements arose out of the individuals' religious beliefs, and a desire to go through life as "brothers and sisters." Each occupant contributed a fixed amount per week to defray household expenses.

Defendant was found guilty of all three charges and fines were imposed. When constitutional issues were raised in the trial court, the trial judge found that the provisions of the ordinance were a valid exercise of the municipality's police powers.

The Appellate Department of the Superior Court reversed the trial court and held that the ordinance was unconstitutional insofar as it classified permissible uses according to occupants' biological or legal relationships. An appeal was taken to the New Jersey Supreme Court.

The New Jersey Supreme Court noted that the zoning power of a city, although broad, is not without limitations. A valid zoning regulation must both represent a reasonable exercise of the police power and bare a real and substantial relation to a legitimate municipal goal. Furthermore, the court noted, the regulation may not exceed the public need or substantially affect uses which do not partake of the offensive character of those which caused the problem sought to be ameliorated. Using this test, the Supreme Court held that the numerical limitations of this zoning ordinance were invalid.

The court stated, "We have no quarrel with the legitimacy of Plainfield's goal. Local governments are free to designate certain areas as exclusively residential and may act to preserve a family style of living . . . A municipality is validly concerned with maintaining the stability and permanence generally associated with single family occupancy and preventing uses resembling boarding houses or other institutional living arrangements. (Citation omitted.) Moreover, a municipality has a strong interest in regulating the intensity of land use so as to minimize congestion and overcrowding . . . nevertheless, the power to attain these goals is not without limits. A municipality may not, for example, zone so as to exclude from its borders, poor or other unwanted minorities. (Citations omitted.) Nor may zoning be used as a tool to regulate the internal composition of housekeeping units. (Citations omitted.) A municipality must draw a careful balance between preserving family life and prohibiting social diversity." The court went on to say, "The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. Plainfield's ordinance, for example, would prohibit a group of five unrelated 'widows, widowers, older spinsters, or bachelors - or even of judges' from residing in a single unit within the municipality. (Citation omitted.)

"On the other hand a group consisting of ten distant cousins could so reside without violating the ordinance. Thus, the ordinance distinguishes between acceptable and prohibited uses on grounds which may, in many cases, have no rational relationship to the problem sought to be ameliorated."

Reviewing court decisions from many other states on this subject, the court stated, "the courts of this and other states have often noted that the core concept underlining single family living is not biological or legal relationship but, rather, is character as a single housekeeping unit. (Citations omitted.) As long as a group bears the 'generic character of a family unit as a relatively permanent household,' it should be equally as entitled to occupy a single family dwelling as its biologically related neighbor."

The court then zeroed in on some specific problems with the ordinance in question. "The Plainfield ordinance is both underinclusive and overinclusive. It is overinclusive because it prohibits single housekeeping units which may not, in fact, be overcrowded or cause congestion; it is underinclusive because it fails to prohibit certain housekeeping units - composed of related individuals - which do present such problems. Thus, for example, five unrelated retired gentlemen could not share a large eight-bedroom estate situated upon five acres of land, where as a large extended family including aunts, uncles and cousins, could share a small two bedroom apartment without violating this ordinance."

The court then offered some suggestions for alternatives to this ordinance. "Area or facility-related ordinances not only bear a much greater relation to the problem of overcrowding than do legal or biologically based classifications, they also do not impact upon the composition of the household. They, thus, constitute a more reasoned manner of protecting the public health. Other legitimate municipal concerns can be dealt with similiarly. Traffic congestion can appropriately be remedied by reasonable, even-handed limitations upon the number of cars which may be maintained at a given residence. Moreover, area related occupancy restrictions will, by decreasing density, tend by themselves to reduce traffic problems. Disruptive behavior—which, of course, is not limited to unrelated households—may be properly controlled through the use of the general police power."

The court then dealt with the alleged legal justification for the ordinance. "Plainfield, in attempting to justify its

regulation, relies upon *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In that case the United States Supreme Court upheld an ordinance which limited to two the number of unrelated individuals who could reside in a single family dwelling. *Belle Terre* has been widely criticized by the commentators and its rationale appears to have been undermined in part by the more recent case of *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). In any event, *Belle Terre* is at most dispositive of any federal constitutional question here involved. We, of course, remain free to interpret our constitution and statutes more stringently. (Citations omitted.) We find the reasoning of *Belle Terre* to be both unpersuasive and inconsistent with the result reached by this court in [other cases]. Hence, we do not choose to follow it."

Finally, the court stated, "Today we hold that municipalities may not condition residence upon the number of unrelated persons present within the household. Given the availability of less restricted alternatives, such regulations are insufficiently related to the perceived social ills which they were intended to ameliorate. Although we do not doubt Plainfield's good faith, the means it chose to further its legitimate goals were overreaching in their scope and hence cannot be permitted to stand."

Justice Mountain wrote a dissent in which Chief Justice Hughes joined. In his dissent, Justice Mountain stated, "What the court has chosen to do is most unusual. Normally, where an issue of this sort arises, a court will rest its decision upon a statutory rather than a constitutional ground. It has been suggested that this rule is absolute and unyielding. Had this course been followed here, the result would be very different from the end now achieved. Had the decision been reached as a matter of statutory interpretation, then the Legislature, had it seen fit to do so, could have amended the statute to provide expressly that municipalities should thence forth have the power the court had found not to have been previously granted. Now it is completely foreclosed from doing this because the court has found there to be a *constitutional* violation. The Legislature cannot amend the constitution."

Justice Mountain noted that a parallel experience had occurred in Illinois where the Supreme Court in that state in 1966 was requested to rule upon the validity of a similar ordinance. In the case of *City of Des Plaines v. Trottner* 216 N.E.2d 116 (1966), the court determined that as a matter of *statutory construction* the ordinance was invalid because the Zoning Enabling Act in Illinois had not delegated to municipalities the power to make such a classification. In 1967, the Illinois Legislature reacted and expressly granted municipalities that power. Justice Mountain noted that the difference between the way in which the common problem was handled in Illinois and the way it has been handled in New Jersey is striking. The way the Illinois Supreme Court handled it, the people, through their Legislature were able to alter the decision by enacting correcting legislation. In New Jersey, however, the Supreme Court has deprived the people of the opportunity to act through the Legislature to overturn this decision. Justice Mountain referred to this as, "an unfortunate resort to the New Jersey constitution."

Another concern of Justice Mountain was the "cavalier treatment of *Village of Belle Terre v. Boraas*, *supra*, a case decided by the United States Supreme Court in 1974." Justice Mountain stated, "Why the majority rejects *Belle Terre* is not clear. It is said not to be persuasive, but we are not told why or wherein its inadequacy lies. All other state courts that have addressed this issue since *Belle Terre* was decided have chosen to follow it. *Rademan v. City of Denver*, 186 Colo. 250, 526 P.2d 1325 (1974); *Prospect Gardens Convalescent Home, Inc. v. City of Norwalk*, 32 *Conn. Supp.* 214, 347 A.2d 637 (1975); *Association for ADUC. Dev. v. Hayward*, 533 S.W. 2d 579 (Mo. 1976)."

Justice Mountain later added in his dissent, "Limiting occupancy to single families and not to more than four unrelated individuals, as has been done by the City of Plainfield, is in every sense fair and reasonable and should be sustained. The majority would be better employed in protecting the rights of homeowners . . . grievously threatened by this decision . . . rather than in conjuring up imaginary hobgoblins in the form of nonexistent invasions by swarms of country cousins.

"Let me indicate more affirmatively why I believe the Plainfield ordinance should be sustained. Appellate takes the position, stated both above, that if a family, composed of an indefinite number of persons, may legally occupy a 'single-family' residence, that an indefinite number of unrelated persons should have the same right. The majority has agreed and in so doing has deplorably denigrated one of the greatest and finest of our institutions—the family. The family should be entitled—as until now it has been—to stand on its own in a distinctly *preferred* position. There is no support in our *mores* as there should be none in our law, to justify the elevation of any group of unrelated persons to a position of parity with a family."

Chief Justice Hughes joined in this dissent.

Husband may not rape wife under common law rule

State of New Jersey v. Albert Smith (1979) 404 A.2d 331.

Defendant Albert Smith was prosecuted under New Jersey statutes annotated Section 2a: 138-1 for the rape of his wife. Defendant filed a motion to dismiss the indictment charging him with raping his wife on the grounds that a man may not be convicted under the New Jersey rape statute for rape of his wife, even though the Legislature, in a new code soon to be effective, speaks clearly of its determination that a spouse should not be excluded in such matters.

The trial judge dismissed the indictment charging Smith with raping his wife, writing an opinion in which the trial judge reluctantly held that a man could not be prosecuted at common law for raping his wife. See 148 N.J. Super. 219, 372 A. 2d 386 (County Court 1977).

The Superior Court of New Jersey, Appellate Division, granted the motion of the state for leave to appeal.

In its opinion the Appellate Division stated, "Although a great deal of that which is said in the opinion below has our collegial agreement, including our hardy concurrence as to the fatally anachronistic nature of Sir Matthew Hale's view regarding the eternal irrevocability of a wife's consent to submit to her husband sexu-

continued on next page

ally, we do not all uniformly subscribe to everything that is there said. We readily acknowledge the responsibility of all judges not to depart from pronouncements of superior appellate courts (citations omitted). We part company with Judge Scalera (the trial judge) only in the unlikely event his opinion is read to suggest that the common law is untouchable as far as trial courts are concerned . . . the common law has always had the inherent capacity to develop and adapt itself to current needs; indeed, if this were not true it would have withered and died long ago rather than have grown and flowered so gloriously. While these changes almost invariably are left to legislative action or appellate court pronouncement, we see no reason why the trial court, in situations such as this one where neither legislative fiat nor superior precedent constrains, should not contribute to this growth process on the rarely appropriate occasion."

The Appellate Division continued, "there is ample reasonable cause to believe that the common law rule excluding a husband from a statute condemning rape has heretofore obtained in New Jersey if for no other reason than because the rule did exist at common law and has not been abrogated here by legislation or judicial decision. (Citations omitted.) But even were we to indulge the present inclination of some of us to declare that in this more enlightened age there is no longer room for such parochial thinking, we could not apply the effect of such determination retrospectively. (Citation omitted.) Dismissal of this count of the indictment by Judge Scalera was imminently correct in any circumstance and is affirmed.

"Having thus decided the case before us we will not undertake to address further the substantive question or enunciate a rule of law. Considerations relating to the nature of the matter, the genuine ambivalence on the part of at least one of us with respect to the question, the absence of need in the present case for such a determination and the unlikelihood that the problem will again arise in view of the imminence of the effective date of the new code of criminal justice produced this restraint. In the new code the legislature speaks clearly of its determination that a spouse should not be excluded or enjoy any preferential treatment in matters such as this. N.J.S.A. 2C: 14-5 (b)."

