CONSTITUTIONAL AND EQUITABLE OBJECTIONS TO CLOSURE OF BATHHOUSES

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I

CONSTITUTIONAL OBJECTIONS TO BATH CLOSURE

INTRODUCTION

Dr. Mervyn Silverman, Director of Health for the City and County of San Francisco recently remarked: "There are substantial civil rights issues connected to a policy to close the bathhouses." (See Exhibit ___, attached to the transcript of Dr. Silverman's deposition of November 2, 1984). Defendants agree.

Plaintiffs have acknowledged that "the trial court will be able to fashion a preliminary injunction that can accommodate any of petitioners arguments that the court finds persuasive." (See "Answer and Opposition to Petition for Writ of Supercedeas," at p. 16, lines 10-12).

On October 9, 1984, Dr. Silverman issued an order commanding defendants to close their businesses that same day. (See Exhibit A to "Complaint for Permanent Injunction, Preliminary Injunction and Temporary Restraining Order). The next day, plaintiffs filed a complaint seeking an injunction to enforce Dr. Silverman's closure order.

On October 16, 1984, the court issued an "Order to Show Cause Re Preliminary Injunction." In essence, the OSC commanded defendants to show cause: (1) why Dr. Silverman's closure order should not be enforced by the court and why defendants should not be enjoined from operating their businesses pending trial; and, (2) why a more limited injunction should not issue.

Although defendants object to a closure of their businesses on constitutional, equitable, and statutory grounds, they do not oppose reasonable regulations designed to discourage high-risk sexual activity through educational and other appropriate means. (See "Proposed Terms of Preliminary Injunction).

I(A)

OBJECTION TO ILLEGAL SEARCH AND SEIZURE

Total closure of defendants' businesses would infringe several substantive constitutional rights of the owners and patrons of defendants' businesses. However, before discussing these constitutional infringements, defendants must object to the warrantless and illegal searches of their premises conducted under the auspices of the City and County of San Francisco.

Specifically, defendants object to several declarations filed by plaintiffs as a part of their moving papers in support of the requested injunctive relief, i.e., declarations of Kevin Aiken, David Anderson, James G. Campbell, and Pierre Merkl. (See Volume II of "Declarations in Support of Application for Preliminary Injunction and For Temporary Restraining Order").

For reasons discussed within, defendants insist that the court refrain from considering these declarations in evaluating the merits of plaintiffs' request for a preliminary injunction. To protect the privacy rights of the owners and patrons of defendants' businesses, the court should order the declarations stricken from the record. The portion of the court's file containing these declarations should be sealed. Furthermore, as

a condition to granting any further injunctive relief, plaintiffs should be ordered to turn over to the court all documents in plaintiffs' possession, or in the possession of declarants or their associates or supervisors, or in the possession of any employee or agent of plaintiffs, which contain references to declarants' observations while they were on defendants' premises without a warrant. After those documents are turned over to the court, they should be sealed.

Dr. Silverman is aware of the "sensitive nature of public intrusion into matters of personal privacy" which is involved in official public health actions which may be taken to address the AIDS problem in San Francisco. (See Dr. Silverman's declaration at p. 3, lines 20-21, which is included in Vol. I of "Declarations in Support of Application for Preliminary Injunction"). Dr. Silverman also has noted that sexual activity "is a matter of individual privacy". (Id, at p. 6, line 3).

Notwithstanding the awareness of the sensitive privacy rights which are at stake, the Health Department authorized and paid undercover agents to conduct warrantless surveillance of the sexual activities of patrons on defendants' premises during the first week of October, 1984. (See transcript of Dr. Silverman's deposition of November 2, 1984). Earlier this year, the city conducted a similar covert operation in which bathhouse patrons were spied on, but plaintiffs have not presented evidence from those illegal activities. (Id.)

I(A)(1)

Warrantless Searches of Defendants' Premises Violated Their State Constitutional Privacy Rights

The warrantless entry into defendants' establishments and the surveillance conducted by plaintiffs' agents of activities occurring inside these bathhouses violated both Article I, Sec. 13 and Article I, Sec. 1 of the California Constitution.

In 1972, California voters overwhelmingly amended Article I, Sec. 1 of the California Constitution to include "privacy" among other inalienable rights listed therein. For purposes of brevity, this constitution provision will be referred to as the "state privacy amendment."

Article I, Sec. 13 also protects privacy. It prohibits government agents from conducting unreasonable searches and seizures. Defendants' are not invoking federal constitutional protections against unreasonable searches and seizures. Instead, defendants arguments rest solely on state constitutional grounds. Although federal constitutional provisions may be cited from time to time in this brief, said references are purely for purposes of analogy. It is defendants' position that the state Constitution provides more than adequate protection against the constitutional infringements caused by the surveillance of plaintiffs' agents. Therefore, any reference to the "Fourth Amendment" should be considered as a reference to Art. I, Sec. 13's restriction on unreasonable searches and seizures.

