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SEXUALAWREPORTER

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NON-COMMERCIAL SEXUAL SOLICITATION

The Case for Judicial Invalidation

By DR. ARTHUR C. WARNER

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(Editor's Note: The following was submitted as a brief, *Amicus Curiae,* to the California Supreme Court in the case of *Pryor v. Municipal Court,* No. L.A. 30901. Effective January 1, 1976, the California Legislature decriminalized private sexual acts between consenting adults. However, a statute prohibiting the solicitation of lewd acts remained in force. This solicitation statute has been used by the police to make arrests for solicitations to commit sexual acts in private which are no longer illegal. In the *Pryor* case the California Supreme Court will decide such issues as: 1) the inconsistency of this solicitation law vis-a-vis the "consenting adults act," 2) whether a law prohibiting the solicitation of lawful sexual acts violates the First Amendment, and 3) whether a conviction under such a law may be based upon the uncorroborated testimony of a plainclothes vice officer. If, as is expected by many civil libertarians, the California Supreme Court voids this solicitation law, it will be the first state Supreme Court to have done so. Because of the importance of this case, and especially because this brief is the definitive word on the invalidity of such statutes and should be used by other lawyers as a model brief, the *SexuaLaw-Reporter* is pleased to present the complete text of this brief.)

Introduction & Historical Background

The National Committee for Sexual Civil Liberties requested standing as *amicus curiae* in the instant case because of what it deems to be important and central legal questions–some of them of constitutional dimension–which underlie the issues here presented. State sexual solicitation statutes which involve simple verbal solicitations to engage in some form of sexual activity, and which contain no offer or request for money, are of comparatively recent origin. (Throughout these pages the discussion will be confined to simple *non-commercial* sexual solicitations between consenting persons at or above the age of sexual consent.) As Petitioner has indicated on page 8 of his brief, the grandfather of all state solicitation statutes was the English Act of 1898 which punished with up to two years' imprisonment any "male person who in any public place persistently solicits or importunes for immoral purposes."[1] This language did not specifically refer to homosexual conduct, and was actually drafted with pimps and procurers in mind. However, like Section 647(a) of the California Penal Code, it soon became the recognized legal vehicle in England against all forms of homosexual solicitation. The concept herein embodied was soon adopted by a number of American jurisdictions, of which Section 722(8) of the old New York Criminal Code was representative. (This was superseded by the present New York solicitation law in 1965.) Section 722(8) punished as a disorderly person anyone "who, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, ... frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness." The rationale behind both of these laws was a desire to preserve the public peace. The English act required "persistent" importuning, the intention having been to limit its criminal sanctions to solicitors who refused to take "No" for an answer. Such a refusal obviously threatened a breach of the peace. In the case of the New York law, there had to be at least a threat to the peace. In this regard, both statutes were simply extending the common-law concept which underlay the offense of open lewdness. Open or public lewdness was an offense at common law not because it was considered immoral, and hence deserving of punishment–but because indecent conduct occurring in public constituted a threat to public order. Had morality been its *raison d'etre,* the law would have punished lewd or indecent conduct wherever it occurred, whether in public or in private. Here, it is significant to note that there was no crime of fornication at common law, only adultery. And, since the latter was an offence against morality, it was punished wherever it took place, in public or in private, and, as a morals offense, it was cognizable originally in the ecclesiastical courts, not in the royal courts.

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Applicant with homosexual orientation admitted to Florida State Bar

Robert F. Eimers applied for admission to the Florida Bar. He was a graduate of Hastings College of Law in San Francisco and had passed all parts of the Florida Bar Examination. The Florida Board of Bar Examiners found him qualified in all respects with one possible exception. The Board submitted the following question to the Florida Supreme Court and asked for an advisory opinion:

Whether an applicant with an admitted homosexual orientation who is fully qualified for admission to the Florida Bar in all other respects can qualify for admission under the provisions of Article IV, Section 19, of the Rules of the Supreme Court of Florida Relating to Admission to the Bar, which section places a strict prohibition against any recommendation by the Board to the Supreme Court for admission to the Florida Bar for a person not determined to be of *good moral character.*

It is unclear how Eimers' sexual orientation came to the attention of the Board of Bar Examiners. At a hearing before the Board, Eimers was asked about the matter. He candidly admitted his homosexual preference. No questions were asked and no information was given concerning his actual sexual practices or conduct.

The Supreme Court stated, "We answer this question in the affirmative, noting that our response is limited to situations in which the applicant's sexual orientation or preference is at issue. This opinion, then, does not address itself to the circumstances where evidence establishes that an individual has actually engaged in homosexual acts."

"In the instant case, the issue which must be resolved is whether there is a rational connection between homosexual orientation and fitness to practice law." *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957).

"The layman must have confidence that he has employed an attorney who will protect his interests. Further, society must be guaranteed that the applicant will not thwart the administration of justice."

"In the instant case, however, we cannot believe that the candidate's mere preference for homosexuality threatens these societal exigencies."

"Accordingly, we find that the applicant in the instant case is qualified for admission to the Florida Bar...." *Florida Board of Bar Examiners, Re: Robert Francis Eimers,* Case No. 51, 154, March 2, 1978.

Justice Boyd dissented as follows:

"Applicant admits he is a homosexual. Before a finding on the issue of his fitness to practice law I would remand this cause to the Board of Bar Examiners for an inquiry whether he has committed homosexual acts of the kind criminally outlawed by Section 800.02, Florida Statutes (See *Franklin v. State,* 257 So.2d 21, 24 (Fla., 1971).) There should not be admitted to the Florida Bar anyone whose sexual lifestyle contemplates routine violation of a criminal statute." □

Corroboration rule eliminated in D.C. rape prosecutions

The rule of decision in the District of Columbia has been, since 1902, that in any sex case involving an allegation of rape or any lesser included offense, the defendant may not be convicted based upon the uncorroborated testimony of the complaining witness. This was not a requirement at common law and appears to be a rule of evidence established by the D.C. courts without a basis in statute or in the constitution.

In *Arnold v. United States,* 358 A.2d 335 (1976), the District of Columbia Court of Appeal, sitting *en banc* as a panel of 10 judges, has abolished this evidentiary requirement.

The facts of the case involve a female victim who was standing at a bus stop late at night. She had just missed her bus and was worried she would be late to work. The defendant stopped and spoke with her. He offered to give her a ride to work and she accepted. Instead of driving her to work, the defendant took her to a secluded spot and made threats on her life until she submitted to sexual intercourse.

Before the commencement of the trial the prosecution requested that the court not instruct the jury, at the close of the evidence, that it must find corroboration of the victim's testimony before returning a guilty verdict. The court granted the motion over the defendant's objection. The defendant was convicted and he appealed.

The Court of Appeal recoginzed that by refusing to give the requested instruction on corroboration mandated by established case law of the jurisdiction, the trial court defied precedent which, of course, was error. However, the majority noted that the error was not of a constitutional dimension and that in its opinion, the result reached by the jury would not have been any different even had the instruction been given.

Referring to the landmark decision of the California Supreme Court which eliminated the cautionary instruction in California rape cases, *People v. Rincon-Pineda,* 123 Cal.Rptr. 119 (1975), the Court of Appeal held: "Because of the adequacy of constitutional protections available to every defendant in a sex case, we are persuaded that the requirement of corroboration of the victim's testimony presently serves no legitimate purpose."

"We reject, therefore, the notion given currency so long in this jurisdiction, that the victim of rape and other sex-related offenses is so presumptively lacking in credence that corroboration of her testimony is required to withstand a motion for a judgment of acquittal. Accordingly, we mandate that in the future no instruction directed specifically to the credibility of any mature female victim of rape or its lesser included offenses and the necessity for corroboration of her testimony shall be required or given in the trial of any such case in the District of Columbia court system." Five justices joined in this majority opinion. These five justices further held that the instant defendant's conviction would not be reversed notwithstanding the fact that this rule of corroboration was the established law at the time of his trial.

A concurring opinion was written by four other justices. They agreed that the corroboration rule should be eliminated in future cases, but that this defendant's conviction should be reversed and a new trial ordered because of the failure to use the instruction.

A strong dissent was registered by Associate Justice Mack:

"I likewise emphatically reject any notion that a victim of rape or other sex-related offenses is presumptively lacking in credence. It does not follow that I can view with approval the mandate of the majority summarily striking in this case the corroborative evidence rule in future cases of rape . . .

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Corroboration rule

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"The majority has stated that the evidentiary and instructional requirement is being eliminated because of its demeaning implications—thus candidly and commendably recognizing that the criminal law must not be blind to the rights of women. The rights of women are not best served, however, by a mere pronouncement that dicta traced to the 17th century writings of Lord Chief Justice Hale have no place in modern jurisprudence . . .

"I have grave doubt that the abolishment of the corroboration rule, without more, will make the ordeal of women less demeaning or the administration of justice more equitable. I fear that the majority, without assessing the consequences, is giving 'lip service' to a complex problem for legislative reform . . .

"The rule which the majority dispenses with was apparently imposed in this jurisdiction in 1902. I think it is an oversimplification to suggest that, in this country at least, such a rule was adopted solely because of entrenched notions concerning women."

The dissent points out that statistics show that nationwide, 89% of the 455 men executed for rape between 1930 and 1969 were black men. The possibility of a jury returning a guilty verdict based upon racial prejudices is real. The dissent further states that according to available statistics, although D.C. is one of the only jurisdictions having such a corroboration requirement in rape cases, the conviction rate for rape is substantially higher in the District of Columbia than in the nation as a whole. As a result of these additional considerations, the dissent argues that the elimination of the corroboration rule should come from legislative rather than judicial reform, after a thorough analysis of the problem. For example, with the elimination of the corroboration requirement via legislation, further reforms might also be in order such as lowering the penalty, redefining the crime and delineating degrees, and standards of proof be reexamined. □

Adulterous wife is good mother

A Louisiana Circuit Court of Appeal upheld a lower court determination that a mother was fit for custody of her children, despite her engagement in an adulterous relationship with another man since legal separation from her husband. *Greer v. Greer,* 346 So.2d 846 (La.App.1st Cir., 1977).

The lower District Court found that—since the parents' legal separation, already more than a year long in duration—the minor children were doing well in the living arrangement with the mother; and granted the husband's suit for divorce, but denied a change of custody from the mother.

On appeal, the Circuit Court articulated a custody guideline of the Louisiana Supreme Court that "the welfare of the children is the paramount consideration," *Fulco v. Fulco,* 254 So. 2d 603 (1971); and added that the "party seeking to change custody granted by a 'considered decree' has a heavy burden" of showing the court such a change is in order.

Unable to overcome this burden, the Circuit Court found its earlier decision in *Johnson v. Johnson,* 331 So.2d 854 (La. App. 1st Cir., 1976), controlling: "One or several acts of adultery with the same paramour does not, *per se,* render morally unfit a mother who is otherwise suited for custody."

In both the *Johnson* and *Greer* decisions the "immoral" acts of the mother were performed away from the children's observation. In *Johnson,* the Court stressed the unreliability of the father to care for the children. In *Greer,* the Court relied more on the father's inability to demonstrate that the adulterous mother was unfit for custody of the children. □

Intercourse with minor does not contribute to delinquency

In a 2-to-1 decision, the New Mexico Court of Appeals has decided that sexual intercourse with a 15-year-old boy does not constitute the crime of contributing to the delinquency of a minor. *State v. Favela,* No. 3195, February 7, 1978.

The defendant was a 23-year-old woman and the minor was a 15-year-old boy. The case involved one act of sexual intercourse between the two which was consensual and private in nature. The majority interpreted the relevant statute in such a manner that an act would be considered "delinquent" only if the act would be a crime if committed by an adult. Subsequent to a recent legislative revision, consensual sexual intercourse between an adult and a 15-year-old male no longer constituted a crime.

The State argued that the sexual act could be considered illegal under either the "unlawful cohabitation" or the "indecent exposure" laws. The majority rejected this argument because there was no evidence of unlawful cohabitation. Cohabitation requires proof that the parties were living together as husband and wife. Indecent exposure requires proof that the act was performed in a place exposed to public view. Therefore, the majority concluded, the indictment should have been dismissed.

Justice Sutin wrote a concurring opinion. As to whether the act of sexual intercourse tended to cause or encourage the delinquency of a young man 15 years of age, he wrote:

"As a matter of law, I say that it did not. To me, a legal act does not tend to cause or encourage juvenile delinquency. A consensual act of sexual intercourse engaged in by a young man is nothing more than sex education essential and necessary in his growth toward maturity and subsequent domestic family life.

"The legislature abolished fornication as a crime. In doing so, it cast aside the ancient religious doctrine that forbids such practices. It recognized, as a matter of public policy, that this conduct did not violate the mores of the 20th century. Today, sexual intercourse is recognized as normal conduct in the development of a human being. As a result, this subject is taught to children in public schools . . . The fact that a normal young man experiences one act of sexual intercourse does not tend to cause or encourage a perversion of the sexual instinct.

In his dissent, Justice Hernandez objected to the narrow interpretation given to the delinquency statute by the majority. In his opinion, "It is not required that the act complained of constitute a crime. It is only necessary for the state to prove that the act would tend to cause or contribute to the delinquency of a minor."

"In my opinion, the defendant's conviction should be affirmed, despite the argument that the consensual act of intercourse is not a crime. I consider that it is, nonetheless, immoral and would tend to cause the minor to be a delinquent."

In the wake of considerable public uproar over the majority opinion, the New Mexico Supreme Court summarily reversed the Court of Appeals. The Supreme Court announced its result and stated that its opinion would be written sometime in the future. □

Mr. Justice Rehnquist on gay student organizations

On February 21, 1978, the United States Supreme Court denied the petition for a writ of certiorari in *Ratchford v. Gay Lib*, #77-447. Justices Rehnquist, Blackmun, and Burger were of the opinion that the petition should have been granted and plenary consideration should have been given to the case.

The controversy arose when the University of Missouri refused to grant formal recognition to the campus gay student organization. The student group filed a lawsuit in Federal District Court. The District Court denied relief to the student group on the ground that the university had a right to deny recognition to the group because to grant recognition would increase the likelihood that the state sodomy law would be violated by the students. The student group appealed and the Court of Appeals reversed.

The University then filed the instant petition to the Supreme Court. In a 6-to-3 vote, the Court denied the petition. The following is the complete text of the dissenting opinion written by Mr. Justice Rehnquist with whom Mr. Justice Blackmun joined.

"There is a natural tendency on the part of any conscientious court to avoid embroiling itself in a controversial area of social policy unless absolutely required to do so. I therefore completely understand, if I do not agree with, the Court's decision to deny certiorari in this case. In quick summary, the University of Missouri, exercising the traditional authority granted to it by the State to regulate what student organizations will have access to campus facilities, denied recognition to respondent, Gay Lib. The denial stemmed from a finding by a University-appointed hearing officer that formal University recognition would 'tend to expand homosexual behavior which will cause increased violations of [the State's sodomy statute].' Respondent, choosing to remove the dispute from its traditional University setting to the federal courts, sued in the United States District Court for the Western District of Missouri, claiming that the denial infringed their constitutional rights to free speech and freedom of association. The District Court held that the University had not violated respondent's constitutional rights. Respondent, continuing to pursue a judicial solution to its problem, persuaded two judges of a three-judge panel of the Court of Appeals for the Eighth Circuit to reverse the District Court. A petition for rehearing *en banc* was denied by an equally divided court. The University now seeks certiorari here to review that decision.

"Courts by nature are passive institutions and may decide only those issues raised by litigants in lawsuits before them. The obverse side of that passivity is the requirement that they do dispose of those lawsuits before them and entitled to attention. The District Court and the Court of Appeals were doubtless as chary as we are of being thrust into the middle of this controversy but were nonetheless obligated to decide the case. Unlike the District Court and the Court of Appeals, Congress has accorded to us through the Certiorari Act of 1925, 28 U.S.C. Section 1254, the discretion to decline to hear a case such as this on the merits without explaining our reasons for doing so. But the existence of such discretion does not imply that it should be used as a sort of judicial storm cellar to which we may flee to escape from controversial or sensitive cases. Our rules provide that one of the considerations governing review on certiorari is whether a Court of Appeals 'has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court.' Rule 19(b). In my opinion the panel decision of the Court of Appeals meets both of these tests, and I would therefore grant certiorari and hear the case on the merits.

"The sharp split amongst the judges who considered this case below demonstrates that our past precedents do not conclusively address the issues central to this dispute. In the same manner that we expect considered and deliberate treatment of cases by these courts, we have a concommitant responsibility to aid them where confusion or uncertainty in the law prevails. By refusing to grant certiorari in this case, we ignore our function and responsibility in the framework of the federal court system and place added burdens on other courts in that system.

"Writ large, the issue posed in this case is the extent to which a self-governing democracy, having made certain acts criminal, may prevent or discourage individuals from engaging in speech or conduct which encourages others to violate those laws. The Court of Appeals holds that a state university violates the First and Fourteenth Amendments when it refuses to recognize an organization whose activities both a University fact finder and the District Court found were likely to incite violations of an admittedly valid criminal statute. Neither respondent nor the Court of Appeals contend that the testimony of the expert psychologists at these hearings was insufficient to support such a finding. They appear to take instead the position that such a finding is not governed by the normal 'clearly erroneous' test established in Fed. Rules Civ. Proc. 52(a). This unusual conclusion, in itself, would seem to me to be sufficient to warrant a grant of certiorari.

"But lurking behind this procedural question is one which surely goes to the heart of the inevitable clash between the authority of a State to prevent the subversion of the lawful rules of conduct which it has enacted pursuant to its police power and the right of individuals under the First and Fourteenth Amendments who disagree with various of those rules to urge that they be changed through democratic processes. The University in this case did not ban the discussion in the classroom, or out of it, of the wisdom of repealing sodomy statutes. The State did not proscribe membership in organizations devoted to advancing 'gay liberation.' The University merely refused to recognize an organization whose activities were found to be likely to incite a violation of a valid state criminal statute. While respondent disavows any intent to advocate present violations of state law, the organization intends to engage in far more than political discussion. Among respondent's asserted purposes are the following:

" '3. Gay Lib wants to provide information to the vast majority of those who really don't know what homosexuality or bi-sexuality really is. Too much of the same prejudices are now directed at gay people just as it is directed at ethnic minorities.

" '4. Gay Lib does not seek to proselytize, convert, or recruit. On the other hand, people who have already established a pattern of homosexuality when they enter college must adjust to this fact.

" '5. Gay Lib hopes to help the gay community to rid itself of its subconscious burden of guilt. Society imprints this self-image on homosexuals and makes adjustment with the straight world more difficult.'

Expert psychological testimony below established the fact that the meeting together of individuals who consider themselves homosexual in an officially recognized university

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Justice Rehnquist

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organization can have a distinctly different effect from the mere advocacy of repeal of the State's sodomy statute. As the University has recognized, this danger may be particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood.

"The University's views or respondent's activities and respondent's own view of them are diametrically opposed. From the point of view of the latter, the question is little different from whether university recognition of a college Democratic club in fairness also requires recognition of a college Republican club. From the point of view of the University, however, the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined. The very act of assemblage under these circumstances undercuts a significant interest of the State which a plea for the repeal of the law would in no wise do. Where between these two polar characterizations of the issue the truth lies is not as important as whether a federal appellate court is free to reject the University's characterization, particularly when it is supported by the findings of the District Court.

"As the split in the lower court judges shows, *Healey v. James,* 408 U.S. 169 (1972), did not directly address these questions. There we remanded the decision of the Court of Appeals of the Second Circuit to decide whether the University's refusal to recognize a local branch of the Students for a Democratic Society was motivated by a factual conclusion that the organization would not abide by reasonable campus regulations of the sort held valid in *Esteban v. Central Missouri State College,* 415 F. 2d 1077, 1089 (CA8 1969) (per Blackmun, J.). Here the question is not whether Gay Lib as an organization will abide by university regulations. Nor is it really whether Gay Lib will persuasively advocate violations of the sodomy statute. Instead, the question is whether a university can deny recognition to an organization the activities of which expert psychologists testify will in and of themselves lead directly to violations of a concededly valid state criminal law.

"As our cases establish from *Schenk v. United States,* 249 U.S. 47 (1919), in which Mr. Justice Holmes, speaking for a unanimous court, held that the government has a right to criminally punish words which are 'used in circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,' to *Brandenburg v. Ohio,* 395 U.S. 444 (1969), some speech that has a propensity to induce action prohibited by the criminal laws may itself be prohibited. A fortiori, speech and conduct combined which have that effect may surely be placed off limits of a university campus without doing violence to the First or Fourteenth Amendments.

"Healy was decided by the lower courts in what may fairly be described as a factual vacuum. There this Court stated that a student organization need not be recognized if such recognition is likely to incite criminal violations, but did not have to consider how that standard would be applied to a particular factual situation. No attempt had been made by the University to demonstrate that imminent lawless action was likely as a result of the speech in question, nor was there any hint that any such effort was likely to have been successful. Here, such a demonstration was undertaken, and the District Court sitting as a finder of fact concluded that petitioner had made out its case. The Court of Appeals' panel opinion, for me at least, sheds no light on why this conclusion of the District Court could be rejected. By denying certiorari, we must leave the university officials in complete confusion as to how, if ever, they may meet the standard that we laid out in *Healey.*

"The mathematically even division of the Court of Appeals on the petititon for rehearing *en banc* gives some indication of the divergence of judicial views which may be expected from conscientious judges on difficult constitutional questions such as this. Our views may be no less divergent, and no less persuasive to one another, than were the views of the eight judges of the Court of Appeals. But believing as I do that we cannot under our rules properly leave this important question of law in its present state, I would grant the petition for certiorari."

The Chief Justice would grant the petition and give plenary consideration to this case. □

Breach of promise to marry action retained in Washington

Disregarding the nearly universal criticism by legal commentators, the Supreme Court of the State of Washington sitting *en banc* has held that the breach of promise to marry action existing under that State's common law should be retained. The court treated the action as a quasi contract quasi tort action for the recovery of foreseeable special and general damages which are caused by defendant's breach of promise to marry. The court did, however, modify the action to the extent that a plaintiff may now not recover for loss of expected financial and social position. The court reasoned that such damages are a holdover from 17th century England where marriages were contracted for material reasons and were basically property transactions. Following this reasoning, the court held that evidence of the defendant's wealth and social position is immaterial in assessing the plaintiff's damages. *Standard v. Bolin,* 565 P.2d 94 (1977).

In a well reasoned dissent, Associate Justice Utter noted that the current public policy expressed in Washington State's 1973 Dissolution Act is to disregard fault in determining the property rights of parties at the dissolution of a marriage. Since one of the parties to a dissolution suffers at least as much humiliation, embarrassment, mental suffering, and loss of financial expectation and security as does a party to a breakup of an engagement, it seems incongruous to apply differing public policies to the two situations. □

Obscenity conviction is not a basis for denying a license

The Appellate Division of the Superior Court of New Jersey has held that the denial of a license to operate a movie theater by a municipality on the basis of prior obscenity convictions of the applicant constitutes an impermissible prior restraint on the constitutionally protected right of free speech. The remedy for past abuses, said the court, lies not in the suppression of the right to show all films, but in criminal prosecution for violations of constitutional obscenity laws. *Haymar Theaters Inc. v. City of Newark,* 374 A.2d 502. □

D.C. prostitution statute not limited to solicitations

In *Dinkins v. United States*, 374 A.2d 292 (1977), the District of Columbia Court of Appeal sitting *en banc* held that a D.C. statute making it a misdemeanor "for any person to invite, entice, persuade, or to address for the purpose of prostitution" is *not* "so drafted as to make critical the questions of who makes the first contact or overture (visual or verbal) and who first broaches the subject of money or gain for such services."

Here, a covert police officer in his private car said, "Hi," and waved to Diane Dinkins. After the officer's asking, "What are you doing?" and Dinkins' reply of, "Anything you want . . . ," and after the officer's inquiry into price for services and Dinkens' response of, "Ten and three," Ms. Dinkins was arrested and subsequently convicted under the D.C. Code 1973, Section 22-2701 before the Superior Court.

The case was appealed, and originally submitted without oral argument to a division consisting of three judges. Two of the judges *proposed* to reverse the Superior Court; and according to a D.C. intracourt practice, a *proposed majority opinion* of the division court was circulated to the nondivision judges. The third division judge, as well, circulated a dissenting opinion. Ultimately, a majority of the judges in active service *withheld release of the proposed opinion,* and set the case for *en banc* consideration. Ten judges (rather than nine) sat *en banc* due to D.C. procedure allowing a retired judge on the division court to sit in appropriate appellate review. Only three judges dissented from the majority view.

The gist of the plaintiff-appellant's contention was that " 'no solicitation (was) made for prostitution since Miss Dinkins' conduct was responsive (to the officer) rather than (initiatory)' and that . . . the element of money or gains fail(ed) of proof since the officer mentioned that subject first."

The majority court noted that neither the word "solicit" nor "solicitaion" is used in the statute; and that Dinkins was not being convicted of soliciting for prostitution, but of enticing and addressing for prostitution. Using *Webster's Third International Dictionary,* the court emphasized that neither "entice" nor "address" "require an active, initiatory effort but can occur in a responsive manner."

The three dissenting judges reminded the majority of *Riley v. United States,* 298 A.2d 228, in which a 1973 D.C. Court of Appeal rules, "(I)t is appropriate to determine if similarity exists between the common-law and contemporary usage of the words used in Section 22-2701. Historically, 'urging, inciting, requesting, or advising another person to commit a crime' was in itself punishable as the crime of solicitation . . . ". The justices, as well, briefly stated Marshal on *Law of Crimes* (7th ed. 1967): "(T)he gist of (solicitation) is incitement . . . the gravamen of this common-law misdemeanor lay in counselling, enticing, or inducing another to commit a crime . . ."; and Perkins on *Criminal Law* (2d ed. 1969): "(T)he word 'solicitation' . . . is employed in the law as a general label to cover any use of words or other device by which a person is requested, urged, advised, counseled, tempted, commanded, or otherwise enticed or incited to commit a crime . . . ."

The dissenting not only felt that the majority opinion ignored the common law's traditional use of the words "invite, entice, persuade, or address," by relying on *Webster's* literal usage; but totally avoided the legislative intent and history of D.C. Code 1973, Section 22-2701, by extending the statute beyond offenses of "soliciting for prostitution."

A dissenting justice (with whom the two others joined) could only conclude, "(I) had always thought that if a prostitute is merely standing on a corner she may not be convicted of this statute simply because she is a prostitute. Only if she solicits for prostitution may a conviction follow. I would have thought a construction of the statute was that simple, but now it seems that it is not." □

News racks in Los Angeles receive due process protection

In 1972, the City of Los Angeles enacted a municipal ordinance regulating the size, weight, appearance, and placement of news racks installed and maintained on the City sidewalks. The ordinance provided for summary seizure, retention, and destruction of offending news racks. Kash Enterprises Incorporated, after a number of its news racks had been removed from their sidewalk locations pursuant to the provisions of the ordinance, instituted an action for declaratory and injunctive relief attacking the ordinance as unconstitutional on its face. In *Kash Enterprises Incorporated v. City of Los Angeles,* 138 Cal.Rptr. 53 (1977), the California Supreme Court sitting *en banc* considered the plaintiff's constitutional attacks on the ordinance.

Kash Enterprises first contended that a number of the substantive provisions of the ordinance, limiting the placement and appearance of news racks, was impermissibly vague and overbroad. The court reasserted the principle that localities do have authority to constitutionally impose reasonable "time, place, and manner" regulations on the use of news racks. Provisions in the ordinance prohibiting placement of news racks in locations which unreasonably interfere with or impede the flow of pedestrian or vehicular traffic, in a manner which would interfere with City street-cleaning equipment; or within three feet of lawns, flowers, shrubs or trees, were all upheld as requirements which do not unduly hamper the distribution of newspapers through news racks.

Plaintiff presented a further constitutional challenge to the ordinance, challenging provisions which authorize a public officer to summarily remove any news rack which he believes to be in violation of the ordinance's size, weight, appearance, or location requirements. Under the terms of the ordinance, such seizure could take place prior to affording the news rack owner any notice of the removal. The challenged subdivision further provided that after such summary removal, the Board of Public Works Commissioners were to notify the owner of the seizure of the rack and the place of its storage. The owner was then to be informed that unless he claimed the rack within forty-five days, and paid the cost of removal, the rack would be deemed abandoned, and subsequently destroyed. The court ruled that the ordinance, as written, accorded a news rack owner absolutely no opportunity for a hearing on the merits of seizure, either before or after the removal. No matter how arbitrary or wrongful the removal may have been, under the terms of the ordinance an owner could never recover his rack without paying the administrative cost of removal; if he did not pay the fee, the City would then destroy the news rack. The court concluded that this procedure violates both procedural Due Process and the First Amendment. □

Florida "breast exposure" ordinance held unconstitutional

In *Steffens v. State,* 343 So.2d 90 (1977), a Florida District Court of Appeal held that a municipal ordinance prohibiting female employees of a public business to "expose themselves above the waist to the extent that the breasts are bare or so thinly covered by mesh, transparent net, lawn skin tight materials which are flesh colored and worn skin tight, so as to appear uncovered" was unconstitutional and void for vagueness.

The court felt that any statute/ordinance which forbids an act in terms "so vague that people of common intelligence must necessarily guess at its meaning . . . violates . . . due process . . . ." Observing the "scanty female apparel which is now socially acceptable in public, particularly on beaches," the court felt that the type of clothing prohibited by the Miami Springs Code was "extremely unclear."

The Code did not limit the forbidden acts as to place, and the court concluded, "A female waitress might very well be in violation of this ordinance if she bared her breasts while taking a shower in her home or in a public shower stall."

Section 16-14.01 of the Miami Springs Municipal Code deemed such *exposure* a misdemeanor, punishable by fine not exceeding $500 *or* jailing not more than sixty days *or both*; each day such violation continued would constitute a separate offense and would be punishable as a separate offense. □

Obscenity held not to be a common law nuisance

The Board of Selectmen of the town of Berlin, Vermont, sitting as a local board of health, sought to close down an adult book store by declaring it a nuisance affecting the public health by way of a civil action seeking an order of abatement in the Superior Court of the State of Vermont. *Napro Development Corporation v. Town of Berlin,* 376 A.2d 342 (1977). Given the fact that local boards are endowed with the statutory power to define what constitutes a public nuisance, the Board of Selectmen of the town of Berlin attempted to equate obscenity with lewd and indecent writings which were recognized at common law as a common-law crime, hence, a public nuisance. The Supreme Court of Vermont in rejecting the argument of the town of Berlin held that an activity to be considered a public nuisance must disrupt the comfort and convenience of the public by affecting some general interest. The central basis of the public-nuisance concept is interference, and the fact that even some significant portion of the public disapproves of purportedly indecent behavior, cannot raise that private conduct to a level sufficient to constitute the requisite interference. While noting that statutory schemes specifically dealing with materials of an obscene nature as a public nuisance may meet constitutional muster, the common law of public nuisance may not be used to both define the standards of protected speech and to serve as the vehicle for its restraint. The Court concluded that the concept of public nuisance is too vague and amorphous to employ in circumstances where its application might intrude in the arena of speech and expression protected by the First and Fourteenth Amendments to the United States Constitution and the Vermont Constitution. Books and films are entitled to protection until there is a judicial determination that an item is obscene as prohibited by State law which meets the constitutional standards set forth in *Miller v. California,* 93 S.Ct. 26. □

Passaic obscenity law is not vague or preempted

The Law Division of the Superior Court of New Jersey in *Expo Incorporated v. City of Passaic,* 373 A.2d 1045 (1977), upheld a Passaic City ordinance which provides:

> It shall be unlawful for any person, organization, or corporation to maintain *** in the City of Passaic that shall engage in or allow, permit, or suffer in or upon the premises any obscenity, lewdness, immoral indecent acts or activity and any acts that would arouse the sexual desire of others, or allow, permit, or suffer the premises to be conducted in such a manner as to become a nuisance.

Plaintiff, the operator of a go-go juice bar, attacked the ordinance in an effort to recover damages against the City for closing down plaintiff's business prior to conducting a hearing. In denying relief to the plaintiff, the Court held that state preemption of the subject of obscenity was limited to obscene materials. Distinguishing live entertainment on the basis that it varies from place-to-place and from night-to-night the Court allowed the local ordinance to stand.

Plaintiff also attacked the ordinance as being unconstitutionally vague. Citing *State v. DeSantis,* 323 A.2d 489 (1974), the court in *Expo* noted that the New Jersey Supreme Court had construed the word "obscenity" in the State Obscenity Laws of 1971 to mean "patently offensive representation or depictions of ultimate sex acts, normal or perverted, actual or simulated, in patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." The Court reasoned that this saving interpretation should extend to all legislation using the word "obscenity," both State and local. □

Florida massage and lewdness statutes held unconstitutional

In *State v. Bales,* 343 So.2d 9 (1977), the Surpreme Court of Florida held that Florida statutes regulating *massage for fee without a license* and regulating *lewdness* are not overbroad or vague, and are related to the health and welfare of the community.

The *massage statute,* Section 480.02(1), Florida Statutes, states in part, "It shall be unlawful for any person . . . to engage . . . or attempt to practice massage for a fee, or for a gratuity . . . ." Initially, the trial court held that the definitions of masseur were "vague, overbroad and an inordinate use of the police powers . . . ." Upon the State's appeal, appellee argued that the phrase, "for a gratuity," in Section 480.02(1) would allow the statute to trespass upon the enjoyment of sexual relations between married couples; but the Supreme Court viewed the definition of "gratuity" as limited to a "tip" and not including "for free."

The *lewdness statute,* Section 796.07(3) (a), Florida Statutes, states, "It shall further be unlawful in the state: (a) To offer to commit . . . or engage in, prostitution, lewdness, or assignation." (Lewdness is previously defined to include any indecent or obscene act.) The trial court, here, did not determine the statute vague; and upon appellee's cross-appeal, the Supreme Court upheld the lower court's determination and statute's constitutionality, although remanded this second count for a further finding of fact. □

COURT BRIEFS...

Support of illegitimates limited

The Ohio Supreme Court in a 4-3 decision reaffirmed the common law rule that the biological father of a child cannot be held for its support where the mother during pregnancy contracts marriage with another man who marries her with full knowledge of her condition and thereby consents to stand in *loco parentis* to such child and to being the father of the child. The dissent points out that the majority holding penalizes the child by limiting its possible sources of support, and the State, by increasing the possibility that the child will become a ward of the State, while it protects the natural father from the consequences of his meritritious acts. The dissent further noted that the conclusive presumption implicit in the majority opinion possibly constitutes a denial of Due Process under the Fourteenth Amendment. *Hall v. Rosen*, 363 N.E.2d 725.

Cohabitation no automatic bar to alimony

The District of Columbia Court of Appeal has held that alimony payments are not subject to being terminated on the ground that the divorced wife was living with an individual and having sexual relations with him in the absence of evidence that the former husband was unable to pay the amount previously decreed or that the former wife was in any lesser need for alimony payments. It is established doctrine that a subsequent remarriage may be a proper basis upon which to terminate alimony payments. The court stressed that this ruling was not to be taken as in any way condoning cohabitation after divorce. *Alibrando v. Alibrando*, 375 A.2d 9 (1977).

Rights of rape victim protected

Division Two of the Court of Appeal of Washington State ruled that a defendant charged with rape is not denied procedural Due Process by application of a law which makes inadmissible evidence of the victim's past sexual behavior when such evidence is sought to be used on the issue of the victim's credibility or to prove the victim's consent.

The law interpreted by the court provides for a pre-trial motion whereby defendant may attempt to show that the evidence is relevant to the issue of the victim's consent and that the probative value of the evidence outweighs the danger of undue prejudice. *State of Washington v. Blum*, 561 P.2d 226 (1977).

Adultery will not justify murder

The Supreme Court of Georgia has held that the defense of justifiable homicide is not available to a defendant who takes the life of an adulterous spouse or that spouse's illicit lover, even in those instances where a man discovers his wife in an adulterous act. *Berger v. State*, 231 S.E.2d 769 (1977).

Child custody and cohabitation

The Appellate Court of Illinois for the Second Appellate District has ruled that a divorced mother's cohabitation with her boyfriend and possible sexual relationship is not relevant to the question of child custody unless it is shown that the relationship has a negative effect on the children. While conceding the desirability of upholding the family as an institution, the court noted that the alleged indiscretion on the part of the mother, which has since ended, did not necessitate a change in custody. *Hendrickson v. Hendrickson*, 364 N.E.2d 566 (1977).

All sodomy is not alike

In interpreting the expanded definition of "sodomy" contained in New Mexico's sodomy statute, the Supreme Court of New Mexico has held that the statute allows prosecution for different kinds or acts of sodomy. The court, thus, upheld the conviction of defendant for four counts of sodomy upon evidence that he had penetrated the mouth of the victim three separate times and her anus once. *State v. Elliott*, 557 P.2d 1105 (1977).

Obscene language protected

The Supreme Court of Louisiana has ruled unconstitutional an ordinance which made criminal the use of obscene, abusive, or insulting language to or in the presence of a police officer. In the absence of evidence that the defendant's remarks tended to incite an immediate breach of the peace, the freedom of speech will extend to protect even obscene language. *City of New Orleans v. Lyons*, 342 So.2d 196.

Lack of consent is issue in "unnatural and lascivious" case

Defendant Reilly was prosecuted under the Massachusetts statute prohibiting "unnatural and lascivious acts." The victim testified to being driven by the defendant under threat to a secluded spot where she was forced to commit an act of fellatio on the defendant. The defendant did not testify on the ground that the case was one of mistaken identity.

Relying on the case of *Commonwealth v. Balthazar*, 318 N.E.2d 478 (1974), which held that consensual conduct in private could not be the basis for a conviction under this statute, the defendant requested an instruction to the jury that lack of consent was an element of the crime to be proved by the prosecution. The trial court refused the instruction.

The Commonwealth argued that consent is a defense which must be put in issue by the defendant before the prosecution has a duty to prove lack of consent. It was argued that since the defendant did not defend on the theory of consent the instruction was properly refused by the trial court. The Court of Appeals reversed. *Commonwealth v. Reilly*, 363 N.E.2d 1126 (1977).

The Court held that consent is not an affirmative defense to be raised by the defendant. Instead, the Court held that lack of consent is an element of the crime which must be proved by the prosecution and which must be submitted to the jury.

ADMINISTRATIVE RULINGS...

Santa Barbara school district votes to protect gay students

On December 15, 1977, the Santa Barbara School District in California adopted an official policy of non-discrimination against gay students. Last September the board had adopted a resolution which specifically prohibited discrimination against school employees on the basis of sexual orientation. This latest resolution broadened this policy to specifically include students as well.

In its latest action, the board adopted a compliance mechanism for grievances brought by employees and students.

The Santa Barbara School District is 100 miles north of Los Angeles and employs 1,600 persons and has 16,000 students in grades Kindergarten through twelfth. □

Congress passes child porn bill

The House of Representatives unanimously voted final congressional approval of a bill making it a crime to produce pornographic movies or magazines involving males or females under the age of 16.

The bill also amended the Mann Act by making it a crime to transport males under 18, as well as females, across state lines for purposes of prostitution or other commercial sexual exploitation. □

Alaskan school district enacts homosexual ban

At its meeting in early January, the Copper River School District school board passed a resolution banning "moral turpitude" among school district employees. Board members agreed by a 5-2 vote that homosexuality and cohabitation are "inconsistent with decency, good order and propriety of personal conduct, and constitute 'unfitness to teach' in the district."

The ban, which went into effect on January 15, 1978, says:

"Any employee of the Copper River School District shall be dismissed from employment in the Copper River School District after due process, for engaging in homosexuality, lesbianism, or sodomy; or who openly declares him or herself to be a homosexual or lesbian and any employee of the Copper River School District who is found to be living in a state of cohabitation." □

Discrimination against gays banned in N.Y. executive order

Shortly after being sworn into office as New York Mayor, Edward I. Koch signed an Executive Order prohibiting discrimination on the basis of sexual orientation by all city agencies.

The order covers employment, housing, credit, contracts made by all agencies under the control of the mayor, including the city police and fire departments. The school system is not covered by the order because it is operated by an independent board.

Koch stated, "Discrimination is wrong and throughout my public life I have fought against all forms of discrimination. I intend, as mayor, to continue that fight." □

LEGISLATION...

Sexual orientation protections adopted in Aspen, Colorado

Aspen, Colorado has joined the ranks of over 40 other municipalities in this country in passing an ordinance which prohibits discrimination on the basis of sexual orientation. The ordinance forbids discrimination in housing, employment, and public accommodations.

Under this ordinance a complaint of discrimination is first filed with the local police department. Penalties provide for fines of up to $300 and/or imprisonment for up to 90 days. The ordinance also provides for reimbursement of attorneys' fees. □

Alaska legislature considers new penal code reforms

In 1899, Congress approved a criminal code for the Territory of Alaska which was based upon existing Oregon law. Many of these century-old Oregon-based criminal statutes are still on the books in Alaska despite the fact that Oregon enacted a new penal code in 1973.

For 11 years the Alaska Legislature has attempted to pass a new penal code. In 1976 it established a permanent Alaska Code Commission and also set up a blue-ribbon Criminal Law Revision Subcommission to prepare a draft of the proposed criminal code before December, 1977. The Subcommission has prepared the draft which is currently being considered by the Legislature.

The proposed code decriminalizes private sexual acts between consenting adults, setting the age of sexual consent at 16.

In the commentary which accompanies the draft revision, the Subcommission recognized that "large numbers of people share with them the strong sentiment regarding the immorality of the conduct which would no longer be criminal under the Tentative Draft." It eliminated them, nevertheless, on the following grounds:

1) Any statute prohibiting private sexual conduct between consenting adults is subject to constitutional attack in light of the court's holding in *Ravin v. State*, 537 P.2d 494, 504 (Ak., 1975), that "... citizens of the State of Alaska have a basic right to privacy in their homes under the Alaska Constitution." Furthermore, the Alaska Supreme Court indicated *in dicta* in *Harris v. State*, 457 P.2d 638, 645 (Ak., 1969), that some of the members of that court might invalidate the sodomy statute on privacy grounds.

2) In the State of Alaska, there is no history of any prosecution under the old statutes prohibiting adultery, cohabitation, or sodomy.

3) The Subcommission also recognized that "there are limits beyond which utilization of criminal sanctions loses its meaning and may become destructive to social interest as a result of capricious special applications, constitutional infringements, or non-enforcement leading to general contempt for law or misallocation of limited law enforcement resources." □

SEXUAL SOLICITATION (Continued from Page 1)

The Modern Period & Section 647(a)

As we move to the modern period, one is struck by the way in which most modern enactments in the area of open lewdness and of solicitation have all but forgotten that preservation of the public peace was the social purpose behind the older laws. Rarely under the modern statutes is there a requirement that there be a threat to public order in order to sustain a conviction, nor need the solicitation be "persistent" or continuing. Yet, if the purpose of these statutes is no longer to protect the public peace, it becomes relevant to inquire as to what other valid state purpose warrants their enactment. This is not too hard to do in the case of Section 647(a) of the California Penal Code, the subject of this brief. In discussing this provision in 1967 in the case of *People v. Dudley,* the Appellate Department of the Los Angeles Superior Court declared:

> We cannot believe the Legislature intended to subject innocent bystanders, be they men, women or children, to the public blandishments of deviates so long as the offender was smart enough to say that the requested act was to be done in private. Nor do we feel the legislators were unaware of the open, flagrant and, to decent people, disgusting solicitations of sexual activity which have occurred on the public streets of some of our cities. Moreover, it is not to be forgotten that to some a homosexual proposition is inflammatory, which public utterance might well lead to a breach of the peace.[2]

The *Dudley* court, as we can see, did raise the question of a breach of the peace, but more as an afterthought. Its emphasis was on the affront and disgust which homosexual solicitations allegedly engender on the part of "innocent bystanders." This raises new and important questions. Analogizing from the common-law crime of open or public lewdness, the framers of sexual solicitation statutes on the order of Section 647(a) have always proceeded on the assumption that these solicitations constituted open and flagrant conduct, proscription of which was required by the public interest. Thus, Section 647(a) and kindred statutes give lip-service to the idea that they protect the public from offense and outrage. Yet a moment's reflection should make it evident that location *per se* does not necessarily convert a conversation otherwise private into a public one. It is illogical to make the *locus* of the solicitation the sole determinant as to whether it is public or private in character. A private conversation between two persons, both of whom are attending a large public gathering, is no less private simply because it takes place in the midst of a public conclave. Unless overheard by others, such a conversation is, in fact, private, involving only the two persons privy to it. The same is true of the solicitations being considered here, yet the law arbitrarily denominates them as "public" simply because they occur in a public place. Like all private conversations, they are heard only by the persons to whom they are addressed, and, in the vast majority of cases, they offend no one.

