SEXUAL LAW REPORTER

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BRIEF: A thorough memorandum reviewing most procedural and substantive legal issues involved in raising discriminatory enforcement in a criminal case can be obtained by mailing $5.00 to cover postage and reproduction costs of this 37-page Brief *(revised 9-1-76)* to the Los Angeles office of the *SexuaLawReporter* c/o BDE-1.

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SEXUALAWREPORTER

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THOMAS F. COLEMAN

Publisher

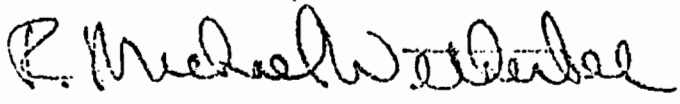
THANK YOU FOR SUBSCRIBING TO THE SLR ...

This is a special reprint version of Volume One, Number 1, in answer to many requests from libraries and others who desire a complete collection of our publication for their file.

The original version was printed on 8-1/2 x 11 inch separate pages, stapled together in the corner -- a format utilized by many other newsletters, but one which is not too compatible with most of the binders available for bookshelf reference.

Because it was necessary (for printing purposes) to add an extra page, we are utilizing it to express our appreciation for your interest and support and to invite you to send us your comments and suggestions on future issues to be produced in the coming months.

THE STAFF OF THE SLR



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January, 1976

. . . *The SexuaLawReporter* is a new and important contribution. It is very helpful to anyone concerned with the fast-developing law of sexual privacy.

—ARYEH NEIER
Executive Director
American Civil Liberties Union

SPECIALIZED NEWSLETTER NARROWS COMMUNICATIONS GAP FOR ATTORNEYS, EDUCATORS, SEXUAL LAW REFORMERS

The *SexuaLawReporter,* a bi-monthly newsletter which started publication in April, 1975, covers a field that has been long neglected by the general news media and the specialized press.

In an age in which sexual awareness is developing rapidly, there is a strong impetus toward sexual reform that requires a reliable line of communication if it is to grow and be successful.

The *SexuaLawReporter* is developing a nationwide communications network that will, through the newsletter, inform sexual reform activists, members of the bench and bar, law school professors and students, and others of judicial and legislative efforts—both successes and failures—on the federal, state and local levels.

In addition, the *SexuaLawReporter* will cover related fields, such as sociology, theology, literature, medicine and psychology, among others. The newsletter will explore how various disciplines contribute toward strengthening or loosening current sexual laws and attitudes—and what role they play in reshaping those laws and attitudes.

This newsletter, published by a non-profit corporation, is not a totally neutral publication. While it will not take positions on legislation or lobby for specific changes, its editorial policy contends that many legal sexual restraints, as currently written and enforced, are often detrimental to the exercise of democratic rights.

In its bi-monthly issues, the *SexuaLawReporter* will report the news and analyze key developments in the field. For example: Why legislation passed or failed; the consistency or inconsistency of judicial rulings based on prior decisions and the court's attitudes on sexual matters, or the prospects of new proposals toward reform based on past experience and critical appraisal by informed activists.

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SexuaLawReporter

APRIL-MAY 1975 VOLUME 1, NUMBER 1

California: Lawmakers growing up

Why did a sexual reform bill legalizing oral copulation and sodomy pass in the California Assembly this year when in the past similar bills never even got out of that body's Criminal Justice Committee?

And why are the chances of the bill's passage in the more conservative Senate looking better than anyone would have expected before the new 1975 Legislature went into session?

Did the November, 1974, election revolutionize the California Legislature? If it did, how come, since sex reform was never an issue during the campaigns? And if it didn't, as is more likely the case, why the sudden change?

Why? Why? Why? The answers are important not only for Californians but for sexual law reformers in other states who are looking for just such a reversal in the sexual attitudes of their State Legislatures.

The most prominent reason circulating in Sacramento, the capital, and in San Francisco, the home of sexual law reform in California, attributes the reversal in legislative attitudes to the change in Administrations.

This is credible, but . . .

Former Gov. Ronald Reagan had made it clear during his eight years in office that he would veto any bill making oral copulation and sodomy among consenting adults legal acts. The new governor, Jerry Brown, had privately told gay leaders during the election campaign that he would sign such a bill if he was elected.

And the governor is standing by this commitment, say observers in Sacramento.

Now the Assembly wasn't likely to pass a controversial sex bill in the past when it knew Reagan would veto the measure and no chance existed of overriding such a veto. But it appears too simplistic to reason from this that a new governor—favorable toward sex reform but afraid to say so publicly—would move a legislative body that hasn't shown even a twitch of life when sex reform had been proposed.

Other factors combined with the election of Brown to cause this sudden about-face in the Legislature.

One of them is the political infighting within the Assembly. Last year, Assemblyman Willie Brown, author of the sexual reform bill, lost out in his bid for the speakership to fellow San Franciscan, Leo McCarthy.

If Brown had become Assembly Speaker, his bill may not have passed. Brown had been closely allied to the previous Speaker, Bob Moretti, and Moretti didn't help Brown's Bill at all. Moretti was a Speaker whose dominant personality couldn't influence legislation because, being ideologically rigid, he made too many enemies, besides running for the governorship.

Brown, too, would have been a similar, "cult-of-personality" Speaker, according to capital observers, and that would have made it difficult for him to arrange the compromises necessary to pass his sex bill and other key legislation.

McCarthy, who is certainly not a weak Speaker, operates, however, in a low-key manner, delegating power to the men who helped put him in power. One of them, for example, Majority Leader Howard Berman, in only his second term, has expressed support of the Brown bill in his

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. . . but judges still in knickers

When during the 1960s people complained that the courts were making laws, judicial critics were certainly not referring to the field of sex.

The courts in California, for example, avoided the whole question of the constitutionality of those laws—sometimes quite frankly and sometimes quite insincerely and evasively.

There are two classic examples of both court attitudes.

One is an appellate decision made in July, 1974, reversing a Superior Court judge who did rule that the statute making oral copulation a crime was unconstitutional.

The other is a recent decision by an appellate court which reversed an oral copulation conviction but not on constitutional grounds.

"Since it is probable that no case involving consenting adults in private will be likely to come before the courts, it would seem appropriate that those concerned with the deprivation of fundamental rights resulting from an unconstitutional application of Section 288a (the oral copulation statute) express their concern to the Legislature rather than endeavoring to have the courts indulge in 'judicial legislation,' which practice has been subject to criticism on occasion," said the Second District Court of Appeal in the July, 1974 case.

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Communications gap in SexuaLaw

No more languishing

There is so much happening today in the field of sexual reform, but without a reliable means of communication few people really know what's going on. Activists themselves are ignorant of many important developments across the country.

How do lawyers in New York and Los Angeles, for example, learn that they may be working on similar cases and could benefit from each other's experience and research?

What lawyers have the time to check out sexual court cases throughout the country, many of which are unpublished?

And if someone gets wind of something of interest to him or her—be they attorneys, psychologists, doctors, sociologists, organizers, etc.—where do they look for more detailed information?

Some professionals in the field belong to an organization like the National Committee on Sexual Civil Liberties. But while such a committee has been a valuable means of communications among many activists at diverse ends of the continent, it was more like a grapevine than a line of communication.

That is why some committee members suggested more than a year ago that someone publish a SexuaLawReporter. The idea was a good one, but who was going to put together a network of people who would do the necessary but painstaking work of reporting on all the news?

So the idea languished . . . until a few people realized that someone had to do something about this communications gap without any more delays, even if the initial effort wasn't going to be as comprehensive as desired.

So the SexuaLawReporter is out!

The first issue does give a fairly good picture of the areas the newsletter will cover—and we will expand our coverage as we continue to explore sexual problem areas, report on sex cases in the courts, keep track of legislation across the country and probe into related fields.

Future issues will be more representative of the rest of the country. This first issue has a disproportionate California emphasis. There will also be a better balance of sexual categories. We expect to have much more heterosexual and bisexual news as we expand our reporting network.

The SexuaLawReporter not only reports sexual news and legal developments, but we will analyze them and make commentaries when appropriate. We are also designed to be a forum for anyone who has something important to say or share with other people in the same field of interest.

A bi-monthly periodical, the SexuaLawReporter is published by the Sexual Law Reporter, a non-profit corporation. Subscription rates are $15 a year for individuals and $25 a year for libraries. Please use the coupon in this issue for ordering subscriptions.

Projects and proposals

Equal protection

The following proposal has been submitted to the American Bar Association by the Committee on Equal Protection of the Law and its Subcommittee on the Rights of Homosexuals:

> **BE IT RESOLVED, That the Congress of the United States, the Legislatures of the several states, and municipal governments are urged to enact legislation to prohibit discrimination on the basis of Sexual orientation.**

For a 14-page footnoted report discussing all legal and logical arguments for such legislation, contact: E. Carrington Boggan, chairperson of the Equal Protection Committee, 685 Third Ave., New York, N.Y., 10017. This report, with minor alterations, could be submitted to almost any government body or official to support legislation in other parts of the country.

Anti-gay ideology

A resolution opposing anti-gay ideology has been proposed by the National Gay Caucus of the National Lawyers Guild.

The resolution cites a guild policy adopted at the 1974 national convention in Minneapolis—which recognizes the role of gay people in the revolutionary movement and vows to struggle against anti-gay ideology on the left—and urges:

". . . that the National Lawyers Guild shall not co-sponsor nor lend its name in any way to any activity, program or project if the activity in question explicitly excludes any gay people from participation."

Task force

A Victimless Crimes Task Force has been established in Michigan to study and make recommendations on laws regulating sexual conduct between consenting adults, including homosexual conduct, adultery and prostitution.

The task force will present its findings and recommendations to the Michigan Commission on Criminal Justice in May. Whoever wishes to give input should contact the task force chairman, Col. George Halverson, director of state police, State Police Headquarters, 714 Harrifon Rd. East Lansing, Mich.

Irrational bias

The National Executive Board of the National Lawyers Guild, meeting in San Francisco on Feb. 17, agreed to fund a gay rights project proposed by the Gay Caucus of the People's College of the Law.

To be undertaken this summer, the project will try to enforce the public accommodations law forbidding irrational discrimination by focusing on (1) racial and sex discrimination in gay businesses and (2) discrimination against gay people in non-gay businesses.

The project will be based in Los Angeles. Law students interested in participating in the project should contact Steve Schleifer, 4118 Franklin Ave., Los Angeles, 90029; telephone (213) 663-7462. Stipends will be given to participating students.

In the courts

Decisions: Vaginal search shocks judge

Sex organs and private body cavities have been declared off limits to the probing hands and eyes of the police, at least in nonmedical surroundings, according to a decision by the U.S. District Court for the Eastern District of Wisconsin.

In the case of *United States ex rel Betty Jean Guy* v. *Lewis McCauley*, (1974) 385 F.Supp. 193, in which Ms. Guy's vagina was searched by a policewoman when she was seven months pregnant, Chief Judge John M. Reynolds wrote in granting a writ of habeus corpus:

"Physical examinations of sexual organs and/or body cavities by nonmedical personnel, however, are not routine to our everyday lives. In addition to being medically unsound, the forceful probing and examining of the vagina and anus by strangers attacks the very dignity, privacy, and integrity upon which our Constitution is founded."

To the statement by a Milwaukee policewoman that such nonmedical searches of sex organs and private body cavities are routine, Reynolds added:

"If this be true, this policy shocks the court."

Ms. Guy was arrested in her home on Dec. 5, 1970 by Milwaukee vice officers on a warrant charging her with the sale of cocaine. Two policewomen then took her in the bathroom and told her to strip, bend over and spread her buttocks.

Nothing was found. When the arresting party and Ms. Guy went to the Police Station another search was ordered. One of the policewomen donned rubber gloves and helped Ms. Guy spread her buttocks while the other officer inspected the vaginal area with the aid of an ordinary searchlight.

In this second search, a plastic container of heroin was seen protruding from the vagina.

Convicted of the possession of heroin, Ms. Guy appealed to the Wisconsin Supreme Court, which upheld the conviction despite her claim that the evidence of the heroin should have been suppressed because the vaginal search violated the Fourth Amendment and the Due Process clause of the Fifth Amendment.

The court, in its December, 1974 decision, cited *U.S.* v. *Robinson*, (1973) 414 U.S.218, 94 S.Ct.467, 38 L.Ed 2d 427, in rejecting the claim that bruised dignity alone, under an otherwise authorized search, violated the Fourth Amendment.

But it did grant the writ on the basis of the Due Process clause, which assures fair and humane treatment by law enforcement officers, said the court, and that the decision of what is humane must be "based on a community sense of what is decent and fair, not on anyone's personal conception of civilized conduct."

"While the probing and regarding of body cavities and sexual organs is a routine medical practice," the court went on, "it is not normal for it to be forced on individuals by nonmedical police personnel in nonmedical surroundings. This is an important distinction."

Something extra

The Massachusetts Supreme Court has ruled that the state statute prohibiting unnatural and lascivious acts—a statute used to prosecute oral copulation and sodomy cases—does not apply to private sex acts between consenting adults.

This opinion by the court did not, however, apply to the case at hand. In *Commonwealth* v. *Balthazar*, (Mass. Supreme Ct., 11-1-74) 318 N.E.2d 478, the defendant argued that the statute was void for vagueness and violated his right of privacy.

Balthazar had been convicted of *forcing* a female victim to perform oral copulation on him.

In discussing the vagueness argument, the court defined the statute as meaning, "irregular indulgence in sexual behavior, illicit sexual relations, and infamous conduct which is lustful, obscene and in deviation of accepted customs and manners."

It then held that the statute was not unconstitutionally vague as applied to the facts of this case.

The violation of privacy argument didn't go far because the act Balthazar was convicted of—forcing a female victim to perform oral copulation—was not an act between consenting adults.

The court, in choosing to avoid the constitutional issue, held that as a matter of law private sexual conduct between consenting adults is not in violation of this statute because it is not so contrary to community customs and manners as to fit within the definition of the crime.

Damages only

A lesbian teacher in Oregon, who lost her job when the school board discovered she was a practicing homosexual, won a partial victory when she sued for damages and reinstatement.

The trial court held she was wrongfully dismissed under an unconstitutionally vague statute but limited her relief to damanges. She appealed.

In *Burton* v. *Cascade School District*, (U.S.C.A. 9th) #73-1568, on Jan. 13, 1975, the Ninth Circuit Court of Appeals upheld the trial court, stating: "We cannot say that an award limited to monetary damages was inadequate for a wrongful dismissal, under an unconstitutionally vague statute, of a *nontenured* teachers."

The majority indicated that damages might have been inadequate for a *tenured* teacher.

Chief Justice Lumbard dissented, stating that reinstatement would be appropriate remedy for an individual who has been terminated from her job in violation of her constitutional rights.

(More court news pages 7, 8)

Sexual worlds collide in Mishima's 'Forbidden Colors'

If the *Bushido*, the ancient code of Japan's Samurai class, was a deep well of love for Emperor, nation and tradition, it was also an instrument of profound contempt for the self-indulgences of materialism, scrutable emotions and all things effeminate.

Under the pressures of materialistic individualism, the modern adherents of *Bushido* have been squeezed into a hard ball of fanaticism and, until his spectacular suicide in 1970, Yukio Mishima worked tirelessly to further squeeze all the softness out of that fanaticism and hurl it against the decadent body of 20th century Japanese society.

In *Forbidden Colors*, Mishima raised the prospect of homosexuality as the last bastion of masculine ideology and, therefore, the possible depository of the strength needed to destroy the smothering, feminine softness of the society around him.

"As in that long-ago warlike time, loving a woman was an effeminate act. . . . any emotion that ran counter to his own masculine virtue seemed effeminate. To samurai and homosexual the ugliest vice is feminity. Even though their reasons for it differ, the samurai and the homosexual do not see manliness as instinctive but rather as something gained only from moral effort."

Love, contempt and destruction are the antagonists and the vehicle in which Mishima shows us a misanthropic writer, aging but powerful, who manipulates a beautiful young homosexual as a weapon of revenge against several of the women from his past.

There is very little of malice in this—simply the will to action on the part of the writer, who has deliberately atrophied his capacity to love, and the ability to act of the boy, who has not yet discovered his. That, and the agreement that the destruction of feminine power is an act of purity and beauty.

Under the tutelage of the old writer, the boy Yuichi is first married, and then introduced to a succession of society women who are, each in turn, smitten by his beauty.

Thus Yuichi progresses simultaneously through the world of gay bars, gay parties and gay alliances on the one hand, and that of the philandering society rake on the other. The difference, of course, being that the alliances with the women are frustratingly fruitless to them, as the old writer intended.

But as these various worlds begin to collide and interact in ways never imagined by Yuichi or his old mentor, the solid spiritual foundation of their mutuality is shaken and cracked.

Both are threatened, as their defenses crumble, by the possibility of love invading and dissolving the hard core of their spiritual centers, and each must deal with that growing horror by himself.

—Jack Holloway

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Constitutional Law—Equal Protection in Zoning—Restricting Dwelling Use to No More Than Two Unrelated Persons is Constitutional, St. Mary's Law Journal, Vol. 6, No. 2, pp. 495-506, Summer, 1974.

Oral Copulation: A Constitutional Curtain Must be Drawn, San Diego Law Review, Vol. 11, No. 2, pp. 523-534, Feb., 1974.

Sex and the Social Order—A View of Some of the Sociological, Psychological and Legal Issues Involved, Journal of the Beverly Hills Bar Association, Vol. 8, No. 4, pp. 51-57, Sept., 1974. (Ed. Note: A surface discussion of some changing attitudes about sexuality and sex roles.)

In Re Cary: A Judicial Recognition of Illicit Cohabitation, Hastings Law Journal, Vol. 25, No. 5, pp. 1226-1247, April, 1974. (Ed. Note: Excellent discussion of the recent California case, In Re Cary (1973) 34 C.A.3d 345, in which the court extended community property rights to persons cohabiting in a manner of husband and wife but who were not legally married and who had no belief that they were married. Query: Will this open up the family law courts to all persons living together in lover relationship for court relief for property distribution?)

Special Project: Criminal Code Revision—A Prosecutor Looks at the New Criminal Code; A Hornbook to the North Dakota Criminal Code, North Dakota Law Review, Vol. 50, No. 4, pp. 631-638, pp. 639-756, Summer, 1974. (Ed. Note: A comprehensive review of the new penal code in North Dakota, including all sexual laws, which are to take effect in July, 1975.)

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Sarong Gals: Green Light for the Red Light Abatement Law, Pepperdine Law Review, Vol. 1, No. 1, pp. 116-128, 1973. (Ed. Note: A discussion of California's Red Light Abatement Law allowing injunctive relief for lewdness constituting a nuisance, its interpretation by the courts, and its constitutionality.)

California v. *La Rue: The Demise of the "Bottomless" Bar*, Pepperdine Law Review, Vol. 1, No. 1., pp. 129-136, 1973.

Rise and Fall of Roth—A Critique of the Recent Supreme Court Obscenity Decisions, Criminal Law Bulletin, Vol. 10, pp. 785-826, November, 1974.

Sexual Factors in Marital Discord, Family Law Quarterly of the American Bar Association, Vol. 8, No. 2, pp. 225-237, Summer, 1974. (Ed. Note: Reprint of a Masters and Johnson lecture at the meeting of the Family Law Section of the A.B.A. at its meeting in August, 1973.)

Homosexuality and Validity of Matrimony—A Study of Homopsychosexual Inversion, Catholic Lawyer, Part I: Vol. 19, No. 2, pp. 84-101, Spring, 1973; Part II: Vol. 19, No. 3, pp. 169-199, Summer, 1973. (Ed. Note: The article deals with the topic from a religious perspective; absolutely no analysis from a secular point of view.)

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Hustling for Rights, by M. G. Haft, Civil Liberties Review, 1:8-26, Winter/Spring, 1974.

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Incest Offenses and Alcoholism, Medicine, Science and the Law, 14:124-8, April, 1974.

Legislation

Congress

H.R. 166, introduced in the House by Rep. Bella Abzug (D-NY) on Jan. 14, 1975. Referred to Judiciary Committee. Substantive provisions: would amend the Civil Rights Act of 1964 to prohibit discrimination on the basis of affectional or sexual preference in public accommodations, public facilities, public education, federally assisted opportunities, employment, educational programs receiving financial aid and housing sales, rental, financing and brokerage services.

California

A.B. 181, introduced in the Assembly by Howard Berman (D-Sherman Oaks). Referred to the Judiciary Committee. Substantive provisions: would plug gaps in the Credit Discrimination Law to permit women to qualify for credit with commingled earnings and to prohibit evaluation of a woman's credit using such factors as birth control and her child-bearing age.

A.B. 194, introduced by Assemblyman Alister McAlister (D-San Jose). Referred to Criminal Justice Committee. Substantive provisions: would prohibit a jury to be instructed in sex trials, including oral copulation and sodomy, that the testimony of the complaining witness should be examined with caution.

A.B. 407, introduced Jan. 7 by Assemblyman Howard Berman (D-Sherman Oaks). Referred to Criminal Justice Committee. Substantive provisions: would exempt from prosecution all persons employed by an exhibitor of obscene matter if those employees have no control, directly or indirectly, over the exhibition of the obscene matter.

A.B. 489, introduced Jan. 15 by Assemblyman Willie Brown (D-San Francisco). Passed by the Assembly 46-22 on March 6 and referred to the Senate Judiciary Committee. Substantive provisions: would decriminalize private sexual acts between consenting adults.

A.B. 633, introduced Jan. 30 by Assemblyman John Foran (D-San Francisco). Referred to the Labor Relations Committee. Substantive provisions: would prohibit discrimination in employment because of sexual orientation.

A.B. 642, introduced Jan. 30 by Assemblyman Ken Meade (D-Oakland). Referred to the Criminal Justice Committee. Substantive provisions: would enact the Nonvictim Crime Special Defense Act of 1976, which would allow a person charged with a crime, including some sex crimes, to plead innocent if that person did not injure or threaten injury to other persons or their property.

A.B. 890, introduced Feb. 20 by Assemblyman Peter Chacon (D-San Diego). Referred to the Housing and Community Development Committee. Substantive provisions: would prohibit discrimination in housing accommodations because of sex and marital status as well as because of race, color, religion, national origin or ancestry.

S.B. 513, introduced Feb. 27 in the Senate by George Moscone (D-San Francisco). Referred to the Senate Judiciary Committee. Substantive provisions: would repeal two lewd conduct provisions of the Penal Code, Sections 647 (a) and (d).

S.B. 565, introduced March 10 by Senators David Roberti (D-Los Angeles) and Donald Grunsky (R-Watsonville). Referred to the Senate Judiciary Committee. Substantive provisions: would revise the entire California Penal Code, including all sexual provisions. The bill would decriminalize private sexual conduct between consenting adults. The age of consent for such conduct would be 18. A sexual solicitation statute would be retained Prostitution would continue to be a crime.

S.B. 574, introduced March 12 by Sen. Alan Robbins (D-North Hollywood). Referred to Senate Judiciary Committee. Substantive provisions: would extend crime of rape to acts of sodomy by a male with a male or a female, toughen probation in rape cases and prohibit a jury in a rape case to be instructed that the testimony of a witness should be examined with caution.

S.B. 575, introduced March 12 by Sen. Alan Robbins (D-North Hollywood). Referred to Senate Judiciary Committee. Substantive provisions: would require county hospitals to test rape victims for venereal disease and pregnancy free of charge, require professionals trained in examining rape victims to be on call in county hospitals with a county population over 500,000, and require the inclusion in public school physical education manuals teaching techniques of nonaggressive defense.

Colorado

For information the following legislation contact Atty. Gerald Gerash, Suite 412, Majestic Bldg., 209 16th St., Denver, 80202; telephone (303) 266-1354.

H.B. 1363, introduced Feb. 25 in the House by Rep. DeMoulin. Referred to the Judiciary Committee. Substantive provisions: would prohibit the affectional or sexual orientation of a proposed custodian or associates to be considered in determining the custody of a child.

H.B. 1427, introduced in the House by Reps. Webb and McCroskey. Referred to the Business Affairs and Labor Committee. Substantive provisions: would include affectional or sexual orientation in the statute prohibiting discrimination in granting credit.

H.B. 1428, introduced March 3 in the House of Reps. Webb and McCroskey. Referred to the Business Affairs and Labor Committee. Substantive provisions: would include sexual orientation of an individual in the criteria for determining unfair housing practices.

H.B. 1429, introduced March 3 in the House by Reps. Webb and McCroskey. Referred to the Business Affairs and Labor Committee. Substantive provisions: would prohibit discrimination by an employer or a labor organization because of affectional or sexual orientation.

H.B. 1430, introduced March 3 in the House by Reps. Webb and McCroskey. Referred to the Business Affairs and Labor Committee. Substantive provisions: would include sexual orientation of an individual in the criteria for determining discrimination practices in public accommodations.

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Legislation continued

Massachusetts

H. 2944, introduced in the House. Substantive provisions: would decriminalize private sexual conduct between consenting adults.