A warrantless entry into a gay bathhouse for the purpose of conducting a search therein constitutes an illegal search and

seizure in violation of the Fourth Amendment. People v. Brown (1975) 53 Cal.App.3d Supp. 1, 7. Covert surveillance of public restrooms violates the Fourth Amendment. People v. Triggs (1973) 8 Cal.3d 884. Government surveillance of the sexual activities of patrons of defendants' establishments is even more offensive to constitutional guarantees against unreasonable searches and seizures.

The investigators involved in this surveillance activity were paid agents of the government and executed the spying operation at the request of the Department of Health. (See transcript of Dr. Silverman's deposition of November 2, 1984). Such "government snooping" violates the state privacy amendment. White v. Davis (1975) 13 Cal.3d 757.

Fundamental to our privacy -- and essential to social relationships and personal freedom -- is the ability to control the circulation of personal information. White v. Davis, supra, at p. 774. The covert operation instigated by the Department of Health and conducted by agents paid with government funds (to the tune of $35,000) "epitomizes the kind of government conduct which the new constitutional amendment condemns" and "constitutes 'government snooping' in the extreme." (Id, at pp. 775-776).

The state privacy amendment is "self-executing," needs no enabling legislation, and creates an enforceable right for every Californian. White v. Davis, supra, at p. 775. As Californians, defendants object to the gross violation of their privacy rights under Art. I, Sec. 1 by the warrantless entry and search of their premises by paid agents of the City and County of San Francisco.

I (A) (2)

Defendants Invoke Exclusionary Rules

Whatever label may attach to a proceeding, the exclusionary rule is triggered by improper government conduct whether the proceeding contemplates the deprivation of one's liberty or property. People v. One 1960 Cadillac Coupe (1964) 62 Cal.2d 92, 96-97. Here, defendants' fundamental property rights are threatened by the proposed total closure of their businesses.

Although the application of the exclusionary rule to civil proceedings is worked out on a case-by-case basis (Emslie v. State Bar 1974) 11 Cal.3d 210), the Supreme Court has declared that illegally seized evidence is inadmissible in a civil forfeiture proceeding. One 1960 Cadillac Coupe, supra, at p. 96. As will be discussed in the section of this brief addressing "Equitable Defenses," to the extent that a closure order is overbroad it results in a forfeiture.

This proceeding is "quasi criminal" insofar as total closure requires defendants to forfeit substantial property rights (the right to operate their businesses) and to the extent that defendants could be incarcerated for violating any injunction which may issue.

Defendants invoke the exclusionary rule of Article I, Sec. 13 (broader in scope than the federal exclusionary rule). People v. Brisindine (1975) 13 Cal.3d 528, 549-550. They also invoke the exclusionary rule associated with Article I, Sec. I. People v. Arno (1979) 90 Cal.App.3d 505, 511-513.

I(A)(3)

Vicarious Exclusionary Rule Invoked

In addition to raising their own rights, defendants also invoke California's vicarious exclusionary rule. Defendants may seek exclusion of evidence obtained in violation of the privacy rights of third parties. People v. Martin (1955) 45 Cal.2d 755, 761. The Martin rule has been consistently adhered to by the California Supreme Court. Kaplan v. Superior Court (1971) 6 Cal.3d 150, 157. The vicarious exclusionary rule overrides the mandate of Evidence Code Section 351 that "[e]xcept as otherwise provided by statute, all relevant evidence is admissible." (Id, at p. 159).

By seeking to intervene, some patrons are attempting to assert their own constitutional rights. However, other patrons whose state constitutional privacy rights (Art. I, Sec. 1, and Art. I, Sec. 13) were violated by these government authorized investigations are not intervenors. Many of them will not intervene because, by its nature, intervention would force them to disclose their affiliation with bathhouses. Others won't intervene as this requires them to come "out of the closet" -- the public equates bathhouse attendance with homosexuality.

On behalf of those patrons not intervening, defendants invoke the vicarious exclusionary rule. Accordingly, in the course of formulating its ruling in this case, defendants object to the court considering any evidence illegally gathered by the investigators while on the defendants premises.

