SEXUA LAW REPORTER

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SEXUALAWREPORTER

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TRANSSEXUALS: RIGHTS UNDER, AND PROBLEMS WITH, THE LAW

"Transsexualism can be broadly defined as an obsession to belong to the opposite sex which is not practically reversible by psychological or other medical treatment." Note: TRANSSEXUALS IN LIMBO: THE SEARCH FOR A LEGAL DEFINITION OF SEX, *21 Maryland Law Review 236 (1971).* In recent years the medical profession has come to recognize the legitimacy of the medical problem, developed medical techniques to alter the sex of the transsexual, and proceeded to perform such operations. Inevitably, however, legal problems have evolved both for the pre-operative and post-operative transsexual, some which are explored below.

CROSS-DRESSING

As of 1971 there were apparently eleven states having laws prohibiting cross-dressing or disguising oneself. (See: Smith. TRANSSEXUALISM, SEX REASSIGNMENT SURGERY, AND THE LAW, *56 Cornell Law Review 963, 990 (1971).* Many more prohibitions may be in effect in municipalities. Under either jurisdiction the laws may easily bring the transsexual in confrontation with the police. Although cross-dressing is more commonly associated with *transvestitism*, the transsexual may be as much a victim of such laws. (For example, a post-operative transsexual may still have a driver's license identifying her as a male.)

An example of how the courts have dealt with the problem is illustrated by *City of Cincinnati v. Adams,* 330 N.E. 2d 463 (Ohio 1974). There, defendant was charged with a violation of a city ordinance prohibiting any person to "appear in a dress or costume not customarily worn by his or her sex, or in a disguise when such dress, apparel, or disguise is worn with the intent of committing any indecent or immoral act. . . ." Defendant, a male, was standing in a parking lot dressed in a blouse, brassiere and women's slacks, and was wearing a woman's wig, earrings and carrying a purse. The court struck down the ordinance on due process grounds, ruling that the law did not give the defendant fair notice of what was prohibited because of its vagueness and overbreadth. The court implied that, in its opinion, any ordinance prohibiting transvestitism, unaccompanied by criminal activity or solicitation, would be unconstitutional.

In *People v. Simmons*, 357 N.Y.S. 2d 362 (1974), defendant male was dressed in female clothing and after soliciting another male for sex, stole some money from him. One charge against him was violation of a New York statute prohibiting criminal impersonation, defined as when one "impersonates another and does an act in such assumed character with intent . . . to injure or defraud another." After a lengthy discussion of definitions and other cases, the court concluded that the statute did not apply to this defendant because he was not impersonating another but was simply himself in different clothes. □ *continued on page 8*

U.S. Supreme Court vacates judgment against gay federal employee

The United States Supreme Court has vacated the judgment of the Ninth Circuit Court of Appeals upholding the discharge of a gay federal employee. *Singer v. United States Civil Service Commission*, No. 75-1459, 45 U.S.L.W. __ (U.S. January, 1977). In a two sentence order, the Court remanded Singer's case to the Court of Appeals for reconsideration in light of the memorandum submitted to the Court by the Solicitor General on behalf of the Civil Service Commission. The memorandum suggested that the case be returned to the Civil Service Commission so that Singer can be given a new hearing under the standards embodied in the Commission's new, more-favorable policy regarding the employment of homosexuals.

Singer was employed in the Seattle office of the Equal Employment Opportunity Commission as a probationary clerk typist. His difficulties began in the spring of 1972 when the Civil Service Commission began a routine investigation to determine whether "his work performance or conduct . . . demonstrate[d] his fitness or his qualifications for continued employment." 5 C.F.R. §315.804. Although Singer's job performance was rated by his employer as "superior" or "very good", the Commission's investigation quickly revealed that Singer was openly gay. As a result, the Commission conducted a hearing. The charges leveled against Singer at the hearing included kissing another man in the company cafeteria, telling his supervisor he was gay and that he planned to continue in his lifestyle, answering a newspaper's inquiries about his job by stating that he had to put up with "closet queens", applying for a marriage license with another man in a manner that attracted widespread

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IN THE COURTS...

D.C. court upholds sodomy statute

The District of Columbia Court of Appeals has upheld a lower court conviction of attempted sodomy where the defendant was arrested while engaging in an act of oral copulation with another man in a public place. *Stewart v. United States,* 364 A. 2d 1205 (1976). Defendant first argued that the sodomy statute was unconstitutionally overbroad because it potentially invaded his zone of privacy. Although it cited *Doe v. Commonwealth's Attorney,* 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 425 U.S. 901, in a footnote, the court did not dismiss defendant's argument perfunctorily, but instead ruled that since this defendant's acts were committed in public, he lacked standing to raise the issue of private consensual acts.

Defendant next argued that the statute violated his right to equal protection since the prohibition of sodomitic acts has a disproportionate effect on homosexuals. The court responded that the statute was facially neutral and that even if the effect was disproportionate against homosexuals, "we find that the prohibition of sodomitic acts is a reasonable exercise of the right of the legislature to maintain a decent society." To defendant's argument that the statute was discriminately enforced against homosexuals, the court could find no basis in the record to support his position.

Finally, to his argument that the law violated the Establishment Clause of the First Amendment, the court noted that "[t]here is no dispute that religious forces motivated the original laws proscribing sodomitic acts. However . . . [defendant] has failed to demonstrate that such laws, as presently enacted, connote 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' "

California court reverses conviction under repealed law

A conviction of (consensual) oral copulation has been reversed by the California Supreme Court, based on the repeal of section 288a of the Penal Code. *People v. Rossi,* 555 P.2d 1313 (1976). When the decriminalizing amendment became effective on January 1, 1976, judgment of conviction had been rendered, with proceedings suspended and the defendant placed on probation. The judgment was not final, however, since the period for appeal had not lapsed.

Justice Tobriner's opinion concludes that "it may be regarded as an establishing rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter. . . . Although the Legislature retains the constitutional authority to preserve criminal sanctions for acts committed prior to repeal, we can find nothing in the amending legislation to suggest that the Legislature intended such a result here."

Dissenting in a 5-2 decision, Justice Clark argues that "[p]ermitting defendant to entirely escape punishment for her offense is, of course, inconsistent with" the premise of *In re Estrada,* 408 P.2d 948 (1965) — relied on by the majority. *Estrada* provided for retroactive operation of an amendment mitigating punishment, so that a lighter punishment might be imposed, where the amendment *increased* punishment. However, Justice Clark contends *Estrada* should be construed as affirming legislative intent that an offender of a repealed or amended statute *should be* punished.

[Section 288a now proscribes oral copulation only where force is involved, or where the acts are committed with a minor or while defendant is confined in a state prison.]

Sodomy victim's orientation not relevant in Georgia

The Court of Appeals of Georgia has ruled that the sexual orientation of the victim in a forced sodomy case is irrelevant and upheld the lower court's sustaining of an objection to the asking of such a question of the victim by defense attorneys. *Abner v. State,* 229 S.E. 2d 83 (1976). Defendants were convicted of aggravated sodomy. On appeal they argued that the evidence might support a conviction of sodomy but not aggravated sodomy because the victim did not cry out for help. To support their position that the acts were consensual, defendants attempted to elicit testimony from the victim about his sexual orientation. The lower court sustained the prosecutor's objection to the question.

On appeal the Court of Appeals affirmed. "The appellants argue that the character of the alleged victim as a homosexual would negate the element of force in [the statute]; we are cited to the 'rape' cases as analogous. We cite the appellants to *Lynn v. State,* 203 S.E. 2d 221. What is relevant in this case is whether the alleged victim was forced against his will to commit the acts of sodomy; we do not believe his general character is otherwise necessary or proper but would be irrelevant to the issue under investigation. There was no error."

Conviction upheld where rapist was impotent

Holding that "proof of impotency does not constitute a complete defense to a charge of rape," the Arizona Court of Appeals (Division 1) has upheld a rape conviction under A.R.S. §13-612. *State v. Kidwell,* 556 P.2d 20 (1976).

The statute provides that the "essential guilt of rape consists in the outrage to the person and feelings of the female, and any sexual penetration however slight is sufficient to complete the crime."

In a case of first impression in Arizona appellate courts, the court has concluded that "whether penetration is accomplished by an erect or non-erect penis is not, in our opinion, relevant if penetration is established." An expert medical witness had testified that slight penetration could have occurred without erection — and the victim had testified to penetration of approximately one inch.

The court noted that uncontroverted evidence of impotence had not been present, in combination with positive testimony of penetration, in cases relied on by the defendant and cited for the proposition that impotence is a complete defense to rape. Although the defendant's theory has "considerable authority" from other jurisdictions, the court said, the discussion of impotence in those cases was "only dicta" and — "[i]f faced with a case such as the one sub judice with the crime defined as it is in [our statute] we have little doubt that most, if not all jurisdictions would reach the same result as we have."

North Carolina upholds sterilization for retarded

The North Carolina statute providing for the sterilization of certain "mentally retarded" persons has withstood constitutional challenge for the second time this year. In *North Carolina Association for Retarded Children v. State of North Carolina*, 420 F.Supp. 451 (M.D.N.C. 1976), a three-judge federal court, following the decision of the North Carolina Supreme Court in *In re Sterilization of Moore* 221 S.E.2d 307 (N.C. 1976), upheld the statute in all respects save one against a challenge brought by the Association for Retarded Children and the U.S. government.

The North Carolina scheme permits the county welfare director or the director of a state mental institution to petition the state district court for the involuntary sterilization of a mentally retarded person 1) when the director feels that sterilization is in the best interests of the mental, moral or physical improvement of the retarded, 2) when the director feels that sterilization is in the best interests of the public at large, 3) when it is likely, in the opinion of the director, that the retarded person will procreate a child with a tendency to physical or mental deficiency or would, because of the retarded person's condition, unlikely to improve, be unable to care for a child, or 4) when the next of kin or legal guardian of the retarded person requests that the director file a petition.

The court had no difficulty in holding unconstitutional the provision of the challenged law requiring a sterilization petition to be filed at the request of the next of kin or guardian. This section of the statute, in the court's view, represented an arbitrary and capricious delegation of unbridled power to the guardian or next of kin. The balance of the statute, however, was found to be constitutionally unobjectionable.

The federal court construed the statute to require that the director, and the state court granting the director's petition, find both that sterilization is in the best interests of the retarded person or the public at large *and* that the retarded person is likely to procreate a defective child or to be unable to care for a child, defective or otherwise. The court found valid the state's presumptions, underlying the statute, that in some rare cases retardation is inherited and that in some cases a person is so retarded that he or she would be unable to care for a child. The court also laid great stress on the fact that the validity of these presumptions must be established by clear and convincing evidence in a court hearing at which the retarded person is given considerable procedural protection, including the right to appointed counsel. In light of these procedural protections, it summarily rejected plaintiffs' procedural due process challenge.

Turning to plaintiffs' equal protection and "substantive due process" claims, the court, after some uncertainty, at least insofar as the equal protection challenge was concerned, fixed upon strict scrutiny as the appropriate standard of review. Judged by that standard, the court found the state's interest in preventing the birth of a defective child or of a nondefective child whose parents cannot care for it sufficiently compelling to justify the statute. Moreover, the means chosen to implement the state's purpose—an individualized hearing in every case, with appellate review—were the narrowest possible means available to achieve the state's ends. The court made it quite clear that a statute providing for sterilization of *all* retarded persons would be unconstitutional.

Sexual advance is sex discrimination

In *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C. 1976), a federal district court has held that the "retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitute sex discrimination within the definitional parameters of Title VII of the Civil Rights Act of 1964." In dictum, the court also stated that the same holding would apply where homosexual advances were made and rejected between a supervisor and employee of the same sex, but that the retaliatory action of a rejected bisexual supervisor would not be violative of the Act.

The question of the applicability of Title VII to retaliatory actions based on refusal of sexual favors arose from the complaint of a female employee of the Justice Department who claimed that she was fired after she refused her male supervisor's sexual advances. Defendants contended that the supervisor's conduct was not covered by Title VII, arguing that plaintiff was fired not because she was a woman but because she refused to have sex with her supervisor. The court, while recognizing the theoretical cogency of this argument (see, e.g., *Geduldig v. Aiello*, 94 S.Ct. 2485 (1974)), rejected defendants' mode of analysis as inconsistent with the Act's purposes and plain meaning. In the court's view, the supervisor, whose behavior was apparently exclusively heterosexual, was imposing a requirement on female employees that he did not impose upon males—that the females, in addition to their other duties, be available as sex partners.

The court indicated that an isolated personal incident unrelated to employment would not come within the Act's purview and that plaintiff had shown that her supervisor made a "policy or practice" of requiring sexual submission from female employees. While the court's holding that complaints based on incidents unrelated to employment do not state a Title VII claim appears to be sound, the requirement that an employee show a policy or practice can be used to place an unnecessary and unrealistic burden on plaintiff. *See, e.g., Miller v. Bank of America*, 418 F.Supp. 233 (N.D.Cal. 1976), noted elsewhere in this issue. Whether a supervisor is given the opportunity to make a practice of firing sexually uncooperative employees may depend entirely on his or her selectivity, and there is no sound reason why the first victim of a concededly discriminatory practice should not be given a remedy.

Sexual advance is <u>not</u> sex discrimination

In *Miller v. Bank of America*, 418 F.Supp. 233 (N.D. Cal. 1976), a federal court dismissed the claim by a black woman that her white supervisor violated the sex discrimination prohibition of the Civil Rights Act of 1964 when he fired her, allegedly for refusing to have sex with him.

The court attempted to distinguish *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C. 1976), noted elsewhere in this issue, on the grounds that in *Williams* a showing had been made that the supervisory conduct represented a policy or practice imposed on plaintiff and other women similarly situated; whereas the case before the court represented an isolated personal incident and the defendant bank condemned the conduct of which the supervisor was allegedly guilty.

□ *Court News continued on following page*

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The court further held that plaintiff could not claim that her supervisor's alleged act was tacitly approved by the bank because she failed to bring the matter to the bank's attention by not filing a complaint with the bank.

The decision in *Miller* can be criticized for its misreading of the *Williams* case. The *Williams* court specifically held that the policy of a supervisor is to be imputed to the entity that the supervisor represents. Had the *Miller* court followed this holding, plaintiff should have been allowed to prove that her supervisor had a practice of demanding sexual favors as a condition of employment without the necessity of tracing this practice farther up the line of corporate command. Moreover, while it is true that the *Williams* plaintiff did show that her supervisor had made sexual advances to other employees, it is not clear what kind of evidence the *Williams* court found sufficient to support that allegation, and it might well be that the *Miller* plaintiff could have shown a "policy or practice" entirely from testimony concerning her supervisor's attitude about women generally or black women in particular.

Gay student group gains recognition

In *Gay Alliance of Students v. Matthews*, 544 F.2d 162-(1976), the Court of Appeals for the Fourth Circuit has unanimously upheld the right of a campus organization of gay students at the state-run Virginia Commonwealth University (VCU) to be registered as a student organization.

Gay Alliance of Students (GAS) was organized in 1974 to provide support for gay students at Virginia Commonwealth University, to educate the straight community, and to lobby for gay rights. It sought registration as a student organization to gain the benefits attendant upon that status: inclusion in the directory of organizations available to VCU students, eligibility for VCU funding and administrative assistance, access to VCU facilities to publicize its meetings and activities. The application was denied on the grounds that recognition of GAS would increase the opportunity for homosexual contacts, would attract homosexuals to VCU, and would encourage students to join GAS. The University also found that membership in GAS, while it might benefit some students, might be detrimental to others.

The Court of Appeals, relying on *Healy v. James*, 92 S.Ct. 2338 (1972), held that withholding permission for GAS to register as a student organization, even though it did not amount to a total ban on GAS meetings, nevertheless hindered GAS's recruitment effort and denied it services that were afforded to other groups and thus constituted a denial of first amendment and equal protection rights unless justified.

The court held that if VCU's denial of registration rights to GAS was an attempt to prevent homosexuals from meeting to discuss common problems and advocate changes in the *status quo*, then VCU's policy would be permissible under the first amendment only if such meetings constituted incitement to imminent lawless action. (See *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). On the other hand, if the state sought to minimize homosexual activity by making it more difficult for gays to organize, denial of registration rights to GAS could only be predicated on a showing that GAS was an organization "devoted to carrying out alleged, specifically proscribed sexual practices." (See *Healy v. James*, 92 S.Ct. 2338 (1972)).

Judged by these standards, the court found the VCU's attempted justifications for denial of registration to GAS insufficient. If registration increased the number of GAS members, this result would be entirely consistent with first amendment values, which leave individuals free to choose in the marketplace of ideas, and would in no way imply state "approval" for GAS's aims. If some persons were hurt by their association with GAS, the court held, this was the price exacted if the freedom to choose inherent in the first amendment were to be preserved.

The students' first amendment rights to choose their associates must prevail over the state's interest, as *parens patriae*, in "protecting" them from harmful contacts.

As to VCU's interest in refusing recognition to GAS so as to minimize the frequency of homosexual contacts, the court found that there was no showing that GAS was inciting people to imminent unlawful activity or that it was dedicated to carrying out such activity. Therefore, although VCU remained free to regulate student conduct, illegal or otherwise, that materially and substantially impaired work or discipline at VCU, its attempt to do so by banning a gay organization was an impermissibly overbroad assault on the associational rights of GAS members.

The court also rejected on overbreadth grounds the state's argument that recognition of GAS would attract other homosexuals to VCU.

In a brief paragraph, the court also upheld GAS's equal protection claim. Noting that the discrimination against GAS was based solely on the "content" of the message GAS sought to convey, the court held that the unequal treatment given to GAS was insufficiently tailored to furtherance of a substantial governmental interest to withstand a charge of invidious discrimination.

In terms of remedy, the Court of Appeals reversed the District Court insofar as the District Court failed to order that VCU register GAS and accord it all the privileges offered to other organizations. In one respect, however, the Court of Appeals cut back on the decree of the District Court. The latter had ordered VCU to grant GAS campus newspaper space and campus broadcast time to advertise its activities. Finding that the newspaper and radio station determined their own content independent of VCU authorities and did not discriminate between registered and non-registered organizations, the court limited the decree on remand to one which would restrain VCU authorities from denying GAS access to newspaper space and broadcast time on the same basis as other organizations.

Proper record required to support discriminatory enforcement

The Supreme Court of Wisconsin has ruled that discriminatory prosecution under the prostitution statute violates equal protection, but reversed a lower court's dismissal of charges under the law because of lack of evidence. *State v. Johnson*, 246 N.W. 2d 503 (1976). The defendants were charged with committing an act of sexual perversion for money with apparently

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ILLINOIS STATE BAR ASSOCIATION APPROVES RESOLUTION AND REPORT

SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION

The Section of Individual Rights and Responsibilities recommends adoption of the following resolution:

> *BE IT RESOLVED, that the American Bar Association having previously urged the repeal of all laws prohibiting noncommercial sexual conduct between consenting adults in private, and the Task Force on Homosexuality of the National Institute of Mental Health having found that homosexuals are subjected to discrimination which results in harm to society and the homosexual individuals themselves and having recommended that such discriminatory practices and policies be changed, the Illinois State Bar Association urges that the legislature of the State of Illinois and the municipal governments enact legislation prohibiting discrimination against persons because of sexual orientation.*

REPORT

The purpose of this resolution is to encourage the passage of legislation supplementing present civil and human rights statutes to prohibit discrimination against persons solely on the basis of their sexual preference.

In a major study of homosexuality, the National Institute of Mental Health, a federally-funded body, reported that "although estimates of the prevalence of homosexuality are only tentatively established, it is believed that there are currently at least three or four million adults in the United States who are predominantly homosexual and many more individuals in whose lives homosexual tendencies or behavior play a significant role. . ."[1]

The Task Force report also states:

> "Homosexuality is not a unitary phenomenon, but rather represents a variety of phenomenon which takes in a wide spectrum of overt behaviors and psychological experiences. Homosexual individuals can be found in all walks of life, at all socioeconomic levels, among all cultural groups within American society, and in rural as well as urban areas. Contrary to the frequently held notion that all homosexuals are alike, they are in fact very heterogeneous."[2]

The report points out that "individual homosexuals suffer in being isolated from much of society. . ." and the less apparent fact that "society at large inevitably loses (as a result of this discrimination) in a number of ways—loss of manpower, economic costs, etc."[3] The Task Force concluded that employment policies and practices with respect to homosexuals should be changed.

> It is recommended that there be a reassessment of current employment practices and policy relating to the employment of homosexual individuals with a view toward making needed changes. Discrimination in employment can lead to economic disenfranchisement, thus engendering anxiety and frustrating legitimate achievement motivation.[4]

Social, religious, medical and legal attitudes toward homosexuality have been undergoing rapid change in recent years. The American Psychiatric Association, altering a position it had held for almost 100 years, decided in December 1973 that homosexuality is not a mental disorder. The board of trustees of that group, which has 20,000 members, approved a resolution that said in part, ". . . by itself, homosexuality does not meet the criteria for being a psychiatric disorder."[5] The membership of the Association upheld its trustees' decision at its annual meeting in April 1974.[6] The Association simultaneously adopted the following resolution with respect to discrimination against homosexuals:

> "Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation, and licensing *and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other persons.* Further, the American Psychiatric Association supports and urges the enactment of civil rights legislation at the local, state, and federal level that would offer homosexual citizens the same protections now guaranteed to others on the basis of race, creed, color, etc. Further, the American Psychiatric Association supports and urges the repeal of all discriminatory legislation singling out homosexual acts by consenting adults in private. (Emphasis added.)

In 1955, the Model Penal Code of the American Law Institute recommended the repeal of laws proscribing private sexual behavior between consenting adults.[7] In 1961, Illinois was the first state to repeal prohibitions against private homosexual acts involving consenting adults. Subsequently, Colorado, Connecticut, Delaware, Hawaii, North Dakota, Ohio and Oregon have enacted similar legislation.

Cities which have passed some form of homosexual civil rights legislation include Detroit, Minneapolis, San Francisco, Seattle, Columbus, St. Paul and the District of Columbia, as well as smaller cities and towns such as Alfred, New York, Ann Arbor, Michigan, East Lansing, Michigan, and Palo Alto, California. Toronto, Canada has also taken similar action. □ *continued on following page*

Editor's Note: Regarding states which have repealed sodomy laws, see *2 Sex.L.Rptr. 45* and *2 Sex.L.Rptr. 57.* For further information regarding local governments passing antidiscrimination laws, see *2 Sex.L.Rptr. 31.*

In May 1974 and again in January and March 1975, a bill was introduced in Congress to prohibit discrimination on the basis of sexual orientation—amended in the current bill to read "affectional or sexual preference"—as well as sex and marital status. Referred to as the "Civil Rights Amendment of 1975" it specifically covers "public accommodations," "public education," "housing sale, rental, financing, and brokerage services" and "prevention of intimidation."[8]

Religious bodies have begun to alter their position on homosexuality.[9] As an example, in July 1970 the National Convention of the Lutheran Church in America passed a resolution which stated in part: ". . .the sexual behavior of freely consenting adults in private is not an appropriate subject for legislation or police action. It is essential to see such persons as entitled to justice and understanding in church and community."[10]

Statistics on discrimination against homosexuals are difficult to obtain, in part because, as recently shown in a major scientific study, only a fifth of the sample group could be described as "overt" homosexuals.[11] Unlike other minority groups in our society, the vast majority of homosexuals are not overtly distinguishable from their heterosexual counterparts.

Ample evidence of job and other discrimination does exist, however. The United States Civil Service Commission has an official exclusionary policy directed at homosexuals conducted under the guise of dismissal for "such cause as will promote the efficiency of the service."[12] The military services make considerable effort to exclude homosexuals.[13] Homosexuals are also subject to attempts to exclude them from immigration into the United States or from citizenship once here on the basis that homosexuality per se is evidence of a lack of "good moral character."[14]

In the 1960's, the Civil Service Commission's policy came under scrutiny in the courts. *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), upheld the Commission's position that the mere existence of a homosexual in a governmental agency impaired the efficiency of that agency, ". . .(h)owever, the agency's awareness of the difficulties that might be encountered in defending its policy toward homosexuals was made manifest upon the granting of certiorari by the Supreme Court, At this juncture, the Commission chose to reinstate Dew with back pay in lieu of responding on the merits of the issue."[15]

In *Scott v. Macy*, 349 F.2d 182, (D.C. Cir. 1965), the same court found for the appellant who had been dismissed for homosexual activities because the Commission had failed to specify the particular acts held to be "immoral" and once again ". . .the agency found the appellant suitable for employment rather than face the merits of the issue in further litigation."[16]

Finally, a totally unambiguous case involving the discharge of a homosexual in government employ was that of *Norton v. Macy* in 1969.[17] Here the court stated:

> ". . . the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."[18]

In reliance on *Norton v. Macy*, the court in *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Calif. 1973) aff'd 538 F.2d 905 (9th Cir. 1975), ordered the reinstatement of a federal civil service employee who had been discharged solely because he was a homosexual. The court held that the "Commission can discharge a person for immoral behavior only if that behavior actually impairs the efficiency of service." *Hampton, supra,* at 401. Since the Commission had not even tried to establish the necessary nexus between the plaintiff's sexual orientation and the efficiency of service, his discharge was unlawful.

Despite such cases as *Norton* and *Hampton*, it is significant to note that sexual orientation does not yet enjoy the same constitutional protection as do other classifications. For example, the *Hampton* court expressly ruled that discrimination on the basis of race was "per se illegal" and required no showing that race was irrelevant to the requirements of a job. *Sexual preference discrimination, on the other hand, does require such an evidentiary burden.* See 528 F.2d at 906.

While the requirement that a rational connection exist between sexually oriented activity and job function may be considered to provide some protection against arbitrary action, it is by no means "failsafe." For example, the court in *Gayer v. Schlesinger*, 490 F.2d 740 (D.C. Cir. 1973), was willing to find precisely such a connection with respect to the issuance of a security clearance when the government successfully framed the issue in terms of national defense.

Thus, it should be clear that, absent the recommended express statutory guidelines, the courts may continue to find areas of "legitimate discrimination" which will result in such aberrations as *Gayer.*

With reference to the exclusion of homosexual immigrants from United States citizenship, *In re Labady*, 326 F.Supp. 924 (S.D.N.Y. 1971) marks a new stand by the courts:

> "(P)etitioner has led a quiet, peaceful, law-abiding life as an immigrant in the United States. Although he has engaged on occasion in purely private homosexual relations with consenting adults, he has not corrupted the morals of others, such as minors, or engaged in any publicly offensive activities, such as solicitation or public display. . . Under all of the circumstances, setting aside our personal moral views, we cannot say that his conduct has violated public morality or indicated that he will be anything other than a law-abiding and useful citizen."[19]

But the problems of not having the recommended *statutory* protection can easily be illustrated. In contrast to *In re Labady*, the petitioner in *Kovacs v. U.S.*, 476 F.2d 843 (2nd Cir. 1973), was denied his petition for naturalization because he allegedly lied under oath about his prior homosexual activities. The court expressly held that petitioner was "not being denied naturalization for his sexual activities—but rather for his lack of candor under oath." *Kovacs*, at 845. Accordingly, the court distinguished *Labady* on the basis that there the petitioner "testified truthfully about prior homosexual acts." "Had Kovacs testified truthfully about his past, (the court said) the petition might well have been granted." *Kovacs*, at 845.

The commitment of the court to that principle, however, must be questioned considering that Kovacs' petition was filed prior to the *Labady* decision—at a time when proof of homosexual activity was grounds per se for exclusion. *Even the court recognized that Kovacs' honesty would probably have resulted in a denial of his petition. Kovacs*, at 845. Nevertheless, Kovacs was presented with a 'heads I win, tails you lose' proposition which further contributes to the legal ambiguities in this area.

The Immigration and Naturalization Service, like the Civil Service Commission, chose not to appeal this decision, and still uses homosexuality *per se* to bar immigrants from citizenship on the grounds that it constitutes lack of "good moral character."

Testimony at the hearings on a City Council bill to prohibit discrimination against homosexuals in New York City

illustrated fears of the bill's opponents that such legislation would force employers to hire and landlords to rent to any homosexual, whether or not the applicant would otherwise be a suitable employee or tenant.[20] The legislation recommended herein, like the bill before the New York City Council,[21] is not for the purpose of forcing persons unsuitable for reasons other than their sexual orientation upon employers and landlords; rather, the legislation requested is to insure that sexual preference, like sex and race, will not *in and of itself* be a disqualification for employment, housing or public accommodations.

The subject of homosexual school teachers is highly charged with emotional factors and the objections are usually based on the fear that homosexuals are child molesters who will seduce children. Research has shown, however, that "the man who is sexually interested in children is rarely homosexual with well-developed interests in adult males. [M]ore often, the offender is a single or married male who lives a relatively conventional life with only sporadic, or no adult homosexual contact."[22]

Cases specifically involving school teachers have recently begun to appear in varied jurisdictions. The Supreme Court of California has held that a homosexual school teacher's loss of employment without evidence of a connection between his private life and his ability to perform as a teacher was a violation of due process under the Fourteenth Amendment.[23] A federal district court held recently that homosexuality *per se* could not be grounds for dismissal or refusal to hire a teacher although the teacher's transfer from teaching duties in that case was ultimately upheld because he had failed to reveal prior membership in a gay students organization on his teaching application. *Acanfora v. Board of Education of Montgomery County*, 359 F.Supp. 843 (D.Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974), *cert. denied* __ U.S. __ (1974).

Editor's Note: The Illinois Bar Association Report was adopted by the Assembly on November 12, 1976. It is reproduced herein because it presents arguments, supported by case citations, that can be used in future litigation and legislative lobbying from both a *pro* and *con* position. The Report has been partially edited for reasons of space – for copies of the full Report, write to *SexuaLawReporter* for Reprint IBA, at 75c per copy.

But, again, lack of legislative remedy is problematic here. Although an increasing number of courts have held that dismissal of a public school teacher solely on the basis of sexual orientation is unconstitutional, at least one court has limited the range of remedies that will be made available to such an aggrieved teacher. *Burton v. Cascade School Dist. Union High School No. 5*, 512 F.2d 850 (9th Cir. 1975) held that reinstatement of a wrongfully discharged nontenured homosexual teacher was not mandatory, that reinstatement was within the discretionary authority of the court, and that such a teacher may well be left solely with a remedy in damages (but no job!). The court very clearly stated that it does *not* recognize sexual orientation discrimination on the same constitutional level as "racially motivated discriminations or . . . those aimed at punishing the exercise of free speech." *Burton*, at 853. According to the court, the latter are more likely to "compel reinstatement" than the former. *Burton*, at 853. The problem is not that reinstatement is viewed as a discretionary remedy, but rather the court's continual insensitivity to claims of sexual orientation discrimination. Thus, a court's capacity to *fairly* exercise its discretion is severely impaired by its indefensible hostility to the claim on the merits.

As the dissent in Burton correctly points out, "The fact [plaintiff] was . . . not discriminated against on racial grounds or was not fired for exercising her First Amendment rights does not mean that she is entitled to a lesser sort of remedy than would be available in racial discrimination or First Amendment cases. All violations of constitutional rights should receive adequate redress, which in this case requires reinstatement." *Burton*, at 855.

Homosexuals in other professions, including the legal profession, have also been denied the right to engage in their profession because of their sexual orientation and have had to seek relief from the courts. *In re Kimball*, 33 N.Y. 2d 586, 347 N.Y.S. 2d 453 (1973).

Homosexual groups seeking the benefits of corporate status and gay student organizations seeking the same rights and benefits as other student organizations have had to resort to the courts to gain the protection and benefits routinely granted other similarly situated non-gay groups. *Owles v. Lomenzo*, 31 N.Y.2d 965, 341 N.Y.S. 2d 108 (1973); *In re Thom*, 53 N.Y.2d 609, 347 N.Y.S.2d 571 (1973); *Woods v. Davidson*, 351 F.Supp. 543 (N.D. Ga. 1972); *Gay Students Organization of the University of New Hampshire v. Bonner*, 367 F.Supp. 1088 (D.N.H. 1974), *aff'd* 509 F.2d 652 (1st Cir. 1974).

In the last decade, the courts have begun to acknowledge that privacy is a basic constitutional right. Unfortunately, landlords, private employers and, to a large extent, governmental agencies are still free to inquire into the private sexual behavior of individuals. The legislation requested herein would make such inquires as irrelevant and improper as they are in matters of race and religion.

* * *

The recommendation and report of the Section are concerned not with particular sexual acts which in some states may continue to be prohibited to both heterosexuals and homosexuals, rather, this report addresses itself to the discrimination encountered by admitted or suspected homosexuals, particularly in employment, housing and public accommodation. Thus the question raised is one of status—the status of being homosexual.

In *Robinson v. California*,[29] the Supreme Court overturned a California statute which made it a criminal offense for a person to be addicted to the use of narcotics. The court ruled that making the status of narcotic addiction a criminal offense was an affliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The status of being a homosexual should not result in cruel and unusual punishment, nor should it deprive an individual of the full rights of citizenship guaranteed to others.

CONCLUSION

That a problem of sexual orientation discrimination exists in Illinois is much more difficult to prove by decisions or documentation than it may be in other jurisdictions. This is not due to an absence of a discrimination problem, but rather, in part, to the lack of any clear state statutory remedial legislation which would provide discrimination victims access to the state courts and their attorneys tools to assure fair treatment for all citizens.

Throughout our history there have always been some groups which were regarded as not entitled to the rights and privileges enjoyed by other citizens. Our progress towards a more humane society has been evidenced by the extension of equal rights to such groups so that now race, sex, religion and national origin are recognized as having no legitimate bearing on the opportunities that should be available to anyone. Sexual orientation should be added to that list.

Respectfully Submitted,

Lawrence Schlam, *for the Section Council on Individual Rights and Responsibilities*

FOOTNOTES ON PAGE 9

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Transsexuals' Rights Under and Problems With the Law

MARRIAGE

The cases dealing with the legal problems of marriage for transsexuals fall into three categories: marriages between two homosexuals; marriages between a person of one sex and a person of the opposite sex who was formerly of the same sex; and marriages between two persons of the same sex, one of whom subsequently became a member of the opposite sex. Although homosexual marriage is literally not within the scope of this article, the cases will be examined briefly because of the effect on the third category above and the fact that the topic is frequently used by analogy or directly incorporated by the few courts which have dealt with transsexual marriages.

The reported cases have unanimously rejected claims by homosexuals to their right to marry. In *Baker v. Nelson*, 191 N.W. 2d 191 (1971), the Minnesota Supreme Court denied efforts by two males to obtain a marriage license, reasoning in part that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis", and ruling that such a denial did not violate their First Amendment right to freedom of religion, Eighth Amendment right not to be cruelly and unusually punished, Ninth Amendment right to privacy, and Fourteenth Amendment rights to equal protection and due process. The court also interpreted the Minnesota marriage statutes (which did not prohibit such marriages on their face) to apply only to opposite sex couples. Essentially the same issues were raised and rejected by other courts in the subsequent cases of *Jones v. Hallihan*, 501 S.W. 2d, 588 63 A.L.R. 3d 1195 (Ky. 1973), and *Singer v. Hara*, 522 P. 2d 1187 (Wash. Ct. App. 1974).

Anonymous v. Anonymous, 325 N.Y.S. 2d 499 (1971) involved a "marriage" between two males, one of whom thought the other was female. Upon an attempt at consummation, the unsuspecting male discovered the true sex of the other. Shortly thereafter he left for overseas in the military service. In the meantime, the second male underwent a sex change. Upon return from overseas, the first male sued for a declaration as to the status of the marriage. The New York Supreme Court declared that the marriage ceremony had not in fact created a valid marriage, noting, however, that "[w]hat happened to the [second male] after the marriage ceremony is irrelevant, since the parties never lived together."

The issue of whether a marriage is legal when one of the parties has changed his or her sex before the marriage ceremony appears to present more of a problem to the courts and seems to hinge on whether the operation has resulted in the ability of the transsexual to perform sexually.

In *B. v. B.*, 355 N.Y.S. 2d 712 (1974), prior to the marriage, the husband had undergone an operation for a mastectomy and a hysterectomy, and was undergoing androgenous hormonal therapy at the time of the marriage. Subsequently the wife discovered that the husband was without a penis and could not perform sexually. The wife brought suit for an annulment on the ground that the husband was a female, and the husband brought a cross-suit for divorce. The court ruled that the husband could not succeed on a suit for divorce because there had been no valid marriage to begin with. "Assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage." "While it is possible that defendant may function as a male in other situations and in other relationships, defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship. As plaintiff asserts defendant 'does not have male sexual organs, does not possess a normal penis, and in fact does not have a penis.' "

On the other hand, in *M.T. v. J.T.*, 355 A. 2d 204 (N.J.-1974), the court determined that a marriage between a man and a postoperative transsexual (who had been a male prior to the operation) was a valid marriage. M.T. underwent a sex change prior to the marriage ceremony (the operation being paid for by J.T.). After the ceremony they lived as husband and wife and had sexual intercourse. J.T. then left the household. M.T. sued for support. The court rejected the reasoning of a similar English case, *Corbett v. Corbett*, 2 All E.R. 33 (P.D.A. 1970), which had adopted the position that a person's sex was determined at birth and could not be changed. Rather, the court said, a number of factors, medical and psychological, must be taken into account, and if it is appropriate the person should be considered to have changed his or her sex for marital purposes. Here, the court determined, M.T. was a female for marital purposes and would recover support from J.T., the marriage having been valid.

VITAL RECORDS CHANGES

The reported cases in this area have dealt with the topics of change of name and change of sex on one's birth certificate. Because many of the cases deal with the two issues simultaneously, they will be treated together here. Although changes of names on the certificate have been granted, there appear to be no cases which have ordered change of sex.

Anonymous v. Weiner, 270 N.Y.S. 2d 319 (1966), involved a petition for an order directing the New York City Department of Health to change the sex designation on petitioner's birth certificate following a sex change. The court relied heavily on a recommendation of the New York Academy of Medicine questioning whether birth certificates should be changed, and decided to defer to the City Board of Health denial of the petition.

In re Anonymous, 293 N.Y.S. 2d 834 (1968), involved a petition for change of name from an "obviously male name to an obviously female name." The court noted that at common law, one could adopt any name one wished, absent fraud or the interference with others. In discussing the recommendation relied on by the *Weiner* court, the court said that "[t]his court is in complete disagreement with the conclusion reached by the learned committee. A male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact. This individual dresses, acts, and comports himself as a member of the opposite sex." "It would seem to this court that the probability of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted, without annotations of any type, to classify this individual as a 'male' when, in fact, as aforesaid, the individual comports himself as a 'female.' " The court therefore ordered the change of name and that a copy of its order be appended to the petitioner's birth certificate.