(Editor's Note: Legislation similiar to that enacted in New Jersey, removing the spousal exception from the rape law, has been introduced in many legislatures around the country. For example, House Bill 904 was introduced in the Florida House of Representatives in 1979 and that bill stated, 'Nothing in this chapter shall preclude the bringing of a charge of sexual battery by an individual against a person who is his or her legal spouse." Similiar legislation was introduced and enacted into law in California this year. That bill, Assembly Bill 546, passed the California Assembly on a vote of 50 to 18. The Senate concurred and Governor Brown signed the bill into law. That law removes reference to gender from the rape law and creates a new criminal category for rape of a spouse by force or threat of force.)

Sexual issues arise in custody and foster care litigation

In a split decision, the New Jersey Appellate Court, in *M.P. v. S.P.*, 404 A.2d 1256 (1979), ruled that two minor children were better off with their "dutiful" lesbian mother than with their father, whose sexual behavior indicated a "troubled and deviant" personality.

The defendant mother had had custody of the minor children for seven years when the plaintiff father sought and was awarded by the trial court custody of the minor children on the ground of "changed circumstances."

The mother appealed, contending that the trial court's decision was based solely on the fact that she was an admitted practicing homosexual. The appellate court agreed, finding in all respects that she was a dutiful mother and that the father had failed to meet his burden of showing that "the probability for serious psychological harm accompanying or resulting from such a [change of custody] will not become a reality."

Of particular significance was the court's finding that the possibility that the mother's sexual orientation might cause the children some embarrassment did not constitute "changed circumstances" and intimated that it might, in fact, benefit the development of the children. It stated that:

> "because the community is intolerant of her differences the girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice."

A similar result was reached by the Michigan Circuit Court in *Smith v. Smith,* Mich. Cir. Ct., Kent Cty. (1979), where the father objected to the mother's custody of their child on the ground that she was an admitted lesbian and lived with her lesbian lover.

After hearing expert testimony on the subject of female homosexuality to the effect that "it is not a disorder or a disease, but rather a variation" and that "sex is not a significant variable in the case of a child [but] it is, rather, the kind of care, the quality of care, the love, security, affection, and consistency of discipline that are important", the court held that "lesbianism is only one of several factors to be considered, and that in and of itself, female homosexuality is not a bar to the granting of custody of a child or children under the Child Custody Act of 1970."

In *Marriage of Ashling*, 599 P.2d 475 (1979), the Oregon Court of Appeals affirmed the plaintiff father's request that custody of the minor children be vested in him. The opinion did not state the reason for the father's custody request nor the grounds on which it was granted or affirmed. It did, however, overturn a restriction placed on the visitation rights of the mother, a lesbian. The restriction required that "visitation [be] limited to such time and place that Petitioner does not have with her, in her home, or around the children any lesbians." The court found the mother's sexual practices to have been discreet and deleted the restriction.

Illinois, less liberal, took into consideration in a contested child custody case, both the emotional and *moral* well-being of the children.

In *De Franco v. De Franco*, 67 Ill. App. 3d 760 (1979), the plaintiff father successfully sought to have the custody of his children taken from their mother and vested in him on the ground that the mother "had commenced cohabiting with a male person in the residence occupied by her and the minor children." The male in question was married and the adulterous relationship was, the court noted, a crime in Illinois as well as constituting "an interference with Illinois public policy protecting the marital relationship and the family as an institution." Based upon this public policy embodied in The Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. 1977, ch. 40, para. 101 et seq., the court held that "the type of flagrant adulterous relationship present here . . . negatively affected the moral health of the De Franco children.

In Minnesota, a father's parental rights were terminated in *In Re H.M.P.W.*, 281 N.W.2d 188 (1978), based on Minn. Stat. § 260.221(b)(4) which states that parental rights can be terminated if "the parents are unfit by means of debauchery . . . or repeated lewd and lascivious behavior, or other conduct found by the court to be likely to be detrimental to the physical or mental health or morals of the child."

The father had been convicted several times for criminal sexual conduct but argued that although his criminal conduct fell within the meaning of "lewd and lascivious behavior," the statute implied that "such reprehensible conduct must be observed by the children or must affect them directly." The Minnesota Supreme Court rejected such an interpretation, finding that the wording of the statute indicated that lewd and lascivious conduct is, per se, detrimental to the physical or mental health or morals of the offender's child.

Big Brother

The right of the Big Brothers organization to ask prospective "big brothers" whether they are homosexual has been upheld by the Minnesota Supreme Court in *Big Brothers, Inc. v. Minneapolis Comm'n on Civil Rights,* 284 N. W.2d823 (1979).

The case arose when Gary Johnson, in his application to the organization, named Jack Baker as a reference, a well-known spokesman for homosexuals, which in turn led to his disclosing, when asked by the organization, that he was gay. Johnson contended that the Minneapolis Civil Rights Ordinance, which forbade discrimination by certain entities on the ground of, among others, "affectional preference," prohibited Big Brothers from inquiring about affectional preference and from communicating such preference, where it was same-sex directed, to the mother of the potential "little brother." The court noted that every potential big brother was subject to questioning on any important aspect of his lifestyle which differed from what the mother would regard as a normal stereotype and concluded that since the Big Brothers' objective in inquiring into sexual preference was legitimate, to then inform the mother of any same-sex affectional preference would be a violation of the Civil Rights Ordinance only if *actual* discrimination could be shown.

Sexual history of mother is irrelevant in paternity action

South Carolina Department of Social Services v. Brown, South Carolina Supreme Court, opinion filed March 15, 1979.

In the case of *South Carolina Department of Social Services v. Brown*, South Carolina Supreme Court, opinion filed March 18, 1979, the Department of Social Services brought a paternity action against respondent William Brown. In the trial court, the family court judge found that the Department failed to establish paternity. The South Carolina Supreme Court reversed that holding because the trial court considered irrelevant evidence.

Emma Mae Cooper, the child's mother, testified at the hearing that respondent was the father of the child. She testified that she had sexual relations with no one other than respondent from December 1969 through March 1970, and that the child was born in November 1970.

On cross-examination, Ms. Cooper testified that she had given birth to four children, including the child in question. Three of the four are living and each has a different father. No testimony, however, was introduced to connect Ms. Cooper's previous sexual history with the critical period of the conception of the child in question.

The trial court relied upon this evidence concerning her previous sexual history in finding that the Department had failed to prove its case. The Department argued on appeal that the consideration by the trial court of Ms. Cooper's previous sexual history was erroneous.

The South Carolina Supreme Court held, "it is generally recognized that evidence of the mother's sexual activity is irrelevant and immaterial in a paternity proceeding, except for impeachment purposes, unless the specific instances of sexual activity are within the critical period of conception. (Citations omitted.) The general rule is well stated in an annotation on the subject at 104 A.L.R. 84: 'The issue in bastardy prosecutions being the paternity of the child, the character of evidence admissible must bear a definite relationship to the probability of the accused being the father, and within this limitation the general rule has become established that evidence of sexual intercourse between the mother of an illegitimate child and others than the accused about the time of commencement of the period of gestation is admissable upon that issue, while offers of evidence, unlimited as to time, and referring to a time when in the course of nature conception could not have taken place, will be rejected as irrelevant and immaterial.' 104 A.L.R. at 85.

"The above stated rule was applied by this court in *Kenington v. Catoe*, 68 S.C. 470, 47 S.E. 710 (1904).

"Since the evidence of Ms. Cooper's sexual activity was not introduced for impeachment purposes and was not related in time to the conception of Joseph, the evidence was not relevant to any issue presented in this case. The family court erred by considering this evidence in its order."

Sterilization of retarded not authorized by common law

A father's petition to have his 20-year-old mentally retarded daughter surgically sterilized was denied in *Guardianship of Tulley*, 83 Cal. App. 3d 698 (1978).

Diane Tulley suffered from cerebral palsy. At age 20, she had the intelligence and comprehension of a three year old. The medical testimony established that although Diane was capable of engaging in sexual intercourse, any resulting pregnancy would cause psychiatric harm and that a hysterectomy would be in her best interests.

The issue, as stated by the Court of Appeals, was "whether in the absence of statute the court is authorized to order the involuntary sterilization of a mentally incompetent ward where . . . the guardian consents to such operation, and the procedure suggested is justified both medically and socially."

The court noted that "sterilization . . . is an extreme remedy which irreversibly denies a human being the fundamental right to bear and beget a child [and that] the overwhelming majority of courts hold that the jurisdiction to exercise such awesome power may not be inferred from the general principles of common law, but rather must derive from specific legislative authorization." Citing *Guardianship of Kemp*, 43 Cal. App. 3d 758 (1974), which involved a similar situation, the court pointed out that Cal. Welf. & Inst. Code section 7254 provides for the circumstances and procedures under which mentally retarded persons can be sterilized and stated that in view of the comprehensive nature of the statute "it may be concluded that the Legislature did not intend that sterilization of the mentally retarded was to be carried out without meeting the requirements imposed by this statute." It also rejected the claim that to deny the relief requested would violate Diane's constitutional right to privacy, holding that the statute did not erect an absolute bar to the sterilization of mentally retarded persons and that the restrictions imposed by the statute were within the state's right "to provide adequate procedural safeguards to ensure the avoidance of potential abuses."

Cohabitation becomes issue in alimony modifications

Several court decisions have looked at the question of what facts constitute a material change in circumstances which will justify a change in an alimony award.

In *Brister v. Brister*, 92 N.M. 711, 594 P.2d 1167 (1979), the husband sought to reduce his alimony obligations on the ground of changed financial circumstances in that his former wife was living with and receiving financial support from her lover. The court stated that "there is no fixed rule by which the amount of alimony can be determined" and that each case must turn upon its own facts with the most important factor being the alimony recipient's *need* for support. The fact that financial support was received from another is not in itself grounds for reducing or terminating an alimony award." The case was remanded to the trial court for determination of the wife's actual needs during the period she was receiving financial aid from her lover.

California, on the other hand, has provided by statute, Cal. Civ. Code section 4801.5, that where an alimony-receiving spouse is cohabiting with a person of the opposite sex, a rebuttable presumption of a decreased spousal support need is raised.

The meaning of "cohabitation" was raised in *Thweatt v. Thweatt*, 96 Cal. App. 3d 530 (1979), where a husband sued, based on section 4801.5, for the reduction or termination of his alimony obligations on the ground that his former wife was sharing a house with a man named Muldrow. The facts indicated that there was no sexual relationship between the wife and Muldrow but that Muldrow was simply a roommate who shared the expenses of rent, utilities and food. The issue was whether such a platonic relationship constituted "cohabitation" within the meaning of section 4801.5.

The court reviewed the history of section 4801.5, noting that the former provisions of the section had used the term "living with" rather than "cohabitation" and that the term had been construed to encompass a situation where parties of the opposite sex shared living accommodations on a platonic basis. The replacement of the "living with" standard with that of "cohabitation" indicated to the court that "it is not enough to show the supported spouse and the person of the opposite sex 'were merely sharing living accommodations.' " However, the court declined to state whether a sexual relationship was required to be shown under the "cohabitation" standard.