II

A CLOSURE ORDER VIOLATES DEFENDANTS' CONSTITUTIONAL RIGHTS

A municipality may impose reasonable conditions on the operation of a business. In re Porterfield (1946) 28 Cal.2d 91, 101. Defendants acknowledge this principle of law. Therefore, they do not oppose reasonable regulations discouraging high-risk sexual activity so long as the privacy rights of their patrons are respected and so long as the regulations are not impossible for defendants to follow. In fact, defendants have formulated and submitted to plaintiffs and to the court a set regulations which accommodate the various competing interests involved in this controversy. (See "Proposed Terms of Preliminary Injunction).

II(A)

At Stake Is Defendants' Right to Operate Lawful Businesses

Defendants have a fundamental right to pursue a lawful occupation. Townsend v. County of Los Angeles (1975) 49 Cal.App.3d 263, 267. The right to engage in a lawful business is constitutionally protected. In re Porterfield, supra, at p. 102. Defendants have been exercising this constitutionally protected right for many years. In fact, defendants hold valid police permits issued by the City and County of San Francisco authorizing them to operate bathhouses.

The right to possess property is a fundamental right

protected by Article I, Sec. 1 of the California Constitution. Under Article I, Sec. 19 of the California Constitution, private property may not be taken or damaged for public use without the payment of just compensation. If a municipal regulation goes too far, it may be recognized as an unconstitutional "taking." Penna. Coal Co. v. Mahon (1922) 260 U.S. 393. In such cases, the issue is not what the taker has gained, but rather what the owner has lost. Baldwin Park Redevelopment Agency v. Irwin (1984) 156 Cal.App.3d 428, 435. Under an order of total closure, defendants will lose their rights to possess property and to operate lawful businesses which have played a historic and important role in the evolution of the gay movement and which continue to play an important function for gay males in their pursuit of safety, privacy and happiness. (See "Declaration of Allan Berube," submitted with Defendants "Response to Order to Show Cause.")

Apparently under a theory that closure is in the public interest, Dr. Silverman expects defendants to discontinue their operations, close down their businesses, shut their doors, and walk away, without any concern for their own rights or the rights of their patrons. Defendants have a vested property interest in the continued operation of their businesses. Of course, the City and County of San Francisco has the right to institute eminent domain proceedings, whereby it could lawfully acquire defendants businesses and thereby effectuate a closure. To the extent that Dr. Silverman's closure order (or for that matter, closure pursuant to the proposed preliminary injunction) is overbroad in its sweep, it violates defendants' fundamental rights to possess property and to pursue a lawful business.

II(B)

Defendants' First Amendment Rights Are Involved

Article I, Sec. 2 of the California Constitution does not merely track the language of the First Amendment to the United States Constitution. This provision of the state Constitution guarantees that every person may "freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

The California Supreme Court has unanimously held Article I, Sec. 2 to be a "protective provision more definitive and inclusive than the First Amendment. . . ." Wilson v. Superior Court (1975) 13 Cal.3d 652, 658.

Defendants adopt the approach taken by the Supreme Court in People v. Glaze (1980) 27 Cal.3d 841, and rest their entire "First Amendment" argument on Article I, Sec. 2 of the California Constitution and not on the federal Constitution. Nevertheless, in keeping with convention, the free speech rights at stake will be referred to as "First Amendment" rights. (Id, at p. 844, fn. 2).

In cooperation with the San Francisco AIDS Foundation, several months ago defendants instituted an educational program designed to discourage "unsafe sex" and to encourage "safe sex" amongst its patrons. (See "Declaration of Edward Power," submitted by defendants in opposition to the Temporary Restraining Order and attached to the "Petition for Writ of

Supercedeas" as Exhibit E.)

Nine separate educational activities were established: (1) poster in entry of establishments; (2) brochures in entry; (3) condom offered to each customer; (4) risk reduction information given to each customer; (5) posters in other locations; (6) brochures in other locations; (7) free condoms available inside; (8) signs posted advertising free condoms; and (9) "safer sex" signs posted. (Id., p. 2)

Additional educational efforts were undertaken, including a forum on "safe sex" at the Club Baths and Ritch Street baths during the busiest time for patrons. (Id., p. 3)

Up to the day the court issued the TRO requiring closure of the bathhouses, defendants continued to communicate with their patrons on the subject of AIDS, particularly in the form of posters and distribution of literature on the premises. (See "Declaration of Thomas Steel" which was submitted in opposition to the TRO and which was attached to the "Petition for Writ of Supercedeas" as Exhibit F.) Examples of the types of literature distributed to patrons by defendants is found attached to the "Declaration of Robert K. Friedel." (See Exhibit G, to "Petition for Writ of Supercedeas.)