□ continued across

In another *In re Anonymous*, 314 N.Y.S. 2d 688 (1970), the issues were both the right of the petitioner for a change in name and sex on the birth certificate. The court relied on the *Anonymous* case above, but pointed out some difficulties with the request for relief: "retirement at the age of 62 instead of 65 under the rules and regulations of the Social Security Administration, improved ratings for life insurance purposes, the automatic right of exclusion from jury duty, possible marital benefits and rights of inheritance which differ, in some states and nations, according to the sex of the person." The court granted the request for a change of name but refused to allow the order to be used as evidence that the sex of the petitioner had in fact been changed.

The same issues were involved in *Hartin v. Director of Bureau of Records, Etc.*, 347 N.Y.S. 2d 515 (1973). There the Bureau had agreed to change petitioner's first name and issue a new birth certificate, but not to change the sex designation. Relying on *Weiner*, the court denied the request for the change in sex on the certificate.

The only case found which appears inclined to change the sex designation on the birth certificate is *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975). Plaintiff's claim was based on the equal protection clause to the Fourteenth Amendment in that the Commissioner of Health granted some requests for change on birth certificates while denying hers; and that the state must show some substantial interest in making such a denial because of the substantial detrimental impact on her, such as the inability to marry and the humiliation of carrying a passport with the opposite sex designated. The court did not finally decide the issue in its written opinion, however, but denied the state's motion for summary judgment, ruling that plaintiff had stated a claim.

EMPLOYMENT

Only one case has been found regarding the employment rights of a transsexual. In *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975), plaintiff, a medical technician, informed defendant that she intended to undergo sex conversion surgery. She was discharged on the ground that such a change might have a potentially adverse effect on patients and co-workers. She sued under the 1964 Civil Rights Act for injunctive and monetary relief on the ground that the discharge constituted sex discrimination under the Act. The court granted the defendant's motion to dismiss, stating that "[s]ituations involving transsexuals, homosexuals or bi-sexuals were simply not considered [by Congress in passing the Act], and from this void the Court is not permitted to fashion its own judicial interdictions."

MEDICAL ASSISTANCE

Finally, in the area of medical assistance to transsexuals, is the case of *Denise R. v. Lavine*, 383 N.Y.S. 2d 568 (1976), in which the Commissioner of the New York State Department of Social Services denied a requested authorization for medical assistance for sexual conversion surgery. The applicable part of the Social Services Law provided that eligible persons were entitled to medical assistance "necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap." Petitioner was examined by a psychiatrist who determined that there was no "formal disturbance of thinking, nor suicidal inclination", □ *continued on page 12*

FOOTNOTES TO ILLINOIS REPORT
Text Slightly Abridged

1. *Final Report of the Task Force on Homosexuality*, National Institute of Mental Health, October, 1969, U.S. Department of Health, Education, and Welfare Publication No. (HMS) 72-9116, Printed 1972, at p.2.
2. *Id.*
3. *Id.*
4. *Id.*
5. *New York Times*, December 16, 1973.
6. *New York Times*, April 9, 1974.
7. American Law Institute, Model Penal Code §207.
8. 93d Congress, 2d Session, H.R. 14752, May 14, 1974.
9. *See, e.g.*, statement on Private Sexual Morality, adopted by the Council of the Episcopal Diocese of New York on March 18, 1971: "We favor repeal or those statutes that make such practices among competent and consenting adults criminal acts." *See also* Resolution on Homosexuals and the Law, adopted April 12, 1969, by the Council for Christian Social Action of the United Church of Christ, which states in part that "even while we proclaim a unity under God which transcends our division . . . we still honor variations among men in their political loyalties, lifestyles, and sexual preferences." The United Church of Christ recently ordained an acknowledged homosexual into its ministry.
10. Resolution passed by the National Convention of the Lutheran Church in America, Minneapolis, Minnesota, July 2, 1970.
11. M.S. Weinberg & C.J. Williams, *Male Homosexuals*, Their Problems and Adaptations, Oxford University Press, New York (1974).
12. 5 U.S.C. §7501 (a) (Supp. III 1965-67). *See generally*, Note, *Government-Created Employment Disabilities of the Homosexual*, 82 Harv. L. Rev. 1738 (1968).
13. Army Regulations AR 40-501, P2-34 (A) (2) (December 5, 1960), for example, list "overt homosexuality" as a cause for rejection for employment, enlistment, or induction. See also, *Berg v. Middendorf*, __ F.Supp. __, (D.D.C. June 2, 1976), denying a temporary restraining order prohibiting the discharge of a homosexual officer from the Navy.
14. 8 U.S.C. §1427 (a).
15. 45 St. John's L. Rev. 303, at 304-5 (1970).
16. *Id.* at 305-6.
17. 417 F.2d 1161 (D.C. Cir. 1969).
18. *Id.* at 1165.
19. *In re Labady*, 326 F.Supp. 924, 930 (S.D.N.Y. 1971).
20. *The Record of the Association of the Bar of the City of New York*, volume 28, number 2, February, 1973, Committee Report by the Special Committee on Sex and Law and the Committee on Civil Rights, "New York City Council Intro." No. 475, p. 148, 149.
21. Intro. 554.
22. J. Gagnon & W. Simon, *Sexual Encounters Between Adults and Children* at p. 11 (1970). In V. Defrances, *Protecting the Child Victim of Sex Crimes by Adults* at p. 38 (1969), a study of sex crimes against children over a five year period from 1962-67 revealed that 10 to 12 female children were victims for every male child victim, and that the offenders against female children were heterosexual while the offenders against male children were homosexual.
23. *Morrison v. State Board of Education*, 1 Cal. 3d 214, 416 P.2d 375, 82 Cal. Rptr. 175 (1969).

29. 370 U.S. 660 (1962).

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U.S. Supreme Court vacates judgment against gay federal employee

press coverage which mentioned his employment with EEOC, and the appearance of Singer's name accompanied by his place of employment as an organizer of a symposium on mental health and civil rights for sexual minorities sponsored by the Seattle gay community.

Singer did not dispute any of these allegations, except to state that he had never specifically authorized his identification as a federal employee in connection with the publicity that he received.

After the hearing, the Commission notified Singer that his continued employment would not "promote the efficiency of the service." The Commission stated that this conclusion was based on such factors as the "potential disruption" that might be caused by the "revulsion" of his fellow employees, the fear that Singer would use the prestige or authority of the government to advocate homosexual causes, and possible embarrassment and loss of public confidence in the agency.

Singer brought an administrative appeal of this decision, in support of which he offered a petition signed by his fellow employees and the District Director of EEOC stating that Singer was a good worker and that there was "absolutely no evidence that he has ever offended a member of the public in his duties in this office." The Commission ultimately rejected Singer's appeal, finding substantial evidence of "immoral and notoriously disgraceful conduct" and concluding that public knowledge that such a person as Singer was employed in the government service would undermine public confidence in the service.

Singer challenged the Commission's ruling in federal court, but both the District Court and the Court of Appeals rejected Singer's claims, holding that there was no violation of the First Amendment, due process or government regulations. See *Singer v. United States Civil Service Commission*, 530 F.2d 247 (9th Cir. 1976), 2 Sex.L.Rptr. 25, 53.

While Singer's court challenge and appeal were pending, the Civil Service Commission changed its policy regarding the employment of homosexuals. The Commission ruled that, effective December 21, 1973, homosexuality *per se* would not be grounds for termination. Under the new policy, homosexuals can be terminated where there is evidence that their homosexual conduct affects job fitness, but terminations based on unsubstantiated conclusions about possible embarrassment to the federal service are not permitted.

The Court of Appeals was aware of these new guidelines when it decided Singer's appeal, but did not apply them to Singer's case.

After the Court of Appeals decided his appeal unfavorably to him, Singer petitioned the U.S. Supreme Court for certiorari. In a somewhat unusual move, the Solicitor General, on behalf of the Commission, joined Singer in urging the Court to grant the writ. The Solicitor General stated that the Commission, since it has adopted new guidelines concerning the employment of homosexuals, has no interest in judicial resolution of the issue of whether it is permissible to terminate an employee simply for advocating homosexuality and has determined to give Singer the benefit of a hearing under the new guidelines. The Solicitor General also made it clear that the only possible stumbling block to Singer's reinstatement after a new hearing would be the allegation that Singer listed the EEOC as a sponsor of the gay rights symposium with which his name and employment was publicly associated.

In arguing for reversal of the decision by the Court of Appeals, Singer, possibly influenced by dicta in that court's opinion, contended that he would be fired even under the new guidelines, as administratively construed.

The National Gay Task Force urged the Solicitor General to follow the course that he subsequently adopted. NGTF's position would appear to be the only sensible one in view of the Court's present attitudes. It is widely agreed that a denial of certiorari in this case, to say nothing of an affirmance of the Court of Appeal's decision, would have been seriously harmful to the gains that gays have made in the area of federal employment.

It should be noted that the court did not adopt the Solicitor General's suggestion that it remand the case directly to the Civil Service Commission, but rather remanded to the Court of Appeals. That court must now decide whether to return the case to the Commission, but it is unlikely that the court will refuse to adopt that course, since the Commission itself is urging it.

Chief Justice Burger and Justices White and Rehnquist dissented in this case and would have denied certiorari, thus leaving Singer's firing undisturbed.

Singer is the first case decided by the Supreme Court that can be considered even remotely favorable to gays, and its impact on the employment rights of gays should be considerable.

—John Ward

EDITOR'S NOTE:

Having reserved this space for late-breaking developments, immediately before final copy went to the typesetter, the *SexuaLawReporter* telephoned the clerk of the Ninth Circuit Court of Appeals in San Francisco in order to provide readers with the current status of *Singer v. United Civil Service Commission.*

However, as this issue goes to press, it appears that nothing has transpired since the case was remanded to the Ninth Circuit by the U.S. Supreme Court in January.

Future issues of the *SexuaLawReporter* will carry whatever decision the Court of Appeals renders in this important case. For a comprehensive background of the *Singer* case, see *2 Sex.L.Rptr. 25.*

Under the new Civil Service Commission policy ruling, homosexuals can be terminated where there is evidence that their homosexual conduct affects job fitness, but terminations based on unsubstantiated conclusions about possible embarrassment to the federal service are not permitted.

...IN THE COURTS

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a private complainant. The complainant male was not charged under the statute.

Defendants brought a motion to dismiss the charges, alleging that since they were charged and the complainant was not, the law was being discriminately enforced in violation of the equal protection clause. Without hearing any evidence to support defendants' argument, but relying solely on the facts of the instant case, the trial court dismissed the charges.

The Supreme Court reversed and remanded for a full hearing on the prosecutorial practices on prostitution charges. "From the face of the complaint it seems conclusive that the complainant did violate some law against sexual morality. As alluded to by the trial court, it is conceivable he could have been charged with patronizing a prostitute, sexual perversion, or a party to the crime of prostitution." "If women prostitutes are consistently prosecuted and men patrons are consistently not prosecuted, without valid prosecutorial discretion, the equal protection clause is violated."

After stating that there might be valid prosecutorial reasons for prosecuting a prostitute and not the patron, such as giving immunity from prosecution to testify, the court said that it was required to remand for a full hearing to give the defendants an opportunity to develop a factual record to support their discriminatory enforcement claim.

Child support no legal hindrance to remarriage

The state cannot impose special restrictions on persons seeking to marry who have minor children who are not in their custody, a three-judge federal district court has recently held. *Redhail v. Zablocki*, 418 F.Supp. 1061 (E.D. Wis. 1976). Plaintiffs successfully challenged, on equal protection grounds, the validity of a Wisconsin statute that required persons who had minor children living apart from them, and whom they were under a court order to support, to obtain court permission before they could be issued marriage licenses.

The federal court held that this disparate treatment must be justified by a showing that it necessarily furthered a compelling state interest by the least burdensome possible mean (the "strict scrutiny test"). The court found strict scrutiny appropriate both because certain persons (those who could not support their children from previous marriages) were absolutely denied the right to marry on the basis of wealth alone.

The state attempted to justify the challenged statutes as furthering its interest in providing counselling to prospective marriage partners and in protecting the welfare of minor children. The court rejected both of these justifications, pointing out that, whatever the state's interest in counselling, it did not justify an outright ban on marriages for persons who were unable to support their children by prior relationships and that the state had a variety of alternative means for requiring those who could not afford to do so to support their children.

□ *Court News continued on page 12*

SEXUALAWREPORTER

"...intolerance of the unconventional halts the growth of liberty."
—Judge JOSEPH H. YOUNG, *U.S. District Court, Maryland*

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...IN THE COURTS

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Telephone company can refuse to hire gays

The decision of a trial court that homosexuals have no right to employment with the telephone company, and that the state agency responsible for enforcing private discrimination has no jurisdiction over discrimination against them, has been upheld by the California Court of Appeal, First District. *Gay Law Students Association, et al. v. The Pacific Telephone and Telegraph Company, Fair Employment Practice Commission of California, et al.*, 135 Cal. Rptr. 465 (1977).

Plaintiffs were four individuals who claimed to have been terminated or refused employment by the Company, and an organization of law students organized to improve the status of homosexuals by combatting discrimination against them. Also a plaintiff was the Society of Individual Rights, an organization to promote equal treatment for homosexuals in all areas. The individual plaintiffs' claims had been rejected by the FEPC, after which it was joined in the suit to compel it to accept jurisdiction.

Plaintiffs' first contention was that the F.E.P. Act prohibited all employment discrimination unless based on a bona fide occupational qualification, even though the ground might not be specifically set out in the statute. In support, they analogized the Act to the state public accommodations law, which the California Supreme Court has ruled prohibits all discrimination. See *In re Cox*, 474 P.2d 992 (1970).

The appeals court responded that *Cox* was distinguishable because prior to passage of the public accommodations law, the common law prohibited all discrimination in public accommodations, and thus the legislature simply codified existing law; however, the court said, the common law was that " 'an employer's right to employ and discharge whom he pleases, in the absence of any statutory or contractual provision is unquestioned.' " "The Unruh (public accommodations) Act enumerated certain bases of discrimination where *all* arbitrary discrimination had already been prohibited by prior statutory and case law; therefore, it was reasonable to conclude, as the *Cox* court did, that the Legislature intended these bases to be illustrative rather than restrictive.

"On the contrary, the F.E.P. Act carved out *for the first time* bases for discrimination in employment which were considered to be contrary to public policy and therefore prohibited. Not having any prior case law or statutory precedent to rely on, it must be assumed that our legislators were cognizant of the fact that they were establishing new prohibitions rather than emphasizing old ones. Thus it is highly unlikely that they intended the enumerations to be illustrative rather than restrictive." (Emphasis in original)

"Determinative of the subject question, however, is the fact that the Legislature only last year had before it a bill to amend the Act to include 'sexual orientation' as an enumerated base of prohibited discrimination and that it rejected such an amendment." "We note further that Title VII of the Civil Rights Act, the federal counterpart to the F.E.P. Act (42 U.S.C.A., sec. 2000 et seq.) has been interpreted by the United States Supreme Court and other federal courts to prohibit only those bases of employment discrimination enumerated in the Act. (See, e.g., *Espinoza v. Farah Mfg. Co.*, 94 S.Ct. 334 (1973); *Bradington v. International Business Machines Corp.*, 360 F.Supp. 845 (D. Md. 1973), aff'd. 492 F.2d 1240 (4th Cir. 1974)."

Plaintiffs' second contention was that discrimination against homosexuals is discrimination on the basis of sex, one of the bases under the F.E.P. Act, because of the disparate impact of the Company's alleged policy. The legal basis of their argument, based on *Griggs v. Duke Power Co.*, 91 S.Ct. 849 (1971), was that since there are more male homosexuals in the population than female, and since the Company discriminated against homosexuals in general, males were being discriminated against, leading to discrimination on the ground of sex. The court did not reject the legal position (although it noted that usually the doctrine has been applied to discrimination against "minorities"), but responded that there had been no evidence presented as to percentages of male v. female employees at the company.

To plaintiffs' contention that discrimination against homosexuals constitutes sex discrimination "in the literal sense of the word", the court cited *Smith* v. *Liberty Mutual Insurance Co.*, 395 F. Supp. 1098 (D. Ca. 1975) and *Voyles* v. *Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975), cases which have previously rejected that position under the Civil Rights Act of 1964.

Moving to their claims against the FEPC, plaintiffs contended that the agency's refusal to assume jurisdiction over such discrimination denied them due process and equal protection of the law. The court responded that the state had not interfered with the private hiring of homosexuals but had remained neutral, and there was no constitutional issue. Distinguishing *Boddie v. Connecticut*, 91 S.Ct. 780 (1970), where the state set up a monopolistic machinery for the obtaining of divorces, the court responded that the state was not precluding homosexuals from obtaining private employment.

Finally the court rejected plaintiffs' argument that because the Company is a monopoly it should be prohibited from discriminating arbitrarily in its employment process. Distinguishing *James v. Marinship Corp.*, 155 P.2d 329 (1944), where a "closed shop" union refused admission to blacks, the court said that there the California Supreme Court had found discrimination against blacks to be against the "strong public policy of this state" but that "[n]o such policy with reference to homosexuals has been enunciated."

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and therefore recommended against the surgery. A second doctor at the same hospital began administering hormones to petitioner and subsequently recommended medical assistance for the surgery. The Court of Appeals, in a 4-3 decision, adopted the determination of the Department on the ground that "where an administrator adopts one of several conflicting opinions, it is not the province of the court to substitute its judgment unless the agency's determination is unreasonable or without a basis in law." The dissenters argued that there was no independent examination of the petitioner by the Department and adopted the view of the second doctor that the surgery should be performed.

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CONTRACT AND EQUITY PROTECTION EXTENDED TO UNMARRIED COUPLES

The 1970 census figures indicated that eight times as many couples are living together without being married as cohabitated in the prior decade. The recent decision of the California Supreme Court in *Marvin v. Marvin*, 557 P.2d 106 (1976), is a recognition of our changing social customs and is an important step toward protecting the reasonable expectations of meretricious couples. The purpose of this article is to demonstrate the necessity and the inevitability of the *Marvin* holding through an examination of inequitable results reached under prior decisional law.

A meretricious spouse is one who cohabits with another knowing that the relationship does not constitute a valid marriage. Prior to 1973, California courts consistently adhered to the general rule of *Vallera v. Vallera*, 132 P.2d 761 (1943), that a meretricious spouse enjoyed no community interest in earnings and accumulations acquired during such a relationship.

The *Vallera* court identified two exceptions through which a meretricious spouse might successfully claim an interest in accumulations held by the other spouse. First, an equitable interest would arise in such a relationship where "a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations." Second, even in the absence of such an express agreement, a meretricious claimant might recover on a theory of resulting or constructive trust.

An examination of decisions applying these two exceptions to the *Vallera* rule reveals that a meretricious spouse was only narrowly protected and had a difficult burden of proof in attempting to secure an equitable share of joint accumulations.

EXPRESS AGREEMENTS

A meretricious claimant could successfully assert property rights in jointly accumulated properties where she/he was able to prove the existence of an *express* agreement. This rule might be invoked where the meretricious spouses had agreed to pool earnings, to share in accumulations, or to compensate the nonearning spouse for services rendered during the period of the relationship.

The difficulty in recovering on the basis of an express agreement is apparent from the paucity of decisions permitting a meretricious spouse an equitable property interest based on such an agreement. In the typical situation, persons entering into a meretricious living arrangement do not make such agreements, and in a subsequent lawsuit the court would find "no evidence of any such agreement between them." In absence of an express agreement, the courts are satisfied in "leaving the parties in the position in which they have placed themselves."

In decisions where the courts have found the requisite express agreement, the relationship has been likened to a business enterprise or joint venture. For example, the court in *Garcia v. Venegas*, __ Cal. Rptr. __ (1951), found a "contract to pool . . . work and earnings and share equally in the property accumulated therewith" on the basis of the plaintiff's testimony that her meretricious spouse frequently told her during their five year relationship that "everything was both for him and for her, that everything was for the both of them, that all he bought was in her power or in her possession. . . ." The Garcia couple had collected rents from boarders in order to meet their living expenses. The defendant's earnings had been used to purchase three lots, which were later sold. The sale proceeds and the defendant's subsequent earnings were applied to the purchase of a house and lot. These activities, said the court, were "a joint business enterprise, somewhat akin to a partnership, . . . one which any two persons might undertake."

Other courts strained the analogy between a meretricious relationship and business venture in order to reach an equitable result. Evidence of an express agreement has often been slight, as in the case of *Bridges v. Bridges*, 270 P.2d 69 (1954), where the finding of an express agreement was based on testimony of the meretricious wife that "everything was supposed to be 50-50."

Unlike the decisions discussed above in which courts applied the dissimilar analogy of partnership in order to make an equitable division of property on termination of a meretricious relationship, most courts applied rules which narrowed the possibility of recovery on the basis of an agreement between meretricious spouses.

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IN THE COURTS...

Status as homosexual grounds for teacher dismissal

The Supreme Court of Washington, in a 6-2 decision, has upheld the dismissal of a teacher on the ground of "immorality" because he was a known homosexual and also on the ground that as a known homosexual, his ability and his fitness to teach was impaired with resulting injury to the high school in which he taught, thereby justifying his dismissal. *Gaylord v. Tacoma School District No. 10*, 559 P.2d 1340 (1977).

Gaylord's superiors first became aware of his sexual status when a former high school student told the school's vice-principal he *thought* Gaylord was a homosexual. The vice-principal confronted Gaylord at his home the same day. Gaylord admitted he was a homosexual and attempted to have the matter dropped. Less than a month later, the school board found probable cause for his discharge due to his *status* as a *publicly known homosexual.* This status was contrary to the school district policy which provided for discharge of school employees for "immorality." A month later, after a hearing, Gaylord was discharged.

On appeal, the Supreme Court looked at two issues in reaching its conclusion: (1) whether substantial evidence supported a trial-court finding that Gaylord was guilty of immorality, and (2) whether substantial evidence supported the trial court finding that, as a known homosexual, Gaylord's fitness as a teacher was impaired to the injury of the high school, justifying his discharge.

As to the first issue, the court examined whether homosexuality was immoral. To decide this, the court looked to the dictionary and various psychiatric literature to determine what "homosexuality" meant. Quoting from the New Catholic Encyclopedia, the court found that a homosexual is: "[a]nyone who is erotically attracted to a notable degree toward persons of his or her own sex and who engages, or is psychologically disposed to engage, in sexual activity prompted by this attraction. * * * Once friendship between persons of the same sex leads to physical expression, a homosexual act has occurred. . . . The danger remains that the individual will yield to desire for the overt act. 7 *New Catholic Encyclopedia* 116 (1967)."

The court then said that "[i]f Gaylord meant something other than homosexual in the usual sense, he failed to explain what he meant by his admission of homosexuality or being a homosexual so as to avoid any adverse inference, although he had adequate opportunity at trial to do so. He clearly had a right to explain that he was not an overt homosexual and did not engage in the conduct the court ascribed to him which the court found immoral and illegal." In continuing their examination of whether homosexuality is immoral, the court, citing the *Encyclopedia Judaica* and the *New Catholic Encyclopedia*, said, "Homosexuality is widely condemned as immoral and was so condemned as immoral during biblical times." The [trial] court found "sexual gratification with a member of one's own sex is implicit in the term 'homosexual.' This finding would not necessarily apply to latent homosexuals; however, the court in effect found . . . reasonable inferences . . . it applied to Gaylord."

Moreover, the court found that "[v]olitional choice is an essential element of morality. . . . In the instant case plaintiff desired no change and has sought no psychiatric help because he feels comfortable with his homosexuality. He has made a voluntary choice for which he must be held morally responsible."

The final question on this point was whether the repeal of the sodomy statute while the case was pending deprived sodomy of its immoral character. The court disposed of this by saying: "Generally the fact that sodomy is not a crime no more relieves it of its immoral status than would consent to the crime of incest."

As to the second issue, regarding Gaylord's performance as a teacher, the court found that sufficient substantial evidence supported the trial-court findings as to the impairment of Gaylord's efficiency. The trial court found that, although Gaylord had been a teacher in the Tacoma School District for over 12 years, had received favorable evaluations of his teaching throughout this time, and that during the time his status as a homosexual was unknown to others in the school, his teaching efficiency was not affected nor did his status injure the school, when it became publicly known that Gaylord was a homoseuxal, "the knowledge thereof would and did impair his efficiency as a teacher with resulting injury to the school had he not been discharged."

Gaylord assigned error to this finding of fact, asserting that his homosexuality became known at the school only after the school made it known and that he could not be responsible therefor so as to justify his discharge as a homosexual. The Supreme Court disagreed, stating that "by seeking out homosexual company he took the risk his homosexuality would be discovered. * * * It was the vice-principal's duty to report the information to his superiors because it involved the performance capabilities of Gaylord. The school cannot be charged with making plaintiff's condition known so as to defeat the school board's duty to protect the school and the students against the impairment of the learning process in all aspects involved. Second, there is evidence that at least one student expressly objected to Gaylord teaching at the high school because of his homosexuality."

The court then went on to state that it was important to remember that Gaylord's homosexual *conduct* must be considered in the context of his position of teaching high school students. The students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality. Likewise, the court said, to say that school directors must wait for prior specific overt expression of homosexual conduct before they act to prevent harm from one who chooses to remain "erotically attracted to a notable degree towards persons of his own sex and is psychologically, if not actually disposed to engage in sexual activity prompted by this attraction" is to ask the school directors to take an unacceptable risk in discharging their fiduciary responsibility of managing the affairs of the school district.

In a sharply worded dissent, Associate Justice Dolliver found that both arguments by the majority were untenable. His position was that "[t]o uphold this dismissal, we must find substantial evidence supporting the finding that Mr. Gaylord was discharged for 'sufficient cause' . . . which has been defined as *'conduct which would affect the teacher's*

efficiency.' " [Emphasis in original.] In response to the majority's assertion that an admission of a homosexual status connotes illegal as well as immoral acts which are proscribed, Dolliver asserted that "[t]here is not a shred of evidence in the record that Mr. Gaylord participated in any of the acts [sodomy or lewdness]. * * * The trial court made a most puzzling finding that, 'From appellant's own testimony it is unquestioned homosexual acts were participated in by him, although there was no evidence of any overt acts having been committed.' The trial court essentially found that, as an admitted homosexual, unless Mr. Gaylord denied doing a particular immoral or illegal act, he can be assumed to have done the act. The court has placed upon the appellant the burden to negate what it asserts are the implications that may be drawn from his testimony although he never was accused of participating in acts of sodomy or lewdness."

Having found no inappropriate conduct, Dolliver was unwilling to take the leap in logic accepted by the majority that admission of a status or identity implies the commission of certain illegal or immoral acts.

As to the finding by the majority that Gaylord's teaching efficiency was impaired, Justice Dolliver stated: "The second glaring error in this proceeding is the respondent's failure to establish that Mr. Gaylord's performance as a teacher was impaired by his homosexuality. As pointed out by the trial court in its findings, the evidence is quite clear that, having been a homosexual for the entire time he taught at Wilson High School, the fact of Mr. Gaylord's homosexuality did not impair his performance as a teacher. In other words, homosexuality per se does not preclude competence. *Acanfora v. Board of Educ. of Montgomery County*, 359 F.supp. 843 (D.Md. 1973)."

At the trial, a variety of witnesses speculated on the effect that Gaylord's homosexuality might have on his effectiveness in the classroom. The speculation varied considerably, some testifying that his effectiveness would be damaged, and some testifying to the contrary. Justice Dolliver responded by saying: "I find such speculation to be an unacceptable method for justifying the dismissal of a teacher who has a flawless record of excellence in his classroom performance."

In summing up his arguments, Dolliver found that to base a dismissal on the proof of a status with no showing of conduct and no showing of an actual detrimental effect on teaching efficiency violated the constitutional due process rights to which Gaylord was entitled.

Don Gaudard New SLR Editor

Beginning with this issue, Don Gaudard has become Editor of the *SexuaLawReporter* replacing R. Michael Wetherbee.

Gaudard is also an editor of the legal section of the *Journal of Homosexuality* and has been a staff member of the SLR for over a year. He is a law student at People's College of Law in Los Angeles and is employed by the law firm of Coleman and Kelber.

Teacher who advocates gay rights must submit to psychiatric examination

In *Gish v. Board of Education of the Borough of Paramus, Bergen County*, 336 A.2d 1337 (1976), the Appellate Division of the New Jersey Superior Court held that the Board of Education's directive that the teacher, John Gish, submit to a psychiatric examination was fair and reasonable, did not violate his First or Fourteenth Amendment rights, and was not a denial of due process even when two psychiatrists were not produced for cross-examination.

In June, 1972, Gish assumed the presidency of the New Jersey Gay Activists Alliance and subsequently participated in a number of communications through various public media in which he promoted the Alliance. He also attended a convention of the National Education Association and helped organize a gay caucus within the NEA.

In July, 1972, the Board of Education adopted a resolution directing Gish to submit to a psychiatric examination since his "overt and public behavior" indicated a strong possibility of potential psychological harm to students as the result of their continued association with him and his "conduct during said period evidences a harmful, significant deviation from normal mental health affecting [his] ability to teach, discipline and associate with students. . . ."

Gish appealed to the Commissioner of Education and the State Board of Education, both of which affirmed the action of the Board of Education.

On appeal from the decision of the State Board of Education, Gish contended that the Board's directive to submit to a psychiatric examination constituted a violation of his First and Fourteenth Amendment rights to free speech and association. The Court held that this contention was without merit since the Board of Education ". . . does not question the right of Gish to say or do any of the things [he did]. It simply contends that . . . Gish's actions display evidence of deviation from normal mental health which may affect his ability to teach, discipline, and associate with students." Since the Board of Education has an obligation "to determine the fitness of teachers" which "is a reflection of their duties to protect students from danger of harm, . . . we are satisfied that the board's determination was a fair and reasonable one. . . . It was based on credible evidence and did not constitute an abuse of discretion."

Gish also argued that he was entitled to but not afforded Fourteenth Amendment protections of due process because the two psychiatrists upon whom the Board of Education relied in making their determination to request the psychiatric evaluation were not produced for cross-examination. In response, the court stated that the requirement that appellant subject himself to a psychiatric examination "can hardly be classified as a penalty or sanction." In determining what procedures are required, the court held that the competing interests of the teacher and school board must be balanced. Since the "submission by Gish to a psychiatric examination takes nothing from him except his time, . . . from the standpoint of being deprived of a right or privilege it is minimal, except as it may loom in his mind."

□ *Court news continued on following page*

...IN THE COURTS

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Sheriff of municipal jail held liable for rape of male inmate

In *Doe v. Swinson*, __ F.Supp. __ (E.D. Va. 1976), a federal district court has held that the sheriff of a municipal jail is liable in damages to a prisoner who is raped by other inmates, where the sheriff's negligence in failing to provide adequate security is responsible for the occurrence of the incident. The court held that the sheriff's affirmative conduct in failing to correct security deficiencies amounted to cruel and unusual punishment in violation of the Eighth Amendment and a denial of equal protection.

Plaintiff, a nineteen-year-old man who was raped twice by one or more of his three cellmates, recovered $50,000 based on the long-term sexual and emotional effect that the jury found the rape would have on him.

In upholding the jury's verdict the court rejected the defendant's contention that municipal officials (as the sheriff was) are immune from §1983 suits brought against them in their official capacity. Moreover, the court rejected the notion that the sheriff was entitled to the qualified immunity that attaches to officials in the performance of their duties, since the court held that that doctrine applied only to discretionary acts and that the duty to provide adequate protection from sexual assaults is absolutely not discretionary. Moreover, "[e]ven if the Court concedes that immunity might be granted . . . as to the manner in which defendant chooses to carry out his absolute duty . . . defendant did not successfully meet his duty to exercise reasonable care in any manner so that the differing means of performance he may have chosen and corresponding immunity are irrelevant."

In addition, the court held that recovery was not barred by the doctrine of *Rizzo v. Goode*, 96 S.Ct. __ (1976), which precludes §1983 liability on the part of supervisory officials absent a showing that they acted affirmatively to cause the injury complained of. The court found that the sheriff knew of the sloppy security practices and actively condoned them by failing to adopt more stringent measures.

Also, the court rejected defendant's argument that the inmate had to show a pattern or practice of conduct directed against him personally in order to recover under the Eighth Amendment for simple negligence. It was sufficient for the plaintiff to show that the defendant was aware that the danger of such assaults was common in the local area and that sexual attacks were frequent.

Finally, the court refused to accept the defendant's theory that a finding of liability against the sheriff was inconsistent with a finding of no liability on the part of his subordinate, that the sheriff was entitled to a new trial for faulty jury instructions, and that the verdict was excessive. This last holding was based on evidence of the effects of the rape on plaintiff's career development, mate selection, and sexual identity.

Prospective employee wins damages for rape

A woman who was in the process of applying for employment was raped by an employee of the company has won $5,000 in damages from the employee, but the company escaped liability. *Mays v. Pico Finance Co., Inc.*, 339 So.2d 382 (1976). Plaintiff appeared for a job interview at one of the company's offices and was told by the assistant manager that she would have to be interviewed by the manager of another office at another location the following day. Instead, the assistant manager, who had no duties regarding the hiring of employees, took the plaintiff to a motel room and there raped her three times.

As against the assistant manager, the jury found that a rape had been committed but that the plaintiff suffered no damage, and thus awarded her no damages. The appeals court reversed, ruling that as a matter of law plaintiff should recover for "the forcible offense against her person," setting damages at $5,000 against the assistant manager personally.

With regard to plaintiff's suit against the company, the appeals court affirmed the trial court's dismissal of the suit. The court said that the question was whether "the tortious conduct of the employee 'was so closely connected in time, place, and causation to his employment-duties as to be regarded a risk of harm fairly attributable to the employer's business, as compared with conduct motivated by purely personal considerations entirely extraneous to the employer's interests,' " citing *Lebrane v. Lewis*, 292 So.2d 216 (1974). Since the assistant manager was not working on the day in question, his duties did not include hiring employees, and his activities were strictly personal, the court ruled that the company would not be held liable.

Cross dressing illegal in Chicago

In an unanimous opinion, the Illinois Court of Appeals, heavily influenced by the adverse decision in *Doe v. Commonwealth's Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), aff'd 96 S.Ct. 1489, ruled that Section 192-8 of the Chicago Public Morals Code was not unconstitutional, thereby affecting the conviction of two defendants charged with violating the ordinance by "wearing clothing of the opposite sex with intent to conceal his or her sex." *City of Chicago v. Wallace & Kimberley*, 357 N.E.2d 1337 (1976).

Defendants contended the ordinance was (a) unconstitutionally vague; (b) denied them equal protection of the laws; and (c) was an improper exercise of police powers.

With regard to the vagueness argument, the Court, relying on the specific intent clause of the ordinance, held that the language of the ordinance was explicit and that a person of common intelligence and experience could easily ascertain what conduct was prohibited. It distinguished the instant case from *City of Columbus v. Rogers*, 324 N.E.2d 563 (1975), found to be unconstitutional, because the ordinance in *Rogers* which prohibited cross dressing did not require an *intent* to conceal his or her sex.

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The court then held that the ordinance did not deny defendants equal protection of the laws because the classification is based on gender. And, since the U.S. Supreme Court in *Doe* did not recognize any liberty interest in alternative sexual orientations, the State could take an interest in maintaining the integrity of the sex based on traditional sexual classifications.

The main thrust of the case, however, was that the Court felt the ordinance was a proper exercise of police powers; that it did not violate a fundamental personal liberty without satisfying a proper governmental purpose. Although the ordinance does not mention homosexuality, Justice Dieringe said the language of Section 192-8, "suggests it was not enacted to regulate the manner in which one may dress. Rather, it appears to prohibit conduct of a homosexual nature. . . ."

"Furthermore, based on *Doe* (supra) such (homosexual) conduct is not a fundamental right protected by the 14th Amendment and homosexuality may contribute to moral delinquency." Thus, "if a state may prohibit homosexual activity between consenting adults in private, it may also prohibit offensive displays of homosexual conduct in public." (Note: Illinois repealed its sodomy law 16 years ago.) And, if homosexuals wear the clothing of the opposite sex, this "would allow males to more easily victimize females, particularly in public ladies' facilities."

Sexual advance is not sex discrimination

In *Tompkins v. Public Service Electric & Gas Co.*, 422 F.Supp 553 (D.N.J. 1976) the U. S. District Court for the District of New Jersey becomes the fourth of five district courts that have considered the matter to hold that sexual harrassment of a female employee by a male supervisor does not in and of itself constitute a violation of Title VII of the Civil Rights Act of 1964. However, the court held that employing company's subsequent conduct in terminating or otherwise persecuting the employee for complaining about the sexual incident can be a Title VII violation, if motivated by gender-based reasons.

Plaintiff in *Tompkins* alleged that her supervisor made sexual advances to her, which she rebuffed. Upon complaining to the company, plaintiff claimed that she was subjected to a series of disciplinary actions and threats that ultimately culminated in her being fired some fifteen months after the incident occurred.

In rejecting plaintiff's theory that sexual harrassment is a per se violation of Title VII, the court adopted the position that the real nature of the evil involved in employer-employee sexual advances is abuse of authority, and that the gender of the parties is incidental. The court feared that acceptance of the contrary position, urged by plaintiff and by the Equal Employment Opportunity Commission as *amicus curiae*, would create a federal tort remedy for every "inebriated approach by a supervisor . . . at the office Christmas party."

On the other hand, if the employee complains of such an incident and his or her grievance is inadequately processed or results in retaliatory treatment, such employer conduct may ". . . reflect a conscious choice to favor the male employee over the female complainant on the ground that a male's services are more valuable than a female's" and so amount to sex discrimination.

Sex offender not constitutionally entitled to jury determination

The decision of a trial court that a mentally disordered sex offender is not entitled to a jury determination of whether or not he is amenable to further treatment has been upheld by the California Court of Appeal. *People v. Oglesby*, 135 Cal. Rptr. 640 (1977).

The defendant was charged with armed robbery, assault with intent to rape, and assault with a deadly weapon. Pursuant to a plea bargain he pleaded guilty to assault with intent to rape. Also, pursuant to the plea bargain the court found him to be a mentally disordered sex offender and committed him to a state hospital for an indeterminate period.

About 30 months later, the state hospital returned the defendant to court as one who had not recovered and would not benefit by further treatment, but was still a danger to others. The court sentenced him to state prison with credit for his time in the state hospital.

On appeal, the defendant argued that he was entitled to a jury determination as to whether he should have been returned to the state hospital instead of being sent to state prison, relying on *People v. Burnick*, 535 P.2d 352 (1975), *People v. Feagley*, 535 P.2d 373 (1975), and a statutory provision which allows a jury determination of the relevant factual issues in the initial determination of whether or not a person is a mentally disordered sex offender.

The court held that the Mentally Disordered Sex Offenders Act "neither excuses nor mitigates an offender's criminal conduct. Although committed as a mentally disordered sex offender, he may nevertheless be held penally responsible for the crime of which he was convicted. When the . . . [commitment proceedings] have run their course, the criminal case may be resumed and sentence imposed."