H. 2848/2849, introduced in the House. Substantive provisions: would prohibit discrimination on the basis of sexual orientation in employment, housing, public accommodations and other areas.

New York

A. 1220, introduced in the Assembly by William Passanante (D-Manhattan). Substantive provisions: would decriminalize private sexual conduct between consenting adults.

S. 731, introduced in the Senate by Roy M. Goodman (R-Manhattan). Substantive provisions: would decriminalize private sexual conduct between consenting adults.

A. 3211, introduced in the Assembly and co-sponsored by Assemblypersons Passanante, Blumenthal, Grannis, Tesce and Runyon. Substantive provisions: would amend the State Human Rights Law to prohibit discrimination on the basis of sexual orientation in the areas of employment, licensing, child custody, foster-child placement and other areas.

Duluth

Proposed city ordinance, introduced by Councilman Robert Stevenson in late 1974 and referred to the council's Personnel Committee. Substantive provisions: would sprohibit discrimination in city employment on the basis of marital status or sexual orientation. Postponed for further public hearings until June, 1975.

Proposed ordinance, third draft submitted to the City Council. Substantive provisions: would prohibit discrimination on the basis of affectional or sexual preference in credit, education, public or private employment, public accommodations, public services, housing and real property. Creates an Equal Opportunity Commission to oversee and investigate. Sets civil penalties for violations. Contact: Michael Wetherbee, Esq. Suite 412, Loring Park Office Bldg., 430 Oak Grove, MN., 55403.

growing up

(continued from page 1)

freshman year under Moretti. And when he became majority leader just before the November election, he promised to fight for the bill in the current session.

Furthermore, McCarthy's law partner in San Francisco, Assemblyman John Foran (now chairman of the powerful Ways and Means Committee), beat off a strong primary opponent by making commitments to a segment of San Francisco's large gay community. And McCarthy, who had never been a supporter of Brown's bill, helped run Foran's primary campaign!

McCarthy is the type of person who doesn't make many long-lasting enemies. He will compromise his principles to get legislation passed, and such a Speaker could do wonders in an Assembly which has been dominated for so long by such unyielding personalities as Moretti and Jess Unruh.

It is also too simplistic to judge the Assembly as anti-sex as it appears to be from the history of Brown's bill. Witness, for example, the fate of Senate Bill 39 last year.

That bill, proposing Penal Code Revision, struck out the crimes of oral copulation and sodomy for heterosexuals but made homosexual conduct per se a crime: "A person is guilty of homosexual conduct when he engages in sexual conduct with a person of the same sex."

Such wording in a Penal Code Revision is a step backward for sexual reform.

While the bill passed in the Senate (which was anxious for a complete code revision), it died in the Assembly, where the homosexual conduct proposal ran into trouble in committee, thus indicating that assemblymen were not insensitive to gay people in California.

The new Penal Code Revision bill, co-authored by the man (Sen. Donald Grunsky) who had written in the homosexual conduct crime a year ago, now eliminates the criminality of private sex acts (i.e., oral copulation and sodomy) for everyone in California.

This is an indication that the Senate may not be its usual conservative self in taking up the Brown bill. After all, the Senate does want a general revision of the Penal Code; and if it passes the new revision bill, making private sex acts among consenting adults legal, how could it reject the Brown bill that would do the same?

And last, but far from the least factor, is the mounting pressure that the gay community in California has put on legislators for almost 10 years. That pressure was felt heavily and effectively when the Assembly Criminal Justice Committee killed SB 39 last year.

For so many years the pressure seemed futile and unrewarding. Yet today, there is no question that legislators, especially power brokers from San Francisco and Los Angeles, are listening and responding.

The pressure has mounted each year, and from the 46-26 vote on the Brown bill in March and the comments by the new proponents of the bill, the pressure drive appears to have adequately made the point that laws against homosexual acts are unjust.

This is the most important lesson sexual reform activists in other states can learn from California's legislative situation: apply pressure and don't fold, even if it doesn't seem to be getting results at first. It is not shocking anymore in California when someone declares himself or herself gay during hearings in Sacramento. And the legislators seem to be catching up with the times; oral copulation and sodomy are not so shocking to them anymore!

In the Senate, where hearings on the Brown bill before the Judiciary Committee should provide a widely publicized forum for sexual reform, Majority Leader George Moscone and Sen. Milton Marks, a Republican, will be going all out for the measure because they are both running for mayor of San Francisco and actively seeking the large gay vote there.

In addition to the Brown bill and the Senate's Penal Code Revision measure, sex reform legislation has also been introduced by Foran (adding sexual orientation to the discrimination section of the State Labor Code); by Moscone (doing away with lewd conduct statutes); by Oakland Assemblyman Ken Meade (a special victimless crime plea, which includes current sex crimes), and by San Fernando Valley Sen. Alan Robbins (a rape bill, including male rape).

In the courts continued

Litigation: Obscenity see-saw

The California Supreme Court on Feb. 24, 1975 accepted for hearing an obscenity case that has really bounced around.

Here is the track record of the defendants in *People* v. *Nissinoff*, Crim. 18481, who were convicted in Alameda County Municipal Court of three counts of violating Section 311.2 of the State Penal Code, i.e., distributing or selling obscene material.

• On appeal to the Appellate Department of the Superior Court their convictions were upheld.

• The defendants then petitioned the U.S. Supreme Court for certiorari, and the court ordered that the cause be "remanded to the Appellate Department of the Superior Court of the State of California, County of Alameda, for further consideration in view of *Miller* v. *California*, 413 U.S. 15."

On remand, the court reversed, concluding that Sections 311 and 311.2 of the Penal Code were unconstitutional in that they "are not consistent with the guidelines established in *Miller* v. *California* and the scope of the regulation is not limited to the depiction of sexual conduct specifically defined."

• When the Superior Court then certified the case to the Court of Appeal for review, that court (43 C.A.3d 1025) reversed and held that those sections of the Penal Code were not unconstitutional.

So it is now up to the California Supreme Court in this see-saw.

Taxpayer's suit

A taxpayer's suit is being used in California to challenge the state's lewd conduct law.

Filed in June, 1974, against Los Angeles Police Chief Ed Davis and Sheriff Peter Pitchess, attorneys Al Gordon and Thomas F. Coleman sought a preliminary injunction to stop them from spending taxpayer's money "unconstitutionally" in enforcing California's lewd conduct statute.

That statute, Section 647, is constantly used against homosexuals in the Los Angeles area.

The attorneys in *Gordon* v. *Davis et al* are trying the route of the taxpayer's suit to challenge the lewd conduct law because other efforts to strike down the statute have met with court rebuffs.

A Superior Court judge denied the application for a preliminary injunction, but the case is still pending. For information contact Gordon and Coleman at 3701 Wilshire Blvd., Los Angeles, 90010.

L.A. Beanery: 'Fagots Stay Out'

When Barney's Beanery, a restaurant and bar in Los Angeles embarked on a campaign against gay patrons—a sign was posted saying "Fagots Stay Out" and employees wore shirts with the same misspelled slogan as well as sold them to customers—a suit was filed charging the establishment with a violation of Section 51 of the California Civil Code which forbids irrational discrimination in public accommodations and business establishments.

While the language of the statute seems to imply that it only prohibits discrimination on the bases of color, race, religion, ancestry, and national origin, the California Supreme Court held in *In re Cox* (1970) 3 C.3d 205 that such language was illustrative rather than restrictive.

The Court stated that "although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit all arbitrary discrimination by business establishments."

In *Sirico* v. *Barney's Beanery*, filed in January, 1975 in the Los Angeles Superior Court, a preliminary injunction was sought on the grounds that the establishment discriminated against homosexuals. The plaintiff cited the case of *Stoutman* v. *Reilly* (1951) 37 C.2d 713, 234 P.2d 969, for the proposition that business establishments in California were not permitted to discriminate against gay patrons.

In *Stoutman* the State Board of Equalization suspended the plaintiff's permit to sell liquor in his bar on the grounds that the premises were used as a disorderly house for purposes injurious to public morals because persons of known homosexual tendencies patronized the establishment and used it as a meeting place.

The Supreme Court noted that the owner of a business establishment might be liable for violating Section 51 of the Civil Code if he ejected patrons merely because they were homosexual.

The defendant, Barney's Beanery, filed a demurrer claiming that the complaint failed to state a cause of action and the court upheld the owner, saying that his right to free speech was stronger than a gay person's right to be free from discrimination. The case was then dismissed.

An appeal was filed with the Second District Court of Appeal. A decision is not expected for some time. Attorney for the plaintiff is Albert L. Gordon, 3701 Wilshire Blvd., Suite 700, Los Angeles, California, 90010.

. . . unless she's perfect

Homosexual parents may not lead otherwise normal lives and retain custody of their children, according to a recent ruling by a California State Appeals Court. They will have to be better than everyone else.

At least that is the opinion of Albert Gordon, attorney for Linda Mae Chaffin who was denied custody of her two

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In the courts continued

unless she's perfect

teen-age daughters because of what Justice Macklin Fleming called "a combination of factors," including Ms. Chaffin's residence with her female lover in the home in which the children would be housed.

Fleming noted that Ms. Chaffin had two prior criminal convictions—for shoplifting and bad checks—and denied the thrust of an amicus brief filed by the ACLU that the denial really hinged on Ms. Chaffin's lesbianism.

However, when the case was at trial in Superior Court, the County Probation Officer had reported that he found Ms. Chaffin to be a fit mother who was adequately handling her children, who wished to remain with her. But he had recommended against Ms. Chaffin because of the "combination of factors" which, Gordon said, "in literally hundreds of cases have not been considered by a judge to be important enough to take children away from their mother."

On appeal, the court said:

"The fact that in certain respects enforcement of the criminal law against the private commission of homosexual acts may be inappropriate and may be approaching desuetude, if such is the case, does not argue that society accepts homosexuality as a pattern to which children should be exposed in their most formative and impressionable years or as an example that should be put before them for emulation.

"In exercising a choice between homosexual and heterosexual households for purposes of child custody a trial court could conclude that permanent residence in a homosexual household would be detrimental to the children and contrary to their best interests."

With the approval of Ms. Chaffin's former husband, the children were turned over to her parents, and attorney Gordon concluded that "the meaning of this case is that a lesbian woman cannot have custody of her children unless she's perfect."

The case (1975) 45 C.A.3d 39, is now being handled by attorney Elena Ackel for appeal to the California Supreme Court. Ms. Ackel's office is at 1800 West Sixth St., Los Angeles, 90057, (213) 483-1937.

Gay deputy AG ordered back

A California deputy attorney general, dismissed because of his homosexuality, was ordered reinstated by Los Angeles Superior Court Judge David Eagleson on Feb. 21, 1975.

The Attorney General's Office has until April 22 to file an appeal if it wants. Judge Eagleson wrote no opinion in making his judgment.

Taylor was dismissed a year after he had been arrested in a raid on a gay bar in Los Angeles. Charged with lewd conduct, Taylor plead guilty to trespassing. He said he plea bargained because he feared the publicity and the complications of a trial.

In August, 1973, the Attorney General's Office dismissed him on three grounds: (1) conviction of a crime involving moral turpitude, (2) immorality and (3) conduct bringing discredit upon the agency.

Taylor appealed to the State Personnel Board. A hearing officer, finding that Taylor had not committed the acts he was arrested for, recommended he be reinstated. But the Personnel Board ignored the recommendation and, without holding a hearing, upheld the dismissal by a 3-1 vote.

Then he applied for a writ of mandate ordering reinstatement and he won. Attorney for Taylor is David Brown, 6922 Hollywood Blvd., Los Angeles. The A.C.L.U. of Southern California participated in the case.

Throwing caution to the winds?

The California Legislature and the State Supreme Court are considering whether to do away with the requirement that cautionary instructions be given to juries in most sex cases, including rape, sodomy and oral copulation.

Women's groups have long fought against the cautionary instruction in rape cases. Such a requirement, mandated in the case of *People* v. *Nye*, (1951) 38 C.2d 34; 237 P.2d 1, instructs the jury to examine with caution the testimony of a witness accusing someone of rape.

California Jury Instructions Criminal (CALJIC), a semi-official form book for jury instructions, suggests the following instructions in oral copulation and sodomy cases:

"A charge such as that made against the defendant in this case is one which is easily made and, once made, is difficult to defend against even if the person accused is innocent.

"The law requires that you (the jury) examine with caution the testimony of the person upon and with whom the act is alleged to have been committed." The authority cited in CALJIC is *People* v. *Trolinder*, 121 Cal.App.2d 819, 264 P.2d 601, and *People* v. *Putnam*, 20 Cal.2d 885, 129 P.2d 367.

The cautionary instruction has become customary in almost all sex crime cases.

A bill (S.B. 574) introduced in the Legislature by Sen. Alan Robbins (D-North Hollywood) would prohibit a cautionary instruction in a rape case, thereby making it easier to get a conviction.

But a bill (A.B. 194) introduced by Assemblyman Alister McAlister is more comprehensive on the same subject. It would prohibit such cautionary instructions in oral copulation and sodomy cases as well as in rape trials.

Gay groups are expected to fight the McAlister bill because gay men accused of oral copulation and sodomy are already at quite a disadvantage—and it is usually gay men who are charged with those crimes, even though current statutes in California make them crimes for everyone.

The California Supreme Court accepted in March, 1975, a case (*People* v. *Rincon-Peneda* Crim. 18510 in which the justices will question the propriety of requiring a cautionary instruction in all sex cases, even though the case under consideration involves just a rape decision.

Petition for this high court hearing was made by the People after the Court of Appeal, in an unpublished Opinion (2 Crim. 25299) reversed a rape conviction.

still in knickers

continued from page 1

That case was *People* v. *Schwarz*, 2d Crim. No. 22621, in which the court reversed the ruling by Superior Court Judge George M. Dell that the statute was unconstitutional.

And sexual law reformers are doing just what that court recommended, as the accompanying story on legislative action in California indicates.

The case just cited involved seven defendants charged with consensual acts of oral copulation, but they were engaged in making a film—and the Court of Appeal ruled that the acts were semi-public and not private.

But a fresh case, involving both oral copulation and sodomy, raises the question of constitutionality on more solid grounds. While the First District Court of Appeal reversed a man's conviction on both counts, it faced the issue of constitutionality in evasive terms.

In fact, this case provides a good example of a variety of problems facing attorneys who are trying to strike down such sex laws.

Here briefly are the facts in this important case, *People* v. *Reeves*, 1 Crim. 12437, Jan. 22, 1975.

The defendant, David Reeves, is accused of orally copulating and sodomizing a 19-year-old who admitted he did not resist in either the sexual advances or the sexual acts, although during the trial the prosecution indicated that this didn't mean the young man consented to the acts.

In reversing the conviction of Reeves and remanding the case back to Santa Clara Superior Court, the Court of Appeal agreed with defense attorney Earl Stokes that there were trial errors and prosecutorial misconduct.

The errors and the misconduct all centered on the prosecution bringing the question of homosexuality into the trial and the judge allowing it over objections from Stokes. The court found the intrusion of sexual orientation into the trial "so inflammatory as portend 'undue prejudice' at sight." It relied, for this finding, on *People* v. *Giani*, 145 Cal.App2d 539 at pp. 541-546; *People* v. *Kelley* (1967) 66 Cal.2d 232, 242-244, and *People* v. *Peters* (1972) 23 Cal.App.3d 522, 533.

That was a significant ruling itself for the homosexual community. But the appellate court dismissed the constitutional arguments that Stokes raised—he wants not only a reversal but also a dismissal—and he has asked the California Supreme Court for a hearing.

(The Supreme Court took up the petition for a hearing on March 19, but put off a decision on whether to accept the case unitl April 22 because it needed more time to consider the petition.)

The right of privacy—involving here private, consensual sex acts—was the first constitutional issue raised. But the court ruled that the appellant lacks standing because the question of consent was a critical and genuine issue during the trial—and thus refused to consider the constitutional merits of this point.

But, in fact, the question of consent was not one which the jury was instructed to consider in deciding whether Reeves was innocent or guilty. It only came up when the issue of whether the 19-year-old was an accomplice was purused by the defense.

The appellate court didn't rule that if and when the case is retried that the judge must instruct the jury that if it finds the act was consensual it must find the defendant not guilty. This would be a constitutionally mandated defense even though the statute does not provide for such a defense.

If not, when the case is retired, the jury might convict Reeves even though it believes that he engaged in private sexual conduct between consenting adults.

In this way, the court appears to be facing the case dishonestly. The fact is that courts try to evade the constitutional issue any way they can, which explains why in California sexual law reform is more likely to come through legislative action rather than through judicial decisions.

The Court of Appeal dealt with two other constitutional points in its Reeves decision. Without comment but just citing two cases, it declared that the oral copulation and sodomy statutes are not void for vagueness and do not violate the Establishment Clause of the First Amendment.

Simply citing cases and avoiding commentary is another way the courts avoid facing the constitutionality of sex laws head on.

The Second District Court of Appeal is now hearing another challenge to the oral copulation statute—this one involving a woman charged with a sex crime for orally copulating a man during the making of a film.

In seeking a reversal of her conviction—the case is *People* v. *Sheila I. Rossi*, No. 2 Crim. 26482—attorney Stanley Fleishman resorts to an arrays of legal and sociological arguments.

On the privacy issue, Fleishman cites a part of the California Constitution to challenge the legitimacy of the state to regulate consensually private sex. In 1972, the voters of California added this article to the state constitution:

"All people are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; and pursuing and obtaining safety, happiness and privacy."

But all the talk about privacy appears useless when arguing before the courts. They seem to want the Legislature to relieve them of the subject of sex.

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SEXUALAWREPORTER

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Child custody dilemma: sexual lifestyle vs. a child's best interests

One of the most disturbing areas in the field of sexual law is child custody, with the key phrase, "the best interests of the child," all too often suffering — along with the children and their parents — at the expense of the moral indignation of the judiciary.

The way judges focus on the sexual lifestyle of loving and concerned parents and dismiss "the best interests" of children is grist for tragic dramas as painful as the great Greek tragedies that have exposed in piercing images the frailties of humankind for more than 2000 years.

When the Oklahoma Court of Appeals rejected a mother's custody plea for her three-year-old boy because the mother continued to have sexual relations with a man who had been her lover since shortly after her divorce, the judges didn't mince words:

". . . this does not agree with the Court's concept of moral conduct," it said in *Brim v. Brim,* 532 P.2d 1403 (Jan. 1975).

In California, a lesbian fought for more than a year a court order taking away her two daughters. She lost in the Court of Appeal (Frye v. Chaffin, 45 C.A.3d 39) and took her case all the way to the California Supreme Court, which refused in May to hear the case, while her children, living with the coldness and bitterness of their grandparents, ran away.

Fortunately for her, a move for a modification in the original custody order succeeded, and a new lower court judge gave the children, 15 and 13, back to their mother.

(See Vol. 1 #1 of the SLR for details of this case through the Court of Appeal ruling.)

Cases such as these, unfortunately, are not the exception. That is why a child custody decision by a Minnesota judge (Torrance v. Torrance, DC 646333) stands out so strikingly. The judge is Suzanne C. Sedgwick, the first woman appointed (last year) to a District Court seat (the Fourth Judicial District) in Minnesota history.

In awarding custody (April, 1975) of two boys, 11 and 9, to their father, who had been living unmarried to a woman to the disapproval of the children's mother, Judge Sedgwick wrote a Memorandum of Fact directed at the State Supreme Court in case the mother appeals the decision.

". . . there is an increasing number of cases where one, and sometimes both, parties are living with a boyfriend or girlfriend without marriage, and the question frequently is what emphasis the court should place on marriage or non-marriage of the custodial parent(s).

"Two sometimes separate factors which must be acknowledged are the motivation, religious or otherwise, of the parents and the quality of a relationship from the vantage point of the children.

"This court does not believe it is necessary to either condemn or condone any relationship, but it is necessary that the Court assess the quality of the relationship between the adults as it affects the child. Some marriages are not stable environments in which to raise children, and some informal relationships are very stable and can provide the emotional, psychological and physical security necessary to raising children."

In this case, where the two boys had been with the father for six years until the mother objected to his sexual lifestyle, Judge Sedgwick found the father "has provided a stable environment and his liaison with his fiancee appears to have a positive, rather than negative, effect on the boys."

In her Memorandum of Fact, Judge Sedgwick comments on the Oklahoma custody case mentioned above, *Brim v. Brim,* in which a three-year-old boy was taken from his mother because she slept in the same bed with a man not her husband three to five nights a week.

That court argued that the mother's sexual lifestyle "does not agree with the Court's concept of moral conduct," to which Judge Sedgwick replied:

"Although the Court considered at length the fact that the adult majority considers the conduct of the woman to be wrong, it did not consider the effect on the child of depriving it of the only single continuous relationship it had with an adult by removing him from his mother."

In the California case of lesbian mother Linda Mae Chaffin, her homosexuality appeared to be the major reason for the court order depriving her of her children, even though a probation officer found she had been a fit mother and the children, 15 and 13, wished to remain with her.

"The fact that in certain respects enforcement of the criminal law against the private commission of homosexual

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UPCOMING . . . in the August-September issue of the SLR:

Rape — The double-edged sword. What changes in the law do women want? How successful have they been?

Prostitution — Society's schizophrenic attitude. What legal problems do prostitutes face? Legalized prostitution?

Sex Laws — Discriminatory enforcement. What legal remedies are available?

Legal Strategy — How experienced attorneys handle difficult sexual cases. Start of a regular feature.

IN QUESTION ...

ITEM: San Francisco police will issue tickets instead of making arrests for marijuana and sex offenses. People cited, however, will still have to make court appearances, but the idea has been hailed by gay leaders and city officials.

QUESTION: Will this new practice give police a license to crack down further on alleged marijuana and sex offenders, since it is the convenience of citation that is being hailed?

While those cited don't face the trauma of jail before a court appearance, they will still be booked and charged with a crime. The new program doesn't ease any of the penalties for the offenses.

* * *

ITEM: The hottest television property today is "Monty Python's Flying Circus," a British satirical review that is brutal in its jibes, especially towards women and homosexuals.

The creators of the show, aired on public television, were in New York in May giving the news media some idea of the problems they face with their humor.

"Once we had a line where someone was asked what his hobbies were," said Michael Palin. "He answered, 'Strangling animals, golf and masturbation.' The BBC said we couldn't say masturbation because it would offend people. Nothing about strangling animals."

QUESTION: Doesn't that remind you of priorities in the United States?

* * *

ITEM: Cities across the country are passing ordinances banning the display of periodicals on sidewalk newsracks if they exhibit "obscene" photographs, whatever those are.

QUESTION: Since those ordinances are designed to protect the minds of juveniles, why haven't City Councils and Boards of Supervisors questioned teenagers at public hearings or ordered a survey of youngsters to find out what affect nudity on the newsracks has on them?

Most such ordinances have not been enforced because of lawsuits challenging their constitutionality.

* * *

ITEM: Los Angeles DA Joseph Busch tried to close down a pornographic publisher, Milton Luros, with a novel approach: Using the State's 1913 Red Light Abatement Act and claiming Luros was guilty of prostitution by paying models to be photographed in the nude and while performing sex acts.

Judge Parks Stillwell ruled against Busch because the publisher's premises, which Busch claimed is a "nerve center for sex and money," were not where the models did their thing. A deputy city attorney had worked on the case for three years and the county spent at least $100,000, the amount that Busch sought in settlement negotiations.

QUESTION: How far should a DA go in wasting taxpayer monies?

At one point in the trial, Dep. DA Thomas Eden appealed to the judge to rule in his favor because police officers had spent so much time surveilling the publisher's headquarters in the heat of the San Fernando Valley. Now that is desperation!

Winning this case was attorney Stanley Fleishman.

* FOOTNOTES ...

A brief review of sexual legal news throughout the country:

"I never would have been able to have a political career if I hadn't been a part of an extended family," Connecticut Gov. Ella Grasso told the New York Times in a special Sunday feature on May 4.

This telling remark seems to explain why the first woman to be elected governor in her own right has surprised people who expected her to be more progressive than she is.

"She is opposed to abortion (she is Catholic), against the legalization of marijuana, deeply reluctant to accept any changes in the laws concerning homosexuality," wrote reporter Paul Cowan.

The governor is credited with helping defeat in the State House a bill banning discrimination against homosexuals. The vote was 87-60. In the Senate the bill had won 23-11.

* * *

"We are encouraging lawyers to sue for rape," Dr. William Masters of Masters-Johnson fame told a seminar in May during the annual convention of the American Psychiatric Association in Southern California.

"We in the helping professions have taken gross advantage of our patients for many years," he said, referring to the seduction of patients by sex therapists.

"It is time it was stopped." And he proposed such therapists should be charged with rape and not malpractice.

* * *

The Michigan Advisory Commission on Criminal justice has recommended that homosexuality, sodomy and adultery among consenting adults should be removed from the criminal statutes of the state. But, it added, the state should continue its ban on sexual relations "in public places, soliciting, procuring and selling of sexual acts."