It distinguished *In Re Marriage of Leib*, 80 Cal. App. 3d 629 (1978), where the court implied that a platonic relationship would suffice under section 4801.5, by the fact that *Leib*, although no sexual relationship was involved, did involve a one-on-one relationship between a man and a woman, where the parties vacationed together and the man paid a large part of their routine living expenses.

Thus, the *Thweatt* decision was limited to its facts, a situation involving a "boarding house arrangement."

A Minnesota court, in *Anonymous v. Anonymous*, Ramsey Cty. Minn. Dist. Ct. (2d Dist. 1978), held that a wife's subsequent lesbianism constituted a material change in circumstances justifying the termination of alimony.

In 1972 the couple were divorced and entered into an agreement providing that the husband would pay the wife $130 per month "until such time as she remarries or dies, whichever occurs first." Shortly thereafter, they were reconciled but did not remarry. In 1976, they again separated and the wife commenced living with her lesbian lover. The husband sued for, among other things, a decree terminating his alimony obligations. The court stated that there was nothing in the relative financial condition of the parties which would justify a termination of alimony but pointed out that there had been a basic change in the assumptions which underlay the 1972 agreement, namely that at the time of the agreement, the wife was 30 years old and the husband could realistically have assumed that she would remarry. The court stated that the husband would not have stipulated to agree to pay alimony until the wife's remarriage or death had he known of his wife's sexual orientation.

Bail may be denied in Nebraska rape prosecutions

Parker v. Roth (1979) 278 N.W. 2d 106.

Article I, Section 9, of the Nebraska Constitution was amended by vote of the people on November 7, 1978. This ballot amendment was referred to as the 1978 Bail Amendment. That article now provides "all persons shall be bailable by sufficient surities, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The amendment added the phrase, "Sexual offensives involving penetration by force or against the will of the victim" to the section of the Nebraska Constitution pertaining to bail. In the case of Parker v. Roth (1979) 278 N.W. 2d 106, the Supreme Court of Nebraska upheld the consitutionality of this prohibition of bail in certain rape cases.

The defendant attacked the constitutionality of this bail restriction on the grounds that it violated the Eighth Amendment to the United States Constitution, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and appellant's presumption of innocence protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The defendant also argued that it impaired his right to the effective assistance of counsel and to freedom to prepare his defense under the Sixth and Fourteenth Amendments to the United States Constitution and that the bail amendment violated the cruel and unusual punisment clause of the United States Constitution.

The defendant was charged with having subjected another person to sexual penetration by force on January 10, 1979. After entering a plea of not guilty he sought release on bail. The municipal court denied the request on the basis that the state constitution did not permit bail in a case of this nature.

Defendant then filed a petition for writ of habeas corpus in the district court alleging that he was being unlawfully imprisoned and deprived of his liberty by virtue of the municipal court's refusal to set bail. The district court, following a hearing, upheld the constitutionality of the bail amendment. From the order denying bail, defendant appealed to the Nebraska Supreme Court.

Without admitting his guilt, defendant stipulated for purposes of this appeal that the proof was evident or the presumption was great that appellant committed a sexual offense involving penetration by force.

The Supreme Court first reviewed defendant's contention that the law violated the Eighth Amendment to the United States Constitution. The court held that the Eighth Amendment does not support the position that bail is required in all cases. The court noted that even the defendant acknowledged this. Appellant argued to the court that, with exception of capital offenses and non-capital murder, bail must be permitted in all cases. The court held, "The plain words of the Eighth Amendment merely stand for the proposition that if the legislative body has provided that certain offenses be bailable, the court may not in effect deny defendant's freedom through imposing an excessive amount of bail. That is not to say that the denial of bail in all instances may not be a violation of some other provision of either the Federal Constitution or our State Constitution. It is simply to say that the Eighth Amendment to the Federal Constitution does not stand for the proposition that one has a constitutional right to bail."

The court then examined the early history of bail, particularly in England, and came to the conclusion that there was no right to bail, such concept not being a part of the English legal system. The court then went on, "The framers of the constitution were well aware of the problems of bail in England, and could quite easily have provided that bail should be permitted for all offenses had they so intended. They were not, however, attempting to provide a new right in the new country but instead were transferring an accepted, recognized principle that if an offense was bailable, the individual right to freedom could not be defeated by requiring bail in excessive amounts." The court added, "Though this country is now more than two hundred years old, there appears to have been no case directly decided by the United States Supreme Court on this issue."

The court did, however, look to two U.S. Supreme Court cases which discussed the right to bail. *Stack v. Boyle,* 342 U.S. 1, 72 S.Ct1, and *Carlson v. Landon,* 342 U.S. 524, 72 S.Ct. 525. The Nebraska court then quoted from those cases, "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases." The Nebraska court then held, "in view of these authorities, we must reject appellant's contention that the 1978 Bail Amendment violates the excessive bail prohibition of the Eighth Amendment."

Refusing to strictly scrutinize the Bail Amendment, the Nebraska Supreme Court used the "rational basis" test to determine whether the Bail Amendment violated Equal Protection. After noting that even in rape cases, bail can only be denied if the proof is evident or the presumption great, the court stated, "We are therefore left with the question of whether the Legislature in the first instance, and the people thereafter, acted rationally and reasonably in concluding that, where the proof was evident or the presumption great that an individual had committed a sexual offensive involving penetration by force or against the will of the individual, such persons should not be free on bail pending trial." The court concluded that such a decision was not irrational.

With respect to the argument that the Bail Amendment violated the defendant's presumption of innocence, the court stated, "Presumption of innocence has

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BAIL

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nothing to do with confinement or release prior to trial. Presumption of innocence is only a recognition that, under our American jurisprudence, one charged with a criminal offense is presumed innocent until proven guilty beyond a reasonable doubt . . . Whether the defendent is released on bail pending trial has no relationship to the presumption of innocence he is clothed in. One charged with murder, a non-bailable offense, enjoys the presumption of innocence. Likewise, one eligible for bail who cannot make bail, enjoys the presumption of innocence. We are unable to see how one confined to jail loses a presumption of innocence because of his incarceration."

The court then rejected defendant's other arguments. Justice McCown filed an opinion in which he concurred in the result but not the reasoning of the majority opinion. He stated, "the majority opinion asserts that a 'right to bail' does not involve a 'fundamental right' guaranteed by the Constitution of the United States. It is clear that a denial of any 'right to bail' of necessity, involves a loss of liberty and that the constitutional guarantee that no person shall be deprived of liberty without due process of law is a 'fundamental right.' The United States Supreme Court said, "From the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure . . . Federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional *right to freedom* before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.' *Stack v. Boyle*, 342 U.S.1, 72 S.Ct.1. The right to bail is a 'fundamental right' of every person, and any constitutional or legislative enactment dealing with it must be strictly scrutinized."

Justice McCown, therefore, took exception to the majority's position that they need not strictly scrutinize this amendment.

Prison censorship of sexually oriented publications invalid

The United States District Court in New York reviewed, in *Jackson v. Ward*, 458 F. Supp. 546 (1978), the constitutionality of certain guidelines used by New York's corrections officials in determining which publications prison inmates may receive.

One of the two guidelines in issue, Guideline no. 2, stated that "publications which appeal to prurient interests or which are utterly without redeeming social value, or which clearly depict acts involving necrophilia, masochism, sadism, bestiality, or unnatural preoccupation with excrement, are not acceptable. Otherwise, literature dealing with the subject of sex is to be considered appropriate." The other, Guideline no. 6, stated that "the publication should not incite disobedience towards law enforcement officers or prison personnel." Both were challenged as vague and overbroad on their face.

The court pointed out that "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law" and that "a prisoner or inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Correctional authorities must, therefore, show a substantial and controlling interest which requires the subordination or limitation of these First Amendment rights. The standard required is "a substantial factual showing by corrections officials that a publication poses a tangible threat to the order, security, or rehabilitative programs of the prison before they may bar the publication from the facility" and such restriction of First Amendment rights may be "only to the extent absolutely necessary."

The court found Guideline no. 2 to be unconstitutional in that it failed to comply with the standard set forth by the U.S. Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), defining obscenity and the prison authorities failed to show that such material had any harmful effect on the peace and order of the institution.

Guideline no 6, on the other hand, was upheld on the ground that it had adopted the equivalent of a "clear and present danger" standard.

Judge may not be disciplined for adultery in Pennsylvania

The Pennsylvania Supreme Court in *In the Matter of Dalessandro*,(Pa.) 397 A.2d 743 (1979), has held that an open and notorious adulterous relationship by a judge does not constitute grounds for disciplinary action.

The court reviewed a determination by the Judicial Inquiry and Review Board that Judge Dalessandro's "open and notorious relationship" with a married woman while he himself was married violated Article 5, section 18(d) of the Pennsylvania Consitution. Article 5, section 18(d) sets forth the kind of conduct which warrants discipline of judges. Such conduct involves misconduct in office, neglect of duty or any violation of Article 5, section 17 of the Pennsylvania Constitution, which prohibits judges from engaging in any activity prohibited by law or which violates any canon of legal or judicial ethics prescribed by the Pennsylvania Supreme Court.

The court first examined Article 5, section 18(d) and found that it was concerned only with the conduct of a judge in his *official* capacity. It then proceeded to examine Article 5, section 17(b) and after first noting that Judge Dalessandro's adulterous relationship was not prohibited by law, focused on Canons 1 and 2 of the Canons of Judicial Ethics, finding that they, like Article 5, section 18(d), focused on official conduct. The court stated that "the language of these Canons strongly indicates that they are concerned with the conduct of a judge in his official capacity and not with his conduct in his private life" and concluded that:

"the constitutional scheme and the Canons are concerned with:
(1) the conduct of a judge acting in an official capacity
(2) any other conduct which affects the judge while acting in an official capacity, and
(3) conduct prohibited by law.
To read into the constitution or the canons prohibitions which go beyond the above categories is to enter a most precarious area of inquiry for the state—the realm in which private moral beliefs are enforced and private notions of acceptable social conduct are treated as law."

Further, the court noted that if the conduct of a judge is offensive to the "personal sensibilities" of the public, the public can assert their views through the election process, judges being publicly elected officials.

NATIONAL COMMITTEE FOR SEXUAL CIVIL LIBERTIES

FACT SHEET

It's Time You Knew About The National Committee for Sexual Civil Liberties

NCSCL is unique:

- For over 10 years it has fought and won the Constitutional battles on the issues affecting all our lives.
- It has educated countless legislators with its special knowledge and expertise.
- It has monitored and influenced the administrative bureaucracies and expanded our rights—both at state and federal levels.
- It has given us the Executive Branch of government as a tool to effectuate social and legal change.