That the foregoing is true is amply documented by the evidence adduced in the scholarly and respected study of the subject which appeared more than a decade ago in the *UCLA Law Review* under the title, "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County." The foreword to this was written by The Honorable Justice Stanley Mosk.[3] The authors of this study found:

> that most homosexuals who are "cruising" for partners do not brazenly solicit the first male; rather, they will employ glances, gestures, dress and ambiguous conversation to elicit a promising response from the potential partner before an unequivocal solicitation for a lewd act is tendered.[4]

Michael Schofield, the noted British sociologist, has stated that "the great majority [of homosexual solicitors] are merely trying to find out if the other man is homosexual by the use of words or an inquiring look which would go unnoticed by the man who is heterosexual." He continues:

> If the other man does not respond, the homosexual will go away and seek a sexual partner elsewhere. A homosexual would be stupid to importune persistently and pressingly as he is well aware that the vast majority of men look upon homosexual activities with repugnance.[5]

Evidence abounds that homosexual solicitation is extremely circumspect and cautious in character, and that, with few exceptions, the conduct is so subtle in its use of indirection, innuendo, and subterfuge, that only the cognoscenti are aware of what is going on. In sum, the stereotype which is frequently portrayed of a brazen and flagrant homosexual accosting and affronting defenseless respondents who are repelled by his conduct is largely myth, which, like other myths regarding homosexuals and homosexuality, is frequently repeated to justify repressive and unjust laws. In truth, the very methods which have to be employed by the police to apprehend persons for homosexual soliciting is proof of the inoffensiveness of the conduct. As the well known Wolfenden Committee stated more than twenty years ago: "This particular offense necessarily calls for the employment of plain-clothes police if it is to be successfully detected."[6] If this be so, these are certainly not the methods customarily required to apprehend persons whose conduct is alleged to be so open and blatant that it constitutes an affront to public decency. Yet it is only through the persistent and diligent use of police decoys and plain-clothesmen that arrests under sexual solicitation laws are at all possible. By its very nature the offense is a clandestine one, and it is almost invariably witnessed by only one person—the arresting officer—upon whose probity and integrity extraordinary reliance must perforce be placed. The *UCLA Report* stated:

> Most convictions . . . are based exclusively on the arresting officer's allegation that the defendant has made an oral solicitation for a lewd act. Prosecutions based on the police decoy's testimony are not often dismissed for lack of sufficient evidence . . . .
>
> Yet it is questionable whether convictions should be based exclusively on the oral testimony of the arresting officer. No crime is easier to charge or harder to disprove than the sex offense. In addition to lack of corroboration, the solicitation may be equivocal or unindicative of a firm intent to consummate the solicited act. When prosecutions are limited to credibility contests between defendants and arresting officers the likelihood of miscarriages of justice is evident . . .[7]

This is not the place to discuss the opportunities for "shakedowns" and/or extortions to which such unsavory law enforcement practices dispose.[8] The only point to be made is that the picture of homosexual solicitations limned by the court in *Dudley,* and on which its decision rested, is at odds with the facts. If protection against the alleged affront to public decency is the purpose of the solicitation portion of Section 647(a), then why is it necessary for almost all solicitation arrests to be police-initiated affairs? The UCLA investigators found "that communications from [private] citizens complaining about solicitations by homosexuals are rare."[9] In truth, this is an understatement. From the investigation and *Report on the Enforcement of Section 647(a) of the California Penal Code*

by the Los Angeles Police Department conducted by Barry Copilow & Thomas F. Coleman, it would appear that complaints from members of the general public for conduct violative of Section 647(a) are virtually non-existent. Of the 662 arrests cited therein, 642 were made by plain-clothes policemen, 15 by uniformed officers, and only 5 involved complaints from private citizens, of which 2 were actually private security officers. The remaining three complaints by private individuals were not for homosexual solicitations, but for lewd conduct of a heterosexual character.[10] In a follow-up study two years later by Chet R. Toy, the statistical breakdown showed a total of 29 arrests involving complaints, of which 22 involved homosexual conduct and 7 heterosexual. The complainants in all 22 homosexual cases were plain-clothes vice officers. Only three arrests of heterosexual offenders were made by plain-clothes police. Three other heterosexual arrests were made by uniformed policemen, and the seventh heterosexual case involved the lone complaint from a private citizen.[11]

To those who might conclude that private citizens seem to be loath to make complaint, the evidence from the same studies is clear. The Toy investigation disclosed that there is no reluctance on the part of private citizens to complain about violations of Section 314.1 of the California Penal Code, which involves indecent exposure. Although the sample used for 314.1 offenses was small, the fact that 75% of the cases involving indecent exposure were initiated as a result of complaints from private citizens indicates that private individuals will complain when the circumstances warrant.[12]

Section 647(a)

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

In short, it would appear that Section 647(a) prohibits "offensive" solicitations which do not offend, and protects from public affront persons who are not affronted. It protects phantom victims from phantom injuries. This is not to deny that there are occasions when private citizens may be offended by the soliciting prohibited by 647(a). This, however, in no way obviates the provision's manifest overbreadth, which is discussed at greater length below.[13] Suffice it to say here that Section 647(a) cannot pass constitutional muster merely by a showing that it protects an occasional affronted person. Where, as in this case, the state's ostensible rationale for the existence of this penal statute is found, for the most part, to be wanting, the law cannot be saved by pointing to the occasional circumstance when the provision can be constitutionally justified. To permit overbreadth under such conditions would make a mockery of constitutional protection.

In actual fact, however, the overbreadth of the solicitation portion of 647(a) is more serious than anything suggested by the foregoing, because it is overbroad even if one accepts as true the factual postulates described by the court in *Dudley*. We must assume that even the *Dudley* court would have been prepared to admit that there are *some* homosexual solicitors whose importuning involves no "innocent bystander"and is offensive to no one. What state policy warrants bringing those solicitations within the penal ambit of 647(a)? Nothing in 647(a) distinguishes between solicitations which affront or risk affronting others and those which offend no one and create no risk of doing so. Thus, Section 647(a) must be considered overbroad in its solicitation aspects, even if we accept the factual assumptions made by the court in *Dudley*.

At this point it would be repetitious to iterate the arguments made by other parties to this litigation regarding the discriminatory police enforcement which characterizes Section 647(a). Even a cursory perusal of the material already submitted demonstrates that, though Section 647(a) is phrased so as to be applicable to "lewd or dissolute conduct"of either a homosexual or a heterosexual character, it is, *de facto*, used almost exclusively to suppress homosexual solicitations or conduct. This is not the kind of evenhanded administration of the law which our jurisprudence presupposes.

The Import of the California Consenting Adults Statute

So far we have been discussing 647(a) in terms of the situation prior to the enactment of the California Consenting Adults Statute, the so-called Brown Act, which became effective on 1 January 1976.[14] It now becomes necessary to examine this section in the light of this legislation, which, among other things, legalized all private sexual conduct–heterosexual and homosexual–between consenting persons 18 years of age or above.The impact of this law is central to any consideration of the present validity of 647(a). Here it should be noted that, when the Brown bill was under active consideration by the Legislature, lobbyists for the police, who opposed the measure, appeared before the legislative committees to which the bill had been referred in order to register their opposition. One of the principal arguments put forward by those police lobbyists in opposition to the bill was that the sodomy law reform which the measure proposed would undermine the legality of Section 647(a). One can admire the legal prescience of these police spokesmen whilst simultaneously wondering why they deemed the preservation of the solicitation provisions of 647(a) so vital. Were they unaware of the fact that more than one third of the states have either never had laws punishing simple, non-commercial sexual solicitations, or have repealed those they once had?

No doubt the fears of the police lobbyists were, from their viewpoint, justified, for enactment of the Brown Act did destroy the one and only valid ground on which the solicitation portions of Section 647(a) rested. Prior to Brown it was always possible to contend that most of the solicitations which led to arrests under 647(a) were for conduct which was illegal under the laws of California. This was certainly true of homosexual solicitations, virtually all of which were for conduct that was illicit prior to the Brown Act.[15] Consequently, any solicitation to engage in such conduct constituted a request to commit a crime, and its punishment could be justified on those grounds. In fact, prior to the Brown Act, it could have been argued that the apparently discriminatory enforcement of 647(a) as between homosexual and heterosexual offenders merely reflected the fact that homosexual solicitations were, in almost all cases, requests to commit illegal acts, and that the law-enforcement authorities were exercising a quite-proper discretion in concentrating their efforts under 647(a) against solicitations to commit criminal offenses.[16]

With the advent of Brown, all such reasoning must fall by the wayside, for we are now confronted with the stark fact that most of the solicitations to engage in homosexual relations,

just as in the case of solicitations to engage in heterosexual relations, are for conduct which is perfectly legal, unless, of course, either one of the parties is under the age of 18. This new law is in many ways inconsistent with, if not in direct conflict with, the rationale behind the solicitation portions of Section 647(a). For, if the enactment of the Brown Act means anything at all, it must, at the very least, represent official recognition by the state of California that continued punishment of homosexual conduct when it takes place in private constitutes a grave injustice to a significant segment of its citizenry, and that no legitimate state purpose is served by continuing to punish it. Even the most cursory perusal of the public reform movement which led to the ultimate passage of the Brown Act—which extended over a period of some seven or eight years prior to its final enactment—discloses that the intention of the reformers in campaigning for the Brown bill was to redress grievances that were common to both the then-existing sodomy law and Section 647(a). This was also the intention of legislators who voted for the bill's passage. Amongst the several grounds advanced for passing the Brown Act was the fact that then-existing penal law, which punished virtually all forms of homosexual conduct, was a source of numerous social evils, such as blackmail, extortion, and sadistic violence. A strong desire to reduce, if not to eliminate, these evils unquestionably entered into the considerations of those who fought for the Brown bill both outside and within the Legislature. Yet the existence of the solicitation portion of Section 647(a) stands as a direct invitation to the very blackmail, extortion, and violence, the eradication of which was one of the main reasons why the Brown Act was adopted.[17] To remove criminal sanctions from the conduct itself, yet to continue to punish solicitations to engage in the now-licit conduct, is not only a masterpiece of inconsistency, but provides the blackmailer, the extortionist, and those disposed to violence against homosexuals with a substitute vehicle for their operations. Under 647(a) the blackmailer or extortionist need only threaten to denounce his victim for "having propositioned" him, while the homosexual's assailant will justify his conduct, often successfully, on the same grounds. It was never the intention of those who voted for the Brown bill to create such an anomaly and to allow its obvious purposes to be nullified by any provision in 647(a). Where, as here, there exist two statutes which are inconsistent, it has been a commonplace of our jurisprudence for courts to hold that the older of the two laws must yield to the more recent enactment for the evident reason that the public policy reflected in the newer enactment is presumed to represent the current intention of the Legislature and was meant to supersede anything inconsistent with it.

"To remove criminal sanctions from the conduct itself, yet to continue to punish solicitations to engage in the now-licit conduct, is not only a masterpiece of inconsistency, but provides the blackmailer, the extortionist, and those disposed to violence against homosexuals with a substitute vehicle for their operations."

The Constitutional Issues

There are, however, stronger reasons for striking down Section 647(a) either in whole or in part, and these derive from the constitutional issues which the passage of the Brown Act posed. For once it is recognized that the enactment of Brown transformed the solicitations involved in Section 647(a) into speech with a potential claim to constitutional protection, rather than mere requests to commit illegal acts, it becomes necessary to examine the extent to which these verbal communications are constitutionally safeguarded. A great deal of attention has been devoted by the Supreme Court of the United States to delineating the line between speech which enjoys constitutional protection under the First Amendment and that which is outside of its protection. In general, all speech falls under the Amendment's protective umbrella, but the protection is not absolute, for there are three exceptions. The first need not concern us here. It has to do with speech which is libelous. But the other two exceptions are central to the present case. The first of these involves what originally came to be known as the "clear-and-present-danger" rule. It was first enunciated by Mr. Justice Holmes in 1919 in *Schenck v. U.S.* He defined it thusly:

> The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[18]

Since the First Amendment, via the Fourteenth, has been held to be applicable to the states as well as to the Federal Government, Holmes' statement also includes "substantive evils" which a state legislature as well as Congress "has a right to prevent." As is evident from this definition, the clear-and-present danger test was directed primarily against the advocacy of conduct which was criminal. The rule lasted for about forty years, its last application having been the Supreme Court's decision in *Terminiello v. City of Chicago* in 1949, which overturned defendant's conviction for breach of the peace because the trial judge had instructed the jury that anyone could be found guilty of this offense if the language he used "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[19] Writing for the majority, Mr. Justice Douglas declared:

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance, or unrest.[20]

Eventually, however, the clear-and-present-danger standard gave way to a much narrower test, which has come to be known as the "fighting words" rule. This was first enunciated by the court in 1942 in *Chaplinsky v. New Hampshire,* where it held that, in order for speech to lose its First Amendment protection as "fighting words," it must contain expressions "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[21] An indication of how narrow is the exception to constitutional protection based on the concept of "fighting words" is illustrated by the Supreme Court's decision

in *Lewis v. City of New Orleans* in 1974, in which the following New Orleans ordinance was found to be facially invalid:

> It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty.[22]

Defendant Lewis had been arrested under the ordinance for having said to a policeman who had apparently arrested her son, "You God damn mother-fucking police–I am going to Giarrusso [the police superintendent] to see about this."[23] As Mr. Justice Powell said in his concurring opinion,

> It is unlikely . . . that the words said to have been used here would have precipitated a physical confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered. The words may well have conveyed anger and frustration without provoking a violent reaction from the officer. Moreover, . . . a properly trained officer may reasonably be expected to "exercise a higher degree of restraint" than the average citizen, and thus be less likely to respond belligerently to "fighting words."[24]

In assessing the character of Petitioner's solicitation in the present case, it may be worth noting that, like virtually all the solicitations punished under 647(a), his was made to a police officer. Also relevant in this regard is one of the earliest cases that led to the development of the "fighting words" doctrine. This was *Cantwell v. Connecticut*, one of several Jehovah's Witnesses cases decided by the Supreme Court in the 1940's.[25] This decision struck down a state conviction of a defendant who, unlicensed, had gone door to door accosting strangers in order to play phonograph records of blatantly inflammatory anti-Catholic tracts, the substance of which grossly offended the religious and moral sensibilities of his mainly Roman-Catholic listeners.

In short, the import of the afore-mentioned cases would appear to dispose of the court's reasoning in *Dudley*, which upheld the solicitation provisions of 647(a) on the ground that these requests offended and disgusted those to whom they were made.

We come now to the second exception to the general protection that speech enjoys under the First Amendment. This involves speech which is obscene. Here one is immediately struck by the fact that Section 647(a) does *not* in fact punish lewd or dissolute or obscene solicitations at all. It requires only that the solicitation be for *conduct* which is lewd or dissolute–something quite different. It may well be that those who drafted 647(a) perceived no difference, but it really requires no great stretch of the imagination to recognize that a solicitation is not necessarily lewd or dissolute simply because the conduct which it requests is lewd or dissolute. There are a multitude of subjects which many people find inherently lewd or dissolute, but which have nevertheless to be discussed because of the demands of everyday life. These discussions *about* lewd subjects are themselves not necessarily lewd, otherwise a discussion about adultery would have to be considered adulterous. A solicitation to commit a lewd act may be lewd or it may not be lewd, but this depends on the character of the solicitation, not on the nature of the act solicited. Speech is not automatically contaminated by its subject-matter despite the incredible assertion to the contrary by the court in *Silva v. Municipal Court.*[26]

The matter is compounded by the fact that neither 647(a) itself nor the decisions under it provide the least guidance as to the meaning of "lewd" or "dissolute." The same must be said for its companion section, 647(d) of the same statute, which punishes anyone "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." Significant is the fact that in none of the prosecutions involving solicitations for homosexual conduct under either 647(a) or 647(d) do the People appear to have attempted to prove that the solicitation, as distinct from the conduct solicited, was in fact "lewd" or "dissolute" or "lascivious." A reading of these cases suggests that the courts have simply proceeded on the assumption that the solicitation was lewd, dissolute, or lascivious, probably because the solicited conduct was then illegal. In some instances, the court expressly stated that, because the conduct solicited was illegal, it was, *ipso facto*, lewd. In other cases this was not formally expressed.[27]

People v. Dudley and *People v. Mesa*, it is true, found the solicitations illegal on the ground that requests from "deviates" to engage in homosexual relations affronted, outraged or disgusted "innocent bystanders."[28] According to this reasoning, a solicitation would appear to be lewd or dissolute under 647(a) if it outraged or disgusted others. The problem with this is that, absent obscenity or "fighting words," outrage or disgust on the part of auditors does not remove speech from First Amendment protection. Furthermore, since it is the solicitation which is being punished, it is the language of the solicitation and not the character of the conduct solicited which must be the test of the solicitation's obscenity. Outrage or disgust, however, cannot in any reasonable sense be the test of the obscenity of the soliciting language. There is the same want of logic in the test applied in *Dudley* and *Mesa* as there was in the attempt to impute lewdness or dissoluteness to the solicitation from the character of the conduct solicited. For many people, the mere mention of the term "homosexual" or "homosexuality" sends shivers down their spines and engenders intense feelings of disgust, revulsion, or anger, no matter in what context the subject is raised. If these feelings of disgust, revulsion, or anger were to be made the controlling element in determining the obscenity of a conversation or writing–and hence dispositive of its legality under 647(a)–then Alfred Kinsey's *magnum opus* would have had to be suppressed as obscene and could never had been published. Entire areas of human thought could never be openly discussed because of the outrage or disgust which their ventilation would generate. (This writer once heard it suggested that what went on in the Nazi concentration camps should never be discussed because it was too revolting for "decent" people to hear.) In fine, if subjects which affront or revolt some people are to be banned –presumably on the theory that this makes them obscene–the consequences for our free society and the First Amendment are too ominous to elucidate.

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Obviously, something more is necessary than the mere fact that some people consider certain subjects offensive or

disgusting in order to convert an otherwise lawful conversation into an obscene one open to criminal sanctions. Here, as indicated, 647(a) offers no guidance in determining what this may be, nor have the courts succeeded in filling the void. Thus, besides being overbroad because it punishes all solicitations whether they be obscene or not, 647(a) is also vague in that it provides no reasonable standard for a judicial determination of what solicitations are proscribed. Does the statute punish only obscene solicitations, or only solicitations to engage in illegal conduct, or both or none of these?

Admittedly this vagueness was of no moment in the days before the Brown Act for the simple reason that, although the homosexual solicitations under which defendants were convicted were never demonstrated to have been lewd or dissolute in fact, at least in most instances they were solicitations to engage in prohibited conduct, and therefore were open to punishment under the general legal rule that allows for punishment of solicitations to commit crimes. Thus, in pre-Brown days, the final outcome of these cases would have been the same whether the solicitations had been found to be obscene or not. But the enactment of Brown destroyed the ability to convict for these solicitations on the ground that they constitute requests to engage in prohibited conduct, and left as the only possible ground for their proscription their lewdness, which, as indicated, has never been demonstrated.

Reference has already been made to the inconsistency between 647(a) and the Brown Act. This inconsistency runs deeper than that already discussed for it involves something akin to due process or equal protection. Once homosexual conduct has been legalized by the state, due process would seem to require that the state afford a reasonable opportunity to all persons to communicate their desires to engage in the now-licit conduct, otherwise the newly-legalized area of conduct would, in large measure, be illusory. One does not meet consensual partners for any form of licit sexual relations by waiting silently in one's room for a sexual partner to appear. The right to engage in homosexual relations is no different than the right to engage in heterosexual relations. It requires social contact and interpersonal communication for that right to be implemented. Of necessity, this implementation must be allowed in public as well as in private, otherwise the right to engage in the conduct—which, conceded, is licit only when it takes place in private—would largely be frustrated. That is to say, *implementation* of the right created by Brown is a matter separate and distinct from the right itself, and cannot be governed by the fact that the conduct legalized by Brown may be performed only in private. For the law sets the same limitations of place on heterosexual conduct as on homosexual conduct, yet the implementation of the right to engage in lawful heterosexual conduct is never questioned, whether that implementation occurs in public or in private. Because no penalties attach to the man who asks a girl to go to bed with him, heterosexual solicitations are tendered in many different places and in a variety of situations, ranging all the way from restaurants, where men not infrequently propose sexual relations to the waitresses, to airplanes, where they proposition the hostesses. But because homosexual conduct has, until the Brown Act, been savagely repressed, and because it continues to be condemned—although less so—by important segments of society, the homosexual counterparts of these heterosexual solicitations have had to be made in the most furtive and clandestine manner, usually at a few select locations, known only to a minority of homosexuals, and frequented only by *some* of these together, of course, with the police. So long as the conduct for which these homosexual solicitations were made remained criminal, there was little legal redress which could be offered to persons such as the Petitioner in the present case. But if the newly established right to engage in homosexual relations in private means anything at all, it must carry with it the same ability to communicate to others the desire to engage in those relations which heterosexuals have always enjoyed with respect to heterosexual relations. This is a right which attaches to all lawful conduct as a matter of course. This means the right to employ reasonable means of communication to express the desire to engage in the lawful conduct, *whether that communication be made in a public or in a private place.*

> "Once homosexual conduct has been legalized by the state, due process would seem to require that the state afford a reasonable opportunity to all persons to communicate their desire to engage in the now-licit conduct, otherwise the newly-legalized area of conduct would, in large measure, be illusory."

This is *not* to suggest that every solicitation, no matter where or how it is made, is legal so long as the conduct it solicits is legal. To impute legality to a solicitation simply from the legality of the conduct solicited is no better than to hold a solicitation obscene when the conduct solicited is obscene. A sexual solicitation, whether homosexual or heterosexual, shouted out before a large audience at a public meeting might well be found obscene, even though the same solicitation made under different circumstances would not be so considered. Again, a sexual solicitation made privately to only one auditor may still be obscene because of the vulgarities of the language in which it was couched. In short, there are a host of different factors—time, place, circumstances, language, to mention only some—which go to the determination of the obscenity of any particular solicitation.

Obviously, where a solicitation is obscene, it is devoid of First Amendment protection, even though the conduct solicited is perfectly lawful. But nothing in the instant record even remotely suggests that this was the case here. How else but in the way he did could the Petitioner have communicated to Officer Peters his wish to engage in legal homosexual conduct? The language he employed was simple, courteous, friendly, and direct. While the term "cocksucking" is not one that is used in so-called "polite" society, it happens to be the all-but-universal term used in common parlance to describe the conduct Petitioner had in mind. Would it have been any less lewd had he resorted to some Latin euphemism to describe the conduct in question—the way Victorian writers once attempted to hide their meaning when writing about sex a century ago? As the U.S. Supreme Court, through Mr. Justice Brennan, succintly declared more than twenty years ago, "Sex and obscenity are not synonymous."[29]

But conceding that there will be those who will consider Petitioner's solicitation to have been obscene, and thus without constitutional protection, this in no way destroys his right to challenge the constitutionality of Section 647(a). The Supreme Court's decisions in *Lewis v. City of New Orleans, supra,* and in *Gooding v. Wilson,* the case on which the *Lewis* decision

was based, make this quite clear. Speaking for the court in *Gooding*, Mr. Justice Brennan declared:

> It matters not that the words . . . used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," *Id.* 486 . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.[30]

Thus, in Section 647(a), we have a statute which indiscriminately punishes *all* solicitations, not merely the lewd or dissolute ones. This means that it brings within its prospective reach speech which is protected by the First Amendment and speech which may constitutionally be punished–a patent case of facial overbreadth. As noted before, the use it makes of such terms as "lewd" and "dissolute" provide no clue as to how wide a zone of criminality the Legislature intended to establish. Certainly a state may not evade its manifest First Amendment obligations by loosely sprinkling a statute with terms such as "lewd" or "dissolute" in the expectation that these will provide escape from constitutional scrutiny. Yet this would appear to be the case here. Whatever the reasons for these infirmities, we are confronted, as we have said, with a law that is both vague and overbroad, either one of which conditions warrants striking it down as constitutionally defective. Their conjunction makes the case for invalidity doubly strong. And where these defects involve a law penalizing speech, the reasons for striking it down are stronger yet. As the Supreme Court stated in 1963:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.[31]

If, then, Section 647(a) must be considered both vague and overbroad, what, if anything, is there left which can constitutionally be saved with respect to its solicitation portion? What of the fact that, even with the enactment of Brown, there remain *some* solicitations which are for sexual conduct intended to be carried out in public places – conduct which can be presumed to be illegal under the open lewdness aspects of 647(a) or under Section 314.1 (indecent exposure) even after the Brown Act? May not the solicitation portion of 647(a) be saved by judicially construing the statute so that it reaches only solicitations for conduct which continues to be illegal? There are four objections to any such effort at judicial salvage. The first is that, to uphold the statute by limiting its scope to solicitations for illegal conduct cavalierly ignores the plain requirement of the section that the solicitation be for conduct which is "lewd" or "dissolute," not for conduct which is illegal, and the burden of some of the preceding pages has been to demonstrate that there is no congruity between lewdness and illegality. Conduct may be illegal, yet neither lewd nor dissolute, and conversely, it may be lewd and dissolute–under properly defined standards –yet still legal. To limit the ambit of 647(a) to solicitations to engage in unlawful conduct would be to create a class of punishable solicitations essentially different from those proscribed by the statute. While courts have been known to indulge in so-called "judicial legislation," the practice reflects no credit on the judicial process.

The second objection to this form of judicial salvage is that it would produce a law incompatible with the entire history of solicitation laws in our Anglo-American juris-

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prudence and irreconcilable with the rationale that has traditionally justifed the enactment of such statutes.The offense of solicitation, like those of conspiracy and of attempting to commit a crime, belong to a class of offense known as "inchoate" crimes, because they punish conduct which is not fully consummated. The activities constituting inchoate offenses are punished in order to discourage planning or preparation for certain criminal acts. For obvious reasons the preparations which are inchoate offenses are intended to punish are, by definition, preparations to commit serious crimes, such as felonies and serious misdemeanors. One does not hear of indictments for conspiracy to litter the streets, nor of prosecutions for attempting to park a car in a prohibited area. The same is true of solicitations. Although many states do not have sexual solicitation laws of the kind under discussion here, virtually every jurisdiction has the more general type of solicitation statute which punishes solicitations to commit crime in general. But all of these so-called "general" solicitation statutes are limited in some manner so that they apply only to solicitations to commit certain named offenses or to certain types of crimes–in every case only the more serious ones. Viewed from this perspective, it is apparent that the sexual solicitation statutes are a very special form of solicitation law. In that they punish solicitations to commit very minor offenses, they are anomalies.[32] Consequently, for this Court to attempt to save the solicitation portion of 647(a) by limiting its application to requests to engage in illegal conduct would mean that a person could be arrested for *suggesting* to another person in public that he park his car near a fire hydrant. In short, to avoid reducing the law to an absurdity, this Court would have to indulge in more substantial judicial surgery, such as rewriting the statute so that its provisions applied only to solicitations for conduct which was both obscene *and* illegal. But such a sexual solicitation law would be absolutely *sui generis* in that no American jurisdiction has a solicitation law of such a character. At the very least, the decision whether or not to have such a statute should be made by the Legislature, not by this Court.

The third objection to a judicial rewriting of Section 647(a) is a very practical one. It would throw the courts into a morass

 (Continued from Page 15)

of interpretative problems involving the meaning of the terms "public" and "private." This is because, in most cases, the question of the legality of the solicited conduct rests on whether it was intended to take place in private or in public.[33] Normally courts have no difficulty determining whether conduct is public or private in character. But this is only because in these cases they are dealing with actual, consummated conduct. Here there would be no actual acts at all, merely putative ones, the public or private character of which would depend on the nuances of the words the solicitor used. Problems too numerous to detail would arise even when the solicitations were apparently unambiguous. Defendant might propose that the conduct be performed in a park, one portion of which was public, the other private. Which section did he have in mind? Again, the language of 647(a) speaks of a place "exposed to public view," but this could create difficulties because some places are exposed to public view by day but not at night. What point in time did the solicitor intend? Then there would be the truly ambiguous solicitations where no actual location was even mentioned. Even when these interpretative problems are surmounted, the question arises whether the penal law should permit the difference between criminality and legality to turn on such fine distinctions, particularly when it is appreciated that nothing but peaceful words are involved. Should *requests* to engage in conduct which is not inherently evil—we must accept the Legislature's conclusions in this regard when it passed the Brown Act —but which is illegal only because it was intended to take place in the wrong location, be subject to punishment? Should the man who merely *solicits* such conduct be forced to register as a sex offender and to suffer all the scarifying sequelae for the rest of his life? How far can the criminal law go without demeaning itself? Is it not sufficient that the *conduct* is in any event punished should it actually take place in public?

We come now to the last and most compelling objection to any judicial construction which would cure 647(a). This is a constitutional one. To attempt to save Section 647(a) by limiting its reach to solicitations for conduct intended to take place in public violates the constitutional principle that "an overbroad statute which sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid, although in a non-First Amendment situation the Court would simply void its application to protected conduct."[34]

To summarize: Any attempt to save the solicitation portion of 647(a) would:

(1) Ignore the section's clear mandate that the conduct solicited be "lewd"or "dissolute."
(2) Criminalize solicitations to engage in conduct that constitutes very minor offenses, and thereby produce a statute unique in American jurisprudence.
(3) Raise a host of interpretative problems.
(4) Violate the constitutional rule which requires facially overbroad statutes involving First Amendment speech to be struck down in their entirety.

What, then, should this Court do? Fortunately, there are judicial opinions involving analogous statutes in two states, Colorado and Ohio, in both of which private consensual deviate sexual relations have been legalized. The National Committee for Sexual Civil Liberties urges this Court to follow either or both of these decisions. The Colorado case, a decision by its Supreme Court, was *People v. Gibson.*[35] Defendant had been convicted under a Colorado statute which punished any person who "loiters for the purpose of engaging or soliciting another person to engage in deviate sexual intercourse."[36] The main thrust of the majority opinion was that the statute did not "require the loitering to be coupled with any other overt conduct," with the result that "the loitering need[ed] only [to] be coupled with the state of mind of having 'the purpose of engaging or soliciting another person to engage in . . . deviate sexual intercourse.' "[37] This the court found violative of constitutional due process. Were the decision to have rested here, it would hold little relevance for the present case. But the People in *Gibson* requested the court to reconstrue "the statute

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so that it prohibits loitering only when the loitering is coupled with the overt act of solicitation."[38] Such a re-interpretation would have brought the statute closer to 647(a). It is the Colorado Supreme Court's response to this suggestion which is so pertinent here. The court refused to re-interpret the statute because "it would require" the "court to usurp a legislative function, and secondly, it would render the statute inconsistent with at least one other section of the Criminal Code."[39] Referring to the fact that deviate sexual conduct was no longer illegal in Colorado, the court pointed out that "the People's construction . . . would make it illegal to solicit another for a non-crime." Concluding, the court declared: "Because the People's construction would force us in effect to amend the statute, and because the construction would produce inconsistencies within the Code, we are obliged not to make this construction."[40]

The Ohio decision was a holding by the Court of Appeal of Franklin County in 1975, review of which was denied by the Supreme Court of Ohio.[41] It struck down Section 2307.04(B) of the Columbus City Code, which read as follows:

> No person shall solicit a person to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard.[42]

In doing this, the County Court of Appeal noted that, "regardless of taste, tradition, or common acceptance, free speech is protected unless it falls into the category of 'fighting words.' "[43] It then quoted with approval the following opinion of the trial court:

> Even though the Columbus ordinance deals with invitations to engage in "sexual activity," the Constitutional problem is not solved in favor of the ordinance. Since sexual activity is illegal only under specific circumstances, and since the ordinance is not limited to *illegal* sexual activity, and since an invitation to sexual activity is not, necessarily, obscene, the ordinance is not limited by its own wording to "obscene" speech. *Cohen v. California,* 403 U.S. 15, 20 (1971); *Miller v. California,* 413 U.S. 15, Part II (1972); *Eastman Kodak Co. v. Hendricks* (1958), 262 F. 2d 392.
>
> In the same way in which invitations to engage in sexual activity are not, necessarily, obscene, those invitations are not, necessarily, fighting words. In fact

those invitations could easily be classified as loving words.

This analysis would suggest that the ordinance is unconstitutional since it is not limited to fighting or obscene words.[44]

With these two decisions in mind, the National Committee for Sexual Civil Liberties respectfully asks this Court to do likewise.

Sociological Epilogue

To discuss the legal infirmities of Section 647(a) without reference to the deleterious social consequences to which it and statutes like it conduce would be to discuss the law *in vacuo*. Though the National Committee for Sexual Civil Liberties does not claim to be knowledgeable regarding the matter of corruption within law-enforcement agencies in California; it can, based on data from other jurisdictions, state unequivocally that administration of sexual solicitation laws is frequently characterized by police entrapment and extortion. This is not to contend that, in all such instances, the conduct of the police was such as to constitute the legal offense of entrapment as defined in the jurisdiction involved. (These definitions differ substantially from state to state.) What is contended is that the police behavior, whether or not it actually constitutes legal entrapment, frequently amounts at the very least to enticement, and is of such a kind that any fair-minded person would question whether the nature of the offense warranted the employment of disreputable methods in its apprehension.[45] As for actual extortion, what has frequently been said about the sodomy laws applies with equal force to the sexual solicitation laws. Both are grist for the mills of blackmailers and extortionists. Whitman Knapp, erstwhile chairman of the New York City Commission which investigated that city's police department a few years ago, stated publicly that "our laws dealing with such problems as gambling, the Sabbath, and sex are... an important source of [police] corruption."[46] In addition to constituting a standing invitation to police corruption, sexual solicitation laws on the order of 647(a) are open to capricious enforcement, permitting the police to use them for purposes of harassment, for satisfying personal grudges, or as a means of filling their monthly arrest quotas when the need arises.

No reference to the solicitation laws would be complete without reference to the robberies and "muggings" which they encourage on the part of certain elements of the population, some of whom are not otherwise criminal. Robbery and its kindred offense, blackmail, have always been the two crimes most closely associated with homosexuality. The homosexual is one of the most tempting preys of those who specialize in these crimes, since these criminals know that, in the vast majority of cases, their homosexual victims will never report the offenses to the police. This is because the homosexual fears that, with the law being what it is, he will himself face criminal charges if he were to go to the authorities. The same is true in the case of "mugging." These unprovoked assaults on homosexuals are usually committed by young roughs, often working in gangs, who consider as fair game anyone suspected of being homosexual, even where there is no manifestation of homosexuality on the part of the victim. The merest suggestion of a homosexual proposal, real or fancied, is often sufficient to result in violence, and there are numerous occasions when the sexual proposal is actually induced by the mugger himself. There are also occasions when the victim is not homosexual. For reasons already indicated, the great majority of muggings of homosexuals go unreported and the mugger knows that he can commit his crime with virtual impunity. A study of one hundred muggings in New York City, the results of which appeared in the New York *Times*, indicated that "at least 20% of the attacks studied were against chronic drunks or men seeking the company of prostitutes or homosexuals, victims who by their habits are unusually vulnerable to being mugged."[47] Since this study was confined to court cases, it was, by definition, limited to what had come to the attention of the authorities. Hence it involved only the visible fraction of the iceberg constituting homosexual mugging, for it is no exaggeration to state that, for every mugging of a homosexual which is brought to the attention of the authorities, at least four go unreported and undetected.[48]

A high proportion of assaults on homosexuals involve no actual robbery or attempted robbery at all. Even when a robbery does take place, the assailants' decision to rob their victim often comes as an afterthought, after the assault, which was their real purpose. Thus the mugging is often a form of sadism, pure and simple. Many people continue to applaud those who assault or murder homosexuals and recognition of the fact that the sodomy laws have traditionally provided social encouragement of this kind of violence was one of the reasons why the Brown Act was passed. Like the old-type sodomy laws, sexual solicitation statutes on the order of 647(a) provide the same pillar of social approval to this kind of savagery. Among certain social classes in our urban areas "rolling the queers for kicks" is an established form of Saturday night entertainment. No social stigma attaches to this conduct; those who engage in it consider it the surest way of demonstrating their professed heterosexuality to their peers. Robbery is rarely the real motive in these cases—which sometimes result in murder—even though a few dollars may be taken from the victim. The following observations and account by an eminent psychoanalyst may convey some appreciation of the social attitudes toward homosexuals which laws like 647(a) help to perpetuate.

> ... the "homosexual" may become prey to the most unconscionable cruelty at the hands of oppressors who regard their sadism as righteousness. Physical violence and various forms of bodily assault upon these people are common in our society and often result in murder. This violence frequently receives tacit approval, even at the official level, by the type of person who maintains ... that "the only good queer is a dead queer." Indeed, "queer-baiting" has become a rather popular sport in some circles. The following instance—one among many—exemplifies the usual pattern:
>
> One spring evening ... a young man stood waiting for a trolley near his home in San Francisco. His name was William P. Hall. He was a teacher by profession. ... As he stood alone waiting for the streetcar that was to take him to a dinner engagement ..., he [was] surprised to see a car carrying four young men come to a precipitous halt beside him. Three of the young stalwarts descended from the car and approached him directly .... Nothing about the teacher is reported to

"In addition to constituting a standing invitation to police corruption, sexual solicitation laws on the order of 647(a) are open to capricious enforcement, permitting the police to use them for purposes of harassment, for satisfying personal grudges, or as a means of fulfilling their monthly arrest quotas when the need arises."

> have been particularly distincitve, let alone eccentric . . . one of the approaching gang called out bluntly to him, "Are you a queer?"
>
> . . . the teacher's reply was more educative than anger-provoking.
>
> "What if I asked you that question?"
>
> Those were the very last words spoken by William Hall. The three young hoodlums stormed the defenseless man and proceeded to beat him into a state of unconsciousness . . . . The police later reported . . . that Hall had been struck in the head by some weapon resembling a blackjack . . . . The boys removed from Hall's . . . body a wallet containing $2.85 and left their victim . . .
>
> He [Hall] met his death in this brutal fashion because a group of young toughs had presumed to diagnose him as a "homosexual"—a "sex deviate," the officials called it in their report—a "queer." The diagnosis was fatal for Hall, as the young vigilantes were out to cleanse the community of such filth. After having attacked . . . the teacher, they continued their prowl of the city in search of other "queers"; but finding no more people to assault and murder that night, they went home . . .
>
> In reporting the details of this atrocity, the *News Call Bulletin* thought it proper . . . to add that, "The [police] officers made clear Hall certainly was not . . . " a "sex deviate." . . .
>
> The young murderers certainly believed that their action was innocuous, if not virtuous. About this case inspector Robert McLellan commented to the press, "They said they considered Hall's death justifiable homicide." He added, "They seem to regard the beating-up of whomever they consider sex deviates as a civil duty." . . .
>
> The number of youths led to such criminality under the guise of decency is far from negligible. These young men admitted that the beating they gave Hall was not the first they had ever administered to a person whom they deemed to be [homosexual] . . . There had been many other such nights for this advanced guard of the puritan terror. When they left their friends that fateful evening they felt quite free to announce their intention of seeking prosective victims without the slightest fear of losing face. They said they knew of at least fifty other youths within the brief confines of their own neighborhood who participated in similar attacks upon "queers." . . . The *News Call Bulletin* reported that it had been affirmed by the young vigilantes that they "keep watch on establishments patronized by homosexuals, then track down the patrons as potential victims for attack." . . .
>
> The young . . . are highly impressionable and become very easily conditioned by the unverbalized attitudes that impinge upon them from the environment . . . . These youths, like so many others, have gained the impression that assault and battery and even murder are justifiable if the object of one's hostility is homosexual . . . . In a society that condones legal oppression of the sexual nonconformist, and in which almost all morality has become equated with sexual morality, it is not surprising that the young should come to believe that any . . . form of brutality is . . . justified in the suppression and extermination of "the deviate." . . .
>
> A youth goes out to hunt down a "queer" and, having found one and attacked him, then robs him of a couple of bucks. How different is this from the activities of a police force that, with the aid of cunning techniques, often entraps the "deviate" and then turns him over to a lawyer who makes a not unhandsome fee "defending" the culprit in a case of "sodomy" or "solicitation"?[49]

The same writer concluded:

> . . . a growing number of young hoodlums in America make a practice of "queer-baiting," comfortable in the knowledge that so-called homosexuals will almost never call upon the police for protection and that they really cannot do so . . . . *These youths take their cue from the laws and from the intolerant spirit that brings about and perpetuates such laws.*[50]

Though the events just described occurred before the Brown Act, the Hillsborough murder last year in San Francisco should remind this Court that, despite some improvement, the penal law, in the form of Section 647(a), still continues to stand in indirect support of such outrages.

This Court now has a rare opportunity to strike down this section. The entire concept of sexual solicitors preying on "offended" or "affronted" innocents is a construct of an age long since passed. Whether it was ever a valid assumption is debatable. Is it expecting too much of an ordinary adult in full command of his mental faculties to say "No" to an unwanted sexual proposal without the intervention of the criminal law?[51] While ostensibly protecting the public from substantive evils, the solicitation portion of 647(a) is in reality a "morals" statute encapsulated within language purporting to protect the public from offenses which the public itself does not consider sufficiently offensive to report to the authorities. Consequently, the only "public outrage" is to the tender sensibilities of the vice-squad officers whose daily—or nightly—careers are dedicated to uncovering as many such solicitations as possible. As the *UCLA Report* noted:

> Since the [police] decoy operates to apprehend solicitors, it is difficult to argue that he is a victim or that he is outraged by the proscribed conduct, particularly when he engages in responsive conversation or gestures with the suspect.[52]

Section 647(a) places a cloak of respectability and legality over an enforcement process which is unsavory from beginning to end.

The most charitable justification for this entire procedure is that the legislators who several generations ago passed the original laws from which 647(a) is descended knew nothing about homosexuality and conceived of the homosexual as a *rara avis* or sexual "freak," against whom the public had to be protected. They probably sincerely believed they were legislating against the abnormal sexual desires of a *handful* of degenerates, when, in fact, they laws they passed adversely affected the lives of thousands, if not millions, of people who, as a group, constitute the second largest recognized minority of the population. Stated in utilitarian terms the sum of human

"Is it expecting too much of an ordinary adult in full command of his mental faculties to say 'no' to an unwanted sexual proposal without the intervention of the criminal law?"

unhappiness which their laws have produced and are producing is incalculable. Today there is no longer any excuse for their ignorance. Defendants arrested for soliciting under 647(a) constitute a representative cross-section of the American public and are visible proof that, in our post-Kinsey world, the old stereotypes regarding homosexuals and homosexuality are no longer tenable. Informed people and those not so informed, whether homosexual or not, now recognize that laws such as Section 647(a) harm important segments of the population in one of the most central and vital aspects of human existence. And the police know this too, which is why they find soliciting under 647(a) such a "gravy-train" for arrests. In the words of H.L.A. Hart, the eminent Oxford jurist, these laws "demand the repression of powerful instincts with which personal happiness is intimately connected."[53] Like prohibition, they should either be repealed or struck down judicially if constitutionally defective.

A Final Note

Throughout these pages the discussion has been confined to the solicitation portion of Section 647(a). Yet the same section also includes the crime of engaging in "lewd or dissolute conduct," which is really a separate and distinct offense, and which, in most jurisdictions, is the subject of a separate statute, usually denominated "open" or "public indecency," or "open" or "public lewdness." Since Petitioner was not charged with engaging in lewd or dissolute conduct, this brief has deliberately eschewed discussing the engaging aspects of Section 647(a), although it is clear that some—not all— of the same infirmities which attach to the terms "lewd" and "dissolute" also apply to their use in connection with engaging. There might also exist legal questions regarding the meaning of the terms "public place," a "place open to the public," and "exposed to public view." This brief ventures no opinion on any of these matters. They are mentioned here only because it is recognized that this Court may, for reasons of its own, come to the conclusion that all of Section 647(a) is defective—its engaging portion as well as its soliciting portion—and that therefore the entire section should be struck down. The same necessity would arise were this Court to conclude that these two portions are inseverable, so that overturning the solicitation part would automatically require overturning the engaging part.

However, the National Committee for Sexual Civil Liberties recognizes that this Court might be loath to invalidate all of Section 647(a) for the very practical reason that it might fear that to do so, would create a serious lacuna in the law, whereby lewd or obscene conduct occurring in public would no longer be punishable. It is to assure this Court that this would not be the case that this final note is written. California appears to be blessed with an extremely ample larder of sex-control statutes, with the result that the loss of 647(a) in its entirety would in no way reduce the ability of law-enforcement authorities to suppress the kind of conduct against which the engaging portion of 647(a) is directed. Several sections of the California Penal Code stand as surrogates for this purpose. The principal one is Section 314.1, indecent exposure, which punishes essentially the same kind of conduct as that proscribed under the engaging portion of 647(a). In fact, modern penal codes in some states have combined the old crimes of indecent exposure and public lewdness into a single statute.[54] Furthermore, as indicated above, Section 314.1 has the advantage of being a statute under which the public at large is willing to make complaint when it is truly affronted by offensive conduct.[55] It is the kind of statute which should be availed of much more frequently, for, in doing so, the *public* interest would be served rather than that of policemen out to make easy arrest records. At the present time Section 314.1 appears to be used primarily only after the police have received a complaint, which is probably because it contains no solicitation provision and consequently requires more police effort in order to apprehend its violators.

Another provision which could be availed of in lieu of Section 647(a) is Section 242, which punishes assault and battery. This could be used to prosecute so-called "groping" cases, where a defendant engages in some form of lewd or obscene sexual touching of another person. Like Section 314.1, it is presently underused, being utilized for this purpose only by the Los Angeles city attorney's office. Finally, there is Section 647a of the Penal Code—sometimes confused with Section 647(a)—which punishes annoying or molesting a child under 18 years old, and which, so this writer has been informed, has been held to cover the sexual solicitation of children under that age. In short, eliminating the whole of 647(a) would produce no different practical result than invalidating only its solicitation portions.

In venturing these observations regarding the engaging portion of 647(a), it is hoped that this Court will not feel that this Committee has trenched on its judicial prerogatives. Throughout these pages its purpose has been to bring to this Court's attention (1) the evils and injustices for which statutes on the order of Section 647(a) are responsible, (2) to demonstrate that the section is constitutionally defective, and (3) respectfully to petition this Court to recognize these legal infirmities and thus to redress the injustices. □

SEXUALAWREPORTER

INTOLERANCE OF THE UNCONVENTIONAL HALTS THE GROWTH OF LIBERTY

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NOTES

1. 61 & 62 Vict., cap. 39, sec. 1(1)(b).