The court went on to say that the initial commitment as a MDSO is discretionary with the court and a "person is given no 'right' to such treatment by the Act." Therefore its power is substantially the same when a person has been returned to the court as the defendant was. "Neither the Act, nor *Burnick*, nor *Feagley*, bestowed upon the defendant any right to a jury determination of the correctness of the hospital staff's report before he might be sentenced for his crime."

Court questions consensual sodomy law

The New York Court of Appeals, the state's highest court, has issued a decision questioning the validity of New York's consensual sodomy in two cases involving defendants arrested for violation of this law. *People v. Rice and Mehr*, __ N.E.2d __ (1977).

The court stated that "great constitutional issues . . . are present in these cases" involving "questions of conduct traditionally treated as criminal and yet, when committed privately and circumspectly, suggestive of an unwarranted interference by the State with the lately recognized and inchoate 'penumbral' right of privacy."

The two cases, *People v. Mehr* and *People v. Rice*, had come to the court on appeals from lower court decisions on motions to dismiss the cases before trial on the grounds that the consensual sodomy statute was unconstitutional.

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Contract and equity protection extended to unmarried couples

Agreements between meretricious spouses were frequently held to be unenforceable based upon the conclusion that the "contract" was founded upon immoral consideration. In *Hill v. Estate of Westbrook*, 247 P.2d 19 (1952), the court found that the decedent made an express agreement to compensate his meretricious mate for her services over a sixteen-year period. The plaintiff had worked in the decedent's business, given birth to two children and contributed her "extramarital" earnings to the decedent and to a house which he had purchased. Although the plaintiff had alleged that her services included contributions of her funds and assistance in the decedent's business, the court found that her inclusion of the service of "living with [decedent] as man and wife . . . and during said time bearing [him] two children" was fatal to her action.

The cases in which "immoral" consideration was found offer little insight into what factual circumstances are relied upon in invalidating the meretricious agreement. The court in *Hill* relied upon *Ballerino v. Ballerino*, 82 P.199 (1905), a case in which the plaintiff was denied a right to compensation for his collection of rents and care of property which was used for prostitution purposes. The *Hill* court apparently accepted the equation of a prostitute or "concubine" with a meretricious spouse who had lived continuously with the decedent for a long period of time and had applied her energies to business as well as to intimate activities.

In *Updeck v. Samuel*, 266 P.2d 822 (1954), the court held an oral contract to transfer an undivided half-interest in real property invalid and offered the following explanation of its finding of "unmoral and immoral" consideration: "The illegal oral contract was void *ab initio* because it . . . was based on the consideration that the parties live together as husband and wife. . . . At the time both parties were legally married to other spouses. Hence the alleged agreement called for them to live in a state of adultery. * * * A contract which has the direct effect of promoting sexual immorality is against public policy."

A similarly ambiguous "test" of immoral consideration was set forth in *Pete v. Henderson*, 318 P.2d 720 (1957), where a man agreed to build a room onto his house in which the plaintiff could live for the remainder of her life. In upholding the agreement, the court concluded that more than the fact of a meretricious relationship must be shown in order to invalidate the agreement, as "it does not appear that such relationship *had any connection with* the contract for . . . construction and occupancy." Likewise, the opinion in *Croslin v. Scott*, 316 P.2d 755 (1957), explained: "It is only when the property agreement is made in connection with the other agreement, or the illicit relationship is made a consideration of the property agreement, that the latter becomes illegal." The *Croslin* court suggested that if the meretricious claimant agreed to contribute services other than the 'service' of co-habitation, such as "performing labor and furnishing materials in the building of the house," that continuance of the relationship would not be considered as consideration underlying the agreement.

In making the enforceability of an agreement dependant upon the absence of any "connection" between the covenants and the relationship, the courts were free either to segregate or to integrate the agreement and the "illicit" relationship in order to reach whatever result they considered desirable.

The presence of equitable considerations apart from cohabitation alone appears to have influenced judicial findings of legal and not immoral consideration in meretricious agreements. In *Anderson v. Fratis*, 226 P.2d 363 (1951), an agreement was made between the meretricious spouses *after* they had separated, and the 'wife' received properties which the 'husband' sought to recover. He argued that the consideration was void and contrary to public policies, and the court reminded him that he had beaten the defendant and attempted to run over her with his automobile — her waiver of claims for damages in their agreement was in itself "sufficient consideration." In *Arata v. Bank of America*, 35 Cal. Rptr. 703 (1963), the court upheld the claims for support by the offspring of a meretricious couple. "Nothing in the testimony . . . *expressly* supports the proposition that . . . continuation of the relationship was part of the consideration for [the husband's] agreements to support [the children]."

The cases discussed above reveal that the decision to invalidate a meretricious agreement on the basis of "immoral" consideration was often made through the court's subjective evaluation of the respective "moral turpitude" of the parties, rather than through an objective evaluation of the nature of the relationship and the conduct of the parties. Where a meretricious spouse was viewed as a "scheming" claimant with no reasonable expectation of benefits "attending the status of marriage," such a spouse was likened to a prostitute. Where the court was moved by the familial nature of the relationship or was able to find business transactions involved, the meretricious nature of the relationship was less important.

QUANTUM MERUIT AND TRUST THEORIES

Cases in which the meretricious spouses have sought to recover the reasonable value of services rendered during the relationship also reveal a subjective judgment of the judiciary as to the value of services rendered by the nonworking party. Two cases, *Lazzarevich v. Lazzarevich*, 200 P.2d 49 (1948), and *Keene v. Keene*, 371 P.2d 329 (1962), illustrate the injection of subjective judgment into determinations of meretricious property rights.

In *Lazzarevich*, two spouses were reconciled following the entry of an interlocutory divorce decree and, on their lawyer's representation, believed that no final decree had been entered. The couple separated some time *after* they learned that they had in fact been legally divorced. The court awarded the 'wife' a half interest in property acquired during the 'putative period' following the divorce, as well as quasi-contractual recovery for the reasonable value of her services during the putative period. An implied promise on the part of the defendant to pay plaintiff for her services (in excess of amounts expended by the defendant for her support) was raised, said the court, by the defendant's "fraudulent misrepresentation" of the legality of their marital status. An "innocent but material misrepresentation" by the defendant that no final divorce decree had been entered was sufficient to support a finding of unjust enrichment in the amount of such services. Citing the *Restatement of Restitution*, the court held that a putative spouse's recovery of

quasi-contractual compensation was not based upon her expectations: "The fact that the one rendering the services does not expect to be compensated therefor or otherwise to receive benefit is immaterial."

However, the *Lazzarevich* court then cited *Vallera* and stated that, after plaintiff learned of the final divorce decree and the relationship became meretricious, plaintiff had no reasonable expectation of continuing benefits that equity could protect. Therefore, plaintiff was denied recovery for services performed by her during the "meretricious period." Thus, putative status based on the plaintiff's good faith belief in a valid marriage resulted in the court's finding of the defendant's 'unjust' enrichment. But when the plaintiff was found to be no longer "innocent" or "deluded," consideration of benefits retained by the defendant was not a factor deserving attention.

In *Keene v. Keene*, the protection offered meretricious spouses by the *Vallera* decision was unnecessarily and unfairly narrowed. The plaintiff cohabited with the defendant for 18 years, and she contributed farm labors as well as performance of the traditional duties as a housewife in their relationship. The court refused to impose a resulting trust upon the defendant's property on two grounds. First, in the absence of an express agreement to share jointly in accumulations, the plaintiff could recover only if she had contributed "funds." "Funds," said the court, had a "common, everyday" meaning which did not include *either* marital *or* extramarital services — a meretricious spouse could recover in trust only where money or property of value was contributed in acquisition of property. Second, the court noted that a resulting trust would be imposed only where the contribution was made before or at the time of the acquisition; therefore, subsequent contribution of services was not a basis for recovery.

Justice Peters reminded the *Keene* majority in his dissenting opinion that case law relied upon in *Vallera* permitted recovery for contribution of services as well as of money, and that the law permitted a finding of resulting trust based on implied intentions of the parties to compensate a spouse for labors improving the value of acquired property. Justice Peters concluded that recovery of the reasonable value of services performed by a meretricious spouse was unfairly limited due to judicial notions of "sin."

The limitations which circumscribe recovery in quasi-contract by a meretricious spouse are even more apparent in cases which held that a spouse must be able to specifically identify and trace amounts contributed to a joint acquisition of property. In *McQuin v. Rice*, 199 P.2d 742 (1948), a meretricious husband was denied a trust interest in property purchased during his eight year relationship with the decedent. He testified that he had made payments to his "wife" for the purchase of the property, but he did not remember exact amounts or dates of such payments. Finding a "complete failure of proof," the court refused to impose a trust: "None of the money turned over to the deceased from plaintiff's paychecks was traced as having been paid as part of the purchase price of the property. * * * In absence of evidence to the contrary, *it must be assumed that plaintiff's labor and contributions from his paychecks were intended as payments for his share of the living expenses or as gifts.* [Citation.]" (Emphasis added.) The high burden of proof imposed by the tracing requirement eroded the already uncertain protection of *Vallera.*

DEVELOPMENT OF THE NEW LAW

Paul and Janet Cary lived together for eight years, knowing that they were not legally married. Nevertheless, they "held themselves out" as husband and wife, conducted business affairs as husband and wife, and had four children. Paul worked outside of and Janet worked inside of the home. Upon their separation, Paul petitioned for an annulment of marriage and for a determination of child custody. In determining the parties' respective property rights, the trial court awarded a one-half interest of the couple's property to Janet. In *In re Marriage of Cary*, 109 Cal. Rptr. 862 (1973), a revolutionary ruling issued which applied community property principles to a meretricious relationship and essentially eliminated the "good faith" distinction between putative and meretricious mates. The Court of Appeals concluded that a "community property" interest in joint accumulations and earnings was acquired where the parties were involved in an "ostensible marital . . . and actual family relationship," "regardless of whether the deficiency [in the absence of a valid marriage] is known to one or both, or neither of the parties."

The Cary reasoning was rejected by the Court of Appeals in *Marvin v. Marvin* __ Cal. Rptr. __ (1975), rev'd 557 P.2d 106 (1976). Michelle Marvin, a singer and entertainer who gave up her career in order to live with Lee Marvin, filed suit when he terminated the support payments which had been forwarded to her following the end of their six-year relationship. Michelle alleged that she and the defendant "entered into an oral agreement" that "they would combine their efforts and earnings and would share equally in any and all property accumulated as a result of their efforts whether individual or combined." Michelle agreed to "devote her full to defendant . . . as companion, homemaker, housekeeper, and cook."

Although it recognized that the question of illicit consideration is "generally one of fact," the Court of Appeals upheld the trial court's dismissal of the complaint and denial of leave to amend, and held as a matter of law that the alleged contract was unenforceable upon its face. As in *Hill v. Estate of Westbrook*, supra, the Court of Appeals apparently considered the inclusion of cohabitation as a "service" in the agreement as fatal to the contract's enforce-

□ *continued on page 20*

"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."

—JUSTICE TOBRINER in *Marvin v. Marvin*

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Contract and equity protection extended to unmarried couples by California Supreme Court

ability, although the Court did not find that the agreement was predicated upon the continuation of the relationship and merely noted "involvement" and "contemplation" of a marriage relationship as "basic consideration" for the agreement. And as in *Hill*, the decision implies a heavy emphasis of "moral" considerations — the Court mentioned four times that plaintiff knew that she was not married to the defendant and that he had a legal wife living at the time they began cohabiting.

In reversing and remanding the action for trial, the California Supreme Court compromised and thus resolved the conflicting positions of the Appellate Districts. The reasoning of *Cary* was rejected, because "[n]o language in the Family Law Act addressed the property rights of nonmarital partners, and nothing . . . suggests that the Legislature considered that subject." However, the *Marvin* court did "share the perception of the *Cary* . . . [Court] that the application of former precedent in the factual setting of [that case] would work an unfair distribution of the property accumulated by the couple." Because of legislative silence with respect to rights of meretricious claimants, it was the judiciary's responsibility to delineate such rights and to remedy the "deficiencies" in former precedents.

The *Marvin* court concluded that: (1) the Family Law Act does not govern rights to property acquired during a meretricious relationship, contrary to the reasoning in *Cary*; (2) agreements made between meretricious couples are enforceable even where the couple contemplates the creation or continuation of their nonmarital relationship, so long as sexual services are not *explicityly* the consideration underlying the agreement; (3) in the absence of an express contract, the courts should inquire into the conduct of the parties and allow recovery if the facts demonstrate an implied contract on some tacit understanding between the parties or warrant the application of quantum meruit or trust principles.

The *Marvin* decision makes clear that only agreements *explicitly* founded upon the consideration of meretricious sexual services are not *explicitly* the consideration underlying the agreement; (3) in the absence of an express conenforceable to the extent that a portion of the agreement resting on other consideration is severable. The ruling protects the reasonable expectations of the meretricious couple by allowing the couple an "election," i.e., a choice to pool only a portion of their earnings or to keep their earnings separate. At the same time, the opinion implicitly overrules prior decisional law in which courts searched for immoral consideration based upon their subjective evaluation of moral turputide. Findings of illicit or immoral consideration are limited to agreements which are, in effect, contracts for prostitution.

Because the *Marvin* court held that the plaintiff's complaint stated a cause of action based upon an express contract, the decision's language concerning implied agreements is dicta. Nonetheless, the Court's conclusion that a meretricious spouse may recover on the basis of an implied agreement expands the basis for such recovery far beyond that permitted under prior case law. The *Marvin* court thus adopted the dissenting position of Justice Curtis in *Vallera v. Vallera.* Although the dicta at least indicates the Court's willingness to protect reasonable expectations of meretricious couples, the decision offers no guidelines to direct the trial courts in finding implied agreements. The Court does not indicate what would constitute sufficient evidence of an implied agreement, and further litigation will be necessary before proper guidelines are established. Because the rights of meretricious couples remain uncertain pending such further litigation, it may be necessary for couples to execute express agreements or contracts prior to entering into such a relationship in order to clarify their property rights and to avoid litigation.

The *Marvin* decision effectively encourages contractual "marriages" and heralds the acceptance of alternative life styles. The implications of the decision may even be far-reaching enough to provide legal protection in "quasi-marriages" of same-sex couples, at least insofar as property rights are concerned. The primary importance of the *Marvin* decision lies in its repudiation of the holding in *Vallera v. Vallera* that "equitable considerations arising from the reasonable expectation of . . . benefits attending the status of marriage . . . are not present [in a nonmarital relationship]." The *Marvin* opinion permits division of property based upon reasonable expectations and equitable considerations other than those attendant to marriage: "We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies; we need to treat them just as we do any other unmarried person."

— STEVEN T KELBER and LINDA P. HORNER

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Sodomy law continued from page 17

The trial court granted the motions and held that the statute was unconstitutional as a denial of equal protection of the law to single persons, since the statute made consensual sodomy a crime only when committed by persons not married to each other, but legal when committed by persons married to each other. An intermediate appellate court reversed that decision and held the statute to be valid.

The Court of Appeals declined to rule on the merits of the defendant's constitutional challenge on the grounds that it did not have enough facts about the place where the acts occurred and whether any persons other than the actors had been present. The court sent the cases back to the lower court for a full trial, stating that its action was "without prejudice, however, to a review or application for review of the issues on the merits when, as, and if defendants, or either of them, are convicted."

The cases are significant because the Court's decision indicates that it does not feel precluded from an examination of the merits of the constitutional issues by the U.S. Supreme Court's decision in *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd 96 S.Ct. 1489, 2 Sex.L.Rptr. 2, 36. This is in keeping with a recent line of decisions from the highest courts of a number of states asserting their right to reach independent judgments on significant issues of individual liberties under the constitution of their own states. □ Court News continued on page 23

ADMINISTRATIVE RULINGS...

Navy policy partially changed regarding homosexual discharges

The Secretary of the Navy, W. Graham Claytor, Jr., has upgraded to "honorable" the "other than honorable" discharge awarded to the first U.S. Naval Academy graduate to challenge the Navy's ban on homosexuals in the Navy.

The action, taken on April 14, 1977, retroactively upgraded the discharge of former Ensign Vernon E. Berg, III, which took place after the United States District Court in Washington, D.C., refused to enjoin the Navy from discharging the Annapolis graduate.

In a brief filed in the court action, which seeks the reinstatement of Berg in the Navy and challenges the constitutionality of the Navy ban on homosexuals, the U.S. Department of Justice, which represents the Navy in the court proceedings, stated: "In recent weeks events have occurred which significantly alter the positions of both the plaintiff and the defendant in this lawsuit. . . . Pursuant to plaintiff's counsel's request of February 15, 1977, the Secretary of the Navy has reconsidered plaintiff's case as well as the Navy's policy concerning the discharge of homosexuals, and has determined that certain changes should be made in Naval policy regarding the processing of homosexuals for discharge. In light of this policy change, on April 14, 1977, the Secretary ordered that plaintiff be issued an honorable discharge."

While the Secretary's action has in effect granted Berg part of the relief he sought — an upgrading of his discharge to honorable — it still does not change the Navy's basic policy of exclusion of gay people from the service. The change in the Navy's policy on the type of discharge to be awarded to homosexuals, however, should help gay service men and women who previously were given less than honorable discharges to obtain upgrading of their discharges to honorable if they apply for such upgrading through the Navy's Board for Correction of Naval Records.

Job Corps revises manual on sexuality

The U.S. Job Corps has distributed to all its training centers a revised manual on "Sexuality" which eliminates the anti-homosexual elements contained in the previous manual which was entitled "Sexual Deviation." The revised manual urges respect for differing sexual lifestyles and instructs Job Corps directors that "[r]ules concerning sexual behavior must be the same for heterosexual and homosexual activities."

The previous manual was aimed at the "prevention and management" of homosexuality and included such phrases as "chronic overt homosexuality." It also prescribed "medical discharges" for "sexual deviation" except in cases where the individual seemed "motivated to change" his or her sexual orientation.

The new manual states clearly that "[a] man or woman may not be excluded from participating in the Job Corps solely on the basis of his/her choice of a sexual partner of the same gender. Therefore, homosexuality will be considered as one part of the total spectrum of sexuality, and should be of concern to center staff only when a particular behavior is not in keeping with the center's regulations. . . ."

The manual also suggests that Job Corps centers use their Intergroup Relations Programs to "include understanding of different sexual preferences and lifestyles." It also includes a list of books and articles by and about gay women and men, and suggests that local gay groups be used as resources for staff training.

Narrow interpretation of sexual orientation clause

The Bloomington, Indiana, Human Rights Commission has ruled, in a 5-1 decision, that gays and same-sex couples have no rights to dance with each other. Although the city has an ordinance banning discrimination on the basis of sexual orientation, the rights board ruled that dancing does not fall within the protected categories of that legislation.

The decision found that gays are an "invisible class" and since same-sex dancing does not necessarily indicate sexual orientation, the Commission ruled, there is nothing that can be done to force local discotheques to allow same-sex dancing.

The Commission has also said that it has no jurisdiction over situations in which people of the same sex are barred from sharing an apartment. The Commission asserted that this is a "neutral" issue and does not necessarily indicate anti-gay discrimination.

Tucson enacts gay rights ordinance

Tucson, Arizona, has become the 39th community in the U.S. to pass a gay civil-rights bill. It was the second community to pass such legislation this year, following Dade County, Florida.

The Tucson bill, which was passed unanimously by the seven-member City Council, is one of the most comprehensive ordinances in the nation. It forbids both public and private discrimination on the basis of "sexual or affectional preference or marital status" in the areas of employment, housing, public accommodations, credit, lending and insurance. It also bars personal discriminatory practices and aiding and abetting such practices. Unlike most other cities with gay-rights legislation, the Tucson ordinance empowers the city attorney to *prosecute* rather than requiring those discriminated against to appeal to the local Human Rights Commission.

According to members of the Tucson Gay Coalition, a factor which spurred the gay community to action on behalf of the bill and influenced members of the council to support gay rights, was the recent brutal murder of a gay man by a gang of teenagers and the controversial sentencing of the killers to probation and what amounted to a reprimand from the judge.

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-Compiled by DON GAUDARD

Unwed employee's firing for pregnancy is sex discrimination

The termination of an unmarried female employee for being pregnant constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. *Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364 (6th Cir. 1977). Plaintiff, the executive secretary for the Senior Vice President of defendant company, had been employed in that position nearly five years when her employer learned that she was pregnant. He immediately gave her two weeks notice, later rescinding that order and transferring her to a clerical position after consulting with the company's attorney. The court of appeals affirmed the district court's finding that this transfer to a less desirable position amounted to constructive termination of employment.

EEOC Guidelines, 29 C.F.R. §1604.10(a), forbid blanket exclusion of employees due to pregnancy, and the court held that this rule is a correct interpretation of the Civil Rights Act, 42 U.S.C. §2000e-2(a) and applies to unmarried as well as married women, there being no rational job-related reason to distinguish between the two groups. The court rejected as sophistry the company's argument that plaintiff had failed to show that she was treated any differently from "expectant fathers." The court distinguished *General Electric Co. v. Gilbert*, 97 S.Ct. 401, which relies on similar reasoning, on the grounds that *Gilbert*, unlike the present case, did not involve *invidious* discrimination against pregnant women. The court also rejected the company's argument that the firing of plaintiff was a legitimate attempt to control premarital sex among employees. Plaintiff was not fired because she had sex, the court held, but because she got pregnant.

Sexual survey by student is constitutionally protected

In the case of *Trachtman v. Anker*, 426 F.Supp. 198 (1976), the court held that the first amendment protects a student seeking to distribute a questionnaire concerning sexual attitudes and practices to his fellow students and publish an article based on the survey in the school newspaper. The school principal and the New York City Board of Education had denied the student permission to conduct the survey on the grounds that such a survey could only be conducted with sufficient sensitivity by professional researchers and that a student-run survey would cause irreparable psychological harm to some students by causing them to confront their sexual conflicts too abruptly and prematurely. The survey probed attitudes about such issues as homosexuality, sex outside of marriage, masturbation, and the equality of the sexes.

In reaching its conclusion, the court applied the principle enunciated in *Tinker v. Des Moines Independent Community School District*, 89 S.Ct. 733 (1969), that school officials may restrict expressive student activity only to the extent "necessary to avoid material and substantial interference with schoolwork or discipline." Based on the evidence presented, the court found that defendants had failed to prove that a student-run survey would be harmful to high school seniors and juniors, but instead showed that a soberly-conducted student survey would help students to face and resolve their sexual conflicts. However, the court held that school officials could validly deny access to the questionnaire to the younger students — ninth and tenth graders.

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SEXUALAWREPORTER

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...IN THE COURTS

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Fitness hearing required for homosexual military discharge

A Navy enlisted woman, denied permission to re-enlist for the sole reason that she had engaged in homosexual conduct during the period of her Naval service, has won injunctive relief in a landmark federal court decision, *Saal v. Middendorf*, No. C-73-1299 WWS (N.D. Cal. February 8, 1977).

Plaintiff successfully challenged, on procedural due process grounds, the validity of the Secretary of the Navy's Instruction 1900.9A which mandates the prompt separation from the service of naval personnel who are involved in homosexual acts on the grounds that such persons are "security and reliability risks who discredit themselves and the Naval service by their homosexual conduct."

Plaintiff Saal's victory, while significant, was a narrow one. The court did not hold that the Navy is constitutionally barred from refusing to enlist or re-enlist persons who have engaged in homosexual acts or from discharging persons who engage in homosexual acts while they are in the Navy. But the court did hold that, when the Navy seeks to discharge such persons or bar their re-enlistment, it must consider each case on its own merits and can no longer rely on the blanket presumption that homosexual conduct *ipso facto* renders a person unfit for the service and requires mandatory discharge. "In the case of every other class of misconduct warranting an undesirable discharge [except for homosexual acts or drug trafficking], the regulation in some form or other specifically directs that the decision to discharge shall be based on the merits of the case." Henceforth, the Navy must provide the same procedural protection to persons who engage in homosexual conduct.

In response to a request from the court, the Navy submitted a list of reasons that purportedly justify the disparate treatment of homosexuals. Retention of known homosexuals, the Navy argued, would create a shipboard tension because most Navy personnel "despise/detest" homosexuals. In addition, the Navy expressed fear that homosexuals would be unduly influenced in performance of their duties by emotional relations with other homosexuals, that chain-of-command problems could arise since enlisted persons would not respect an officer who exhibited homosexual tendencies, that parents would not permit their children to join the Navy if the Navy harbored homosexuals in its ranks, that homosexuals might force their desires on others, that homosexuals would be more susceptible to blackmail and other pressures, including "undue influence by a homosexual partner." The court noted that all of these reasons were applicable to other classes of persons besides homosexuals. "Thus, 'tensions and hostilities' could justify exclusion of members of minorities or other persons who also may be 'despised' by some; disruptive emotional relationships could exist between male and female Navy personnel justifying exclusion of women; parents may become concerned over their children associating with Navy personnel who may gamble, use alcohol or drugs or engage in illicit heterosexual relations; persons other than homosexuals may engage in disruptive physical aggression; and fear of criminal prosecution, social stigma and divorce and the danger of undue influence is a risk created by any form of illegal or antisocial conducts, not confined to homosexuality. In other words, the problems which the Navy enumerates to support blanket exclusion of persons who engage in homosexual acts are problems which are endemic to a heterogeneous society and with which it deals in the ordinary course of its operations on a case-by-case basis." Moreover, the Court noted, the Navy made no showing that homosexuals as a group were less qualified to perform the tasks required of Navy personnel; and, in plaintiff's case, her record showed that her performance was rated as superior by the Navy, even during the period when her case was in litigation.

In reaching its conclusion that the Navy's blanket discharge rule for homosexuals was constitutionally invalid, at least as applied to plaintiff, the court applied the test set forth in *Kelley v. Johnson*, 96 S.Ct. __ (1976), which dictates that a military regulation must stand unless plaintiff demonstrates that the challenged regulation bears no rational relation to the "unique military exigencies" that dictate the regulation's promulgation. However, the court also indicated that a more demanding standard might be appropriate in light of the stigma that the challenged regulation imposes upon individuals.

It should be noted that the court's opinion does not make it entirely clear whether the court is holding Instruction 1900.9A invalid on its face, or merely as applied to plaintiff. However, as a matter of logic, there would appear to be no reason why the court's holding that plainttiff is entitled to have her fitness to serve "evaluated in the light of *all relevant factors* and free of any policy of mandatory exclusion" should not be applicable to any person whom the Navy seeks to discharge for homosexual acts.

Peep show closed by curtain ruled a public place

A California Court of Appeal affirmed the conviction of a man charged with lewd conduct in a movie booth at an adult bookstore. *People v. Freeman*, 136 Cal. Rptr. 76 (1977). The police, without a search warrant, entered the bookstore, pulled back the curtain of a movie booth, and arrested the defendant therein, charging him with engaging in lewd or dissolute conduct in a public place or in a place open to the public or exposed to public view.

The issue on appeal was whether a booth, curtained by the owner of a movie arcade, is the type of public place that can be searched without a warrant. That is, does the fact that the booth was curtained off convert it into a private place that is not subject to a search warrant without a showing of probable cause or exigency.

Relying on *People v. Dumas*, 512 P.2d 1208 (1973) and *People v. Edwards*, 458 P.2d 713 (1969), the court held that a curtain placed over the front of the booth did not convert it into a private place, and even though defendant expected his privacy to be maintained, such expectation was not reasonable. The court found that the curtain's purpose was to shut out excessive light, not to secure privacy, and therefore the intrusion by law enforcement officers was not unconstitutional. The California Supreme Court denied a hearing of the case.

SEXUAL LAW REPORTER

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GAY RIGHTS DEFEAT IN DADE COUNTY HAS NATIONAL IMPLICATIONS

Because this issue of the SLR is late in going to press, we are able to present a detailed account of the background, results and national implications of the June 7th Election in Dade County, Florida, regarding the civil rights of gay people.

In July, 1976 several gay rights leaders in Miami formed the Dade County Coalition for the Human Rights of Gays. The Coalition involved itself in the fall elections and 45 of the 49 candidates endorsed by the coalition were elected to public office.

In December, 1976 Dade County Commissioner Ruth Shack introduced an ordinance to prohibit discrimination in housing, private employment, and public accommodations on the basis of sexual orientation. The Commission tentatively approved the resolution by a vote of 9-0, but scheduled a public hearing on the issue.

An organization was formed by Anita Bryant and her supporters called *Save Our Children from Homosexuality.* This group attended the public hearing on the proposed gay rights ordinance in January, 1977 and urged the Commission to reverse its previous vote. However, the Commission again approved the ordinance, but only by a vote of 5-3. Bryant promised a petition drive to repeal the ordinance by referendum.

Save Our Children, Inc. collected over 60,000 signatures, more than six times the number needed for the referendum. The Commission was then faced with the decision of repealing the ordinance or having the issue placed on the ballot for a referendum. It was estimated that the election would cost the taxpayers over $100,000.00. In March, 1977 the Commission voted 6-3 against repealing the ordinance. The ordinance then had to be placed on the ballot to allow the voters to decide whether to repeal it.

In April, 1977 the Bryant forces filed suit in the Dade County Court to enjoin the Commission from proceeding with the referendum, asking the court to declare the proposed ordinance invalid. The plaintiffs charged that the local ordinance was inconsistent with state law and was therefore void on its face. Their argument was premised on the claim that homosexuality was illegal under state law, and that the Commissioners could not force employers, landlords and businesses to accept homosexuals as workers, tenants, or customers. The plaintiffs argued that the state law prohibiting "unnatural and lascivious conduct" in public or in private outlawed homosexual conduct. Therefore, they argued, homosexuals are criminals.

Judge Sam Silver issued a temporary restraining order, stopping the referendum, pending his final ruling on the legality of the ordinance. □ *continued on page 38*

SLR REPORT:

Los Angeles Prosecutor reforms guidelines on lewd conduct cases

After months of study and discussion within his own office and with defense attorneys, the gay community, and local police, Burt Pines, Los Angeles City Attorney, has adopted new guidelines for the prosecution of misdemeanor complaints arising out of non-commercial sexual solicitations, lewd conduct, or loitering under Sections 647(a) and 647(d) of the California Penal Code.

Section 647 provides in part as follows:

"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

"(a) 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.

"(d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act. . ."

Sections 647 (a) & (d) are misdemeanors with maximum penalties of up to six months in jail or a $500.00 fine or both. In addition, anyone convicted of either of these offenses must register as a sex offender with the local police. A conviction of either offense is considered a conviction of crime involving "moral turpitude" which may result in the denial, suspension, or revocation of teaching credentials or other professional licenses.

There have been about 2,500 arrests for these offenses each year by the Los Angeles Police Department. After making the arrest, the police contact the City Attorney in order that a complaint may be filed with the court. The City Attorney reviews the arrest report and will either 1) file a complaint charging the defendant with a violation of Sections 647(a) or (d), or 2) reject the case and file no complaint with the court for any offense, or 3) file a complaint with the court for some other offense related to the facts in the arrest report. Until the formation of these new guidelines, there have been no written criteria as to which of these alternatives would be chosen by the Deputy City Attorney reviewing the case for possible filing. □ *continued on page 35*

THIS ISSUE:

SPECIAL SUMMARY OF LEGISLATION AFFECTING SEXUAL LAW REFORM

IN THE COURTS...

Gay Ensign's Discharge Upheld

Judge Gesell of the U.S. District Court for the District of Columbia has granted summary judgment in favor of the Navy and dismissed the complaint of Ensign Vernon E. Berg, a naval officer who was cashiered from the service for engaging in homosexual acts while in the Navy. *Berg v. Clayton*, __ F.Supp. __ (D.D.C. 1977).

The Navy's action against Berg started when he was stationed aboard the *U.S.S. Little Rock* in Galta, Italy, in July, 1975. An enlisted man serving on the *Little Rock* claimed that Berg "attempted to perform a homosexual act upon him," and an investigation into Berg's sex life ensued. Berg freely admitted that he had been sexually active while in the Navy, but denied ever having sex with other Navy personnel. Since Navy regulations forbid all homosexual activity on the part of naval personnel, and not merely sex with other naval personnel, Berg's admission brought him within the prohibition of the regulations. Berg was given a hearing before an Administrative Discharge Board, which recommended discharge under "other than honorable conditions." Berg was discharged on June 3, 1976, after Judge Gesell denied his request for a temporary restraining order. On April 14, 1977, the Secretary of the Navy ordered Berg's discharge upgraded to honorable.

A major factor in Berg's defeat was the Supreme Court's decision in *Doe v. Commonwealth's Attorney*, 96 S.Ct. 1489, *aff'd mem.* 403 F. Supp 1199 (E.D. Ca. 1975) Judge Gesell read *Doe* as authoritatively promulgating the principle that homosexual activity is unprotected by the constitutional right of privacy.

According to the court's reasoning, it follows from this premise that a dismissal for homosexual activity is to be judged by a lenient standard of review and upheld unless proven to be irrational. See *Kelley v. Johnson*, 96 S.Ct. 1440 (1976). The court, applying this test, accepted the Navy's explanation that its policy of discharging sexually active homosexuals was based on its concern that homosexual officers would be less effective on shipboard because they would be ridiculed by the enlisted personnel, with an attendant diminution of their ability to command. This state of affairs would "compound the already severe pressures faced by all officers aboard ship, putting the homosexual officer in an unusually difficult position, thus further decreasing his effectiveness." The policy of discharging known homosexuals is thus justified, in the Navy's view, "as long as [the Navy] is assigned its present fleet mission."

The court held that Berg's evidence that he was a good officer who served without experiencing the kind of difficulty foreseen by the Navy was "not to the point. The issue is whether the concerns expressed by the Navy would apply to so few officers that a general policy against homosexuality is irrational." Berg failed to prove that the Navy's fears were fanciful, and evidence was presented by the Navy that the Navy's concerns "have a basis in fact and are not conjectural."

The court acknowledged that "there are problems inherent in burdening a class of people because of the reactions they engender," but it held that it is permissible to take into account the reactions of third persons where the class that is burdened is not "suspect" or engaged in protected behavior.

[Judge Gesell's reasoning, in concluding that minimal scrutiny of Navy policy is all that is required in the *Berg* case can be criticized. It is true that the regulation under which Berg was terminated regulates conduct that is at least arguably unprotected by current Supreme Court doctrine. But the Navy terminates not only those who engage in homosexual conduct, but also those who have "homosexual tendencies," as it must if its justifying reasons—fear of the reaction of third persons—is to be taken seriously. (Indeed, in order to be fully consistent, the Navy should cashier everyone who is perceived to be homosexual by his or her shipmates, regardless of whether or not the perception is accurate.) Moreover, whether or not the real or suspected homosexual has actually engaged in homosexual acts is irrelevant in terms of Navy policy, except perhaps if those acts take place on shipboard. It thus seems anamoalous to judge the validity of the Navy's policy—which is directed against persons and not conduct—by a standard that might be appropriate if the target of the entire scheme of regulation were conduct only. In addition, since it was not proved that Berg had sex with other Navy personnel, his discharge, it may be argued, fairly presents the issue of how far the Navy can go in punishing people not for what they do, but for who they are. This issue was not adequately dealt with by Judge Gesell's opinion. —*ED.*]

Berg also raised other objections to the validity of his termination, all of which were summarily rejected by the court. Berg's claim that he was terminated without procedural due process was rejected on the ground that he had no "liberty" or "property" interest in continued employment by the Navy. His liberty interest was vindicated when his discharge was upgraded to honorable, and his property interest ended when he admitted to having performed homosexual acts while in the Navy, the court held. The court conceded that Berg had an interest in persuading the Administrative Board to recommend that he be retained despite his homosexual conduct, but held that this "hope" was insufficient to trigger procedural due process protection. It should be noted that the *Berg* court's analysis of the procedural due process issue, beginning as it does from the premise that it is at least theoretically possible for a person who commits homosexual acts to remain in the Navy, differs completely from that of the court in *Saal v. Middendorf*, __ F.Supp. __, 3 Sex.L.Rptr. 24, which reads Navy policy as being one of blanket exclusion of gays, and, as such, a violation of due process.

The court also held that the Administrative Board which recommended Berg's termination was valid under Navy regulations even though three members stated that they "could envision no circumstances under which it would be advisable to retain a homosexual in the service." The court held it sufficient that the Board members indicated that they could keep an open mind on the subject of homosexuality and would listen to the expert testimony.

Finally, the court rejected Berg's claims that the hearing leading to his discharge was invalid because its findings were not approved in accordance with Navy regulations, that the regulation under which he was discharged was not signed by the President, and that the Secretary of the Navy abused his discretion in not deciding to retain Berg in the Navy despite his homosexual conduct.

□ *more Court News on page 37*

LEGISLATION...

ALABAMA	AL
ALASKA	AK
ARIZONA	AZ
CALIFORNIA	CA
COLORADO	CO
CONNECTICUT	CT
DELAWARE	DE
FLORIDA	FL
GEORGIA	GA
HAWAII	HI
IDAHO	ID
ILLINOIS	IL
INDIANA	IN
IOWA	IA
KANSAS	KS
KENTUCKY	KY
LOUISIANA	LA
MAINE	ME
MARYLAND	MD
MASSACHUSETTS	MA
MICHIGAN	MI
MINNESOTA	MN
MISSISSIPPI	MS
MISSOURI	MO
MONTANA	MT
NEBRASKA	NE
NEVADA	NV
NEW HAMPSHIRE	NH
NEW JERSEY	NJ
NEW MEXICO	NM
NEW YORK	NY
NORTH CAROLINA	NC
NORTH DAKOTA	ND
OHIO	OH
OKLAHOMA	OK
OREGON	OR
PENNSYLVANIA	PA
RHODE ISLAND	RI
SOUTH CAROLINA	SC
SOUTH DAKOTA	SD
TENNESSEE	TX
UTAH	UT
VERMONT	VT
VIRGINIA	VA
WASHINGTON	WA
WEST VIRGINIA	WV
WISCONSIN	WI
WYOMING	WY
DIST. of COLUMBIA	DC
PUERTO RICO	PR

EDITOR'S NOTE: The *SexuaLawReporter* wishes to thank the legislatures of the 30 states which responded to our recent survey addressed to *all* state legislatures. With information from other sources we were able to supplement this survey with the legislation from an additional eleven states. Over 500 pieces of legislation were reviewed, including the entire Criminal Codes from several states.

Our special thanks go to the Maryland *Governor's Commission to Study the Implementation of the Equal Rights Amendment* and to the Massachusetts *Special Study Commission on the Equal Rights Amendment* for the extensive information they provided us. — *DG*

SEXUAL OFFENSES

AZ—SB 1023 creates and defines crimes relating to prostitution, obscenity, furnishing or displaying sexual materials to minors, publicly displaying nudity or sex for advertising purposes.

AZ—SB 1035 provides for punishment of life imprisonment upon the third conviction for rape, sodomy, arson and other specified crimes.

AZ—HB 2055 bans all sexual acts between persons of the same sex, while all non-commercial sexual acts between consenting heterosexual adults would be lawful.