NCSCL has:

the history and background, the record, the legal expertise and the political understanding to win the cases of the '80s in the courts, and to educate those entrusted with government to ensure that liberty, equality and justice become reality.

Purpose and Goals

The National Committee for Sexual Civil Liberties is a private, nonprofit organization dedicated to the pursuit of sexual civil liberties through education, both public and within the executive, legislative, judicial, and administrative branches of government.

The purpose of the Committee is to work to ensure equal rights in all areas in which government is involved, no matter what the sexual, affectional, or relationship status of the person.

The Committee consists of a select group of men and women chosen for their dedication to the concept of total civil rights in the sexual area and for their expertise and scholarship in their various professional, academic, and practical disciplines, such as law, sociology, history, psychology, medicine, education, science, and theology.

Through its members and its distinguished Board of Consultants, the Committee strives to gather together, from all regions of the nation and beyond, those whose achievements, aptitudes, and temperaments may prove to be a valuable resource in the pursuit of sexual civil liberties.

Activities of the NCSCL and Its Members

Since its beginnings over a decade ago, the Committee and its members have been active in litigation, education of officials in government and private organizations, and research and writing in the field of sexual liberties. Much of the work has been done in the name of the Committee; some has been in the names of individual members who have credited the Committee as the source of information, ideas, and other assistance.

The Committee meets twice a year and presents an annual program of scholarly papers and panels. Some time is usually devoted to reviewing the current publications of interest, including books and articles by Committee members.

Some Current Projects

The National Committee is assisting in the development, expansion, enforcement, and implementation of ***executive orders*** banning sexual orientation discrimination and invasion of sexual privacy in several states and on the federal level. Its most recent achievements have been in California, where Governor Edmund G. Brown Jr. issued an order banning discrimination in certain areas of state government under his jurisdiction. A similar executive order issued earlier by the governor of Pennsylvania was obtained through the work of members of the Committee. In conjunction with this project, the Committee is actively concerned with establishing a ***Sexual Privacy and Orientation Commission*** in California and several other jurisdictions.

The Committee is working with, educating, and serving as a consultant for various ***administrative agencies,*** departments, commissions, and councils throughout California state government and in several other states.

The Committee is concerned with the establishment of new criteria for publication of appellate opinions and changing policy regarding citation of ***unpublished opinions*** as precedent.

The Committee continues to educate those with past convictions for "lewd conduct" or "sexual solicitation" in California, of the ***retroactive effect of the new law*** in this area (see Litigation Project for information on the case of *Pryor v. Municipal Court*) and to assist the judiciary in creating a procedure to administer the effect of the new law.

Jury instruction committees (both ad hoc committees and those associated with bar associations) have worked and are working with the Committee to ensure that the jury instructions developed for sexual cases are a fair and correct statement of the law. This includes correcting previous misinterpretations of the law contained in standard instructions used by judges to inform juries of the applicable law at the conclusion of a criminal case.

Litigation Project

Major Victories of the 1970s

Sexual Solcitation/Lewd Conduct: In the case of *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, the Litigation Project was successful in challenging the constitutionality of the California statute prohibiting soliciting or engaging in lewd conduct. The California Supreme Court held that the statute was vague, and it established a totally new definition for the term "lewd conduct." The Court also held that solicitation of a lawful sex act may not be criminalized by the state, and that the state may not constitutionally prohibit sex in public absent a showing of the presence of someone who may be offended. Under the new statutory interpretation, a prosecutor must prove that a defendant knew or should have known of the presence of someone who may be offended. The new definition and this new interpretation were made retroactive, even to cases which have been final and closed for years. The Litigation Project had previously attempted to overturn this law in numerous cases, including *Silva v. Municipal Court* (1974) 40 Cal.App.3d 733; *People v. Williams* (1976) 59 Cal.App.3d 225; *People v. Deyhle* (1976) 76 Cal.App.3d Supp. 1. The Litigation Project also filed an amicus brief before the Ohio Supreme Court in the case of *State v. Phipps* (1979) 58 Ohio St.2d 271, urging the Court to declare that state's homosexual solicitation law unconstitutionally overbroad. Although that Court did not declare the statute overbroad, it did place a limiting construction on the statute.

Employment Discrimination: After two years of unsuccessful attempts to administratively secure a favorable interpretation of the California Fair Employment Practices Act to include protection for homosexuals, the Litigation Project involved itself in the case of *Gay Law Students' Association v. Pacific Telephone and Telegraph Company* (1979) 156 Cal.Rptr. 14. The California Supreme Court held that being openly gay is a "political activity" protected by the California Labor Code section which prohibits employers from regulating or attempting to influence the political activities of employees. This was a landmark decision in that it was the first time any state supreme court had granted protection to homosexuals against discrimination by private employers.

Prostitution: The Litigation Project was successful in establishing that soliciting for an act of prostitution is a specific intent crime under California law. In the case of *People v. Norris* (1978) 152 Cal.Rptr. 134, the Appellate Department of the Los Angeles Superior Court held that in every case involving solicitation for prostitution, the prosecutor must prove that the defendant intended that an act of prostitution actually occur. Since the purpose of the statute, the Court held, is to prevent the solicitation of a crime, if the defendant does not intend for a crime to be committed, he or she must be found not guilty. This ruling has resulted in more frequent acquittals.

Sexual Battery: After the Los Angeles City Attorney established a policy of filing battery charges in sexual cases involving allegations that a male defendant touched the genital area of a plainclothes vice officer, the Litigation Project became involved in the establishment of standards of guilt and innocence. In the case of *People v. Sanchez* (1978) 147 Cal.Rptr. 850, the Appellate Department of the Los Angeles Superior Court held, for the first time in California, that a jury must return a verdict of not guilty if it has a reasonable doubt as to whether the defendant had a reasonable belief that the officer would not object to the touching and therefore would not be offended. Prior to the *Sanchez* case, defendants had to raise the defense of entrapment, which must be proved by a preponderance of evidence. The *Sanchez* case reversed that burden so that a defendant now need only establish a reasonable doubt as to whether the officer was acting in an enticing manner. As a result of this case, juries are returning not guilty verdicts more frequently.

Loitering/Solicitation: In the early 1970s, the Colorado Legislature enacted a penal code revision decriminalizing private sex between consenting adults as well as sexual solicitation. The Legislature, however, enacted a law prohibiting loitering for the purpose of soliciting deviate sexual conduct. The Litigation Project successfully challenged the constitutionality of that statute in the case of *People v. Gibson* (Colo. 1974) 521 P.2d 774. This case became a model for similar challenges in other states, including the attempt by the Litigation Project to have a similar law in California declared unconstitutional. See *People v. Ledenbach* (1976) 132 Cal.Rptr. 643. A Municipal Court judge declared the California law unconstitutional but was reversed on appeal. The Litigation Project is participating in further litigation in this area (see below).

Privacy: The first case of the Litigation Project involved a challenge to the Texas sodomy law, which punished oral and anal sex between all consenting adults in private. The Litigation Project was successful in having a 3-judge Federal District Court declare that statute unconstitutionally overbroad in the case of *Buchanan v. Batchelor* (N.D. Texas, 1970) 308 F.Supp. 729. Although this decision was reversed on procedural grounds only by the United States Supreme Court, the substantive holding by the District Court remains a landmark decision.

Some Test Cases for the 1980s

Consenting Adult Private Sex: A majority of states in this country continued to criminalize private sexual acts between consenting adults. Some of those states allow married couples to perform oral and anal sex in private, but deny the same rights to unmarried persons, whether heterosexual or homosexual. The Litigation Project has become involved in several major test cases challenging the so-called "sodomy laws." The New York sodomy law prohibits consenting adult sex of this nature except if the parties are married to each other. The Litigation Project filed an amicus curiae brief in the case of *People v. Ronald Onofre,* Case No. 914/1979. On January 24, 1980, the Appellate Division of the Supreme Court of the State of New York unanimously declared the New York sodomy law unconstitutional, stating that sexual privacy is a fundamental right. Because of its importance, the case has been accepted by the New York Court of Appeals. The Litigation Project will remain involved in the case until an opinion is rendered by that Court. The Pennsylvania sodomy law is similar in scope to that of New York and is also under attack by the Litigation Project. *Commonwealth v. Scagliano* was argued before the Pennsylvania Supreme Court. The Litigation Project filed an amicus curiae brief and participated in oral argument in that case. The Massachusetts, Rhode Island, and Maryland laws prohibiting various forms of private sexual conduct are also being scrutinized in cases in which the Litigation Project is participating.

Sex Registration: California law provides that anyone convicted of certain sex crimes must register as a sex offender in the community in which he lives. This requirement applies to persons convicted of rape, child molestation, as well as certain forms of consenting adult sexual behavior. The Litigation Project is working toward having the sex registration requirement declared unconstitutional as it applies in cases of consenting adult sexual behavior (*People v. Ripley,* presently on appeal in the California appellate courts). Although many prosecutors, judges, and police agencies are of the opinion that sex registration for consenting adult conduct is unnecessary and too severe a penalty, no one has been successful in having either the Legislature of the courts eliminate the requirement. In the last three years, the state Senate has, on two occasions, rejected attempts to limit the registration requirement. The courts therefore seem to be the appropriate avenue.

Loitering/Solicitation: California prohibits loitering in a restroom for the purpose of soliciting a lewd act. The word "lewd" is not defined, and the statute is so vague that it allows for arrest based upon suspicion rather than probable cause. Anyone convicted of this offense must register as a sex offender. If a teacher is merely arrested for this offense, he may be immediately suspended without pay. The Litigation Project was successful in a constitutional challenge to this law, at the trial court level. The prosecution has appealed and the Project will continue litigation in this area until there is a definitive decision by the California Supreme Court.

Sexual Solicitation/Lewd Conduct: When a Municipal Court judge in Tulsa, Oklahoma declared that city's lewd conduct ordinance unconstitutionally vague, the prosecution appealed. The Litigation Project filed the main brief in support of the decision of the Municipal Court. The Project is currently awaiting the decision of the Court of Criminal Appeals for the State of Oklahoma in that case (*City of Tulsa v. Carmack,* Case No. 0-79-58).

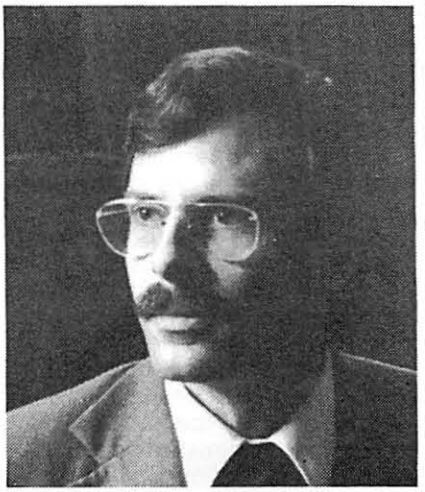
In addition, the Litigation Project is participating in several California appellate cases which will clarify some of the ambiguities of the decision in *Pryor v. Municipal Court,* establishing criteria for arrest and prosecution, setting forth the roles that plainclothes vice officers may and may not play, and testing the appropriateness of the jury instructions which were developed by California's official jury instruction committee (CALJIC) as a result of the work of the National Committee's jury instruction project (see above.)