2. *People v. Dudley,* 58 Cal.Rptr. 557 (1967) at 559; 250 Cal.App.2d Supp. 955 at 958.

3. Jon J. Gallo, Stefan M. Mason, Louis M. Meisinger, Kenneth D. Robin, Gary D. Stabile, and Robert J. Wynne, authors, *UCLA Law Review,* Vol. 13, No. 3 (March, 1966). Hereafter cited as *UCLA Report* with pagination following that of the Law Review. The study's rather parochial title obscures its wide range and depth, and the general applicability of most of its conclusions to the entire state of California and beyond.

4. *Ibid.,* p. 699, note 84.

5. Michael Schofield, *The Sociological Aspects of Homosexuality* (London, 1965), p. 200.

6. Committee on Homosexual Offences and Prostitution, *Report,* command paper 247 (Her Majesty's Stationery Office, London, 1957), p. 43.

7. Pp. 694-695.

8. But see *infra,* pp. 24-30.

9. *UCLA Report,* p. 698, note 83.

10. Barry Copilow & Thomas Coleman, *Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department* (privately printed, Los Angeles, 1972), pp. 14 & 18. A copy of this study is submitted with this brief.

11. Chet R. Toy, *Update: Enforcement of Section 647(a) of the California Penal Code by the Los Angeles Police Department* (privately printed, Los Angeles, 1974), pp. 4 & 6. A copy of this study is also submitted herewith. The statistical breakdown of both the original study and the follow-up—but not the studies themselves—were initially presented to the municipal court and admitted into evidence at the hearing on the motion to suppress. Subsequently the breakdowns were lodged with this Court by the Petitioner.

12. *Ibid.,* p. 6.

13. Infra, p. 10 *et sec.*

14. California *Statutes 1975,* chapter 71, section 10 & chapter 877, section 2.

15. Technically, even prior to the Brown Act, homosexual conduct short of anal or oral contact, and occurring in private, was probably legal; hence any request to engage in such forms of homosexuality when intended to occur in private was probably a solicitation to engage in lawful conduct.

16. This argument, however, was never completely true, in view of the fact that the old Section 288a of the California Penal Code, comprising the crime of oral copulation, which was one of the statutes modified by the Brown Act, was applicable to heterosexual as well as to homosexual relations.

17. For further discussion of the connection between the sodomy laws and/or sexual solicitation statutes on the one hand and the social encouragement of violence on the other, see *infra,* pp. 24-30.

18. 249 U.S. 47 (1919) at 52.

19. 337 U.S. 1 (1949) at 3.

20. *Ibid.,* at 4-5.

21. 315 U.S. 568 (1942) at 572.

22. 415 U.S. 130 (1974) at 132

23. *Ibid.,* at 138.

24. *Ibid.,* at 135. Here it should be noted that, like Justice Powell, the framers of the Model Penal Code suggested that, before it lost its constitutional protection as "fighting words," speech which was addressed to police officers should be allowed to go further than speech addressed to ordinary citizens for the same reasons as those adduced by Powell. See *Model Penal Code,* Comment 4, Tentative Draft No. 13 (Philadelphia, 1961), sec. 250.1, pp. 13-18.

25. 310 U.S. 296 (1940).

26. *Silva v. Municipal Court* (1974), 115 Cal.Rptr. 479; 40 Cal.App. 3d 733. In this case the court quoted from Mr. Chief Justice Burger in *Kaplan v. California* (413 U.S. 115 [1972] at 119) as follows:

> Obscenity *can,* of course, manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct. (Italics this writer's.)

Then, ignoring the crucial word "can" in the above statement, the *Silva* court went blithely on to misinterpret it completely. It declared:

> Under this rule the solicitation (in and of itself) of an obscene act will reasonably be deemed obscene conduct or at least a written or oral description of obscene conduct and therefore beyond First Amendment protection. Certainly any solicitation to engage in an obscene act, to be understood, must include a description of the proposed conduct. (115 Cal.Rptr. 481; 40 Cal.App. 3d 737.)

Thus, where the Chief Justice was merely restating the well-known fact that obscenity can be either written or oral or both, the *Silva* court twisted this around completely and claimed that it meant that any oral description of obscene conduct automatically constituted either obscene conduct in its own right or at least an oral description of obscene conduct, which description enjoyed no constitutional protection.

27. See *People v. Dudley, supra,* and *People v. Mesa* (1968), 71 Cal.Rptr. 594; 265 Cal.App. 2d 746, as representative of cases under Section 647(a), and *People v. Ledenbach* (1976), 132 Cal. Rptr. 643; 61 Cal.App. 3d Supp. 7, for those arising under 647(d). In *Ledenbach* the court specifically equated illegality with lewdness. (132 Cal.Rptr. 644; 61 Cal.App. 3d Supp. 10).

28. See *People v. Dudley,* 58 Cal.Rptr. 559 & *People v. Mesa,* 71 Cal.Rptr. 597.

29. *Roth v. United States,* 354 U.S. 476 (1957) at 487. See also *Manual Enterprises v. Day,* 370 U.S. 478 (1962), in which the court upset a Post Office ban on the mailing of homosexual magazines.

30. 405 U.S. 518 (1971) at 520-521.

31. *NAACP v. Button,* 371 U.S. 415 at 432-433.

32. The only other special form of solicitation statute is the one that prohibits solicitations to engage in prostitution, but prostitution is a more serious offense than lewdness, and it is traditionally associated with other more serious crimes, such as illegal drug trafficking and robbery, so that there is substantial warrant for punishing solicitations for it.

33. This discussion ignores soliciting to commit serious sexual offenses, such as rape, which is already covered by the California general solicitation law. See *Penal Code,* sec. 653f.

34. Lester S. Jayson *et alii,* editors, *The Constitution of the United States of America: Analyses and Interpretations,* prepared by the Congressional Research Service, Library of Congress, Senate Document no. 92-82, 92nd Congress, 2nd Session (Washington, D.C., 1973), p. 960. See also *Swickler v. Koota,* 389 U.S. 241 (1967); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *United States v. Robel,* 389 U.S. 258 (1967); *Gooding v. Wilson, supra.*

35. 521 P.2d 774 (1974).

36. *Ibid.,* at 774.

37. *Ibid.,* at 775.

38. *Ibid.*

39. *Ibid.*

40. *Ibid.,* at 776.

41. *City of Columbus v. Scott,* 353 N.E.2d 858 (1975). Decision to deny review, Supreme Court docket #76-206, May, 1976.

42. *Ibid.,* at 859.

43. *Ibid.,* at 860.

44. *Ibid.,* at 861.

45. Police tactics which are acceptable in the apprehension of serious crimes put the law in disrepute when applied to the petty offense involved here. The same can be said for the extravagant use of police resources for the detection of these offenses.

46. As quoted in the New York *Times,* 7 June 1970, p. 65, column 1.

47. New York *Times,* 20 May 1968, p. 52, columns 1-2.

48. Not one of the eight representatives of organizations working in the field of homosexuality who were interrogated by this writer gave an estimate of more than 10% as the proportion of robberies and muggings of homosexuals which are reported to the police.

49. Wainwright Churchill, *Homosexual Behavior Among Males: A Cross-Cultural and Cross-Species Investigation* (New York, 1967), pp. 194-197 *passim.*

50. *Ibid.,* pp. 226-227. Italics this writer's.

51. Once again it must be noted that the reference is merely to non-commercial solicitations involving persons at or above the sexual age of consent.

52. P. 698.

53. H.L.A. Hart, *Law, Liberty, and Morality* (Stanford, California, 1963), p. 43, being the Harry Camp Lectures delivered at Stanford University.

54. See New penal code proposed for the State of *New Jersey,* Assembly Bill No. 642, 1976, chapter 34, section 20:34-1.

55. See *supra,* p. 6.

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THE SEX LAW EXPLOSION

A Survey of Judicial and Legislative Developments in Sexual Law During the Past Decade

By Thomas F. Coleman
Publisher, SexuaLawReporter

During the past decade, our legal system has been confronted with a revolution. The sexual mores and behavior of Americans have changed drastically, but the body of sex law, both legislative and judicial, is based on the politics of another era. Judges, legislators and administrators have been faced with the task of closing the gap between "what is" and "what should be." They have also reevaluated the fundamental principles upon which many laws regulating sexual behavior have been based. Some of the areas undergoing reanalysis in legal circles are rape, transsexualism, abortion, contraception, homosexuality, alternative love relationships, and prostitution.

Sexual law seems to be a narrow specialty. But a closer look shows that it is an area so broad that it will be impossible to discuss fully all the major developments over the past ten years. An overview of certain areas will be given spotlighting major court cases or legislative development. However, consensual sexual behavior and homosexual civil rights have created the most controversy and initiated the most change and will be discussed in detail.

Rape, Prostitution, and Transsexualism

The traditional rape case usually involves two witnesses – the male defendant and the female victim. While courts have dealt with cases of homosexual rape, the overwhelming majority are heterosexual. In most cases the only prosecution witness to the crime is the female victim. The trial becomes a credibility battle between the female victim and the male defendant. The jury usually has two issues to decide: whether sexual intercourse has occurred and whether the sex act was committed against the will of the victim. Since the trial is a credibility contest, the defense attorney uses every lawful tactic to discredit the female victim. The two devices used most frequently are the introduction of evidence about the past sexual history of the victim to show that she is immoral or promiscuous and the invocation of a "cautionary instruction." The law in most states requires the judge to instruct the jury at the close of the case to "examine the testimony of the complaining witness with caution." However, the testimony of other witnesses is not to be viewed in this way. The law also allows the defense attorney to ask the female victim about her past sexual life – the number of sexual experiences she has had, with whom she has had them, and other similar details. The law assumes that if she is of unchaste character that it is likely that she consented on this particular occasion.

Feminists have developed an organized effort to change the law with respect to the cautionary instruction and cross-examination of the rape victim about her past sexual history. Legislation has been introduced in many states to shift the focus of rape cases from victim to defendant. Challenges have been made in court as well. After legislative debates over the past four to five years, more than one-third of the states have enacted laws prohibiting use of cautionary instructions and cross-examination of the rape victim about her past sexual conduct.

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IN THE COURTS...

Fort Worth police enjoined from harassing gay persons

The Chief of Police of Fort Worth, Texas, has agreed to stop "illegal surveillance and harassment" of patrons of gay bars and members of gay organizations, including the Metropolitan Community Church. The "Agreed Judgment" enjoining such activity resulted from a class action filed on behalf "of all gay persons in the City of Fort Worth." The suit alleged a conspiracy under the Civil Rights Act (42 U.S.C. Section 1983, 1985) to deprive the plaintiffs of their constitutional right of privacy and equal protection of the laws. *Cyr. v. Walls,* Civ.No.CA 4-75-51,_____F.Supp._____, (N.D.Tex., March 8, 1978).

Plaintiffs had alleged that during a 1974 meeting of the Texas Gay Conference, three police officers circled the church repeatedly; recorded the license plate numbers of numerous parked automobiles; and stopped some of the participants leaving the meeting for questioning. The names and numbers recorded were later released for publication to Fort Worth newspaper reporters.

Defendants' motion to dismiss was denied on October 31, 1977. In rejecting defendants' argument that the surveillance techniques were justified by their obligation to enforce the Texas sodomy statute, the court held that to accept this position would be "tantamount to recognizing homosexuality as a status crime," contrary to *Robinson v. California,* 370 U.S. 660 (1962).

Relying on the summary affirmance of *Doe v. Commonwealth's Att'y,* 403 F.Supp. 1199 (E.D. Va. 1975) (See 2 *Sex.L.Rptr.* 36), the district court held that "there can be no doubt that such state sodomy and homosexuality laws are constitutional." Nevertheless, the court recognized that relief from police interference with unlawful activities was not requested. Instead, plaintiffs had asked for "protection for individuals whom the police may suppose to be gay while those individuals are engaged in lawful activities of peaceful assembly and association." Rejecting the defendant's claim that "there can be no such thing as a 'law-abiding gay individual', the court held that "the mere propensity or desire of an individual to commit a criminal act does not permit state interference with that individual's freedom. The individual does not become a law violator until he commits an overt criminal act."

Despite the court's warning that plaintiffs would face "a heavy burden in proving not only a course of conduct by the police which violated their constitutional rights but also that such course of conduct is not justified in light of the criminal nature of homosexual acts," the case has not been settled.

Four months after the denial of the motion to dismiss, an "Agreed Judgment" had been filed enjoining defendants "and their successors in public office" from: (1) conducting any investigation or surveillance of any sort of non-criminal activity by the plaintiffs without probable cause to believe that criminal acts had been or were being committed; (2) collecting or maintaining any files dealing with any form of non-criminal activity on the part of the named plaintiffs or the class they represented; and (3) harassing plaintiffs "in any way" because they were homosexual or allegedly homosexual without probable cause to believe that a crime had been committed. The court further ordered proof of the destruction of all police "lists, files or records of any sort reflecting non-criminal activity" by the plaintiffs or the represented classes.

Certification of the protected class was, in the court's view, "complicated by the fact that gay individuals are not readily identifiable, unlike individuals with certain racial or color characteristics, individuals with certain types of surnames, or individuals of a certain physical sex." Rather than certify "all gay persons," the court instead chose "all persons in attendance" at gay bars or meetings of gay organizations. And, since plaintiffs had "invariably" used the word "gay" to describe the individuals for whom protection was sought, while defendants "invariably" used the word "homosexual," the court found it necessary to adopt its own, unique definition: "While recognizing that these terms are often used interchangeably in the vernacular, the Court will attempt, for the sake of clarity, to use the term 'homosexual' in describing specific sexual acts and those persons who engage in, promote or encourage such acts. The Court will attempt to use the term 'gay' in referring to the more general aspects of the life-styles of those individuals who prefer the companionship of members of their own sex and of the commercial institutions that serve those life-styles." □

U.S. Court upholds obscenity convictions

The United States Supreme Court has ruled that a state may prohibit as obscene the sale of materials which are not specifically described in the state's obscenity statute. This apparent retreat from the standards set forth in *Miller v. California* came in *Ward v. Illinois,* 431 U.S. 767 (1977), a prosecution for the sale of two sado-masochistic magazines.

The Illinois statute contains a general prohibition on the sale of materials which meet the test for obscenity described in *Roth v. United States.* In prior cases, the Illinois Supreme Court had construed the statute to incorporate the definition of obscenity used in *Miller.* Part (b) of that definition required that the proscribed communication be specifically described in state law, and contained several examples of what the court considered adequate description. Ward claimed that as applied to him, the statute violated part (b) of the *Miller* definition because none of the examples construed into the law by the Illinois court included sado-masochism.

In rejecting this claim, the court held that a statute's descriptive list of prohibited communications need not be exhaustive to comply with *Miller.* As long as the statute as construed clearly indicates "the kinds of sexual conduct which may not be represented," the court declared, it defines the conduct proscribed with sufficient specificity.

In another case, *Smith v. United States,* 431 U.S. 291 (1977), the court by a 5-4 vote has held that the presence or absence of state obscenity laws does not conclusively determine the "community standard" applied in federal obscenity cases. However, the court held that such laws may be placed before the jury which is permitted to determine the actual community standard for itself. The court also held that the defense was not entitled to question the prospective jurors about their understanding of community standards, and that the underlying statutes, 18 U.S.C. Section 1461, was not unconstitutionally vague. Justices Brennan, Stewart, Marshall and Stevens dissented. □

Supreme Court remains aloof to gay rights

The Supreme Court has once again declined to give its views on the extent to which the Constitution may limit state regulations of private, consensual sexual conduct among adults. In a brief order, with only Justices Brennan and Marshall dissenting, the Court denied a petition for certiorari by Eugene Enslin, who had been convicted in 1974 of violating North Carolina's prosecution of the "abominable and detestable crime against nature." *Enslin v. Walford*, 98 S.Ct. 2257 (1978).

According to the trial testimony, Sam Hudson, a detective with the Jacksonville Police Department who "wanted to run Enslin out of town,"gave $30 to a Marine stationed at nearby Camp Lejeune to solicit an act of fellatio from Enslin. Hudson testified that "This was a deliberate and planned attempt on my part, using this 17-year-old prosecuting witness . . . to set Mr. Enslin up so that I could prosecute him for homosexual conduct."

The Marine went to a bookstore to meet Enslin, whom he asked for "a little extra excitement," which Enslin then agreed to provide. While Hudson was hiding in the bushes across from the bookstore with a pair of binoculars, the two men went into Enslin's bedroom. The Marine testified that he consented to participate in the act, which was not observed by the detective because of the absence of windows in the room.

Enslin was arrested, tried, convicted and sentenced to one year, spending nine months in prison. His conviction was affirmed by the North Carolina Supreme Court, which, although presented with broad constitutional challenges on privacy and equal protection grounds, responded only to the contention that the statute was unconstitutionally void for vagueness. The Supreme Court denied certiorari in 1976.

A writ of habeas corpus was sought, and was denied by the federal district court, without a published opinion. The Fourth Circuit affirmed, 565 F.2d 156 (1977), believing itself bound by the Supreme Court's summary affirmance of *Doe v. Commonwealth's Attorney*, 425 U.S.901 (1976).

Enslin's petition for certiorari to the Supreme Court was, perhaps, encouraged by recent abortion and birth control decisions which seemed to indicate that the issue of state regulation of private adult homosexual conduct was not meant to be foreclosed by the Court's summary affirmance in *Doe*. Mr. Justice Brennan's opinion in *Carey v. Population Services International*, 431 U.S. 678 (1977), for example, makes it clear that, contrary to the view of the district court in *Doe*, the constitutional right of privacy is not confined to marital relationships. In fact, Justice Powell's concurring opinion in *Carey* complains that the majority requires that *"all* state regulation affecting adult sexual relations . . . be justified only by compelling state interests, and must be narrowly drawn to express only those interests." Justice Rehnquist alone indicated dissent from Justice Brennan's observation "that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults."

Theoretically, at any rate, this disposition of *Enslin* is not to be taken as an indication of the Court's view on the merits. Nevertheless, it seems clear that many lower courts will understand the decision to mean not only that gay persons have no federal constitutional protection from laws that restrict private sexual conduct, but also that government is free to limit access to housing, public accommodations and employment opportunities as well as the exercise of First Amendment guarantees.

Although there is vast misunderstanding over the effect that must be given the Court's summary dispositions, several courts have felt bound by the summary affirmance of *Doe* to reject the claim that gay persons have constitutional rights at all! Compare *Matlovich v. Secretary of the Air Force*, 13 FEP Cas. 269, 2 *Sex.L.Rptr.* 53 (D.D.C. 1976), with *Saal v. Middendorf*, 427 F.Supp. 192, 3 *Sex.L.Rptr.* 24 (N.D.Cal. 1977); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 2 *Sex.L.Rptr.* 65 (5th Cir. 1976), with *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976).

Justice Rehnquist argued strongly in *Edelman v. Jordan*, 415 U.S. 651 (1974), that summary affirmances are not entitled to full precedential value because the absence of briefing and argument does not provide "adequate opportunity to fully explore and treat" the issues. Yet, in *Carey*, he cited the *Doe* affirmance for the proposition that 'while we have not ruled on every conceivable regulation affecting [private, consensual sexual] conduct, the facial constitutional validity of criminal statutes prohibiting *certain* consensual acts has been "definitively" established."

Despite strong criticism from legal scholars, law review commentators [*see, e.g.*, Richards, "Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory." 45 *Fordham L. Rev.* 1281 (1977)] and the national media, the Court continues to insulate itself from the growing controversy over the constitutional rights of gay persons. Cases favorable to gay litigants have been denied review over the dissent of its conservative members [*Rachford v. Gay Lib*, 98 S.Ct. 1276 (1978) (Blackmun, Burger and Rehnquist, JJ., dissenting); *see also Singer v. U.S. Civil Service Comm.*, 97 S.Ct. 725 (1977) (Burger, Rehnquist and White, JJ., dissenting)] while cases denying federal constitutional protection are denied plenary consideration over the dissent of its liberal members [*Doe v. Commonwelath's Attorney*, 425 U.S. 901 (1976) (Brennan, Marshall and Stevens, JJ., dissenting)].

The strongest statement, strangely, comes from Justice Rehnquist in *Rachford v. Gay Lib*, 98 S.Ct. 1276 (1978):

> "There is a natural tendency on the part of any conscientious court to avoid embroiling itself in a controversial area of social policy unless absolutely required to do so . . . . Courts by nature are passive institutions and may decide only those issues raised by litigants in lawsuits before them. The obverse side of that passivity is the requirement that they *do* dispose of those lawsuits before them and entitled to attention. [The lower courts] were doubtless as wary as we are of being thrust into the middle of this controversy but were nonetheless obligated to decide the case. Unlike [them], Congress has accorded to us . . . the discretion to decline to hear a case such as this on the merits without explaining our reasons for doing so. But the existence of such discretion does not imply that it should be used as a sort of judicial storm cellar to which we may flee to escape from controversial or sensitive cases . . . . By refusing to grant certiorari in this case, we ignore our function and responsibility in the framework of the federal court system and place added burdens on other courts in that system."

(Justice Rehnquist is even more strongly committed to "the principal that we must treat appeals [from state courts] on their merits." See *Southern & Northern Chapters v. Public Util. Comm.*, 98 S.Ct. 251, 252 (1977) (dissenting opinion).)

Perhaps the explanation for his vehemence lies in his view of the soundness of the Court of Appeals decision, which found that the University of Missouri had infringed the gay students' constitutional rights to free speech and freedom of association by refusing to grant recognition. □

–Donald C. Knutson

The 'right to marry' — What implications for the unmarried?

A recent United States Supreme Court case upholding the "right to marry" may carry with it some ominous implications for those who choose not to exercise this right.

The case, *Zablocki v. Redhail,* 98 S.Ct. 673 (1978), involved a Wisconsin resident who was denied a marriage license for failure to meet his child support obligations. The statute provided that any resident obligated to support a child not in his custody was required to submit proof that the child was not likely to become a public charge. A three-judge district court enjoined enforcement of the statute, and the Supreme Court affirmed.

The majority opinion was written by Justice Thurgood Marshall, and joined by Justices Brennan, White, and Blackmun, and (with minor reservations) Chief Justice Berger. Justices Stewart, Powell and Stevens each wrote separate opinions concurring in the result, and Justice Rehnquist dissented. Each of these opinions is important in predicting the future course of sexual rights litigation in the High Court.

The majority opinion continues Justice Marshall's quest for intermediate standards of scrutiny in equal protection cases. Holding the right to marry "fundamental" under *Loving v. Virginia,* 388 U.S. 1 (1967), the majority applied a test of "critical examination of the state interests advanced in support of the classification [.]" However, marriage was held to be fundamental right because "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." The Court quoted liberally from *Carey v. Population Services Int'l.,* 431 U.S. 678 (1977), and many other privacy cases to establish that "the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child-rearing, and family relationships."

Stressing the anomaly that otherwise would result from protecting other sex-related decisions without similarly protecting marriage, the majority noted that an unmarried woman had a fundamental right either to undergo an abortion or to give birth to an illegitimate child. "Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. And, if appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place." The Court then held that the admittedly legitimate state interests advanced did not justify an absolute prohibition on marriage by the persons affected.

Justice Stewart, concurring, rejected the equal protection model as inappropriate, preferring a due process inquiry. Characterizing marriage as a "privilege . . . to be defined and limited by state law," Justice Stewart held that "freedom of personal choice in matters of marriage and family life" is part of the concept of "liberty" protected by the Due Process Clause. Under that model, relying on *Boddie v. Connecticut,* 401 U.S. 371 (1971), Justice Stewart viewed the statute as irrational when applied to the indigent. The Stewart opinion is marked by its failure to cite such cases as *Carey; Planned Parenthood v. Danforth,* 428 U.S. 52 (1976); and *Eisenstadt v. Baird,* 405 U.S. 438 (1972), all of which upheld the sexual privacy rights of the unmarried. Unlike the majority, which viewed marriage as only a small part of the privacy right implicitly available to many other groups, Justice Stewart's opinion does not clearly indicate how far beyond marriage (if at all) the Constitution protects personal sexual choices.

Justice Stevens' opinion is similarly unclear. In attacking the law under review as a "statutory blunderbuss . . . clumsy and deliberate legislative discrimination between the rich and the poor . . . ," Justice Stevens formulated the protected right as "[t]he individual's interest in making the marriage decision independently [,]" thereby avoiding the issue of sexual activity among the unmarried.

It is in Justice Powell's concurring opinion that we see definite hostility to the constitutional rights of extramarital or homosexual relations. Justice Powell's concept of the right of privacy extends only to marriage, and even then is in large measure unable to withstand state regulation.

> "The marriage relation traditionally has been subject to regulation, initially by the ecclesiastical authorities, and later by the secular state . . . . The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people . . . . State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests . . . ."

Justice Powell therefore would invalidate state regulation over domestic relations only when it is imposed "in a manner which is contrary to deeply rooted traditions."

The Powell opinion would deny constitutional protection to those whose sexual relationships do not coincide with the "widely held values" of the majority. Together with Justice Rehnquist, who dissented from the denial of certiorari in *Ratchford v. Gay Lib,* 98 S.Ct. 1276 (1978), on similarly moralistic grounds, this forms a bloc of two Justices who will not interfere with state laws against homosexuality or other minority sexual practices. On the other side, we may infer that the two Justices who dissented from both the denial of certiorari in *Enslin v. Walford,* 98 S.Ct. 2257 (1978), and the summary affirmance in *Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976)—Justices Brennan and Marshall—are willing at least to give serious consideration to the claim of all sexual minorities to private, consensual sexual expression. Justice Stewart (by virtue of his concurrence in *Zablocki*) and Justices Burger and White seem thus far to be unwilling to indicate their views.

The remaining two Justices have made conflicting statements in the sexual privacy area. Although Justice Blackmun wrote the opinion in *Roe v. Wade,* 410 U.S. 113 (1973), upholding abortion rights for all women, including the unmarried, he joined Justice Rehnquist in his equation of homosexuality with measles in *Ratchford v. Gay Lib.* And, although Justice Stevens joined the dissenters in *Doe v. Commonwealth's Attorney,* his opinion in *Zablocki* appears to take pains to avoid any discussion of the rights of the unmarried. The remarkable number of separate opinions filed in this comparatively easy case reflects the extreme uneasiness which afflicts most of the Justices in sexual rights cases. □

—Donald M. Solomon

Supreme Court lets stand 'television rape' decision

A California lawsuit alleging that a television program caused a sexual assault against a young girl will proceed to trial after a United States Supreme Court decision refusing to hear the case.

The plaintiff in *Niemi v. National Broadcasting Co.*,_____ U.S._____(Apr. 24, 1978), *denying cert. to Olivia N. v. National Broadcasting Co.*, 141 Cal.Rptr. 511 (Cal. App. 1977), was a nine-year-old girl who alleged that four minors sexually assaulted her with a bottle on a San Francisco beach, after having viewed the NBC-TV movie, "Born Innocent," in which a similar scene was depicted. The complaint alleged that the television program "incited" the real-life attack and that NBC was negligent in permitting the program to be shown in the early evening hours.

When the case came on for trial, the defendants moved the court to decide their claim of First Amendment protection as a "constitutional fact" before empaneling a jury. The trial judge did so, and dismissed the action. The California Court of Appeal reversed, holding that plaintiff's right to a jury trial had been violated. Recognizing that television broadcasting is entitled to a wide degree of First Amendment protection, and that the categories of unprotected speech are limited, the court nevertheless noted that a defense motion for summary judgment had already been denied when the trial judge made his determination. Holding the case unripe for constitutional decision at that time, the court left open the possibility of further review after trial and judgment. The Supreme Court declined to review the case, with Justice William J. Brennan dissenting. □

New York court extends alimony protection to husbands

A New York State trial court has declared unconstitutional a statute permitting awards of alimony only to wives, and granted temporary alimony to a husband. In *Thaler v. Thaler*, 391 N.Y.S.2d 331 (1977), the husband, an Israeli national, married an American citizen in Israel. She filed an action for annulment six weeks after their arrival in the United States. Because of his alien status, the husband could not obtain work while remaining in New York to contest the annulment proceeding. He applied for temporary alimony, notwithstanding that N.Y. Domestic Relations Law Section 236 provided for such awards only against husbands in favor of wives.

The Supreme Court for Nassau County granted the award. In a spirited opinion, Justice Bertram Harnett held, in accord with other New York cases, that sex is a suspect classification, but that in any event the state could not preclude an entire class of persons from receiving alimony where the basis of alimony awards is individual need.

> "Given the legal inhibition against sexual discrimination, the fact that statistically a wife is much more likely to be an alimony recipient cannot reasonably mean that a husband as a matter of law should be excluded altogether from alimony access."

Calling the statute "blatantly discriminatory and condescending," Justice Harnett awarded temporary alimony and an interim counsel fee to the husband. □

Verbal solicitation not attempted lewd act

The Court of Appeal for the Second District of California has held that a mere verbal sexual solicitation does not constitute the attempt to commit a lewd act.

The facts at trial showed that Appellant did not touch the victim, but only requested to perform an act of oral copulation.

In reversing Appellant's conviction for attempted lewd acts upon a child under fourteen, the Court stated: "The fact that the person solicited is needed for consummation of the offense cannot logically or reasonably change the character of a defendant's acts from mere preparation to an unequivocal act to commit the ultimate offense."

The Court, however, rejected Appellant's contention that a California Penal Code Section which prohibits double punishment would preclude conviction of molesting a minor under 18 (Cal.P.C. Section 647a), when Appellant was also convicted of the greater, comprehensive offense provided by California Penal Code Section 288—attempting to commit a lewd act with a child under fourteen. That Court found that since the relevant statute prohibits only double punishment, and the evidence was insufficient to sustain conviction on the greater, comprehensive offense, Appellant was properly convicted of child molestation, which includes the solicitation of a minor. □

Ohio's sexual solicitation law voided in landmark decision

> (Ed. Because this opinion written by the majority of the First Appellate District Court of Ohio is so excellently written and may well serve as a model opinion for other appellate courts across the country, it is being reprinted in full. *State of Ohio v. Phipps*, No. C-76886, opinion filed March 29, 1978.)

Phipps was convicted of importuning in violation of R.C. 2907.07(B). The brief record discloses that Phipps stopped his car at a downtown corner in Cincinnati about 2:15 in the morning, rolled down a car window, and said to the single male standing on the sidewalk, a complete stranger, "Hop in, let's have some sex." The stranger approached the car and peered into the back seat. Phipps then said, "You look paranoid, come on in, I want to suck your dick." After the man got into the car, Phipps made the specific proposal again along with some other conversation, but he did not touch the other man in any way. The stranger was a police officer in civilian clothes, and he testified that he was offended. Phipps was arrested immediately. On this evidence, Phipps was convicted by the Hamilton County Municipal Court sitting without a jury.

The two assigned errors are the court's refusal to dismiss the prosecution of this charge because the statute is unconstitutional, and the court's finding of guilty despite the failure of the evidence to prove a culpable mental state.[1]

R.C. 2907.07(B) reads in full as follows:

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

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Ohio solicitation

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We note that what must offend the other person is a solicitation; that is, the communication of an offer which seeks the consent of the other person to engage in a mutual activity. The major thrust of the statute is against speech, not conduct. The state is not required to prove any overt act, or any touching of the person, or a verbal aggression in circumstances leading directly to violence (or any other illegal action). The state need prove no more than an oral proposal which offends its recipient.

Two constitutional issues are presented under appellant's first assignment of error. They will be considered in the following order: whether the statute is unconstitutional for overbreadth because it violates the free speech clause of the First Amendment, and whether the statute is unconstitutional for vagueness because it violates the due process clause of the Fifth Amendment. Because our conclusions on these two issues are dispositive, and because appellant did not raise any equal protection issue, we do not reach that constitutional question.

As to free speech, we hold that the statute in its entirety violates the First Amendment because it is an overbroad restriction on speech.[2] Compare *Columbus v. Scott* (1975), 47 Ohio App. 2d 287, in which the Tenth District Court of Appeals found unconstitutional a city ordinance identical to R.C. 2907.07(B) in all respects except that it contained no requirement that the other person be of the same sex.

Being a cornerstone of our liberty, the freedom to speak one's mind has a preferred position in our system of self-government. This is not an absolute constitutional right, and our inquiry must be whether the importuning statute constitutes an impermissible restriction on speech protected by the First Amendment.

There are two categories of speech. One of these includes those forms of speech which may be said to be *per se* unprotected by the First Amendment. Examples are: libel and slander, *Beauharnais v. illinois* (1952), 343 U.S. 250; calculated falsehood, *Time, Inc. v. Hill* (1967), 385 U.S. 374; obscenity in "works of art," *Miller v. California* (1973), 413 U.S. 15; "fighting words," *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568 and *Cincinnati v. Karlan* (1974), 39 Ohio St. 2d 207. Phipp's invitation does not fall into any one of the foregoing: obviously, it is not libel, slander or calculated falsehood; it is not "obscene," despite any lay impression to the contrary, because the obscenity exception is, by definition, limited to expression by "works" and does not include direct communication between persons; it is not "fighting words," because it is not limited to those homosexual solicitations which are likely to provoke a violent response, and because we have nothing before us to show "that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities" with execrations like that uttered by Phipps. *Cohen v. California* (1971), 403 U.S. 15, at 23; *Brandenburg v. Ohio* (1969), 395 U.S. 444; *Healy v. James* (1972), 408 U.S. 169. Importuning is not *per se* unprotected speech.

The second category is speech that is protected by the First Amendment but can be regulated if the state can show that it has a compelling need to do so and if the regulation is limited to the minimum amount necessary to protect that compelling state interest. Normally such invasion of the right of free speech is justified when the state acts to prevent a substantial evil that rises "far above" public inconvenience, annoyance and unrest. See, for example, *Terminiello v. Chicago* (1949), 337 U.S. 1, for speech which does not go beyond the protection of the First Amendment; and *American Communications Assoc., CIO v. Douds* (1950), 339 U.S. 382, for speech which may be regulated by reason of a compelling state interest. The respective interests of the individual and the state must be weighed. In the words of Judge Learned Hand, the courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis* (2nd Cir. 1950), 183 F.2d 201, at 212, *aff'd* 341 U.S. 494.

What, then, is the state interest asserted in R.C. 2907.07(B) and is it so "compelling" as to justify the restriction of speech contained therein? Two possible interests suggest themselves: (1) prevention of homosexual activity and (2) prevention of language personally offensive to the citizens. Neither of these "evils" is sufficient in our judgment to justify the restriction imposed.

The 1974 Criminal Code does not prohibit adults from engaging in sexual activity, including homosexual acts, in private and with the consent of the participants. Adults are free to consent to and may engage in any type of sexual activity they may choose without violating the law.[3] Having chosen to decriminalize private homosexual acts between consenting adults, the legislature cannot, logically, retain the criminal nature of proposals to engage in such acts, even if the proposal is personally offensive to the person addressed. How else is the actor to determine whether or not the other person will consent, thus removing the subsequent act from the prohibitions of the law? If individuals are permitted to engage in consensual acts, reason and consistency say that they should be allowed to communicate with each other in order to determine whether or not both consent.[4] We know of no principle of constitutional law to the effect that when you *ask* another's consent to engage in lawful activity (that is, "lawful" so long as the other consents), you may nevertheless be held criminally responsible if the activity suggested happens to offend the other person or if you go about it in such a way as to offend him.

Preventing the use of offensive language is also an insufficient basis on which to support this statute. Offensive language alone, however discordant with widely accepted values, is not subject to governmental regulation. *Cohen v. California, supra,* at 22 *et seg.; Coates v. Cincinatti* (1971), 402 U.S. 611. Thus the importuning statute cannot be said to promote a compelling state interest.

We find no other constitutionally sufficient reason to uphold this statute. Homosexual invitations are clearly not advocacy of social reform, political progress, economic change, or sexual freedom. They are offers personally directed to another and may violate the sence of decency of many persons. However, we find no constitutional precedent holding that communications about sexual matters are in a category different and apart from, and therefore subject to greater regulation than, communications about politics, economics, literature, science, art or social matters. There is such a thing as unprotected obscenity in works of art; clearly, we are not as free to expose our bodies as we are to expose our economic, religious and political beliefs. Nevertheless, we believe that verbal communication about sexual matters *per se* is not subject to any greater restriction than that in other areas of human experience and activity.

The entire section falls before the First Amendment, whether it seeks to cover the instance where the actor knows the other person is offended, or the instance where the actor is simply reckless in that respect.[5]

Further, we hold that R.C. 2907.07(B) is unconstitutionally vague. This upholding of unconstitutionality is based

on "[t]he underlying principle . . . that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss* (1954), 347 U.S. 612, 617.

What makes the accused's solicitation a criminal act is that it is "offensive to the other person." If he or she is offended, a crime has been committed; if not, there is no offense. It all depends upon the other's individualistic reaction to the proposal. The standard is not limited to what reaction would be expected by a reasonably prudent man under the circumstances; the sole standard is the feelings of this one person, however idiosyncratic and unpredictable.[6]

If at the moment of the proposal the actor knows in actual fact that it will be "offensive to the other person" and he nevertheless proceeds, then, assuming *arguendo* that the action's offensiveness crosses over a clearly drawn line of criminality, the accused could be held criminally responsible, because he can logically be held to understand that he stepped over the line. The standard is ascertainable by reason of his knowledge of the other's reaction. Under established principles of law, we may infer that the accused intended to offend. But this does not establish the statute's constitutional status because offensive language is not *per se* subject to governmental regulation.

The situation changes when the actor does not know what the other's reaction will be. Is he reasonably and fairly warned that he will be subject to criminal punishment if with heedless indifference to the consequences he proceeds to make his proposal in perverse disregard of a known risk that it will likely be offensive?[7] The answer will depend on whether the probability of personal offense is a "known risk" that any person so confronted will "likely" be offended.

We believe that answer must be that the actor is not fairly warned. First, the line between unpunishable overtures and criminal importuning is drawn by the other person's feelings, a test of infinite variables. It is an *ad hominem* rule. Second, if we seek to resolve the uncertainty by applying the legal concept of "reasonable cause to know," we must weigh the probabilities of offensiveness. We believe that the diversity and unpredictability of human sexual responses are such that the probability of accurate predictions about the offensiveness of homosexual advances are too uncertain to provide a firm foundation for a standard of criminal conduct.

We conclude that in drawing the line of criminality at solicitation recklessly offensive to the other person, the legislation is unconstitutionally vague because it seeks to rest criminality on offensive language *per se* and because it uses an *ad hominem* guideline not limited to any ascertainable standard of rule or reason.

The first assignment of error is well taken, and we are constrained to reverse the conviction below and discharge defendant.

Having determined that the statute falls by reason of unconstitutionality, it is unnecessary for us to pass upon the second assignment of error, in which *Phipps* questions the sufficiency of the evidence to sustain his conviction.

We reverse the conviction below and discharge the defendant. □

NOTES TO OHIO SOLICITATION

1. Appellee did not file a brief or seek to participate in oral argument.

2. This defendant may attack R.C. 2907.07(B) on free speech grounds because of "the transcendant value to all society of constitutionality protected expression," which is deemed to justify a defendant's attacking free speech restrictions, even though his own conduct could be regulated by a narrowly specific statute. *Gooding v. Wilson* (1972), 405 U.S. 518 at 521.

3. Two other divisions of R.C. 2907.07 prohibit solicitations to engage in clearly illegal conduct. Division (A) controls proposals to persons under age 13 to engage in any sexual activity (whether or not the offender knows the minor's age). The act would be gross sexual imposition, a violence of R.C. 2907.05(A)(3). Division (C) prohibits solicitations to sexual conduct when the offender is age 18 or more and is 4 or more years older than the other person, and that person over age 12 and under age 15 (whether or not the offender knows the minor's age). The act would be sexual imposition, a violation of R.C. 2907.06(A)(4). However, the act solicited under division (B) would not constitute criminal conduct if the proposal (as made) or the act (if accomplished) or both were not offensive to the other person. On the other hand, it would be a crime if the proposed contact (if accomplished) was offensive to the other person. R.C. 2907.06(A)(1).

   In R.C. Chapter 2907, Ohio prohibits a wide variety of sexual agressions when the actor physically touches or abuses another under aggravated circumstances; such as, purposely compelling the other to submit, substantially impairing the other's judgment or control, knowingly coercing the other to submit, engaging in physical contact knowing the other person's ability to appraise or control his conduct is impaired or his awareness of what is going on is impaired or mistaken, or knowing that the sexual contact is offensive to the other person or being reckless in that regard.

4. On the contrary, where the underlying act sought by the accused is illegal, the solicitation thereof may be prohibited without running afoul of the First Amendment. *Cherry v. State* (1973), 18 Md. App. 252, 306 A. 2d 634; *Riley v. U.S.* (D.C. App. 1973), 298 A.2d 288; Annot. ("Construction and effect of statutes making solicitation to commit a crime a substantive offense") 51 A.L.R. 2d 953 (1957).

5. The majesty of the First Amendment can tolerate the sort of deviation from decency and good taste demonstrated by Phipps' conduct. The state's substantial interest in an ordered society will be advanced by other Ohio criminal laws that prohibit physical sexual aggression. Whether or not the delineation of sexual offenses in the Ohio Criminal Code is sufficient to protect the sexual integrity of individuals against actual physical assault and to regulate the sexual ambience of society is a political question for the legislature to resolve. It is not within the judicial function.

6. We can identify two areas of uncertainty: will the other person be offended, and if so, how much? Prediction of human reactions in general has not yet been reduced to measurable standards, and prediction of responses to sexual advances is as difficult as that to any other experience. Thus, in the first instance, a person has no measurable way to become aware, in advance, of how the other will react to his offer. He is not prohibited from making any homosexual advance, only those which offend. All will depend on the time and place and the circumstances of the approach, together with such imponderable factors as the sexual sensitiveness of the other person and his feelings at the moment.

   The second uncertainty reflects on the degree of offensiveness: how offended must this other person be for the trier of facts to say that it was a violation of law? The range of reactions to homosexual overtures runs from outrage to pleasurable anticipation. Where is the line of criminality to be drawn? If we attempt to cure these uncertainties by a judicial gloss that only a substantial offensiveness, or one likely to result in physical violence, is reached by the statute, we would tend to dispel some of the fuzziness of the line of criminality, but we would not dispel all of it. The actor still does not know, in advance, whether the other will be offended to that degree. The incurable defect lies in the feelings of the other person at the moment.

7. See the definition of "recklessly" and "reckless" in R.C. 2901.22(C). We have no difficulty with these definitions because they are of constitutional clarity. Our concern stems from the use of that word in seeking to prohibit "recklessly offensive" solicitation measured solely by the feelings of the other person. We strike down a standard of criminality that turns on an unpredictable and unmeasurable reaction. We do not reach in this case, and therefore reserve, any and all questions about the use of "recklessly" and "reckless" in any other provision of the Ohio Revised Code.

Transsexuals win medical assistance, lose employment rights

The California Court of Appeal, First District, Division Three, has by a 2-1 vote held transsexuals eligible for sex reassignment surgery under the state's Medi-Cal program for indigents. *G.B. v. Lackner,* 145 Cal. Rptr. 555 (Apr. 20, 1978); *Doe v. Lackner,* 145 Cal. Rptr. 570 (Apr. 20, 1978). Both cases involved male-to-female transsexuals who were independently diagnosed as suffering from gender dysphoria, for which sex reassignment surgery was the only recognized therapy.

The only question decided by the majority opinion was whether the surgery was medically necessary under the state statutes and regulations. The Department of Health had characterized it as "cosmetic," which had been defined as "[s]urgery to alter the texture of configuration of the skin and its relationship with contiguous structures . . . sought by the patient for personal reasons . . . ." The court in *G.B.* held that the sex reassignment surgery was obviously not cosmetic, stating: "Male genitals have to be considered more than just skin, one would think."

In its opinion, the majority relied heavily on expert testimony presented at the administrative level, in which the witnesses described the procedures and emphasized their necessity to correct the condition of gender dysphoria; and liberally quotes the medical literature supporting the same view. The negative determination in both cases had been made by a state consultant whose specialty was ophthalmology. The court concluded that all the evidence pointed to a finding of medical necessity, and that the classification of sex reassignment surgery as "cosmetic" was arbitrary.

In a dissenting opinion, Judge Scott argued that great weight should have been given to the administrative decision, and that the proposed surgery was properly classified as cosmetic because the patient's primary problem was one of attitude. "No evidence was presented in the record that appellant's genitals were abnormal or unhealthy . . . . The surgery is performed in an effort to alleviate the patient's emotional distress which is caused by his subjective perception of his body." Judge Scott also addressed the appellants' arguments that both the federal Social Security Act and the constitutional right of privacy compelled Medi-Cal to pay for the surgery. Although both *Doe v. State Dept. of Pub. Welfare,* 257 N.W.2d 816 (Minn. 1977), and *Rush v. Parham,* 440 F.Supp. 383 (N.D.Ga. 1977), had held that the federal Act requires such payments, Judge Scott distinguished *Doe* on the ground that there the State had conceded the medical necessity of the operation, and expressed disagreement with the *Rush* court's reliance on the opinion of the treating physician. On the statutory issue, Judge Scott concluded that "[t]he fact that no technique has yet been found which will relieve the depression associated with transsexualism, except transsexual surgery, does not compel the conclusion that such surgery is medically necessary." On the constitutional issue, Judge Scott relied on *Maher v. Roe,* 97 S.Ct. 2376 (1977), which held that denial of Medicaid funds for abortions was not violative of the privacy right.