* * *

A U.S. District Judge in Butte, Mont., has upset officials in Washington with a ruling that the draft is unconstitutional because it is sexually discriminatory.

Lower court decisions on the subject have always upheld the draft's constitutionality. But Judge W. D. Murray dismissed an indictment against an alleged draft dodger and set the stage for a Supreme Court review when he said:

"Legislation limiting the draft to male citizens denies them equal protection under the law. All citizens, male and female, must be subject to the draft on an equal basis."

* * *

Nothing seems to be going right these days for Los Angeles police chief Ed Davis, homophobia's top dog. In an opinion issued at the behest of the city's Civil Service Commission, City Atty. Burt Pines said that in the hiring of police officers, "mere homosexuality, standing alone, does not justify disqualification."

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IN THE COURTS...

Soliciting for prostitution is a crime, but prostitution itself is not

While prostitution is not a crime in the State of Michigan or the city of Detroit, the U.S. District Court for Eastern Michigan nonetheless found that a city ordinance making it a crime to accost or solicit in public for prostitution *is* constitutional.

But in *Morgan v. City of Detroit,* 389 F.Supp. 922 (Feb., 1975), the court did find unconstitutional — for vagueness — that part of the ordinance that made it a crime to accost or solicit people in public for "any other lewd immoral act."

The plaintiffs in this case were the owners of a massage parlor and a nude photographic studio as well as employes of both establishments.

To the claim that the ordinance violates the right of privacy, the court said:

"While it may be true that the completed acts of prostitution, fornication and adultery are consensual, the crime of accosting and soliciting is not, since the party accosted or solicited cannot by definition have yet consented and is, therefore, not protected by the right of privacy."

The court did point out, however, that the "right of privacy prohibits the state from proscribing activity conducted in private between consenting individuals where no overriding state interest can be shown." In this case, the solicitation took place in public.

Plaintiffs claimed also they were being denied their First Amendment right of freedom of speech because the accosting and soliciting law impinges on pure communication.

"Whatever else one might say about the act of accosting and soliciting," said the court, "it is doubtlessly intended to sell a product. It is now well-settled that while 'freedom of communicating information and disseminating opinion' enjoys the fullest protection of the First Amendment, 'the Constitution imposes no such restraint on government as respects purely commercial advertising.' "

A crucial part of the ruling is the way the court viewed the term "other lewd immoral acts."

Noting that there is no objective definition of "lewd" in Michigan, nor in any other jurisdiction surveyed in a brief sampling of opinions, the court accepted the plaintiffs' arguments that this part of the ordinance violated the Due Process Clause of the 14th Amendment.

"But perhaps a more important fact is that whatever definition is accepted, the standard is subjective in that whether an act is 'lustful,' 'dissolute,' 'libidinous' or 'lascivious' depends on the actor's social, moral and cultural bias. There are no objective standards to measure whether proposed conduct is 'lewd.' "

Restroom spying without a warrant is illegal

The U.S. District Court for Eastern Pennsylvania has enjoined the Lancaster police from conducting warrantless spy operations on public toilets in a train station and a public park.

The police in this case, *Kroehler v. Scott,* USDC EPa March 13, 1975, had drilled holes in the ceilings of restrooms in Penn Central Railroad Station and Long Park.

Said the court, relying on *Katz v. U.S.,* 389 U.S. 347, *People v. Triggs,* 506 P.2d 232, and *Buchanan v. State,* 471 S.W. 2d 401:

"We are neither unmindful of the numerous complaints of criminal activity which properly spurred the defendants to act expeditiously nor critical of police motivations aimed at ridding the community of criminal activity.

"However, we are compelled to safeguard zealously the fundamental guarantees embodied in the Constitution, particularly as they pertain to innocent and law-abiding citizens properly using public facilities.

"Therefore, we cannot ignore the fact that these surveillances swept into the gaze of the government not only those in criminal activity, but also countless innocent and unknowing persons who reasonably expected and were properly entitled to a modicum of privacy. Such a practice cannot be condoned on the sole ground that the defendants understandably expected to find evidence of criminal activity on the part of certain individuals while simultaneously subjecting all individuals using the facilities to a general 'search.' "

The Fourth Amendment, the court went on, requires a warrant before any legal surveillance is made of the restrooms.

Transsexual arrests: Cruel and unusual punishment

Police methods used to arrest transsexuals in Washington, D.C., deny transsexuals due process and constitute cruel and unusual punishment, ruled the D.C. Superior Court in *U.S. v. Collins* (March 13, 1975).

The court, in fact, said it found police methods "shocking." It said:

"The transsexual depends for his sexual engagements on brief, impersonal street encounters; the government provides him with such encounters.

"The transsexual seeks out persons who demonstrate a particular interest in him; the government provides him with such persons in the form of an undercover officer.

"The transsexual's opportunities for sexual engagement are extremely limited; the government provides him with what may be his only real opportunities. And then the transsexual is arrested and taken into police custody.

"We must all agree that there is a point of unfairness beyond which the government cannot constitutionally go."

Stiffer rules required to commit sex offenders

The California Supreme Court has ruled, in a 4-3 decision, that a person may be committed as a mentally disordered sex offender only by a unanimous jury vote and not the three-fourths vote as is standard in a civil case.

Proof beyond a reasonable doubt instead the preponderance of evidence is now needed for commitment as a result of this decision.

Furthermore, the court held that sex offenders, once committed to a state hospital, cannot be transferred there by administrative decision.

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IN THE COURTS

continued

Stiffer rules required to commit sex offenders

A prison spokesman said after the ruling was made on May 16, that 52 state hospital patients in the mentally disordered sex offender category are currently in state prisons as a result of transfers and may have to be returned to hospitals.

The court rulings were in three companion cases: *People v. Burnick,* Crim. 16554; *People v. Feagley,* Crim. 16818, and *People v. Bonnerville,* Crim. 16777, all decided May 15, 1975.

Justice Stanley Mosk, who wrote the majority opinion, said a person committed on the basis of the preponderance of the evidence and a three-fourths jury vote "remains forever a pariah, branded with the twin marks of mental and sexual abnormality."

A person committed as a mentally disordered sex offender could be sentenced to a state hospital for an indeterminate period — possibly for life.

California currently has 706 such patients confined to state hospitals, 512 at Atascadero and 194 at Patton, near San Bernardino.

Civil sanctions disallowed for publishing rape victim's name

The U.S. Supreme Court has ruled that Georgia may not allow civil sanctions to be placed on a broadcasting company which televises the name of a rape victim because such sanctions would violate the First Amendment.

In Cox Broadcasting Corp. v. Cohn, 92 S.Ct. 1029 (March 3, 1975), the victim's father brought the action against the television station because the reporter covering court hearings used the victim's name on the air after learning it from public court documents.

While the Supreme Court upheld a reporter's right to use information from public documents, including a rape victim's name, it did add:

"If there are privacy interests to be protected in judicial proceedings, the State must respond by means which avoid public documentation or other exposure of private information."

Sex charges dismissed in Miami; 'Legislature guilty'

Charges of "unnatural and lascivious" conduct against 21 men arrested in the Miami Club Baths have been dismissed by Dade County Court Judge Morton Perry because the statute was unconstitutionally vague and violated "freedom of assembly, privacy and equal protection as guaranteed by the Florida and U.S. Constitutions."

(*State v. Alvarez et al,* Case #75-52493, May 8, 1975.)

Judge Perry noted that the Florida Supreme Court in Franklin v. State (1971), 257 So.2d 21, had requested the Florida Legislature to replace a sodomy and oral copulation statute (800.01), which it had ruled unconstitutional, and to amend the "unnatural and lascivious act" statute (800.02), which it had made "a lesser included offense to 800.01."

Both statutes were in need of "proper conditions and restraints," the Florida Supreme Court had said.

Since the Legislature repealed the sodomy statute but didn't replace it and failed to "shore up" the unnatural and lascivious act law, the Dade County Court found that sex charges against homosexuals (consenting, in private and not involving juveniles) deprive them of constitutional rights.

The Club Baths bust originally involved 65 men, but charges against 44 were immediately dropped because of deficiencies in arrest forms.

Unusual markings on penis ruled as admissible evidence

A trial judge was correct in permitting a police officer's testimony regarding unusual markings on a defendant's penis to be admitted into evidence at a trial involving charges of aggravated rape and sodomy, ruled the Minnesota Supreme Court.

In State v. Riley, (March 7, 1975) N.W.2d, the court upheld such testimony, serving to identify the defendant, because it was based on a valid search.

Where the defendant contended that the inspection constituted a warrantless search in violation of the Fourth Amendment, the court cited *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, L.Ed.2d. 427 (1973):

" 'If the arrest is lawful, the privacy interest guarded for the Fourth Amendment is subordinated to a legitimate and overriding governmental concern.' "

Maryland is stripped of indecent exposure penalty

A two-year sentence for indecent exposure, imposed under common law standards, has been ruled illegal by the Court of Special Appeals of Maryland because a corresponding statute, which take precedence, authorizes a fine of not more than $50 and costs.

In *Dill v. State,* 332 A. 2d 690 (Feb. 21, 1975), the court found the warrant for Dill's arrest valid since it included all the elements of the statuatory offense.

The penalty of the common law crime was changed from a two year jail term to a fine "not to exceed $50 and costs" in a 1902 legislative act. An amendment to that act in 1967, bringing the statuatory crime squarely in line with the common law offense, failed to make any changes in punishment.

The court, however, did include a footnote in its decision that the Legislature has the perogative to authorize a harsher penalty — a footnote that sounds more like a recommendation.

'Lewd is obscene,' porno theater loses its appeal

The Michigan Court of Appeals has ruled that the word "lewd" is construed to mean "obscene" and thus upheld the closing down of an adult theater under the state's Public Nuisance Act.

Defendants argued that the word "lewd" is vague and not synonymous with "obscene," which is defined in *Miller v. California,* 413 U.S. 15, the standard case in judging obscenity.

In *Cahalan v. Diversified Theatrical Corp.* (March 4, 1975), the Michigan Court of Appeals disagreed with the vagueness argument:

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LEGISLATION...

Congress

Discrimination — HR 166 (SLR Vol. 1 #1), referred to House Judiciary Committee, subcommittee on Civil and Constitutional Rights.

Tax & Singles — HR 850, by Koch, referred to Ways & Means Committee. Would extend to singles tax rate benefits enjoyed by marrieds.

S 149, by Packwood, referred to Senate Finance Committee. Companion bill to HR 850.

Sex offenses — S 1, by McClellan and ten others, referred to Senate Judiciary Committee, subcommittee on Criminal Laws and Procedures, where current hearings began April 17, 1975. Defines sexual offenses (Subchapter "E," 1641-6) and includes obscenity and solicitation in defined disorderly conduct (Subchapter "G," 1861 a(3) and (6).

Arizona

Homosexual Marriage — AB 2024, by James Skelly and Donna Carlson, passed by House 37-3, referred to Senate Committee on Natural Resources. Prohibits same-sex marriage.

Colorado

Four Bills Killed — HBs 1363 (child custody), 1428 (housing), 1429 (employment), 1430 (public accomodations). See Vol. 1 #1 of the SLR.

Credit — HB 1427 (SLR Vol. 1 #1) passed by Assembly 42-18. Senate vote expected in late May. Includes affectional or sexual orientation in statute prohibiting credit discrimination.

Connecticut

Discrimination — SB 1607, passed by Senate 23-11, defeated by Assembly 87-60. Would have added phrase "sexual orientation" to existing anti-discrimination statutes.

California

Tax & Singles — AB 6, by Cline, referred to Revenue and Taxation Committee. Allows single persons to figure taxes at same rate as married couples.

SB 43, by Roberti, referred to Revenue and Taxation Committee. Companion bill to AB 6.

SB 240 by Marks, referred to Revenue and Taxation Committee. Identical to SB 43.

Credit — AB 181, by Berman et al, referred to Judiciary Committee. Would prohibit denial of credit to any person based on marital status.

Cautionary Instructions — AB 194, by McAlister, referred to Criminal Justice Committee. Prohibits cautionary instructions to juries in sexual assault cases.

Obscenity — AB 407, by Berman, passed by Assembly and referred to Senate Judiciary Committee and reported to Senate floor. Awaiting full senate vote. Exempts employees from prosecution for exhibition of obscene material.

California

Sex Tabloids — AB 1482, by Wilson et al, referred to Criminal Justice Committee. Defines new categories of "offensive sexual matter" and prohibits vending such matter within 1½ miles of schools.

Obscenity — SB 128, by Marks, referred to Senate Judiciary Committee. Companion bill to AB 407.

Sodomy — AB 489, by Brown, passed by Assembly and Senate and signed by Governor Brown. Decriminalizes private sexual activity between consenting adults.

Employment — AB 633, by Foran, reported out of Labor Relations Committee to Ways and Means and placed on "inactive" file. Would amend Labor Code to prohibit discrimination on basis of sexual orientation.

Victimless Crimes — AB 642, by Meade, referred to Criminal Justice Committee. Would allow dismissals in certain sex offenses where no injury to person or property is demonstrated.

Teachers — AB 820, by Berman, referred to Education Committee. Requires dismissal of teacher for immoral conduct be based on relation of such conduct to teacher's fitness to teach.

AB 1071, by Berman, reported out of Education Committee to Ways and Means. Authorizes, rather than requires, dismissal of teacher for sexual offenses.

AB 1248, by Alatorre, referred to Criminal Justice Committee. Provides for credentialing of teachers convicted of sexual offenses.

Housing — AB 890, by Chacon, reported out of Committee on Housing and Community Development to Ways and Means. Would extend protection of Rumsford Fair Housing Act to bases of sex and marital status.

Child Abuse — AB 1063, by Robinson, passed by Assembly and referred to Senate Judiciary Committee. Adds probation officers to persons required to report cases of suspected sexual and other abuse of children.

"Quickie" Marriage — AB 554, by Burke, passed by Assembly 47-19 and referred to Senate Judiciary Committee. Would repeal exemption from health certification requirement of persons claiming previous cohabitation.

Paternity — AB 1185, by McAllister, referred to Judiciary Committee. Would give judges in paternity cases discretion in excluding or admitting evidence of blood tests showing the possibility of the alleged father's paternity.

Massage — SB 242, by Whetmore, referred to Judiciary Committee. Would prohibit administration, in massage parlor, of massage to person of opposite sex.

Lewd Conduct — SB 513, by Moscone, referred to Judiciary Committee. Would repeal section 647 (a) of the penal code prohibiting the soliciting or engaging in lewd conduct in a public place.

Rape — SB 574, by Robbins, received "do pass" recommendations from Judiciary and Revenue and Taxation Committees and is awaiting vote of the full Senate. Would require imprisonment of rapists upon second conviction, and eliminate cautionary instructions to juries in such cases.

Venereal Disease — SB 575, by Robbins, referred to Finance Committee. Would require free examination for venereal disease of victims of sexual assaults.

Minors' Contraception — SB 395, by Beilenson, passed by Senate 22-16 and referred to Assembly Health and Welfare Committee. Would allow minors to receive medical care related to prevention or treatment of pregnancy without parental consent.

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BOOK REVIEWS & ARTICLES...

Living together and the law: two books deal with cohabitation awareness

Since living together without being married is no longer unusual, two publishers have issued books on the subject with almost the same names.

While both books deal with the same aspects of people living together — debts, communal property, renting, child custody, credit, insurance, employment, etc. — the one by Massey and Warner is better designed and thus easier to read.

Sex, Living Together and The Law, by Carmen Massey and Ralph Warner, 187 pp. Nolo Press, $4.95.

Cohabitation Handbook, Living Together and The Law by Morgana King, 177 pp. Ten Speed Press, $3.95.

The authors write differently. Massey and Warner, in their larger book, write simply and without reference to court cases. King riddles his book with court cases and citations, goes further into defining legal terms and sounds more authoritative.

King writes his book based on California law — his court cases are from California — with annotations wherever there are legal differences in New York. At the end he has a chapter on legalities and illegalities in all 50 states, including some comments.

Massey and Warner provide elaborate tables on how different states deal with sex laws, common law marriage, no fault divorce and interstate succession. The table on Interstate Succession: What Happens to Your Property If You Die Without a Will is quite extensive.

The *Cohabitation Handbook* is designed only for heterosexual couples. *Sex, Living Together and The Law* has a short chapter on gay couples and says in the first page of the Introduction:

"Much of what follows is oriented to two persons of the opposite sex. But gay couples and persons living in groups will find that a great deal of the information is also relevant to them."

"There are few written laws on the subject," writes King. "Most of the law has been developed in the courts. But court-made law is often ambiguous and is subject to sudden refinements and modifications by other courts. So what little law there is can change like the wind. Accordingly, living together is in a twilight zone, uncertain at best, with few strings, few protections and few obligations."

As a result, much of what the two books say is mostly common sense, but of the kind that surfaces only with a keen awareness of this state of living. And along with providing some valuable legal information, creating this awareness is the purpose of both books.

The following is a list of articles which would be of interest to SLR subscribers.

Cross Examination of Rape Victims, Georgia Law Review, Vol. 8, pp. 973-83, Summer, 1974.

Survey of Iowa Law, Drake Law Review, Vol. 24, pp. 105-84, Fall, 1974.

The Constitutionality of Laws Forbidding Private Homosexual Conduct, Michigan Law Review, Vol. 72, pp. 1613-37, August, 1974.

Borass: A Warning to Industry and Land Developers? Houston Law Review, Vol. 12, pp. 253-62, October, 1974.

Constitutional Law — Zoning — Local zoning Ordinance Excluding More Than Two Unrelated Persons From Occupancy of Single Family Homes Held Not Violative of 14th Amendment, Equal Protection or Due Process of Law — Village of Belle Terre v. Borass, Villanova Law Review, Vol. 19, pp. 819-3], May 1974.

Doe v. Planned Parenthood Association of Utah: The Constitutional Right of Minors to Obtain Contraceptives Without Parental Consent, Utah Law Review, 1974, pp. 433-43, Summer, 1974.

Village of Belle Terre v. Borass: A "Sanctuary for People," University of San Francisco Law Review, Vol. 9, pp. 391-414, Fall, 1974.

Zoning: Village of Belle Terre v. Borass — A Reaffirmation and Strengthening of the Police Power, Capitol University Law Review, Vol. 4, pp. 156-67, 1975.

Affects of Extending the Homestead Exemption to Single Adults, Baylor Law Review, Vol. 26, pp. 658-70, Fall, 1974.

Civilizing Our Sex Laws, T. of Social Problems TL, Vol. 13, pp. 106-12, July, 1974.

Exclusionary Zoning: For Whom Does The Belle Terre Toll, California Western Law Review, Vol. 11, pp. 85-116, Fall, 1974.

Victimless Crime, Social Work, Vol. 19, pp. 406-411, July, 1974.

Homosexual Legal Rights, Editorial Research Reports, Vol. 1, pp. 183-200, March, 1974.

Psychological Study of Sex Offenders: Causes, Treatment, Prognosis, Police Law Quarterly, Vol. 3, pp. 5-31, January, 1974.

Victimless Crimes: The Case Against Continued Enforcement, Journal of Police Science and Administration, Vol. 1, pp. 401-408, December, 1973.

Transsexuals' Legal Considerations, Archives of Sexual Behavior, Vol. 3, pp. 33-50, January, 1974.

Roe and Paris: Does Privacy Have a Principle? Stanford Law Review, Vol. 26, pp. 1161-1190, May, 1974.

An Exploratory Study of 500 Sex Offenders, Criminal Justice and Behavior, Vol. 1, pp. 13-20, March, 1974.

Last Minority? With Little Fanfare More Firms Accept Homosexual Employees; Gay Activism Prompts Shift in Hiring, Wall Street Journal, Vol. 184, p. 1, July, 1974.

Victimless Crimes — The Case for Continued Enforcement, by Edward M. Davis, Journal of Police Science and Administration, Vol. 1, pp. 11-20, March, 1973.

A new procedures code questions sex registration

A new Criminal Procedures Code is being proposed in California, and a staff draft of the new code notes that, "Probably the most controversial change would be the repeal of Penal Code Sections 290 and 290.5 relating to the registration of sexual offenders."

The registration of sex offenders has come under attack lately as "cruel and unusual punishment" by sexual civil rights advocates.

"These (Penal Code) revisions," said introductory notes by the staff, "were originally designed to assist in the prevention and investigation of sex crimes.

"In this respect registration is outmoded by the availability of computerized information systems concerning the modus operandi of offenders, such as PATRIC — Pattern Recognition and Information Correlation developed by the Los Angeles Police Department."

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The great American heresy: Being single and paying for it

"It is heresy in America to embrace any way of life except as half a couple," wrote Erica Jong in "The Fear of Flying." "Solitude is un-American."

One correction: When she speaks of "half a couple," she should have said "half of a married couple."

There are in the United States today more than 45 million single people over the age of 18, and they feel the brunt, economically as well as socially, of this American heresy.

If you look at tax laws, hiring policies (especially of large corporations), insurance rate structures, housing rentals, credit policies and adoption and child placement regulations, as well as social attitudes, you will understand why many single people consider themselves as second-class citizens.

Erica Jong aptly sums up the way official America characterizes single people: "selfish." But this self-serving image, used to justify inequities, no longer has as widespread appeal as it used to, mainly because the population of single people is growing rapidly.

The reasons: that still legendary post-World War II baby boom, the high divorce rate, longer life for people resulting in more widows and widowers, and a modern lifestyle of remaining single, a lifestyle that includes co-habitation rather than marriage.

(A few census figures: The divorce rate in America increased 80 percent between 1960 and 1972; the number of adults who have never been married rose from an estimated 12.9 million in 1960 to 16.2 million in 1970, and the number of families headed by women rose from 4,225,000 in 1955 to 6,607,000 in 1973. And of the 6,607,000, five million are run by single, divorced or widowed women.)

As a result, the protest of single people angry at the inequities they face, especially under federal and state tax laws, is growing too. Bills to remove tax penalties single people pay each year are in congressional committees in the House and Senate, and similar legislation has been introduced in many states.

While it is unlikely any will pass this year, support for them increases annually. In Washington, a group known as COST, the Committee of Single Taxpayers, is organizing the singles tax movement nationwide.

In a table sent out to individuals and groups (including gay organizations in a move to capitalize on the growing gay movement) COST estimates the federal government takes up to 20 percent more taxes from a single person than it does from a married person.

For example, a married person making $10,000 in taxable income pays $1,820 in federal taxes; a single person pays $2,090 — $270 more, a difference COST calls a penalty.

To many single people, the tax laws are attempting to regulate morality.

"I would like to say that there has been a great deal of talk in the Congress, both in the House and the Senate about taxation relating to the morals of the people of the United States," said Vivien Kellems in testimony before the House Ways and Means Committee in 1972.

"Taxation is for one purpose only, to raise revenue for the legitimate functions of the government. I believe that the people of this country are perfectly capable of taking care of their morals whether they are married or single."

Kellems, who died a few months ago, started the whole singles tax movement back in the late 1950s. Not only was she a driving force, but she was bitingly articulate.

"Is it a reasonable classification (for income tax purposes) when a woman loses her husband, her taxes go up immediately?" she once told a congressional committee in one of her many effective ways of telescoping this tax injustice.

Anyone interested in getting involved in this fight should contact COST, 1628 21st St., N.W., Washington, D.C., 20009; phone (202) 387-2678.

IN THE COURTS continued

'Lewd is obscene,' porno theater loses its appeal

"Various dictionaries define lewdness as the quality or state of being lewd, sexually unchaste or licentious, lascivious or obscene.

"From above it can be clearly seen that lewd and obscene are synonymous. Indeed, we believe that this is the generally understood meaning of the term. For us to say that the showing of obscene films does not fall within the meaning of 'lewdness' would require us to ignore reality."

The court then held "that the term 'lewdness' as used in the Public Nuisance Act is limited to those types of patently offensive depictions or descriptions of hard core sexual conduct given as examples in *Miller v. California.*"

Colorado court sanctions 'gross sexual imposition'

The Supreme Court of Colorado has ruled that "obvious physiological differences" justify the enactment of a statute which limits the crime of "gross sexual imposition" to males.

In *People v. Gould,* 532 P. 2d 955 (March 17, 1975), the defendant claimed he was denied equal protection because there is no similar legislation protecting males against femmes.

The statute which follows the one on rape in the state penal code says: "Any male who has sexual intercourse with a female person not his spouse commits gross sexual imposition if (a) he compels her to submit by any threat less than those set forth (under "Rape") but of sufficient consequence reasonably calculated to overcome resistance . . ."

The court said such a statute being limited to males is not arbitrary.

Curse words not obscene

The Supreme Court of Ohio has ruled that the words "motherfucker" and "pigs" are not obscene when used in outbursts toward police officers during confrontations.

In City of Columbus v. Fraley, 324 N.E. 2d 735, the court cited four cases in dismissing the charges, two of which also involved the city of Columbus.