Student Organizations: The Litigation Project filed an amicus curiae brief in the case of *Gay Student Services v. Texas A&M University,* which was recently decided by the United States Court of Appeals for the Fifth Circuit, Case No. 77-3395, opinion filed February 20, 1980. The student organization was denied recognition by the University, and filed suit in Federal Circuit Court for injunctive relief. The Federal District Court dismissed the complaint on a number of procedural theories. The Court of Appeals reversed and ordered the District Court to reinstate the complaint and allow the students to prove their case. The Court of Appeals held that if the facts stated in the complaint were true, the students had stated a cause of action entitling them to a decision on the merits. The Project has also acted as consultant to attorneys and student organizations in similar cases around the country in which universities have denied official recognition to gay student organizations.

Prostitution: The Litigation Project is currently involved in a challenge to the prostitution laws in this country. The Project has chosen California as the battleground for this litigation for three reasons. First, the California statute is one of the broadest and most prohibitive in the country, if not the world. Second, the California Supreme Court has demonstrated a willingness to strictly scrutinize statutes regulating sexual conduct and speech. Third, the Project has enlisted the support of a historian, a sociologist, sex therapists, and several attorneys and law students to work on the project (all of whom reside in Los Angeles). The research material and the briefs developed in this case will be a model for challenging prostitution laws in other states.

In *People v. Farnia, et al.*, presently before the Los Angeles and Beverly Hills Municipal Courts, the Project is seeking to establish that private sex between consenting adults is a constitutionally-protected right, and there is no compelling state interest or rational basis for criminalizing private sex simply because money or other consideration is involved. The Project is seeking to limit the statute so that only the public aspects of prostitution are regulated, not the private aspects. On March 19, 1980, the California Court of Appeal, Second Appellate District, issued its decision in one of the Litigation Project's cases, *People v. Hill* (2 CRIM. No. 34488, Super.Ct.No. A077132), which decision severely limited the definition of prostitution in the context of a pimping and pandering case to the types of "lewd" acts set forth in *Pryor v. Municipal Court.* Nude modeling and such other sexual acts not involving activity *between* two persons thus can no longer be prosecuted under the prostitution statute.

Jay M. Kohorn
Co-Director of the
Litigation Project



Thomas F. Coleman
Co-Chairperson and
Co-Director of the
Litigation Project

Reporting the News

The Legal Periodical

The Sexual Law Reporter (SLR), published by Co-Chairperson Thomas F. Coleman, has been a valuable resource for lawyers and judges throughout the country for over half a decade and is increasingly used by scholars, educators, legislators, administrative officials, and other professionals for much source material available nowhere else.

The periodical has included judicial and administrative case summaries, pending litigation, crucial portions of trial and appellate briefs, special original articles, and analyses which are being cited with increasing frequency in the courts. In addition, important court opinions and, especially, unpublished opinions, have often been reprinted in full. Supporting and contributing to the SLR has been a major activity of the Committee.

The SLR remains available as a consulting service to those in need of its expertise in drafting legislation, administrative guidelines, preparing court briefs, implementing executive orders, or conducting educational seminars. When appropriate, the SLR publishes monographs on subjects of particular interest in the area of sexual law. It also continues its news release service by sending stories and information about important current developments in the area of sexual civil liberties to appropriate newspapers and other periodicals.

Making the News

In the Federal Government

Immigration and Naturalization: Statutes and regulations regarding aliens' private sexual orientation and conduct have been reviewed with the Commissioner of the Immigration and Naturalization Service. Some proposed changes have been adopted.

Public Housing Assistance: The Committee was consulted by the General Counsel's office of the Department of Housing and Urban Development (HUD) regarding regulations defining "family" to include unmarried couples of the same and opposite sex living in a "stable relationship."

Employment Discrimination: A national effort was begun to reverse the Equal Employment Opportunity Commission's (EEOC) decision that it lacks jurisdiction to process complaints alleging private employment discrimination for reason of sexual orientation.

Civil Rights: Testimony was given before the United States Commission on Civil Rights concerning violations of sexual minorities' civil rights, urging complete investigations.

Child Pornography: Members of the Committee have given testimony before and made recommendations to the United States Senate subcommittee investigating child pornography.

Legal Services: The Committee has been a consultant to members of the United States House of Representatives regarding authority of the Legal Services Corporation to aid litigation involving gay rights issues, resulting in defeat of a bill to oust the corporation of that authority.

Criminal Law Reform: The Committee has participated in the monitoring and advising of the National Commission for Reform of Federal Criminal Laws (Brown Commission) so that the sexual provisions of the proposed Federal Criminal Code are brought into conformity with the principles of sexual civil liberties.

Military Law: A special brief for voir dire was submitted in the administrative court martial of Air Force T/Sgt. Leonard Matlovich; also, members of the Committee served as expert witnesses.

In the State Governments

The Committee and its members have been or are involved in:

Consultations and meetings with governors (for the purpose of obtaining gubernatorial executive orders to prohibit discrimination in jobs, housing, etc.), attorneys general, legislators, city councils, and various administrative leaders, personnel and groups:

Work on ***penal code revisions and legislation*** regarding sexual offenses ("loitering," "deviate sexual conduct," "sodomy," "lewd conduct," solicitation, fornication, prostitution, sex offender registration, etc.);

Development of programs of ***pardon or sentence commutation*** for persons still in prison for now-abolished sexual offenses;

Testimony before various governmental agencies and commissions, such as the Florida State and Pennsylvania State advisory committees to the United States Commission on Civil Rights, and the Illinois Department of Insurance (including a successful effort to achieve adoption of a regulation prohibiting discrimination because of marital status or sexual orientation in issuance of life and health insurance policies);

Trials and appellate cases, primarily concerning the constitutionality of state penal statutes or discrimination on the basis of sexual orientation or practices (including nonrecognition of gay student groups on college campuses); and

Work as ***advisors and consultants*** to judges, prosecutors, public defenders, and private attorneys regarding specific statutes, their constitutionality under state and federal Constitutions, and their practical administration.

In Professional Associations

The Committee and various members have written resolutions for, have worked with various sections of, and have testified before the *American Bar Association*, resulting in adoption of official policies urging state legislatures to provide legal remedies against discrimination against single persons in such areas as housing, credit, and employment; and urging state legislatures to repeal laws criminalizing private sexual conduct between consenting adults. The Committee is also urging that the ABA go on record against discrimination because of private sexual conduct or sexual orientation in regard to lawyers or applicants for admission to the bar.

In addition, members of the Committee are taking active roles in the American Historical Association, the American Sociological Association, and the American Association of University Professors.

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Illinois Supreme Court rejects 'Marvin rule'

The Illinois Supreme Court in *Hewitt v. Hewitt*, 394 N.E. 2d 1204 (1979) has declined to follow the trend started by California in *Marvin v. Marvin*, 18 Cal. 3d 660 (1976) regarding the division of property following the breakup of a meretricious relationship. (For a review of the judicial decisions following *Marvin*, see 5 Sex.L.Rptr. 25 [April/June 1979]).

The facts in *Hewitt* were uncontested. When the plaintiff became pregnant in 1960, defendant told her "that they were husband and wife and would live as such, no formal ceremony being necessary, and that he would 'share his life, his future, his earnings and his property' with her." For the next fifteen years they held themselves out as husband and wife and had three children. When they separated, plaintiff sued to recover one-half of the property accumulated during those fifteen years. The trial court denied her relief; the appellate court reversed, finding that plaintiff's complaint had stated a cause of action on an express oral contract. The appellate court adopted the reasoning of the *Marvin* decision but limited its application to "a setting where the relationship of the parties outwardly resembled that of a traditional family."

The Illinois Supreme Court reversed, holding that plaintiff's claims "contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants."

The Court stated that "the issue of unmarried cohabitants' mutual property rights . . . cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties to such relationships." Major public policy questions are involved and the Court noted that more important than the rights of the parties involved is "the impact of such recognition upon our society and the institution of marriage." It queried:

> "Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as 'illicit' or 'meretricious' relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society? In the event of death shall the survivor have the status of a surviving spouse for purposes of inheritance, wrongful death actions, workmen's compensation, etc.? And still more importantly: what of the children born of such relationships? What are their support and inheritance rights and by what standards are custody questions resolved? What of the sociological and psychological effects upon them of that type of environment?

The Court further noted that the Illinois Marriage and Dissolution of Marriage Act ("the Act"), enacted in 1977, invalidated common law marriages, yet the appellate court decision, if allowed to stand, in effect revived the doctrine of common law marriage. Finally, it was pointed out that in enacting the Act, the Illinois Legislature adopted for the first time the concept of the putative spouse, whereby an unmarried person acquires the rights of a legal spouse if he goes through a marriage ceremony and cohabits with another in the good faith belief that he validly married.

In view of the fact that the Legislature had so recently limited a property division between unmarried cohabitants to situations involving a putative spouse, especially since at the time of the Legislature's deliberations *Marvin* had been decided and was widely publicized, the Court concluded that any change in the property rights of unmarried cohabitants would have to come from the Legislature.

Agreement for procreational sexual conduct is void

Fournier v. Lopez, California Court of Appeal, 1st District, Opinion Filed May 2, 1979.

Ms. Fournier and Mr. Lopez carred on a love affair for three years. In 1972, Ms. Fournier's doctor told her that she would be required to have an operation within a year or two which would totally destroy her ability to bear children. In 1973, Ms. Fournier told Mr. Lopez of this problem and that she wanted to bear a child before the impending operation would make it impossible. She asked Mr. Lopez to father her child. After Lopez told her that he could not afford the financial responsibility for a child, Ms. Fournier promised him that if he would impregnate her she would raise the child herself and assume all financial responsibilities for the upbringing of the child. As a result, the parties orally agreed that Mr. Lopez would impregnate Ms. Fournier and that Ms. Fournier would be solely responsible for the support of the child.

In 1974, Ms. Fournier gave birth to the baby. She later changed her mind with respect to the oral agreement and decided that she needed financial assistance from Mr. Lopez.

A lawsuit was instituted and the trial court held that the parties' oral contract was binding on the mother. She appealed and the California Court of Appeal, First District, reversed the trial court decision in an unpublished opinion. *Fournier v. Lopez*, Court of Appeal, opinion filed May 2, 1979.

The majority, citing *Marvin v. Marvin* (1976) 18 Cal 3rd 660, held that "as stated in Marvin, if sexual acts form an inseparable part of the consideration for the agreement, the agreement is invalid. In the present case, the expressed consideration for the agreement was the sexual services of respondent. Without these services there would not have been an agreement. The contract is invalid."