In a federal case also arising in California, the Ninth Circuit Court of Appeal has held in a split decision that neither Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a) (1), which prohibits employment discrimination based on "sex," nor the Equal Protection Clause of the U.S. Constitution forbids discrimination against transsexual employees. In *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), the plaintiff began hormone treatments after obtaining employment as a multilith operator. Although her supervisor knew of the treatments and of plaintiff's plans for sex reassignment surgery, plaintiff received a promotion and a pay raise. When plaintiff asked that her records be changed to reflect her female name, she was dismissed.

The court held that, although Title VII "was intended to place women on an equal footing with men . . . [.], Congress had only the traditional notions of 'sex' in mind." The court relied on the absence of legislative history, and on Congress' failure to expand Title VII to cover sexual preference to support its conclusion. As in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), which sustained exclusion of pregnancy from disability benefit plans, the court failed to explain why there was no connection between a change from male to female and "traditional notions of 'sex.'" [The same court later affirmed an earlier case similarly construing Title VII. *Voyles v. Ralph K. Davies Med. Center,* 570 F.2d 354 (9th Cir. 1978) (table), *aff'g* 403 F.Supp. 456, 2 *Sex.L.Rptr.* 9 (N.D. Cal. 1975).]

The court in *Holloway* also considered a claim of discrimination under the Fourteenth Amendment's Equal Protection Clause. The plaintiff had argued that exclusion of transsexuals from Title VII would be discriminatory; the Ninth Circuit disagreed.

> "This court cannot conclude that transsexuals are a suspect class. Examining the traditional indicia of suspect classification, we find that transsexuals are not necessarily a 'discrete and insular minority,' nor has it been established that transsexuality is an 'immutable characteristic determined solely by the accident of birth.' Furthermore, the complexities involved merely in defining the term 'transsexual' would prohibit a determination of suspect classification for transsexuals." [Citations and footnote omitted.]

Perhaps the court would have benefitted from the evidence before the California state court in *G.B. v. Lackner* and *Doe v. Lackner,* where a medical expert stated that "existent data strongly suggest that the disease [transsexualism] is not simply psychological in nature but that there is an organic component to the disease in the form of prenatal hormonal effects on the developing hypothalamus." (*Doe.*) Many factors –including the obvious social disadvantages–suggest that transsexualism is not voluntarily acquired, nor can it be discarded at will. Perhaps, too, the Ninth Circuit might have recalled the admonition of the Supreme Court in *Hernandez v. Texas,* 347 U.S. 475, 478-79 (1954), that "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection [as blacks] . . . . One method by which this may be demonstrated is by showing the attitude of the community."

Judge Goodwin dissented in the *Holloway* case, stating, "I would not limit the right to claim discrimination to those

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who were born into the victim class . . . . Had the employer waited and discharged the plaintiff as a post-surgical female because she had changed her sex, I suggest that the discharge would have to be classified as one based upon sex." Judge Goodwin would hold Title VII applicable to discrimination against transsexuals because of sex, whether before or after surgery, although perhaps he would allow an employer to defend by showing a business purpose going beyond the mere fact of a change in sex. But where, as plaintiff alleged, the sex change itself triggers dismissal, it is "irrelevant under Title VII whether the plaintiff was born female or was born ambiguous and chose to become female." Judge Goodwin also corrected the majority's unstated willingness to equate transsexualism with homosexuality for Title VII purposes. "This is not a 'sexual preference' case; this is a case of a person completing surgically that part of nature's handiwork which apparently was left incomplete somewhere along the line." □

Conclusive and irrebuttable presumptions in rape cases reviewed in South Dakota

A South Dakota statute provides that "a person sixteen years of age or less shall be presumed incapable of consenting to (acts of sexual penetration)." In *State v. Heisinger,* 252 N.W.2d 899 (1977), the Supreme Court of South Dakota was faced with the question whether, as the trial court had held, this presumption is a conclusive one; or, as defendants urged, only rebuttable, permitting the introduction of evidence of consent and capacity on the part of the prosecutrix.

Although at early common law only non-consensual sexual intercourse was prohibited, consensual sexual intercourse with a female under the age of ten years was later classified as the crime of "rape" and was treated as though force had been used. The minimum age of consent necessary for conviction of this crime had varied over the years in South Dakota from ten to eighteen years by legislative actions. In *Heisinger,* the State contended that the statute in issue was simply intended as "a reaffirmance of the traditional definition of statutory rape, i.e., a femal under the statutory age is conclusively presumed to be incapable of consenting to sexual intercourse." The majority opinion rejected this approach, holding that the statute adopted a rule of evidence rather that creating a substantive crime. Viewed in that light, the court found itself faced with a "fundamental" question of separation of powers. *Wigmore* was cited for the proposition that "to make a rule of conclusive evidence compulsory upon the judiciary is to attempt an infringement upon their exclusive province."

The court noted that the creation of irrebuttable presumptions in criminal cases also raised serious questions of due process, equal protection, self-incrimination and the presumption of innocence. Thus, "basic rules of statutory construction compel us to reach the conclusion that the presumption must be determined to be rebuttable. If an alternate construction of a statute would involve serious constitutional difficulties, then that interpretation should be rejected in favor of one which avoids such constitutional infirmities." The court stated that had the legislature elected to use the phrase, "conclusively presumed," the State's argument "would have considerably more weight. However, the effect on this opinion would be problematic."

Adopting this interpretation of the statute did not free the court from constitutional adjudication, however. Defendants asserted that the rebuttable presumption violated the due process requirements of *Leary v. United States,* 395 U.S. 6 (1969), that "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Attempting to apply *Leary,* the court found it "simply not within the realm of common judicial experience [that] the presumed fact (i.e., persons sixteen years old or less are incapable of consent to the sexual acts enumerated) is more likely than not to flow from the established fact (i.e., the prosecutrix is fifteen years old)." Pointing to the lack of any "authoritative material" which would establish that the presumption "is arbitrary because of a lack of connection between the two in common experience or that it is so strained as not to have a reasonable relation to the circumstances of life," the court found the presumption to be constitutional.

The dissenting opinion urged adoption of the State's interpretation, finding it anomalous that "a person could be found guilty of indecent molestation of a 14-year-old child even though the sexual act has been solicited and willingly participated in by the child, yet at the same time be immune from conviction under the rape statute based upon an act of sexual penetration solicitated and willingly participated in by the same child." □

Court admits "propensity" evidence in sex offense cases

The Arizona Court of Appeals (Division Two) has reaffirmed its rule permitting evidence of similar crimes to be introduced against a defendant in a sex offense case. In *State v. Miller,* 115 Ariz.App. 279, 564 P.2d 1246 (1977), the defendant was initially charged with burglary and child molestation on the basis of two similar incidents. In the trial for the later incident, the child involved in the earlier incident was permitted to testify that the defendant "resembled" the person who molested her. After defendant was convicted on the later incident, he was tried for the earlier incident and acquitted.

The court held the evidence of prior bad acts admissible notwithstanding the lack of positive identification and the subsequent acquittal. Noting that the general rule is that evidence of prior crimes is inadmissible, the court held that "where the offense charged involves an element of abnormal sex acts . . . it is admissible to show the accused's propensity to commit such perverted acts." The court did not indicate the extent of the term "abnormal sex acts," nor did it explain why considerations of reliability and fairness would support admission of prior sex offenses but not of other crimes. In all such cases—perhaps even more so in sex offense trials—the danger is that the jury will convict the defendant for his prior acts, not those for which he was charged. This may have occurred in *Miller,* since the jury in the second trial (where no prior acts were introduced) acquitted the defendant.

The California Court of Appeal has reached a similar conclusion in *People v. Goodson,* 145 Cal.Rptr. 489 (1978); *People v. Haslouer,* 145 Cal.Rptr. 234 (1978). In the *Haslouer* case, the court noted that "such evidence must be received with extreme caution[;] . . . such evidence has certain inherent dangers and the court must carefully weigh its probative value against its prejudicial effect." □

ADMINISTRATIVE RULINGS...

Yale prohibits discrimination against homosexuals

Each year, numerous organizations come to Yale Law School to interview students for possible employment. The school has developed placement guidelines and regulations to insure that the interviewing process is carried on in a responsible and non-discriminatory manner.

Previously, the regulations prohibited discrimination on the basis of race, age, religious preference, sex, and national origin.

In May 1978, the faculty voted to add the term "sexual orientation," to the list of so-called suspect classifications. All organizations using the placement facility have been notified of this change and the new language will be incorporated into the next printing of the law school bulletin. □

Detroit establishes sexual minority task force

After considerable lobbying efforts by the Michigan Organization for Human Rights, a statewide gay-rights coalition, the Detroit Human Relations Commission voted unanimously in May 1978 to establish a *Task Force On Sexuality Discrimination.*

The *Task Force* will include gay and non-gay appointees. The purpose of the *Task Force* is to educate the community about the issues which affect sexual minorities. □

Alaska Human Rights Commission requests gay rights jurisdiction

On June 3, 1978, the Alaska State Commission for Human Rights adopted a resolution on a 4-1 vote which requested that the Alaska State Legislature extend the statutory jurisdiction of the Commission by incorporating the words "sexual preference" as a protected right.

The motion which was adopted stated:

"The Alaska State Commission for Human Rights hereby acknowledges the fundamental human rights of all persons, including those with a sexual preference which may differ from the majority population. Therefore, the Alaska State Commission for Human Rights urges and supports the Alaska State Legislature to extend the words 'sexual preference' as a protected right under AS 18.80, 'Laws Against Discrimination.' " □

Boy Scouts discriminate against gay members

Two members were recently asked to leave the Law Enforcement Police Explorer Post in Mankato, Minnesota, when it was discovered that they were gay.

When questioned about the incident, the director of public relations for Boy Scouts of America in New Brunswick, New Jersey stated, "We support the action taken by the post advisor as a prerogative of the organization to accept or reject any members." □

U.S. Bureau of Prisons sets policy on reporting rapes

On April 17, 1978, Norman A. Carlson, Director of Bureau of Prisons, issued a new policy statement to insure accurate reporting of sexual assaults. The policy statement reads as follows:

BACKGROUND. Terminology used in reporting sexual assaults in institutions had created a misunderstanding on the part of the public as to the nature of these assaults. Specifically, the use of the terms "homosexual assault" and "homosexual rape" to describe assaults or rapes committed by one prisoner upon another is misleading. Through the use of such terms, the public is led to believe that these assaults are committed by persons who are homosexual. While homosexuals are frequently the victims, the vast majority of rapes and assaults are committed by persons who are not homosexual. The terminology used to describe these incidents should not create mistaken impressions by the public.

ACTION. In any references to or reporting of sexual assaults and rapes, staff shall use the terms "sexual assault" or "rape." Care should be paid to communications with the public and the media in the use of this terminology.

Central office staff will review Bureau-wide policy issuances to insure that the terms "homosexual assault" and "homosexual rape" are not used in those issuances. Institutional staff shall make the same review with respect to policy issuances.

It is emphasized that the substance of our investigations of sexual assaults should not change. Full and adequate reporting of all facts to such incidents is vitally important and should continue. □

Amnesty International includes homosexuals as prisoners of conscience

At the International Council Meeting, Amnesty International's membership and decision-making body, held in Bad Honnef, Germany, on September 16-18, 1977, on the basis of a resolution put forward by the French section of Amnesty International and strongly supported by the United States section, the statute of Amnesty was amended to include "sex" along with race, ethnic origin, religion and political beliefs, in defining what Amnesty considers to be Prisoners of Conscience.

> A further resolution of the Council specified that: "considering that certain governments imprison because of sexual orientation or sexual behavior between consenting adults, affirms that Amnesty International considers to be Prisoners of Conscience persons detained or imprisoned because of such orientation or behavior provided that those persons have not infringed the human rights of any other person (and) requests the International Executive Committee to report to the 1978 International Council on the various ways of helping this category of Prisoners of Conscience."

These decisions mean that Amnesty International will consider for adoption as Prisoners of Conscience those men and women who are imprisoned because of homosexual preferences and, as the resolution notes, the International Executive Committee and staff are currently looking into this kind of imprisonment around the world. □

LEGISLATION ...

California Legislature refuses to relax sex registration laws

Under California law, persons convicted of certain sex crimes must register as sex offenders.

The registration laws require the defendant to report to the police department in the community in which he resides and inform the police of his conviction. The defendant must be fingerprinted and photographed. He is then listed in local police files and in the state capitol files as a sex offender. The sex offender must nofity the police of any change of address. If the offender moves to another community in California, the procedure starts all over again with another booking process. Registration is potentially a lifetime requirement.

Under present law, persons convicted of sexual behavior which is consensual and only involving adults must also register. The harshness of the penalty for adult behavior is presently being considered by the California Supreme Court in the case of *In Re Anders*, Crim. No. 20198. In that case, the petitioner argued that required registration for minor sex offenses is cruel or unusual punishment.

State Senator Alan Sieroty (D-Los Angeles) introduced a bill (S.B. 2192) which would have eliminated registration for consenting adult sexual activity. The bill was approved by the Sentate Judiciary Committee on a 5-2 vote. However, when the bill reached the Senate floor in late June 1978, it was defeated. Thirteen senators voted for the bill and twenty-two voted against it.

It appears that any reform in this area will come from the courts, rather than from the legislature; that is, if any reform is forthcoming. □

Mankato, Minnesota refuses to protect homosexuals

On January 22, 1978, the city council in Mankato, Minnesota defeated an amendment that would have prohibited discrimination on the basis of sexual or affectional preference. The vote of the council was 3 in favor of the amendment and 4 against it. □

San Francisco forbids private discrimination against gays

In April 1978, Mayor George Moscone signed into law a new city ordinance which prohibits discrimination against homosexuals in private housing, private employment and public accommodations. While several other California cities and counties have enacted ordinances protecting gays in public housing and employment, San Francisco is the first city in the state to expand this protection against discrimination in the private sector.

Under the ordinance, persons claiming discrimination could file a complaint with the city's Human Rights Commission, file a lawsuit for damages, or ask the District Attorney to initiate action.

Since the state law does not appear to protect gays in private employment, this is the only city in California in which there exists a clear-cut remedy to deal with private employment discrimination on the basis of sexual orientation. □

Alaska Legislature adopts new penal code

In June 1978, the Alaska Legislature adopted a new comprehensive penal code reform package. The new penal code, which becomes effective on January 1, 1980, decriminalizes private sexual acts between consenting adults. The new code establishes 16 as the legal age of consent for such sexual acts. This reform makes Alaska the 20th state in which a legislature has decriminalized such private sexual acts.

Non-commercial sexual soliciation of adults is not a crime under the new code. However, soliciting or engaging in prostitution will continue to be a crime. □

Definition of family expanded in Detroit

Several years ago, the Detroit City Charter was amended by the voters to establish a policy of non-discrimination on the basis of marital status and sexual orientation.

In May 1978, the Detroit City Council unanimously amended that city's single-family zoning ordinance to redefine "family." As previously defined, "family" had only included those "interrelated by bonds of consanguinity, marriage, legal adoption, or guardianship."

As amended, "family" now includes "two persons not interrelated by bonds of consanguinity, marriage, legal adoption or guardianship, provided that such group lives together and occupies a dwelling as a single housekeeping unit with a single set of culinary facilities . . . ."

This action by the Council now brings the zoning laws into conformity with the existing living arrangements of thousands of persons (homosexual couples as well as heterosexual couples) who have been living together in violation of the previous zoning laws. □

Chicago Council votes on gay-rights issues

In December 1977, the City Council of Chicago approved a clause which prohibits discrimination against homosexuals in a lengthy ordinance regulating the sale of condominiums.

However, in May 1978, the Council voted down, by a vote of 42 to 5, an ordinance amendment which would have prohibited ambulance operators from discriminating against customers because of their "sexual orientation." This amendment was offered by Alderman Martin Oberman who has been routinely including gays in every antidiscrimination clause proposed to the City Council.

Alderman Clifford Kelley has introduced a comprehensive gay-rights ordinance which would prohibit discrimination in all city functions. That bill is pending in Committee. □

New Jersey adopts new penal code

Because this issue is late in going to press, we are able to report a major legislative development in New Jersey. In late July, 1978, the New Jersey Legislature passed a bill which revises the entire penal code for that state. In this reform package, private sexual acts between consenting adults has been decriminalized, making New Jersey the 21st state legislature to have done so.

Other reforms in the bill include repeal of the sexual solicitation statute, setting the age of sexual consent at 16 years, and adoption of the open lewdness provisions suggested in the Model Penal Code of the American Law Institute. □

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Efforts to decriminalize prostitution have met with little or no success despite the efforts of civil libertarians. Although some state bar associations have adopted resolutions calling for decriminalization of prostitution, the American Bar Association narrowly defeated such a resolution. Every state in the country has laws regulating prostitution, soliciting for prostitution, or loitering for the purpose of prostitution. Nevada is the only state in which municipalities are given the option to allow prostitution. Numerous court challenges have been made attacking either the prostitution laws themselves or the methods of police enforcement. So far the existing laws and police procedures have survived most attacks.

With the refinement of surgical techniques, more persons are undergoing sex-reassignment surgery than ever before. The courts and legislatures have not been prepared for the legal implications of male-to-female or famale-to-male changes in gender. Transsexuals have demanded the right to change the gender indications on their birth certificates, to be free from employment discrimination, and to be entitled to a name change. They have called for an end to police harrassment. In the case of *M. T.* v. *J.T.*, the New Jersey Supreme Court was faced with the question of determining a person's gender identity for purposes of marriage.[1] A postoperative male-to female transsexual had married the male defendant. Although

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the latter knew of the gender change prior to the marriage, the defendant attempted to avoid support when the couple separated. He alleged that the marriage was void because the plaintiff was "really a man." In upholding the validity of the marriage, the court stated that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche, or psychological sex, then identity by sex must be governed by the congruence of these standards."

In recent federal cases, however, transsexuals have not received judicial recognition of their civil rights. In two such cases, federal judges have held that discrimination against transsexuals in private employment is not a violation of the federal civil rights statute's prohibition against sex discrimination. The earliest reported appellate case dealing with transsexualism that could be found was decided by a New York court in 1966. That court upheld the refusal of the City Board of Health to change the sex designation on a transsexual's birth certificate. Since that decision, an additional fifteen appellate cases have discussed and often expanded the rights of transsexuals. (*Ed.* See 3 Sex.L.Rptr. 1)

Private Sexual Behavior

Most of the laws in existence in the mid-1960s that regulated sexual behavior had been enacted at the turn of the century or in the early 1900s. While these codes were probably reflective of societal attitudes when they were adopted, there can be no doubt that over the years these attitudes have changed drastically.

In the late 1950s the American Law Institute, with the assistance of judges, lawyers, and legal scholars, drafted a "Model Penal Code" as a guide for the various state legislatures that were about to embark upon a wholesale revision of their penal codes. One of the most controversial recommendations of the A.L.I. was the decriminalization of private sexual acts between consenting adults. In 1960 Illinois became the first state to adopt this A.L.I. recommendation. The age of sexual consent was set at eighteen years. In addition, Illinois decriminalized noncommercial sexual solicitations between adults.

Since the decriminalization in Illinois, an additional twenty-two legislatures have voted to decriminalize private sexual acts between consenting adults: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Washington, West Virginia, and Wyoming. In Idaho decriminalization never took effect because the legislature repealed the sexual provision before the effective date of the new code. In Arkansas, sexual reform was operative for one year, and then its legislature re-enacted provisions for private homosexual behavior, retaining decriminalization for heterosexuals. The Arkansas legislature adopted recriminalization in the same session that it commended Anita Bryant for her campaign against homosexuals in Dade County, Florida. As of this writing, the reforms in Iowa, Indiana, Nebraska, Alaska and New Jersey have not gone into effect although passed by their legislatures. So we presently have sixteen states that have completely decriminalized private sexual behavior among consenting adults, and in five states reform will be effective soon.

At first glance one might interpret these legislative changes as being reflective of important changes in popular attitudes. However, this is not necessarily so. The methods by which these changes have occurred must be examined before drawing a conclusion as to how reflective they are of popular attitudes. In only one of these states was a bill specifically designed to decriminalize private sex for adults. In two states decriminalization was accomplined through reform of rape laws. In the remaining states decriminalization was hidden in the general penal code reform package. Usually the chances for passage of sexual-law reform are greatly enhanced when it is part of a bill containing hundreds of other statutory changes. The chances of the public, the church, or conservative legislatures opposing the bill are thus greatly diminished.

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California is the only state in the country that has decriminalized by way of a special bill. In 1975 the vote in the state senate was a tie. When conservative senators threatened to leave the senate floor to break the quorum, they were locked in the room for several hours until the lieutenant governor was flown back to Sacramento from Denver to cast the deciding vote in favor of decriminalization.

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In the mid-1960s the New York legislature passed a general penal code revision. The proposed decriminalization of private sex was strongly opposed by the Catholic Church. As a result, the legislature compromised and decriminalized for married couples only. Acts of oral copulation or sodomy between consenting single persons remain criminal to this day. Special bills to further reform the law have met with defeat each year in Albany.

The Texas legislature reformed its sex laws when it revised its entire penal code in the early 1970s. It decriminalized for all consenting heterosexuals but retained homosexual conduct as an infraction.

In order to get a proper perspective on attitudes toward sex within the legal system, developments within the courts, administrative agencies, and the executive branch of government should also be examined.

Ever since its landmark decision regarding *Griswold* v. *Connecticut* in 1965, the United States Supreme Court has been developing the constitutional right of sexual privacy.[2] In *Griswold,* the Court voided a law that infringed on the rights of married couples to use contraceptives. The Court acknowledged that a right of marital privacy existed and told the government to stay out of the marital bedroom. A few years later the Court expanded this "marital right of privacy" in the case of *Eisenstadt* v. *Barid.*[3] In this case the Court said that single persons also have a right to privacy and that the state could not forbid their use of contraceptives. In the early 1970s the Court again expanded the right of privacy in the series of abortion cases beginning with *Row* v. *Wade*[4]. The right of privacy was held to be so fundamental that the state could not prohibit abortions during the first trimester.

Sexual civil libertarians are hoping that someday this sexual right of privacy might actually be extended by the Court to include the right to engage in private sexual behavior by consenting adults without interference by state regulations. Relying on the *Griswold, Eisenstadt,* and *Roe* cases, several appellate courts and federal courts have indicated that statutes prohibiting such private behavior are unconstitutional. Proponents of decriminalization seemed to be gaining momentum in the courts—and then came *Doe* v. *Commonwealth's Attorney*[5]. Two anonymous homosexuals filed suit in federal district court in Virginia attacking that state's sodomy law. The Virginia law forbids engaging in oral or anal sex, whether married, single, heterosexual, or homosexual. The federal court, in a two-to-one decision, upheld the state law. The anonymous homosexuals appealed to the U.S. Supreme Court. Without even granting a hearing or permitting oral arguments, the Supreme Court summarily affirmed the lower federal court. Justices Brennan, Marshall, and Stevens were of the opinion that the Supreme Court should have granted a hearing. This decision made headlines in newspapers across the country and was considered by civil libertarians as a serious setback.

In the areas of contraception and abortion the U.S. Supreme Court has extended the right of privacy to juveniles. In *Planned Parenthood of Central Missouri* v. *Danforth,* the Court declared as unconstitutional laws that required parental consent prior to an abortion for a minor[6]. On June 9, 1977, in the case of *Carey* v. *Population Services International,* the Court declared as unconstitutional laws that made it a crime to distribute contraceptives to minors under sixteen[7]. Arguments were made that this prohibition was necessary in order to discourage premarital sex among teenagers. The Court held that it would not allow this type of indirect approach to curb teenage promiscuity. Noting that it had not yet definitively decided to what extent states may regulate private sexual behavior among adults, it declined to decide which constitutional rights minors may have regarding sexual behavior.

Although legislative and judicial development of sexual privacy has been somewhat slow, proponents gained considerable leverage when, in 1973, the American Bar Association adopted a resolution urging all state legislatures to decriminalize sexual activity among consenting adults.

Homosexual Civil Rights

Discrimination against the homosexual minority has been a tradition in our country. Behind this discrimination are popular beliefs that homosexuals are sick, sinful, criminal – and molesters of children. After homosexuality was declassified as an illness by the American Psychiatric Association and the American Psychological Association, the sickness theory has been rapidly crumbling. Now that twenty-one states have decriminalized private sexual acts, it is difficult to stereotype homosexuals as criminals. And recent studies in major cities such as Los Angeles and San Francisco show that the overwhelming number of child molestation cases are heterosexual in nature. No state or federal laws prohibit discrimination against homosexuals in housing, employment, or other business transactions, and only about forty municipalities have legislation *protecting* homosexuals in any of these areas.

Until recently the federal Civil Service Commission considered homosexuality a disqualifying factor in federal employment. But after years of litigation and several important victories in federal court, the Civil Service Commission has changed its position.

Homosexual teachers have had the most difficult time achieving employment protection. In California in the late 1960s a teacher was fired because of noncriminal private sexual acts with another consenting teacher. The sexual activity occurred in the privacy of a bedroom. The California Board of Education revoked his teaching credentials on the ground of immorality and moral turptitude. In *Morrison* v. *Board of Education,* a sharply divided California Supreme Court held that this action by the board was illegal because it had failed to show that the teacher was unfit.[8]

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In the early 1970s Joe Acanfora was involved in a gay student organization in Pennsylvania. After moving to Maryland, he applied for a teaching position. He failed to mention his connection with the gay organization when he filled out the job application. After working successfully as a teacher in the Marlyand schools, he was fired because the school board discovered Acanfora was a homosexual. He sought protection in the federal courts but to no avail.[9]

Peggy Burton taught school in Oregon. Although she was a "model teacher," she was fired when the school district was

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Sex Law Explosion

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informed by someone that she was a lesbian. Ms. Burton filed suit in federal court. The United States Court of Appeals for the Ninth Circuit held that her termination was illegal and ordered that she be paid back wages. However, they did not order her reinstatement.[10]

John Gish taught school in New Jersey. Gish was a gay activist and was involved in demonstrations and gay political organizations. Gish was taken out of the classroom when the school discovered his gay-rights involvement. The school board demanded that he submit to a psychiatric examination.

John refused to submit to an exam and sought protection in the state courts. The New Jersey appellate court held that he must submit to the examination.[11] (*Ed.* See 3 Sex.L.Rptr.15)

The latest setback for gay teachers was delivered by the State of Washington Supreme Court in *Gaylord v. Tacoma School District.*[12] Gaylord had been a teacher for many years in the Tacoma area. He was not openly gay and certainly not involved in gay rights. When a former student told an administrator that Gaylord might be a homosexual, the administrator confronted Gaylord with the accusation. Gaylord admitted that he was a homosexual. Subsequently, he was fired and appealed the decision. Although he never admitted engaging in illegal sexual activity, and although private sex is no longer criminal in Washington, the Washington Supreme Court upheld his dismissal. Referring to the Catholic dictionary, the court held that although not illegal, homosexuality is immoral and therefore grounds for dismissal. (*Ed.* See 3 Sex.L.Rptr. 14)

The homosexual battle for civil rights also continues in the areas if immigration, naturalization, military service, child custody, and marriage.

National attention was drawn to discrimination against homosexuals in the military in the case of Air Force Sgt. Leonard Matlovich. Matlovich was involuntarily discharged by the military because of his homosexuality. The federal district court judge who heard the case sustained the discharge but begged the military to reconsider its position on homosexuality. In a more recent case, a federal judge in California has declared that the military must prove, in each case, that the person's homosexuality makes him or her unfit for service. The judge declared as unconstitutional the automatic ban of all homosexuals from military service.[13]

Many homosexuals have had their children taken away from them in child-custody proceedings. Some judges feel that homosexuality automatically makes a parent unfit. The law in this area is developing slowly; only a few appellate decisions are reported. The American Psychological Association has taken the position that homosexuality should not be the sole or even primary consideration in child-custody proceedings. Whether this recommendation will be followed by the courts remains to be seen.

The body of American law with respect to gay civil rights is a very confused state. Whereas twenty years ago homosexuals had no civil rights, today they have some. The turbulance within the legal system during the past decade is bound to continue. Just as the issue of black civil rights gained national attention in the 1960s, gay civil rights seems to be one of the major issues of the coming decade. □

NOTES TO SEX LAW EXPLOSION

1. *M.T v. J.T.*, 355 A.2d 204 (N.J. 1976), petition for hearing in New Jersey Supreme Court granted, 364 A.2d 1097 (1976).
2. *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1679 (1965).
3. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972).
4. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973).
5. *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F.Supp. 1199 (E.D.Va., 1975), aff'd 425 U.S. 901, 96 S.Ct. 1489 (1976).
6. *Planned Parenthood of Missouri v. Danforth*, 96 S.Ct. 2831 (1976).
7. *Carey v. Population Services International*, 97 S.Ct. 2010 (1977).
8. *Morrison v. Board of Education*, 461 P.2d 375, 82 Cal.Rptr. 175 (1969).
9. *Acanfora v. Board of Education*, 359 F.Supp. 843 (1973), aff'd 491 F.2d 498 (4th Cir., 1974), cert. denied, 419 U.S. 836, 95 S.Ct. 64 (1974).
10. *Burton v. Cascade School District*, 512 F.2d 850 (9th Cir., 1975).
11. *Gish v. Board of Education*, 336 A.2d 1337 (1976).
12. *Gaylord v. Tacoma School District*, 559 P.2d 1340 (1977).
13. *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal., 1977).

Massachusetts 'abortion zoning' struck down

The Supreme Judicial Court of Massachusetts has invalidated a local zoning ordinance barring abortion clinics, but not other medical clinics, from certain areas. *Framingham Clinic v. Board of Selectmen*, 367 N.E. 2d 606 (1977). Justice Kaplan, writing for the majority, found the case an easy one. The town of Southborough had zoned the area where the proposed clinic was to be located so as to exclude "abortion clinics," "trailer camps," "commercial race tracks," "junk yards," and "piggeries or fur farms." Other medical clinics were permitted. "This indicated strongly that discrimination was at work against the constitutional right" of privacy, the court held.

Relying principally on *Doe v. Bolton*, 410 U.S. 179 (1973), and other lower-court cases, the Massachusetts court held that first-trimester abortions enjoy "a high measure of freedom from peculiar interposition by the State," that is, "legislation specially directed to the abortion episode." Unlike the minimal requirement of written consent upheld in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), this wholesale exclusion of abortion clinics "appears on its face to be an incursion into the basic right without acceptable justification."

The court rejected the town's contentions that public sentiment against the clinic ought to be considered; that other communities in Massachusetts permitted such facilities; or that private physicians were not prohibited from performing abortions. Justices Hennessy and Quirico concurred in the result purely on statutory grounds, arguing that state laws regulating health facilities had preempted local zoning regulations.

Perceptions of Homosexuality by Justices of the Peace in Colonial Virginia

by Robert F. Oakes, Ph.D.

Mr. Oakes is an assistant professor in the Department of History at the University of Texas.

Laws against homosexuality exist in all states to some extent today, and in most of them even private activity between consenting adults is illegal. Such laws, of course, have a long tradition, and though usually unenforceable, reflect the customs and attitudes of society as a whole. Many of the former jusitifications for these laws, especially medical and even theological, have been eroded considerably in recent years, forcing proponents to fall back upon custom, tradition, "social norms," and history. When we look to history, however, it is clear that many of our traditions in this area are derived from ideas, many of them three or four hundred years old, which are ludicrous in light of current knowledge.

Sources for determining attitudes and beliefs about the nature of homosexuality in the past are extremely difficult to find for periods before the twentieth century. People wrote as little as possible about the "wickedness not to be named," thus creating problems for the historian. One way to determine attitudes, as Louis Crompton has shown, is to study the laws themselves. His survey of colonial America, where (in accordance with either English precedent or biblical injunctions) homosexuality was a capital offense, reveals deep-seated animosity. In Puritan New England, legislators usually incoporated the proscriptions of Leviticus into statutes verbatim. In the southern colonies, English laws were either passed by colonial legislatures or assumed to be already in force. But in every colony, except for a brief period in late seventeenth and early eighteenth-century Pennsylvania, homosexuality was a capital offense, and while it is true that the death penalty was seldom carried out, the fact that it remained on the books in some states until long after the American Revolution indicates the intensity of the reaction to this "crime."[1]

But despite the historical value of the laws themselves in determining attitudes, they generally do not reveal much about beliefs people held on the subject. Obviously it was "detestable," a sin, a horrible crime, but the laws say little about the causes or nature of the crime. A more revealing picture emerges from handbooks published for justices of the peace, explaining the laws to these largely untrained officials. Use of justices of the peace as the principal enforcers of law at the local level had a long history in England, which was carried over into most of the American colonies. Furthermore, these officials usually came from the most influential families, a fact which rendered their handbooks more influential as well.

The institution of justice of the peace was especially strong in Virginia, which by the eighteenth century was the largest and in many ways the most "English" of the colonies. Unlike many other colonies, particularly the northern ones, Virginia did not have a law dealing specifically with sexual offenses. Instead, the colony relied on the English "buggery" statute of 1533.[2] Usually referred to as 25 Henry 8, Chapter 6, this statute made the "detestable and abominable Vice of Buggery," defined as homosexuality between two men or bestiality by men or women, a capital offense. The law may have stemmed from Henry VIII's attack upon the church. For the first time in English history, homosexuality and bestiality, previously punishable in ecclesiastical courts as sins against God, now were punishable exclusively in civil courts as crimes against the state. Henry had taken the first step in a hundred-year program of weakening the church by depriving it of its judicial powers.[3] When one considers the attitude of most churches in twentieth-century America, there is surely irony in the fact that homosexuality became a civil crime in England in order to strengthen the state and weaken the power and influence of the church.

Shortly after the passage of the new law, handbooks for English justices of the peace incorporated the new crime:

> It is enacted that the vice of Buggorie committed with mankynde, or beast be adjudged felonie, and that no person so offendyng that be admytted to his clergye. And that the Justices of peace that have power to here and determine the same, as other felonies.[4]

Refusing to allow "benefit of clergy" specifically denied convicted "buggerers" the opportnity, available in many other capital offenses, of escaping the death penalty for a first conviction. Several other handbooks published in the sixteenth century contained similar language, but as yet there was nothing said about the origin or nature of the crime.[5]

Nearly one hundred years after the statute became law, the great English jurist, Sir Edward Coke, expounding on all English laws in his *Institutes*, gave semi-official sanction to attitudes and beliefs about homosexuality that would influence justices of the peace on both sides of the Atlantic for the next two hundred years. In the Third Part of the *Institutes*, completed in 1628, Coke reinvoked religious sanction for the crime by stating that it was "against the ordinance of the Creator and order of nature." He also held to attributed buggery to the Italians, a long-held belief the origin of which needs further investigation. The Italians presumably either caught it or learned to enjoy it from the "Lumbards." Coke even incorrectly traced the derivation of the word "buggery" to the Italian word "bugeria." He also clarified the method of execution (hanging, as opposed to burning or burying alive) and specified that some evidence of penetration was necessary for the crime. Buggery under English law, therefore, definitely meant anal intercourse by two men. Finally Coke wrote that if the party "buggered" where "within the age of discretion" (presumably meaning boys under fourteen years of age), he would not be guilty of the crime. Englishmen who practiced buggery, by the way, came to the "abomination," according to Coke, in one of four ways: "By pride, excess of diet, idleness, and contempt of the poor."[6] Proud, fat, lazy, rich men must have been quite suspect in seventeenth century England.

One hundred fifty years later, handbooks written specifically for Virginia justices of the peace leaned heavily on Coke's *Institutes*. Richard Starke's *The Office and Authority of a Justice of Peace*, published in Williamsburg in 1774, lists all Virginia crimes aphabetically and devotes one whole section to "buggery." Because this book reveals so much more than the law itself about attitudes on the eve of the Revolution, it is worth quoting at some length:

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> THIS Word is derived from the Italian *Bugarone*, the Vice being said to have been first introduced into *England* by the *Lombards* from *Italy*.
>
> Buggery is a detestable and abominable Sin, Among Christians not to be named, committed by carnal Knowledge, against the Ordinance of the Creator, and Order of Nature, by Mankind with Mankind, or with Brute Beast, or with Womankind with Brute Beast. 3. Inst. 58.
>
> By the Statute of 25. Hen. VIII. Chap. 6, Buggery committed with Mankind, or Beast, is made Felony without Benefit of Clergy; and this Statute making it Felony generally, there may be Accessories both before and after. But those who are *present, aiding,* and *abetting,* are all Principals; and although none of the Principals are admitted to their Clergy, yet Accessories before and after are not excluded from Clergy. 1. H.H. 670.
>
> If the Party buggered be within the Age of Discretion (which is generally reckoned the Age of fourteen) it is no Felony in him, but in the Agent only; but if Buggery be committed upon a Man of the Age of Discretion, it is Felony in them both. 3 Inst. 59. 1 H.H. 670.
>
> The Heinousness of this Crime Happily indeed but little known heretofore in this Colony) renders a strict Examination into the Fact, as well as great Caution in bailing the offender, necessary to be observed by the Justices before whom the Information is made . . . .[7]

Like Coke, Starke obviously accepted the long English tradition of associating homosexuality with Italy. The English and Virginians believed that homosexuality was rare in their country, but widespread in Italy. English parents were warned not to let their sons travel to that country, and when homosexuality seemed to be on the increase in eighteenth-century England, one writer blamed it on the drinking of tea and "the pernicious influence of Italian opera."[8] The association with Italy probably explains why Coke, Starke, and the authors of other American handbooks mistakenly traced the derivation of "buggery" to apparently non-existent Italian words rather than to a corruption of the term *Bulgar*.[9]

After the Revolution, Virginia, no longer wishing to rely on English laws, passed its own buggery statute in 1792: ". . . if any do commit the detestable and abominable vice of Buggery, with man or beast, he or she so offending, shall be adjudged a felon, and shall suffer death, as in case of felony, without benefit of Clergy."[10] When William Walter Hening published a new guidebook for justices of the peace in 1795, his "buggery" section again attributed the origin of both the name and the practice to Italy. And in specific reference to beastiality, Hening cited an example from Coke "of a great lady in England, who cohabited with a *Baboon,* and conceived by it." Ignorant of modern biological possibilities, seventeenth and eighteenth century Englishmen and Americans feared bestiality even more than homosexuality because they believed that inhuman creatures could be produced.[11]

Repeating the belief that the crime was seldom committed in Virginia, Hening nevertheless provided justices with the form to be used for indictments for buggery:

> *county to wit.*
> The jurors for the commonwealth upon their oath do present that_____of the county of_____aforesaid, labourer, not having the fear of God before his eyes, nor regarding the order of nature, but being moved and seduced by the instigation of the devil, on the_____day of _____in the year of our lord_____with force and arms, at the county aforesaid, in and upon *one*_____*a youth about the age of* _____*years,* then and there being, feloniously did wickedly, diabolically and against the order of nature had a venereal affair with the said_____ _____and then and there carnally knew the said_____and then and there feloniously wickedly, and diabolically, and against the order of nature, with the said_____ did commit that detestable and abominable crime of buggery (not to be named amongst *Christians*) to the great displeasure of Almighty God, to the great scandal of all human kind, against the form of the statute in such case made and provided, and against the peace and dignity of the commonwealth.[12]

The indictment form is, in some ways, a throwback to an earlier day. No longer are Italians blamed for homosexuality; instead, the crime resulted from the "instigation of the devil." This religious view is all the more striking in light of the section of "Blasphemy and Profaneness," immediately preceding the "Buggery" section. Here Hening refers to the "real pleasure to every friend to civil and religious liberty" resulting from Virginia's abolition of the "crime of *blasphemy* . . . which has disgraced the code of almost every civilized nation in Europe, as was implicitly adopted in America, prior to the late revolution." But now, Hening crows, Jefferson's act for establishing religious freedom, separating church from state in Virginia, had done away with this archaic crime.[13] It is also interesting that the indictment form applies only to an adult who commits buggery on a presumably innocent youth. In a later edition he mentions animals in a footnote. The implication, of course, is that it never occurred to Hening that buggery could take place between consenting adults. It would only happen when an adult forced himself upon a boy or an animal. The equation of homosexuality with pederasty, by no means uncommon in twentieth-century America, went even beyond Coke, who stipulated that "Amator puerorum . . . is but a species of Buggery."[14]

The Virginia lawmakers, by the way, rejected Thomas Jefferson's 1776 suggestion, when he and others submitted a plan for revising the newly independent state's penal code, that the death penalty for sodomy be abolished. The proposal lumped sodomy with rape and polygamy and called for the "liberalized" penalty of castration for men and cutting a half inch hole in the nasal cartilage of women.[15]

A few years later, in 1800, the Virginia General Assembly, in a revision of the penal code, finally repealed the death penalty for buggery, though only for free men. The crime and most other previously non-clergiable capital offenses now carried penalities from one to ten years in prison. When Hening published a second edition in 1810, this and other changes were incorporated. Again the Italians were blamed and the story about the woman and the baboon was repeated. But the definition of the crime is clarified. Drawing upon Coke's *Institutes,* Henin instructed justices that penetration had to

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take place before the crime could be considered buggery. Emission of semen, without penetration, did not qualify. Presumably the requirement for penetration had always been in effect in colonial Virginia (because of Coke), but now it was specifically spelled out.[16] "For the honour of human nature," Hening wrote with obvious relief, "it must be observed, that this crime is seldom committed." The requirement for penetration and the obvious difficulty in obtaining proof of it, undoubtedly made indictment unlikely.

The removal of the death penalty, while obviously an improvement did not necessarily reflect any less opposition to the crime of buggery. In two hundred years of Virginia's history, there had been only one recorded execution for buggery, and even then (in 1625) there was some question as to the guilt of the condemned.[17] Despite the nearly complete absence of prosecutions, Virginia authorities still felt it necessary to keep the crime on the books, and even the reduced penalty was rather harsh when compared with other (heterosexual) offenses. Bigamy, for instance, was punishable in the new code by a prison term of from six months to two years. Adultery resulted in a twenty-dollar fine; fornication, a ten-dollar fine. Only rape drew heavier penalties, requiring confinement of from ten to twenty years in the case of an adult woman. Ironically, according to Hening, rape of a girl (under ten), since it was not specifically mentioned in the new statutes, came under the general provision of felonies formerly capital. Thus, rape of a child received the same penalty as buggery, one to ten years, considerably less than rape of an adult. Slaves were singled out for harsher punishment. Attempted rape of a white woman carried a penalty of castration; if the attempt succeeded, the penalty was death.[18]

These justice of the peace handbooks, even more than the laws themselves, reveal much about attitudes toward homosexuality in colonial Virginia. Presumably similar surveys of other periods would also prove useful. What these sources do not explain, however, is why people had so much fear that they criminalized homosexuality in the first place, especially in the light of the paucity of prosecutions. But since many of the assumptions, attitudes, and laws of today are derived from often irrational and ignorant beliefs in the past, we need to continue to look at that past for ways to break down the ignorance and prejudice of the present. □

NOTES TO JUSTICES OF PEACE

1. Louis Crompton, "Homosexuals and the Death Penalty in Colonial America," *Journal of Homosexuality* I (1976), 277-293; see also my article "'Things Fearful to Name': Sodomy and Buggery in Seventeenth-Century New England," *Journal of Social History*, forthcoming. I wish to thank Professor Crompton for his suggestions in the preparation of this article.
2. Arthur P. Scott, *Criminal Law in Colonial Virginia* (Chicago, 1930), p. 284.
3. H. Montgomery Hyde, *The Other Love: An Historical and Contemporary Survery of Homosexuality in Britain* (London, 1970), frontispiece, and p. 39; G. Rattray Taylor, *Sex in History* (New York, 1954, 1970), pp. 145-146; Derrick Sherwin Bailey, *Homosexuality and the Western Christian Tradition* (London, 1955), pp. 147-149.
4. Anthony Fitzherbert, *The Newe Boke of Justices of the Peas* (London, 1538; reprint edition New York, 1969) fol. 158.
5. See, for example, . . . *the boke for a Justice of peace* . . . (London, 1544); *The New Book of Justices of Peace Made by Anthonie Fitzherbert* (London, 1554); *The Auctoritie of al Justices of Peace* . . . (London, 1580). I consulted the copies in the rare book collection of the Huntington Library, San Marino, Calif.
6. Hyde, *The Other Love*, p. 37; Sir Edward Coke, *The Third Part of the Institutes of the Laws of England*, 4th ed. (London, 1669), chapter x, pp. 58-59.
7. Richard Starke, *The Office and Authority of a Justice of Peace* (Williamsburg, 1774), p. 61 (Evans #13637).
8. Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (New York, 1977), p. 492; *Plain Reasons for the Growth of Sodomy in England*, quoted in Ralph Blair, *Etiological and Treatment Literature on Homosexuality*, (New York, 1972) p. 1.
9. Vern L. Bullough, *Sexual Variance in Society and History*, (New York, 1976), p. 390.
10. *A Collection of All Such Acts of the General Assembly of Virginia . . . Now in Force* (Richmond, 1803), p. 179.
11. William Waller Hening, *The New Virginia Justice* . . . (Richmond, 1795), p. 93; on fears of bestiality, see my "Things Fearful to Name."
12. Hening, *New Virginia Justice*, pp. 93-94. The wording is a revised version of earlier English indictments.
13. *Ibid.*, p. 93.
14. Coke, *op. cit.*
15. Julian P. Boyd, ed., *The Papers of Thomas Jefferson* (Princeton, 1950-), II, 325.
16. William Waller Hening, *The New Virginia Justice* . . . , 2nd ed. (Richmond, 1810), pp. 147-148.
17. See Crompton, *Homosexuals and the Death Penalty* pp. 290-292.
18. Hening, *New Virginia Justice*, 2nd ed., pp. 144-148, 276, 470-475.