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed. 2d 418 (1971) ("Fuck the draft"), *Hess v. Indiana,* 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed. 2d 303 (1973) ("We'll take the fucking street later"), *Columbus v. Williams,* 36 Ohio St. 2d 7, 302 N.E. 2d 582 (1973) and *Columbus v. Schwarzwalder,* 39 Ohio St. 2d 61, 313 N.E. 2d 798 (1974).

More court news page 19

LEGISLATION

continued

Massachusetts

Private Sexual Acts — H 2944 (SLR Vol. 1 #1) by Frank, referred to Judiciary Committee and taken under study there. Will not be reported out this session.

Discrimination — H 2848 (SLR Vol. 1 #1) reported favorably to House by Commerce and Labor Committee.

H 2849 (SLR Vol. 1 #1) redrafted and renumbered by Committee on Public Service and reported out favorably as H 5868. Passed by House and sent to Senate.

S 272, by Hall, companion bill to H 2848. Passed by Senate.

Solicitation — H 3535, by Cusak, referred to Judiciary Committee. Establishes criminal penalty for solicitation of unlawful sexual act.

H 3694, by Melia, referred to Judiciary Committee. Increases penalty for soliciting for a prostitute.

H 3696, by Orlandi, referred to Judiciary Committee. Establishes mandatory jail sentence for solicitation of illicit sexual intercourse.

Minnesota

Discrimination — HF 536, by Tomlinson, passed by Judiciary Committee, defeated by House 68-50. Would have added phrase "affectional or sexual preference" to existing anti-discrimination statutes.

Rape and Sodomy — HF 654, passed by house 105-22 on May 7, 1975. Defines four degrees of sexual assault and imposes maximum sentences of 5-20 years. Eliminates cautionary instructions to juries. Limits evidence of victim's previous sexual conduct. Repeals statutes outlawing acts of sodomy between consenting adults.

Nebraska

Rape and Sodomy — LB 23, introduced Jan. 9, 1975 by Sen Barnett, passed 37-0 on April 8. Sections decriminalizing consensual sodomy deleted. Redefines rape as "sexual assault," establishes three degrees of sexual assault with varying penalties, bars evidence of victim's prior sexual activity.

New York

Sodomy — A 1220 (SLR Vol. 1 #1) still pending.

S 731 (SLR Vol. 1 #1) still pending.

Discrimination — A 3211 (SLR Vol. 1 #1) still pending.

Oregon

Discrimination — HB 2288, by Committee on Ways and Means, amended by Committee on Human Resources, defeated by House on April 30 by 30-29 vote. (Required constitutional majority of 31 to pass.) Would have prohibited discrimination in public employment on basis of sexual orientation.

HB 2637, by Vera Katz and 15 others, stalled in House State and Federal Affairs Committee. Would add sexual orientation and marital status to existing statutes prohibiting discrimination in employment, housing and public accomodations.

Texas

Sodomy — HB 759, by Rep. Craig Washington. Would decriminalize consensual sodomy.

Wisconsin

Omnibus Sex Bill — AB 269, by Lloyd Barbee and David Clarenbach, referred to Judiciary Committee. Would repeal prohibitions against all consensual sex acts, homosexual marriages, obscenity, abortion, prostitution, incest and contraceptive sales. Reduces age of consent to 14.

Discrimination — AB 209, an open housing bill, referred to Judiciary Committee. Amendment by Clarenbach prohibits discirmination on basis of sexual preference.

AB 358, a public accomodations bill, referred to Judiciary Committee. Amendment by Clarenbach to extend anti-discrimination protection on the basis of sexual preference; defeated in committee.

Cities

Duluth

Discrimination — Proposed City Ordinance (SLR Vol. 1 #1) still pending.

Minneapolis

Discrimination — City Ordinance adopted by City Council March 29, 1974, adds "affectional or sexual preference to the bases on which discrimination is prohibited in employment, union membership, housing, education, public accomodation, etc.

Philadelphia

Discrimination — Bill #1275, by Boyle and Durham April 18, 1975, referred to Committee on Law and Government. Would ban discrimination in employment, housing and public accomodation on basis of sexual orientation.

New York City

Discrimination — Intro 554, by O'Dwyer and 15 others, referred to General Welfare Committee. Would add sexual orientation to general anti-discrimination code.

Madison

Discrimination — An amendment to Municipal Equal Opportunities Ordinance, unanimously accepted Mar. 11, 1975. Adds sexual orientation to statutes prohibiting discrimination in housing, employment and public accomodations. Establishes penalties for violations.

Ithaca

Equal Opportunity — A bill, by Gay People's Center, referred favorably to Charter and Ordinance Committee, 10-2. Would require equal opportunity for gays in employment, housing, education and public accomodations.

Sex reform in California: Brown bill signed, but opponents seek referendum

The new California sex reform bill, already signed by Gov. Jerry Brown, should have wide repercussions throughout the state. That is, if a referendum move to kill the bill doesn't succeed.

Taken out of the penal code by the Willie Brown bill, named after the assemblyman who had introduced this and similar bills since 1969, are sections outlawing adulterous cohabitation, sodomy and oral copulation.

The bill isn't effective until Jan. 1, 1976, but Sen. H. L. Richardson, a right wing Republican, and the Los Angeles Police Department are trying to collect 312,000 signatures of registered voters to put the bill before the electorate next year, probably in June, 1976.

If the referendum does go on the ballot, the law would not take effect until after the election. It would have its greatest impact on homosexuals in California.

With sodomy and oral copulation statutes on the books, gay people have lost jobs and the custody of their children because judges and employers, mostly public agencies and governmental bodies, assumed gay people were criminals since most homosexual acts are illegal.

The new law decriminalizes those sex acts and, in effect, homosexuality.

It keeps sodomy and oral copulation in the penal code only when those acts are committed with a minor, in prison or by force, violence, duress or threat of bodily harm. Sodomy would also be illegal if committed with an animal.

The bill is silent with respect to sodomy or oral copulation in public. Thus, felony arrests or oral copulation in public would disappear and such arrests would be made, instead, for lewd conduct, which is a misdemeanor.

Police will have to use other laws in their harassment of pornographic filmmakers, who often are arrested for conspiracy to commit sodomy and oral copulation; actors and actresses in pornos have also been charged with sodomy and oral copulation as well as conspiracy.

Even though private acts of sodomy and oral copulation between consenting adults may be decriminalized next year, sexual solicitation for such acts will continue to be illegal in California. A bill in the State Senate to repeal the solicitation statute doesn't seem to have a chance of passing.

While the Brown bill passed handily in the Assembly, the vote in the Senate was 20-20, and Lt. Gov. Mervyn Dymally had to break the tie. This close victory in the Senate appears to have doomed any other legislation favoring homosexuals. As a result of the controversy over the Brown bill's passage, some rather conservative sexual provisions have been added to the Senate's proposed revision of the penal code.

If the Brown bill does go before the electorate next year, the election campaign will involve a loud and major debate on homosexuality in the country's largest state — a debate that will obviously capture the attention of the nation and, however the voting may turn out, affect gay legislation throughout the country.

A judge vowed to "smash the system" and started his own sexual revolution:

"Sex is simply a biological fact. It is as much so as the appetite for food. Like the appetite for food, it is neither legal nor illegal, moral nor immoral. To bring Sex under the jurisdiction of law and authority is as impossible as to bring food hunger under such jurisdiction.

"That is why, when the law and the prescribed custom run counter to desires which are in themselves natural and normal, people refuse to recognize the authority of law and custom and secretly give their often ill-considered desires the right of way. This they will continue to do until Sex can be presented to them in another light, with law and authority as completely eliminated as it is in the case, say, of gluttony."

Judge Ben J. Lindsey of Denver was one of the most controversial judges of the century. In the early 1900s his constant attacks on the "establishment" made him a perennial election year target, but he perservered, never bowing to tradition, custom or pressure. A review of his career, the significance of his life and a summary of his widely publicized sex views during the 1920s will be in the next issue of the SLR.

Sex offenders seek castration, which is legal in California

Castration is legal in California, but two convicted sex offenders who want to be castrated to avoid prison terms were having trouble finding a physician to do the operation.

A surgeon who had agreed to remove their testicle and prostrate tubes backed down at the last minute because of a future malpractice suit. The attorney for the two sex offenders, Robert Browne, reportedly had found a San Francisco surgeon who would do the job.

San Diego Superior Court Judge Douglas R. Woodworth approved the surgery originally. The name of the San Francisco surgeon was scheduled to be submitted to him for approval on May 29.

The two sex offenders, Robert de la Haye and Joseph Kenner, both 45-year-old laborers, stirred up a storm when they sought castration.

Into the raging debate stepped a retired judge, John A. Hewicker, who said at least 250 court-ordered castrations were carried out in San Diego during the 20-year period he served on the bench. He retired in 1970.

"The sidewalks are full of guys who ought to be castrated for society's good and their own," he said on May 16. But "the Catholic Church and the psychiatrists oppose it and the damned doctors won't do it."

But the malpractice strike in California threw a monkey wrench into the castration plans.

Up until 1970, castrations had been common in California. In Pasadena in the 1930s, for example, a judge routinely ordered castration for homosexuals and sex deviates.

But a legal opinion in 1970 from the Attorney General's Office ended the practice when it said castration at the request of the defendant should not be used as a basis for parole or lighter sentences.

The law, however, is on the books, and San Diego has a judge who isn't afraid to approve of castration.

IN THE COURTS continued

'University deprived gay students of their rights'

The University of New Hampshire, a state university, deprived gay students of their civil rights when it prohibited the Gay Students Organization (GSO) from holding social functions on campus, ruled the U.S. Court of Appeals for the First Circuit.

When the university's trustees halted GSO social activities on campus, the GSO filed suit in U.S. District Court for the District of New Hampshire and won.

But the trustees appealed.

In University of New Hampshire v. Bonner, 509 F. 2d 652 (Dec. 30, 1974), the First Circuit Court of Appeals agreed that the First Amendment protected the GSO's right of assembly.

To the argument by the university that it had an interest in preventing illegal activity, such as "deviate" sex acts, the court pointed out no such acts took place at a dance which the GSO did hold in November, 1973.

"The ban was not justified by any misconduct attributable to GSO, and it was altogether too sweeping."

Obscenity conviction no basis for theater license revocation

Because the exhibition of motion pictures is an activity protected by the First Amendment, a license to operate a theater in Minnesota may not be revoked on the basis of an individual's past conviction for exhibiting obscene material.

The Minnesota Supreme Court, in *Alexander v. City of St. Paul* (Feb. 28, 1975) _____N.W. 2d_____, ruled that revocation of a theater's license on these grounds "is an unconstitutional prior restraint of free speech and is in violation of the First and Fourteenth Amendments to the U.S. Constitution."

The court thereby reversed the decision of the district court which had, itself, reviewed and upheld action taken by the City Council under St. Paul Legislative Code 372.04 (G).

This case grew out of the arrest of a previously convicted ticket taker at Alexander's "Flick" Theater.

Restroom scan ruled legal

Police surveillance of the open area of a men's restroom in a public park does not constitute an illegal search, ruled the Court of Appeals of North Carolina.

Therefore, it said in *State v. Jarrell,* 211 S.E. 2d 837 (Feb. 19, 1975), the observing officer's testimony and photographs of an act of oral copulation were admissible at trial. And the conviction of the two defendants was upheld.

It rejected the defendants' reliance on People v. Triggs, 8 Cal. 3d 884, 106 Cal. Rptr. 408, 506 P. 2d 232 (1973), a California case in which surveillance was held illegal where the setting was a doorless stall.

Two other cases, involving enclosed stalls, which the North Carolina Court did admit "might ordinarily be understood to afford some degree of personal privacy to an individual occupant," were rejected: *State v. Bryant,* 287 Minn. 205, 177 N.W. 2d 800 (1970) and *contra Smayda v. United States,* 352 F. 2d. 251 (9th Cir. 1965), cert. denied 382 U.S. 981, 86 S.Ct. 555, 15 L.Ed. 2d 471 (1966).

California Supreme Court again evades sex issues

The California Supreme Court, in a 7-2 decision, refused to grant a petition for a hearing in *People v. Reeves,* First District Court of Appeal #12437, Jan. 22, 1975.

(This important case was reported in Vol. 1 #1 of the SLR, on page 9, in a story on how judges evade constitutional questions in sex cases.)

The appellant, David Reeves, had been convicted of sodomizing and orally copulating a 19-year-old. The Court of Appeal dismissed the constitutional arguments raised by Reeves' attorney, Earl Stokes, but granted a reversal of the conviction on trial errors and prosecutorial misconduct.

Stokes then petitioned the Supreme Court for a hearing on dismissing the charges on constitutional grounds rather than reversing them, which means Reeves could be tried again.

The Supreme Court twice delayed making a decision on the petition, indicating it might accept it. But on May 1, 1975, it refused the case. Dissenting were Justices Mosk and Tobriner.

It has been common practice for the Supreme Court to refuse to hear constitutional arguments against the state's oral copulation and sodomy statutes. While those laws were removed as of Jan. 1, 1976, as a result of the Willie Brown bill, a referendum move could repeal the new legislation and throw the constitutional questions back to the courts, which have not been anxious to consider them.

Fellatio is carnal knowledge

In a case involving an adult male and a 10-year-old female, the Court of Appeals of Washington has ruled that carnal knowledge need not include sexual intercourse — and that fellatio is an act of carnal knowledge under the state's sodomy statute.

"Every person . . . who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge . . . shall be guilty of sodomy . . .," says the statute, 9.79.100.

In *State v. Sawyer,* 532 P. 2d. 654 (Feb. 21, 1975), the defendant was charged with sodomy (compelling "a female of the age of 10 years to carnally know him . . . with the mouth or tongue"). His claim that carnal knowledge requires vaginal penetration was rejected by the court.

FOOTNOTES continued

"It is also our view," he went on, "that it would be extremely difficult to develop a legally sustainable pre-employment standard which permits direct inquiry into the exclusively private consensual sexual conduct of applicants in view of the serious invasion of privacy problems . . ."

And Pines maintained his opinion is valid even though current law prohibits sodomy and oral copulation, sex acts homosexuals engage in. The opinion came just after the State Legislature handed Davis another defeat by decriminalizing those sex acts.

* * *

By a 7-0 vote, the Ohio Supreme Court struck down cross-dressing ordinances in several Ohio cities, ruling that they are so vague they violate the 14th Amendment requirement of due process.

Communication gap in SexuaLaw: No more languishing

(This is an update of a story that introduced the first issue of the SLR.)

There is so much happening today in the field of sexual reform, but without a reliable means of communication few people really know what's going on. Activists themselves are ignorant of many important developments across the country.

How do lawyers in New York and Los Angeles, for example, learn that they may be working on similar cases and could benefit from each other's experience and research?

What lawyers have the time to check out sexual court cases throughout the country, many of which are unpublished?

And if someone gets wind of something of interest to him or her — be they attorneys, psychologists, doctors, sociologists, organizers, etc. — where do they look for more detailed information?

Some professionals in the field belong to an organization like the National Committee on Sexual Civil Liberties. But while such a committee has been a valuable means of communications among many activists at diverse ends of the continent, it was more like a grapevine than a line of communication.

That is why some committee members suggested more than a year ago that someone publish a SexuaLawReporter. The idea was a good one, but who was going to put together a network of people who would do the necessary but painstaking work of reporting on all the news?

So the idea languished . . . until a few people realized that someone had to do something about this communications gap without any more delays, even if the initial effort wasn't going to be as comprehensive as desired.

So the SexuaLawReporter is out!

In the first issue, March/April, we noted two deficiencies: a disproportionate California emphasis and a sexual category imbalance, with gay news dominating. These have been corrected in this second issue, which also gives expanded coverage to both court cases and sex legislation throughout the country.

On the boards are plans for special features, such as the column on legal strategy which will appear in the third issue, August/September. We shall look into sexual problem areas (rape, prostitution and discriminatory enforcement of sex laws in the upcoming issue) and look back into history as well as sound out experts on such sensitive questions as how to make the judiciary less timid and more responsive, a report now being prepared.

Most of what we publish we hope will be useful information — perhaps finding an important case to cite in a lawsuit; spotting a national trend in legislation; learning how other lawyers deal with difficult cases, and where various segments of society, especially professionals and politicians, stand on key sexual issues.

The SexuaLawReporter is also designed to be a forum for anyone who has something important to say or share with other people in the same field of interest. We, of course, welcome comments and suggestions, and as we continue to investigate new ideas we shall, at times, survey our readership on their reactions.

Child custody dilemma continued

acts may be inappropriate and may be approaching desuetude, if such is the case, does not argue that society accepts homosexuality as a pattern to which children should be exposed in their most formative and impressionable years or as an example that should be put before them for emulation," said the California Court of Appeals in upholding the lower court's decision.

But the Chaffin children, old enough to know with whom they prefer to live, couldn't stand living with bitter grandparents. By running away just before the State Supreme Court refused to hear the case any further, they set the stage for a modification hearing, in which another probation officer highly recommended Ms. Chaffin as a parent.

The grandparents by this time realized they had no real claim on the children, and they didn't appear at the hearing. Thus, the Chaffin family is together again.

(For further information on this important case, contact Cheryl Bratman, a law student intern for attorney Elena Ackel, 1800 West Sixth St., Los Angeles, 90057, (213) 483-1937. Ackle handled the appeal and the modification move for the American Civil Liberties Union.)

A new procedures code continued

The draft of the new Criminal Procedure Code has been published. It will eventually be proposed as a bill in the Senate by Sen. David Roberti, chairman of the Joint Legislative Committee for Revision of the Penal Code.

Critical comments should be directed to Senator Roberti, at his offices in Los Angeles and Sacramento, or to Maurice H. Oppenheim, project director, 107 South Broadway, Los Angeles, 90012.

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SEXUALAWREPORTER

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Rape & prostitution

"Recent studies I conducted at Atascadero State Hospital (California) with convicted rapists supported the legal double standard. They felt it was a male's right to solicit or harass women on the streets, but women who protected themselves verbally or were outside alone at night were 'whores'."

Dr. Jennifer James, assistant professor of psychiatry and behavioral sciences, U of Washington, in a court deposition December, 1974.

The focus in rape shifts, but the myths still exist

With a suddeness that must have startled even the most ardent feminists, focus in rape cases has spun around from protection of defendants' rights to the justification of violent, sometimes deadly, response against the attacker by the victim.

Though some may welcome it, feminists certainly did not set ut to provoke such violent reactions. Rather, their attempt .ias been to explode the myths concerning rape, to show it as a terrifying, violent assault rather than merely "unwanted sex."

After Inez Garcia was convicted in California for murdering the man she claims helped another man rape her, attorney Charles Garry wrote in his brief to the First District Court of Appeal:

"People think of rape as only a sexual act because they extrapolate from their own experience of normal sex, failing to take into account the serious danger, and reality, of physical harm generally facing the rape victims. In fact, the rapists' motives involve feelings of domination . . . Rape is a power trip — an act of aggression and an act of contempt — and in most cases is only secondarily sexual."

Garry quoted extensively from psychiatric journals (more than a dozen are listed in his table of authorities) to show that nearly all rapes are crimes wherein the major factors are not merely "unwanted sex" but: terror, physical force or injury or the threat of same, actual physical assault (the act of rape) and, finally, humiliation, degradation and shame.

This four-fold assault on the psyche may very well make rape the most violent of violent crimes, and the response, now that women are being conditioned to react rather than to hide, is likely to be more and more violence.

In the light of this probability, as well as Garry's contention that both judge and jurors in the Garcia case were prejudiced against rape victims, his argument before the Court of Appeal could become a major turning point in the way American courts deal with the issue of rape.

"The trial judge presided at the trial . . . soon after the women's liberation movement turned its attention to the problem of rape. The result was a packed courtroom . . . news

☐ continued on page 31

Benign indifference vs. biased indignation

Rape and prostitution are not solely sex crimes; in fact, not even primarily.

As is noted in the accompanying story on rape, women are not usually raped because they are desired sexually, but rather because in trying to assert a desperate need to dominate, a rapist uses sex as an instrument of power.

In prostitution (here meaning heterosexual prostitution), the sex act itself would not be a crime, except in states where adultery and fornication are outlawed — and such statutes are hardly ever enforced. What makes prostitution a crime is not sex but the money that is paid for sex.

How can that be in the world's foremost free enterprise society, where often wasteful and questionable products and projects are welcomed and promoted because they provide business with profits and workers with jobs?

In California this year, when the new consensual sex act was written and later amended, decriminalizing sodomy, oral copulation and adulterous cohabitation, the idea of including prostitution in the bill was rejected outright. The bill had enough trouble passing; with prostitution included, it would have undoubtedly failed.

Commercial sex seems to rub Americans more sorely than any form of private consensual sex, except maybe sex with minors. Why?

Feminists argue that prostitution is one means among many, in a male dominated society, designed to oppress women; and prostitution laws give society the option to crack down on prostitutes whenever it feels like it.

In fact, women, rather than male clients, are chiefly the victims of such police enforcement. Furthermore, when women go to jail for prostitution, they suffer more than most people probably suspect.

☐ continued on page 29

UPCOMING . . .

PSYCHIATRY . . . plays an important role in commiting sex offenders, but psychiatrists have been under a broad attack in dealing with the mentally ill. Are sex offenders mentally ill? What criteria do psychiatrists use?

CONTINUING . . . stories on prostitution, sex laws, rape, etc., started in this issue. Has a new approach toward skirting the law, by calling prostitutes sex therapists, backfired? A raid in San Francisco has brought prostitution into a new spotlight, with new supporters.

ANNUAL INDEX . . . is being prepared for SLR subscribers.

LEGAL STRATEGY...

Indecent conduct case has good vagueness, First Amendment issues

(In this first column of a new, regular feature, we have a case in which a person convicted in a Municipal Court of "indecent conduct" could have sought further legal remedies if he didn't accept Minnesota's unique lenient sentencing provision. The arguments an attorney could use — plus precedents — are outlined in this strategy discussion.)

THE CASE: Defendant, a 30-year-old man, was walking in an area of Minneapolis frequented by gays — a block from the apartment into which he was moving — at about 10:30 on a summer evening.

Two boys, 11 and 13, were sitting on a raised parking lot stoop as the man approached. He began conversing with them when one of the boys said they "were out to get someone." To the man's question about what the expression meant, the boys said they wanted oral sex.

"I could do that," responded the defendant.

"How much are you willing to pay?" queried the boy.

"How much do you charge?"

"Five dollars."

"I don't pay anything," replied the man, who turned away and started talking to a male adult nearby when a police car drove up. One officer asked him what he was doing there. "Just walking," the man said.

"Well, why don't you beat it?" ordered the officer, and he walked away.

After the two officers got out of the car and talked briefly to the two boys, the defendant was half a block away when one of the officers ran up to him and made an arrest.

Because minors were involved, the prosecutor refused to reduce the charge to vagrancy or disorderly conduct. (The defendant had originally been charged with sodomy, in addition to indecent conduct, but the sodomy was dropped before arraignment.)

A motion to dismiss — because the defense attorney contended the city's indecent conduct ordinance was unconstitutional — was rejected by the judge. Two arguments were made, one for vagueness and the other for violating the defendant's freedom of speech.

In rejecting the vagueness argument, the judge cited *State v. Ray,* 292 Minn. 104, 193 N.W. 2d 315(1971). As to the second, the judge held the accused's speech was conduct and thus not protected by the First Amendment.

THE TRIAL: At the request of the defense attorney the witnesses were sequestered and, as a result, a number of discrepancies in their testimony, especially that of the two boys, stood out, including an admission that no solicitation on the part of the defendant ever took place.

However, the accused was convicted by the court (there being no jury right in Municipal Court), presumably for simply stating, "I could do that." Given the sentence, a unique provision under Minnesota law allowing for no jail served and the record of the charge expunged after a year, the defendant decided not to appeal to District Court, where he would have had the right to a jury trial.

STRATEGY: Nothwithstanding the outcome of the motion to dismiss, there were, in fact, vagueness and First Amendment issues present — issues which could have been raised before the District Court and, if after a jury conviction to an appellate court. See an excellent discussion of U.S. Supreme Court cases in Rutzick, "Offensive Language and the Evolution of First Amendment Protection," 9 Harv.Civ.Rts. — Civ.Lib.L.Rev. (Jan., 1974).

While ideally a person's First Amendment rights and the standard burden of proof ought not be suspended or altered simply because minors were present, as a practical matter the "tender years" element had an effect on the outcome of the case.

In an earlier District Court case, to cite a related circumstance, in which a male defendant had asked an undercover female police officer, "How about a blow job?", the Court dismissed the charge of indecent conduct because "this ordinance is unconstitutional on its face in violation of the First and Fourteenth Amendments to the U.S. Constitution on the grounds that it is vague in that it does not give fair notice to the public as to what speech is prohibited, it fosters arbitrary and discriminatory enforcement, it inhibits freedom of speech, and it is overly broad in that (two sections other than those applied to the case above) are susceptible of application to free speech."