Justice Parrish filed a dissent in which he stated, "The question is, may two people strike an enforcable bargain that if they have a baby, that between themselves, only one will be financially responsible for the child's upbringing?

"The majority says no because the agreement was based on an 'illicit consideration of meretricious sexual services.' (Marvin v. Marvin (1976) 18 Cal 3rd 660, 671, 672, 674, 683, 684.) They contend that this was an agreement for prostitution . . . meretricious sex and prostitution are synonymous terms.

"Penal Code Section 647, subdivision (b) proscribes prostitution. But to describe either the father, the mother, or both, in this case, as prostitutes is completely gratuitous.

"This was not a contract in aid of prostitution, it was an agreement in aid of procreation and as such cannot be deemed unenforceable as against public policy."

most teenage pregnancies are unwanted and that a high proportion of teenage girls who become pregnant seek abortion services. The court also pointed to statistics showing that teenage pregnancies pose a higher medical risk to both the adolescent mother and her infant than births to adult women. Another reference was made to the fact that unwanted teenage pregnancies contribute to a high dropout rate so that a great number of teenagers who become pregnant do not finish high school.

After reviewing these detrimental consequences the court stated, "The injurious effects of pregnancy on an unwed teen-ager are thus substantial, far-reaching and may well include severe physical, mental and emotional trauma. In our view a responsible Legislature need not blind itself to the serious sociological consequences. Understandably concerned about the scope of these problems it may, in an era of growing permissiveness, choose to meet them in a variety of ways. It may encourage sex education in schools and provide for the dissemination of relevant educational information and medical attention in a manner described in Civil Code, Section 34.5. It may also, in our view, properly attack the problem more directly by expressly prohibiting acts of sexual intercourse performed by a male with a female, not the wife of the perpetrator, who is under the age of eighteen years."

The court added, "the Legislature is well within its power in imposing criminal sanctions against males, alone, because they are the *only* persons who may physiologically cause the result which the law properly seeks to avoid."

The defendant contended that even if the prevention of pregnancy is a compelling state interest, the classification scheme of the statute is overly broad and unnecessary to the protection of the female minor. He suggested that the state's interest in preventing pregnancy could be served equally well by removing from the ambit of the statute all those who use birth control devices or techniques and all those otherwise incapable of procreation. The Supreme Court disagreed with this argument and quoted from the Supreme Judicial Court of Maine in the case of *State v. Rundlett*, (1978) 391 Ap.2d 815, "We doubt that Legislators, intent on use of the criminal law to prevent juvenile pregnancies, would throw such a roadblock in the way of effective prosecution as would be created by subjecting an under-age prosecutrix to cross-examination of such additionally embarrassing and uncertain details. Furthermore, we believe legislators' rejection of the defenses suggested . . . reflects their reluctance to rely, for accomplishment of their anti-pregnancy objective, upon the doubtful efficacy of contraceptives and the truth of the inevitable claim of non-emission by a male charged with statutory rape."

Defendant suggested that the state's interest in preventing pregnancy could be served equally well by removing from the ambit of the statute all those who use birth control devices or techniques and all those otherwise incapable of procreation.

With respect to the claim that the statute violated equal protection because it only subjects the male sexual partner to prosecution and not the minor female, the court stated, "Furthermore, the Legislature may well have believed that the criminal prosecution of a minor female equally with a male would, as a practical matter, effectively eliminate any possibility whatever of prosecution under the statute. A potential prosecutrix, or family, would be unlikely ever to complain if she would herself be subject to a prosecution on identical charges. Because the Legislature has enacted this legislation with the principal objection of protecting minor females as a class, it is not surprising that it simultaneously elected to exclude the victim herself from the statutory proscription."

The defendant argued that if the court upheld the statute this would necessarily create adverse inferences regarding the capacity of minor females to make intelligent and volitional decisions. In this regard the court stated, "by its very adoption of Section 261.5 the Legislature necessarily acknowledged the obvious truism that minor females are fully capable of freely and voluntarily consenting to sexual relations. If this were not so, the charge brought in these cases would be one of forcible rape." As a result the court rejected this contention.

Finally, the court noted that it is quite possible for the Legislature to modify the statute, to take into consideration one or more of defendant's contentions. However, the court stated that the Legislature is not constitutionally compelled to do so. The court noted that in all of those states which have adopted a neutral statute, the change was effected by the Legislature and not by judicial decree.

There was a rather lengthy dissent written by Justice Mosk, in which Justice Tobriner and Justice Newman concurred. Portions of that dissent are reprinted below.

"I cannot subscribe to the implied premise of the majority that the female of the human species is weak, inferior, and in need of paternalistic protection from the state. That concept is an anachronism in a society in which females have achieved remarkable progress toward equality . . .

"The majority gloss quickly over the facts of this case, yet they illustrate once again the fundamental unfairness of the law that always punishes the young man and never the young woman for a joint act of which she was often equally the cause.

"At the time of the incident, the defendant herein, Michael, was seventeen and a half years old: the so-called 'victim', Sharon, was only one year and eighteen days younger than he. On the evening in question, Sharon and her twenty-one year old sister bought a half-pint of whiskey and two Pepsi-colas to use as mixers. After making this purchase they walked to a bus-stop; Michael and two other male youths rode by on their bicycles, then returned and asked the girls if they would like to drink some wine. The girls replied affirmatively, and accompanied the boys to the railroad tracks. The group drank while walking to the tracks and continued to

do so on arrival. Sharon and Michael then went into the bushes, lay down and began kissing and hugging for half an hour. They were interrupted by Sharon's sister, who asked Sharon if she was ready to leave. Sharon replied that she was not, and her sister left with one of the other boys. With remarkable impartiality, and on her own initiative, Sharon then began kissing a third boy. After he too departed, Sharon and Michael went to a park, lay down on a bench and resumed their sexual activities. In due course Michael told Sharon to remove her pants and when at first she demurred, he allegedly struck her twice. Sharon testified she then said to herself, 'Forget it,' and decided to let him do as he wished. The couple then had intercourse."

The dissenting Justices conceded, as did the majority, that the statute discriminates on the basis of sex and must be carefully scrutinized to determine not only whether the statute serves a compelling state interest but also whether the statute is narrowly tailored to achieve that objective.

The dissenting Justices added, "Neither the Attorney General nor the majority offer any support for their theory that the prevention of pregnancy is or ever was among the purposes of Section 261.5, and both the history and wording of the statute lead to a contrary conclusion. As presently codified the section proscribes the conduct commonly referred to as statutory rape. The modern prohibition against this conduct dates back to the statutes of Westminister enacted during the reign of Edward I at the close of the 13th Century. (Citation omitted.) The age of consent at that time was twelve years, and in 1576 it was reduced by statute to ten. (Citation omitted.) The latter statute was held to be part of the common law of England that was brought to the United States. (Citation omitted.) Its purpose was simply to prohibit sexual intercourse with the underaged female because she was believed to be 'too young to understand the nature and quality of her act' and hence incapable of intelligently consenting thereto. The common law is devoid of any evidence that the statutory rape law was intended to prevent such females from becoming pregnant.

"Statutory rape law in California had it's origin in a provision of our first penal statute (Stats 1850, Ch. 99, Sec. 47, P.234.) Subsequently re-enacted as Section 261, Subdivision 1 of the Penal Code of 1872. These early statutes proscribed sexual intercourse with females under the age of ten, thereby following the English statute of 1576. In 1889, the California statute was amended to make the age fourteen. (Citation omitted.) In 1897, the age was advanced to sixteen. (Citation omitted.) And in 1913, it was fixed at eighteen, where it now remains.

"In light of its origins surely it is at least 'historically improbable' (citation omitted) that the purpose of this statute was prevention of pregnancy. As first enacted, the statute made punishable 'every person of the age of fourteen years and upwards, who shall have carnal knowledge of any female child under the age of ten years, either with or without her consent.' (Citation omitted.) It is a known and indisputable fact—of which we are therefore bound to take judicial notice (citation omitted)—that because of physiological immaturity, the chances that a child of nine years of age or younger can be impregnated are essentially nil. As the majority put it in another context, 'to hold otherwise defies not only common sense and reality but the fundamental laws of biology.'

"The true intent of the Legislature in adopting the California statutory rape law, rather, is revealed in the draftsmen's notes to the Penal Code of 1872. Echoing the view of the common law and citing Blackstone, the draftsmen explained that 'This provision embodies the well settled rule of the existing law; that a girl under ten years of age is incapable of giving any consent to an act of intercourse which can reduce it below the grade of rape.' (Citation omitted.) There was no mention whatever of pregnancy prevention.

"Nor does the gradual increase in the age of consent between 1889 and 1913 provide a legitimate basis for infering that pregnancy prevention ever became a goal of the statute.

"In any event, a far more plausible explanation for these amendments of the statute appears from other legislative history: the age defining this offense was undoubtedly increased because popular views changed both with regard to the suitable age of women for

The majority . . . illustrate . . . the fundamental unfairness of the law that always punishes the young men and never the young women for joint acts of which she was often equally the cause.

marriage and the age until which they were deemed appropriately subject to protective legislation. Thus Section 56 of the Civil Code of 1872 fixed 15 as the age at which a female could marry without parental consent, but in 1921 the age was raised to 18. (Citation omitted.)

"Moreover, even after the age of consent had been raised to a level at which conception became biologically possible, this court continued to declare that 'The obvious purpose of [the statutory rape law] is the protection of society by protecting from violation the *virtue* of young and unsophisticated girls . . . .' (Citations omitted.)

"Finally we recognized the same purpose of the statute—to protect the virtue of young girls—long after the age was raised to 18. In the landmark decision of *People v. Hernandez* (1964) 61 Cal.2d 529, 531, we stated that the statutory rape law conclusively assumes the under-age female incapable of giving informed consent to sexual intercourse because 'she is presumed too innocent and naive to understand the implications and nature of her act . . . .'

"The language of Section 261.5 confirms the lessons of its history. The statute makes no attempt to define culpability in terms of sexual intercourse that creates a risk of pregnancy. It does not permit a defense that the couple used contraceptives or employed other pregnancy prevention techniques, even in cases in which the method of contraception is extremely effective. Nor does the statute make any exception for cases in which either the male or female is sterile, or emission did not occur; yet emission is not a prerequisite to conviction, for 'Any sexual penetration, however slight, is sufficient to complete the crime.' (Citation omitted.) Finally, since

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all girls under the age of 18 fall within its scope, the statute punishes intercourse with a substantial number for whom, as noted above, conception is a sheer impossibility simply because of physiological immaturity.

"In short, reducing illicit pregnancies among teenage girls may well be a laudable governmental objective, but it is wishful thinking to believe that the California statutory rape law was actually enacted or reenacted for that purpose. Under the cases cited at the outset, therefore, it may not properly be invoked to save the statute."