AZ—HB 2055 amended Penal Code to provide for misdemeanor penalties for both homosexual and heterosexual sodomy. *Enacted.*

AZ—HB 2129 increases penalties for rape and disallows suspension of sentence, probation, pardon or parole until person has served the minimum sentence imposed.

AZ—HB 2184 increases penalties for rape, crime against nature, lewd and lascivious acts, and molestation of a child.

AR—Act 828 declares that consensual sodomy (both anal and oral) is a criminal offense only if committed by persons of the same sex. *Enacted.*

CT—SB 960 appropriates $100,000 to State Police Sex Crimes Analysis Unit for data processing capabilities.

CT—SB 961 provides that penetration, for the act of sexual intercourse, may be committed by any part of the actor's body.

CT—SB 962 creates a special investigative task force on sex crimes.

CT—SB 963 establishes a special sex crimes prosecutorial office within the Division of Criminal Justice.

DE—HB 991 redefines sexual intercourse to include cunnilingus with result that non-consensual cunnilingus constitutes crime of rape. *Enacted.*

DE—HB 190 changes age limit of victim from 12 to 16 in which sodomy becomes a class B felony; changes age from 12 to 16 for crime of sexual assault without consent; changes age from 12 to 16 in determining whether there is or is not a defense in sexual offenses.

DE—HB 193 makes a person who patronizes a prostitute guilty of a misdemeanor.

DE—HB 221 is essentially the same as HB 193.

FL—HB 379 provides that any person, rather than only those persons 18 years of age or older, who commits sexual battery on a person 11 years of age or younger is guilty of a life felony.

FL—HB 1091 provides that the commission of sexual battery upon any unmarried person who is under the age of 18 years and who is of previous chaste character is punishable as a second degree felony; provides that it is not a defense to prosecution that the prosecutrix was not of previous chaste character when the lack of such chastity was caused solely by previous sexual relations between the defendant and the prosecutrix; eliminates current prohibition against carnal intercourse with unmarried minors of previous chaste character.

FL—HB 1092 requires persons who are responsible for or supervise the treatment of a victim or apparent victim of sexual battery to make a confidential report for statistical purposes.

FL—HB 1624 provides for forfeiture of any personal property employed in the commission of prostitution, sexual battery, lewd and lascivious behavior, obscenity and other specified crimes.

□ *continued on following page*

LEGISLATION...

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FL—HB 1624 provides for forfeiture of any personal property employed in the commission of prostitution, sexual battery, lewd and lascivious behavior, obscenity and other specified crimes.

FL—HB 1664 provides a first degree misdemeanor penalty for persons taking, possessing, harming, or molesting any anthropoid or humanoid native to Florida.

GA—HB 250 creates and defines the crime of necrophilia.

GA—HB 267 provides that when a person is convicted of rape and the punishment imposed is not death, such person shall also be sentenced to the surgical removal of his testicles.

GA—SB 235 deletes provision that no conviction shall be had for rape on the unsupported testimony of the female. *Passed Senate.*

ID—SB 1196 provides new definitions of prostitution; defines sexual conduct and sexual contact; makes a third conviction for prostitution a felony; makes patronizing a prostitute a misdemeanor. *Enacted.*

ID—SB 1263 strikes provision that a man cannot rape his wife if a spouse has initiated legal proceeding for divorce or separation, or if the spouses have voluntarily been living apart for 180 days or more; provides that uncorroborated testimony may convict; limits the introduction of evidence of past sexual conduct by the prosecuting witness; provides that a person convicted of rape may be ordered to pay costs incurred by the victim. *Enacted.*

IN—HB 1173 would institute felony penalties for all acts of oral or anal sex, except when performed by a married couple. *Rejected by Committee 6-4.*

IA—H 171 amends the Criminal Code to make adultery a serious misdemeanor.

IA—H 524 provides that those now required to report cases of physical abuse of a child also be required to report cases of sexual abuse of children.

KA—SB 310 would drop the ban on consensual sexual acts by members of the same sex. *Died in Committee.*

MD—SB 506 creates a provision for a consecutive sentence upon conviction of a prison inmate for a sexual offense on another inmate. *Passed both Houses.*

MD—SB 699 includes Sexual Offense trials under the law prohibiting evidence of a victim's prior sexual conduct in rape trials. *Passed both Houses.*

MD—SB 700 requires that entry-level and in-service-training be provided for police in the areas of rape and sexual offenses. *Passed both Houses.*

MD—SB 934 changes from first degree rape to second degree rape the act of intercourse with a person under 14 years of age, if the other person is at least 4 years older than the victim. *Passed both Houses.*

MD—HB 1445 is substantially similar to SB 699, except that this bill applies only to first and second degree sexual offenses. *Passed both Houses.*

MD—HB 1650 enables a judge to order restitution by a criminal defendant where the victim suffered actual medical expenses, direct out of pocket losses, or loss of earning as a result of the crime. *Passed both Houses.*

MD—HB 1984 requires the Health Department to reimburse the doctor or hospital for services in the physical examination of an alleged rape or sexual offense victim, when such examination is for the purpose of establishing evidence of the crime. *Passed both Houses.*

MS—SB 2574 would prohibit the seduction or illicit connection of any child under 18 of previous chaste character. *Died in Committee.*

MS—SB 2575 prohibits anyone over the age of 18 from handling, touching or rubbing a child under the age of 14 for the purpose of gratifying his or her lust or indulging in his or her depraved licentious sexual desires whether or not the "victim" consents. *Died in Senate.*

MS—SB 2576 prohibits sexual intercourse between a teacher and a pupil. *Died in Committee.*

MS—SB 2577 prohibits sexual intercourse between a guardian and a ward. *Died in Senate.*

MS—SB 2580 makes it unlawful to window peep for the lewd, licentious and indecent purpose of spying upon the occupants of a structure; provides for imprisonment up to 5 years upon conviction. *Died in Senate.*

MS—SB 2582 makes it unlawful to have carnal knowledge of any unmarried person of previous chaste character younger than himself or herself if the victim were over 12 and under 18. *Died in Committee.*

NE—LB 38 revised entire criminal code; makes all non-commercial sexual activity between consenting adults legal. *Passed by Legislature; Vetoed by Governor; Veto overriden.*

NV—AB 113 requires that persons convicted of crimes be required to register with the police within 24 hours of any change of address.

NV—AB 198 requires that persons convicted of felonies or misdemeanors involving drugs or weapons be required to register with the police within 48 hours of any change of address.

NM—HB 55 creates a special fund to assist in enforcement of certain sexual crimes; provides for training programs for the collection and preservation of evidence and the handling of victims of sexual crimes.

NM—SB 44 provides that a reasonable mistake of fact as to age of victim between 13 and 16 is a defense to criminal prosecution for a sex offense.

NY—A-1201 repeals the sodomy laws which are presently applicable only when performed by persons of the same sex.

NY—S-34 is the same as A-1201.

ND—HB 1469 redefines sexual act and the offenses of gross sexual imposition, sexual imposition, corruption of minors and sexual assault. *Passed both Houses.*

OH—HB 15 provides for mandatory imprisonment and treatment for persons convicted of child molesting.

OH—HB 134 expands the coverage of the prohibitions against gross sexual imposition and sexual imposition.

OK—HB __ would repeal the sodomy laws. *Defeated in House* 54-36.

OR—SB 503 modifies definition of female for certain criminal offenses to refer to a person not maintaining same domicile with husband rather than requiring separation of spouses pursuant to a decree.

OR—SB 857 creates crime of accosting a minor for sexual purposes which includes sexual intercourse and deviate sexual intercourse.

OR—SB 858 provides that crime of sexual abuse in second degree require sexual contact to be offensive to the nonconsenting person and requires actor to know the contact would be offensive; or other person who consents is either under 14 or between 14 and 17 and more than 4 years younger than actor.

OR—HB 2213 repeals provision criminalizing prostitution.

OR—HB 2523 is the same as SB 503.

OR—HB 3176 permits conviction for promoting or compelling prostitution on basis of uncorroborated testimony of those compelled or promoted.

WI—SB 84 provides that any person committing enumerated felonies including sexual assault and sexual perversion while armed with a dangerous weapon shall be imprisoned for not less than 3 years and would be eligible for parole only after serving at least three years.

WI—AB 66 restricts eligibility for probation or parole for person convicted of first degree sexual assault to at least 10 years with no time reduction for good behavior.

SEXUAL ASSAULT

AL—H. 380 provides that opinion and reputation evidence and evidence of specific acts relating to the complaining witness' previous sexual conduct shall be inadmissible in sexual conduct cases except any sexual conduct with the defendant; provides procedures to determine relevancy of proposed evidence of prior sexual conduct with the defendant before such evidence is introduced.

CA—AB 327 makes it illegal for a man to rape his wife. *Passed Assembly Committee.*

CA—AB 883 allows a person over age 12 to give consent for medical treatment for rape. *Passed Assembly; in Senate Committee.*

CT—SB 959 provides for confidentiality of examination and treatment without parental consent to a minor who is a victim of sexual assault.

CT—HB 5606 provides that persons convicted of sexual assault be incarcerated 15-30 years for first offense, 30 years to life for subsequent offense with no reduction allowed and no plea bargaining.

ID—SB 1146 provides for crime of sexual assault; provides that mistake as to age is no defense; provides that convictions may occur upon the uncorroborated testimony of the victim; limits admission of evidence concerning prior sexual conduct of witness.

ID—SB 1263 strikes provision that a man cannot rape his wife under either of the following conditions: (1) a spouse has initiated legal proceedings for divorce or separation, or (2) the spouses have voluntarily been living apart for 180 days or more; provides that uncorroborated testimony may convict; limits the introduction of evidence of past sexual conduct by the prosecuting witness; provides that a person convicted of rape may be ordered to pay costs incurred by the victim. *Enacted.*

MD—SB 700 requires that entry-level and in-service training be provided for police in the areas of rape and sexual offenses. *Passed both Houses.*

MT—HB 188 requires a sentencing judge to impose a sentence of imprisonment for certain specified crimes including sexual assault when committed with a firearm or a knife.

MT—HB 261 requires mandatory minimum prison sentences for certain crimes including sexual intercourse without consent and for any crime committed with a dangerous weapon without the option of deferred imposition or suspension of execution of the sentence. *Passed both Houses.*

MT—SB 339 provides that, in a criminal prosecution for rape, evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim. *Enacted.*

MT—SB 343 applies the definition of "without consent" to the offense of sexual assault.

NH—HB 563 established a sexual assault reporting and prosecution unit within the state police.

NM—SB 371 amends, among other things, statutes to substitute "sexual penetration" for "rape." *Enacted.*

OH—HB 145 amends the Code to provide that a person need not disclose information about a crime if it was acquired while providing counseling services to victims of certain sexual assaults.

OK—SB 266 expands the definition of rape to include prevention of resistance by threats of present or future harm to victim or victim's relatives, or by administration of liquor. *Passed Senate; before House.*

OR—HB 2614 removes cohabitation as an affirmative defense to first degree rape and first degree sodomy.

WA—HB 820 provides training to law enforcement officers who deal with victims of sexual assault; provides training to hospital based personnel in the correct procedures of dealing with sexual assault victims as well as the proper techniques of gathering evidence for possible legal proceedings; provides assistance to existing rape crisis centers and develops a program of public awareness concerning sexual assault and rape prevention.

SPOUSAL ABUSE

CT—HB 7213 provides for establishing and maintaining emergency shelters for women abused by their husbands.

CT—HB 7258 provides that whenever a spouse files a complaint of spousal assault, police refer case to domestic relations officer.

MD—SB 776 requires the Department of Human Resources to establish a model temporary shelter for battered spouses. *Passed both Houses.*

MD—HJR 32 requires the state police to keep statistics on the incidence and disposition of cases of spousal assault, and to report back to the General Assembly in January, 1979. *Passed both Houses.*

EVIDENCE

AR—Act 197 makes evidence of prior sexual conduct of victim of sexual offenses inadmissible unless the relevancy of the evidence is established in a hearing outside the presence of the jury. *Enacted.*

CA—SB 56 permits the exclusion from evidence of the address and telephone numbers of victims of certain sex acts.

CT—SB 610 prohibits introduction of evidence of specific instances of victim's sexual conduct, opinion evidence of above, and reputation evidence of above in a prosecution of a sex offense.

□ *continued on following page*

LEGISLATION...

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DE—SB 133 relates to admissibility of evidence in rape cases. *Enacted.*

FL—HB 838 prohibits state, county, and municipal law enforcement officers from removing any article of clothing in the line of duty in an attempt to obtain evidence for criminal prosecution with respect to prostitution, adultery, fornication, lewd and lascivious acts, or indecent exposure; also prohibits any person compensated by a law enforcement agency from obtaining such evidence. *Defeated.*

FL—HB 1178 revises provisions relating to admissibility of evidence of a victim's sexual conduct in a prosecution for a sexual battery offense. Limits introduction to specified circumstances except where the court determines the admission of such evidence to be relevant and admissible in the interests of justice. *Defeated.*

MT—HB 184 provides that local law enforcement agencies pay for the medical examination of a victim of alleged sexual intercourse without consent when the exam is directed by the agency and when the evidence obtained by the exam is used for investigation or prosecution of an offense. *Enacted.*

NM—HB 55 creates a special fund to promote and assist in effective law enforcement of certain sexual crimes; provides for training programs for the collection and preservation of evidence and the handling of victims of sexual crimes.

OR—HB 3096 relates to procedures for admissibility of evidence in rape trials.

SEARCHES

AR—Act 452 provides absolute civil immunity except for negligence of physicians and licensed nurses who perform lawful searches of body cavities. *Enacted.*

MENTALLY DISORDERED SEX OFFENDERS

FL—HB 416 redefines "mentally disordered sex offender" and authorizes a court to certify a defendant for a determination of whether he is a mentally disordered sex offender; provides for the appointment of experts by the court to examine the defendant; provides for a court hearing and authorizes the appointment of counsel; requires the court to clear the court whenever a person under the age of 16 testifies in any sex offense case; repeals the chapter relating to child molesters. *Defeated.*

IL—HB 639 requires that a defendant be convicted of being a sexually dangerous person with the same standard of proof required in criminal cases of guilty beyond a reasonable doubt before he may be deprived of his freedom by commitment to confinement.

OR—SB 267 revises definition of sexually dangerous persons and provides procedures for commitment.

OR—HB 2279 amends definition of "sexually dangerous person" to include persons who, due to a course of repeated sexual misconduct, are dangerous to all other persons, not just to other persons of the age of 12 or under.

OBSCENITY

AZ—SB 1014 provides for obscene movie abatement and abatement of nuisances which is redefined.

AR—Act 464 establishes a comprehensive obscenity law for the state. *Enacted.*

AR—HB 473 allows local prosecutors to determine "local community standards" in obscenity arrests and would set up a civil procedure to enjoin the showing of allegedly obscene films while criminal proceedings were pending.

CA—SB 740 deals with child pornography.

CA—SB 817 deals with child pornography.

IL—HB 17 redefines obscenity.

IA—S 171 makes public display of explicit sexual materials a misdemeanor.

IA—H 180 authorizes cities and counties to regulate the dissemination and exhibition of obscene material to adults.

IA—H 563 makes public display of explicit sexual material a misdemeanor.

MT—H 381 prohibits showing previews which are rated "R" and "X" if the feature movie is rated "G" or "GP".

MT—SB 341 provides for the enjoining and restraining of obscene motion pictures.

NE—LB 468 redefines terms re obscenity.

ND—SB 2417 makes the displaying of objectional materials to minors a misdemeanor. *Passed both Houses.*

MASSAGE PARLORS

CO—HB 1073 allows boards of county commissioners to license massage parlors.

CO—HB 1303 provides for the licensing of operators of massage parlors and massage therapists and the regulation thereof by the Board of Massage Examiners.

CO—HB 1558 provides standards for local governments to license massage parlors and allows an election of a local option to prohibit the licensing of massage parlors within the limits of a city, municipality, or county. *Passed House; in Senate Committee.*

DE—HB 233 places regulations on the operation of massage parlors.

DE—SB 60 prohibits state or county from issuing license to operate a massage parlor or adult book store without holding a public hearing; provides that no license may be issued if proposed site is within 9/10 of a mile of an existing establishment of the same type.

ADULT BOOK STORES

DE—HB 231 places regulations on adult book stores.

DE—SB 60 prohibits state or county from issuing license to operate a massage parlor or adult book store without holding a public hearing; provides that no license may be issued if proposed site is within 9/10 of a mile of an existing establishment of the same type.

MARRIAGE / DIVORCE

CA—AB 607 specifies that marriage is a personal relationship arising out of a civil contract between a man and a woman. *Passed Assembly; before Senate.*

CO—HB 1077 prohibits marriages between a man and a man or between a woman and a woman and prohibits a county clerk from issuing a marriage license for the

marriage of a man and a man or a woman and a woman.

FL—SB 352 prohibits the issuance of a marriage license to homosexuals. *Enacted.*

MD—SB 874 gives divorce courts all powers of the equity courts, including the power to issue an injunction to protect a spouse from physical harm or harassment. *Passed both Houses.*

MA—H 464 provides for a procedure for the choice of name at marriage.

MA—H 468 provides that no complaint for divorce shall be accepted for filing unless it discloses (a) whether either party is presently receiving payment of benefits from the department of public welfare, and if so (b) whether or not either or both of the parties own any interest in real estate.

MA—H 469 same as H 468.

MA—H 675 provides for an investigation by a special commission relative to the emotional, financial, physical, psychological, moral and social effect on children as a result of divorce or separation.

MA—H 684 requires courts to enter all necessary orders concerning the care, custody and support of children before libels for divorce may be filed.

MA—H 870 establishes the fees in an action for divorce on the grounds of an irretrievable breakdown of the marriage.

MA—H 1072 provides for financial disclosure in divorce actions.

MA—H 1073 eliminates the decree nisi period in divorce actions.

MA—H 1454 makes certain changes in the law concerning the causes for divorce in the state.

MA—S 600 decreases the waiting periods for a no-fault divorce.

MA—S 606 prohibits the granting of divorce.

MA—S 653 provides for judgment to be entered in actions for divorce on the ground of an irretrievable breakdown of the marriage.

MA—S 725 increases certain fees payable relative to divorce.

MA—S 734 establishes a filing fee in separate support cases.

MA—S 1472 clarifies the means by which certain statistical information relative to divorces is collected and transmitted to the Commissioner of Public Health.

MA—S 1475 provides for change of venue in the event of hardship or inconvenience to either party.

MS—SB 2573 makes it unlawful to abduct any child over the age of 14 for the purpose of marriage.

ND—HB 1297 sets lawful age for marriage at 18, or at 16 with consent of parents or guardian. *Passed both Houses.*

ND—SB 2059 prohibits marriage by a woman under 45, or a man of any age unless he marries a woman over 45 if the man or woman is institutionalized as severely retarded; prohibits marriage if a person is infected with syphilis in a communicable form. *Passed both Houses.*

UT—_____ removes distinctions based on sex in domestic relations law relating to marriage, property rights, divorce and separation. *Enacted.*

UT—_____ provides the manner in which a parent and child relationship may be established; provides for recognition of parentage for children induced by artificial insemination; provides for immunity for testimony relating to paternity; provides for new birth certificates.

UT—_____ redefines duties and responsibilities relating to family relationship and provides that the provisions apply equally to men and women. *Enacted.*

ABORTION / CONTRACEPTION

DE—HCR 9 requests Congress to call a constitutional convention to propose amendment to U.S. Constitution to protect lives of all human beings including unborn children at every stage of their biological development.

ID—S 1260 adds to existing law to prohibit payments by the Dept. of Health and Welfare for abortion except under certain conditions. *Enacted.*

MD—HB 1065 requires abortions performed after the twentieth week to be performed in a hospital; requires reasonable steps to be taken to keep the fetus alive if the fetus is aborted "alive and viable"; and provides that the life-saving measures need not be taken if positive prenatal diagnosis of a "significant disease or malformation" is made. *Passed both Houses.*

MD—HB 1297 requires doctors to notify the parents of a minor female before performing an abortion. Some latitude is given the doctor to waive this requirement. *Passed both Houses.*

MT—HJR 17 requests Congress to call a constitutional convention for proposing an amendment to the U.S. Constitution providing that every human being be considered a person with the right to life from the moment of fertilization.

MT—HB 22 clarifies the law regarding consent of minors to abortion.

MT—HB 173 repeals the abortion counselors and counseling services act which made available to a woman who requests an abortion at least two counseling sessions with a qualified counselor. *Enacted.*

MT—HB 387 provides for licensing of persons to sell, dispense or give away prophylactics and to permit advertising for contraceptives and prophylactics in a tasteful and discreet manner.

MT—HB 544 makes comprehensive voluntary family planning services readily available to all persons desiring such services and develops method to make readily available information and educational materials on family planning and population growth to all persons desiring such information.

MT—SB 355 provides for counseling and basic information and education required in conjunction with the provisions of comprehensive voluntary family planning services.

NM—HB 440 provides that every induced abortion shall be reported to the state registrar of vital statistics within five days. *Enacted.*

ND—SCR 4043 requests Congress to adopt amendment to the U.S. Constitution which will guarantee the right of the unborn human to life throughout its interuterine development subordinate only to saving the life of the mother.

CHILD CUSTODY / SUPPORT / ADOPTION

CO—HB 1265 provides that in situations where the state considers parental support of a minor child, the capacity to provide support of both the mother and father shall be considered. *Passed House; before Senate.*

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LEGISLATION...

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DE—HB 132 makes non-payment of support for a child a justification for the person having custody to deny visitation rights.

FL—SB 354 prohibits the adoption of children by homosexuals. *Enacted.*

MD—SB 715 raises significantly the amount of AFDC benefits over a four year period. *Passed both Houses.*

ALIMONY

DE—HB 21 provides a rebuttable presumption relating to the decreased need for support if the supported party is cohabiting with a person of the opposite sex.

DE—HB 199 allows alimony to be awarded to either party to a divorce action on basis of economic need of such party and the ability of the other party to pay.

MA—H 1074 regulates the payment of alimony and the assignment of property in libels for divorce.

MA—S 785 regulates the payment of alimony.

NV—AB 76 permits either spouse to receive alimony without limitation.

SEX EDUCATION

IL—SB 298 provides that sex education be required in all schools with provision that a parent may keep child out of this class without penalty.

MT—HB 544 makes comprehensive voluntary family planning services readily available to all persons desiring such services; would develop and make readily available information and educational materials on family planning and population growth to all persons desiring such information.

MT—SB 355 provides for counseling and basic information and education required in conjunction with the provisions of comprehensive voluntary family planning services.

NV—AB 496 allows courses in prevention of venereal diseases and methods of birth control to be given in all public high schools; would exempt pupils whose parent or guardian objects in writing.

HEALTH

MD—HB 89 requires hospitals to offer every female inpatient over 18 a uterine cytologic examination. *Passed both Houses.*

MD—HB 267 requires group health insurance policies to extend a conversion option, without proof of insurability, to covered dependent spouses, when their group membership is terminated because of their spouse's death or because of divorce. *Passed both Houses.*

MA—H 334 provides that the Department of Education shall assist in implementing a program to educate women in high school on the importance and methods of detecting certain cancers.

MA—H 446 provides that educational programs for the instruction of women in self-examination of breasts for the purpose of detecting symptoms of cancer shall be established.

MA—H 1813 same as H 446.

DISCRIMINATION — MARITAL STATUS

CT—_____ makes it illegal for a landlord not to rent an apartment to a man and a woman who were not married nor related by blood. *Defeated.*

GA—HB 708 prohibits discrimination by financial institutions based on marital status, sex and the usual classifications.

IA—H 165 prohibits discrimination in insurance practices because of marital status or sex of a person.

NV—AB 139 prohibits discrimination in housing based on marital status.

NV—AB 173 revises Fair Rental Housing Act; omits prohibitions of discrimination based on marital status.

OR—HB 2603 defines marital status; declares policy against discrimination on basis of marital status; extends scope of prohibitions against discrimination based on marital status in public accommodations, employment and housing.

WI—AB 15 prohibits discrimination in employment on basis of marital status, economic status, age, educational status or sexual preference.

DISCRIMINATION — SEXUAL ORIENTATION

Congress—HR 2998 amends the Civil Rights Act of 1964 by adding the words "affectional or sexual preference" to each list of conditions for which people cannot be discriminated against.

CA—AB 1130 amends the Fair Employment Practices Act to include "sexual orientation" in the categories of persons against whom it would be unlawful to discriminate in employment.

CA—AB 1302 amends the Fair Employment Practices Act to re-define the word "sex" as it appears in the Act to include "sexual orientation" among other things.

CA—AB _____ prohibits any contractors or suppliers dealing with the State of California from discriminating in employment on the basis of sexual orientation, sex, age, marital status and the usual others.

CA—SB 1253 would allow school boards to dismiss any teacher who is believed to be a homosexual.

CT—HB 5908 bans discrimination against homosexuals in employment, credit and housing. *Defeated 94-43.*

CT—SB 969 is a "Bill of Intent." It would, upon passage, make it the state's public policy to oppose discrimination against homosexuals.

HI—HB 41 bans discrimination on basis of sexual orientation in employment and real estate transactions. *Defeated in House Committee 5-3.*

HI—SB 427 bans discrimination against homosexuals in employment and real estate transactions.

IL—HB 574 bans employment discrimination in institutions of higher learning based on sexual preference.

IL—HB 575 bans employment discrimination against homosexuals in state agencies.

IL—HB 576 prohibits private housing discrimination against homosexuals.

IL—HB 577 forbids discrimination against homosexuals in public housing.

ME—LD 1419 bans discrimination against homosexuals in areas of housing, employment and public accommodations. *Defeated in Senate.*

MD—HB 921 forbids discrimination against homosexuals in employment.

MA—H 3676 provides anti-discrimination protection for homosexual civil servants. *Passed Senate.*

MA—H 3677 adds the term "sexual preference" to the charter of the Massachusetts Commission Against Discrimination thereby prohibiting discrimination on basis of sexual orientation in housing, public accommodations, employment and credit.

MA—H 3751 provides that all sex acts between consenting adults in private would be legal.

MN—SB 497 bans discrimination against homosexuals in areas of employment, housing, credit and access to educational institutions.

NH—SB 87 prohibits homosexuals from consorting in a public place; forbids adult persons of the same sex from "consorting in a lewd and licentious manner." *Lewd* is defined as "indecent and against social mores." *Licentious* is defined as "disregarding accepted rules and standards and morally unrestrained." Endorsed by Governor Thomson.

OR—SB 603 amends the Civil Rights Bill to add sexual orientation and marital status; provides protection in areas of housing, employment and public accommodations.

OR—HB 3310 prohibits discrimination based on sexual orientation in state employment.

PA—SB 83 forbids the hiring of homosexuals or persons convicted of a sex offense for the jobs of state police officer, state correctional guards and staff, state probation officer, correction counselors, or any nursing or staff position in a state institution dealing with mental illness, retardation or physical rehabilitation. Penalizes the hiring officer with dismissal, a fine up to $300 and up to 90 days imprisonment. *Passed Senate.*

TX—_____ would ban all gay organizations from state-supported campuses.

WA—HB 689 bans discrimination against homosexuals in employment, housing, insurance, and licensing.

WI—AB 15 prohibits discrimination in employment on basis of sexual preference, marital status, economic status, age or educational status.

WI—AB 323 decriminalizes all sexual acts between consenting adults in private; provides that persons may no longer have their driver's licenses revoked for conviction of the crime of sexual perversion.

WI—SB 14 reduces the penalties for conviction of sexual perversion from a felony punishable by a $10,000 fine and 2 years imprisonment to a misdemeanor with a penalty of up to 30 days in jail and/or a $500 fine. *Passed Senate; before House.*

RESEARCH, ANALYSIS and COMPILATION
by *DON GAUDARD*

DISCRIMINATION — SEX

AZ—SCR 1014 proposes amendment to State Constitution providing that equality of rights shall not be denied on account of sex.

AZ—SB 1229 prohibits the cancellation and failure to renew motor vehicle insurance on basis of sex.

CO—HB 1262 includes pregnancy in the category of separation from employment because of illness; repeals the special award because of pregnancy provision. *Passed House; before Senate.*

CO—HB 1264 adds sex to statutory provisions prohibiting discrimination on certain grounds. *Passed House; before Senate.*

CO—HB 1272 provides that both sexes shall be treated equally by the state or a political subdivision or institution thereof in specified situations. *Passed House; before Senate.*

DE—SB 35 prohibits educational institutions which receive state funds from restricting participation on a sports team on basis of sex.

FL—SJR 233 amends the Florida Constitution to provide that no person shall be discriminated against because of sex. *Defeated.*

FL—HB 183 provides that no person may be excluded, require another to be excluded, or be required to exclude another from a business transaction on the basis of a policy expressed in any document or writing and imposed by a third party where the policy requires discrimination against the person on the basis of sex, race, color, religion, ancestry, or national origin of the person or the location at which the person conducts or has conducted business; provides that terms of any contract or agreement which are in violation of, or which call for the violation of, such provisions are void and unenforceable.

FL—HB 225 provides that discrimination by an alcoholic beverage licensee in favor of or against any person on the basis of sex, race, color or creed is grounds for suspension or revocation of the license.

FL—HB 350 prohibits any governmental agency or person from wilfully entering into any agreement, contract, arrangement, or understanding with a foreign person or government or international organization, which agreement discriminates any person on the basis of sex, foreign trade relations or the usual grounds.

FL—HB 415 directs the Department of Administration to undertake a program to eliminate discrimination on the basis of sex, race or age in the granting of salaries and promotional opportunities with respect to state employees; directs the Department to make annual salary equity studies and to make salary adjustments.

FL—HB 877 requires the Department of General Services to promulgate guidelines to be followed by all state agencies which have authority to enter into contracts for any commodities or services, to insure that at least 15 percent of the value of such contract purchases be obtained from businesses or other suppliers owned by women or members of a minority group.

FL—HB 1093 regulates leases of public sports facilities or other public property to certain educational or nonprofit institutions or other nonprofit groups, to restrict owners, managers, and operators of such facilities from charging higher or discriminatory rates for such leases; similarly restricts lessees; provides that any sports facility violating

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LEGISLATION...

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these regulations shall lose its property tax exemption and shall have its ad valorem property tax assessment based on commercial property rates.

FL—HB 1502 prohibits any public meeting of a state, county or municipal agency, which meets to promulgate and declare official acts, at any facility or location owned or operated by any organization or individual which discriminates on the basis of sex, age, economic status, race, creed, color, or national origin, or which unreasonably restricts public access to such facility.

GA—HB 279 prohibits discrimination in housing based on sex and the usual classifications.

GA—HB 708 prohibits discrimination by financial institutions based on sex, marital status, and the usual classifications.

IA—SJR 6 provides for amendment to the State Constitution to provide that equality of rights shall not be abridged by the state or a political subdivision thereof on account of sex.

IA—HJR 12 is the same as SJR 6.

IA—H 165 prohibits discrimination in insurance practices because of sex or marital status of a person.

IA—H 481 prohibits discrimination based on sex in retirement programs.

MD—SB 347 attempts to make the procedure for resolution of discrimination complaints against state agencies, officials and employees uniform with the established procedure against private respondents; however two amendments seriously diminish the effects of this bill. *Passed both Houses.*

MD—SB 774 requires, for all employment-related purposes, that disabilities due to pregnancy shall be treated the same as other temporary disabilities. *Passed both Houses.*

MD—SB 775 requires group health insurance providers to *offer* to group purchasers a disability income policy for disability due to pregnancy to the same extent as for other temporary disabilities, whenever the provider offers a disability policy. *Passed both Houses.*

MD—SB 824 repeals sexually-discriminatory criminal provisions for the desertion of a wife by her husband; does not affect existing civil support obligations, nor divorce grounds based on desertion. *Passed both Houses.*

MD—HB 458 completely restructures the Human Relations Commission, and its top staff; authorizes monetary damage awards in employment discrimination cases; provides for certain procedural changes. *Passed both Houses.*

MD—HB 647 makes the refusal to consider both applicants' income when both parties of a marriage apply for a joint account a discriminatory credit practice. *Passed both Houses.*

MD—HB 1010 provides that property exemptions for a disabled veteran's surviving spouse apply to subsequently acquired property, as long as the surviving spouse remains unmarried and owns and resides at that property. *Passed both Houses.*

MD—HB 1991 prohibits sex discrimination in the awarding or performance of state contracts. *Passed both Houses.*

MA—H 986 eliminates references to certain sexual discriminations in the labor laws.

MA—S 95 provides that incapacity to work caused or contributed to by pregnancy, childbirth, miscarriage and recovery therefrom shall be deemed an illness, sickness or disability under any health or temporary disability insurance or sick leave program or plan available to school employees in connection with employment.

MA—S 96 increases the benefits payable to widows or widowers under the workman's compensation act.

NV—AB 451 removes distinctions based on sex from various state laws.

NV—SB 58 provides for eligibility of women as highway patrol personnel.

NV—SB 142 provides that either husband or wife is eligible to be appointed in substitution for incapacitated executor or administrator.

NV—SB 245 provides appropriations to the State Board of Examiners for raising classifications of state employees whose salaries have been set in a manner which discriminates against women.

NV—AJR 27 proposes a constitutional amendment adding equal protection clause to prohibit denial of civil or political rights on basis of sex, race, color, creed, or national origin.

NV—SJR 14 proposes a constitutional amendment to eliminate restrictions on the right to seek elective office by women and duelors.

NV—SJR 15 proposes state constitutional amendment to prohibit denial or abridgement of rights on account of sex.

NH—HB 528 establishes an office of equal employment opportunity.

ND—SCR 4079 directs that an interim study be conducted on the feasibility of enacting comprehensive human rights legislation.

OR—SB 714 prohibits sex discrimination in employment due to pregnancy.

OR—HB 2432 disqualifies organizations that restrict or limit membership by reasons of sex, race, etc. for eligibility under certain ad valorem tax exemptions.

OR—HB 2543 permits distinction between men and women in charging for repair of flat tires.

UT—_____ equalizes the meaning of terms relating to masculine or feminine gender in statutory construction. *Enacted.*

UT—_____ clarifies references in statutory requirements for certain political candidates and appointees to apply equally to men and women. *Enacted.*

UT—_____ provides equal rights of unremarried spouse of an employee in the occupational disease laws which relate to benefits for dependent wives and widows; equalizes the presumption of dependency so that both husbands and wives are treated equally. *Enacted.*

UT—_____ equalizes provisions relating to working in mines or smelters, overtime work and protective labor legislation for men, women and minors. *Failed.*

UT—_____ deletes sexually discriminatory provisions in statutes relating to curriculum in detention schools. *Enacted.*

UT—_____ amends state constitution to allow certain exemptions from property tax to any unremarried surviving spouse of a disabled veteran. *Enacted.*

UT—_____ changes the statutes relating to application for liquor manufacturing to apply equally to men and women. *Enacted.*

UT—_____ deletes the requirement that the practice of cosmetology must be limited to the hair of women or girls. *Enacted.*

UT—_____ relates to exemptions and preferences for veterans, their minor children and widows and extends those benefits to apply to any unremarried surviving spouse of veterans. *Enacted.*

UT—_____ redefines duties and responsibilities relating to family relationship; provides that the provisions apply equally to men and women. *Enacted.*

WI—SB 77 executive budget bill; provides that contracting agencies of the state shall include in all contracts executed to obligate the contractor not to discriminate on the basis of sex and the usual classifications.

WI—AB 9 permits a civil action by a person claiming discrimination in employment or housing if the governmental agency has not held a hearing within 120 days.

EQUAL RIGHTS AMENDMENT

FL—SB 630 provides for a state "straw" ballot on the Equal Rights Amendment.

GA—SR 6 is a resolution to ratify the ERA.

IA—SJR 7 is a resolution to rescind Iowa's ratification of the ERA.

MA—S 1500 is a report of a study relative to the effect of the ratification of the proposed amendments to the state constitution and the U.S. Constitution prohibiting discrimination on account of sex; includes 148 proposed pieces of legislation.

MT—SJR 9 would repeal Montana's ratification of the ERA. *Killed in Senate.*

NV—AB 301 provides for an advisory referendum on the ERA.

NV—SJR 5 ratifies ERA.

EMPLOYMENT

CA—AB 1130 amends the Fair Employment Practices Act to include "sexual orientation" in the categories of persons against whom it would be unlawful to discriminate in employment.

CA—AB 1302 amends the Fair Employment Practices Act to re-define the word "sex" as it appears in the Act to include "sexual orientation."

CA—AB _____ prohibits any contractors or suppliers dealing with the State from discriminating in employment on the basis of sex, age, marital status, sexual orientation, and the other usual classifications.

CA—SB 1253 would allow school boards to dismiss any teacher who is believed to be a homosexual.

CO—HB 1262 includes pregnancy in the category of separation from employment because of illness; repeals the special award because of pregnancy provision. *Passed House; before Senate.*

CT—SB 308 eliminates requirement that disability or leave benefits be paid to any employee disabled as a result of pregnancy.

MD—HB 921 bans discrimination against homosexuals in employment.

MA—S 95 provides that incapacity to work caused or contributed to by pregnancy, childbirth, miscarriage and recovery therefrom shall be deemed an illness, sickness or disability under any health or temporary disability insurance or sick leave program or plan available to school employees in connection with employment.

UT—_____ amends statutory sections relating to merit system personnel and precludes any discrimination therein on basis of sex. *Enacted.*

UT—_____ amends the Workmen's Compensation Act to provide equal right for dependent husbands and widowers; equalizes the presumption of dependency between married persons so that both husband and wives are treated equally. *Enacted.*

UT—_____ provides equal rights for unremarried spouse of an employee in the occupational disease laws which relate to benefits for dependent wives and widows; equalizes the presumption of dependency so that both husbands and wives are treated equally. *Enacted.*

WI—AB 9 permits a civil action by a person claiming discrimination in employment or housing if the governmental agency has not held a hearing within 120 days.

WI—AB 219 prohibits discrimination in employment, membership or licensing on the basis of an arrest or conviction record.

WI—AB 450 prohibits employers and others from making employment conditions contingent upon acceptance of sexual advances; provides that anyone quitting a job because of job-contingent sexual advances can collect unemployment compensation.

TRANSSEXUALS

CA—AB 385 permits persons who undergo sex change operations to alter their birth certificates to match their new identities. *Passed Assembly; before Senate.*

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Los Angeles Prosecutor reforms guidelines on lewd conduct cases

SOLICITATION CASES

As interpreted by the California appellate courts, Section 647(a) prohibits an adult, while in a place open to the public, from requesting another person to engage in lewd conduct, regardless of whether the conduct is to occur in public or private. From past law, it appears that the prosecution could facially justify filing a complaint for 647(a) if the defendant made a simple request of another adult to engage in a lawful sexual act in private, so long as the request itself was made in public.

Although private sexual acts between consenting adults has been decriminalized in California since January, 1976, it appears that it is still illegal to attempt to obtain consent. Several cases are currently on appeal challenging this inconsistency, but none have been decided yet.