Immigration & naturalization — homosexual acts in private — good moral character

A Naturalization examiner in Texas has recommended granting citizenship to a man who has stated that he engaged in homosexual acts in private with other consenting adults during the 5-year statutory period preceding the submission of his petition (Section 316 (a) of the Immigration & Naturalization Act, 8 U.S.C. 1427 (a)). *In re Petition of Richard John Longstaff*, _____ F. Supp. _____, (N.D. Tex. April 17, 1978).

Following the reasoning of the court in *In re Labady*, 326 F.Supp. 924 (S.D. N.Y. 1971), the examiner held that the performance of such acts alone does not preclude a finding of good moral character even where the state in which the petitioner resides has criminal penalties classified as misdemeanors outlawing such acts. As in *Labady*, it was held that such acts are private and are not the legitimate concern of the examiner or the court in determining whether a person is of "good moral character" under the aforementioned provisions of the Immigration & Naturalization Act.

The examiner also noted a trend among the general populace to tolerate private homosexual activity insofar as it is no longer seen as automatic evidence of lack of good moral character. □

Courts fail to extend benefits of 'Marvin' decision

As expected, the California Supreme Court decision in *Marvin v. Marvin,* 557 P.2d 106, 3 *Sex.L.Rptr.* 13 (Cal. 1976), has spawned a great deal of litigation by members of unmarried couples seeking the same legal rights as those extended to their married counterparts. Two recent California Court of Appeal decisions have declined to extend procedural benefits to couples living in "Marvin" relationships.

The court in *Henderson v. Superior Court,* 142 Cal. Rptr. 478 (1978), held non-Californians with no substantial ties to the state ineligible to bring their property dispute before a California court. The couple had lived together in Florida, where they entered into a *Marvin*-type contract. After the relationship ended, the female plaintiff moved to California and sued the male cohabitant, who was still a Florida resident. The defendant's only contact with the forum state was his entry of horses in certain horse races. The court held that personal jurisdiction was lacking: "California has a distinct public interest in not attracting to its borders and drawing into its court system controversies arising out of extramarital and nonmarital affairs carried on and concluded by nonresidents outside the state."

Expressing the fear that California's courts would be "thrown wide open to the grossest form of forum shopping, for which the only equipment needed would be a tenuous claim to some California connection, a serviceable carpetbag, and a one-way ticket from New York, London, Paris, or Cannes," the court held as an alternative ground of decision that the California forum would not be convenient in the case at bench.

In the second case, *Low Tong v. Jocson,* 142 Cal.Rptr. 726 (1977), an automobile accident injured the plaintiff's fiancee, whom he later married. Plaintiff sued for loss of consortium arising out of the fiancee's injuries. California recognizes an action for loss of consortium of a married spouse. *Rodriguez v. Bethlehem Steel Corp.,* 525 P.2d 559 (Cal. 1974). However, in *Borer v. American Airlines,* 563 P.2d 858 (Cal. 1977), loss of consortium between parents and children was held not actionable. Following *Borer,* and arguing that "somewhere a line must be drawn," the court held that actions of loss of consortium must be strictly limited to the marital relationship. The decision appears to be confined to the special public policy problems perceived by California courts in cases seeking to expand tort liability, and does not indicate a general retreat from *Marvin.* □

Alaska upholds lewd acts statute

An Alaska statute which prohibits any person from commission of "a lewd or lascivious act upon or with the body of a child under 16 years of age, to arouse, appeal to or gratify his lust, passions or sexual desires . . .", or those of the child, is not constitutionally infirm, the Alaska Supreme Court has held.

In *Anderson v. State,* 562 P.2d 351 (1977), the court upheld the statute against First Amendment, vagueness and privacy challenges.

Appellant was convicted of performing fellatio on a thirteen-year-old boy. He testified at entry of a plea of nolo contendere that the sexual act had been performed in private with the boy's full knowledge of the nature of the act and with his full consent.

Appellant contended that the statute was so overbroad that it intruded upon the privacy rights of both adults and children. The court construed the statute to require "physical contact of the child's body by the adult or by some instrumentally controlled by the adult." In so doing, the court mooted Appellant's contention that the statute could be read to prohibit parents from dressing in front of their children or displaying sex education materials to them.

Although the court determined that the overbreadth doctrine is available only to challenge infringement of First Amendment rights, it went on to discuss *Anderson's* argument that the presumed incapacity of children to consent to sex under the statute violated their privacy rights. The court held that, assuming children have a right of sexual privacy, the State may nevertheless control the sexual conduct of children to a degree that would be improper as to adults. Specifically left open was the question of whether the right of privacy under the Alaska Constitution protects private, consensual sex between adults.

Having narrowed the construction of the statute to require physical contact, the court refused to apply a First Amendment/overbreadth analysis to Appellant's vagueness objection. Appellant had argued that the phrase, "lewd or lascivious act," was no more explicit than the phrase, "crime against nature," which the Alaska court had found impermissibly vague in *Harris v. State,* 457 P.2d 638 (1969).

The Alaska court agreed that "the terms, 'lewd and lascivious', taken by themselves, seem as imprecise as the phrase, 'crime against nature.' " However, the court stated that the phrase was not to be viewed in isolation, and that its context gave it sufficient precision to withstand a vagueness challenge. Nevertheless, the court intimated that a statue which prohibited any "lewd or lascivious act" might well be so vague as to violate due process. □

Louisiana court inches toward 'Marvin' holding

The Supreme Court of Louisiana has moved closer to California's *Marvin* holding protecting unmarried cohabitants. In *Henderson v. Travelers Ins. Co.,* 354 So. 2d 1031 (La. 1978), the court held that worker's compensation benefits could be paid to a "concubine—in popular parlance, a 'common-law' wife," at least where the decedent's "legitimate family" suffered no loss of benefits thereby.

The decedent had died in a work-related accident in 1971. At that time, he and the claimant "had been living together as man and wife for eleven years . . . in a stable, loving relationship." As a dependent, she would have been entitled to benefits had their marriage been formalized. Although the purpose of the law was stated to be economic and compensatory, an earlier case had denied recovery to a "concubine" on the ground that the statutory intent did not extend to illicit relationships.

The *Henderson* court overruled the earlier decision, and held that benefits could not be denied to any dependent household member "because of moral unworthiness." The court relied in part on the absence of any relation between moral judgment and the economic purpose of the statute, and also noted that Louisiana has no general legislative purpose to deny all benefits to "concubines." In dissent, Justice Summers argued that "the decision demeans the dignity of marriage and to that extent strikes a blow at the family unit and the stability of the social structure." □

Death penalty for rape cruel and unusual

According to the United States Supreme Court, imposition of the death penalty for rape is grossly out of proportion to the severity of the crime, and, thus, constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Only Justices Burger and Rehnquist dissented from the holding of the court in *Coker v. Georgia,* 53 L.ED.2d 982 (1977).

Justice White's plurality opinion stated: "We have the abiding conviction that the death penalty, which 'is unique in its severity and recovability . . .' is an excessive penalty for the rapist who, as such, does not take the human life."

The test for determination of violation of the Eighth Amendment as stated in *Gregg v. Georgia,* 428 U.S. 153 (1976), is whether the punishment: (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering or (2) is grossly out of proportion to the severity of the crime.

The factors to be weighed in making a judgment of the acceptability of a punishment, the court stated, should include public attitudes, history and precedent, legislative attitudes, and the response of juries. Viewing present attitudes to the death sentence for rape, Justice White noted that (1) since 1925 less than half the states have imposed the death penalty for rape; (2) in the wake of *Furman v. Georgia,* 408 U.S. 238 (1972), of the sixteen states which had previously imposed the penalty, only three re-enacted it for the rape of an adult woman; and (3) Georgia juries had imposed the penalty in only five out of sixty-three possible cases.

In a footnote, the court stated that the death sentence for rape may satisfy the first criterion, even though it fails the second.

Justice White acknowledged that, according to Georgia law, the death penalty could not be imposed for rape absent aggravating circumstances, which were present in *Coker.* However, the court stated the aggravating circumstances "do not change the fact that the instant crime being punished is a rape not involving the taking of a human life."

Justice Powell concurred in the holding of the court with the reservation that " . . . it may be that the death penalty is not disproportionate punishment for the crime of aggravated rape."

Mr. Justice Burger, in dissent, indicated that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes, but stated that invalidation of Georgia's law amounted to substituting judicial policy for a legislative decision. □

Court refuses to recognize 'racial impossibility' test in paternity proceedings

A California court has refused to recognize a "racial impossibility" test permitting a putative father to escape liability for child support. In *San Diego County v. Brown,* 45 Cal. Rptr. 483 (1978), the defendant was black, and the mother and child were white. He offered to prove that the marriage was "open" and that his wife had had sexual relations with other men during the marriage. The trial court refused this evidence on the ground that Cal.Evid. Code Section 621 conclusively presumed the issue of the marriage to be legitimate.

The Court of Appeal affirmed, holding that the "conclusive presumption did not deny due process." □

Navy must retain homosexual sailor, court holds

A federal court in San Francisco has preliminarily enjoined the Navy from discharging a homosexual without proof of unfitness or unsuitability arising from the homosexual status. In *Martinez v. Brown,*_____F. Supp._____, No. C-77-2523-CFP (N.D.Cal., Feb. 27, 1978), Judge Cecil F. Poole held invalid those portions of BUPERSMAN Section 3420185-1b. and SECNAVINST 1900.0A which made discharge of homosexuals mandatory. Relying on another military case, *Saal v. Middendorf,* 427 F.Supp. 192 (N.D.Cal. 1977), and federal civil service cases, Judge Poole held that "due process requires that some nexus be shown between homosexual conduct and unsuitability for service before a person can be discharged on account of such activity." Since the Navy policy did not make individual fitness determinations for those members suspected of homosexuality, it was unconstitutional. The court also concluded that "the stigmatizing effect of a discharge for homosexuality" tipped the balance of hardships in favor of awarding a preliminary injunction, and held that exhaustion of remedies through the military discharge review system was not required because of its apparent futility and because of the constitutional issues presented. □

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Consent no defense to sodomy charge

The District of Columbia Court of Appeals in *Harley v. United States,* 373 A.2d 899 (1977), has held that consent is no defense to the crime of sodomy.

Defendant was convicted of assault with intent to commit rape and of sodomy. The facts at trial established that the victim had been attacked and sodomized in a dimly lit playground. The complainant testified that two police officers had passed within thirty-five feet of the attack, but that she was afraid to cry out or struggle.

Based on those facts, Appellant argued that the government has presented insufficient evidence of lack of consent for the case to go to the jury.

In overruling that contention, the court stated that consent is not a defense to sodomy. With respect to the assault charge, the court held that the evidence on appeal had to be viewed in the light most favorable to the government. So viewed, the evidence was held sufficient for submission to the jury. □

Oklahoma public decency statute found too vague

Nude dancers in Oklahoma cannot be charged with the crime of outraging public decency according to that state's Court of Criminal Appeals. *State v. Walker,* 568 P.2d 286 (1977).

Defendant Thelma Jane Walker had been arrested for "exposing her breasts and pubic area" and "committing lewd and lascivious gestures" while performing her dance routine at Satan's Lounge in Tulsa.

The statute under which she was charged prohibited acts outraging public decency and injurious to public morals.

The court concluded that application of the statute to the defendant violated the Supreme Court's obscenity guidelines set out in *Miller v. California,* 413 U.S. 15 (1973), because the prohibited sexual conduct was nowhere "specifically defined by the applicable state laws."

The court noted, however, that conduct such as that under consideration could still be punished as indecent exposure. □

Consensual sex constitutes gross indecency

Consensual sexual acts are punishable under Michigan's gross indecency statute, according to dicta from that state's Court of Appeals.

In the case of *People v. Jones,* 254 N.W.2d 863 (1977), defendant had been convicted of several violations, including gross indecency and assault with intent to commit gross indecency. On appeal he argued that his conviction of both crimes violated the Fifth Amendment prohibition against multiple punishments for the same offense.

In overruling appellant's contention, the court held that the crime of assault with intent to commit a gross indecency is not necessarily a lesser included offense of the crime of gross indecency.

Said the court: "The assault statute punishes an assault committed with a specific intent, whereas the gross indecency statute punishes conduct that is of such character that the common sense of society regards it as indecent and improper."

Illinois court reaffirms disparate incest laws

The Illinois Supreme Court has once again decided that its incest laws may label father-daughter contacts "aggravated incest" punishable more severely than other incestuous contacts.

In *People v. Boyer,* 63 Ill.2d 433, 349 N.E.2d 50 (1976), the court sustained the statutory scheme under both strict and relaxed equal protection tests. Although all victims of incest suffer psychological harm, the court held, "[t]he possibility that the female victim may become pregnant . . . adds considerably to the potential harm . . . ." The court dismissed the argument that this justification is inapplicable where the sexual contacts fell short of intercourse, on the ground that "such action if undeterred would normally lead to acts of intercourse." The court did not consider whether the same justification might also apply in acts of incest with one's mother or sister, which are treated as ordinary incest.

Boyer was reaffirmed without discussion in *People v. Yocum,* 66 Ill.2d 211, 361 N.E.2d 1369 (1977). □

Prisoners — escape — defense of necessity

The Supreme Court of Illinois has held that, in a trial for escape, the jury must be allowed to consider the defendant's contention that he had escaped out of necessity to avoid rape, *People v. Unger,* 66 Ill. 2d 333, 362 N.E. 2d 319 (1977).

While in prison, defendant had been threatened with homosexual rape. After his transfer to a state prison farm, he was in fact raped by three other inmates. His life was also allegedly threatened after he had reported the assault to prison authorities.

The court held that, based upon such evidence, there existed a question of fact to be submitted to the jury on the affirmative defense of necessity. The court also listed the factors relevant to establish a necessity defense, although it stated that not all need be proved in order to have a successful defense: (1) specific threat of death, forcible sexual attack or substantial bodily injury; (2) no time to complain to authorities or a history of futile complaints; (3) absence of force or violence used against prison personnel or innocent persons during the escape; (4) immediate report to authorities by the prisoner after he is removed from danger of violence. Underwood, J., dissented. □

Prisoners may marry, California court holds

The California Court of Appeal (Third District) has held that prisoners have a civil right to marry which cannot be abridged on "security" grounds. The prisoner in *In re Carrafa,* 143 Cal.Rptr. 848 (1978), sought to marry a nonprisoner, but his request was denied on the ground that his fiancee was under investigation for smuggling of firearms and narcotics into the prison. The court held that the right to marry was protected under both constitutional and statutory law, and could therefore be abridged "only if necessary to effect an overriding governmental interest." That necessity was not shown by the pending security investigation, since less restrictive means—including body searches or denial of visitation rights—were available to protect the prison, without denying the right to marry. □

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THE EXECUTIVE BRANCH OF GOVERNMENT

An Untapped Source of Power for Gay Rights

Thomas F. Coleman, J.D.
Publisher, Sexua LawReporter

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Current problems and priorities

The average person, including the average gay person, is not fully cognizant of the extent of the legal disabilities associatied with homosexuality. Just what legal problems do gay people have?

In the majority of states private homosexual acts between consenting adults are still criminal. While it is not criminal to *be* a homosexual, it is criminal to *engage* in homosexual acts in a majority of jurisdictions. Great progress has been made in this area when we consider the fact that in 1960 private homosexual activity was a crime in every jurisdiction in this country. Today, such activity has been decriminalized in twenty-one jurisdictions.[1] Sodomy law reform is necessary to remove the stigma of criminality attached to homosexuality and to those who practice it. However, sodomy law reform is not a "homosexual bill of rights".[2]

It might be noted at this point that when private acts of sodomy have been decriminalized, this action has been the result of legislative action rather than judicial fiat. In fact, all but two jurisdictions decriminalizing private homosexual acts have done so in a criminal code revision package.[3] No state supreme court has yet declared that private homosexual acts between consenting adults are constitutionally protected.[4] The recent action by the United States Supreme Court in *Doe v. Commonwealth's Attorney* has caused responsible activists and attorneys to exercise extreme caution before rushing into the federal courts in the hopes of immediate judicial relief.[5] While the court has indicated that the constitutionality of the sodomy laws is still open to question, it may be quite some time before the Supreme Court is ready to give plenary consideration to the issue.[6] Until that day arrives, gay activists should be realistic about reform of sodomy laws through court challenges.

Changes must occur in other areas of criminal law. In the majority of states it is criminal for one adult to ask another to engage in a homosexual act.[7] The solicitation laws infringe on the First Amendment rights of homosexuals. Open lewdness laws are used by plainclothes vice officers to arrest gay men for public displays of affection or for sexual activity occurring

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IN THE COURTS...

New York Court Voids Prostitution Law

The New York City Family Court -- one of the state's lower courts -- has invalidated the state's prostitution law on equal protection and privacy grounds. *In re P.*, 400 N.Y.S.2d 455 (Fam.Ct. 1978). Of particular note is the fact that the defendant was a fourteen-year-old girl charged under New York's juvenile laws. She was charged with offering to engage in sodomy for a fee, and the court was obliged to consider both the prostitution law and the consensual sodomy laws.

In a lengthy opinion, Judge Margaret Taylor dismissed the charges against the defendant. In the equal protection portion of the opinion, it was noted that New York until 1964 defined a prostitute as a "female person" and did not punish males; since then, enforcement patterns have continued to discriminate against women. "Of those arrested (in early 1977), 2,944 were females and 275 were males .... of the 2,944 female prostitutes arrested, only 60 of their male patrons were charged with a violation." 400 N.Y.S.2d at 460. Undercover officers assigned to prostitution details are always men posing as patrons, never women posing as prostitutes. Treating sex as a suspect classification under the New York state constitution, the court could find no "legitimate distinction" between the arrest of the female prostitute and the release of the male patron. The court also noted that most arrested prostitutes are nonwhite, while their customers are predominantly white.

Turning to the issues posed by the sodomy charge, the court noted that New York criminalizes "deviate" sexual intercourse only between unmarried persons. Finding "no empirical evidence that consensual sodomy is intrinsically harmful," 400 N.Y.S.2d at 463, the court found the right to sexual privacy applicable equally to all, regardless of marital status or the nature of the acts performed. Rejecting biblical citations and other unproven authority, the court posited a complete right to privacy regarding sexual matters. The commercial character of defendant's conduct did not alter the holding. Citing extensive research, the court held that prostitution was not a major contributor to venereal disease and that any "ancillary crime" related to prostitution was caused not by the acts punished, but by the state's decision to punish them. Finding that the prostitution law was not narrowly drawn to accomplish some legitimate state goal, the court held it invalid under the due process clauses. The goal of preserving the family was explicitly rejected, since family stability was not demonstrably affected by prostitution or any other extramarital sex. The court did hold, however, that the public does have a right to be protected from offensive street solicitations by prostitutes; but this objective could be achieved without punishing the underlying sexual activity. The court's conclusion is remarkable:

> "Sex for a fee is recreational, not procreational sex....If it is paternalism that prompts the legislature to protect women by proscribing prostitution, that motive is ill served by the prostitution laws since women are not protected, but rather are penally punished....However offensive it may be, recreational commercial sex threatens no harm to the public health, safety or welfare and therefore, may not be proscribed." (400 N.Y.S.2d at 468) (footnote omitted). □

Court Limits Use of Loitering Statute

The Florida Supreme Court has indicated its disapproval of police enforcement of loitering statutes as substitutes for the prostitution laws. In *B.A.A. v. State*, 356 So.2d 304 (Fla.1978), a female juvenile was observed approaching cars stopped at an intersection and conversing with the drivers. The arresting officer believed that solicitation for prostitution was occurring, but there was insufficient evidence to press that charge. In reversing a conviction under the loitering and prowling statute, the court noted that such convictions require proof that (1) the time or place of loitering were " not usual for law-abiding citizens" and (2) the circumstances warranted "immediate concern for the safety of persons or property in the vicinity." The second element had not been met, and the conviction was reversed. The Supreme Court noted that if defendant's actions could be considered loitering, anyone making a lawful solicitation for charitable purposes could be arrested; such use of loitering statutes "as a 'catchall' provision...when there is insufficient basis to sustain a conviction on some other charge" was disapproved. □

Colorado Court Reinstates Pimping Statute

The Colorado Supreme Court has reversed a lower court's holding that the state's pimping statute was unconstitutionally vague and overbroad. *People v. Stage*, 575 P.2d 423 (Colo.1978). The statute punishes anyone "who knowingly lives on...money... earned...by any other person through prostitution...." The state supreme court held that the trial court should not have considered the merits of the defendant's motion to dismiss, but rather should have denied the motion for lack of standing to raise the issue. The trial court had held the measure overbroad because any merchant or tradesperson could be prosecuted under it for selling goods or services to a prostitute, but the defendant was not charged with such innocent conduct. "When a butcher, baker or candlestick maker is prosecuted for pimping in selling meat, bread or candles to a prostitute, those issues may be brought before us." The court also rejected a First Amendment challenge, noting that there was no specific, objective threat to the defendant's First Amendment rights, and that defendant's claimed "freedom of economic association" was not in fact chilled by prosecution. □ *continued on following page*

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Most State Courts Uphold Prostitution Laws

In several rulings, state courts have generally found a variety of grounds to affirm convictions for prostitution or related offenses.

Profit v. City of Tulsa, 574 P2d. 1053 (Okla.Ct.) Crim.App.1978), was a solicitation case. A police officer stopped his car in response to defendant's waving at him, and asked her to get into the car. She invited him into her house. The court stated the rest of the facts as follows:

> "After a brief conversation the officer asked, 'Well how much is this going to cost?' To which the defendant replied, 'Well, we will talk about price in a minute. First come here, I want you to urinate for me in the stool.' This the officer refused to do. He again inquired as to price, and the defendant at this point became nervous. She accused the officer of being a cop, and asked him to leave. He then placed her under arrest."

Defendant was charged under an information accusing her of soliciting an act of "lewdness or prostitution," but the proof went entirely to the issue of lewdness. The court rejected defendant's argument that her right of privacy in her own home had been violated: "The defendant asked a total stranger to expose himself to her, and to urinate in her presence. This solicitation was not laved of its lewdness by the mere fact that the door was closed." The court also rejected defendant's other assignments of error, noting in part that her criminal intent could be proved by the fact that she suspected the arresting officer of being a policeman and asking him to leave. (Ed. Note: The *Random House Dictionary* defines "lave" as to wash or bathe")

In *Tatzel v. State,* 356 So.2d 787 (Fla.1978), defendant was charged with entering a house for the purpose of "prostitution, lewdness. or assignation." She was observed entering a motel room with a man; the officer later peeked through some open curtains and observed defendant in a state of partial undress. After her arrest, she admitted being a prostitute. The court noted that, under the statute, no payment is required to establish prostitution where the sexual act is "licentious," and held the latter term not vague. Citing *Black's Law Dictionary*, the court defined "Licentious" sex as "that which is without regard to and, therefore, is in violation of, the law." Since fornication is unlawful, it would also constitute prostitution under the statute. The court rejected appellant's due process argument that stigmatizing sexual activity as "prostitution" is unreasonable in light of contemporary mores. Justice Boyd filed a dissenting opinion.

The petitioner in *Dinitz v. Christensen,* 577 P.2d 873 (Nev.1978), was convicted of soliciting an act of prostitution. Her challenges to the statute, defining prostitution as "vagrancy," were rejected with the comment that the conduct for which she was convicted was not merely "status," but required overt acts. Justice Gunderson, in dissent, complained that the author of the majority opinion had unilaterally removed the case from the calendar and decided it without oral argument, misconceiving petitioner's argument in the process.

In Maryland, a narrowing construction of Baltimore's massage parlor ordinance has resulted in a requirement that the prosecution prove that every defendant charged occupied the building for the express purpose of prostitution. The defendant in *Reed v. State,* 381 A.2d 323 (Md.Ct.Sp.App.1978), was arrested in a raid on a massage parlor after another employee offered to engage in prostitution with a vice officer. The only facts in evidence as to Ms. Reed were that she was present and was an employee of the massage parlor. The court held that there was no evidence of defendant's purpose; the fact that the premises were used for prostitution, or that defendant knew that they were, was irrelevant. The crucial element of proof -- the motivating force that prompted defendant to occupy the building -- was absent, and the conviction was reversed. □

Oregon Adopts Marvin Rule; California Applies Marvin to Protect Ex-Husband

The Oregon Supreme Court has adopted a rule similar to California's *Marvin* decision in construing the rights of unmarried cohabitants. In *Beal v. Beal*, 577 P.2d 507 (1978), the male partner in a nonmarital relationship petitioned the court to partition the real property in which he lived, and title to which was in his name. Both parties had lived in the house prior to separation, and had made joint payments toward the mortgage; after separation, the male party continued to live in the house and made all of the payments. Refusing to let the issue turn on who happened to possess legal title to the property, the court held that property division among unmarried couples must turn on the express or implied intent of the parties. Finding an implied intent by the parties to adopt a pooling arrangement during the relationship, the court awarded a ½ interest to the female party, adjusted for differences in the actual amounts contributed toward the house.

The California Court of Appeal has employed *Marvin* as a shield permitting an ex-husband to escape payment of spousal support to an ex-wife now living in a nonmarital relationship. In *In re Lieb*, 145 Cal.Rptr. 763(1978) the husband successfully petitioned to be relieved of the spousal support obligation on the basis of the wife's decreased need. Under an amended statute making irrelevant whether the nonmarital couple held themselves out as married, the court held that the requisite decreased need had been shown. Under *Marvin*, the services of a party to a nonmarital relationship have value, and the court held that Mrs. Lieb's provision of these services to the cohabitant entitled her to that value. If she chose not to claim her rights against the cohabitant, the court held, nevertheless she could not require her ex-husband to support her. Since her only remedy was to exercise her *Marvin* rights, the spousal support was reduced to a nominal sum. □

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...IN THE COURTS

Massage Ordinances Reviewed In Several Jurisdictions

The Supreme Court of Colorado has declared invalid a Denver ordinance prohibiting massages upon members of the opposite sex. *City and County of Denver v. Nielson*, 572 P2d. 484 (Colo.1977). In that case the lower court had held the ordinance valid because the United States Supreme Court's dismissal of the appeals in three similar cases was deemed conclusive of the masseuse's constitutional claims. However, the state supreme court interpreted the Colorado Constitution to afford greater due process protection than the Federal Bill of Rights, and reversed. The ordinance was held to be an improper conclusive presumption, contrary to fact, that all opposite sex massages would lead to illicit sexual activity.

The Indiana Supreme Court has reached a contrary conclusion, preferring to rule in accordance with the federal precedents, in *City of Indianapolis v. Wright*, 371 N.E.2d 1298 (Ind.1978). The court in *Wright* also found the ordinance section permitting inspection by police, health and fire officers constitutional under the search and seizure provisions of the Constitution, and held that the municipal licensing scheme was not preempted by the state legislature, noting that no misdemeanor penalties were involved. However, the preemption Doctrine was used to strike down a Fort Wayne, Indiana ordinance providing misdemeanor penalties. As reported in the Fort Wayne *News-Sentinel* of May 17, 1978, Superior Court Judge Phillip R. Thieme dismissed several prosecutions under the ordinance on the preemption ground. Judge Thieme also held another ordinance, forbidding all nudity except in the privacy of one's home, unconstitutionally overbroad. Although the ordinance had been applied to nude nightclub dancers, it could have been applied to high school locker rooms, artists' models, or theatrical performances.

Massage ordinances also fell under court rulings in Ohio and Utah. *Pentco, Inc. v. Moody*, ___F.Supp. ___ (S.D.Ohio, Mar. 7, 1978), reviewed a comprehensive Columbus, Ohio regulatory scheme. The court sustained the requirement that the license applicant "set forth the exact nature of the massage to be administered" and disclose the names of the applicant's managers, but held that no rational governmental interest supported a similar disclosure requirement for limited partners and other owners not associated with daily management of the business. The court also voided an absolute prohibition on licensing of any applicant convicted of two felonies in the preceding five years, and a similar prohibition on renewal of licenses where a code violation had occurred on the premises, since there was no relationship between the sanction imposed and the fault of the licensee or the severity of the violation. In addition, the court held invalid portions of the ordinance permitting license revocation without prior hearings, prohibiting nudity and late-night massages, and requiring certain records to be kept.

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In a more limited ruling, the Utah Supreme Court in *Hart Health Studio v. Salt Lake County,* 577 P.2d 116 (Utah1978), voided a massage ordinance imposing a $5,000 annual fee on any licensee employing a masseur who had worked for an establishment whose license was revoked, and imposing different restrictions on sole practitioners than those applied to massage parlors. □

Reasonable Belief of Implied Consent Negates Sexual Assault Conviction

The Appellate Department of the Los Angeles Superior Court has reversed a conviction of a gay man accused of "groping" a plainclothes police officer in a secluded area of one of the city's parks. *People v. Sanchez*, 147 Cal.Rptr. 850 (1978).

At trial the defendant testified that the actions of the vice officer in following the defendant around the park and in "cruising" him lead the defendant to believe that the officer would not object to being touched.

The defendant was arrested for a violation of 647(a) P.C., engaging in lewd conduct. However, due to certain guidelines established by the Los Angeles City Attorney in prosecuting gay cases (See 3 Sex.L.Rptr. 25) the City Attorney did not file lewd conduct charges with the Municipal Court but instead charged the defendant with assault and battery.

The defendant requested jury instructions that the prosecution had the burden of proving three elements of the crime: 1) a touching or attempt to touch, 2) which was actually offensive to the "victim", and 3) that the "victim" did not consent, either impliedly or expressly. The trial court at first granted this request, but later, in the middle of the closing argument of the defense, the trial judge changed her mind and held that lack of consent was not an element to be proved by the prosecution. The defendant was found not guilty of battery (no actual touching) but was found guilty of assault (attempt to touch the officer's crotch area).

On appeal, the defendant claimed that the trial judge had committed error by refusing to instruct the jury that lack of consent was an element of the crime. The appellate court held that lack of consent is not an element of crime that must be proved by the prosecution, but is instead an affirmative defense to be raised by the defense. However, the appellate court still reversed the conviction because the defense had raised the defense of consent. The court held that the trial judge should have instructed the jury that, *"the burden of the affirmative defense of a bona fide and reasonable belief by the defendant that the 'victim' impliedly consented and thereby would not be offended by the touching is on the defendant and the degree of proof is to raise a reasonable doubt."*

Because these prosecutions will now be more difficult for the state, the City Attorney requested a higher appellate court to review the case and to delete the new test for cases involving sexual touching of adults. However, the Court of Appeal refused to take the case and the decision of the Appellate Department is now the law in California.

After remand to the trial court, the prosecutor dismissed the charges. □

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Variety of Transsexual Cases

A New Jersey Court has held that a transsexual who had been dismissed for "incapacity" was entitled to a disability pension. Paula Grossman had previously been dismissed on the ground that her mere presence in the classroom could result in psychological harm to the students. *See* 2 *Sex.L. Rptr.* 27. Having been dismissed for incapacity, Grossman applied for a disability pension. In holding that she was entitled to a pension, the court, in *In re Grossman*, 384 A.2d 855 (N.J.Super.1978), took note of the paradox that would result if Grossman were denied the opportunity to teach because of unfitness but were held fit in order to deny pension benefits.

In another case, a New York court has affirmed the denial of Medicaid benefits for sex reassignment surgery. In *Vickers v. Toia,*___N.Y.S.2d___,*CCH Medicare and Medicaid Guide* ¶28,507 (May 13, 1977), The Supreme Court, Special Term, (New York County) distinguished other cases in which the plaintiff's psychiatric evidence was stronger.

However, two much more persuasively reasoned cases, in Georgia and Minnesota, have held transsexuals entitled to public assistance for sex conversion surgery. *Rush v. Parham,* 440 F.Supp. 383 (N.D.Ga.1977); *Doe v. State Dept. of Public Welfare*, 257 N.W.2d 816 (Minn.1977).

The plaintiff in *Rush* brought suit seeking to have the Georgia State Medicaid Plan declared invalid because it altogether prohibited transsexual surgery. The court found that the plan violated Rush's federally protected rights. The court further noted that Rush fell within the five broad categories of services specified within the Social Security Act, and that because her doctors found the surgery "medically necessary" the cost of the surgery was to be reimbursed even if it had to be performed out of the state because Georgia did not have doctors who could perform the surgery.

In *Doe,* a transsexual who had been going through a transsexual program sought to gain public medical assistance benefits when the program's federal funds ended.

The Minnesota Supreme Court concluded that the state's total exclusion of transsexual surgery from medical benefits was arbitrary and void. The state was ordered to evaluate each case individually and decide on the basis of medical necessity whether or not to fund the surgery.

In a third suit involving transsexuality, tennis player Renee Richards sued the United States Tennis Association and other tennis associations to block the use of the Barr sex-chromatin test to determine whether Richards was female. *Richards v. U.S. Tennis Association,* 400 N.Y.S.2d 267 (Spec.T.1977) The controversial test was being used to discover if Richards had two X chromosomes, as females usually do, or one X and one Y chromosome, as males usually do. The various tennis associations had ruled that Richards had to pass the test in order to be eligible to enter a tournament. The court held that the use of the test, which other female participants were not required to take, was "grossly unfair, discriminatory, and inequitable."□

Porno Film Ordinances Fall in Four States

In separate decisions, four widely scattered courts have struck down regulations of pronographic films on the basis of equal protection violations or overbreadth.

Graham v. Hill, 444 F.Supp. 584 (W.D.Tex. 1978), involved a criminal statute prohibiting the showing of films involving a person under 17 observing or engaging in sexual conduct. The court held the statute facially overbroad because it would ban even nonobscene films which fell within its terms.

The defendant in *State v. Pryba,*___A.2d___ (Md.Cir.Ct., Prince George's Co., Mar.14, 1978), was a bookstore owner charged with selling or exhibting films without a license. The statute exempted from liability any "employee" of a "theater which shows motion pictures." The court noted the anomally that a bookstore employee could be held liable for the same acts which a theater usher could perform with impunity. Since the statute irrationally exempted the latter class of persons from liability, defendant (as a member of the disfavored class) had standing to challenge it.

In *Bayside Enterprises v. Carson*, 450 F.Supp. 696 (M.D.Fla.1978), plaintiffs sought an injunction against Jacksonville's scatter-zoning of "adult entertainment" businesses. Distinguishing the Detroit scheme upheld in *Young v. American Mini Theaters*, 427 U.S. 50 (1976), the court noted that Jacksonville's ordinance was not part of the comprehensive zoning scheme but rather was aimed directly at speech and publication, and further held that a requirement that each regulated facility be 2500 feet or more from any church, school, or other "adult" facility and 500 feet from any residential district, effectively barred all new adult establishments and was void for that reason as well.

The court in *Bayside* also struck down a licensing scheme for "adult establishments" because the fees charged were so excessive as to burden the exercise of constitutional rights; and the "good moral character" requirement was unconstitutionally vague. The court also decided the abstention question in plaintiff's favor, but declined to reach a Fourth Amendment argument against a provision for warrantless inspection of regulated premises; and upheld the ordinance's prohibition of opposite-sex massages. A challenge to the ordinance's requirement that licensees reside in the city was mooted by the city's concession of its invalidity.

A statewide "adult establishment" law was declared invalid in *Hart Book Stores v. Edmisten*, 450 F.Supp.904 (E.D.N.C.1978). Holding that the scheme was not a "neutral zoning ordinance," the court declared invalid a statute prohibiting two "adult establishments" from sharing the same building. The court's equal protection holding was predicated on its finding the legislative scheme illogical, since it would merely result in spreading out of sexually oriented businesses into separate buildings. □

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...IN THE COURTS

Rape Law Refined In Several States

The Supreme Court of Kansas found there was no abuse of discretion in a lower court ruling to limit the cross-examination of a rape victim as to her sexual past. *State v. Corn*, 575 P.2d 1308 (Kan.1978). The trial court had allowed the defense counsel to depose the rape victim about her past sexual history, but the deposition did not support the defense's contention that the victim had been a willing participant.

The Colorado Supreme Court upheld the constitutionality of the first-degree sexual assault statute that stated among other things that, if the actor causes the victim to submit by threat of extreme pain then the actor is guilty of first degree assault. *People v. Albo*, 575 P.2d 427 (Colo.1978). Albo attacked the statute for being overbroad and vague, arguments which the court rejected.

In an Oklahoma case, the defendant's apparent ability to carry out his threats of serious bodily harm was held sufficient to show resistance by the victim and sustain the rape conviction. *Barrett v. State,* 573 P.2d 1221 (Okla. Crim.1978). After the defendant slapped the victim and threatened to harm her seriously, she did not offer any physical resistance. The court found that the defendant's threats and his apparent ability to carry them out was sufficient.

The Montana Supreme Court has construed that state's statutory rape law to require that a defendant prove his reasonable belief of the "victim's" age by a preponderance of the evidence. In *State v. Smith*, 576 P.2d 1110 (Mont.1978), the court held that, although the defense of reasonable belief is provided by statute, it is not sufficient for the defendant merely to raise a reasonable doubt in that regard.

In another case involving juveniles, the Oregon Court of Appeals has held that the term "sexual or other intimate parts" includes the undeveloped breast of a seven-year-old girl. *State v. Turner,* 575 P.2d 1007 (Or.App.1978). Thus the defendant, who fondled a young girl's breasts "for the purpose of gratifying his sexual desires," was not entitled to a jury instruction permitting the jury to construe the term "intimate parts" based on the age of the party involved. □

Gay Group Access to Municipal Directory

The Alaska Supreme Court has ruled that a gay organization is entitled to a listing in a city's directory of social services. In *Alaska Gay Coalition v. Sullivan* ___P.2d___ (Alas.1978, appellant had sought inclusion in a "Blue Book" published by the city of Anchorage, but the mayor refused to list it. The state Supreme Court found that the book was a public forum, and that the Gay Coalition had been excluded from it purely because of the beliefs and sexual orientation of its members. Based on traditional "public forum" cases and precedents set by gay students' groups, the court held that the content-based exclusion of the Coalition from the directory violated the Constitution. □

Prior Bad Acts Held Inadmissable In Sex Crimes Cases

Several state courts have begun to halt the trend toward the admission of evidence of "prior bad acts" of the defendant in sex offense trials. In 4 *Sex.L. Rptr.* 29, it was noted that the Arizona Supreme Court and the California intermediate courts had voted to admit such evidence, notwithstanding its prejudicial effect, and despite the fact that it cannot be admitted in non-sexually oriented trials.

The cases restricting admissibility are illustrated by *People v. Thomas*, 573 P.2d 433 (Cal.1978).There the defendant was charged with committing lewd acts on his twelve-year-old stepdaughter and nine-year-old natural daughter. The prosecution introduced evidence of similar acts upon defendant's other daughter many years earlier. The court reversed, holding such evidence inadmissible for any purpose. It clearly could not be used to prove bad character or criminal disposition by itself. It could not prove "common design or plan" because of its remoteness in time; the court specifically noted that its prejudicial effect outweighted any possible probative value. As proof of criminal intent, the evidence was inadmissible because defendant had not placed intent in issue; and there was no foundation for use of the evidence as impeachment of defendant's own testimony.

Finally, the court in *Thomas* rejected the use of prior crimes to corroborate the testimony of the prosecutrix. Although such evidence is available for corroboration purposes, where it concerns parties other than the prosecutrix it may be admitted only after considering its remoteness in time and similarity in method to the charged offense.

Other cases seem to adopt similar rules. In *State v. Jenkins*, 242 S.E. 2d 505 (N.C.1978) , the court held evidence of prior acts admissible "in corroboration of the offense charged," but noted that the prior an act occurred only two weeks prior to the act charged, and that the trial court had given a cautionary instruction regarding the testimony of the prosecutrix, a twelve-year-old child. In *State v. Sicks*, 576 P.2d 834 (Ore. 1978), the court affirmed the exclusion, in a trial for sodomy with a minor, of evidence of similar acts with fourteen other boys consisting of their testimony and photographs. The court noted that intent and identity were not in issue, and rejected the open-ended "common plan" theory of admissibility.

In *State v. Frentz*, 354 So.2d 1007 (La.1978), the court reversed a conviction where the state had buttressed the minor victim's testimony with that of two other boys regarding similar acts at about the same time. The court held that intent was not in issue, since it was proven by the acts themselves, and that identity was also irrelevant. The opinion also rejected a police officer's testimony concerning defendant's reputation as a homosexual, but only because the officer had no personal knowledge of defendant's reputation. The court suggested, however, that a witness with personal knowledge could properly have rebutted defendant's claim of good character by testifying that others regarded defendant as a 'fruit'. □

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Topless Dancing Protected

Topless dancing in bars is a protected exercise of the right of free expression under the Massachusetts Constitution, as construed by that state's Supreme Judicial Court. In *Commonwealth v. Sees* ___N.E. 2d___(Mass.1978), the defendant was convicted of violating a Revere, Mass. ordinance prohibiting licensed saloonkeepers to employ or permit persons who appeared nude or with their genital areas or female breasts exposed. Defendant's female employee had performed a dance wearing only a G-string, without coming into contact with any other person.

The Supreme Judicial Court refused to hold the ordinance unconstitutional on its face, adhering to an earlier decision. Addressing the application of the ordinance to the conduct in question, the court held that any federal constitutional claims were preempted by the state's power to regulate alcoholic beverages under the 21st Amendment. However, a different result was called for under Article 16 of the Massachusetts Declaration of Rights, which provides that "The right of free speech shall not be abridged." Regulation of alcohol did not outweigh free speech as a matter of state constitutional law, and there was no claim that the dance here was obscene. Although the record did not disclose the artistic level of the dance, the court refused to act as a board of "artistic constables," noting that "the artistic preferences and prurient interests of the vulgar are entitled to no less protection than those of the exquisite and sensitive esthete."

In holding the conduct before it protected, the court took care to note that there was no issue of imposition of nudity on the unwilling or unsuspecting public, nor of nude employees mingling with the patrons. Justices Kaplin, Liacos and Abrams concurred in the judgement, believing the ordinance facially void; Justices Hennessy and Quirico dissented. □

Brother And Adopted Sister May Marry

The Colorado Supreme Court has struck down a provision in the state's incest laws forbidding a brother and sister to marry where the relationship is by adoption and not by blood. In *Israel v. Allen*, 577 P. 2d 762 (Colo.1978), the prospective spouses were unrelated except by adoption resulting from the second marriages of their respective parents. In considering their equal protection argument, the court employed a 'minimum rationality test' to avoid the issue whether marriage is a fundamental right, ignoring the holding in *Zablocki v. Redhail*, 98 S.Ct. 673 (1978), that marriage is a fundamental right under the United States Constitution.

The Colorado law was voided, however, because no state interest supported the rule. Although marriage between blood relatives has been discouraged on the ground of genetic dangers or community condemnation, no such considerations bar marriage of an adopted brother and sister. The statute was therefore invalidated, but the remaining portions were held severable. □

Child Molesting Cases: Defenses Stricken, Statutes Upheld

Two recent California appellate cases have further defined the law regarding child molestation (Penal Code §§286, 288, 288a). In *People v. Gutierrez*, 145 Cal.Rptr. 823 (1978), defendant was convicted of forcible rape, and of forcing a 12-year-old girl to orally copulate him, in addition to lewd acts on a child under 14. Defendant sought a jury instruction approving reasonable mistake of age as a defense; this was denied. On appeal, the court refused to follow the rule in statutory rape (under18) cases (see *People v. Hernandez*, 61 Cal.2d 529 (1964)), and held reasonable mistake inapplicable where the victim is "obviously of tender years." In cases where the victim is below any reasonable age of consent, the consent that might flow as a defense from the reasonable mistake is not present.

In *People v. Gonzalez*, 146 Cal.Rptr. 417 (1978), a defendant convicted of lewd acts and sodomy on a 13-year-old victim challenged the sodomy statute on the ground that the age classifications it sets up violated the equal protection clause. The statute, Penal Code §286, was revised in 1975 to decriminalize consensual sex between adults, but classified sodomy with a minor in three categories: if the victim is under 18, the offense is a "felony-misdemeanor" chargeable as either; If the victim is under 16 and the actor over 21, it is a felony with a minimum term; if the victim is under 14 and the actor more than 10 years older than the victim, it is a more serious felony. The court, applying a strict level of scrutiny, upheld the third category under which Gonzalez was convicted, holding the age difference "compelling" in order to prevent children from "succumb(ing) to the sexual blandishment of one who is much older." The likelihood of such a result was deemed more likely than of sexual imposition by one closer to the child's age. The court also held the actual lines drawn to be rational. □

California Sex Offender Registration Wins Appellate Court Approval

Although the issue is presently pending before the California Supreme Court, an appellate panel in that state has considered and upheld the state's sex offender registration law, Penal Code §290. In *People v. Mills*, 146 Cal.Rptr. 411 (1978), the defendant had been convicted of performing lewd acts on a seven-year-old-girl. Recognizing that registration as a consequence of conviction is punitive, the Court of Appeal held that registration of a child molester "does not raise the judicial eyebrow" and hence was not cruel or unusual. In considering Mills' equal protection argument, the court held that imposition of a registration requirement for some sex offenses but not others was an argument to be addressed to the legislators, not the courts. However, the issue is presently awaiting decision by the California Supreme Court in the context of a lewd conduct case, *In re Anders*, Crim. No.20198 (Cal.,argued June 6, 1978). □

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...IN THE COURTS

California High Court Will Hear Statutory Rape Challenge

The Supreme Court in California has granted a hearing in a case challenging the validity of the state's statutory rape law, Penal Code §261.5. *People v. McKeller*, Crim No. 20594 (Cal., filed June 29, 1978). McKeller was charged with four counts of unlawful sexual intercourse with a 16 year-old female (statutory rape) and three counts of oral copulation with her. In order to raise the constitutional issues, defendant pled guilty of one count of statutory rape, and the trial court issued a certificate of probable cause for appeal. Both parties to the sexual act stipulated that they had consented to it.