The dissenting Justices took note that many, if not most, acts of sexual intercourse between parties under the age of 18 are done with mutual consent. Yet the statute punishes only the male for his part in the joint conduct. They felt that this was unconstitutionally discriminatory. The dissent also points out that at least 31 jurisdictions now prohibit sexual intercourse with underaged persons of either sex. (Editor's note: In many of these states the age of consent is 16 years old.)

The dissent further states, "Certainly it is permissible for the Legislature to enact statutes for the protection of the moral character of minors of both sexes, and in particular to prevent their sexual exploitation by persons older and more mature than they; but absent a compelling reason for doing so, equal protection forbids the law to foster one standard of socially acceptable conduct for males and another for females."

New York decision declaring prostitution law unconstitutional is overturned on appeal

In re Dora P. (1979) 418 N.Y.S. 2d 597, Appellate Division, Supreme Court, State of New York.

On December 5, 1977, the Honorable Margaret Taylor, Judge of the Family Court, New York County, issued an opinion in which she declared the New York State prostitution law (Section 230.00 of the Penal Law) and the New York State sodomy law (Section 130.38 of the Penal Law) unconstitutional. *In re P.* (1979) 400 N.Y.S. 2d 455.

On June 28, 1979, the Appellate Division of the Supreme Court of the State of New York issued an opinion reversing Judge Taylor's decision. *In re Dora P.* (1979) 418 N.Y.S. 2d 597.

The case involved a fourteen-year-old female who was brought before the family court by way of a petition charging her with juvenile delinquency. The petition alleged that "respondent did offer to perform a deviate sexual act for U.S. currency," an act which if committed by an adult would constitute the crime of prostitution.

In her opinion Judge Taylor noted that, under the Family Court Act, the court can find that a respondent is a juvenile delinquent only if the court finds beyond a reasonable doubt that the respondent did any act which, if done by an adult, would constitute a crime. The threshold question is, therefore, whether such an act would be a crime if committed by an adult. If not, then the court can go no further and must dismiss the petition. Accordingly, if acts committed by an adult would not constitute a crime because the criminal statute or statutes making such alleged acts a crime were unconstitutional, such acts could not be the basis for a charge of juvenile delinquency.

Judge Taylor noted, "Inasmuch as the petition alleges that the respondent offered to perform an act of consensual sodomy for a fee, the charges brought against respondent necessarily invoke the prostitution statute (P.L. Section 230.00) and the consensual sodomy law (P.L. Sections 130.38; 130.00[2])."

After analysis of statistics showing that the New York prostitution law was enforced in a discriminatory manner against women, Judge Taylor declared that statute unconstitutional as violating the constitutional guarantee of equal protection. On appeal, however, the Appellate Division noted that Judge Taylor had used an improper procedure to make such a determination. The Appellate Division noted that a court may not declare a statute unconstitutional because it is enforced in a discriminatory manner. The proper procedure is for the respondent to file a motion to dismiss the complaint because of such discriminatorty action and for the court to hold an evidentiary hearing so that the court may determine the constitutional issues. Because respondent did not file a motion to dismiss the complaint and because Judge Taylor failed to hold an evidentiary hearing on the manner in which the statute was being enforced, the Appellate Division held that, "under the circumstances, the holding that Section 230.00 of the Penal Law was discriminatorily enforced was without warrant in law."

The New York sodomy law criminalizes "deviate" sexual intercourse performed by unmarried persons, whether of the opposite or the same sex. Thus, the statute creates a distinction between the private consensual sexual conduct of married and unmarried persons. Judge Taylor held that the New York sodomy law violated the right of privacy because "the right of privacy does not attach to the marital relationship but to the individuals involved." She also held that the sodomy law violated equal protection in that there was no rational basis for allowing married parties to engage in deviate sexual intercourse but not allowing unmarried parties to engage in the same conduct in private. With respect to

The lower court stated that "Private, intimate, consensual, sexual conduct not harmful to others, even if it violates the personal moral codes of many, does not violate public morality and is protected by the right of privacy."

these holdings pertaining to the sodomy statute, the Appellate Division of the Supreme Court held, "Constitutional questions should not be reached unless there is need for their determination to resolve the issue at hand and the question is squarely presented."

The Appellate Division added, "No such need here exists; nor, indeed, is the issue presented. Were respondent to be found guilty of the sexual misconduct with which she is charged, the finding could only be that she had performed acts which, if committed by an adult,

would constitute prostitution. That is the only sexual misconduct with which she is charged, and, hence, is the only conduct of which she could be found guilty. In reaching out to come to grips with a problem which was not before it, the Family Court erred." Thus, the Appellate Division held that, since the minor was not actually charged with engaging in sodomy but rather was charged only with engaging in prostitution, the Family Court should not have dealt with the constitutionality of the sodomy statute.

Judge Taylor further held that the prostitution statute violated the right to privacy. The New York statute in question reads: "A person is guilty of prostituion when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."

After reviewing numerous decisions by the U.S. Supreme Court, Judge Taylor stated, "With the foregoing explication of the existence of the right to privacy under the New York State Constitution, and the philosophical underpinnings of this right, this court states at the outset the premise that private, intimate, consensual, sexual conduct not harmful to others, even if it violates the personal moral code of many, does not violate public morality and is protected by the right of privacy."

Judge Taylor noted, "The penal law should act to deprive an individual of liberty only when a real and demonstrable harm to the public can result from the proscribed conduct. The state cannot rely upon the bare assertion of immorality to jusify a criminal prohibition."

Judge Taylor then analyzed the claims that "prostitution is indeed harmful in that it spreads disease, leads to ancillary criminal conduct, encourages criminal organization, and generally may be characterized as anti-social behavior both offensive and injurious to the community." With respect to the claim that prostitution spreads venereal disease, Judge Taylor noted, "All empirical data supports the conclusion of Dr. Charles Winnick of the City University, President of the American Social Health Association, that '[T]he amount of venereal disease attributable to prostitution is remaining fairly constant at a little under five percent, which is a negligible proportion compared to the amount of venereal disease we now have.'"

She concluded that "the state may have a legitimate interest in seeking to eradicate even the small incidence of disease, but the attenuated relationship between prostitution and venereal disease emphasizes that it would be unreasonable to prohibit all prostitution for the sake of eradicating five percent of the 'VD' health hazard."

It was claimed by the Corporation Council that prostitution leads to other crimes. Judge Taylor noted, "The Corporation Council has not come forward with any empirical evidence substantiating that prostitution is the cause—in fact—of ancillary crime. Indeed, it has been concluded by numerous social scientists that crimes ancillary to prostitution are a by-product of the environment to which society consigns prostitution." In this regard, she held "Thus there is a clear inference that it is the criminalization of prostitution and not prostitution itself that leads to ancillary crime." On this point Judge Taylor concluded, "The state must proceed against ancillary crimes directly by enforcing the specific sanctions against such conduct and may not rely on the blunderbuss approach of incarcerating all prostitutes."

Judge Taylor then reviewed the claim that prostitution encourages the spread of organized crime. She held, "There is no factual basis for this allegation. Prostitution plays 'a small and declining role in organized crime's operation.' "

With respect to the argument that commercial sex undermines the stability of the family and is simply immoral, Judge Taylor noted, "The penal law should act to deprive an individual of liberty only when a real and demonstrable harm to the public can result from the proscribed conduct. The state cannot rely upon the bare assertion of immorality to justify a criminal prohibition." After reviewing numerous articles on the subject, Judge Taylor concluded, "It has never been demonstrated that commercial sex has had any effect on the stability of marriage or the family."

Judge Taylor did not hold that the state may not regulate public solicitation of prostitution, she merely held that the prohibition against any and all forms of private sex for money was unconstitutional. With respect to the argument that prostitution is said to offend public sensibilities, Judge Taylor stated, "Individual members of the public may indeed be offended by the public conduct associated with prostitution: they may be solicited on the streets by prostitutes, embarrassed by the advances of street walkers, or find that their path on the sidewalks of thoroughfares blocked. Such conduct may, indeed, be a harm legitimately of interest to the state should it constitute public disorder." Judge Taylor went on to state, "However, the Court will point out that this public conduct is not caused in fact by the act of engaging in sexual relations for a fee. This harm, if any, is caused by the solicitation aspect of prostitution. The *public* aspect of prostitution, solicitation, must be distinguished from its *private* aspect, the performance of sexual relations for a fee in private. Street solicitation is a method of advertising the business of commercial sex. It is separable from the underlying activity. In Nevada and Great Britain, for example, prostitution has been legalized, but street solicitation is prescribed by public order, breach of the peace-type statutes. Advertising is unoffensibly and effectively accomplished by the use of discrete newspaper advertisements."

The *public* aspect of prostitution, solicitation, must be distinguished from its *private* aspect, the performance of sexual relations for a fee in private.

After reviewing the overall statutory regulation of prostitution and the constitutional considerations involved, Judge Taylor held, "Since it has been demon-

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NY DECISION

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strated that only this public element of prostitution may make that conduct harmful, and that public conduct may be dealt with separately from the sexual conduct itself, it would be unreasonable for the state to completely proscribe private, sexual conduct in order to reach distinct public solicitation. Members of the public may have a protectable privacy interest: not to be repeatedly accosted on the streets by a prostitute any more than a religious zealot, peddler, alcoholic, or panhandler, and not to have a group of street musicians, noisy teenagers, solicitors for charities, or street walkers converging at his or her doorstep. These public interests can be protected, but by less intrusive means than those now employed by the state.

"Private, consensual sexual conduct between adults, whether or not performed for a fee, is protected by the right of privacy."

"Private, consensual sexual conduct between adults, whether or not performed for a fee, is protected by the right of privacy. If the state has a legitimate interest in curbing public disorder, it can and must accomplish this objective without depriving the individual of his or her right to engage in private, consensual sexual relations. The constitutionally protected right to privacy makes it encumbant upon the state to implement its policy by more reasonable, less intrusive means."

With respect to Judge Taylor's holding that the prostitution statute was overbroad and violated the right of privacy, the Appellate Division of the Supreme Court also reversed. First, they held, "Whatever may be the rule in other jurisdictions, in this state, there is no legally recognized right of privacy save as it may be conferred by statute." The New York Constitution does not specifically contain a right to privacy. Thus, the Appellate Division reviewed the privacy right in the context of the Federal Constitution only.

The Appellate Division started its analysis by citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628. In that case, the Supreme Court allowed an injunction to issue against the public showing of obscene films exhibited to consenting adults only.

The Appellate Division then misconstrued the analysis of Judge Taylor with respect to the right of privacy. The Appellate Division focused only on the issue of public solicitation, and not on the issue of engaging in commercial sex in private. The Appellate Division held that using the public streets to solicit for prostitution is hardly a right to be deemed "Fundamental" or implicit in the concept of "ordered liberty." The Court then held that the statute criminalizing prostitution was not unconstitutional as applied to this case. The Appellate Division did not venture an opinion, nor did it respond to Judge Taylor's holdings, that the statute was unconstitutionally overbroad on its face in that it prohibited engaging in commercial sex in private. That issue appears to be left to be resolved in another case at some future time.