Furthermore, defendants intend to engage in a more vigorous program of communication in the future -- that is, unless they are prevented from doing so by the "prior restraint" of closure pursuant to a preliminary injunction. (See "Proposed Terms Of Preliminary Injunction). The free distribution of "I Like Safe Sex" stickers is one of the most important features of this

planned program of communication. These stickers will be available upon entry (free of charge) and patrons will be encouraged to use them. An "I Like Safe Sex" sticker could be displayed on a patron's towel, clothing, or body. Use of such a sticker by a patron would be the most efficient way to communicate to potential partners of the patron's desire to engage in "safe sex." This would facilitate like-minded patrons to engage in intimate associations with each other rather than getting involved with persons whose sexual proclivities are unknown.

Defendants firmly believe that the freedom of intimate association between gay males is a fundamental right protected by the state Constitution, as will be discussed further in the section of this brief which directly addresses the "Constitutional Rights of Bathhouse Patrons." Neither the state, nor private organizations has the authority to unreasonably restrict the rights of gay men to freely express their sentiments (Art. I, Sec. 2) or to unnecessarily curtail their freedom of intimate association or right to the pursuit of happiness. (Art. I, Sec. I). Closure of the bathhouses constitutes an unreasonable restriction on defendants' right to communicate with their patrons, and to assist patrons in effectively communicating with each other on a subject of vital concern. Closure would constitute a "prior restraint" on the owners and patrons rights to freedom of expression. It would force patrons to go elsewhere to seek intimate associations, probably to fora which would be less conducive to the free exchange of sentiments about love, fear, and a host of other subjects of vital interest.

Defendants submit that most, if not all, of these educational activities are protected by the First Amendment. Closure of defendants establishments prevents them from continuing this educational program. Closure prevents defendants from communicating with their patrons on an ongoing basis regarding the subject of AIDS. Bathhouse owners can't communicate with their patrons if they must close their businesses and therefore, by definition, are prohibited from having patrons. Closure is an overly broad infringement on the defendants' right to communicate with their patrons on a subject vital to the well being of the patrons.

There are other First Amendment interests at stake. Some of defendants' establishments have television rooms and video rooms where audio-visual entertainment is provided. Audio-visual entertainment of this nature is traditionally protected by the First Amendment. People v. Glaze (1979) 27 Cal.3d 841; Burton v. Municipal Court (1968) 68 Cal.2d 684.

Many patrons may prefer to watch their favorite television shows, including programs such as "60 minutes" or the news, in the company of other gay men. The opportunities for social and political dialogue are enhanced for many men in such an intimate setting. Others may not have an opportunity to view adult movies at home or in a similarly relaxed setting. The bathhouses provide them with a unique opportunity to view and discuss homosexually oriented audio-visual communications. The First Amendments implications of a closure order should not be underestimated.

II(C)

A Closure Order Must Be Strictly Scrutinized

Plaintiffs have suggested that the court should defer to the decision of the Director of Health to order the bathhouses shut down. (See "Opposition to Petition for Writ of Supercedeas," at p. 24). Defendants assert that when substantial constitutional rights are at stake, judicial deference to an executive decision would violate the concept of separation of powers. Furthermore, due process requires that the validity of Dr. Silverman's closure order be determined by the court in a trial de novo. Alta-Dena Dairy v. County of San Diego (1969) 271 Cal.App.2d 66, 73.

Plaintiffs have argued that the closure order is a valid exercise of the state's police power to protect the public health as delegated to local health directors via Health and Safety Code Sec. 3110, Civil Code Sec. 3479, and Health and Safety Code Sec. 3194. (See "Opposition to Petition for Writ of Supercedeas," at p. 21).

However, the standard of review is determined by the nature of the rights assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. Griffin Development Co. v. City of Oxnard (1984) 152 Cal.App.3d 846, 854.

Where a city undertakes intrusive and selective regulation of the otherwise lawful use of property, the usual judicial deference to another branch of government is inappropriate. Moore v. East Cleveland (1977) 431 U.S. 494, 499.

Article I, Sec. 7 of the California Constitution provides that a person may not be deprived of life, liberty or property without due process of law. Accordingly, where the exercise of the police power results in consequences which are oppressive or unreasonable, courts do not hesitate to protect the rights of the property owner against the unlawful interference with his property. Skalko v. City of Sunnyvale (1939) 14 Cal.2d 213, 215-216.

While the wisdom of Dr. Silverman's order is not of judicial concern, the reasonable relation of the order to the perceived problem is. While a city may rely upon the decision of its health director in determining whether to institute injunctive proceedings to enforce a closure order, a reviewing court is not bound by the health director's opinion in determining the reasonableness of the city's exercise of the police power. (Cf. Griffin Development Co., supra, at p. 857).