And, finally, the attorney should raise the question of whether a solicitation involving a homosexual is a cause for action. Constitutional arguments of unequal protection or discriminatory enforcement could be pursued here. Do police make arrests for heterosexual solicitations? What is the history of the enforcement of the indecent conduct statute? The article on discriminatory enforcement in this issue explains the requirements for making such a defense.

—R. Michael Wetherbee

Supplemental magazine: manuscripts welcomed

The SexuaLawReporter is now making plans to publish an annual supplement.

In making these plans, as well as planning our coverage in the newsletter, we invite experts and interested parties in the field of sexual law and related fields to submit manuscripts and suggestions.

Feature articles for the newsletter cannot be longer than four pages double spaced. Longer articles may be submitted for inclusion in the annual supplement, which will be distributed free of charge to subscribers and also sold independently.

One important note, however. Everyone who works on the SexuaLawReporter does so without pay. At this stage in the SLR's development we cannot pay anyone for submitting articles.

But the newsletter is getting more and more attention throughout the country and provides an excellent forum for discussing sexual law. Queries are welcomed. Further information on plans for the supplement will be in future issues.

IN THE COURTS...

Lewd, obscene or indecent: vague last year; now clear when sodomized

The District of Columbia Court of Appeals, which last year found vague and therefore unconstitutional a clause in a statute proscribing "any lewd, obscene or indecent act," has now ruled that a similar clause applying "lewd, obscene and indecent" to a "sexual proposal" is constitutionally clear and valid.

In *District of Columbia v. Garcia, Hilliard and Lehmann,* 335 A.2d 217 (April 1, 1975), the court said that when "lewd, obscene and indecent" are added to the words "sexual proposal," the three adjectives which were vague last year become "clearly distinguishable in terms of constitutional clarity and validity."

The Court's reasoning doesn't get any clearer when it says:

"In contradistinction to the clause of Section 22-1112(a) ('any other lewd, obscene or indecent act') which this court declared unconstitutionally vague in *District of Columbia v. Walters* 319 A.2d 332 (1974) the words 'lewd,' 'obscene' and 'indecent' in the clause at issue here are joined with the term 'sexual proposal,' thereby providing a definite context in which the words can be given meaning."

What becomes clear further on is that the court is disturbed by the act of sodomy. In these three cases, the same plainclothes officer of the Prostitution and Perversion Branch of the Metropolitan Police Department's Moral Division was approached with a verbal suggestion to commit sodomy by the three appellants.

"We conclude that of the various forms of sexual conduct prohibited by the District of Columbia Code, only sodomy, indecent exposure, and indecent sexual acts with children can reasonably be deemed 'lewd, obscene or indecent.' The sexual proposal clause of Section 22-1112(a) can thus be fairly construed to proscribe only proposals to commit sodomy, indecent exposure or, in the case of sexual proposals addressed to children, to perform some sexual act, and is not so vague as to amount to a deprivation of due process of law."

The court characterized those acts as "offenses which focus on the nature of the sexual act or overture itself, proscribing sexual conduct on the outer reaches of immorality which is unnatural and perverted."

Won't consider adultery, but still takes child away

In a ruling which acknowledges that "the district court is not required to deny a parent custody of a child whenever it finds that the parent has had an adulterous affair," the Court of Appeals of North Carolina on May 7 nevertheless upheld the lower court's denial of primary custody to the mother of an eight-year-old boy.

The record contained evidence that the mother had sexual relations with various men, including a current affair. The court awarded primary custody to the child's maternal grandmother, with whom he had lived for most of the three years prior to the proceedings in In re Custody of Edwards, N.C., 214 S.E.2d 215(1975).

3 dissent to upholding 'crime against nature'

With three dissents, the Louisiana Supreme Court has ruled that R.S. 14:89, defining and setting penalties for the "crime against nature" is not unconstitutionally vague.

"These words all have a well defined, well understood and generally accepted meaning, i.e. any and all carnal copulation or sexual joining and coition that is devious and abnormal because it is contrary to natural traits and/or instincts intended by nature, and therefore does not conform to the order maintained by nature," said the majority in *State v. Lindsey*, La., 310 So.2d 89 (1975).

Justice Barnham argued in his dissent that the statute is "patently unconstitutional for the reasons assigned by the U.S. Supreme Court in Miller v. California, 413 U.S. 15. The statute lacks the requisite specificity and fails to make clear exactly what acts are criminally prohibited."

Furthermore, he said, the statute "violates that fundamental right to privacy enunciated by the Supreme Court in *Griswold v. Connecticut.*"

Rape victim's sex life not relevant evidence

A rape victim's past sexual conduct — and the question of her resistance — were among the issues raised in *State v. Geer,* Wash. App., 533 P.2d 389 (1975).

"There is ample authority in Washington to support the proposition that specific acts of sexual misconduct on the part of the prosecutrix are inadmissible in rape cases, as such evidence bears on neither the question of consent or credibility," said the Court of Appeals of Washington on March 26.

While recognizing that "there may exist the extraordinary case in which evidence of specific acts of misconduct might be so highly relevant and material that it should be admitted," the court here ruled against receiving evidence relating to the victim's having lived with a man not her husband — and having illegitimate children.

The defendant in this case had forcibly entered the home of the victim with whom he had been acquainted for some years. Conversation took place prior to his advances and her resistance, but the fact that a knife was held to the victim's forehead clearly invalidated his contention that the act of intercourse was consensual, ruled the court.

Innocuous blurbs don't make books redeeming

Twenty-five publications, which included titles like "The Teeny Suckers" and "The Animal Lovers," were found to be obscene by the Appellate Court of Illinois after a Cook County Circuit Court had previously ruled they were "constitutionally protected."

In City of Chicago v. Allen, 327 N.E.2d 414 (Feb. 6, 1975), the court said that "the inclusion of some innocuous educational, literary, historical or sociological text" did not endow the publications with "redeeming social value."

☐ More court news, page 24

...IN THE COURTS

continued

Cunnilingus, no, but assault and battery, yes

A man who satisfied himself by forcing a woman at knife-point to spread her legs and let him commit cunnilingus has been granted habeus corpus relief because the U.S. Court of Appeals for the Sixth Circuit held that Tennessee's "crimes against nature" statute is not applicable to cunnilingus.

The court remanded the case, *Locke v. Rose,* 6th Circuit, April 4, 1975, with a note that it may be deemed appropriate to initiate a prosecution for aggravated assault and battery.

Tennessee's "crimes against nature" statute has been found in previous court decisions to apply to sodomy and fellatio. A majority of the Tennessee Court of Criminal Appeals (501 S.W.2d 826) had upheld the appellant's conviction because "it would be a paradox of legal construction" to include fellatio and exclude cunnilingus.

The U.S. Court of Appeals said applying the law to cunnilingus is a violation of due process in that it does not give "fair warning" to cunnilingus practitioners.

Halleck's prostitution ruling is struck down

Finding that the District of Columbia's soliciting for prostitution statute does not violate First Amendment free speech rights or the right of privacy, the D.C. Court of Appeals in *U.S. v. Moses,* 17 CrLawRptr 225 (May 22, 1975) reversed Superior Court Judge Charles Halleck's 1972 decision that found the statute unconstitutional.

Halleck's exhaustive opinion, one of the most famous in the field of sexual law, also found that the law was discriminatorily enforced.

The DC Court of Appeals said soliciting is not protected by the First Amendment because while it is speech, it is "a straight forward business proposal" which does not enjoy constitutional protection. Commercial speech, it argued, is subject to reasonable regulation.

As to discriminatory enforcement, the court ruled there was insufficient evidence for such a finding.

Mother's amoral lifestyle limits visitation rights

The "amoral lifestyle" of a non-custodial mother was one of the grounds cited by the Third Circuit Court of Appeal of Louisiana for limiting her visitation rights in *Lawson v. Lawson,* La. App., 311 So.2d 624(1975).

Under the original divorce decree, the children's father has been awarded custody. The trial court found the mother unfit because of a series of extra-marital affairs, but it granted her visitation rights up to 80 days a year, including certain weekends, holidays, birthdays and summer vacation periods.

The Court of Appeal on April 21 curtailed those visitation rights, with the mother's amoral lifestyle a contributing factor.

'Peeping Tom' law is valid: 'males justly singled out'

Mississippi's "Peeping Tom" statute is not unconstitutional because it applies only to males, ruled the state's Supreme Court.

(Says the statute: "Any male person who enters upon real property . . . and thereafter prys or peeps through a window . . . for lewd, licentious and indecent purpose of spying upon the occupants . . . shall be guilty of a felonious trespass . . .")

In Golden v. State, Miss., 311 So.2d 350 (April 21, 1975), the court cited Green v. State, 270 So. 2d 695 (1972), in which it had ruled that the statute does not violate the Equal Protection clause despite being limited to males.

Because "lewd, licentious and indecent spying may afford the opportunity to plot the commission of rape or other sex crimes," and because females are physically incapable of committing rape, "there exists rational justification for singling out males for punishment" as "Peeping Toms," the court said.

Topless go-go dancers not in public's welfare

The Court of Appeals of Arizona has upheld a state liquor regulation which prohibits licensees from employing "any person as an entertainer or in the sale or service of alcoholic beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the areola of the female breast or any portion of his or her pubic hair, anus, cleft of the buttocks, vulva or genitals."

In Langbridge Investment Co. v. Moore, 533 P.2d 564(1975), the Court on March 4 said: "The very nature of the (liquor) industry and its unique effect upon the health and welfare of the public subjects it to strict regulation."

Prior rape convictions ruled admissible evidence

Convictions on two counts of "lewd and lascivious acts" were reversed by the Court of Appeals of Arizona, in *State v. Valdez,* 534 P.2d 449(1975), while affirming the defendant's conviction of rape.

Where the sexual assault included the defendant's rubbing his penis on the victim's buttocks and splashing water on her vagina, the appellate court found on April 24 that these acts were not "unnatural" and therefore not included as offenses under a statute that required a "lewd and lascivious" act be committed in an "unnatural manner."

The rape conviction was upheld despite the defendant's objection to the admission of evidence regarding prior convictions for rape and lewd and lascivious acts.

"If a prior bad act shows a common plan, scheme or device and is not too remote in time, such prior bad act is admissible," said the court, which cited *State v. McFarlin,* 110 Ariz. 225, 517 P.2d 87(1973).

☐ More court news, page 30

Discriminatory enforcement of sex laws: You need to show intentional bias

(Part I of this article will be limited to a discussion of the discriminatory enforcement of sex laws within the context of criminal prosecution.)

Since the case of *Yick Wo v. Hopkins* (1886) 118 U.S. 356, both state and federal courts have considered the availability of the defense of discriminatory enforcement of the law.

Many persons who are unfamiliar with case law seem to think that a mere showing of "selective enforcement" satisfies the defendants' burden of proof in establishing the defense.

But the U.S. Supreme Court in *Oyler v. Bowles* (1962 368 U.S. 448, 456), has determined that there are *three* aspects to the defense that must be established:

(1) Selective enforcement of the law; (2) that such enforcement is intentional on the part of the police and not merely by chance, and (3) that the reason for such a method of law enforcement is based on an arbitrary or unreasonable classification.

The defense of discriminatory enforcement is one which has most often been used by persons claiming to be a target of police, proseeutorial or governmental harassment, e.g. racial minorities, leftwing activists or protesters.

To cite a few court cases: *U.S. v. Steele* (9th Cir., 1972) 461 F.2d 1148, in which the defendant was prosecuted for advocating resistance to the census; *People v. Harris* (1960) 182 Cal.App.2d Supp. 837, in which the defendants claimed that gambling laws were being enforced only against blacks; *U.S. v. Falk* (7th Cir., 1973) 479 F.2d 616, in which the defendant was prosecuted for draft resistance; *U.S. v. Berrigan* (3rd Cir., 1973) 482 F.2d 171, which involved interfering with the selective service, and *U.S. v. Banks,* (W.D.So.Dak., 1973) 368 F.Supp. 1245, which involved the prosecution for occupation of Wounded Knee.

It has only been in recent times that the defense has been raised within the context of sexually oriented cases.

Women have claimed that prostitution laws are enforced in a discriminatory way against them. Studies in Los Angeles, San Francisco and other cities have demonstrated that heterosexual males (the clients) are virtually never arrested or prosecuted. It is usually the female prostitute or the homosexual hustler who are arrested.

This issue was raised in the case of *U.S. v. Moses* back in 1972 before Judge Halleck in the District of Columbia Superior Court.

The defendants made a motion to dismiss based upon discriminatory enforcement of the law. They presented testimony which showed that the DC statute was used almost exclusively against women. Judge Halleck granted the motion to dismiss and the prosecution appealed.

On May 22, 1975, the DC Court of Appeals reversed Halleck and held there was insufficient evidence to warrant a finding of discriminatory enforcement. See *U.S. v. Moses* 17 CrLawRptr 2225.

Discriminatory enforcement of the law has been raised as a defense in recent years in several prosecutions for violations of Section 647(a) of the California Penal Code, which prohibits soliciting or engaging in lewd or dissolute conduct.

Most of those cases have been in Los Angeles Municipal Court, and all have been unsuccessful so far, mainly because of the difficulty in developing the type of proof necessary to convince a judge of police harassment against homosexuals.

The judges seem unwilling to allow defendants to use pre-trial discovery procedures to help develop statistics to prove the defense. Therefore, efforts have been made to develop such statistics by independent searches of court records.

A study in 1973, and an update in 1974, by then law students and later attorneys Barry Copilow and Thomas Coleman found that Section 647(a) was enforced by the Los Angeles Police Department almost exclusively against homosexual males; heterosexual males were virtually never arrested.

The SexuaLawReporter, through its special projects staff, has recently completed a study of 685 arrests and prosecutions of this same statute in Los Angeles from January through June, 1974. The pattern of unequal enforcement, revealed through a computer analysis, still exists.

With this data now available, attorneys can (1) show selective enforcement and (2) draw the inference that such discrimination is intentional and not merely coincidental.

Testimony by vice squad officials would also show that the policy of using only male decoys to enforce the statute increases the percentage of homosexuals arrested. Whether the decision to arrest homosexuals rather than heterosexuals is arbitrary or unreasonable needs further review, but it would seem a judge could so conclude.

Successfully raising the issue of discriminatory enforcement in a criminal *trial* is a difficult task. Even if successful, the net result is the dismissal of a single case. Many sexual civil libertarians have concluded that civil remedies are far superior because if an injunction is issued the policies of a police department can be entirely changed.

In April, 1975, Alameda Superior Judge Spurgeon Avakian issued a preliminary injunction prohibiting enforcement of the prostitution laws in Oakland on a discriminatory basis. That injunction is now on appeal. See Page 1 story.

(Part II of this series in the next issue will review in detail such civil remedies.) —**Thomas Coleman**

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

California Senate passes Penal Code revision

On a vote of 23/3 the California Senate recently passed and sent to the Assembly Criminal Justice Committee a bill revising the 102 year old Penal Code. S.B. 565 would, among other things, repeal existing sexual laws and replace them with new provisions. Focusing on the sexual provisions of the bill, it could be labeled as moderate to conservative.

The bill would be consistent with the recent passage of A.B. 489 and would continue the decriminalization of private sexual conduct between consenting adults.

Unlike many jurisdictions which have undergone penal code revision, California's version would retain prohibitions against sexual solicitations. Indecent exposure would remain a misdemeanor with possible punishment of up to six months in jail. The age of consent would be 18 years old, and any sexual conduct with a minor or between minors, would be a felony. Prostitution would continue to be a crime with both prostitute and customer subject to prosecution.

It is expected that the Assembly Criminal Justice Committee will substantially liberalize the sexual provisions when it hears the bill in the Fall.

Congress

Discrimination — HR 166 (SLR Vol. 1 #1), referred to House Judiciary Committee, subcommittee on Civil and Constitutional Rights.

Tax & Singles — HR 850, by Koch, referred to Ways & Means Committee. Would extend to singles tax rate benefits enjoyed by marrieds.

S 149, by Packwood, referred to Senate Finance Committee. Companion bill to HR 850.

Sex offenses — S 1, by McClellan and ten others, referred to Senate Judiciary Committee, subcommittee on Criminal Laws and Procedures, where current hearings began April 17, 1975. Defines sexual offenses (Subchapter "E," 1641-6) and includes obscenity and solicitation in defined disorderly conduct (Subchapter "G," 1861 a(3) and (6).

California

Tax & Singles — AB6, by Cline, passed 2nd hearing in Revenue and Taxation Committee and held under submission. Would allow single persons to figure taxes at same rate as married couples.

SB43, by Roberti, companion bill to AB6, retained in Revenue and Taxation Committee and subject matter referred to Rules Committee for assignment to appropriate committee.

SB240, by Marks, identical to SB43, pending hearing in Revenue and Taxation Committee.

Credit — AB 181, by Berman et al, passed 2nd reading, amended by author and awaiting 3rd reading. Would prohibit denial of credit on basis of marital status.

Cautionary Instructions — AB194, by McAllister, referred to Judiciary Committee from Criminal Justice Committee. Prohibits cautionary instructions to juries in rape cases.

Obscenity — AB407, by Berman, awaiting 3rd reading in Senate. Exempts employees from prosecution for exhibition of obscene material.

SB128, by Marks, companion bill to AB407, defeated 17-17 by Senate, granted reconsideration at request of author.

"Quickie" Marriage — AB554, by Burke, failed 2nd hearing in Senate Judiciary Committee. Would have repealed exemption from health certification requirement of persons claiming previous cohabitation.

Victimless Crimes — AB642, by meade, held under submission in Criminal Justice Committee. Would allow dismissals in certain sex offenses where no injury to person or property is demonstrated.

Teachers — AB820, by Berman, awaiting hearing in Education Committee. Requires that dismissal of teacher for immoral conduct be based on relation of such conduct to teacher's fitness to teach.

AB1071, by Berman, failed first hearing in Ways & Means after being reported out of Education Committee. Would have authorized, rather than required, dismissal of teachers for sexual offenses.

AB1248, by Alatorre, referred from Criminal Justice to Judiciary Committee. Provides for credentialing of teachers convicted of sex offenses.

Housing — AB890, by Chacon, failed in Ways and Means Committee, granted reconsideration and moved to inactive file at request of author. Would extend protection of Rumsford Fair Housing Act to basis of sex and marital status.

Child Abuse — AB1063, by Robinson, passed by Senate and sent to Governor for signature. Adds probation officers to list of persons required to report cases of suspected sexual and other abuse of children.

Paternity — AB1185, by McAllister, held in Judiciary Committee for interim study. Would give judges in paternity cases discretion in excluding or admitting evidence of blood tests showing the possibility of alleged father's paternity.

Sex Tabloids — AB1482, by Wilson et al, awaiting hearing in Criminal Justice Committee. Defines new categories of "offensive sexual matter" and prohibits vending of such matter within 1½ miles of schools.

Massage — SB242, by Whetmore, still pending in Judiciary Committee, hearing cancelled at author's request. Would prohibit administration, in massage parlor, of massage to person of opposite sex.

Minors' Contraception — SB395, by Beilenson, awaiting 3rd reading in Assembly. Would allow minors to receive medical care related to prevention or treatment of pregnancy without parental consent.

Sexual Solicitation — SB513, by Moscone, referred back to Judiciary from full Senate. Amended by author to decriminalize solicitations to commit "lewd or dissolute conduct" as currently prohibited by section 647(a) of the Penal Code.

Rape — SB574, by Robbins, passed by Senate and referred to Assembly Criminal Justice Committee. Requires imprisonment of rapists upon second conviction, and eliminates cautionary instructions to juries in such cases.

Venereal Disease — SB575, by Robbins, re-referred to Finance Committee. Would require free examination venereal disease, of victims of sexual assaults.

Sex Offenses — SB565, by Roberti, passed Senate 23-3, referred to Assembly Criminal Justice Committee. Penal Code Revision. Prohibits sexual solicitation, indecent exposure, sexual activity with minors, and prostitution.

AB2347, by Briggs, would re-establish prohibitions against sodomy and oral copulation except when committed by man and wife.

Obscene Matter — SB886 by Carpenter, establishes broader definition of "obscene matter" and establishes procedures for local law enforcement agencies to seize and destroy or hold such matter.

Colorado

Credit — HB1427, by McCroskey, defeated by Senate 17-14. Would have included affectional or sexual orientation in statute prohibiting credit discrimination.

ATION...

Sex Offenders — SB12, by Cole, MacManus and Stockton, referred to Judiciary Committee. Deletes sexual assault from list of crimes for which one may be sentenced under Sex Offenders Act, changes receiving center for persons sentenced under the Act from penetentiary to state hospial, reduces from twelve to six months the time for parole eligibility review.

Iowa

Sodomy — Senate Bill by Glenn (Criminal Code Revision package) passed the Senate 37-10 and referred to House for action in 1976. Removes penalties for adult consensual sodomy.

Massachusetts

Solicitation — H3535, by Cusak, passed by Senate, killed by voice vote in House. Would have established criminal penalties for solicitation of unlawful sexual act.

Discrimination — H5868 (formerly H2849) by Committee on Public Service, defeated in Senate. Would have prohibited discrimination on the basis of sexual orientation inpublic employment, housing, public accomodations etc.

Maine

Sex offenses — Criminal Code Revision enacted and signed by Governor, becomes effective March 1, 1976. Chapter on sex offenses prohibits only sexual activity conducted with involuntary partner. Age of consent reduced to 14, prohibition of prostitution and public indecency retained.

Michigan

Sexual Offenses — Report of the Michigan Commission on Criminal Justice, sent to Governor. Recommends repeal of statutes prohibiting adultery, specifically, and those prohibiting sexual activity of any kind between consenting adults, except in public.

Minnesota

Rape & Sodomy — HF654, by Berglin, passed by House, section repealing prohibition of sodomy amended out by Senate. Defines four degrees of sexual assault and imposes maximum sentences of 5-20 years. Eliminates cautionary instructions to juries. Limits evidence of victim's previous sexual conduct.

New Mexico

Sexual Offenses — Criminal Code Revision, signed by Governor. Repeals prohibitions against sexual activity between consenting adults in private.

Oregon

Discrimination — HB2729 introduced, would establish state Office for Affirmative Action. Introduced following failure of bills specifically prohibiting discrimination on basis of affectional or sexual orientation.

Washington

Sex Offenses — Sub. SB2092, Criminal Code Revision, signed by Governor and effective July 1, 1976. Repeals: 9.79.040 (prohibition against) compelling a person to marry, 9.79.070 (prohibition against) seduction, 9.79.100 (prohibition against) sodomy, 9.79.110 (prohibition against) adultery, and 9.79.120 (prohibition against) lewdness (including cohabitation) which are not replaced. Adds: new sections 9A.64.010, prohibiting bigamy, 9A.64.020 prohibiting incest, 9A.88.010 prohibiting public indecency where the perpetrator knows "that such conduct is likely to cause reasonable affront or alarm", 9A.88.020, prohibiting communication with a minor for immoral purposes, and sections 9A.88.030, 050, 060, 070, 080, 090 & 100, dealing with prostitution, including a new crime (9A.88.090) "permitting prostitution."

Rape — HB208, passed, becomes effective September 8, 1975. Allows conviction in the absence of corroboration, victim's testimony. Restricts testimony concerning victim's previous sexual behavior. Establishes three degrees of rape, with maximum and minimum sentences for each. Establishes degrees of statutory rape and keys age of consent to age of oldest actor.

Wisconsin

Omnibus Sex Bill — AB 269, by Lloyd Barbee and David Clarenbach, referred to Judiciary Committee. Would repeal prohibitions against all consensual sex acts, homosexual marriages, obscenity, abortion, prostitution, incest and contraceptive sales. Reduces age of consent to 14.

Discrimination — AB 209, an open housing bill, referred to Judiciary Committee. Amendment by Clarenbach prohibits discrimination on basis of sexual preference.

AB 358, a public accomodations bill, referred to Judiciary Committee. Amendment by Clarenbach to extend anti-discrimination protection on the basis of sexual preference; defeated in committee.

Texas

Sodomy — HB 759, by Rep. Craig Washington. Would decriminalize consensual sodomy.

CITIES

Los Angeles

Massage — an Ordinance which establishes extensive permit requirements and license fees. Requires Massage Parlors to keep lists of customer names and addresses for inspection by city officials.

Los Angeles (County)

Nudity — Emergency Ordinance, passed by Board of Supervisors, prohibits nudity on public beaches and in public parks.

Philadelphia

Discrimination — Bill #1275, by Boyle and Durham April 18, 1975, referred to Committee on Law and Government. Would ban discrimination in employment, housing and public accomodation on basis of sexual orientation.

BOOK REVIEWS & ARTICLES...

How far out of the dark is Tennessee's proposed 'deviate' sex reforms?

Although this article is primarily an analysis of the reform proposals set out in the proposed Criminal Code of the Tennessee Law Revision Commission, it should be of general interest to the SLR readers because (1) the Tennessee experience is typical of many jurisdictions and (2) Johnson examines, in rather catalogue fashion, the constitutional arguments against regulating sexual behavior.