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Los Angeles Prosecutor reforms guidelines on lewd conduct cases

Recent studies have indicated that the solicitation portion of Section 647(a) is used by the Los Angeles Police Department to arrest only males and only for homosexual solicitations. *

Again, it should be emphasized that we are discussing non-commercial solicitations.

Pines has used his prosecutorial discretion to formulate some sensible guidelines for the prosecution of solicitation cases. Rather than waiting for the appellate courts or the legislature to revise the present law. Pines has considered the consenting adults decriminalization in 1976 as well as the claims of the gay community of discriminatory enforcement of the law, and formulated the following criteria for solicitation cases.

A public solicitation of an adult to commit a sex act in a *private place* will no longer be prosecuted, unless the solicitation is grossly offensive, aggressive, or in a repetitive manner. In other words, the person who simply will not take "no" for an answer will be prosecuted.

A public solicitation of an adult to commit a sex act in a *public place* will not be prosecuted unless a police report is presented to the City Attorney which describes in detail each of the following: 1) the character of the location where the solicitation occurred, 2) the conduct of the suspect, 3) the conduct of the "victim", 4) a summary of the entire conversation between the "victim" and the suspect, and 5) the totality of the circumstances cannot be reasonably construed as constituting an invitation or implied consent on the part of the "victim."

The past policy of prosecuting solicitations of minors will be continued.

GROPE CASES

In the past if a person touched the genital area of another person, even if consensual and over the clothing of the other person, the City Attorney often prosecuted for lewd conduct. Of course, the touching must have occurred in a public place or a place open to the public or exposed to public view. Some arrests and prosecutions were based upon consensual touchings between males in gay bars in Los Angeles.

A Los Angeles appellate court held that it would be proper for a judge to instruct a jury in a lewd conduct case that the jury could convict if it found that the conduct was "lustful, lascivious, unchaste, wanton, or loose in morals and conduct." According to this decision it seems that there would be very little difficulty for the prosecution to obtain a conviction in the typical "grope" case.

Notwithstanding this appellate decision, the Los Angeles City Attorney has drastically altered the policies for prosecution of "grope" cases so that it will be more difficult for the prosecutor to obtain a conviction.

Consensual touching cases (not involving exposure of the private parts) will not be filed at all, unless the circumstances are such that the suspects should have known that others would observe and be offended by the conduct.

In *non-consensual* touching cases in which an adult is the "victim", battery charges will be filed instead of lewd conduct charges. There are several benefits to the defendant as a result of this change in policy: 1) the court records will not appear to be sexually related in that the complaint appears to be a "garden variety" battery case; 2) the prosecution must prove that the touching was offensive to the "victim", and was without the consent of the "victim", either express or implied; 3) the defendant can go to trial without the fear of being convicted of a sex offense (i.e., lewd conduct) which would require sex registration; and 4) conviction of battery is not conviction of a crime involving moral turpitude, whereas conviction of lewd conduct is such a crime.

In *non-consensual* touching cases in which a minor is the "victim" a lewd conduct complaint will continue to be filed.

SEX IN PUBLIC

A lewd conduct complaint will be filed when the case involves public masturbation, sexual intercourse, oral copulation, sodomy, and similar sexual conduct in public.

LOITERING IN A RESTROOM

A complaint alleging a violation of Section 647(a) will be filed in restroom cases only when there is *clear and convincing* evidence of a purpose to engage in a lewd act at the restroom. If there is only evidence of an intent to solicit at the restroom, no complaint will be filed.

DISPOSITION GUIDELINES

According to Pines' office, the requirement of sex registration for 647(a) and (d) convictions involves a penalty which is highly disproportionate to the social harm caused by the offender's conduct. Therefore, in cases in which a complaint for 647(a) or (d) is filed, the defendant will be offered an opportunity to plead guilty or no contest (should the defendant elect not to go to trial) to an offense not involving sex registration (e.g. disturbing the peace). This disposition policy can be contrasted with the policies of other neighboring jurisdictions in Los Angeles County. In Pasadena, for example, City Prosecutor Byron Gentry will never reduce the 647(a) charge to a non-registerable offense without the prior approval of the vice officer. The vice officers invariably refuse to accept such a disposition. In Long Beach, City Prosecutor Robert Parkin will reduce some cases to disturbing the peace (first offense masturbation cases) but will not reduce many others (oral copulation, touching cases, second offenses, etc.).

CONCLUSION

The Los Angeles City Attorney has demonstrated the value of prosecutorial discretion. Allthough the California Legislature has been very slow in reforming the penal code, although the local police department has preoccupied itself with the enforcement of victimless crimes, and although other local prosecutors continue to take a tougher position in such cases, Burt Pines has exercised a leadership role in formulating more rational prosecution guidelines in lewd conduct cases. Undoubtedly these guidelines will help to reduce the present court congestion, save the taxpayers an extraordinary amount of money, allow the police and prosecutors to spend more time on crimes against the person and property, and prevent the needless destruction of the social and economic lives of many defendants.

— Thomas F. Coleman

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* In 1975, the SLR conducted a comprehensive study of arrest and prosecution records in more than 800 Lewd Conduct and Solicitation cases in Los Angeles' Central District. A computer analysis of more than 8,614 pieces of information gathered, including *time and place* of arrest, *names and badge numbers* of arresting officers, *age and occupation* of those arrested, as well as *sentencing*, shows that the conclusions of the 1968 study and report *CONSENTING ADULT HOMOSEXUAL AND THE LAW*, 13 UCLA Law Review 694, are still valid today.

...IN THE COURTS

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State-run university loses to Gay Lib in Court of Appeals

The Eighth Circuit has joined the First and Fourth Circuits in holding that a state-run university may not constitutionally withhold recognition of a student organization, comprised largely of homosexuals, whose basic purpose is to provide a forum for a discussion of homosexuality. *Gay Lib v. University of Missouri*, __ F.2d __ (8th Cir. 1977).

Gay Lib's victory in the Court of Appeals came more than six years after its first attempts to gain formal recognition at the University of Missouri. After the initial approval extended to Gay Lib by the student government was vetoed by the Dean of Students, the organization appealed to the University's Board of Curators. That body appointed a fact-finder, who recommended that the University deny recognition to Gay Lib, based on his findings that homosexuality was a compulsive illness and that recognition of Gay Lib would tend to increase the incidence of homosexuality on campus. The Board of Curators followed the recommendation and denied recognition.

Thereupon, the organization sought relief in federal district court. Relief was denied, largely on the strength of testimony by Dr. Charles Socarides and Dr. Harold Voth, which the district court held to establish a likelihood that recognition of Gay Lib would increase homosexual conduct sufficient to justify banning the organization.

The Court of Appeals reversed on two grounds. First, it rejected the psychiatric testimony upon which the district court relied. The court noted that the testimony of Drs. Voth and Socarides amounted to no more than unsupported inference and belief, insufficient bases upon which to curtail first amendment rights. The court also noted that the district court's conclusion that homosexuality is compulsive behavior is contradicted by a substantial body of psychiatric evidence. Second, the court of appeals held that even if it were to accept the district court's conclusion that Gay Lib's presence on campus would render homosexual activity "more likely," this would still be "insufficient to justify a governmental prior restraint on the right of a group of students to associate for the purposes avowed [in Gay Lib's policy statement]."

The Eighth Circuit declined to state definitively what quantum of evidence would be necessary to justify a ban on a gay group in the campus setting, but the court believed it to be clear that "a far greater showing of likelihood of imminent lawless action than that presented here" would be required. The court noted the absence of any finding that Gay Lib advocated any unlawful activity or substantially disrupted campus life. The court held that a ban on Gay Lib "smacks of penalizing persons for their status rather than their conduct, which is constitutionally impermissible."

A dissenting member of the three-judge panel would have affirmed the district court on the ground that its factual findings were not clearly erroneous and were sufficient to justify the ban on Gay Lib.

SEXUALAWREPORTER

INTOLERANCE OF THE UNCONVENTIONAL HALTS THE GROWTH OF LIBERTY

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GAY RIGHTS DEFEAT IN DADE COUNTY HAS NATIONAL IMPLICATIONS

The defendants in the lawsuit argued that homosexuality is a status, and as such is not and cannot be made illegal. Furthermore, they said that the unnatural and lascivious law was unconstitutionally vague. Also they argued that this unnatural law was unconstitutional in so far as it attempted to regulate private sexual behavior between consenting adults. They brought to the judge's attention the fact that many cities throughout the country have such anti-discrimination ordinances, notwithstanding the existence of sodomy statutes in their states. In Pennsylvania, for example, private sexual acts are illegal and yet Governor Milton Shapp issued an Executive Order banning discrimination by state agencies against gays. This Order was challenged in the Pennsylvania courts on the same grounds as the Dade County ordinance, but the courts sustained the Governor's Order.

On April 15, 1977 Judge Silver ruled in favor of the defendants, holding that the Commission had the authority to adopt the ordinance. After this ruling the *Save Our Children* people went back to the Commission and asked them to reconsider putting the issue on the ballot. The Commission voted 5-4 to retain the ordinance.

In April, 1977 Florida Governor Reuben Askew publically announced his opposition to the ordinance. In May the Florida legislature voted to prohibit same sex marriages and to prohibit gays from adopting children.

On June 7, 1977, with 45 percent of the voters going to the polls, the ordinance was repealed by a vote of 70 percent in favor of repeal and 30 percent to retain.

The news of this defeat for gay rights stunned many civil libertarians. Virtually every newspaper, radio and television station across the country carried the story. Anita Bryant announced that she would make this a national campaign. She said her efforts would be targeted to key cities in Texas, Minnesota, and the entire state of California.

Protests and demonstrations occurred in many major cities across the country against the *Save Our Children* Campaign. Five thousand protesters marched in San Francisco, eight thousand in Los Angeles, six thousand in Houston, and three thousand in New Orleans. Wherever Anita Bryant went, thousands of protesters appeared.

California's United States Senator S.I. Hayakawa announced his opposition to gay rights to the press. California State Senator John Briggs introduced a bill in the California legislature to allow school boards to fire teachers they find to be homosexual. California Attorney General Evelle Younger publically stated that the Briggs bill was probably unconstitutional. Younger stated that his own conscience told him that there was no reason why homosexuals could not be deputy attorneys general. San Francisco Mayor George Moscone attacked Briggs, Hayakawa, and Bryant for their anti-gay positions and blamed them for contributing to the brutal death of a gay man in San Francisco by a group of knife wielding youths who were shouting "faggot, faggot!"

On June 30, 1977, a five million dollar lawsuit was filed against Anita Bryant, *Save Our Children, Inc.* and California State Senator John Briggs for inciting the murder of Robert Hillsborough, brought by the *Pride Foundation* on behalf of the mother of the deceased. Based upon the Federal Civil Rights Act, the complaint alleges a conspiracy by the defendants to deprive the deceased of his civil rights. It is maintained that the perpetrators of the murder shouted not only "faggot, faggot", but also, "here's one for Anita!"

Politicians around the country were being confronted by the press and militant gays for their positions on gay rights issues. President Carter told the press that he did not want to get involved in the issue, but added that "gay people should not be abused." Vice President Mondale, when confronted by a group of vocal gays at a San Francisco Democratic fundraiser, ended his speech abruptly and left in order to avoid the issue.

Earlier in the year the Arkansas legislature voted to commend Anita Bryant for her Florida campaign and also reinstated felony provisions for private homosexual conduct. Such conduct had been legal for over a year in Arkansas for both heterosexuals and homosexuals. Today, in Arkansas, only heterosexual conduct in private is legal.

During the *Save Our Children* campaign, the Texas legislature passed a law prohibiting the formation of gay student groups on state college campuses.

The United States Housing and Urban Development Department revised the definition of "family" in such a way that unmarried homosexual and heterosexual couples with a stable relationship could qualify for public housing assistance. As a result of the *Save Our Children* campaign, the House of Representatives voted, by a voice vote, to reverse this administrative decision. As we go to press, the Senate has voted to retain the new family definition.

The *Los Angeles Times* had carried about one to two stories per month about gay issues during the past year, but after the Dade County defeat, it carried two editorials in favor of civil rights for gays, plus at least 15 articles per week on the subject of homosexuality during the weeks following Dade County. Including *Dear Abby.*

Also on June 30th, representatives from the *Dade County Coalition for Human Rights* and their attorney met in Columbus, Ohio with the *National Committee for Sexual Civil Liberties* and key staff members of the *SexuaLaw-Reporter* to analyze the reasons for the Miami defeat. At the conclusion of the meeting, the *National Committee* agreed to assist the *Dade County Coalition* and the *American Civil Liberties Union* in a lawsuit challenging the Florida referendum.

Heretofore an obscure nightclub singer and dilletante evangelist, Anita Bryant was primarily known to most people as a huckster of frozen orange juice on television commercials. The boycott of Florida orange juice by many supporters of the gay rights movement continues. Notwithstanding the possible economic impact, the *Florida Citrus Commission* decided to retain the controversial singer as a spokesperson for their product.

So while it seems that human rights for gay people were defeated in Miami, that vote shocked many people throughout the country. Pro-gay and anti-gay forces seem to be regrouping and preparing for a national battle on the issue that has never been seen or felt in this country before.

Politicians are being required to take a position, churches are being asked to reexamine their doctrines, and the average person is being educated about homosexuality by the media coverage. Gay civil rights will become one of the most controversial political, social, legal, and ethical issues in the next several years.

SEXUALAWREPORTER

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REPORT TO OREGON LEGISLATURE

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State of Oregon, Department of Human Resources

Preliminary Report of the Task Force on Sexual Preference to the Oregon State Legislature, 1977

Full Reprint of Text

Task Force Study on Homosexuality Sets A National Precedent

In April, 1975, Pennsylvania Governor Milton J. Shapp became the first Governor to commit an entire state administration to ending discrimination on the basis of sexual of affectional preference. He established the *Task Force on Sexual Minorities* and issued an executive order directing all state agencies and departments to cooperate with the *Task Force* in ending such discrimination.

One year later the *Task Force* became an official state commission — *Pennsylvania Council for Sexual Minorities.* The Council members consisted of representatives from each state agency as well as representatives from various segments of the gay community throughout the state. Sexual Civil Libertarians throughout the country were impressed with the progress made in Pennsylvania as a result of the education and investigation conducted by the Council.

In March, 1976, at the request of Oregon Governor Robert W. Straub, the *Task Force on Sexual Preference* was established in that state by Richard A. Davis, Director of the Department of Human Resources. This *Task Force* was inspired by the Pennsylvania experience and was partially patterned after the *Pennsylvania Task Force.* The purpose of this *Oregon Task Force* was to assemble accurate information on homosexual men and women in Oregon and to make recommendations on legislative and administrative policies that would insure civil rights to all Oregonians.

Both the *Pennsylvania Council* and the *Oregon Task Force* have issued Reports at the conclusion of their first year of existence.

The *SexuaLawReporter* is pleased to publish the entire text of the Oregon Report, beginning on Page 46 of this issue. We feel that this *Task Force* has made a great contribution to society because of its thorough research and its excellent detailed report.

Unfortunately, due to space limitations we are unable to publish the Report of the *Pennsylvania Council.* Anyone wishing to obtain a copy of that 45-page report should send $5.00 to the Sexual Law Reporter to cover reproduction and mailing costs.

The *SexuaLawReporter* staff would like to commend the members of both the *Oregon Task Force on Sexual Preference* and the *Pennsylvania Council for Sexual Minorities* for their diligent efforts to end arbitrary discrimination and to dispel myths in this sensitive area. We hope that other governors and state executives will take notice and follow suit. Similar action on the federal level would certainly be in order.

—Thomas F. Coleman

PROFESSIONAL ASSOCIATIONS CONSIDER GAY RIGHTS

American Bar Association

A resolution calling for gay rights legislation protecting jobs, housing, and public accommodations was killed August 10 by the A.B.A. Assembly at its annual meeting when a motion to table it was passed by a 163-110 vote.

The resolution had been recommended for passage by the Assembly's resolutions committee following hearings the previous day. Former Attorney General Ramsey Clark and American Psychiatric Association President Jack Weinberg, M.D. spoke in favor of the resolution.

A similar measure had been tabled by the 1976 Assembly. However, the A.B.A. House of Delegates did adopt a resolution in 1973 calling for repeal of state laws prohibiting private sexual acts between consenting adults.

Meanwhile, in other actions affecting gay rights:

- A resolution was passed by the Immigration Committee of the Section of International Law, calling on the President and Congress to support and enact amendments to current law to disallow the I.N.S. to deport or deny entry or otherwise deny naturalization or immigration to aliens because of private consensual sexual activity.
- A program on standards for awarding child custody, held by the Section of Family Law, heard a Menninger Foundation psychiatrist, Dr. Joseph Satten, say that homosexuality itself should not bar a parent from child custody.
- A panel on "Nonmarital Partners: Sex and Serendipity from Coast to Coast," also sponsored by the Family Law Section, discussed evolving legal protections for unmarried couples. The recent case of *Marvin v. Marvin* applying principles of contract and equity to such dissolutions was discussed. (See 3 Sex.L.Rptr. 13 for an extensive article on this subject. —*Ed.*)
- A program on "Homosexuality, Society and the Law" was sponsored by the Section on Individual Rights and Responsibilities. Participants on this panel included Patricia Nell Warren, author of *The Front-Runner,* David Kopay, former professional football player and acknowledged gay, E. Carrington Boggan, author of the ACLU handbook *The Rights of Gay People* and anti-gay California Senator John Briggs.

American Sociological Association

At its 1977 annual meeting, the A.S.A. adopted the following resolutions which were sponsored by the Sociologists' Gay Caucus.

The first resolution was a response to the June 7th defeat of a gay rights ordinance in Dade County, Florida: "The American Sociological Association reaffirms its opposition to oppressive action against homosexuals; and the Association puts itself on record as favoring laws, ordinances and other legal measures which guarantee these civil rights; and the Association opposes efforts to undermine the civil rights of homosexuals, or of any other group, through the distortion of sociological concepts and the falsifying of sociological research."

The second resolution was adopted in response to the need for further research on the subject of homosexuality: "The Council of the A.S.A. shall take action to encourage research, publication, and teaching in the sociology of homosexuality."

The third resolution is a call to even further action: "That the American Sociological Association, recognizing that public opinion polls have repeatedly shown that false and damaging conceptions of homosexuals are widespread among the American public; and that preliminary evidence indicates that the sociological profession is itself by no means totally immune to these pernicious stereotypes; and that the development of the sociology of homosexuality through dissertations, research, publication, and teaching has been stringently inhibited; and that the professional obligation to disseminate sound information on homosexuality remains unmet; [The A.S.A.] shall, in order to move towards rectifying these wrongs, establish a Task Force to review and evaluate existing knowledge in the sociology of homosexuality, and to identify topics in this field which urgently demand research; and shall then take steps to ensure that a report of the Task Force is appropriately disseminated to legislators, public officials, and other concerned parties; and shall charge the Task Force with the further responsibility of conducting a thorough and impartial investigation into the extent, within the profession of sociology, of discrimination against homosexuals and of undue restraint upon research on homosexuality."

National Committee for Sexual Civil Liberties

The National Committee for Sexual Civil Liberties conducted its seventh annual meeting during mid-July in Columbus, Ohio. It considered the status of sexual civil liberties during its week-long conference in the wake of the repeal of the Dade County, Florida human rights ordinance and in light of the recriminalization in Arkansas of private homosexual conduct between consenting adults.

The National Committee is composed of representatives of the most important organizations working specifically in the field of sexual civil liberties. The individual representatives are themselves leading members of the academic community who teach in various disciplines in major universities throughout the United States. Professors of law, psychology, history, anthropology, and sociology came together with leading theologians of the Roman Catholic and Protestant faiths. They participated with lawyers and officials of the major active civil liberties groups in the country.

Leaders in the American Civil Liberties Union, Pride Foundation, *SexuaLawReporter, Journal of Homosexuality,* Dade County Coalition for Human Rights, Pennsylvania Council for Sexual Minorities, and California Committee for Equal Rights were among the participants.

The discussions were opened with the presentation of the Dade County Coalition for Human Rights which responded to the invitation of the National Committee by sending its top leaders and its attorney. A post mortem assessment of the repeal of the Dade County ordinance and its national implications was made by the Committee and the Coalition. The analysis revealed both the strengths and weaknesses of the Florida effort. After conclusions were drawn, the Committee agreed to lend its expertise to a direct legal attack on the repeal of the ordinance.

□ *continued on page 58*

IN THE COURTS...

Gay university teacher reinstated with damages

The United States District Court for the District of Delaware has granted relief to Richard Aumiller, a gay man who was fired from his position as lecturer at the University of Delaware for certain statements he made to the press in which he acknowledged his own gayness and sought to inform the public about the concerns of gays at the University of Delaware. *Aumiller v. University of Delaware*, Civil Action No. 76-84 (June 21, 1977).

The court, following the teachings of *Pickering v. Board of Education*, 391 U.S. 563 (1968), held that a teacher's right to contribute to the debate on a question of public interest must prevail over the state's interest in regulating its employees unless the teacher's comments hinder her or his job performance, disrupt the school, violate confidentiality or impinge upon a close relationship with the teacher's superior. Finding none of these conditions to have been present, the court held the teacher's remarks to the press to have been protected by the First Amendment to the same extent as any other citizen's.

The court distinguished *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972) and *Singer v. United States Civil Service Commission*, 530 F.2d 247 (9th Cir. 1976), *vacated and remanded* 45 U.S.L.W. 3455 (U.S. January 10, 1977), two cases upholding the firing of gays who "flaunt" their homosexuality. The court was of the opinion that the conduct of the plaintiffs in *McConnell* and *Singer* — both of whom sought marriage licenses with other men — was distinguishable from that of the *Aumiller* plaintiff, who did not actively seek publicity but merely gave an interview when asked. Moreover, the *Aumiller* court questioned the persuasive force of either case, since *McConnell* did not fully explore the First Amendment issue and *Singer* was vacated by the Supreme Court for reconsideration in light of the Civil Service Commission's new and more tolerant guidelines concerning the employment of homosexuals.

Having determined that Aumiller's statements were to be judged by the same First Amendment standards applicable to any other citizen, the court proceeded to the traditional First Amendment analysis in which the state's action in penalizing speech is examined to determine whether the state has any interest (apart from content) in regulating or proscribing speech that is so overriding that it would justify limitation of the First Amendment rights of the speaker. The University of Delaware attempted to prove that Aumiller, in making his statements to the press, put himself forward as a university spokesperson, falsely portrayed the student organization of which he was advisor as a place where gays met to find sexual partners, impermissibly used university facilities to give interviews to the press, and used his job as manager of the university theater to put on plays with "gay" overtones. The court rejected these attempted justifications as factually false or as impermissible attempts to prohibit legitimate activity. The court accepted the premise that there are circumstances in which a faculty member could take unfair advantage of her or his position, but that, "Aumiller neither sought to create the false impression that he was speaking on behalf of the University or that the University endorsed his views nor did he set out to exploit the facilities of the University to add credence to his personal views." Accordingly, the court concluded that Aumiller's termination was caused solely by his statements on homosexuality and was therefore an impermissible abridgment of his First Amendment rights. The court likewise rejected as unsupported by the record and totally without merit the state's argument that Aumiller made false statements before and during trial by which he "forfeited" his right to bring suit.

Defendants also argued that, wholly apart from Aumiller's statements to the press, they were justified in terminating him on the grounds that he had two students, one gay and one straight, as roommates. The court held that Aumiller's living situation, although it might affect the scope of relief to which he was entitled, *see Mt. Healthy City School District v. Doyle*, 45 U.S.L.W. 4079 (U.S. January 11, 1977), could not possibly justify infringement on Aumiller's First Amendment rights. In any case, the court found nothing objectionable about the arrangement, inasmuch as the students were 22 and 27 years of age, were not taking courses from Aumiller, and their parents knew of their living arrangements. Moreover, the University had asked faculty members to rent spare rooms to students.

Having found a clear violation of Aumiller's rights, the court turned to the crucial question of remedy. The court found that the University of Delaware was liable as a "person" under 42 USC §1983 and that the University's president had forfeited his official immunity by firing Aumiller, since he knew that firing Aumiller was of doubtful legality but failed to make any inquiry as to what Aumiller's rights were. Accordingly, the court awarded $10,000 compensatory damages to Aumiller and $5,000 punitive damages against the University president. The court also ordered reinstatement for the 1976-1977 academic year. (Since the year was over when the decision was rendered, the court ordered the salary for the year to be paid over to Aumiller.) In ordering reinstatement the court held that even though Aumiller had no tenure, since he proved that his non-retention for 1976-1977 was in violation of his First Amendment rights, defendants had the burden of proving that they had some other non-discriminatory reason for not renewing Aumiller's contract for 1976-1977. Since they failed to meet that burden, Aumiller prevailed on the reinstatement claim. *See Mt. Healthy City School District v. Doyle*, 45 U.S.L.W. 4079 (U.S. January 11, 1977). The court refused to order reinstatement for 1977-1978 but indicated that such a remedy would be available in the appropriate case and ordered the University to consider Aumiller on a non-discriminatory basis should he choose to apply for a position for 1977-1978.

Dismissal of teacher for short dress upheld

Claudette Tardif was a 25-year-old high school teacher who the trial court found to have the image of "an energetic, imaginative and dedicated teacher." During her third year of teaching, however, she became embroiled in a dispute with her supervisor over the length of the skirts she wore to school. At the end of the school year, Ms. Tardif was informed that her contract would not be renewed. Four reasons were given, three relating to Ms. Tardif's teaching ability and one to her "image." □ *continued on page 42*

Dismissal of teacher *continued from page 41*

Ms. Tardif thereupon brought a civil rights action in federal court alleging impermissible interference with her Fourteenth Amendment liberty interest. The trial court did not reach this issue, finding that the school board was justified in firing Ms. Tardif for her failure to take certain outside courses for credit.

On appeal, the First Circuit held that the failure to take courses and other reasons relating to Ms. Tardif's professional competence were pretextual and reached the issue of whether terminating a teacher for the type of apparel he or she chooses to wear is consistent with the teacher's liberty as guaranteed by the Fourteenth Amendment.

The court below had found that Ms. Tardif's dress was comparable to that of other young professionals and had no "adverse effect on her students or her effectiveness as a teacher." The Court of Appeals did not disturb this finding but held that it was an insufficient basis upon which to find a Fourteenth Amendment substantive due process violation. In order to prevail on such a claim, the court held, a teacher must show that the school board acted so irrationally as to demonstrate a lack of good faith. In the court's opinion, any other rule would intrude too much on the school board's legitimate school administration concerns.

The effect of the First Circuit's holding is to leave open a constitutional attack by teachers upon school dress regulations only in the most egregious cases of abuse by authority or where First Amendment interests are implicated. This opening, small as it is, is nevertheless greater than that permitted by the Seventh Circuit, which has adopted a blanket rule that a teacher's interest in choosing his or her dress is subordinate to the school board's judgment, correct or incorrect. *See Miller v. School District No. 167*, 495 F.2d 658 (7th Cir. 1974); *Tardif v. Quinn*, 545 F.2d 761 (1st Cir. 1976).

Loitering for prostitution upheld in New York

In a *per curiam* opinion a three-judge New York appeals court overturned a trial court's finding that a statute prohibiting loitering for the purpose of prostitution was unconstitutionally vague, overbroad and infringed free speech rights. *People v. Smith*, 393 N.Y. S. 2d (1977).

The statute, Penal Law §240.37, reads, "Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute, as those terms are defined in (citations omitted) shall be guilty of a class B misdemeanor."

Examining first the legislative intent and public policy justification for the law, the court stressed the need to stifle an increasing incidence of activity which "causes citizens who venture into . . . public places to be unwilling victims of repeated harassment, interference and assault upon their individual privacy." Such behavior was held to contribute to the disruption and deterioration of community and commercial life in affected areas.

Rejecting outright the lower court's contention that the statute was vague, the appellate court found the law sufficiently plain as to enable a person of ordinary intelligence to understand precisely what acts were proscribed. The court then focused on what it felt was the primary issue of the defendant's claim — that the statute placed unfettered discretion in the hands of the police and thereby encouraged discriminatory enforcement of the law.

The court again noted that the statute prohibited specific acts, i.e., repeated beckoning for the purpose of prostitution It held that this type of a law is quite different from many vagrancy laws which require one to give a reasonable account of oneself thereby elevating the arresting officer to a position of dictatorial proportion in his evaluation of the suspect's behavior.

The court also rejected an attack based on the absence of specific guidelines for the officer to determine whether probable cause exists for an arrest.

Finally, because the statute only applied to communication which was for the purpose of criminal activity, the court found the allegation of an infringement of First Amendment rights to be without merit.

Mistake as to age of teenager no defense to molestation charge

The defendant was convicted by a jury of a violation of Section 647a (annoying or molesting a child under the age of 18) and a violation of Section 272 of the California Penal Code (contributing to the delinquency of a person under the age of 18). On appeal to the Appellate Department of the Los Angeles Superior Court, the conviction was affirmed, one judge dissenting. The Appellate Department, however, certified this case to the Court of Appeal because of the important legal question to be decided. *People v. Atchison*, 138 Cal.Rptr. 393 (1977).

At the trial the defendant testified that the complaining witness had told the defendant that he was 18 and would be 19 in two months. The trial court, relying on a Court of Appeal decision, *People v. Reznick*, 171 P.2d 952 (1946), instructed the jury that if the defendant committed the acts in question it would be immaterial whether he had a reasonable belief as to the age of the minor. On appeal, the defendant claimed that according to *People v. Hernandez*, 393 P.2d 673 (1964), this instruction was in error. In *Hernandez* the California Supreme Court held that an honest and reasonable belief of fact would make an act an innocent one because the defendant would lack the requisite criminal mental state. The Appellate Department felt that *Reznick* was wrong in principle but also felt bound by the decision because it was decided by the Court of Appeal which is a higher court than the Appellate Department.

In a 2-1 decision, the Court of Appeal upheld the conviction. The majority held that it was not error for the trial judge to fail to, sua sponte, instruct that a reasonable mistake as to age would be a valid defense. The defendant's failure to so request such an instruction, the majority held, precluded him for claiming error on appeal.

Upon the petition of the defendant, the California Supreme Court has accepted this case for a hearing. When such a decision is handed down, the SLR will report on the final decision of that court.

Rape law denied equal protection

In *Meloon v. Helgemoe*, C.A. No. 77-11 (D.N.H. April 21, 1977), the constitutionality of the now superseded New Hampshire statutory rape statute was successfully challenged by a male who contended that the statute violated the equal protection clause of the Constitution. The statute, which has since been replaced by a sex-neutral statute, made it a felony for a man to have intercourse with a female who was unconscious or less than fifteen years old, but left unpunished a woman who had intercourse with a male of similar age.

The court determined that the appropriate standard of review required a determination whether the challenged discrimination bore a "fair and substantial relationship to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971). The two proffered justifications for the statute were (1) the female's potential for pregnancy and (2) the more remote possibility that a male would suffer harmful consequences from sexual contact with an older female than *vice versa.*

The court found both of these justifications insufficient under the *Reed* test. The pregnancy justification was rejected because the statute punished intercourse even when it was impossible for the female to conceive and because the court found it irrational to punish the male but not the female when the act was consensual. The psychological harm justification was rejected as "an assumption" not grounded on any competent facts or evidence, but rather on societal sexual standards that are rooted in our male-oriented background and values.

The court, in striking down the statute ruled that the question was not foreclosed by the result in *Buchanan v. State*, 480 S.W. 2d 207 (Tex. Cr. App.), *appeal dismissed* 409 U.S. 814 (1972). *Buchanan* was an attack on the Texas aggravated assault statute which punished male assaults on females more severely than male-male or female-female assaults. The *Meloon* court was of the opinion that the Texas statute was sufficiently different from the New Hampshire statute and that the state of equal protection law had advanced sufficiently since *Buchanan* so that the latter was not binding precedent under the rule of *Hicks v. Miranda*, 422 U.S. 332 (1975).

Petitioner in *Meloon* also attacked the New Hampshire statute on substantive due process grounds but the court found it unnecessary to consider this claim in light of its disposition of the equal protection challenge.

Governor's protection of Pennsylvania gays upheld

On April 23, 1975, Pennsylvania Governor Milton Shapp issued an executive order prohibiting discrimination by state departments and agencies on the basis of sexual preference. Soon thereafter a lawsuit was brought challenging the Governor's authority to issue such an order. (See *Robinson v. Shapp,* 350 A.2d 464 (1975), 2 Sex.L.Rptr. 16—*Ed.*)

On June 23, 1977, in a per curiam order, the Pennsylvania Supreme Court entered a judgment upholding the lower court's decision that the Governor had the authority to issue such an order. The Supreme Court did not render an opinion.

Adulterous mothers found unfit for child custody

By presenting carefully documented evidence of his estranged wife's allegedly adulterous behavior with three different men, a Maryland husband gained custody of his youngest daughter even though the eight-year-old had been living with the wife during the approximately two-year period of separation.

In *Davis v. Davis*, 364 A.2d 130 (1976), the Court of Special Appeals of Maryland, reviewing the original award of the child to her mother, relied on the decision in *Palmer v. Palmer,* 207 A.2d 481 (1965), holding that an adulterous parent is presumed to be unfit. The court went on to state that the presumption of unfitness could be overcome by showing that the adulterous party had repented, terminated the illicit relationship and changed his or her ways so as to evidence little likelihood of a recurrence of the past conduct. In the instant case, however, because the burden of such a showing was not met by the mother, the court reasoned that the chancellor's decision in the original grant of custody was erroneous in not considering the long term effect of ". . . having a child taught her sexual morals by an unrepentant, flagrantly adulterous and promiscuous parent."

Repentance and substantial changes in her living arrangements were not enough to win a custody contest fought by a Louisiana mother. In *Beck v. Beck*, 341 So. 2d 580 (1977), the mother admitted that she allowed her paramour to move into the house trailer she occupied with her young son and that she and her paramour had engaged in sexual relations. She argued, however, that the arrangement only continued for four or five months, and she had since required the man to move out and had discontinued having sexual relations with him.

The court affirmed the award of custody to the father and quoted *Borras v. Falgoust*, 285 So.2d 583 (1973), to support its finding that, "[p]ast misconduct forms an important consideration in determining the present suitability of a parent . . ." Focusing on the interests of the seven-year-old child, the court concluded that, "[s]uch utter disregard for moral guidance and social standards can have but ill effect on the young man."

In a third recent decision along these lines, *In re Marriage of J—H—M*, 544 S.W.2d 582 (1976), a Missouri Court of Appeals stated that adultery is usually insufficient, without more, to stigmatize a mother as an unfit custodian. In affirming the trial court's award of custody of the couple's three daughters to their father, Judge Rendlen emphasized that, "[w]hat we may not condone is exposing children to adulterous and immoral contacts. . . . critical here is that the mother's affairs were conducted with the children's knowledge and while they were present in the house."

Significant also in the court's determination was the evidence presented showing that the mother attempted to instill disrespect and destroy affection of the children for their father.

□ *more Court News on page 58*

This Is A Combined Issue

In order to present the full text of the *Oregon Task Force Report* in one issue, it was necessary to publish a combined issue of what would otherwise have been separate July/August and September/October issues of the *SexuaLawReporter.*

ADMINISTRATIVE RULINGS...

Immigration Department denies validity of gay marriage

On August 15, 1977, the Los Angeles District Director of the U.S. Immigration and Naturalization Service notified Richard Frank Adams that his visa petition filed on April 28, 1975 for the classification of Anthony Corbett Sullivan as a spouse of a United States citizen was denied. Messrs. Adams and Sullivan were issued a marriage license in Boulder, Colorado on April 25, 1975.

The following is the full text of the opinion written by Joseph Sureck, Los Angeles District Director:

"A marriage between two males is invalid for immigration purposes and cannot be considered a bona fide marital relationship since neither party to the marriage can perform the female functions in marriage. *Black's Law Dictionary* defines marriage as

> 'the civil status, condition or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.'

"A marriage certificate was submitted with the visa petition for the beneficiary evidencing that a marriage ceremony was performed on April 21, 1975, in Boulder, Colorado. Correspondence has been introduced into evidence from J. D. MacFarlane, Attorney General of the State of Colorado, to the Speaker, House of Representatives, State Capital, Denver, Colorado. The referred to correspondence is dated April 24, 1975, and was in response to an inquiry whether a County Clerk could issue a license to marry to two men or to two women; and whether a marriage between two men or between two women is valid in Colorado.

"The attorney in an advisory opinion stated that the Colorado Revised Statutes, Section 14-2-104 (1973) provides:

> 'A marriage between a man and a woman licensed, solemnized and registered as provided in this Part One is valid in this State.'

The Attorney General advised that a prerequisite to a valid marriage is that it be between a man and a woman.

"The licensing requirements, however, are directed to *parties.* C.R.S. Section 14-2-106(1)(1)(1973) provides:

> 'When a marriage application has been completed and signed by both parties to a prospective marriage and at least one party has appeared before the county clerk, and has paid the marriage license fee of seven dollars, the county clerk shall issue a license to marry and a marriage certificate form upon being furnished . . . satisfactory proof that the marriage is not prohibited as provided in Section 14-2-110 . . .'

"The Attorney General in his advisory opinion stated the statute seems to require a county clerk to issue a marriage license if the requirements of C.R.S. 14-2-106 are met *but the issuance of the license does not mean that the marriage is valid, and a county clerk should not be required to do what may be a meaningless act.*

"The Attorney General of the State of Colorado concluded that, 'If a county clerk does issue a license to marry to two men or to two women, the resulting marriage is not valid because of the statutory requirement that the marriage be between a man and a woman. It is my opinion that under Colorado statutes and case law a license to marry issued by a county clerk to two men or to two women is void, and a marriage between two men or two women has no legal status in this state. Because the issuance of a license under such circumstances is useless and an official act of no validity and may mislead the recipients of the license and the general public, a county clerk should not issue a marriage license to two men or to two women.'

"Courts in other states have said that a marriage ceremony or a marriage license to enter into a relationship which the parties are incapable of achieving is a nullity. *Jones v. Hallahan*, 501 S.W. 2d 588 (1973); *Anonymous v. Anonymous,* 67 Misc. 2d 982, 325 N.Y.S. 2d 499 (1971). The Kentucky court commented:

> 'If the appellants had concealed from the clerk the fact that they were of the same sex and he had issued a license to them and a ceremony had been performed, the resulting relationship would not constitute a marriage. *Jones v. Hallahan,* supra at 589.'

"Even if there is no prohibition to the issuance of a license to and a marriage between two persons of the same sex in the state where the marriage is performed, the fact remains that a marriage is and always has been a contract between a man and a woman. A union between two males does not create a marriage contract. *Baker v. Nelson*, 191 N.W. 185 (Minn.); *Jones v. Hallahan*, supra.

"One of the parties to this union may function as a female in other relationships and situations, but cannot function as a wife by assuming female duties and obligations inherent in the marital relationship. A union of this sort was never intended by Congress to form a basis of a visa petition. On the basis of the aforementioned reasons, the visa petition is denied."