Reverse discrimination is a defense in California prostitution case

People v. Municipal Court of San Francisco (Lomia Street, real party in interest) (1979) 89 C.A.3d 739.

Several defendants were charged with violating various penal code sections relating to prostitution in the San Francisco Municipal Court. The defendants filed a pre-trial motion to dismiss the charges against them on the grounds that the prostitution statute was being discriminatorily enforced against heterosexuals, that is, a sort of reverse discrimination argument that homosexuals were getting preferred treatment by the prosecutor's office. Defendants then sought discovery into various records, files, and policies of the prosecutor's office to help prove their defense of discriminatory enforcement.

In support of their discovery motion, defendants filed an affidavit declaring that the San Francisco District Attorney's office enforces various penal code sections relating to prostitution and lewd conduct against women who allegedly deal in heterosexual prostitution and related offenses, but not against adult male homosexuals, where these violations occur in certain types of homosexually-owned, operated, or patronized commercial establishments or coincident with operation of male escort services. They claimed the discriminatory enforcement was the result of a policy decision by the San Francisco District Attorney, instituted as a result of his election campaign promises to members of the homosexual community. Those promises pledged that various bath houses would no longer be investigated or prosecuted by the District Attorney's office; an interdepartmental memo confirmed that the police would no longer investigate any possible adult violations of the law relating to any male escort service.

The trial court granted most of the requests for discovery into records and files of the prosecutor's office. The prosecution then successfully sought a writ of mandate from the Superior Court directing the Municipal Court to vacate its discovery order on the grounds that the court had exceeded its jurisdiction. The defendants appealed to the Court of Appeal.

On appeal, the Court stated, "in our view the herein defendants' allegations set forth a claim that they have been victims of an intentional and purposeful and therefore unconstitutional, discriminatory enforcement of the statutes in question. When read and viewed in their entirety, including the rational inferences reasonably drawn therefrom, the declarations show that the defendants are prosecuted because they were women and not men, and because the alleged violations took place in their private apartments instead of public bath houses. Both of the classifications are arbitrary and unjustifiable, and, *if* proved, would be sufficient to establish a denial of equal protection." The Court went on, "denial of defendants' discovery motions would in effect be a denial of their disciminatory enforcement defense, one which has been declared available by the California Supreme Court."

The Court concluded "Discovery is denied where information sought is privileged (*Pitchess v. Superior Court*, 11 C.3d 531), where it represents the work product of the prosecution (*People v. Boehm* (1969) 270 Cal.App.2d 13), where it has no relevance to the defense (*Hinojosa v. Superior Court* (1976) 55 Cal.App.3d 692), and where it is requested with such lack of specificity that it appears to be little more than a fishing expedition (*Ballard v. Superior Court* (1966) 64 Cal.2d 159). The discovery requests granted in the instant case do not fall into any of the above categories. They specifically relate to the defense of discriminatory enforcement, seeking statistical information regarding the number of arrests, prosecutions or investigations of sexual acts or solicitations therefor between adults in homosexual bath houses and/or relating to male escort services and any statements or interdepartmental memoranda which may exist regarding a policy, vis-a-vis the specified homosexual bath houses and male escort services in the District Attorney's office or in the San Francisco Police Department and the reasons therefor." As a result, the Appellate Court vacated the Superior Court order, and reinstated the Municipal Court's order granting discovery.

Anchorage prostitution ordinance is invalid

Brown v. Municipality of Anchorage (1978) 584 P.2d 35.

The Supreme Court of Alaska in the case of *Brown v. Municipality of Anchorage* (1978) 584 P.2d 35, has declared an Anchorage Municipal Ordinance which prohibits loitering for the purpose of solicitation of prostitution to be unconstitutional. The ordinance in question, Municipal Ordinance 8.14.110, states, "no person will loiter in or near a thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of, inducing, enticing, soliciting or procurring another to participate in an act of prostitution." The ordinance goes on to state that various circumstances may be considered in determining whether the purpose manifested is that to commit prostitution. It then states as one of those circumstances that the person is a known prostitute or panderer. It goes on to state, "for the purpose of this section, a 'known prostitute or panderer' is a person who within five years previous to the date of arrest for violation of this section has within the knowledge of the arresting officer been convicted of violating a provision of the city codes or Alaska codes pertaining to prostitution or lewdness."

The Supreme Court noted, "thus anyone known to the police to have committed a prostitution-related offense within the past five years is subject to arrest under this ordinance if he or she is found 'loitering'".

The Supreme Court applied a dictionary definition of the word "loiter" and noted that the ordinance makes it a crime for a previously convicted prostitute or panderer to "spend time idling" to "linger in an aimless way," or "to walk or move slowly indulantly, with frequent stops and pauses."

The Alaska Supreme Court followed the decision of *Papachristou v. City of Jacksonville* (1972) 92 S.Ct. 839,

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which declared a vagrancy ordinance unconstitutionally vague and overbroad.

The Court concluded "the constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.'"

California gays receive statewide housing protection

After direct intervention by the National Committee for Sexual Civil Liberties, the Division of Fair Employment and Housing Practices of the State of California has agreed to investigate and remedy complaints of housing discrimination on the basis of sexual orientation. The National Committee caused the Division to reverse its earlier decision to specifically not handle gay housing cases.

On August 8, 1979, Thomas F. Coleman, Co-Chairman of the National Committee for Sexual Civil Liberties, sent a letter to Mr. John Martin, Jr., President of the Fair Employment Practices Commission, with respect to gay housing cases. This letter contained the arguments as to the legal duty of the Division of Fair Employment and Housing Practices to accept the gay housing cases. In part it read, "Section 1419(f)(2) of the California Labor Code states that it is the duty of the Division to 'receive, investigate, and conciliate complaints alleging a violation of Section 51 or 51.7 of the Civil Code. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.' Section 51 of the Civil Code, more commonly known as the Unruh Civil Rights Act, prohibits housing and public accommodations discrimination for any arbitrary reason. *(See In re Cox,* 1970, 90 Cal.Rptr 24.) This section has also been interpreted by the California Supreme Court to prohibit discrimination against homosexuals. (*See Stoutman v. Reilly,* (1951) 234 P.2d 449.)

The letter to Mr. Martin continued, "Recently several persons have come to the Commission with complaints of housing discrimination and violation of the Unruh Civil Rights Act. They have claimed that they were discriminated against by landlords because of their own homosexuality. The Commission has refused to accept these complaints for investigation. What we are asking for is that the Commission direct its employees to accept complaints for violations of the Unruh Civil Rights Act when such complaints allege housing discrimination on the basis of the sexual orientation of the tenant or the prospective tenant."

In essence, the National Committee was requesting that an administrative directive dated September 15, 1978, entitled "Transmittal Number 44" be modified. That administrative directive, which was distributed to all employees and investigators of the Division of Fair Employment and Housing Practices, stated that gay housing cases would not be accepted by the Division. The National Committee demanded that this administrative directive be changed so that the investigators and employees would be ordered to accept such cases instead of rejecting them.

When negotiations with various officials of the Division proved to be relatively unsuccessful, the National Committee sought and obtained intervention directly from the Governor's office. Thereafter, as a result of meetings with the Governor's office and the Secretary of State and Consumer Service Agency, the head of the Division of Fair Employment and Housing Practices agreed to reverse the previous administrative directive.

Effective October 1, 1979, the Division of Fair Employment and Housing Practices now accepts complaints from gay people throughout the State of California regarding landlords who have discriminated against them on the basis of their sexual orientation. Beginning January 1, 1980, the Division of Fair Employment and Housing Practices will submit quarterly reports to the National Committee with respect to the number of discrimination cases of this nature filed with the Commission and the way in which the Commission handled those cases.

Restroom spying by police constitutes illegal search

In two of the forty-two charges arising out of the surveillance of a public men's washroom, the Michigan Circuit Court for the County of Kalamazoo has suppressed the evidence obtained, each on different grounds.

The facts involved a search warrant which authorized the one-week surveillance of a public men's washroom by means of video and audio equipment. The purpose of the warrant was to visually and orally record *the* solicitation of sexual activity between males and any actual sexual activity between males.

In *People v. Medema*, (case no. A792-00-025FY), the oral and visual evidence recorded was suppressed on the ground that the men's room stalls afforded the people using them, for whatever purpose, a reasonable expectation of privacy and that where such an expectation exists, the search must be supported by a valid warrant. The court found that the warrant failed to meet the requirements of the Fourth Amendment. It stated that to legitimize a search which hoped to observe illegal activity, "there must be a showing of probable cause as to the place to be searched and, further, either limited monitoring of *named* parties or some reasonable grounds which would indicate that all persons on the premises are participants in the criminal activity." To permit the blanket surveillance that the warrant had authorized would, the court noted, create a "Big Brother" atmosphere that it could not nourish.

In *People v. Dezek*, (case no. C791-00-066FY), the court never reached the issue of privacy. It noted first that the Michigan search warrant statute, MCLA § 780.651-658 and MSA § 28.1259(1)-(8), did not extend to "continued surveillance" nor did it permit surveillance by electronic or photographic means. However, the evidence was suppressed on the ground that the warrant was not served on the defendant until six days after the evidence was seized, in violation of MSA § 28.1259(5) which required that the warrant be served "immediately" after the seizing of property under a search warrant.

SEXUALAWREPORTER

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THOMAS F. COLEMAN
Publisher

May, 1980

Dear Subscriber:

This letter is to inform you that the Sexual Law Reporter will be discontinuing publication of its regular quarterly issues. The last quarterly issue to be published is Volume 5, Number 4 (October/December 1979). We will, however, continue to publish special supplements once or twice each year on particular subjects of interest such as prostitution and the law, teenage sexuality and the law, etc.

The Sexual Law Reporter has published 23 issues since it started publication in 1975. We have completed 5 volumes to date. If you do not have a complete set of the SLR you may wish to purchase back issues. A binder is also available and will hold a complete set.

You may have already sent us money for Volume 6 (1980). If you have we will give you a refund or you may apply your credit to a purchase of back issues. Information concerning your refund, if applicable, is found on the reverse side of this letter. An order blank for back issues is also found on the reverse side.

The volunteer staff of the SLR thanks you for your continued support. Since many of us are involved in important litigation concerning sexual civil liberties as well as other projects in this area, we do not have the time or resources to continue reporting the news on a regular quarterly basis. However, we will let you know when we have a special supplement which may interest you.

For an overview of the kinds of projects we are working on, look to the inside of the most recent issue of the SLR (October/December 1979). We hope you will support our work.

Very truly yours,

Thomas F. Coleman

THOMAS F. COLEMAN