On appeal, defendant challenged the statute as (1) an equal protection violation, singling out female "victims" for special protection; (2) a due process violation, employing a conclusive presumption that females under 18 are incapable of consenting to sexual intercourse, and (3) a violation of California's constitutional right to privacy. The Court of Appeal sustained the statute, largely on the theory also adopted by the Missouri court in *In re J.D.G.*, 498 S.W.2d 786 (Mo.1973), that the purpose of the statute is to prevent the social consequences of pregnancy among adolescent girls.

McKeller's argument before the Supreme Court is that the real purpose of the statutory rape laws has been recognized as an ideological commitment to the sexual purity of women. Not only is the statute broader than it need be to prevent pregnancy, were that it's true aim, but there is not even any proof that the legislature considered that the statutory goal. As the First Circuit court noted in *Meloon v. Helgemoe*, 564 F.2d 602, 607 (1st Cir.1977), *cert. denied*, 98 S.Ct. 2858 (1978), "there is a danger that the very uniqueness of this characteristic makes it an available hindsight catchall rationalization for laws that were promulgated with totally different purposes in mind." The petitioner in McKeller argues that this is the case in California as well. □

Consensual Sex Contributes to The Delinquency of Minor

In *State v. Favela*, 576 P.2d 282 (N.M.1978), the New Mexico Supreme Court affirmed the conviction of a woman contributing to the delinquency of a fifteen-year-old boy. The two had engaged in sexual intercourse, which the defendant claimed was consensual. She sought to escape punishment by equating "delinquency" with the term "delinquent act" found in the state's juvenile law. Since the latter term only referred to acts which would be criminal if committed by an adult, the defendant argued that consensual sexual intercourse was not a "delinquent act" and she had therefore not contributed to the minor's delinquency. The court disagreed, holding the two acts "separate in purpose and application." □

Denial Appealed In Surveillance Case

A United States District Court in North Carolina granted a certificate of probable cause to appeal the denial for a writ of habeas corpus in a case where two men were convicted of crimes against nature. *Jarrell v. Stahl*, 446 F.Supp. 395 (W.D.N.C.1977). The petitioners were apprehended and convicted when local police took pictures through a hole in the ceiling of a public restroom. No one else was in the restroom at the time and the court found that the petitioners were entitled to habeas corpus relief because they had a reasonable expectation of privacy, which the police violated. The court noted, however, that because of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L. Ed.2d 1067 (1976) federal habeas corpus was unavailable to state prisoners claiming a conviction based on evidence obtained in an unreasonable search and seizure.

The court issued a certificate of probable cause because it noted that the public interest to be served in this case was different from that served in *Stone v. Powell*, supra. In *Stone* the Fourth Amendment violations by the police were evidently unintentional, and of a technical nature. Further, the crime in *Stone* was murder. *Jarrell v. Stahl*, supra, in contrast, was a victimless crime that was discovered by surreptitious photographing of activities in a public restroom. Noting that there should be a reasonable expectation of privacy in a public restroom, the conduct of the police could be considered offensive to the public in general and to visitors to the restroom in particular. The court, mentioning the avenues Jarrell had exhausted in the appeal process and the others now blocked by *Stone v. Powell*, supra, granted a certificate of probable cause.□

Firings of Police For Adultery Are Voided

In similar cases involving the dismissal of police officers on charges of adultery, two courts have held that the rules and regulations, upon which the charges are based, were unconstitutional. In *Parton v. City of Topeka*, 561 P.2d 885 (Kan.1977), a police officer was dismissed for repeated acts of adultery. The city code, cited to support the dismissal, did not refer to adultery, but mentioned instead job-related acts such as drinking and assault that would have a detrimental effect upon the police department. The lower court found, and the court of appeal affirmed, that the language of the code was unclear and uncertain so that the average person who read it would not be able to deduce that adultery was an offense to be covered by the code.

In the second case, *Smith v. Price*, 466 F.Supp. 828 (M.D. Ga.1977), the court held that the Athens city rules and regulations were violative of the First Amendment right of association. Smith, a five year veteran of the police force, was fired after being warned that continuance of his extra-marital affair would lead to his dismissal. The court, in finding the regulations overbroad, determined that in order for a state to regulate a police officer's off duty conduct the state must prove that the person's usefulness as an officer would be "substantially and materially impaired by the conduct in question."□

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Abortion Cases Considered in Three States

A suit was filed by local taxpayers to enjoin the Pima County, Arizona Board of Supervisors from spending public funds for nontherapeutic abortions and to recover, with interest, past funds spent on elective abortions. *Zuravsky v. Asta,* 116 Ariz. 473, 569 P.2d 1371(1977). The court found that the Board of Supervisors, which had the statutory authority to provide care for the indigent sick in the county, was neither forbidden nor required to pay for elective abortions and, therefore, could not be made to desist from funding elective abortions.

An Oregon appellate court has held that a husband in a divorce proceeding cannot force the wife to undergo an abortion by refusing child support payments if she elects to have the child. *In re. Godwin*, 30 Or.App. 425, 567 P.2d 145(1977). In that case, the trial court awarded custody of a living and unborn child to the mother, but ordered that as to the unborn child, the father's only obligation was to pay the cost of an abortion if one was elected. The appellate court modified the judgement to require the husband to pay child support after the child is born, and to delete the provision regarding abortion costs.

In a lengthy opinion, a federal court has declared invalid several portions of the Illinois Abortion Act of 1975. The court in *Wynn v. Scott*, 449 F.Supp. 1302 (N.D.Ill.1978), voided informed consent requirements mandating that the woman be informed of the "physical competency of the fetus;" spousal and parental consent requirements; provisions mandating the concurrence of two independent physicians for abortions of viable fetuses where necessary to save the mother's life; automatic termination of parental rights in any live born child resulting from an attempted abortion; prohibition of saline abortions after the first trimester of pregnancy; requirement that abortions be registered as vital records; and criminal penalties based on the vague term "miscarriage." The court sustained several other provisions, notably a section requiring physicians to take care to preserve the life and health of a viable fetus, and the definition of "viable" itself.

Nebraska Holds Deadly Force Justifiable to Prevent Rape

The Nebraska Supreme Court, in affirming a conviction, has indicated its view that deadly force may be used to repel a present threat of forceable rape. *State v. Schroeder,*199 Neb. 822, 251 N.W.2d 759 (1978). The defendant, a male prisoner, had testified that he stabbed the victim because he was afraid the victim's earlier threat of rape would be carried out. Although affirming the conviction because there was no present physical threat to the defendant, the court rejected the state's claim that the assault was not justified because the threatened rape was not a "greater evil" than the assault. Two dissenting justices would have reversed, believing that the threat need not be imminent to justify a preventive assault.

Arizona Voids Exposure Statute, Convicts Defendant

The Supreme Court of Arizona has struck down an indecent exposure statute on constitutional grounds, but in holding its ruling to be prospective has affirmed the conviction of a defendant who raised the issue. In *State v. Gates*, 576 P.2d 1357 (Ariz. 1978), the defendant was convicted of wearing a mask while committing the felony of indecent exposure. The court ruled that he had standing to attack the statute as vague even though his own conduct could have been labeled "hard core" and was clearly unprotected by the First Amendment. However, since the statute could be applied to dancing and other forms of theatrical expression protected by the First Amendment, the court followed an earlier Federal Court ruling and struck down the statute as unconstitutionally vague. In determining the question of retroactivity, the court noted that appellant and others who might be prosecuted under the statute had engaged in unprotected conduct, and no purpose would be served by retrospective application of the court's ruling. Justice Gordon, dissenting, would have reversed defendant's conviction on the basis of the constitutional holding; Chief Justice Cameron, concurring specially, would have held the statute valid on its face, although possibly inapplicable to protected conduct. His opinion was the only one that actually described the conduct for which the defendant was arrested and convicted.

Homosexual Issues Reviewed in Michigan And Minnesota

The Supreme Court of Michigan ruled that where the defendant in a murder trial had claimed self-defense, the state had erred in introducing evidence of the defendant's possible homosexuality. *People v. Mitchell*, 265 N.W.2d 163 (Mich.1978). The court held that the state's rebuttal evidence of defendant making homosexual advances to his cellmate was inadmissible because it was not responsive to the defense. Mitchell claimed that the victim grabbed him by the testicles and he reacted to the pain by hitting him. The victim then pulled a knife that Mitchell wrestled away from and stabbed the victim with.

The court further noted that the defendant's sexual preference did not bear on his character for truthfulness. Since Mitchell never put his character at issue the court erred in permitting rebuttal evidence regarding his character to be admitted.

The United States Court of Appeal, Eighth Circuit, denied James McConnell an increase in his educational benefits under the Veterans Act because his marriage to another man had already been declared invalid under Minnesota law in *Baker v. Nelson*, 291 Minn.310, 191 N.W.2d 185 (1971). *McConnell v. Nooner*, 547 F.2d 54 (8th Cir.1976). The court held that McConnell was collaterally estopped from raising the issue of a valid homosexual marriage because of the finding of the court that under Minnesota state law people of the same sex cannot be recognized as a married couple.

ADMINISTRATIVE RULINGS...

Security Clearances Granted to Homosexual Men

On September 1, 1978 David H. Henretta, Jr., a hearing examiner for the Department of Defense, decided that "it is clearly consistent with the national interest to grant the Applicant, John Napier Eves, Jr., access to classified information at the level of SECRET." OSD No. 77-466

Eves' employer requested that the government grant him a Secret clearance. Upon discovering that Eves was a practicing homosexual, had been discharged from the military because of a homosexual arrest, and that he intended to continue his homosexual activity, the government issued a statement of reasons for denying the Secret clearance. The reasons were that his "sexual perversion" would subject him to coercion, influence, or pressure which may be likely to cause action contrary to the national interest. It was further alleged that his activity reflects conduct of a reckless nature indicating such poor judgment, unreliability or untrustworthiness as to suggest that he might fail to safeguard classified information or might disclose classified information to unauthorized persons deliberately or inadvertently. In support of these allegations the government introduced evidence, at a hearing in June 1978, that Eves was arrested on a sodomy charge while serving in the military, that he engaged in oral and anal acts of sodomy with chance acquaintances that he met in bars or baths, and that his activities were unknown to his family. Eves denied that his family did not know of his homosexuality.

Notwithstanding these allegations by the government, the hearing examiner recommended that Eves receive a security clearance.

On September 12, 1978 the Department of Energy issued a security clearance to Alvin R. Crook, a chemist employed by Union Carbide in Tennessee. Crook had applied for the clearance in 1977. After learning that Crook had been previously employed at a gay bar, Crook was called in for an interview. During the interview Crook admitted to engaging in private homosexual acts. He indicated that he would continue to do so in the future. He refused to answer questions about the types of sex acts he engaged in, claiming that similar questions were not asked heterosexual applicants.

In November of 1977 a Letter of Notification was issued by the Department indicating that it would deny the clearance because his conduct presumptively violated the Tennessee sodomy law. Crook filed a formal answer and demanded a hearing. The hearing was set for September 7, 1978. In mid-August affidavits were submitted by Crook to the Department wherein fellow employees attested to their knowledge of his homosexuality and wherein residents of his former home town indicated knowledge of his homosexuality. After receipt of these and other items indicating that Crook did not fear public knowledge of his homosexuality, the Department cancelled the hearing and issued the clearance.

Most Child Molesters Are Heterosexual

Los Angeles Police Department statistics show that in 1976, 78 percent of childeren molested were female. The overwhelming number of perpetrators of such crimes were male. These statistics taken, show that the vast majority of child molestation cases are heterosexual in nature. These figures were recently released by Darryl Gates, Chief of Police for the City of Los Angeles at a meeting with the Los Angeles Police Commission.

The A.C.L.U. Gay Rights Chapter filed a complaint with the Police Commission after Sgt. Lloyd Martin of the department's sexually exploited child unit had repeatedly appeared in the media indicating that 70 percent of children molested in Los Angeles were males. Sgt. Martin had been indicating that the majority of child molestation cases were homosexual in nature.

Chief Gates publicly appologized for Sgt. Martin's actions and indicated that Martin had been admonished.

Gay Civil Service Employee Wins Reinstatement

Because of his openly gay lifestyle and gay rights activities, the U.S. Civil Service Commission, on June 6, 1972, directed the Equal Employment Opportunity Commission to fire John F. Singer, a clerk-typist for the E.E.O.C. Singer appealed to the Civil Service Regional Office in Seattle and the regional office affirmed the disqualification decision. Singer then appealed to the Commission's Board of Appeals and Review. In December, 1972 the Board affirmed the decision to fire Singer. Singer then filed a law suit in the Federal District Court for the Western District of Washington. In March, 1974 that court upheld the Commission's decision that Singer was not suitable for employment. The Ninth Circuit Court of Appeals affirmed that decision in 1976. For a complete review of the case up to and including the decision of the Ninth Circuit Court of Appeals see "Advocacy of Gay Rights is the Issue in Dismissal of Civil Service Employee," 2 *Sex.L.Rptr.* 25.

Singer then petitioned the United States Supreme Court for a writ of certiorari. In January, 1977 the United States Supreme Court granted the writ of certiorari, vacated the decision of the Ninth Circuit, and remanded the case for reconsideration in view of more liberal Civil Service Policies concerning homosexuality. See "U.S. Supreme Court Vacates Judgment Against Gay Federal Employee," 3 *Sex.L. Rptr.* 25.

The Civil Service Commission reconsidered its ruling, in view of its more liberal guidelines on homosexuality which had been issued in 1975, but again the Commission found Singer disqualified for fed-

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eral employment. This new decision was made on October 13, 1977.

Singer next filed an appeal with the Seattle Field Office, Federal Employment Appeals Authority. In decision Number SE071380002, dated July 21, 1978, that Appeals Authority reversed and rescinded the decision of the local office and held that the decision to fire Singer violated the 1975 suitability guidelines on homosexuality. The Appeals Authority stated:

"With respect to the specific factor of 'notoriously disgraceful conduct' the Commission has relied on the fact that the appellant openly kissed other males, openly professed his homosexuality with ensuing publicity, publicly promoted the formation of homosexual groups and organizations, attempted to obtain a marriage license with another man, knowingly distributed a document concerning a symposium which allegedly specifically indicated that his agency was involved in planning the symposium, and that he sought notoriety by flaunting and public display of his pattern of unorthodox and controversial conduct. The Commission found that these facts were considered to be incompatible with successful performance in that it reflected adversely on his job fitness and impeded the efficiency of the employer."

The Appeals Authority found that there was no evidence that Singer's conduct would either, 1) interfere with or prevent his effective job performance, or 2) interfere with or prevent the effective performance of the agency's duties and responsibilities. Any findings to the contrary, said the Appeals Authority, were based upon unsubstantiated conclusions.

Bar Associations Consider Sexual Resolutions

At this year's Annual Meeting of the American Bar Association, the Section of Individual Rights and Responsibilities submitted a recommendation to the House of Delegates [the policy-making body of the association] to support protection of homosexuals in public employment. Although the resolution specifically avoided the issue of discrimination in private employment, it was defeated after an emotional debate. The House of Delegates, at the 1973 Annual Meeting, did pass a resolution calling for the repeal of laws prohibiting private sexual acts between consenting adults. [Ed. Some State Bar Associations have acted favorably upon Gay employment resolutions in the past. See 3 *Sex.L. Rptr.* 5 for a Report approved by the Illinois Bar Association. See also 2 *Sex.L.Rptr.* 66 for a Report approved by the Conference of Delegates of the California Bar Association.]

At this year's annual meeting of the California Bar Association, the Conference of Delegates voted to oppose *Proposition 6*, a statewide ballot issue which would permit the dismissal of teachers who advocate public or private homosexual conduct. In another sexually related resolution, by a vote of 233 to 206, the delegates recommended that the law exempting a husband from prosecution for raping his wife be eliminated.

LEGISLATION...

Update on Gay Rights Municipal Ordinances

Berkeley: An ordinance forbidding discrimination against homosexuals in employment, credit, schools, city services and housing has been adopted by the city council in this city. The law does not include employers with five or fewer employees or landlords who live in single-family or two unit dwellings. The ordinance provides for minimum mandatory penalties for violations. It also allows plaintiffs to recover attorneys fees if they obtain a judgment in their favor. Although several California cities have municipal ordinances forbidding discrimination in city services, only Berkeley and San Francisco have ordinances which regulate discrimination by private employers or landlords for reasons of sexual orientation.

Chicago: Although there is no city ordinance specifically authorizing the Human Relations Commission in this city to take legal action against persons who discriminate for reasons of sexual orientation, the Commission has nonetheless decided to accept and investigate complaints by gays regarding housing discrimination. However, if the case can not be settled voluntarily the Commission will not take further legal action against the landlord. The ordinance from which the Commission received its grant of jurisdiction over discrimination cases forbids discrimination on the basis of sex or marital status. Amendments have been introduced in the city council each year since 1973 to enlarge that jurisdiction to cases involving discrimination for reasons of sexual orientation, but each year the proposed amendments have been defeated.

Hartford: George Athanson, mayor of this Connecticut city, has vetoed a gay rights ordinance which was approved in July by the Hartford City Council. The proposed ordinance would have prohibited discrimination for reasons of sexual orientation in city contract employment and contract compliance.

Miami: In 1976 the Board of Commissioners in Dade County, Florida enacted an ordinance in housing, private employment and public accomodations. That ordinance was repealed by the voters in this county on June 7, 1977. [Ed. See Gay Rights Defeat In Dade County has National Implications, 3 *Sex.L. Rptr.* 25 for complete details of the repeal.] However, after collecting over 10,000 signatures the Dade County Coalition for Human Rights has qualified another gay rights ordinance for the November, 1978 ballot. The *SexuaLawReporter* will give complete details of the outcome of this election in the next issue published.

Seattle: Initiative 13, a measure to repeal the existing gay rights ordinance in this city, will appear on the November 7, 1978 ballot. Similar laws have been successfully repealed in Eugene, Miami, St. Paul and Wichita. On September 30, 1978, the *Citizens to Retain Fair Employment* released the results of a survey [425 telephone interviews] which showed that 66.3 % of the voters were opposed to the repeal of the ordinance in Seattle.

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in quasi-private places. Although these laws are generally pansexual in scope, they are enforced in a discriminatory way so as to include homosexuals but to exclude heterosexuals.[8]

In addition to criminal law reform, gay people should be working for an end to discrimination in employment, housing, public accommodations, child custody and visitation, adoption, marital benefits, foster care, credit, insurance, inheritance laws, taxation, security clearances, military, immigration and naturalization, professional licensing, and many other areas. The adverse affect of some forms of discrimination may be avoided by estate planning or cohabitation contracts drafted by knowledgeable attorneys.[9] In other areas comprehensive protection is only possible by carefully written legislation. In some cases, such as child custody and visitation rights, reform is likely to be accomplished by continually raising judicial consciousness in test cases.

Gay people seem to be preoccupied with the legislative and judicial branches of government. Many people feel that a comprehensive gay rights bill is the answer to the problem. Others are ready to run into court at the drop of a hat.

One purpose of this article is to demonstrate that there is *not* a single approach to attaining equal rights for gay persons. The approach to be taken in each locality will depend upon a wide variety of factors. Although all gay people seem to agree that decriminalization of private homosexuality is a high priority, not all agree on a master plan or an order of priorities after decriminalization occurs. Gay men seem to be more concerned with reform of solicitation and open lewdness laws because they bear the brunt of discrimination as a result of the enforcement of these laws. Lesbians seem to be more concerned about the interpretation and application of child custody laws. Most gay people forget about the problems of gay prisoners and as a result these problems do not receive as much attention as they otherwise might.

The majority of gay people, and probably most gay activists, usually think of reform through the legislative or judicial processes when discussing the role of government in contributing to or ending discrimination against gays. Another purpose of this paper is to reexamine current approaches to ending discrimination against lesbians and gay men. Once one identifies each and every form of discrimination suffered by gay persons, a task which has not yet been accomplished by most gay persons or organizations, some agreement should be reached on priorities. Gay people come in all shapes and sizes, all colors and national origins. Gay people are rich and poor. Gays come from all political persuasions. Lesbians may comprise half of the gay population. For these and other reasons it is unlikely that all gay persons, or even a majority, will agree on a definitive order of priorities. However, it must be assumed that all gay people will agree that it is the ultimate goal of the gay movement to eliminate all forms of discrimination on the basis of sexual orientation. Because of the diversified backgrounds and interests of gay people there must be some give-and-take in formulating priorities.

After becoming acquainted with the forms of discrimination to be eliminated and having at least considered a loose order of priorities, the next step should be to identify the source of the remedy. Is the remedy to be found at the federal, state, or local level? Should legislative, judicial, or executive relief be sought?

Gay people seem to be preoccupied with the legislative and judicial branches of government. Many people feel that a comprehensive gay rights bill is the answer to the problem. Others are ready to run into court at the drop of a hat.

Although attempts have been made in several jurisdictions, the truth is that no state legislature has yet to enact a law prohibiting discrimination on the basis of sexual orientation. Over forty municipalities have passed such ordinances in the last few years but the stability of these laws is questionable. We have seen voters repeal such ordinances in Miami, St. Paul, Wichita, and Eugene. Similar referenda are under way in other cities.

Court cases have been brought in the past several years to secure gay rights through the judicial process. To date no state supreme court has recognized that gays have a constitutional right to engage in private homosexual acts. No state supreme court has declared that gays have a right to employment in the private sector. The U.S. Supreme Court has avoided gay issues and has yet to give plenary consideration to a gay case.[10] In the area of child custody, the "best interests of the child" standard will control the outcome of a case and this will usually be determined on a case-by-case basis. The facts are clear. Reform through the judicial process will probably be much slower than through the other branches of government.

While many have been quick to run into court or seek legislative redress, little attention has been paid to the executive branch of government. The primary purpose of this article is to suggest another source of remedy, that is, securing gay rights through the executive branch.

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Identifying the source of the remedy

When looking for a remedy to a particular form of discrimination against homosexuals, one must first decide whether the problem can be solved at the federal, state, or local level of government, or if the problem can be solved by the government at all. Some forms of social discrimination may only be solved by private attempts to educate misinformed persons.

The federal government has exclusive control over certain subject matter. Federal law and policy govern immigration and naturalization, federal employment and security clearances, the diplomatic service, the military, the merchant service, licensing of the airwaves, as well as numerous other areas. Approaching state courts or legislatures in these areas would be futile. The federal government is also important to the gay rights movement in areas over which it does not exercise exclusive control insofar as it serves as a model to state and local governments. Furthermore, the federal budget is of great importance here. Millions of dollars may be allocated for various activities under existing law. For example, many gay organizations are currently the recipients of C.E.T.A. funds.

State law and policy control most areas of concern to gays. Sodomy, solicitation, and open lewdness laws are products of state penal codes. Federal criminal laws govern in only limited situations. Municipal ordinances need not be discussed since municipalities are creatures of the state and their ordinances stand or fall on the legality of their state equivalents. Child custody and inheritance are matters which are always controlled by state law. The division of property in the course of a divorce, separation, or even the dissolution of a "gay relationship" is determined by the laws of the state government. While there is usually room for some local legislation concerning employment, housing, and public accommodations, state law will often preempt local regulation.

Importance of the executive branch

The executive branch of government, whether at the federal, state, or local level, will ultimately prove to be a most important resource for securing gay rights. Unfortunately, little emphasis has been placed on developing a better relationship with this branch of government. A cursory identification of the problems confronting gay persons makes it manifest that most problems are amenable to executive solutions, many without the need for legislation or judicial intervention.

At the federal level more change may be secured through the executive branch than through Congress or the federal courts. While there may be enough support to ward off anti-gay legislation, it is unlikely that Congress will enact affirmative legislation for many years. Because of the "Nixon influence" on the Supreme Court and because of its current "hands off" attitude concerning gay rights, meaningful protection from the federal judiciary will be slow in coming. Many states are also plagued with hostile courts or legislatures. Under such circumstances, the executive branch can play a more prominent role.[11]

The executive branch of government, whether at the federal, state, or local level, will ultimately prove to be a most important source for securing gay rights. Unfortunately, little emphasis has been placed on developing a better relationship with this branch of government . . . most problems are amenable to executive solutions . . . .

In many states there is more potential contact with the executive branch than with the courts or legislatures. Most state legislatures are not in session throughout the year. Legislative action is often impossible because of long periods of adjournment. In Oregon, for example, the legislature is only in session for six months every two years. The problem in dealing with the courts is related but somewhat different. First there must be a test case. Sodomy laws often go unchallenged because of the difficulty in finding consenting adults who have been prosecuted for an act in private. Also, when one manufactures an artificial test case such as *Doe v. Commonwealth's Attorney, supra*, a court is likely to either refuse to consider the issues or to deliver an unfavorable ruling.[12] Furthermore, after years of litigation, a court may avoid the substantive question and instead decide a case on a procedural technicality.[13] Administrative officials sit at their desks, vulnerable to pressure, on a year-round basis. An actual case need not be at hand in order to request policy changes from the executive branch.

There are many other reasons why administrative change may come before reform by the courts or legislatures. Since administrative regulations which have the force of law may often be achieved with little or no publicity, the chances of adverse public reaction can be minimized. Court cases are usually matters of public record and knowledge and legislative action requires a public vote. The exercise of administrative discretion does not.

Since administrative regulations which have the force of law may often be achieved with little or no publicity, the chances of adverse public reaction can be minimized.

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Legislative change can only occur when a group of legislators decides that it will occur. Judicial policy is established by a majority of an appellate court. But in the executive branch it is frequently possible for major changes to occur as the result of the decision of one person. The President, a governor, or a department head may often promulgate regulations without the consent of a group of persons having equal authority.

One of the primary concerns of legislators, if not the most important consideration, is to be reelected. It is difficult for a legislator to vote on an issue without worrying about the effect of that vote on possible reelection. Middle management and even department heads in the executive branch may often take positions without concern for public reaction. Usually the public will not learn of the action. But even if the public were aware, these bureaucrats are usually not subject to the electoral process since they are appointed to their positions.

In assessing the power of one branch of government vis-a-vis another, one should not only consider who controls the guns, but also who does the hiring and firing of employees. Although the legislature adopts or rejects a budget, it is the executive branch which does the hiring and firing of thousands of government employees. When push comes to shove these employees will be more influenced by the attitudes of the executive branch than by those of the legislature or judiciary.

Consider the influence of the executive branch on the legislature and on legislation. Priority status is usually afforded bills introduced or supported by the administration. Also, through the power of appointment, the executive can put pressure on legislators. An unfriendly legislator may be influenced when he learns that his friends will not receive judicial or administrative appointments. Furthermore, executive appointments are made to committees and commissions which make legislative recommendations. The actions of these bodies influence not only legislation but also public opinion.

The executive branch is also not without its influence on the judiciary. In many states the governor appoints judges. Even in states such as California and New York where judges must eventually appear on the ballot, vacancies created by death, retirement, or removal are filled by executive appointment. In many states county prosecutors, the attorney general, and public defenders are appointed by the executive. These court officers have a tremendous influence on the judiciary. Another major aspect of executive influence on the judiciary is prosecutorial discretion. A prosecutor, as a representative of the executive branch, decides when and if to file a criminal prosecution. If a case is filed, the prosecutor decides under which law to prosecute and also which arguments to present to the court. If a prosecutor enters into a stipulation with a defense attorney, a judge will usually defer to that stipulation.

There is yet another reason which highlights the importance of the executive branch with respect to gay rights. The executive department represents all branches of government in all cases, both criminal and civil, whether as plantiff or as defendant. A good relationship with those persons providing this legal representation is extremely important.

Possibly the most important reason for working with the executive branch has not been mentioned. Bureaucrats are younger, more urban than legislators and judges and are often better educated. As a result they may be more progressive in the area of sexuality and homosexuality. Most surveys concerning sexual attitudes have indicated that support for homosexual rights is more likely to come from young, urban, and college-educated persons than from most other segments of society.

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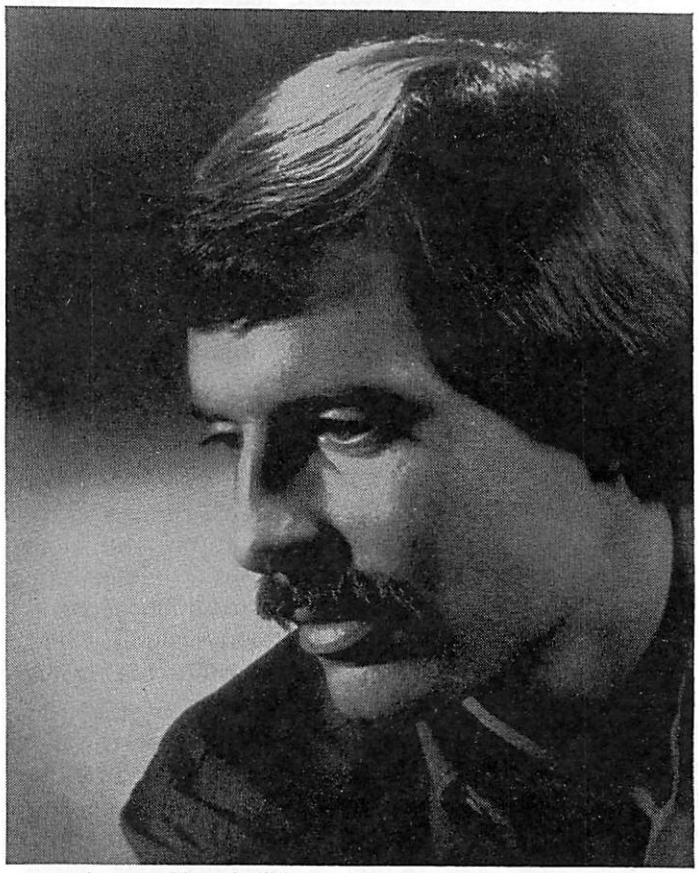

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Some general considerations

Because bureaucratic techniques are sophisticated, one should become familiar with these techniques before tackling an executive or wandering through the administrative maze. Administrative regulations are often unintelligible, many times deliberately so.

Bureaucrats prefer to remain out of the public eye. Political sophistication is the ability to focus the spotlight on them.

Probably the single most important step in dealing with the bureaucracy is to find someone on the inside who knows the inner workings. This person can be informative as to which buttons to push to bring about the needed changes. This is also necessary to minimize bureaucratic runarounds.

The size of bureaucracy is vast. One should be prepared to accept this fact. In the past decade the number of workers in state government has tremendously increased. For example, in Pennsylvania the number has increased by 38%, in Ohio by 65%, in New Jersey by 81%, and in Maryland by 110%. Pennsylvania ranks 47th in the nation in this ratio.

In dealing with bureaucrats it must be remembered that they are protected by civil service and by strong unions. They have excellent job security and they know it.

While the executive appoints them and the legislature funds them, neither has control over them. Bureaucrats silently carry out the policies that they favor or find important, and are capable of blocking those they oppose. This can be advantageous or disastrous to gay rights, depending on bureaucratic attitudes and bureaucratic relationships with leaders of the gay rights movement.

How does one gain power over the bureaucrats? Bureaucrats prefer to remain out of the public eye. Political sophistication is the ability to focus the spotlight on them.

The Pennsylvania experience

Pennsylvania has been chosen for analysis and discussion for two reasons. First, Pennsylvania is the only jurisdiction where a permanent executive commission, dealing with sexual minorities, has been established. Second, the accomplishments in Pennsylvania have occurred despite the failure of the legislature or the courts to decriminalize private acts of homosexuality.

Several years ago, the Pennsylvania legislature enacted a penal code revision package without decriminalizing private homosexual conduct. Consensual sodomy was merely reduced from a felony to a misdemeanor. Lowering the criminal penalties, rather than decriminalizing, is not unique to Pennsylvania in that at least seven other states have taken similar legislative action.[14] However, the Pennsylvania Legislature may be described as hostile to gay rights. Discriminatory legislation against homosexuals was passed by the legislature a few years ago, but was finally vetoed by the governor.[15] Not unlike many other jurisdictions, reform through the judicial branch has been slow in Pennsylvania because of the great difficulty in finding appropriate test cases. This situation with the legislature and the courts created a climate in which reformers turned to the executive branch. Fortunately, they had a sympathetic governor.

At the conclusion of his first term as governor, Milton Shapp, then running for reelection, made a campaign promise to issue an executive order in his second term. After reelection he fulfilled that promise and issued an order to all state departments and agencies forbidding discrimination in state services and employment for reasons of sexual orientation.

It soon became apparent that an executive order would not be enough. If that order were to be properly implemented, it would be necessary to study each state agency and department in order to determine what changes were necessary to end discrimination against sexual minorities. The *Pennsylvania Task Force on Sexual Minorities* was created for this purpose.

The *Pennsylvania Task Force* was established as a temporary study group which worked under the authority of the governor's office. The group was comprised of gay and non-gay participants from rural and urban areas throughout the Commonwealth. Men and women, blacks and whites were included. Committees were formed which met with high-ranking representatives from each state department. The annual reports of every department were analyzed, as a result of which the heterosexual biases and assumptions relied upon by state agencies became apparent. It was not the duty of the *Pennsylvania Task Force* to solve these problems, but to uncover and identify them.

Not unlike many other jurisdictions, reform through the judicial branch has been slow in coming in Pennsylvania because of the great difficulty in finding appropriate test cases.

The Department of Welfare provides an excellent example of the work required to make changes in the discriminatory delivery of state services. In January 1975, the *Pennsylvania Task Force* requested a memorandum from the Secretary of Welfare. The Secretary was asked to issue an order prohibiting dis-

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crimination for reasons of sexual orientation in that department's employment practices and also to end such discrimination in the delivery of services to clients of that department. Almost two years after the initial request, that order was finally issued. Notwithstanding the continual contact and prodding from the state *Task Force*, it took two years to get one simple policy statement issued.

The Department of Welfare was studied for other possible areas of discrimination. Problems exist in state hospitals. Many young gay persons had been placed in such hospitals by confused or cruel parents. Aversion therapy was being used in some state hospitals. Other hospitals were keeping patients who refused to "reform". Children who are gay should be placed in proper homes. There had been no effort to place gay foster children with understanding parents. The family counseling programs conducted by the Welfare Department operated under the assumption that all families were heterosexual. There had been no training of staff to deal with gay families or gay problems.

A typical example of the extent of heterosexual bias in the Department of Welfare concerned institutions for the mentally retarded. The staff evaluated the behavior of mentally retarded persons in the following manner. "Healthy" heterosexual behavior was regarded as the best form of conduct. Having no relationship at all was considered an intermediate form of behavior. Homosexual behavior was highly disapproved of and was considered the worst possible form of conduct.

Problems existed in old-age and nursing homes which are operated by the Department of Welfare. Psychiatrists had been called in when two persons of the same sex had displayed affection by holding hands in front of other persons.

Problems existed in state hospitals. Many young gay persons had been placed in such hospitals by confused or cruel parents. Aversion therapy was beng used in some state hospitals.

Although the local mental health clinics run by the Department were supposed to do yearly assesments of the mental health of the community, no evaluation had been done concerning sexuality and mental health.

The Department had not allocated any funding for research projects involving homosexuality.

Although the Department enters into contracts with outside companies, there had been no requirement that contractors have a policy of non-discrimination for reasons of sexual orientation.

If it took two years to get a simple policy statement from the Secretary of the Department of Welfare, how long can it be expected to take for effective change to occur in these other areas? These examples involve only one state department. What about the problems that exist in the numerous other departments and agencies of the state?

Obviously the *Pennsylvania Task Force* could not deal with these problems on an issue-by-issue basis. Such an approach would have kept them busy for 400 years.

. . . the welfare, health, and education committees . . . have become standing committees of each corresponding state department. The object of the Council is not to perpetuate itself, but rather to integrate the concerns of sexual minorities into the daily operations of each state agency.

Because a long-term and efficient method to deal with these problems was necessary, a permanent body — the *Pennsylvania Council for Sexual Minorities* — was established.

Race, sex and geography were important factors in the make-up of the *Council* membership. This group was not to be dominated by white, middle-class, urban males from Philadelphia. The membership was to include both gays and non-gays. Furthermore, representatives from each state department took permanent positions on the *Council*.

In order to be as efficient as possible, committees were formed corresponding to functions of state government. There are now committees on welfare, health, education, state police, employment, finance, legislation, corrections, and community relations. There are also special committees on third world problems, youth, and special minority concerns (transvestites and transsexuals).

Most funding of the *Council* comes from the governor's office. There are no salaried employees and the only compensation of *Council* members is for travel expenses.

As of this writing, the welfare, health, and education committies do not actually operate under the authority of the *Council*. Instead, they have become standing committees of each corresponding state department. The object of the *Council* is not to perpetuate itself, but rather to integrate the concerns of sexual minorities into the daily operations of each state agency.

Progress in other areas has resulted from *Council* activities. The Secretary of Education has issued a ruling that homosexuality *per se* is not a ground for denying credentials to a teacher. The Department of Insurance has issued regulations forbidding

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discrimination for reasons of sexual orientation in the transactions of insurance companies. The Governor has appointed a known lesbian to the Women's Commission and he has also proclaimed "Gay Pride Week" throughout the state. The Department of Justice has established a Community Advocate Unit to aid minorities, including gays, with their legal problems.

One collateral benefit has been the ability of gay men and women from around the state to meet on a monthly basis to study and discuss the functions of state government. Not only has this produced a new sophistication in dealing with the executive branch, but it has enabled gays to be more effective in dealing with other branches of government as well.

Community leaders from around the country can learn from the Pennsylvania experience. The *Pennsylvania Council for Sexual Minorities* stands as a role model for the rest of the nation.[16]

The Oregon experience

In, 1971, the Oregon legislature decriminalized private homosexual acts between consenting adults. This reform was part of the new penal code which went into effect at that time. Many gay activists in Oregon thought the next step was legislative enactment of a state law prohibiting discrimination in employment, housing, and public accommodations. A bill along these lines was introduced in 1973 but failed to gain sufficient support in the legislature. Another bill was introduced during the next legislative session but again met defeat in 1975.

The purpose of the *Oregon Task Force* was to study the problems of homosexuals throughout the state and to report its findings to the legislature with recommendations for appropriate legislation.

Oregon's major gay rights organization, named the *Portland Town Council*, then approached the executive branch for relief. One of the *Town Council's* members had substantial experience working with the *Pennsylvania Task Force*.

Members of the *Portland Town Council* met with the governor of Oregon. Governor Straub was a first-term governor and was unwilling to issue an executive order as had been done by Governor Shapp in Pennsylvania. However, Governor Straub did request the Department of Human Resources to establish a *Task Force on Sexual Preference*.

The purpose of the *Oregon Task Force* was to study the problems of homosexuals throughout the state and to report its findings to the legislature with recommendations for appropriate legislation. The *Portland Town Council* drew up a list of potential appointees and the governor selected the members of the *Oregon Task Force* from those recommended. The group, similar to a blue ribbon commission, was comprised of 12 members from various professions.

A lesson should be learned from the Oregon experience. When it is not possible to get an executive order from the governor, it may be possible to have a temporary study commission created under the auspices of a state department. However, even when a temporary body is created, there should be some apparatus to enable it to continue operating. There should be no forced dissolution after any given time span.

The life of the *Oregon Task Force* was from March 1976 to March 1977. Regrettably, no provision was made whereby the group could continue functioning beyond the original year.

Last year the *Oregon Task Force on Sexual Preference* issued a "Report to the Legislature" which contained its findings and recommendations. The report has been published and contains an excellent discussion of many of the myths and fabrications concerning homosexuals and homosexuality. See 3 *Sex. L. Rptr.* 39 for the complete text of the Report.

Whether a permanent council will be established in Oregon remains to be seen.

A lesson should be learned from the Oregon experience. When it is not possible to get an executive order from the governor, it may be possible to have a temporary study commission created under the auspices of a state department. However, even when a temporary body is created, there should be some apparatus to enable it to continue operating. There should be no forced dissolution after any given time span.

Concluding remarks

Efforts to secure civil rights for gay people through the courts or legislatures should not be minimized. All avenues should be pursued. However, lobbying or litigating are not the only methods to achieve justice. Too little attention has been paid to the executive branch of government. Many major advances for the gay rights movement can be achieved without new legislation or judicial protection. The experiences in Pennsylvania and Oregon should be

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...IN THE COURTS

Court of Claims Upholds Marital Income Tax Rates

The federal Court of Claims has considered and rejected an argument that the joint income tax rates for married couples discriminates against unmarried persons. The plaintiffs in *Mapes v. United States*, 576 F.2d 896 (Ct.Cl.1978), sued for a refund of the "marriage penalty" they were forced to pay as a consequence of the unavailability of single individuals' tax rates. The court, noting that marriage results in a tax "penalty" only when the spouses' incomes are roughly equal and causes tax savings where they are disparate, held that any discrepancy was a necessary consequence of the need for administrative convenience, and held that the "minimum rationality" test had been satisfied. Analyzing the legislative history of the joint return, the court also held that the higher marital rates were proper consequences of a Congressional concern to avoid windfalls to those couples residing in community property states and to those able to shift income from one spouse to the other.

The court rejected plaintiff's argument that strict scrutiny should be applied. Apart from the general principal that tax classifications are entitled to considerable deference, the court held that the fundamental right to marry was not burdened, and that the statute, being gender-neutral, did not discriminate on the basis of sex. Quoting Gilbert and Sullivan, the court commented that "our Internal Revenue Code provides an opportunity for the young to demonstrate the depth of their unselfishness," and suggested that cohabitation could permit couples to "enjoy the blessings of love while minimizing their forced contribution to the federal fisc."□

Denial of Security Clearance Revised

A California Federal Court has reversed a Department of Defense administrative decision denying a security clearance to an open homosexual. In *Fulton v. Secretary of Defense*, No. C-77-1534-SHO (N.D.Cal., June 16, 1978). the plaintiff was an engineer working for a defense contractor. Although a hearing examiner recommended granting a security clearance, an appeals board reversed, finding that the plaintiff had engaged in homosexual acts, singly and in groups, in states where such acts were criminal. The appeals board had expressed "grave concern" that plaintiff would be subject to coercion by denying him sexual gratification, and determined that his "irresponsible" sexual activity rendered him unreliable.

In denying the government's motion for summary judgment, Judge William H. Orrick found that there had been no "rational connection" established between plaintiff's behavior and the national interest. Although the judge declined to hold that private homosexual acts cannot be the basis for denial of a clearance, he indicated that denial cannot be based on the unsupported conclusions of the board, but must be rationally explained. However, Judge Orrick also denied the plaintiff's motion for summary judgment, preferring instead to remand the case to the administrative agency "to articulate the requisite rational nexus and...to adduce evidence, if any exists, in support thereof."□

Juror's Obscenity Opinions Mandated Exclusion

A Texas court has ruled that a juror, whose own strong opinions on nudity and premarital sex would have precluded application of a community standard, should have been excluded for cause in an obscenity trial. The juror in *Evert v. State*, 561 S.W.2d 489 (Tex.Crim. 1978), had stated she objected to premarital sex and believed frontal nudity *per se* obscene. Since she indicated she could not disregard her beliefs and apply a community standard, the court held that the failure to exclude her for cause warranted reversal.□

SEXUALAWREPORTER

Intolerance of the Unconventional Haults The Growth of Liberty

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carefully examined. Undoubtedly, similar approaches will prove to be successful in other jurisdictions throughout the country.

Although twenty-one states have reformed their sodomy laws, no state legislature has yet enacted affirmative legislation protecting homosexuals from arbitrary discrimination. Only a small number of municipalities have done so and the permanence and effectiveness of these ordinances is dubious. Perhaps the most important step toward the achievement of full civil rights, even before the enactment of affirmative legislation, is the creation of a temporary study commission or a permanent council similar to those previously discussed.

There is something missing in the current strategies of the gay rights movement. A key factor could well be the pursuit of reform through executive action. Unlike reform through the legislature or the courts, administrative reform through executive action is a necessity whether or not a particular jurisdiction has reformed its sodomy and open lewdness laws and repealed its sexual solicitation law. Legal reform without companion administrative reform means that the former becomes for the most part a hollow victory. But administrative reform has the advantage of being capable of initiation and substantial fulfillment prior to and without any legal reform whatsoever. The sheer immensity of what needs to be done in the area of administrative reform guarantees years of extensive effort and most of the objectives are capable of accomplishment without any reform of the criminal laws. Thus administrative reform through executive action is a program which can be implemented in any state at any time.

For homosexuals to obtain equality before the law with heterosexuals, certain legal reforms must be achieved. The sodomy laws must be reformed so as to decriminalize private sexual acts between consenting adults. The open lewdness laws must be reformed so as to conform to section 251.1 of the Model Penal Code, requiring that the actor is aware that someone may be affronted or alarmed by the conduct in question. And, of course, the sexual solicitation laws which proscribe solicitations for sexual acts not involving money or some consideration must be repealed. Ultimately these legal reforms must accompany administrative reform.

In jurisdictions which have not undergone homosexual legal reform of the kind under discussion, administrative reform may possibly provide the necessary leverage for legislative action toward that end. The political contacts --both administrative and legislative-- which a well-coordinated program of executive action develops, can provide the strongest possible foundation for the eventual passage of such legislation. In sum, it matters little whether law reform has occurred in any particular state, as a complete reform of every state's executive and administrative agencies is essential if the rights of gay people are to be more than pious platitudes engrossed on pieces of parchment. The task ahead may be enormous, but the sooner the beginnings are made, the better for all concerned.[17] □

NOTES: THE EXECUTIVE BRANCH OF GOVERNMENT

1 Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, South Dakota, Washington, West Virginia, Wyoming.