Defendants submit that a total closure of their businesses is questionable as an unreasonable and overextensive invasion of their rights to possess property and to operate their businesses. As will be discussed later, a closure order also intrudes on the rights of gay males (a constitutionally protected minority), especially their freedom of speech and association in addition to their rights to privacy and the pursuit of happiness. Although free speech cases may be more publicized and dramatic, the protection of a person's property against deprivation without due process is also a constitutional right. Griffin Development Co., supra, at p. 856.

Limitations on the right to pursue a lawful occupation may be sustained only after the most careful scrutiny. Sail'er Inn v. Kirby (1971) 5 Cal.3d 1, 17. Operating a bathhouse, even though regulated, is a lawful occupation, and the strict scrutiny standard is justified on this ground alone.(Id.)

In determining whether a right is fundamental, the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it in the life situation. Anton v. San Antonio Community College (1977) 19 Cal.3d 802, 823. Historically, gay bathhouses have played a significant role in the emotional, social, and sexual development of many gay men. (See "Declaration of Allan Berube," submitted with Defendants' "Response to Order to Show Cause.") Traditionally, gay bathhouses have provided an environment especially conducive for gay males to exercise their right to pursue happiness through the exchange of ideas and fantasies with other receptive individuals. The bathhouse is a "gay institution" of sorts. Unlike most other social environments, the gay bathhouse allows gay males to temporarily shed the historically imposed cultural oppression of society, religion, and family, while they engage in a medium of communication they most highly prize, namely, the verbal exchange of emotional sentiments intertwined with intimate association. Additionally, gay bathhouses provide an environment in which social and sexual communication may occur without fear of violence, blackmail, or intimidation. Closure of the bathhouses is an indirect attack on the constitutional freedoms most valuable to the gay male population. First Amendment freedoms, such as the right of association, are protected not

only against heavy-handed frontal attacks, but also from being stifled by more subtle government interference. Britt v. Superior Court (1978) 20 Cal.3d 844, 852. Little wonder that so many gay organizations and gay leaders have taken positions against closure of the bathhouses!

"The choice, then, which the courts must make -- 'to say where the individual's freedom ends and the State's power begins' -- is a delicate one. . . . And it is the character of the right, not of the limitation, which determines what standard governs the choice." In re Porterfield, supra, at p. 103.

Where the exercise of constitutionally protected activity is regulated or prohibited, a heavy burden is placed on the government to justify the action taken. That burden requires the government to prove that the regulation sought is narrowly drawn and necessary to the achievement of a compelling state interest. Britt v. Superior Court (1978) 20 Cal.3d 844, 857.

As mentioned earlier, valuable and substantial First Amendment rights are at stake. This court must show a "zealous solicitude for rights falling within the protection of the First Amendment." Burton v. Municipal Court, supra.

Injunctive relief must be limited in scope so that infringement upon First Amendment rights is no greater than that which the government proves essential. People ex rel. Van de Kamp v. American Art Enterprises (1977) 75 Cal.App.3d 523, 527.

For whatever reason, the First Amendment rights of the bathhouses "fell between the cracks" at the hearing on the Motion for a Temporary Restraining Order. (See Reporter's Transcript of

the proceedings in Dept. 19 on Oct. 15, 1984, attached as Exhibit L to the "Petition for Writ of Supercedeas.) Out of concern for the First Amendment rights of the adult book stores, the court declined to issue a TRO directed at them. It appears that the court did not consider the First Amendment interests implicated in a closure of the bathhouses. They should not be overlooked in coming to a decision on whether, and what type of a preliminary injunction should issue, if any.

Under a strict scrutiny standard, an order requiring total closure of the bathhouses would be unconstitutional. A narrower approach will achieve the objectives of the health director without stripping the bathhouse owners and their patrons of all constitutional rights.

As plaintiffs have already acknowledged, "the trial court will be able to fashion a preliminary injunction that can accommodate any of petitioners' arguments that the court finds persuasive." (See "Answer and Opposition to Petition for Writ of Supercedeas," at p. 16, lines 10-12). One reasonable alternative to an overly broad closure order has been suggested. (See "Proposed Terms Of Preliminary Injunction.") If a preliminary injunction issues, that approach should be adopted by the court.

* * *

III

CONSTITUTIONAL RIGHTS OF BATHHOUSE PATRONS

Male homosexuals are almost the exclusive victims of AIDS. (See "Answer and Opposition to Petition for Writ of Supercedeas," at p. 5). It has been estimated that nearly 99% of AIDS victims in San Francisco are gay males. (See "Declaration of Dean Echenberg" at p. 9, and "Declaration of Paul A. Volberding" at p. 7, both of which were submitted in plaintiffs' moving papers in support of their complaint for injunctive relief.)