Crimes Against Nature in Tennessee: Out of the Dark and Into the Light? by Victor S. Johnson, III, Memphis State University Law Review, 5:319-55, 1975.

The code's most important reform is the complete decriminalization of consensual "deviant" (sic) sexual intercourse.

Unlike the Texas Penal Code, upon which this Tennessee version is modeled, consensual homosexual acts are not retained in the code as misdemeanors. However, as is revealed in Section 39-1307, Sexual Abuse of a Child, the proposed code is not a sweeping liberal reform.

"Deviate" sexual intercourse would not be permitted with any child under the age of 16 unless the consenting parties are within three years of age of each other. And "deviate" sexual intercourse is absolutely forbidden with a child under 12.

But this section seems to permit, by the earlier section's definition of "deviate," heterosexual child abuse.

If, as the author states, the "effect of the draft is to foster personal privacy, yet to condemn sexual violence," either he apparently failed to examine adequately the language of the proposed code or heterosexual violence against children is covered elsewhere in the code.

That the author is quick to announce the liberal effects of the proposed statute is evident by his stressing that sexual violence between spouses, including those merely cohabitating, is specifically exempted by the proposed code.

Mr. Johnson ventures no guess as to whether homosexual couples would be included as those who cohabitate, or, in other words, whether this section of the "reform" would give gay couples the right to abuse one another with impunity because of the spousal relationship.

While well-intentioned, the article fails to analyze adequately the negative aspects of the proposed code. The present Tennessee law is, indeed, a "legal relic" that should be reformed, but the proposed code also has serious drawbacks.

Although this reviewer has not been overly impressed by the article, its second half, listing and briefly describing the constitutional arguments against regulating sexual behavior, will be useful, especially for litigating attorneys.

—David Repogle

ACLU's guidebook on gay rights provides answers for lay people and lawyers

This ACLU paperback — like other ACLU rights books dealing with the rights of reporters, mental patients, prisoners, servicemen, teachers, students, women, criminal suspects, the poor and hospital patients — is certainly worth buying.

It treats the subject of gay rights in a lay, readable form, yet provides legal citations for the benefit of lawyers. Although not entirely up to date (which is understandable given the fluidity of the subject matter), the book examines gay rights in these areas:

Free speech and associations; equal employment; licenses; equality in the military service, including military and non-military security clearances; immigration and naturalization; housing and public accomodations; family affairs, including marriage and children; and criminal laws. It deals also with the rights of transvestites and transsexuals.

The Rights of Gay People by the American Civil Liberties Union (ACLU), Avon Books, 250 W. 55th St., N.Y., N.Y., 10019.

Basically a reference work called a guidebook, the book's question and answer format allows the reader to quickly obtain answers to the most frequently asked inquiries about gay people's legal problems — answers buttressed by legal citations for those who wish primary sources on the book's conclusions.

For example: The chapter of gay families flatly answers "No!" in response to the question, "Are gay marriages now recognized by any state?; but then it proceeds to discuss at length the legal arguments that have been made on the issue before various courts.

In the same chapter is a discussion of the "do's and don'ts" of ensuring gay familial rights by private contract as well as an excellent section on gay parents' rights to custody and visitation of their children. The remainder of the book is equally insightful and well done.

NOTES: Gays and the Feds; Buffalo Law Review

A bicentennial conference on Gays and the Federal Government will be held from Friday, October 10, through Monday, October 13, in the nation's capitol. For information on registration, housing and the various panels and speakers, write: Bicentennial Conference, GAA/DC, Box 2554, Washington, DC 20013.

* * *

The Fall 1975 issue of the *Buffalo Law Review* will be devoted exclusively to gay law. Send full length articles or case & comments (before September 1st) to Gay Rights issue, *Buffalo Law Review*, Lord O'Brian Hall, Amherst Campus/SUNY, Buffalo, NY 14260.

continued

Benign indifference vs. biased indignation

"In Oakland," noted Alameda Superior Court Judge Spurgeon Avakian in April, "the basic picture that emerges from the record is that in male-female prostitution, the woman is generally arrested and quarantined for a period of one to four days, and is tested for venereal disease and treated (if the test is positive) before being released on bail.

"The man is not detained. He is permitted to go his own way and at most is given a citation which does not involve booking, fingerprinting, or bail, much less quarantine; nor does he attract the attention of the public or his family and friends which often attends the arrest and quarantine procedure."

Judge Avakian issued a preliminary injunction in April "prohibiting enforcement of the prostitution laws in Oakland (against street-walkers) on a discriminatory basis." This civil complaint for declaratory judgment and injunctive relief was filed more than a year previously by the American Civil Liberties Union.

The Alameda County District Attorney has appealed the preliminary injunction. A hearing was held on June 12, and a decision is expected soon. But whether the injunction is upheld or dissolved, the court battle will continue when both sides argue constitutional questions during a trial for a permanent injunction.

"Prostitution, often described as the oldest profession, is deemed to be inevitable," the judge commented further in his Memorandum of Decision. "And, in the privacy of male circles, at least, that is often thought to be a good thing. Men who get caught patronizing prostitutes are treated with benign indifference. But there are indignant voices which cannot be ignored, so there have to be some arrests, and prosecution, and fines and even short jail terms. Hardly anyone expects these measures to be effective. This has been the historical experience.

"Recently, however, the demand for equal rights for women has focused attention on this disparity at the specific level of law enforcement activity. This lawsuit is but one of many around the country in which courts are being asked to apply the equal protection clauses of federal and state constitutions to the enforcement of laws regulating sexual behavior.

"The traditional practices do not survive this scrutiny. The plain, unvarnished fact is that men and women engaged in proscribed sexual behavior are not treated equally."

As to the price a woman pays as a prostitute, Dr. Jennifer James, assistant professor of psychiatry and behavioral sciences at the University of Washington, wrote in one of her many articles on the subject:

"Prostitutes once arrested usually plead guilty and are subject to sentences from 30 to 180 days in jail. Various jurisdictions allow shorter sentences and utilize probation, but the usual penalties for prostitution are greater than those for either shoplifting, larceny or assault."

In a deposition made December, 1974, in the Oakland civil complaint, Dr. James deals with the abuse and injury resulting from prostitution statutes:

"The jail terms meted out to prostitutes, who are essentially involved in a crime without a complainant, contribute to the permanent degradation of the woman. She is labeled, arrested and incarcerated for verbal exchange. The label not only adds to the social burden already borne by the prostitute but forces her deeper into the profession the criminal justice system claims to be forcing her out of. Once arrested and given a criminal record, it becomes difficult to find a legitimate profession . . . In England, studies after the decriminalization of prostitution indicated the women left the profession earlier and with more success once the criminal label was removed.

"The jail environment provides additional abuse in the exposure of women, particularly young women, to serious criminal modus operandi and drugs. Our research into prostitution and heroin addiction produced substantial evidence of introduction to narcotics in the jail environment. In addition, a review of prison commitment for women notes up to 70 percent of the women currently incarcerated for felonies were first arrested as prostitutes."

The official police view of prostitution, as exemplified in this excerpt from a deposition by Lt. Elwood Strelo, head of the Oakland vice control division, is openly biased towards women and generous to male customers.

"Before discussing prostitution enforcement further, it is necessary to make a distinction. The prostitute, male or female *(overwhelmingly female: editor),* is usually a recidivist, always a professional criminal, profiting from committing illicit sexual acts, who frequently assumes a false identity and frequently moves from city to city, having no roots in any community, and by reason of his or her profession is extremely promiscuous.

"The customer or would-be customer is not in the business of committing crime for profit; is less promiscuous; is

☐ continued on page 31

The other crime problem accompanying prostitution

One of the reasons police give for cracking down on prostitution, especially streetwalkers, is that other crimes, mainly robbery and assault, accompany prostitution.

"I personally have observed in the City of Oakland that where prostitution starts in an area, the narcotics traffic increases rapidly," explained Lt. Elwood Strelo, head of Oakland's vice control division. "Robberies increase in direct proportion to the increased prostitution activity, and crimes of violence, including violations of Sections 245 Penal Code (assault with a deadly weapon) and 187 Penal Code (murder) increase."

But Lieutenant Strelo didn't provide Judge Avakian, who had issued a preliminary injunction halting enforcement of the prostitution laws, with any statistics on crime increases in the West MacArthur Blvd. neighborhood where prostitutes hang out.

There are, however, other opinions about ancillary crimes accompanying prostitution.

In 1971, the San Francisco Crime Commission pointed out: "... society's effort to prevent crimes of violence associated with prostitution would be more effective by concentrating law enforcement efforts on the pimps rather than on the girls, on the 'associated crimes' rather than prostitution."

And Judge Charles Halleck, in his famous decision dismissing prostitution charges in the District of Columbia because of discriminatory enforcement, said:

"To arrest and criminally prosecute a prostitute because of a possibility that crime-related activity might be involved directly or indirectly is massively antithetical to traditional concepts of due process, equal protection and individual liberty."

... IN THE COURTS

continued

Parents have no right to make child sterile

The Court of Appeals of Indiana has ruled that "the common law attributes of the parent-child relationship" do not include the parent's right to obtain sterilization surgery for the child, where the "sole purpose (of the proposed vasectomy) is to prevent the capability of fathering children."

The mother of a 15-year-old brain-damaged boy had been denied a declaratory judgment of her right to authorize the sterilization in *A.L. v. G.R.H.,* Ind., 324 N.E.2d. 501 (1975).

In affirming the decision of the lower court, the Court of Appeals on April 16 cited In Interest of M.K.R., Mo., 515 S.W.2d 467(1974) and In re Kemp's Estate, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64(1974), "where the courts of Missouri and California held that their respective juvenile statutes making general provision for the welfare of children were insufficient to confer jurisdiction to authorize the sterilization of retarded girls in the absence of specific sterilization legislation."

Nudity not obscene, but outlawed in bars

A municipal ordinance in Omaha which attempts to "control (i.e. prohibit) nudity as a technique in selling liquor" is fulfilling "a legitimate object," ruled the Nebraska Supreme Court.

In *Midtown Palace v. City of Omaha,* 229 N.W.2d 56, the High Court on May 15 cited *Paladino v. City of Omaha,* 471 F.2d 812, 8th Cir., to affirm the rule that the 21st Amendment, which repealed prohibition, authorizes proscription of "sexually oriented performances, not otherwise obscene or illegal, in establishments which it licenses to sell liquor by the drink."

The appeal, seeking a declaratory judgment voiding the ordinance, was based on the plaintiff's reference to a recent statute providing that "no municipality, county, or other governmental unit within the state shall make any law, ordinance or other regulation relating to obscenity . . ."

But the Court said that "nudity and obscenity are not synonymous" — and that the ordinance does not violate the statute which reserves control of obscenity to the state.

Court finds 'lewd' clear: eager for sexual indulgence

In *Martin v. State,* Okla. Cr., 534 P.2d 685(1975), the Court of Criminal Appeals of Oklahoma has ruled that neither the words "lewdly" or the phrase "private parts" is unconstitutionally vague. Both terms are used in the Indecent Exposure Statute, 21 O.S. 1971, Section 1021(1).

The court on April 16 cited Rich v. State, Okl. Cr., 266 P.2d 476, in which "lewd" was defined as "an unlawful indulgence in lust: eager for sexual indulgence."

Law Review articles of special interest

Ameliorative Sex Classification and the Equal Protection Clause. Washburn Law Journal; 14:127-33, Winter 75.

Corporation Law — Discretionary Granting of Nonprofit Charters. U of Toledo Law Review; 6:237-52, Fall 74.

Corporations — First Amendment Rights. Akron Law Review; 8:375-82, Winter 75.

Emerging Bifurcated Standard for Classifications Based on Sex. Duke Law Journal; 163-87, March 75.

Equal Protection or Equal Denial? Is It Time for Racial Minorities, the Poor, Women and other Oppressed People to Regroup? I. S. Reid. Hofstra Law Review; 3:1-36, Winter 75.

Escape from Prison, Defenses, Duress, Homosexual Attacks. Akron Law Review; 8:352-9, Winter 75.

Gay Students Organization v. Bonner (367 F Supp 1088): Expressive Conduct and First Amendment Protection. Maine Law Review; 26:397-414, 1974.

Homosexual's Legal Dilemma. Arkansas Law Review; 27:687-721, Winter 73.

Incest Offenses and Alcoholism. M. Virkkunen. Medical Science and Law; 14:124-8, April 74.

Kahn v. Shevin (94 SupCt 1734)—Sex: a Less-Than-Suspect Classification. U of Pittsburgh Law Review; 36:584-601, Winter 74.

Marriage Rights, Homosexuals and Transsexuals. Akron Law Review; 8:369-74, Winter 75.

Recent Developments in the Area of Sex-based Discrimination — the Courts, the Congress and the Constitution. New York Law Forum: 20-359-80, Fall 74.

Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause. Hastings Constitutional Law Quarterly; 2:153-785 — Winter 75.

Demon Rum & The Dirty Dance: Reconsidering Government Regulation of Live Sex Entertainment After California v. LaRue. Wisconsin Law Review; 1:161-91, 1975.

The daring judge of yesteryear and a responsive judiciary today

The review of the career of Judge Ben J. Lindsey of Denver, noted sex reformer in the early 1900s, had to be put off until the next issue of the SLR because of space limitations.

In an age when judges, especially lower court judges, are afraid to take any initiatives in the area of sexual law, Judge Lindsey's daring moves on and off the bench perhaps provide some instruction on how to make the judiciary more responsive.

His career, in any case, was a startling one. His constant attacks on the "establishment" made him a perennial election year target, but he persevered, never bowing to tradition, custom or pressure.

And against his career, we shall look at two judges who faced the difficulties of bucking the conservative judicial establishment when they sought office for the first time. One in fact, ran into heavy fire from the police when he got on the bench.

Both are friends, in varying degrees, of sexual reformers.

continued

The focus in rape shifts, but the myths still exist

coverage and political agitation around the case. Irritated because this was not just another trial, and totally lacking both insight into what rape is like and any real understanding for the victim, he was visibly annoyed that the issue of rape kept complicating the trial."

One of the mostly middle-aged jurors referred to the defendant as "scum" in the jury room and another dismissed the entire question of the alleged rape as an instance of a man "just trying to give a girl a good time."

Garry had come into the courtroom well prepared to deal with these attitudes.

A psychiatrist with 30 years' practice was prepared to discuss published research showing why most rape victims fail to report the fact of rape even when reporting the assault in general, but the court prevented her from doing so.

A Ph.D student who had taught a course in the field of rape and rape victims and who had trained police officers in the subject was prepared to testify about the traumatic effect of rape upon its victims, about how long the effects last, but her testimony was excluded.

"The jury had to decide if there was a rape, depending largely on its evaluation of appellant's actions and statements. It had to decide whether the alleged rape was adequate provocation for appellant to have acted from the heat of passion. It had to decide how the 'reasonable person' responds to such an attack and whether the 'cooling period' was sufficient to dissipate a 'reasonable person's' heat of passion. It had to decide whether the trauma of rape could trigger a state of unconsciousness or diminished capacity in appellant. Finally, it had to evaluate the significance, if any, of appellant's failure to tell the police she had actually been raped."

And the jury had to decide all this, Garry noted, in the absence of expert testimony, after the judge's many remarks that the fact of rape was "irrelevant," and in the light of all the popular misconceptions about rape — that the victim "asks for it," that the victim "enjoys it," that a truly unwilling victim "cannot be raped," and that rape is only perpetuated on persons of low moral character; all myths that Garry cites and which the feminist movement has been fighting, apparently without much success yet.

Garry's appeal now invites a ruling on these questions.

—Jack Holloway

(More on rape in upcoming issues.)

Function of rape: Keeping women in their place

"Rapists perform for sexist males the same function that the Ku Klux Klan performed for racist whites; they keep women in their 'place' through fear. The threat of rape is used to keep women out of jobs — for example, the Pittsburgh Post Gazette *has used this as a reason not to hire women reporters; it is used to keep women off the streets at night (unless they are telephone operators or nurses); it keeps women passive for fear they will be thought provocative."*

Psychologist Dr. Jo-Ann Evans Gardner
in **Sexist Justice** by Karen DeCrow,
Random House, 1973.

• Attorney on Joan Little's jury

A 25 year old white attorney is one of 12 jurors, 5 black and 7 white, in the trial of Joan Little, 20 year old black woman accused of murdering a night jailer she claims tried to rape her on April 24, 1974 in Bauford County Jail, North Carolina.

To the state's case that Little killed Clarence Alligood in an escape attempt, defense attorneys Jerry Paul and Karen Galloway said they are going to prove rape as a defense by: 1) putting prisoners on the stand to testify that guards frequently exchange sexual favors for amenities; 2) producing an autopsy report showing the guard had engaged in sexual activity just before his death, and 3) demonstrating that an ice-pick wound in the jailer's thigh proved that he wasn't wearing any pants when Little stabbed him eleven times.

Indifference vs. indignation continued

frequently not a recidivist offender; is more easily deterred from repeated offenses; rarely, if ever, is armed with a false identity and usually has roots in this or another community."

What Lieutenant Strelo doesn't point out is that a male customer is not a recidivist because he is hardly ever arrested, rarely booked and almost never jailed. Proponents of decriminalizing or legalizing prostitution — there is a difference — note that: (1) male customers are not more easily deterred from repeated offenses, perhaps less easily deterred; (2) female prostitutes are mobile, but they often have roots in some community; (3) female prostitutes are more promiscuous (if that is a proper term in this context) because they are physically capable of having more sex than men; but male customers are indeed quite promiscuous, especially since they run little risk; and (4) Strelo's comparison paints female prostitutes as hardened criminals, which they usually aren't unless they become so because of the jail environment.

(To be continued in the next issue.)

—Joel Tlumak

SEXUALAWREPORTER

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GREAT — as to subste e contents.
SEXIST — as to staff.
SUBSCRIPTION — you have it in the form of my enclosed check !

– RENEE C. HANOVER
Attorney, Chicago

VERDICTS!

. . . It becomes readily apparent that the *SLR* fulfills an especially significant function which ought to be of vital concern to all — that of presenting the sort of in-depth reportage of issues and legislation imperative to sexual law reform. Such information has been, and continues to be, regularly disregarded or suppressed by the commercially focused newspapers.

CARL JOHNSTON
Editor, H.E.L.P. Newsletter

. . . I think the *SLR* is a worthwhile and informative publication — keep up the good work.

– ELAINE NOBLE
State Representative
Commonwealth of Massachusetts

. . . Very impressed by the first issue. Enclosed is a check for a subscription. Thanks for going through the trouble to produce this service.

– PAUL ALBERT
Attorney, San Francisco

. . . Our congratulations on your first issue of the *SexuaLawReporter*. You have approached a subject of great sensitivity in a thoroughly responsible manner, in the tradition of other law reporters. It seems to me that your dedication and professional foray into a delicate field of human activity is in keeping with the highest tradition of the Bar. Your initiative and tenacity are among the fine and nobel virtues of every pioneering effort which has ever led to social change. May your efforts be rewarded within a few short years.

– G. KEITH WISOT
President, Los Angeles County
Public Defenders Association

To receive future issues . . . .

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SEXUALAWREPORTER

Volume One, Number 4 ISSN 0098-2423 OCTOBER / DECEMBER 1975

Crackdowns on female prostitution usually focus on streetwalkers, who are easy police targets. Out in the public, these women are often poor (and Third World), without the protection of influential clients and regarded disparagingly by middle class society. Houses of prostitution and high-priced call girls are less frequently targets of police enforcement of prostitution laws. Operating privately, these women are less vulnerable to police decoys, their clientele is necessarily wealthier and often influential, and within the class structure of prostitution, they are at the privileged top.

The house of 'fine traditions'

Individual arrests of streetwalkers are a daily event in a large city and mostly go unnoticed by the public and the press (See article on streetwalkers at 1 SLR 21). On the other hand, a recent raid on an alleged San Francisco brothel, the *Golden Gate Foundation,* made headlines and was kept in the public eye by the media for nearly two weeks.

Several distinctive factors explain this publicity.

The women arrested are white, middle class, articulate feminists who have been outspoken about their work and police treatment of them during and after the raid. They insist they were engaged not in illegal acts of prostitution but in research and therapy of psycho-sexual problems and explain that:

Each client of the *Foundation* was assigned a numbered file; after he saw and possibly engaged in sexual acts with one of the therapists, a three-page research sheet on him was added to his file, and the staff went through the files weekly to make out a therapy program for clients with an identifiable sexual problem.

The defendants state that they studied psycho-sexuality and learned how to identify and avoid venereal disease. Furthermore, the *Foundation* had obtained a city business tax registratio license.

The media was quick to inform the public that the *Foundation* operated in nostalgic Victorian style, with gilded business cards, "Preservation of Fine Traditions, K.C. Desmond, Executive Planning Director," and was housed in a large, partially restored Victorian building, the downstairs decorated with overstuffed furniture, a roaring fire, huge potted palms, a grand piano and a wooden bar.

There are eight defense lawyers, three of them female (one is a serious candidate for San Francisco District Attorney, running on the promise to curtail the prosecution of victimless crimes), with the American Civil Liberties Union also involved in the case. All of these factors have aroused the public's curiosity as well as concern about the use of tax funds to enforce laws prohibiting the victimless crime of prostitution.

For two months prior to the raid, the vice squad expended enormous resources surveilling the building which bears the sign: Golden Gate Research and Development Foundation. Clients were followed from the house, their names traced through license plate checks and cab drivers, and rental car agencies questioned as part of high-drama detective work.

The investigation climaxed on May 8, 1975, when a vice squad officer called the *Foundation* to make an appointment

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Psychiatric Justice: A 'split personality' within the profession

When the membership of the American Psychiatric Association voted on April 8, 1974 (5,854 *for,* 3,810 *against*) to eliminate homosexuality from its *Manual of Mental Disorders,* the APA provided critics of psychiatry with a clear-cut example of what they might call psychiatric injustices.

For years, critics have assailed the psychiatric profession for equating psychology with medicine. They claim that classifying mental disorders as diseases on a medical model is nonsensical and nonfunctional. In the case of categorizing homosexuality as a mental disorder, the APA had been lined up against a growing number of Americans who believe they are living normal lives.

Yet, when the vote came, no criticism was heard of the profession, at least not publicly. There were only cheers, from gay people, sexual civil libertarians and vocal psychiatrists who had fought for the declassification. The only expression about the strangeness of curing an illness by a vote — Would physicians cure cancer by voting to declassify it as a disease? — was in TIME magazine's heading: "Instant Cure."

What also went unnoticed were the other "sexual deviations" still listed as mental disorders: Fetishism, pedophilia, transvestitism, exhibitionism, voyeurism, sadism and masochism. In light of the cure of homosexuality, the classification of those "deviations" as mental disorders has been seriously questioned.

In fact, the credentials of the psychiatric profession have to be questioned also, just from the APA vote alone. And critics, themselves often psychiatrists, have questioned those credentials on the whole question of treating psychology as medicine.

Here, for example, is one simply-put expression of this criticism by Dr. E. Fuller Torrey from his book, *The Death of Psychiatry:*

"In recent years, the medical metaphor has been used increasingly frequently to describe economic conditions. When unemployment and prices both rise, the economists often

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House of 'fine traditions'

for him and a friend, using the name of an identified client as introduction (having determined that the client was safely out of town). The officers were given an appointment after some hesitation by Kitty Desmond, the alleged madame, and a reminder (which the officers themselves confirm) that, "You're coming over for therapy, you know. We are an emotional therapy research Foundation."

The men were admitted to the house at 8 p.m.; by 9:40 the house was swarming with no less than 18 police officers. Six women were arrested on misdemeanor counts of solicitation for prostitution and/or residing in a "house of ill fame." Desmond was charged with felony counts of solicitation and keeping such a house; and one male was arrested on misdemeanor charges of keeping a house and aiding and counseling another in the commission of a misdemeanor.

What transpired in the *hour and a half* after the two vice squad officers first entered the premises is disputed. The defendants claim each of the two officer clients took two women to upstairs bedrooms and engaged in sexual acts. The police version agrees that the men went upstairs with the women but denies that the officers had sex with them.

One officer, states the police report, left the bedroom several times to "go to the bathroom" or "to make a very important phone call". In fact, in order for Vice Squad Captain Saughnessy to report that "a criminal violation had occurred," he says that he began to remove his clothes but fended off defendants' caresses and was able to avoid intercourse until he was rescued by the sound of the colleagues downstairs, whereupon he identified himself as a police officer to the two women he was with.

The defendants complain of their treatment by the police. Desmond says that the vice squad photographer forced some of the women to pose nude for "official" photographs which have since disappeared from the prosecution's files. Moreover, a client whom the police found nude in an upstairs bedroom with one of the defendants was not arrested — and the police report calls *him* the "victim."

Motions to dismiss were filed by the defense on the grounds that the solicitation statute was discriminatorily enforced by the arrest of the female defendants and the release of the male client. The motion argues that gender alone is an unconstitutional classification for arrest, and, therefore, the statute is unconstitutional as applied in this case.