2 When the Consenting Adults Bill was enacted in California, newspapers such as the *Los Angeles Times* referred to the new law as the "homosexual bill of rights." This caused many misconceptions concerning the status of homosexuals in California. Among the many unredressed injustices is the fact that the Consenting Adults Act provided no protection against the arbitrary firing of homosexuals in the private sector.

3 Those two states are California and New Mexico. In New Mexico, the reform occurred in a revision of the rape laws. California is the only state in which sodomy law reform occurred in a special bill exclusively designed to accomplish that singular purpose.

4 The Florida Supreme Court voided that state's sodomy law on vagueness grounds only. See *Franklin v. State*, 247 So.2d 21 [1971], but Florida also has a law prohibiting unnatural and lascivious conduct in private. The Supreme Judicial Council of Massachusetts has interpreted its statute prohibiting unnatural and lascivious acts as excluding private homosexual acts. However, that interpretation was not based upon constitutional grounds. See, *Commonwealth v. Balthazar*, 318 N.E.2d 478 [Mass., 1974]. The Iowa Supreme Court has recognized a constitutional right of privacy for private heterosexual behavior. See *State v. Pilcher*, 242 N.W.2d 348 [1976]. In what may be considered the most important decision to date, the New Jersey Supreme Court recently voided, on constitutional grounds, a fornication statute. See *State v. Saunders*, ___A.2d___[1977]. A decision recognizing a constitutional right to engage in private homosexual acts is yet to be delivered by any state supreme court, although there is *obiter* to that effect in the *Saunders* case.

5 *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F.Supp. 1199 [E.D.Va., 1975], aff'd 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751.

6 In a footnote, the Court has indicated that the issue is still open to question and that the Court's refusal to grant a hearing in *Doe, supra*, is not the final word. See *Carey v. Population Services International*, 97 S.Ct. 2010, 52 L.Ed.2d 675 [1977].

7 Laws prohibiting non-commercial solicitations appear to exist in all but approximately fourteen jurisdictions in this country.

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8 See Gallo, Jon J. et al., "The Consenting Adult Homosexual and the Law: An Empirical study of Enforcement and Administration in Los Angeles County," U.C.L.A. Law Review, Vol. 13, No. 3 [March 1966]. Also see, "Enforcement of Section 647[a] of the California Penal Code by the Los Angeles Police Department," by Coleman and Copilow, privately published by the *Sexualaw Reporter*.

9 The recent decision of the California Supreme Court in *Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 [1976], indicates that contract and equity law may provide many protections for gay marital-type relationships.

10 See *Doe v. Commonwealth's Attorney, supra; Singer v. U.S. Civil Service Commission*, 97 S.Ct. 725 [1977]; *Ratchford v. Gay Lib*, 98 S.Ct. 1276 [1978]; *Enslin v. North Carolina*, 98 S.Ct. ___ [1978]. Both the *Doe* and *Enslin* cases involved issues of sexual privacy. The *Singer* case involved the right of an openly gay person to remain an employee of the federal government. The Supreme Court has also refused to review three gay-teacher cases. For the state court opinions in two of those cases, see *Gaylord v. Tacoma School District*, 559 P.2d 1340 [1977]; and *Gish v. Board of Education*, 336 A.2d 1337 [1976]. See also *Acanfora v. Board of Education*, 359 F.Supp. 843 [1973], aff'd 491 F.2d 498 [4th Cir., 1974], *cert. denied*, 419 U.S. 836, 95 S.Ct. 64 [1974]. See also *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 [1971], a case involving the right of two persons of the same sex to enter into a marriage recognized by the state. A direct appeal was taken to the United States Supreme Court and was dismissed for want of a substantial federal question, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65 [1972].

11 Some progress has already been made at the federal level with the executive branch of government. The Civil Rights Commission has agreed to take up gay issues in the area of unequal administration of justice and has included gay issues in its current survey of future civil rights priorities. The Bureau of Prisons has agreed to stop referring to "homosexual rape" in prison because it misleads the public into believing these rapes are committed by homosexuals. The Navy has partially changed its policy excluding homosexuals from service. The U.S. Job Corps adopted a policy that its rules concerning sexual behavior must be the same for homosexual and heterosexual activities, also eliminating its previous policy aimed at the prevention and management of homosexuality. An administrator for the Agency for International Development, a State Department agency, has held that discrimination by this agency against homosexuals would be fundamentally inconsistent with the due process rights guaranteed under the U.S. Constitution. The Public Health Service has held that homosexuality should no longer be considered evidence of a "psychopathic personality." The Immigration and Naturalization Service has changed its policy and now holds that homosexuality per se, is not evidence of a lack of good moral character and, in itself, will not bar naturalization of a homosexual alien. The Federal Communications Commission has issued a proposed rule which makes it mandatory for broadcasters to ascertain leaders of all significant groups in the community, including gays.

12 In *Doe, supra,* two anonymous homosexuals asked the Federal District Court in Virginia to void the Virginia sodomy law. They had not been prosecuted but argued that they feared possible prosecution, although they failed to plead any facts supporting this assertion. Rather than simply denying them standing to raise the constitutional issues, the Federal District Court delivered an extremely unfavorable ruling.

13 After a three-judge federal court held the Texas sodomy law to be unconstitutional, *Buchanan v. Batchelor*, 308 F.Supp. 729 [1970], the United States Supreme Court reversed that ruling on procedural grounds and remanded the case to the Texas criminal courts for reconsideration. Had this route been pursued, it would have involved further years of litigation through the Texas criminal justice system, at the conclusion of which the same undecided federal questions would have been litigated in the federal courts. But thousands of dollars in costs, the years wasted in waiting for an ultimate judicial decision, plus knowledge that the ultimate arbiter -- the U.S. Supreme Court -- is likely to be unwilling to render a final decision all demonstrate the frequent futility of embarking on such a course of action.

14 Arkansas, Idaho, Montana, New York, Texas, Vermont, Virginia.

15 The Pennsylvania Legislature passed a bill which would have prohibited homosexuals from employment in certain sensitive positions, such as state hospitals, police, or teaching. The Governor vetoed this bill when it reached his desk, after receiving a communication from the Attorney General to the effect that the bill was unconstitutional.

16 For a further discussion of the Pennsylvania experience, see Bonine, Susan, "Governor's Leadership on Equal Rights Brings Gains to Gays in Pennsylvania," 2 *Sex.L.Rptr.* 13 [1976].

17 In the process of this writing the author has deliberately eschewed any attempt to offer a "how to do it" outline of the steps which might be necessary to establish an executive council or committee in any particular state. Each jurisdiction is a complex unto itself with its own political by-ways and social structure. There is no one road to paradise and those who wish to work for the establishment of such an agency in their own states must first master their own political imperatives. To do otherwise would be to court disaster. It would also be advisable to contact the political leaders in Oregon and Pennsylvania who have made achievements in those jurisdictions.

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ATTEMPTED REPEALS OF GAY RIGHTS ORDINANCES: THE FACTS

Buoyed by a stunning victory in the Dade County election of June, 1977 (see "Gay Rights Defeat in Dade County Has National Implications," *Sex. L. Rptr.* 25 1977), anti-gay forces led by Anita Bryant announced that this was only the first of many campaigns in a battle that was to become nationwide in scope. The promise that civil rights protection for gays would face attack on many fronts was not long in the keeping. In the last year and a half, anti-discrimination ordinances similar to that defeated in Dade County have been challenged in St. Paul, Wichita, Eugene, and Seattle. While each of these elections has received news coverage in both the gay and non-gay media, it is the goal of this article to facilitate a side-by-side examination of the issues, campaigns, and personae that were a part of these most recent challenges to sexual civil liberties. Following the election in Florida, the first new assault on a law guaranteeing civil rights protections to gays took place in St. Paul, Minnesota. The ordinance under attack was passed by the City Council of St. Paul in July of 1974, and had been in effect since December, 1975. Prior to repeal on April 25, 1978, Chapter 74 of the St. Paul Legislative Code had read in part:

> 74.01 Declaration of Policy
> The council finds that discrimination in employment, education, housing, public accommodations, and public services based on race, creed, religion, sex, color, national origin or ancestry, affectional or sexual preference, age or disability adversely affects the health, welfare, peace and safety of the community. Persons subject to such discrimination suffer depressed living conditions, poverty, and lack of hope, injuring the public welfare, placing a burden upon the public treasury to ameliorate the conditions thus produced, and creating conditions which endanger the public peace and order. The public policy of St. Paul is declared to be to foster equal opportunity for all to obtain employment, education, housing, public accommodations, and public services without regard to their race, creed, religion, sex, color, national origin or ancestry, affectional or sexual preference, age or disability, and strictly in accord with their individual merits as human beings.

Under Section 74.02, Affectional or Sexual Preference is defined as follows:

> Affectional or Sexual Preference means having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment.

The law specifically forbade discrimination by labor unions, employers, employment agencies, educational institutions, sellers or buyers of real estate and those providing public accommodations. The enforcement process could be instigated either by an individual complaint to the St. Paul Human Rights Commission or the commission director could file an action on his or her own motion. Over the four-year period in which the ordinance was in effect, eleven complaints were filed citing discrimination on the basis of sexual or affectional preference.

The prime mover in the successful initiative campaign to repeal the ordinance was Rev. Richard A. Angwin, pastor of the Temple Baptist Church of St. Paul. Rev. Angwin and his organization, Citizens Alert for Morality, characterized the issue as a conflict between bible morality and ordinary sin. The 33-year-old preacher's response to the charge that repeal would be tantamount to treating gays as second-class citizens was to state, "I think that anyone who is immoral is a second-class citizen." He argued that homosexuality was morally wrong and that the ordinance, in effect, gave respectability to an immoral lifestyle. *continued on page 70*

INSIDE

Supreme Court Rules Broadcasters Use of Indecent Language May Be Regulated

In a 5/4 decision, the United States Supreme Court has ruled that the Federal Communications Commission has statutory and constitutional authority to impose sanctions on broadcasters who allow the use of repeated indecent words over the airwaves. *Federal Communications Commission v. Pacifica Foundation*, 98 S.Ct. 3026 (1978).

Pacifica Radio broadcast a 12-minute satiric monologue by George Carlin which was entitled "Filthy Words." In the monologue Carlin listed the dirty words one could not say over the airwaves and repeated them over and over again in a variety of colloquialisms. The words included "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." The broadcast occurred at 2 o'clock in the afternoon on a New York radio station owned by Pacifica. A few weeks later, a man stated in a complaint to the F.C.C. that he and his son had heard the broadcast while driving in a car. The man complained about the F.C.C. allowing such a broadcast.

The Commission made a finding that such a broadcast of these dirty words in a repetitive manner at 2 o'clock in the afternoon was "indecent" and prohibited by law. Pacifica appealed the decision and the United States Court of Appeals for the District of Columbia reversed the F.C.C., with each of the three judges on the panel writing a separate opinion. 556 F.2d 9. The United States Supreme Court granted the F.C.C.'s petition for certiorari.

A majority opinion was written by Mr. Justice Stevens and joined by The Chief Justic and Mr. Justice Rehnquist. The main issue before the Court was whether the F.C.C. has any power to regulate a broadcast that is indecent but not obscene.

Five justices held that the Commission has the power to regulate "any obscene, indecent, or profane language by means of radio communications," pursuant to 18 U.S.C. §1464. They held that since these words were used in the disjunctive it must have been the intent of Congress to grant power to the F.C.C. to regulate language which was indecent but not necessarily obscene. The majority held that the language in question was not obscene but was definitely indecent.

The majority also held that although the F.C.C. would be prohibited from censoring the content of a program prior to broadcast, the statutory prohibition of censorship "has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties."

Conceding that the Carlin monologue was unquestionably "speech" within the meaning of the First Amendment, and that the Commission's objections were in part based upon the content of that speech, the Court was called upon to decide whether the regulation of such speech violated the First Amendment.

Justices Powell and Blackmun agreed with Justices Stevens, Rehnquist and the Chief Justice that the F.C.C. regulation did not violate the First Amendment. These Justices all agreed that this result turned on the unique characteristics of the medium of radio, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interests of unwilling adults in not being assaulted by such offensive speech in their own homes. However, this is where Justices Powell and Blackmun parted company with the other three members of the majority. The Chief Justice and Justices Stevens and Rehnquist held that indecent language, even though not obscene, may be given less protection under the First Amendment because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Justices Powell and Blackmun were unable to subscribe to the proposition "that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection."

Mr. Justice Stewart wrote a dissenting opinion, with whom Justices Brennan, White, and Marshall joined. In this dissent, the minority justices held that the statute authorizing the F.C.C. to regulate "obscene, indecent, or profane language" should be interpreted such that the language must be "obscene" under the standards set forth in *Miller v. California*, 93 S.Ct. 2607 (1973) and may not be regulated if it is merely "indecent."

Mr. Justice Brennan wrote a separate and stinging dissent, joined by Justice Marshall. In this dissent, the majority was accused of shirking the responsibility assumed by each Member of the Court to jealously guard against encroachments on First Amendment freedoms. Justice Brennan stated; "As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven 'dirty words' healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that."

Justice Brennan harshly continued, "Yet there runs throughout the opinions of my Brothers Powell and Stevens another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share in their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain."

Justice Brennan later concluded, "In this context, the

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Court's decision may be seen for what, in the broadest perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking."

Distribution of Contraceptives to Minors May Violate Parents' Constitutional Rights

A Class action on behalf of the parents of minor, unemancipated children was brought seeking declaratory and injunctive relief to stop distribution by a state-run family planning center of contraceptive devices and medication to plaintiff's children without plaintiff's knowledge and consent. A federal district court in Michigan held that such a practice of distributing prescription and non-prescription devices and drugs to unemancipated minors, without prior notice to their parents, violated the constitutional rights of the parents. *Doe v. Irwin*, 428 F.Supp. 1198. The family planning center appealed and the Court of Appeals reversed and remanded the case back to the district court for reconsideration, 559, F.2d 1219, in view of the United States Supreme Court decision in *Carey v. Population Services International*, 97 S.Ct. 2010 (1977).

Upon remand, the federal district court, after a consideration of the *Carey* decision, readopted and reaffirmed its previous decision and wrote a lengthy opinion explaining its reasoning for so doing. *Doe v. Irwin*, 441 F.Supp. 1247 (1977).

The court held that "Parental authority is plenary. It prevails over the claims of the state, other outsiders, and the children themselves. There must be some compelling justification for interference."

Further, the court noted that "The Center is not confining itself solely to the furnishing of sex education and birth control information." The Center also furnishes minors with prescriptive contraceptives which the court found could have dangerous and possibly fatal side effects.

Balancing the rights of minors concerning the use of contraceptives on the one hand with the rights of parents to raise and control their children on the other hand, the court finally concluded that the Constitution required that the parents at least be afforded notice by the Center prior to distribution of such material. This, the court held, would at least assure the possibility of a consultation between the parent and child.

The court did not decide what would happen if, after such a consultation, the minor wanted to use contraceptives and the parent refused to consent to such use.

The court stated that "Only an unthinking application of reasoning developed in racial and sexual discrimination cases could lead to a conclusion that once a child expresses ideas in contrast with those of the parent that the parent has no further right to guide, counsel, and educate that child and the state may then begin to fulfill that function. That is what the defendants ask this court to conclude. This court refuses, however, to accept such an invitation."

Finally, after reviewing the several opinions written by members of the Supreme Court in *Carey*, the court stated, "An examination of the individual opinion leads me to the conclusion that a majority of the Court would affirm the result reached in this case."

Buffalo Anti-Obscenity Ordinance Is Voided

A store owner was arrested and prosecuted for a violation of a Buffalo anti-obscenity ordinance. The ordinance prohibited display or distribution of certain material to persons under the age of 17 years if the material "is principally made up of descriptions or depictions of illicit sex or sexual immorality or which is obscene, lewd, lascivious, or indecent, or which consists of pictures of nude or partially denuded figures posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust or perversion for commercial gain or any article or instrument of indecent or immoral use."

Several months after his arrest the charge was dismissed upon the City's failure to appear for trial. The store owner thereafter instituted an action for declaratory and injunctive relief on the grounds that the ordinance was unconstitutionally vague and overbroad. The trial court agreed and granted injunctive relief and the Appellate Division of the Supreme Court affirmed. *Calderon v. City of Buffalo*, No. 25/1978, decided March 1, 1978.

The Appellate Division held that the statute was over broad because it did not include a requirement that the material be "harmful to minors" and because it did not provide for a defense that the material was disseminated for bona fide scientific, educational, or comparable research or study. With respect to the vagueness challenge, the court stated, among other things that "as to the prohibitions against materials which are 'obscene, lewd, lascivious, or indecent,' only 'obscene' is defined and the other terms are open to a wide range of interpretations, particularly the word 'indecent.' "

Second Time in Six Months

Appellate Court Again Declares Ohio Solicitation Law Unconstitutional

For the second time in six months, the Ohio Court of Appeal, First District, has held that state's homosexual solicitation law unconstitutional. In March, 1978, the court held the law violated Due Process because of its vagueness and violated the First Amendment because it infringed on the free speech rights of homosexuals. That decision; *State v. Phipps,* ____N.E. 2d____, was reported at 4 *Sex.L. Rptr.* 25.

In the new decision, *State v. Faulk,* no. C-77486, filed September 13, 1978, the court held that the state could not prohibit homosexual solicitation and allow heterosexual solicitation. This the court said, violates Equal Protection.

The *Phipps* case, which was decided in March, was a split decision. Justice Palmer wrote the dissent in *Phipps* in which he disagreed with the two judge majority on the free speech and vagueness issues. He indicated in his dissent that if a proper case came along in which the issue was raised [the attorneys in the *Phipps* case failed to raise the Equal Protection issue] he would probably void the law for that reason.

Shortly after the *Phipps* case was decided there was a change in judges in the First District Court of Appeal. Justice Palmer remained but two new justices replaced those who had written the majority in *Phipps.* Justice Palmer was able to convince the two new justices to support his dissenting position regarding free speech and vagueness. As a result, the *Faulk* decision specifically disapproves of the *Phipps* decision on those issues.

With respect to the 'flip-flop' on the free speech and vagueness issues by the First District Court of Appeal in less than six months, Justice Palmer writes:

> "The author of this opinion strongly dissented from that judgement in Phipps and, finding himself of the same opinion in the case *sub judice,* has now been joined in that determination by the other members of the instant panel. The conflict thus resulting is of sufficient importance, in our judgement, that normal and wholly appropriate considerations of deference and precedent must needs give way. We hold, therefore, that for the reasons stated in the dissenting opinion in *Phipps,* R.C. 2907.07 (B) is neither in conflict with the First Amendment rights to freedom of speech, nor is it so vague nor imprecise that it fails Fourteenth Amendment standards."

No reasons were given as to why "normal and wholly appropriate considerations of deference and precedent must needs give way."

Because the *SexuaLaw Reporter* had only reprinted the full text of the majority opinion in *Phipps,* and because that opinion has now been questioned, we are reprinting below the full text of Justice Palmer's dissenting opinion in *Phipps.* Notes may be found on page 62.

The National Committee for Sexual Civil Liberties and the Columbus Ohio Chapter of the National Lawyers Guild have filed briefs in the Supreme Court of Ohio in the *Phipps* case. The *SexuaLaw Reporter* will report on the outcome of this case.

DISSENTING OPINION
in State v. Phipps

Palmer, P.J., Dissenting:

I regret to find myself in disagreement with the conclusions of my colleagues, who have discovered what seems to them to be two deficiencies in the importuning statute, R.C. 2907.07 (B), requiring it to be stricken from the criminal code of this state as facially unconstitutional. Despite what I trust and believe to be my own regard for the undoubted centrality in our constitutional system of the First and Fourteenth Amendments, I am able to discover only one arguable constitutional problem in the statute, *viz.,* whether a statue making an offensive homosexual solicitation criminal while ignoring similar heterosexual solicitations affords the former class the equal protection of the law—and that question was one not raised in either the trial court or here and is therefore not before us for decision.

I.

Considering first what I believe to be the less sensitive of the two grounds urged to sustain the holding, the majority finds the statute "unconstitutionally vague" because it defines as criminal, conduct which the individual could not reasonably understand to be proscribed. If I follow the argument of the majority, it is conceded that there is nothing vague about the statute up to the point of the last clause, but it becomes vague with the addition of the phrase "or is reckless in that regard". Thus, the majority agrees that "[i]f at the moment of the proposal, the actor knows in actual fact that it will be 'offensive to the other person' and he nevertheless proceeds then . . . the accused could be held criminally responsible, because he can logically be held to understand that he stepped over the line." But, holds the majority, "[t]he situation changes when the actor does not know what the other's reaction will be", and proceeds recklessly in that regard. Why is this so? Certainly it is not because the meaning of "reckless" is vague. The word is expressly—and in my judgement clearly--defined by statute, is otherwise well known to

the law[2], to the laity[3], and is used with substantial frequency in both civil and criminal statutes [4], and is moreover consistently used within Chapter 2907 to define prohibited sexual conduct.[5].

Indeed, I do not understand the majority to quarrel with this. Rather, two other grounds are advanced to sustain the thesis. First, say my colleagues, " . . . the line between unpunishable overtures and criminal importuning *is drawn by the other person's feelings,* a test of infinite variables". Yet, as we have seen, the majority concedes that the first half of the statute meets constitutional muster, where the solicitation is known to be offensive to the other person—*a line also drawn drawn by the other person's feelings.* If it is *ad hominem* in the one, it is *ad hominem* in the other. The majority cannot have it both ways.

Secondly, says the majority, " . . . If we seek to resolve the uncertainty [i.e., of what is meant by 'reckless'] *by applying the legal concept of 'reasonable to know',* we must weigh the probabilities of offensiveness", which the majority finds to be too uncertain, given the range of human sexual responses, to provide a standard of criminal conduct. Perhaps so, if we ignore the statutory definition of "reckless" and choose to define it instead in terms borrowed from tort law. The fact is that the legislature has defined the term for use and it is that definition we must apply, not some other:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to the circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."
>
> R.C. 2901.22(C)

I find no vagueness here. If an individual stands outside a church on Sunday morning and solicits sexual conduct from each person exiting from the portals, he many not "know" that the solicitations are offensive to those strangers, but he is certainly acting with heedless indifference to the consequences by perversely disregarding a known risk that such solicitations will be offensive. So here, where the defendant pulled his car up to a complete stranger with a crude and bald invitation to engage in sexual conduct. I simply am not convinced, whatever "the diversity and unpredictability of human sexual responses" may be, that this or any potential solicitor could not fully understand the statutory proscription against such solicitations where the response is not actually "known" to him in advance. If he can reasonably understand that he may be held criminally liable for a sexual solicitation known by him to be offensive to another, as the majority concedes, I see no reason why he cannot reasonably understand that he may also be criminally liable where he does not know what response he will get, but recklessly proceeds, as defined in R.C. 2901.22(C), to make his solicitation anyway.

If the majority is concerned with the dificulty of applying the statutory definition of "reckless" to individual cases of solicitation, the concern is no more legitimate than a score of other instances in law of applying an intellectualized standard to particular facts. Indeed, this Court has already commenced the task of applying the standard to cases before us, and with no particular difficulty. Thus in *City of Cincinnati v. DeFelice,* No. C-76736 (1st Dist Nov. 23, 1977) decided by a panel of this Court over which the author of this dissent presided, we unanimously reversed a conviction under R.C. 2907.07(B) where the record demonstrated that the soliciation (again, of an undercover policeman) had been preceded by fifteen or twenty minutes of very circumspect courting behavior on the part of the defendant which, if not actively encouraged, was certainly not objected to by the object of the defendant's attention. We had no problem in deciding that since the solicitation was neither known to be offensive, *nor reckless in that regard,* the State had failed to establish an essential element in its case.

The instant case I find to be the other side of the coin from *DeFelice, supra,* and wholly appropriate for criminal sanctions. The Ohio statutes mandate the kind of distinctions we spelled out in *DeFelice* between solicitations recklessly made and those circumspectly undertaken, and are obviously specific enough to permit courts to readily make them, and in my judgement, potential defendants to readily understand them.

'I simply am not convinced, whatever 'the diversity and unpredictability of human sexual responses' may be, that this or any potential solicitor could not fully understand the statutory proscription against such solicitations where the response is not actually 'known' to him in advance.

One final word before we leave this aspect of the majority opinion. My colleagues find it important to state, in the preamble to the discussion of this issue, and to emphasize throughout the discussion, that "the sole standard [i.e. of a criminal sexual solicitation] is the feelings of this one person [the victim of the solicitation], however idiosyncratic and unpredictable." I simply do not understand this to be true. The statutory standard is whether *the offender knows* the solicitation is offensive, or is reckless in that regard. The state of mind of dispositive importance is that of the *offender,* not the victim. If the victim is an idiosyncratic fundamentalist preacher to whom the world and all its works is sin and to whom a mild and innocuous flirtation would be grossly offensive, there could theoretically be a breach of R.C. 2907.07(B) as to him, *but only if the offender knew his idiosyncracy.* The question of *recklessly* making a criminal solicitation to an idiosyncratic or unpredictable audience simply does not arise, given the statutory definiton of the word; one does not perversely disregard a known risk where one unknowingly offends an eccentric in the area of his eccentricity.

I conclude that the majority have placed on the statute, in their emphasis on the state of mind of the *victim,* a burden the language of the enactment does not deserve; and to the extent that in doing so, it has led them to concentrate on the vagaries and unpredictability of human receptivity to sexual overtures, and to conclude, therefore, that the enactment is impermissibly vague, it has led them, in my judgement, into error.

II.

The second basis for holding the instant statute unconstitutional is the conclusion of the majority that this legislation offends against the First Amendment by imposing impermissible restrictions on free speech. Central to the thinking of my colleagues is their analysis of R.C. 2907.07(B) which leads them to conclude that:

> " . . . what must offend the other person is a solicitation; that is, the communication of an offer which seeks the consent of the other to engage in a mutual activity. *The major thrust of the statute is against speech, not conduct."*

Having then concluded, and having further satisfied themselves that the instant "speech" falls within no recognized exception to First Amendment gurantees, their decision is logically reached.

My quarrel with this analysis is quite basic. I do not agree that the statue strikes at free speech; I do not believe the statute is directed to speech at all, except adventitiously; I believe the statute is directed to *acts,* to *conduct,* which may or may not be advanced through speech. Since I heartily agree with my learned brothers that "the freedom to speak one's mind [is] a preferred position in our system of self-government", I willingly assume what should quite properly be the substantial burden of the differentiating the communications protected by the First Amendment from the acts required to bring R.C. 2907.07 (B) into play.

In assuming this burden, I would start with what seems to me to be self-evident: contrary to the opinion of the majority that the "thrust of the statute is against speech," and that the "state need prove no more than an *oral proposal* which offends its recipient," I would think that the proscribed offense of solicitation could be consummated (and proved) without resort to speech at all. Thus, I take it that a solicitation could be accomplished quite readily by pantomime, by the solicitor exposing his person, for instance, accompanied by suitable gestures, all without speech. If the example seems *outre* it is one well within the experience of most police court magistrates. Further, I would think the majority would agree that the statute would subsume—even if they argued that the First Amendment covered—a solicitation by *written* invitation.

The point is that the statutory proscription *is against offensive sexual solicitations,* however they may be consummated, and not against speech or "oral proposals". To be sure, the solicitation must be communicated to another in some fashion, but the means of doing so, whether by speech, gestures, or the type of telepathy (or empathy) that sometimes mysteriously and silently serves in these relationships, is irrelevant, just as it is irrelevant to a charge of armed robbery whether the defendant orally communicated with his victim by saying "Stick 'em up", or simply thrust a gun into the man's face. The result is precisely the same.

I conclude from this that the statute is addresed to *an act* or to conduct—offensive solicitation—not to speech or communciaton as such. Obviously, most sexual importuning under the statute will commence, at least, in some form of verbal communication, since this is the usual way one individual makes contact with another; but I do not believe it is of the essence of the statute. It is the *solicitaion* that is sought to be regulated, not the speech, writings, or gestures that make it manifest to the offended party. And it is this fact which, in my judgement, removes the matter from the protection of the First Amendment.

I conclude from this that the statute is addressed to an act or conduct—offensive solicitation—not to speech or communication as such.

This distinction I have sought to draw may profitably be illustrated by contrasting the instant case with *Cohen v. California,* cited *supra* in the majority opinion. There is as much difference between the legend on the defendant's jacket in *Cohen* and the sexual solicitation in the instant case as there is between an idea and an act. However crudely and offensively phrased and whether one agrees with its sentiments or not, "Fuck the Draft" expresses a thought, a principle, an idea—the stuff, in short, of First Amendment concern. Mr. Cohen was saying in effect, "I detest and oppose the Draft and urge you to do the same". So phrased, the incident would never have reached court; his election to use an earthy shortcut for the thought did not alter its essence or deprive it of its protected status. We are willing to suffer the crudity in order to protect the idea and to preserve its free exchange in the marketplace of ideas. In the instant case, however, we have absolutely nothing I can perceive that could be dignified as thought, an idea, or statement of principle or philosophy, nothing indeed except a gross act of solicitation to a furtive sexual encounter which happened to be initiated verbally.

Indeed, it is possible to argue that the distinction between the expression of an idea, however repellant or at odds with conventional wisdom, as in *Cohen v. California* or the proposed march of the Nazis through Skokie, Illinois, *Village of Skokie v. National Socialist Party* (Ill. 1978), 46 U.S.L.W. 2396, and verbal conduct[6], may well lie at the root of most of the examples listed by the majority within their category of "forms of speech

. . . *per se* unprotected by the First Amendment." Certainly, the exception as to "fighting words" is a limitation on what is in reality *conduct,* not communication. When one calls another a foul name knowing that it will provoke a kinetic response, it is the equivalent of a right cross to the jaw.[7] Advocacy of the overthrow of the government by force of violence can, under certain circumstances, have the equivalent value of throwing a bomb.[8] The exceptions as to libel and slander are ancient in the common law, long predating our Constitution,[9] and the rule as to obscenities may well derive from a different source entirely, as an expression of moral outrage and a calculated decision by our judicial predecessors not to extend the protection of the First Amendment to something so unworthy and profitless.[10]

The dichotomy I have suggested between speech protected by the First Amendment and speech constituting an unprotected verbal act is by no means a unique discovery of this author. Other authorities have addressed themselves to the issue and have articulated the distinction—although it must be said that in too many instances the expression of the concept has been clouded by arguments as to whether the speech was "worthwhile" or "useful" and therefore fit for First Amendment protection. Such qualitative judgements obviously have nothing to do with the matter, if it is speech qua speech, it is protected, worthwhile or not.

Thus, two recent federal cases, both factually close to the instant case, may be cited to illustrate the distinction between speech and verbal conduct with respect to the First Amendment. *Morgan v. City of Detroit* (E.D. Mich. 1975), 389 F. Supp. 922, presented the case of a prosecution under a Detroit ordinance prohibiting solicitation for prostitution. Prostitution itself was not a crime in either the city or the State of Michigan, and the ordinance was challenged as a consitutional infringement of free speech under the First Amendment. The court held that the speech involved in solicitation was not within First Amendment protection stating:

> "Plaintiffs have not indicated, nor is the Court aware, of any social value that will be advanced by the speech involved in accosting and soliciting to prostitution. . . ."

citing with approval the words of Chief Justice Burger in *Paris Adult Theater I v. Slaton* (1973), 413 U.S. 49,67:

> *"Where communication of ideas, protected by the First Amendment, is not involved,* or the particular privacy of the home protected by *Stanley,* or any of the other 'areas or zones' of constitutinally protected privacy, the mere fact that, as a consequence [of criminal laws], some human 'utterances' or 'thoughts' may be incidentally affected does not bar the State from acting to protect legitimate state interests." (Emphasis added)

Similarly, in *United States v. Moses* (D.C. App. 1975), 339 A. 2d. 46, the court sustained a federal criminal enactment prohibiting solicitation for prostitution. Pointing out that while Congress had not chosen to make prostitution a crime:

> "Rather it sought to control the seemingly ineradicable business by prohibiting solicitatin for prostitution. [T]he act of soliciting for prostitution is *sui generis* when evaluated against the broad spectrum of freedom of speech cases. *The Great majority of First Amendment cases involve a true expression of ideas or beliefs,* which a solicitation for prostitution is not. . . .
>
> [The statute] proscribes a highly particularized form of speech. It recites no punishable *conduct* other than inviting, enticing, or persuading or addressing another, for purposes of prostitution . . . [citations]. *Nor does the prohibited speech fall within the realms of opinion on issues, political dissent, enumeration of grievances, social dialogue, or the like . . .* " (Emphasis added)

pointing out (in footnote 7) that:

> "Almost any conduct or communication arguably expresses some message or idea: Here, however, the exposition of any idea is only a minor part of, and incidental to, the communication."

Id. at 51-52. Although both decisions discuss the exemption of "commercial speech" from First Amendment protection, having been decided before the dispositive U.S. Supreme Court decisions in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), 425 U.S. 748, and *Bigelow v. Virginia* (1975), 421 U.S. 809, the distinctions between protected ideas and unprotected conduct is clearly implied and to a considerable extent expressly stated.

The dichotomy I have suggested between speech protected by the First Amendment and speech constituting an unprotected verbal act is by no means a unique discovery to this author.

The majority opinion herein acknowledges and accepts the validity of legislative enactments restraining sexual solicitations where the act solicited is expressly prohibited by law (see footnote 4, majority op.) but draws a distinction between that speech and the instant speech soliciting an act now decriminalized. The distinction, in my judgement, is without difference, since even in the cases where the act solicited is in fact a crime, the logic supporting the restraints depends on the distinction between speech and verbal conduct discussed above.

Thus, in *District of Columbia v. Garcia* (D.C. App. 1975), 335 A. 2d 217, the court observed that solicitations to perform a criminal act were more akin to conduct than to speech, and were among the limited classes of speech denied First Amendment protection in *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, since "by their very utterance [they] inflict injury or tend to incite an immediate breach of the peace." The court drew the distinction between such verbal conduct and speech which advocates an idea in the following terms:

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"It is important to emphasize the precise nature of the speech which the sexual proposal clause of §22-1112(a) proscribes. The principle is well established 'that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' However, there is a significant distinction between advocacy and solicitation of law violation in the context of freedom of expression. Advocacy is the act of 'pleading for, supporting, or recommending; active espousal' and, as an act of public expression, is not readily disassociated from the arena of ideas and causes, whether political or academic. *Solicitation, on the other hand, implies no ideological motivation but rather is the act of enticing or importuning on a personal basis for personal benefit or gain.* Thus advocacy of sodomy as socially beneficial and solicitation to commit sodomy present entirely distinguishable threshold questions in terms of the First Amendment freedom of speech.. The latter, we hold, is not protected speech.(Emphasis added)

District of Columbia v. Garcia, supra, at 223-24. Sexual solicitations may thus be restrained not simply becaused they invite the commission of illegal acts, as the majority suggests, but because they constitute verbalized conduct, not verbalized ideas, thoughts, principles, or opinions protected by the First Amendment.

A simlar conclusion must be reached with respect to restraints on *commercial* sexual proposals. To simply classify the solicitations as "commercial speech" and, therefore, not worthy of First Amendment protection will no longer suffice in view of the two recent Supreme Court cases which expressly and effectively dismantled the commercial speech doctrine as previously understood. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* and *Bigelow v. Virginia, supra.* Both decisions hold that "commercial" speech is to be accorded neither any more nor any less protection than that accorded to other types of speech. And—of significance to the instant cases—in both decisions, the Court undertook an extensive analysis of the speech in question to determine whether it was, in fact, speech, *i.e.,* the dissemination of information of interest to the public, or was some other type of verbal conduct. The issue, as framed by the Court in the *Board of Pharmacists'* case, was:

"Our question is whether speech which does 'no more than propose a commercial transaction,' *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations,* 413 U.S., at 385, 93 S.Ct., at 2558, 37 L.Ed.2d, at 677, is so removed from any "exposition of ideas, '*Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942), and from " 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government.' " *Roth v. United States,* 354 U.S. 476, 484, 77 S. Ct. 1304, 1308, 1 L.Ed.2d 1498, (1957), that it lacks all protection. Our answer is that it is not."

Id. at 762. If such solicitations are to be restrained, it is not because they are "commercial", *but because they are irrelevant in the marketplace of ideas, and therefore outside First Amendment protection.* See also *Morgan v. City of Detroit, supra,* at 927; *United States v. Moses, supra,* at 52-53.

III:

Finally, a word should be said concerning the appropriate legal and constitutional fundament for this legislation. For reasons I have stated above, I believe it has nothing to do with the regulation of speech as such. When speech is involved in the offense, that fact is adventitious and irrelevant. What this and similar statutes direct themselves to is rather the protection of an individual's *right of privacy* against grossly offensive and unsolicited acts of verbal assault to his person. In the content of the particular legislation in question, the General Assembly of this state has recognized the right of an individual to be free of offensive sexual solicitations. Indeed, the authority of the state in this area is suggested by no less an authority than *Cohen v. California, supra,* where the Supreme Court stated:

[W]e have . . . consitently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech. . . . The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner".

Id. at 21; see also *Erzoznik v. City of Jacksonville* (1975), 422 U.S. 205, 210-11; *Paris Adult Theater I v. Slaton, supra,* at 59.

R.C. 2907.07(B) represents the expression of a legislative judgment that an offensive homosexual solicitation is an essentially intolerable invasion of a substantial privacy interest. For myself, I am unable to find any constitutional basis raised in this appeal which would deny them the right to express that judgment in the form legislated, and I therefore necessarily disagree with the observation of my brothers, who " . . . find no other constitutionally sufficient reason to uphold this statute."

I point out, with respect, that if the majority concludes, as the opinion states:

"However, we find no constitutional precedent holding that communications about sexual matters are in a category different and apart from, and

therefore subject to greater regulation than, communications about politics, economics, literature, science, art or social matters . . . we believe that verbal communication about sexual matters per se is not subject to any greater restriction than that in other areas of human experience and activity."

Then I would have thought that the more appropriate basis for holding the statute unconstitutional would have been a finding that the state lacks the necessary police power to enact the statute. If the majority feels, as this and other language in the opinion" seems to state, that it is impossible to reconcile the instant legislation with any aspect of public health, safety, or morals, then the statute falls without any need for attack from the First Amendment. *State, ex rel. Bowman v. Board of Commissioners* (1931), 124 Ohio St. 174; 10 O. Jur. 2d, Constitutional Law, Sec. 111, 150 *et seq.* I hope it is not unfair to suggest that perhaps this, and not really questions of freedom of speech or vagueness, is as the heart of the majority decision. If this is so, in whole or in part, it would be preferable to state the concern clearly, so that issue could be fully and fairly on the main point and without distraction from which I am constrained to believe—with all possible respect to the opposing views of my brothers—are extraneous constitutional issues.

I would affirm.

NOTES TO OHIO SOLICITATION

I. R. C. 2901.22(C) provides that:

"(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

2. See, *e.g.*, 39 O. Jur. 2d, Negligence, Section 131; BLACK'S LAW DICTIONARY 1435 (4th ed. 1968)

3. See, *e.g.*, WEBSTER'S NEW COLLEGIATE DICTIONARY 965 (G.C. Merriam Co. 1974)

4. See, *e.g.*, R.C. 2903.06, 2903.13, 2909.06, 2911.21, 2917.11, 4511.20.

5. See, *e.g.*, R.C. 2907.06 (Sexual imposition); R.C. 2907.09 (Public indecency); R.C. 2907.31 (Disseminating matter harmful to juveniles); R.C. 2907.32(A)(1) (Pandering obscenity).

6. An analogous concept is expressed in the rule of evidence permitting the introduction of certain hearsay testimony as evidence of "verbal acts." See generally 21 O. Jur. 2d, Evidence, Section 364, and cases cited therein.

7. See *Chaplinksy v. New Hampshire* (1942), 315 U.S. 568, wherein the Supreme Court held that certain limited classes of speech, including "the lewd and obscene, the profane . . . and the insulting or 'fighting' words", were not entitled to First Amendment protection since "by their very utterance [*they*] *inflict injury or tend to incite an immediate breach of the peace.*" *Id.* at 572. (Emphasis added) The Court observed that:

"Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."
Id.

8. *See Schenk v. United States* (1919), 249 U.S. 47, wherein a statutory proscription against the advocacy of anti-draft sentiments during wartime was upheld with the observation that:

"The character of every act depends upon the circumstances in which it is done . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. *It does not even protect a man from an injunction against uttering words that may have all the effect of force.*" (Emphasis added)

9. See *Roth v. United States* (1957), 354 U.S. 476, 482-83.

10. *Id.* at 482-88

11. For instance, this language on page 5 of the majority opinion:

"Having chosen to decriminalize private homosexual acts between consenting adults, the legislature cannot, logically, retain the criminal nature of proposals to engage in such acts, even if the proposal is personally offensive to the person addressed. How else is the actor to determine whether or not the other person will consent, thus removing the subsequent act from the prohibitions of the law? If individuals are permitted to engage in consensual acts, reason and consistency say that they should be allowed to communicate with each other in order to determine whether or not both consent."

Age Mistake Is Defense To Child Molestation

The defendant was convicted of annoying or molesting a child under age 18 (Penal Code §647a), and contributing to the delinquency of a child under age 18 (§272). At his trial the defendant testified that he had asked the boy how old he was and that the boy stated he was 18. The defendant further testified that the boy appeared to be over 18-years-old to the defendant. The trial judge instructed the jury that if the defendant committed the sexual act it was immaterial whether or not he knew the age of the minor. The minor was in fact 15 years old.

The Supreme Court of California held that this instruction was erroneous and that reasonable mistake as to age is a defense to a prosecution for child molestation or for contributing to the delinquency of a minor. *People v. Atchison,* Crim. No. 20086, filed September 18, 1978, ___P.2d___.

Gay Rights Ordinances

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Opposition to the repeal was led by the St. Paul Citizens for Human Rights. They engaged the assistance of seven prominant clergymen, representing 141 St. Paul churches, who expressed support for the protection of gay rights. These ministers argued that the issue was civil rights, not religious beliefs. They saw the law not as a validation of the gay lifestyle or homosexuality, but rather as a guarantee to gays that the basic rights of all citizens would not be denied them.

The mayor of St. Paul, George Latimer, who was running for re-election himself at the time, campaigned door-to-door in an effort to convince voters that the ordinance should stand. He was re-elected despite this unpopular position.

The measure that went before the voters read as follows:

> "Should Chapter 74 of the Saint Paul Legislative Code which prohibits discrimination in employment, education, housing, public accommodations and public services based on race, creed, religion, sex, color, national origin or ancestry, affectional or sexual preference, age or disability be amended by removing "affectional or sexual preference" from the ordinance and should Section 74.04, which provides as follows:
> "No person shall discriminate, on grounds of race, creed, religion, color, sex, national origin or ancestry, affectional or sexual preference, age or disability, with respect to access to, use of, or benefit from any institution of education or services and facilities rendered in connection therewith, except that a school operated by a religious denomination may require membership in such denomination as a condition of enrollment, provided such requirement is placed upon all applicants" . . . be further amended by removing "provided such requirement is placed upon all applicants?"

The wording of the ballot as well as the propriety of including gay rights and educational issues in the same question were the subjects of a law suit filed three days after the election. This action, taken on the part of the St. Paul Citizens for Human Rights, was an attempt to obtain an injunction to prevent the repeal from taking effect before its legality could be challenged. The argument was that gays might otherwise be discriminated against as a result of a repeal which might later be declared invalid by the state Supreme Court. The judge denied the injunction on the ground that he could not foresee any hardship to gays as a result of allowing the repeal to take effect.

Five thousand, six hundred voters signed the petition to put the ordinance on the ballot. In the campaign that followed, thousands of dollars were spent by both sides. In the end, 54,101 voted to remove "affectional or sexual preference" from the ordinance, while 31,689 voted that it should be retained. Gay rights candidate Tom Burke, who was defeated in a bid for a City Council seat observed, "Our assessment is that what happened is that the right wing turned out the vote." Mayor Latimer concluded, "We just were not able to convey to people who abhor the practice of homosexuality that they should set those feelings aside when it comes to granting them civil rights." Encouraged by the overwhelming victory in St. Paul and eyeing the next battleground, Rev. Angwin announced, "I foresee doing some work in Wichita, a city very close to my heart."

Within three days, Rev. Angwin had made good his prediction. His contribution toward organizing the Wichita campaign was hardly necessary, though. The Wichita group opposing that city's gay rights ordinance was already in full operation. In fact, Wichita's Concerned Citizens for Community Standards had begun several years earlier with the original purpose of combating pornography. Unlike the situation in St. Paul where the law had been on the books for nearly four years, Wichita's ordinance was born in controversy and opposed from its inception by the Concerned Citizens.

The conflict began in the summer of 1977 when the Homophile Alliance of Sedgwick County asked the City Commission to amend its civil rights code so as to prohibit discrimination in housing, employment and public accommodations on the basis of marital status and sexual or affectional preference.

"We were just not able to convey to people who abhor the practice of homosexulaity that they should set those feelings aside when it comes to granting them civil rights."