Plaintiffs assert that AIDS is transmitted by intimate sexual contact, particularly those forms of contact which involve the exchange of bodily fluids. (Id.)

Accordingly, government action in dealing with this problem, is directed primarily at gay men -- especially at their intimate associations.

Gays are accustomed to government attempts to prevent them from exercising their rights to privacy and freedom of speech. Up until 1976, private homosexual conduct between consenting adults was a crime; up until 1979, verbal suggestions between adults designed to effectuate such conduct were also subject to criminal prosecution. Today, sex in private (including sex in bathhouses) and public invitations to engage in private sex are legal. Pryor v. Municipal Court (1979) 25 Cal.3d 238.

Government agencies have attempted -- ultimately unsuccessfully -- to close down businesses which catered to homosexuals. Stoutman v. Reilly (Cal., 1951) 234 P.2d 969;

Vallerga v. Dept. of Alcohol Beverage Control (Cal., 1960) 347 P.2d 909.

Administrative agencies such as the Los Angeles Police Commission have adopted rules prohibiting same sex dancing in establishments holding dance hall permits. (See "Report of the California Commission on Personal Privacy," p. 479, fn. 722).

Courts have imposed conditions of probation prohibiting gay probationers from associating with known homosexuals or frequenting establishments where known homosexuals congregate -- although such conditions were ultimately declared void. People v. Rylaarsdam (1982) 130 Cal.App.3d Supp. 1, 14.

Gays have continually been subjected to employment discrimination. Morrison v. State Board of Education (Cal., 1969) 461 P.2d 375; Gay Law Student Assn. v. Pacific Telephone Co. (1979) 24 Cal.3d 458. The various forms of discrimination suffered by gays over the years is almost endless. [For example: Hubert v. Williams (1982) 133 Cal.App.3d Supp. 1 (housing); Nadler v. Superior Court (1967) 225 Cal.App.2d 523 (child custody); Matlovich v. Secretary of Air Force (D.C. Cir., 1978) 591 F.2d 852 (military); Marks v. Schlesinger (Cal. 1974) 384 F. Supp. 1373 (security clearances); Hill v. INS (9th Cir. 1983) 714 F.2d 1470 (immigration); In re Longstaff (5th Cir., 1983) 716 F.2d 1439 (naturalization)]

For nearly two years, the members of the California Commission on Personal Privacy studied invasions of privacy and discrimination on the basis of sexual orientation. Nearly one-third of the Commission's 500-page final report addressed the legal and social problems of gays in California. After examining

various legislative, constitutional, judicial, and executive reforms which have occurred in California over the years, the Commission concluded: "[I]t is the public policy of the state of California to protect and defend the personal privacy of all of its inhabitants and to encourage the elimination of discrimination based upon sexual orientation." (See, "Report of the Commission on Personal Privacy," State of California, 1982, at p. 434.)

As a result of the "second class citizenship" and discrimination to which gays have traditionally been subjected over the years, all three branches of state government, and the executive and legislative branches of local governments have been treating sexual orientation as a "suspect classification."

Assembly Bill 848 was recently passed by the Legislature and signed by the Governor. It amends the Ralph Civil Rights Act which punishes violence against minorities. The new amendment lists "sexual orientation" along with other traditionally suspect classifications.

Executive Order No. B-54-79 was signed by Governor Brown to prohibit discrimination in state employment on the basis of sexual orientation and that order remains in full force and effect to this day. Then-Attorney General George Deukmejian issued a formal opinion upholding the validity of the Governor's executive order. 63 Ops. Cal. Atty. Gen. 583 (1980).

The California Supreme Court has declared sexual orientation discrimination unconstitutional. Gay Law Students Assn, supra. The California Court of Appeal has interpreted the Supreme

Court's decision in Gay Law Students Assn. as treating sexual orientation as a suspect classification. One division of the Court of Appeal has noted that discrimination based on certain characteristics "is immediately suspect and may be subject to the strictest scrutiny by the courts," and then lists "homosexuality" as an example. Halford v. Alexis (1982) 126 Cal.App.3d 1022, 1031-1032. The court in Kubik v. Scripps College (1981) 138 Cal.App.3d 544, 550, also lists "sexual orientation" as a suspect classification.

The City and County of San Francisco has treated sexual orientation as a suspect classification for several years. Since 1972, sexual orientation discrimination has been outlawed in housing, employment, public accommodations, and government contracting. (See City Administrative Code, Sections 12-A,B,C,E.) In 1978, the Board of Supervisors expanded the scope of protection against sexual orientation discrimination. (See Art. 33 of the City Police Code).