San Francisco Municipal Court Judge Mary Moran Pajalich wrote, in denying the motion:

Defendants complain of discriminatory enforcement in the arresting of professional prostitutes while not arresting the non-professional customer. The professional prostitute is regarded as the more likely to be assiduous in the practice of that profession, and no unreasonable discrimination can be shown in discouraging by arrests those who are more likely to continue violating the law.

The defense also demurred on the basis that the complaints were uncertain and that on its face the solicitation statute is unconstitutionally vague and overbroad and therefore void. The provision of the statute challenged as vague reads, " 'Prostitution' includes any lewd act between persons for money or other consideration." The defense argues that the term "or other consideration" is vague in that it proscribes both legal and illegal conduct.

Further motions to dismiss contend that the statutes invade defendants' rights of privacy, association and freedom of speech granted by the state constitution and the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution. They claim that all allegedly criminal acts occurred in private, and that it was the "victim" who solicited the defendants over the telephone, resulting, according to *Katz v. United States,* 398 U.S. 347 (1967) in a reasonable expectation of privacy.

Judge Pajalich denied these motions as well, while nearly simultaneously in August, Judge George W. Phillips of the neighboring Alameda County Superior Court, ruled that the California solicitation statute is unconstitutional on its face since the language of the statute is vague and therefore violates due process of law.

. . . A key issue in the Golden Gate case is who solicited whom?

Phillips found that, "The term 'solicit' provides no fixed standard on which the police can base arrests." Thus he severed the solicitation provision from the rest of the prostitution statute. He also ruled that the statute is unconstitutional as applied because it is discriminatorily enforced by the Oakland police against female prostitutes and not their male clients (see 1 SLR 29 for the related order by Judge Avakian). Phillips issued a writ of prohibition, enjoining prosecution of the petitioners for solicitation. The order is now being appealed by the state.

A key issue in the *Golden Gate Foundation* case is who solicited whom.

According to the Avakian order (discussed at 1 SLR 29), police officers engaged in criminal acts such as soliciting prostitution for the purposes of making an arrest are not exempt from the accomplice section of the penal code and may be criminally liable as accomplices. With the Avakian order also on appeal, this issue is certain to be crucial.

The public reaction to the *Foundation* raid overwhelmingly opposed the extravagant use of public funds to prosecute this "crime." In a questionnaire taken in June by the 17th Assembly Republican Council, a conservative district in which the *Foundation* is located, 78 percent of those polled believe the arrest was a waste of time and money.

San Francisco Mayor Joseph Alioto responded to critics: "Any idea that the operation of a bordello is a victimless crime is 'naive.' The potential for blackmail shakedowns and violence in these operations is too well known to merit further elaboration."

The defense counters that if there is blackmailing in this case, it is being done by the prosecution. *Foundation* clients observed entering or leaving the house by the police have been questioned by the district attorney's investigators with at least an implicit threat of embarrassing public exposure for failure to cooperate. The prosecution, on the other hand, views pleas to former clients by the defendants for contributions to their legal defense fund as extortion.

Desmond says that two-thirds of the *Foundation's* clients in fact had problems of impotency or premature ejaculation, and that *Foundation* women attempted to teach each client to know his own body, to communicate about his sexual needs and likes, and to examine, for instance, why he found it necessary to get drunk on each visit and was therefore impotent during his session. *However, when questioned by*

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IN THE COURTS...

A sodomy reversal refuses to regulate consenting sexual conduct

A sodomy conviction has been reversed by New Mexico's Court of Appeals in a decision which specifically refused to regulate sexual conduct between consenting adults.

This decision found that the old sodomy statute in New Mexico had been unconstitutional. The state's new sodomy statute, which limits state regulation to acts in which force or coercion is involved, was labelled constitutional in the majority opinion.

In *State v. Elliot,* _____ P.2d _____, (7/9/75), the court based its decision on "the right to marital privacy" in "sexual practices and family relations" (See *Griswold v. Connecticut)* — and the extension of that privacy right, by way of the Fourteenth Amendment's equal-protection clause, to unmarried, consenting adults (See *Eisenstadt v. Baird*).

"We have found nothing in judicial opinions dealing with sodomy statutes which suggests that a compelling necessity to regulate sexual conduct between consenting adults overcomes this statute's violation of constitutionally-protected rights."

The Court thereby reversed the conviction of the male defendant whose female sexual partner claimed he had raped her and forced acts of sodomy. The jury acquitted Elliot of rape, believing the episode was consensual. However, the old sodomy statute did not include the element of consent, so the sodomy conviction was automatic if the jury believed the acts occurred. ("Whoever commits sodomy is guilty of a third degree felony.")

Neither party raised the issue of the statute's constitutionality, but Judge Sutin (writing for a 2-1 majority) reasoned that "this appeal provides a proper forum" for deciding the issue. Because "consenting adults in New Mexico have not, in practice, been subject to prosecution," he said, they "have no effective way to prevent infringement of their rights by the sodomy statute."

Judge Lopez concurred "in the results only" — while Judge Hendley found the majority's action "at best, a blatant abuse of judicial power." Insisting that the facts of the case do not justify the court's decision, he said "the stretching of the instant case to a discussion of the right to marital privacy is a distortion of the first order."

The state has adopted Hendley's dissent as the basis for its petition for a writ of certiorari, asking that the New Mexico Supreme Court review the Court of Appeals decision.

Right of privacy protects the sale of contraceptives

Reviewing a Wisconsin statute which limits advertising, display, and sale of contraceptive devices, the U.S. District Court (W.D., Wisconsin) has concluded (a) that the "decision whether to become pregnant as a result of sexual intercourse is a fundamental interest of women, protected by the constitutional right of privacy," (b) that "this conclusion encompasses both married and unmarried women," and (c) that the reasons "for including the abortion decision within the right of privacy are equally persuasive for including the contraception decision within that right."

In Baird v. Lynch, 390 F. Supp. 740 (11/26/74), the three judge court found that "the only state interest upon which defendants may rely . . . is . . . its interest in the absence of, or low incidence of, premarital sexual intercourse." Then, reviewing arguments for and against premarital sex, the court said: "the existence of these competing considerations renders the state's interest less compelling than it might otherwise be."

The primary outcome of the suit is an order permanently enjoining the defendants (i.e., the state) from enforcing Wisconsin Section 450.11(4), "with respect to articles to be used to prevent pregnancy":

"(4) No person shall sell or dispose of or attempt to offer to sell or dispose of any indecent articles to or for any unmarried person; and no sale in any case of any indecent articles shall be made except by a pharmacist registered under this chapter or a physician or surgeon duly licensed under the laws of this state."

(The opinion confronts a series of related issues and includes an analysis of U.S. Supreme Court cases such as *Roe v. Wade* (1973) and *Eisenstadt v. Baird* (1972). Procedural matters, such as standing to challenge, are discussed, as well as social, psychological, and commercial aspects of the availability of contraceptives.)

Court voids unfit discharge where homosexuality is issue

The United States Court of Claims has declared void the involuntary discharge of an Air Force staff sergeant who had been found a "Class II homosexual."

("Those cases where a member of the Air Force has engaged in one or more homosexual acts, or has proposed or attempted to perform an act of homosexuality which does not fall into the Class I category," i.e., does not involve assault, coercion, force, fraud, intimidation, or acts with minors.)

In the Air Force proceedings which occurred in 1962, the board of officers accompanied its finding of Class II homosexuality with a recommendation that the airman be retained in the service. However, the commander disapproved the board's findings and recommendations, convening a new board whose majority ultimately recommended a general, unfitness discharge.

Allegations of homosexuality were based on three notes which the airman contended were "party joke" material — and which the second board interpreted as sexual proposals.

Numerous procedural errors and irregularities led to the trial court's voiding of the discharge. Here, in *Bray v. U.S.*, 515 F.2d 1383 (as amended 6/27/75), the Court of Claims adopted that opinion, stating: "The law is well-established that an agency is bound by its own regulations. [Footnote omitted] When the procedures followed ignore pertinent procedural regulations or violate minimum concepts of basic fairness, a discharge issued to a serviceman prior to the expiration of his enlistment term is void. [Footnote omitted]."

The Court here ordered recovery of pay and correction of records.

Municipality may regulate massage parlor activities

Where the owner and one employee of a Milwaukee massage parlor challenged the constitutionality of an ordinance regulating such establishments, the U.S. District Court (E.D., Wisconsin) has ruled that the ordinance "appears to represent the legitimate exercise by a municipality of its police power."

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In *Saxe v. Breier*, 37 F.Supp. 635 (12/24/74), the plaintiffs argued unsuccessfully that the prohibition of "presumed illegal sexual conduct" would have "such a chilling effect upon the operation of said business as to virtually prevent the lawful operation thereof.

The ordinance (Section 106-13, Milwaukee Code) regulates hours, requires record-keeping (names of patrons and technicians, dates and times of visits), prescribes minimum dress requirements for patrons and technicians, prohibits massage of the breasts of females, the genital areas of both sexes, and sets out minimum qualifications for licensing of technicians.

In prior cases, the court had struck down, on "equal protection" grounds, provisions which prohibited technicians from massaging persons of the opposite sex. [See, for example, *Corey v. City of Dallas*, 352 F. Supp. 977,982 (1972).]

Muni Court strikes down cross-dressing ordinance

Cincinnati's cross-dressing ordinance has been found unconstitutionally vague and a violation of the Fourteenth Amendment due process guarantee. But the Hamilton County Municipal Court, in *City of Cincinnati v. Adams*, 42 Ohio Misc. 48, 33 N.E. 2nd 463 (11/8/74), rejected the argument that a transvestite's mode of dress "is an expression protected by the First Amendment."

The defendant, a man dressed as a woman and arrested after soliciting an undercover officer, was charged under Section 909-5, C.M.C., which provides:

"No person within the city of Cincinnati shall appear in a dress or costume not customarily worn by his or her sex, or in a disguise when such dress, apparel, or disguise is worn with the intent of committing any indecent or immoral act or of violating any ordinance of the city of Cincinnati or law of the state of Ohio."

While pointing out that "the legislative body can prohibit cross-dressing when it is associated with criminal misconduct and bears a reasonable relation to the public health, safety, morals and welfare," the court nevertheless found the ordinance unconstitutionally vague and a violation of the Fourteenth Amendment due process guarantee.

The court noted lack of precision in the phrase "not customarily worn" and in the terms "indecent" and "immoral." Citing inadequate standards and lack of "fair notice" of conduct prohibited as the basis of its ruling, the court remarked that the ordinance might bring guests at a masquerade party under suspicion — and further commented that "the propriety of criminalizing cross-dressing in view of contemporary clothing and hair styles common to both sexes is debatable."

Finally, Judge Gorman's opinion notes that "absent this ordinance, the conduct of a transvestite remains subject to statutes or ordinances prohibiting soliciting, importuning, pandering, obscenity, public indecency, trespassing, or soliciting rides or hitch-hiking" (Statute numbers omitted).

Court must assess 'obscenity' independent of a guilty plea

The U.S. Court of Appeals (Fifth Circuit) has reversed a conviction of mailing an obscene letter (18 U.S.C. Section 1461), where the district court had not reviewed the letter itself. The case of *Clique v. U.S.*, 514 F.2d 923 (6113175) was remanded because:

"The rule that a guilty plea does not excuse the court from reviewing the actual material on which the plea is based applies with equal force to the district court judge as it does to the appellate judge."

Despite Clique's guilty plea, the Court ruled that "in this constitutionally sensitive area (First Amendment rights), the convicting court was under a constitutional duty to assure itself of the unprotected nature of Clique's writing."

The ruling is based on the U.S. Supreme Court holdings in *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed. 2d 793 (1964) — and in *U.S. v. Cote*, 413 U.S. 905, 93 S.Ct. 3061, 37 L.Ed. 2d 1037 (also a Fifth Circuit case) in which this court "adopted the interpretation that an obscenity conviction must be supported by an independent factual assessment according to the prevailing legal standards, even where a guilty plea has been entered."

Hospital's timing of sterlization upheld

In *Padin v. Fordham Hospital*, 392 F.Supp. 447 (1/14/75), the U.S. District Court (S.D., N.Y.) has concluded that: "A public hospital may not be able constitutionally to maintain a policy of refusing to perform tubal ligations (citation omitted) but it surely is able to schedule tubal ligations at its convenience so long as such scheduling does not operate to effectively establish a policy of not performing such procedures.

The plaintiff, arguing her right of privacy had been invaded, had been denied the sterilization procedure on the occasion of a Caesarean operation for the birth of her seventh child, because the anesthesiologist, a Roman Catholic, refused the assist, on religious grounds. The tubal ligation was performed at the same hospital four months later.

Commercial health club is no haven for sodomy

The District of Columbia Court of Appeals has ruled again that "the right to privacy" does not protect acts of sodomy committed in a commercial health club.

The privacy right recognized in U.S. Supreme Court decisions such as *Eisenstadt v. Baird* (1972), *Stanley v. Georgia* (1969), and *Griswold v. Connecticut* (1965) was ruled inapplicable to activities conducted in the Regency Health Club, where membership is open to the public "with minimum formality and modest fees." (See *Harris v. U.S.*, 315 A.2d at 574, n.15 for another Regency Health Club case).

Here, in U.S. v. McKean et al., 338 A.2d 439 (5/30/75) the Court of Appeals reversed the lower court's dismissal of informations, ruling that "appellee may not claim a right to or reasonable expectation of privacy in the constitutional sense of the word, regardless of whether the cubicles in which the alleged acts occurred were in fact 'secluded'."

☐ More court news, page 41

Discriminatory enforcement of sex laws: Injunctive relief in a civil suit is another remedy

Part I of this article (see 1 SLR 25) was limited to discriminatory enforcement within a criminal prosecution. The following (Part II) is an analysis of civil remedies.

While discriminatory enforcement of the law may be raised as a defense in a criminal prosecution, this is not the only remedy for a violation of equal protection in the enforcement of a statute. Injunctive relief may also be sought.

"If law enforcement officers attempt to enforce a criminal statute arbitrarily and in a discriminatory manner, such action may be restrained by the courts." Downing v. California State Board of Pharmacy, 85 C.A.2d 30, 192 P.2d 89 (1948).

"It is settled that where a penal statute causes irreparable damage to property rights, the injured party may attack its constitutionality by an action to enjoin its enforcement," said the court in *Wade v. San Francisco,* 82 C.A.2d 337, 186 P.2d 181 (1947).

Normally, the cases in which injunctive or declaratory relief have been granted because of discriminatory enforcement are those in which criminal prosecution is threatened or expected, but in which actual prosecution has not begun.

Once criminal proceedings are instituted, extraordinary relief would be denied on the ground that there is an available legal remedy, i.e. raising the issue as a defense.

In *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 366 U.S. 582 (1961), the plaintiff/appellant was being prosecuted in state court for violations of the Sunday closing law. The corporation brought suit in Federal District Court to enjoin the prosecution, contending that it was discriminatory.

In affirming the District Court's denial of relief, the Supreme Court stated: "Since appellant's employees may defend against any proceeding that is actually prosecuted on the ground of unconstitutional discrimination, we do not believe that the court below was incorrect in refusing to exercise its injunctive powers at that time." Two Guys, supra., page 589.

Under proper circumstances, a suit for an injunction against state officials for enforcing a law in a discriminatory manner may be brought in federal court. *Glicker v. Michigan Liquor Control Commission,* 160 F.2d 96 (6th Cir., 1947); *Moss v. Hornig,* 314 F.2d 89 (2nd Cir., 1963); *Evansville v. Gaseterin,* 51 F.2d 232 (7th Cir., 1931); *Gambulous v. Harris,* 361 F.Supp. 390 (W.D. Okla., 1973).

As to the defense that "he who comes into equity must come with clean hands," the court in *City of Ashland v. Heck's Inc.,* 407 S.W.2d 421 (Ky. App., 1966) held:

"With respect to the argument that as admitted violators of the law plaintiffs do not have clean hands and are thus not entitled to equitable relief, we think the answer is that if a person singled out for prosecution under a law that is not being enforced against anyone else could be denied relief because he stands in violation of that law, in practical effect the equal protection clause of the Fourteenth Amendment could never be invoked against any arbitrary and willful discrimination in the enforcement of criminal laws. That simply cannot be."

As to the type of order that should issue once the court finds unconstitutional discriminatory enforcement, the court in *Wade, supra.,* page 339, said:

"For the guidance of the trial court it is proper to point out that if the proof satisfies the court that the ordinance is being enforced against appellants with intentional discrimination, any injunction issued by the court should be so framed as to permit the future enforcement of the ordinance against all violators without discrimination if the defendants see fit in the proper performance of their duty so to enforce it."

The first civil suit to my knowledge which pertains to discriminatory enforcement of sexual laws was filed in June, 1973, *Gay Coalition of Denver v. City and County of Denver,* Civil Action No. C-37520, Denver District Court. Plaintiffs claimed that the Denver Police Department was enforcing municipal ordinances against homosexually oriented persons in a discriminatory way.

The ordinances in question prohibited lewd conduct, sexual solicitations, indecent acts and loitering. Plaintiffs developed statistics which showed that 91.4 percent of those arrested were homosexually oriented males. On Sept., 19, 1974, the case was settled by way of a stipulation between the parties.

In the stipulation the defendants agreed that "enforcement shall be conducted within the same guidelines and in the same manner, regardless of the sexual orientation, sexual persuasion or sex of any citizen." Defendants further agreed:

"The Denver Police Department shall not condone, encourage or tolerate oppressive and harsh police activity against homosexually oriented persons nor establishments where homosexually oriented persons gather." The court maintained jurisdiction over the case for one year.

A more recent suit was filed in Oakland, Calif., in which the plaintiffs alleged that the prostitution law was being enforced in a discriminatory way against women. A preliminary injunction was issued to prevent discriminatory enforcement (See 1 SLR 29).

More recently, on Aug. 21, in *Hartway v. Municipal Court of California* (Sup.Ct. Alameda County, No. 467665-2), a declaratory judgment was entered by Judge George Phillips Jr. declaring the method of enforcement used by the Oakland police to be unconstitutionally discriminatory.

"Since the 1961 amendment to the Penal Code Section 647(b), the solicitor, whether customer or prostitute, is guilty in the eyes of the law," noted Phillips. "Nevertheless, the enforcement pattern now followed by the Oakland Police Department harkens back to an era when only the woman was punished. How can this pattern of systematic discrimination be explained?

"It appears evident that the pattern of discrimination is due in part to the unconstitutionally vague and severable portion of Penal Code Section 647(b)," and then the judge focused on the term "solicit," saying it "provides no fixed standard on which the police can base arrests."

For a further analysis of civil and criminal remedies for discriminatory enforcement of the law, see 4 ALR3d 404.

The case of *Murguia v. Municipal Court,* 5 Civil No. 2316, now pending in the California Supreme Court, might be of interest to SLR readers. After the Fifth District Court of Appeals handed down a decision virtually eliminating the availability of discriminatory enforcement as a defense to criminal prosecutions, the Supreme Court accepted the case. Arguments have been completed, and a decision is expected in the next few months.

—Thomas F. Coleman

This issue of the SLR will not provide a list of recent law review articles of special interest because so few articles have been published in the past two months. Since most are published in the fall and winter, the next issue of the SLR will resume this feature. —Ed.

Arizona

Marriage — HB 2024: Prohibits marriage between persons of the same sex. Passed House. Held in Senate Committee.

Legitimacy — SB 1390: Removes distinction between legitimate and illegitimate children. Enacted June 6, 1975.

Pandering — HB 2131: Makes pandering a felony. Enacted June, 1975.

Sexual Assault — SJR 1001 & 1002: by Roeder. Joint resolution for training program for investigation of such crimes; would have investigators be same sex as victims.

Sexual Assault — SB 1002: Applies sexual assault laws to both sexes. Victim's prior sexual conduct inadmissible except in limited situations. Requires registration with police of those convicted of certain sex crimes. Passed Senate. Held in House.

Adultery — SB 1380: by Farr. Repeals adultery and cohabitation laws. Passed Senate Judiciary Committee.

Arkansas

Sex Offenses — Act 280 of 1975: Decriminalizes private sexual acts. Sets age of consent at 16. Prohibits loitering for purpose of soliciting or engaging in prostitution or deviate sexual activity. Effective January 1, 1976.

California

Employment — AB 633: by Foran. Prohibits discrimination in public or private employment because of sexual orientation. Defeated 22/48 in Assembly on September 12, 1975.

Sex Offenses — SB 565: by Roberti. General Criminal Code Revision. Private sex decriminalized. Sets age of consent at 18. Prohibits sexual solicitation, prostitution, indecent exposure, loitering in a restroom. Passed Senate. Pending in Assembly Criminal Justice Committee. No hearings scheduled until January, 1976. Criminal Justice Committee amendments expected to be liberal (age of consent at 16, eliminate loitering, sexual solicitation.)

Miscellaneous — AB 6, SB 43, SB 240, AB 554, AB 642, AB 820, AB 890, AB 1482, AB 2327, SB 513, AB 2327 died. For summary of contents of these bills see 1 SLR 26.

Prostitution — AB 1436: Applies prohibition against procuring females for prostitution also to males. Passed both Houses and is awaiting Governor's signature.

Florida

Rape Victims — SB 1215: Creates responsibilities of hospitals to victims of sexual assault. Enacted June 23, 1975.

Adultery — HB 1510: by Hector. Repeals fornication, adultery, and cohabitation laws.

Mental Health — HB 104: by Haben. Establishes guidelines for mentally disordered sex offender proceedings. For next session.

Sex Offenses — HB 1297: by Robinson. Appropriates $100,000 to Dept. of Health for treatment, rehabilitation, and research into various sex crimes. For next session.

Name Change — HB 1537: by Gordon. Petition for name change shall not be denied because of sex or marital status. For next session.

Georgia

Credit — HB 40: by Jordan. No discrimination on bases of sex and marital status. Civil and criminal penalties. Enacted April 18, 1975.

Sex Offenses — HB 425: by Knight. Victim's prior sexual conduct inadmissible except in limited situations. No corroboration required. Prohibits publication of name of victim. Makes forcible or consensual sodomy a felony. Pending in House Special Judiciary Committee until 1976 session.

Hawaii

Discrimination — HB 1171: by Rep. Ushijima. Would prohibit discrimination on the basis of sexual orientation in the areas of housing and employment. Pending in House Committee on Labor and Public Employment. — HB 500: Same as HB 1171.

Iowa

Sex Offenses — SF 85: by Glenn. General Criminal Code Revision. Decriminalizes private sexual acts. Sets age of consent at 16. Prohibits cautionary instruction in sexual abuse cases. Prohibits prostitution, indecent exposure. Sexual solicitation of persons 16 or over not criminal. Passed Senate. To be debated in House in 1976 session.

Insurance — SF 500: by Doderer. Prohibits discrimination on bases of sex and marital status. Pending in Senate.

Rape — SF 1009. Victim's prior sexual conduct inadmissible except in limited situations. Recently enacted.

Kansas

Bestiality — SB 351: by Pomeroy. Creates new crime with Misdemeanor penalties. Pending in Senate. Companion Bill is HB 2228.

Rape — SB 432: by Meyers. Applies to both sexes. Victim's prior sexual conduct inadmissible except in limited situations. Spouse may be prosecuted. Pending in Senate. Companion bill is HB 2492.

Adultery — HB 2223: by Lawing. Repeals adultery and cohabitation laws. Pending in House.

Louisiana

Sex Offenses — SB 400: Prohibits homosexual and heterosexual rape. Prohibits consensual oral or anal copulation, both homosexual and heterosexual. Recently enacted.

Rape — HB 619: Victim's prior sexual conduct inadmissible except when committed with accused. Recently enacted.

Credit — SB 523: No discrimination because of sex or marital status. Recently enacted.

Massachusetts

Discrimination — S 272: by Sen. Hall. Prohibits discrimination on the basis of sexual orientation in employment, housing, public accomodations and other areas. Pending in House Ways and Means Committee. Co-filed as H 2848.

Solicitation — H 3535: by Rep. Cusack. Would establish penalty for sexual solicitation. Defeated in House, June 3, 1975.

Custody — H 3875: by Rep. Gray. Would require notice be given to fathers of children born out of wedlock prior to adoption. Referred to House Judiciary Committee.

Michigan

Mental Health — SB 634: by Vander Laan. Requires court to commit those acquitted because of insanity to psychiatric evaluation. Pending in Committee on Health.

Sex Offenses — No number assigned yet. General Criminal Code Revision by Basil Brown. Decriminalizes private sexual conduct. Sets age of consent at sixteen. To be introduced in October.

Housing — SB 13: No discrimination on bases of sex and marital status. Enacted July 29, 1975.

Credit — HB 4101 & 4102: by McNeely. Prohibits discrimination on bases of sex and marital status. Held in Committee on Corporations and Finance.

Insurance — HB 4962: by Mathieu. No discrimination on basis of marital status in maternity coverage. Held in Committee on Insurance.