—George Latimer
Mayor of St. Paul

The Commission voted for an amendment prohibiting discrimination against singles but voted down the homosexual rights portion. The city's legal department told the commissioners that a gay rights ordinance would probably conflict with state sodomy laws. The Commission, however, asked Attorney General Curt Schneider for an opinion on this question. Schneider answered that although an ordinance would not protect homosexuals from prosecution under sodomy statutes, it would not conflict with current laws. When it became apparent that the Commission would again consider gay rights, the Concerned Citizens for Community Standards said it would begin a petition drive to repeal any such ordinance. The proposed amendment was adopted by a 3 to 2 vote. However, because of the threatened repeal, City Attorney John Dekker advised the Commission to codify the gay rights section as a separate ordinance in order to guard against a repeal of the city's entire civil rights law. Commissioner Porter echoed Dekker's fears when he stated, "I wasn't willing to submit to the voters the question of civil rights for blacks, browns, women or anyone else. I'm not confident they would vote for them." On September 27, 1977, the Commission adopted the following ordinance:

> Section 2.12.960 of the Code of the City of Wichita, Kansas, shall read as follows:
> a. Wherever, in the Code of the City of Wichita,

Kansas, reference is made to discrimination in Housing, Public Accommodations and Employment based upon race, religion, color, sex, physical handicap, national origin or ancestry, said reference shall be construed to include discrimination based upon sexual or affectional preference.

b. For purposes of this section the term "sexual or affectional preference" means having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment.

Almost immediately following the passage of the new law, Concerned Citizens, headed by its President, Rev. Ron Adrian and Chairman Rev. Mike Schepis, began circulating petitions to obtain the required signatures that would force the Commission either to reverse its decision or put the measure to a vote of the public. Only 9,815 signatures were required; 26,097 were obtained.

Of the eighteen members of the executive board of Concerned Citizens, all but four were clergy. Their mailing list of over 1500 names included many who supported their efforts with substantial monetary contributions. In all, the organizationspent over $43,000 on the campaign, $10,000 of which was donated by Anita Bryant's Protect America's Children group.

"I wasn't willing to submit to the voters the question of civil rights for blacks, browns, women, or anyone else. I'm not confident they would vote for them."

—Commissioner Porter
Wichita City Commission

Philosophically aligned with the predominantly fundamentalist protestants of Concerned Citizens, was the Most Rev. David Maloney, Bishop of the Wichita Diocese. Maloney authored an anti-ordinance article which was distributed at all Catholic churches in the diocese.

The pro-ordinance arguments were presented by several diverse organizations. An effort at reaching the voters through leaflets and mass mailings was coordinated by the authors of the ordinance—The Homophile Alliance of Sedgwick County. The religious Caucus for Human Rights, a group formed to "support human rights in Wichita" and made up of both lay persons and clergy inaugurated a door-to-door outreach to gain public support. Other gay and non-gay organizations including the Y.W.C.A. and student groups from Wichita State University added their support.

The Concerned Citizens characterized the issue not as one involving civil rights but one of special privileges. They stated that gays were asking the voters to approve their (the gays) immoral life style. "Human rights yes, but no one has the right to be immoral," they stated. In addition to ethical objections they voiced the argument that the ordinance would conflict with the state's sodomy law. That law states that oral or anal copulation between persons, not husband and wife or consenting adult members of the opposite sex is a misdemeanor.

Concerned Citizens was able to bring its message to the voters by the use of radio advertising spots utilizing those emotional appeals that spelled success for their predecessors in Dade County. One such advertisement informed listeners that under the existing gay rights ordinance, "We are open for the right of homosexuals to recruit our children."

Pro-ordinance forces argued that public accommodations, shelter, and jobs do not amount to special privileges. For the most part, groups emphasized that homosexuality was not illegal, and voters were not being asked to condone its practice but merely to afford all citizens "human rights."

In an attempt to block the May 9 referendum, four supporters of the ordinance filed suit in the United States District Court, calling on the court to exercise its power to prevent a popular vote on a civil rights issue. The suit contended that homosexuality was not a crime and that the state may not interfere with the freedom of homosexuals "nor deprive them of their legal and constitutional rights." The suit further alleged that "false and fraudulent campaigning" on the part of the anti-gay forces was calculated to appeal to the passions and prejudices of the community towards plaintiffs and their representative class", and that allowing the election pro cess to go forward to its predicted conclusion, a deteat of the ordinance, would further encourage unlawful and unconstitutional discrimination and the commission of threats and physical violence against the plaintiffs and others. In denying the motion, Judge Frank Theis based his decision on what he found to be the failure of plaintiffs to establish the element of "irreparable injury" required for obtaining the relief sought. "I think that I'm as sensitive to civil rights as anyone can be, but I don't think you've met the requirements for an injunction," Theis told the plaintiffs.

This was not the first time pro-ordinance workers attempted to impede the election process. In December of 1977, the Homophile Alliance filed suit in Sedgwick County District Court, challenging the way the ordinance had been coded, i.e., separate from the civil rights law as a whole. That suit was dropped a week after the judge dissolved an earlier restraining order which had prevented the city from receiving the petitions calling for repeal of the ordinance.

The May 9 election saw 44.4 % of the eligible voters taking part. This was a large turn-out for a city election. Repeal of the ordinance was carried by a vote of 47,246 for repeal as opposed to 10,005 in favor of its retention. Only two precincts were carried by pro-ordinance voters, both were located near Wichita State University.

In the aftermath of the election there was talk of recalling those members of the commission who had passed the ordinance in the first place. Such sentiments were inspired by statements such as those of Concerned Citizens' Rev. Adrian who exhorted his followers to ". . . unite our forces and rise up and say this is a Christian nation and vote Christian leaders into office." Homophile Alliance leader Robert Lewis observed, "There are a lot of bigots in Wichita, Kansas. They hate us and they fear us. It's a lack of education."

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Gay Rights Ordinances

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Two days after the election, the Wichita Eagle published a story the last paragraph of which announced, "Concerned Citizens' leaders plan to offer assistance to a group seeking to repeal a similar gay rights ordinance in Eugene, Ore., May 23."

Opposition to the Eugene, Oregon, gay rights ordinance began promptly after its passage on November 28, 1977. The ordinance prohibited discrimination in employment practices generally, in city contracts, in housing practices, and in public accommodations, where such discrimination was based on sexual orientation.

Section 4.615 of the Eugene Civil Rights Ordinance defined sexual orientation as follows:

> "*Sexual Orientation.* A person's belief in or practice of any type of sexual relationship or conduct that is not prohibited by the laws of the state of Oregon or this city. Sexual relationship or conduct as these terms are used herein have the ordinary meaning and include but are not limited to the actions described in ORS 163.305 (1), (7), (8), without regard to whether the sexual relationship or conduct occurs between members of the same or opposite sex, and also includes any other conduct that may cause someone to believe that another person believes in or practices such sexual relationship or conduct."

Enforcement of this law was instigated by an aggrieved party's filing a complaint with the Eugene Human Rights Council.

Within one week after the petition drive to put the ordinance before the voters began, 10,000 signatures had been obtained. The group responsible for the initial opposition to the law was the Ecumenical Laymen's League. This group which had previously been involved in anti-abortion work eventually de-emphasized its participation in the anti-gay rights issue, though many of its members later joined V.O.I.C.E. of the People (Volunteer Organization in Community Enactments) which then took up the anti-ordinance banner. This group was aided by the efforts of the familiar sounding Concerned Citizens for a Better Eugene.

In contrast to the battles waged in other cities, the forces behind saving the ordinance were united in one organization under the Eugene Citizens for Human Rights. The amalgam of diverse factions into a more cohesive and coordinated campaign may have something to do with the higher degree of success. The action to repeal the ordinance was defeated in over 1/3 of the precincts.

Another contrast with earlier ordinance challenges was a more low-key campaign which until close to the election was freer of the emotional and inflammatory exchanges that characterized the St. Paul and Wichita confrontations. It was not until just prior to the election that the coalition of conservative churches introduced such topics as child molestation, gay teachers as role models, erosion of the family, and biblical condemnation as relevant to the ballot question. For the most part, the ordinance foes cited a lack of need for the law, the notion that to allow the ordinance to stand was to approve of the gay lifestyle, and that the ordinance amounted to special privilege as the points prompting their opposition.

Eugene Citizens for Human Rights, the pro-ordinance group, attempted to communicate to the voters that gay people were being discriminated against and needed the law to protect their right to get and hold jobs and obtain housing based on their personal qualification for such and without regard to their private sexual lives. The group used both "public coming out" by way of media advertising as well as door to door canvassing to persuade the voters to their side.

It was not until just prior to the election in Eugene that the coalition of conservative churches introduced such topics as child molestation, gay teachers as role models, erosion of the family, and biblical condemnation as relevant to the ballot question.

On May 23, 1978, by a margin of 62% to 38%, the referendum succeeded and Eugene, Oregon, became the third city in one year to repeal civil rights protections previously afforded to its gay citizens.

The Eugene Citizens for Human Rights did not disband following the defeat, but plans to continue a community education program with the goal of re-introducing a similar ordinance within a year or two.

The state of Washington is no stranger to gay rights controversies. The employment discrimination case of *Singer v. United States Civil Service Commission,* 530 F. 2d 247 (9th Cir., 1976) reversed and remanded, 97 S. Ct. 725 (1977), see also "U.S. Supreme Court Vacates Judgement Against Gay Federal Employee", 3 Sex. L. Rptr. 1 (1977); the gay teacher case, *Gaylord v. Tacoma School District,* 559 P. 2d 1340 (1977) cert. denied, see also "Status as Homosexual Grounds for Teacher Dismissal" 3 Sex. L. Rptr 14 (1977); and the lesbian child custody cases, *Schuster v. Schuster, Isaacson v. Isaacson,* 585 P. 2d 130 (1978), are but several legal skirmishes which arose in that state and have since gained national attention. There is a high degree of visibility among gays and gay rights groups in Washington and there has been for some time. Organizations such as the Dorian Group have been affecting politics in the state for several years.

It was in this more sophisticated political atmosphere that Seattle Police Officer David Estes spawned a campaign that would bring gay civil rights its first major victory since the loss in Dade County.

On January 13, 1978, Estes filed an initiative measure to repeal portions of two Seattle ordinances. The first, The Seattle Fair Employment Practices Ordinance, became law on September 1, 1973, when the measure was passed by an 8 to 1 vote of the Seattle City Council. The provisions of the ordinance apply to private employers as well as to the City of Seattle and prohibit

discrimination by employers, employment agencies or labor unions based on race, color, sex, marital status, sexual orientation, political ideology, age, creed, religion, ancestry, or national origin.

The second law the initiative was aimed at removing was Seattle's Open Housing Ordinance. The purpose of this law, which was passed in 1975 by a vote of 5 to 4, is to promote the availability and accessibility of housing and real property to all persons and to prohibit discriminatory practices in real property transactions. Specifically forbidden is conduct which adversely affects or differentiates between or among individuals or groups of individuals, because of race, color, religion, ancestry, national origin, sex, marital status, sexual orientation or political ideology. The law defines sexual orientation as follows:

"'Sexual orientation' means male or female heterosexuality, bi-sexuality, or homosexuality, and includes a person's attitudes, preferences, beliefs and practices pertaining to sex, but shall not include conduct which is unlawful under city, state or federal law."

Aggrieved individuals can file a complaint with the Office of Women's Rights to seek relief under the law. An individual need not bring suit in order to pursue his or her claim.

Officer Estes, asserting that "The purpose of the law is to discourage deviant behavior, not encourage it," and declaring, "I cannot support any law that is contrary to the laws of Moses," established with the help of fellow police officer Dennis Falk, an organization called SOME (Save Our Moral Ethics). The group ran full page advertisements in the Seattle Times which included copies of the initiative petition to be signed and sent in. These ads were supplemented by radio spots exhorting listeners to make use of the petitions. SOME was successful in that it had obtained the neccessary signatures by the August deadline but the cost of the media campaign was in the tens of thousands of dollars and money was short for the election battle that followed. This was the case notwithstanding a $10,000 contribution from Bryant's Protect America's Children.

The fatal shooting of a young black man by Officer Falk created further problems for the anti-ordinance forces The head of the group's speakers bureau resigned as a result of the incident leaving Estes as SOME's only major spokesperson.

The ground work for the campaign of the pro-gay Citizen's to Retain Fair Employment had begun several years earlier. Religious issues, so often the weapon of the anti-gay rights forces, were defused by the prompt announcement of support for the ordinance by the Church Council of Greater Seattle. This organization's Task Force on Lesbians and Gay men had already been at the mission of educating the public on gay issues for nearly two years.

While those opposed to the ordinances saw them as a threat to morality, Citizens to Retain Fair Employment emphasized the necessity of the laws to guarantee the right of privacy. A television commercial which depicted a family being spied upon while having dinner, was used to bring across the message of the danger of state intrusions into the personal lives of citizens. A coalition of community, business and political leaders identified with diverse viewpoints but united on the issue of civil rights for gays, was brought together with obvious effectiveness by the C.R.F.E.

When the voters were asked on November 7, 1978, "Shall Seattle's Fair Employment and Open Housing ordinances be changed to remove their prohibition of discrimination based on sexual orientation?"

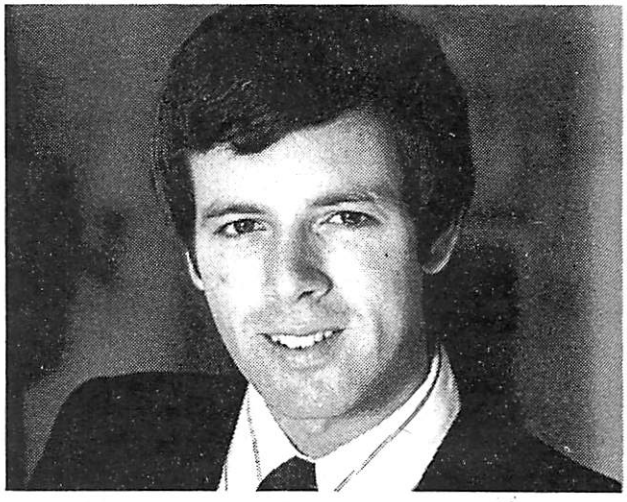
The response was 37% yes, 63% no.

CONCLUSION

The impressive reversal of gay rights set-backs as evidenced by the Seattle vote and the defeat, that same day, of California's Proposition 6, has sparked a new optimism among proponents of sexual civil liberties. But while the importance of these successes cannot be denied, it should also be noted that November 7, 1978, also marked the second time in seventeen months that the voters of Dade County, Florida refused to include homosexuals among the eighteen other classifications of individuals protected by that county's anti-discrimination ordinance.

The goal of this article has been a compilation and presentation of facts rather than an analysis of the factors that may have contributed to the inconsistent reaction voters have demonstrated toward the issue of civil rights and sexual orientation. In conclusion, however, one observation might be in order. It would appear to this writer that the characterization of the issues and tactics of persuasion used to win support for the equal treatment of sexual minorities, is not nearly as significant to the winning of minds as is a higher degree of gay community visibility and the concommitant education of the electorate toward which that visibility contributes.

Timothy J. Sullivan



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Sexual Preference of Big Brothers May Be Subject to Scrutiny.

(Ed. Several years ago the City of Minneapolis enacted a Human Rights Ordinance which prohibited discrimination on the basis of sexual or affectional preference in areas of housing, employment and public accomodations. Litigation developed as to whether Big Brothers Inc. was a public accomodation and that it could engage in sexual orientation discrimination. Big Brothers filed a lawsuit to determine the extent to which they may inquire into the sexual orientation of applicants. The full text of the court's opinion &Big Brothers, Inc. V. Minneapolis Commission on Civil Rights, District Court for the Fourth Judicial District, No. 735111, decided April 24, 1978] follows.)

Big Brother's policy of communicating sexual or affectional preference information to a mother and a Little Brother only in those instances where there is a preference for persons of the same gender was found by the Special Hearing Examiner to result in adverse and unequal treatment of homosexuals, constituting discrimination under the Minneapolis Civil Rights Ordinance. Big Brothers, Inc. was therefore enjoined from further inplementing this policy, and given the option of either ceasing to inquire and disseminate sexual or affectional preference information as to all volunteer applications *or* to inquire and disseminate such information as to all applicants, whether the sexual or affectional preference be homosexual or heterosexual. it is this Court's opinion that the Minneapolis Civil Rights Ordinance does not prohibit Big Brothers, Inc. from obtaining all information relevant to a prospective Big Brother's capacity to be a companion for boy, including information pertaining to sexual or affectional preference, but only prohibits the discriminatory use thereof.

Though complainant concedes that parents of Little Brothers do indeed have the right to be informed of the affectional or sexual preference of a potential Big Brother, he contends that *only* the mother may inquire into this particulary sensitive area, and seeks a construction of the Ordinance which would forbid communication by Big Brothers, Inc. of affectional preference information. The basis of complainant's argument is that if information about homosexuality is conveyed, it will raise a "red flag" and prevent him from becoming a Big Brother. Complainant fears that mothers will reject him because of his sexual preference, apparently recognizing the fact that many parents do not view homosexuals as "normal male models" for their children, and that many parents would prevent, when possible, such contact.

What is of ultimate importance here, however, is that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education vs. LaFleur,* 414 U.S. 632, 639, 640 (1974). Parenthood is a fundamental legal right, *Mattis vs. Schnarr*, 502 F.2d 588 (8th Cir. 1974), and the liberty guaranteed by the Fourteenth Amendment includes the right to *direct* the upbringing of children. *Meyer vs. Nebraska*, 262 U.S. 390 (1923); *Pierce vs. Society of Sisters*, 268 U.S. 510 (1925). Among the rights of the members of the family "are those of having the family maintained intact without interference by outsiders", *Miller vs. Monsen*, 228 Minn. 400, 37 NW 2d 543, 545 (1949) and this protection from outside interference, even by government, is protected under the U.S. Constitution. *Meyer vs. Nebraska*, supra *Pierce vs. Society of Sisters*, supra. In fact, such a fundamental right may only be interfered with by the State if there is a compelling governmental interest. *Memorial Hospital vs. Maricopa County*, 415 U.S. 250 (1974).

The fundamental right of a parent to raise a child as he/she sees fit within the confines of the law, therefore, cannot be intruded upon absent a compelling State interest. This right surely includes a parent's prerogative of preventing her child fron entering into a relationship with a homosexual. Indeed, the presence of a homosexual near a child may be a matter of legitimate concern to a parent, and has been recognized as such by various courts, e.g. *McConnell vs. Anderson*, 316 F. Supp 809, 814 (D. Minn. 1970); *Safransky vs. State Personnel Board,* 62 Wisc. 2d 464, 215 NW 2d 379 (1974); *Acanfora vs. Montgomery County Board of Education*, 359 F. Supp. 843 (D. Md. 1973).

Complainant would have this Court interpret and extend the Minneapolis Civil Rights Ordinance in a broader fashion han is reasonable or appropriate, and essentially contends that homosexuals have a right that does not exist for others who may apply to become a Big Brother. What complainant seeks is imposition of a burden on mothers who are concerned about the sexual or affectional preference of a potential Big Brother, when in all other instances, Big Brothers, Inc. obtains and relates information concerning all vital, important and significant aspects of the applicant to mothers. Surely it was not the intent of the Ordinance to place a parent in a most difficult and awkward situation in order to assert her right to direct the upbringing of her child by making an informed and knowledgeable decision as to whether she will permit a particular person to be a companion for her son. Nor can it seriously be contended that a social service agency such as Big Brothers must be prohibited from effectively carrying out the very purpose for which it exists.

Mr. Justice Marshall on Sexual Privacy Rights

(Ed. The United States Supreme Court seldom, if ever, has expressed its opinion about constitutional protections surrounding private sexual behavior. When cases involving alleged sexual misconduct are presented to it, the Court refuses to grant a hearing. Occasionally one or more Justices write an opinion dissenting from the denial of certiorari in such cases. The following is the opinion of Mr. Justice Marshall, dissenting from the denial of certiorari in Hollenbaugh v. Board of Trustees of Carnegie Free Library, No. 78-5519, decided December 11, 1978. *Mr. Justice Brennan also voted, without opinion, to grant certiorari.*

The procedural aspects of the case are as follows. After being dismissed from employment as a librarian and a janitor respectively, plaintiffs filed suit in federal court claiming violation of their civil rights by the library. The federal district court dismissed the lawsuit for want of "state action," 405 F.Supp. 629 (1975). *The dismissal was reversed by the United States Court of Appeals for the Third Circuit on the grounds that there was significant state involvement with the library,* 545 F.2d 382. *The Court of Appeals remanded the case for trial. After a non-jury trial in the federal district court, that court granted a judgment for defendants on the ground that the constitutional rights of the plaintiffs were not violated,* 436 F.Supp. 1328 (1977). *The United States Court of Appeals affirmed that decision on the basis of the district court's opinion. Plaintiffs then sought a writ of certiorari from the United States Supreme Court. The writ was denied and no hearing was granted.*

The full text of the dissenting opinion of Mr. Justice Marshall follows.)

Mr. Justice Marshall, dissenting:

The Court today lets stand a decision that upholds, after the most minimal scrutiny, an unwarranted governmental intrusion into the privacy of public employees. The ruling below permits a public employer to dictate the sexual conduct and family living arrangements of its employees, without a meaningful showing that these private choices have any relation to job performance. Because I believe this decision departs from our precedents and conflicts with the rulings of other courts, I would grant certiorari and set the case for argument.

Petitioner Rebecca Hollenbaugh served as a librarian and petitioner Fred Philburn as a custodian at the state-maintained Carnegie Free Library in Connesville Pa. The two began seeing each other socially, although Mr. Philburn was married at the time. In 1972 Ms. Hollenbaugh learned that she was pregnant with Mr. Philburn's child, and within a month, Mr. Philburn left his wife and moved in with Ms. Hollenbaugh. Due to her pregnancy, Ms. Hollenbaugh sought and was granted a leave of absence by the respondent's Board of Trustees from March to September 1973. While petitioners did not conceal their arrangement, neither did they advertise it.

Responding to some complaints from members of the community, the Board of Trustees attempted to dissuade petitioners from continuing to live together. When petitioners refused to alter their arrangement, they were discharged. They subsequently brought this action under 42 U.S.C. §1983 seeking declaratory and injunctive relief and monetary damages.

After a nonjury trial, the District Court found that under the minimun rationality test, petitioners' discharge did not violate the Equal Protection Clause. The Court further concluded that petitioners' behavior was not encompassed within the constitutional right to privacy. 436 F. Supp 1328 (WD Pa 1977). The Court of Appeals for the Third Circuit affirmed on the basis of the District's Court's opinion.

I have frequently reiterated my objections to the perpetuation of "the rigid two-tier model [that] still holds sway as the Court's articulated description of the equal protection test." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J. dissenting); see, e.g. *Marshall v. United States*, 414 U.S. 417, 432-433 (Marshall, J. dissenting); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 98-110 (Marshall J., dissenting). The test that this Court has in fact applied has often, I believe, been much more sophisticated. The substantiality of the interests we have required a state to demonstrate in support of a challenged classification has varied with the character of the classification and the importance of the individual interests at stake. See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 767 (1977); Craig v. Boren, 429 U.S. 190 (1976); *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); see also Gunther, "Foreward; In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 *Harv. L. Rev.* 1 (1972). Had the courts below undertaken this inquiry, rather than unreflectively applying the minimum rationality test, the outcome here may well have been different.

Respondent does not claim to have relied on a legislative proscription of particular sexual conduct. The Commonwealth of Pennsylvania repealed its law prohibiting adultery and fornication in 1972. Laws of the General Assembly of the Commonwealth of Pennsylvania, Act No. 334, §3 (1972). Rather, in the exercise of ad hoc and, it seems, unreviewable discretion, respondent determined to deprive petitioners of their jobs unless "they 'normalized' their relationship through marriage or [unless] Philburn moved out." 436 F. Supp., at 1331. The District Court found that "The motivating factor behind the discharges of [petitioners] was that they were living together in a state of 'open adultery' " Id, at 1332. Respondent was unwilling to appear as if it "Condoned [petitioners] extramaritial 'affair' and . . . the child's birth out of wedlock." Ibid. Thus, respondent apparently did not object to furtive adultery, but only to

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petitioners' refusal to hide their relationship. In essence, respondent sought to force a standard of hypocrisy on its employees and fired those who declined to abide by it. In my view, this form of discrimination is particulary invidious.

Such administrative intermeddling with important personal rights merits more than minimal scrutiny. One such right, clearly implicated by petitioners' discharge, is that "Of the individual . . . to engage in any of the common occupations of life," *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Perhaps even more vital is "The right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Although we have never demarcated the precise boundaries of this right, we have held that it broadly encompasses "freedom of personal choice in matters of marriage and family life." *Cleveland Board of Education v. LaFleur*, 414 U.S. 636, 639-640 (1974) (pregnancy). See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and *Zablocki v. Redhail*, 434 U.S. 374, 383-385 (1978) (marriage); *Skinner v. Oklahom ex rel. Williamson*, 316 U.S. 535, 541-542 (1942) (procreation); *Eisenstadt v. Baird*, 405 U.S. 438, 453-454; Id., at 460, 463-465 (White, J., concurring in result), and *Carey v. Population Services International*, 431 U.S. 678, 684-685 (1977) (contraception); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), and *Meyer v. Nebraska*, 262 U.S. at 399 (child rearing and education); *Roe v. Wade*, 410 U.S. 113, 152-153 (1973) (abortion), *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (right to determine family living arrangements).

Petitioners' rights to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection. That petitioners' arrangement was unconventional or socially disapproved does not negate the resemblance, cf. *Carey v. Population Services International*, 431 U.S., at 698-699 (plurality opinion); *Eisenstadt v. Baird*, 304 U.S., at 452-453; *Wisconsin v. Yoder*, 406 U.S. 205, 223-224 (1972), particularly in the absence of a judgment that the arrangement so offends social norms as to evoke criminal sanctions. And certainly, no distinction can be drawn between this case and those cited above in terms of the importance to petitioners of this personal decision. In addition, to impose separate living arrangements as a condition of employment impinges not only on petitioners' associational interests, but also on the interests of their child in having a two-parent home. See *Trimble v. Gordon*, 430 U.S., at 769-770 (1977); *Weber v. Aetna Casualty & Surety co.*, 406 U.S. 164, 175 (1972).

Petitioners' choice of living arrangements for themselves and their child is thus sufficiently close to the interests we have previously recognized as fundamental and sufficiently related to the constitutional guarantee of freedom of association that it should not be relegated to the minimun rationality tier of equal protection analysis, a disposition that seems invariably fatal to the assertion of a constitutional right. See *Massachusetts Board of Retirement v. Murgia*, 427 U.S., at 319-320 (Marshall, J., dissenting). Rather, respondents should at least be required to show that petitioners' discharge serves a substantial state interest. See *San Antonio School District v. Rodriguez*, 411 U.S., at 124-126 (Marshall, J., dissenting); *Massachusetts Board of Retirement v. Murgia*, 427 U.S., at 325 (Marshall, J., dissenting); *Reed v. Reed*, 404 U.S. at 76-77. As the plurality held in *Moore v. City of East Cleveland*, 431 U.S. at 499, "When the government intrudes on choices concerning family living arrangements, this court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."

Moreover, respondent's actions here may not withstand even the minimal scrutiny of the rational basis test. In the District Court's view, the test was satisfied because respondent could have legitimately concluded that petitioners' relationship impaired their effectiveness on the job and that failure to discharge them would constitute tacit approval of an illicit relationship.

Petitioners right to pursue an open rather than a clandestine personal relationship and to rear their child together in this environment closely resemble the other aspects of personal privacy to which we have extended constitutional protection.

That court acknowledged, however, that petitioners were "competent employees who had no significant problems with their employers until the circumstances that gave rise to their discharge." 436 F. Supp., at 1330. In suggesting that respondent could rationally find petitioner Hollenbaugh unfit to perform her duties, the Court observed merely that her job "involved direct and frequent contacts with the community" and the "community [was] well aware of [petitioners'] living arrangement." Id., at 1332, 1333. This reasoning reduces to the conclusion that Hollenbaugh was incompetent as a librarian because some members of the community disapproved of her lifestyle. But the District Court never intimated that this disapproval affected the community members' use of the library or that Hollenbaugh's marital status in any way diminished her ability to discharge her duties as a librarian. And the court gave no indication that Philburn's custodial job called for similar contacts with the community or that his performance was affected in any way by his extramarital relationship.

Nor does the District Court's opinion make clear how respondent's interest in avoiding the appearance of "tacit approval" of petitioners' relationship provided a rational basis for petitioners' discharge. The Court adverted to no evidence suggesting that petitioners' status impaired the library's performance of its public function. Morover, the state has given some indication of the prevailing moral sensibilities of the community by the repeal in 1972 of the criminal sanctions against fornication and adultery.

On a record so devoid of evidence in support of petitioners' discharge, the Court of Appeals' holding appears to conflict with decisions of other courts striking down similar attempts by governmental bodies to regulate the private lives of their employees. In *Andrews v. Drew Municipal Separate School District,* 507 F 2d 611 (CAS 1975), cert. dismissed as improvidently granted, 425 U.S. 559 (1976), the Court of Appeals found that a school district rule barring employment of unwed parents was insufficiently related to any legitmate objective to satisfy the requirements of the Equal Protection Clause. Similarly, in *Drake v. Covington County Board of Education*, 371 F Supp. 974, 979 (MD Ala. 1974), a three-judge District Court declared unconstitutional the dismissal of an unmarried, pregnant teacher, finding no compelling interest "which would justify the invasion of [the teacher's] constitutional right of privacy." See also *Mindel v. United States Civil Service Commission*, 312 F. Supp. 485 (ND Cal. 1970) (discharge of postal clerk for living with a woman not his wife held unconstitutional). These decisions reflect a considerably greater degree of solicitude for the privacy interests of public employees than was evident in the rulings of the courts below.

I believe that individuals choices concerning their private lives deserve more than token protection from this Court, regardless of whether we approve of those choices. Accordingly, I dissent from the denial of certiorari.

'The Finger' Is Not an Obscene Gesture

The defendant, a high school student, was convicted for "giving the finger" to a state trouper who was driving alongside the school bus which was transporting the defendant home. A Connecticut statute criminalizes using abusive or obscene language or making an obscene gesture. The defendant appealed on the ground that "the finger" is not an obscene gesture.

The Appellate Session of the Superior Court held that while giving "the finger" may not be constitutionally protected under all circumstances even though it expresses an idea, it is not "obscene" because it is not erotic and does not appeal to the prurient interest in sex. The court stated, "It can hardly be said that the finger gesture is likely to arouse sexual desire. The more likely response is anger. Because the charge and proof were limited to making an obscene gesture the defendant's conviction cannot stand." *State v. Anonymous*, 377 A.2d 1342 (1977).

Complete Text of Appellate Opinion Voiding New Jersey Sodomy Law

(Ed. Because of the importance of the following decision, [State v. Ciufinni, Superior Court of New Jersey, Appellate Division, A-1775-76, decided December 6, 1978], *the full text of the court's opinion is reproduced.)*

Defendant was indicted for assault with intent to commit sodomy (N.J.S.A. 2A:90-2), sodomy (N.J.S.A. 2A:143-1) and impairing the morals of a child (N.J.S.A. 2A:96-3). Prior to trial, on the prosecutor's motion, the count charging defendant with impairing the morals of a minor was dismissed because the alleged victim was over sixteen at the time of the incident generating the charge. At the conclusion of the State's case the trial court dismissed the sodomy count for failure of the State to prove penetration.

The case against the defendant was submitted to the jury on the charge of assault with intent to commit sodomy and attempted sodomy as a lesser included offense thereof. The jury found defendant guilty of assault with intent to commit sodomy. As interpreted by our courts sodomy includes anal intercourse and bestiality, but does not include fellatio or cunnilingus. See *State v. Morrison*, 25 *N.J. Super* 534 (Co. Ct. 1953); *State v. Pitman*, 98 *N.J.L.* 626 (Sup. Ct. 1923), aff'd., 99 *N.J.L.* 527 (E. & A. 1924). Emission is not required. *State v. Taylor*, 46 *N.J.* 316, 334-335 (1966).

The prosecution arose from an incident which occurred on July 23, 1975 in the Township of Dover, Ocean County. The alleged victim, N., a male slightly over 16-years old testified that he was hitchhiking at night and was picked by defendant. N. agreed to go to defendant's home for an alleged party. They arrived at defendant's home at about 10:45 p.m. No one else was present, making N. suspicious. N. said that he told defendant he wanted to leave and that defendant then struck him on the forehead. N. said he became very scared and withdrawn. Sexual activity then took place after both partially disrobed. Defendant got on top of N., tongued his ear, put his mouth on N.'s penis, and put his penis between N.'s buttocks. N. said that after about one-half hour he ran from the house, walked to his home a mile and a half away, and went to bed. The next day N. told his mother about the episode and a complaint was made to the police.

At trial the defendant, through counsel, contended that any sexual activity between the two was consensual, non-violent, and did not include attempted anal intercourse. The trial judge ruled that proof of consent was irrelevant. Defendant asserts that he did not testify at trial because of the court's ruling on the consent issue.'

Defendant's principal contention on appeal is that the trial court erred in precluding any affirmative evidence or cross-examination on the alleged victim's consensual participation in the episode. The case was tried in

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September 1976 when the question of the criminality of sodomy between consenting males over 16 years of age was controlled by *State v. Lair*, 62 *N.J.* 388, 396-397 (1973). The Supreme Court in *Lair* had rejected the defendant's contention that the constitutional right of privacy immunizes unmarried participants in the act of sodomy from prosecution, although the Court there recognized that the act was noncriminal when performed by married persons. *Id.* at 396. In rejecting defendant Lair's contention that constitutional considerations demanded decriminalization or private, consensual sodomy the Supreme Court stressed the legislative alternative to judicial reformation of this aspect of our penal law stating:

> We think it worth mentioning that several of the problems raised by the arguments presented upon this appeal would readily respond to appropriate legislation. We call especial attention to provisions appearing in the proposed *New Jersey Penal Code* submitted as part of the *Final Report of the New Jersey Criminal Law Revision Commission* (1971). Section 2C:14-2 is entitled "Sodomy and Related Offenses." This proposal "excludes from the criminal law all sexual practices not involving force, adult corruption of minors, or public offenses . . . based on the grounds that no harm to the secular interests of the community is involved in a typical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities." 2 *N.J. Penal Code:* Commentary, 196. The wisdom of this or of any other like proposal is, of course, purely a matter for legislative determination. [62 *N.J.* 388, 397-398].

A concurring opinion by Chief Justice Weintraub expressed "reservations as to the constitutionality of the application of the sodomy statute to a consensual act between adults committed in private" but concluded that "this is not the case to grapple with the constitutional issue" because "there was no room for a finding that the anal penetration was consented to." *Id.* at 399.

However, several decisions of our Supreme Court since *State v. Lair, supra,* convince us it has been implicitly overruled insofar as it affirms the criminality of consensual homosexual sodomy between adults. In *State v. J.O.*, 69 *N.J.* 574 (1976), a unanimous Supreme Court held that the private act of fellatio between mutually consenting males was not criminally indecent exposure within the meaning of the "private lewdness" statute, *N.J.S.A.* 2A:115-1. The Supreme Court noted that its views on the noncriminality of the consensual homosexual conduct in which the defendants engaged squared with the terms of the then proposed Code of Criminal Justice. The Court stated that a "private consensual act between adults such as committed by defendants, should not be within the ambit of criminal statutes." *Id.* at 577.

Finally, in *State v. Saunders*, 75 *N.J.* 200 (1977), the Supreme Court held that the fornication statute, *N.J.S.A.* 2A:110-1, unconsitutionally criminalized heterosexual conduct between consenting adults in violation of their constitutional right of privacy. The majority opinion by Justice Pashman stated broadly:

> 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. Although persons may differ as to the propriety and morality of such conduct and while we certainly do not condone its particular manifestations in this case, such a decision is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard.
>
> ***We therefore join with other courts which have held that such sexual activities between adults are protected by the right of privacy. [*Id.* at 213-214].

Lair's refusal to decriminalize private consensual sodomy between unmarried adults was, in our view, undermined by the majority opinion in *Saunders* when it stated in footnote seven at 75 *N.J.* 217:

> It may also be observed that *State v. Lair*, 62 *N.J.* 388, may have been a poor case in which to discuss the problems of sexual relations between unmarried persons. In construing our sodomy statute, *N.J.S.A.* 2A:143-1, we were not faced with any factual basis for finding that consent had been given for the sexual acts performed there. Thus, there was no reason to apply the constitutional protection which we find today to unmarried persons. *See* 62 *N.J.* at 398-99 (Weintraub, C.J., concurring). *See also State v. J.O.*, 69 *N.J.* 574 (1974), where we narrowly construed the private lewdness statute, *N.J.S.A.* 2A, 143-1, to avoid any constitutional objection.

Of further pertinence in discerning the breadth of the constitutional path which the court took in holding that the individual's right o' personal privacy and autonomy prevailed over the state's right to regulate private sexual conduct is footnote eight at 75 *N.J.* 219 in the *Saunders* majority opinion.

> Our decision today confirms the determination of the New Jersey Criminal Law Revision Commission that fornication should not constitute a criminal offense. *See The New Jersey Penal Code, Volume II: Commentary,* Final Report of the New Jersey Criminal Law Revision Commission, October 1971 Introductory Note to Chapter 14 on Fornication at 189.

In sum, the Court's legal and constitutional perception coincided with the dimensions of the pending legislative reform. Of further significance is our Supreme Court's summary affirmance in *Doe v. Commonwealth's Attorney for City of Richmond*, 403 *F. Supp.* 1199, 1200, aff'd., 425 *U.S.* 901, 96 *S.Ct.* 1489, 47 *L.Ed.* 2d 751, reh. den., 425 *U.S.* 985, 96 *S.Ct.* 2192, 48 *L.Ed.* 2d 810 (1976), which upheld the constitutionality of Virginia's sodomy statute as applied to private sexual conduct between consenting male adults, and its decision to rest its

constitutional interpretation on our State's analogue to the Fourteenth Amendment, *N.J. Const.* (1947), Art. I, par 1[2], noting that "the lack of constraints imposed by considerations of federalism permits this court to demand stronger and more persuasive showings of a public interest in allowing this State to prohibit sexual practices than would be required by the United States Supreme Court." *State v. Saunders, supra,* at 217. Our review of post-*Lair* judicial developments leads us to the conclusion that *Lair* has been impliedly overruled by *State v. Saunders, supra.* Where more recent decisions of the Supreme Court plainly undermine the authority of a prior decision although not squarely and explicitly overruling it, we are entitled to follow the current doctrine and need not be confined by the prior ruling. See *e.g., State v. Chiarello,* 69 *N.J. Super.* 479, 498 (App. Div. 1961), certif. den., 36 *N.J.* 301 (1962). Moreover, we conclude this case is appropriate for retroactive application of the *Saunders* holding since defendant asserted the defense of consent at trial, this case was pending on direct appeal when *Saunders* was decided, and the change in the law was to defendant's benefit. *State v. Nash,* 64 *N.J.*. 464, 468-471 (1974); *State v. Koch,* 118 *N.J. Super.* 421, 429-433 (App. Div. 1972).

So that our opinion today may not be misconstrued as approving or fostering what many consider opprobrious conduct we here iterate the concluding paragraphs of the majority in *Saunders.*

> This is not to suggest that the State may not regulate, in an appropriate manner, activities which are designed to further public morality. Our conclusion today extends no further than to strike down a measure which has as its objective the regulation of *private* morality. To the extent that *N.J.S.A.* 2A:110-1 serves as an official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs, it is not an appropriate exercise of the police power.
>
> Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate "remedy" for such conduct cannot come from legislative fiat. Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right of personal autonomy is fundamental to a free society. Persons who view fornications as opprobrious conduct may seek strenuously to dissuade people fron engaging in it. However, they may not inhibit such conduct through the coercive power of the criminal law. As aptly stated by Sir Francis Bacon, "[t]he dignity without intruding on the liberty of others." The fornication statute mocks the dignity of both offenders and enforcers. Surely police have more pressing duties than to search out adults who live a so-called "wayward" life. Surely the dignity of the law is undermined when an intimate personal activity between consenting adults can be dragged into court and "exposed." More importantly, the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy. [75 *N.J.* 219-220].

Following the defendant's conviction here, and pending the hearing of this appeal, the Legislature adopted and the Governor signed into law the "New Jersey Code of Criminal Justice" Chapter 78 of the Laws of 1978; *N.J.S.A.* 2C:1-1, *et seq.*, effective date September 1, 1979. The new Code of Criminal Justice codified the recommendation of the *New Jersey Criminal Law Revision Commission,* noted in *State v. Lair, supra,* and decriminalized private consensual sodomy. *N.J.S.A.* 2C:14-1, *et seq.* "Sexual Offenses." Legislative reform, of course is not sufficient standing alone for acceptance of defendant's argument that private consensual sodomy between adults is constitutionally protected conduct, retrospectively. Such reform does demonstrate the parallel judicial and legislative attitudes to the criminality of private sexual conduct.

The State contends that a defendant's consent is irrelevant to a charge of assault, citing *State v. Brown,* 143 *N.J. Super.* 571 (Law Div. 1976), aff'd *o.b.,* 154 *N.J. Super* 511 (App. Div. 1978). This is no doubt correct with respect to a violent assault capable of producing injury or designed to compel non-consensual submission to any sexual act. However, in this case, as we consrue the court's charge, the jury was presented with alternate theories of assault. The judge explained to the jury that any assault must be proven beyond a reasonable doubt and that it must have concurred with an intent to commit sodomy. The judge then said:

> Now there is testimony in this case as to two possible assaults. There was testimony concerning an alleged striking of Mr. N., and there was testimony with regard to an alleged placing of the defendant's penis against the body of Mr. N.

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Intolerance of the Unconventional Halts the Growth of Liberty

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The jury was free under the testimony presented and this instruction to accept or reject one or both theories of assault, *i.e.*, an alleged blow to N.'s head or a non-violent technical assault, the touching of N.'s body with defendant's penis. Such a touching could have occurred with N.'s consent under a view of the evidence which the jury might have reasonably entertained if the defendant's testimony on consent had not been precluded by the court's ruling. The court's exclusion of any proof relevant to defendant's contention that this was a non-violent consensual attempt at sodomy may have caused defendant to be convicted under an improper theory. Therefore, we cannot accept the State's contention of harmless error. *R.* 2:10-2.

Since a retrial is necessary we comment on an additional point of error claimed by defendant. He argues that he was improperly prevented on cross-examination from exploring the alleged victim's use of marijuana on the evening of the alleged criminal episode. Defendant argues that such evidence of marijuana use was relevant to the evaluation of N.'s ability to perceive and recall the events of the episode. We agree with defendant's contention. The substantially contemporaneous use of illegal and potentially dangerous drugs insofar as it may relate to a witness' ability to perceive and recall, is highly relevant to credibility. *State v. Franklin*, 52 *N.J.* 380 398-400 (1968) (alcohol); 3A *Wigmore, Evidence* (Chadbourn rev. ed. 1970), §933 at 761-762; Annotation, "Use of drugs as affecting competency of witness," 65 *A.L.R.* 3d 705, 720-725, 731-733 (1975). Thus this line of examination is proper but the jury should be carefully instructed that any testimony about drug use is admitted solely for the purpose of evaluating credibility, and no other.

In view of the reversal the remaining points raised by defendant need not be considered.

Reversed.

NOTES TO NEW JERSEY CASE

1. The State has not suggested that N. at the age of 16 years and two months was too young to consent. We do not think the State could make such a contention consistent with the equal protection clause in light of the legislative approval of 16 years as the "age of consent" for female sexual conduct. See *N.J.S.A.* 2A:90-2 (assault with intent to carnally abuse a female under 16); *N.J.S.A.* 2A:138-1 (carnal abuse of a female under 16 years; New Jersey's equivalent of statutory rape).

2. Natural and unalienable rights.

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Obscenity 'Scienter Test' Is Subject of Dispute

Petitioner was convicted of possession of obscene matter with intent to disseminate it in violation of Massachusetts law. At the conclusion of the evidence, trial counsel requested the trial judge to instruct the jury that they had to find both that the defendant knew the contents of the material disseminated (a film) *and* knew the nature and the character of the film. Instead, the trial judge instructed that they could find the defendant guilty if he knew the contents of the material *or* the nature and character of the material. His conviction was affirmed by the Massachusetts Appeals Court and the Supreme Judicial Court denied further review.

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court in Massachusetts. *Mascolo v. Snow*, Civ. No. 78-1267-F. He applied for bail pending review of his petition and his bail application was referred to M. Cohen, United States Magistrate, for consideration. The Magistrate noted that a convicted state prisoner who filed for a writ of habeas corpus should be admitted to bail pending review of the petition only in exceptional circumstances, such as where he presents a clear case on the law as well as the facts.

Relying on the decision of *Hamling v. United States*, 418 U.S. 87, 123 (1974), and four U.S. Court of Appeals decisions since *Hamling*, the Magistrate concluded that the law and facts in this case seem to be clear and that the petitioner should be admitted to bail pending a full review of his petition since it was likely that he would ultimately be granted the writ of habeas corpus. (Report and Recommendation for Admission to Bail filed June 27, 1978.)

PUBLISHER'S MEMO

New Column on Pending Litigation

The *National Committee for Sexual Civil Liberties* is undertaking a new project of monitoring pending litigation throughout the United States involving issues which will have a significant impact on the development of sexual civil liberties. With the assistance of the *National Committee* we will report the progress of these cases to our subscribers. We will report the name of the case, the court in which the litigation is occurring, the case number, the names of the attorneys, the issues involved, and a status report. If you are aware of any such cases please send the information to us so that we can include the case on our docket.

Subscriber Participation Welcomed

During the past year many subscribers have sent us information regarding legislation, administrative decisions, court cases, and other newsworthy information. We would like to express our appreciation to them and we hope that others will participate in our newsgathering process in the coming year.