Because the closure order is aimed primarily, if not solely, at the intimate associations and meeting places of gay males, this court should employ the strict scrutiny standard of review. With all due respect to the city's executive branch, the state judiciary should not defer to its decision. Instead, the court should carefully scrutinize its official action insofar as it does and will have a tremendous impact on the rights of a protected minority group.

Strict scrutiny is also required when government action infringes on a fundamental right. Sail'er Inn v. Kirby (1971) 5 Cal.3d 1, 16. The right of an adult to engage in sexual

relations with another adult is a fundamental right. People v. Belous (1969) 80 Cal.Rptr. 354, 359. The right to engage in consenting adult sexual relationships is not confined to the marital relationship. Morales v. Superior Court (1979) 99 Cal.App.3d 283, 290. (Article I, Sec. 1 - privacy).

Nor is the right to sexual privacy confined to the home. It accompanies a person from place to place and protects him against government intrusion whenever he has a reasonable expectation of privacy. People v. Triggs (1973) 8 Cal.3d 884.

The right to form "alternate relationships" is also protected by the state privacy amendment. City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123. (Art. I, Sec. 1 - privacy and the pursuit of happiness). The protection afforded to intimate associations by the state privacy amendment is broader in scope than federal constitutional privacy protections. Strict scrutiny is required when the right to sexual privacy is threatened by government action. Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252.

Closure of the bathhouses would infringe on the freedom of intimate association of gay men who choose to assemble at such establishments. Therefore, strict scrutiny is required.

As discussed earlier, the patrons' First Amendment rights are also threatened by the closure order. Plaintiffs attempt to equate the freedom of intimate association with roller skating. (See "Response and Opposition to Petition for Writ of Supercedeas" at pp. 48-49). This analogy is insulting to those who are sensitive to the preservation of civil liberties. The

right to exercise one freedom of intimate association cannot be placed on a par with pure physical amusement such as roller skating.

Especially on behalf of those patrons who may not intervene because they need to shield their private associations from public examination, defendants submit that freely chosen intercourse between two adults, particularly in the form of sexual liaison, is one of the most highly prized forms of communication. As such, defendants submit that intimate association in the form of sexual liaison is protected expression under Article I, Sec. 2 of the California Constitution. Private sexual expression between two consenting adults is not merely physical conduct, it is one of the most unique methods to express one's "sentiments" to another human being. There are some things in life that can't be communicated in mere words. When one person is attempting to communicate and share love and affection with another receptive individual, eliminating the sexual liaison emasculates the content of the message.

Defendants assert that the patrons' right to share and express their "sentiments" with each other in an environment free from the fear of physical violence (which the baths are) violates their "First Amendment" rights under Article I, Sec. 2 of the California Constitution. Spiritual Psychic Science Church v. City of Azuza (1984) 155 Cal.App.3d 1067, 1089-1091. As plaintiffs have acknowledged, when First Amendment issues are at stake, strict scrutiny is required. (See "Answer and Opposition to Petition for Writ of Supercedeas," at p. 41).

IV

EQUITABLE DEFENSES TO PROPOSED CLOSURE

Defendants offer the following equitable defenses in response to the Order to Show Cause why the court should not grant the injunctive relief requested by plaintiffs. In particular, these defenses are raised as objections to the proposed closure of their businesses.

IV(A)

PLAINTIFFS HAVE "UNCLEAN HANDS" AND THEREFORE SHOULD BE DENIED INJUNCTIVE RELIEF

As in other equity cases, a party who seeks injunctive relief must some into equity with "clean hands." (See "Injunctions," 38 Cal.Jur.3d 486.) Put another way, no one can take advantage of his own wrong. Civil Code Sec. 3517.

This means that if the plaintiff has been guilty of improper conduct connected with the controversy and hand, equity should deny him relief with respect to that controversy. The fact that a plaintiff in equity does not have an adequate remedy does not justify disregarding the maxim of "clean hands." (See "Equity," 30 Cal.Jur.3d 461).

The "unclean hands" doctrine is not confined to equitable actions, but is also available in legal actions. Goldstein v. Lees, 46 Cal.App.3d 614.

Any unconscionable conduct that relates to the transaction

in issue may give rise to the defenses of unclean hands and bar relief. Samuelson v. Ingraham, 272 Cal.App.2d 804. The improper conduct need not be of a criminal nature, or even of a nature sufficient to constitute the basis of a cause of action. His hands are rendered unclean within the purview of the maxim by any form of conduct that, in the eyes of honest and fair-minded persons, may properly be condemned as wrongful. Katz v. Karlson, 84 Cal.App.2d 469.