An appeal to the Board of Immigration Appeals will be filed, according to Mr. Sullivan.

Defense Department denies clearance to homosexual

Roy Lee Fulton, an applicant for a security clearance at the level of "Secret," has been denied the clearance on the grounds of his homosexual conduct.

The statement of reasons (SOR) for the denial of the clearance by the Defense Department was as follows:

CRITERION H: alleging criminal conduct and acts of sexual perversion;

CRITERION I: alleging activities of a reckless, irresponsible or wanton nature which indicates poor judgment, unreliability or untrustworthiness as to suggest that the Applicant might fail to safeguard classified information entrusted to his care and use or might disclose classified information to unauthorized persons or otherwise assist such persons whether deliberately or inadvertently in activities inimical to the national interest; and

CRITERION K: alleging Applicant may be subjected to coercion, influence or pressure which may be likely to cause action contrary to the national interest.

Hearing Examiner Joseph Sacks, after a full hearing of the case on the merits, found as follows:

"Since 1965, Applicant engaged in acts of fellatio and sodomy with diverse males on numerous occasions in violation of state penal statutes. Such sexual engagements were generally with strangers; on occasions Applicant participated in group sexual acts, i.e., more than two persons being present and participating. Applicant indicated an intent to continue to engage in acts of fellatio and sodomy.

"Applicant's conduct does not reflect activities of a reckless, irresponsible or wanton nature within the intent of CRITERION I.

"The facts and circumstances in Applicant's case do not warrant the determination that he may be subjected to coercion, influence or pressure within the intent of CRITERION K.

"It is clearly consistent with the national interest to grant a security clearance to the Applicant at the level of 'Secret'."

Department Counsel, on behalf of the Department of Defense, entered an appeal in this case seeking a review and reversal of the determination of the hearing examiner. Department Counsel contended that the ultimate decision on the issues is in error.

On June 9, 1977, the Department of Defense Appeal Board reversed the decision of the hearing examiner. In denying the security clearance, the Appeal Board found as follows:

"Applicant's sexual conduct, at least until December, 1975, violated California penal statutes (Penal Code, Sections 286 and 288a). Applicant also admits to having engaged in homosexual acts in the past in Illinois and Texas and expresses his intention to continue in the future.

"Granted, the California Code was amended as of January 1, 1976, decriminalizing private consensual adult sexual behavior formerly prohibited by Sections 286 and 288a. The decriminalization of certain aspects of sexual behavior, in private, between consenting adults does not negate the inference that Applicant's conduct did and does fall within the provisions of CRITERION H, nor the conclusions to be drawn therefrom.

"The above change in the law did not 'sanctify' nor excuse previous violations of the law nor violations in other states in which Applicant has resided or may reside in the future. Neither does it establish a constitutional right to engage in promiscuous homosexual activity.

"Applicant has engaged in criminal conduct and sexual perversion. His manifest and stated intention to continue promiscuous and irresponsible homosexual activity and his participation in group homosexual activity not only targets him for possible coercion and pressure, but casts serious doubts upon his trustworthiness, reliability and responsibility, thus precluding a finding in favor of Applicant."

For the reasons set forth in the Appeal Board decision, Fulton's clearance at any level of classification was denied.

State Department agency lifts anti-gay policy

After several years of litigation and administrative hearings, L. M. Smith, a foreign service agent formerly employed by the Agency for International Development, was ordered reinstated with back pay, notwithstanding his acknowledged homosexuality.

On August 18, 1977, John J. Gilligan, Administrator for A.I.D., a State Department agency, issued the final decision in this case. Mr. Smith was fired by the agency in 1972 because of his homosexuality.

Some noteworthy factual findings of the Administrator include the following:

"I agree with and adopt the findings of the Administrative Law Judge . . . that Smith, after disclosure of his homosexual activity to the Government, could no longer be found to be a security risk. I also agree with and adopt the Administrative Law Judge's conclusions . . . that the asserted 'criminality' and 'immorality' of Smith's conduct are not grounds for termination of employment. In view of my determination below that homosexuals as a class are not unsuitable for employment in the AID Foreign Service, I find that the rationale expressed . . . [that a dread of loss of job should his sexual conduct become known] . . . is no longer a relevant ground for decision in this case.

"It is proper, in my view, for the Agency to consider, in its evaluation of the qualifications or performance of an applicant or employee any evidence that homosexual preferences adversely affect, or are likely to affect, the ability of the individual to perform his or her job well."

The Administrator discussed previous findings of administrative law judges that homosexuals as a class are not suited for foreign service employment. "Such a class-based determination," he concluded, "would be fundamentally inconsistent with the due process rights guaranteed to Mr. Smith under the Fifth Amendment to the Constitution."

Finally, he held that, "This Agency is dedicated to the principle that the suitability of each individual must be judged on his or her own fitness. Where, as here, an employee has a sound record, has a demonstrated ability to operate effectively in a foreign environment, and has no record of prior misconduct or of public behavior which could or would impair the effectiveness of Agency operations, private homosexual conduct will not be grounds for dismissal from employment."

Accordingly, Mr. Smith, was reinstated into A.I.D. employ, with back pay.

University of California and Harvard protect gays

Daniel Cantor, Harvard University Director of Personnel, recently announced that, "It is Harvard's actively pursued policy to hire, compensate and promote its people solely on the basis of job performance. No one is to be denied a job, or appropriate treatment once employed, because of his or her sexual preferences."

Cantor also explained that this non-discrimination policy applied to both teaching and non-teaching employees.

Meanwhile at the University of California system, Archie Kleingartner, Vice President of Academic and Staff Personnel Relations, issued a letter to all U.C. Chancellors:

"The University of California does not and will not discriminate in its employment relationship with any individual based on personal characteristics, including sexual orientation, which are not job-related."

The University of California system has campuses in Berkeley, Davis, Irvine, Riverside, San Diego, Los Angeles, San Francisco, Santa Barbara, and Santa Cruz. Hundreds of thousands of students are enrolled at these campuses.

Other universities which have adopted similar non-discrimination policies include Temple University, Cornell University, University of Michigan, Rutgers University, Haverford College in Pennsylvania, Portland State University and the University of Cincinnati.

OREGON TASK FORCE ON SEXUAL PREFERENCE PRELIMINARY REPORT

Introduction

Most of the members of this Task Force, like most of our citizens, are heterosexual. And, like most of those who will read this report, when we began our work on the Task Force, we each had our own prejudices and private feelings about what homosexual women and men were like and the kinds of problems which might arise because of someone's homosexual orientation.

Homosexuality is a subject which, until recently, was not openly spoken of in our society. It is still most commonly referred to in the form of derisive jokes. The people who most often do make public comments on homosexuality are those with negative opinions. Because their negative opinions generally are unchallenged, they assume their views are shared by most of the people around them. In fact, many people personally feel tolerant toward homosexuality, but remain silent because they imagine their more positive opinions will open them to personal attack and ridicule. The unfortunate result is that questions people have about homosexuality go unanswered because of anxieties about bringing up the subject.

Our early meetings reflected this; at first, many of us were cautious in expressing our opinions. As we became more comfortable, we began acknowledging our own misgivings which were, of course, quite similar to those many people have: uneasiness about effeminate men; concern about homosexual teachers; the belief that in homosexual couples one person takes a male role and the other a female role; concerns about being proselytized or approached sexually by homosexuals.

When friends, family, and co-workers learned that we were serving on this Task Force, there were sometimes uplifted eyebrows and "jokes." We felt the pressure to mention our wives or husbands or close friends of the opposite sex — the pressure to "prove" that we were heterosexual, to satisfy those around us. Thus we experienced the pressures which people are subjected to when someone thinks they might be homosexual.

As the year progressed, we were able to sort out our thoughts and feelings. Many men and women who were homosexual attended our meetings. Rarely did they resemble the stereotype of the swishing man or the stomping woman. We soon learned it was impossible to tell from appearances which members of the public at our meetings were homosexual and which were heterosexual.

On occasion members of the Task Force have been asked to identify which other members are homosexual. This occurred at one of our meetings and our spontaneous response was to return the question to its asker: "Can you tell who among us is homosexual?" It was an object lesson that a person's sexual preference is not readily apparent.

We realize our report will be controversial. Because our findings and recommendations are unanimous, some people who read this report will assume that we began with a positive bias. Our starting point, however, was much the same as that of other people. Our views today are different from our views of a year ago because in the past year we have had experiences which most Oregonians have not yet had: the opportunity to meet a variety of men and women who we know to be homosexual; to see how diverse their lives are in contrast to the stereotypes; and to openly discuss our own personal feelings and reservations instead of attempting to deal with them alone, as most of us had done before serving on this Task Force.

This unique experience has had a profound effect on us and many of our recommendations reflect the conviction that other Oregonians would benefit by similar experiences.

The Portland Town Council served as an advisory board to the Task Force. The members of this civil rights organization assisted subcommittees by suggesting problem areas for study and by acting as a liaison with other homosexual men and women who provided us with information about their own experiences. The Portland Town Council members who advised us did not have voting rights. The findings and recommendations of this Task Force are the sole responsibility of the members of this Task Force.

The 12 members of the Task Force represent a cross-section of the community: the legal profession; medicine; education; religion; business and labor; state and local government; parents; and minorities. THE MEMBERS ARE:

HOLLY HART
Chairperson, Attorney at Law
AUSTIN AMERINE
Pastor, Metropolitan Community Church
ELSIE BUSHBECK
D.P.M., Commander, USNR (Ret.)
JANE EDWARDS
Attorney, ACLU Chairperson
JIM MANLEY
Area Representative, AFL-CIO Human Resources Development Institute
ALYCE MARCUS
Affirmative Action Office, City of Portland
BETTY POLEN
Health & Safety Education Specialist, Portland Public Schools
Rev. EARL RIDDLE
Council Director, United Methodist Oregon-Idaho Conference
ROLLIN SCHALEGER
Pastor, St. Peter's Lutheran Church, Medford, Oregon
ANN SHEPHERD
(Former) Newspaper Reporter, Mother of 5 Daughters
JOE TRAINER, M.D.
Health Sciences Center, University of Oregon

This Preliminary Report has been prepared to present the unanimous recommendation of the *Task Force* that civil rights legislation be extended to prohibit discrimination on the basis of sexual orientation and marital status in employment, housing, and public accommodations. *To this end we recommend the passage of Senate Bill #603.* We submit the results of our research, information-gathering, and deliberation on the problem of employment discrimination against homosexual women and men and others thought to be homosexual, which led to the above recommendation.

However, our work could not have been accomplished without the assistance of the Portland Town Council. It was absolutely essential to carrying out our assignment that we make contact with a substantial number of homosexual women and men. Women and men who have already been injured because of discrimination because of their sexual preference, understandably, are reluctant to risk being identified and perhaps, thereby, subjected to further discrimination. The Portland Town Council was able to disseminate the information that this Task Force would objectively and confidentially receive testimony from homosexual people.

Method of Study

Information on discrimination in employment, housing, and public accommodations was obtained through the following means:

1. Individual interviews
2. Written correspondence
3. Questionnaires distributed to state employees in a pilot study of attitudes toward homosexuals
4. An employment discrimination survey of homosexual and heterosexual members of the public
5. Testimony at the public meetings of the Task Force

Because employment is of greater concern than housing and public accommodations to legislators, the public, and homosexual men and women themselves, this portion of our study concentrated on employment.

Results of Study

Occupational Range

Through a questionnaire we asked 170 homosexual men and women about their current, or most recent, employment. The range of job titles listed cover 104 occupations (*See* TABLE 1).

This list of occupations demonstrates several important facts: (a) in contrast to other minority groups, homosexual people have long been at work throughout the many jobs in our economy; (b) contrary to the stereotypes, homosexual men and women are not concentrated in a few occupations; and (c) we are not faced with the question, "What would happen if homosexuals were allowed in certain occupations?" The evidence shows that homosexual men and women already are represented in virtually every occupation.

The prediction that there will be negative consequences if homosexual people are permitted in certain occupations ignores the fact that homosexual women and men are already working in every area and the negative consequences have not occurred.

Since 1974, the City of Portland has had a stated policy of non-discrimination against city employees on the basis of sexual orientation. A member of the Task Force, *Alyce Marcus,* is in the Bureau of Personnel, which has responsibility for administering this policy. To date, the City has not received any complaints from members of the public alleging any misconduct by those city employees who are homosexual.

Some Actual Cases of Discrimination

The Task Force has received testimony from numerous people who were either denied employment or terminated from employment after their sexual orientation became known.

□ *continued on page 48*

TABLE 1

OCCUPATIONAL RANGE

of the 84 Homosexual Men and the 86 Homosexual Women Studied in the Discrimination Survey

Administrative Assistant
Advertising Manager
Artist/Designer
Assistant Cook
Assistant Manager
Asst. Personnel Director
Attorney
Auto Mechanic

Bank Clerk
Bartender
Beauty Operator
Bookbinder
Bookkeeper
Bus Driver
Buyer

Carpenter
Cashier
Chemist
Child Care Worker
Civil Engineering Tech.
Clerical Specialist
Clerk Typist
Computer Operator
Computer Programmer
Construction Laborer
Corporation President
Coach
Counselor

Day Care Teacher
Day Care Worker
Delivery Driver
Dental Technician
Department Manager
Director
Dishwasher
Drill Press Operator

Employment Counselor
Engineer
Executive Director
Executive Secretary

Factory Representative
Factory Worker

Gas Station Attendant
General Office Manager
Graphics Designer
Grocery Clerk

Hairdresser
Hospital Worker
Housekeeper
Housemaid
House Painter

Instructional Aide
Instructor, Athletics
Insurance Clerk
Insurance Underwriter
Interior Designer
Inventory Cont. Specialist

Janitor

Kitchen Helper

Laboratory Technician
Laborer
Landscape Gardener
Law Clerk
Lecturer
Legal Secretary
Light Assembly Worker

Manager
Marketing Director
Masseuse
Medical Records Assist.

Nurse, RN
Nurse's Aide
Nursing Assistant

Office Clerk
Operations Assistant

Personnel Supervisor
Physical Therapy Assist.
Physician's Assistant
Police Officer
Printer
Producer/Writer
Production Worker
Program Assistant
Program Coordinator
Psychological Tech.
Public Relations
Purchasing Agent

Quality Control

Railroad Worker
Realtor
Receptionist
Restaurant Manager
Retired

Sales Manager
Salesperson
Sales Representative
Secretary
Small Business Owner
Social Worker
Sports Director

Teacher
Teacher's Aide

U. S. Army

Waiter

The following cases serve as illustration:

1. **Personal interview** Male, 44 years old. He was recruited from New York by the owner of a Portland-based international firm for a position as director of marketing. The owner found out he was homosexual soon thereafter and wanted to fire him on the spot, but the company was in financial difficulty and he was kept on. After a year his responsibilities gradually were taken from him until he resigned. He is currently unemployed.
2. **Questionnaire** Female, 25 years old. She was employed for 2½ years as the successful manager of an athletic club and terminated when her employer learned she was homosexual. She is currently unemployed.
3. **Personal interview** Male, 27 years old. After applying for a counselor position, two members of the interviewing panel told him he was not hired because another person on the panel knew he was homosexual.
4. **Personal interview** Male, 26 years old. He was fired from his bartender job after the owner concluded he was homosexual from observing his friends.

To summarize these and other examples of discrimination given in testimony to the Task Force, men and women may be denied employment once their sexual orientation becomes known. This is true even when they have exemplary work records. Seldom are they told directly that their sexual orientation is the reason for termination or failure to get the job. They find out only from co-workers or others in whom the employer has confided.

Homosexual women and men are denied jobs working with children, not because they have engaged in misconduct with children, but because of the automatic assumption that they might engage in such misconduct. Homosexuals who have been satisfactory employees for years and given no one reason to doubt their integrity in conducting themselves properly, have been summarily dismissed for exchanging a hug with a friend, or because of the appearance of their friends, or because of their honesty in acknowledging their sexual orientation in an encounter group at work.

Homosexuals are placed in a *Catch 22* position over whether they should let supervisors or co-workers know of their sexual preference; if they do, they may not be hired or may be fired; if they don't, and it is found out by some coincidence, they may be fired supposedly because they were not honest.

The Threat of Employment Discrimination

Most homosexual men and women do not report that they have actually been discriminated against in employment opportunities because of their sexual preference. However, they do report that they experience considerable insecurity because of the awareness that they *might be* subjected to discrimination. Most believe that they are not discriminated against solely because they avoid doing anything which might indicate their sexual orientation.

To avoid discrimination, homosexual women and men most often do not discuss their off-the-job social lives at work, i.e., who their friends are, who they live with, and the everyday ups and downs of their personal lives which most heterosexual men and women do not hesitate to discuss with co-workers.

Despite this caution, there always remains the possibility that by some coincidence a co-worker will discover an individual's sexual orientation.

Many employers state they personally do not or would not discriminate on the basis of sexual orientation, but the homosexual man or woman is in a position of playing Russian Roulette — it is difficult to predict which particular employer will or will not discriminate, so the tendency is for homosexuals to conceal their sexual orientation, even in employment situations where that might be unnecessary.

The need to conceal one's sexual orientation takes its own toll. In our society, a secret is often regarded as dishonesty. Employers may reason that if a person is homosexual and keeps that a secret, then the person is untrustworthy and unsuitable as an employee. Furthermore, the assumption is often made that if you keep something secret, you must be ashamed of it or it must be bad. We have learned from homosexual women and men, who are careful not to acknowledge their sexual orientation, that they are not motivated by shame or lack of integrity, but by the fear of losing their means of livelihood and/or a valued career.

They understandably experience some anxiety when a co-worker asks a friendly question about whom they live with, or whom they took their vacation with, or whether there is "someone special" in their lives. Imagine what it would be like if you were married but felt you had to keep it a secret from the people at work. There is very little you could talk about concerning your life away from work that you would not have to distort in order to conceal the existence of your husband or wife and the importance of that person in your life.

The Ripple Effect of Discrimination

People who are homosexual are not the only ones who suffer because of the traditional prejudices and discrimination against homosexuals — all of us do.

Heterosexual men who are slight of build, have certain mannerisms thought to be effeminate, or have a personal appearance which corresponds to the stereotype of "what homosexuals look like" are more vulnerable to employment discrimination than the average male homosexual. Since most homosexual men are not effeminate, discrimination weighs most heavily on those men who look like the stereotype; more often than not, they are heterosexual. Heterosexual women who are mannish in appearance, who cut their hair short and don't wear cosmetics, or who have an assertive manner, may be subject to employment discrimination because they are thought to be lesbian or because they do not fit the feminine image the employer wants.

Men who share housing are sometimes suspected of being homosexual. Often they are not. But the stigma attached to men sharing an apartment or house has discouraged many heterosexual male friends from living together. Those men who try to do so may find some landlords are not willing to rent to them. Two or more women wishing to live together may also experience this difficulty.

"The prediction that there will be negative consequences if homosexual people are permitted in certain occupations ignores the fact that homosexual women and men are already working in every area and the negative consequences have not occurred."

Heterosexuals interested in certain occupations traditionally filled by members of the opposite sex may be reluctant to pursue their natural choice because they might be suspected of being homosexual. Consider the man who is a secretary, nurse, fashion designer, or librarian. Consider the woman who is a truck driver, professional athlete, auto mechanic, or even politician. This restrictive influence on choice can also affect a person's style of clothing, hobbies, or anything else that might fall into some stereotype about homosexuals. The freedom of all of us is limited as long as stereotypes about homosexuals persist and we do not feel free to do what we want for fear we will be thought to be a homosexual.

Civil rights protection on the basis of sexual orientation will protect not only those who are homosexual, but heterosexuals who might be thought to be homosexual.

Additionally, parents, other relatives, and close acquaintances of homosexual women and men are injured by the discrimination and threat of discrimination against their family members and friends. A primary concern of many parents, when they learn their son or daughter is homosexual, is that they will be subjected to discrimination. The Task Force has learned that parents experience great anxiety about their children's employment security. These parents probably would be less anxious about their son's or daughter's sexual orientation if they were reassured their child's future career would not suffer as a result.

A Case of Mistaken Identity

Testimony that dramatically illustrates many of the factors at work in discrimination on the basis of sexual preference was given by a *heterosexual* woman who was terminated from a management trainee program because of the belief that she had made sexual advances toward other women trainees.

Employed by the Portland division of a national retail organization, she was summarily called into her supervisor's office, after a month of satisfactory work, and informed that she was being dismissed for making sexual advances toward other employees. The supervisor refused to give her any details about the charges.

Thinking she was charged with allegedly making passes at men, she filed a complaint of sex discrimination with the Oregon Civil Rights Division, since men are rarely if ever fired for making passes at women with whom they work. Only later did she discover that it was *women* she had supposedly made advances toward.

The fact that this woman was heterosexual and clearly had no intention of making sexual advances to other women gives us an excellent opportunity to see how traditional prejudices and personal anxieties about homosexuality might lead to very wrong conclusions.

What forces were at work which might lead co-workers and a supervisor to believe that an employee is making homosexual advances? The woman had recently been separated from her husband and had resolved before beginning the job not to become involved with any man at work. Since she was recently separated, many people no doubt assumed she was "available" to men. When this very conventionally attractive woman consistently did not respond to the usual social and sexual overtures by her male co-workers, this might have planted a seed of doubt in some people's minds about her social and sexual orientation. We have all experienced the social expectations that eligible men and women should be showing their heterosexual interest by dating and

"The freedom of all of us is limited as long as stereotypes about homosexuals persist and we do not feel free to do what we want for fear we will be thought to be a homosexual."

everyday flirtations. Many male supervisors routinely relate to female employees through a low, but constant, level of flirtation. The woman who does not respond "appropriately" may seem "strange."

Although in a management trainee program in which people are typically competitive with each other, the woman believed it was important for co-workers, and particularly women, to be supportive of each other in a situation where they were trying to advance in a traditionally male field. This was reinforced by her recent experiences in a life enrichment program which encouraged cooperation. When co-workers expected competitiveness, but were met with supportiveness, they may have become suspicious — why is this woman being so friendly?

Once she had innocently triggered these sorts of doubts, the stage was set for an expression of physical affection to be interpreted in a sexual way. This woman, like many women, was naturally warm and affectionate. When a woman co-worker was experiencing difficulty because her daughter was presenting some behavior problems, the woman at one point stopped by to see the mother after work, to offer whatever help she could. On another occasion, she placed her arm around the mother at work, as they were discussing how upset she was because of her child.

We do not know anything about the personal experiences or anxieties of the mother which may have predisposed her to interpret the woman's actions as sexually motivated. But once one co-worker jumped to these conclusions and told others, several people apparently began retrospectively "discovering" the homosexual nature of the woman's conduct.

Because everyone tends to be afraid of this subject, no one, not even the supervisor when he terminated her, would let her know their suspicions. She was never given the opportunity to answer the charges against her and so stop the spreading anxieties.

This case is striking, but probably not all that unusual. As long as people have preconceived ideas about what homosexual men and women act like or look like, they may interpret totally non-sexual actions and words by both heterosexual and homosexual co-workers as homosexual in nature. Heterosexual employees may be terminated or never promoted, for reasons they are never told, because they "look or act gay" — at least to someone.

If the innocent behavior of a heterosexual employee can be so misconstrued, it is possible that co-workers will be even more inclined to wrongly interpret the behavior of an employee who is known to be homosexual.

Most homosexual women and men are much more circumspect about their relationships at work than heterosexual employees, because they are well aware there is more likelihood that their actions will be misinterpreted as sexual advances than the actions of a heterosexual. They are aware, also, that sanctions against any misbehavior would be more severe in their case, than against heterosexual employees who promote sexual liaisons at work.

□ *continued on following page*

Once a homosexual man or woman is identified, the fears and anxieties of co-workers and supervisors may be triggered and innocent actions given a sexual interpretation. With the protection of the civil rights law, individuals, heterosexual and homosexual, who feel that suspicions of this nature are limiting their employment opportunities, will have a forum in which to confront their otherwise silent accusers and defend themselves.

Causes of Discrimination: Stereotypes and Myths

The threat of discrimination against people who are thought to be homosexual exists because of certain myths and stereotypes common in our society about homosexuality. Like all stereotypes, they result in an individual being judged without regard for that individual's own qualities and merits.

Some of the prejudices we have relate to the qualities which employers believe are necessary to make a good employee. Other prejudices obviously have nothing to do with a person's work abilities — but they make homosexuality appear so repugnant that some people do not want to associate with homosexual people at all.

We have not attempted to trace the development of the stereotypes about homosexuals and homosexuality in our society. The important fact is that stereotypes exist and are held in common by many people. The concern of the Task Force was to discover whether the stereotypes are accurate in describing the majority of homosexual men and women and why the stereotypes engender so much anxiety and antagonism. After all, there are many things which we may disapprove of in each other's behavior — or even regard as immoral: for example, an unmarried woman having a child — but that doesn't mean we are nervous about sitting at a desk next to such a person or afraid to talk about the person's life situation.

In this section we will consider several stereotypes and myths about homosexual women and men and discuss: (a) how accurate each generalization is in describing the many homosexual men and women in our society; (b) why people may be particularly upset about it; and (c) how, if at all, it relates to ability to perform a job.

I. *The myth that there are only a small number of homosexual people in our society and that they live on the fringes of society.*

Havelock Ellis estimated that in England in 1901, approximately 2% to 5% of the male population was permanently homosexual. Hirschfield, in Germany in 1920, did a study which indicated that 2.3% of the male population was fully homosexual and an additional 3.4% partially homosexual. Katherine Davis in 1929 studied the female population and concluded that 16% of women had had overt homosexual experience. The 1940 study by Landis and colleagues indicated that 4% of women had experienced overt homosexual activity and 21% had more intense emotional or physical attachments to other women than to men. The Kinsey study of 1948 indicated that beyond age 15, about 25% of males had "more than incidental homosexual experience" and that by age 45, 13% had homosexual contacts leading to orgasm and that about 10% were homosexual for three or more years. A study of women in 1953 showed that by age 45, about 28% of women had experienced psychological arousal toward other women, 21% had some overt experience, and 13% had experienced orgasm through homosexual activity. Morton Hunt reviewed the older materials of Kinsey and did his own study in 1970, reporting that among males over age 15, 10% of married and 11% of single males had significant homosexual experience, and that 7% were overtly homosexual for more than three years in their adult lives, while 3% of females were overtly homosexual for more than three years in their adult lives.

Thus, the available studies have produced a consistent pattern of data, *showing little variation in their results over a period of more than 75 years.* It seems reasonable to conclude that no less than 10% of the adult population of Oregon — *or more than 150,000 Oregonians* — have had a homosexual orientation for at least three years of their adult lives.

The Task Force has found that homosexual men and women are represented in all age groups, socioeconomic classes, racial and ethnic groups, educational levels, and employment categories. They are an integral part of our society.

II. *The stereotype that homosexual men are effeminate and homosexual women are masculine in appearance and behavior.*

There are effeminate men in our society and masculine-appearing women. Some of these people are heterosexual and some are homosexual. Most homosexual men and women, like most heterosexual men and women, conform in behavior and appearance to culturally prescribed sex roles.

The majority of homosexual men and women live their entire lives without other people suspecting they are homosexual. They can do so precisely because of their conventional appearance.

This stereotype that homosexual men and women are somehow less-than-men or less-than-women is important, however, because it is a source of much of the hostility that people have toward homosexual men and women.

Boys are taught to shun what are considered girls' games and clothes and forms of emotional expression, such as crying. Males are also taught to measure their manliness by their sexual success with women. Men are very anxious about doing anything that might be considered feminine. Many men are embarrassed — and angered — at the idea that a man would "break ranks" and act unmanly. When that happens, it may remind many men of their own vulnerability and self-doubts. Who, after all, is the ever unflinching tower of strength that men are supposed to be?

Women are also conditioned to sex-appropriate behavior. Women who step beyond the stereotyped women's role by entering a traditional male occupation or hobby, particularly athletics, have often been accused of being lesbians, an effective way of scaring women away from traditionally male activities.

Our concept of sex roles is changing and becoming less rigid. But the dual fears — that of being homosexual and that of stepping outside one's proper sex role — continue to feed each other.

□ *continued across*

"The Task Force has found that homosexual men and women are represented in all age groups, socioeconomic classes, racial and ethnic groups, educational levels, and employment categories. They are an integral part of our society."

"...homosexual men and women are not any more obsessed or preoccupied with their sexuality than heterosexual men and women. However, heterosexuals, for various reasons, may be preoccupied about the sexuality of homosexuals."

This circle of anxiety can only be broken by the realization that people's sexual orientation and the other aspects of their lives — their jobs, hobbies, style of dress, emotional expressiveness — are not all tied together in a rigid way. A man is not less-than-a-man because his emotional and sexual ties are the strongest with other men and a woman is not less-than-a-woman because her emotional and sexual attractions are to other women.

Roles in a relationship do not have to be rigid either. For a heterosexual couple, the traditional idea has been that the man has to be strong and the woman dependent. As sex roles in heterosexual marriage are changing, we can see that a man and a woman do not have to conform to rigid roles in order to relate well to each other. In a relationship between two men, also, one does not have to be strong and the other dependent and weak. In a relationship between two women, one of them does not have to "be the man."

Employers may be concerned that a homosexual male would wear women's clothing (drag) to work. Or they may believe that because of appearance or mannerisms, homosexual men and women would alienate customers and make other employees uncomfortable.

Many people believe that homosexual men want to be women or that lesbians want to be men. It is, therefore, important to distinguish among the following:

1. **Transsexuals** are individuals who are biologically of one sex, but who psychologically feel that they are of the other sex and so feel "trapped in the wrong kind of body." Transsexuals who are preparing for sex change surgery may be conspicuous as they try to become accustomed to wearing the clothing of the opposite sex and developing the appropriate mannerisms. Transsexuality is not a sexual preference, i.e., it is not a matter of sexual attraction to another person. Instead, *transsexuality is a matter of self-identity or gender identity.*

2. **Transvestites** are people who obtain emotional or sexual satisfaction from dressing in the clothes of the opposite sex, although they wear the clothes which are considered socially appropriate for their own sex most of the time. *Most transvestites are actually heterosexual.* They have no interest in bringing their cross-dressing to work with them. Transvestites are not interested in sex change surgery.

3. **Homosexuals** are people whose sexual preference is for other people *of their own sex.* Most homosexuals are *not* either transvestites or transsexuals. Most homosexuals do not dress in drag. The minority of homosexuals who do dress in drag *do so only in private social settings or as performers in stage shows.* They, also, have no interest in bringing this form of recreation into their work lives or in surgically changing their sex.

The question of dress codes for men and women at work is distinct from the question of employment discrimination on the basis of sexual preference. Prohibiting employment discrimination on the basis of sexual preference will not affect an employer's right to dictate appropriate dress for male and female employees.

III. *The stereotype that homosexuals are obsessed with sex.*

When we find out that someone is homosexual, we may believe that person's life is dominated by sex. We end up defining that person by their sexual preference, as if that were the focus of their life. We do not do that with someone who is heterosexual — we realize their sexual preference is only one facet of their lives.

The homosexual man or woman is no more preoccupied with sex than the heterosexual man or woman. It is our societal anxiety about sexuality which focuses on a man or woman's homosexuality and exaggerates the importance of sex in that person's life.

An employer may rationalize that he/she does not want a homosexual working for the firm because the homosexual will be distracted and not a good worker, but it is probably the employer who would be distracted.

Homosexual women and men, just as heterosexual women and men, go through a period of adjustment and self-acceptance, during which they may be particularly concerned about their sexuality and it may occupy a considerable amount of their attention. Once that period is over, sex continues to have a place in their lives, but only a place — not the whole terrain.

Half of the men in our society have either had actual homosexual experience or have experienced sexual attraction to other men; a third of the women in our society have had same-sex experiences. Since these experiences occurred in a social atmosphere of very strong disapproval, many people have a large amount of residual confusion and guilt about these feelings and experiences. They may also have a very negative idea of what homosexual relationships are like because their own relationships were experienced under fear of discovery or of rejection and were, therefore, often sexually or emotionally unsatisfying.

People may judge homosexual relationships by their own isolated experiences: when a stranger made a pass at them in a public restroom; or when a depressed friend "confessed" his or her homosexual feelings. They may associate past episodes with current difficulties they are having with their heterosexual relationships, e.g., a man who is experiencing a period of impotency may think of his past homosexual attractions and wonder if the impotency with his female sexual partner is a "sign" that he is homosexual.

To summarize, homosexual men and women are not any more obsessed or preoccupied with their sexuality than heterosexual men and women. However, heterosexuals, for various reasons, may be preoccupied or obsessed about the sexuality of homosexuals.

IV. *The stereotype that homosexuals try to "recruit" other people to homosexuality and may impose themselves on their co-workers.*

There are several myths combined here: that homosexual men and women are promiscuous and indiscriminate in their sexual relationships; that they are aggressive and dangerous; and that they believe a homosexual lifestyle is best for everyone. □ *continued on following page*

"The fear that homosexual men and women will try to 'recruit' heterosexual men and women is sometimes a projection by persons who are quite anxious about their own homosexual feelings, their waning sexual functioning, or their lack of confidence in their masculinity or femininity."

In contrast to these myths, we have found that homosexual women and men tend to be far more cautious in their social relationships than heterosexual women and men. Heterosexual women and men engage in casual flirtation and establish sexual relationships with co-workers with little fear that their employment status will suffer as a result. Many women do not bother to report to their supervisors the persistent, unwanted sexual advances of men because they doubt that any action would be taken against the male employees.

But homosexual men and women know that *any sign of sexual interest in a co-worker may bring rapid and extreme penalties.* Many homosexuals have a personal policy of not becoming involved with anyone at work to avoid such repercussions. If a homosexual man or woman does become interested in someone else, he or she usually tries to verify that the person is also homosexual and would, therefore, not be affronted or alarmed by a show of interest. This involves some difficulty. Since most homosexual women and men avoid giving any indication of their sexual orientation and are not readily identifiable by appearance, co-workers who are homosexual often do not recognize each other. If homosexual men and women felt free to acknowledge their sexual orientation without risking their employment status, occasions of "mistaken identity" would obviously be reduced.

Most homosexual men and women believe that their sexual orientation is "right for them," but that does not mean they have any interest in imposing their orientation on other people. On the contrary, it is more often heterosexuals who insist that their sexual orientation is superior and heterosexuals who speak of "reforming" homosexuals. Heterosexual men and women will sometimes try to "convert" a homosexual co-worker by attempting to seduce him or her. Because of such personal experiences, homosexual women and men expressed to the Task Force a strong conviction that everyone's sexual orientation should be respected and people should not impose their sexual orientation on others.

The fear that homosexual men and women will try to "recruit" heterosexual men and women is sometimes a projection by persons who are quite anxious about their own homosexual feelings, their waning sexual functioning, or their lack of confidence in their masculinity or femininity.

The Concern About Child Molesting *

One of the most persistent stereotypes about homosexuals is that they are child molestors. A film, recently removed from the audiovisual library of the Portland Public Schools for its objectionable nature, is typical of how this myth is perpetuated. The film is designed to warn children against strangers and it portrays all the offenders, in enactments of child seduction, as being homosexual.

* Child molesting in this report refers to any sexual offense against a person under 18 years of age, from rape to touching of intimate areas.

A concern was voiced at the Task Force meeting of September 22, 1976, by *Mrs. Claude Pike.* She had been told by a Juvenile Detention Home caseworker that "homosexuals were preying on 10 to 12-year-old boys on downtown Portland streets," and she felt all homosexuals should be kept under police surveillance. Also mentioned at that meeting was the case, publicized in Salem newspapers, of a grade-school teacher, a male, allegedly having sexual relations with his male students.

Members of the Task Force are as concerned as the rest of the population about sexual molestation of minors and, in fact, about child abuse and neglect of any sort. For that reason, the Task Force has recommended that civil rights legislation be amended to make explicit the right of employers to fire or refuse to hire anyone, heterosexual or homosexual, in an occupation involving minors, who has been convicted of sexual misconduct with a minor.

Furthermore, homosexuals are as concerned as heterosexuals about child molesting and are rightfully upset that uninformed people equate orientation toward the same sex with an uncontrolled sex drive and lack of good judgment. Educational material prepared in May 1974 by the National Gay Task Force states:

"Homosexuals join heterosexuals in agreeing that young people as well as adults must be protected from unwanted sexual advances."

The question, "Are homosexuals any more likely to sexually molest children than heterosexuals?" was addressed as a legitimate area of research for the Task Force, since the issue has been used to justify discrimination against homosexuals, particularly in employment.

Investigation of child molesting consisted of personal interviews with experts on sexual offenses, review of police reports and state Children's Services Division (CSD) records, and library research. Caseworkers and officials of the Multnomah County Juvenile Court, the Multnomah County Sheriff's Office, the Sex Crime Detail of the Portland Police Department, and the State of Oregon Protective Services Unit of CSD, as well as a psychiatrist and a sexology consultant, were interviewed.

1. *Sexual offenses against children are perpetrated by males.*

To the best knowledge of the experts interviewed and according to reports of sexual offenses in the State of Oregon (1973-1976), Multnomah County (1974-1975), and the City of Portland (1976), *only two cases involving female offenders were found* and those involved 11- and 12-year-old girls simulating sexual intercourse with younger children. There is no evidence that women (and that, of course, includes lesbians) ever sexually molest children.

2. *The great majority of sexual offenses against children are heterosexual in nature, i.e., male offenders and female victims.*

The annual report of the Children's Services Division on Child Abuse in Oregon shows that in 1973-75, 85-90% of cases of child sexual molestation were perpetrated by *fathers, stepfathers, foster fathers, grandfathers, brothers, uncles, and mothers' boyfriends.* Another 6-10% were perpetrated by men known to the family, such as *friends, neighbors, and house boarders.* The November and December 1976 and January, 1977, figures, which were broken down by sex of the victim and the offender for the Task Force, show 63 cases of sexual molestation of children (23%

of all cases of child abuse and neglect reported for those three months). All offenders were male; 62 offenders were relatives and acquaintances and 1 was a stranger; 55 victims were *female,* 8 *male.*

Multnomah County figures for 1974-75 show all offenders were male; *85% of the victims for each year were female.*

Portland Police Bureau records for the first 11 months of 1976 show 212 cases of sexual offenses against children; *81% (172) of the victims were female.* Of the cases involving boys, at least 18% of the offenders were known to have also molested girls. Offenders totaled 242; males—239, females—3 (11 to 12-year-old girls involved in sex play with younger children). *The majority of offenders were relatives, friends, or acquaintances of the victims.*

In an interview with two counselors at the Multnomah County Juvenile Court, who handle child molestation cases, they told the Task Force they had heard of "literally thousands of cases of heterosexuals molesting children." One counselor had never heard of a case of *homosexuals* molesting children in 18 years at the Court; the other said that in 12 years' experiences she could safely say she had heard of *less than five cases.* The only ones she could recall were two which each involved fathers sexually molesting their sons.