Scholarships — HB 5115: by Bullard. No discrimination on bas of sex and marital status in grants. Held in Committee on Colleg and Universities.

Sexual Assault — SB 1207: Victim's prior sexual conduct inadmissible except in limited situations. No corroboration required. Enacted November 1, 1974.

ATION...

Missouri

Sex Offenses — General Criminal Code Revision. by Rep. Holliday. Decriminalizes private sexual conduct between consenting adults. Passed House. Not considered by Senate because session ended.

Montana

Discrimination — HB 633. Prohibits discrimination on the basis of marital status in areas of employment, credit, education. Recently enacted.

Employment — HB 8. Prohibits discrimination in state and local government employment practices on the basis of marital status. Recently enacted.

Sexual Assault — SB 283. Victim's prior sexual conduct inadmissible except in limited situations. Recently enacted.

New Jersey

Sex Offenses — A 3282: by Hawkins. General Criminal Code Revision. Decriminalizes private sexual acts. Sets age of consent at sixteen. Prohibits bigamy, open lewdness, prostitution. Eliminates sexual solicitation law. Held in Committee on Judiciary.

Discrimination — S 259: No discrimination on bases of sex and marital status in housing, employment, credit, and public accomodations. Recently enacted.

Right to Life — S 3136: by Maressa. Asks Congress to call convention to propose constitutional amendment that from moment of fertilization every human being is a person entitled to the right to life. Held in Judiciary Committee.

Sex Offenses — S 3146: by Imperiale. No corroboration necessary to convict. Held in Senate Judiciary Committee.

Jurors — A 620: No disqualification to serve because of sex or marital status. Recently enacted.

Rape — A 1576: by Florio. Prohibits evidence of victim's prior sexual conduct other than with defendant. Held in Judiciary Committee.

Conjugal Visits — A 1714: by Hamilton. Permits such visits to prison inmates. Held in Committee on Institutions, Health, & Welfare.

Victims — A 1953: by Bornheimer. Creates training center for counselors of sex crime victims. Held in Committee on Institutions.

Sex Offenses — A 3359: by Shuck. Victim's prior sexual conduct other than with defendant admissible under some circumstances. Held in Judiciary Committee.

New Mexico

Sex — SB 198: decriminalizes private sexual conduct between consenting adults. Prohibits conduct by force, with children, in public. No corroboration required. Victim's prior sexual conduct inadmissible except in limited situations. Enacted April 3, 1975.

New York

Sodomy — A 1220-A: by Passannante. Would decriminalize private sexual conduct between consenting adults. Reported out of Codes Committee. Sent back to committee by author on June 30th when floor vote showed two and a half to one against.

Insurance — A-6288-A: by Silverman. No discrimination because of sex or marital status. Committee on Insurance.

Discrimination — A 3211: by Passannante. No discrimination because of sexual orientation or marital status in employment, housing, education, credit, accomodations. Committee on Governmental Operations. Not reported out of committee because of vote on A 1220-A.

Sex Offenses — A 6698: by Fink. Victim's prior sexual conduct inadmissible except in limited situations. Committee on Codes. Companion bill is S 4821 by Barclay.

North Carolina

Sex Offenses — SB 300. Deletes the requirement of a specific intent to commit an unnatural sex act from the crime of taking indecent liberties with children and increases the punishment. Enacted June 24, 1975.

Transexual — SB 873. Authorizes issuance of a new birth certificate after sex reassignment surgery. Enacted June 11, 1975.

South Carolina

Credit — H 2076: by Waller. No discrimination on bases of sex and marital status.

Massage Parlors — Act No. 281: Requires records kept of names and addresses of employees and customers. No massage of person of opposite sex. Enacted June 24, 1975.

Texas

Rape — HB 284: Victim's prior sexual conduct inadmissible except in limited situations. No corroboration required if victim informs any person of offense within 6 months. Enacted May, 1975.

Rape — SB 127: Prohibits consensual sexual conduct with female under 17. Promiscuity of female is defense. Enacted May, 1975. Amendment decriminalizing consensual homosexual conduct was defeated.

Sodomy — HB 759: by Washington. Would decriminalize consensual homosexual acts in private. Died in Committee.

Vermont

Sex Offenses — H 419: General Criminal Code Revision. Would decriminalize private sexual acts. Sets age of consent at 16. Prohibits prostitution, public indecency, and rape. Victim's prior sexual conduct inadmissible except in limited situations. Passed House. To be considered by Senate in January.

Virginia

Sex Offenses — S 542: General Criminal Code Revision. Prohibits consensual fornication, lewd cohabitation, prostitution, consensual sodomy, bigamy, adultery, incest, indecent exposure, profane swearing. Effective October 1, 1975.

Marriage — H 1470: Prohibits marriage of persons of same sex. Has such grounds for divorce as adultery, sodomy, or buggery outside the marriage. Approved March 24, 1975.

Credit — H 375: No discrimination on bases of sex and marital status. Enacted March 24, 1975.

Rape — H 1703: Prohibits consensual sex with female between 13 and 15. Defense of female's promiscuity. Defense that parties subsequently married and remained married for two years. Effective October 1, 1975.

Wisconsin

Housing — A 209: by Barbee. No discrimination on bases of sex, marital status, or sexual preference. Held in Judiciary Committee.

Employment — A 484: by Barbee. No discrimination on bases of sex and marital status in wages. Held in Committee on Labor.

Insurance — A 707: No cancellation of insurance because of marital status. Passed both Houses. Awaiting Governor's signature.

Credit — S 108 & 109: by Flynn. No discrimination on bases of sex and marital status. Passed Senate. Pending in Assembly Judiciary Committee.

Sexual Assault — S 233: by Bablitch. Applies crime to both sexes. Creates marital sexual assault. Victim's prior sexual conduct inadmissible except in limited situations. Pending on Senate calendar.

Prostitution — S 359: by Flynn. Would apply prostitution laws to both sexes. Passed Senate. Pending in Assembly Judiciary Committee.

THE JUDICIARY...

Judge Ben B. Lindsey: A fearless reformer who defied 'The Beast'

Judge Ben Lindsey sat on the bench in Denver (County Court, later Juvenile Court) from 1900 to 1926 and in Los Angeles (Superior Court) from 1934 to 1943.

A lower court judge who has to go before the voters regularly does not usually make headlines. Yet Judge Lindsey did, and consistently. "For twenty-five years his name had been a household word in the United States, and it is safe to say that he was better known by the general public than many national political figures of his time," wrote biographer Charles Larsen in The Good Fight, published in 1972.

"As early as 1914, in a poll conducted by Hearst's *American Magazine*, he won the ambiguous honor of tying with Andrew Carnegie and Billy Sunday for 8th place as single 'Greatest Living American.'"

Yet, today Judge Lindsey is hardly known.

He built his reputation as the "kids' judge" in Denver, and his reknown spread throughout the nation (eventually he influenced juvenile legislation in forty states) and abroad. Then, in the 1920's, he became "a spokesman" for the youth of that era and its sexual revolution — chiefly, through two books.

The Revolt of Modern Youth, which a year after publication had been translated into German, Dutch, Danish, Swedish and Japanese, and The Companionate Marriage, a long-time best seller which alienated some of the Judge's supporters — Walter Lippman and Jane Addams, among them — who had backed him in his fight for progressive juvenile legislation.

"In *The Companionate* as in *The Revolt,*" wrote Biographer Larsen, "the Judge again called for the repeal of all federal and state laws which forbade the use of the mails to disseminate information about birth control or prohibited the medical prescription of the diaphragm, then regarded as the most effective contraceptive device available."

"Beyond these negative recommendations for the repeal of existing laws, the Judge proposed positive legislation to require the public schools to include information about birth control in required sex-education courses."

Judge Lindsey's career is interesting for SLR readers because his legal and social philosophy coincides with the philosophy today of sexual law reformers. Here is how he explains, in a quote from the biography, his conversion from a pro-prohibition stance to an anti-prohibition one:

"Your (Lindsey, speaking of himself) attitude toward prohibition is based on whether you believe human beings can be educated to decency and voluntary restraint in the indulgence of an appetite, or that they must be restrained by force and law. Your attitude on the time-honored sex taboo is based on precisely the same choice."

His definition of "companionate marriage" was quite a revolutionary one by the time he introduced it in magazine articles in 1926 and in his book in 1927:

"Companionate marriage is legal marriage, with legalized birth control, and with the right to divorce by mutual consent for childless couples, usually without payment of alimony."

But even more interesting than his views was the Judge's fearless character. He didn't care who he had to attack to rewrite the legal system in Colorado regarding juveniles, and eventually his fearless attitude, remarkable today with a timid judiciary, led to his downfall in Colorado, which included his being disbarred.

Judge Lindsey was appointed to his County Judgeship in 1900 because his party won the state's gubernatorial election and his reign as Juvenile Judge in Denver was a political one but without any kowtowing to politicians, itself a remarkable feat.

Where today, for example, are the Judges who rewrite the laws for State Legislatures? Where are Judges who relish, if it helps justice, embarrassing public officials in open court and where are Judges who travel nationwide campaigning their viewpoints which are elaborated in journals and best sellers? Nowhere today — and many people would find such Judges distasteful.

But making Judges more visible is one way, perhaps, of making them more responsive, and the political road, which Lindsey traveled, is worthy of exploration today. After this look here of Judge Lindsey, the SLR shall tackle the question of making hard-fought electoral campaigns, not occasionally but frequently, for Judgeships, by looking at two Judges who did: Judge Susan Sedgewick of Minneapolis and Judge Edward Cragen of San Francisco.

Judge Sedgewick is a liberal in her sexual thinking, a liberality she has demonstrated, and Judge Cragen, in his election a year ago, had the support of San Francisco's Gay Community. Today he has stiff opposition from the police.

Back to Judge Lindsey, who had stiff opposition (though he kept winning elections) all through his judicial career, especially since an episode in 1902. At issue, in an appeal before him, was the illegal practice of saloon keepers serving women. Wrote Biographer Larsen:

"When a token arrest was made of a dive keeper who had illegally served a woman, a magistrate held that such ordinances as the one involved deprived women of their equal rights. Lindsey, whose court had appellate jurisdiction in the matter, reversed the decision, fined the dive keeper $100 and publicly excoriated the magistrate for his decision."

Then Judge Lindsey invited all members of the Denver Police Board to come to his court on Saturday morning, May 24, 1902. Now with the Police Board in the jury box and courtroom filled with children, the Judge lectured:

"It became the duty of this court recently to send a young girl to the Industrial School. She was not depraved or vicious; she was capable of being a good, pure woman with any kind of favorable environment. But she was subject to temptations. What were those temptations? The wine rooms; not one, many. She was induced to enter such places. You knowingly permitted them to run in violation of the law. Yet the child is punished and disgraced. You and the dive keeper, the real culprits, you go scot-free."

In 1908, Judge Lindsey came out with a book, *The Beast and the Jungle*, broadly attacking Denver's establishment — politicians, corporations, the rich, public officials — whom he collectively called "The Beast."

His career reached its culmination during the success of his reform legislation in Colorado through 1926; a year after a court invalidated his 1924 election (in 1927); he was disbarred in Colorado. Seven years later, he won a Superior Court Judgeship election in Los Angeles, but by then he was in his 60's and although his spunk wasn't strong, his effectiveness was. He died in 1943.

Judge Ben Lindsey, a controversial Judge, deserves to be remembered today. His career was indeed a good fight.

LEGAL STRATEGY...

California Supreme Court calls cautionary instruction a 'rule without reason'

"Since it does not in fact appear that the accused perpetrators of sex offenses in general and rape in particular are subject to capricious conviction by inflamed tribunals of justice, we conclude that the requirement of a cautionary instruction in all such cases is a rule without reason," said a six-member majority of the California Supreme Court on July 31.

This decision is one which will be cited and referred to throughout the country, in court cases and in legislative public hearings seeking to eliminate cautionary instructions in other states.

The controversy here is a complicated one. The feminist movement has fought cautionary instructions because, it claims, they are responsible for the low prosecution and conviction rate in rape arrests.

(And the California Supreme Court, in its ruling, cites statistics showing the large acquittal and dismissal rate in rape cases, even noting that studies of jury behavior found that "juries will frequently acquit a rapist or convict him of a lesser offense, notwithstanding clear evidence of guilt.")

But while in rape cases a victim is always involved, in a large number of sex crimes, such as lewd conduct and oral copulation, for example, there usually are no victims. As a result, attorneys and reformers who oppose cautionary instructions in rape cases may not be unsympathetic to the use of them for victimless sex crimes.

The SLR here presents the main points of this key California Supreme Court ruling. In future issues, we shall look at nationwide efforts to eliminate or curtail the use of cautionary instructions as well as analyze the major arguments made by the court.

In *People v. Leonard Rincon-Pineda,* 14 C.3d 864 (7/31/75),

"The judgment here under review arose from the wanton and brutal rape of a young woman who lived alone near defendant's temporary residence. As is often typical of such a crime, it was witnessed by no one other than the victim and the rapist. Owing to this circumstance, to the trauma inflicted on the victim and to legal principles of long standing legitimacy, the treatment of the victim during the prosecution of the defendant was also quite typical of that heretofore accorded those unfortunate enough to fall victim to this sorry genre of crimes.

"The trial judge was of the opinion that a once unimpeachable rule of law could not appropriately be applied to circumstances such as those present herein. Because he considered it to be demeaning of the victim in the instant case, the judge refused to deliver to the jury a cautionary instruction which originated in the 17th century and which reflects adversely on the credibility of the complaining witness in a prosecution for sexual assault. The judge's failure to so instruct the jury is the sole objection before us on this appeal.

"We have previously held the instruction in issue to be mandatory, and the omission of the instruction was accordingly erroneous. However, upon reviewing the evidence before the jury we conclude that the error was not prejudicial.

"Moreover, we are of the opinion that as presently worded the instruction is inappropriate regardless of the particular evidence which might be adduced at trial. Since defendant herein was accorded plenary due process and nevertheless was found by a jury on the basis of substantial evidence to have committed the rape and related sexual assaults testified to by the victim, we affirm the judgment below.

The cautionary instruction which the judge failed to make states:

"A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent.

"Therefore, the law requires that you (the jury) examine the testimony of the female person named in the information with caution."

The California Supreme Court traced the history of cautionary instructions in rape and all other sex offense cases back to the writings of Sir Matthew Hall, Lord Chief Justice of the Court of King's Bench from 1671 to 1676 in England.

And then it commented:

"The rights of an accused to present witnesses in his defense and to compel their attendance, subsequently enshrined in the Sixth Amendment, were barely nascent in the 17th century . . . Most importantly of all, in the context of a rape case, one accused of a felony in Hale's day had no right whatsoever to the assistance of counsel . . ., while today he is constitutionally entitled to such assistance regardless of his personal means (Gideon v. Wainwright 372 U.S. 335, 339-345 (1963).)

"Considering that under the Anglo-Saxon adversarial system of justice "when a prisoner is undefended his position is often pitiable, even if he has a good case" (1 Stephen, History of the Criminal Law of England, 1883, p. 442), we recognize that there may well have been merit to Hale's assertion that a prosecution for rape was an ideal instrument of malice, since it forced an accused, on trial for his life, to stand alone before a jury inflamed by passion and to attempt to answer a carefully contrived story without benefit of counsel, witnesses, or even a presumption of innocence.

"But the spectre of wrongful conviction, whether for rape or for any other crime, has led our society to arm modern defendants with the potent accounterments of due process which render the additional constraint of Hale's caution superfluous and capricious."

As to *People v. Lenard Rincon-Peneda,* the Supreme Court found that the "defendant was accorded a full measure of modern due process; he stood before the jury represented by counsel, clothed in the presumption of innocence, and shielded by the need for his guilt to be established beyond reasonable doubt ere he could be convicted . . . Under the circumstances here present we cannot say that there is a substantial probability that a jury which had properly been given the cautionary instruction would have been any more aware than was the jury which convicted defendant that the key issue in the case was the credibility of the complaining witness. It follows that the trial court's error was not prejudicial, and did not result 'in a miscarriage of justice.' "

With that decision made, the court said "the time is ripe for review of the cautionary instruction which should have been given at defendant's trial, to the end of determining whether it should continue to be mandated in the trial of every case involving a charge of a sex offense." And after 17 pages of review, the court found that a cautionary instruction in rape and other sex cases "is a rule without reason."

—Joel Tlumak

COURT BRIEFS...

o *Intercourse law justified*

The possibility of pregnancy — and the danger of sexual exploitation — justify a law prohibiting sexual intercourse between males and minor females, without denial of equal protection. *Flores v. State*, 230 N.W.2d 639, Wisconsin Supreme Court.

o *Incest law hard on males*

"Not because they are men, but because of their positions in the family," a law prohibiting incest may penalize males more severely than females. *People v. York*, 329 N.E.2d 845, Appellate Court of Illinois.

o *Indecency without 'public'*

Ruling on an ordinance relating to public indecency and immorality, the Court of Appeals of Arizona (Division 1, Dept. A) has reasoned that "the ordinance does not require that members of the public be present, only that the event occurred in a public place." Further, "there is no requirement that a particular individual's decency be outraged or have his morals injured or corrupted.

In Johnson v. Phoenix City Court, 535 P.2d 1067 (5/22/75), the defendant and the arresting police officer were the only persons present when, in an adult movie theater, the defendant made sexual advances on the officer.

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Psychiatric justice

describe our economy as 'sick'. Facing inflationary dangers in 1969, President Nixon announced 'We are on the road to recovery from the disease of runaway prices.'

"Now everybody knows that runaway prices are not really a disease. But where this is forgotten, where the 'as if' of the metaphor becomes lost, then something new occurs. We begin to think that runaway prices ARE disease. And if we are logical, we will assign a doctor to 'cure' it.

"Absurd as it may sound, this is exactly what has happened in the field of human behavior."

Psychiatrists stand apart from other psychologists precisely because they are also physicians, and their medical status gives them the most authoritative psychology credentials in American society, especially within the legal system. And the *Manual of Mental Disorders*, last revised as a whole in 1968, speaks of psychiatrists as physicians and says that with the adoption by the APA of the revised manual (in which homosexuality was listed as a mental disorder), "American psychiatrists for the first time in history will be using diagnostic categories that are part of an international classification of diseases."

One of the foremost critics of psychiatry, Dr. Thomas S. Szasz, himself a psychiatrist, expresses the "disease controversy" in such a way that he gives, unwittingly, a crystal-clear characterization of homophibia, the fear and hatred of homosexuals.

Dr. Szasz is particularly known for two books, *The Myth of Mental Illness* and *Law, Liberty and Psychiatry* — and this quote is from a short essay on *The Myth of Mental Illness* in the book *Ideology and Insanity:*

"The position "according to which contemporary psychotherapists deal with problems in living, not with mental illnesses and their cures, stands in sharp opposition to the currently prevalent position, according to which psychiatrists treat mental diseases, which are just as 'real' and 'objective' as bodily diseases.

"I submit that the holders of the latter view have no evidence whatever to justify their claim, which is actually a kind of psychiatric propaganda: their aim is to create in the popular mind a confident belief that mental illness is some sort of disease entity, like an infection or a malignancy.

"If this were true, one could *catch* or *get* a mental illness, one might have or harbor it, one might transmit it to others, and finally one could get rid of it." And this kind of thinking mirrors the thought processes of homophobes who claim homosexuals would infect society if given equal rights and thus should be confined until "cured".

The APA's *Manual of Mental Disorders*, 1968 edition, defines the category of sexual deviations as well as names eight of the deviations, of which homosexuality was one. This definition is particularly interesting because it certainly doesn't sound like a disease classification. And Dr. Szasz as well as sexual reformers would probably say the definition sounds more like a "judgement" than a medical diagnosis:

"This category is for individuals whose sexual interests are directed primarily toward objects other than people of the opposite sex, toward sexual acts not usually associated with coitus, or toward coitus performed under bizarre circumstances as in necrophilia, pedophilia, sexual sadism, and fetishism. Even though many find their practices distasteful, they remain unable to substitute normal sexual behavior for them. This diagnosis is not appropriate for individuals who perform deviant sexual acts because normal sexual objects are not available to them."

Two quotations from famous authors and experts put this medical diagnosis into perspective.

"One of the most conspicuous features of psychiatric history is that it is totally different from medical history," wrote psychiatrist Gregory Zilboorg in *The History of Medical Psychology.*

□ Continued on page 43

SLR BULLETIN BOARD

Midwest conference: Women and the Law

The 1975 Midwest Conference on Women and the Law, sponsored by the Women's Group of Washington University School of Law, St. Louis, Missouri, will be held October 24-26.

Workshops planned are government and politics, the criminal justice system, gay rights, athletic discrimination, ethics, minority women, family and juvenile law.

New gay bibliography

A new Gay Bibliography (5th Edition), put out by the Task Force on Gay Liberation, is now available. This non-fiction list includes over 175 items: books, articles, pamphlets, audio-visuals, periodicals, bibliographies and directories.

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Psychiatric justice

"Psychiatry still lags behind medicine as to the certainty of its task, the sphere of its activity, and the methods to be pursued.

"General medicine, in the narrow sense of the word, never had to ask itself what disease is. It always knew what it meant to be ill, for both the patient and the doctor knew what pain and other forms of physical suffering were.

"Psychiatry never had such clear criteria of illness. Only a very small proportion of the mentally ill show any suffering: very few if any are aware that their suffering is caused by a mental illness ... Medicine had less differences with the medieval barbers who practiced surgery than it has today with psychiatry.

"The history of twenty-four centuries of medicine shows clearly that there has always been a strong and deep-seated antagonism between medicine and psychiatry."

And then there's Sigmund Freud, upon whom Dr. Torrey lays much of the blame for "the categorization of the psychological under the medical model." In looking at the medical diagnosis of sexual deviations in the APA's *Manual of Mental Disorders,* a characterization of Freud's work by Eric Fromm is appropriate:

"Man had to become aware of the unconscious forces within him, in order to dominate and control them," wrote Fromm in an essay "Psychoanalysis and Zen Buddhism."

"Freud's aim was the optimum knowledge of truth, and that is the knowledge of reality; this knowledge to him was the only guiding light man had on this earth. These aims were the traditional aims of rationalism, of the Enlightenment philosophy and of Puritan ethics.

"But while religions and philosophy had postulated these aims of self-control in what might be called a utopian way, Freud was — or believed himself to be — the first one to put these aims on a scientific basis (by the exploration of the unconscious) and hence to show the way to their realization."

Now putting Puritan ethics on a scientific basis is indeed a questionable pursuit, if at all possible. But plain, old Puritan ethics, in its unscientific form, rings out through the definition of sexual deviations, and a majority of the APA's membership apparently thought so when it cut homosexuality out of the cateogry.

At this point, we should take the question of psychiatric credentials and with it explore the area of involuntary commitment of people to mental hospitals and institutions, including sex offenders. There are several key court decisions in this area and a fierce controversy raging between anti-mental illness psychiatrists and psychologists, who oppose involuntary commitment, and mental health reformers.

That will have to be explored in a future issue, but the whole problem of psychiatric justice or injustice is summed up in a partial viewpoint, by Dr. Szasz:

"After the turn of the century, and especially following each of the two world wars, the pace of this psychiatric conquest increased rapidly. The result is that, today, particularly in the affluent West, all of the difficulties and problems of living are considered psychiatric diseases and everyone (but the diagnosticians) is considered mentally ill.

"Indeed, it is no exaggeration to say that life itself is now viewed as an illness that begins with conception and ends with death, requiring, at every step along the way, the skillful assistance of physicians, and especially, mental health professions."

—Joel Tlumak

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House of 'fine traditions'

prosecution investigators, clients have denied that they have a sexual problem for which they were being treated. The defense claims that this is another example of blackmail by the prosecution — that clients cannot admit sexual difficulties to the investigators for fear of exposure and because of prevailing macho mores and embarrassment.

Margo St. James, retired prostitute and colorful founder of Coyote, a highly publicized prostitutes' union, disputes the idea of blackmail (of their clients) by prostitutes. She claims that men who frequent high-priced prostitutes are often important married executives, public servants and politicians who simply cannot afford to have extramarital affairs because their status makes such emotional entanglements dangerous. These men pay prostitutes, says St. James, not so much for sex itself, but for "therapy," conversation, company and for the discretion and silence which the money buys.

The *Golden Gate Foundation* case focuses attention on the fine line between sex therapy and prostitution. The prosecution maintains that the difference between paid sex with a sex surrogate and paid sex with a prostitute is a physician's prescription for the former. Some feminists argue that such an arrangement simply makes the therapist the pimp, taking the bulk of the expensive fees and paying the female surrogate a small portion of the take.

Desmond and St. James feel strongly that the Foundation and many prostitutes provide one-to-one emotional and sexual counselling for men who are pressured to perform sexually by society, overwhelmed by the responsibilities of their jobs and families and very lonely for emotional contact. Whether the courts will support this view remains to be seen as the case proceeds.

—Patricia Lerman

(Ms. Lerman is an Attorney, practicing law in San Francisco)

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UPCOMING IN THE SLR

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