The application of the unclean hands doctrine is primarily a question of fact for the trial court. (See "Equity," 30 Cal.Jur.3d 467-468).

The doctrine of unclean hands is invoked on the grounds of public policy and as a means of protecting the court's integrity. Katz, supra; Seymour v. Cariker, 220 Cal.App.2d 300.

Plaintiffs engaged in unconscionable misconduct because -- knowing the privacy interests involved -- they devised a covert operation whereby they sent paid agents into the bathhouses to conduct warrantless searches inside the premises. An administrative warrant should have issued or a judicial warrant should have been obtained before the searches were conducted. People v. Brown (1975) 53 Cal.App.3d Supp. 1.

When innocent people are subjected to illegal searches -- including, as here, they do not even know that their private parts and bodily functions are being exposed to the gaze of paid government agents -- their rights are violated. People v. Triggs (1973) 8 Cal.3d 884, 893. In seeking to honor reasonable expectation of privacy, courts must consider the expectations of of innocent people. (Id.)

Patrons on the premises during the exploratory searches conducted by these paid government agents had a reasonable expectation that they were not under government observation. (Cal. Const., Art. I, Sec. 1 and Art. I, Sec. 13). White v. Davis (1975) 13 Cal.3d 757. Private associations, affiliations and activities are presumptively immune from inquisition. Morales v. Superior Court (1979) 99 Cal.App.3d 283, 290.

He who comes into equity must come with clean hands. By participating in an illegal undercover operation which violated defendants' right to be free from warrantless searches of their premises and their patrons' reasonable expectations of privacy -- and by attempting to use the fruits of this illegal activity -- plaintiffs have rendered their hands unclean. They are now asking this court to compromise its integrity by asking the court to rely on evidence gathered in the course of these privacy invasions. The court should refuse to participate in plaintiffs privacy invasion scheme. Lasher v. Kleinberg (1980) 164 Cal.Rptr. 618. The court should require plaintiffs to start the process over -- this time conducting themselves in a lawful manner which respects the privacy rights of defendants and their patrons.

* * *

IV(B)

THE COURT SHOULD AVOID DECLARING A FORFEITURE

Dr. Silverman's closure order, in effect, requires defendants to forfeit valuable property rights, namely, their businesses, on the grounds that to do so would be in the public interest. A preliminary injunction requiring defendants to close their businesses would, for all practical purposes, be an order declaring a forfeiture.

Forfeitures and penalties are not favored by either courts of law or courts of equity. (See "Forfeitures," 34 Cal.Jur.3d 326.) Statutes imposing them are strictly construed, and every intendment and presumption is against their validity and in favor of the person against whom they are sought to be imposed. (Id., at p. 327). The law abhors forfeitures and construes statutes strictly to prevent them. People ex rel. Mosk v. Barenfeld, 203 Cal.App.2d 166.

Although equity does not favor forfeitures and penalties, it will nevertheless enforce them on full, clear, and strict proof of a legal right thereto. (See "Forfeitures," 34 Cal.Jur.3d 349. And even where a legal right to a forfeiture is clearly shown, equity will still not enforce it if the plaintiff has another remedy. Plante v. Gray, 68 Cal.App.2d 582.

Here, plaintiffs have a remedy other than closure of defendants businesses. A less restrictive alternative -- which will accommodate the competing interests of the parties -- is available. (See "Proposed Terms of Preliminary Injunction).

IV(C)

HE WHO SEEKS EQUITY MUST DO EQUITY

The frequently declared maxim that "he who seeks equity must also do equity" means that a court will not grant relief to a plaintiff -- regardless of the nature of the controversy or the character of the relief sought -- unless the plaintiff is willing to provide for all the equitable claims which are justly asserted by the defendant where such claims grow out of the same controversy. (See "Equity," 30 Cal.Jur.3d 469).

A party who demands equitable relief must offer to do equity in the trial court. The maxim applies not only to traditional equity actions but also to actions authorized by statute. Thus, a plaintiff may be required to "do equity" as a condition precedent to the assertion of a statutory right. (Id, at p. 472).

Plaintiffs have hinted that at the preliminary injunction stage of these proceedings they would be prepared to accept an order which accommodates the legitimate concerns and rights of the owners and patrons of the bathhouses. (See "Answer and Opposition to Petition for Writ of Supercedeas," at p. 16).

To achieve a full degree of justice in the implementation of this maxim, a court should take into consideration all of the circumstances. Strain v. Security Title Ins. Co., 124 Cal.App.2d 195. The "Proposed Terms of Preliminary Injunction," submitted with their "Response to Order to Show Cause" does exactly that. Accordingly, defendants submit that any preliminary injunction which may issue should be patterned on that proposal.