Comparing Oregon's figures with those of other areas: the Regional Resource Center for Child Abuse in Boise, Idaho, reported 83 child molestings (ages 2-16) from January through September of 1976; 95% of the victims were female. In a study of sexual abuse of children in Minneapolis, 1970, 88% of the victims were female; all of the offenders were men. In a survey made in San Francisco in 1972, there were 107 reported incidences of child molesting. All were by heterosexuals.

A computer search at the University of Oregon Medical School Library of all books and professional journals published in the United States in the past 2½ years failed to turn up a single item linking the subject of child molestation with homosexuals.

In all the research cited, mostly from short-term records, the percentage of male victims ranges from 0-19%. Some people may label all these cases as homosexual, because the offender and victim were both male. However, information was available in some cases that the offender had also molested girls. Also, in many cases the offender can be assumed to be heterosexual, since he was a father, the boyfriend of the mother, the babysitter's husband, etc.

Findings of the Task Force indicate:

- **Sexual offenses against children are perpetrated by males; the great majority are heterosexual in nature, i.e., male offenders and female victims.**
- **Child molesting cannot be labeled as either heterosexually or homosexually motivated; rather, it is a neurotic behavior known as pedophilia, having little to do with opposite or same-sex orientation of the molestor.**
- **Male teenage prostitutes are more likely to be exploiters than victims.**
- **Occasional sexual activity with the same sex, by itself, is not likely to create a sexual preference for the same sex.**

3. Child molesting cannot be labeled as either heterosexually or homosexually motivated; rather, it is a neurotic behavior known as pedophilia, having little to do with opposite or same sex orientation of the molestor.

The conclusion from this research and the opinion of acknowledged experts in the field is that child molesting is a behavior identified as "pedophilia," which is a neurosis quite apart from sexual preference or orientation. According to a Portland psychiatrist, pedophilia may not be sexually motivated at all, but rather an "acting out" sexually to relieve anxieties about inability to establish satisfactory peer relationships.

Pedophilia is defined in the literature as *an abnormally accentuated fondness for children; an erotic craving for a child of the same or different sex on the part of the adult.* It may be due to influences which delay or prevent formation of ordinary social and sexual relationships.

Bud Powell, manager of the Protective Services Unit, CSD, State of Oregon, and Sgt. Bill Johnson of the Sex Crime Detail, Detective Division, Portland Police Department, agree that child molestation has little to do with heterosexual or homosexual motivation, but, rather, is related to pedophilia.

The National Gay Task Force has pointed out that "all scientific research on the subject agrees that child molestation is primarily the activity of neither homosexuals nor heterosexuals but of a distinct category of men . . . who are known as 'pedophiles.' These men are exclusively attracted to children, without regard to their sex, and it is noted in *all studies* that the majority of those apprehended for molesting young boys also have a history of molesting young girls."

The belief that homosexuals have an uncontrolled sex drive which causes them to molest children is negated by the profile of the child molestor:

> "Sex offenders, as a class, are rather shy, timid, and non-aggressive; undersexed rather than oversexed." (Bromberg, *Crime and the Mind,* 1948.)
>
> "Pedophiliacs are particularly afflicted with anxiety regarding sexual potency. They are often impotent or partially so. Inferiority feelings lead them to seek younger, less formidable love objects, whose ignorance prevents their deficiencies from becoming obvious. The child sexual object saves the ego from blows." (Karpman, *The Sexual Offender and His Offenses,* 1957.)

4. Male teenage prostitutes are more likely to be exploiters than victims.

Further investigation of Mrs. Pike's statement that 10-12 year old boys were being seduced by homosexuals, found that the Juvenile Detention Home caseworker she named as her source was admittedly not an authority on child molestation cases. He told the Task Force interviewer that his "personal observation is nil in this area." His knowledge came from vice squad arrests of teenage prostitutes. The youngest boys arrested for prostitution that he had seen at JDH were 15-16 years old and had a history of delinquency. A check of the Portland Police Bureau Uniform Crime Report of 1975 showed the arrest of 63 persons under 18 for prostitution and commercialized vice; 49 girls and 14 boys.

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TABLE 2

Types of Sexual Offenses Against Children, by Sex of Victim Portland Police Bureau, January-November 1976

OFFENSES	Female Victim		Male Victim	
	No.	(%)	No.	(%)
Statutory Rape	3	(1)	0	
Attempted Rape	24	(12)	2	(5)
Rape	63	(30)	0	
Oral Sodomy	39	(19)	14	(32)
Anal Sodomy	6	(3)	7	(16)
Masturbation	0		4	(9)
Digital Penetration	8	(4)	0	
Prohibited Touching	53	(26)	13	(29)
Other	8	(4)	4	(9)
Subtotals:	204		44	

TOTAL OFFENSES* = 248

**Totals are larger than number of cases (212) because multiple offenses were perpetrated in some cases, mostly with female victims.*

The youngest boy arrested was in the age category: 13-14. Street-wise people realize that teenage male prostitutes are often heterosexuals out to make some easy money, who sometimes beat up and rob their male "trick" with little likelihood that the incident will be reported to the police.

5. Occasional sexual activity with the same sex, by itself, is not likely to create a sexual preference for the same sex.

According to the *Kinsey Report* of 1948, about half of the older males (48%) and nearly two-thirds (60%) of the boys who were preadolescent at the time of the research, recalled sexual activity with other boys in their preadolescent years. The average age of the first sexual contact between boys was nine years, two-and-a-half months. Sexual contact with their own sex is fostered in young boys by the greater accessibility of their own sex, the socially encouraged disdain for girls' ways, their admiration for male prowess, and their desire to emulate older boys. The anatomy and functional capacities of male genitalia interests young boys to a great degree. Older preadolescents and younger adolescent males exhibit their masturbatory techniques to lone companions or to whole groups of boys. In the latter case, there may be simultaneous exhibition as a group activity (pp. 168-169).

The data in the *Kinsey* study indicates that at least 37% of the male population has some homosexual experience to the point of orgasm between the beginning of adolescence and old age. *"This is more than one male in three of the persons that one may meet as he passes along a city street,"* (p. 623).

The guilt and anxiety felt by many men about a few homosexual experiences in past years and the fears that sex-play amongst children of the same sex will affect later sexual orientation seem unfounded. Child seduction by adults also seems to have little effect on starting a sexual pattern. As C. A. Tripp points out in *The Homosexual Matrix*, 1975: ". . .a person who merely participates in a sexual activity is much less subject to being conditioned by it than is the instigator."

State Personnel Attitude Survey

A questionnaire was distributed to two sample groups of employees (administrative, clerical and service) of state divisions, as a pilot study of attitudes toward homosexual clients, co-workers, and supervisors. One sample covered employees of a number of state divisions located in a common facility in one of our larger metropolitan areas. The other sample covered employees of a single division located in offices throughout the state. Results from the two studies corresponded to a high degree. The full results of this study will be available in our Final Report.

The following is a summary of the findings which are particularly relevant to the issue of civil rights protection in employment:

1. There was a higher return rate of this questionnaire than of other questionnaires on different subjects which had been distributed to these employees, suggesting that state employees are interested and concerned about the subject of homosexuality.
2. Respondents were asked whether they would feel comfortable working with co-workers or supervisors who were homosexual. The response was:

   Co-workers: Comfortable, 65%; Not comfortable, 7%; Depends, 28%

   Supervisors: Comfortable, 63%; Not comfortable, 7%; Depends, 30%

   Those who answered "depends" gave the following reasons: *behavior, personality, whether they would try to impose their values on others, whether they would make sexual advances.*

   Those who had already been professionally involved with homosexuals were twice as likely to say they would feel comfortable working with a homosexual co-worker or supervisor as those who had never been professionally involved with homosexuals.
3. A higher percentage of the statewide sample than the metropolitan sample (88% to 70%) reported they had been professionally involved with homosexual clients, indicating that there are homosexual men and women throughout the state and that they are not at all concentrated in larger cities, as is sometimes thought.

   The statewide sample reported that they had co-workers who were homosexual only half as often as did the metropolitan sample. This suggests the possibility that homosexual state employees in small offices in less-populated areas of the state feel more cautious about revealing their sexual orientation to co-workers.

4. 66% said they had a generally positive attitude toward homosexuals and 53% said their attitude had improved as a result of knowing someone who was homosexual. Comments included: "Close association has removed my prejudice," "Working with problem-free homosexuals," "My co-worker was an extremely professional, competent person," "Having friends who are homosexual has helped me see them first as people."
5. 52% said they definitely would attend an optional educational training program for state employees on homosexuality. 15% of those who had a negative attitude said they would attend such a program. Only 17% of the total respondents said they definitely would not attend such a training program. The remainder were undecided.

Conclusions

In considering employment protection for homosexuals, the most important points to be made from this study are:

(a) contact with co-workers who acknowledge their homosexual orientation produces an increase in positive attitude and a decrease in feelings of discomfort about homosexuals, a reaction contrary to the prediction that knowing that one's colleague or boss is homosexual would have a disturbing effect; and (b) a majority of people would like more information about the subject of homosexuality, including some of those who hold negative views.

Enforcement of the proposed civil rights provisions would be administered by the Bureau of Labor and the Civil Rights Division. The Bureau already utilizes Technical Assistance personnel to provide educational programs on the laws as they relate to discrimination on the basis of currently protected groups, such as women and minorities.

In view of the interest which many people express in more information on the subject of homosexuality, Technical Assistance could expand to educational programs available to employers and their personnel on sexual orientation, which could present them with accurate information to refute the stereotypes and myths which might otherwise make them resistant to treating homosexual employees in an equitable manner.

The Role of Government

All of us are involved in a circular pattern: there exist certain traditional negative stereotypes about homosexuality and homosexuals; most homosexual women and men do not at all resemble these stereotypes, but because of the negative stereotypes, they are careful not to acknowledge their sexual orientation for fear of reprisal; and so the traditional negative stereotypes persist.

We have found that attitudes among Oregonians toward homosexuality are much more positive than we originally assumed. A study conducted by three Portland State University sociologists in 1972 reported the following findings:

1. 50% of a sample of Multnomah County residents (N=954) thought homosexuality was *not* immoral, while only 34% thought it was immoral.
2. 49% thought homosexuals *should be* allowed to teach school, while only 37% thought they should not.
3. 56% thought homosexuals *could be* desirable employees, while only 25% thought they could not.
4. Although 56% did not know whether private homosexual conduct was legal or illegal in Oregon [it had been legal for about six months at the time of the study], 70% thought that homosexuality *should not* be against the law, while only 22% thought it should be.

It is reasonable to assume that because of increased public discussion of homosexuality since the decriminalization of homosexual conduct, public attitudes are even more receptive than they were in 1972.

Many of us are afraid to express our more accepting attitude publicly because we assume that most of the people around us continue to have very negative attitudes. The fact that homosexuality is rarely openly discussed and instead, is most often mentioned only in the context of derisive jokes, reinforces this idea. Also, since sexual orientation is not obvious, *heterosexuals who speak up for civil rights protection for homosexuals are often suspected of being homosexuals themselves.*

Most people have some anxieties on this subject, or certainly some questions. Because there is a taboo against talking seriously about homosexuality, questions which could be answered and reassurance which could be given are not forthcoming. since often a person's best friends are of the same sex, people do not even feel comfortable talking about the subject to their own friends.

Meanwhile, a small but vocal minority, which is particularly anxious about this subject — *so much so that they have even opposed the study of homosexuality by government* — perpetuates our assumption that the people around us have less accepting attitudes than we have.

Many of our citizens want more accurate information on homosexuality, but they do not know where to obtain that information. Those who do know may be reluctant to make themselves "suspect" by seeking it out.

There are many employers who actually do not discriminate against employees on the basis of sexual preference — but they hesitate to make this a stated, publicized policy because they do not want to single out their department for public scrutiny or the scrutiny of their own superiors. There are many people in state government, heterosexual and homosexual, who realize that individuals served by their department may not be treated equitably or effectively because so many services are tailored to heterosexual marriage and family, even though an increasing number of heterosexuals are no longer within that framework. These government personnel sometimes have excellent ideas about how their services could be improved, but are reluctant to single themselves out by making their suggestions known.

The Task Force has found that many people believe discrimination against homosexuals should end — but few people want to make the first move toward that end.

Government can break this stalemate by providing the basic protection of a civil rights law *prohibiting discrimination on the basis of sexual orientation or marital status* in employment, housing, and public accommodations.

With such a law, the many people who personally oppose discrimination will no longer be in the position of seemingly taking a stand against overwhelming social tradition; employers who do not discriminate will be able to state openly that this is their policy, since it also will be the law.

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Since people's attitudes toward homosexuals improve when they have a co-worker known to be homosexual, some of those now opposed to civil rights legislation because of their lack of accurate information may someday come to favor the legislation, as their actual on-the-job acquaintances with homosexual men and women demonstrate that their prejudices and stereotypes are unjustified.

Extending civil rights legislation to include sexual orientation will provide a climate for further attitude change and will improve the morale, mental health, and contribution to society of all citizens.

Provisions of the Civil Rights Bill

Bills to extend the protection of the civil rights laws to homosexual men and women were introduced in both the 1973 and 1975 sessions of the Oregon Legislature. The Task Force was created by Governor Straub after the 1975 session. Part of our assignment was *to assemble accurate information and recommend possible modifications* in those bills, and so assist the Legislature in any future consideration of civil rights legislation.

As a result of our studies, the Task Force has recommended that several provisions of the previously proposed civil rights legislation be changed. The current sponsors of *Senate Bill 603* have already incorporated our recommendations, with the result that the current civil rights bill is different in several important respects from the earlier bills.

The following indicates each changed provision, with an explanation of why the change was recommended by the Task Force:

Recommendation to Add New Provision:

"It is an affirmative defense to any charge of unlawful employment discrimination on the basis of sexual orientation for the defendant to plead and prove that the employment involved work with minors and that the employee or prospective employee had a prior conviction involving conduct with a minor, for violation of ORS 163.355, 163.365, 163.375, 163.385, 163.395, 163.405, 163.415, 163.425, 163.435, 163.445, or violation of a comparable statute of any other jurisdiction."

Explanation: As discussed in the section on child molesting, there is no evidence that homosexuals are any more likely to pose a danger to children who they may work with than heterosexuals. However, there are some individuals, heterosexual and homosexual, who do commit sexual offenses involving minors. These individuals are clearly not suitable for employment which would place them in a position of responsibility over children.

Most of the negative public response to civil rights protection for homosexual women and men is expressed in such statements as: "This bill would require schools to recruit homosexual teachers," or, "This bill would make it impossible for schools to fire a teacher who molested students."

This provision makes it clear that an employee who had a history of sexual misconduct involving children could be denied employment involving children. The provision would operate as follows: if a person brought a complaint against an employer, charging that there was discrimination because of that person's sexual orientation, the employer could successfully defend against the charge by proving that the person had been convicted of a sexual offense involving a minor. In other words, the employer would be proving that the person was not being acted against because of his/her sexual orientation per se, but rather because of already demonstrated misconduct.

Actually, this provision is technically unnecessary, because an employer can always act against a member of a protected group for "cause." This provision parallels laws which protect the employment rights of ex-convicts, for example. Although their employment rights are protected, an employer may nevertheless deny them employment if their past convictions involved offenses related to their proposed job duties. A convicted embezzler does not have to be hired as a bank teller.

In making this recommendation, *we want to emphasize that we do not feel that homosexuals present a particular danger to children.* On the contrary, it is because the vast majority of homosexual adults, like the majority of heterosexual adults, do not present any danger to children and have no sexual interest in children, that their employment rights should be protected against the myth that they present a special danger. *The employment rights of the vast majority of homosexual and heterosexual men and women should not be jeopardized because of the misconduct of a few. Should we pass a law prohibiting fathers from being alone at home with their daughters just because most child molesting is committed by fathers against their daughters? There is a greater likelihood that a child will be molested by his or her own father, or stepfather, or uncle, or brother, than by a homosexual teacher or childcare worker.*

Recommendation to Delete Old Provision and Add New Provision

1975 provision to be deleted: (. . .it is an unlawful employment practice) For any employer, labor organization or employment agency to inquire into or investigate the sexual orientation of any employee or prospective employee, except in cases involving affirmative action programs for elimination of discrimination on the basis of sexual orientation.

Provision to be added: (. . .it is an unlawful employment practice) For any employer, labor organization or employment agency to inquire into or investigate the sexual orientation of any employee or prospective employee. However, it is not an unlawful employment practice, with respect to an employee or prospective employee who is or would be working primarily with minors, to inquire of such person as to whether he has any prior convictions, involving conduct with a minor, for violation of ORS 163.355, 163.365, 163.375, 163.385, 163.395, 163.405, 163.415, 163.425, 163.435, 163.445, or violation of a comparable statute of any other jurisdiction.

Explanation: The provision which has been *deleted* assumed that there might be affirmative action to increase the representation of homosexuals in certain occupations in the same way that affirmative action has been used to increase the representation of women and minorities in occupations from which they have historically been excluded. But, in fact, no one has ever proposed that affirmative action would be either necessary or desirable to improve the employment situation of people on account of their sexual preference. Because women and minorities are readily identifiable by their appearance, they have been excluded from many job categories and have been denied even the opportunity to demonstrate or develop their competence in these occupations. *But because homosexual women and men are not readily identifiable by appearance, and because they take*

care not to acknowledge their sexual orientation, they suffer more from the threat of discrimination once on the job rather than from being barred from employment to begin with. Homosexual men and women are already represented throughout the work force (except that lesbians, like other women, have been excluded from certain occupations by sex discrimination). There is no need for affirmative action to increase the number of homosexuals in various occupations so as to compensate for historical exclusion. There is only a need to protect them from current refusals to hire or dismissals, if and when their sexual orientation becomes known.

The Task Force is also concerned that people's rights of privacy be protected. *Employers have no legitimate interest in the personal or sexual lives of their employees, except where that involves misconduct affecting job performance.* Employers should not be given license to inquire into a person's sexual orientation under the guise of an affirmative action plan.

As previously discussed, where a job involves work with minors, past misconduct with minors is, however, relevant to present job performance, and so employers are given the limited right to inquire into convictions for sexual offenses involving minors, for this limited purpose.

Discrimination on the Basis of Marital Status

The Task Force recommends that discrimination be prohibited where it is based on *marital status,* as well as where it is based on *sexual orientation.*

Discrimination on the basis of marital status injures unmarried people, whether they are heterosexual or homosexual. Employers may have a policy of hiring only married people, because they subscribe to the theory that married people are more stable. Landlords may rent only to married couples, believing that they are more settled and take better care of property. The result is that single people, *both homosexual and heterosexual,* may be denied job and housing opportunities available to married people, although they may be just as capable and responsible as married individuals.

The current trend in our society is for people to marry later or not at all. The traditional expectation that all adults would marry, transformed into a preference for married people by some employers and landlords, limits the opportunities of single adults.

Sometimes the preference of an employer or landlord for married persons is actually an attempt to eliminate homosexual men and women from consideration. For this reason, if homosexual men and women are to be protected from discrimination, discrimination on the basis of marital status must also be prohibited.

This is another area which demonstrates that *heterosexual* people may often be victims of attempts to discriminate on the basis of sexual preference. The landlord who states he will only rent to married couples, in an attempt to keep out homosexual men and women, also injures the many heterosexual men and women who are single and are looking for rental housing.

Conclusion

It is the unanimous recommendation of the Task Force on Sexual Preference that Senate Bill #603, prohibiting discrimination in employment, housing, and public accommodations, on the basis of sexual orientation and marital status, be enacted into law.

SEXUALAWREPORTER

INTOLERANCE OF THE UNCONVENTIONAL HALTS THE GROWTH OF LIBERTY

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...IN THE COURTS

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'Drunk tank' is a 'public place'

Defining a "public place" was the task of the Arkansas Supreme Court in *State v. Black*, 545 S.W.2d 617 (1977). Noting that the "drunk tank" of the Little Rock city jail was so situated that prisoners confined across from the "tank" as well as the not uncommon groups of persons who "tour" the jail would have no difficulty seeing acts committed in the cell, the court reversed a trial court dismissal and found appellee's alleged act in violation of the Ark. Crim. Code §41-1811 (1976), Public Sexual Indecency.

While acknowledging that the fact situation was different, the Arkansas high court extracted the language of the Maryland Court of Appeals in the indecent exposure case of *Messina v. State,* 13 A2d 578. There they found the Maryland court to hold, "An exposure is 'public' or in a 'public place,' if it occurs under such circumstances that it could be seen by a number of persons, if they were present and happened to look."

The Arkansas court justified its reversal by utilizing the definition in *Messina* while conjecturing that had a "tour" been in progress at the time, the alleged act of appellee Black could have been observed.

Nude entertainers forbidden in bars

Another battle in the official crusade against topless/bottomless dancing was won recently when a three-judge court in the District of Connecticut upheld that state's strict regulations forbidding nudity, partial nudity, simulated nudity, an imaginative variety of real or simulated sex acts, and any mingling with the customers on the part of entertainers. The challenged statute also requires prior written permission before holding live entertainment in an establishment serving liquor. *Inturri v. Healy,* 426 F. Supp. 543 (1977).

The court found *California v. LaRue,* 93 S.Ct. 390 (1972), controlling, despite the fact that the Connecticut regulations contain features such as the prior permission requirement and the ban on mingling that were not present in the California liquor regulations upheld in *LaRue.* The *Inturri* court holds that when the state is exercising its power under the Twenty-first Amendment to regulate the sale of liquor within its boundaries, it may prohibit expressive conduct so long as its regulations are not wholly irrational.

The court applied a similarly permissive "rational relation" test in rejecting plaintiffs' equal protection claims. Plaintiffs claimed that the challenged regulations were enforced against barrooms but not against dinner-theaters. The court held that this claim of disparate enforcement, if true, did not amount to invidious discrimination because state officials could rationally conclude that dinner theaters presented a less "provocative" atmosphere than did barrooms. The court reserved for another day the question of the extent to which the state may validly regulate entertainment in dinner theaters.

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Meeting of National Committee for Sexual Civil Liberties

The Committee then heard from its Little Rock representative regarding the recriminalization of private homosexual conduct in Arkansas. The Committee decided to institute a legal challenge to the statute which now penalizes such conduct after more than a year during which such conduct had been lawful.

The Editor of the *SexuaLawReporter* presented a detailed report of more than 500 pieces of sex-related legislation pending or recently enacted across the country. (*See* 3 Sex.L.Rptr. 27.) An in-depth analysis of this legislation was made and considered in the context of current social changes and religious pressures.

At this point in the conference the theologians and church moralists reviewed the underlying religious problems to provide the necessary insight into the fundamentalist mentality. Their analysis, augmented by the understanding of the psychologists present, provided the Committee with a firm base for countering the anti-homosexual campaign begun by religious groups and lay persons, so evident in the recent Dade County situation.

The Committee's participation in the March, 1977 White House Conference on Homosexuality, as well as its continuing role in the ongoing discussions with federal agencies were then discussed. For this purpose, the Committee invited the co-executive directors of the National Gay Task Force to appear at its final session.

(*Editor's Note:* At the conclusion of the conference, representatives of the National Committee and the *SexuaLawReporter* traveled to the nation's capitol for meetings with California Senators Alan Cranston and S.I. Hayakawa, Lionel Castillo, Director of the Immigration and Naturalization Service, and various other congressional leaders.)

PUBLISHER'S MEMO

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Back Issues Again Available

Back issues of the SLR are available at a rate of $25.00 per volume for institutions and organizations and $15.00 per volume for individual subscribers. Volume One contains 1975 issues, Volume Two contains 1976 issues and Volume Three contains 1977 issues. Each volume ordered comes with a comprehensive index. File binders (which will hold all three volumes) are available at a cost of $5.00. The SLR staff would like to thank the *Playboy Foundation* for printing these back issues for us.

SEXUAL LAW REPORTER

Volume Three, Number 5 ISSN 0098-2423 November / December 1977

A CONSTITUTIONAL RIGHT TO SEXUAL PRIVACY

Recent Word from Above

by THOMAS B. DePRIEST, J.D.
Virginia State Bar

Civil libertarians hoped for a wave of constitutional decisions from the Supreme Court in the wake of *Griswold v. Connecticut*, 381 U.S. 479 (1965), with its talk of constitutional "penumbras" and "zones of privacy" for the individual. Important extensions of *Griswold* and its arguments were upheld in *Stanley v. Georgia*, 394 U.S. 577 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); and *Roe v. Wade*, 410 U.S. 113 (1973), to name only a few. More recently, with the most notorious example being *Doe v. Commonwealth*, 425 U.S. 901 (1976), the Court's affirmation without any oral argument of the validity of the Virginia sodomy statute apparently halted the growth of a judicially recognizable right, founded on the Constitution, to sexual privacy. Some hope remains, however.

The Supreme Court recently struck down a New York statute that regulated the sales and the distribution of contraceptives. *Carey v. Population Services International*, 431 U.S. —, 97 S.Ct. 2010, 52 L.Ed. 2d 675, 45 U.S.L.W. 4601 (June 9, 1977). In the opinion, Mr. Justice Brennan naturally relied on *Griswold* and its progeny, but he also included a curious aside concerning this whole matter of sexual privacy. As he discussed the state's prohibition on the sale of contraceptive devices to minors under sixteen, he had to respond to the state's argument that such a prohibition properly discouraged sexual promiscuity among the young. Then, in Footnote 17, he added:

> We observe that the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits statutes regulating such [private consensual sexual] behavior among adults.

In that same footnote, Mr. Justice Brennan referred to pages 719 through 738 of an anonymous *Note on Privacy: Constitutional Protection for Personal Liberty*, 49 N.Y.U. *L. Rev.* 670 (1973). No prior judicial citations of the *Note on Privacy* exist. This reference and the quoted passage are unnecessary for the decision in *Carey*. Why were they included? The author seems to be giving us one of those hints which members of the Court have historically passed along from time to time, while waiting for the proper factual context and the proper argument to present themselves for determination. Footnote 17 in *Carey* directs us to focus our attention on arguments which can persuade a court to recognize a constitutional right to sexual privacy.

At the beginning of the section of pages mentioned in Footnote 17, the author of the *Note on Privacy* points out that the expected wave of constitutional challenges after *Griswold* to criminal statutes regulating private sexual behavior has, in fact, produced few victories. The most serious obstacle has been the unfortunate factual context of most privacy cases. The courts seldom see the proper litigants who can raise the privacy arguments. The presence of a defendant in court usually means that private adult consensual sexual activity is not at issue. *Griswold* and progeny have taught us that if children, force, or public exposure is involved, there can be no privacy challenge from the defendant. Finding a defendant with "clean hands" is difficult since truly private adult consensual activities are only rarely, if ever, prosecuted. In other words, a party before a court who needs the privacy defense can't raise it, and the party who can use the privacy argument successfully is seldom before a criminal court.

On the other hand, the factual context of civil proceedings is often more favorable to a successful use of sexual privacy arguments. Hearings seeking to reverse a denial of public employment, of a security clearance, of naturalized citizenship, of an immigration visa, of a liquor license, of state bar admission, or of an honorable military discharge — all of these hearings may present a party who has committed a proscribed sexual act only in private with another consenting adult. Clearly, the party in such proceedings who raises the sexual privacy argument cannot be silenced as quickly as the defendant in a criminal case.

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IN THE COURTS...

Fornication law voided on privacy ground

In a landmark decision which has received nationwide press coverage, the New Jersey Supreme Court voided that state's fornication law on the ground that it violated the right of privacy under both the state and federal constitutions. *State v. Saunders*, A-126, December 13, 1977, __ A.2d __.

The following includes excerpts from the Court's opinion.

"Defendant Charles Saunders was indicted along with Bernard Busby on charges of rape, assault with intent to rape and armed robbery. At trial both admitted to having had sexual intercourse with the two complainants, but insisted that the women had participated willingly in exchange for a promise that they would receive 'reefers' (marijuana cigarettes) in return. The trial judge, on his own initiative, charged the jury that the defendants could be convicted of the 'lesser included offense' of fornication (*N.J.S.A.* 2A:110-1) if they were found not guilty on the other grounds. The jury acquitted the defendants of the charges in the indictment and convicted them of fornication."

"In charging the jury, the judge defined the crime of fornication as 'an act of illicit sexual intercourse by a man, married or single, with an unmarried woman.' "

Upon conviction of the fornication violation, one defendant was fined $50.00, and the other, who had already spent seven months in jail awaiting trial, was sentenced to "time spent."

The defendants challenged the constitutionality of the fornication law on the grounds that it violated the right of privacy under both the federal and state constitutions. The trial judge agreed that the United States Supreme Court decision in *Eisenstadt v. Baird*, 92 S.Ct. 1039 (1972), had extended the right of privacy to unmarried individuals. He concluded, however, that the state's interests in preventing venereal disease and illegitimacy were sufficiently "compelling" to justify prohibiting sexual relations by unmarried persons.

The Appellate Division affirmed the decision below for substantially the same reasons, adding a reference to the United States Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney for City of Richmond*, 96 S.Ct. 1489 (1976), aff'g 403 F.Supp. 1199 (E.D.Va. 1976).

The New Jersey Supreme Court noted that the right of privacy is not specifically mentioned in either the state or federal constitutions. The Court cited *Griswold v. Connecticut*, 85 S.Ct. 1678 (1965), for the holding that such a right exists under the Constitution, nonetheless. The Court also noted that this right has been more recently discussed and expanded by the United States Supreme Court in cases such as *Roe v. Wade*, 93 S.Ct. 705 (1973), and *Carey v. Population Services International*, 97 S.Ct. __ (1977).

After a thorough discussion of the privacy cases and the extent and scope of that right, the Court held, "We conclude that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice. Thus, the statute infringes upon the right of privacy."

"We recognize that the conduct prohibited by this statute has never been explicitly treated by the Supreme Court as falling within the right of privacy. In fact, we note that this question has been specifically reserved by the Court." (*See Carey, supra*, 52 L.Ed.2d at 687, n.5.)

The Court noted that it would be rather strange for the right of privacy to protect the decision to bear or beget children, but not to protect the more fundamental decision as to whether to engage in the conduct which is a necessary prerequisite to childbearing.

"Surely, such a choice involves considerations which are at least as intimate and personal as those which are involved in choosing whether to use contraceptives. We therefore join with other courts which have held that such sexual activities between adults are protected by the right of privacy."

"In emphasizing the progression from *Griswold* to *Carey*, we have not overlooked the Court's summary affirmance in *Doe v. Commonwealth's Attorney for City of Richmond* [citation omitted], which upheld the constitutionality of Virginia's sodomy statute as applied to private sexual conduct between consenting male adults. We are not inclined to read this controversial decision too broadly. Though the lower court's decision is technically binding as a precedent [citation omitted], it does not necessarily represent the reasoning of the Court."

The Court then shifted its focus to decide if there were any compelling state interests which would justify the existence of the statute. The state had argued that three such interests existed: (1) prevention of venereal disease, (2) protecting the institution of marriage, and (3) public morals. The Court thoroughly discussed each of these interests and found that none of them was sufficiently compelling to warrant such an intrusion of the right of privacy of consenting adults.

The decision of the Court was not unanimous. The majority opinion, basing its decision on both the federal and state constitutional rights of privacy, was decided by four justices. A concurring opinion, basing the decision solely on the state constitution, was filed by Justice Schreiber. The dissenting opinion by Justices Clifford and Mountain would not have reached the constitutional issue in this case, preferring to possibly reverse the lower court on other grounds. However, the dissent indicated that "absent a compelling state interest, the State may not regulate a person's private decisions which have merely incidental effects on others. In application, that principle leads to the conclusion that if two people freely determine that they wish to have sexual relations in a setting inoffensive to and only incidentally affecting others, the State is without authority to interfere through the criminal process with that decision, despite the fact that such decision may be in violation of conventional community standards. And that includes the grubby little exercise in self-gratification involved here."

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Solicitation law interpreted in Ohio

Under the present-day sexual solicitation statute in Ohio [R.C. 2907.07(B), the state is required to demonstrate, beyond a reasonable doubt, that the defendant had solicited a person of the same sex to engage in sexual activity, knowing such solicitation to be offensive to the other person *or being reckless in that regard.*

Defendant Gene DeFelice had been prosecuted under this statute, was convicted, and he appealed to the Ohio Court of Appeals for the First Appellate District. On appeal, he argued that the statute was unconstitutional in violation of the First Amendment, and that his conviction was against the manifest weight of the evidence.

The prosecution did not charge that the defendant knew that his solicitation would be offensive to the arresting officer, who was a plainclothes policeman. The prosecution theory was that the solicitation was at least "reckless in that regard." *State v. Gene DeFelice*, __ N.E. 2d __.

The record reflects that the solicitation, when it was finally openly expressed, had been preceded by an extended period of friendly conversation in a bus station restroom between the defendant and the officer, punctuated by tentative physical contact involving the defendant rubbing the neck, shoulder, and legs of the officer. The Appellate Court concluded that the protestations of the officer were scarcely of an order which would have permitted the trier of facts to conclude, beyond a reasonable doubt, that their continuance was reckless.

The overt solicitation occurred outside the bus station during a walk around the block while the two discussed whether or not to go to the defendant's place to kill a six-pack of beer.

The Court of Appeals held, "Since we conclude that the record demonstrates a solicitation met with little meaningful protest and otherwise accompanied by as much circumspection as may be expected in these unfortunate encounters, we find that the appellee failed in its burden of proving every element of the offense charged in the complaint. . . ."

The Court of Appeals declined to pass upon the constitutionality of the statute, since it could reverse on these other grounds. However, the constitutionality of this state statute is in very much doubt as a result of the ruling of the Franklin County Court of Appeals in 1975 in *City of Columbus v. Scott*, 353 N.E.2d 858. In that case, another District Court of Appeals voided a similarly worded Columbus ordinance on First Amendment grounds.

"Unnatural and lascivious" law is held vague

In *Balthazar v. Superior Court*, 428 F.Supp. 425 (D. Mass 1977), District Judge Tauro has expressed grave doubts about the continuing validity of statutes forbidding "unnatural and lascivious acts." Such statutes, Judge Tauro held, are unconstitutionally vague unless their meanings are clarified by judicial construction. Moreover, the defendant whose conviction provides the occasion for judicial clarification of a vague statute cannot be penalized for his or her conduct, since this would contravene the "rough idea of fairness" that is the basis for the vagueness doctrine.

Balthazar was accused of forcing a female victim to put her "tongue on his backside," and was convicted in state court of violating the prohibition against "unnatural and lascivious" acts. The Massachusetts Supreme Judicial Court upheld his conviction on the grounds that the statute provided fair warning to Balthazar, at the same time taking the opportunity to hold the statute inapplicable to consensual private adult activity. Balthazar then brought the present federal habeas action.

In overturning Balthazar's conviction, Judge Tauro, disagreeing with the Massachusetts court, held that a rule against "unnatural and lascivious" conduct would not put the average person on notice that oral-anal conduct was forbidden, since the Massachusetts court had never so stated and cases from other jurisdictions reached conflicting results. The court distinguished *Rose v. Locke*, 423 U.S. 48 (1975), a case upholding a "crimes against nature"-statute, on the grounds that the latter phrase "had a well established common law meaning, had been authoritatively construed by the state courts, and had been previously applied to the petitioner's conduct." While overturning the statute as applied to Balthazar's conduct, Judge Tauro declined to hold the statute unconstitutionally vague on its face because the Massachusetts courts have now authoritatively construed the statute to refer to fellatio and oral-anal conduct except where such conduct occurs in private between consenting adults.

Detroit's sexual solicitation law is held unconstitutional

Plaintiff John Allan Steponaitis brought an action for declaratory judgment and damages arising out of an alleged wrongful arrest and prosecution for the offense of "accosting and soliciting . . . for any other lewd immoral act" as proscribed by *Detroit Municipal Code*, Section 39-1-52.

Defendants in the lawsuit were the City of Detroit, the Corporation Counsel for the City of Detroit, and the Chief of Police for the City of Detroit Police Department.

Plaintiff asserted in his complaint that he was arrested and prosecuted pursuant to the same portion of the *City of Detroit Code*, "lewd and immoral act," that was declared unconstitutionally vague and indefinite by Judge Kennedy on February 24, 1975, in *Morgan v. City of Detroit*, 389 F.Supp. 922 (*See* 2 Sex.L.Rptr. 42, 44. —*Ed.*)

The defendants did not present any facts or legal argument in opposition to the *Steponaitis* lawsuit.

On December 10, 1976, in *Steponaitis v. City of Detroit*, Civil Action No. 76-614-365-CZ, The Honorable John H. Hausner, Judge of the Wayne County Circuit Court, entered the following *Order of Declaratory Judgment*:

"This Court, being a State Court, is persuaded that pursuant to the Federal Declaratory Judgment Act, 28 USC §2201 and the 'Supremacy Clause,' US Const Art. VI, it is bound by the Federal Court's decision in *Morgan* declaring the phrase, 'lewd immoral act,' contained in *Detroit Municipal Code* #39-1-52 as unconstitutional.

"It is further declared that the judgment of the unconstitutionality of the aforesaid portion of *Detroit Municipal Code* #39-1-52 is binding upon the City of Detroit, its agents, officers, employees and representatives, including but not limited to its Corporation Counsel and the Detroit Police Department."

□ *more Court News on page 66*

ADMINISTRATIVE RULINGS...

Michigan Civil Rights Commission accepts homosexuality report

Although the Michigan Bar Association and the Governor's Advisory Commission on Criminal Justice have already recommended decriminalization of private sexual acts between consenting adults, the Michigan Legislature has failed to adopt such reform.

In August 1977, the state's Civil Rights Commission directed its staff to help work for the repeal of such state laws regulating this private behavior. The Commission accepted a 12-page staff report which was very sympathetic to the homosexual cause.

The report estimated that there are about 400,000 homosexuals living in Michigan, and, developing a wide variety of aspects within this context, stated that child molestation is no more characteristic of homosexuals than of heterosexuals.

Although the Commission might be inclined to accept some cases of discrimination, its present position is that it lacks jurisdiction over such cases until the Legislature specifically authorizes such an addition to its current grant of power. Some cities, such as East Lansing, Ann Arbor, and Detroit, protect gays in some fashion, but attempts to change state law in this regard have twice died in the House of Representatives.

Nudity at San Diego beaches outlawed

For the past several years, Black's Beach in San Diego, California, has been a "clothing-optional beach." Pursuant to a municipal ordinance, persons using this beach were free to either wear clothes or to use the beach without wearing clothes.

A group of citizens opposed to nudity collected a sufficient number of signatures to qualify an initiative for the ballot which would outlaw nudity at all San Diego beaches, *including* Black's Beach.

The election on this issue occurred in September 1977. The voters approved the total ban on nudity.

According to polls taken prior to the election, the initiative should have failed. Over 50% of those polled were opposed to the total prohibition of nudity at Black's Beach.

However, only 43% of the voters actually voted in the election. Of those that voted, 54% were in favor of the total ban on nudity and 46% were opposed. Apparently, those who didn't care about nudity at the beaches didn't turn out at the polls and as a result the prohibition was enacted.

The initiative is not self-operating. The city council must still vote to implement the initiative. It is expected that the council will approve implementing legislation in the near future. Many users of the formerly nude beach have vowed to defy the initiative and to continue using the beach in the nude. Others have threatened court action to challenge the new law.

Reform Jewish association adopts homosexuality resolution

On November 21, 1977, at its Biennial Convention in San Francisco, the Union of American Hebrew Congregations (UAHC), the national association of Reform Jewish Congregations, passed the following resolution:

"Whereas the UAHC has consistently supported civil rights of all individuals,

"Be it therefore resolved that homosexual persons are entitled to equal protection of the law. We oppose discrimination against homosexuals in areas of opportunity, including employment and housing. We call upon our society to see that such protection is provided in actuality.

"Be it further resolved that we affirm our belief that private sexual acts between consenting adults are not the proper province of government and law enforcement agencies.

"Be it further resolved that we urge congregations to conduct appropriate educational programs for youth and adults, so as to provide greater understanding of Jewish values as they relate to the spectrum of human sexuality."

Women's Year Nat'l Conference supports E.R.A. and gay rights

Nearly 12,000 women, including 1,000 lesbians, attended the International Women's Year National Conference in Houston, Texas, this November. Twenty-five pro-women resolutions were passed during the Conference, including resolutions favoring passage of the Equal Rights Amendment and gay rights.

The resolution on the E.R.A. was short and simple:

"The Equal Rights Amendment should be ratified."

The gay rights resolution was finally adopted, after much heated debate, and was worded as follows:

"Congress, State, and local legislatures should eliminate discrimination in employment, housing, public accommodations, credit, public facilities, government funding, and the military. State legislatures should reform laws that restrict private sexual behavior between consenting adults. State legislatures should prohibit consideration of sexual or affectional orientation as factors in determination of child custody or visitation rights. Rather, child custody cases should be evaluated solely on the merits of which party is the better parent, without regard to that person's sexual and affectional orientation."

Police Associations oppose hiring homosexual officers

On the first day of its six-day conference in Los Angeles this October, the International Association of Chiefs of Police adopted a resolution opposing the hiring of gay police officers. The main proponent of the resolution was Los Angeles Chief of Police, Edward M. Davis, who is resigning from the Los Angeles Police Department in January 1978 and will run for the Republican nomination for governor next year. He has been a longtime opponent of the gay rights movement.

A few weeks earlier at its meeting in Providence, Rhode Island, the Fraternal Order of Police adopted a similar resolution.

CALIFORNIA'S HOMOSEXUAL TEACHER INITIATIVE RECEIVES A MAJOR SET-BACK; IS WITHDRAWN

Senator Briggs Angrily Attacks Chief Justice Rose Bird After Collection of Approximately 100,000 Signatures

In August 1977, State Senator John Briggs submitted a "California Save Our Children Initiative" to the California Attorney General. This was the first of a series of steps which was necessary to qualify this initiative for the statewide June 1978 ballot. The complete text of the initiative appears on the following pages.

California law required the Attorney General to prepare a summary of the initiative. On September 1, 1977, the Attorney General submitted the following summary to the California Secretary of State:

> "SCHOOL TEACHERS — HOMOSEXUAL ACTS OR CONDUCT. INITIATIVE STATUTE. Prohibits hiring, and requires dismissal, by school district board of any probationary or permanent teacher, teacher's aide, school administrator or counselor who has engaged in a public homosexual act described in Penal Code sections 286 or 288a, or who has engaged in advocating, soliciting, imposing, encouraging or promoting of private or public homosexual acts directed at, or likely to come to the attention of schoolchildren and/or other employees. Provides for filing charges, hearings, judicial review. Financial impact: Unknown, but potentially substantial local cost to school districts depending on the number of cases which receive an administrative hearing."

State law requires that the petitions which are circulated to the voters contain the summary as prepared by the Attorney General.

On October 17, 1977, the Pride Foundation filed a Petition for a Writ of Mandate in the California Supreme Court. This legal action requested the Court to require the Attorney General to withdraw the initiative on the grounds that the title and summary do not conform to the requirements of the state Elections Code. It was argued that the title and summary under which the initiative was being circulated was grossly misleading. The Elections Code requires that the title and summary adequately inform the persons asked to sign the petition of the main purposes and effects of the initiative.

According to Professor Donald Knutson, one of the attorneys for the Pride Foundation, "From its summary, one would suspect that this initiative deals only with teachers who have made homosexual advances to their students, or those who commit public sex crimes, or those who advocate the commission of such crimes. If that was its purpose, the initiative would not be necessary at all. California law presently deals with such cases even more severely than would the initiative."

The lawsuit alleged that the title and summary differ from the actual initiative in two major respects: 1) the summary purports to deal only with criminal conduct, when, in fact, the initiative applies the same sanctions to conduct which is perfectly legal under California law; and 2) the title and summary make no mention of the fact that the initiative places severe restrictions on the freedom of speech of all California teachers, teachers' aides, administrators, and counselors. The initiative would have a chilling effect on the ability of school personnel to discuss the subject of homosexuality in public or private, in school or out of school, for fear they would lose their jobs.

On November 1, 1977, one day before the Supreme Court was scheduled to decide whether to intervene in this initiative lawsuit, Senator Briggs held a press conference to announce his withdrawal of the initiative. Briggs angrily attacked the Chief Justice of the California Supreme Court and said that he would not trust her and "her court" to decide the fate of California school children. Briggs promised to start the campaign anew and vowed to qualify it for the November 1978 general elections. It is now impossible for the initiative to qualify for the June 1978 primary elections.

The *SexuaLawReporter* contacted the Attorney General and Senator Briggs for more detailed information regarding this setback. The Attorney General's office told us that on the day the title and summary were sent to the Secretary of State, the Attorney General also issued a press release. This release contained an inaccurate version of the official title and summary.

It appears that, through an oversight, the Briggs staff left the following sentence out of the initiative petitions which were circulated for signatures: *"Provides for filing charges, hearings, judicial review."* Various sources indicate that his staff copied the summary from the press release rather than from the official letter to the Secretary of State.

Briggs has resubmitted the initiative to the Attorney General for another title and summary. He has until May 1978 to collect over 300,000 signatures in order to qualify the initiative for the November elections.

The California Supreme Court has dismissed the Petition for a Writ of Mandate because the issues are now moot as a result of the withdrawal of the initiative.

California civil liberties groups are elated with this temporary victory. They feel that should Briggs obtain sufficient signatures to qualify the initiative for the ballot, chances of defeating the proposal are much better at the November elections than they would be at the June elections. In June, the primary elections occur, and Republicans will be at the polls in full force because of the contest for the Republican nomination for governor. Senator Briggs, Attorney General Evelle Younger, and Los Angeles Police Chief Edward M. Davis are all major contenders for that nomination. Many more Democrats will be at the polls in November.

COMPLETE TEXT OF THE SENATOR JOHN BRIGGS INITIATIVE

o *Republican JOHN V. BRIG*
Elected to represent the 3
the father of three childre
Beach State College and ar

The People of the State of California do enact as follows:

SECTION 1. Section 44837.5 is added to the Education Code, to read:

44837.5 One of the most fundamental interests of the state is the establishment and the preservation of the family unit. Consistent with this interest is the state's duty to protect its impressionable youth from influences which are antithetical to this vital interest. This duty is particularly compelling when the state undertakes to educate its youth, and, by law, requires them to be exposed to the state's chosen educational environment throughout their formative years.

A schoolteacher, teacher's aide, school administrator or counselor has a professional duty directed exclusively towards the moral as well as intellectual, social and civic development of young and impressionable students.

As a result of continued close and prolonged contact with schoolchildren, a teacher, teacher's aide, school administrator or counselor becomes a role model whose words, behavior and actions are likely to be emulated by students coming under his or her care, instruction, supervision, administration, guidance and protection.

For these reasons, the state finds a compelling interest in refusing to employ and in terminating the employment of a schoolteacher, a teacher's aide, a school administrator or a counselor, subject to reasonable restrictions and qualifications, who engage in public homosexual activity and/or public homosexual conduct directed at, or likely to come to the attention of, schoolchildren or other school employees.

This proscription is essential since such activity and conduct undermines that state's interest in preserving and perpetuating the conjugal family unit.

The purpose of Sections 44837.6 and 44933.5 is to proscribe employment of a person whose homosexual activities or conduct are determined to render him or her unfit for service.

SECTION 2. Section 44837.6 is added to the Education Code, to read:

44837.6 (a) The governing board of a school district shall refuse to hire as an employee any person who has engaged in public homosexual activity or public homosexual conduct should the board determine that said activity or conduct renders the person unfit for service;

(b) For purposes of this section, (1) "public homosexual activity" means the commission of an act defined in subdivision (a) of Section 286 of the Penal Code, or in subdivision (a) of Section 288a of the Penal Code, upon any other person of the same sex, which is not discreet and not practiced in private, whether or not such an act, at the time of its commission, constituted a crime; (2) "public homosexual conduct" means the advocating, soliciting, imposing, encouraging, or promoting of private or public homosexual activity directed at, or likely to come to the attention of schoolchildren and/or other employees; and (3) "employee" means a probationary or permanent certificated teacher, teacher's aide, school administrator or counselor;

(c). In evaluating the public homosexual activity and/or the public homosexual conduct in question for the purposes of determining an applicant's unfitness for service as an employee, a board shall consider the factors delineated in Section 44933.5(f).

SECTION 3. Section 44933.5 is added to the Education Code, to read:

44933.5 (a) In addition to the grounds specified in Sections 44932, 44948 and 44949, or any other provision of law, the commission of "public homosexual activity" or "public homosexual conduct" by an employee shall subject the employee to dismissal upon a determination by the board that said activity or conduct renders the employee unfit for service. Dismissal shall be determined in accordance with the procedures contained in this section;

(b) For the purposes of this section, (1) "public homosexual activity" means the commission of an act defined in subdivision (a) of Section 286 of the Penal Code, or in subdivision (a) of Section 288a of the Penal Code, upon any other person of the same sex, which is not discreet and not practiced in private, whether or not such act, at the time of its commission, constituted a crime; (2) "public homosexual conduct" means the advocating, soliciting, imposing, encouraging or promoting of private or public homosexual activity directed at, or likely to come to the attention of, schoolchildren and/or other employees; and (3) "employee" means a probationary or permanent certificated teacher, teacher's aide, school administrator or counselor;

(c) Notwithstanding any other provision of law regarding dismissal procedures, the governing board, upon the filing of written charges that the person has committed public homosexual activity or public homosexual conduct, duly signed and verified by the person filing the charges, or upon written charges formulated by the governing board, shall set a probable cause hearing on the charges within fifteen (15) working days after the filing or formulating of written charges and forward notice to the employee of the charges not less than ten (10) working days prior to the probable cause hearing. The notice shall inform the employee of the time and place of the governing board's hearing to determine if probable cause exists that the employee has engaged in public homosexual activity or public homosexual conduct. Such notice shall also inform the employee of his or her right to be present with counsel and to present evidence which may have bearing on the board's determination of whether there is probable cause. This hearing shall be held in private session in accordance with Govt. Code §54957,

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unless the employee requests a public hearing. A finding of probable cause shall be made within thirty (30) working days after the filing or formulation of written charges by not less than a simple majority vote of the entire board.

(d) Upon a finding of probable cause, the governing board may, if it deems such action necessary, immediately suspend the employee from his or her duties. The board shall, within thirty-two (32) working days after the filing or formulation of written charges, notify the employee in writing of its findings and decision to suspend, if imposed, and the board's reasons therefor;

(e) Whether or not the employee is immediately suspended, and notwithstanding any other provision of law, the governing board shall, within thirty (30) working days after the notice of the finding of probable cause, hold a hearing on the truth of the charges upon which a finding of probable cause was based and whether such charges, if found to be true, render the employee unfit for service. This hearing shall be held in private session in accordance with Govt. Code §54957, unless the employee requests a public hearing. The governing board's decision as to whether the employee is unfit for service shall be made within thirty (30) working days after the conclusion of this hearing. A decision that the employee is unfit for service shall be determined by not less than a simple majority vote of the entire board. The written decision shall include findings of fact and conclusions of law;

(f) Factors to be considered by the board in evaluating the charges of public homosexual activity or public homosexual conduct in question and in determining unfitness for service shall include, but not be limited to: (1) the likelihood that the activity or conduct may adversely affect students or other employees; (2) the proximity or remoteness in time or location of the conduct to the employee's responsibilities; (3) the extenuating or aggravating circumstances which, in the judgment of the board, must be examined in weighing the evidence; and (4) whether the conduct included acts, words or deeds of a continuing or comprehensive nature which would tend to encourage, promote, or dispose schoolchildren toward private or public homosexual activity or private or public homosexual conduct;

(g) If, by a preponderance of the evidence, the employee is found to have engaged in public homosexual activity or public homosexual conduct which renders the employee unfit for service, the employee shall be dismissed from employment. The decision of the governing board shall be subject to judicial review.

SECTION 4. Severability Clause

If any provision of this enactment or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or application of this enactment which can be given effect without the invalid provision or application, and to this end the provisions of this enactment are severable.

ARRESTED TEACHERS' RIGHTS EXTENDED IN CALIFORNIA

On July 21, 1977, the California Supreme Court handed down two decisions expanding the rights of teachers who have been arrested on misdemeanor sex charges.

The first case, *Board of Education v. Jack M.*, 139 Cal.Rptr. 700, involved a teacher who was arrested for an alleged homosexual solicitation in a public restroom. Although no criminal charges were ever filed against the teacher, the school board initiated proceedings in Superior Court to establish its right to discharge the defendant from his tenured teaching position. The Superior Court resolved conflicting evidence in the defendant's favor and found that his conduct did not demonstrate unfitness to teach. On appeal to the Second District Court of Appeal, that decision was reversed in a 2/1 decision. The teacher was then granted a hearing in the California Supreme Court.

The school board was charging the teacher with "immoral conduct" and "evident unfitness to teach." In the Superior Court proceeding the vice officer testified that the defendant had masturbated in a toilet stall. The defendant teacher denied this act. The school board argued that this act of masturbation *per se* proved unfitness to teach.

The Supreme Court held that, standing alone, the terms "immoral conduct" and "evident unfitness to teach" are so broad and vague that they could be constitutionally infirm and that therefore the only proper criterion for a dismissal proceeding is his or her "fitness to teach."

The Supreme Court noted that although the school board argued that students, viewing their teacher "in the light of an exemplar," may emulate the teacher's act; that the teacher may be unable to fulfill his duty to "impress and instruct his students in manners and morals"; and that the teacher's acts evidenced a lack of judgment and discretion are merely disputable inferences which might be drawn from the evidence. The trier of fact, however, did not draw such inferences. Instead, the trial court found that: 1) the teacher's conduct did not come to the attention of the students, parents, or fellow teachers; 2) his conduct was an isolated incident; 3) he does not present a danger to students or fellow teachers; and 4) his conduct does not demonstrate unfitness to teach.

In the second decision handed down by the court, *Newland v. Board of Governors of the California Community Colleges*, 139 Cal.Rptr. 620, the teacher was convicted of lewd conduct. Newland applied for a teaching credential. The board denied the credential on the ground that Newland had, seven years earlier, been convicted of this misdemeanor. The board argued that California law prohibited anyone convicted of lewd conduct from obtaining a certificate, and that the applicant was not entitled to a "fitness hearing." The Supreme Court noted that this had previously been the law in California. However, a recent legislative enactment provided for "fitness hearings," provided the applicant met three conditions 1) obtained a certificate of rehabilitation, 2) his probation had terminated, and 3) his case had been subsequently dismissed under certain statutory provisions. Newland had satisfied the last two conditions, but could not satisfy the first. Certificates of rehabilitation are only issued to convicted *felons*, not *misdemeanants.*

The Supreme Court held that giving this preference to felons denied misdemeanants equal protection of the laws. The Court, therefore, ordered a fitness hearing in this case.

...IN THE COURTS

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Solicitation is not ground for closure as nuisance

The Court of Appeal of Michigan has decided that the state's nuisance abatement law cannot be used to close a bar simply because the building is frequented by prostitutes who solicit, on the premises, sexual acts for profit, to be performed elsewhere. The court found in *State Ex Rel. Calahan v. Levenburg*, 254 N.W.2d 797, that the statutory term, "assignation," must be read as being synonymous with "prostitution," thus referring to the performance of sexual acts for profit. Consequently, the lower court's interpretation of the term as including the making of an appointment for prostitution was erroneous. Because there was no proof and no finding that sexual acts for profit occurred on the premises, the trial court finding that the bar was a "building or place used for the purpose of assignation" was erroneous and therefore reversed.

The court relied on the intent of the legislature in passing the law, concluding that, "Just as the statute does not apply to motion picture theaters showing obscene movies, because it was never meant to, so also it does not apply to bars or other buildings in which accosting or soliciting occurs, because such was not the intent of this statute at the time of its enactment."

Sexual solicitation law reviewed in Massachusetts

In 1974, the Supreme Judicial Court of Massachusetts held that private sexual acts between consenting adults were not punishable under that jurisdiction's "unnatural and lascivious act" statute. [*Ed.* See *Commonwealth v. Balthazar*, 318 N.E.2d 478, habeas corpus granted sub nom. *Balthazar v. Superior Court*, 428 F.Supp. 425 (D.Mass.1977).]

Now, in *Commonwealth v. Scagliotti*, __ N.E.2d __ (1977), that Court holds that the solicitation law of that jurisdiction may not be used to prosecute for public solicitations of sexual acts which are intended to occur in private.

The defendant in this case was convicted on a complaint charging the common law crime of soliciting another to commit a felony. The felony solicited was the commission of an "unnatural and lascivious act with another person."

The events in question occurred in a "mini-movie" theater which exhibits sexually explicit films in small cubicles within the theater. The prosecution witness (a plain-clothes vice officer) testified that, while in a cubicle, the defendant entered and offered to perform an unnatural act.

The defendant argued on appeal that the trial judge erred in instructing the jury that the cubicle within the theater was a public place as a matter of law. The Supreme Judicial Court held that this was reversible error: "The public nature of the consensual act is an essential element to be proved by the prosecution. The issue was whether the defendant had offered to commit an act in a public place."

The Supreme Judicial Court also defined what type of "privacy" would insulate the defendant from prosecution." By privacy, in this sense, we mean removal from the public view and elimination of the possibility that the defendant's conduct might give offense to persons present in a place frequented by members of the public for reasons of business, entertainment, or the like." The Court held that the cubicle could not be held, as a matter of law, to be a private place. Whether the cubicle was public or private was a matter for the jury to decide according to the Court's definition of "privacy."

Discriminatory enforcement claim rejected in prostitution case

When the Alameda Superior Court issued a preemptory writ of prohibition directing the Municipal Court not to prosecute persons arrested under California's Penal Code Section 647(b), the People appealed to prevent the Superior Court from enforcing its order. The Supreme Court dissolved the writ of prohibition and affirmed the constitutionality of the California law which prohibits every person from soliciting for or engaging in any act of prostitution.

In *People v. Superior Court (Hartway)*, 138 Cal.Rptr. 66 (1977), the constitutionality of the statute was examined on two grounds: First, that the term "solicit" was too vague to provide fair notice of offending conduct, and second, that the law was unconstitutional as applied by the Oakland Police Department in that the Department systematically discriminated against women in its enforcement of the statute, denying them equal protection under the law.

As defined in *People v. Phillips*, 160 P.2d 872 (1945), "solicit" was held to mean, "To tempt [a person]; to lure on, esp. into evil, . . . to bring about, forth, on, etc., by gentle or natural operations; to seek to induce or elicit . . . . [!]" In challenging on vagueness grounds, amici pointed out that by this definition one could be convicted for "waiving to a passing vehicle, nodding to a passing stranger or standing on a street corner in a miniskirt." Though appearing to agree in theory, the court was quick to point out that there was no evidence in the record that any arrest had ever been made on the basis of such ambiguous conduct and observed that ". . . evidence indicates that persons arrested for this crime not only make their statements verbally, but, assuming one is familiar with their jargon, express themselves in language of brutal clarity."

A suggestion that the statute be interpreted to require "verbal offers" was rejected with the concern that " . . . well advised prostitutes would immediately enroll in sign language courses."

The court, in applying the standard, enunciated in *Colten v. Kentucky*, 92 S.Ct. 1953 (1972), that "the root of the vagueness doctrine is a rough idea of fairness . . . ," found that this statute met the standard.

In addressing respondents' second contention, the court pointed out the elements required to sustain the allegation of discriminatory enforcement. Here, the defendant was required to prove: (1) that *he* had deliberately been singled out for prosecution on the basis of some invidious criterion, and (2) that the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.

Defendants alleged that discrimination in enforcing 647(b) took four forms: (1) More men than women are employed as "decoys" for solicitation of acts of prostitution with the result that more female prostitutes than male customers are arrested for that crime; (2) In "trick" cases, the female prostitute, but not the male customer, is arrested,

even if his culpability is as great as, or greater than, hers; (3) If the man is arrested in a trick case, he is merely cited, *i.e.*, released with a written notice to appear in court; whereas, the woman is subjected to custodial arrest; (4) Female prostitutes are quarantined when arrested; whereas, their male customers are not so restrained.

To counter the defendants' evidence that in 1973 and 1974 1,160 women were arrested by the utilization of male decoys, while 57 men were arrested by means of female decoys, the court pointed out that the Oakland police force was engaged in a "profiteer"-oriented attack on the activity, not unlike that used in narcotic enforcement where police efforts were focused on arresting "sellers" rather than "buyers." The court added that even assuming *arguendo* that using more male decoys than female is a manifestation of deliberate discrimination against women, the defendants failed to establish the second requirement of the discriminatory enforcement defense: that defendants would not have been arrested but for the policy.

The court next rejected the defense that in arrest situations where the man was of equal or greater culpability, he was most often released, while the woman was taken into custody. The court found that the arrests they reviewed were " . . . based on probable cause to believe the arrestee [had] committed the offense and not on the basis of the sex of the arrestee."

Arrest procedures were attacked on the ground that the alleged prostitute was placed under custodial arrest while the customer was cited and released. The Municipal Court reasoned, and the Supreme Court concurred, that the most obvious proof that this practice was not discriminatory toward women was that male prostitutes were similarly treated. The court also based its conclusion on the finding that prostitutes, unlike their customers, did not ordinarily satisfy requirements for release on their own recognizance.

Prostitute-customer dissimilarities in treatment were also identified in the quarantine required of the prostitute, but not of the patron. The court noticed evidence of a higher degree of venereal disease among prostitutes than among the general public, along with the observation that male and female prostitutes were treated alike, to refute defendants' contention of discriminatory enforcement in this practice. The court also indicated that, in any event, the quarantine procedure was the responsibility of the Health Department, not the police.

Pointing out the difference between drug statutes where the legislature prescribed differing penalties for profiteer and customer, Justice Tobriner, in his dissent, indicated that no such penalty distinctions were embodied in the prostitution statute. Thus, the words, "every person," should guide law enforcement to prosecute customers every bit as aggressively as it pursues the prostitutes themselves.

Sexual advance is sex discrimination

The Fourth Circuit, ruling on a point that has been much disputed in the District Courts (*see* 3 *Sex.L.Rptr.*3 and 3 *Sex.L.Rptr.*17), has held, *per curiam*, that a female employee who alleges that she has been discharged for rebuffing the sexual advances of a male supervisor states a claim of sex discrimination under Title VII of the Civil Rights Act of 1964. *Garber v. Saxon Business Products, Inc.*, 552 F.2d 1032 (4th Cir. 1977).

Sexual advance constitutes Title VII violation

The United States Court of Appeals for the District of Columbia has held that termination of employment for refusal to accede to a supervisor's request for sexual favors constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964, as amended. *Barnes v. Castle*, No. 74-2026 (D.C. Cir. July 27, 1977). The court rejected the district court's reasoning that plaintiff, a government employee whose job classification was terminated when she declined to have an affair with her supervisor, was fired not because she was a woman but because she refused to have sex. "Appellant's gender, just as much as her (sexual) cooperation, was an indispensable factor in the job-retention condition of which she complains, absent a showing that the supervisor imposed a similar condition upon a male employee."

The Court of Appeals indicated that sexual exploitation of employees by homosexual as well as heterosexual supervisors would fall within the proscription of the Civil Rights Act. If, however, the supervisor were bisexual, there would be no discrimination based on gender, according to the court's analysis.

The district court, in granting summary judgment for the defendants, had evidently been influenced by its fear that a contrary holding would elevate every inharmonious, personal sexual relationship in the workplace into grounds for a Title VII complaint. The Court of Appeals was unimpressed with this reasoning. If a supervisor attempts to take advantage of even one employee and the employer fails to take corrective action when notified, there is a Title VII violation and relief may be sought in federal court.

In a concurring opinion, Judge MacKinnon agreed with the majority that the case must be remanded but would have held that vicarious liability should attach to plaintiff's employer (rather than only to the individual superior) only if plaintiff could show that the employer were aware of and ratified the supervisor's conduct.

Law on gay rights passed in Wichita

The Wichita City Commission passed a gay rights ordinance on September 6, 1977 by a 3-2 vote. The ordinance would prohibit discrimination in employment, housing, and public accommodations on the basis of sexual preference.

After seven hours of debate, the deciding vote was cast by Commissioner Jack Shannahan. Conservative groups are threatening a petition drive for a referendum. However, if the petition is successful, no referendum would be possible until August 1978.

United Press International quoted Commissioner Shannahan as follows:

"What it comes down to is whether we can deprive people of livelihood, a meal to eat and a place to sleep, simply because we don't like the way they choose to lead their lives. This ordinance in no way condones homosexual acts. As a Christian, I cannot condone such acts because I believe it to be a sin. However, believing in the Christian ethic of love and brotherhood, I cannot deprive somebody of the right to eat or have a place to sleep or hold a job because that person in my eyes is a sinner."

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Prison diary lacks privacy

Linzie Gardner, a Michigan prison inmate, was employed as an inmate nurse in the prison psychiatric clinic. While so employed, he took a desk diary from the clinic, brought it to his cell, and used it as his own personal diary. When prison officials discovered this diary in Gardner's cell, they confiscated it and read it. Finding that it contained sexual matters and also indicating a possibility that Gardner had sex with the clinic's patients, the officials convened a board and fired Gardner from his clinic job. Claiming violation of his Fourth and Fourteenth Amendment rights, Gardner brought suit in federal court. The court denied relief. *Gardner v. Johnson*, 429 F.Supp. 432 (E.D. Mich. 1977).

Gardner claimed that his dismissal deprived him of Fourteenth Amendment "liberty" and "property." The court held that tenure in a prison job does not merit constitutional protection and that Gardner had, in any case, received a termination hearing that met due process requirements.

In dismissing Gardner's Fourth Amendment claim of unconstitutional search and seizure of his personal notes, the court relied entirely on the fact that the book in which the diary was kept belonged to the state and was considered contraband when found in a prisoner's cell. The court does not explain the reasoning by which it concludes that Gardner's conversion of a petty item of state property justified official intrusion into his most intimate thoughts, apparently considering it obvious that a prisoner who purloins a state-owned office diary can have no reasonable expectation that his writings in the book will be private.

U.S. Supreme Court declines review of gay teacher cases

On October 3, 1977, the Supreme Court denied certiorari in two gay teacher cases.

The first case, *Gaylord v. Tacoma School District*, (See 3 *Sex.L.Rptr.* 14), involved a public high school teacher who was fired solely on the ground that he was a homosexual. The Washington State Supreme Court upheld the dismissal in a 6/2 decision on the ground that homosexuality is "immoral." Gaylord was fired after he was privately questioned by the school principal. Gaylord had an untarnished record after more than 13 years in the teaching profession. Justices Brennan and Marshall voted to grant a hearing in the case.

The second case, *Gish v. Board of Education*, (See 3 *Sex.L.Rptr.* 15), involved a public school teacher who refused to submit to a psychiatric examination after being ordered to do so by the school board. The board demanded such an exam when it learned of Gish's gay rights activities. Gish organized a gay caucus within the National Education Association in 1972 and also assumed the presidency of the New Jersey Gay Activists Alliance. Gish appealed to the New Jersey appellate courts, but those courts held that the board's insistence on the exam was reasonable. The U.S. Supreme Court declined to review those appellate court holdings.

Student sex survey may be censored

Over the strong dissent of Judge Mansfield, a panel of the Second Circuit has ruled that high school officials do not violate the First Amendment when they prohibit distribution to high school students by the student newspaper of a questionnaire concerning the students' sexual attitudes and behavior. *Trachtman v. Anker*, Nos. 989-90 (2d Cir., Aug. 31, 1977).

The district court had ruled that such a prohibition could be sustained with respect to ninth and tenth graders but that officials could not prevent distribution of the questionnaire to older students.

The questionnaire was prefaced by a warning that it contained sensitive material; replies were anonymous and purely voluntary. The questionnaire sought students' views on such topics as masturbation, homosexuality and premarital sex, and, in addition, asked about students' sexual behavior.

The Court of Appeals, in reversing the district court, adopted the lower court's standard — that school officials could ban the questionnaire if they showed a strong possibility of significant psychological harm resulting from the questionnaire — but held that school officials could meet this standard if they demonstrated that their belief that psychological damage would ensure was rationally based and not merely speculative. The court held that testimony echoing this belief and chiefly elicited from psychologists and other experts employed by defendants was sufficient to meet the burden of proof. According to the Court of Appeals, the facts accepted by the district court would at most support a conclusion that the potential benefits of a questionnaire outweighed the possible harm, but would not support a conclusion that there was no possibility of psychological harm to the students.

In reaching this result, the Court of Appeals distinguished such cases as *Bayer v. Kinzler*, 383 F.Supp. 1164 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 504 (2d Cir. 1975), (recognizing school newspaper's right to disseminate birth control information over official objections) on the grounds that a questionnaire seeking to elicit information is more invasive of psychological privacy than a publication that merely disseminates information.

By a vigorous dissent, Judge Mansfield rejected the majority's legal test and disputed its construction of the facts. "[A] general undifferentiated fear of emotional disturbance on the part of some student readers strikes me as too nebulous and as posing too dangerous a potential for unjustifiable destruction of constitutionally protected free speech rights to support a prior restraint." Moreover, even accepting the majority's standard, the proof relied upon by defendant school officials amounted to no more than conclusory statements that the questionnaire could be harmful. In Judge Mansfield's view the district court was amply justified in rejecting this testimony in favor of plaintiff's evidence that such questionnaires would have no serious adverse psychological consequences. To find otherwise would be to ignore the reality that students growing up in New York City are exposed to sexual stimuli of all kinds every day. In this context a voluntary, private, anonymous questionnaire hedged about with warnings to the sensitive cannot rationally be regarded as a sufficient danger to justify abridgement of free expression.

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A Constitutional Right to Sexual Privacy

As the *Note on Privacy* points out, however, *Griswold* itself raised another obstacle to successful privacy challenges to both criminal and civil regulations. Toward the conclusion of his concurrence, Mr. Justice Goldberg — joined by Mr. Justice Brennan, we should note — pointed out that the Court's holding in *Griswold* "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct." 381 U.S. at 498-9. For many courts, this bit of dictum has been dispositive of cases even where the privacy issue has been raised by a proper party.

The governments and laws of the nation have traditionally enshrined marital relationships while they have stigmatized extramarital relationships. It is this long Judeo-Christian and English-common-law heritage that courts have used so frequently to defeat the privacy arguments. Vagueness attacks, claims of cruel and unusual punishment, and invocations of the establishment clause have also failed. Supporters of a constitutional right of sexual privacy want to argue that the government should not regulate such behavior simply because it is private and should be beyond the power of government interference. Unfortunately, the government can continue to interfere simply because it always has whenever it wanted to.

Most privacy challenges failed because they were fought on these terms. They focused on a state's lack of interest or power to regulate private adult sexual activities, rather than on the nature of the activity involved. It is the thesis of the *Note on Privacy* — and by extension, of Mr. Justice Brennan — that a state's interest, or lack thereof, should not compel any conclusions as to the existence of an affirmative constitutional right. The states' interest in limiting speech during World War I created a strain on the limits of the First Amendment, but it did not extinguish the affirmative Constitutional right to free speech. State interest guides the manner and extent of regulation, not the extent of the right that is to be regulated.

If privacy cases are to be won, 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. The *Note on Privacy* suggests the following analysis:

I. Is the alleged right a right of privacy?

1. Does it either further or depend on the values deemed important by the Court in *Griswold, Stanley, Eisenstadt, Roe,* et al.?
2. Does it commonly involve the home?
3. Does it concern values associated with the home, such as seclusion, intimacy, or the pleasures of associating with family or close friends?
4. Is it a right of personal autonomy?
5. Does it involve autonomous decisions that shape an individual's personal life, either long-term or short-term?
6. Is it similar to values underlying the Bill of Rights amendments found relevant in prior privacy cases? For example, the security and seclusion in the home guaranteed by the Third and Fourth Amendments. Or the personal security and autonomy guaranteed by the Fourth and Fifth Amendments?

SEXUALAWREPORTER

INTOLERANCE OF THE UNCONVENTIONAL HALTS THE GROWTH OF LIBERTY

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II. Is the alleged right a fundamental privacy right?
Roe v. Wade, 410 U.S. 113 (1973).

1. Is it "implicit in the concept of ordered liberty"? *Palko v. Connecticut*, 302 U.S. 319 (1937).
2. How important is it to the individual who asserts it? To the state regulating it?
3. How burdensome is the state regulation?

This word "fundamental" can cause two problems. As the *Note on Privacy* points out, it can easily lead the privacy argument before a court into an analysis of the magnitude of the right at issue. If it is to prevail, the privacy argument

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A CONSTITUTIONAL RIGHT TO SEXUAL PRIVACY

must first focus not on the magnitude of the right but on its nature and whether it is constitutionally protected from state intervention.

Second, the Supreme Court uses "fundamental" to label certain constitutional rights, which in turn produces a higher standard of judicial review when such rights are burdened by state regulation. The state must demonstrate that a compelling or substantial government interest is at stake in the restriction of this fundamental right. Courts have been unwilling to call privacy a fundamental right for this reason. The *Note on Privacy* reports that the Supreme Court upheld the government restriction of a fundamental right in only one case: *Korematsu v. United States*, 323 U.S. 214 (1944). The war powers of the federal government gave it the authority to disregard private civil liberties of Japanese-Americans. Few courts will label privacy as a fundamental right when doing so would strike down thousands of criminal and civil statutes and regulations with one stroke of the judicial ax. The desired constitutional protection for sexual privacy must be extended case by case, argument by argument.

APPLICATION TO ADULT PRIVATE CONSENSUAL SEXUAL ACTIVITY

Clearly, the right of adults to engage in any type of private consensual sexual activity is part of the broad right to privacy. It touches many of the same rights and values that were so important to the results in *Griswold, Stanley, Eisenstadt, Roe*, and *Carey*. It does commonly involve the home life of both heterosexual partners and homosexual partners. Their rights to seclusion, intimacy, and companionship are infringed upon by government intrusion. Depending on the nature of the activity, it may often involve a right to personal physical autonomy and the right to shape one's own future happiness. The right to engage in this activity, while clearly beyond the conscious scope of the Bill of Rights is, nevertheless, similar to the values it supports in the Third, Fourth, and Fifth Amendments.

The historical roots of a concept of sexual privacy lead us into the second part of the analysis: If there is a right to sexual privacy, how far do the courts protect it? Only rarely will a court use the outcome-determinative label of "fundamental" on a privacy right as the Supreme Court did in *Roe*, so we must ask if this right to sexual privacy is "implicit in the concept of ordered liberty?" As we noted, the whole history of our legal tradition clearly encourages continued government regulation of private sexual activity, but inherent in our Bill of Rights and, indeed, in our system of constitutional democracy is the concept of protection for the rights of minorities that would otherwise be overlooked in a pure democracy. In matters of speech and religion, to name only two, our founders and our courts have known that the majority is not always right. The principle also applies to codes of sexual behavior.

Social attitudes and morals change over time, have changed since the writing of the Constitution. As the *Note on Privacy* points out, the challenge of a minority moral code may ultimately undermine the universality of the majority's moral code and thus destroy its right to universal enforcement. This is one of the lessons of *Griswold, Eisenstadt, Roe*, and *Carey*. The majority view, that a sexual act is immoral, can never rationally be dispositive of the constitutionality of the state regulation of that act. Thus, while the concept of sexual privacy has not historically been "implicit in the concept of ordered liberty," in a larger sense it is within our constitutional traditions of protection for minority rights, limitations on the sphere of government, and relatively few limitations on the sphere of personal liberty. However, this analysis brings us dangerously near the outcome-determinative standard of judicial review that we sought to avoid by refusing to argue the fundamental nature of the right to sexual privacy.

The second line of analysis focuses on the importance of the right to sexual privacy to the individual who asserts it. Clearly, the right to sexual privacy is extremely important to certain individuals; for example, to a homosexual whose psychological and emotional well-being may depend on the recognition of this right by courts. Then against this personal importance we balance the social importance of the state statute under attack. We look at the reasons for, and the means of, government regulation of private sexual activity. As the *Note on Privacy* suggests, this leads into the historical analysis discussed above, but it leaves a court to make its own determination of whether a state's alleged interests are constitutionally legitimate. Here a court will be more willing to find majority moral codes to be an insufficient basis for government of private conduct. Also, the court can examine for itself the relationship between the asserted interests of the state and the practical realities of the challenged statute. The *Note on Privacy* offers the example of a rarely-enforced state sodomy statute which is defended on the grounds that it promotes public morality. The very fact that such a law is only rarely enforced to control private conduct demonstrates that the statute is relatively unimportant in a state program of promoting public morality. In a civil proceeding, the success of the privacy argument with this analysis can depend on the nature of the party. Where public employment has been denied both to a teacher and to a clerk because of their homosexual relationships, the clerk might prevail with a privacy argument where the teacher will not. Only after the court has recognized a right of sexual privacy for the clerk will it be willing to extend that right to the more sensitive position of teacher.

A FINAL WORD

Courts have refused to recognize a right to sexual privacy because of its fundamental nature and outcome-determinative standard of review. They can now use this means test, as the *Note on Privacy* calls it, to inquire into the personal nature and the importance of the right to the individual before the court. Each case can be considered on its own merits. This is not a revolutionary concept, but it has not appeared in privacy arguments with any frequency. The courts can examine the burden on the right resulting from state regulation and inquire into the constitutional legitimacy of the relationship between the regulation and reasonable state interests. In the courts where the state interests have finally been articulated in this way, the right of sexual privacy often prevails. *Carey* is a recent example. Without using the "fundamental" label, this argument shifts the burden of proof from the party arguing for a right of privacy onto the state arguing for a burden on it. Mr. Justice Brennan wanted us to know this, so he included Footnote 17 in his *Carey* opinion.